Forbidden Fruit: Revival and Reinterpretation of North Carolina's Right to Earn a Living

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INTRODUCTION

Emerging from the Civil War, the framers of North Carolina's 1868 Constitution (the "Constitution") proclaimed a self-evident truth the State of North Carolina (the "State") had long denied: "all persons" are endowed with the right to the "enjoyment of the fruits of their labor."[1] This right was not created by the Constitution but recognized as inherent to human dignity—a natural right predating government.[2]

Having known both bondage and the denial of wages, the constitutional delegates who met in Raleigh—some formerly enslaved—would have understood the moral weight of guaranteeing the right to enjoy the fruits of one's labor.[3] The delegates also feared the "'Southern white man' would oppress freed slaves by refusing to recognize any rights 'beyond the mere fact of his liberty.'"[4] Against that backdrop, Section 1 of Article I (the "Fruits of Labor Clause" or the "Clause") of the State Constitution stood as a commitment to the principle that the rewards of one's work anchor not only individual freedom, but the foundations of a just and self-governing society.[5]

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[1] N.C. CONST. art. I, § 1.

[2] *See* Nicholas C. Ulen, *Corporations, Natural Rights, and the Assembly Clause: An Originalist Critique of Corporate Speech Jurisprudence*, 10 WAKE FOREST J.L. & POL'Y 25, 38 (2019).

[3] *See* Earl Ijames, *African American Political Pioneers*, 48 TAR HEEL JUNIOR HISTORIAN 24, 24 (2008), https://digital.ncdcr.gov/Documents/Detail/tar-heel-junior-historian-2008-fall-v.48-no.1/3700444?item=5370137; Mole' v. City of Durham, 866 S.E.2d 773, 777 (N.C. Ct. App. 2021).

[4] Richard Dietz, *Factories of Generic Constitutionalism*, 14 ELON L. REV. 1, 20 (2022) (quoting ALBION W. TOURGÉE, AN APPEAL TO CAESAR 244 (1884)).

[5] *See, e.g.*, Bryan v. Patrick, 33 S.E. 151, 153 (N.C. 1899) ("It may not be amiss here to remark that the people of North Carolina, when assembled in convention, were desirous of having some rights secured to them beyond the control of the Legislature, and those they have expressed in their bill of rights and Constitution.").

Although the 1868 constitutional convention materials do not appear to discuss the Clause specifically or identify its drafter,[6] the provision's purpose may be inferred from adjacent historical sources. Albion W. Tourgée, who played a central role in shaping the rights-bearing structure of the 1868 Constitution, linked the right to enjoy the fruits of one's labor to the natural-rights tradition reflected in the Declaration of Independence:

> The slave was a man forcibly deprived of a natural and inherent right, the right of self-control, of "life, liberty, and the pursuit of happiness." Not from any desert on his part, not because of any infraction of the laws of society, but simply because another man desired to hold and enjoy the fruits of his labor.[7]

The Clause also responded to the material realities of emancipation. In 1865, Peter Johnston, a formerly enslaved North Carolinian, wrote to President Andrew Johnson that although he was free, he was "free but without a cent."[8] Read together, such sources suggest that the Fruits of Labor Clause was concerned not only with abstract natural rights, but also with the concrete problem of ensuring that freedom included a meaningful opportunity to work and retain the rewards of one's labor.[9]

Today, the constitutions of only North Carolina, Missouri, and Oklahoma specifically enumerate a right to earn a living or to enjoy the rewards of one's work.[10] Missouri and Oklahoma each contain textually analogous guarantees—protecting, in broad terms, the right to enjoy "the gains of their own industry."[11] Missouri's Supreme Court has acknowledged that the phrase "enjoyment of the gains of their own industry" originates in "workplace

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[6] Dietz, *supra* note 4, at 20.
[7] *Id.* at 20 (quoting ALBION W. TOURGÉE, AN APPEAL TO CEASAR 244 (1884)).
[8] David H. Gans, *"I Am Free but Without A Cent": Economic Justice as Equal Citizenship*, 93 GEO. WASH. L. REV. 221, 223-24 (2025) ("[The federal Reconstruction] Amendments center the rights and dignity of Black people who had long been robbed of the fruits of their labor and left impoverished by enslavement—those like Peter Johnston, a formerly enslaved North Carolinian who penned a letter to the President in 1865, observing that 'I am free but without a cent.'").
[9] *See* Dietz, *supra* note 4, at 20-21.
[10] *See* Anthony J. Meyer, *Natural Law in Missouri*, 2023 U. ILL. L. REV. ONLINE 22 app. A (2023).
[11] *See id.*

slavery." The Missouri Supreme Court has applied it in only three instances: twice to invalidate laws compelling uncompensated labor, and once to strike a prohibition on selling a lawful product.[12] The Oklahoma Supreme Court, on the other hand, has never recognized a private right of action under its analogous provision.[13] Missouri and Oklahoma share the substantive text of North Carolina's Clause, yet unlike North Carolina, neither state has developed an occupational-liberty doctrine or a general framework for constitutional review of economic regulation.

North Carolina's Fruits of Labor Clause initially received little sustained attention, perhaps dismissed as a "'glittering . . . sounding generalit[y]'" of natural rights philosophy.[14] Yet North Carolina's text is broader than its counterparts, promising all citizens the "enjoyment of the fruits of their labor."[15] Unlike Missouri and Oklahoma, North Carolina has recently begun to give that language concrete, but uncertain, doctrinal force.[16]

For North Carolina, the Fruits of Labor Clause's dormant textual breadth burst into doctrinal prominence in August 2025.[17] Although courts and scholars long overlooked the Clause, the North Carolina Supreme Court (the "Supreme Court") issued three decisions that

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[12] Fisher v. State Highway Comm'n of Mo., 948 S.W.2d 607, 610 (Mo. 1997) (en banc) ("The origin of the 'enjoyment of the gains of their own industry' phrase is in workplace slavery. Equally, the cases of this Court discussing this phrase concern labor, occupations, professions, and the marketplace. Only three times has this Court invoked this phrase to invalidate a law: twice when government forced individuals to work without compensation; and once when the state prevented individuals from selling a lawful product . . . ." (citation omitted)).

[13] Payne v. Kerns, 467 P.3d 659, 663 (Okla. 2020) (holding that "the Oklahoma Supreme Court has never recognized a private right of action pursuant to Okla. Const. art. 2, §2.").

[14] Anthony B. Sanders, *Social Contracts: The State Convention Drafting History of the Lockean Natural Rights Guarantees*, 93 UMKC L. REV. 641, 642 (2024) (quoting Letter from Rufus Choate to E.W. Farley and the Maine Whig State Central Committee (Aug. 9, 1856), *reprinted in* THE WORKS OF RUFUS CHOATE: WITH A MEMOIR OF HIS LIFE 215 (1862)).

[15] *See* Sanders, *supra* note 14, at 666 (explaining that a delegate to Missouri's constitutional convention advocated for the word "fruits" because "[t]he word 'gains' seems to refer more to pecuniary profit [, while] the word 'fruits' will cover the results of the labor of a man in every department.").

[16] *See* cases cited *infra* note 18. The phrase "concrete, but uncertain" is intentionally paradoxical. The North Carolina Supreme Court has deemed the Clause clearly enforceable without defining its limits, scope of application, or governing test. *See id.* In that sense, the court's own jurisprudence has been paradoxical, which is discussed in the following sections.

[17] *See* cases cited *infra* note 18.

simultaneously expanded the Clause's force and unsettled its analytical framework.[18] In two of the cases, the majority framed its rulings as faithful to the Constitution's commitment to protecting the "inalienable" right to earn a living.[19] By contrast, the dissent accused the majority of "abus[ing] notice pleading principles" to create a *Lochnerian*[20] weapon to invalidate disagreeable legislation.[21] Yet in the third decision, involving an agency's indefinite exclusion of a law-enforcement officer from his profession, neither the majority nor the dissent mentioned the Clause at all.[22] The Supreme Court's omission of the Clause cast immediate doubt on the coherence and consistency of the emerging doctrine.[23] The Supreme Court's decisions mark a constitutional inflection point: North Carolina's courts must now brace for a surge of challenges to State action, occupational regulation, and professional licensing schemes brought under the banner of the Fruits of Labor Clause.

This Article argues that the Supreme Court's 2025 decisions revived the Fruits of Labor Clause without supplying a coherent framework for enforcing it. The Supreme Court expanded the Clause's reach in the emergency-regulation context while failing to engage it where its historical force is strongest: the State's exclusion of individuals from lawful occupations. The result is a doctrine of genuine constitutional significance but uncertain direction. This Article proposes a principled correction rooted in the Clause's Reconstruction origins—a correction that demands meaningful judicial scrutiny of state action burdening the

[18] *See* Howell v. Cooper, 919 S.E.2d 212 (N.C. 2025); N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 684 (N.C. 2025); Devalle v. N.C. Sheriffs' Educ. & Training Standards Comm'n, 919 S.E.2d 152 (N.C. 2025).
[19] *See Howell*, 919 S.E.2d at 215-23; *Stein*, 919 S.E.2d at 688-98.
[20] *See* Lochner v. New York, 198 U.S. 45, 57-58 (1905). In *Lochner*, the United States Supreme Court invalidated a New York State statute prescribing maximum working hours on the basis that it violated the right to "freedom of contract." *Id.* at 57. The decision was later overruled and criticized as an example of "intrusion by the judiciary into the realm of legislative value judgments . . . ." Ferguson v. Skrupa, 372 U.S. 726, 729 (1963).
[21] *Howell*, 919 S.E.2d at 223.
[22] *See generally Devalle*, 919 S.E.2d 152 (containing no reference to the officer's right to earn a living).
[23] *See id.* (containing no reference to the officer's right to earn a living).

right to earn a living while preventing the Clause from becoming an instrument of judicial policymaking.

The Background traces the Fruits of Labor Clause from its Reconstruction-era origins through its long dormancy and uneven revival in North Carolina jurisprudence. The Background begins with the Prohibition-era decisions, which first treated the Clause as a means-end constraint on the State's police power. The Background then examines employment-regulation cases, in which the court used the Clause to scrutinize occupational licensing schemes, before turning to modern decisions in the criminal and employment context. Finally, the Background analyzes the Supreme Court's 2025 decisions that revived the Clause as a limit on emergency economic regulation while ignoring it in the setting of occupational exclusion.

