OFF-RAMP TO INJUSTICE: NORTH CAROLINA UNJUSTLY DETERS RECOVERY AGAINST STATE ACTORS FOR CIVIL RIGHTS DEPRIVATIONS AND TORT CLAIMS

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INTRODUCTION

The United States Constitution affords protections designed to insulate individuals in every state from civil rights deprivations. However, the enforcement of these civil rights varies significantly by jurisdiction, producing disparate outcomes depending on the forum state in which litigation is brought. In all states, plaintiffs seeking redress for civil rights violations must navigate the available avenues in their jurisdiction for recovery—legal highways and litigious roads that often prove insufficient, poorly navigable pathways toward justice. Littering these avenues is a collection of insufficient and outdated state torts laws, qualified and sovereign immunity roadblocks, and narrow lanes of legislative willpower to pass laws directly addressing civil rights claims.

In every jurisdiction, claimants alleging government wrongdoing may sue state actors under Section 1983.[1] However, this federal avenue for redress presents plaintiffs with the formidable challenge of navigating qualified immunity.[2] States have implemented local practices for redress of constitutional deprivations and tort-based injuries as alternatives to suing under federal law. These state alternatives include: (1) allowing claimants to pursue state law tort claims; (2) the creation of an implied right of action which provides for state constitutional tort claim suits; or (3) permitting constitutional tort claims to proceed as a matter of law under a state's own civil rights statute.[3]

Plaintiffs suing state actors in North Carolina, whether for civil rights violations, constitutional torts, or personal injuries, face inadequate avenues for redress. Indeed, North Carolina—devoid of a civil rights statute—provides victims of constitutional deprivations only two of the three state alternative avenues for justice identified above. Currently, North Carolina only allows plaintiffs to pursue civil rights claims under an implied right of action (limited to a narrow set of causes of action under the state constitution)[4] or to litigate tort claims governed by the state's controlling tort law.[5] Notably, the North Carolina Supreme Court deems that tort law is adequate to remedy an alleged harm resulting from government wrongdoing; accordingly it has refused to allow such claims to be brought as constitutional

1. 42 U.S.C. § 1983.

2. *See infra* Part III.A.

3. Alexander Reinhart et al., *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 759–60 (2021).

4. *See generally* Edwards v. City of Concord, 827 F. Supp. 2d 517 (M.D.N.C. 2011).

5. N.C. GEN. STAT. § 143-291(a) (2025).

torts.[6] Because an "adequate remedy" exists, claims against state actors must be brought as mere tort actions, precluding a constitutional tort cause of action.[7] Both of these pathways—a claim brought under an implied right of action under the North Carolina Constitution and a tort claim brought against a state actor—leave claimants with poor enforcement tools for redress of civil rights violations.[8]

Victims of civil rights deprivations in North Carolina face disparate challenges when seeking redress due to preclusive controlling state tort law. For example, when a North Carolina state actor is sued for negligence, the claimant must have immaculately clean hands—that is, they must bear no fault in the conduct giving rise to the claim.[9] Under North Carolina's application of contributory negligence, a plaintiff who is proven only 1% at fault is barred from recovery.[10] Moreover, North Carolina courts apply the doctrine of contributory negligence in tort actions against private residents *and* state actors.[11]

Contributory negligence—a widely disfavored doctrine[12]—can prevent victims of civil rights violations from recovering in North Carolina. Indeed, identical claims brought in 46 other states would yield damages proportional to the plaintiff's comparative negligence in the matter, not a complete bar.[13]

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6. *Id.* at 521–22 (holding that plaintiff's intentional tort claims were an adequate remedy and therefore no constitutional claim was available). Constitutional torts are private lawsuits alleging injury due to the violation of a constitutional right. Noah Smith-Drelich, *The Constitutional Tort System*, 96 IND. L.J. 571, 571 (2021).

7. *Edwards*, 827 F. Supp. 2d at 520; Smith-Drelich, *supra* note 6, at 571.

8. *See infra* Part II.

9. *Contributory Negligence*, BLACK'S LAW DICTIONARY (12th ed. 2024) [hereinafter *Contributory Negligence*, BLACK'S LAW DICTIONARY]; Draughon v. Evening Star Holiness Church of Dunn, 843 S.E.2d 72, 76 (N.C. 2020) ("A plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to his injury.").

10. *See Contributory Negligence*, BLACK'S LAW DICTIONARY, *supra* note 9; *Draughon*, 843 S.E.2d at 76.

11. N.C. GEN. STAT. § 143-291(a) (2025).

12. *See generally* Hailey M. Bunce, *System Shock: Fontenot Shows Why North Carolina's Contributory Negligence Rule Must Go*, 93 N.C. L. REV. 623 (2015); Stephen Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 25 (1996).

13. Under the comparative negligence doctrine, plaintiffs' shared negligence in a matter is used as a metric for awarding damages proportional to their percentage of fault. *Comparative-Negligence Doctrine*, BLACK'S LAW DICTIONARY (12th ed. 2024); Sydney Goldstein, *Comparative and Contributory Negligence Laws by State*, LAWINFO, https://www.lawinfo.com/resources/personal-injury/comparative-and-contributory-negligence-laws-by-state.html (last updated Mar. 12, 2025); Bunce, *supra* note 12, at 623.

Striking discord with comparative negligence, negligence claims against state actors in North Carolina are subject to the harsh doctrine of contributory negligence codified in the North Carolina Tort Claims Act (NCTCA).[14]

When the North Carolina Supreme Court has determined an "adequate remedy" exists, plaintiffs suing state actors are limited to only one of two off-ramps for redress.[15] Claimants are either steered toward recovering damages for government wrongdoing via the NCTCA (and the codified doctrine of contributory negligence therein[16]) or Section 1983—faced with the hurdles presented by qualified immunity. Neither the NCTCA nor Section 1983 offers victims of government wrongdoing an adequate pathway toward justice. Rather, the preclusive effects of contributory negligence and qualified immunity shield state actors in North Carolina from liability due to insufficient state laws governing civil rights and tort claims against government actors. To provide claimants in North Carolina with adequate means of redress in actions against government actors, legislative action is necessary to provide statutory remedies to the insufficient status quo.

This Article proceeds in five parts. Part I provides background detailing North Carolina's historical adherence to contributory negligence, from the doctrine's common law adoption to the codification in the NCTCA. Next, Part II details the effect of Section 1983 on suits for civil rights violations against North Carolina state actors, highlighting the insufficiency of the NCTCA in providing equitable relief to plaintiffs because of the application of contributory negligence and the challenges of seeking redress under Section 1983 stemming from qualified immunity. Parts III–IV advance two discrete proposals. First, North Carolina should adopt a state statutory analogue to Section 1983, offering a direct and comprehensive avenue for claims against state actors for civil rights violations. Second, North Carolina should amend the NCTCA to apply comparative negligence rather than contributory negligence. Finally, Part V addresses potential impacts from the proposed legislation.

I. CONTRIBUTORY NEGLIGENCE AND THE NORTH CAROLINA TORT CLAIMS ACT

Contributory negligence and comparative negligence are two discrete doctrines controlling whether a plaintiff can recover in a negligence suit if they themselves are negligent. Every American jurisdiction follows one of

14. N.C. GEN. STAT. § 143-291 (2025).
15. Edwards v. City of Concord, 827 F. Supp. 2d 517, 520 (M.D.N.C. 2011).
16. § 143-291(a).

these two doctrines to allocate responsibility and recovery in negligence claims.[17] Under the doctrine of comparative negligence, a plaintiff's recovery is reduced proportionally to their degree of fault.[18] In contrast, contributory negligence—a harsher doctrine—bars a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault.[19] For a plaintiff's recovery to be barred due to their own contributory negligence, the defendant has the burden to demonstrate the plaintiff's partial culpability.[20]

Contributory negligence, first appearing in the 1809 English case *Butterfield v. Forrester*, is rooted in the concept of fault blameworthiness, with Lord Ellenborough stating that "[o]ne person being in fault will not dispense with another's using ordinary care for himself."[21] This new legal doctrine of contributory negligence rapidly gained traction across England and the United States. Indeed, by the mid-19th century, American courts adopted the doctrine with few exceptions.[22] However, the tide would soon shift. With the dawn of the 20th century, many jurisdictions abandoned contributory negligence in favor of the more equitable doctrine of comparative negligence.[23]

Various comparative negligence jurisdictions apply the doctrine differently. A minority of jurisdictions apply a pure comparative negligence standard which proportionately awards damages for each party's ascertained fault, irrespective of a liability threshold for the plaintiff.[24] By contrast, the majority of jurisdictions apply a modified comparative negligence standard (sometimes referred to as the *50-percent rule*).[25] Modified comparative negligence instructs that a plaintiff's recovery is proportional to their contributory negligence provided that their fault percentage falls below a legislatively-determined threshold.[26] Typically, recovery is barred if a

17. *Comparative and Contributory Negligence in Personal Injury Lawsuits*, JUSTIA, https://www.justia.com/injury/negligence-theory/comparative-contributory-negligence/ (last updated July 2025).

