NO. COA11-299 **THIRTIETH-A DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**From MACON**
	)	
ISAAC HUTCHISON BIRCH	)	

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BRIEF FOR THE STATE

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

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STATEMENT OF THE CASE

On 26 March 2010, Isaac Hutchison Birch ("defendant") was charged with driving while impaired ("DWI") and failing to operate his vehicle's headlamps. (R. pp. 2, 3, 6). As noted in the Motion to Dismiss filed contemporaneously herewith, the district court proceedings are not reflected in the Record on Appeal.

Defendant's case initially was heard in Macon County Superior Court on 1 and 2 June 2010, during which time the Honorable Bradley B. Letts, Superior Court Judge presiding, attempted to ascertain whether defendant desired appointed counsel or preferred to waive his right to counsel. (T. pp. 1-16). After defendant waived counsel (T. pp. 9-14), defendant's case was heard on 30 September 2010 before the Honorable Mark E. Powell, Superior Court Judge Presiding. (R. pp. 122-25). A jury found defendant guilty of DWI[1] (T. p. 72; R. p. 121), and the court imposed a Level Five punishment of sixty days imprisonment, suspended on twelve months

[1]The Record on Appeal does not disclose the disposition of the charge of failure to operate headlamps.

unsupervised probation. (T. pp. 74-75; R. pp. 124-25). Defendant gave timely notice of appeal. (T. p. 75).

The settled Record on Appeal was filed on 9 March 2011, docketed on 14 March 2011, and mailed to the parties on 15 March 2011. (R. pp. 1, 137). On 14 April 2011, defendant filed a motion for an extension of time to file his brief, in which he sought an additional sixty days to file his brief. By Order entered 14 April 2011, this Court allowed defendant's motion in part, extending the time for filing by thirty days to 16 May 2011. Defendant filed his brief on 17 May 2011, and the State filed a motion to strike and dismiss. Defendant filed a response to the State's motion, and by Order entered 19 May 2011, this Court denied the State's motion and deemed defendant's brief timely filed.

Contemporaneous with the filing of the instant brief, the State has filed a Second Motion to Dismiss based upon a jurisdictional defect in the Record on Appeal.

STATEMENT OF THE FACTS

At approximately 2:27 a.m. on 26 March 2010, Officer Matthew Breedlove ("Officer Breedlove") of the Franklin Police Department was in his marked patrol car in an alleyway off West Main Street in the Town of Franklin when he observed a truck driving westbound on West Main Street without its headlights or taillights on. (T. pp. 40-44, 48). Officer Breedlove pulled onto West Main Street and followed the truck as it turned onto Harrison Avenue. (T. pp. 42, 44). Officer Breedlove activated his blue lights, but the truck did not initially show any intention of stopping. (T. p. 42).

After traveling one-half to three-quarters of a mile and passing several areas where it could safely pull off the road, the truck eventually pulled into a restaurant parking lot. (T. p. 43).

Officer Breedlove approached the vehicle and observed defendant in the driver's seat. (T. p. 44). After requesting his license and registration, Officer Breedlove asked defendant why he did not stop sooner. (T. p. 44). Defendant, who had a glazed look in his eyes, produced his license and registration and responded "the street was narrow." (T. pp. 44-45, 60). Officer Breedlove then told defendant he observed him driving in the dark without headlights, to which defendant stated "it was his right to drive without headlights." (T. p. 45). Officer Breedlove detected a very strong odor of alcohol emanating from defendant's breath and asked defendant if he had been drinking, to which defendant responded, "Not a lot since 10:30." (T. pp. 45-46).

Officer Breedlove then asked defendant to exit the truck, but defendant hesitated and questioned Officer Breedlove. (T. p. 46). Officer Breedlove explained he needed to determine defendant's level of impairment, and defendant remarked that Officer Breedlove "might as well go ahead and give him the ticket because he was not blowing." (T. pp. 46-47). Defendant eventually exited the truck, and Officer Breedlove continued smelling alcohol about defendant's breath. (T. p. 46). Defendant refused to submit to the Alco-Sensor and field sobriety tests. (T. p. 48). Officer Breedlove formed the opinion that defendant was driving while appreciably impaired by alcohol and placed defendant under arrest for DWI. (T. pp. 50-51).

Officer Breedlove transported defendant to the Macon County Detention Center, and at 2:55 a.m., Officer Breedlove, a certified chemical analyst, read defendant his chemical analysis rights. (T. pp. 51-55). Defendant refused to sign the rights form, refused to contact a witness, and refused to submit to the test. (T. pp. 55-59; R. pp. 10, 120). During this time, Officer Breedlove continued to note that a "constant, very strong odor of alcohol" was coming from defendant's breath and that defendant was "rebellious," "interruptive," and "disorderly." (T. p. 56, 60).

