ARTICLES

FACTORIES OF GENERIC CONSTITUTIONALISM

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Every state has its own constitution. Their language—varied, dense, often quite lengthy—contrasts with the more familiar, streamlined language of the United States Constitution. Still, there is quite a bit of shared language among the fifty state constitutions and the federal one. The framers of the Bill of Rights, for example, were inspired by language from the early states' constitutions.[1] The Bill of Rights, in turn, inspired the framers in many future states.[2]

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[1] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 7–9 (2018).

[2] Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 332 (2011).

This provides fertile ground for a longstanding scholarly debate: should similar state and federal provisions be treated as coextensive, or should states experiment with more expansive interpretations of those same words? There are examples of states departing from the federal interpretation, but they are rare.[3] Instead, states often address their corresponding constitutional provisions through what legal scholars call "lockstepping,"[4] a "reflexive imitation of the federal courts' interpretation of the Federal Constitution."[5] State constitutional scholarship tends to focus on the ability of state courts to interpret language in their constitutions more broadly than matching language in the federal one, and on the circumstances under which they should do so.[6]

But there is another category of state constitutional law: the idiosyncratic provisions that have no federal counterparts. For example, an obscure Texas provision became national news when a state judge mistakenly quit his job by announcing plans to run for the Texas Supreme Court.[7] How did this happen? The Texas Constitution provides that a judicial officer's announcement of candidacy for another office "shall constitute an automatic resignation of the office then held."[8]

Many of these state provisions, like the Texas "automatic resignation" clause, address rather tedious aspects of state governance. Some, though, are far weightier—addressing important social issues such as privacy,[9] education,[10] and access to healthcare.[11] They often are a reflection of the state's culture or ethos. The Montana Constitution, for example, celebrates "the quiet beauty of our state, the grandeur of our

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[3] SUTTON, *supra* note 1, at 16–21.

[4] Blocher, *supra* note 2, at 339; Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 48 (2006); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788 (1992).

[5] SUTTON, *supra* note 1, at 174.

[6] *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695 (2010).

[7] Reis Thebault, *A Newly Elected County Judge Resigned Abruptly. Just One Problem: It was an Accident*, WASH. POST (Apr. 3, 2019), https://www.washingtonpost.com/nation/2019/04/04/newly-elected-county-judge-resigned-abruptly-just-one-problem-it-was-an-accident/.

[8] TEX. CONST. art. XVI, § 65.

[9] FLA. CONST. art. I, § 12.

[10] N.C. CONST. art. I, § 15.

[11] HAW. CONST. art. IX, § 3.

mountains, the vastness of our rolling plains" and then guarantees the people the right to "a clean and healthful environment."[12]

One might assume that these unique state provisions cannot suffer from lockstepping. After all, there is no equivalent federal provision whose steps these provisions could follow.[13]

This article challenges that assumption. It examines four provisions in the North Carolina Constitution that each address some form of state-sponsored cronyism or abuse in the marketplace. These four clauses—the Exclusive Emoluments Clause, Monopolies Clause, Fruits of Their Labor Clause, and Just and Equitable Tax Clause—are distinctive and address different subjects. The framers of these provisions, and the early cases addressing them, understood that they were not meant as general, but weak, protections of economic liberty; instead, these clauses were designed as powerful protections against specific state action that the framers viewed as repugnant.[14]

But over time, North Carolina's courts fashioned legal tests for these provisions that aligned them with the bare minimum protections afforded to economic liberty under the federal Due Process Clause—a test known as rational basis.[15] These state provisions are now largely in lockstep with a federal doctrine known as "economic substantive due process."

This article traces the history of these four constitutional clauses and explains how they evolved from powerful constitutional protections to redundancies. Several shared patterns emerge and, from those, this thesis:

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[12] MONT. CONST., pmbl., art. II, § 3.

[13] Indeed, many commentators treat it as axiomatic that state provisions with no federal equivalent cannot be subjected to lockstepping. *See, e.g.*, Brett Legner, *Interpreting the Illinois Constitution: Understanding the Rights Afforded by a Modern Charter*, 48 LOY. U. CHI. L.J. 851, 877 (2017) ("Still other rights may have no analogue in the Federal Constitution, so they are given their own independent meaning out of necessity."); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 391 (1998) ("Most provisions in state constitutions have no federal analogue, and with regard to these dissimilar clauses, a court has no choice but to interpret the provisions independently, without reference to the Federal Constitution."). *But see* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 969–70 (2011) (noting the state courts have "implicitly transplanted" some federal doctrine without a direct state equivalent, such as concepts of Article III justiciability).

[14] *See, e.g.*, Duncan v. City of Charlotte, 66 S.E.2d 22, 26–28 (N.C. 1951).

[15] *See infra* pp. 11–12 and note 71.

First, the challenges of fashioning a novel constitutional test put even the most idiosyncratic state constitutional provisions at risk of federal lockstepping. These challenges include the lack of scholarship on the meaning of the provisions; the tendency of both litigants and courts to lump these claims together with more familiar federal and state constitutional claims; and the political fallout of an impactful ruling that invokes a little-known state constitutional clause.

Second, this lockstepping is particularly harmful to state constitutional provisions with no federal equivalent. These provisions have their own particularized wording, history, and corresponding state law precedent. All of that is lost when courts bind these clauses to unrelated federal provisions.

This outcome runs counter to a key premise of state constitutional scholarship—that state courts can (and will) act as "laboratories of democracy" and experiment with broader rights than those provided through the federal constitution.[16] State constitutional provisions with no federal equivalent should be a font of constitutional experimentation. But instead of producing experimental doctrine, some state courts have become mindless factories of familiar constitutional jurisprudence: content to pump out generic copies of unrelated federal law.

I. OVERVIEW OF FEDERAL ECONOMIC SUBSTANTIVE DUE PROCESS

To meaningfully understand how a state constitutional provision is in lockstep with federal doctrine, one must recall the applicable federal doctrine. Here, that doctrine is known as "economic substantive due process."

The Fourteenth Amendment's Due Process Clause provides that no state may "deprive any person of life, liberty, or property, without due process of law."[17] The text of this clause signals that it provides a

[16] Justice Brandeis popularized the "laboratories of democracy" concept in a famous concurrence: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[17] U.S. CONST. amend. XIV, § 1.

procedural protection and, indeed, it does.[18] But it also has a "substantive" component, which evaluates the state's *reason* for a deprivation of life, liberty, or property.[19]

In the early part of the twentieth century, the Supreme Court aggressively applied substantive due process to invalidate state regulations of business and commerce.[20] This period, often called the "*Lochner* era" after the name of one of the leading cases, lasted until the mid-1930s.[21] The due process protections of business and industry that arose during this period became known as "economic substantive due process."[22]

By the late 1930s, the Supreme Court had thoroughly rejected this robust form of due process review for commercial regulations.[23] In its place, the Court held that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the [legislators'] knowledge and experience."[24] This legal standard became known as "rational basis review."

Rational basis review created a "double standard" separating "economic regulation from all other sorts of government action."[25] Even as the Supreme Court entered an era of rapidly expanding constitutional rights in the 1950s and 1960s, courts treated economic substantive due process as a "constitutional exile"[26] and challenges to economic regulation were largely unwinnable.[27] In short, as courts put the rational basis test to work, it proved to be "a test that the government generally cannot fail."[28]

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[18] Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 418–19 (2010).

[19] *Id.*

[20] *See* Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 14 (1991).

[21] *Id.* at 3.

[22] *See id.* at 7–8, 58–59.

[23] *Id.* at 3.

[24] United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

[25] Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 84 (2001).

[26] *Id.* at 75–77.

[27] *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

[28] Baker & Young, *supra* note 25, at 80–81.

There are two defining characteristics of rational basis review that are relevant to this article. First, rational basis review is unconcerned with the actual reasons behind the challenged action.[29] Courts evaluate whether there is "any conceivable rational basis" for the challenged state action, not whether state actors had that particular rational basis in their minds.[30] Scholars have referred to this as a "hypothetically inclined" standard because it requires no "evidence that a proffered rational inference be one held by the legislature enacting the provision in question."[31]

This standard is noteworthy because several of the constitutional provisions discussed in this article seek to prohibit forms of state-sponsored cronyism and favoritism. With these types of prohibitions, the wrong that is addressed is the State's favoring of one person or group over others. A standard that asks whether there is any conceivable basis for the State's decision, rather than examining the State's actual intent, can be a poor fit for this type of prohibition.

The second important characteristic of rational basis review is its role as a sweeping, baseline standard. Virtually any government act that burdens an individual or business implicates either substantive due process or related equal protection principles that also are subject to rational basis review.[32] In other words, any laws that implicate one of the four state constitutional provisions described in this article, which deal with specific types of economic activity, also implicate either the Due Process Clause or the Equal Protection Clause in the U.S. Constitution.

