LABORATORIES OF DEMOCRACY: NORTH CAROLINA'S EXPERIMENT WITH THE NATURAL RIGHT TO THE FRUITS OF YOUR OWN LABOR

Maria Colombo[*] *& Connor P. Fraley*[**]

The obligation to earn one's bread by the sweat of one's brow also presumes the right to do so.[1]

ABSTRACT

The Fruits Clause of the North Carolina Constitution recognizes that, among other inalienable rights, people are endowed by their Creator with the right to "the enjoyment of the fruits of their own labor."

Since introducing the Fruits Clause in the post-war Constitution of 1868, North Carolina has, in fits and starts, protected this right through judicial review. The Supreme Court of North Carolina periodically struck down legislative and executive actions which infringed upon the Fruits right when those actions lacked sufficient justification. After some uncertainty about the continuing vitality of the right, the court in 2024 unanimously affirmed that it is beginning a new stage in its experiment in the laboratory of democracy, one which provides meaningful protection to the economic freedoms inherent in any concept of ordered liberty.

This Article surveys the history of the Fruits Clause, drawing lessons from precedent to chart a path for North Carolina courts to follow in evaluating Fruits claims in this new era. We identify pitfalls and doctrinal tensions

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[1] Pope St. John Paul II, *Centesimus Annus* para. 43 (1991).

that will need to be resolved along the way relating to the scope of the right, the standard of review, and appropriate remedies. We develop principles to guide the court as it strikes a balance between the prerogatives of the government and the constitution's guarantee of protection for the inalienable rights of the People who created that same government.

Although North Carolina is the only state with an enumerated Fruits right, the importance of this experiment is not limited to North Carolina. If the abolitionists who framed the Fruits Clause were correct, the right it protects is an inalienable natural right. The North Carolina Supreme Court is poised to serve as a modern model for other jurisdictions as they fashion an appropriate doctrine to vindicate their own citizens' fundamental right to the enjoyment of the fruits of their own labor.

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1. INTRODUCTION

Article I, Section I of the North Carolina Constitution provides that "all persons . . . are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness."[2] After some uncertainty about the continuing vitality of the Fruits right, the Supreme Court of North Carolina has unanimously signaled that it is prepared to recognize meaningful protection for this constitutional guarantee.[3]

Research examining the meaning and scope of the Fruits Clause remains underdeveloped. This Article investigates history, precedent, and first principles to sketch out a meaningful path forward as North Carolina courts develop a coherent doctrine protecting the right—a doctrine that could guide other jurisdictions endeavoring to protect their own citizens' economic liberties. We proceed in five parts.

Part 2 examines some of the early history of the Fruits Clause. It details the philosophical underpinnings of the right, shedding light on the drafters' vision in 1868. Part 3 explains judicial review of economic regulations in the federal system before providing a comprehensive analysis of North Carolina Fruits Clause precedent. We identify the context and principles that will guide North Carolina jurists as they further develop the Fruits doctrine.

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2 N.C. CONST. art. I, § 1 (emphasis added).

3 Jeffrey Steven McConnell Warren, *The Forbidden Fruit Revisited: N.C. Supreme Court Unanimously Reaffirms Right to Earn a Living*, ELLIS & WINTERS LLP (Sep. 18, 2024), https://perma.cc/9BWM-NFRB.

Part 4 discusses the scope of the Fruits right, argues that heightened judicial scrutiny is appropriate, and examines how that scrutiny might operate in practice. Specifically, it sets forth a workable doctrinal framework through the lens of two prominent COVID-era cases that spearheaded the Clause's current revival. Part 5 turns to remedies. It examines relevant factors for courts to consider when crafting relief for aggrieved parties when the government's rights-violating action fails to pass constitutional muster.

And finally, Part 6 examines the broader implications of North Carolina's experiment as a laboratory of democracy. It explains why the Fruits right is natural to all persons and explores the principled way that other courts can use North Carolina as a model for a new experiment in protecting one of the fundamental rights that Americans fought a Civil War to protect.

2. ORIGINS OF THE FRUITS CLAUSE

The Fruits Clause is unique to the North Carolina constitution.[4] The Clause was added with the ratification of the state's second constitution in 1868, the same year that Congress adopted the Fourteenth Amendment.[5] In this post-Civil War era, many of the changes made in 1868 reflected an attempt to "adapt[] [the Constitution] to the reality of the end of slavery."[6]

Given this context, some legal scholars have concluded that the Fruits Clause "was obviously grounded in the history of an enslaved people

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4 We note that most other state constitutions reference property rights in their Lockean rights guarantees. Anthony B. Sanders, *The State Convention Drafting History of the Lockean Natural Rights Guarantees*, 93 U. MO.-KAN. CITY L. REV. 641, 646–47 (2025). For example, Virginia recognizes certain "inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." VA. CONST. art. I, § 1. The closest analog to the North Carolina clause is in Missouri, whose constitution acknowledges that "all persons have a natural right to . . . the enjoyment of the gains of their own industry." MO. CONST. art. I, § 2. An earlier version of that constitution did express the right as one to "fruits." Sanders, *supra* note 4, at 666. Maryland's 1864 constitution included a fruits right as well. *Id.* Regardless of how framed, enumerated or unenumerated, every state has a hook to hang its Fruits hat on. *See generally infra* Part 6.

5 *See Justice Berger Explores Future of 'Fruits of Their Own Labor' Protections*, CAROLINA J. (May 15, 2023), https://perma.cc/6AX3-RCHG [hereinafter *Justice Berger*].

6 John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1759 (1992).

obligated to work for the benefit of others but unable to benefit for themselves."[7] Thus, some narrowly construe the Fruits Clause as simply reflecting the end of slavery by enshrining the right to keep what you earn.[8] But this narrow view is not the only plausible interpretation of the scope of protection from government interference that the Fruits Clause was intended to provide—nor is it the best one. The historical record does not speak directly to the drafters' understanding of the scope of the right. In fact, "convention materials from the framing of the 1868 Constitution do not discuss th[e] provision or who drafted it."[9] Thus, to shed light on the philosophical underpinnings of the Fruits right, it is necessary to look more broadly. Most obviously, robust protection of property rights was at the core of the ideas espoused by the enlightenment "thinkers" who heavily influenced our Nation's founders, and no doubt had continued influence on the drafters in 1868.[10] Locke, for example, wrote:

> Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this no body 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*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to . . . .[11]

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7 Mitch Kokai, *Protecting the Fruits of College Athletes' Labor*, CAROLINA J. (Jan. 24, 2019), https://perma.cc/PU4A-RS2U (quoting former Supreme Court of North Carolina Justice Bob Orr).

8 *See* Jeffrey Warren, *The Scarlet Letter: North Carolina,* Giglio*, and the Injury in Search of a Remedy*, 12 WAKE FOREST L. REV. 24, 42 (2022).

9 Richard Dietz, *Factories of Generic Constitutionalism*, 14 ELON L.J. 1, 20 (2022).

10 *See infra* notes 11–36 and accompanying text.

11 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

Locke viewed a person's labor as "a moral foundation of property rights" and thus "that the right to work and the right to own what that labor produces is a natural right as important as life and liberty."[12] In his view, government was established for the *primary purpose* of protecting property rights. He wrote, "[g]overnment has no other end but the preservation of property."[13]

Similarly, Adam Smith wrote that "[t]he property which every man has in his own labour, as it is the original foundation of all other property, . . . is the most sacred and inviolable."[14] He too recognized the government's role in protecting property rights, writing that "[p]roperty and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government."[15]

These ideas guided our Nation's founders and the drafters of North Carolina's early constitutions.[16] In Federalist 54, James Madison declared that "[g]overnment is instituted no less for protection of the property, than of the persons of individuals."[17] North Carolina channeled this sentiment in its first constitution—ratified in 1776—which was one of five state constitutions to include a "law of the land" clause declaring that no free man would be "deprived of his Life, Liberty or Property, but by the Law of the Land."[18] This provision can be traced back to the Magna Carta in 1215,[19] highlighting the influence of traditional English protections of property rights on North Carolina's earliest constitution.[20] The drafters no doubt leaned on their

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12 Dietz, *supra* note 9, at 21.

13 Edwin G. West, *Property Rights in the History of Economic Thought: From Locke to J.S. Mill* 6 (Carleton Econ. Papers, Working Paper No. 2001-01, 2002).

14 *Id.* at 5.

15 *Id.*

16 *See* Orth, *supra* note 6, at 1765 ("American constitutionalism, as the Revolutionaries themselves loudly protested, was nothing new; rather, it was deeply rooted in English tradition.").

17 THE FEDERALIST NO. 54, at 370 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

18 N.C. CONST. of 1776, Declaration of Rights, § 12; James W. Ely, Jr., *Property Rights in American History*, HILLSDALE COLL. 3, https://perma.cc/J9D7-WCBT.

19 Orth, *supra* note 6, at 1766.

20 These Law of the Land Clauses are the original Due Process Clauses. *See* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 29–31 (2003).

biblical knowledge, too, in their understanding of the dignity of work in the pursuit of happiness.[21]

Further, North Carolina courts displayed a willingness to protect property rights against government interference as early as 1833. In *Hoke v. Henderson*, the North Carolina Supreme Court indicated that the judiciary is tasked with ensuring that property rights are protected.[22] The court stated, "[i]n reference to . . . divesting of the rights of property, it has been repeatedly held in this State . . . that there are limitations upon the legislative power."[23] While protection for the specific property right at issue in *Hoke* was later overruled,[24] the decision demonstrates that early North Carolinians understood that there are limits on the government's ability to interfere with the property rights of its citizenry.

Albion Tourgee was another important influence and a key player during the 1868 convention.[25] Tourgee was raised in Ohio and dropped out of college to fight for the Union army.[26] After the war ended, he moved to Greensboro, North Carolina, and had a "remarkable" career in the state.[27] Tourgee "served as an influential delegate to the 1868 [North Carolina] constitutional convention, he coauthored the state's revised civil codes, and from 1868 to 1874 he served as a superior court justice."[28] A staunch abolitionist, Tourgee devoted his life to aiding North Carolina's black community,

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21 *See, e.g.*, *Genesis* 2:15, 3:19; *Ecclesiastes* 3:10–13, 5:18–20; *Psalm* 128:2; *Proverbs* 14:23; *Colossians* 3:23. Christian tradition continues to recognize these old rights. *See, e.g.*, Pope Leo XIII, *Rerum Novarum* para. 10 (1891) ("Is it just that the fruit of a man's own sweat and labor should be possessed and enjoyed by any one else? As effects follow their cause, so is it just and right that the results of labor should belong to those who have bestowed their labor."); Pope St. John Paul II, *Centesimus Annus* para. 43 (1991) ("The obligation to earn one's bread by the sweat of one's brow also presumes the right to do so.").

22 15 N.C. 1, 15–16 (1883).

23 *Id.*

24 Mial v. Ellington, 46 S.E. 961, 964 (N.C. 1903) (overruling *Hoke*).

25 JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 19 (2d ed. 2013).

26 UNDAUNTED RADICAL: THE SELECTED WRITINGS AND SPEECHES OF ALBION W. TOURGÉE 3 (Mark Elliot & John David Smith eds., 2010).

27 *Id.*

28 *Id.*

founding freedmen's schools and "facilitating the purchase of land . . . for blacks."[29]

Tourgee advocated for robust protection of property rights. He argued that other fundamental rights are dependent on the ability to keep what is rightfully yours.[30] He explained that man's rights are deprived "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."[31] And he wrote, regarding Reconstruction failures,

> [t]he duty which lay before the Government was not chiefly nor primarily to restore statal relations. That was a matter which could be done in ten minutes and by a single act of five lines. Its duty was to erect in the lately rebellious regions Republican governments, in which the rights of all should be secured, protected and maintained. Such governments had never existed here. Free speech, free thought, free labor, and free ballot, were strangers to the territory which fell a victim to secession. The very basic elements of Republican government were lacking here. Reconstruction hinted at going back to these husks. The duty of the nation was to tread them under foot, and sternly set its face to secure to every man in that new domain which its arms had just conquered from slavery, not only the rights of a freeman, but the protection and security of a freeman, and an unmistakable guarantee that he might transmit them to his children, and they to theirs in endless perpetuity.[32]

Tourgee articulated why property rights, including the ability to pass down what one has gained, are so fundamental to a free society. To Tourgee, property rights were the core protection needed for African Americans to succeed in the Reconstruction era. And he strongly advocated for these ideals as a delegate at the 1868 convention.[33]

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29 *Id.* at 3–4.

30 *See* Dietz, *supra* note 9, at 20.

31 *Id.*

32 UNDAUNTED RADICAL, *supra* note 26, at 59.

33 *Id.* at 5–6.

Chief Justice Marshall professed similar ideas that perhaps informed Tourgee. Marshall wrote that:

> the slave trade . . . is contrary to the law of nature . . . . That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.[34]

With a Nation founded on the ideals of Locke and Smith, and a constitutional convention guided by Tourgee, the Fruits Clause was likely understood to provide broad protection for the property rights of North Carolinians. Over 150 years later, these same principles underlie our jurisprudence and belie the notion that the Fruits Clause is a mere "relic of the old days."[35] Rather, this history cements the right as "a valuable tool that offers robust protections" for North Carolinians today.[36]

3. Fruits Precedent

Federal courts have long reviewed economic regulations under rational basis review, a test that North Carolina has, at times, seemed to mirror in verbiage but arguably not in analysis. This part briefly traces the federal system's history, evaluating economic regulations from *Lochner* to *Lee Optical*. Then, it provides a comprehensive overview of North Carolina Fruits Clause precedent to identify relevant principles and doctrinal evolution. We conclude that, although the North Carolina Supreme Court has articulated various tests, the court has consistently applied a more searching review than is applied in the federal system.

3.1. Lockstepping and the Federal Approach

Despite the unique protections of the state constitution,[37] the North Carolina Supreme Court "has largely adopted a lockstep method of state

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34 The Antelope, 23 U.S. 66, 120 (1825) (Marshall, C.J.).

35 *Justice Berger*, *supra* note 5

36 *Id.*

37 Dietz, *supra* note 9, at 7, 13, 19, 24 (analyzing the Exclusive Emoluments, Monopolies, Fruits of Their Labor, and Just and Equitable Tax Clauses).

constitutional interpretation," meaning that "the court construes state constitutional provisions identically with federal court interpretations of their federal counterparts."[38] Lockstepping provides benefits including stability and predictability within the legal system. However, it has the potential to diminish North Carolinians' rights by eroding the distinctions between the separate texts. And even where the text of the two constitutions is the same, lockstepping ignores the unique history and precedent associated with the state's constitution and assumes that the United States Supreme Court is correct in its interpretation of both of them. Lockstepping is particularly detrimental (and unjustified) when applied to state constitutional provisions with no federal equivalent (such as the Fruits Clause) because the "particularized wording, history, and corresponding state law precedent . . . is lost when courts bind these clauses to unrelated federal provisions."[39] As a result, lockstepping can result in state courts under-protecting rights explicitly recognized in the state constitution.[40]

In federal courts today, economic regulations are reviewed for minimum rationality under the "substantive component" of the Fourteenth Amendment's Due Process Clause.[41] Minimum rationality, or rational basis review, means that a court will uphold a regulation unless the challenger can show that no "rational basis" for the regulation exists.[42] As currently practiced, this sets an extremely low bar for the government to meet. Under this standard, courts will uphold a regulation if there is "any conceivable

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38 Grant E. Buckner, *North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate*, 36 N.C. CENT. L. REV. 145, 147, 154 (2014).

39 Dietz, *supra* note 9, at 4.

40 *See* Buckner, *supra* note 38, at 147 ("This 'non-approach' to state constitutional interpretation results in deferential conformity to the Supreme Court of the United States and diminishes the identity of the state constitution as a separate legal document."); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 20 (2018) [hereinafter SUTTON, 51 IMPERFECT SOLUTIONS] (rejecting the "top-down constitutional world" where the "state supreme courts move in lockstep" with the U.S. Supreme Court over similarly-worded provisions).

