

# UNCONSTITUTIONAL EMOLUMENTS: THE EMOLUMENTS CLAUSES OF THE NORTH CAROLINA CONSTITUTION\*

JOHN V. ORTH\*\*

*Both the United States Constitution and the North Carolina Constitution include emoluments clauses, but neither constitution defines the meaning of emoluments. Suits in federal courts against President Donald Trump charging him with receiving prohibited emoluments have raised the question whether emoluments as used in the Federal Constitution are limited to payments for employment or office-holding. A review of North Carolina cases reveals that emoluments, as used in the state constitution, are not limited to compensation for public employment but may include benefits or privileges granted in consideration of public services more generally.*

INTRODUCTION .....	1727
I. DEFINITION OF EMOLUMENTS .....	1732
II. EMOLUMENTS FOR PUBLIC EMPLOYMENT .....	1733
III. EMOLUMENTS FOR PUBLIC SERVICES IN GENERAL .....	1734
IV. EMOLUMENTS AND FUNDAMENTAL PRINCIPLES .....	1737
CONCLUSION .....	1738

## INTRODUCTION

*A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.*

—N.C. CONST. art. I, § 35

The election of President Donald Trump, a businessman in the active pursuit of profit, has raised questions concerning two emoluments clauses in the United States Constitution.<sup>1</sup> Article I, Section 9 prohibits federal

\* © 2019 John V. Orth.

\*\* William Rand Kenan, Jr. Professor of Law, University of North Carolina School of Law. A.B. 1969, Oberlin College; J.D. 1974, M.A. 1975, Ph.D. (history) 1977, Harvard University.

1. U.S. CONST. art. I, § 9; cl. 8; *id.* art. II, cl. 7. A third emoluments clause concerns senators and representatives, who are prohibited from being appointed to any federal office

officers, including the president, from receiving “any present, Emolument, Office, or Title, of any Kind whatever, from any King, Prince, or foreign State,” except with the consent of Congress.<sup>2</sup> Article II, Section 1 limits the compensation of the president to a salary “which shall neither be encreased [sic] nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”<sup>3</sup> Together, these clauses are designed to ensure the undivided loyalty of federal office holders. Mindful of corrupt practices in English history,<sup>4</sup> the framers of the Constitution worked to ensure the integrity of officials in the new republic.<sup>5</sup>

Constitutional provisions concerning emoluments were not new when the Federal Constitution was drafted and ratified. The first state constitutions, adopted a dozen years earlier in the aftermath of the Revolution, also included emoluments clauses.<sup>6</sup> Unlike the United States Constitution, which established a federal government for a union of pre-existing states, the prior state constitutions organized the governments of those states. When the former British colonies declared their independence on July 4, 1776, they cut themselves off from the previous source of their political authority.<sup>7</sup> As one revolutionary leader in North Carolina later explained, “At the time of our separation from Great Britain, we were thrown into a similar situation with a set of people ship-wrecked and cast on a maroon’d island—without laws, without magistrates, without government, or any legal authority.”<sup>8</sup> The government of the former Crown colony—now an independent state—had to be built on a new foundation: popular sovereignty. Power would no longer come from the top down but from the bottom up.

---

“which shall have been created, or the Emoluments whereof shall have been encreased [sic]” during their time in Congress. *Id.* art. I, § 6, cl. 2.

2. *Id.* art. I, § 9, cl. 8.

3. *Id.* art. II, § 1, cl. 7.

4. See, e.g., SIR GEORGE CLARK, *THE LATER STUARTS 1660–1714*, at 86–87, 130 (2d ed. 1955) (describing secret pensions paid by King Louis XIV of France to King Charles II and King James II of England); LEWIS NAMIER, *THE STRUCTURE OF POLITICS AT THE ACCESSION OF GEORGE III 2–4* (2d ed. 1929) (emphasizing the role of family ties and patronage in English politics in 1760).