This too, makes rational basis a poor fit for constitutional provisions targeting specific conduct. If an all-encompassing constitutional protection and a less-inclusive one both share the same standard of review, there is little reason for litigants to focus on the less-inclusive one. That provision becomes superfluous.

Finally, although most of this article's analysis involves North Carolina cases directly referencing federal substantive due process, there are a handful of notable cases that ignore federal due process and focus on

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[29] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

[30] *Id.* at 309.

[31] Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1652 (2016).

[32] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

its equivalent in the North Carolina Constitution.[33] This provision, known as the "Law of the Land Clause" states that no person shall be "deprived of his life, liberty, or property, but by the law of the land."[34] North Carolina's courts have repeatedly held that this clause is in lockstep with the federal Due Process Clause.[35] Thus, challenges to ordinary business and commercial regulations under the Law of the Land Clause are subject to rational basis review.[36] The practical effect of lockstepping is that state constitutional decisions discussing or applying rational basis review under the Law of the Law Clause are applying the federal Due Process Clause standard.

With this background in mind, we examine the four state constitutional provisions whose interpretations form the thesis of this article.

II. EXCLUSIVE EMOLUMENT CLAUSE

North Carolina's Exclusive Emoluments Clause dates back to the State's original 1776 Constitution, and it remained unchanged in substance through two new state constitutions, in 1868 and 1971.[37] The clause provides as follows: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."[38]

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[33] *See, e.g.*, Town of Emerald Isle v. State, 360 S.E.2d 756, 765–66 (N.C. 1987); Affordable Care v. N.C. State Bd. of Dental Exam'rs, 571 S.E.2d 52, 59–60 (N.C. Ct. App. 2002).

[34] N.C. CONST. art. I, § 19.

[35] *See in re* Sterilization of Moore, 221 S.E.2d 307, 309 (N.C. 1976) ("The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution."); *see also* Hajoca Corp. v. Clayton, 178 S.E.2d 481, 486 (N.C. 1971) (holding that the requirements of due process are "for all practical purposes, the same under both the State and Federal Constitutions."); State v. Fowler, 676 S.E.2d 523, 540 (N.C. 2009) ("Our courts have long held that [t]he law of the land clause has the same meaning as due process of law under the Federal Constitution." (quoting State v. Guice, 541 S.E.2d 474, 480 (N.C. Ct. App. 2000))).

[36] Poor Richard's, Inc. v. Stone, 366 S.E.2d 697, 699 (N.C. 1988) (comparing "law of the land" to "due process" and holding that North Carolina's Law of the Land Clause permits the State to regulate "economic enterprises provided the regulation is rationally related to a proper governmental purpose.").

[37] JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 89 (G. Alan Tarr ed., 2d ed. 2013).

[38] N.C. CONST. art. I, § 32.

The location of the Exclusive Emoluments Clause in the original 1776 Constitution hints at its purpose. That constitution began with a "Declaration of Rights."[39] The first two provisions in the declaration addressed fundamental concepts of popular sovereignty: that "all political power is vested in and derived from the people only" and that the people had the sole right to govern themselves.[40]

Immediately after these foundational principles, the framers inserted the Exclusive Emoluments Clause.[41] It thus reflects the framers' rejection of the practice of a sovereign and nobility receiving financial support or special privileges from the State solely by virtue of their title.[42] Together with the other accompanying clauses at the beginning of the Declaration of Rights, it was intended to ensure that the people of North Carolina can "compete equally for political and economic advantage."[43]

Although this clause often is called the Exclusive *Emoluments* Clause, it is important to recall that it prohibits "exclusive or separate *emoluments or privileges*."[44] There is a robust scholarly debate about the meaning of the term "emolument" in late eighteenth century usage, largely due to the word's use in the United States Constitution.[45] Despite that debate, North Carolina courts have never struggled with the meaning of the word. Dictionaries from the late 1700s define the word to mean "profit" or "advantage"[46] and, as explained below, North Carolina courts have consistently applied this meaning. These courts hold that, when the term "emoluments" is combined with the term "privileges," together they broadly encompass all forms of rights or benefits that one could receive.[47]

In the nineteenth and early twentieth century, North Carolina courts commonly invoked the Exclusive Emoluments Clause to invalidate state laws that granted special privileges to favored businesses or interest

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[39] N.C. CONST. of 1776, Declaration of Rights, §§ 1–25.

[40] *Id.* §§ 1–2.

[41] *Id.* § 3.

[42] *See id.*

[43] John V. Orth, *Unconstitutional Emoluments: The Emoluments Clauses of the North Carolina Constitution*, 97 N.C. L. REV. 1727, 1729–30 (2019).

[44] *Id.* at 1729.

[45] *Id.* at 1732.

[46] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (21st ed. 1775).

[47] *See* Duncan v. City of Charlotte, 66 S.E.2d 22, 26–27 (N.C. 1951); Simonton v. Lanier, 71 N.C. 498, 506 (1874).

groups.[48] A useful example of this early treatment is *Simonton v. Lanier* in 1874.[49] There, the North Carolina legislature enacted a law authorizing a bank in Statesville, and provided that the bank could "lend money upon such terms and rates of interest as may be agreed upon."[50] The bank later argued that this statute authorized it to lend money at a higher rate of interest than allowed by the general state banking laws.[51]

The state supreme court rejected this interpretation on the ground that it would violate the Exclusive Emoluments Clause.[52] In doing so, the court focused on whether the bank received this special treatment in exchange for a public service:

> What public services has this bank rendered in consideration of the grant? It agrees to pay taxes, but carefully guards against paying more than other tax payers on the same valuation of property. It neither has paid or agreed to pay any consideration for the extraordinary and exclusive emoluments and privileges it claims to be conferred upon it by the State . . . .[53]

Importantly, the court did not assess whether the existence of this bank served the public interest or whether an exemption from general banking laws allowed the bank to advance some public interest. Instead, the court focused on whether the bank "rendered" a public service in exchange for the grant of the special privilege.[54]

Duncan v. City of Charlotte offers another useful example.[55] In the late 1940s, North Carolina changed its workers' compensation laws to provide that certain heart conditions suffered by firefighters, including heart attacks, were deemed "occupational diseases" as a matter of law, and thus subject to workers' compensation payments.[56] Those same diseases, for all other types of employees, were covered only if the employee proved they were "the natural result of a particular employment."[57]

The state supreme court struck down the law under the Exclusive Emoluments Clause: "the statute seeks to confer upon firemen a special

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[48] *Simonton*, 71 N.C. at 502–503 (1874).

[49] *Id.*

[50] *Id.* at 501.

[51] *Id.* at 502.

[52] *Id.* at 503.

[53] *Id.*

[54] *Id.*

[55] 66 S.E.2d 22, 26–27 (N.C. 1951).

[56] *Id.*

[57] *Id.*

privilege not accorded other municipal employees, nor to employees in private industry."[58] Although the court did not say so expressly, it must have focused, like the court in *Simonton*, on whether there was some *specific* public service rendered in consideration of *this* particular privilege. After all, the work of municipal firefighters is crucial to the public interest and welfare. If the standard were merely whether the recipient of the special treatment acted in the public interest, the challenged law would have been upheld. Unfortunately, as is often the case with these early decisions, the court did not describe the standard it was applying; it simply asserted that the "special privilege" contravened the limits of the Exclusive Emoluments Clause.[59]

The shift in Exclusive Emoluments jurisprudence began in the late 1960s with *State v. Knight*.[60] At the time, North Carolina law exempted various professions from jury duty.[61] As the court observed, the exempted professions "were as varied as physicians, railroad brakemen, funeral directors, ministers, gristmillers and linotype operators."[62] A criminal defendant charged with murder challenged the State's jury exemption law on various grounds, including the Exclusive Emoluments Clause, Law of the Land Clause, and federal Due Process Clause.

Based on existing jurisprudence, these special exemptions from jury duty raised Exclusive Emolument concerns. They are quite similar to the workers' compensation law in *Duncan*, which treated firefighters differently than other workers.[63] And one could ask the same question in *Knight* that the court asked in *Simonton*: what public service have these people rendered in consideration of an exemption from jury duty?[64]

But rather than deciding the case by applying an existing test, the court created a new one. First, the court addressed the federal due process claim, holding that

> so far as the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution are concerned, it is sufficient, in order to sustain a state statutory exemption, that there is reasonable ground for

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[58] *Id.*

[59] *Id.*

[60] 152 S.E.2d 179, 184 (N.C. 1967).