41 Dietz, *supra* note 9, at 3.

42 *Id.* at 5; *see infra* Section 6.2.

rational basis" for the state's action.[43] Rational basis review is acknowledged to be "a test that the government generally cannot fail."[44]

However, this federal doctrine, referred to as "economic substantive due process," has changed significantly over time.[45] Most notably, during the early twentieth century, federal courts reviewed economic regulations somewhat more meaningfully. One notorious case, *Lochner v. New York*,[46] illustrates this prior approach.

In *Lochner*, the Supreme Court of the United States struck down a law that made it a criminal offense to employ bakers for more than sixty hours per week, even when those bakers wanted to do so.[47] The Court held that "no reasonable ground" for the government's interference with a private contract existed.[48] In reaching this conclusion, the Court disclaimed each of the state's purported reasons for the regulation as unsubstantiated by the evidence and stated that the regulation "has no such direct relation to, and no such substantial effect upon, the health of the employee" to justify its interference with the right to contract.[49]

During the *Lochner* Era, the Supreme Court of the United States, though it did so infrequently, was willing to invalidate regulations that burdened economic rights without sufficient justification. This approach came to an abrupt end in 1937 with the Supreme Court's decision in *West Coast Hotel Co. v. Parrish*.[50] There, in a departure from precedent, the Court upheld Washington state's minimum wage law for women, reversing course from an earlier case in which the Court had struck down such price controls which were built on the assumption that a female worker would not "preserve her morals" if she was not paid more than double the going rate for her industry at the time.[51] The prior case protecting women's freedom to contract had

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43 Dietz, *supra* note 9, at 6.

44 *Id.* at 5 (quoting Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 81 (2001)).

45 *Id.*

46 198 U.S. 45, 52 (1905).

47 *Id.* at 57.

48 *Id.*

49 *Id.* at 64.

50 300 U.S. 379, 392 (1937).

51 Adkins v. Children's Hosp., 261 U.S. 525, 555 (1923), *overruled by*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

been brought by a young woman who had been very happy with her job, but had been fired and replaced by a man because of the minimum wage law.[52] The *West Coast Hotel* Court reasoned that "[t]he Constitution does not speak of freedom of contract" and that the liberty that it protects may only prevail against the power of the legislature if, after giving "every possible presumption is in favor" of the government, the statute appears to be "palpably in excess of legislative power."[53]

Further, the Court laid out the standard going forward—eventually known as rational basis review—explaining that economic regulations with "a reasonable relation to a proper legislative purpose" will be upheld.[54] *West Coast Hotel* put an end to the *Lochner* Era and established that economic regulations were to be reviewed for minimum rationality under the federal constitution.

Since *Lochner*'s repudiation, the common, though weakening, refrain among legal scholars and commentators is that the *Lochner* Era was a drastic mistake. At this point, *Lochner* stands as "one of the most reviled decisions that the Supreme Court ever handed down."[55] The *Lochner* Era is attacked as a period of extreme judicial activism, one where judges invaded the legislative sphere and imposed their preferred ideology on the people.[56] Often accused of "inventing [new rights] out of whole cloth," *Lochner* Era judges are criticized for their alleged willingness to impose personal policy preferences "without explicit constitutional justification."[57]

Overall, it is now well understood that rational basis review is all a challenger can hope for when challenging economic regulations in the federal system. Modern application of rational basis review is exemplified in a

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52 *See id.* at 542–43. The opinion is not clear whether Ms. Lyons was able to protect her morals after losing her income at the job which was the "best she was able to obtain for any work she was capable of performing" where "she could not secure any other position at which she could make a living, with as good physical and moral surroundings, and earn as good wages" as before the government restricted her freedom to contract and put her out of the job. *See id.*

53 300 U.S. at 391, 398.

54 *Id.* at 398.

55 Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of* Lochner v. New York, 1 N.Y.U. J.L. & LIBERTY 515, 516 (2005).

56 *Id.* at 519.

57 *Id.*

mid-1950s opinion, *Williamson v. Lee Optical of Oklahoma*.[58] There, the Supreme Court of the United States upheld an Oklahoma law against a Fourteenth Amendment challenge that prohibited opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist.[59] By virtually every measure other than economic favoritism for physicians, the law was nonsensical. The Court itself admitted that the law imposed a "needless, wasteful requirement."[60]

But the law was upheld under rational basis review. The Court offered various hypothetical justifications that "[t]he legislature might have concluded" rationalized the law's enactment.[61] According to the Court, judges, if they were to strike down a law, even one as arbitrary as this one, would be supplanting their own personal policy views in place of those of the legislature.[62]

The Court stated that "the law need not be in every respect logically consistent with its aims to be constitutional."[63] "It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it."[64] This reflexively deferential approach continues in the federal system today.

3.2. Overview of Fruits Clause Cases

North Carolina precedents support a broad reading of the scope of the Fruits Clause. "[A]lthough perhaps aimed originally at slavery, [the Fruits Clause] has been the basis of many constitutional challenges to various occupational regulations."[65] There are two overlapping lines of cases

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58 348 U.S. 483 (1955).

59 *Id.* at 486.

60 *Id.* at 487.

61 *Id.* ("The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation . . . . Or the legislature may have concluded that eye examinations were so critical . . . that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.").

62 *Id.* at 486–87.

63 *Id.* at 487–88.

64 *Id.* at 488 (emphasis added).

65 ORTH & NEWBY, *supra* note 25, at 46.

implicating the Fruits Clause: occupational licensing mandates and general interference with economic interests.

Licensing mandates, particularly during the 1940s to 1960s, generally received heightened scrutiny.[66] In contrast, later licensing cases and instances of general economic interference have been less searching, though not unanimously so.[67] Nevertheless, the North Carolina Supreme Court has consistently evaluated Fruits claims under a heightened form of scrutiny even when the plain language of the court's opinions at times reads like rational basis. Most recently, as discussed in Part III, the North Carolina Supreme Court affirmed that heightened review is appropriate and articulated a workable test for Fruits Clause cases.[68]

3.2.1. Early Fruits Cases

We begin our overview of Fruits Clause precedent with two early cases. In *State v. Williams*, the court struck down a statute that prohibited a person from carrying a proscribed amount of alcohol into a particular county in any single day.[69] The defendant argued that his indictment under the statute violated his property and liberty rights secured by Article 1 Section 1 of the North Carolina Constitution.[70] In striking down the law, the court recognized that the defendant's alcohol was his property, and "he was, by virtue of the constitutional guarantee that he shall enjoy the fruits of his own labor and pursue his own happiness, entitled to carry [the alcohol] whithersoever he went and apply it to his own use in such manner as he saw fit."[71]

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66 *See infra* Section 3.2.1 (discussing licensing requirements struck down under the Fruits Clause in *State v. Harris*, *State v. Ballance*, *Roller v. Allen*, and *Treants Enters., Inc. v. Onslow Cnty.*).

67 *Compare* Poor Richard's, Inc. v. Stone, 366 S.E.2d 697, 700 (N.C. 1988) (articulating rational basis review as the proper standard for Fruits of Labor claims), *with* King v. Town of Chapel Hill, 758 S.E.2d 364, 370–71 (N.C. 2014) (applying a more rigorous test requiring a "substantial government purpose" and prohibiting "officious and inappropriate regulation"). *See also infra* Section 3.2.2.

68 Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 726–27 (N.C. 2024); *see* discussion *infra* Sections 3.2.1–3.2.2.

69 61 S.E. 61, 62 (N.C. 1908).

70 *Id.*

71 *Id.* at 66.

But in *State v. Lawrence*, another early Fruits case, the court upheld a law that required photographers to gain licensure in order to operate a photography business.[72] Licensure was restricted to those "who shall qualify as to competency, ability, and integrity."[73] The court showed great deference to the legislature's determination that the licensing act was in the "public interest" and held that the act was not "arbitrary or unreasonable."[74] Essentially, the court appeared to apply traditional rational basis review. Roughly ten years later, however, this case would be overruled when a similar regulation purporting to protect the public from "inferior picture[s]" was scrutinized.[75]

3.2.2. Heightened Review

Two years after *State v. Lawrence*, the court decided *State v. Harris* and applied a more searching analysis of the economic regulation at issue.[76] There, the court struck down a statute that created a state dry cleaners commission with discretion to issue or deny licenses to people who wished to operate dry cleaning businesses.[77]

The court established several guiding principles for the Fruits Clause. First, the court recognized a distinction between the legislature's ability to regulate "learned professions" compared to "ordinary trades and occupations."[78] Learned professions include those careers "requiring scientific or technical knowledge and skill," while ordinary occupations are "harmless in themselves" and pursued "as a matter of common right."[79] Examination and licensing requirements for the former are justified by the need for public confidence and trust in professionals.[80] By contrast, there is a weaker interest

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72 197 S.E. 586, 588 (N.C. 1938).
73 *Id.* at 590.
74 *Id.*
75 *See infra* notes 86–91 and accompanying text.
76 6 S.E.2d 854 (N.C. 1940).
77 *Id.* at 859.
78 *Id.* at 861.
79 *Id.*
80 *See id.*

in regulating ordinary occupations, like dry cleaners, and thus the state's power over such professions dries up.[81]

The *Harris* Court did not clearly define which occupations are "learned" and which are "ordinary" but did provide some guidance. First, a regulation "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."[82] And second, an occupation is classified as "learned" or "ordinary" based on "common knowledge and experience," and a classification cannot be overcome by a mere declaration by the legislature to the contrary.[83]

Lastly, the court indicated special concern for regulations that "exclude" persons from engaging in an occupation altogether.[84] The "power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it."[85]

Almost a decade later, the court decided *State v. Ballance*, which would become a seminal Fruits Case.[86] In *Ballance*, the court struck down a statute imposing licensing requirements on photographers because the statute bore no "rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare."[87] Drawing from *State v. Harris*, the court identified photography as "one of the many usual[,] legitimate[,] and innocuous vocations by which men earn their daily bread."[88] The statute "unreasonably obstruct[ed] the common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life[.]"[89] The

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81 *Id.* ("[T]he slendering thread of police authority must come to an end, and constitutional guaranties of personal liberty must supervene.").

82 *Id.* at 863 (emphasis added).

83 *Id.* at 862 ("The Legislature cannot, by preamble or fact finding declaration, attribute to a business or occupation a character which it does not have according to common knowledge and experience and thus withdraw the legislation from judicial review.").

84 *Id.* at 863.

85 *Id.*

86 51 S.E.2d 731 (N.C. 1949).

87 *Id.* at 735.

88 *Id.*

89 *Id.* at 736.

court explained that a profession "involving skill" is not necessarily subject to regulation, and noted that

> Photography is an honored calling which contributes much satisfaction to living. Like all honest work, it is ennobling. In the economy of nature, toil is necessary to support human life, and essential to develop the human spirit. The great sculptor, Michelangelo, spoke a profound truth applicable to all mankind in uttering the cryptic phrase "It is only well with me when I have a chisel in my hand."
>
> . . . .
>
> It is undoubtedly true that the photographer must possess skill. But so must . . . every other person successfully engaged in a definitely specialized occupation . . . . Yet, who would maintain that the legislature would promote the general welfare by requiring a mental and moral examination preliminary to permitting individuals to engage in these vocations merely because they involve . . . skill?[90]

The court concluded that "the right to earn one's daily bread cannot be made to hang on so narrow a thread."[91]

Despite the court's use of the term "rational" in its analysis, the court did *not* apply the federal system's highly deferential rational basis review. In fact, the court *rejected* multiple justifications averred by the State, such as fire safety, fraud, and the need for skillfulness.[92] The Court clearly applied some heightened standard of review and not the reflexively deferential rational basis seen in *Lee Optical* or *State v. Lawrence*.

Next, the court decided *Roller v. Allen* and struck down a licensing requirement for tile layers.[93] The court acknowledged the right to earn a livelihood as "fundamental" and regulable only "in the paramount public interest."[94] To be upheld, an economic regulation "must have a rational, real, or substantial relation to the public health, morals, order, or safety, or

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90 *Id.* at 735–36.

91 *Id.* at 736.

92 *Id.* at 735–36.

93 96 S.E.2d 851 (N.C. 1957).

94 *Id.* at 854.

general welfare."[95] In brief, it must be "reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm."[96]

Further, in contradiction to *Lee Optical*'s blind deference to the legislature,[97] the court stated that "unreasonable and unnecessary restrictions" will be struck down.[98] In *Roller v. Allen*, the court dismissed as pretextual the state's asserted interest in combatting fraud in the tile laying industry by instituting a licensing board. They noted that the Act's "main and controlling purpose [was] not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business."[99] Essentially, the court's review of the evidence revealed that the law, which purported to be in the public good, operated more as class legislation for the benefit of incumbents.[100] Importantly, the analysis turned on the Act's actual purpose, as ascertained by the court, rather than the state's asserted purpose.

Thirty years later, the court once again applied heightened review in *Treants Enterprises, Inc. v. Onslow County* to strike down an ordinance intended to combat prostitution by imposing licensure requirements on "companionship businesses."[101] While the county's central target was "movie mates" establishments, county officials feared that a narrowly defined ordinance would allow movie-mates operators to evade regulation by restructuring their businesses to fall under "some further adult entertainment guise."[102] Therefore, the ordinance defined regulated entities broadly to cover all "companionship businesses" in order to "effectively combat

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95 *Id.* at 856–57.

96 *Id.* at 857.

97 348 U.S. at 487 (stating that economic regulations will be upheld even when not "logically consistent").

98 *Roller*, 96 S.E.2d at 859.

99 *Id.*

100 Some suggest that an improper motivation lay behind the law. To the extent the law itself was designed to further that improper motive, there is no issue in the record. But the court did not purport to strike down the law based on the subjective motivations of the legislators themselves, and it would have been inappropriate for them to do so. *See generally* Connor P. Fraley, *End* Arlington Heights, 23 GEO. J.L. & PUB. POL'Y (forthcoming 2025) (on file with author) (rejecting judicial investigation of subjective legislative motive).

101 360 S.E.2d 783, 784 (N.C. 1987).

102 *Id.* at 784 (internal quotation marks omitted).

prostitution,"[103] a seemingly rational legislative decision. Further, the court accepted the county's evidence that movie-mates establishments were in fact serving as grounds for prostitution and other crimes.[104]

Despite the court's recognition that the county had both a rational basis for defining the ordinance broadly and a legitimate evil at hand to correct, the court nonetheless struck down the ordinance. The court framed the inquiry as "not whether [the county] has the power to combat prostitution and its associated evils, but whether [the county's] companionship ordinance as written violates [the Fruits Clause]."[105]

The court—citing *Roller v. Allen*, *State v. Ballance*, and *State v. Harris*—applied a form of heightened review. Specifically, the court concluded that "companionship" is overly broad, sweeping in for regulation "nursing homes and companions for the elderly."[106] Because of its insufficient tailoring, the ordinance was not "rationally related" to combatting prostitution and was struck down.[107]

3.2.3. Rational Basis In Name Only

Overall, in *Harris*, *Ballance*, *Roller v. Allen*, and *Treants* the court was willing to strike down unnecessary, unjustified, or overbroad licensing requirements affecting ordinary occupations. In those four cases, the court used lofty language indicating the importance of the Fruits right and emphasized the state's burden to demonstrate real harm in order to justify interference. In subsequent cases, the court walked back some of this visionary language and articulated a test seemingly in lockstep with the federal system.[108] However, while the language mirrored federal rational basis review, the analysis did not. In application, the court has declined to adopt blind deference to legislative enactments or hypothetical, ex-post facto justifications that are not borne out by the evidence.[109]

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103 *Id.*

104 *Id.* at 785.

105 *Id.*

106 *Id.* at 786.

107 *Id.* ("We hold that by reason of its overbreadth, the ordinance is not rationally related to a substantial government purpose and violates our state constitution.").

