Tully v. City of Wilmington: A Fundamental Right To Be Treated Reasonably at Work*

Kevin Tully, a distinguished police corporal in Wilmington, North Carolina, was rejected for a promotion because he outsmarted his advancement test—the "correct" answers were based on outdated law, while Tully's answers were up-to-date. When Tully was denied an internal appeal of his test results, he turned to the North Carolina Constitution for help. For the first time, the Supreme Court of North Carolina interpreted article I, section 1 of the state constitution, which guarantees to every North Carolinian the "enjoyment of the fruits of their own labor," to protect a fundamental right to pursue one's chosen occupation in the public sector as well as the private sector. Across America, public employees suffer from stagnant wages, growing workloads, and political gamesmanship. They are largely denied rights guaranteed to private employees by federal employment and labor statutes and to other citizens by the federal Constitution. This Recent Development shows how state courts can "step into the breach" by extending similar state constitutional provisions to public employees.

This Recent Development makes three contributions. First, it defines the contours of this often overlooked fundamental right protected by article I, section 1 by tracing the "fruits clause" from its adoption in 1868 to today, drawing a single thread of reasoning from the Supreme Court of North Carolina's antiregulatory precedent to its most recent case, Tully v. City of Wilmington*. Second, it synthesizes precedential treatment of the fruits clause, outlining a straightforward test for judges to evaluate future claims brought by public employees under the clause. Third, it uses two examples—overworked school social workers and counselors and nonconfidential sexual harassment reporting policies for state legislative employees—to demonstrate how creative lawyers can improve working conditions for public employees by litigating future cases under the fruits clause.*

In his now famous article, *State Constitutions and the Protection of Individual Rights*, former United States Supreme Court Justice William Brennan called on civil rights advocates to look beyond the promise of the Fourteenth Amendment to state constitutions, which, too, are "font[s] of individual liberties."[1] Brennan

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

criticized that, eight years after the Warren Court,[2] the U.S. Supreme Court had "crippled" the protections of the federal Constitution, condoning "both isolated and systematic violations of civil liberties" throughout the country.[3] In such circumstances, he argued, the task of protecting civil rights falls to the arbiters of state constitutional protections.[4]

Justice Brennan's depiction of crippled federal rights rings particularly true for government employees. Over Brennan's protests, the federal Constitution's guarantee of due process has not been meaningfully extended to public employees,[5] and citizens may lose other fundamental rights simply by being on the government's payroll.[6]

Luckily, the Supreme Court of North Carolina "step[ped] into the breach"[7] in *Tully v. City of Wilmington*,[8] transforming an often-overlooked clause of the North Carolina Constitution into a powerful protector of public employee rights. Article I, section 1 of the North Carolina Constitution, which recognizes an "inalienable right[]" to the "enjoyment of the fruits of their own labor,"[9] had primarily been interpreted as a limit on the state's economic

2. Chief Justice Earl Warren retired in 1969. *The Warren Court, 1953–1969*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/timeline_court_warren.html [https://perma.cc/FB7S-6FWA].

3. Brennan, *supra* note 1, at 502–03 (citing Stone v. Powell, 428 U.S. 465, 494 (1976) (denying federal habeas corpus relief for a Fourth Amendment unreasonable search violation when state courts have considered the Fourth Amendment claim)). *See generally* Francis v. Henderson, 425 U.S. 536 (1976) (denying federal habeas corpus relief for alleged exclusion of African Americans from a grand jury when the defendant failed to raise the issue in state court); Paul v. Davis, 424 U.S. 693 (1976) (holding law enforcement may publicly condemn individuals as criminals without due process); Rizzo v. Goode, 423 U.S. 362 (1976) (denying federal equitable relief to plaintiffs injured by law enforcement when named defendants "played no affirmative part in depriving . . . any constitutional rights"); Hicks v. Miranda, 422 U.S. 332 (1975) (holding that federal plaintiffs cannot challenge the constitutionality of a criminal statute when no state criminal proceedings are yet pending against plaintiffs); O'Shea v. Littleton, 414 U.S. 488 (1974) (finding no case or controversy when the plaintiffs had not personally suffered the constitutional violations alleged).

4. Brennan, *supra* note 1, at 503.

5. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 932 (1997) (finding no Due Process Clause violation when a police officer was suspended without pay after being charged, but not convicted, of a crime); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 579 (1972) (finding no Due Process Clause violation when a state university declined to rehire a professor without a hearing); Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 887, 899 (1961) (finding no Due Process Clause violation when a short-order cook at a naval gun factory was fired without reason or a hearing). *But see McElroy*, 367 U.S. at 900 (Brennan, J., dissenting) ("[This case's] result in effect nullifies the substantive right . . . not to be arbitrarily injured by Government.").

6. *See, e.g.*, U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973) (holding that the First Amendment does not protect federal employees' right to participate in campaign management). *But see* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) ("[A] teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

7. Brennan, *supra* note 1, at 503.

8. 370 N.C. 527, 810 S.E.2d 208 (2018).

9. N.C. CONST. art. I, § 1.

regulatory power in past cases.[10] However, in *Tully*, the court expanded its interpretation to include a limit on government treatment of its own employees, guaranteeing every public employee the fundamental right to "pursue his chosen profession free from" unreasonable government interference.[11]

Though the holding in *Tully* was limited to the facts in that case, this Recent Development argues that the court's reasoning recognizes a broad, fundamental right for public employees to be treated reasonably by their employers. Consequently, mistreated public employees who, except in rare circumstances,[12] would have no recourse under the federal Constitution may now seek relief under North Carolina law. Across the country, millions of public employees are harassed, overworked, denied benefits, or terminated due to unreasonable government actions or policies.[13] Rooted in an enumerated right unique to the North Carolina Constitution but with sisters and brothers throughout the United States,[14] *Tully*'s reasoning provides a roadmap for how creative lawyers can win relief for public employees in state court.

This Recent Development proceeds in three parts. Part I briefly summarizes the history of article I, section 1 and outlines the Supreme Court of North Carolina's decision in *Tully*. Section II.A defines the fundamental right to "pursue [one's] chosen profession,"[15] evoked in *Tully*, by analyzing how it has been understood and protected in the state's antiregulatory precedent. Section II.B instructs courts how to identify and remedy when public employers violate this fundamental right. Finally, Part III outlines two specific examples of how this newly understood right can protect school counselors from being overworked and government employees from sexual harassment.

I. *TULLY V. CITY OF WILMINGTON*

A. *History of the "Fruits Clause"*

Unlike the federal Constitution, the North Carolina Constitution begins with its Declaration of Rights.[16] Exceptionally concerned with government

10. *See infra* notes 23–27 and accompanying text.

11. *Tully*, 370 N.C. at 536, 810 S.E.2d at 215.

12. *See, e.g.*, Stidham v. Peace Officer Standards & Training, 265 F.3d 1144, 1153 (10th Cir. 2001) (holding that the Constitution prohibits a public employer from revoking an occupational license and disseminating negative information about an employee without due process).

13. *See* Mike Maciag, *The Alarming Consequences of Police Working Overtime*, GOVERNING: FUTURE STS. & LOCALITIES (Oct. 2017), https://www.governing.com/topics/public-justice-safety/gov-police-officers-overworked-cops.html [https://perma.cc/UG78-XHDY]; Katie Reilly, *'I Work 3 Jobs and Donate Blood Plasma To Pay the Bills.' This Is What It's Like To Be a Teacher in America*, TIME (Sept. 13, 2018), https://time.com/longform/teaching-in-america/ [https://perma.cc/A5JB-4C3F].

14. *See infra* notes 213–15 and accompanying text.

15. *Tully*, 370 N.C. at 536, 810 S.E.2d at 215.

16. N.C. CONST. art. I, §§ 1–38.

encroachment on individual liberties, North Carolina's framers adopted the declaration one day before adopting the state constitution itself[17] and refused to ratify the U.S. Constitution until the Bill of Rights was passed.[18] Given the primacy of individual liberty in the minds of the framers, North Carolina courts have long recognized a "'direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights' when no other state law remedy is available."[19]

In 1868, North Carolina amended the beginning of its Declaration of Rights to state that "all persons are . . . endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[20] North Carolina adopted the "fruits of their own labor" clause ("fruits clause") in the same year the nation ratified the Fourteenth Amendment to the U.S. Constitution.[21] The fruits clause was adopted during Reconstruction and was "obviously grounded in the history of an enslaved people obligated to work for the benefit of others but unable to benefit for themselves."[22]

Despite the abolitionist origins of the fruits clause, North Carolina courts have largely interpreted it as a libertarian limit on government economic regulation, protecting "legitimate business, occupation, or trade" from regulation that was not "reasonably necessary" for "the promotion or protection of the public health, morals, order, or safety, or the general welfare."[23] Under the fruits clause, North Carolina courts have struck down regulations of private businesses including photography,[24] real estate advertising,[25] companion escort services,[26] and tow trucks.[27]

In 1979, the Supreme Court of North Carolina expanded the fruits clause to protect public employees in addition to private businesses.[28] In *Presnell v.*

17. Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289–90 (1992).

18. Troy L. Kickler, *North Carolina's Ratification Debates Guaranteed Bill of Rights*, N.C. HIST. PROJECT, https://northcarolinahistory.org/encyclopedia/north-carolinas-ratification-debates-guaranteed-bill-of-rights/ [https://perma.cc/SP77-VQ9J].

19. *Tully*, 370 N.C. at 533, 810 S.E.2d at 214 (quoting *Corum*, 330 N.C. at 783, 413 S.E.2d at 290).

20. N.C. CONST. art. I, § 1.

21. U.S. CONST. amend. XIV.

22. Mitch Kokai, *Protecting the Fruits of College Athletes' Labor*, CAROLINA J. (Jan. 24, 2019, 4:02 AM), https://www.carolinajournal.com/opinion-article/protecting-the-fruits-of-college-athletes-labor/ [https://perma.cc/P38Q-CUPV] (quoting former Supreme Court of North Carolina Justice Bob Orr).