Defendant did not present any evidence at trial. (T. p. 53).

ARGUMENT

I. DEFENDANT'S APPEAL SHOULD BE DISMISSED BECAUSE HE HAS FAILED TO CITE LEGAL AUTHORITY REQUIRING HIS CONVICTION BE VACATED AND BECAUSE THE ISSUES RAISED ON APPEAL ARE, IN ADDITION TO BEING FRIVOLOUS, BARRED BY THE POLITICAL QUESTION DOCTRINE.

On appeal, defendant's sole argument is that the current state government in North Carolina is illegitimate and, therefore, his conviction must be vacated. Defendant's contentions are unsupported by legal authority and concern political questions for which judicial review is impermissible. Accordingly, defendant's appeal should be dismissed and conviction upheld.

A. Defendant has failed to cite any legal authority.

As a preliminary matter, defendant has failed to cite any legal authority for his contention that the trial court lacked jurisdiction to enter judgment on his DWI conviction. In fact, an argument substantively identical to defendant's was raised in *State v. Sullivan*, __ N.C. App. __, 687 S.E.2d 504 (2009), *appeal denied*,

364 N.C. 247, 699 S.E.2d 921 (2010), *cert. denied*, __ U.S. __, 178 L. Ed. 2d 754 (2011). In *Sullivan*, this Court dismissed the defendant's argument regarding North Carolina's legitimacy after the Civil War for failure to cite legal authorities pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure. *See Sullivan*, __ N.C. App. at __, 687 S.E.2d at 509 (dismissing the "'frivolous'" and "'rambling'" argument that "the State of North Carolina cannot prove its lawful creation after the Civil War" (citation omitted)).

The 2009 amendments to the Rules of Appellate Procedure, which did not apply in *Sullivan*, seem to indicate that failure to cite authority does not automatically result in an argument being deemed abandoned. *See* N.C. R. App. 28(b)(6). Nevertheless, it remains the rule that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *First Charter Bank v. Am. Children's Home*, __ N.C. App. __, __, 692 S.E.2d 457, 463 (2010) (omission in original) (internal quotation marks and citations omitted). Instead, "[a]ppellate review is limited to those questions clearly defined and presented to the reviewing court in the parties' briefs, in which arguments and authorities upon which the parties rely in support of their respective positions are to be presented." *Id.* (internal quotation marks and citations omitted).

Here, although defendant has provided historical references and citation to cases concerning the Reconstruction Act, he has offered no legal authority supporting his claim that his DWI conviction should be vacated because of events following the Civil War. Accordingly, defendant's appeal should be dismissed.

B. Defendant's arguments are barred by the political question doctrine.

Assuming *arguendo* defendant's brief is sufficient under the Appellate Rules, his argument appears to proceed as follows: (1) North Carolina was lawfully created as the 12th State in the Union; (2) North Carolina lawfully seceded from the Union;[2] (3) the Reconstruction Acts unlawfully annulled the 12th State and, through coercion, admitted North Carolina into the Union as the 39th State; (4) the 39th State is unconstitutional and illegitimate as it does not derive its authority from the consent of the governed; and therefore, (5) North Carolina today cannot enforce its laws. Although "patently frivolous," *see Sullivan*, __ N.C. App. at __, 687 S.E.2d at 509, the issue raised by defendant on appeal is a quintessential, non-justiciable political question, the resolution of which cannot be found in this Court. Accordingly, defendant's appeal should be dismissed and conviction upheld.

Pursuant to the political question doctrine, "'courts will not adjudicate political questions.'" *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (quoting *Powell v. McCormack*, 395 U.S. 486, 518, 23 L. Ed. 2d 491, 515 (1969)), *cert. denied*, 533 U.S. 150 L. Ed. 2d 804 (2001). The doctrine was first announced over two centuries ago, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60, 71 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the

[2] *But see Texas v. White*, 74 U.S. (7 Wall.) 700, 726, 19 L. Ed. 227, 237 (1868) (explaining the Union is an "indissoluble relation" and, therefore, Texas' secession was "absolutely null").

executive, can never be made in this court"), and has long been recognized in our state, even before the alleged 1868 watershed moment under defendant's theory. *See, e.g.*, *In re Bradshaw*, 60 N.C. (1 Win.) 454 (1864) (noting "the Courts are not at liberty to enter" into "conjectures on political questions"). In fact, since the doctrine is premised on separation of powers, *see Powell*, 395 U.S. at 518, 23 L. Ed. 2d at 515, the political question doctrine arguably has a stronger foundation in North Carolina as, unlike the federal Constitution, our state Constitution "includes an *express* separation of powers provision." *Bacon*, 353 N.C. at 716, 549 S.E.2d at 853-54 (emphasis in original) (citing N.C. Const. art. I, § 6). *See generally* John V. Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C. L. REV. 1 (1983).