108 *See* discussion *infra* Section 3.2.2.

109 *See* discussion *infra* Section 3.2.2.

Three years after *Roller v. Allen*, the court decided *State v. Warren*.[110] There, the court upheld an act that created a real estate licensing board and required all brokers to pass an exam certifying their "honesty, truthfulness, integrity and competency."[111] In upholding the law, the court stated that a regulation needs a "rational, real, or substantial relation to one or more of the purposes for which police power is exercised and that the occupation to be regulated is clothed with a substantial public interest."[112] The court summarized the test as requiring that "(1) the purpose of the statute [is] within the scope of the police power, (2) the act [is] reasonably designed to accomplish this purpose, and (3) the act [is] not . . . arbitrary, discriminatory, oppressive or otherwise unreasonable."[113]

With language reminiscent of *Lee Optical*, the *State v. Warren* court seemed to indicate that the court would uncritically defer to the legislature's power. The court walked back *Roller v. Allen*'s indication that "unnecessary or unreasonable" regulations would be struck down. Instead, in *State v. Warren*, the court remarked that "the wisdom of [the legislature's] enactments is not the concern of the courts."[114] The court appeared to be lockstepping its analysis with the federal approach articulated by the United States Supreme Court in *Lee Optical* just five years prior.

However, despite this language, the court still conducted a probing analysis of the "honesty, truthfulness, . . . and competency" standard required for real estate brokers to gain licensure.[115] The court conducted a lengthy analysis of the unique role of brokers as the intermediary in real estate transactions and the "relation of trust and confidence" that position elicits.[116] The court concluded that licensing requirements are justified by the real risks to the public when the dishonest or incompetent operate in such a role.[117] Only after conducting its own analysis to confirm that there are substantial reasons to regulate brokers did the court uphold the Act.[118]

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110 114 S.E.2d 660 (N.C. 1960).
111 *Id.* at 663.
112 *Id.* at 664.
113 *Id.*
114 *Id.* at 666.
115 *Id.* at 663 (internal quotation marks omitted).
116 *Id.* at 665.
117 *Id.* at 665–66 ("Disloyalty may have its origin in ignorance as well as fraud.").
118 *Id.* at 667.

Almost twenty years later, in *Poor Richard's, Inc. v. Stone*, the court upheld another licensing requirement, this time for businesses dealing in military goods.[119] There, the General Assembly had enacted a statute that required businesses involved in the purchasing or selling of military property to obtain a license to operate.[120] Obtaining licensure required a business to post a one-thousand-dollar bond and maintain certain records for the state to inspect.[121]

Here, the court stated that economic regulations will be upheld under the Fruits Clause if "rationally related to a proper governmental purpose."[122] This articulation is nearly identical to rational basis review as recognized in the federal system. The court condensed the three-step test articulated in *State v. Warren* and stated that the Fruits Clause analysis is "twofold."[123] The court must ask "(1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?"[124] The latter inquiry is "a question of degree" and "must be measured by balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated."[125]

In *Poor Richard's*, the court held that prong (1) was met based on the "distinguishing feature[s]" of businesses dealing in military property.[126] Because military property is manufactured for use by the state or federal government for military services—not civilian use—the government had an interest in preventing black market sales of military property.[127] These "peculiar" issues provided a "rational basis" for the statute.[128] The court held that the state does *not* need to prove that any black market sales have in fact taken place.[129] Instead, the court will presume such facts exist unless "evidence is to the contrary, or if facts judicially known or proved, compel

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119 366 S.E.2d 697, 697 (N.C. 1988).
120 *Id.* at 698.
121 *Id.*
122 *Id.* at 699.
123 *Id.*
124 *Id.*
125 *Id.* at 700.
126 *Id.* at 699.
127 *Id.*
128 *Id.*
129 *Id.* at 699–700.

otherwise."[130] In other words, the State did not have to prove the magnitude of the problem it sought to remedy.

The statute also passed prong (2) of the test. The court noted that the licensing scheme was not overly burdensome as it simply required regulated businesses to provide certain information, maintain certain records, and execute a bond.[131] Further, the statute only regulated the business' particular transactions involving military property and left untouched other aspects of the business.[132]

Overall, while the language of *Poor Richard's* mirrored federal rational basis review, the opinion itself demonstrated that the court did not subscribe to traditional rational basis review in practice. Instead, the court showed that it was unwilling to blindly defer to the judgment of the legislature and would instead take a close look at the legislature's purported justifications for the law. Further, while *Poor Richard's* articulated the rule that "an act passed by the legislature is presumed to be constitutional,"[133] the analysis makes clear that this presumption can certainly be overcome.

The next Fruits Claim to reach the court came in 2014. In *King v. Town of Chapel Hill*, the owner of a towing business challenged the town's authority to regulate the towing industry via an ordinance.[134] The ordinance, among other provisions, included a requirement that tow truck operators notify the police department before towing a vehicle and respond within fifteen minutes to communications from owners of towed vehicles.[135] The ordinance also mandated certain notice and signage requirements intended to alert drivers that the area is a "tow-away zone."[136] It also authorized the town council to cap towing fees, preventing tow truck operators from charging fees in excess of the fee schedule created by the town council.[137] As a result, the ordinance "increase[d] [tow truck operators'] operating costs,

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130 *Id.* at 700.

131 *Id.*

132 *Id.*

133 *See, e.g.*, Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cnty. Bd. of Comm'rs, 399 S.E.2d 311, 315 (N.C. 1991).

134 758 S.E.2d 364, 367–68 (N.C. 2014).

135 *Id.*

136 *Id.* at 370.

137 *Id.* at 368.

[and] the fee cap limit[ed] [their] ability to allocate those costs to those illegally parked."[138]

The court cited *Treants* as the relevant standard: "an ordinance that regulates trades or businesses 'must be rationally related to a substantial government purpose.'"[139] The court examined each challenged provision separately. Ultimately, the notice and signage requirements were upheld as "rational attempt[s] at addressing some of the inherent issues affecting citizen health, safety, or welfare that arise when one's car is involuntarily towed."[140]

But the fee schedule did not fare so well. Noting that the provision "implicates the fundamental right to 'earn a livelihood,'" the court held that there is "no rational relationship between regulating fees and protecting health, safety, or welfare."[141] Further, because the cap hindered tow truck operators' ability to operate at a profit, the city exceeded its authority by "plac[ing] the burden of increased costs incident to the regulation solely on towing companies."[142] Citing the same logic, the court upheld part of the ordinance that required towers to accept credit and debit cards, but struck down the part of the ordinance that prevented towing companies from passing on the credit card processing fee because it too functioned as a fee cap.[143]

King v. Town of Chapel Hill demonstrates how the court can be appropriately discriminating when evaluating Fruits challenges to legislation with multiple provisions, upholding those provisions reasonably related to proper government interests while striking down those that infringe on economic rights without sufficient justification.

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Given this pool of precedent, Fruits Clause doctrine was unsettled and lacked an overarching doctrinal framework at the outset of the COVID-19 Pandemic. Precedent from the mid-twentieth century and later in *Treants* dealing with occupational licensing mandates showed consistent protection

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138 *Id.*

139 *Id.* at 370.

140 *Id.* at 371.

141 *Id.*

142 *Id.*

143 *Id.* at 372.

for a robust Fruits Clause.[144] Other cases, however, like *State v. Warren*, articulated a test seemingly in lockstep with federal rational basis review.[145] Still, even when borrowing familiar language from the federal system, the court consistently showed a willingness to question legislative judgment and demand adequate justification for actions that infringe on the Fruits right, indicating that perhaps the right has more teeth than would appear at first glance.[146]

4. The Scope of the Right and Standard of Review

As the court moves forward in developing Fruits Clause doctrine in this novel post-COVID era, it will have to answer four questions. First, what is the scope of the right and what interests are protected? Second, should there be heightened review at all? Third, if there is heightened review, what should the standard be? And fourth, what should the remedial landscape look like for violations of the Fruits right? Informed by text, history, and precedent, this part examines each question in turn.

4.1. The Scope of the Fruits Right

The Fruits Clause, at minimum, protects people "engaging in any legitimate business, occupation, or trade."[147] The Fruits Clause has long been wielded to challenge occupational licensing mandates[148] and, more recently,

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144 *See, e.g.*, Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957) ("unreasonable and unnecessary restrictions" will be invalidated); *see also supra* Section 3.2.1.

145 *See generally* 114 S.E.2d 660 (N.C. 1960) (articulating the Fruits inquiry as "(1) the purpose of the statute must be within the scope of the police power, [and] (2) the act must be reasonably designed to accomplish this purpose"); *see also supra* Section 3.2.2.

146 *See Warren*, 114 S.E.2d at 665 (conducting a thorough review of the business of real estate brokers to confirm the judgment of the legislature); *see also King*, 758 S.E.2d at 372 (striking provisions that failed to be closely connected to the city's proper exercise of police power).

147 State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949).

148 *See, e.g.*, State v. Harris, 6 S.E.2d 854 (N.C. 1940) (striking down a licensing requirement for owners of dry cleaners).

to guard against general interference with business interests.[149] In the latter scenario, the Fruits right seemingly has broad application. In *King v. Town of Chapel Hill*, for example, the Fruits Clause was operable where the challenged government action burdened a business owner's ability to operate at a profit,[150] implying that the Fruits right applies where a business can operate but not profitably so.

Additionally, one of the court's earliest Fruits cases, *State v. Williams*, indicates that the clause is not limited to strictly "business" interests, but instead applies whenever there has been a deprivation of a property right.[151] There, the Fruits right was implicated where a government restriction prevented a person from carrying a certain amount of alcohol into Burke County, even if the alcohol was all for personal consumption and the possessor had no illegal intent to sell.[152] Essentially, the government had no sufficient justification to deprive a citizen of the ability to move his property from one place to another.[153]

In more recent years, the court has been willing to expand the Fruits Clause to novel contexts. In 2018, the court decided *Tully v. City of Wilmington* and invoked the Fruits Clause in the public employment context.[154] There, a police officer was denied a promotion because he failed a mandatory written examination, but he later discovered that the exam's answer key was outdated and that, if it had been updated, he would have passed.[155] The department policy manual stated that "[c]andidates may appeal any portion

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149 *King*, 758 S.E.2d at 372 (invalidating provisions that unjustifiably burdened the ability of towing company to operate profitably).

150 *Id.*

151 61 S.E. 61, 66 (N.C. 1908); *see supra* Section 3.2.

152 *Williams*, 61 S.E. at 66.

153 *See id.* ("If, then, the spirits, wine, or beer, as the case may be, which the defendant had on the 10th July, 1907, was his property, he was, by virtue of the constitutional guarantee that he shall enjoy the fruits of his own labor and pursue his own happiness, entitled to carry it with him whithersoever he went and apply it to his own use in such manner as he saw fit . . . .").

154 810 S.E.2d 208 (N.C. 2018).

155 *Id.* at 211.

of the selection process."[156] Seeking to appeal his result, the officer filed a grievance but was rejected.[157]

The officer asserted a Fruits interest in his employment with the police department and challenged the department's actions as violative of the Fruits Clause.[158] And although a position of future employment is not a vested property right, the court held that the Fruits Clause applies "when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place."[159]

There are other novel contexts in which some jurists have indicated that the Fruits right might apply. In a 2021 case, *In re Harris Teeter, LLC*, the court reviewed a grocery store chain's challenge to Mecklenburg County's method of assessing the value of a business' property for tax purposes.[160] The majority held that the county's method properly reflected the "true value" of Harris Teeter's property as required by statute.[161] In ruling this way, the court rejected Harris Teeter's argument that the county improperly considered its "favorable economic performance" rather than assessing "true value" as "market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller," as the term is defined by statute.[162]

In his dissent joined by two other justices, Justice Phil Berger, Jr. argued that the county's use of a "non-uniform, statutorily unacceptable valuation method" had "deprived Harris Teeter of their profits, i.e., the fruits of their labor."[163] He expressed concern that "this valuation method will curtail economic liberty and produce inconsistent and undesirable results for businesses."[164] This reasoning suggests that the court is willing to meaningfully entertain Fruits challenges in novel contexts.

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156 *Id.*

157 *Id.* ("A supervisor also told Tully that '[e]ven if you are correct, there is nothing that can be done.'").

158 *Id.* at 212.

159 *Id.* at 215.

160 861 S.E.2d 720 (2021).

161 *Id.* at 735–36.

162 *Id.* at 729.

163 *Id.* at 736–37 (Berger, J., dissenting).

164 *Id.* at 737.

Overall, the Fruits right clearly applies to traditional categories of recognized liberty and property interests including one's own personal property, business property, business profits, and position of employment.[165] Nevertheless, there are boundaries to the Fruits right. For example, the court easily rebuffed an argument that a litigant's participation in a trial is "labor" and a jury's verdict the "fruits" of that labor.[166]

Principles, history, and precedent undergirding the Fruits Clause suggest a broad right that is potentially implicated whenever government action affects a citizen's ability to engage in business, industry, or employment, or interferes with the use of a citizen's lawfully acquired property rights.

No doubt, the right sweeps in a good amount of conduct as people go about their daily lives and arrange their affairs as they see fit, consonant with the rights of others. The vision of ordered liberty that the people of North Carolina recognized is a broad one, and not one the courts should shy away from. To the extent that there is concern that Fruits jurisprudence will work too great an interference with the government's efforts to regulate, those concerns are better directed at the standard of review or the remedy for violations—not the scope of the right.

4.2. Heightened Review Is Appropriate

Now we turn to the appropriate standard of review. North Carolina should not lockstep its analysis of economic regulations with the federal system's rational basis test. The Fruits Clause is uniquely enumerated in the North Carolina Constitution and was understood to provide broad protection for property rights. Further, precedent demonstrates that the North Carolina Supreme Court has consistently applied heightened review, even when using language that reads like rational basis.

Regarding the first point, lockstepping risks under-protecting the right recognized in the Fruits Clause. Constitutional interpretation should begin with the text. The Fruits Clause is text unique to the state constitution; thus, North Carolina courts are tasked with interpreting this unique provision and giving effect to the full scope of the right protected. By lockstepping with the federal system, state courts would shirk their duty to uphold the

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165 *See supra* notes 154–164 and accompanying text.

166 Rhyne v. K-Mart Corp., 594 S.E.2d 1, 14 (N.C. 2004).

rights enshrined in the state constitution and would risk becoming "mindless factories . . . content to pump out generic copies of unrelated federal law."[167]

Further, the drafters of the Fruits Clause understood it to encompass broad protection for the property rights of North Carolinians. They chose to insert that unique language into the Declaration of Rights because they believed enumerating the protection of property rights was essential to preserving liberty.[168] As such, North Carolina's Constitution "is more detailed and specific than the federal Constitution in the protection of the rights of its citizens."[169] Rational basis review—a test the government generally cannot fail—is too flimsy to provide the level of protection that our drafters envisioned.[170]

Second, precedent demonstrates that the North Carolina Supreme Court has understood that traditional rational basis review is an inappropriate standard. In early cases such as *State v. Harris*, *State v. Ballance*, and *Roller v. Allen*, the court struck down economic regulations under heightened review.[171] The court distinguished "learned professions" from "ordinary occupations" and stated that "unnecessary" regulations would be struck down.[172] Rational basis review does not allow for either of those limitations.

Further, even in later cases such as *Poor Richard's* where the court upheld licensing requirements under a test that read like rational basis, the court still took a harder look at the state's justifications than rational basis review allows.[173] The court did not blindly defer to the state's judgment in the same way that the federal court did in *Lee Optical*. Instead, the court reached its own conclusion that the regulations served a proper interest in a way that was justified.

For these reasons, we conclude that some kind of meaningful review is appropriate. The trickier question is about what standard or standards should govern that analysis.

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167 Dietz, *supra* note 9, at 4.

168 *See supra* notes 13–15 and accompanying text.