23. State v. Ballance, 229 N.C. 764, 770, 51 S.E.2d 731, 735 (1949).

24. *Id.*

25. N.C. Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 10, 13, 228 S.E.2d 493, 495–96 (1976).

26. Treants Enters., Inc. v. Onslow County., 83 N.C. App. 345, 353, 350 S.E.2d 365, 370 (1986).

27. King v. Town of Chapel Hill, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014).

28. Presnell v. Pell, 298 N.C. 715, 717–18, 260 S.E.2d 611, 612–13 (1979).

Pell,[29] a public school principal fired an employee based on a false claim that the employee had distributed liquor on school grounds.[30] Despite her employer's dishonesty, the employee had no recourse under state tort law because North Carolina allows even bad faith terminations of at-will employees.[31] Still, the court allowed the employee's claims for defamation and wrongful termination to proceed—while the termination itself may not have risen to a violation, the principal's false accusations could have unreasonably inhibited the employee's ability to find *future* employment in the *private* sector.[32] Though a strong first step, the holding in *Presnell* was restrictive. Under *Presnell*, government mistreatment of public employees was only violative if it interfered with future, private employment opportunities. Prior to deciding *Tully* in 2018, the court had never recognized a fundamental right to pursue work in the *public* sector free from unreasonable government interference.[33]

B. *Factual Summary and Procedural History*

Kevin Tully—a police corporal for the Wilmington Police Department—applied for a promotion after eleven distinguished years of service.[34] During his tenure, Tully investigated over fifty homicides, led twelve homicide investigations with a 100% clearance rate, and was named the 2011 "Wilmington Police Officer of the Year."[35]

Tully completed a written examination as part of his application but failed.[36] Confused, Tully obtained a copy of the official exam and discovered he had outsmarted the test: the "correct" answers were based on outdated law.[37] Tully filed a grievance informing the city of its error but was told that "the test answers were not a grievable item."[38] This response directly conflicted with the department's policy manual, which stated that "[c]andidates may appeal any portion of the selection process."[39]

Tully filed suit on December 30, 2014, alleging state constitutional violations.[40] Tully's claim alleged that the city's denial of his promotion

29. 298 N.C. 715, 260 S.E.2d 611 (1979).

30. *Id.* at 717–18, 260 S.E.2d at 613.

31. *Id.* at 718–19, 260 S.E.2d at 613.

32. *Id.* at 719, 260 S.E.2d at 614.

33. Tully v. City of Wilmington, 370 N.C. 527, 533, 810 S.E.2d 208, 213 (2018) ("[A]pplication of this constitutional provision in the present context is an issue of first impression.").

34. *Id.* at 528, 810 S.E.2d at 210–211.

35. *Id.* (internal quotation marks omitted).

36. *Id.* at 528, 810 S.E.2d at 211.

37. *Id.* at 529, 810 S.E.2d at 211.

38. *Id.*

39. *Id.* at 530, 810 S.E.2d at 211 (quoting CITY OF WILMINGTON POLICE DEP'T, POLICY MANUAL directive 4.11, ¶ III(f), at 6 (rev. ed. July 25, 2011)).

40. *Id.* at 530, 810 S.E.2d at 211–12. Tully pleaded violations of both article I, section 1 and article I, section 19. Section 19 prohibits deprivation of life, liberty, or property "but by the law of the land,"

"arbitrarily and irrationally deprived [him] of enjoyment of the fruits of his own labor" in violation of article I, section 1.[41] The trial court dismissed Tully's claims.[42] The North Carolina Court of Appeals reversed, reasoning that Tully was entitled to a "'non-arbitrary and non-capricious promotional process' in accordance with the rules set forth in the Policy Manual, including its appeals provision."[43]

C. *The Supreme Court of North Carolina's Analysis*

The Supreme Court of North Carolina agreed, finding that, as pleaded by Tully, the state acted arbitrarily and capriciously by denying him the right to appeal a portion of his promotion application when its policies allowed him to "appeal any portion of the selection process" in violation of his constitutional rights.[44] The test answers were in fact a "grievable item." Consequently, Tully had been denied his "right under Article I, Section 1 to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process."[45]

The *Tully* court rooted its holding in four doctrinal conclusions. First, the court noted that the rights enumerated in the Declaration of Rights must be interpreted "liberal[ly] . . . in favor of [North Carolina] citizens."[46] Reflecting on the history of article I, section 1,[47] the court concluded that "[t]he very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State."[48]

Second, the court reaffirmed that the fruits clause constitutes a "fundamental guarant[y]"[49] that "emphasizes the dignity, integrity and liberty

a phrase "synonymous with due process." *Id.* at 538–39, 810 S.E.2d at 216–17 (internal quotation marks omitted) (first quoting N.C. CONST. art. I, § 19; and then quoting State v. Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)).

41. *Id.* at 530, 810 S.E.2d at 212.

42. *Id.* at 531, 810 S.E.2d at 212.

43. *Id.* (emphasis omitted) (quoting Tully v. City of Wilmington, 249 N.C. App. 204, 210, 790 S.E.2d 854, 858 (2016)).

44. *Id*. at 536, 810 S.E.2d at 215 (internal quotation marks omitted).

45. *Id.* at 536, 810 S.E.2d at 215–16.

46. *Id.* at 533, 810 S.E.2d at 214 (quoting Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)).

47. *See supra* Section I.A.

48. *Tully*, 370 N.C. at 533, 810 S.E.2d at 213–14 (quoting Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)).

49. *Id.* at 534, 810 S.E.2d at 214 (internal quotation marks omitted) (quoting State v. Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)).

of the individual, the primary concern of our democracy."[50] Drawing a line from its antiregulatory precedent to the current case, the court repeated that the clause is "very broad in scope" and is "intended to secure . . . extensive individual rights."[51]

Third, the *Tully* court explicitly held that the fruits clause applies both when the government acts as a regulator and when "a governmental entity acts in an arbitrary and capricious manner toward one of its employees."[52] Echoing *Presnell*, the court held that, although Tully lacked a property interest in a promotion, he had a "liberty interest in pursuing [his] chosen profession free from unreasonable actions of [his] employer."[53]

Finally, the court held that a public employer's action is "arbitrary and capricious" when it "fail[s] to abide by promotional procedures that the employer itself put in place."[54] For this conclusion, the court looked to federal caselaw from other contexts—immigration and tax law—which has held that agency action in violation of "rules, regulations, or procedures which it has established" will be struck down.[55]

Relying on these four conclusions, the court found that Tully had properly stated a claim for relief.[56] Noting "the admittedly sparse authority in this area of the law," the *Tully* court elected not to proffer a broad constitutional cause of action but instead limited its holding to the facts of the immediate case.[57] In order to state a claim "grounded in this unique right under the North Carolina Constitution,"[58] the court held:

> 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.[59]

50. *Id.* (internal quotation marks omitted) (quoting State v. Warren, 252 N.C. 690, 693, 114 S.E.2d 660, 663 (1960)).

51. *Id.* (internal quotation marks omitted) (quoting State v. Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)).

52. *Id.* at 535, 810 S.E.2d at 215.

53. *Id.* at 534, 810 S.E.2d at 214.

54. *Id.* at 535–36, 810 S.E.2d at 215.

55. United States v. Heffner, 420 F.2d 809, 811–12 (4th Cir. 1969) (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, (1954)); *see also* Farlow v. N.C. State Bd. of Chiropractic Exam'rs, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (1985) (observing that *Accardi*'s "rationale is sound").

56. *Tully*, 370 N.C. at 537–38, 810 S.E.2d at 216.

57. *Id.* at 536, 810 S.E.2d at 216.

58. *Id.* at 536–37, 810 S.E.2d at 216.

59. *Id.*

II. A FUNDAMENTAL RIGHT TO BE TREATED REASONABLY AT WORK

While the holding in *Tully* only addresses situations where a public employer violates its own published policy, the court's reasoning is considerably broader. Rather than articulate a specific right for public employees, the court applied the broad right developed in its previous fruits clause cases to the public employer-employee relationship. This part endeavors to outline the contours of this fundamental right to articulate why courts ought to apply heightened scrutiny to public employer actions.

A. *The Fruits Clause Establishes a "Fundamental Right," and Infringement Receives Heightened Scrutiny*

Article I, section 1 of the North Carolina Constitution guarantees a "fundamental right to 'earn a livelihood'"[60] and "pursue [one's] chosen profession."[61] To understand this right, North Carolina courts look to the U.S. Supreme Court's fundamental rights jurisprudence as guidance.[62] Still, the North Carolina Constitution is "more detailed and specific than the federal Constitution in the protection of the rights of its citizens."[63] A regulation may receive more exacting scrutiny under the North Carolina Constitution than it would under federal law.[64] Thus, a government action that abridges the right to pursue one's chosen occupation will be held invalid unless it meets a "single standard": it must have a "rational, real and substantial relation to a valid governmental objective."[65] While this test sounds like "rational basis" review, North Carolina precedent strongly suggests that it bites like heightened

60. King v. Town of Chapel Hill, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (quoting Roller v. Allen, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957)).

61. *Tully*, 370 N.C. at 536, 810 S.E.2d at 215.

62. *See, e.g.*, Presnell v. Pell, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979) (first citing Codd v. Velger, 429 U.S. 624 (1977); and then citing Cox v. N. Va. Transp. Comm'n, 551 F.2d 555 (4th Cir. 1976)). Interestingly, the *Presnell* court cited to *Meyer v. Nebraska*, 262 U.S. 390 (1923), and to *Truax v. Raich*, 239 U.S. 33 (1915), for the proposition that a fundamental right "to engage in any of the common occupations of life" was protected by the Fourteenth Amendment as well as by article I, section 1. *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617 (quoting *Meyer*, 262 U.S. at 399). However, the *Presnell* court seemingly ignored the Supreme Court's decision to abandon its economic fundamental rights jurisprudence in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). Still, the *Tully* court referenced *Presnell* as a justification for the existence of a similar right under article I, section 1 of the North Carolina Constitution. *Tully*, 370 N.C. at 534–35, 810 S.E.2d at 214–15. Thus, it is appropriate to consider *Presnell* instructive in our effort to understand the implications of the fruits clause on public employees, even if *Presnell*'s treatment of the Fourteenth Amendment is no longer doctrinally sound.

63. Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

64. *See* Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 351–52, 350 S.E.2d 365, 369 (1986) ("[O]ur state Supreme Court has reserved the right to grant relief against unreasonable, arbitrary, or capricious legislation under our state constitution in circumstances under which no relief might be granted by federal court interpretations of due process.").

65. *Id.* at 352, 350 S.E.2d at 369–70.

scrutiny. A thorough analysis of this "single standard" is necessary to understand how the fruits clause can be used to better protect public employees.