5. U.S. CONST. art. I, § 9, cl. 8.

6. See generally *THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* (Ben Perley Poore ed., Washington Government Printing Office 2d ed. 1877) (reprinting several, original state constitutions).

7. *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

8. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787) (Ashe, J.). Samuel Ashe had been a member of the committee of the Fifth Provincial Congress in 1776 that drafted the North Carolina Declaration of Rights and Constitution. See 10 *THE COLONIAL RECORDS OF NORTH CAROLINA* 913–14, 918 (William Saunders ed., 1890); Lindley S. Butler, *Provincial Congresses*, in *ENCYCLOPEDIA OF NORTH CAROLINA* 917, 918 (William S. Powell ed., 2006).

On December 18, 1776, North Carolina adopted its first constitution.<sup>9</sup> The very first section of the North Carolina Constitution's Declaration of Rights proclaimed the new basis of legal authority: "That all political Power is vested in and derived from the people only."<sup>10</sup> The second section spelled out the necessary consequence for North Carolina: "That the people of this State ought to have the sole and exclusive Right of regulating the internal Government and Police thereof."<sup>11</sup> Section 3 declared that there would be no privileged classes in the new state: "That no Man or set of Men are entitled to exclusive or separate Emoluments or Privileges from the Community, but in Consideration of Public Services."<sup>12</sup>

After establishing various other political principles, such as separation of powers,<sup>13</sup> and guaranteeing important civil rights, particularly those of criminal defendants,<sup>14</sup> the Declaration of Rights returned to the issue of privileged classes. Section 22 declared that "no Hereditary Emoluments Privileges, or Honors ought to be granted or conferred in this State."<sup>15</sup> The next section concerned the associated issue of economic privilege: "That Perpetuities and Monopolies are contrary to the Genius of a free State, and ought not to be allowed."<sup>16</sup> These clauses, read in combination, make it

9. 10 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 8, at 974; 23 THE STATE RECORDS OF NORTH CAROLINA 980–84 (Walter Clark ed., 1904). The Declaration of Rights had been adopted the day before. 10 COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 8, at 973; 23 THE STATE RECORDS OF NORTH CAROLINA, *supra*, at 977–79. The Constitution made the Declaration "part of the constitution of this State." N.C. CONST. of 1776, § 44.

10. N.C. CONST. of 1776, Declaration of Rights, § 1, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 9, at 977.

11. *Id.* § 2, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 9, at 977.

12. *Id.* § 3. This section has been described as "a general statement of the fundamental inalienable rights of man—equal rights to all, special privileges to none." Robert D. Lewis, Note, *Constitutional Law—Special Privileges and Emoluments—Race Track Franchise*, 33 N.C. L. REV. 109, 109, 112 (1954) (citing *State v. Felton*, 239 N.C. 575, 80 S.E.2d 625 (1954)).

13. N.C. CONST. of 1776, Declaration of Rights, § 4, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 9, at 977.

14. *Id.* §§ 7–13.

15. *Id.* § 22, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 9, at 978. Describing the "[r]eal emotion" that lay behind provisions like this one, Gordon Wood explained that "the revolutionaries knew only too well what kin and patrimonial officeholding had meant in their lives." GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 181 (1991). The framers of the Federal Constitution were well aware of the public feeling. *See id.* The United States Constitution reinforced the state's ban. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility.").

16. N.C. CONST. of 1776, Declaration of Rights, § 23, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 9, at 978. Referring specifically to this section, Gordon Wood commented that "[f]rom the outset the new republican states . . . tended to view with suspicion the traditional monarchical practice of enlisting private wealth and energy for public purposes by issuing corporate privileges and licenses to private persons." WOOD, *supra* note 15, at 187–88. In fact, the monarchical practice was to use the grant of a monopoly as a gift of revenue rather than as an incentive for serving public purposes. *See, e.g., The Case of Monopolies* (1602) 77 Eng. Rep. 1260, 2160–61 (KB) (invalidating a royal grant of a monopoly for the import and sale of

clear that in the “free State” of North Carolina, there would be only one class of citizen: free men, who would compete equally for political and economic advantage.<sup>17</sup> Unlike the emoluments clauses of the United States Constitution, which were designed to prevent federal officials from being corrupted by foreign governments, Congress, or the states, the North Carolina emoluments clauses were designed to prevent the state government from favoring one person or group over another.