169 Corum v. Univ. of N.C. *ex rel.* Bd. of Governors, 413 S.E.2d 276, 290 (N.C. 1992).

170 *See infra* Section 6.2.

171 *See supra* Section 3.2.1.

172 *See supra* Section 3.2.1.

173 *See supra* Section 3.2.2.

4.3. Evaluating Fruits Claims

When a Fruits claim is at issue, a two-part test is appropriate. First, the court must determine if there was statutory or constitutional authority for the action that affects the Fruits right. When the government acts *ultra vires*, no balancing is necessary to find a violation and entitlement to a remedy. Second, for government actions that are within statutory or constitutional authority, the court should evaluate the claim under the Fruits test articulated in *Ace Speedway*.[174]

4.3.1. No Statutory or Constitutional Authority

A theme revealed in recent cases, and COVID cases in particular across the nation, is the threat to individual rights and liberties posed by executive actors when acting on short notice and with little oversight. In situations where the executive branch feels that someone must respond to a crisis, there can be a temptation to act first and look for statutory authority later. The same lessons on executive overreach have been taught by recent attempts by different executive actors across the country to make creative new uses of old statutes to try and advance policy goals that they cannot win in the legislature.[175] And, naturally, those holding executive authority may

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174 For so-called "facial" challenges to legislative actions, the same test would apply, just with an eye toward every possible application of the statute, not just the one before the court.

175 *See, e.g.*, Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 760–61 (2021) (creative new use of CDC authority to take measures to stop the spread of disease to regulate housing policy and ban evictions); Biden v. Nebraska, 600 U.S. 477, 494 (2023) (creative new use of 9/11 HEROES Act to try to write off half a trillion dollars in student loans); California v. Trump, 963 F.3d 926, 932–34 (9th Cir. 2020) (creative new use of appropriations for military requirements to provide funds for a wall on the Southern border); West Virginia v. EPA, 597 U.S. 697, 710–12 (2022) (creative new use of ancillary provision of the Clean Air Act to place statewide energy mix under the regulatory power of the EPA); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–26 (2000) (creative new use of Food & Drug Act to try to bring tobacco into FDA's control); V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (Fed. Cir. 2025), *cert. granted*, 2025 WL 2601020 (No. 25-250) (aggressive new use of the International Emergency Economic Powers Act to impose reciprocal tariffs on foreign trading partners).

be biased toward thinking that their policy goals are emergencies, reinforcing temptations toward unilateral executive action which can pose a real threat to individual rights.

The government's response to the Pandemic ushered novel Fruits cases into the courts. At both the state and federal level, businesses were acutely affected by the government's attempts to stop the spread of COVID. In North Carolina, executive branch action laid the groundwork for Fruits Clause challenges.

Regarding the first prong of the test (acting with or without statutory authority), North Carolina's *Kinsley v. Ace Speedway*[176] and *N.C. Bar & Tavern Association v. Cooper*[177] cases highlight a clean distinction, with *Ace Speedway* presenting the example of the executive acting without statutory authorization.

Governor Roy Cooper signed Executive Order 141 in May of 2020.[178] This order was sweeping, attempting to address a wide range of issues raised by the COVID-19 pandemic. The Order prohibited "mass gatherings."[179] Parks, trails, and beaches had to abide by the mass gathering limitation, but retail businesses, restaurants, tattoo parlors, and pools were exempted.[180]

The latter categories were subject to more precise, tailored standards based on facts specific to their industry. For example, retail businesses had to operate at "Emergency Maximum Occupancy," which limited them to the lower of either 50% of the building's fire capacity or the number of people in the store.[181] Either of these metrics could result in a retail business with many more than 25 customers inside a building, while an outdoor stadium or arena was flatly prohibited from having more than 25 people attend an event.

Ace Speedway, a 51-acre outdoor racetrack in Alamance County, with stadium seating for 5,000 was subject to the 25-person limitation.[182] Ace had

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176 904 S.E.2d 720 (N.C. 2024).

177 901 S.E.2d 355 (N.C. 2024).

178 Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020).

179 *Id.*

180 *Id.*

181 *Id.*

182 Warren, *supra* note 3.

implemented recommended risk mitigation measures such as temperature checks, screening, disinfection, social distancing, plexiglass, and contact tracing in conjunction with local health officials, the sheriff, and the state health department.[183] As Ace saw it, by May and June of 2020, the greatest uncertainty about COVID had largely passed, and local officials understood the low risk posed by outdoor venues.[184] The speedway's home county had few active cases, and virtually all of the county's deaths had occurred in nursing homes.[185]

The 25-person limitation seemed arbitrary when more confined locations, like the Lowe's hardware store nearby, were allowed thousands.[186] And Ace wasn't afraid to say so, with its owner making press statements criticizing the Governor and his orders.[187] After Ace's owner spoke out, the Governor came after Ace—having his office personally call the county sheriff and writing to them and other county officials.[188] No other speedway that was holding races in excess of the Governor's limits (of which there were many) received such treatment until several months later—*after* Ace had filed counterclaims alleging selective enforcement.[189] As Ace saw it, this series of events "imprison[ing people] in their own homes" was a brazen violation of the constitution that the people had to push back against.[190]

Ace could not operate profitability under the 25-person cap, and its business was effectively shut down.[191] Because of the burden the Order imposed, Ace chose to defy Governor Cooper's Order, announcing to the press:

> [U]nless they can barricade the road, I'm going to [race]. The racing community wants to race. They're sick and tired of the politics. People are not scared of something that ain't killing

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183 Appellee's Brief at 4–5, Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720 (N.C. 2024) (No. 280PA22), 2023 WL 4028000 [hereinafter Ace Brief].

184 Appellant's Brief at 10, *Ace Speedway*, 904 S.E.2d 720 (No. 280PA22), 2023 WL 3467853 [hereinafter Secretary Brief].

185 Ace Brief, *supra* note 183, at 5–6.

186 *Id.* at *6.

187 *Id.* at *6; *see Ace Speedway Owner Steamed About Phase 2 Restrictions*, GASTON GAZETTE, (May 21, 2020), https://perma.cc/K23H-2JEX.

188 Ace Brief, *supra* note 183, at 6.

189 *Id.* at 7–8.

190 *See* GASTON GAZETTE, *supra* note 187.

191 *Id.*

> nobody. It may kill .03 percent, but we deal with more than that every day, and I'm not buying it no more.[192]

Governor Cooper asked the Alamance County Sheriff to enforce the Executive Order against Ace, which he declined to do.[193] Ace continued to hold races, and in June of 2020, rather than having the Attorney General enforce the executive order with misdemeanor criminal prosecutions—the remedial method authorized by the emergency statutes—the Secretary of the North Carolina Department of Health and Human Services ("DHHS") issued an "imminent hazard" abatement order under a different statutory scheme, demanding that Ace close its track.[194]

As the Secretary saw it, the abatement order was necessary during the earlier parts of COVID to protect public health.[195] An objecting business owner openly violating an Executive Order, a crime, was exposing the health care system to unjustified risk.[196] Without local help, they needed to protect Ace's patrons and to prevent such public "[f]louting" of the measures.[197] Others would be encouraged to violate the order absent state-level enforcement to reestablish deterrence and promote compliance.[198] The "*repeated*[]" and "*public*[]" violation of the order inviting "*thousands*" of attendees made Ace a "brazen" violator.[199] Ace still refused to comply.[200]

DHHS and its Secretary, at that time Mandy Cohen,[201] went to court to enforce the abatement order, filing a complaint and motion for temporary

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192 *Id.*

193 Kinsley v. Ace Speedway Racing, 904 S.E.2d 720 (N.C. 2024).

194 *See id.* at 725.

195 Secretary Brief, *supra* note 184, at 45.

196 Ace Brief, *supra* note 183, at 26–27.

197 Secretary Brief, *supra* note 184, at 13, 62.

198 *Id.* at 65–66.

199 *Id.* at 61–63 (emphasis added).

200 *Id.* at 15.

201 Ace Speedway has a good case that the Secretary acted arbitrarily. Secretary Cohen candidly admitted on camera the unsupported and arbitrary way that she and other health directors conspired together during the pandemic to arbitrarily decide what the people they work for could and couldn't have. *See* Steve Harrison, *With the Pandemic Behind Us and Mandy Cohen Up for a Big New Job, How Did She Do?*, WFAE 90.7 (June 12, 2023), https://perma.cc/UC5X-V75H. Secretary Cohen was later promoted to head the Centers for Disease Control. *Id.*

restraining order seeking to enjoin Ace from holding another race.[202] DHHS was successful, and Ace was enjoined.[203] After complying with the injunction, Ace filed a counterclaim alleging, among other claims, that DHHS violated Ace's rights under the Fruits Clause, and DHHS filed a motion to dismiss based on sovereign immunity.[204] The trial court denied the motion to dismiss, finding that Ace had plausibly alleged a violation of its state constitutional rights, which, in North Carolina, operates as a waiver of sovereign immunity.[205]

The Secretary lodged an interlocutory appeal on the immunity question.[206] At the Court of Appeals, Ace prevailed again.[207] The unanimous panel held that Ace had pled a colorable claim that its rights under the Fruits Clause had been violated.[208] The Court of Appeals adopted a broad view of the protections afforded by the Fruits Clause stating that "[t]he core principle . . . is that government may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."[209] The panel held that further discovery must take place before the court could determine whether Ace presented an "imminent hazard" that would justify DHHS's actions.[210]

The North Carolina Supreme Court granted discretionary review, giving the court the opportunity to define the scope of the Fruits right in this novel context.[211] The focus of the Court's inquiry was whether Ace adequately asserted a colorable claim based on the allegations in its counterclaim, which must be accepted as true at the motion to dismiss stage.[212] It found that Ace had stated a claim, but did not analyze statutory authority.

The Secretary's creative use of the abatement power to work around

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202 Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 725 (N.C. 2024).

203 *Id.*

204 *Id.* Ace also alleged that DHHS targeted Ace for selective enforcement in violation of the state Equal Protection Clause. This Article will only address the Fruits claim.

205 *Id.*

206 *Id.*

207 *Id.*

208 Kinsley v. Ace Speedway Racing, Ltd., 877 S.E.2d 54, 62 (N.C. Ct. App. 2022).

209 *Id.* (internal quotations omitted).

210 *Id.* at 63.

211 Kinsley v. Ace Speedway Racing, Ltd., 883 S.E.2d 455 (N.C. 2023) (mem.).

212 *Kinsley*, 904 S.E.2d at 725–26.

the enforcement limitations of the Executive Order took her out of the realm of her legitimate authority. While the court did not tackle the issue in this way because *Ace Speedway* did not argue it, full analysis of a Fruits claim should always start with government actor's claimed source of authority.

The police power is vested in the legislature and delegated to the executive by statute.[213] Accordingly, the Secretary has no power unless the General Assembly grants it. Therefore, the analysis in *Ace Speedway* should not have started with whether the challenged action fell within the police power writ large, but whether it fell within the statutory authority granted to the Secretary.

Ace's harms were largely caused by the abatement order and the injunction seeking to enforce it, so its counterclaims did not challenge EO 141's restrictions directly, but rather its method of enforcement.[214] Section 166A-19-30 of the North Carolina Emergency Management Act grants the Governor breathtaking authority once he has declared an emergency, and these powers are nearly coextensive with the police power.[215] So a challenge to the order itself likely would not be resolved on the ground that the Governor acted *ultra vires*. Nonetheless, Executive Orders under the emergency provisions were enforceable criminally, with violations constituting Class 2 misdemeanors.[216] In North Carolina, when statutory schemes provide remedies for the executive branch, those remedies are exclusive.[217] All parties in *Ace* agreed that charges could have been brought.[218] Thus, the emergency provisions would not entitle the government to seek an injunction to enforce the executive order.

So the Secretary turned elsewhere to find injunctive authority, making a creative new use of a statute authorizing abatement orders for imminent hazards.[219] Ultimately, Ace should have won its claim on the statutory ground that § 130A-20 abatement authority does not encompass endemic disease.

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213 N.C. GEN. STAT. § 166A-19.30(a)(2)

214 Ace Brief, *supra* note 183, at 26–28.

215 N.C. GEN. STAT. § 166A-19.30 (2020).

216 *Id.* § 166A-19.30(d).

217 *See* Moose v. Barrett, 27 S.E.2d 532, 534 (1943).

218 Ace Brief, *supra* note 183, at *28; *see* Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 724 (N.C. 2024).

219 N.C. GEN. STAT. § 130A-20 (2020).

The extent of the Secretary's power is a question of statutory interpretation. An imminent hazard is defined in the statute as "a situation that is likely to cause an immediate threat to human life" or health or "irreparable damage to the environment if no immediate action is taken."[220] When the Secretary finds a hazard, she can order any actions necessary or, after reasonable attempt to notify the owner, enter the property and take all actions necessary to abate the hazard.[221] A literalistic reading of the statute could suggest that the Secretary may invoke this power for virtually any threat, but courts use text and context to give the statute a fair reading, not a maximalist one.[222] A fair reading is how "a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."[223]

Applied here, "imminent hazard" does not encompass the potential spread of a disease endemic in the population but only extends to acute events such as dangerous hazardous materials incidents or serious acute physical dangers like the risk of a stadium collapse. Other interpretive indicators support this as the fairest reading of the statute. Three of the strongest ones are the presumption of consistent usage, the rule against surplusage, and the greater legislative context.

First, other uses of "imminent hazard" within the statute confirm the HAZMAT sense.[224] These uses include granting a right of entry to the Department of Environmental Quality to respond to solid waste and drinking water incidents, unsafe swimming pools, generators and transporters of hazardous waste, solid waste disposal, "inactive hazardous substance[s]" under "substantial threat of release which is "likely to cause [serious] harm to the public health or the environment before a remedial action plan can be developed," imminent hazards in landfills, Superfund/CERCLA hazardous waste sites, and public water systems.[225] Further, the imminent hazard abatement provision itself includes liability for emergency medical response

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220 *Id.* § 130A-2(3).

221 *Id.* § 130A-20(a).

222 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33–41, 355–58 (2012) (detailing the "Fair Reading" Method and the false notion that words should all be strictly construed).

223 *Id.* at 33.

224 *See id.* at § 25 (presumption of consistent uses).

225 *See, e.g.*, N.C. GEN. STAT. §§ 130A-17, 23(d), 294.1, 303(b), 310.5(a), 310.6(f), 310.10, 317(e), 322.

tied to a "hazardous material release."[226] The General Assembly placed the imminent hazard abatement section right next to a different section which discusses a "class or category of property," suggesting dangerous materials in a product on the market, not disease.[227] That same section includes provisions covering the cost of cleanup, further suggesting a HAZMAT sense.[228]

Second, other parts of the statutory scheme do address disease through quarantine and isolation powers.[229] Those sections confer "the authority to issue an order to limit the freedom of movement or action of persons or animals that are infected" or "which have been exposed" or are "reasonably suspected" to be, or to "limit access" to "an area or facility that may be contaminated with an infectious agent."[230] The Secretary may use the power "only when and so long as the public health is endangered, all other reasonable means for correcting the problem have been exhausted, and no less restrictive alternative exists."[231] But the Secretary's abatement order here was based on an interpretation of the statute that completely avoided the quarantine and isolation provisions.

Finally, legislative context can also be relevant. The General Assembly added the quarantine and isolation provision in a law designed to enhance the executive branch's ability to respond to terrorist attacks, including biological ones.[232] Granting these powers to the Secretary suggests that the Secretary's preexisting "imminent hazard" authority does not extend to infectious disease. This interpretation does not exclude serious disease-related hazards at a particular location, such as the site of an anthrax attack or a lab leak. But, as in this case, for a disease already in general circulation (which negates the imminence of the threat which would require the energetic executive branch to intervene), the Secretary must meet the stringent requirements of isolation and quarantine—and that she did not do.

Granting the power to take "all actions necessary" may be prudent delegation to the energetic executive as applied to a specific place with a

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226 *Id.* § 130A-20.01.