As our Supreme Court has explained, "'[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (omission in original) (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 178 (1986)). Under the doctrine, a case should be dismissed as nonjusticiable when any of the following conditions are met:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without

> expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 686 (1962) (bracketed numbering added); *see also Nixon v. United States*, 506 U.S. 224, 236, 122 L. Ed. 2d 1, 13 (1993); 1 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.16, at 183-84 (1986) [hereinafter ROTUNDA].

On appeal, defendant contends the current government of North Carolina – the "39th State" – is illegitimate and incapable of prosecuting him because he is a citizen of the lawful state of North Carolina – the "12th State." Defendant, in effect, asks this Court to decide between "two" alleged state governments.

In 1847, the Supreme Court declined to decide whether "the acknowledgment of a domestic State is like the recognition of the independence or existence of a foreign State," which is a nonjusticiable, political question. *Boland v. Jones*, 46 U.S. (5 How.) 343, 374, 12 L. Ed. 181, 196 (1847). Two years later, however, the Court conclusively answered that question in the affirmative and held the same constituted a political question. *See Luther v. Borden*, 48 U.S. (7 How.) 1, 12 L. Ed. 581 (1849).

Luther arose "out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842" – often termed the Dorr Rebellion. *Id.* at 34, 12 L. Ed. at 595. The suit was for trespass after the defendants entered and searched the plaintiff's home without his consent. *Id.* at 34, 12 L. Ed. at 595-

96. The defendants justified their actions by contending that they were acting under orders of the lawful charter government, which plaintiff was actively attempting to overthrow. *See id.* The plaintiff, on the other hand, countered that the charter government had ceased to exist and had been replaced by a new government headed by Thomas Dorr. *See id.* at 34-37, 12 L. Ed. at 595-97.

"Thus, out of a simple trespass action the Supreme Court was called upon to determine which was the legitimate government of Rhode Island." ROTUNDA, *supra*, at 182. The Supreme Court declined, noting the wholly untenable consequences of such a determination:

> For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, -- if it had been annulled by the adoption of the opposing government, -- then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

Luther, 48 U.S. (7 How.) at 38-39, 12 L. Ed. at 597.

The Court also noted a Rhode Island state court could not reasonably adjudicate a dispute between entities claiming to be the lawful Rhode Island government. *See id.* at 39-40, 12 L. Ed. at 598 ("Indeed, we do not see how the question could be tried and judicially decided in a State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the

authority of the government from which it is derived."). Similarly, in the instant case, this Court was established under what defendant would contend was the illegitimate "39th State," as it was approved by constitutional amendment in 1965 and established in 1967. If defendant's argument had merit, which is denied, this Court would not even exist and, thus, would be incapable of vacating defendant's judgment. On the other hand, if this Court were to rule on the merits of the case, however frivolous, it would "necessarily affirm[] the existence and authority of the government under which it is exercising judicial power." *Id.* There scarcely can be a more political question than political existence, and defendant's contentions implicate nearly all the conditions for a political question. *See Baker*, 369 U.S. at 217, 7 L. Ed. 2d at 686.

Ultimately, the Court in *Luther* held the plaintiff's arguments revolved around inherently political questions and, thus, declined to rule on the merits of the case. *Luther*, 48 U.S. at 46-47, 12 L. Ed. at 601. The Court based its decision on the Guarantee Clause in the United States Constitution, *see* U.S. Const. art. IV, § 4, and held that "it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." *Luther*, 48 U.S. at 42, 12 L. Ed. at 599. Once such a decision is made, it cannot "be questioned in a judicial tribunal." *Id.* Instead, "the courts must administer the law as they find it." *Id.* at 45, 12 L. Ed. at 600.

As the Court further explained, "the sovereignty of every State resides in the people of the State," who alone "may alter and change their form of government." *Id.* at 47, 12 L. Ed. at 601.[3] Whether a government has been displaced and replaced by another, however, "is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it." *Id.* Even the dissenting justice found it "obvious" that the validity of the charter government was a political question and that the Court cannot "be the umpire in questions merely political." *Id.* at 48, 51, 12 L. Ed. at 601, 603 (Woodbury, J., dissenting). Accordingly, this Court is precluded from reviewing the political question posited by defendant – *i.e.*, whether there are two state governments and which is legitimate.