18. *Comparative-Negligence Doctrine*, *supra* note 13.

19. *Contributory Negligence*, BLACK'S LAW DICTIONARY, *supra* note 9.

20. N.C. GEN. STAT. § 143-299.1 (2025).

21. (1809) 103 Eng. Rep. 926, 927, 11 East 60, 61.

22. Gregory D. Smith, *Contributory Negligence as a Matter of Law: The Last Vestiges*, 23 TORT & INS. L.J. 674, 674 (1988).

23. *Id.* at 675. In 1908, the United States Congress passed the Federal Employer's Liability Act, which codified a pure comparative negligence standard. 45 U.S.C. § 51.

24. Pure comparative negligence is followed by a minority of jurisdictions that apply comparative negligence to torts claims. *Pure-Comparative-Negligence-Doctrine*, BLACK'S LAW DICTIONARY (12th ed. 2024). The pure comparative negligence doctrine allocates damages directly proportional to the parties' fault, irrespective of a threshold. *Id.*

25. *50-Percent Rule*, BLACK'S LAW DICTIONARY (12th ed. 2024).

26. *Id.*

plaintiff's negligence surpasses a set threshold of 50% or 51%.[27] Currently, the majority of jurisdictions apply some form of modified comparative negligence in tort actions.[28]

Following a surge of cases and statutes in the 1970s, courts and legislatures around the country replaced contributory negligence with the comparative negligence approach.[29] Nationally, the hold contributory negligence had as the controlling comparative fault doctrine quickly loosened. Following Florida and California's adoption of comparative negligence in the 1970s,[30] ten additional states instituted the more equitable comparative negligence doctrine.[31] By 1995, 46 states had jettisoned contributory negligence, leaving only a handful of jurisdictions clutching onto the all-or-nothing bar on recovery created under *Butterfield*.[32]

The wave of comparative negligence ratification never reached the courthouses nor the legislature of North Carolina. Rather, North Carolina remains one of only four states (joined by Alabama, Maryland, and Virginia) and the District of Columbia that still apply the doctrine of contributory negligence.[33] Beginning with the North Carolina Supreme Court's adoption of contributory negligence in *Morrison v. Cornelius*, the state's adherence to the doctrine was solely based on common law precedent.[34] An entire century elapsed before contributory negligence was statutorily recognized. In 1979, the North Carolina General Assembly codified contributory negligence in the Products Liability Act.[35] However, this codification of contributory negligence was in direct contrast to legislative trends around the country.[36]

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27. *Id.*

28. *Contributory and Comparative Negligence by State*, BLOOMBERG LAW (Jan. 3, 2023), https://pro.bloomberglaw.com/insights/litigation/contributory-and-comparative-negligence-by-state/#states-a-f.

29. Gardner, *supra* note 12, at 1, 37.

30. John S. Hickman, *Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability*, 48 VAND. L. REV. 739, 742–43 (1995).

31. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Placek v. Sterling Heights, 275 N.W.2d 511 (Mich. 1979); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); Scott v. Rizzo, 1981-NMSC-021, 96 N.M. 682, 634 P.2d 1234; Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984); Nelson v. Concrete Supply Co., 399 S.E.2d 783 (S.C. 1991); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).

32. Gardner, *supra* note 12, at 1, 3.

33. *Comparative & Contributory Negligence Law: 50-State Survey*, JUSTIA, https://www.justia.com/injury/negligence-theory/comparative-contributory-negligence-laws-50-state-survey/ (last visited May 17, 2026).

34. 63 N.C. 346, 348 (1869).

35. N.C. GEN. STAT. § 99B-4(3) (2025).

36. Hickman, *supra* note 30, at 742–43.

Indeed, by the 1980s, most other state legislatures had codified comparative negligence, recognizing the doctrine as a more equitable approach to remedying harms.[37]

In 1987, the North Carolina General Assembly reaffirmed its commitment to contributory negligence with a subsequent codification of the doctrine in the North Carolina Tort Claims Act (NCTCA), barring recovery by contributorily negligent plaintiffs seeking damages from the state.[38] The NCTCA allows claimants to sue the "State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State" for alleged unintentional torts.[39] Providing a vehicle for private citizens to sue state actors for negligent conduct, the NCTCA waives sovereign immunity for such claims in actions against state departments and agencies.[40] However, the NCTCA applies only to claims advanced for unintentional misconduct and applies North Carolina tort law—including contributory negligence.[41] As a result, the NCTCA bars plaintiffs who are even 1% contributorily negligent from recovering damages.

Negligence lawsuits brought against state actors under the NCTCA are heard exclusively by the North Carolina Industrial Commission.[42] If the Industrial Commission finds that a state actor, operating "within the scope of [their] office, employment, service, agency or authority . . . was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant[,]" the tribunal may award damages up to $150,000.[43] In accord with North Carolina's general tort principles, the NCTCA places the burden of proving contributory negligence on the defendant.[44]

The NCTCA has analogues in many other states, allowing civil rights violations that involve tort claims to be litigated under the forum state's tort

37. *Id.*

38. § 143-291(a).

39. *Id.*

40. Meyer v. Walls, 489 S.E.2d 880, 884 (N.C. 1997).

41. TREY ALLEN, UNIV. N.C. SCH. GOV'T., IMMUNITY OF THE STATE AND LOCAL GOVERNMENTS FROM LAWSUITS IN NORTH CAROLINA 2 (2013).

42. § 143-291(a); *see* Guthrie v. N.C. Ports Auth., 299 S.E.2d 618, 628 (N.C. 1983) (holding that the Industrial Commission has exclusive jurisdiction over negligence claims against government defendants). The Industrial Commission is an agency created by the North Carolina General Assembly tasked with administering the North Carolina Worker's Compensation Act and the North Carolina Torts Claims Act, among several other state programs. *About the N.C. Industrial Commission*, N.C. INDUS. COMM'N, https://www.ic.nc.gov/about.html (last visited May 17, 2026).

43. § 143-291(a)–(a1).

44. § 143-299.1; *see* Barney v. N.C. State Hwy. Comm'n, 192 S.E.2d 273, 277 (N.C. 1972) (holding that mere speculation and unsubstantiated possibilities are insufficient to establish a finding of contributory negligence).

laws.[45] The purpose of acts like the NCTCA is to provide an avenue for tort claims in state courts against government actors when a claim may be difficult to advance under federal law or absent a state civil rights statute.[46] Alternatively, plaintiffs can sue for a limited set of civil rights violations through an implied right of action brought under the North Carolina Constitution.[47]

While the North Carolina Supreme Court has recognized a right to damages under the state constitution, claims brought this way are limited to violations of free speech, due process, and rights to education.[48] Notably, among the 16 states that have recognized an implied right of action for constitutional violations, North Carolina stands as the only state that hasn't limited the reach of these suits by application of immunity defenses.[49] Importantly, for a claim against the state to properly advance under the North Carolina Constitution, there must be no "adequate" state remedy.[50] This limits the scope of the implied right of action for constitutional deprivations, effectively excluding many tort claims, particularly negligence claims.[51]

Thus, plaintiffs in North Carolina may only pursue negligence claims against state actors for civil rights violations through one of two avenues: (1) the NCTCA or (2) Section 1983.[52] However, claims brought under the NCTCA or Section 1983 face significant challenges particular to either legal channel. Negligence claims spawning from civil rights violations litigated under the NCTCA must survive assertions of contributory negligence defenses.[53] Alternatively, causes of actions brought under Section 1983 are often precluded by qualified immunity.[54]

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45. Kendall Morton et al., *50 Shades of Government Immunity: Complications with Bringing Civil Rights Claims Under State Laws*, INST. FOR JUST. (Jan. 25, 2022), https://ij.org/report/50-shades-of-government-immunity/.

46. *Id.*

47. *See* Corum v. Univ. of N.C., 413 S.E.2d 276, 290 (N.C. 1992) (holding that actions brought under the state constitution are limited to claims alleging deprivations of due process, free speech, or rights to education).

48. *See id.*; Craig *ex rel.* Craig v. New Hanover Cnty. Bd. of Educ., 678 S.E.2d 351, 354 (N.C. 2009) (recognizing a cause of action for a violation of the right to education); Sale v. State Highway & Pub. Works Comm'n, 89 S.E.2d 290, 295–98 (N.C. 1955) (recognizing a cause of action under the state due process clause).