227 *Id.* § 130A-20.

228 *Id.*

229 *See* SCALIA & GARNER, *supra* note 222, at 167–69 (Whole-Text Canon).

230 N.C. GEN. STAT. § 130A-2(3a), (7a) (2023).

231 *Id.* § 130A-145(a).

232 *Id.* § 5.

serious risk of death; but it opens the door to tyranny if applied to a generally circulating disease. Because reading "imminent hazard" to include endemic disease renders the isolation and quarantine provisions surplusage,[233] there is good reason to conclude that inclusion is not a fair reading of "imminent hazard."

But even if endemic disease were fairly encompassed by "imminent hazard," the quarantine and isolation provisions function as a more specific limitation on government power any time it uses isolation and quarantine as a remedy.[234] Either path shows the Secretary acted outside her imminent hazard abatement authority.

A case such as *Ace Speedway*, where the government acts in excess of its statutory authority, should be an easy one under the Fruits Clause. Failing at step one means that no question needs to be answered as to the justification for infringing on the economic rights of citizens. The only question left should be on remedies.[235]

Nevertheless, the court in *Ace Speedway* took a different route, and in doing so articulated the current Fruits test:

> the challenged state action must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm. This test involves a twofold inquiry: (1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?[236]

Drawing from *Poor Richard*'s "twofold" framework, the court established a form of heightened review for Fruits cases, making clear that rational basis review as conceived in the federal system is inappropriate.[237] We make two points on this score.

First, regarding prong (1), the court will not blindly defer to the State's asserted "purpose" for the interference. Rather, the court will identify the government's *actual* purpose and then ask whether that purpose is

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233 *See* SCALIA & GARNER, *supra* note 222, at 174–79 (Surplusage Canon).

234 *Id.* at 183–88 (General/Specific Canon).

235 *See infra* Section 5.2.1.

236 904 S.E.2d 720, 726 (N.C. 2024) (cleaned up).

237 *Id.*

proper.[238] This requires two layers of critical review at the outset. The court, drawing lessons from *Roller v. Allen* and *State v. Ballance*, emphasized that the actual purpose "may not always be the purpose initially put forward by the State."[239] Indeed, a plaintiff may *rebut* the purpose asserted by the State by providing evidence to the contrary.[240]

Second, and regarding prong (2), the court will engage in a "fact-intensive analysis" balancing the effectiveness of the State's action against the burden imposed on the plaintiff.[241] The court will meaningfully review the State's actions to determine whether it was "reasonable for the state to choose this approach, with its corresponding benefits and burdens[.]"[242]

In formulating this framework, the court signaled its doctrinal support for precedent such as *State v. Ballance*, *Roller v. Allen*, and *Poor Richards* that critically and meaningfully reviewed instances of government interference. The principles underlying these cases will continue to guide the court in crafting Fruits doctrine in this new era.

4.3.2. When There Is Statutory or Constitutional Authority—*Ace Speedway* Test

Conversely, when the government acts with authority, there must be a second step to determine whether the government's infringement on the Fruits right was justified. *N.C. Bar & Tavern Association v. Cooper* presents a clean case that makes it to the second step.[243]

Another COVID-era case, *N.C. Bar & Tavern* involves a challenge by an industry group to the governor's executive order which shuttered their bars at a time when everyone needed a drink.[244] Nonetheless, the order allowed restaurants with bars in them to remain open, as well as breweries, distilleries, and wineries.[245]

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238 *Id.* at 726–27.

239 *Id.* at 727.

240 *Id.*

241 *Id.*

242 *Id.*

243 N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 355 (N.C. Ct. App. 2024), *aff'd in part, rev'd in part sub nom.*, N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 284 (N.C. 2025).

244 *Id.* at 360–61.

245 *Id.*

There was no doubt that the governor was acting with statutory authority, relying as he was on the broadly sweeping executive powers under the emergency statutes.[246] In defense of the distinction between bars and restaurants with bars, the governor claimed that bars presented a greater risk than those establishments in the other categories and announced at a press conference that the decision was made based on "data and science."[247]

The association submitted public records requests the day after the press conference, requesting the governor to provide the science and data upon which he based his decision.[248] The data was not provided until four months later, several months after the association filed a suit for injunctive relief.[249]

The association was not impressed with what it received. The association amended its complaint to include, among other claims, a violation of the Fruits Clause.[250] The trial court denied the association's motion for summary judgment and dismissed the complaint in its entirety.[251]

On appeal, the Court of Appeals reversed and rendered summary judgment on the Fruits claim.[252] The court first examined the scope of the right. It looked at other cases applying the clause to licensing requirements, government employment, and industry regulation to conclude that the clause is implicated "when a government actor shuts down an entire industry, here the bar industry."[253] It found that clause still applies "even when a government official acts with the best stated purposes."[254]

In its analysis, the court engaged in a "careful review of the Record."[255] It did so with an eye toward identifying if the exercise of government power was "overbroad, unequally applied, or otherwise not carefully targeted at achieving the stated purpose."[256] It determined that, under the

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246 N.C. GEN. STAT. § 166A-19.30.
247 *Cooper*, 901 S.E.2d at 361.
248 *Id.* at 361.
249 *Id.*
250 *Id.*
251 *Id.*
252 *Id.* at 374.
253 *Id.* at 368.
254 *Id.* at 369.
255 *Id.* at 370.
256 *Id.* at 369.

Fruits Clause, its obligation was to "attempt to square [the governor's] reasoning for precluding Plaintiffs' bars from the opportunity to reopen under the specified guidelines that, for example, restaurants had, with their stated ability to follow the same guidelines as restaurants."[257]

Since the bars in this case were equally capable of meeting the conditions imposed on other classes of establishments, the challenge turned on whether the government had a reasonable basis on which to treat the bars differently.[258] The government's proffered reason for the distinction it made was that the "science and data" showed that private bars were at higher risk than private restaurants.[259]

The governor submitted the following "science and data" as the basis for treating bars differently in his May 2020 executive order: a *Washington Post* article from September 2020 claiming that there was a relationship between foot traffic at bars and the number of COVID cases three weeks later, an opinion piece at *NPR* claiming that "Bars Are Fueling COVID-19 Outbreaks" without citing any scientific studies, an article reporting on an outbreak at a Louisiana bar that did not address any particular risk at bars compared to other establishments, a single scientific study from four months after the fact about COVID-19 generally that does not address bars, and his own executive order issued almost eight months later saying that "studies have shown that people are significantly more likely to be infected with COVID-19 if they have visited a bar or nightclub for on-site consumption."[260]

In short, the governor provided no "science and data" which could have actually served as the basis for his decision at the time that he made it. The only basis for treating bars differently from restaurant bars, then, was "speculat[ion]," which is not a rational basis upon which to infringe upon the right of the people to the fruits of their own labor.[261] Echoing analysis under the Administrative Procedure Act, the court found the governor's distinction "arbitrary and capricious" and directed the entry of partial summary judgment, finding a violation of the Fruits Clause.[262]

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257 *Id.* at 369–70.
258 *Id.*
259 *Id.* at 370.
260 *Id.* at 370–71.
261 *Id.* at 371.
262 *Id.* at 369, 371, 374.

The case made it to the North Carolina Supreme Court, which largely agreed, although it remanded the case.[263] The court distinguished between the equal protection claim—for which it found "at least some conceivable basis"[264]—and the Fruits claim, for which it found that the Court of Appeals had applied too *low* a standard, given its invocation of the lack of a rational basis for the governor's actions.[265] The court reiterated the Fruits test as laid out in *Ace Speedway*: (1) the court will look for whether the "actual purpose" of the government action is a "proper governmental purpose," which is one that "addresses the public interest and promotes the accomplishment of a public good, or prevents the infliction of a public harm."[266] Then, (2) if there is an actual proper purpose, the court will analyze in a "fact-intensive inquir[y]" whether "the means chosen to effect that purpose are reasonable," by "balanc[ing] . . . the public good likely to result against the burdens resulting to the businesses being regulated," taking into account "how effective [] the state action [is] at achieving the desired public purpose."[267] This is a "question of degree—given all the options available to the state to advance the governmental purpose, was it reasonable for the state to choose this approach, with its corresponding benefits and burdens?"[268]

In short, the court drew a clean line between what it sees as the minimum rationality test and North Carolina's Fruits standard, even in an extreme case that the Court of Appeals would have found failed under both. The case now sits at the trial court for more factual development. Only time will tell what the fact-intensive inquiry will yield.

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The cases discussed here provide some guideposts on the scope of the right and the test for identifying a violation, but they also present important—and thus far, unanswered—remedial questions that, in any comprehensive scheme to protect the people's fundamental right to the fruits of

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263 N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 684 (N.C. 2025).

264 *Id.* at 696.

265 *Id.* at 694.

266 *Id.* at 693 (internal quotation marks omitted) (citation modified).

267 *Id.* at 693–94 (internal quotation marks omitted) (citation modified).

268 *Id.* at 694.

their own labor, must also be answered. The next part tackles those questions.

5. REMEDIES

Ace Speedway and *N.C. Bar & Tavern* established a workable Fruits Clause test, but left the question of remedies for a later decision.[269] The remedies issue is complicated by the tension between citizens' desire for meaningful redress and the government's fear of unlimited damages claims when it violates constitutional rights. This part lays out North Carolina's constitutional remedies doctrine and proposes a remedial solution for Fruits claims that balances the interests in a way that is consistent with the state constitutional standards created in *Corum v. University of North Carolina*[270] and further developed in *Washington v. Cline*.[271]

5.1. North Carolina Constitutional Remedies Doctrine

Consistent with the common law principle that there is no right without a remedy,[272] the North Carolina Constitution declares that "[a]ll courts shall be open; every person for an injury done him . . . shall have remedy by due course of law."[273]

Corum lays out how the courts approach remedies for violations of constitutional rights. The creation of a common law remedy by the judicial branch against the other branches is strong medicine. Thus, "[w]hen called upon to exercise its inherent constitutional power to fashion a common law remedy . . . the judiciary . . . must bow to established claims and remedies."[274] To reduce friction between the branches, the court must satisfy two prongs before creating a remedy. First, there must be no adequate state law

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269 Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 729–30 (N.C. 2024); N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 355, 360, 371–72 (N.C. Ct. App. 2024), *aff'd in part, rev'd in part sub nom.*, N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 284 (N.C. 2025).

270 413 S.E.2d 276, 291–93 (N.C. 1992).

271 898 S.E.2d 667, 668–69, 670–73 (N.C. 2024).

272 *See infra* note 340 and accompanying text.

273 N.C. CONST. art. I, § 18.

274 *Corum*, 413 S.E.2d at 291.

remedy.[275] Second, the remedy must be the least intrusive necessary to right the wrong.[276]

An adequate alternative exists where the plaintiff has an opportunity to be heard and, if successful, to get some form of relief.[277] A remedy need not be a complete one to be adequate, but "one that meaningfully addresses the constitutional violation, even if the plaintiff might prefer a different form of relief."[278] Where the legislature has provided a direct way for people to receive relief, and the relief is meaningful, the judiciary need not intervene.[279] Still, the meaningfulness requirement has teeth, rejecting remedies which are only available in theory, such as those barred by sovereign immunity.[280]

Some cases have suggested a more aggressive adequacy standard, allowing a claim when the "type of remedy sought" is not otherwise provided.[281] Justice Earls made a strong argument that supplemental remedies should be allowed because partial remedies, even if strong, do not redress every injury a citizen may suffer.[282] Under this reading, a remedy cannot be adequate unless it "fully vindicate[s]" the constitutional right.[283] She also argued that an adequate remedy must also "pack[] enough sting" to "meaningfully deter future government illegality."[284]

But this maximalist reading cannot be the rule. This approach would take two prongs (adequacy and least intrusive) pointing toward judicial restraint and find that the test is never satisfied unless a statute gives exactly the same remedy as the court would give or the plaintiff has asked for. This approach would never "bow to" existing remedies.[285] *Cline*, by contrast, strikes the right balance by requiring meaningful relief but deferring to the

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275 *Id.*

276 *Id.*

277 *Cline*, 898 S.E.2d at 669.

278 *Id.* at 671.

279 *Id.*

280 *See* Craig v. New Hanover Cnty. Bd. of Educ., 678 S.E.2d 351, 355 (N.C. 2009).

281 *Cline*, 898 S.E.2d at 678 (Earls, J., dissenting) (quoting Deminski v. State Bd. of Educ., 858 S.E.2d 788, 794 (N.C. 2021)).

282 *Id.* at 673–74.

283 *Id.* at 678–79.

284 *Id.* at 674, 677.

285 *Id.* at 671 (majority opinion).

legislature if it takes the initiative in shaping that real relief. Consistent with *Corum*'s admonition that courts must fulfill their "responsibility to protect the state constitutional rights of the citizens" by taking a hard look at adequacy and ensuring that remedies are meaningful and not only theoretical, *Cline* suggests that judicial review of alternative remedies is not reflexively deferential.[286]

So in *Cline*, where the remedy sought was money damages for a violation of the constitutional right to a speedy trial, the defendant was denied that remedy because he had the opportunity to raise the argument in court pursuant to a state statute for which the remedy provided was dismissal of charges with prejudice.[287] That remedy is not just adequate, it has even been characterized as, from the government's perspective, a "severe remedy."[288] And for Cline himself, the statute provided more than just the *opportunity* to get a dismissal—his convictions for kidnapping, robbery, burglary, and attempted sex offense were in fact dismissed with prejudice.[289]

On the second prong, courts are directed that, "in exercising [its inherent constitutional] power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong."[290]

The facts of *Corum* involved a tenured university professor who was allegedly removed from his deanship in retaliation for his protected speech relating to the fate of a certain artifact collection.[291] In his opinion, administrators had tried to disguise and hide the controversial move which would have divided the collection, and Dr. Corum made his opposition known publicly while trying to convince them to change their minds.[292]

While it would ultimately be up to the trial judge to fashion the remedy if Dr. Corum prevailed at trial, the court suggested that there are some cases where nothing less than damages would do.[293] While reinstatement to

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286 *Id.* at 672–73; Corum v. Univ. of N.C., 413 S.E.2d 276, 290 (N.C. 1992).

287 *Cline*, 898 S.E.2d at 672 (citing the Criminal Procedure Act, N.C. GEN. STAT. § 15A-954(a)(3) (2023)).

288 *Id.* (quoting Barker v. Wingo, 407 U.S. 514, 522 (1972)).

289 *Id.* at 669; *see* Washington v. Cline, 833 S.E.2d 219, 220 (N.C. Ct. App. 2019).

290 *Corum*, 413 S.E.2d at 291.

291 *Id.* at 280–82.

292 *See id.* at 281–82.

293 *Id.* at 290–91.

the prior deanship could have been a less intrusive remedy, the court did not close the door on a remedy for lost wages for a completed violation of the speech right—an injury for which nothing other than damages would seem to remedy.[294]

Other cases inform the work that "least intrusive remedy" does, and they reveal that effect on the treasury is not the lodestar of intrusion; rather, the prerogative of the other branches is. For example, where the violation of the right was to an opportunity to receive a sound basic education, the remedy would require that education to be provided on a forward-looking basis, which makes sense because of the ongoing violation of the positive right.[295] While this may have left no remedy for past violations, an injunction to bring the education to a certain level (without specifying the means by which the legislature must do so) corrects the wrong of the denial of the positive right, which is more valuable to the student and less intrusive on both the treasury and, more importantly, the legislature's prerogative to design the school system.[296]

Leandro considered a restricted remedy at first—threatening to declare a violation and to send that declaration to the legislature for reconsideration with a strong suggestion to correct the violation.[297] Nevertheless, that remedy was sent with a threat of greater intrusion if the legislature did not sufficiently correct the deficiency.[298] And the court later followed through with the threat.[299] Whether the court went too far in doing so is a different question, but the gradation of remedies for ongoing violations provides some sense of what a "least intrusive" remedy is going for.