1. *Ballance* and the Development of the Single Heightened-Scrutiny Standard

The Supreme Court of North Carolina first articulated its modern "single standard" test to measure violations of the fruits clause in *State v. Ballance*.[66] Decided in 1949, *Ballance* was adjudicated before the U.S. Supreme Court fully developed modern scrutiny tests.[67] Still, the *Ballance* court had the benefit of two U.S. Supreme Court cases outlining levels of scrutiny: *United States v. Carolene Products Co.*[68] and *Korematsu v. United States*[69]. Under *Carolene Products*'s rational basis review, a law survives so long as it is rationally related to some legitimate government objective, and courts give extreme deference to the government, presuming "the existence of facts supporting the legislative judgment," even in the absence of such facts.[70] In contrast, under the "rigid scrutiny"[71] described in *Korematsu*, a court gives no deference to the government and allows government action only after agreeing the action was "necessary" to achieve a compelling government interest.[72]

In *Ballance*, the state prohibited professional photographers from taking pictures without a state license.[73] In support of the law, the government argued that the licensing scheme reduced the risk of fire from photography chemicals and protected the public from unskilled or fraudulent photographers.[74] Still, the court struck down the licensing requirement as a violation of the fruits clause.[75]

The *Ballance* court held that the law lacked a "rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare" and was not "reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm."[76] Despite the state's

66. 229 N.C. 764, 51 S.E.2d 731 (1949).

67. *Id.*; *cf*. Bolling v. Sharpe, 347 U.S. 497 (1954) (establishing the doctrine of strict scrutiny); Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29, 29 (2005) ("It was in the *Bolling* case that the Court clearly and definitively established its doctrine of 'strict scrutiny.'").

68. 304 U.S. 144 (1938).

69. 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). *Korematsu* is widely regarded as a lousy example of the U.S. Supreme Court's application of heightened scrutiny. *Trump*, 138 S. Ct. at 2423; Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165, 167 (1996). Given that this case was the only example of heightened scrutiny available to the *Ballance* court in 1949, though, it is worth outlining here.

70. *Carolene Prods.*, 304 U.S. at 152.

71. *Korematsu*, 323 U.S. at 216.

72. *Id.* at 217–18.

73. State v. Ballance, 229 N.C. 764, 766, 51 S.E.2d 731, 732 (1949).

74. *Id.* at 770–71, 51 S.E.2d at 735–36.

75. *Id.* at 772, 51 S.E.2d at 736.

76. *Id.* at 769–70, 51 S.E.2d at 735.

contention that a regulation of photographers would reduce fire and fraud, the court found that the fire risk posed by photographers' chemicals was "no greater than that inseparable from the things utilized daily in the home and in scores of other vocations,"[77] and the risk of unskilled photography was "no more dangerous to the public than any other ordinary occupation of life."[78] Further, the court reasoned that "ordinarily the public is best served by the free competition of free men in a free market."[79] Unskilled, fraudulent photography could be better prevented, the court argued, through competition than regulation. Finally, because the law attempted to regulate "one of the many usual legitimate and innocuous vocations by which men earn their daily bread,"[80] it violated the photographer's fundamental right to "earn his livelihood by any lawful calling."[81]

Ballance stands for three powerful principles that North Carolina courts still use when applying heightened scrutiny to determine whether a government action violates the fruits clause. First, the deference typical of *Carolene Products*'s rational basis review is not afforded to the government under the "single standard." The *Ballance* court did not presume the existence of facts supporting the legislature's assertion that its regulation would reduce fire and fraud and rejected those proffered interests.[82] Second, the government's proffered "valid" interest must be directly connected to the occupation regulated. Government regulation of photography was inappropriate in *Ballance*, in part, because photography was a "usual legitimate and innocuous vocation[]."[83] Third, government action is not "reasonably related" when its proffered interest can be achieved through less restrictive, alternative means. The *Ballance* court rejected the regulation, in part, because fire and fraud could be more effectively reduced in the open market without infringing on anyone's constitutional rights. These principles, applied here to regulation of a private occupation, clearly constitute a more heightened scrutiny than traditional rational basis review and can guide modern courts in evaluating government action toward public employees.

77. *Id.* at 771, 51 S.E.2d at 735.

78. *Id.* at 771, 51 S.E.2d at 736 (internal quotation marks omitted) (quoting Rawles v. Jenkins, 279 S.W. 350, 352 (Ky. 1925)).

79. *Id.*

80. *Id.* at 770, 51 S.E.2d 735.

81. *Id.* at 769, 51 S.E.2d 734.

82. *Id.* at 771, 51 S.E.2d 735–36. Compare this reasoning in *Ballance* to the "great deference" given to policymakers under the "rational basis test" implemented in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 180–81, 594 S.E.2d 1, 7, 15 (2004).

83. *Ballance*, 229 N.C. at 770–71, 51 S.E.2d at 735.

2. Valid Government Interests and the Regulation of "Ordinary and Simple" Occupations

Since *Ballance*, North Carolina courts have honed the meaning of "valid governmental objective."[84] To begin, a valid objective must "promote the accomplishment of a public good" or "prevent the infliction of a public harm."[85] Still, not every occupation is sufficiently connected to the public good to fall within the scope of the so-called "police power."[86] Thus, the government has no valid reason to regulate those "ordinary lawful and innocuous occupations" at the core of the fruits clause.[87]

An occupation is "ordinary and simple"[88] so long as it does not have some "distinguishing feature in the business itself or in the manner in which it is ordinarily conducted, the . . . probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare."[89] In other words, an occupation is beyond the reach of government regulation unless it can be distinguished in a way that implicates the public welfare. Regulations of these ordinary and simple occupations fail heightened scrutiny; because they have insufficient connection to any public good, regulation of these occupations lacks any legally sufficient "valid objective."[90] Consequently, courts have "not hesitated to strike down regulatory legislation" that touches on such occupations "as repugnant to the State Constitution."[91]

The line between complex and simple occupations is a fine one. In *North Carolina Real Estate Licensing Board v. Aikens*,[92] the North Carolina Court of Appeals drew that line between real estate *brokers* and real estate *advertisers*. Sixteen years earlier, the Supreme Court of North Carolina in *State v. Warren*[93] upheld a law regulating real estate brokers because real estate transactions "provide opportunities for collusion to extract illicit gains" and are of serious

84. *See* Poor Richard's, Inc. v. Stone, 322 N.C. 61, 64, 366 S.E.2d 697, 698–99 (1988); Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 352, 350 S.E.2d 365, 370 (1986).

85. *Ballance*, 229 N.C. at 769–70, 51 S.E.2d at 735.

86. *Id.* at 769, 51 S.E.2d at 734 ("[T]he State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society.").

87. *Id.* at 770, 51 S.E.2d at 735.

88. N.C. Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 13, 228 S.E.2d 493, 496 (1976).

89. *Stone*, 322 N.C. at 65, 366 S.E.2d at 699 (internal quotation marks omitted) (quoting State v. Harris, 216 N.C. 746, 758–59, 6 S.E.2d 854, 863 (1940)).

90. *Aikens*, 31 N.C. App. at 11, 228 S.E.2d at 495.

91. *Id.* at 11, 228 S.E.2d at 495 (first citing Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957); then citing *Ballance*, 229 N.C. 764, 51 S.E.2d 731; then citing Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948); and then citing *Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940)).

92. 31 N.C. App. 8, 228 S.E.2d 493 (1976).

93. 252 N.C. 690, 114 S.E.2d 660 (1960).

"economic significance," meaning the "mismanagement of either could produce widespread distress and unrest."[94]

After *Warren*, the North Carolina General Assembly expanded the law to cover those who advertise property available for sale, lease, or rent, without actually facilitating any transactions.[95] The *Aikens* court distinguished these advertisers from the brokers in *Warren*, since "[t]he business activity . . . does not involve a confidential relationship with the customers nor negotiations or other acts as an intermediary," and none of the "knowledge of mortgages, suretyships, escrow agreements and other real property subjects" required of brokers was "reasonably relevant to [advertisers'] business activity."[96] Unlike real estate brokering, real estate advertising was an innocuous vocation unrelated to a valid government interest. Because the government's regulation of this ordinary and simple occupation was not supported by a valid government interest, the court invalidated the expanded regulation while allowing regulation of real estate brokers to continue.

3. "Rational, Real and Substantial": Is the Law Necessary and Tailored, and Does the Benefit Outweigh the Burden?

The protection of the fruits clause is not limited only to ordinary and simple occupations. As seen in *Tully*, North Carolina courts may invalidate unreasonable government treatment of occupations at the heart of the police power—police officers themselves.[97] Government action will survive heightened scrutiny only if it has a "rational, real and substantial relation" to the government's objective.[98] Again, while this sounds like rational basis review, it is not. To have a "rational, real, or substantial relation," the policy must be "reasonably necessary" to achieve that objective.[99] Similar to traditional heightened scrutiny, a law can fail as "unnecessary" if the objective could be achieved without infringing on the fundamental right,[100] the policy is overinclusive,[101] the burden on an individual's right outweighs the value of the

94. *Aikens*, 31 N.C. App. at 11–12, 228 S.E.2d at 496 (citing State v. Warren, 252 N.C. 690, 114 S.E.2d 660 (1960)).

95. *Id*.

96. *Id.* at 12, 228 S.E.2d at 496.

97. Tully v. City of Wilmington, 370 N.C. 527, 539, 810 S.E.2d 208, 217 (2018).

98. Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 352, 350 S.E.2d 365, 370 (1986); *see also* State v. Ballance, 229 N.C. 764, 769, 51 S.E.2d 731, 735 (1949) (explaining the "rational, real, or substantial relation" standard for the legitimacy of a state's statute).

99. *Ballance*, 229 N.C. at 769–70; 51 S.E.2d at 735.

100. *See, e.g.*, *id.* at 771, 51 S.E.2d at 736 (striking down a regulation where reliance on an unregulated free market could more effectively ensure competency and integrity among photographers).

101. *See, e.g.*, *Treants*, 83 N.C. App. at 355, 350 S.E.2d at 372 (striking down a regulation of prostitution because it broadly reached other, legitimate companion services).

government's interest,[102] or legal doctrine from "other contexts" suggests the government policy or action is unreasonable.[103] These principles are best understood with reference to precedent.