North Carolina was not alone among the former British colonies in its determination to prevent the development of privileged classes. In fact, both emoluments clauses in the North Carolina Declaration of Rights were derived from a section of the Virginia Declaration of Rights, which had been adopted earlier in 1776, providing that “no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.”<sup>18</sup> The first emoluments clause of the North Carolina Declaration of Rights (Section 3) is copied directly from the Virginia Declaration, while the second emoluments clause (Section 22) generalizes the Virginia ban on hereditary offices into a ban on *any* “Hereditary Emoluments, Privileges or Honors.”<sup>19</sup>

Since their adoption in 1776, the North Carolina emoluments clauses have undergone only editorial changes, but their position and context have been altered, raising the risk of subtly altering their significance. In 1868, when the state adopted its second constitution, the Declaration of Rights became Article I, and its sections were renumbered—a renumbering necessitated by the insertion of sections recognizing the effects of the Civil War. The ban on exclusive emoluments or privileges (Section 3 in 1776) became Section 7 in 1868,<sup>20</sup> separated from the sections on popular

---

playing cards). On the later history of section 23, see generally John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399 (2009).

17. Almost a century would pass before the abolition of slavery ended the distinction between free men and slaves. U.S. CONST. amend. XIII. And almost another half-century would elapse before women would be granted the vote. *Id.* amend. XIX.

18. VA. CONST. of 1776, Bill of Rights, § 4, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES, *supra* note 6, at 1909; see John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1797 (1992) (listing sources of various sections of the North Carolina Declaration of Rights of 1776).

19. N.C. CONST. of 1776, Declaration of Rights, § 22, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 9, at 978.

20. N.C. CONST. of 1868, art. I, § 7, *reprinted in* NORTH CAROLINA MANUAL 1981–1982, at 847 (John L. Cheney, Jr. ed.) (“No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”).

sovereignty by sections prohibiting secession,<sup>21</sup> pledging allegiance to the government of the United States,<sup>22</sup> and prohibiting the repayment of any debt incurred to fund the recent “insurrection or rebellion” or paying “any claim for the loss or emancipation of any slave.”<sup>23</sup> Because of those and other new sections, the ban on hereditary emoluments (Section 22 in 1776) became Section 30 in 1868, moving it further away from the ban on exclusive emoluments than it had been in the original 1776 Constitution.<sup>24</sup>

More significant contextual changes occurred in the latest North Carolina Constitution, which went into effect in 1971.<sup>25</sup> The ban on exclusive emoluments or privileges (Section 3 in 1776 and Section 7 in 1868) was relocated in order to group it with the ban on hereditary emoluments and became Section 32 in the 1971 Constitution,<sup>26</sup> separating it even further from the provisions on self-government. At the same time, the original phrase “man, or set of men” in the ban on exclusive emoluments or privileges was replaced with “person or set of persons.”<sup>27</sup> Throughout the 1971 Constitution, captions were added to the various sections. The section that banned exclusive emoluments or privileges was labeled simply “Exclusive emoluments,” obscuring the equal ban on exclusive privileges.<sup>28</sup> The section on hereditary emoluments (Section 22 in 1776 and Section 30 in 1868) became Section 33 in the 1971 Constitution, with the descriptive caption “Hereditary emoluments and honors.”<sup>29</sup>

Since 1776 there has been no attempt to create hereditary emoluments or honors in North Carolina, so the section prohibiting them has only infrequently been cited—usually in connection with the prohibitions on exclusive emoluments and on perpetuities and monopolies—to demonstrate the framers’ intent to prohibit privileged classes.<sup>30</sup> By contrast, the North

21. *Id.* § 4, reprinted in NORTH CAROLINA MANUAL 1981–1982, *supra* note 20, at 846–47.