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294 *See id.* at 291.

295 *See* Leandro v. State, 488 S.E.2d 249, 261 (N.C. 1997).

296 As in the sovereign immunity context, declarations and injunctions can be very expensive to comply with, even if federal courts are unable to enter damages judgments against the state directly, such as when they order a state to run an integrated school system or to build a new prison. *See, e.g.*, Williams v. Edwards, 547 F.2d 1206, 1218–19 (5th Cir. 1977).

297 *See Leandro*, 488 S.E.2d at 261.

298 *See id.*

299 *See generally* Hoke Cnty. Bd. of Educ. v. State, 879 S.E.2d 193 (N.C. 2022) (after decades of deference, holding that an order to disburse funds from the treasury without following the usual constitutionally required appropriations process is an appropriate remedy under *Corum* to enforce constitutional right to the privilege of education).

5.2. Application of Remedies Doctrine to Fruits Claims

To be sure, courts can reasonably come to different conclusions as to what remedies are adequate and the least intrusive in a given case. The court in *Corum* itself directed its instructions to the trial judge, who must "craft the necessary relief."[300] Based on the general contours that the court laid out to guide that craft, the more recent COVID cases raise important remedial issues in a new context. We next offer some principles to help guide the remedial questions likely to arise as the Fruits Clause begins to get more action in the trial courts.

5.2.1. *Ace Speedway*

In *Ace Speedway*, the parties disagreed about whether the possibility of an injunction provided an adequate remedy. The Secretary argued that Ace had an opportunity to raise its arguments and receive a remedy by opposing the preliminary injunction to enforce the abatement order.[301] She argued that allowing damages later would be "[r]ewarding Ace's inaction," and she pointed out that some other businesses were successful in enjoining the executive order (which was not even the order that Ace was challenging), demonstrating that the remedy is more than theoretical.[302]

Ace argued that no case law supported the Secretary's "injunction-first" theory and that damages need not be shown to be least intrusive at the pleadings stage.[303] Ace also cited a private law case which supported the common law proposition that equitable remedies will be denied if there is adequate remedy at law.[304] Ace finally argued that it had no opportunity to seek an injunction because it was already a defendant in the enforcement proceeding.[305]

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

301 Secretary Brief, *supra* note 184, at 71–72.

302 *Id.*

303 Ace Brief, *supra* note 183, at 42.

304 *Id.* at 43 ("The court's equitable intervention is obviated when an adequate remedy at law is available . . . ." (quoting Embree Const. Grp., Inc. v. Rafcor, Inc., 411 S.E.2d 916, 920 (N.C. 1992))).

305 *Id.* at 44.

On our view, Ace is wrong about the traditional common law rule. While it holds true in contracts cases where the intrusion of a remedy like specific performance is significantly greater than provision of damages and could deter efficient breaches, the government has a different relationship to money damages than private parties. But that does not mean that injunctive relief is always inadequate or that damages are by definition less intrusive.

Similarly, we find the Secretary's exhaustion or mitigation theory is unpersuasive. First, this case was not one where Ace had already received a remedy or had an alternate administrative process to resort to. The cases the Secretary cited had those features, which were not present in this *Ace Speedway*. And second, the courts that weighed in on the question after the Secretary briefed the case explicitly rejected the argument, holding that when injunction claims are moot, their availability in the past does not prevent a suit requesting damages in the present.[306] *Corum* places the responsibility to craft remedies on the court, not the parties; therefore, mitigation and intrusion are pertinent at the remedies stage, not the pleadings stage.[307]

Ace had no adequate remedy other than damages. The Secretary's argument is effectively that a moot injunction claim is an adequate remedy for a completed constitutional violation that led to lost business. While Ace technically had an opportunity to receive some remedy, the fast-moving nature of emergency executive action and the substantive standards that govern preliminary relief resist the conclusion that the possibility of injunction—a possibility not even conferred by the legislature as part of the emergency statute—constitutes "meaningful" relief.

Timing matters. For example, in actions which quickly become moot, damages have been found appropriate because an injunction is not functionally available.[308] On the other end of the spectrum, statutes tend to continue into perpetuity absent injunction. Prospective relief against an infringing

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306 Howell v. Cooper, 892 S.E.2d 445, 451 (N.C. Ct. App. 2023), *appeal docketed and disc. rev. of add'l issues allowed*, No. 252A23, 900 S.E.2d 928 (N.C. May 30, 2024) (mem.).

307 *Id.*

308 *See generally, e.g.*, Est. of Fennell v. Stephenson, 554 S.E.2d 629 (N.C. 2001) (police excessive force).

statute meaningfully addresses the continuing injury, even if damages would be preferred in addition. Between these two poles on timing are the abatement and emergency executive orders at issue in *Ace Speedway* and *N.C. Bar & Tavern*.

Breadth of harm matters, too. Statutes, for example, tend to apply to broader classes of people and tend to target individuals or groups less specifically. Executive action, on the other hand, tends to vary more broadly. A statewide executive order relating to COVID-19 may be as broadly felt as any generally applicable statute, generating public injuries that are far closer to generalized grievances than they are to any particularized harm to individuals. A damages claim for a truly statewide order could essentially lead to an order for every citizen in the state to write a check to themselves. That would not make much sense.

Conversely, an abatement order that targets a single company, as in *Ace Speedway*, or a targeted provision of an executive order that affects a small group of companies, as in *N.C. Bar & Tavern*, will be more acutely felt. For affected persons, the smaller group means both that they are likely to have less political clout to advocate on their own behalf, as well as less resources to draw on to defend themselves. A statewide executive order is subject to litigation statewide, and a business in one corner of the state could benefit from litigation on the other side of the state. Not so with individual companies and smaller groups, who, if they are to litigate at all, must bear the burden themselves.

The Secretary could argue that an injunction prevents future injury by clearly establishing some lines for the government to not cross next time there is a once-in-a-century pandemic or other emergency, providing meaningful prospective relief. That may be true if an injunction can actually be obtained, but a moot claim paired with no damages means that the challenger will likely lack standing after the order expires. And in individually targeted cases like this abatement order, or for a once-in-a-century pandemic, the risk of future enforcement will likely be too remote to produce a ripe controversy.

Emergencies move quickly. The justice system does not. It only takes a day to get a TRO, so in theory an injunction is available before too much

harm accrues, but the substantive standards governing preliminary relief make this unlikely. When public health officials act on short notice and in quickly changing situations, the reasons for the judicial branch to defer are the greatest—second guessing could be dangerous to public health. The balance of equities will virtually always support leaving an abatement order in place, the public interest and risk of irreparable harm will almost always favor the government, and, without time for any discovery, the likelihood of success will be low, even under North Carolina's *Ace Speedway* Fruits standard. This remedy is thus largely illusory. Further, since preliminary relief is not a decision on the merits, it is not obvious that it even constitutes the day in court and opportunity to be heard that *Corum* requires.

While the Secretary may suggest that deference is a merits question, not a remedies question, that contention cannot be squared with the court's functional, common-law approach that looks to the end of the case for adequacy, not the beginning. Sovereign immunity is also mixed up with the merits question but nonetheless destroys adequacy.[309] While the possibility of preliminary injunctive relief cracks open the courthouse door to a remedy where sovereign immunity does not, the *Cline* standard is not met any time there is a *possible* remedy, but when there is a "meaningful" one.

So for temporary executive actions as in *Ace Speedway*, the court's functional approach suggests that if a full hearing and decision on the merits is unlikely to occur before the prospective remedy is moot, injunction is not a meaningful remedy, at least for orders affecting individuals or smaller groups who are less likely to benefit from facial challenges brought by others. For such actions, the availability of damages actually promotes the deference the State requests, providing an additional reason to deny preliminary relief by reducing the irreparable harm to the challengers—and leaving key public health measures undisturbed when they matter most.

Of course, the government may not see it that way. For the State, an injunction is just a slap on the wrist easily complied with, the other a real penalty that places at least a moral burden on the State that is more likely to deter even necessary (and not just inappropriate) action. The government

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309 Craig v. New Hanover Bd. of Educ., 678 S.E.2d 351, 354 (N.C. 2009).

may even argue that the courts have a heightened reason *not* to defer in an emergency to protect individual rights and prevent harms to the people at large through damages claims against the treasury—but it's hard to square that with the double deference given to preliminary relief for emergency public health measures. If reduced deference is a price the State has to pay to not be subject to damages, so be it, but the government consistently asked for deference in every COVID case, including in *Ace Speedway*, and has consistently received it from the courts.

Ace Speedway fits into the *Corum* pattern snugly. The action was by an executive officer, not the legislature, and was targeted at an individual business. Where an injunction was not available and was mooted once the abatement order changed, the business was already subjected to the entirety of the completed violation. There was no ongoing rights violation after the alleged emergency was over. Where the harm was being forced to follow an order later determined to be unlawful, causing lost business and profits, it's hard to see anything other than damages as adequate. Any remedy less intrusive would not be sufficient to remedy the wrong.

If and when the case makes it to that stage, allowing a damages claim in *Ace Speedway* would not be so intrusive that the State will start bleeding cash for its normal operations. Under the still-deferential *Ace Speedway* standard of review, if the government acts in good faith, damages are unlikely. The availability of damages is not so intrusive if the government usually wins. Very few individual businesses are ever subject to abatement orders. And resolving *Ace Speedway* in favor of damages requires a similar remedy for statewide executive orders.

5.2.2. *N.C. Bar & Tavern*

N.C. Bar & Tavern marks another point on the spectrum. The class of businesses affected by the executive order was broader than an individual

business, but still discrete and insular, representing around only 200 North Carolina establishments.[310]

We think that a group of this size being targeted is not so big as to be akin to the general public to preclude a damages remedy. Perhaps an order targeting all establishments that serve food or drink would be widespread and large enough that damages would not be appropriate. On the merits, such a ban would be far more defensible, and even if overbroad, the group is large enough and the burden evenly spread enough that such a ban would be more like a public burden.

There could be some moral hazard in this situation. A future governor, mindful about potential liability, may draw a health order broader rather than narrower to try to avoid the potential of damages. But the hazard is only apparent. It is tantamount to saying that a future governor is less likely to single out discrete classes for disparate treatment unless he has a good reason for doing so. That's all the *Ace Speedway* standard ever required, and even in the cases discussed here, the parties did not dispute that some measures were justified, provided they were applied to all those similarly situated.

There is some concern that plaintiffs given a damages remedy will drag their feet and rack up damages instead of seeking an injunction promptly. The government had advanced this concern as one that sounds like an exhaustion argument that applies to remedies rather than existing administrative procedures.[311] Where there is low chance of success, it would be perverse to require a citizen to try to interfere with emergency health policy before being eligible to seek the less-intrusive damages remedy. There may be a way to address this concern with some kind of mitigation of damages doctrine similar to that in other contexts, but in the meantime, the focus for the courts should be more on the responsibility of the government not to violate the constitutional rights of citizens than the responsibility of citizens to minimize their damages from those violations.

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310 Appellant's Brief at 13, N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 355 (N.C. Ct. App. 2024) (No. 126PA24), *discretionary rev. allowed*, 901 S.E.2d 232 (N.C. July 5, 2024) (mem.).

311 *Id.* at 31; Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

And nothing the court does prevents the General Assembly from providing a remedial process, like a disaster fund or by explicitly authorizing expenditures for violations with some kind of damages cap that will pass the "adequate" test if a court finds that various executive orders or public health measures violated the constitution to deal with the potential flood of claims to be made whole.

In sum, the current cases reveal some important considerations as courts wrestle with appropriate remedies and whether damages should be available: (1) the relative size of the affected group, (2) whether a violation is completed or ongoing, (3) the likely or actual timeframe of the issue, (4) the availability of injunctive relief in a final ruling on the merits before the case becomes moot, (5) the relevant standards of review at each potential remedial stage, (6) the existence of a targeted remedial scheme by the legislature, (7) the likelihood that the challenger will benefit from an injunction sought by other affected individuals, and (8) the nature of the government action.

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North Carolina faces a unique opportunity to develop more robust and nuanced protections and remedies for the right to the fruits of one's own labor. It has plenty of precedent to guide it, and recent cases have presented the courts with the opportunity to lay out a meaningful scope of the right, a test for a violation of that right, and a corresponding remedy. But because North Carolina is the only state to have a Fruits Clause in its constitution, do any of these developments have any relevance outside the state of North Carolina?

6. Implications for Other Jurisdictions

What lessons can be drawn from North Carolina's experience? Other courts may find inspiration to provide similar protection to the fundamental rights that, while enumerated in North Carolina's constitution, are just as present in the unenumerated or differently phrased property rights under other constitutions. The right to the fruits of one's own labor, however

conceived, is a fundamental and natural right; therefore, North Carolina's experience is legitimately applicable in every court across the nation.

North Carolina's experiment has the potential to model a recalibration of protections for the fundamental right to some measure of economic liberty. The last decades of jurisprudence and scholarship have shown that, while *Lochner* may have been too aggressive in application, the case and the doctrine it embodies was not quite as bad as the legends about it suggest. Similarly, the response to *Lochner* embodied in *Lee Optical* adopting a virtual legislative supremacy over certain fundamental economic rights[312] swung too far the other way. North Carolina has the opportunity to develop and model a more balanced approach.

Protections for natural rights are exactly the kind of matter best suited for the laboratories of democracy. States cover less people, making the risk of error in experimentation significantly lower. They can adjust or adapt to specific circumstances on the ground, producing a more tailored approach than the U.S. Supreme Court can in ruling for the entire nation. And if the Supreme Court ever shifts back toward protecting economic liberties and other natural rights with a stronger hand, the presence of state experimentation will give them more datapoints to work with and reduce the level of disruption in states that have already moved the needle—the move then would be an act of collective recognition across the country rather than an imposition from on high.

6.1. The Right Protected by North Carolina's Fruits Clause is an Inalienable Natural Right

If the abolitionists were correct, the right protected by the Fruits Clause, while unenumerated or bundled up with property rights in other constitutions, is universal.[313] Whether treated as a Lockean natural right or a right deeply rooted in our nation's history and tradition and implicit in the

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312 *See supra* text accompanying notes 58–63; *Lee Optical*, 348 U.S. at 488.

313 N.C. CONST. art. I, § 1 ("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 these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); *see supra* Part 2.

concept of ordered liberty, there is no reason to believe that the right is limited to North Carolinians.

Economic liberty fits comfortably in the prevailing substantive due process test for identifying unenumerated fundamental rights.[314] That test looks for those rights "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty."[315] There are certain "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[316] The *Glucksberg* test is necessarily conservative in its identification of unenumerated fundamental rights—when recognizing constitutional protections, courts reduce the universe of choice that the elected branches have to adjust to changing circumstances.[317] Thus, to ensure that the courts do not stray into merely constitutionalizing their policy preferences in a vague term like "liberty,"[318] we look to "[o]ur Nation's history, legal traditions, and practices" to provide "guideposts for responsible decisionmaking."[319]

Fitting comfortably within that test is the right of individuals to order their own affairs and pursue happiness[320] in lawful ways of their choosing, "to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."[321] When identifying fundamental liberty rights under the Fifth and Fourteenth Amendments, the Court regularly looks to the Bill of Rights and U.S. Constitution

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314 The same would likely be true if the Privileges or Immunities Clause was the place the Court looked for these rights. *See, e.g.*, McDonald v. Chicago, 561 U.S. 742, 813–50 (2010) (Thomas, J., concurring); JOHN HART ELY, DEMOCRACY AND DISTRUST 22–30 (1980).

315 Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

316 Palko v. Connecticut, 302 U.S. 319, 325 (1937) (internal quotation marks omitted).

317 *See Glucksberg*, 521 U.S. at 720.

318 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239 (2022) ("We all declare for Liberty; but in using the same word we do not all mean the same thing" (quoting Abraham Lincoln, *Address at Sanitary Fair in Baltimore, Md.* (Apr. 18, 1864), *reprinted in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 301 (R. Basler ed., 1953))).