First, a law will fail heightened scrutiny if less burdensome alternatives could achieve the government's objective. The *Ballance* court struck down the photography licensing scheme, in part, because the government's goals could have been achieved through the "free competition of free men in a free market" without infringing on any individual liberties.[104] Again, the *Ballance* court gave no deference to the government's preference of method.[105]

Second, a law will fail if it is overinclusive. In *Treants Enterprises, Inc. v. Onslow County*,[106] a state law required licensing for any business "providing or selling male or female companionship."[107] While the North Carolina Court of Appeals agreed that "[t]he prevention or hindrance of organized prostitution . . . is unquestionably a valid objective of local government," it struck down the law as unnecessarily broad.[108] The court reasoned that the licensing requirement placed an "onerous burden[]" on legitimate businesses uninvolved with prostitution.[109] Thus, the court held that "[t]he denial or burdening of innocent persons' rights to practice lawful occupations because some other businesses . . . are a subterfuge for illegal activity is capricious and irrational."[110]

Third, a law will fail if its burdens outweigh its benefits. In *Poor Richard's, Inc. v. Stone*,[111] the Supreme Court of North Carolina upheld a regulation on military merchants' property, but only after "balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated."[112] A policy's reasonableness, the court decided, "becomes a question of degree."[113] There, the court decided that (1) the statute was sufficiently narrow, since it sought only to regulate "those transactions which involve military property" rather than all sales transactions; and (2) the government's objective of ensuring military property is not unlawfully sold outweighed the real but limited burdens on the seller because the statute

102. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 64, 366 S.E.2d 697, 698–99 (1988).
103. Tully v. City of Wilmington, 370 N.C. 527, 536, 810 S.E.2d 208, 215 (2018).
104. *Ballance*, 229 N.C. at 771, 51 S.E.2d at 736.
105. *Id.*
106. 83 N.C. App. 345, 350 S.E.2d 365 (1986).
107. *Id.* at 346, 350 S.E.2d at 366 (capitalization omitted) (internal quotation marks omitted).
108. *Id.* at 355, 350 S.E.2d at 371–72.
109. *Id.* at 355, 350 S.E.2d at 372.
110. *Id.*
111. 322 N.C. 61, 366 S.E.2d 697 (1988).
112. *Id.* at 66, 366 S.E.2d at 700 (citing *In re* Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973)).
113. *Id.*

employed a "commonly used licensing scheme" that ordinary sellers could navigate without much trouble.[114]

This list is not exclusive. North Carolina courts may look to other areas of state and federal law to determine whether a particular government action or policy is unreasonable.[115] In *Tully*, the court cited federal immigration and tax law to conclude that an agency's government action that violates the agency's own policies is unreasonable.[116] The central question is whether, in light of all circumstances—including the presence of less restrictive alternatives, the breadth of the action, the burden on the individual, and other relevant legal doctrines—the government's action was reasonably necessary to further a valid interest.

B. *The Fruits Clause Bars Public Employer Action That Is Not "Reasonably Necessary" To Achieve a "Valid Governmental Interest"*

As discussed above, the government cannot infringe on the right to pursue one's chosen occupation in the private sector unless the infringement has a "rational, real and substantial relation to a valid government interest."[117] In *Tully* and *Presnell*, the Supreme Court of North Carolina extended that fundamental guarantee to those whose "chosen occupation" is in the public sector as well.[118] Thus, while *Tully* adopted a narrow, fact-specific test, it is clear that the fruits clause's heightened scrutiny "single standard" test described above still restrains the government when it acts as an employer as well as when it acts as a regulator.

To demonstrate a fruits clause violation under this "single standard," a public employee must first show (1) her right to pursue her chosen occupation was injured by her employer; and (2) she has no other avenue for relief.[119] Then, the burden shifts to the employer to (3) identify a "valid governmental objective" achieved by the action; and (4) show that the action is "reasonably necessary" to achieve that objective.[120] If the government's action is found either to be invalid or unnecessary, the court should find for the employee. This four-part test, rooted in the fruits clause precedent outlined above, ensures that government employers are acting within the confines of the state constitution.

114. *Id.*

115. Tully v. City of Wilmington, 370 N.C. 527, 536, 810 S.E.2d 208, 215 (2018).

116. *Id.* (first citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954); and then citing United States v. Heffner, 420 F.2d 809, 811–12 (4th Cir. 1969)).

117. *See supra* Section II.A.

118. *See Tully*, 370 N.C. at 539, 810 S.E.2d at 217; Presnell v. Pell, 298 N.C. 715, 723, 260 S.E.2d 611, 616 (1979).

119. Elements one and two are generally required for any direct claim under the North Carolina Constitution. *See* Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (establishing that direct claims can be brought "in the absence of an adequate state remedy" against a government actor for violations of rights guaranteed by the North Carolina Constitution).

120. Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 352, 350 S.E.2d 365, 369–70 (1986).

1. Injury to a Public Employee's Right To "Earn A Livelihood"

Under step one, a public employee must show that his or her right to pursue his or her chosen occupation was injured by a government policy or action.[121] The Supreme Court of North Carolina has made clear that the fruits clause creates a liberty right to work, not a property interest in any particular job—ironically, the right to "enjoy the fruits of their own labor" is a fundamental right to pursue those fruits but does not create a property right to the fruits themselves.[122] Instead, to state a claim under the fruits clause, an employee must point to a violation of her liberty right to pursue her chosen occupation without unreasonable government interference.

No case has neatly defined a full list of possible fruits clause violations. In *Tully*, the plaintiff did not have a property right to a promotion but did have a liberty right to pursue a promotion within the confines of his employer's stated grievance policy.[123] In *Presnell*, the employee lacked a property right to her job but maintained a liberty right to pursue similar work elsewhere without the burden of defamatory accusations from her previous governmental employer.[124] Additionally, *Ballance* and its progeny hold that burdensome regulation of an occupation may constitute infringement of an individual's right to pursue that occupation.[125]

2. Alternative Avenues for Relief

Under step two, public employees must show that they have no adequate, alternative state law remedy. Direct claims under the North Carolina Constitution are available only "in the absence of an adequate state remedy."[126] This is a "logical limitation"[127]: direct constitutional remedies are "furnished" by courts under state common law, "which provides a remedy for every wrong."[128] If an "adequate" remedy is available under a state statute, courts will not furnish a constitutional remedy.

121. *See* Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447, 451, 368 S.E.2d 892, 894–95 (1988) (finding a public employee had not stated a claim for relief because her rights under article I, section 1 had not been violated).

122. *Tully*, 370 N.C. at 538, 810 S.E.2d at 217 ("[A] property interest in employment 'can arise from or be created by statute, ordinance, or express or implied contract, the scope of which must be determined with reference to state law.'" (quoting *Presnell*, 298 N.C. at 723, 260 S.E.2d at 616)).

123. *Id.* ("We are aware of no authority recognizing a property interest in a promotion . . . .").

124. *Presnell*, 298 N.C. at 723, 260 S.E.2d at 616 ("These allegations are insufficient to show a Fourteenth Amendment 'property' right or vested interest in plaintiff's continued employment.")

125. *See* State v. Ballance, 229 N.C. 764, 770, 51 S.E.2d 731, 735 (1949).

126. Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992).

127. Matthew R. Gauthier, *Kicking and Screaming: Dragging North Carolina's Direct Constitutional Claims into the Twenty-First Century*, 95 N.C. L. REV. 1735, 1744 (2017).

128. *Corum*, 330 N.C. at 782, 413 S.E.2d at 289.

North Carolina courts have not fully defined what state law remedies are adequate.[129] Generally speaking, a remedy will be adequate so long as it allows the plaintiff to "enter the courthouse doors and present his claim"—in other words, the opportunity for victory must be guaranteed to the plaintiff, not victory itself.[130] Still, a remedy is generally inadequate if it is barred by sovereign immunity.[131]

Some fruits clause cases may fail step two. For example, a public employee who is terminated in violation of her written employment contract, such as a tenured public university professor, likely has an adequate remedy under state contract law and thus could not bring a claim under the fruits clause. State law also bars employment discrimination based on "race, religion, color, national origin, age, sex or handicap" by employers of fifteen or more employees.[132] Most public employees, though, have no written or implied contract with their employers and many have claims that do not arise under any state or common law principle. These employees may be able to satisfy step two and show they have no "adequate remedy."

3. Valid Government Objectives in Regulating Its Own Employees

At step three, the government bears the burden to show that its action was in pursuit of a "valid governmental objective."[133] In many cases, this burden will be easily met. Since government jobs are by definition connected to the public health, safety, morals, or welfare, even the most ordinary and simple government job can be "distinguish[ed]" from those professions protected in *Ballance* and its progeny by the simple fact that each is a public, not private, occupation.[134]

Still, the government's power to regulate its employees does not guarantee that every action will be in service of a valid governmental objective. A government action may fail if, like in *Tully*, the government presents no "reason or rationale" whatsoever for its infringement.[135] In addition, a government objective may be invalidated by another limit on the police power—racial animus, for example, is not a valid government objective.[136] Unlike rational basis

129. For a full analysis of the contours of direct claims under the North Carolina Constitution, see Gauthier, *supra* note 127, at 1736–38.

130. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 333–34, 340, 678 S.E.2d 351, 355 (2009).

131. *Corum*, 330 N.C. at 785–86, 413 S.E.2d at 291–92.

132. N.C. GEN. STAT. § 143-422.2 (2019).

133. Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 352, 350 S.E.2d 365, 370 (1986); *see* Poor Richard's, Inc. v. Stone, 322 N.C. 61, 64–65, 366 S.E.2d 697, 699 (1988).

134. *See Stone*, 322 N.C. at 65, 366 S.E.2d at 699.

135. Tully v. City of Wilmington, 370 N.C. 527, 536, 810 S.E.2d 208, 215 (2018).

136. N.C. GEN. STAT. § 143-422.2 (barring racial discrimination of employees generally); Loving v. Virginia, 388 U.S. 1, 11 (1967) (invalidating a ban on interracial marriage because "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies" such a ban); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring) ("I cannot conceive of

review, where courts presume "the existence of facts supporting the legislative judgment,"[137] the government must prove under heightened scrutiny that its actions were actually taken in pursuit of a legally valid objective.

4. "Reasonably Necessary" Employer Policies and Actions

Under step four, the government bears the burden to show that its action is "reasonably necessary" to accomplish its valid objective. While a court may look to a wide range of factors in determining whether a particular government action was reasonably necessary, seven factors from the fruits clause precedent analyzed above appear particularly relevant to the public employer-employee context.

To determine whether a government employer's action or policy was "reasonably necessary," a court should consider: (1) the degree to which the job is "ordinary and simple;" (2) the degree to which the regulation is tailored to the interest; (3) the significance of the government's interest; (4) the significance of the burden on the employee; (5) the degree to which the policy is consistent with other government policies; (6) the degree to which the policy is reasonable in light of similar policies in other contexts; and (7) how judicial intervention would impact constitutional structure and the separation of powers.