49. Reinhart et al., *supra* note 3, at 759 & n.91.

50. *See Corum*, 413 S.E.2d at 290.

51. *Id.*

52. *North Carolina*, INST. FOR JUST. [hereinafter *North Carolina*, INST. FOR JUST.], https://ij.org/report/50-shades-of-government-immunity/state-profile/north-carolina/ (last visited May 17, 2026).

53. N.C. GEN. STAT. § 143-299.1 (2025).

54. Morton et al., *supra* note 45.

II. A HOBSON'S CHOICE: SECTION 1983 OR THE NORTH CAROLINA TORT CLAIMS ACT

This Part demonstrates that the remedies North Carolina law affords plaintiffs for civil rights deprivations, constitutional torts, and negligence arising from state-actor misconduct are riddled with significant legal barriers. Plaintiffs attempting to recover damages from state actors in North Carolina are faced with a Hobson's choice: an illusory decision between courses of action that offer no real choice at all.[55] This choice manifests in a plaintiff's decision in how to sue North Carolina state actors. Whether filing a claim for government wrongdoing under Section 1983 or bringing suit under the North Carolina Tort Claims Act (NCTCA), claimants face distinct statutory and doctrinal hurdles that constrain even valid claims.

In every state, Section 1983 empowers plaintiffs wishing to sue a government actor for alleged civil rights violations to seek redress.[56] However, Section 1983 suits are subject to a slew of immunity hurdles and judicial precedent.[57] Enacted in 1871 as part of the Civil Rights Act, Section 1983 provides a mechanism for enforcing the Fourteenth Amendment by authorizing civil actions against government actors.[58] Deprivations of "any rights" enumerated in the Constitution by "person[s] who, under color of state law or custom" constitute actionable lawsuits in federal and state courts.[59] Importantly, 42 U.S.C. § 1988 informs the scope of Section 1983, which directs courts to apply federal law where suitable and permits the use of state law when necessary to effectuate Section 1983's purpose.[60]

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55. *Hobson's Choice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Hobson%27s%20choice (last visited May 17, 2026).

56. 42 U.S.C. § 1983.

57. *Id.* "[The] creation of qualified immunity, rigorous municipal liability standards, pleading requirements, limitations on injunctive relief, and caveats for plaintiffs' attorneys' entitlement to fees have combined to make it exceedingly difficult for plaintiffs to use Section 1983 in its intended manner." Reinhart et al., *supra* note 3, at 757.

58. Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977). Largely lying dormant for decades, Section 1983 was revived in the seminal case, *Monroe v. Pape*, whereby the Court looked to the legislative history of the federal statute to hold that an avenue for claims against state actors for violations of constitutional rights is actionable under it. 365 U.S. 167, 170 (1962).

59. 42 U.S.C. § 1983; *see* Testa v. Katt, 330 U.S. 386, 394 (1947); Martinez v. California, 444 U.S. 277, 284 (1980) (evidencing that Section 1983 may be the basis for a cause of action brought in state courts).

60. 42 U.S.C. § 1988 states:

[Section 1983] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the

Section 1983 claims were given teeth by the 1962 *Monroe v. Pape* Supreme Court decision.[61] The *Monroe* Court extrapolated four purposes of Section 1983: "(1) to override unconstitutional state laws, (2) to provide remedies where state laws are deficient, (3) to provide remedies which are technically, but not practically available under state law, and (4) to provide remedies substantially equivalent to those practically available in state court."[62] Armed with the precedent established in *Monroe*, plaintiffs may bring suit in state or federal court against local government actors for constitutional violations.[63] Consequently, an explosion of lawsuits were filed in the wake of the *Monroe* decision.[64]

However, subsequent Supreme Court decisions introduced the doctrine of qualified immunity, substantially limiting the viability of Section 1983 claims and shielding government officials from liability.[65] Section 1983 claims have proven to be difficult legal battles due in large part to the defense of qualified immunity.[66] As a result, many claimants alleging civil rights violations have maneuvered away from difficult Section 1983 litigation toward filing lawsuits under state tort claims acts, like the NCTCA.

Responding to the difficulties of litigating Section 1983 claims and the limited remedies available under state tort law, a handful of states have enacted civil rights statutes analogous to Section 1983.[67] With these laws, state legislatures have created causes of action that empower plaintiffs to bring lawsuits for violations of state constitutions as a matter of state law.[68] By directly addressing civil rights violations, these statutes circumvent the difficulties of relying on a state tort claims act rather than Section 1983.[69] To

court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

§ 1988(a).

61. 365 U.S. at 191.

62. *See Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494, 496 (1970); *Monroe*, 365 U.S. at 167.

63. ALLEN, *supra* note 41, at 1–2.

64. JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 10 (2023).

65. *Id.* at 73–79. Suing state officials under Section 1983 also presents additional immunity defenses that warrant pause on account of plaintiffs seeking recovery from state actors for alleged tort damages. Namely, judicial and legislative immunity block recovery in claims advanced for liability emanating from legislative or judicial acts.

66. SCHWARTZ, *supra* note 64, at 71–80.

67. ARK. CODE ANN. § 16-123-101 (2025); CAL. CIV. CODE § 52.1 (West 2025); COLO. REV. STAT. § 13-21-131 (2025); ME. REV. STAT. ANN. tit. 5, § 4682 (West 2025); MASS. GEN. LAWS ch. 12, § 11I (2025); NEB. REV. STAT. § 20-148; N.J. REV. STAT. § 10:6-2; N.M. STAT. ANN. § 41-4A-3.

68. Reinhart et al., *supra* note 3, at 760.

69. Morton et al., *supra* note 45; Reinhart et al., *supra* note 3, at 761.

date, the majority of states have not passed Section 1983 analogues—indeed, only eight states have enacted their own legal mechanism to directly enforce civil rights.[70]

III. AN ARGUMENT FOR A NORTH CAROLINA CIVIL RIGHTS STATUTORY ANALOGUE TO SECTION 1983

North Carolina is among 42 states without a Section 1983 analogue, having yet to enact a state civil rights statute.[71] Such a law would allow claimants to pursue constitutional violations directly, rather than forcing them into underlying tort theories, subject to the North Carolina Tort Claims Act's (NCTCA) contributory negligence rule. Additionally, a state civil rights statute can avoid the bulwarks of qualified immunity defenses that plague claims brought under Section 1983.

This Part serves three functions: (1) to illustrate the way that lawsuits are advanced but also hindered under Section 1983; (2) to highlight critical statutory provisions that would strengthen a North Carolina Section 1983 analogue; and (3) to propose statutory language for a North Carolina civil rights statute. The proposed language draws from common law and statutory precedent to protect the law from the deflating effects of qualified and sovereign immunity.

A. Section 1983: Scope and Redressability Limitations

Government actor wrongdoing can trigger a host of lawsuits, including civil rights claims of discriminatory animus (amounting to constitutional tort claims), negligence tort claims, or intentional tort claims. However, lawsuits brought against government actors as Section 1983 claims are limited to civil rights violations and torts linked directly to constitutional rights deprivations.[72] As the United States Supreme Court held in *Paul v. Davis*, Section 1983 is not a vehicle for redress for all claims against state actors.[73] Rather, only claims that implicate constitutional violations, tort or otherwise, are properly brought under Section 1983.[74] Such a liberal use of the federal statute to sue state actors for *any* tort, the Court continued, "would make of

70. Reinhart et al., *supra* note 3, at 760, 763.

71. *North Carolina*, INST. FOR JUST., *supra* note 52.

72. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981), *overruled on other grounds by* Daniels v. Williams, 475 U.S. 327 (1986) (stating that respondent's claim that state actors' loss of his mailed package, while incarcerated, constituted a violation of the Fourteenth Amendment was not a cognizable action under Section 1983 thereby differentiating the claim as a mere tort suit).

73. 424 U.S. 693, 701 (1976).