The Analysis proposes a framework for applying the Clause in the wake of the Supreme Court's 2025 decisions. First, the Analysis reformulates the Supreme Court's current conjunctive test into a disjunctive test, allowing plaintiffs to proceed on either an improper-purpose or an unreasonable-means theory. Second, the Analysis argues that the Court should treat the "proper purpose" inquiry as a substantive question rather than a formal prelude to means-end review. Third, the Analysis develops a tiered approach to means-end scrutiny calibrated to the severity and specificity of the State's burden, distinguishing generally applicable regulations, total prohibitions, and individualized exclusions from particular occupations. Fourth, the Analysis addresses the emergency context, explaining why the Clause's natural-rights foundation accommodates broader governmental latitude when the common good is imminently at stake, while cautioning that emergency latitude cannot be indefinite. Finally, the Analysis considers the practical litigation consequences of

the Supreme Court's 2025 decisions, including the lowered Rule 12(b)(6) threshold and the increased importance of comparators, alternatives, and evidentiary support for governmental purposes.

BACKGROUND

I. FROM DORMANCY TO DOCTRINE

Despite the lofty aspirations of North Carolina's framers to enshrine an "inalienable" right to earn a living within the State's Declaration of Rights, the Fruits of Labor Clause lay largely dormant in North Carolina jurisprudence for half a century as an artifact of natural rights philosophy and social contract theory.[24] During this period, the Supreme Court deferred to the State's asserted purposes for economic regulation, declining to "hunt for a hidden intent under the guise of regulating trade to restrict the rights of any class of persons to enjoy the fruits of their own labor."[25]

A. *Prohibition and the First Principles of Liberty*

The beginnings of the Prohibition era briefly revived judicial attention to the Fruits of Labor Clause. In *State v. Williams*,[26] the Supreme Court foreshadowed the Clause's potential significance as a substantive limit on governmental power. There, the defendant was charged with bringing more than one-half gallon of "spirituous, vinous or malt liquors" into Burke County for nonmedical purposes.[27] The defendant moved to quash the indictment, arguing that it violated his constitutional right to enjoy the fruits of his labor.[28] The Supreme Court agreed.[29]

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[24] *See* Dietz, *supra* note 4, at 20-21.
[25] State v. Moore, 10 S.E. 143, 144-45 (N.C. 1889).
[26] 61 S.E. 61, 67 (N.C. 1908).
[27] *Id.* at 62-63.
[28] *See id.* at 62.
[29] *Id.* at 66-67.

Although the legislature could prohibit the sale or possession of alcohol with intent to sell, the challenged ordinance criminalized mere possession and transport of alcohol, including for lawful personal use.[30] The Supreme Court emphasized that the underlying Burke County prohibition targeted selling or disposing of liquor "for gain," and did not ban keeping liquor for oneself or for one's family.[31] Against that statutory backdrop, the Supreme Court asked what relation, if any, a flat one-half-gallon-per-day cap on importation bore to preventing unlawful sales.[32] Concluding that the restriction bore "no reasonable, substantial relation" to suppressing illegal sales, the Supreme Court struck it down as an unwarranted exercise of the police power.[33]

Williams treated the Fruits of Labor Clause as a basis for examining a means-end fit—whether the restriction the State imposed was reasonably necessary to carry out the State's asserted public purpose.[34] In doing so, the Supreme Court grounded its analysis in a concrete standard of judicial review, requiring courts to assess both the legitimacy of the State's purpose and the reasonableness of the means chosen to advance that purpose.[35]

After North Carolina enacted a statewide alcohol prohibition, however, the Supreme Court moved in a more deferential direction. In *Glenn v. Southern Express Co.*,[36] the plaintiff

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[30] *Id.* at 67 ("Chapter 806 of the Laws of 1907, prohibiting any person from carrying into the county of Burke in any one day more than one-half gallon of vinous, spirituous or malt liquor, is not a valid exercise of the police power, for that it unduly restricts the right of the citizen to the use of his property, without any intent to violate any prohibited act in relation to it; that the carrying into the county of Burke of the prohibited quantity has no reasonable, substantial relation to the sale of liquors, as prohibited by law.").
[31] *Id.*
[32] *See* State v. Williams, 61 S.E. 61, 67 (N.C. 1908) ("Chapter 806 of the Laws of 1907, prohibiting any person from carrying into the county of Burke in any one day, more than one-half gallon of vinous, spirituous or malt liquor, is not a valid exercise of the police power, for that it unduly restricts the right of the citizen to the use of this property, without any intent to violate any prohibited act in relation to it; that the carrying into the county of Burke of the prohibited quantity has no reasonable, substantial relation to the sale of liquors, as prohibited by law.").
[33] *Id.*
[34] *See id.* at 64.
[35] *See id.*
[36] 87 S.E. 136, 138 (N.C. 1915).

ordered liquor from Virginia for personal use, but the carrier refused to accept or deliver the shipment.[37] The carrier refused the order based on a 1915 statute limiting spirit liquor deliveries to one quart per package and no more than one quart every fifteen days.[38] When the plaintiff sought mandamus to compel delivery, the Supreme Court denied relief.[39]

Unlike *Williams*, which treated the challenged quantity limit as an unjustified intrusion on otherwise lawful personal possession and use, the *Glenn* Court accepted the State's argument that quantity restrictions were a reasonable enforcement mechanism for prohibition.[40] The *Glenn* Court reasoned that "personal use" shipments were difficult to distinguish from liquor "introduced to sell" and had become "a prolific source of evasion" of the prohibition laws.[41] The *Glenn* Court candidly acknowledged that, "without regard to the policy of the state in favor of prohibition," the law looked like "an arbitrary and unwarranted interference" with private rights.[42] Once viewed as a means of enforcing the statewide prohibition, however, the *Glenn* Court concluded there was a "reasonable relation" to sustain the statute.[43] In doing so, the *Glenn* Court signaled a greater willingness to credit legislative judgments about the necessity of prophylactic restrictions—even when those restrictions burdened individual liberty in the name of public morals and public welfare.

Together, *Williams* and *Glenn* frame a question that resurfaced more than a century later: whether the "fruits of one's labor" impose judicially enforceable limits on governmental power, or whether the fruits yield to legislative judgments about the scope of the police power. *Williams* envisioned a constitutional order in which courts tested whether

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[37] *See id.*
[38] *Id.*
[39] *See id.* at 143.
[40] *See id.* at 141-42.
[41] *Id.* at 142.
[42] Glenn v. Southern Express Co., 87 S.E. 136, 141-42 (N.C. 1915).
[43] *Id.* at 142.

a purported public-welfare measure bore a real and substantial relation to preventing a public harm, rather than intruding on lawful private conduct.[44] *Glenn*, by contrast, treated prophylactic restrictions as permissible tools of prohibition enforcement and credited the legislature's assessment that such limits were reasonably necessary to advance the State's public morals and public welfare policy.[45] Yet, as the Supreme Court's 2025 decisions would paradoxically reveal, competing impulses—judicial scrutiny of means-ends "fit" and judicial deference to legislative policy judgments—would continue to coexist.[46]

B. *Industrial Regulation and the Rise of Economic Liberty*

By 1940, in *State v. Harris*,[47] the Supreme Court signaled a shift in its focus from legislative deference toward individual economic freedom. In *Harris*, the defendant operated a dry-cleaning business in Henderson without first obtaining a license from the newly created State Dry Cleaners Commission (the "Commission").[48] The statute required all dry cleaners, pressers, and dyers to obtain a license from the Commission—a board composed mainly of members from the dry-cleaning trade—before engaging in that work.[49] The defendant challenged the statute on the basis that it unreasonably excluded him from his chosen profession and violated his right to earn a living.[50] The Supreme Court agreed.[51] The Supreme Court explained that:

> While many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable. Conceding this, a law which

[44] *See* State v. Williams, 61 S.E. 61, 66 (N.C. 1908).
[45] *Glenn*, 87 S.E. at 141 (quoting Reid v. Colorado, 187 U.S. 137, 152 (1902)) ("Where the methods have been devised by the State under the power to protect the property of its people from injury and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the State is entitled to accomplish.").
[46] *See infra* ANALYSIS Part I.
[47] 6 S.E.2d 854, 866 (N.C. 1940).
[48] *Id.* at 856.
[49] *See id.* at 860.
[50] *See id.* at 856.
[51] *See id.* at 864.

> destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquery.[52]

Consistent with the fit-based reasoning suggested in *Williams*, the Supreme Court ruled that the regulation of a business 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."[53] *Harris* thus applied the Fruits of Labor Clause to protect access to an "ordinary harmless occupation[]" from exclusionary licensing untethered to a genuine public-welfare justification.[54]

A decade later, in *State v. Ballance*, the Supreme Court extended the occupational-liberty logic from *Harris* while attempting to articulate a more coherent Fruits of Labor Clause standard.[55] In *Ballance*, a photographer was prosecuted for taking pictures for compensation without a license from the State Board of Photographic Examiners.[56] In striking down the licensing statute as unconstitutional, the Supreme Court rooted its analysis in natural rights philosophy, emphasizing both the breadth of the State's Declaration of Rights and the constitutional significance of the right to pursue a lawful calling.[57] The Supreme Court explained that, although the State could impose "reasonable qualifications" on professions involving specialized skills that "intimately affect[] the public health, morals, order, or safety, or the general welfare,"[58] it could not require a license for more "ordinary"

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[52] *Id.* at 863.
[53] State v. Harris, 6 S.E.2d 854, 863 (N.C. 1940).
[54] *See id.* at 864.
[55] 51 S.E.2d 731, 734-36 (N.C. 1949).
[56] *Id.* at 732.
[57] *Id.* at 734-35.
[58] *Id.* at 735.

occupations.[59] Occupations, such as photography, could not face licensing restrictions absent a showing that such a restriction was "reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm."[60]

The Supreme Court applied the principle articulated in *Ballance* eight years later in *Roller v. Allen*.[61] In *Roller*, the plaintiff was a tradesman who had performed tile, marble, and terrazzo contracting without a license.[62] The plaintiff failed an examination administered by the North Carolina Licensing Board for Tile Contractors, and he commenced an action to enjoin enforcement of statutes creating the licensing board on the ground that they prohibited him from earning a living in an ordinary occupation.[63] The Supreme Court sided with the plaintiff, explaining that the licensing scheme did not have a substantial relation to the public health, morals, order, safety, or general welfare—"tile work consists of selecting and installing tile."[64] The Supreme Court explained that "ordinary lawful and innocuous occupations and trades" are "off-limits ground on which trespassing is forbidden by the Constitution."[65]

Read together, *Harris*, *Ballance*, and *Roller* supplied the occupational-liberty framework for the Fruits of Labor Clause doctrine: the State could regulate or qualify work where the occupation itself posed genuine risks to public welfare, but could not exclude citizens from ordinary, harmless callings through licensing schemes lacking a sufficient public justification.[66] The early cases suggest the Clause's original doctrinal office was not

[59] *Id.*
[60] *Id.*
[61] 96 S.E.2d 851, 859 (N.C. 1957).
[62] *See id.* at 853-54.
[63] *Id.* at 854.
[64] *Id.* at 856-57.
[65] *Id.* at 859.
[66] *See* State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949); State v. Harris, 6 S.E.2d 854, 863 (N.C. 1940); *Roller*, 96 S.E.2d at 859.

to authorize free-ranging review of economic policy but to protect against exclusion from ordinary lawful work absent sufficient public justification. Later cases, as discussed below, translated the concern into the language of arbitrariness, pretext, and reasonableness.[67] Properly understood, the inquiries are derivative of the Clause's basic commitment to protecting the opportunity to labor.