22. *Id.* § 5, reprinted in NORTH CAROLINA MANUAL 1981–1982, *supra* note 20, at 847.

23. *Id.* § 6.

24. *Id.* § 30, reprinted in NORTH CAROLINA MANUAL 1981–1982, *supra* note 20, at 848 (“No hereditary emoluments, privileges, or honors, ought to be granted or conferred in this State.”).

25. See JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 32–38 (2d ed. 2013).

26. N.C. CONST. art. I, § 32 (“No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”).

27. *Id.*

28. *Id.*

29. *Id.* art. I, § 33 (“No hereditary emoluments, privileges, or honors shall be granted or conferred in this State.”).

30. See, e.g., *Bryan v. Patrick*, 124 N.C. 651, 661, 33 S.E. 151, 153 (1899) (“When our people were organizing a new state . . . [t]hey intended and did relieve themselves from burdensome fetters and trammels, and did whatever was necessary for their safety and to promote the general welfare. This reasoning is not a mere question of construction. . . . It is declared in the Constitution Art. I, sec. 7, ‘No man or set of men are entitled to exclusive or separate emoluments

Carolina ban on exclusive emoluments has been “frequently invoked by [the Supreme Court of North Carolina] to strike down legislation conferring special privileges not in consideration of public service.”<sup>31</sup>

### I. DEFINITION OF EMOLUMENTS

The constitutional definition of emoluments is disputed. Most dictionaries at the time of the drafting of the North Carolina and federal constitutions defined emolument simply as “[p]rofit” or “advantage.”<sup>32</sup> A century later, the first edition of Henry Campbell Black’s *Dictionary of Law* (1891) gave a more elaborate definition, emphasizing payment for services: “The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites . . . .”<sup>33</sup> At the same time, it added a more general definition—“advantage; gain, public or private”<sup>34</sup>—with no mention of employment or office-holding. This general definition continued to appear in subsequent editions of Black’s legal dictionary for the next hundred years, through the revised fourth edition in 1968,<sup>35</sup> after which only the definition of emolument tied to office or

---

or privileges from the community but in consideration of public services’; in section 30, ‘No hereditary emoluments, privileges, or honors ought to be granted or conferred in this State’; and in section 31, ‘Perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed.’”). Similar statements appear in *Washington Toll Bridge Co. v. Commissioners of Beaufort*, 81 N.C. 491, 504–05 (1879) and *McRee v. Wilmington & Raleigh R.R.*, 47 N.C. (2 Jones) 186, 190 (1855).

31. *Brumley v. Baxter*, 225 N.C. 691, 698, 36 S.E.2d 281, 286 (1945). For examples of violations of the emoluments clause, see *Cowan v. Sec. Life & Trust Co.*, 211 N.C. 18, 21, 188 S.E. 812, 814 (1936); and *Simonton v. Lanier*, 71 N.C. 498, 503 (1874).

32. See, e.g., 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, AND ILLUSTRATED IN THEIR DIFFERENT SIGNIFICATIONS BY EXAMPLES FROM THE BEST WRITERS, TO WHICH ARE PREFIXED, A HISTORY OF THE LANGUAGE AND AN ENGLISH GRAMMAR (3d ed. 1755). But see James C. Philips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760–1799*, 59 S. TEX. L. REV. 181, 233–34 (2017) (concluding that “the Congressional and Presidential Emoluments Clauses would have *most likely* been understood to contain a narrow, office or public-employment sense of ‘emolument,’” but recognizing that “the Foreign Emoluments Clause is more ambiguous given the modifying language ‘of any kind whatever’”).