74. *Id.*

the Fourteenth Amendment a font of tort law,"[75] ignoring the legislative purpose of Section 1983 as an avenue for civil rights litigation.[76] Thus, Section 1983 claims must be narrowly tailored toward remedying civil rights deprivations, with few exceptions.[77]

To be properly seated as a Section 1983 claim, a plaintiff must demonstrate two elements: (1) proof that the defendant deprived the plaintiff of a constitutional right and (2) the deprivation was done "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[78] However, even when a claim is properly seated, Section 1983 plaintiffs face significant hurdles to recovering damages. While the *Monroe* decision empowered plaintiffs to sue governmental officials for civil rights violations, the defense of qualified immunity tempers governmental accountability.[79] Moreover, qualified immunity imposes a heightened evidentiary burden on many government-wrongdoing claims.[80]

Frustrating plaintiffs' Section 1983 claims for over 50 years, qualified immunity grants public officials immunity from civil lawsuits when "performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights."[81] Created by the United States Supreme Court in *Pierson v. Ray*, qualified immunity was originally deployed to shield a respondent judge and police officers from liability for claims alleging false arrest and imprisonment brought under Section 1983.[82] The Court, finding that the public officials acted in good faith based on their subjective belief that the arrests were proper, granted them qualified immunity, thereby shielding the judge and police officers from liability.[83] The *Pierson* Court's creation of qualified immunity dramatically narrowed

75. *Id.*

76. *Id.*

77. *See* RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 14:126, at 1635 (3d. ed. 2025) (discussing the *Parratt* Court's determination to differentiate common-law torts claims from suits alleging genuine constitutional deprivations); *Parratt*, 451 U.S. at 535 (providing a two-pronged analysis to determine if a claim is properly brought under Section 1983 or is merely a tort for which adequate state remedies exist).

78. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

79. *See generally* SCHWARTZ, *supra* note 64, at 73–91 (expounding on the Court-created doctrine of qualified immunity).

80. In Section 1983 suits, plaintiffs bear the burden of demonstrating that the facts of the claim mirror facts from a previously decided case where a defendant's actions have been found to violate clearly established law. Harlow v. Fitzgerald, 457 U.S. 800, 814–18 (1982).

81. *Qualified Immunity*, BLACK'S LAW DICTIONARY (12th ed. 2024).

82. 386 U.S. 547 (1967) (establishing qualified immunity as a defense based on good faith and probable cause of arresting police officers, despite finding that the law that triggered the arrests was found to be unconstitutional).

83. *Id.*

the scope of successful claims brought under Section 1983 by creating a defense for state actors previously unavailable.

The weight of the Court's decision was noted in Justice Douglas's emphatic dissent to the *Pierson* Court's holding.[84] Citing the congressional intent behind the passing of Section 1983, Justice Douglas railed against the creation of immunities granted to officials as contrary to the function of the statute.[85] Nevertheless, qualified immunity has developed into a formidable defense for public officials, precluding many Section 1983 claims when there is "no prior court decision with nearly identical facts."[86] Thus, the power to hold government actors accountable, wielded by plaintiffs in the *Monroe* decision, eroded after the Court's creation of qualified immunity.

The breadth of qualified immunity's ability to shield state actors from liability, absent a previous court decision with identical facts, is shocking. For example, in an Eleventh Circuit case, a Georgia police officer, while ordering a man and his six children to the ground, fired two shots at the family's dog, striking a ten-year-old child in the knee with an errant bullet.[87] The family sued the officer for excessive force under Section 1983 and lost; the qualified immunity defense shielded the officer.[88] Because no other court had decided a case on those specific facts—whereby a child was shot by a police officer who was attempting to kill the family dog—the court held that the officer's actions, under the doctrine of qualified immunity, had not violated "any clearly established rights."[89] Troublingly, this broad protective defense of qualified immunity is not restricted to the federal courts. Indeed, the federal doctrine of qualified immunity traces its origins to a good-faith immunity defense under Mississippi law and continues to operate as a defense in most states, including jurisdictions with civil rights statutes.[90]

States that have enacted civil rights statutes have done so to provide an avenue for claimants to bring constitutional tort claims as a matter of state law.[91] These state alternatives to Section 1983 largely mirror the federal statute's language and scope, allowing for recovery and injunctions for

84. *Id.* at 558–67.

85. *Id.* at 567 (Douglas, J., dissenting) ("Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights.").

86. SCHWARTZ, *supra* note 64, at 74; *see* Harlow v. Fitzgerald, 457 U.S. 800, 814–18 (1982) (holding that police officer's entitlement to qualified immunity does not depend on whether they acted in good faith but rather on whether they did not violate clearly established law).

87. Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019).

88. *Id.* at 1323.

89. *Id.* at 1307.

90. *Pierson*, 386 U.S. at 555.

91. Reinhart et al., *supra* note 3, at 760.

constitutional torts committed by public officials.[92] However, this avenue of redress is often muted by a state's decision to incorporate qualified immunity as a defense. Consequently, plaintiffs face hurdles analogous to the federal protection afforded to state actors in states that recognize qualified immunity defenses under their civil rights statutes.

As in federal civil rights actions, when a state's civil rights statute recognizes qualified immunity, plaintiffs must show that their claim arises under clearly established law.[93] For example, Arkansas directs that its civil rights statute be construed consistently with federal and state decisions interpreting Section 1983. Accordingly, the Arkansas Supreme Court, citing United States Supreme Court precedent,[94] has held that the Arkansas civil rights statute would allow defendants to access the qualified immunity defense where appropriate.[95] Thus, in Arkansas courts, as in federal courts, unless the facts of the claim mirror facts from a previously decided case where a defendant's actions have been found to violate clearly established law, qualified immunity precludes plaintiff recovery.

However, unlike claims brought under Section 1983, adherence to qualified immunity in constitutional tort claims brought under *state* civil rights acts is discretionary. Indeed, several jurisdictions have declined to adopt qualified immunity as a defense to claims advanced under their state's civil rights statute.[96] Currently, California, Colorado, and New Mexico are among the states with Section 1983 analogues that preclude the defense of qualified immunity.[97] California's civil rights statute directly addresses issues of immunity for state actors facing liability for a constitutional tort.[98] While echoing the federal model, the statute departs from a strict analogue by eliminating California's immunity defenses found elsewhere in state law. Namely, qualified immunity is not available for "any cause of action brought against any peace officer or custodial officer . . . or directly against a public entity that employs a peace officer or custodial officer" brought under the state's civil rights statute.[99] Like California's disposal of the defense, Colorado's and New Mexico's civil rights statutes also expressly preclude qualified immunity as a defense.[100]

92. *See* sources cited *supra* note 67.
93. Reinhart et al., *supra* note 3, at 752.
94. Cleavinger v. Saxner, 474 U.S. 193, 202 (1985).
95. Robinson v. Langdon, 970 S.W.2d 292, 296 (Ark. 1998).
96. Reinhart et al., *supra* note 3, at 760.
97. *Id.*
98. CAL. CIV. CODE § 52.1(n) (West 2025).
99. *Id.*
100. COLO. REV. STAT. § 13-21-131(2)(b) (2025); N.M. STAT. ANN. § 42-4A-4 (2025).

B. Statutory Provisions for Creation of an Effective North Carolina Section 1983 Analogue Must Preclude Qualified and Sovereign Immunity

To provide an effective means of holding government actors accountable for constitutional violations, a proposed North Carolina Section 1983 analogue must eliminate the defense of qualified immunity. Otherwise, the state's process for recovering against public officials "under color of any statute" offers no meaningful distinction from the Supreme Court's restrictions on Section 1983 claims.[101] Additionally, North Carolina must also waive sovereign immunity for claims brought under the state's civil rights statute, as in the North Carolina Tort claim Act (NCTCA).[102] Notably, "sovereign immunity shields . . . governments themselves from constitutional-tort damages under any and all conditions."[103] Legislative waiver of the state's immunity for constitutional deprivations is essential to provide plaintiffs with effective equitable and injunctive relief. On this point, the *Corum* court quipped:

> 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.[104]

Through statutory preclusion of qualified and sovereign immunity, a North Carolina civil rights statute would empower plaintiffs to pursue litigation based on the merits of their claims. Too often, the novelty of a claim may dissuade plaintiffs from seeking damages for government wrongdoing. Indeed, the need to demonstrate clearly established law frequently bars many otherwise meritorious claims.[105] Similarly, if the state reserves sovereign immunity as a defense to constitutional deprivations, no claims are actionable against state actors, rendering a civil rights statute toothless.

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101. *See* Pierson v. Ray, 386 U.S. 547, 556 (1967) (creating the defense of qualified immunity for Section 1983 lawsuits).

102. N.C. GEN. STAT. § 143-291 (2025).

103. Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1704 (2022).

104. Corum v. Univ. of N.C., 413 S.E.2d 276, 291 (N.C. 1992).

105. SCHWARTZ, *supra* note 64, at 75.

C. Inclusion of Attorney's Fees Creates Equitable Redressability

An advantage for plaintiffs suing under a state civil rights statute is that most such laws permit recovery of attorney's fees when the plaintiff prevails.[106] Inclusion of this provision could encourage attorneys to advance claims when the plaintiff is unable to pay legal fees. Oftentimes, civil rights litigation is not a lucrative branch of legal services. Fees are usually paid through contingency arrangements and collected only after a favorable judgment; in many cases, the damages awarded fall well below an attorney's typical income for comparable work.[107] Attorney's fees, once recoverable under Section 1983 actions via 42 U.S.C. § 1988, have become largely unrecoverable following the *Evans* Court's approval of fee-waiver settlements.[108] This mechanism allows defendants to avoid paying attorney's fees while still resolving the civil rights issue central to the litigation.