[61] *Id.* at 180. *See, e.g.*, N.C. GEN. STAT. § 90-45 (repealed 1967); N.C. GEN. STAT. § 90-150 (repealed 1967).

[62] *Knight*, 152 S.E.2d at 182.

[63] *Duncan*, 66 S.E.2d at 26.

[64] Simonton v. Lanier, 71 N.C. 498, 503 (1874).

> the Legislature to believe that the public interest and general welfare will be better served by the grant of the exemption than by subjecting the members of the exempted class to the duty imposed upon other members of the community.[65]

The court also applied this same test to the corresponding Law of the Land Clause claim: "We so hold with reference to the provisions of Article I, s 17, of the Constitution of North Carolina."[66]

Then, the court explicitly stated that the same test used for a federal due process challenge applies to an Exclusive Emoluments Clause challenge as well:

> Therefore, the limitation of Article I, s 7, [Exclusive Emoluments] like that of Article I, s 17, [Law of the Law/Due Process] does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is reasonable basis for the Legislature to conclude that the granting of the exemption would be in the public interest.[67]

The court repeated that "the principle to be applied" to Exclusive Emoluments Clause challenges is the same "as in questions arising under the exercise of the police power pursuant to the requirement of due process of law."[68]

The court applied this standard and determined that there was a *conceivable* reasonable basis for concluding that each of the applicable juror exemptions served the public interest, primarily because the jobs involved "services which are so vital to the public welfare."[69] Notably, the court was unconcerned with whether the legislature actually had these reasons in mind—as opposed to other grounds such as favoritism or political patronage—when it created these jury exemptions.

Unsurprisingly, *Knight* marked the end of successful Exclusive Emoluments Clause challenges. Reduced to what is, effectively, rational basis review,[70] Exclusive Emoluments challenges failed even when the

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[65] *Knight*, 152 S.E.2d at 183.

[66] *Id.*

[67] *Id.* at 184.

[68] *Id.*

[69] *Id.* at 185.

[70] *Knight* uses the phrase "reasonable basis" rather than "rational basis" but the key aspects of rational basis review are present in the analysis. Moreover, North Carolina's state courts often use the words "reasonable" and "rational" interchangeably when applying rational basis review. In *Poor Richard's, Inc. v Stone*, for example, the court held that the standard for a Law of the Land Clause challenge is whether the "regulation is rationally related to a proper governmental

facts would have presented strong cases under the early Exclusive Emoluments case law.[71]

So, for example, when the State prohibited motor vehicles over several select blocks of the public beach on Emerald Isle—giving the residents of the favored beachfront properties a valuable benefit—the court upheld the law because it "reasonably serves the public interest" by limiting "vehicular traffic in the areas where such traffic is likely to cause the most interference with public pedestrian use of the beach."[72]

Similarly, when the State offered Dell more than $300 million in state and local tax incentives to bring a factory to the State, attracting "national attention and notoriety,"[73] the court rejected an Exclusive Emoluments Clause challenge because "the incentives and subsidies provided to Dell are intended to promote the general economic welfare of the communities involved, rather than to solely benefit Dell, and, accordingly, do not amount to exclusive emoluments."[74]

One notable effect of *Knight* and its progeny is to render meaningless a key portion of the text of this constitutional provision. Recall that the Exclusive Emoluments Clause limits its otherwise total ban on "exclusive or special emoluments or privileges" by permitting them "in consideration of public services."[75] By inserting a broad, caselaw-driven rational basis test, North Carolina's courts have rendered superfluous the "public service" criteria already in the text of the provision.

Moreover, the *Knight* test is difficult to reconcile with earlier cases. The laws authorizing the special bank rates in *Simonton* and the special benefits for firefighters in *Duncan* promote the general welfare of the

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purpose." Poor Richard's, Inc. v. Stone, 366 S.E.2d 697, 699 (N.C. 1988) (emphasis added). But the court then stated that the test "is thus twofold: (1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?" *Id.* (emphasis added). *See* State v. Fowler, 676 S.E.2d 523, 544 (N.C. Ct. App. 2009); Hope - A Women's Cancer Ctr., P.A. v. North Carolina, 693 S.E.2d 673, 680 (N.C. Ct. App. 2010) (citing due process cases interchangeably using "rational relation standard" and "reasonable relation standard").

[71] *See* Town of Emerald Isle *ex rel.* Smith v. North Carolina, 360 S.E.2d 756 (N.C. 1987).

[72] *Id.* at 765.

[73] Richard Craver, *Dell Plant to Close in 2010*, WINSTON-SALEM J., https://www.journalnow.com/news/local/dell-plant-to-close-in/article_67fbdfb4-1745-5dc6-b784-2a18900de756.html (last updated Dec. 12, 2012).

[74] Blinson v. State, 651 S.E.2d 268, 278 (N.C. Ct. App. 2007).

[75] N.C. CONST. art. I, § 32.

communities involved to the same extent as the massive tax subsidies approved for the computer manufacturer in *Blinson*. The modern test effectively overrules these earlier precedents, but the courts never bothered to explain why those cases were flawed, or why federal due process doctrine offered a more suitable standard.

Finally, the *Knight* test eliminates what is likely a key intent of the framers of the Exclusive Emoluments Clause—the protection against awarding special privileges or benefits based on cronyism or political patronage. Under the modern "reasonable basis" test, privileges and benefits that the legislature intended solely as preferential treatment for a particular interest group will be upheld, so long as the courts can imagine some conceivable reasonable basis for them.[76]

In short, by borrowing language from federal Due Process Clause doctrine, North Carolina's courts overruled more than a century of precedent and transformed the once robust Exclusive Emolument Clause into a forgotten redundancy.

III. MONOPOLIES CLAUSE

Like the Exclusive Emoluments Clause, the Monopolies Clause was part of the State's original 1776 Constitution and has survived to modern times with only minor grammatical changes.[77] It provides that "monopolies are contrary to the genius of a free state and shall not be allowed."[78]

The framers included this language as a response to the crippling effects of English mercantilism on the colonists.[79] Among other forms of protectionism, the Crown sold monopoly rights to favored businesses.[80] These monopolies covered virtually every area of commerce imaginable.[81]

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[76] *Blinson*, 651 S.E.2d at 278.

[77] N.C. CONST. art. I, § 34.

[78] *Id.* The full provision also prohibits "perpetuities," but that portion of the clause and its corresponding case law are not relevant to this article.

[79] Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1007–1008, 1073–74 (2013).

[80] *E.g.*, *Tea Act*, HIST. (Sept. 29, 2019), https://www.history.com/topics/american-revolution/tea-act.

[81] Renée Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 HARV. J.L. & PUB. POL'Y 37, 38 (2012).

The framers designed the Monopolies Clause to prevent the State from awarding these sorts of monopoly rights in the future.[82]

Thus, the term "monopolies" in this constitutional provision means "a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right."[83] It does not apply to businesses that achieve monopoly power in a market without state intervention.[84]

From the outset, courts have struggled to apply this provision, despite understanding the framers' intent. This is partly because the clause, if interpreted broadly, would cover the same ground as other provisions in the state constitution. For example, as one scholar observed, because "a legal monopoly would be a grant of an exclusive right to trade in a certain area or to deal in certain goods, it is indistinguishable from the 'exclusive . . . privileges'" in the Exclusive Emoluments Clause.[85]

Similarly, a broad interpretation of this provision could invalidate many routine economic regulations. Courts, unsurprisingly, rejected this broad reading of the clause and upheld ordinances that required meat and fish to be sold in licensed markets;[86] permitted the state to contract with private parties for the operation of public bridges and ferries;[87] and created state-granted monopolies for public utilities.[88] Yet these cases failed to articulate a standard that identified the sort of monopolies that *were* prohibited.

As a result, it was rare to see stand-alone Monopolies Clause claims. Litigants typically asserted the claim together with Due Process Clause claims, and occasionally with Exclusive Emoluments Clause claims or Fruits of Their Labors Clause Claims, which are discussed in the next section. Courts, in turn, typically analyzed these lawsuits on other

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[82] Joshua C. Tate, *Perpetuities and the Genius of a Free State*, 67 VAND. L. REV. 1823, 1833–34 (2014).

[83] State v. Harris, 6 S.E.2d 854, 864 (N.C. 1940).

[84] *See id.*

[85] ORTH & NEWBY, *supra* note 37, at 91.

[86] State v. Pendegrass, 10 S.E. 1002, 1003 (N.C. 1890); State v. Perry, 65 S.E. 915, 917 (N.C. 1909).

[87] *In re* Spease Ferry, 50 S.E. 625, 626–27 (N.C. 1905).