C. *Doctrinal Lull and Academic Scrutiny@*

For all its Lockean inspiration, *Ballance* proved less a catalyst than a coda.[68] After 1949, the Clause was invoked intermittently—most notably when the Supreme Court invalidated a county ordinance restricting businesses "providing or selling male or female companionship," finding no rational connection to a substantial governmental objective.[69]

As judicial attention waned, scholarly curiosity filled the void. Justice Exum, writing in the North Carolina Law Review, cited the Fruits of Labor Clause, noting "how much richer . . . these . . . grants of individual liberties" are when compared to the federal Bill of Rights.[70] Professor Louis Bilionis described the Fruits of Labor Clause as a "*Lochner*-like economic due process [provision] with text to back it up."[71] J. Michael McGuinness, a constitutional litigator, wrote that the Fruits of Labor Clause was "ripe for application to a broad range of government conduct which deprives individuals of liberty."[72] Together, these voices anticipated the Clause's eventual revival as a textual foundation for renewed judicial scrutiny of State action affecting North Carolinians' economic freedom.

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[67] *See* cases cited *supra* note 18.
[68] *See generally Ballance*, 51 S.E.2d 731 (invoking broader Lockean themes without generating a broader jurisprudential shift).
[69] Treants Enters., Inc. v. Onslow Cnty., 350 S.E.2d 365, 366 (N.C. Ct. App. 1986), *aff'd*, 360 S.E.2d 783 (N.C. 1987) (internal quotation marks omitted).
[70] James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1747 (1992).
[71] Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1807 (1992).
[72] J. Michael McGuinness, *The Rising Tide of North Carolina Constitutional Protection in the New Millennium*, 27 CAMPBELL L. REV. 223, 231 (2005).

II. A MODERN REVIVAL

The Fruits of Labor Clause's relative obscurity ended in 2010, when the North Carolina Court of Appeals (the "Court of Appeals") decided *In re W.B.M.*[73] In *In re* W.B.M., the petitioner challenged the constitutionality of Gen. Stat. § 7B–300 *et seq.*, a statute requiring the Department of Health and Human Services to maintain "a list of . . . individuals identified by county directors of social services as [responsible for child maltreatment.]" After an investigation, the Department of Social Services placed individuals on a Responsible Individuals List ("RIL"), but did not grant them a hearing.[74] Once on the RIL, childcare institutions received the identities of the "responsible individuals" found fit to care for or adopt children.[75]

Relying in part on the Fruits of Labor Clause, the Court of Appeals held the statutory scheme unconstitutional on procedural due process grounds.[76] The court explained that the RIL "carrie[d] consequences that are serious to the accused individual[s]," including depriving those individuals of their right to "earn [a] livelihood in the childcare field, and to pursue a career in the childcare profession."[77] The court explained "[n]o matter how elaborate, an investigation does not replace a hearing[,]" and held that accused individuals were entitled to "notice and an opportunity to be heard" on the merits of the allegations against them "before being placed on the RIL."[78]

By grounding its procedural due process analysis in the Fruits of Labor Clause, the *In re W.B.M.* court recognized that the freedom to pursue a chosen profession is entitled to

[73] 690 S.E.2d 41, 53 (N.C. Ct. App. 2010).
[74] *Id.* at 43.
[75] *See id.*
[76] *Id.* at 52.
[77] *Id.* at 49.
[78] *Id.* at 50, 52.

meaningful procedural protection before the State may restrict it.[79] In that respect, the decision treated occupational liberty not as a subordinate policy interest, but as a constitutional guarantee requiring notice and an opportunity to be heard before it may be burdened. [80]

Where *In re W.B.M.* linked the Clause to procedural due process, *King v. Town of Chapel Hill*[81] revived it as a substantive check on economic regulation. There, the owner of a towing business challenged an local ordinance authorizing the Chapel Hill Town Council to adopt maximum fees for towing vehicles and prohibit charges for certain services.[82] In declaring the ordinance unconstitutional, the Supreme Court explained, in part, that it had a "duty to . . . [prevent] arbitrary government actions that interfere with the right to the fruits of one's own labor."[83] The capping of fees, the Supreme Court explained, had "no rational relationship between regulating fees and protecting health, safety, or welfare."[84] *King*, therefore, reintroduced the Clause as a basis for reviewing whether economic restrictions were supported by a genuine, evidence-based rationale,[85] even though the Supreme Court did not clearly specify the level of scrutiny or a comprehensive doctrinal framework.[86]

Where *King* breathed substantive life into the Clause, *Tully v. City of Wilmington*[87] provided it with procedural form. In *Tully*, the Supreme Court held that a municipal police department violated a public employee's constitutional right to the fruits of his own labor by

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[79] *See* 690 S.E.2d 41, 52 (N.C. Ct. App. 2010).
[80] *See id.*
[81] King v. Town of Chapel Hill, 758 S.E.2d 364, 374 (N.C. 2014).
[82] *See id.* at 367-68.
[83] *Id.* at 371.
[84] *Id.*
[85] *See id.* (quoting Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957)) ("A state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them.").
[86] *See id.*
[87] 810 S.E.2d 208, 217 (N.C. 2018).

failing to adhere to its promotion procedures.[88] In so holding, the Supreme Court affirmed that

> [t]he basic constitutional principle of personal liberty and freedom embraces the right of the individual to be free to enjoy the faculties with which he has been endowed by his Creator, to live and work where he will, to earn his livelihood by any lawful calling, and to pursue any legitimate business, trade or vocation.[89]

The Supreme Court articulated a three-element framework for evaluating civil claims asserted under the Fruits of Labor Clause:

> a public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation. If a public employee alleges these elements, he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor.[90]

Although *Tully* spoke in sweeping terms about the breadth and significance of the Fruits of Labor Clause, the framework it established appeared to confine the Clause's protections to the employment relationship—and, more narrowly still, to disputes involving promotional decisions.[91] Yet the right to "the enjoyment of one's labor" soon pressed beyond the workplace.[92]

In *State v. Kelliher*, the defendant—convicted of first-degree murder as a juvenile—received two consecutive life sentences with the possibility of parole.[93] On appeal, the Court of Appeals held that the sentence constituted a *de facto* punishment of life without the possibility of parole and, therefore, was cruel and unusual.[94] The court explained:

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[88] *See id.* at 215-16.
[89] *Id.* at 214.
[90] *Id.* at 216.
[91] *See id.*
[92] *See* N.C. CONST. art. I, § 1.
[93] *See* 849 S.E.2d 333, 335-38 (N.C. Ct. App. 2020), *appeal dismissed*, 854 S.E.2d 584 (N.C. 2021), *aff'd as modified*, 873 S.E.2d 366 (N.C. 2022).
[94] *Id.* at 352.

> North Carolina's Constitution provides that persons' "inalienable rights" include the "enjoyment of the fruits of their own labor," N.C. Const. Art. I, § 1, and our Supreme Court has recognized that "a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life . . . is legal grotesquery." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940). It is difficult, then, to deny that incarcerating a juvenile with no hope for release until or after the point at which society no longer considers them an ordinary member of the workforce seems to run afoul of the "hope for some years of life outside prison walls" required by [*Graham v. Fla.*, 560 U.S. 48 (2010)] and [*Miller v. Alabama*, 567 U.S. 460 (2012)].[95]

Kelliher should not be understood to transform the Fruits of Labor Clause into a free-floating general limitation on criminal punishment. The Court of Appeals did not hold that the Clause constrains sentencing as such, nor did it suggest that every burden on a person's future capacity to work raises an independent fruits-of-labor claim. Instead, the court noted that the Clause has historically been invoked to review burdens far less severe than the one at issue in *Kelliher*.[96] If those burdens warrant constitutional scrutiny, then the permanent elimination of any realistic prospect of return to productive life warrants it as well.[97] *Kelliher* stands for the proposition that courts should consider the Clause when the State extinguishes any realistic prospect that a person will return to a lawful productive life, including in the criminal justice context.

One year later, the Court of Appeals extended *Tully*'s logic to disciplinary terminations, hinting that the real question at issue was governmental arbitrariness—a

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[95] *Id.* at 350.

[96] State v. Harris, 6 S.E.2d 854, 866 (N.C. 1940); State v. Ballance, 51 S.E.2d 731, 736 (N.C. 1949); Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957).

[97] *Ballance*, 51 S.E.2d at 734 (citations omitted) ("The term 'liberty' as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is 'deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare . . . . It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion.").

principle soon to be tested in larger arenas.[98] In *Mole' v. City of Durham*, the Court of Appeals applied the Clause in the civil setting for the first time since *Tully*, extending the Clause beyond the promotional context, and recognizing a viable claim where a police department failed to adhere to its own disciplinary procedures before terminating a police officer's employment.[99] *Mole'* suggested that the constitutional concern identified in *Tully* was not limited to promotion decisions but could also apply where State actors arbitrarily departed from their own established rules in ways that burdened a person's livelihood.[100]

The State Supreme Court, however, subsequently issued an unsigned order directing that *Mole'* "stand[ ] without precedential value," stripping the decision of authoritative force with no explanation. [101] The Court's unexplained step removed what would otherwise have been the most direct appellate extension of *Tully* beyond the promotion context, leaving the boundaries of the Clause murky.[102]

Taken together, *W.B.M.*, *King*, *Tully*, *Kelliher*, and *Mole'* revived the Fruits of Labor Clause along several distinct tracks: procedural due process, substantive review of economic regulation, public-employment remedies, and a possible broader concern with productive existence and arbitrariness. But the cases did not yield a unified governing theory.[103] The crucible that would provide a theory—unifying or not—was not professional licensing or promotion, but pandemic governance.