319 *See Glucksberg*, 521 U.S. at 721.

320 N.C. CONST. art. 1, § 1; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

321 Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

for historical guidance in identifying deeply rooted rights.[322] In the Contracts Clause and the Thirteenth Amendment, the right to the fruits of one's own labor and to order their private affairs finds ready support.[323] The Court also looks to the "Anglo-American common-law tradition" to find deep roots.[324]

No one sums up the deep tradition of these natural liberties better than James Wilson:

> Nature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections. If all this be true, the undeniable consequence is, that he has a right to exert those powers for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some publick interests do not demand his labours. This right is natural liberty.[325]

Of course, not even the *Lochner* Court treated these fundamental rights as absolute, or even subject to "strict scrutiny."[326] But the Court's later-breaking tiers-of-scrutiny approach[327] that calls for strict scrutiny when a right is labeled "fundamental," has done much to restrict the return of the right to the fruits of their own labor, or of contract, to the category where it

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322 *See Glucksberg*, 521 U.S. at 720.

323 U.S. CONST. art. I. § 10, cl. 1; *id.* amend. XIII.

324 *E.g.*, *Glucksberg*, 521 U.S. at 711–16.

325 2 THE WORKS OF JAMES WILSON 587 (Robert Green McCloskey ed., 1967).

326 Lochner v. New York, 198 U.S. 45, 53 (1905) (recounting that "[b]oth property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state").

327 *See* United States v. Rahimi, 602 U.S. 680, 731–32 (2024) (Kavanaugh, J., concurring) (describing how tiers of scrutiny "are a relatively modern judicial innovation" with "no basis in the text or original meaning of the Constitution" adopted "by accident" in the 1950s and 60s (first quoting J. Alicea & J. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFFAIRS (2019), https://perma.cc/SZ6D-8CGN; and then quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 125 (1991) (Kennedy, J., concurring))).

belongs.[328] While it has not been given protection consistent with the label, courts have continued to refer to economic liberty rights as fundamental and among those rights that, when the government seeks to restrict them, the "[d]etermination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."[329]

Even though the Ninth Amendment directs courts to not construe the enumeration of rights to deny or disparage other rights that are unenumerated,[330] that is exactly what the Court appears to have done in some contexts, peaking with Justices Black[331] and Scalia,[332] who unabashedly rejected any role for the courts to protect the unenumerated rights of the people against the government. This was the fear of the Federalists when they opposed a Bill of Rights and argued that one was "not only unnecessary . . . , but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted."[333] While in a system that recognizes the people as the sovereign, such a provision is not strictly necessary because "in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations," the risk is nonetheless real.[334]

The modern view is out of step with the Founders. For instance, James Iredell, a Washington appointee to the Supreme Court from North Carolina, recognized that for any "collection or enumeration of rights" someone made, he could "immediately mention twenty or thirty more rights not

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328 *See* Reno v. Flores, 507 U.S. 292, 302 (1993) (holding that the Fourteenth Amendment "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest").

329 Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

330 U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

331 Griswold v. Connecticut, 381 U.S. 479, 508, 512 (1965) (Black, J., dissenting).

332 Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) ("[T]he Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them . . . .").

333 THE FEDERALIST NO. 84, *supra* note 17, at 579 (Alexander Hamilton).

334 *Id.*

contained in it."[335] As the First Congress was debating the details of the Bill of Rights, Theodore Sedgwick mocked the exercise, asking why not also specify "that a man should have a right to wear his hat if he pleased, that he might get up when he pleased, and go to bed when he thought proper."[336] Surely these were rights the people retained. In this way, Sedgwick could just have easily objected if the Bill of Rights did not contain protections for the freedom of speech (or if the First Amendment were repealed)—that right does not come from the Constitution, so it would be foolhardy to interpret its exclusion as an authorization for the government to abridge it without justification.[337] The Founders' fear of enumerated rights doing harm to unenumerated ones has been fully realized.

While the federal doctrine has fallen away from the understanding of the Founders, state courts need not follow. They have equal (and perhaps greater) warrant to provide protection to this fundamental right. They can do this through their own due process clauses or other provisions recognizing the inalienable rights of the people. Two-thirds of the states have Baby Ninth Amendments guaranteeing protection for unenumerated rights.[338] Many states even have Baby Tenth Amendments that go even further than providing rights protection by indicating that the *power* to violate these rights was never delegated in the first place.[339] Many state courts also adhere to the robust traditional understanding that a right without a remedy is no right at all.[340]

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335 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 167 (Jonathan Eliot ed., 1836).

336 CREATING THE BILL OF RIGHTS 159 (Helen E. Veit et al. eds., 1991) (statement of Theodore Sedgwick, Aug. 15, 1789).

337 *See* HADLEY ARKES, BEYOND THE CONSTITUTION 77 (1990).

338 ANTHONY B. SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS 5 (2023).

339 *See id.* at 27–30.

340 *E.g.*, N.C. CONST. art. I, § 18 ("[E]very person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."); MISS. CONST. art. 1, § 24; ALA. CONST. art. 1, § 13; ALASKA CONST. art. 1, § 16; CONN. CONST. art. 1, § 10; DEL. CONST., DECLARATION OF RIGHTS § 14; *accord* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23)).

The right protected by North Carolina's Fruits Clause is a natural, fundamental, inalienable right, protectable by every court in the country. But North Carolina's experiment is not the first place other courts can look for lessons in protecting fundamental economic liberties.

6.2. Lessons from *Lochner*

As North Carolina and other courts evaluate the landscape of constitutional protections for economic rights, they may be spooked by the prospect of (or cowed into submission as a result of being accused of) participating in "Lochnerism." But they should not be afraid to engage in thoughtful analysis; the legends about *Lochner* exceed the reality. And the "rational basis" regime that has followed *Lochner*, epitomized in *Lee Optical* is more problematic than is generally assumed—risking as it does a descent into might-makes-right legislative supremacy.

6.2.1. *Lochner*'s Legendary Status

Lochner was not quite as bad as its reputation suggests. Whatever lessons are to be learned from the *Lochner* era, the Court was wrong in *West Coast Hotel* to say that there is no basis for protecting unenumerated natural rights against the government. If *Lochner* was wrong, its error was in application, not in rejecting legislative supremacy over economic rights.

Lochner has found a small, but growing cadre of defenders in recent years, though they recognize that position as one where they are "asked to offer some reflections on the jurisprudence of Darth Vader, or to consider whether [they] might revisit the subject of dueling and say a few redeeming words for that institution, now faded."[341] Nonetheless, *Lochner* "must surely

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[341] HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS 79 (2010); *see also generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011) (arguing that the common wisdom about *Lochner* has been widely misunderstood and unfairly maligned); Randy E. Barnett, *After All These Years,* Lochner *Was Not Crazy—It Was Good*, 16 GEO. J.L. & PUB. POL'Y 437 (2018) (defending *Lochner* as a "reasonable and good decision" in a debate against Akhil Amar).

stand as one of the most reviled—and persistently misunderstood—cases in our constitutional law."[342]

The record of the *Lochner* era was, in light of the legend surrounding it, surprisingly deferential to legislatures. The Court upheld the vast majority of economic regulations that came before it, including other restrictions on working hours and even compulsory vaccinations.[343] *Lochner* appears to be the outlier case of the *Lochner* era.

Lochner was an exceptional case. The law was defended as a health requirement, but was enacted as part of the labor code.[344] The State had already regulated the working conditions to make them more safe, including the tiling of floors, the provision of washrooms, the heights of the ceilings, proper drainage, plumbing, and painting, and providing inspections and safety enforcement mechanisms.[345] For a law that was purportedly aimed at protecting the health of bakers, it was odd that it excluded half of the baking establishments in the state and did not seek to protect the owners of bakeries and their families, including children.[346] That the regulations excluded bakers at "hotels, restaurants, clubs, boardinghouses, and even in private households" while showing special solicitude for those working in bakeries led to the vast majority of bakers covered by the regulation being those employees who were most likely to be "members of the bakers' union."[347] Those small bakeries that could not afford the unions, but hired one or two employees who worked long hours were out of luck, and many of them had to close,

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342 ARKES, *supra* note 341, at 79.

343 *Id.* at 97 (allowing health-based limitation of hours for workers at smelting plants (citing Holden v. Hardy, 169 U.S. 366 (1898)); *see generally* Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901) (allowing requirement that owners of mines redeem coal for cash when workers were paid in kind); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (allowing compelled vaccination for public health and safety); Petit v. Minnesota, 177 U.S. 164 (1900) (allowing requirement that barbershops be closed on Sunday against economic liberty challenge); Holden v. Hardy, 169 U.S. 366 (1898) (upholding eight-hour working restriction for work in underground mines).

344 Lochner v. New York, 198 U.S. 45, 58 (1905).

345 *Id.* at 61–62.

346 ARKES, *supra* note 341, at 100–01.

347 *Id.* at 101.

"enlarging the portion of sales taken by the larger, more corporate factories like the National Biscuit Company."[348]

On top of these questionable dynamics was the nature and enforcement of the restriction itself. The law did more than protect workers from domineering employers demanding long hours, but declared that "no employee shall be required *or permitted* to work" more than ten hours in one day or more than sixty hours per week.[349] This was not merely a restriction on employers, but even prohibited employees from asking for overtime.[350] And it was enforced with *criminal* penalties.[351] The mere act of permitting an employee to work was a crime, and the law pitted "the right of the individual to labor for such time as he may choose" against the purported exercise of the police power for health.[352] The indictment charging Mr. Lochner contradictorily alleged both that he "permitted" and "required" the employee to work more than sixty hours.[353] While the state's justification for restricting employers from requiring more than sixty hours is easy to recognize, the restriction on voluntary work needed to be justified separately—and that the state failed to do.[354]

Courts frequently talk about the *Lochner* decision, and its approach to the law generally as a court "passing on the wisdom of legislation" or "substituting its policy preferences" for that of the legislature.[355] But that is not exactly what went on in *Lochner*. Certainly, in a sense, the decision can be characterized as evaluating a legislative policy judgment to limit the working hours of bakers, on pain of a criminal penalty, and that that was better than the alternative. But the Court's analysis did not really aim at policy wisdom,

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348 *Id.* (citing BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 116–19 (2d ed. 1980)).

349 *Lochner*, 198 U.S. at 52 (emphasis added) (internal quotation marks omitted).

350 *Id.*

351 *Id.*

352 *Id.* at 54.

353 *Id.* at 52.

354 *See* ARKES, *supra* note 341, at 88.

355 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

but whether the provision, as written, could fairly be characterized as an exercise of the police power to advance health at all.[356]

But the facts, other laws, substantial underinclusivity, and greater context led the Court to conclude that the State, in restricting the acknowledged rights of workers, could not provide any health argument based on working hours that was anything other than "shadowy and thin."[357] One that, if accepted as a justification to interfere with the freedom of workers, would allow for a state which could supervise "every act of the individual," including "his hours of exercise, the character thereof, and the extent to which it shall be carried."[358] And it could extend to every profession, since any work at all could theoretically be less healthful than not working or that, since office buildings have "artificial light" and the "sun never shines," restrictions on the working hours of lawyers and bankers would be health laws.[359] All the Court was looking for was "some fair ground," some distinguishing feature about baking which could supply a "plausible foundation" for the claim that the law regulated for health or welfare more than "the possible existence of some small amount of unhealthiness."[360] Lacking any evidence that working hours had any "direct relation to" or "substantial effect upon" employee health or welfare to any "real" degree, the law could not be considered anything other than a regulation of how individuals wished to spend their time—a regulation outside the police power of the state.[361] And the Court refused to cabin the purported justifications for the law to bakers, but examined what the principled results would be if the purported justifications were accepted as justifying interference with individual rights.

Nevertheless, the state of the evidence may not have been as one-sided as the Court claimed. The principal dissenters, while acknowledging

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356 *Lochner*, 198 U.S. at 56–57 ("This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.").

357 *Id.* at 62.

358 *Id.*

359 *Id.* at 59–62.

360 *Id.* at 59, 61–62.

361 *Id.* at 64.

that the "liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good," would uphold any statute unless it is has "no real or substantial relation to [the police power], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[362] They found that in bakeries, "as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors" and relied on Treatises on workers diseases about the problems of flour dust in the air, and New York's own reports that shorter working hours "promise to enhance the industrial efficiency of the wage-working class" and "intelligence," while "allowing higher standards of comfort and purer family life."[363] The dissent approached the question as what the proper line is for the number of hours the state should allow bakers to work, with ten hours being the "middle ground" that New York reached.[364]

It would have been helpful if Lochner had shown to the court that the alternative measures adopted (which do not themselves invade any individual rights of the worker), indeed reduced the risk to workers of inhaling flour substantially enough, or if mandated ventilation was only partially effective, but not technologically advanced enough to be sufficient to mitigate the potential hazards. Evidence was necessary to counter the presence of those risks to show the lack of rationality in the additional restriction. But surely the answer to the factual question of whether the physical safety provisions in fact made the air safe to breathe should matter—the right to earn a living and to the fruits of your own labor can only justifiably yield to real reasons for their restriction, not "any reasonably conceivable state of facts that could provide a rational basis."[365]

6.2.2. *Lee Optical* Swung the Pendulum Too Far

The new era is not quite as good as its proponents claim. While judicial restraint is no doubt a virtue, judicial modesty can go too far—leaving

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362 *Id.* at 68 (Harlan, J., dissenting).

363 *Id.* at 70–71.

364 *Id.* at 72.

365 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

the constitutional rights of individuals unprotected from the whims of the other branches in a scheme of effective legislative (or executive) supremacy.

The rational basis test itself may be a bit of a misnomer, with one of its harshest critics describing the test as "insane" rather than "rational," as measured by the definition of "the inability to tell right from wrong," and as one examining no "basis" because of its endorsement of "speculative and hypothetical" factual scenarios, and as involving no "test" because of its lack of principled results, so much so that the test has become a "Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor."[366] The result of the test is a variety of otherwise "bizarre phenomena that would never be tolerated in any other setting," namely, "judges simultaneously recognizing and refusing to protect fundamental constitutional rights; permitting government lawyers and witnesses to misrepresent—or at least disregard—material facts; preferring conjecture over evidence; [and] saddling plaintiffs with a burden of proof that is technically impossible."[367]

While we view the federal rational basis test with more charity than our fire-breathing colleague, its standard no doubt swung the pendulum too far. While the test makes sense for answering the question of whether the legislature has the *power* to pass a law, an additional premise is necessary to conclude that the existence of that power means that the various fundamental *rights* must *yield* to that power. If *Lee Optical* is meant only to mark the outer bounds of what legislatures are empowered to do in response to factual circumstances on the ground, few would have any objection to it. But as a test that purports to provide some level of protection for the acknowledged fundamental rights[368] of those who do not fit within certain protected classes who receive special solicitude,[369] we agree with the sentiment that it

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366 Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 897, 897 (2006).

367 *Id.*

368 *See, e.g.*, Connecticut v. Gabbert, 526 U.S. 286, 292 (1999) (acknowledging the "right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation" (citing Dent v. West Virginia, 129 U.S. 114 (1889))).

369 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

disparages those rights to "appoint as [their] sole guardian the rational basis test."[370]

While few would deny the legislature the power to respond to any conceivable state of facts, we suspect few would think their mere *ability* to respond to a contingency is a sufficient *justification* for infringing on *any* fundamental right unless the contingency in fact occurs.

It is a fundamental principle that power cannot be the source of its own justification: "[T]o admit that Might makes Right is to reverse the process of effect and cause."[371] If a right that we recognize is indeed a right, "what validity can there be in a Right which ceases to exist when Might changes hands?"[372] Even the current rational basis test acknowledges that law requires more than following the established procedures of bicameralism and presentment by a body with power to make law. Rather, laws that restrain fundamental rights must have some substantive characteristics that go beyond the mere whim of the sovereign. Few have endorsed a regime of true plenary authority for the legislature,[373] though some courts have, in effect, come mighty close to it with the federal rational basis test and highly deferential constitutional standards of review.