[88] *See in re* Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729, 734 (N.C. 1973).

constitutional grounds, treating the Monopolies Clause as an afterthought.[89]

One excellent example of this treatment is the successful Monopolies Clause challenge in *In re Certificate of Need for Aston Park Hospital.*[90] In 1971, North Carolina enacted a "Certificate of Need" or "CON" law.[91] These laws, which now exist in a majority of states, provide that certain types of healthcare capital expenditures—for example, expanding a hospital with more beds, or adding new imaging equipment to a physician's practice—require regulatory approval.[92]

Shortly after this 1971 Certificate of Need law took effect, a nonprofit hospital in Asheville requested permission to replace its existing 50-bed hospital with a 200-bed "new and larger hospital of modern design and equipment."[93] State regulators reviewed the application and denied it on the ground that there were already enough hospital beds in the Asheville area.[94] The aggrieved hospital sued, alleging that North Carolina's Certificate of Need law violated various provisions of the state constitution including the Monopolies Clause, Equal Protection Clause, and Law of the Land Clause.[95]

The introductory analysis of the opinion reads as if the state supreme court—finally—was preparing to address the meaning and scope of the Monopolies Clause. The court first explained that the state constitution does not permit the State to deny a hospital the right to expand its services "merely because to do so endangers the ability of other, established hospitals to keep all their beds occupied."[96]

Next, the court quoted Justice Harlan in a turn-of-the-century U.S. Supreme Court opinion: "It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the

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[89] *See* Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957); Simonton v. Lanier, 71 N.C. 498, 503 (1874).

[90] *See in re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d at 731.

[91] *Id.*

[92] Emily Whelan Parento, *Certificate of Need in the Post-Affordable Care Act Era*, 105 KY. L.J. 201, 205 (2017).

[93] *In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d at 730.

[94] *Id.*

[95] *Id.* at 732.

[96] *Id.* at 734.

public against their exactions."[97] The court notes that "Mr. Justice Harlan was, of course, speaking of monopolies created by private ingenuity and operated for profit and of legislation designed to curb their economic stranglehold upon the public. His observation, however, applies also to monopolies created by statute though not operated for profit, as such."[98] The court likewise observed that "it has been the common experience in America that competition is an incentive to lower prices, better service and more efficient management."[99]

But despite all the references to the dangers of state-sponsored monopolies, the above-quoted analysis had nothing to do with the Monopolies Clause. It was an analysis of the hospital's Law of the Land Clause claim.[100] After this discussion, the court restated the well-settled standard for a Law of the Land Clause claim—that the challenged law must be upheld so long as it has "a reasonable and substantial relation to the evil it purports to remedy"[101]—and then concluded "no such reasonable relation" existed in the case.[102] Thus, the court held, the Certificate of Need law "is a deprivation of liberty without due process of law, in violation of Article I, s 19 of the Constitution of North Carolina . . . ."[103]

Then, immediately after this rather lengthy Law of the Land Clause analysis, the court addressed the hospital's accompanying Monopolies Clause claim in a single paragraph with no further analysis: "Such requirement establishes a monopoly in the existing hospitals contrary to the provisions of Article I, s 34 of the Constitution of North Carolina . . . ."[104] Did the court intend to adopt the Due Process Clause test as the test for the Monopolies Clause? If not, what test did the court apply when it determined that the challenged regulation created an impermissible monopoly?

The state supreme court answered this question a decade later when confronted with another state-sponsored monopoly.[105] State regulators

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[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 735.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 736.

[105] Am. Motors Sales Corp. v. Peters, 317 S.E.2d 351, 354 (N.C. 1984).

denied a car dealer a license to sell Jeeps in the "North Wilkesboro market area."[106] Automobile dealerships are heavily regulated under North Carolina law and, because there already was a licensed Jeep dealer nearby, the State denied the dealer's expansion plans.[107]

The car dealer sued. Notably, unlike past cases, the sole constitutional provision at issue was the Monopolies Clause; there was no accompanying Law of the Land or Due Process Clause challenge.[108]

The court rejected the car dealer's claim. It first determined that the automobile dealership regulations imposed a "vertical restraint" on trade which the court held "does no offense to the constitutional proscription of monopolies" because it does not stifle competition or increase prices.[109] This holding is odd because, as explained above, the concern that drove the framing of the Monopolies Clause was not the fear of higher prices or other harms to consumers; it was a desire to prevent the State from awarding exclusive commercial rights to favored businesses.[110]

In any event, the court did not end there. It then addressed and distinguished *Aston Park*. The court described *Aston Park*'s holding as follows: "the statutory requirement of obtaining a certificate of need prior to constructing a private hospital violated the Anti-monopoly Clause of the North Carolina Constitution."[111] The court then explained that *Aston Park*'s holding "turned on the absence of a rational relationship between the required certificate of need and any public good or welfare consideration."[112] In *American Motors*, by contrast, the State "possesses an important interest in protecting automobile dealerships from manufacturer's abuse of the franchise system, an interest which is accomplished by the statute in question."[113]

So, any questions concerning the legal standard used in *Aston Park* were resolved by *American Motors*. In Monopolies Clause claims, as with state and federal due process claims, courts examine whether there is a

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 357.

[110] *See supra* notes 78–81 and accompanying text.

[111] *Am. Motors Sales Corp.*, 317 S.E.2d at 358.

[112] *Id.*

[113] *Id.* at 358–59.

"rational relationship" between the regulation and "any public good or welfare consideration."[114] This is rational basis review.

As with the Exclusive Emoluments Clause, there are several reasons why applying rational basis review to the Monopolies Clause is odd. First, consider the text of the provision again: "monopolies are contrary to the genius of a free state and shall not be allowed."[115] It is a categorical prohibition on *something* that the framers viewed as unacceptable for society. The challenging legal question is defining what that something (a monopoly) is.

Rational basis review is a poor fit for this type of prohibition. That standard says, in essence, that monopolies are generally permissible, but monopolies having no rational relation to a legitimate government interest are not.[116] There is little to support the notion that the framers contemplated this sort of rationality standard. Even setting aside the political benefits of rewarding powerful interests with these monopolies—which, after all, might be an important tool to the fragile government of a newfound nation—scholars of the time noted that monopolies could lead to higher wages for workers.[117] Propping up wages certainly could be viewed as a legitimate government interest, even if it produced higher prices for consumers and perhaps was not the wisest choice.[118] Thus, it is more likely that the framers understood there were some rational grounds for awarding monopolies, but believed them on-balance to be so repugnant that the constitution should prohibit them entirely.

Moreover, the rational basis standard wipes away the pieces previous courts had begun to assemble to define the constitutional term "monopolies." For example, *Harris*'s holding that a monopoly was "an exclusive privilege to do something which had theretofore been a matter of common right" could be used to exclude public utilities and many other modern state-granted monopolies whose operation was never a "common

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[114] *Id.* at 358.

[115] N.C. CONST. art. I, § 34.

[116] *See Am. Motors Sales Corp.*, 317 S.E.2d at 359.

[117] *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 111–12 (1776) ("In the end, perhaps, the apprentice himself would be a loser. In a trade so easily learnt he would have more competitors, and his wages, when he came to be a complete workman, would be much less than at present. The same-increase of competition would reduce the profits of the masters as well as the wages of the workmen. The trades, the crafts, the mysteries, would all be losers. But the public would be a gainer, the work of all artificers coming in this way much cheaper to market.").

[118] *Id.*

right."[119] Likewise, the discussion in *Aston Park* concerning the difference between state-granted exclusivity that protects entrenched interests and exclusivity that protects the public, could be used to separate impermissible monopolies from permissible ones.[120]

Instead, as with the Exclusive Emolument Clause, North Carolina courts took a constitutional provision with no settled legal standard of its own and repeatedly evaluated it in connection with claims applying rational basis. Ultimately, the rational basis standard seeped into Monopolies Clause jurisprudence without the courts ever explaining why the standard suits the distinctive language of the clause.