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[98] *See infra* Background Part III.
[99] *See* 866 S.E.2d 773, 785 (N.C. Ct. App. 2021), *aff'd*, 884 S.E.2d 711 (N.C. 2023).
[100] *See id.* at 778-79.
[101] *See* Mole' v. City of Durham, 884 S.E.2d 711, 711 (N.C. 2023).
[102] *See id.* at 718 (Morgan, J., dissenting); *id.* at 719 (Earls, J., dissenting).
[103] *See id.* at 725 (Earls, J., dissenting); King v. Town of Chapel Hill, 758 S.E.2d 364, 374 (N.C. 2014); Tully v. City of Wilmington, 810 S.E.2d 208, 216 (N.C. 2018).

III. THE COVID RENAISSANCE

A doctrine born of 19th-century liberty ideals found new relevance amid 21st-century emergency governance. After the State confirmed its first COVID-19 case on March 3, 2020,[104] Governor Roy Cooper (the "Governor") and various agencies issued executive orders, directives, and regulatory measures that sharply curtailed economic activity across the State.[105] Businesses and citizens across the State challenged these orders, directives, and measures on the basis that they violated the right to earn a living.[106] The pandemic, thus, became the Fruits of Labor Clause's first sustained modern stress test.

The pandemic-era litigation developed along several tracks. First, constitutional challenges like *Kinsley v. Ace Speedway Racing, Ltd.*,[107] *Howell v. Cooper*,[108] and *North Carolina Bar & Tavern Ass'n v. Cooper*[109] pressed whether emergency closures and phased reopenings satisfied a means–ends inquiry grounded in purpose and proportionality. Second, administrative decisions such as *Locklear v. North Carolina Criminal Justice Education & Training Standards Commission*[110] invoked the Clause in disputes over occupational exclusion. Third, differences in procedural posture—especially the distinction between Rule 12(b)(6) and Rule 56 of the North Carolina Rules of Civil Procedure—began to shape how courts discussed arbitrariness, purpose, and reasonableness.[111] Together, these decisions transformed the Fruits of Labor Clause from sporadic rhetoric into a constraint on governance

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[104] *See North Carolina Identifies First Case of COVID-19*, N.C. DEP'T OF HEALTH & HUM. SERVS. (Mar. 3, 2020), https://www.ncdps.gov/news/press-releases/2020/03/03/north-carolina-identifies-first-case-covid-19.
[105] *See A Timeline: North Carolina's Pandemic Recovery Progress*, N.C. PANDEMIC RECOVERY OFF. (Nov. 4, 2024), https://ncpro.nc.gov/news-stories/timeline.
[106] *See* cases cited *infra* notes 107-109.
[107] Kinsley v. Ace Speedway Racing, Ltd., 877 S.E.2d 54, 65 (N.C. Ct. App. 2022).
[108] Howell v. Cooper, 892 S.E.2d 445, 454 (N.C. Ct. App. 2023).
[109] N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 355, 374 (N.C. Ct. App. 2024).
[110] Locklear v. N.C. Crim. Just. Educ. & Training Standards Comm'n, No. 22 DOJ 02965, 2023 WL 2711303 (N.C. Off. of Admin. Hearings 2023).
[111] *See Kinsley*, 877 S.E.2d at 672 (evaluating claim at 12(b)(6)); *N.C. Bar & Tavern Ass'n*, 901 S.E.2d at 362 (evaluating claim at Rule 56).

and regulation, even as they introduced uncertainty about the level of scrutiny, the evidentiary burden, and the line between judicial review and policy substitution.[112]

The first COVID-19 case to reach both the Court of Appeals and the Supreme Court was *Kinsley v. Ace Speedway Racing, Ltd*.[113] There, a racetrack challenged an abatement order issued by the State's Department of Health and Human Services directing it to cease operations, even after the racetrack installed plexiglass barriers, implemented six-foot distancing markers, conducted contact tracing, utilized touchless thermometers, and established screening booths in consultation with local health officials.[114] The Court of Appeals held that the racetrack adequately alleged the State's actions were arbitrary because the State disregarded the public health measures adopted by the facility.[115] Such arbitrariness, the *Kingsley* Court explained, rendered the State's conduct actionable under the Fruits of Labor Clause, which protects the "fundamental" right to "conduct a lawful business [and] earn a livelihood."[116]

At the pleading stage, *Kinsley* suggested a broader inquiry than the inquiry articulated in *Tully*. Rather than asking whether the claim fit within *Tully*'s three-element framework for public-employment disputes, the Court of Appeals distilled the inquiry into whether the State's conduct was arbitrary in a way that burdened the plaintiff's ability to earn a living.[117] The Court of Appeals's shift suggested that the Clause was not confined to promotional

[112] *See infra* cases cited notes 220, 224 (invoking the Clause as a constraint on police power, yet declining to clearly apply that framework to govern that constraint).
[113] 877 S.E.2d 54, 65 (N.C. Ct. App. 2022).
[114] *Id.* at 58.
[115] *See id.* at 62-63.
[116] *Id.* at 61.
[117] *Id*. at 62.

disputes or even to public employment, but could also reach broader "arbitrary" exercises of State power affecting lawful economic activity.[118]

Although the *Kinsley* decision was unanimous, the Supreme Court took the unusual step of granting certiorari.[119] During the briefing period, renewed attention to the Fruits of Labor Clause surfaced in other corners of state adjudication—including in administrative proceedings concerning occupational licensing.[120] In *Locklear v. North Carolina Criminal Justice Education & Training Standards Commission*, the North Carolina Highway Patrol sought to suspend a trooper's law enforcement certification after he allegedly disposed of evidence and lied about it.[121] The Office of Administrative Hearings (the "Office") rejected the position, invoking the Fruits of Labor Clause as a constitutional constraint on the State's power to deprive individuals of their livelihoods:

> The Tribunal emphasizes a principle so imperative that it appears at Article 1, Section 1 of the Constitution of North Carolina: "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." N.C. Const. art. I, § 1. The Constitution commands that the Tribunal recall these issues: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 3.
> . . .
> There is nothing in government more dangerous to the liberty and rights of the individual than a too ready resort to the police power . . . . Resort to the police power to exclude persons from an ordinary calling, finding justification only by the existence of a vague public interest, often amounting to no more than a doubtful social convenience, is collectivistic in principle, destructive to the historic values of these guaranties, and contrary to the genius of the people who did all that was humanly possible to secure them in a written constitution . . . . No good can come to society from a policy which tends to drive its members from the ranks of the

[118] *See id.* at 62-63.
[119] *See* Kinsley v. Ace Speedway Racing, Ltd., 883 S.E.2d 455, (N.C. 2023).
[120] *See* sources cited *infra* notes 121, 123, 125.
[121] *See* Joe Locklear, No. 22 DOJ 02965, 2023 WL 2711303 (N.C. Off. of Admin. Hearings 2023); *see also, e.g.*, Naa Abordo, No. 22 DHR 01762, 2022 WL 17552038 (N.C. Off. of Admin. Hearings 2022) (explaining that the Fruits of Labor Clause increases the importance of procedural due process in the occupational licensing context).

> independently employed into the ranks of those industrially dependent, and the economic fallacy of such a policy is too obvious for comment.[122]

The Office echoed its sentiment two months later, explaining that "rules mandating an automatic lifetime ban from a field of work inevitably create tension with people's right to the 'enjoyment of the fruits of their own labor' in the Constitution."[123] In recommending that the trooper be permitted to continue working in law enforcement, the Office stated that the Fruits of Labor Clause "disfavors barring citizens from professions."[124]

The citation of the Fruits of Labor Clause by administrative tribunals, as in *Locklear* and *Coffer*, marked a renewed application in the regulatory sphere.[125] By invoking the Clause to preserve an individual's livelihood despite acknowledged misconduct, the Office recast it as a quasi-substantive due process safeguard—protecting not only against arbitrary economic regulation, but also against State power to exclude citizens from lawful occupations without sufficient justification.[126] Operating without clear guidance from the Supreme Court, these administrative tribunals nevertheless recognized that occupational exclusion implicates fundamental liberty interests.[127]

While the Supreme Court contemplated its decision in *Kinsley*, the Court of Appeals confronted parallel questions in two challenges to the Governor's COVID-era executive orders: *Howell* and *North Carolina Bar & Tavern Ass'n*.[128] In *Howell*, seventeen bar owners

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[122] *Locklear*, 2023 WL 2711303.
[123] Fallon Coffer, No. 22 DOJ 04730, 2023 WL 4533812 (N.C. Off. of Admin. Hearings 2023).
[124] *Id.*
[125] *See* Bio-Med. Application of N.C., Inc., No. 20 DHR 2366, 2020 WL 8257515 (N.C. Off. of Admin. Hearings 2020); *Abordo*, 2022 WL 17552038.
[126] *Locklear*, 2023 WL 2711303.
[127] *Id*. (recognizing that the suspension or revocation of an occupational license implicates N.C. Const. art. I, § 1); *see also* State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949) (explaining that occupational exclusion triggers constitutional scrutiny).
[128] *See* Howell v. Cooper, 892 S.E.2d 445, 448 (N.C. Ct. App. 2023); N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 355, 360 (N.C. Ct. App. 2024).

challenged Executive Order No. 118, [129] which required bars across North Carolina to close, in whole or in part, from March 17, 2020,[130] until May 14, 2021,[131] arguing that its blanket prohibition on an entire economic sector deprived business owners of their right to the fruits of their labor.[132] On a motion to dismiss,[133] the Court of Appeals agreed, reasoning "that the blanket prohibition—rather than regulation—of an entire economic sector violates one's right to earn a living[.]"[134] The Court of Appeals offered no detailed explanation for its conclusion.[135]

North Carolina Bar & Tavern Ass'n arose from related executive orders but reached the Court of Appeals on summary judgment.[136] There, the plaintiffs attacked the schedule of closures and phased reopenings imposed by the Governor's executive orders as arbitrary, contending that the distinctions drawn among businesses lacked scientific justification.[137] For example, establishments "principally engaged in the business of selling alcoholic beverages for onsite consumption" were required to remain closed, while bars within restaurants were permitted to open for on-premises service under certain conditions.[138] Viewing the evidence in the light most favorable to the plaintiffs, the Court of Appeals agreed the schedule was arbitrary, explaining that nothing in the record demonstrated the "[p]laintiffs' bars, as opposed to the bars located in other establishments serving alcohol, posed a heightened risk at the time Executive Order No. 141 was issued."[139]

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[129] *See Howell*, 892 S.E.2d at 454.
[130] N.C. Exec. Order No. 118 (Mar. 17, 2020).
[131] N.C. Exec. Order No. 215 (May 14, 2021).
[132] *Howell*, 892 S.E.2d at 448-49.
[133] *See id.* at 449.
[134] *Id.* at 453.
[135] *See id.*
[136] *See* N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 355, 363 (N.C. Ct. App. 2024).
[137] *See id.* at 370-71.
[138] *Id.* at 361.
[139] *Id.* at 370.