Factor one reflects precedential significance of job complexity. Jobs that include great responsibility for public finances, health, or welfare or are vulnerable to illicit behavior warrant more stringent regulation, while more ordinary and simple jobs warrant less burdensome restrictions. Details of the job are particularly important—recall the difference in *Aikens* between real estate *brokers* and real estate *advertisers*.[138] For example, while passage of a thorough background check may be a reasonably necessary prerequisite to ensure a public school custodian does not pose a threat to school children, such a restriction may be less reasonably necessary for a custodian in a public building that has no children.

Factor two reflects precedential hostility to regulations that are overbroad and interests that can be achieved through less restrictive means. As in *Ballance*, each court must determine the actual causal relationship between the action and the intended result and inquire whether other, less restrictive actions could achieve the same result.[139] And, as in *Aikens*, an action reasonably necessary to regulate one occupation—like real estate brokers—may still violate the fruits

a valid legislative purpose . . . which makes the color of a person's skin the test . . . ."); Enoch v. Inman, 164 N.C. App. 415, 415–16, 596 S.E.2d 361, 362 (2004) (holding state employees may sue for race discrimination under Title VII or 42 U.S.C. § 1983).

137. United States v. Carolene Prods., 304 U.S. 144, 152 (1938).

138. *See supra* notes 92–96 and accompanying text.

139. *See supra* notes 73–81 and accompanying text.

clause if it reaches another occupation—like real estate advertisers—for which the action is unnecessary.[140]

Factors three and four reflect the *Stone* balancing test and hostility toward regulations whose burdens outweigh its benefits.[141] Like in *Stone*, each court ought to factor individual "burdens" against the "public good likely to result" from the government action.[142] Narrowly tailored, "commonly used" burdens on employees may be justified by significant government benefits.[143] Again, the court should assess a regulation's tailoring, benefits, and burdens on the merits rather than defer to the government's assessment.[144]

Factors five and six reflect *Tully*'s reasoning: allowing courts to look to outside reference points to assess reasonableness.[145] As held in *Tully*, a public employer's action that violates its own policies is presumptively unreasonable.[146] Under factor five, a burdensome policy or action is less reasonable if other North Carolina agencies or political subdivisions achieve the same objectives through less burdensome policies. Factor six allows courts to look to employment policies in other jurisdictions and the private sector and to legal doctrines in other areas of law to measure whether an employer's action is reasonably necessary. For example, a county's use of employee surveillance technology[147] designed to reduce employee theft may be less reasonable if other North Carolina counties, or similar counties across the United States, or even substantially similar private employers, maintain lower theft rates without utilizing invasive technology. Certainly, each job, county, department, and state has its own idiosyncrasies, and public employers should have the flexibility to pursue new solutions to local problems. Factors five and six simply allow courts to inform their reasonableness determinations by looking to outside standards.[148]

140. *See supra* notes 92–96 and accompanying text.

141. *See supra* notes 111–114 and accompanying text.

142. Poor Richards, Inc. v. Stone, 322 N.C. 61, 66, 366 S.E.2d 697, 700 (1988).

143. *Id.*

144. *See supra* note 82 and accompanying text.

145. *See* Tully v. City of Wilmington, 370 N.C. 527, 536, 810 S.E.2d 208, 215 (2018) (looking to federal immigration and tax administrative law to determine whether an agency action is unreasonable when it violates its own policies); *supra* notes 115–116 and accompanying text.

146. *Tully*, 370 N.C. at 536, 810 S.E.2d at 215; *see supra* notes 54–55 and accompanying text.

147. Employee surveillance technology is becoming more popular, particularly among private technology companies. *See* Ellen Sheng, *Employee Privacy in the US Is at Stake as Corporate Surveillance Technology Monitors Workers' Every Move*, CNBC (July 22, 2019, 6:42 AM), https://www.cnbc.com/2019/04/15/employee-privacy-is-at-stake-as-surveillance-tech-monitors-workers.html [https://perma.cc/GTH7-P29B].

148. Outside "standards of care" are widely used to show unreasonableness in North Carolina employment law. White v. Consol. Planning, Inc., 166 N.C. App. 283, 302, 603 S.E.2d 147, 160 (2004) ("Plaintiff offered sufficient expert testimony regarding the standard of care in the insurance industry to raise a genuine issue of material fact as to whether [defendant] breached its duty to plaintiff."). Outside "standards of care" are also common to show unreasonableness in other areas of North Carolina

Finally, I add one concern that has not been mentioned in any fruits clause case prior but should be considered in future cases concerning public employees. Like the federal Constitution, the North Carolina Constitution vests each branch of government with "separate and distinct powers.[149] Factor seven asks courts to recognize that any claim asking for judicial relief for an employee of the executive or legislative branches necessarily calls into question this separation of powers. Public political jobs intimately involved in the effectuation of powers enumerated to other branches, such as a governor's chief of staff or a legislator's political advisor, may warrant different regulation than nonpolitical jobs. Still, North Carolina courts have not shied away from prohibiting or compelling action from other branches when fundamental rights are concerned.[150] Courts are obliged to protect even political employees from unreasonable government treatment.

III. EXAMPLES: CREATIVE USE OF THE FRUITS CLAUSE

Two concrete examples—overworked school counselors and social workers, and legislative staffers facing sexual harassment—help to explain how the promise of the fruits clause can be leveraged to improve the lives of North Carolina's public employees.

A. *Overworked School Counselors and Social Workers*

In addition to teachers, administrators, and other support staff, North Carolina's public schools employ school counselors and social workers to "promote student success, provide preventive services, and respond to

law, such as products liability and medical negligence. *See, e.g.*, Nicholson v. Am. Safety Util. Corp., 124 N.C. App. 59, 64–65, 476 S.E.2d 672, 676 (1996) ("The essential elements of a products liability action predicated upon negligence are: '(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and; (4) loss because of the injury.'" (quoting Ziglar v. E. I. Du Pont de Neumers & Co., 53 N.C. App. 147, 150, 280 S.E.2d 510, 513 (1981))), *aff'd as modified*, 346 N.C. 767, 488 S.E.2d 240 (1997); *see also* Robinson v. Duke Univ. Health Sys., Inc., 229 N.C. App. 215, 233, 747 S.E.2d 321, 334 (2013) ("In order to maintain an action for medical malpractice, a plaintiff must offer evidence to establish (1) the applicable standard of care; (2) breach of that standard; (3) proximate causation; and (4) damages.").

149. N.C. CONST. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); *id.* art. III, § 1 ("The executive power of the State shall be vested in the Governor."); *id.* art. IV, § 1 ("The judicial power of the State shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice.").

150. *See, e.g.*, Leandro v. State, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) (holding that the North Carolina legislature cannot deny students the right to "equal access" to public education without showing the denial was "necessary to promote a compelling governmental interest" (internal quotation marks omitted) (quoting Town of Beech Mountain v. County of Watauga, 324 N.C. 409, 412, 378 S.E.2d 780, 782 (1989))).

identified student needs."[151] School counselors monitor and treat their students' mental health through school-wide programming and one-on-one counseling.[152] School social workers "provide the vital link between the home, school, and community"[153] by "connecting students and their families to critical community services such as food stamps, healthcare services and childcare alternatives."[154]

School shootings, natural disasters, and rising teen suicide rates have placed outsized pressure on counselors and social workers, who often serve as the only mental health professionals in their students' lives.[155] The vast majority of today's students—72%—experience some significant stressor, such as violence, abuse, or the loss of a loved one, before the age of eighteen.[156] Suicides among children ages ten to seventeen increased by 70% in the decade between 2006 and 2016.[157] To effectively serve every student's needs, the American School Counselor Association ("ASCA") and the National Association of Social Workers ("NASW") recommend employing one counselor and one social worker for every 250 students.[158] A lower ratio of one counselor and social worker per fifty students is recommended when the social worker or counselor is providing services to students with intensive needs, like suicidal tendencies, addiction, or trauma.[159]

American schools lag behind the ASCA- and NASW-recommended ratios. Nationally, public schools employ on average one counselor for every

151. REBECCA GARLAND, SCHOOL COUNSELOR JOB DESCRIPTION 6 (2008), https://files.nc.gov/dpi/documents/studentsupport/counseling/standards/counselordesc.pdf [https://perma.cc/RY36-HJES].

152. *Id.* at 6–7.

153. *School Social Worker*, N.C. DEP'T PUB. INSTRUCTION, https://www.dpi.nc.gov/educators/specialized-instructional-support/school-social-worker [https://perma.cc/ZP29-YBNE].

154. *What Is the Difference Between a School Counselor and a Social Worker?*, ABA DEGREE PROGRAM GUIDE, https://www.abadegreeprograms.net/faq/what-is-the-difference-between-a-school-counselor-and-a-social-worker/ [https://perma.cc/UF9B-SNG4].

155. Bethany Bray, *One School Counselor per 455 Students: Nationwide Average Improves*, COUNSELING TODAY (May 10, 2019), https://ct.counseling.org/2019/05/one-school-counselor-per-455-students-nationwide-average-improves/ [https://perma.cc/34KL-RWB3]; Mattie Quinn, *After Shootings and Hurricanes, Where Are the School Counselors?*, GOVERNING: FUTURE STS. & LOCALITIES (Apr. 9, 2018, 3:00 PM), https://www.governing.com/topics/education/gov-school-counselors-trauma-shooting-disaster.html [https://perma.cc/A9JE-HQKD].

156. AMIR WHITAKER ET AL., AM. CIVIL LIBERTIES UNION, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 4, https://www.aclu.org/report/cops-and-no-counselors [https://perma.cc/GX24-PP5Q].

157. *Id.*

158. *NASW Highlights the Growing Need for School Social Workers To Prevent School Violence*, NAT'L ASS'N SOC. WORKERS (Mar. 27, 2018) [hereinafter *NASW News Release*], https://www.socialworkers.org/News/News-Releases/ID/1633/NASW-Highlights-the-Growing-Need-for-School-Social-Workers-to-Prevent-School-Violence [https://perma.cc/PE3L-XTD2]; *Student-to-School-Counselor Ratio 2015–2016*, AM. SCH. COUNS. ASS'N, https://www.schoolcounselor.org/asca/media/asca/home/Ratios15-16.pdf [https://perma.cc/JRU4-FMGY].

159. *NASW News Release*, *supra* note 158.