IV. FRUITS OF THEIR LABOR CLAUSE

The next relevant clause is not from North Carolina's original constitution. In 1868, during Reconstruction, North Carolina ratified an entirely new constitution.[121] The framers carried over most of the provisions of North Carolina's original Declaration of Rights.[122] But they also added a few new provisions, including a new first section of the Declaration of Rights, which remains in the State's current constitution: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among

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[119] State v. Harris, 6 S.E.2d 854, 864 (N.C. 1940). The North Carolina Court of Appeals used this reasoning in *Rockford-Cohen Grp., LLC*, the first successful Monopolies Clause challenge since *Aston Park*. Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins., 749 S.E.2d 469, 473 (N.C. Ct. App. 2013). The case addressed legislation making a nonprofit association the sole provider of continuing education for bail bondsmen, thereby excluding other competitors. *Id.* The court of appeals reasoned that, when the legislature first enacted the law requiring continuing education for bail bondsmen, anyone could provide it. *Id.* at 472. Thus, providing this continuing education was a "common right." *Id.* at 474. The court then found that granting a single organization the exclusive right to provide the training thus violated the Monopolies Clause. *Id.* It is unclear from the opinion whether the court of appeals reached this conclusion because there was no rational basis for the exclusive right, or whether the court applied some other test. *See id.* at 271–74. The State appealed the ruling on the ground that it involved a substantial constitutional question (providing an appeal by right, *see* N.C. GEN. STAT. § 7A-30), but the North Carolina Supreme Court dismissed the appeal and denied discretionary review. Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins., 762 S.E.2d 461, 461 (N.C. 2014).

[120] *In re* Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729, 734 (N.C. 1973).

[121] N.C. CONST. of 1868.

[122] ORTH & NEWBY, *supra* note 37, at 19.

these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[123]

Of course, this language is borrowed from the Declaration of Independence, with one notable exception: the Declaration of Independence does not refer to the people's inalienable right to "the enjoyment of the fruits of their own labor."[124] That language is unique to North Carolina's constitution.

The convention materials from the framing of the 1868 Constitution do not discuss this provision or who drafted it, but scholars have acknowledged that a prominent participant at the convention—Albion W. Tourgée—crafted many of the key rights added to the 1868 Constitution.[125] Tourgée was a prolific writer and one of his later works, *An Appeal to Caesar*, shows that Tourgée connected the right to the fruits of one's own labor with the other inalienable rights in the Declaration of Independence:

> The slave was a man forcibly deprived of a natural and inherent right, the right of self-control, of "life, liberty, and the pursuit of happiness." Not from any desert on his part, not because of any infraction of the laws of society, but simply because another man desired to hold and enjoy the fruits of his labor.[126]

Tourgée wrote of his concern that even after emancipation the "Southern white man" would oppress freed slaves by refusing to recognize any rights "beyond the mere fact of his liberty."[127] His proposals for the 1868 constitutional convention focused on equality in "civil and political rights" that went beyond the fundamental liberties protected by the Fourteenth Amendment.[128] These proposals were largely accepted. The 1868 Constitution as a whole reflected the "desire to ensure equality by

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[123] N.C. CONST. art. I, § 1. The 1868 Constitution stated that "all men are created equal." N.C. CONST. of 1868, art. I, § 1. North Carolina's current constitution, ratified in 1971, changed the wording to "all persons are created equal." N.C. CONST. art. I, § 1.

[124] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

[125] Judge Robert N. Hunter, Jr., *The Past As Prologue: Albion Tourgée and the North Carolina Constitution*, 5 ELON L. REV. 89, 97 n.57 (2013); Michael Kent Curtis, *Reflections on Albion Tourgée's 1896 View of the Supreme Court: A "Consistent Enemy of Personal Liberty and Equal Right?"*, 5 ELON L. REV. 19, 21 (2013).

[126] ALBION W. TOURGÉE, AN APPEAL TO CAESAR 244 (1884).

[127] *Id.* at 253–54.

[128] TO THE VOTERS OF GUILFORD (1867), UNDAUNTED RADICAL: THE SELECTED WRITINGS AND SPEECHES OF ALBION W. TOURGÉE 25–27 (Mark Elliott & John David Smith eds., 2010).

placing in the Constitution social policies designed to promote not only equal protection of the laws, but also social equality."[129]

It is likely, then, that the addition of the phrase "the enjoyment of the fruits of their own labor" reflected the framers' view that it was not enough to guarantee one's inalienable right to life, liberty, and the pursuit of happiness. It conveys a Lockean view of labor—that it is a moral foundation of property rights[130]—and that the right to work and the right to own what that labor produces is a natural right as important as life and liberty.[131]

There were signs at the beginning of the twentieth century that this language created an affirmative claim against the State's "unlawful interference" with the right to enjoy the fruits of one's labor.[132] But it was not until the 1940s that courts began applying the Fruits of Their Labor Clause to strike down state and local laws.[133]

In *State v. Harris*, the defendant was charged with operating a dry-cleaning business without a license.[134] Several years earlier, the legislature had enacted a law creating a "State Dry Cleaners Commission" that would "promulgate rules and regulations" for dry cleaners and "grant licenses to conduct the business of dry cleaning."[135] The defendant asserted that these dry-cleaning regulations violated the Law of the Land Clause, Monopolies Clause, and Fruits of Their Labor Clause.[136]

The court lumped the Law of the Land Clause and Fruits of Their Labor Clause analyses together, but the court's analysis was more aggressive than traditional rational basis review would allow. It observed that

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[129] Hunter, *supra* note 125, at 97.

[130] JOHN LOCKE, TWO TREATISES ON GOVERNMENT 115–16 (Awnsham & John Churchill eds., 1698) ("Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.").

[131] *Id.*

[132] State v. Hay, 35 S.E. 459, 462 (N.C. 1900) (Douglas, J., concurring).

[133] *See, e.g.*, State v. Harris, 6 S.E.2d 854, 858 (N.C. 1940).

[134] *Id.* at 856.

[135] *Id.* at 856–57.

[136] *Id.* at 858.

> regulation of a business or occupation under the police power must be based on some distinguishing feature in the business itself or the manner in which it is ordinarily conducted, the natural and probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare.[137]

The court further distinguished laws excluding people from an occupation. It explained that "[w]hile many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable."[138] This is a clear reference to the Fruits of Their Labor Clause. The court continued, "[c]onceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquery."[139] The court thus held the regulations unconstitutional.[140]

A decade later, in *State v. Ballance*, the defendant was charged with "engaging in the practice of photography for compensation" without a license from the State Board of Photographic Examiners.[141] Again, the defendant challenged the regulations under the Law of the Land Clause and Fruits of Their Labor Clause.

This time, the court emphasized that the standard was "reasonableness."[142] For professions involving "special knowledge or skill and intimately affect[ing] the public health, morals, order, or safety, or the general welfare," the court held, the State could require "reasonable qualifications" and a demonstration of those qualifications "by an examination."[143] For "the ordinary lawful and innocuous occupations of life," by contrast, the legislature could impose "such regulations relating thereto as are reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm" but could not exclude people from practice in the profession through licensing.[144] The court then held that photography was "one of the many usual legitimate

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[137] *Id.* at 863.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 863–64.

[141] 51 S.E.2d 731, 732 (N.C. 1949).

[142] *Id.* at 735.

[143] *Id.*

[144] *Id.*

and innocuous vocations" and thus the licensing requirements violated both the Fruits of Their Labor Clause and the Law of the Land Clause.[145]

Although the strong language in these cases suggested that the Fruits of Their Labor Clause might evolve into something more than another test for rationality, it was not to be.

By the 1960s, the state supreme court began to walk back the sweeping language of these earlier cases. In *State v. Warren*, a suit challenging the licensing and regulation of real estate brokers, the court treated the Fruits of Their Labor Clause as coextensive with state and federal due process protections and held that regulation was permissible if it "has a rational, real or substantial relation to one or more of the purposes for which police power is exercised."[146]

In *Treants Enterprises, Inc. v. Onslow County*, the plaintiff challenged an ordinance requiring a license to offer escort services or other "companionship in exchange for money or other valuable consideration."[147] This case again involved challenges under both the Fruits of Their Labor Clause and the Law of the Land Clause. This time, the court was even more explicit in joining the claims together and applying rationality review: "A single standard determines whether the . . . ordinance passes constitutional muster imposed by both section 1 and the 'law of the land' clause of section 19: the ordinance must be rationally related to a substantial government purpose."[148]

One could argue that being rationally related to a *substantial* government purpose is a higher standard than being rationally related to a *legitimate* government interest (the ordinary rational basis standard). But North Carolina courts have not treated it that way. Since the cases in the 1960s that shifted the standard to rationality, the only successful Fruits of Their Labor Clause challenges involved government action so arbitrary that was not rationally related to *any* government purpose.[149]

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[145] *Id.*

[146] 114 S.E.2d 660, 663–64 (N.C. 1960).

[147] 360 S.E.2d 783, 784 (N.C. 1987).

[148] *Id.* at 785.