Read together, *Howell* and *North Carolina Bar & Tavern Ass'n* demonstrate that Fruits of Labor Clause litigation was beginning to turn on both substance and procedure, but neither decision offered a clear articulation of the standard governing Fruits of Labor Clause claims.[140] In *Howell*, the Court of Appeals emphasized that "the thrust of the fruits of labor clause is that the State may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."[141] The court then concluded, without explanation, that Executive Order No. 118's blanket prohibition on an entire economic sector contravened the Fruits of Labor Clause.[142] In *North Carolina Bar & Tavern Ass'n*, by contrast, the Court of Appeals appeared to adopt a rational basis approach and discussed whether the executive orders had a "rational relationship" to the "protect[ion of] health, safety, or welfare."[143] The Supreme Court granted certiorari in both cases.[144]

Five months after *North Carolina Bar & Tavern Ass'n,* a unanimous Supreme Court affirmed the Court of Appeals' decision in *Kinsley*.[145] In doing so, the Supreme Court departed from *Tully* and articulated a reformed Fruits of Labor Clause framework. The court explained:

> to survive constitutional scrutiny under [the Fruits of Labor Clause], 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?"[146]

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[140] *See* Howell v. Cooper, 892 S.E.2d 445, 445 (N.C. Ct. App. 2023); *N.C. Bar & Tavern Ass'n*, 901 S.E.2d. at 355.
[141] *Howell*, 892 S.E.2d at 452 (internal quotation marks omitted).
[142] *See id.* at 453.
[143] *N.C. Bar & Tavern Ass'n*, 901 S.E.2d at 368-69 (internal quotation marks omitted).
[144] Howell v. Cooper, 900 S.E.2d 928, 928 (N.C. 2024); N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 232, 232 (N.C. 2024).
[145] *See* Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 730 (N.C. 2024).
[146] *Id.* at 726 (citations omitted).

On its face, this formulation seemed to impose a demanding burden on claimants: they must allege both that the State lacked any proper purpose for the interference *and* that the means selected were unreasonable.[147]

The Supreme Court's test, however, contained an internal tension. By definition, if a statute lacks a proper governmental purpose, there is no legitimate end to which the law's means could be reasonably tailored. Therefore, the analysis should terminate at the first step. Conversely, if the State can identify a proper purpose, the claimant's challenge necessarily shifts to the second step—not disputing the propriety of the purpose itself, but arguing that the statute is an irrational, excessive, or poorly tailored means of advancing it. Viewed this way, the two prongs do not function as cumulative hurdles but instead operate as alternative routes to invalidation. *Kinsley*'s framing of the two prongs as a single, conjunctive test creates a doctrinal paradox: plaintiffs are required to deny the existence of any legitimate governmental end while simultaneously arguing that the State selected unreasonable means to advance that same end.[148]

Rather than address that tension, the Supreme Court moved directly to elaborating on the second prong of its twofold test, explaining that the Fruits of Labor Clause is violated if the burden of the challenged action outweighs its effectiveness in serving the public:

> [t]he means used must be measured by balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated. This requires assessing two fact-specific questions—first, how effective is the state action at achieving the desired public purpose and, second, how burdensome is that state action to the targeted businesses. The analysis then becomes "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?[149]

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[147] *Id.*
[148] *See id.*
[149] *Id.* at 727 (quoting Poor Richard's, Inc. v. Stone, 366 S.E.2d 697, 700 (N.C. 1988)).

Applying the new standards to the case before it, the Supreme Court concluded that the purpose of the abatement order issued by the Department of Health and Human Services was not to mitigate the spread of COVID-19, but to retaliate against the racetrack for publicly criticizing the Governor.[150] The Supreme Court further found that the State's decision to close the racetrack while permitting other mass gatherings fell short of a reasonable means of addressing the pandemic's spread, even if the State cited public health as justification for the closure.[151] The court recognized that, although the claim could survive a 12(b)(6) motion to dismiss, the racetrack would face a "tremendous" burden proving its allegations.[152]

The *Kinsley* framework marked both a maturation and a complication of the Fruits of Labor Clause. On one hand, the *Kinsley* framework elevated the Clause from a narrow employment doctrine to a generalizable constitutional standard—requiring the State to show that its actions pursue a proper public end and the means chosen are proportionate to that end.[153] In theory, this framework promotes transparency, evidence-based governance, and constitutional accountability, situating economic liberty within the same means-ends logic that governs other fundamental rights.[154] Yet the framework's structure creates instability. By framing the inquiry conjunctively, the Supreme Court left unclear whether both prongs must independently do work or whether one simply collapses into the other. If the State lacks a proper purpose, there is little left for the first inquiry to do; if the purpose is proper, the analysis shifts to the far less determinate question of whether the burden imposed is justified in light of the public benefits asserted.[155] That open-ended "question of degree" gives the

[150] *Id.* at 728.
[151] *See Kinsley*, 904 S.E.2d at 728.
[152] *Id.*
[153] *See id.* at 727.
[154] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 719-21 (1997).
[155] *Kinsley*, 904 S.E.2d at 727.

framework flexibility, but it also leaves substantial room for inconsistent application and judicial second-guessing.[156]

The Court of Appeals confronted one aspect of *Kinsley*'s doctrinal uncertainty in *Proctor v. City of Jacksonville*, the first published decision to apply *Kinsley*.[157] In *Proctor*, three food truck owners brought a claim under the Fruits of Labor Clause challenging a municipal ordinance that allegedly imposed "severe restrictions" on their ability to earn a living.[158] The plaintiffs contended that the ordinance's true purpose was to "protect brick-and-mortar restaurants from competition," a rationale the court determined was not a proper governmental objective.[159] The *Proctor* court found the plaintiffs stated a claim and declined to reach the second prong of *Kinsley*'s twofold test.[160] By omitting the second part of *Kinsley*'s test, the court implied that the absence of a proper governmental purpose alone may suffice to sustain a Fruits of Labor claim.[161]

Taken together, the pandemic-era cases revived the Fruits of Labor Clause in a form both more consequential and unsettled than before. *Kinsley* supplied a general framework,[162] whereas *Howell* and *North Carolina Bar & Tavern Ass'n* showed that procedural posture could shape how that framework was applied,[163] and *Locklear*, *Coffer*, and *Proctor* demonstrated that the Clause was now being invoked across regulatory and occupational

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[156] *Id.*
[157] *See* 910 S.E.2d 269, 272 (N.C. Ct. App. 2024).
[158] *Id.*
[159] *Id.* at 277-78.
[160] *Id.*
[161] *See id.*
[162] *See* Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 726 (N.C. 2024) (citations omitted).
[163] *See* Howell v. Cooper, 892 S.E.2 445, 453 (N.C. Ct. App. 2023); N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 355, 368-69 (N.C. Ct. App. 2024).

contexts.[164] By the end of the COVID-19 pandemic, the Clause had become an active constraint on governance, but the terms of that constraint remained uncertain. The Supreme Court's 2025 decisions would soon bring that tension into sharper focus.

ANALYSIS

The Analysis proceeds in two parts. The first part examines the Supreme Court's 2025 trilogy. In *Howell* and *North Carolina Bar & Tavern Ass'n*, the Supreme Court revived the Fruits of Labor Clause as a substantive constraint on the State's police power but left its operative framework underdeveloped. In *Devalle v. North Carolina Sheriffs' Education & Training Commission*, decided the same day, the court upheld the indefinite exclusion of a law enforcement officer from his profession without acknowledging the Clause, creating an internal inconsistency with the COVID-19 era decisions. The second part proposes a principled correction with five components: a disjunctive reformulation of *Kinsley*'s two-part test; a substantive "proper purpose" inquiry; a tiered approach to means-end scrutiny focused on the severity and specificity of the State's burden; an accommodation for genuine emergencies; and a recognition that *Corum v. University of North Carolina*'s remedial limits cannot substitute for the substantive question *Devalle* left unanswered.

Second, this Section considers the immediate litigation consequences of the 2025 decisions, including a lowered threshold for surviving a Rule 12(b)(6) motion and increased importance for comparators, alternatives, and evidentiary support for governmental purposes. Additionally, the Analysis argues that a doctrine faithful to the Clause's Reconstruction

[164] Joe Locklear, No. 22 DOJ 02965, 2023 WL 2711303 (N.C. Off. of Admin. Hearings 2023); Fallon Coffer, No. 22 DOJ 04730, 2023 WL 4533812 (N.C. Off. of Admin. Hearings 2023); Proctor v. City of Jacksonville, 910 S.E.2d 269, 277-78 (N.C. Ct. App. 2024).

origins must protect the plaintiff in *Devalle* just as vigorously as the plaintiffs in *Howell* and *North Carolina Bar & Tavern Ass'n*.

I. 2025: THE FRUITS OF LABOR CLAUSE ASCENDANT AND ADRIFT

In three decisions issued the same day, the Supreme Court both expanded and unsettled the Fruits of Labor Clause.[165] Read together, the rulings chart a paradoxical trajectory: the court moved the Clause from the margins of state constitutional law toward the center of debates over governmental power, while simultaneously fracturing its doctrinal coherence. In *Howell* and *North Carolina Bar & Tavern Ass'n*, the Supreme Court invoked the Clause as a powerful constraint on the State's police power, yet declined to apply the very framework it had announced to govern that constraint.[166] Yet, in *Devalle*, decided that same day, the court declined to take up the mantle laid down in *Locklear* and *Coffer*.[167] Instead, it upheld the indefinite exclusion of a rehabilitated law enforcement officer from his chosen profession without acknowledging the constitutional right it invigorated in *Howell* and *North Carolina Bar & Tavern Ass'n.*[168] The Clause emerged from this trilogy more consequential, but less coherent.