33. *Emolument*, BLACK’S LAW DICTIONARY (1st ed. 1891). The definition also included a final phrase: “Any perquisite, advantage, profit, or gain arising from the possession of an office,” and cited 105 Pa. St. 303, *id.*, a mistake for 105 Pa. 303, the citation of *Apple v. Crawford*, 105 Pa. 303 (1884); a mistake corrected in the second edition of *Black’s Law Dictionary*’s definition of emolument, which added citations to *Hoyt v. United States*, 51 U.S. 109 (1850) and *Vansant v. State*, 53 A. 711 (Md. 1902). See *Emolument*, BLACK’S LAW DICTIONARY (2d ed. 1910).

34. *Emolument*, BLACK’S LAW DICTIONARY (1st ed. 1891) (citing “Webster,” i.e., *Webster’s Dictionary*, without indicating any particular edition).

35. *Emolument*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968) (replacing the citations to *Hoyt* and *Vansant* with citations to *United States v. MacMillan*, 209 F. 266 (N.D. Ill. 1913);

employment appeared.<sup>36</sup> Beginning with the seventh edition in 1999, the definition of emolument in *Black's Law Dictionary* was shortened to “[a]ny advantage, profit, or gain received as a result of one’s employment or one’s holding of office,”<sup>37</sup> a definition that remained unchanged in subsequent editions and appears in the most recent, tenth edition published in 2014.<sup>38</sup>

Suits currently pending in federal courts against President Trump charge him with receiving prohibited emoluments from foreign governments and from federal and state instrumentalities.<sup>39</sup> On behalf of the president, the United States Department of Justice has argued that the meaning of emolument is limited to “profit arising from an office or employ,”<sup>40</sup> while the plaintiffs have argued for a more general definition, including advantages gained as a result of his office.<sup>41</sup> North Carolina cases have not drawn a sharp distinction between emoluments granted as compensation for public services in the form of public office-holding or employment and emoluments granted in consideration of public services more generally. Nonetheless it is useful to consider the two separately.

## II. EMOLUMENTS FOR PUBLIC EMPLOYMENT

Two North Carolina cases concerning emoluments for public employment illustrate the need to justify certain payments as compensation for public services. In 1995, in *Leete v. County of Warren*,<sup>42</sup> the Supreme

---

*McLean v. United States*, 226 U.S. 374 (1912); and *State ex rel. Todd v. Reeves*, 196 Wash. 145 (1938)).

36. *Emolument*, BLACK’S LAW DICTIONARY (5th ed. 1979) (defining emolument as the “profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites. Any perquisite, advantage, profit, or gain arising from the possession of an office” and deleting the citation to *MacMillan*); *Emolument*, BLACK’S LAW DICTIONARY (6th ed. 1990) (continuing to omit the citation to *MacMillan*).

37. *Emolument*, BLACK’S LAW DICTIONARY (7th ed. 1999).

38. See *Emolument*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Emolument*, BLACK’S LAW DICTIONARY (9th ed. 2009); *Emolument*, BLACK’S LAW DICTIONARY (8th ed. 2004).

39. See *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 50–51 (D.D.C. 2018); *Dist. of Columbia v. Trump*, 291 F. Supp. 3d 725, 732 (D. Md. 2017); *Citizens for Responsibility and Ethics in Washington (CREW) v. Trump*, 276 F. Supp. 3d 174, 179 (2017).

40. Memorandum of Law in Support of Defendant’s Motion to Dismiss at 28, *Citizens for Responsibility and Ethics in Washington*, 276 F. Supp. 3d 174 (2017) (No. 1:17-CV-00458) (quoting JAMES BARCLAY, *Emolument*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN (Richardson & Urquhart et al. eds., London 1774)). The complete definition of emolument in Barclay is “profit arising from an office or employ; gain or advantage.” JAMES BARCLAY, *Emolument*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN (Richardson & Urquhart et al. eds., London 1774).