[149] King v. Town of Chapel Hill, 758 S.E.2d 364, 371 (N.C. 2014) (upholding various requirements in local towing ordinance but invalidating an "arbitrary" fee schedule that had "no rational relationship between regulating fees and protecting health, safety, or welfare"); Tully v. City of Wilmington, 810 S.E.2d 208, 215 (N.C. 2018) (holding that city violated Fruits of Their Labor Clause when it "arbitrarily and capriciously denied him the ability to appeal an aspect of

As with the other clauses discussed above, the shift to rational basis review for the Fruits of Their Labor Clause is never explained by the courts. None of these cases examined the history of the Fruits of Their Labor Clause. None applied any theory of constitutional interpretation to its distinctive text. The courts simply lumped these claims together with due process claims and treated them as coextensive. The result, as with the other provisions described above, is redundancy and obscurity.

V. JUST AND EQUITABLE TAX CLAUSE

The final relevant clause—the Just and Equitable Tax Clause[150]—differs from the previous clauses in a few key ways. First, it is by far the newest addition to the North Carolina Constitution, having been added in the 1930s.[151] It is also, by far, the least developed in North Carolina's jurisprudence. It was first addressed as "a substantive claim in its own right" in 2013, eighty years after its adoption.[152] Since then, it has been examined in only one other case.[153] But the same pattern described in the earlier sections of this article already is taking shape; although the words "just and equitable" mean something different from "rational," the Just and Equitable Tax Clause is well on its way to rational basis review—and irrelevance.

As with the other clauses in this article, it is useful to first examine why the framers put this clause in the state constitution. As discussed above, North Carolina adopted an entirely new constitution in 1868 during Reconstruction.[154] The 1868 Constitution listed acceptable forms of taxation, including a capitation tax on certain adult men, taxes on real property, taxes on personal property including stocks and bonds, and taxes on "trades, professions, franchises, and incomes."[155]

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the promotional process despite the Policy Manual's plain statement that '[c]andidates may appeal any portion of the selection process'").

[150] N.C. CONST. art. V, § 2.

[151] Dawn K. Milam, *Syntax on Sin Tax: The Supreme Court of North Carolina Invigorates the Just and Equitable Tax Clause*, 98 N.C. L. REV. 912, 914 (2015).

[152] IMT, Inc. v. City of Lumberton, 738 S.E.2d 156, 158 (N.C. 2013).

[153] *See* Smith v. City of Fayetteville, 743 S.E.2d 662 (N.C. 2013).

[154] N.C. CONST. of 1868.

[155] *Id*. art. V, §§ 1, 3.

By the 1930s, legal scholars were concerned that the State's approach to taxation might conflict with the intent of the framers.[156] As a commentator from North Carolina's Institute for Government explained in a report on proposed constitutional changes, the framers of the 1868 Constitution likely intended for the taxation provisions to "restrict the types of taxes the legislature could levy."[157] But that didn't happen. As the report explained, the State was then "levying (in addition to levying all the taxes enumerated except the property tax) a gasoline tax, a motor vehicle tax, a sales tax, an inheritance tax and numerous inspection and other 'fees' which are, in reality, taxes levied for special services."[158] As a result, legal scholars were concerned that the State's approach to taxation was not permitted by existing constitutional provisions and "if it were declared unconstitutional, the legislature's entire tax program would be wrecked."[159]

At the same time that these tax-related concerns arose, there was a push to draft a revised constitution that would update many other, unrelated portions of the 1868 Constitution.[160] Ultimately, the governor appointed a Constitutional Commission to research and draft what is now known as the 1933 Proposed Constitution.[161] Among other changes, the Constitutional Commission proposed a complete re-write of the taxation provisions in the 1868 Constitution.[162] The Commission explained that the "thought has prevailed that constitutional provisions as to taxation and indebtedness should provide adequate authorization for meeting the legitimate functions of government, and adequate protection against abuse and oppression."[163]

This led the Commission to propose a new taxation section of the constitution that gave the legislature broad discretion to levy taxes of any kind.[164] But the Commission also added a new restriction on taxation: The

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[156] 1 DILLARD S. GARDNER, POPULAR GOVERNMENT: THE PROPOSED CONSTITUTION FOR NORTH CAROLINA 51 (Albert Coates et al. eds., 1934).

[157] *Id.* at 53.

[158] *Id.*

[159] *Id.*

[160] N.C. Const. Comm'n, *The Report of the North Carolina Constitutional Commission*, 11 N.C. L. REV. 5, 5–6 (1932).

[161] *Id.* at 5.

[162] *Id.* at 5–6.

[163] *Id.* at 8.

[164] *Id.*

newly drafted Article V, Section 1 began with the phrase "The power of taxation shall be exercised in a just and equitable manner . . . ."[165]

The 1933 Proposed Constitution never took effect.[166] At the time, any constitutional amendment approved by the General Assembly had to be put on the ballot "at the next general election to the qualified voters of the whole State."[167] Shortly after the General Assembly passed the proposed amendment, the State's voters went to the polls to vote on a convention to ratify the Twenty-First Amendment to the United States Constitution, repealing prohibition.[168] The State mistakenly failed to put the 1933 Proposed Constitution on the ballot in that election and, on the advice of the state supreme court, abandoned the project entirely.[169]

Several years later, the General Assembly proposed a constitutional amendment that contained the tax provisions from the failed 1933 Proposed Constitution.[170] The voters approved that amendment in 1936, thereby adding the Just and Equitable Tax Clause to the North Carolina Constitution.[171]

Nearly eighty years passed before the meaning of the Just and Equitable Tax Clause reached the State's appellate courts. In the late 2000s, small businesses began popping up in North Carolina that appeared to offer casino-style gambling in the form of video poker and slot machines.[172] These businesses sidestepped "traditional gambling restrictions by combining legal sweepstakes with video games that simulate a gambling environment."[173] Local government officials—who found themselves under intense pressure to shut down these "sweepstakes casinos"—turned to taxation for a solution.[174] In what the media described

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[165] *Id.* at 28.

[166] Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2064 (1999).

[167] *In re* Opinions of the Justices, 181 S.E. 557, 557 (N.C. 1934).

[168] Allen, *supra* note 166.

[169] *See in re Opinions of the Justices*, 181 S.E. at 557.

[170] Allen, *supra* note 166, at 2065.

[171] Act of April 29, 1935, ch. 248, § 1, 1935 N.C. Sess. Laws 270 (ratified by popular election and codified as amended at N.C. CONST. art. V, § 2(1)).

[172] *See* Hest Techs., Inc. v. State *ex rel.* Perdue, 749 S.E.2d 429, 431 (N.C. 2012).

[173] *Id.*

[174] *See Tax 'em to Death*, GREENSBORO NEWS & REC., https://greensboro.com/editorial/tax-em-to-death/article_c992444e-33c7-5e58-bee5-fd1589d96bc2.html (last updated Jan. 25, 2015).

as an effort to "Tax 'em to death,"[175] some localities increased the local licensing taxes on these businesses by more than *one million* percent.[176] Those businesses brought Just and Equitable Tax Clause suits, arguing that these astronomical tax increases were unconstitutional.[177] The City of Lumberton's case was the first to arrive at the state supreme court.

At the outset, the court rejected the city's argument that "a challenge to the amount of a tax is not a justiciable claim under the Clause."[178] The court held that the words "taxation shall be exercised in a just and equitable manner" imposed a "substantive limitation" of the government's taxing power.[179] The court also discussed one of its earlier cases, *Nesbitt v. Gill*, which dealt with uniform application of taxes.[180] Although it was not a Just and Equitable Tax Clause case, the *Nesbitt* court "discussed factors that could be considered when determining whether a tax was just and equitable, such as size of the city, sales volume, and exemptions from alternative taxes."[181] The court held that "trial courts should look to *Nesbitt* for guiding factors in assessing" Just and Equitable Tax Clause claims, but "those factors should not be viewed as exhaustive."[182]

Next, the court explained the "need for balance" between any constitutional limits on taxation and the "legislative authority to enact taxes":

> The constitutional tension between the affirmative statement of the government's taxing authority and the limitation of the Just and Equitable Tax Clause must be resolved in a manner that protects the citizenry from unjust and inequitable taxes while preserving legislative authority to enact taxes without exposing the State or its subdivisions to frivolous litigation.[183]

Finally, the court applied these principles to Lumberton's sweepstakes taxes by concluding, effectively, that there was no need to apply them: "While these competing considerations might be difficult to reconcile in nuanced cases, the case at bar is hardly nuanced."[184] The court held that "the present tax—representing a 59,900% minimum tax increase

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[175] *Id.*

[176] IMT, Inc. v. City of Lumberton, 738 S.E.2d 156, 157 (N.C. 2013).

[177] *Id.* at 158.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 159.

[181] *Id.*

[182] *Id.* at 160.

[183] *Id.* at 159.

[184] *Id.* at 160.

upon conduct viewed as putatively lawful at the time of the assessment—transgressed the boundaries of permissible taxation and constituted an abuse of the City's tax-levying discretion."[185] That was the extent of the court's analysis.