The ambiguity begins with *Howell* and *North Carolina Bar & Tavern Ass'n*, where the Supreme Court reaffirmed the Fruits of Labor Clause as a substantive constraint on state power and outlined what appeared to be a workable burden-shifting framework concerning governmental purpose and proportionality.[169] Yet, in taking this approach, the Supreme Court left crucial contours undefined—how, and to what extent, courts should discern the

[165] *See* Howell v. Cooper, 919 S.E.2d 212, 223 (N.C. 2025); Devalle v. N.C. Sheriffs' Educ. & Training Comm'n, 919 S.E.2d 152, 167-68 (N.C. 2025); N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 684, 697-98 (N.C. 2025).
[166] *See Howell*, 919 S.E.2d at 220-22; *N.C. Bar & Tavern Ass'n*, 919 S.E.2d at 693-95.
[167] *See Devalle*, 919 S.E.2d at 167-68.
[168] *See id.*
[169] *See N.C. Bar & Tavern Ass'n*, 919 S.E.2d at 693.

government's "actual" purpose; how "reasonableness" and efficacy are to be measured; and whether *Kinsley*'s two-part inquiry operates conjunctively, disjunctively, or not at all.[170]

The Supreme Court's rhetoric in the COVID-19 cases was sweeping. Echoing the early sentiments expressed in *Ballance*, the Supreme Court characterized the right to earn a living as the "first principle[ ] of freedom,"[171] and a "fundamental human right [that the] government [is] bound to respect."[172] The protections afforded to this right, the court explained, represent the "supreme expression of the people's will . . . ."[173] The court's framing places the Clause squarely within its natural-rights tradition and signals that the court no longer regards the provision as a mere constitutional ornament.

Against that backdrop, the first opinion—*Howell*—addressed whether bare allegations of industry-wide closure suffice to put the State on notice of a claim under the Fruits of Labor Clause.[174] There, the Supreme Court affirmed the Court of Appeals but sidestepped the substantive inquiry of whether the statewide closure of all bars during the COVID-19 pandemic was supported by a proper governmental purpose, whether the means chosen to achieve that purpose were reasonable, or whether the efficacy of the closure was sufficient to outweigh the business owners' economic liberty interest.[175] Such allegations were largely absent from the plaintiffs' complaint, which was filed before the *Kinsley* decision.[176] As the court itself observed, the pleading was not "structured . . . around the standards articulated in *Kinsley*."[177]

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[170] *Id.*; *see also Howell*, 919 S.E.2d at 221.
[171] *N.C. Bar & Tavern Ass'n*, 919 S.E.2d at 693.
[172] *Howell*, 919 S.E.2d at 220 (internal quotation marks omitted).
[173] *Id.* (internal quotation marks omitted).
[174] *See id.* at 215.
[175] *See id.* at 220.
[176] *See id.* at 220-21.
[177] *Id.* at 220 n.16.

Nevertheless, the Supreme Court concluded the plaintiffs' allegation that the forced closure of their businesses deprived them of the ability to earn a living "unquestionably puts the trial court and defendants" on notice that the plaintiffs intended to challenge the reasonableness of a blanket ban on their industry under the second *Kinsley* prong.[178] This "fact-intensive analysis" justified the denial of the motion to dismiss.[179] The *Howell* decision marked a departure from *Glenn*, where the Supreme Court expressed no qualms with categorical bans on alcohol sales.[180]

Howell is significant not only because the claim survived dismissal, but because of what the Supreme Court failed to address. The court did not analyze whether the executive orders were supported by a proper governmental purpose, whether the means chosen were reasonable, or whether the efficacy of the closures justified the burden imposed on bar owners.[181] Instead, the court allowed the case to proceed because the complaint sufficiently signaled an intent to challenge the reasonableness of the State's action.[182]

By declining to apply *Kinsley*'s two-part inquiry—whether the challenged action serves a proper governmental purpose and whether the means chosen to advance that purpose are reasonable—the Supreme Court effectively treated the second prong as sufficient at the pleading stage, or at least relaxed the plaintiff's burden in a way inconsistent with *Kinsley*'s conjunctive formulation.[183] By sidestepping any analysis of whether the asserted purpose of mitigating the spread of COVID-19 was proper, the court implied that legitimate purposes

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[178] Howell v. Cooper, 919 S.E.2d 212, 221 (N.C. 2025)
[179] *Id.* (internal quotation marks omitted).
[180] *See, e.g.*, Glenn v. S. Express Co., 87 S.E. 136, 142 (N.C. 1915).
[181] *See Howell*, 919 S.E.2d at 221.
[182] *See id.* ("The complaint in this case seems to focus on the second prong: whether the executive orders' closures of bars were a reasonable means to effect the purpose of limiting COVID-19's spread . . . . The complaint unquestionably puts the trial court and defendants on notice of the transactions, occurrences, or series of transactions or occurrences that plaintiffs intend to prove.").
[183] *See id.*

may violate the Fruits of Labor Clause if pursued through disproportionate or arbitrary means.[184]

Howell's context renders its outcome especially troubling for State actors. If the rapid spread of a novel virus is not enough to justify the emergency, temporary closure of businesses, the circumstances in which the State could ever act to impose economic restrictions remain unclear. The *Howell* decision suggests that even when swift executive action may be essential, courts will permit challenges to proceed without requiring plaintiffs to allege that the State acted without a proper purpose or by unreasonable means.[185] By taking this approach, *Howell* risks moving the Fruits of Labor Clause away from a safeguard against arbitrary regulation and toward a more intrusive form of judicial review that may limit legitimate exercises of police power. The *Howell* approach could chill future emergency responses and regulatory measures aimed at protecting the public good.

Justice Earls, joined by Justice Riggs, echoed this sentiment in her *Howell* dissent.[186] In her view, the majority "abuse[d] notice pleading principles to invite meritless litigation" and "grant[ed] itself a roving license to second-guess policy choices, reweigh trade-offs, and displace decisions appropriately made by the political branches" under emergency circumstances.[187] Justice Earls faulted the majority for permitting the plaintiffs' claims to proceed despite the executive orders' purpose to protect public health, the absence of any theory explaining why the orders lacked a close relationship to that purpose, and the complaint's silence on whether the restrictions were unsuccessful in curbing COVID-19.[188]

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[184] *See id.* at 221-22.
[185] *See id.* at 223 ("We acknowledge that the COVID-19 pandemic was a chaotic period of time.").
[186] *See id.* (Earls, J., dissenting).
[187] Howell v. Cooper, 919 S.E.2d 212, 223 (N.C. 2025) (Earls, J., dissenting).
[188] *See id.* at 225-26.

Justice Earls warned that, under the majority's reasoning, the Fruits of Labor Clause risked becoming a "*Lochner*-esque weapon," empowering courts to invalidate economic regulations based on their own sense of reasonableness rather than principled deference to the policymaking branches.[189]

The Supreme Court's decision in *North Carolina Bar & Tavern Ass'n*, like its decision in *Howell*, did not grapple with the propriety, reasonableness, or efficacy of the challenged state action.[190] Rather than grappling with the record, the court articulated a new burden-shifting framework and remanded the case to the trial court with instructions to reopen factual discovery and reconduct summary judgment proceedings in light of the revised framework.[191]

At step one of this new framework, courts must identify the government's actual purpose for the challenged interference with economic activity, recognizing that this "may not always be the purpose initially put forward by the State."[192] Plaintiffs may rebut the stated purpose with evidence showing it is pretextual and that the State is pursuing a "different, unstated" objective.[193] If a proper purpose is shown, the burden shifts to the government to demonstrate that the means chosen to advance that purpose are reasonable.[194]

The framework announced in *North Carolina Bar & Tavern Ass'n* gave the Fruits of Labor Clause a sharper structure than *Howell*. This framework makes purpose, pretext, and proportionality central to the analysis and confirms that "mere interference" with the right to

[189] *Id.* at 223.
[190] *Cf.* Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 728 (N.C. 2024) (evaluating the propriety of the government's stated purpose, and whether the means chosen to affect that purpose—closing one business while ignoring others posing an equal, if not greater, risk to public health—were effective and reasonable).
[191] *See* N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 684, 693-94, 697 (N.C. 2025).
[192] *Id.* at 693 (internal quotation marks omitted).
[193] *Id.* (internal quotation marks omitted).
[194] *Id.*

earn a living—not total exclusion from work—is enough to trigger constitutional review.[195] In that respect, *North Carolina Bar & Tavern Ass'n* significantly expanded the Clause's practical reach. Temporary or partial restraints on economic activity now require justification.

Justice Riggs, joined by Justice Earls, dissented in *North Carolina Bar & Tavern Ass'n*.[196] Justice Riggs explained that she would have affirmed the trial court's entry of summary judgment in favor of the Governor.[197] Employing the *Kinsley* test, Justice Riggs indicated that the executive orders indisputably aimed to slow the spread of COVID-19, and that the plaintiffs offered no evidence rebutting this purpose.[198] Moreover, she explained that the plaintiffs failed to demonstrate that the phased reopening of businesses was unreasonable.[199]

Howell and *North Carolina Bar & Tavern Ass'n* established the Fruits of Labor Clause as an enforceable constitutional guarantee while leaving much about its operation unresolved. Although the Supreme Court announced a new analytical framework in *North Carolina Bar & Tavern Ass'n*, it did not apply that framework to the pleadings in *Howell*, leaving its role at the motion to dismiss stage uncertain.[200] Still, one point emerges clearly: the pleading bar is low.[201] The gain is a potential remedy for North Carolinians and government accountability. Contemporaneous rationales, comparators, and proportionality will matter under the *Howell* and *North Carolina Bar & Tavern Ass'n* standards.

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[195] *See id.*
[196] *See id.* at 698 (Riggs, J., concurring in part and dissenting in part).
[197] *See* N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 684, 702 (N.C. 2025) (Riggs, J., concurring in part and dissenting in part).
[198] *Id.* at 703 (Riggs, J., concurring in part and dissenting in part).
[199] *Id.* (Riggs, J., concurring in part and dissenting in part).
[200] *See* Howell v. Cooper, 919 S.E.2d 212, 221 (N.C. 2025).
[201] *See id.* ("The complaint in this case seems to focus on the second prong: whether the executive orders' closures of bars were a reasonable means to effect the purpose of limiting COVID-19's spread . . . . The complaint unquestionably puts the trial court and defendants on notice of the transactions, occurrences, or series of transactions or occurrences that plaintiffs intend to prove.").