455 students—nearly double the recommended ratio.[160] Social workers fare even worse. As of 2016, American schools averaged one social worker for every 2000 students, and "[m]ore than 67,000 schools reported zero social workers serving their students."[161] These higher ratios result in negative outcomes for both children and support staff: due to the highly emotionally taxing nature of their work, "overworked and under-resourced"[162] counselors and social workers are particularly vulnerable to burnout.[163]

North Carolina similarly lags behind the recommended ratios. Symone Kiddoo, a Durham County social worker, reported being solely responsible for 1125 students—a ratio nearly five times the NASW recommendation.[164] She is not alone. On average, the state employs one counselor for every 367 students and one social worker for every 2000.[165] These high ratios are just the average. Though data for each school counselor and social worker's workload is not publicly available, it is not hard to imagine a counselor or social worker whose ratio is significantly higher than the average, with 3000 to 4000 students under their individual care (as opposed to the recommended 500).

By using the test outlined above, a court could find these individual, extreme ratios between school counselors or social workers and their students to be a violation of the fruits clause. To demonstrate the four-part test outlined above, let's imagine a hypothetical plaintiff who works as a school counselor and is individually responsible for 500 students.

1. Step One: Interference

At step one, an employee must show that an outsized number of students interferes with her right to pursue her chosen occupation. Our plaintiff has chosen to work as a counselor in a public school. Her large student load infringes on her ability to pursue her career in two ways: first, high counselor-to-student ratios pose an emotional roadblock to counselors. In addition to the ordinary

160. T. Keung Hui, *How Many School Counselors Is Enough? Berger and NCAE Hotly Debate Issue Ahead of May 1 March*, NEWS & OBSERVER (Raleigh Apr. 29, 2019, 4:17 PM) [hereinafter Hui, *How Many School Counselors Is Enough?*], https://www.newsobserver.com/news/politics-government/article229802244.html [https://perma.cc/6V62-853D (dark archive)].

161. WHITAKER ET AL., *supra* note 156, at 12.

162. Alanna Fuschillo, *The Troubling Student-to-Counselor Ratio that Doesn't Add Up*, EDUC. WK. (Aug. 14, 2018), https://www.edweek.org/ew/articles/2018/08/14/the-troubling-student-to-counselor-ratio-that-doesnt-add.html?cmp=eml-enl-eu-news1&M=58578827&U=1001093 [https://perma.cc/GY2R-SUFV].

163. Rhonda Williams, *The Importance of Self-Care*, ASCA: SCHOOLCOUNSELOR (Jan. 1, 2011), https://www.schoolcounselor.org/magazine/blogs/january-february-2011/the-importance-of-self-care [https://perma.cc/RT6D-FE2X] ("Researchers have identified that the range of school counselors who have high levels of emotional exhaustion and burnout is between 30 percent and 66 percent.").

164. Hui, *How Many School Counselors Is Enough?*, *supra* note 160.

165. Greg Childress, *On School Psychologists, North Carolina Doesn't Measure Up*, PROGRESSIVE PULSE (Jan. 18, 2019), http://pulse.ncpolicywatch.org/2019/01/18/north-carolina/ [https://perma.cc/62DR-NFNK].

fatigue of being overworked, counseling is a uniquely draining profession that leaves professionals emotionally exhausted.[166] A counselor with double the number of recommended students may be unable to persist in her chosen profession, getting burned out early in her career.[167]

Second, high counselor-student ratios reduce a counselor's ability to do her job effectively. Counselors are simultaneously responsible for improving their school's mental health environment and providing direct therapy to high-need students.[168] A counselor responsible for 500 students likely has twice as many high-need students but the same amount of time, causing her to spend less time with each student or fail to meet with a student entirely. Further, counselors are often additionally responsible for scheduling, testing, and other administrative work, which also increases with their student load.[169] Consequently, counselors with high ratios may have *less* total time to spend with a greater number of high need students. This restriction on efficacy could be viewed by a court as a burdensome regulation of her chosen profession since the government's decision to burden her with extra students has hindered her ability to pursue the fruits of her labor: improved children's mental health.

The state in our hypothetical case could contend that, since mental health professionals exist in the private sector, this burden does not interfere with our plaintiff's ability to pursue her chosen occupation outside the school system. More on point, private schools also employ counselors to conduct highly similar work. Still, public school counselors have different responsibilities than private sector counselors,[170] often working county or statewide to improve mental health outcomes.[171] Public school counselors have greater access to a wide range of students, since minority students in particular "are more likely to follow through with school-based services due to the barriers to accessing community mental health services."[172] Further, the mental and emotional strain placed on counselors working with an outsized number of students could cause burnout, making them unwilling or unable to continue working as a counselor, even in

166. Williams, *supra* note 163 ("[C]ounseling is a form of one-way giving.").

167. *See id.*

168. GARLAND, *supra* note 151, at 7.

169. *See* Hui, *How Many School Counselors Is Enough?*, *supra* note 160.

170. For example, public school counselors often help students with career or college plans. Typically, private school counselors do not. *School Counselor 101*, EDUCATOR'S ALLY (Aug. 24, 2015), https://educatorsally.com/school-counselor-101/ [https://perma.cc/BG4Y-RJUM].

171. *See* N.C. SCH. COUNSELOR ASS'N, STRATEGIC PLAN: 2013-2014 THROUGH 2018-2019, at 4–5, https://www.ncschoolcounselor.org/page-1535570 [https://perma.cc/6JT8-6LVR] (describing the professional development objectives for school counselors and the desired results including an "[i]ncrease in requests for NCSCA representation in statewide activities and events.").

172. Carol J. Kaffenberger & Judith O'Rorke-Trigani, *Addressing Student Mental Health Needs by Providing Direct and Indirect Services and Building Alliances in the Community*, 16 PROF. SCH. COUNSELING 323, 325 (2013).

the private sector.[173] Like in *Presnell*, this reduction in a school counselor's ability to find work in the private sector could constitute an interference with her state constitutional rights.[174]

2. Step Two: Adequate Alternatives

In step two, the employee must show that she has no adequate alternatives to remedy her grievance. For our hypothetical plaintiff, this is likely easy to prove. School counselors are typically at-will employees and, if they have multi-year employment contracts, which are rare, the contract likely does not guarantee any counselor-student ratio.[175] Further, North Carolina public employees are barred from collective bargaining, a typical method used to address burdensome work conditions in other states.[176]

The state could argue that, because school funding and hiring is a political determination, school counselors should turn to the political process to push school districts to reduce counselor-student ratios. This argument would likely fall flat, though. In many of the fruits clause cases outlined above, plaintiffs *could* have petitioned the legislature to repeal the unconstitutional regulation.[177] Never has a North Carolina court recognized political lobbying as an adequate alternative in fruits clause cases.

3. Step Three: Valid Governmental Objective

At step three, the government bears the burden of showing that its action was in furtherance of a valid governmental objective. Here, the government's primary objective is budgetary. The legislature and school districts must balance the cost of hiring more counselors with other budgetary priorities, such as hiring more teachers and increasing employee pay while keeping taxes competitive with other nearby states.[178] Certainly, the state's budget priorities are valid

173. *See* Williams, *supra* note 163.

174. *See supra* notes 29–33 and accompanying text.

175. School districts are allowed to sign school employees to multi-year contracts, but few do. *See* T. Keung Hui, *It's Not Tenure, but NC Teachers Will Get More Job Security*, NEWS & OBSERVER (Raleigh Dec. 20, 2017, 1:03 PM), https://www.newsobserver.com/news/local/education/article190767074.html [https://perma.cc/WYQ2-JSE9 (dark archive)].

176. Dawn Baumgartner Vaughn, *Freshmen State Legislators Want To Overturn Law that Has Held Back Unions for 60 Years*, NEWS & OBSERVER (Raleigh Apr. 24, 2019, 7:20 PM), https://www.newsobserver.com/news/local/article229597039.html [https://perma.cc/2YPR-2FBG (dark archive)].

177. *See, e.g.*, State v. Ballance, 229 N.C. 764, 768–72, 51 S.E.2d 731, 734–36 (1949) (striking down a commercially restrictive statute on constitutional grounds alone and never mentioning a requirement that a plaintiff petition the legislature first before commencing litigation).

178. The North Carolina General Assembly's 2019 budget proposal included some raises for state employees and teachers, hired more school psychologists, increased the state's "rainy day fund," and preserved a corporate tax cut but fell short of providing the $688 million necessary to meet nationally recommended ratios for school counselors, social workers, nurses, psychologists, and resource officers statewide. *See* Dan Way, *N.C. General Assembly Releases Budget Plan; Prepares for Battle with Governor*,

governmental interests. Still, because providing each student with a "sound basic education" is also a constitutionally prescribed, valid governmental objective,[179] the state may struggle to show that its decision to burden our hypothetical plaintiff with 500 students was reasonably necessary to achieve its budgetary priorities.

4. Step Four: Reasonably Necessary

At step four, the government must show that its interference with plaintiff's constitutional right was reasonably necessary to achieve the interests established in step three. As discussed above, a court should look to seven factors to determine whether the state's interference was reasonably necessary.

Factor one (job complexity) weighs in favor of both our plaintiff and the state. School counseling is a complex job—North Carolina school counselors are required to have a master's degree and have a direct impact on the mental health of North Carolina children.[180] Typically, the judiciary should defer to the state's experienced judgment on how to regulate these complicated professions. In this case, though, the state likely cannot claim that an extreme 1:500 counselor-student ratio is a beneficial regulation on the school counseling profession. High ratios have demonstrably negative impacts on student mental health outcomes, college admissions, and overall student success.[181] Thus, job complexity in this case may suggest counselors need *more* one-on-one time with students and, thus, lower ratios.

Factor two (tailoring) weighs strongly in favor of the plaintiff. While increased funding would help reduce counselor ratios across the state, the General Assembly could eliminate extreme counselor-student ratios without providing increased funding. In July 2017, the legislature required all school districts to reduce average class sizes for kindergarten through third-grade classes from twenty-two to seventeen students without providing additional funding.[182] While the plan was politically unpopular and eventually

CAROLINA J. (June 25, 2019, 4:24 PM), https://www.carolinajournal.com/news-article/n-c-general-assembly-releases-budget-plan-prepares-for-battle-with-governor/ [https://perma.cc/9PN4-YS6T]; Hui, *How Many School Counselors Is Enough?*, *supra* note 160.

179. Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997); *see* N.C. CONST. art. I, § 7.

180. North Carolina school counselors are required to have a master's degree. *School Counseling*, N.C. DEP'T PUB. INSTRUCTION, https://www.dpi.nc.gov/educators/specialized-instructional-support/school-counseling [https://perma.cc/L8R2-EQA5].

181. James Murphy, *The Undervaluing of School Counselors*, ATLANTIC (Sep. 16, 2016), https://www.theatlantic.com/education/archive/2016/09/the-neglected-link-in-the-high-school-to-college-pipeline/500213/ [https://perma.cc/TQ6B-ASGU (dark archive)].