Aside from some related sweepstakes-taxation cases, the only other case to evaluate the Just and Equitable Tax Clause is *North Carolina Department of Revenue v. Graybar Electric Company*, a case that began in the North Carolina Business Court.[186] In *Graybar*, the taxpayer argued that the State's tax treatment of dividends "created a double taxation on the same income" in violation of the North Carolina Constitution's Just and Equitable Tax Clause.[187] The taxpayer also claimed that the taxation "violates the Law of the Land Clause in the North Carolina Constitution and the Due Process Clause contained in the Fourteenth Amendment of the United States Constitution."[188]

Already, we can see the challenge the business court faced. The "*Nesbitt* factors"[189] described by the supreme court in *IMT*—the size of the city, sales volume, and exemptions from alternative taxes—are inapplicable to state taxation of dividends. Thus, *IMT* offered no guidance to the trial court on the legal test to apply in this type of Just and Equitable Tax Clause challenge.[190]

With no guidance from the supreme court, the business court took the same approach North Carolina courts so often used with the other constitutional clauses discussed in this article: it lumped the Just and Equitable Tax Clause claim together with the state and federal due process claims and resolved them all under rational basis review: "the Court concludes that Graybar has failed to show that its tax burden . . . is the product of discriminatory or arbitrary taxation or otherwise derives from an abusive or unreasonable taxation scheme in violation of the North Carolina or United States Constitution."[191]

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[185] *Id.*

[186] N.C. Dep't of Revenue v. Graybar Elec. Co., No. 17 CVS 13902, 2019 NCBC LEXIS *2 (N.C. Super. Ct. Jan. 9, 2019).

[187] *Id.* at *7.

[188] *Id.* at *23.

[189] *IMT, Inc.*, 738 S.E.2d at 159.

[190] *See Graybar Elec. Co.*, No. 17 CVS 13902, 2019 NCBC LEXIS at *24–25.

[191] *Id.* at *27–28.

The Supreme Court heard the *Graybar* case on direct appeal and affirmed it in a one-word, per curiam order.[192]

VI. THE CHALLENGES OF INNOVATIVE STATE CONSTITUTIONALISM

In the end, all four of these state constitutional provisions share substantially the same standard of review: is the challenged state action rationally related to the public welfare or some other government purpose? This is rational basis review. Thus, these provisions offer the same protection as the federal and state due process clauses, whose broad application extends to all subject matter covered by these more specific clauses. Indeed, courts often lump these clauses with accompanying due process claims and resolve them in the same analysis.[193]

Of course, there is nothing inherently wrong with this outcome. To be sure, because courts evaluating meritorious federal and state constitutional claims often address the federal claim first,[194] having identical standards of review means the state clauses effectively are redundant. But, if the state courts applied some theory of constitutional interpretation, analyzed these provisions, and determined that rational basis review was the appropriate test for them, this redundancy is inoffensive.

That doesn't appear to be what happened. First, North Carolina's courts never used rational basis language until after the federal courts began using that test for substantive due process claims.[195] If this standard was the appropriate one from the outset, why didn't any of the nineteenth-century cases mention it? Why did the language only surface in state cases after the federal courts created it?

Second, there is little evidence that North Carolina's courts developed their doctrine through constitutional interpretation of the actual clauses at issue. As discussed above, challenges under these idiosyncratic state provisions almost always are accompanied by a federal due process challenge or the state equivalent. One common problem in state constitutional analysis "is the failure of the court to specify whether its

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[192] N.C. Dep't of Revenue v. Graybar Elec. Co., 838 S.E.2d 627, 627 (N.C. 2020).

[193] *Graybar Elec. Co.*, 17 CVS 13902, 2019 NCBC LEXIS at *27–28.

[194] *See* SUTTON, *supra* note 1, at 178–182.

[195] *Compare* Simonton v. Lanier, 71 N.C. 498 (1874) (applying no specified standard of review), *with* State v. Knight, 152 S.E.2d 179, 183 (N.C. 1967) (applying rational basis review).

analyses and rulings relied on the state or federal constitutions."[196] This is certainly the case for the North Carolina provisions discussed in this article. Again and again, courts lumped distinctive state constitutional claims with ordinary due process clause claims and disposed of them with the same legal tests. These shared standards appear more the result of claims being jumbled together than of a reasoned process applying some theory of constitutional interpretation to specialized provisions of the state constitution.[197]

Finally, there is a pattern to the decisions that first co-opted rational basis language: they are close cases where, if the holding is not limited, the ruling could have sweeping, possibly unintended implications. Eliminating some long-standing commercial regulation or exemption, for example, could wreck an entire industry vital to the state economy. Likewise, overturning a popular form of municipal taxation could devastate city and county budgets and lead to painful program cuts and layoffs.

Moreover, the four constitutional provisions examined in this article generally target state-sponsored cronyism or abuse in the marketplace. On the other end of this sort of cronyism, typically, is some powerful interest benefitting from the status quo: automobile dealerships;[198] real estate agents;[199] wealthy landowners;[200] businesses receiving tax incentives.[201] For judges who rely on reelection or reappointment to keep their jobs, it takes courage to hand down a ruling that will pit a powerful interest group against them.

Lastly, because these specialized North Carolina provisions are so obscure—even for lawyers and judges—it is easy for critics to argue that the court was merely reaching for something to justify a result-orientated ruling. It feeds a cliché of unbridled "judicial activism."

With these issues in mind, it is far safer for North Carolina's elected judges to use rational basis than to craft a novel state standard that could

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[196] Gardner, *supra* note 4, at 785.

[197] This jumbling phenomenon is not unique to these provisions. For example, there is a well-documented pattern of state courts, in cases involving similar federal and state constitutional claims, failing to specify whether they are analyzing the federal or the state claim in the opinion. *See id.* at 785.

[198] *See supra* notes 105–11 and accompanying text.

[199] *See supra* note 146 and accompanying text.

[200] *See supra* note 70–71 and accompanying text.

[201] *See supra* note 73 and accompanying text.

have unintended results. Rational basis review, with its minimal protections and body of federal doctrine, offers a stability and consistency that a novel state test might not. In short, when state courts are called on to interpret their own constitutions, the risks and challenges posed by an innovative ruling, when compared to the safety of existing federal doctrine, puts even the most idiosyncratic state constitutional provisions at risk of federal lockstepping.

VII. THE HARMS OF LOCKSTEPPING IDIOSYNCRATIC STATE PROVISIONS

The willingness of state courts to transplant unrelated federal doctrine into their own constitutional jurisprudence is troubling for a number of reasons. First, crafting a new legal test for an unusual state provision may not be as challenging as courts believe it to be. Consider again the Exclusive Emoluments Clause, which prohibits "exclusive or separate emoluments . . . but in consideration of public services."[202] State governments routinely engage in classifications and line-drawing that benefit some groups and not others.[203] For this reason, courts seem wary of a treatment of this clause that would cause chaos for these many routine classifications laws. Looking at the text of the clause, then, courts struggle with two specific questions: (1) when is an emolument an "exclusive" one; and (2) what acts done in exchange for this emolument can be considered a "public service."

One readily can imagine legal tests that answer these questions. For example, the statute challenged in *Knight*, which granted jury exemptions to broad categories of people employed in specific professions, is not as exclusive as a law that grants a jury exemption to one specific person.[204] Courts could fashion a list of factors to assess whether a government classification primarily rewards a particular person or group, or instead serves broader goals that require some incidental form of classification or line-drawing.

Similarly, courts could evaluate whether an emolument is "in consideration of public service" without delving into messy questions concerning the wisdom of legislative decision-making. For example, courts could examine factors such as whether the service provided is one

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[202] N.C. CONST. art. I, § 32.

[203] *See, e.g.*, United States v. D'Anjou, 16 F.3d 604, 612 (4th Cir. 1994).

[204] *See supra* notes 60–62 and accompanying text.

the government otherwise would provide, or whether it is a service that benefits all members of the community.

This same analysis can be done with the other three provisions as well. So, whatever the reasons for North Carolina's adoption of rational basis review, it is not because there was no other choice.

The risks associated with crafting a novel legal standard for these provisions also are lessened because they are state constitutional provisions, not federal ones. In North Carolina, for example, constitutional cases typically make their way from the trial courts, through the court of appeals, and ultimately to the supreme court on discretionary review.[205] But the supreme court has the power to bypass the court of appeals and take a case immediately following a trial court judgment.[206] Although rare, the court has done so in a number of important constitutional cases.[207] It also has done so quickly—in one case granting a petition to bypass the court of appeals three days after it was filed.[208] Thus, if a constitutional rule yielded unintended results in the trial courts, the supreme court has tools to quickly resolve the issue.