The cost, however, is doctrinal instability. It remains unclear how and whether courts must meaningfully assess the "reasonableness" of government action, scrutinize the sincerity of its stated purpose, or weigh the proportionality and efficacy of the means employed to achieve it. Even though *Kinsley* appeared to require such inquiries, *Howell* seemingly made it optional, leaving lower courts to navigate the line between genuine constitutional review and judicial restraint without a clear compass.[202]

Although the Supreme Court in *Howell* and *North Carolina Bar & Tavern Ass'n* invalidated COVID-era restrictions in the name of economic liberty, it showed no such concern for public employees.[203] In *Devalle*,[204] a former state trooper challenged the Commission's decision to indefinitely deny his recertification as a justice officer for lack of "good moral character." Despite undisputed evidence of rehabilitation—including years of successful service as a school resource officer and strong references from his superiors—the Commission relied solely on his 2016 misconduct and demeanor at the recertification hearing to justify its denial.[205]

The administrative law judge, the superior court, and the Court of Appeals unanimously concluded that the Commission violated its own definition of "good moral character,"[206] and both the former state trooper and amici argued that the Commission's unsupported determination contravened the Fruits of Labor Clause's prohibition on arbitrary

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[202] *See id.* at 221-22.
[203] *See id.* at 215-16 (allowing a complaint against the Governor for COVID-19-era bar closures to proceed past the pleading stage); *see also* N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 684, 689, 693-94 (affirming decision to vacate summary judgment in favor of the Governor for his COVID-19 bar closures because the Fruits of Labor Clause "bars state action *burdening* [economic] activities" (internal quotation marks omitted)).
[204] 919 S.E.2d 152, 155 (N.C. 2025).
[205] *See id.* at 158.
[206] Devalle v. N.C. Sheriffs' Educ. & Training Standards Comm'n, 887 S.E.2d 891, 897 (N.C. Ct. App. 2023); Devalle v. N.C. Sheriffs' Educ. & Training Standards Comm'n, No. 20 CVS 1273, 2021 WL 11132326, at *7 (N.C. Super. Nov. 22, 2021).

departures from agency rule.[207] Despite these arguments, a divided Supreme Court reversed and permitted the Commission's decision to stand, thereby allowing the former state trooper's indefinite exclusion from his chosen profession.[208]

What is most striking about *Devalle* is not necessarily its outcome, but the Supreme Court's complete failure to engage the Fruits of Labor Clause.[209] The omission of *any* discussion of the right to earn a living in a decision affirming the indefinite exclusion of a citizen from his chosen profession creates substantial uncertainty about the future direction of the State's economic-liberty jurisprudence. By declining to acknowledge the Clause in the occupational-licensing context—despite having, on the very same day, dramatically expanded its reach in cases involving economic regulation—the Supreme Court left unclear whether the right to earn a living applies consistently across contexts, or whether it is a principle the judiciary will invoke in select circumstances.[210]

The Supreme Court's silence in *Devalle* does not by itself indicate that *Devalle* was wrongly decided. Law enforcement may not be the "ordinary … [and] innocuous occupation" contemplated by *Roller*.[211] Courts may, therefore, owe greater deference to legislative and administrative judgments concerning the fitness of individuals entrusted with arrest powers, use of force, and the credibility necessary to function within the criminal justice system.

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[207] *See* New Br. of Petitioner Appellee Maurice Devalle, *Devalle*, 919 S.E.2d 152 (No. 158PA23); Br. by Amicus Curiae Southern States Police Benevolent Association, *Devalle*, 919 S.E.2d 152 (No. 158PA23); Br. of Amici Curiae North Carolina Advocates for Justice and State Employees Association of North Carolina, Inc., in Support of Maurice Devalle, *Devalle*, 919 S.E.2d 152 (No. 158PA23).
[208] *See Devalle*, 919 S.E.2d at 161-68.
[209] *See id.*
[210] *Compare id.* (omitting any reference to the Fruits of Labor Clause in the occupational licensing setting), *with* State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949) (invalidating an occupational licensing regulation pursuant to the Fruits of Labor Clause).
[211] Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957).

But the distinctions between "ordinary … [and] innocuous occupations"[212] and more complex occupations, like law enforcement, go to *how* the Fruits of Labor Clause should apply, not *whether* it applies at all. In *Devalle*, instead of remaining silent on the applicability of the Clause, the Supreme Court should have acknowledged that occupational exclusion was at issue and analyzed whether the special character of law enforcement justified the Commission's determination under the governing constitutional standard. The Supreme Court's failure to address the Clause leaves unclear whether occupational exclusion remains the doctrine's core concern[213] or whether its application depends on context-specific judicial discretion untethered from stated principle.

The Supreme Court's omission sits uneasily with the broader trajectory of the case law. *Devalle* is in tension not only with *Howell* and *North Carolina Bar & Tavern Ass'n*, but also with lower-court decisions such as *Kelliher*, where the Court of Appeals construed the Fruits of Labor Clause as providing at least some limitation on criminal sentencing.[214] If the Clause can inform constitutional limits on criminal punishment—even protecting people convicted of the gravest offenses from being denied all opportunity to labor—it is difficult to ignore its total absence from a case involving a law-abiding citizen's exclusion from his livelihood.[215] The same broader understanding appeared in administrative decisions such as *Locklear* and *Coffer*, where adjudicators invoked the Clause to scrutinize occupational exclusion directly.[216] Against that backdrop, the Supreme Court's silence in *Devalle* creates

[212] *Id.*
[213] *See* State v. Harris, 6 S.E.2d 854, 866 (N.C. 1940); State v. Ballance, 51 S.E.2d 731, 736 (1949); *Roller*, 96 S.E.2d at 859.
[214] *See* State v. Kelliher, 849 S.E.2d 333, 350-52 (N.C. Ct. App. 2020).
[215] *See generally* Devalle v. N.C. Sheriffs' Educ. & Training Standards Comm'n, 919 S.E.2d 152, 155 (N.C. 2025) (reversing the lower court without reference to the Fruits of Labor Clause).
[216] *See* Joe Locklear, No. 22 DOJ 02965, 2023 WL 2711303 (N.C. Off. of Admin. Hearings 2023); Fallon Coffer, No. 22 DOJ 04730, 2023 WL 4533812 (N.C. Off. of Admin. Hearings 2023).

an internal inconsistency: a provision capacious enough to inform constitutional limits on criminal punishment cannot easily be reconciled with a jurisprudence that treats its application to occupational exclusion as optional.

Taken together, the trilogy of *Howell*, *North Carolina Bar & Tavern Ass'n*, and *Devalle* leaves the Fruits of Labor Clause prominent but unsettled. In one breath, the Supreme Court elevated the Clause to the center of North Carolina's constitutional identity—an enforceable limit on the State's authority to restrict economic life.[217] In the next, the court declined to articulate a stable framework for applying the Clause, or to recognize its existence in contexts where its protection seems naturally implicated.[218] The result is a doctrine of undeniable vitality but uncertain direction: one capable of deepening judicial engagement with economic liberty, yet equally capable of drifting toward selective enforcement.

II. SHIFTING TOWARD A PRINCIPLED FRUITS OF LABOR JURISPRUDENCE

The problem is not that the Fruits of Labor Clause framework announced in *Kinsley* and developed in *North Carolina Bar & Tavern Ass'n* is unworkable. Instead, the problem is that the Supreme Court's 2025 decisions leave unclear what work the "proper purpose" inquiry is doing,[219] destabilize the relationship between governmental purpose and means-end fit, and create a doctrine that appears conspicuously more protective in business-regulation cases than in cases of occupational exclusion. If emergency public-health measures are subjected to searching review without clear limiting principles, the Clause risks becoming an instrument for judicial second-guessing of legitimate governance.[220] If, by

[217] *See* Howell v. Cooper, 919 S.E.2d 212, 221 (N.C. 2025); N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 684, 693 (N.C. 2025).
[218] *See generally Devalle*, 919 S.E.2d 152 (lacking reference to Fruits of Labor Clause in analysis).
[219] *See* Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 726 (N.C. 2024).
[220] *See* Smith v. Turner, 48 U.S. 283, 329-30 (1849); State v. Hay, 35 S.E. 459, 462 (N.C. 1900) (Douglas, J. concurring); Trustees of Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 70 (N.C. 1805) ("The despotic power as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the

contrast, the Clause is not acknowledged when the State indefinitely excludes a person from his occupation, the right to earn a living looks hollow. A workable doctrine must avoid both results.

A principled Fruits of Labor Clause framework should begin with a premise now reflected in the case law: "mere interference" with the right to earn a living is enough to trigger constitutional review.[221] *Kinsley*'s conjunctive formulation requires plaintiffs to allege simultaneously that the State lacked a proper purpose and that it chose unreasonable means to advance that same purpose.[222] To resolve the *Kinsley* paradox, a plaintiff should be required to plead and later prove either that the challenged action lacked a proper governmental purpose[223] *or* that the means chosen to advance an otherwise proper purpose were unreasonably restrictive.[224] The inquiries are related, but they do not do the same work. The first asks whether the State is pursuing a constitutionally proper end. The second asks whether the burden imposed is justified in light of that end.

A disjunctive formulation eliminates *Kinsley*'s confusion while lowering the pleading bar, but it does not dispense with the requirement of alleging facts, as *Howell* effectively did.[225] A plaintiff proceeding under either theory must still plead facts sufficient to call into

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existence of such power is necessary; government could not subsist without it; and if this be the case it cannot be lodged any where, with so much safety as with the Legislature. The presumption is that they will not call it into exercise except in urgent cases, or cases of the first necessity.").

[221] *See N.C. Bar & Tavern Ass'n*, 919 S.E.2d at 693.

[222] *See Kinsley*, 904 S.E.2d at 730.

[223] *See N.C. Bar & Tavern Ass'n*, 919 S.E.2d at 693.

[224] *See* State v. Williams, 61 S.E. 61, 67 (N.C. 1908) ("The Legislature, in the exercise of the police power, may, by appropriate enactments, regulate and, if they deem it conducive to the public health, morals, peace or safety, entirely prohibit the manufacture and sale of intoxicating liquors . . . . [But the prohibition of] any person from carrying into the county of Burke in any one day more than one-half gallon of vinous, spirituous or malt liquor, is not a valid exercise of the police power, for that it unduly restricts the right of the citizen to the use of his property, without any intent to violate any prohibited act in relation to it; that the carrying into the county of Burke of the prohibited quantity has no reasonable, substantial relation to the sale of liquors, as prohibited by law.").

[225] *See* Howell v. Cooper, 919 S.E.2d 212, 221 (N.C. 2025) (indicating only that the complaint "seems to" be focusing on the second *Kinsley* prong).

question either the propriety of the State's purpose or the reasonableness of its means. The claim that one's business was closed is not, standing alone, enough—the plaintiff must identify the improper purpose or the burden.[226] Determining an improper purpose or an unreasonable burden is a distinct inquiry, so each requires a separate analysis.

The first question is whether the State acted for a proper purpose. Courts should treat that inquiry as a legitimate one, not merely a formal prelude to means-end review.[227] That inquiry should ask three questions: whether the purpose proffered by the State is the actual purpose of the challenged action, whether it is constitutionally proper within the meaning of historical case law,[228] and whether the plaintiff has alleged or proven facts suggesting pretext or some other unstated objective.[229] If the State identifies a proper purpose with evidentiary support appropriate to the procedural posture, and the plaintiff fails to establish pretext, the plaintiff must carry the case on the means-end prong alone.