In 1976, Congress passed 42 U.S.C. § 1988 to allow, per a court's discretion, "the prevailing party . . . a reasonable attorney's fees as part of the costs."[109] However, as civil rights litigation grew, so did attorney's fees. In some cases, attorney's fees dwarfed the accompanying plaintiff's recovery.[110] The *Evans* decision muted attorneys' ability to be compensated for their work on Section 1983 claims. The Court, in dicta, recognized that fee-waiver settlements, sanctioned under *Evans*, may serve as a financial deterrent for lawyers who would otherwise pursue civil rights deprivation claims.[111] Thus, including a provision awarding attorney's fees would make claims brought under the state statute more desirable for plaintiffs and lawyers faced with the financial hurdles of civil rights litigation.

D. This Article's Proposed North Carolina Civil Rights Statute

Using existing state Section 1983 analogues as models, this Article proposes North Carolina legislation that mirrors the Federal Code by providing the language necessary to bring claims for constitutional violations, along with a mechanism for injunctive and equitable relief.

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106. Reinhart et al., *supra* note 3, at 760.

107. SCHWARTZ, *supra* note 64, at 21–22.

108. *See* Evans v. Jeff D., 475 U.S. 717, 719–20 (1986) (holding that courts have the power to refuse to award attorney's fees in fee waiver settlements).

109. 42 U.S.C. § 1988(b).

110. *See* Riverside v. Rivera, 477 U.S. 561, 573–74 (1986) (holding that attorney's fees need not be proportionate to the damages awarded plaintiff, though the attorney's fees were seven times the amount of damages awarded).

111. *See Evans*, 475 U.S. at 741 n.34; SCHWARTZ, *supra* note 64, at 26.

Namely, the proposed legislation should first identify who may bring a claim against whom and for what:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . *that* subjects, or causes to be subjected, any . . . *person within North Carolina* to the deprivation of . . . *their exercise or enjoyment of rights* secured by the Constitution . . . *of the United States or North Carolina* shall be liable to the *injured party for injunctive or equitable relief or other proper redress* . . . .[112]

The above language outlines the framework for civil rights litigation within North Carolina. Like Section 1983, the proposed North Carolina civil rights statute establishes a cause of action for constitutional violations and specifies the parties who may be sued. The draft legislation, consistent with 42 U.S.C § 1988, should also include a provision for attorney's fees to be awarded to plaintiffs upon favorable judgments. This provision fosters an environment that is conducive to claimants' ability to pursue damages irrespective of their ability to afford legal representation. The proposed language is:

> *Any aggrieved party who prevails in an action authorized by this section shall be entitled to an award of the costs of litigation and reasonable attorney's fees per the court's discretion.*

Coupled with an express provision for the awarding of attorney's fees, the proposed North Carolina civil rights statute should also statutorily preclude qualified immunity as a defense to prohibit courts from diluting the effectiveness of the law. Proscriptive language that bars qualified immunity would legislatively protect the North Carolina law from suffering judicial declawing in the same manner as Section 1983 has undergone via a series of Supreme Court holdings.[113] In North Carolina, this move to exclude qualified immunity as a defense stands on judicial precedent in cases brought under an implied right of action.[114]

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112. 42 U.S.C. § 1983.

113. *See supra* cases and text accompanying notes 80, 82, 86, 101.

114. *North Carolina*, INST. FOR JUST., *supra* note 52; Evans v. Cowan, 510 S.E.2d 170, 175 (N.C. Ct. App. 1999) (holding a citizen may bring a direct claim for violation of their constitutional rights under the North Carolina constitution only absent an adequate state remedy).

In *Corum v. University of North Carolina*, the North Carolina Supreme Court denied the defenses of qualified or sovereign immunity[115] to claims alleging violations of constitutional rights.[116] With decisive language, the *Corum* court proclaimed, "[W]hen there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail."[117] However, the types of claims allowed under this implied right of action are limited, leaving many claims against state actors unactionable and unprotected from immunity defenses under the *Corum* decision.[118]

The creation of a statute-based cause of action from a North Carolina civil rights statute would circumvent these limitations placed on suits brought under an implied right of action. However, to secure this pathway as a viable avenue of redress for constitutional deprivations, the statute must preclude qualified and sovereign immunity. To do so would echo the veneration the North Carolina Supreme Court expressed for the sanctity of citizen rights under the United States and North Carolina Constitutions: "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State."[119] Drawing from Colorado's and California's statutory proscriptions of immunity defenses to claims brought under their states' civil rights statutes, the proposed North Carolina statutory provision tenders:

> *Qualified immunity and sovereign immunity are not defenses to liability pursuant to this section.*[120]

A claim for constitutional deprivations brought under a North Carolina Section 1983 analogue would address civil rights violations. Such a claim would avoid the virtually impenetrable qualified immunity barrier in a Section 1983 claim and the harsh doctrine of contributory negligence found in the NCTCA.

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115. MICHAEL CROWELL, UNIV. N.C. SCH. GOV'T., BASICS OF LOCAL GOVERNMENT LIABILITY AND IMMUNITY IN NORTH CAROLINA 1 (2011) ("Sovereign immunity is the state's immunity from a lawsuit of any kind unless the state consents to be sued.").

116. 413 S.E.2d 276, 291 (N.C. 1992).

117. *Id.* at 292.

118. *Id.* at 291 (recognizing a cause of action for violation of plaintiff's freedom of speech); *see* Craig *ex rel.* Craig v. New Hanover Cnty. Bd. of Educ., 678 S.E.2d 351, 354 (N.C. 2009) (recognizing a cause of action for violation of the right to education); Sale v. State Highway & Pub. Works Comm'n, 89 S.E.2d 290, 295–98 (N.C. 1955); *supra* Part I.

119. *Corum*, 413 S.E.2d at 290.

120. *See* COLO. REV. STAT.§ 13-21-131(2)(b) (2025); CAL. CIV. CODE § 52.1(n) (West 2025).

IV. AMENDING THE NORTH CAROLINA TORT CLAIMS ACT TO ADOPT COMPARATIVE NEGLIGENCE

This Part will address an alternative pathway toward achieving more equitable judgments for claimants bringing tort claims—constitutional or not—against state actors in North Carolina. Currently, when a state actor has harmed a plaintiff and there is an "adequate state remedy," the North Carolina Constitution will preclude constitutional claims from advancing.[121] This Part will show that claimants' current avenue for litigating tort claims against state actors is *inadequate* due to the application of the contributory negligence doctrine in North Carolina. Beginning with a case illustrating the harsh effects of contributory negligence under the North Carolina Tort Claims Act (NCTCA), this Part demonstrates how comparative negligence is a more equitable fault standard for plaintiffs to pursue claims against state actors. Finally, this Part proposes statutory amendments to modify the NCTCA to abandon contributory negligence in favor of comparative negligence.

A. The Preclusive Harshness of Contributory Negligence Derails Justice

In the summer of 2011, a woman went jogging in Centennial Park, located in the heart of North Carolina's capital city, Raleigh.[122] After finishing her exercise, the woman phoned her husband to pick her up from the park.[123] Spotting her husband's car, she deviated from the park's pedestrian pathway, cut across a grassy median, and stepped into an uncovered, city-maintained storm drain—falling five feet into the drain and sustaining injuries.[124] Subsequently, the woman sued the North Carolina Department of Transportation (NCDOT) under the NCTCA and lost.[125]

The Industrial Commission (the tribunal that hears claims against state actors under the NCTCA)[126] found in favor of NCDOT due to the woman's contributory negligence.[127] Despite NCDOT's duty to maintain the storm drain cover to prevent such accidents, the Industrial Commission and the North Carolina Court of Appeals found that the woman's choice to deviate from the paved pedestrian path, coupled with her attention aimed at her husband's car, constituted contributory negligence.[128] Considering her

121. Edwards v. City of Concord, 827 F. Supp. 2d 517, 520 (M.D.N.C. 2011).
122. Khatib v. N.C. Dep't of Transp., 819 S.E.2d 111, 112 (N.C. Ct. App. 2018).
123. *Id.*
124. *Id.*
125. *Id.*
126. N.C. GEN. STAT. § 143-291(a) (2025).
127. *Khatib*, 819 S.E.2d at 112–13.
128. *Id.* at 113.

account and NCDOT's evidence, the Court of Appeals denied recovery for the woman's injuries, finding (1) a lack of due care and (2) a proximate connection between her negligence and the injury.[129]