Even if a state rebalances the test for infringements of fundamental economic liberty rights, states that embrace "Thayerism"[374]—those which insist upon the plenary power of state legislatures and refuse to strike down statutes unless they violate an express provision of the state constitution "beyond a reasonable doubt"[375]—will face an additional hurdle for vindicating

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370 Neily, *supra* note 366, at 913.

371 JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, *in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 169, 173 (Ernest Barker ed., 1962).

372 *Id.*

373 One notable dissenter on this point was Justice Black, who in *Griswold v. Connecticut*, expressed the view that courts should not set aside legislative policies even if they are "unreasonable, unwise, *arbitrary, capricious or irrational*," but only if the statute at issue violates "certain specific constitutional provisions . . . ." 381 U.S. 479, 508, 521 (1965) (Black, J., dissenting) (emphasis added). He concluded that the government had the "right to invade" the fundamental rights of individuals "unless prohibited by some specific constitutional provision." *Id.* at 510.

374 *See* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 58–62 (2022) [hereinafter SUTTON, WHO DECIDES?].

375 James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149–51 (1893).

those rights. Although the practice has been in decline since the New Deal due in part to its indeterminacy and apparently selective invocation,[376] some courts, including those in North Carolina, have continued to embrace this standard over the years.[377] The approach was based on an assumption that because broadly worded constitutional provisions are vague and somewhat indeterminate, in order to allow for "the great, complex, ever-unfolding exigencies of government," courts should stay away and adopt the view that any choice by the legislature which "is rational is constitutional."[378] In much the same way that, before the doctrine was overruled, courts under *Chevron U.S.A. v. Natural Resources Defense Council* deferred to agency interpretations of their own grants of authority to bring their expertise to bear and update broadly-worded statutes for current circumstances,[379] so too does the Thayer approach, which has a disputed historical pedigree as an original matter,[380]

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376 *See* Cass R. Sunstein, *Thayerism*, U. CHI. L. REV. ONLINE *11–19 (2024).

377 *See, e.g.*, McKinney v. Goins, 911 S.E.2d 1, 7 (N.C. 2025); Harper v. Hall, 886 S.E.2d 393, 414–15 (N.C. 2023); Cmty. Success Initiative v. Moore, 886 S.E.2d 16, 32 (N.C. 2023); Holmes v. Moore, 886 S.E.2d 120, 129 (N.C. 2023); State v. Strudwick, 864 S.E.2d 231, 240 (N.C. 2021); State v. Grady, 831 S.E.2d 542, 553 (N.C. 2019); Cooper v. Berger, 809 S.E.2d 98, 111 (N.C. 2018); Hart v. State, 774 S.E.2d 281, 284 (N.C. 2015); Baker v. Martin, 410 S.E.2d 887, 889 (N.C. 1991); Gardner v. City of Reidsville, 153 S.E.2d 139, 150 (N.C. 1967); Am. Equitable Assurance Co. of N.Y. v. Gold, 106 S.E.2d 875, 876 (N.C. 1959); Nesbitt v. Gill, 41 S.E.2d 646, 651 (N.C. 1947); Glenn v. Bd. of Educ., 187 S.E. 781, 784 (N.C. 1936); Bickett v. State Tax Comm'n, 99 S.E. 415, 416 (N.C. 1919) (quoting Ogden v. Saunders, 25 U.S. 213, 270 (1827) (opinion of Washington, J.)).

378 G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 77 (1993).

379 *See* 467 U.S. 837, 844, 865–66 (1984), *overruled by*, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

380 *See generally* John O. McGinnis, *James Bradley Thayer and Judicial Restraint*, L. & LIBERTY (Dec. 19, 2019), https://perma.cc/DQ2M-E4BB; Derek A. Webb, *The Lost History of Judicial Restraint*, 100 NOTRE DAME L. REV. 289 (2024) (arguing that Thayerism, or something like it, was relatively well established as a matter of liquidation of meaning); Hugh D. Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt"*, 74 RUTGERS L. REV. 1429 (2022) (arguing that the formulation had some traction in state courts, but operates more as a rhetorical position rather than a doctrine); Anthony B. Sanders, *Reasonable Doubt About James Bradley Thayer*, 18 ELON L. REV. (forthcoming 2026) (arguing that the historical pedigree of Thayerism was weak, but became stronger after Thayer popularized it).

demand deference to legislatures interpreting their own grants of authority or the individual rights limiting their own authority.

The rational basis test is a version of Thayerism as applied to unenumerated (or in North Carolina's case, enumerated) rights. In response to *Lochner*, which was perceived to be a case of judicial policy overreach—in Justice Holmes's polemic, the Court constitutionalizing "Mr. Herbert Spencer's Social Statics"[381]—the New Deal Court, similarly zealous to preserve the majoritarian New Deal policies that were running up against limits on the power of the federal government, did a one-eighty. In the famous "switch in time that saved nine" case of *West Coast Hotel Co. v. Parrish*. The Court, under pressure from President Franklin Roosevelt's court-packing threat, in a 5-4 decision overruled its prior case, which had found wage-price controls to be unlawful infringements on the liberty of citizens.[382] It determined that, going forward, the Court would uphold statutes unless they were "palpably in excess of legislative power."[383] This newfound enthusiasm for deference culminated in the present rational basis test, that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[384]

We have great respect for, as applied to the states, the dual ethic that deference of this sort embodies: first, that the states, in contradistinction to the federal government, are not those of limited enumerated powers, but of more general grants of the police power; and, second, that deference to the political branches is warranted on questions of policy. But this "Thayerism" minimizes the role of the courts too much, warping the legitimate role of the judiciary as the referee of the proper authority of the political branches. Aside from a "beyond a reasonable doubt" standard sitting oddly when it comes to legal standards about conflicts with a constitution,[385] it also,

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381 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

382 300 U.S. 379, 400 (1937).

383 *Id.* at 398 (quoting Nebbia v. New York, 291 U.S. 502, 538 (1934)).

384 Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955).

385 *See* SUTTON, WHO DECIDES?, *supra* note 374, at 61 ("Thayer's 'beyond a reasonable doubt' formulation also takes an evidentiary form of proof and awkwardly gives it a linguistic task. Meaning is not determined by proof. It is determined by context and conventional tools for interpreting language.").

literally applied, would reduce all generally-worded provisions in state constitutions to a virtual nullity, such as "due process," the "law of the land," that "elections shall be free," the right to "the fruits of their own labor," or even the "freedom of speech." While perhaps it is easy enough to identify whether a law implicates one of these rights, it is a huge jump to reach the conclusion that any particular provision violates that express text "beyond a reasonable doubt." This approach is at odds with the Founder's view of the judiciary, which exists to "guard the constitution and the rights of individuals" and is obligated to strike down "acts contrary to the *manifest tenor* of the constitution."[386] They knew that citizens "would have every thing to fear from [the judiciary's] union with either of the other departments," making its "firmness and independence . . . an indispensable ingredient" and a "citadel of the public justice and the public security."[387]

While it is admirable to recognize the legislature's independent duty to interpret the Constitution and engage in dialogue with the other branches,[388] deference doctrines as aggressive as Thayerism or *Chevron* come with too great a risk to the individual rights that the courts themselves are also authorized to interpret in the face of majoritarian pressure. Insistence upon such deference in the federal context led to both the watering down of individual rights and to the vast expansion of the power of the legislature (or agencies). For one particularly salient example, the enumerated power to regulate interstate commerce was extended to "those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them *appropriate means to the attainment of a legitimate end*."[389]

The better approach is more balanced, and recognized by Thayer himself in some contexts—to give the Constitution nothing more and "nothing

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386 THE FEDERALIST NO. 78, *supra* note 17, at 524, 527 (Alexander Hamilton) (emphasis added).

387 *Id.* at 523–24.

388 This view is dubbed "departmentalism," in contradistinction with judicial supremacy. *See* Garrett Snedeker, *Don't Trade Judicial Supremacy for Executive Supremacy*, THE AM. MIND (May 7, 2020), https://perma.cc/BY8V-WUU8 (rejecting Adrian Vermeule's precept of common good constitutionalism that the executive should receive maximum deference to use its energy and abilities in the bureaucracy to advance the common good).

389 Wickard v. Filburn, 317 U.S. 111, 124 (1942) (emphasis added).

less than its just and true interpretation."[390] This requirement that courts provide clarity[391] to the constitutional provision at issue, using traditional tools to capture a "clearly discerned meaning of the constitution," gets the balance right.[392] In discerning clear rules, the courts can distinguish which questions are for them to decide because the people placed the rule in the constitution, and which are for the political process to sort out.[393] Thayer's approach, by contrast, failed to treat judicial review as an interpretive enterprise, but instead fell into the error that the Court did in *Chevron*—treating interpretation as a political act and potential ambiguity in the text as a delegation to the legislature to apply its "undisciplined discretion" in choosing how to interpret it.[394]

Only after a statute is found to be constitutional does the obligation of the judge shift to being a faithful agent of the legislature by applying the law as written. When it comes to the constitutional question, because *Lochner* was not quite as bad as the legends portray it, and the new minimum rationality regime is not as good as was promised, we think that the doctrine which strikes the right balance will end up looking more like *Lochner* than *Lee Optical*.

6.3. The Laboratories of Democracy Are the Perfect Place to Develop the Right Balance on Fundamental Economic Liberties

The move toward protecting economic liberty will be one involving constitutional innovation. Such innovation carries risks of overstepping by judges and risks the creation of unprincipled constraints on the power of legislatures to adapt the law over time. On the flipside, lack of innovation runs the risk of leaving fundamental rights at the whims of government

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390 SUTTON, WHO DECIDES?, *supra* note 374, at 60 (quoting Thayer, *supra* note 375, at 155).

391 *See generally* John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843 (2016) (endorsing an approach where judges are obligated to pin down the precise meaning of a constitutional provision, if they could, before determining whether a particular government action clearly conflicted with it).

392 *See* SUTTON, WHO DECIDES?, *supra* note 374, at 62–68.

393 *See id.* at 68.

394 *See* McGinnis, *The Duty of Clarity*, *supra* note 391, at 904–05, 907.

actors who restrict rights without sufficient justification. As the courts navigate this territory, experimentation in the laboratory of democracy is the most advisable path forward.[395]

Fifty states can temper the risks of going too far and provide examples for others to follow or avoid. Some might want to try an "arbitrary and capricious" approach like under the Administrative Procedure Act, deferring to the factual conclusions drawn by the political branches so long as they are supported by evidence from which a reasonable person could reach their conclusion, or upon which certain policy preferences might justify preferring one supportable course over another. Some states might try "burden shifting," requiring the government to articulate rationales for actions that infringe upon fundamental rights to narrow the universe of facts which need to be disproven by a challenger. Others might defer to the government's identification of hazards, but allow tailoring challenges to be brought by those who can prove that there are equal or stronger alternatives to address the hazards that are less intrusive on fundamental rights. Some could do the reverse, leaving broad discretion in means, but giving tighter scrutiny to the existence of hazards the government is purporting to address. We suspect few would want to provide strict or intermediate scrutiny to all challenges, but some might even want to try that, too. The door should be open to experimentation in this department. While it may not be clear what the right answer is, we think it is at least clear that *Lee Optical* is the wrong one.

States cover less people, making the risk of error in experimentation significantly lower. They can adjust or adapt to specific circumstances on the ground, producing a more tailored approach than the U.S. Supreme Court can in ruling for the entire nation.[396]

State courts should not rely too heavily on the U.S. Supreme Court. If we do not encourage the state supreme courts to step up to the plate, we risk "creating state courts that lack the necessary fortitude to fill the gap when we need it most"—those times when the Supreme Court withdraws from protecting the fundamental rights of citizens, as it did in *Buck v. Bell*.[397]

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395 SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 40, at 210 ("Let one State (or a few) experiment with reviving *Lochner* . . . . Then see what happens.").

396 *Id.* at 16–17.

397 *Id.* at 4–5.

The Court's continued lambasting of the *Lochner* legend[398] should not discourage states from examining the potential wisdom that was lost from the past regime.

As more states experiment, efficiencies and pressure points can be worked out. That conversation can take place across numerous courts, each governing a smaller territory in places where the constitution is easier to change and the risk of error is smaller than at the Supreme Court.[399] After percolation and experimentation, "the market of judicial reasoning [will] identif[y] winners and losers."[400] By waiting, the U.S. Supreme Court can "choose whether to federalize the issue *after* learning the strengths and weaknesses of the competing ways of addressing the problem."[401]

Once it has learned from experience by waiting and seeing, the risk of the United States Supreme Court coming back to enforce protections of natural and fundamental rights is a lot lower.[402] Patience would also help with the Court's legitimacy.[403] It would be less likely to have to apply a "federalism discount" when making a "winner-take-all decision," diluting the potency of the right to make up for its broad applicability.[404] If litigants push the Court to move too quickly in imposing a national standard that has a federalism discount, they risk leading the doctrine down a path that provides less overall protection rather than more.[405] Too quick an adoption of a national standard could lead to discouragement and lockstepping from state courts that are not inclined to go too far, or lead to backpedaling from the Court in a way that minimizes the impact of an apparently momentous decision.[406]

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398 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 521–22 (2018); Obergefell v. Hodges, 576 U.S. 644, 694 (2015) (Roberts, C.J., dissenting); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 623 (2012) (Ginsburg, J., concurring).

399 SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 40, at 16–19.

400 *Id.* at 20.

401 *Id.*

402 *Id.* at 68–70.

403 *Id.* at 69.

404 *Id.* at 70–71.

405 *Id.* at 71.

406 *See id.* at 72–78.

Even if the U.S. Supreme Court never comes back around to protecting economic liberty, the country would still be a whole lot better off encouraging and tolerating "fifty-one imperfect solutions" rather than the one (exceedingly weak) imperfect solution we currently have—especially where "imperfection may be something we have to live with" when it comes to vindicating the natural right to the fruits of your own labor.[407]

Nevertheless, in the grand scheme of unenumerated rights implicating economic liberty, it is fitting that a State with the right enumerated do the experiment first.[408] North Carolina is on track to do just that.

7. CONCLUSION

Unique text warrants unique constitutional analysis. North Carolina's Fruits Clause recognizes the natural, inalienable, fundamental right to economic liberty, a liberty limited only by reasonable regulations. *Lee Optical*-style fact-free rational basis review is too weak to be the appropriate standard of review for this right. North Carolina precedent demands otherwise, and the state supreme court's recommitment to meaningful review of government actions that implicate the Fruits Clause is a welcome sign.

This Article offers lessons from the past and recommendations for the future as North Carolina courts develop the doctrine. After *Ace Speedway* and *N.C. Bar & Tavern*, citizens have a framework to make Fruits challenges, providing the Supreme Court of North Carolina a prime opportunity to develop the scope of the right, the contours of the standard of review, and the tricky remedial questions that come with common-law enforcement of constitutional rights.

The right of the people to the fruits of their own labor is inherent in the concept of ordered liberty. And when the people created their governments to better secure their rights, they did not wholly alienate those rights to legislative majorities. North Carolina has a unique opportunity to lead the way in developing a coherent doctrine that strikes the right balance.

This right that is unenumerated in other constitutions is enumerated in North Carolina's. It is thus fitting for North Carolina to venture into the fray first. The lessons it learns along the way should be carefully considered

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407 *See id.* at 19, 216.

408 *See supra* Parts 2–5.

by other courts who, if they are inclined to agree with the abolitionists, are warranted in rejecting uncritical deference doctrines that come dangerously close to adopting "might makes right." *Lochner*'s reputation is not entirely without warrant, but the *Lochner* era itself was not as problematic as the legends imply. And the *Lee Optical* era has had its own problems. Courts should not let *Lochner* name-calling stop them from trying to strike the right balance. Backed by courage and right reason, North Carolina's labors could bear much fruit.