182. *See, e.g.*, T. Keung Hui & Lynn Bonner, *North Carolina Schools Get Reprieve on K-3 Class-Size Rules*, NEWS & OBSERVER (Raleigh Feb. 8, 2019, 2:08 PM), https://www.newsobserver.com/news/local/education/article199108964.html [https://perma.cc/MN6G-J35U (dark archive)] (detailing the delay of a class-size reduction law that was imposed without additional funding).

abandoned,[183] the legislature could conceivably employ a similar strategy to require school districts to rein in extreme counselor-student ratios without sacrificing their valid budgetary objectives. The presence of a budget-neutral alternative to extreme ratios, even a politically unpopular one, undermines the state's argument that high ratios are reasonably necessary to achieve it budget priorities.

Factors three (government interest) and four (employee burden) likely weigh in favor of the plaintiff as well. While the government does have an interest in reducing spending, that interest is likely small compared to the significant burden a 1:500 counselor-student ratio places on the employee. Reducing ratios for school counselors, social workers, nurses, psychologists, and resource officers statewide to recommended levels would cost $688 million;[184] however, it would cost significantly less to eliminate extreme examples where a counselor has a number of students that far exceeds the statewide average. This reduced cost would likely pose a small burden on the state: in 2018, North Carolina had a $357 million surplus and spent over $100 million of the $23 billion budget on earmarks, or "no-strings-attached cash to faith-based and other charities" and local governments.[185] In contrast, our hypothetical plaintiff is effectively working two jobs, responsible for twice as many students, crises, programs, meetings, forms and filings as is recommended for her profession. In the absence of additional facts, the burden on our plaintiff far outweighs the financial burden on the state to remedy her extreme workload.

Factors five (state comparisons) and six (national comparisons) weigh in favor of both parties. On one hand, at 500 students, our plaintiff treats 133 students more than North Carolina's average counselor at 1:367. Since average counselor-student ratios fluctuate county by county,[186] the plaintiff can likely point to counties in North Carolina where no counselors are responsible for 500 students. National comparisons also favor the plaintiff: the plaintiff's load is higher than the national recommended ratio and actual average.[187] On the other hand, only two states have managed to reach the recommended counselor-student ratio, and North Carolina's average ratio is lower than most states'

183. *Id.*

184. Hui, *How Many School Counselors Is Enough?*, *supra* note 160.

185. Colin Campbell, *Sooooie! There's Plenty of Pork in the State Budget*, NEWS & OBSERVER (Raleigh June 1, 2018, 6:04 PM), https://www.newsobserver.com/opinion/article212376184.html [https://perma.cc/9YJV-HTYM (dark archive)].

186. Wake County, home of North Carolina's state capital, Raleigh, has an average 1:447 counselor-student ratio. Michael Perchick, *Wake County Public Schools Budget Calls for More School Support Staff*, ABC11 (Apr. 11, 2018), https://abc11.com/3329095/ [https://perma.cc/M38V-VKHB]. Mecklenburg has a ratio of 1:358. *See Charlotte-Mecklenburg Schools*, NAT'L CTR. EDUC. STAT., https://nces.ed.gov/ccd/districtsearch/district_detail.asp?ID2=3702970 [https://perma.cc/MZH3-DRKH].

187. Hui, *How Many School Counselors Is Enough?*, *supra* note 160.

averages or the nation's as a whole.[188] The government could argue that reducing the student-to-counselor ratio further is unrealistic given these comparisons. Still, the issue here is not the experience of the *average* school counselor but a single school counselor who is responsible for *twice* the recommended ratio. Because this counselor's workload is significantly higher than the state or federal averages, comparisons to other school systems could benefit the plaintiff.

Finally, factor seven (separation of powers) favors the state. Hiring additional counselors implicates the budgeting power at either the state or local level, a power explicitly reserved to the legislative and executive branches.[189] Traditionally, courts are reluctant to instruct political bodies on how to allocate funds. Still, the Supreme Court of North Carolina has required greater education funding to guarantee fundamental rights in the past, and a recent judicial order will require the state to significantly increase school funding in future budgets.[190] While a court should hesitate before interfering with the state's budgetary power, doing so is appropriate where, as here, budget decisions have interfered with a public employee's constitutional rights. Because the factors weigh in favor of our plaintiff when balanced, a court in this hypothetical case should find that the government's interference with the plaintiff's right to pursue her chosen occupation as a public school counselor was not reasonably necessary to pursue valid budgetary interests, and thus violated the state constitution.

B. *Sexual Harassment Reporting for Legislative Staff*

A similar analysis can be conducted for the General Assembly's sexual harassment reporting policy for legislative staff. Under North Carolina Human Resources policy, "[a]ll [North Carolina public] employees have the right to work in an environment free from discrimination and harassing conduct."[191] Generally, state employees who suffer harassment may bypass their immediate supervisor and file a report through an independent process[192]—any employee, that is, except staffers at the General Assembly. Currently, legislative staff,

188. *Student-to-School-Counselor Ratio 2015–2016*, *supra* note 158.

189. *See* N.C. CONST. art. III, § 5(3).

190. *See* Leandro v. State, 346 N.C. 336, 356–357, 488 S.E.2d 249, 260 (1997); Herbert L. White, *Judge's Order Fast-Tracks Leandro Remedy for Education Opportunity*, CHARLOTTE POST (Jan. 25, 2020, 9:09 PM), http://www.thecharlottepost.com/news/2020/01/25/local-state/judge-s-order-fast-tracks-leandro-remedy-for-education-opportunity/ [https://perma.cc/Y4NE-MWCN].

191. N.C. OFFICE OF STATE HUMAN RES., STATE HUMAN RESOURCES MANUAL: UNLAWFUL WORKPLACE HARASSMENT § 1, at 15 (Apr. 2019), https://files.nc.gov/ncoshr/documents/files/Unlawful_Workplace_Harassment_Policy_updated.pdf [https://perma.cc/M3P7-3NK2].

192. N.C. OFFICE OF STATE HUMAN RES., STATE HUMAN RESOURCES MANUAL: EMPLOYEE GRIEVANCE POLICY § 7, at 29 (Dec. 23, 2015), https://files.nc.gov/ncoshr/documents/files/Employee_Grievance_Policy-Agency_1.pdf [https://perma.cc/53UP-GKCG].

interns, and pages who experience harassment may report to either their supervisor, the Speaker of the House or the Senate Pro Tempore, or the Legislative Ethics Committee.[193] None of these options are confidential, and despite numerous failures by the Legislative Ethics Committee to investigate alleged harassment,[194] these reporting policies have not been updated since 2010.[195]

In 2018, news broke that Representative Duane Hall had engaged in "persistent sexual innuendo" and "repeated, unwanted sexual overtures," including kissing two women without their consent.[196] One woman who applied to work as his Legislative Assistant in 2016 was told that he could not hire her unless she "gained 100 pounds" because she was "too pretty."[197] Five other sources detailed harassment that predated the 2016 encounter but requested anonymity in the press "for fear of repercussions in their current jobs" as legislative staffers.[198] Still, no formal complaints were filed against Rep. Hall.[199] The legislature's "unlawful workplace harassment policy" would have required victims of harassment to report Representative Hall, a Democrat, to either Speaker of the House Tim Moore, a Republican, or to Representative Hall's colleagues in the Legislative Ethics Committee.[200] Neither reporting avenue would have allowed the confidentiality sought by the five sources who reported the harassment to the press.[201]

Like in the example above, this reporting policy may violate the rights of legislative employees under the fruits clause. First, employees could likely show that the reporting policy places a barrier on their ability to pursue their chosen occupation. The General Assembly is a unique work environment for those hoping to participate in researching, shaping, and helping citizens navigate

193. N.C. GEN. ASSEMBLY, PERSONNEL MANUAL, UNLAWFUL WORKPLACE HARASSMENT POLICY § 7 at 5–6 (2006); Memorandum from Steve Goss, N.C. Senator, and Rick Glazier, N.C. Representative, Co-Chairs of the Legislative Ethics Comm., to Members of the Gen. Assembly (Mar. 9, 2010), http://mediad.publicbroadcasting.net/p/wunc/files/ethic_guideline_9_creating_respectful_workplace.pdf?_ga=2.23090106.161351228.1512998410-1374912147.1505836178 [https://perma.cc/5QDJ-B4CV].

194. *See* Jeff Tiberii, *Does A 'Good Ol' Boy' Culture Pervade The North Carolina General Assembly?*, WUNC (Dec. 13, 2017), https://www.wunc.org/post/does-good-ol-boy-culture-pervade-north-carolina-general-assembly#stream/0 [https://perma.cc/A6T8-8CB2].

195. *See* H.B. 817, 2019 Gen. Assemb., 2019–2020 Sess. (N.C. 2019) (proposing to create an independent, confidential reporting scheme for legislative employees).

196. Billy Ball, *Top Democrats Call on Rep. Duane Hall To Resign Amid Sexual Misconduct Allegations*, N.C. POL'Y WATCH (Feb. 28, 2018), http://www.ncpolicywatch.com/2018/02/28/top-democrats-call-rep-duane-hall-resign-amid-sexual-misconduct-allegations/ [https://perma.cc/9XTE-QA6U].

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

public policy.[202] Sexism and harassment create a complete barrier to this work for some individuals—at least one woman was denied employment based on her appearance—and "are associated with negative outcomes such as decreased job satisfaction, lower organizational commitment, withdrawing from work, ill physical and mental health, and even symptoms of post-traumatic stress disorder."[203] Victims are less likely to report harassment due to fear of retaliation, especially when reporting avenues are not confidential.[204] When reports are suppressed, harassers avoid liability and are able to continue their behavior without repercussion. Thus, nonconfidential reporting policies like the one here could decrease reporting and enable harassment.

Second, depending on specific circumstances, a plaintiff-employee injured by the reporting policy may not have adequate alternatives under state law. Though North Carolina and federal employment law prohibit sexual harassment,[205] employees may not be able to win relief against a state legislator. Legislators acting in their official capacities enjoy "absolute immunity" in certain circumstances.[206] When legislators have acted outside their official capacities, the state may not be vicariously liable for their actions.[207] And the fruits clause may prohibit more sexual harassment than state or federal law—a question that has not been considered by any court.

Third, if a hypothetical plaintiff could meet her burden in steps one and two, the state could likely meet its burden in step three. The state's nonconfidential reporting process balances the state's valid objective of reducing sexual harassment with its goal of ensuring that the accused can confront accusers. Further, by allowing legislators to internally regulate their colleagues' behavior, the policy ensures that legislators are not beholden to unelected investigators.