Absent from the Court of Appeals' decision is any discussion about NCDOT's duty of care owed to the community. The court prioritized whether contributory negligence barred the recovery, despite the uncovered storm drain, rather than assessing breaches of duty by both parties.[130] Indeed, contributory negligence precludes any liability for a defendant irrespective of their tortfeasor conduct.[131] Arguably, had the Industrial Commission been released from the NCTCA's statutory direction to apply contributory negligence,[132] this case may have been decided more equitably by weighing both the woman's breach and the conduct (or omissions) of NCDOT. Determining liability based on the relative fault of the plaintiff and defendant embodies a comparative negligence approach.[133]

Under the doctrine of comparative negligence, a calculus of fault allocates proportionate liability to all parties and assigns damages accordingly.[134] While North Carolina courts currently apply contributory negligence, plaintiffs petitioning the courts to apply comparative negligence is not without precedent.[135] These attempts have pivoted on the novel application of comparative negligence via *lex loci*.[136] Under the doctrine of *lex loci*, the use of another state's substantive law circumvents the forum state's laws in certain circumstances, usually when the incident giving rise to the claim occurs out of state.[137]

For example, in *Parsons v. Alleghany County Board of Education*, the North Carolina Court of Appeals, reviewing a decision by the Industrial Commission, applied the substantive law of Virginia in a negligence case brought against a school bus driver.[138] The incident giving rise to the suit in *Parsons* occurred in Virginia, while the action was filed in North Carolina.[139] Because the forum state's law deviated from the state where the incident took

129. *Id.*

130. *Id.* at 112–115.

131. *Contributory Negligence*, BLACK'S LAW DICTIONARY, *supra* note 9.

132. N.C. GEN. STAT. § 143-291(a) (2025).

133. *See supra* Part I.

134. *Comparative-Negligence Doctrine*, *supra* note 13.

135. *See* Midgett v. N.C. Dep't of Transp., 568 S.E.2d 643, 646 (N.C. Ct. App. 2002) (evidencing the plaintiff's attempt to circumvent contributory negligence through the application of federal maritime law).

136. *Lex Loci*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The law of the place; local law.").

137. Kirby v. Fulbright, 136 S.E.2d 652, 654 (N.C. 1964).

138. 165 S.E.2d 776, 778 (N.C. Ct. App. 1969) (applying Virginia substantive law to a claim brought under the NCTCA).

139. *Id.*

place, the *Parsons* court applied North Carolina procedural law, but adhered to the substantive law that controls in Virginia.[140] This case is an example of one contributory negligence jurisdiction applying the law of another.[141] Hypothetically, under *lex loci*, North Carolina courts could apply comparative negligence if that doctrine governed the substantive law where the incident occurred. Indeed, one such plaintiff attempted this legal tactic.[142]

In *Midgett v. N.C. Department of Transportation*, the plaintiff argued that, because the negligence claim arose from an incident at sea, federal law—allowing comparative negligence—should apply, rather than the NCTCA's contributory negligence rule.[143] The plaintiff argued that the *Parsons* court's application of *lex loci* created a legal avenue for the Industrial Commission to abandon contributory negligence and adopt the comparative negligence standard used under the Jones Act.[144] Ultimately, the plaintiff in *Midgett* failed to establish that federal law governed under *lex loci*.[145] The *Midgett* court was unconvinced that it was bound to apply *lex loci* in the same manner that the *Parsons* court adhered to Virginia substantive law.[146] Specifically, the *Midgett* court held that the *Parsons* decision cannot be interpreted to expand the jurisdiction of the Industrial Commission to hear tort claims based entirely on federal law.[147] Thus, the court declined to extend *lex loci* on jurisdictional grounds rather than substantive law.[148] However, North Carolina courts have further defined when they will consider tort law from other jurisdictions, even if it differs from state law.[149]

While the plaintiff in *Midgett* sought a novel application of comparative negligence under federal law via *lex loci*, the attempt to avoid contributory

140. *Id.* This case is an example of one contributory negligence jurisdiction applying the law of another. *Id.* Interestingly, the *lex loci* application would have allowed the North Carolina court to apply comparative negligence, provided the doctrine was the law of the jurisdiction.

141. Virginia, like North Carolina, applies contributory negligence. *Comparative & Contributory Negligence Law: 50-State Survey*, *supra* note 33; *see supra* Part I.

142. *See* Midgett v. N.C. Dep't of Transp., 568 S.E.2d 643, 644–45 (N.C. Ct. App. 2002); 46 U.S.C. § 688. The plaintiff in *Midgett* argued that the court should apply comparative negligence because it is the standard of the Jones Act. *Midgett*, 568 S.E.2d at 644–47.

143. 568 S.E.2d at 646.

144. *Id.* at 646–47. The Jones Act is a federal maritime law governing injuries suffered by seamen during the course of employment at sea. 46 U.S.C. § 688.

145. *Id.* at 646.

146. *Id.* at 647.

147. *Midgett*, 568 S.E.2d at 646–47 (stating that the North Carolina General Assembly hasn't waived sovereign immunity for claims alleging negligence under federal statutes brought under the NCTCA).

148. *Id.* at 647.

149. *Id.* at 646–47.

negligence was unsuccessful.[150] However, the *Midgett* court, while considering the plaintiff's argument that federal law should control, noted the disparate outcomes stemming from adherence to contributory negligence in dicta.[151] Regarding the court's decision to bar recovery for the plaintiff in *Midgett*, the court recognized that "an employer who would be liable to a partially negligent claimant under the Jones Act, would not be liable to the same claimant 'in accordance with the laws of North Carolina,' because of the state law doctrine of contributory negligence."[152] The *Midgett* court suggested that, even if the Industrial Commission had jurisdiction, the plaintiff's otherwise meritorious claim could not succeed under the controlling law of the NCTCA.[153] It was precisely this harsh, preclusive effect of contributory negligence, illustrated by the *Midgett* court, that prompted the vast majority of jurisdictions in the United States to adopt comparative negligence laws.[154]

Despite acknowledgments of the disparate outcomes afforded plaintiffs under controlling law, lower North Carolina courts are bound by precedent to adhere to contributory negligence.[155] Challenges to a lower court's application of contributory negligence fall short of moving the needle toward the state's adoption of comparative negligence. Indeed, as the North Carolina Court of Appeals stated in *Jones v. Rochelle*, it is "beyond th[e] Court's authority to abandon the doctrine of contributory negligence."[156] The North Carolina Court of Appeals further recognized that adopting comparative negligence would require either: (1) the North Carolina Supreme Court to embrace the doctrine, or (2) the legislature to enact a statute replacing contributory negligence with comparative negligence.[157]

If recent North Carolina Supreme Court decisions indicating reluctance to adopt comparative negligence are predictive of the Court's position, contributory negligence remains firmly entrenched in the state's

150. *Id.* at 647.

151. *Id.* at 646.

152. *Id.*

153. *Id.* at 647.

154. Gardner, *supra* note 12, at 3.

155. *See* Saunders v. Hull Prop. Grp., 847 S.E.2d 83, 83 (N.C. Ct. App. 2020) (recognizing the Court's adherence to precedent); Copeland v. Amward Homes, N.C. 837 S.E.2d 903, 907 (N.C. Ct. App. 2020) (acknowledging North Carolina's adherence to contributory negligence).

156. 479 S.E.2d 231, 235 (N.C. App. 1997).

157. *Copeland*, 837 S.E.2d at 907 (stating that "such considerations [of adopting comparative negligence in place of contributory negligence] must be presented to our Supreme Court or our Legislature").

jurisprudence.[158] With over 155 years of *stare decisis* bolstering the Court's adherence to precedent, the North Carolina Supreme Court has not demonstrated any willingness to abandon the doctrine of contributory negligence.[159] Therefore, the most promising way for North Carolina plaintiffs to obtain equitable judgments against state actors is to amend the NCTCA to adopt comparative negligence. Such an amendment would bind the Industrial Commission to judgments based on comparative fault analysis rather than barring recovery for plaintiffs deemed contributorily negligent.

B. Amending the Language in the North Carolina Tort Claims Act to Apply Comparative Negligence

The bar on claims against state actors under the North Carolina Constitution, where an adequate state remedy exists, implies that the NCTCA provides sufficient relief.[160] However, the inverse is true. As demonstrated in this Article, the application of contributory negligence creates inequitable judgments that preclude recovery for injured plaintiffs—cases that would be decided differently under a comparative fault analysis.[161] Consequently, the inclusion of contributory negligence in the NCTCA[162] offers inadequate redress for plaintiffs claiming government wrongdoing. Furthermore, without the availability of a state civil rights statute, claimants are funneled into a restrictive path for claims deemed to have an "adequate state remedy,"[163] reducing constitutional tort claims to mere tort actions brought under the NCTCA.