In addition to the Guarantee Clause discussed in *Luther*, the issues raised by defendant also are rendered nonjusticiable by

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[3]In fact, "the people of the State" rejected an attempt to dismantle the Reconstruction-era constitution two years after its creation. *See* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1781 (1992) ("When pre-war political forces reemerged in 1870 in the form of the Conservative Party and won control of the general assembly, they immediately proposed a convention to replace the hated carpetbagger constitution. Although not required to submit the issue to the voters, they did so – and suffered an embarrassing defeat."). Indeed, "[w]ith the passage of time and amendments, the attitude towards the Constitution of 1868 had changed from resentment to a reverence so great that until the second third of the twentieth century, amendments were very difficult to obtain." *Id.* at 1785 (internal quotation marks and citation omitted). Further, regardless of any issues defendant has with that Constitution, our State now operates under the Constitution of 1971, under which "[a]ll political power is vested in and derived from the people." N.C. Const. art I, § 2.

virtue of the Statehood Clause. Specifically, Article IV, Section 3, of the United States Constitution provides:

> New States may be admitted *by the Congress* into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned *as well as of the Congress*.

U.S. Const. art. IV, § 3 (emphases addd). As one commentator has aptly noted, for political question purposes, "the Statehood Clause appears to commit statehood issues to Congress." Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393, 2454 & n.278 (2001). Accordingly, the constitutionality of North Carolina as the "39th State," however frivolous, cannot be determined in the judiciary because of the inherent political question under the *Baker* framework. *See Baker*, 369 U.S. at 217, 7 L. Ed. 2d at 686.[4]

Finally, to the extent defendant requests this Court review the constitutionality or legitimacy of North Carolina's ratification of the Fourteenth Amendment, the United States Supreme Court held decades ago "that issues having to do with the ratification of amendments are political questions best left to the

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[4]The constitutionality of other states similarly has been questioned, but answers cannot be found in the courts. *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Constitutional*, 90 CAL. L. REV. 291, 297 (2002) (assessing the constitutionality of West Virginia's statehood, along with that of Kentucky, Maine, and Vermont, but noting "nobody would take seriously, other than as a parable about constitutional interpretation generally, the conclusion that West Virginia is unconstitutional, and nobody today would act on such a conclusion").

determination of Congress." Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 544 (1992). Specifically, in *Coleman v. Miller*, 307 U.S. 433, 83 L. Ed. 1385 (1939), the Supreme Court declined, on political question grounds, to decide whether the Child Labor Amendment was properly ratified by the Kansas legislature, holding "the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." *Coleman*, 307 U.S. at 450, 83 L. Ed. at 1394; *cf. also Scott v. Jones*, 46 (5 How.) 343, 378, 12 L. Ed. 181, 198 (1847) (declining to rule on a challenge to the validity of the enactment process of a state statute as "a matter so purely political and so full of party agitation"). Therefore, defendant's challenge to North Carolina's ratification of the Fourteenth Amendment also is nonjusticiable and cannot be reviewed by this or any other Court.

CONCLUSION

Although concomitant with sesquicentennial commemorations of the Civil War, defendant's DWI conviction is wholly independent of and untainted by the firing on Fort Sumter, the surrender at Appomattox, and the Reconstruction thereafter. Defendant has offered no legal authority in support of his argument, which, at most, relates solely to the role of the State vis-à-vis the federal government and has no correlation to the ability of the former to

enforce its own laws. Indeed, defendant acknowledged as much when he submitted to state law by, *inter alia*, (a) obtaining a North Carolina drivers license (R. pp. 2, 3), (b) surrendering his license as a condition of his pre-trial release (R. p. 9), (c) registering his vehicle with the Division of Motor Vehicles and obtaining a license plate and registration card (R. p. 4), and (d) fueling his vehicle, which would have entailed a state gas tax.[5]

Nevertheless, defendant's argument, while frivolous, is simply not justiciable. Issues concerning the legitimacy of allegedly different state governments or the validity of the ratification of constitutional amendments are barred by the political question doctrine and cannot be resolved in the judiciary. Accordingly, the State respectfully requests this Court dismiss defendant's appeal and uphold the judgment below.

Electronically submitted, this the 15th day of June, 2011.

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[5]Defendant also contended at trial that the proceedings were "wasting money in fact of *the State of North Carolina*" (T. p. 37) (emphasis added), even though under his theory there is no State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY I have this day served the foregoing BRIEF FOR THE STATE upon DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed as follows:

Isaac Hutchison Birch
462 Judd Duvall Lane
Franklin, North Carolina 28734

This the 15th day of June, 2011.

/s/ ELECTRONICALLY SUBMITTED
Jess D. Mekeel
Assistant Attorney General