The second question remains: whether the means chosen were justified in relation to the State's end. This inquiry raises a concern that must be addressed directly. Some will argue that the breadth of the Clause's protection of North Carolinians' "inalienable . . . [right to] the enjoyment of the fruits of their own labor"[230] provides *Lochner*-like power, enabling courts to invalidate broad swaths of economic regulation as unconstitutional interference with that right.[231] To foreclose that interference, two variables should govern the intensity of

[226] *Cf. Howell*, 919 S.E.2d at 223-24 (Earls, J., dissenting) ("The bars did not allege that the Governor's actions were unreasonable, made with an improper purpose, or even ineffective at curbing the spread of COVID-19 or saving lives.").
[227] *See id.* at 220-21, 225 (mentioning, but not engaging with, the "proper purpose" inquiry).
[228] *See* State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949).
[229] *See* Kinsley v. Ace Speedway Racing, Ltd., 904 S.E.2d 720, 728 (N.C. 2024); N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 694, 693-94 (N.C. 2025).
[230] N.C. CONST. art. I, § 1.
[231] Bilionis, *supra* note 71; *see Howell*, 919 S.E.2d at 223 (Earls, J., dissenting).

judicial scrutiny: the severity of the State's burden on the right to earn a living and the specificity with which that burden is directed.

A generally applicable regulation that burdens an ongoing business without extinguishing the ability to earn a living—such as licensing conditions, capacity restrictions, or reporting requirements—calls for a showing that the State acted to "promote the accomplishment of a public good, or to prevent the infliction of a public harm" through reasonable means,[232] but not necessarily the least restrictive means.[233] A total prohibition on pursuing a lawful occupation, whether by executive order or revocation of a license necessary to practice, shifts the inquiry from reasonableness to comparative efficacy: the State should establish not only a proper purpose, but also a "substantially greater likelihood"[234] that the prohibition, rather than a less restrictive alternative,[235] will accomplish that purpose. Where the State singles out a specific business or, as in *Devalle*,[236] excludes a particular person from a profession, it must justify the individualized prohibition.[237] First, the justification requires that the State's rule serves the public good or prevents a public harm. Second, the justification requires that the exclusion of a specific business or person, as opposed to a less severe measure, is substantially likely to serve the public good or prevent a public harm.

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[232] *Ballance*, 51 S.E.2d at 735.
[233] *See* Glenn v. S. Express Co., 87 S.E. 136, 142 (N.C. 1915).
[234] *See In re* Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729, 735 (N.C. 1973) ("To deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attach based upon Article I, § 19 of the Constitution of North Carolina."); *see also Ballance*, 51 S.E.2d at 735.
[235] *See* Poor Richard's, Inc. v. Stone, 366 S.E.2d 697, 700 (N.C. 1988).
[236] Devalle v. N.C. Sherriff's Educ. & Training Standards Comm'n, 919 S.E.2d 152, 155 (N.C. 2025).
[237] *See In re* W.B.M., 690 S.E.2d 41, 52 (N.C. Ct. App. 2010) (requiring "notice and an opportunity to be heard" before an individual is placed in the Responsible Individuals List as to justify infringement on the right to the "enjoyment of the fruits of their own labor.").

Emergency conditions should widen the range of reasonable means available to the State to address the emergency.[238] Put differently, although "emergency does not create power," it "may furnish the occasion for the exercise of power."[239] The Constitution is not "a suicide pact";[240] it is "intended to endure for ages to come," and must, therefore, "be adapted to the various crises of human affairs."[241] Even the social-contract theory, from which the Fruits of Labor Clause arose, recognized that individuals enter civil society and surrender certain rights with the expectation that laws will serve the common good.[242] The Clause's natural-rights foundation does not preclude, and may affirmatively support, broader governmental latitude when the common good is genuinely and imminently at stake.

In the emergency setting, courts should be slower to infer pretext, more willing to credit the State's need to act under conditions of uncertainty, and less demanding of *ex ante* precision. Even so, the State should still be required to identify the public end it seeks to advance, explain why the means chosen were reasonable in light of the available information, and justify material disparities among similarly situated actors whose right to earn a living it

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[238] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905) ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."); Slaughter-House Cases, 83 U.S. 36, 62 (1872) ("This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."); Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

[239] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

[240] *Terminiello*, 337 U.S. at 37.

[241] M'Culloch v. Maryland, 17 U.S. 316, 415 (1819).

[242] *See, e.g.*, State v. Hay, 35 S.E. 459, 462 (N.C. 1900) (Douglas, J., concurring); Trustees of Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 70 (N.C. 1805) ("The despotic power as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case it cannot be lodged any where, with so much safety as with the Legislature. The presumption is that they will not call it into exercise except in urgent cases, or cases of the first necessity.").

burdens. But emergency latitude cannot be indefinite.[243] The longer a restriction persists, the heavier the State's burden should become to justify its continuation as conditions evolve.[244]

Corum[245] supplies another limiting principle against using the Clause to dismantle laws and regulations, but only a remedial one. Under the *Corum* doctrine, a plaintiff may proceed directly under the Constitution only when no adequate alternative remedy is available.[246] *Corum*'s rule tempers the Clause's expansion by ensuring that it remains a remedy of last resort, not a parallel vehicle for routine employment or regulatory disputes.[247] But *Corum* does not answer the distinct substantive question left open by *Devalle*: whether the Fruits of Labor Clause applies when the State bars a citizen from his livelihood.[248]

North Carolina's Declaration of Rights provides that a "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."[249] As North Carolina's history makes clear, one of those principles is that the Fruits of Labor Clause emerged from Reconstruction as a guarantee that people long denied the rewards of their labor—most importantly, formerly enslaved people—could work, sell their labor, and retain their wages.[250] A doctrine faithful to that history, as well as to the Clause's roots in North

[243] *Blaisdell*, 290 U.S. at 439 ("Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power."); *see also* Glenn v. S. Express Co., 87 S.E. 136, 141-42 (N.C. 1915).
[244] *See, e.g.*, Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic*, 109 VA. L. REV. 489, 530 (2023) (citing Roman Catholic Diocese of Brooklyn v. Cuomo, 529 U.S. 14, 67 (2020)).
[245] Corum v. Univ. of North Carolina, 413 S.E.2d 276, 294 (N.C. 1992).
[246] *Id.* at 289.
[247] *Id.* at 290.
[248] *See generally* Devalle v. N.C. Sherriff's Educ. & Training Standards Comm'n, 919 S.E.2d 152 (N.C. 2025).
[249] N.C. CONST. art. I, § 35.
[250] *See* Dietz, *supra* note 4, at 19-21; Gans, *supra* note 8, at 223-24.

Carolina's case law,[251] should, therefore, be just as protective of the plaintiff in *Devalle*[252] as the plaintiffs in *Tully*,[253] *Kinsley*,[254] *Howell*,[255] and *North Carolina Bar & Tavern Ass'n*.[256]

The Supreme Court's 2025 decisions carry immediate litigation consequences. The recent cases suggest a more searching form of review than traditional deference would allow, incentivize the State to articulate contemporaneous justifications for burdens on lawful labor, and place greater weight on the evidentiary record supporting means-end fit.[257] The decisions also appear to lower the threshold for surviving a Rule 12(b)(6) motion: after *Howell*, a plaintiff may reach discovery by alleging facts that challenge either the State's asserted purpose or the reasonableness of its means, even without a fully developed theory at the pleading stage.[258] As a result, Fruits of Labor Clause litigation is likely to focus increasingly on comparators, alternatives, line-drawing, scientific or economic support, and the sincerity of governmental purposes. Yet it remains unclear whether the Clause will be applied when the State indefinitely excludes an individual from his profession.

The practical effects underscore the central tension of the modern doctrine. The Clause now promises genuine scrutiny of state action burdening the right to earn a living, but its application remains uneven. Whether the Fruits of Labor Clause matures into a principled safeguard or drifts into an unpredictable vehicle for judicial reweighing of policy judgments will depend not simply on the framework the Supreme Court has announced, but on the consistency, discipline, and restraint with which courts apply it.

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[251] *See* State v. Harris, 6 S.E.2d 854, 866 (N.C. 1940); State v. Ballance, 51 S.E.2d 731, 736 (N.C. 1949); Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957).
[252] *Devalle*, 919 S.E.2d at 167-68.
[253] Tully v. City of Wilmington, 810 S.E.2d 208, 217 (N.C. 2018).
[254] Kinsley v. Ace Speedway Racing, Ltd., 883 S.E.2d 455 (N.C. 2023).
[255] Howell v. Cooper, 900 S.E.2d 928 (N.C. 2024).
[256] N.C. Bar & Tavern Ass'n v. Cooper, 901 S.E.2d 232 (N.C. 2024).
[257] *See* N.C. Bar & Tavern Ass'n v. Stein, 919 S.E.2d 684, 693 (N.C. 2025).
[258] *See* Howell v. Cooper, 919 S.E.2d 212, 221 (N.C. 2025).

CONCLUSION

The revival of North Carolina's Fruits of Labor Clause is more than a jurisprudential curiosity. The revival marks a consequential development in the State's constitutional law doctrine: the reemergence of an express guarantee of economic liberty as a meaningful constraint on governmental power. What began in 1868 as a repudiation of a social order built on the denial of labor's rewards has reentered modern doctrine—unevenly, but unmistakably—as a source of judicially enforceable limits on regulation, exclusion, and arbitrariness.

The revival of the Clause, however, brings an old tension back into view. North Carolina's Constitution demands meaningful scrutiny of state action affecting the right to earn a living, but it does not license courts to convert every contested policy judgment into a constitutional wrong. The resulting tasks are disciplined ones: to require the State to identify a proper public end, to test the fit between that end and the means chosen to advance it, and to insist on evidence rather than rhetoric—while resisting the temptation to turn the Fruits of Labor Clause into a vehicle for judicial policymaking. Properly applied, the Clause will be neither a blunt instrument against regulation nor a ceremonial flourish. Instead, the Clause will function as a workable safeguard of a distinctly North Carolinian constitutional commitment: citizens are entitled to work and enjoy their rewards.

In that respect, North Carolina now stands apart. Missouri and Oklahoma possess similar constitutional language, but neither state has given its guarantee comparable doctrinal force. North Carolina has an opportunity—and a responsibility—to show that meaningful protection for economic liberty need not rest on resurrected *Lochner*ism, but can arise from faithful interpretation of its own text, history, and constitutional tradition. Whether the Fruits of Labor Clause matures into such a safeguard, or becomes the forbidden fruit of judicial

temptation, will depend on whether courts can honor its promise without exceeding its warrant.