Contributory negligence appears both explicitly and implicitly throughout the NCTCA. The NCTCA expressly allows recovery for plaintiffs only when there "was no contributory negligence on the part of the claimant."[164] Additionally, the NCTCA limits the liability of state actors to circumstances where "a private person[] would be liable to the claimant in accordance with the laws of North Carolina."[165] Because contributory

158. *See* Cullen v. Logan Devs., 904 S.E.2d 730, 732 (N.C. 2024) (applying contributory negligence); Draughon v. Evening Star Holiness Church of Dunn, 843 S.E.2d 72, 74 (N.C. 2020) (applying contributory negligence).

159. The North Carolina Supreme Court first adopted the doctrine of contributory negligence in 1869 in *Morrison v. Cornelius*. 63 N.C. 346, 350 (1869).

160. Edwards v. City of Concord, 827 F. Supp. 2d 517, 520, 523 (M.D.N.C. 2011) (stating that "no direct constitutional claim is recognized" when an adequate remedy is available (like claims brought under the NCTCA)).

161. *See supra* Part IV.A.

162. N.C. GEN. STAT. § 143-299.1.

163. Craig *ex rel.* v. New Hanover Cnty. Bd. of Educ., 678 S.E.2d 351, 354 (2009).

164. § 143-291(a).

165. *Id.*

negligence is codified elsewhere in North Carolina law, the NCTCA's implicit references to it serve to reinforce the doctrine.[166] Additionally, the NCTCA contains a standalone provision that details contributory negligence as a matter of defense.[167] Overall, contributory negligence pervades the NCTCA, curtailing state-actor liability with only one exception.

Notably, the NCTCA broadly applies contributory negligence as a defense to state liability except for claims arising from smallpox vaccinations of state employees.[168] The NCTCA provides that "contributory negligence is not a defense for claims" brought under NCTCA by an individual that contracts smallpox or experiences an adverse reaction to the smallpox vaccination while living with a smallpox-vaccinated state employee.[169] Moreover, this anomalous provision does not require that the plaintiff prove negligence on behalf of the state, effectively making claims brought under this Section per se violations.[170] The provision demonstrates that the NCTCA permits a standard other than contributory negligence.

Legislators in North Carolina have repeatedly attempted, and failed, to pass bills that would enshrine comparative negligence into law statewide.[171] An alternative—though less comprehensive—approach to promoting statewide adoption of comparative negligence is to amend the NCTCA, removing contributory negligence from the law. Based on the NCTCA's provision excluding contributory negligence in claims related to smallpox vaccinations,[172] the statute itself provides precedent for departing from general North Carolina tort law. Rather than attempting to remove contributory negligence statewide through a comprehensive omnibus bill, amending the NCTCA provides lawmakers a limited statutory foothold to begin modernizing North Carolina tort law.

Amending the NCTCA to apply comparative negligence accords with the liberties granted to the Industrial Commission in the Act itself. The NCTCA grants the Industrial Commission extensive latitude, empowering the tribunal "to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent" of the law.[173] As the North Carolina Supreme Court has commented, the "obvious

166. *See* § 99B-4(3) (codifying contributory negligence into North Carolina's Product Liability Act).

167. § 143-299.1.

168. § 143-300.1A.

169. *Id.*

170. *Id.*

171. As of 2025, House Bill 811 aims to abolish contributory negligence statewide. H.B. 811, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

172. § 143-300.1A.

173. § 143-300.

intention of the General Assembly in enacting the Tort Claims Act [NCTCA] was to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency."[174] Yet, the remedies available to injured plaintiffs under the NCTCA are tempered by the harshness of contributory negligence—effectively shrinking, not enlarging, the rights of claimants.

Amending the language of the NCTCA to apply comparative negligence requires several modifications to other sections of the law. The first time contributory negligence is implied in the NCTCA is when the NCTCA defines the conditions governing which state actors are liable for negligence "in accordance with the laws of North Carolina."[175] To avoid the Industrial Commission applying general North Carolina tort law—and thus contributory negligence—to NCTCA claims, amendments must explicitly sever the statute from statewide tort law while maintaining liability for state actors.

This initial implicit reference to contributory negligence in the NCTCA may be avoided by including a restrictive clause modifying the sentence. Currently, the instant section reads:

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.[176]

This Article's proposed restrictive clause would modify the phrase "would be liable to the claimant in accordance with the laws of North Carolina"[177] to include the additional language: *without the availability of the defense of contributory negligence*. Modifying the statutory language would allow North Carolina tort law to remain intact while removing the contributory negligence defense for NCTCA claims.

Contributory negligence first appears explicitly in the NCTCA in the following sentence:

174. Wirth v. Bracey, 128 S.E.2d 810, 813 (N.C. 1963).
175. § 143-291(a).
176. *Id.*
177. *Id.*

> If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim was asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid . . . .[178]

Amending this section requires removing the phrase: "and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim was asserted."[179] Additionally, this sentence provides the first opportunity to codify modified comparative negligence as the controlling fault standard for claims brought under the NCTCA. This Article's proposed amended language reads:

> If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury . . . the Commission shall determine the amount of damages that the claimant is entitled to be paid[180] *based on the comparative negligence of the parties, so long as the claimant's contributory fault does not exceed 50%.*

Contributory negligence next appears in the NCTCA as a defensive doctrine.[181] Amending the NCTCA to apply comparative negligence requires a complete rewriting of this section to reflect the inclusion of comparative negligence as controlling law. Here, the amended language will detail the application of modified comparative negligence when the state asserts that the plaintiff was negligent in the incident giving rise to the claim. By including language that details the metrics of a comparative fault analysis, the NCTCA will require the Industrial Commission to analyze the

178. *Id.*
179. *Id.*
180. *Id.*
181. § 143-299.1.

proportional negligence of each party and award damages accordingly.[182] This Article's proposed language reads:

> *§ 143-299.1. Comparative negligence as matter of defense; burden of proof.*
>
> ~~Contributory~~ [N]egligence on the part of the claimant or the person [o]n whose behalf the claim is asserted shall be deemed to be a matter of defense on the part of the State department, institution or agency against which the claim is asserted, and such State department, institution or agency shall have the burden of proving that the claimant or the person in whose behalf the claim is asserted was guilty of ~~contributory~~ negligence[183] *that contributed to the claimant's injury. If negligence on the part of the claimant or the person on whose behalf the claim is asserted is found by the Commission to be contributory to injury of the claimant or the person on whose behalf the claim is asserted, the Commission shall assess the comparative negligence of both parties and award damages based on comparative fault analysis and determinations of each party's share in the negligent conduct giving rise to the claim.*

The final NCTCA amendment to eliminate contributory negligence would involve revising the provision exempting claims related to smallpox vaccinations of state employees. The existing operative language states: "The provisions of G.S. 143-299.1 shall not apply to claims made under this section, and contributory negligence is not a defense for claims under this section."[184] Because provision G.S. 143-299.1 has been amended to reflect adherence to comparative negligence, the sentence may remain while excising the irrelevant clause precluding contributory negligence. The proposed amended language reads:

> The provisions of G.S. 143-299.1 shall not apply to claims made under this section~~, and contributory negligence is not a defense for claims under this section~~.[185]

182. *See infra* Part V.B (detailing fault metrics between plaintiffs and defendants for this Note's proposed adoption of modified comparative negligence).

183. § 143-299.1.

184. § 143-300.1A.

185. *Id.*

Amending the NCTCA to adopt comparative negligence would allow North Carolina claimants injured by state actors to recover more equitably than under the current contributory negligence regime. Because the North Carolina Supreme Court has limited claims against state actors under the North Carolina Constitution when an "adequate state remedy"[186] is available, plaintiffs seeking redress for constitutional deprivations or torts committed by government officials are necessarily constrained by the harsh doctrine of contributory negligence. Adopting this language brings North Carolina in line with the nationwide standard of comparative negligence, allowing recovery for claims otherwise barred under the state constitution.

V. CONSIDERATIONS AND IMPACTS OF ADOPTING A NORTH CAROLINA CIVIL RIGHTS STATUTE AND AMENDING THE NORTH CAROLINA TORT CLAIMS ACT

This Article proposes two discrete legislative avenues to create more equitable outcomes for plaintiffs seeking redress for government actor wrongdoing.[187] Creating a North Carolina Section 1983 analogue and amending the North Carolina Tort Claims Act (NCTCA) both provide statutory solutions to the preclusive barriers that hinder claimants from pursuing constitutional and unintentional tort claims against state actors. However, the adoption of either of these proposals requires consideration of how these changes would impact policy in North Carolina. First, this Part will address the implications of the adoption of a North Carolina civil rights statute and associated policy concerns of precluding qualified immunity for claims brought for constitutional rights deprivations. Second, the impacts of amending the NCTCA to apply comparative negligence for tort claims against state actors will be considered.