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202. *See, e.g.*, *Legal Analyst I (Local Government Law Staff Attorney)*, N.C. GEN. ASSEMBLY, https://careers.ncleg.net/PostingDetails/1081 [https://perma.cc/QM47-SPMD] ("The nonpartisan staff of the Legislative Analysis Division provide legal analysis, policy research, general information, and legislative drafting services for all 170 Legislators of the North Carolina General Assembly.").

203. Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 127 (2007).

204. Expectation of retaliation and nonconfidentiality are leading reasons employees do not file sexual harassment claims. *See* Carly McCann, Donald Tomaskovic-Devey & M.V. Lee Badgett, *Employer's Responses to Sexual Harassment*, U. MASS. AMHERST: CTR. FOR EMP. EQUITY (Dec. 2018), https://www.umass.edu/employmentequity/employers-responses-sexual-harassment [https://perma.cc/5K9V-XJZX].

205. 42 U.S.C. § 2000e-2(a) (2018); N.C. GEN. STAT. § 143-422.2(a) (2019).

206. TREY ALLEN, IMMUNITY OF THE STATE AND LOCAL GOVERNMENTS FROM LAWSUITS IN NORTH CAROLINA 8 (2013) (first citing Scott v. Granville County, 716 F.2d 1409 (4th Cir. 1983); and then citing Vereen v. Holden, 121 N.C. App. 779, 468 S.E.2d 471 (1996)).

207. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html [https://perma.cc/S5QT-8UVE].

At step four, though, a court could find that the policy is not reasonably necessary. Factor one weighs in favor of the government: legislative jobs are often partisan and may demand advanced legal training. Factor two weighs in favor of the employee: the policy is not well tailored since the Legislative Ethics Committee may dispose of complaints before accused legislators can confront accusers at a formal hearing,[208] and legislators may be criminally investigated in other contexts by unelected third parties.[209] These facts show that the government's interest is relatively small (factor three), because its objectives are not truly affected under its current plan, while employees' interests (factor four) are high in reducing sexual harassment and avoiding retaliation for reporting harassment. Factors five and six strongly weigh in favor of the plaintiff because (as discussed) the legislature's policy is in conflict with the general state reporting policy. Finally, factor seven weighs in favor of the government, because a court interference with the legislative branch's regulation of its own employees directly implicates the separation of powers. Still, factors one and seven are outweighed by the other five. A court could find this reporting policy to be a constitutional violation.

CONCLUSION

In *Tully v. City of Wilmington*, the Supreme Court of North Carolina extended a long recognized fundamental right to "pursue [one's] chosen profession" free from unreasonable government interference as applying to public sector employees.[210] While the court's holding was limited to the facts of that case, its reasoning gives public employees a new avenue to seek relief when they are unreasonably burdened by their employers.

The *Tully* court's reasoning is not limited to North Carolina. While a guarantee to "the enjoyment of the fruits of their own labor"[211] is unique to the North Carolina Constitution, twenty-six states have similar protections, including a right to "the enjoyment of the gains of their own industry,"[212] "to be rewarded for industry,"[213] and to the "means of acquiring . . . property."[214]

208. N.C. GEN. STAT. § 120-103.1(c)–(h2) (2019).

209. *Id.* § 120-103.1(b)(2)c.; *see* Dan Kane, *Prosecutor Asks SBI To Review Allegations Raised About House Speaker Moore*, NEWS & OBSERVER (Raleigh Oct. 8, 2018, 11:11 AM), https://www.newsobserver.com/news/local/article219586045.html [https://perma.cc/4KGN-7ZEV (dark archive)].

210. Tully v. City of Wilmington, 370 N.C. 527, 536, 810 S.E.2d 208, 215–16 (2018).

211. N.C. CONST. art. I, § 1.

212. OKLA. CONST. art. II, § 2 (Westlaw through Nov. 2018 amendments); *see also* ALASKA CONST. art. I, § 1 (Westlaw through 2019 First Reg. Sess. and 2019 First Spec. Sess. of the 31st Leg.) (stating "the enjoyment of the rewards of their own industry").

213. FLA. CONST. art. I, § 2 (Westlaw through 2018 legislation).

214. VA. CONST. art. I, § 1 (Westlaw through 2019 Reg. Sess.); W. VA. CONST. art. III, § 1 (Westlaw through 2019 Reg. Sess.); *see* CAL. CONST. art. I, § 1 (Westlaw through Ch. 3 of 2020 Reg. Sess.) ("acquiring, possessing and protecting property"); COLO. CONST. art. II, § 3 (Westlaw through

Like in North Carolina, these provisions have been similarly interpreted as protections against unreasonable regulation.[215] While the exact reasoning used by the *Tully* court will not make sense in every state, other states may be receptive to arguments rooting protections for public employees in their constitutions.

Though public jobs remain desirable for their relative stability and guaranteed benefits,[216] budget cuts,[217] increased demands,[218] and political

amendments adopted through the Nov. 5, 2019 election) (same); FLA. CONST. art. I, § 2 (Westlaw through 2018 legislation) ("to acquire, possess and protect property"); IDAHO CONST. art. I, § 1 (Westlaw through effective legislation through Chapter 95 of the 2020 Second Reg. Sess. of the 65th Idaho Leg.) ("acquiring, possessing and protecting property"); IOWA CONST. art. I, § 1 (Westlaw through Nov. 8, 2016 General Election) (same); ME. CONST. art. I, § 1 (Westlaw through Chapter 586 of the 2019 Second Reg. Sess. of the 129th Leg.) (same); MASS. CONST. pt. 1, art. I (Westlaw through amendments approved Feb. 1, 2020) (same); MONT. CONST. art. II, § 3 (Westlaw through 2019 Sess.) (same); N.H. CONST. art. I, § 2 (Westlaw through Chapter 7 of the 2020 Reg. Sess.) (same); N.J. CONST. art. I, § 1 (Westlaw through amendments approved at Nov. 5, 2019 election) (same); N.M. CONST. art. II, § 4 (Westlaw through amendments approved at the general election held Nov. 6, 2018) (same); NEV. CONST. art. I, § 1 (Westlaw through the end of the 80th Reg. Sess. 2019) (same); OHIO CONST. art. I, § 1 (Westlaw through File 29 of 133rd General Assemb. 2019–2020) (same); UTAH CONST. art. I, § 1 (Westlaw through Chapter 1 of the 2020 Gen. Sess.) ("to acquire, possess and protect property"); VT. CONST. art. I, § 1 (Westlaw through acts 1–85, and 99 of the Adjourned Sess. of the 2019–2020 Vermont General Assemb.) ("acquiring, possessing and protecting property"). Other states use a similar formulation. *See* HAW. CONST. art. I, § 2 (Westlaw through end of the 2019 Reg. Sess.) ("acquiring and protecting property"); KY. CONST. § 1 (Westlaw through emergency effective legislation through Chapter 5 of the 2020 Reg. Sess.) (same); S.D. CONST. art. VI, § 1 (Westlaw through 2019 Sess. Laws) (same). Some states have even broader phrasing. *See* ARK. CONST. art. II, § 2 (Westlaw through the end of the 2019 Reg. Sess. of the 92d Arkansas General Assemb.) ("acquiring, possessing and protecting property and reputation"); N.D. CONST. art. I, § 1 (Westlaw through amendments approved at the general election held Nov. 8, 2018) (same); PA. CONST. art. I, § 1 (Westlaw through Nov. 5, 2019 General Election) (same). *But see also* LA. CONST. art. I, § 4 (Westlaw through amendments through Jan. 1, 2020) ("Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.").

215. *See, e.g.*, Leege v. Martin, 379 P.2d 447, 452–53 (Alaska 1963) (striking down a commercial-fisherman licensing scheme on state constitutional grounds); Grondin v. Town of Hinsdale, 451 A.2d 1299, 1301 (N.H. 1982) ("[The state constitution places] limitations upon the so-called police power . . . and nullif[ies] arbitrary legislation passed under the guise of that power."); Cryan v. State, 583 P.2d 1122, 1124 (Okla. 1978) ("To sustain encroachment on an individual's liberty, there should be an obvious and real connection between the regulation and its purpose to protect the public welfare and that this purpose can be served in no less restrictive means.").

216. Carole Moore, *Government Jobs Offer Good Pay Benefits*, BANKRATE (May 5, 2008), https://www.bankrate.com/finance/jobs-careers/government-jobs-offer-good-pay-benefits.aspx [https://perma.cc/RXX5-YSBN].

217. *See, e.g.*, Michael Leachman, *Timeline: 5 Years of Kansas' Tax-Cut Disaster*, CTR. ON BUDGET & POL'Y PRIORITIES (May 24, 2017), https://www.cbpp.org/blog/timeline-5-years-of-kansas-tax-cut-disaster [https://perma.cc/3UMD-DJVC] (describing the impact of severe budget cuts on Kansas's public employees).

218. *See, e.g.*, *Why Class Size Matters Today*, NAT'L COUNCIL TCHRS. ENG. (Apr. 1, 2014), http://www2.ncte.org/statement/why-class-size-matters/ [https://perma.cc/7UT2-UUYB] ("Today public schools employ 250,000 fewer people than before the recession of 2008–09, while enrollment has increased by 800,000, and class sizes in many schools are at record highs.").

gamesmanship[219] have depressed morale across the country and made recruitment and retention of public employees even more challenging.[220] In addition to political and legislative action, public employees who suffer unreasonable treatment at the hands of their employers ought to have a remedy in court. Creative lawyers and judges should answer Justice Brennan's call and use these often-overlooked state constitutional provisions to protect public servants from unreasonable, unlawful employer abuse.

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219. *See, e.g.*, Ivonne Rovira, Opinion, *Teachers, Make Matt Bevin See Red. Be in Frankfort Friday To Kill His Bad Pension Bill*, COURIER J. (Louisville July 17, 2019, 10:43 AM), https://www.courier-journal.com/story/opinion/2019/07/17/kentucky-pension-crisis-jcps-teacher-calls-protest-frankfort/1753545001/ [https://perma.cc/C88A-YYEW] (detailing legislative chaos in Kentucky concerning teacher pensions).

220. Howard Risher, *Why Is Public-Employee Morale So Bad?*, GOVERNING: FUTURE STS. & LOCALITIES (Aug. 23, 2016, 6:15 AM), https://www.governing.com/gov-institute/voices/col-public-employee-morale-engagement-lessons-private-sector.html [https://perma.cc/JQB8-8DLN].

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