Moreover, as many scholars have observed, even if the courts are unwilling to step in, the people might do so. When compared to the United States Constitution, it is far easier to amend most state constitutions,[209] including North Carolina's.[210] Thus, if the courts' interpretation of a state

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[205] North Carolina law provides litigants with a right to appeal from the court of appeals to the supreme court in cases involving "a substantial question arising under the Constitution of the United States or of this State." N.C. GEN. STAT. § 7A-30(1) (2019). But in recent years, the North Carolina Supreme Court has treated this as an alternative form of discretionary review, often dismissing a notice of appeal on this ground after concluding that the constitutional question was not sufficiently "substantial." *See* Justice Robert Orr, *What Exactly is a "Substantial Constitutional Question" for Purposes of Appeal to the North Carolina Supreme Court?*, 33 CAMPBELL L. REV. 211, 222 (2010).

[206] N.C. R. APP. P. 15(e)(1)–(2).

[207] *See*, *e.g.*, Cooper v. Berger, 809 S.E.2d 98, 103 (N.C. 2018).

[208] *See* Umberger v. Pike Corp., 781 S.E.2d 801 (N.C. 2016).

[209] SUTTON, *supra* note 1, at 16.

[210] For example, the people of North Carolina ratified four amendments to the North Carolina Constitution in the 2018 general election. *See generally* Act of June 25, 2018, N.C. Sess. Laws 96 (providing an amendment process for the North Carolina Constitution to protect the right to hunt, fish, and harvest wildlife) (codified as amended N.C. CONST. art. I, § 38); Act of June 27, 2018, N.C. Sess. Laws 110 (providing an amendment process for the North Carolina Constitution to provide better protections and safeguards for victims of crime) (codified as amended N.C. CONST. art. I, § 37); Act of June 28, 2018, N.C. Sess. Laws 119 (providing an amendment process for the North Carolina Constitution to provide a maximum tax rate of seven

provision proved unworkable for the public, the people have the power to take action when the courts will not. In sum, the risk of some novel legal standard spiraling out of control is a weak justification for lockstepping these state provisions.

Finally, encouraging states to adopt their own legal tests for constitutional provisions with no federal equivalent serves important principles of federalism. The text of the United States Constitution is, of course, well-charted territory. No one will stumble on a forgotten clause that everyone else had overlooked. But many state constitutional provisions have a sense of practical obscurity.

It is not just the headline-making examples, such as the Texas judge who, unaware of the Texas Constitution's automatic resignation clause, mistakenly resigned.[211] Many basic liberties announced in North Carolina's comparatively short constitution are similarly overlooked. Take, for example, North Carolina's Just and Equitable Tax Clause, ratified in 1936.[212] The first tax challenge asserting this right was not until 2013.[213] Similarly, in 2020 the North Carolina Court of Appeals examined a state constitutional provision concerning the people's "right to instruct" their representatives.[214] That clause had never before been addressed by the state appellate courts—although it has existed in substantially the same form since the State's first constitution in 1776.[215]

For this reason, when a state constitutional provision with no federal equivalent falls in lockstep with federal doctrine, it can be far more harmful than the ordinary lockstepping most often examined by legal scholars. After all, if courts and litigants focus on federal due process jurisprudence when a similarly worded state provision offers the same protection, they are at least still talking about due process. When those same courts and litigants focus on federal due process and ignore more particularized state provisions, the wording, the history, and the precedent of those state clauses all fade away. Litigants may stop asserting them and

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percent on incomes) (codified as amended N.C. CONST. art. V, § 2); Act of June 29, 2018, N.C. Sess. Laws 128 (providing an amendment process for the North Carolina Constitution to require photo identification to vote in person) (codified as amended N.C. CONST. art. VI, §§ 2–3).

[211] *See* Thebault, *supra* note 7.

[212] Milam, *supra* note 151, at 914.

[213] *See* IMT, Inc. v. City of Lumberton, 738 S.E.2d 156, 158 (N.C. 2013).

[214] Common Cause v. Forest, 838 S.E.2d 668, 672 (N.C. Ct. App. 2020).

[215] *Id.*

the courts' ability and willingness to analyze them will wither.[216] The result is that language carefully chosen by the framers is lost.

This language, moreover, often conveys some crucial part of a state's spirit and ethos. Some legal scholars have questioned whether this sort of individual "state culture" actually exists, noting that the "pop anthropology" typically employed to distinguish one state's citizens from another is unreliable.[217]

This is a valid concern when deciding whether to interpret a state constitutional provision differently than an analogous federal provision. But this article examines state provisions *without* a federal equivalent. So, it is not a matter of invoking state "culture" to interpret language differently than others might; it is a matter of not ignoring culturally significant protections that the framers included in their unique constitutional framework.

But even this view—that a state's idiosyncratic provisions are important reflections of its character—has been criticized by scholars.[218] James Gardner, for example, points to the New York Constitution's "provision specifying the width of ski trails in the Adirondack Park."[219] "If a state constitution reflects the character of the people of a state" Professor Gardner asks "can one say of New Yorkers, for example, that they are a people who cherish their liberty to ski?"[220]

This article makes a different point. Whatever the reason for a provision limiting some of New York's ski trails to specific widths measured in feet, it is something unique to the State of New York. If New York courts reflexively adopted federal substantive due process doctrine for this provision, thus permitting legislators to fix the width of these ski trails to any distance rationally related to some legitimate government

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[216] Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 205 (1998) ("[I]ndependent interpretation is essential to the development of state constitutional law because it requires state courts to learn more about their state's constitutional beginnings and subsequent constitutional changes.").

[217] Long, *supra* note 4, at 59–61 ("For example, according to one seemingly plausible stereotype, the people of Vermont live in a rural, mountainous state historically isolated from its neighbors, with a cultural and political history to match. . . . Yet, real Vermonters do not match this essentialized image of a laconic lone farmer.").

[218] *Id.* at 52.

[219] Gardner, *supra* note 4, at 819.

[220] *Id.*

purpose, it would render the actual limits meaningless.[221] The uniqueness of that constitutional provision is destroyed and replaced with monolithic federal doctrine.

That is the harm lockstepping poses to the North Carolina provisions described in this article. The framers of these four clauses wanted them to mean *something*. As four redundant copies of federal due process doctrine, they do not. And those provisions did not get to this point because North Carolina courts, through theories of constitutional interpretation, guided them there. Their current meaning is a reflection of the courts' failure to examine them and instead to lump them together with other constitutional claims with which judges and lawyers are more familiar.

Saving these provisions from irrelevancy will require courts to reject the notion that federal constitutional doctrine is "some sort of *lingua franca* of constitutional argument generally."[222] North Carolina courts must be willing to innovate. That will not be easy. There is very little scholarship to aid this task. The distinctiveness of these provisions means few law professors or commentators will bother with them; whatever the current path to renown in the legal academy, it is certainly not by way of the North Carolina Constitution's Exclusive Emoluments Clause.

Thus, state judges likely will need to create the appropriate doctrine themselves. That should not be a troubling concept. Scholars have for years speculated that the state constitutional movement "derives from the aspiration of state court judges to be independent sources of law."[223] But it is one thing to aspire to this independence, and another to achieve it. Hans Linde wrote that in state constitutionalism, the "pull toward a common law of judicial review, toward a vortex of cliches, is strong. Counsel and courts find comfort and convenience in words that judges already have used."[224] To construct meaningful independent doctrine, state judges must resist the comforts of settled federal law.

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[221] For two of the North Carolina provisions discussed in this article—the Exclusive Emoluments Clause and the Monopolies Clause—this argument is even stronger. These constitutional provisions existed *before* ratification of the United States Constitution and the Bill of Rights. We know that the framers borrowed language from the early state constitutions (including North Carolina's). *See* SUTTON, *supra* note 1, at 10–12. That these constitutional guarantees were not among the ones transplanted into our nation's constitution further underscores how their importance is confined to the state that enacted them.

[222] Gardner, *supra* note 4, at 766.

[223] Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421 (1996).

[224] Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 229 (1992).

In sum, the tendency of state constitutional law to move in lockstep with federal doctrine is not limited to provisions with similar wording. State constitutional *language* may be "generally richer, more detailed, and more specific than that of the federal document,"[225] but the *jurisprudence* is far richer and more detailed on the federal side. If state courts fail to develop independent doctrine for their idiosyncratic constitutional provisions, the wealth of federal constitutional doctrine will lure courts to it. The result is that these clauses—which the people believed important enough to enshrine in their state constitutions—become irrelevant.

[225] James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1746 (1992).