A. Implications and Potential Impacts of a North Carolina Civil Rights Statute

Allowing claims stemming from constitutional deprivations to be brought under a North Carolina Section 1983 analogue that statutorily precludes qualified immunity, would empower claimants to seek redress under the state's civil rights statute rather than the federal statute. While plaintiffs would benefit from a Section 1983 analogue, state agencies and law

186. Edwards v. City of Concord, 827 F. Supp. 2d 517, 520 (M.D.N.C. 2011) (citing Craig *ex rel.* Craig v. New Hanover Cnty. Bd. of Educ., 678 S.E.2d 351, 356–57 (2009)).

187. *See supra* Parts III–IV.

enforcement would undoubtedly disfavor such a law. Indeed, many law enforcement agencies point to qualified immunity as a necessary protection from litigation regarding police conduct.[188]

Precluding qualified immunity as a defense under a North Carolina civil rights statute would face legislative resistance due to concerns over state actors' liability. These same suits, if brought under Section 1983, would likely favor state actors due to the expansive application of qualified immunity. Moreover, providing an avenue of redress that avoids qualified immunity would permit plaintiffs to avoid restrictive federal precedent.[189] Removing the need to prove prior violations of established law would make a North Carolina civil rights statute one of the few that would allow plaintiffs to hold state actors liable, unshielded by qualified immunity.[190] Nevertheless, adopting a Section 1983 analogue in North Carolina would do little to advance civil rights protections unless it also precluded qualified immunity. Indeed, inclusion of qualified immunity would merely create legislative redundancy for claims that could be litigated under either the federal or state civil rights statute.

This Article concedes that the creation of a North Carolina civil rights statute that precludes qualified immunity will render verdicts that increase the number of cases holding government actors liable. Moreover, government actors sued as defendants acting in their official capacity could yield damages payable by municipalities, thereby creating financial burdens on local governments and taxpayers.[191] However, consistent with United States Supreme Court precedent, North Carolina courts are unlikely to hold municipalities financially liable under *respondeat superior*, which would limit damages to harmful conduct by state actors acting pursuant to official government policies.[192]

Importantly, this narrowing of municipality financial liability would echo the Supreme Court's interpretation of Congress's intent behind the Civil Rights Act.[193] As the Court held in *Monell v. Department of Social Services*,

188. *See generally* Bobby Reilly Sheahan, *Qualified Immunity Today*, LEB (Oct. 10, 2023), https://leb.fbi.gov/articles/featured-articles/qualified-immunity-today (explaining that many law enforcement agencies claim that the defense of qualified immunity is necessary to shield officers from lawsuits associated with the daily duties performed by police).

189. Pierson v. Ray, 386 U.S. 547, 555 (1967).

190. Reinhart et al., *supra* note 3, at 760. Colorado, California, and New Mexico preclude qualified immunity as a defense for claims brought under their respective state civil rights statutes. *Id.*

191. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 679–683, 690–91 (1978) (holding that municipalities can be held liable for damages when a state actor inflicts injury while executing a government policy while simultaneously precluding liability for *respondeat superior* claims).

192. *Id.* at 691.

193. *Id.* at 690–91.

respondeat superior is not a basis for rendering municipalities liable under Section 1983 for constitutional torts of employees.[194] Rather, monetary damages for liability dispositions under Section 1983 are levied on municipalities only when a state actor is found to have acted under official government policy causing injury to a plaintiff.[195] Nevertheless, although limiting municipalities' liability under *respondeat superior* reduces the pool of defendants, precluding qualified immunity would likely expand the number of state agencies and officials financially liable for civil rights violations.

Despite the expected increase in state actor liability from a North Carolina civil rights statute, government accountability must not be subordinated to fiscal concerns. Underscoring this dilemma is a choice that champions justice over monetary considerations: whether state actors will be held accountable for civil rights violations irrespective of the purse penalized by liability. Moreover, creating a North Carolina civil rights statute that precludes qualified immunity does not constitute a binding assumption of risk on the part of taxpayers. Rather, the law would serve as an incentive for government agencies and municipalities to adopt constitutionally sound policies and practices. Indeed, "[T]he mere possibility of having to pay a large settlement may cause errant municipalities to align their policies and customs with constitutionally acceptable standards."[196] Thus, the adoption of a North Carolina civil rights statute will offer claimants redress for government wrongdoing while simultaneously incentivizing government agencies and municipalities to ensure adherence to constitutional rights guarantees via policy.

B. The Potential Impacts of Amending the North Carolina Tort Claims Act to Apply Comparative Negligence

This Article has proposed that the North Carolina General Assembly amend the North Carolina Tort Claims Act (NCTCA) to jettison the doctrine of contributory negligence in favor of comparative negligence. A noteworthy artifact of this proposal is the lingering statewide application of contributory negligence for all negligence claims brought against private actors. Indeed, if amended to apply comparative negligence, the NCTCA would stand as the sole litigation vehicle in North Carolina that refrains from applying contributory negligence to tort claims. While far from ideal, this disparity

194. *Id.* at 693.

195. *Id.* at 694–95.

196. Terry Clayton Paulson, *42 U.S.C. 1983–Civil Rights–Municipalities Liable for Money Damages*, 2 U. ARK. LITTLE ROCK L. REV. 419, 425 (1979).

between claims against private and state actors represents an extension of the NCTCA's existing, limited departure from contributory negligence.[197] Grounded in an existing NCTCA exception, the proposed amendment to adopt comparative negligence for claims against state actors circumvents the broader and historically contentious issue of abandoning contributory negligence statewide.[198]

Claims adjudicated under a comparative fault doctrine would inevitably result in state actors being held liable more often than under a contributory negligence regime. To avoid meritless claims and limit liability for state actors, the NCTCA may function most equitably—and less distanced from the current paradigm—by applying a modified comparative negligence fault standard.[199] Modified comparative negligence is grounded in principles of fairness, aiming to provide just compensation to injured parties while limiting recovery in less meritorious cases where the plaintiff bears the majority of fault.[200] Thus, modified comparative negligence presents a reasonable compromise between the harsh preclusive effect of contributory negligence and the liberal dispensing of liability damages in pure comparative negligence jurisdictions.[201]

Amending the NCTCA to apply modified comparative negligence would align North Carolina's fault doctrine, as applied in claims against state actors, with most jurisdictions in the United States. By limiting damages to claims brought by plaintiffs who share equal or less than 50% liability, modified comparative negligence strikes a balance between justice for injured plaintiffs and a potential torrent of meritless claims that could spell financial ruin for municipalities and state actors. Adopting a modified comparative negligence standard in the NCTCA would reflect the doctrine favored by lawmakers nationwide while balancing liability, fiscal concerns, and equitable recovery for injured claimants.

CONCLUSION

Plaintiffs in North Carolina, seeking to hold state actors accountable for civil rights deprivations, constitutional torts, and negligence, are currently limited by inadequate avenues for proper redress. Forced onto an off-ramp of

197. N.C. GEN. STAT. § 143-300.1A (2025). The NCTCA instructs that contributory negligence should not apply for claims against state actors for injuries related to smallpox vaccinations. *Id.*; *see supra* Part IV.B.

198. *See supra* Part I.

199. *See supra* Part I.

200. *50-Percent Rule*, *supra* note 25.

201. *See supra* Part I.

injustice, injured plaintiffs are faced with three limited and problematic paths toward recovery: (1) a claim filed under the North Carolina Tort Claims Act (NCTCA) that precludes recovery for plaintiffs found contributorily negligent; (2) a claim advanced under the North Carolina Constitution which severely limits the type of actionable suits; or (3) a federal claim brought under Section 1983 that presents plaintiffs with the formidable hurdle presented by qualified immunity. This Article proposes two targeted legislative reforms to address deficiencies in North Carolina law and provide plaintiffs with adequate remedies.[202]

Adoption of a state civil rights statute and amending the NCTCA are two discrete, but not mutually exclusive means of providing equitable and just avenues for redress. In isolation, either proposal will advance justice for plaintiffs who have suffered wrongdoing at the hands of government actors. Working in tandem, the two pieces of proposed legislation would mark a substantive march toward the vindication of constitutional rights and exercise of government accountability. Together, amending the NCTCA and creating a North Carolina civil rights statute would safeguard constitutional rights by ensuring equitable redress under North Carolina state law.

202. *See supra* Parts III–IV.