41. See Plaintiffs’ Memorandum in Opposition to Defendant’s Motion to Dismiss at 30–32, *Citizens for Responsibility and Ethics in Washington*, 276 F. Supp. 3d 174 (2017) (No. 1:17-CV-00458).

42. 341 N.C. 116, 462 S.E.2d 476 (1995).

Court of North Carolina held that a grant of funds to a county manager after his voluntary resignation conferred an unconstitutional emolument because the funds were not being granted in exchange for employment.<sup>43</sup> By contrast, in 1999, the North Carolina Court of Appeals in *Crump v. Snead*<sup>44</sup> held that a state statute retroactively extending the term, and therefore continuing the compensation of an elected town councilmember, did not confer an unconstitutional emolument because the councilmember was being paid for services rendered while in public office.<sup>45</sup> Defining emolument, the court in *Crump* relied on the sixth edition of *Black's Law Dictionary* (1990): “[T]he profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites.”<sup>46</sup>

### III. EMOLUMENTS FOR PUBLIC SERVICES IN GENERAL

Although the Supreme Court of North Carolina has struck down many state-granted emoluments and privileges,<sup>47</sup> it has upheld many as well.<sup>48</sup> Notwithstanding definitions of emoluments as compensation for office or employment, North Carolina courts have not limited the meaning of constitutional emoluments to payments for public employment. Payments or other nonmonetary benefits may be granted by the state in consideration of public services more generally. In cases concerning state-provided benefits to veterans of World War I and World War II, for example, the Supreme Court of North Carolina rejected claims of unconstitutional emoluments or privileges, even though the recipients’ services were completed and had not been rendered to North Carolina, but had been “primarily rendered to the United States.”<sup>49</sup>

43. *See id.* at 117, 123, 462 S.E.2d at 477, 480.

44. 134 N.C. App. 353, 517 S.E.2d 384 (1999).

45. *See id.* at 354, 356–57, 517 S.E.2d at 385, 387.

46. *Id.* at 356, 517 S.E.2d at 387 (quoting *Emolument*, BLACK’S LAW DICTIONARY (6th ed. 1990)). The court in *Snead* omitted the additional phrase, also emphasizing payment for service in office that appeared in the sixth edition: “Any perquisite, advantage, profit, or gain arising from the possession of an office.” *Emolument*, BLACK’S LAW DICTIONARY (6th ed. 1990).

47. *See, e.g.*, *Duncan v. City of Charlotte*, 234 N.C. 86, 94, 66 S.E.2d 22, 28 (1951).

48. *See, e.g.*, *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 658, 386 S.E.2d 200, 214 (1989); *Motley v. State Bd. of Barber Exam’rs*, 228 N.C. 337, 342, 345, 45 S.E.2d 550, 553, 555 (1947); *Brumley v. Baxter*, 225 N.C. 691, 698, 36 S.E.2d 281, 286 (1945); *Hinton v. Lacy*, 193 N.C. 496, 500, 513, 137 S.E. 669, 672, 678 (1927).

49. *Brumley*, 225 N.C. at 696, 698, 36 S.E.2d at 285–86 (holding that the donation of municipal land for World War II Veterans’ Center was not an unconstitutional emolument); *see also Motley*, 228 N.C. at 345, 45 S.E.2d at 555 (holding that a statute making veterans of World War I and World War II who had practiced barbering for three years in the army eligible to become registered barbers without examination and apprenticeship was not an unconstitutional emolument); *Hinton*, 193 N.C. at 513, 137 S.E.2d at 678 (holding that a home loan program for veterans of World War I was not an unconstitutional emolument).

In 1987, in *Town of Emerald Isle v. State*,<sup>50</sup> the Supreme Court of North Carolina radically restated the “public services” required to support an exclusive emolument or privilege. Without mention of public office or employment—or of any other services rendered to the public by the beneficiary—the court directed attention to the public good to be served by the benefit.<sup>51</sup> Upholding a statute that restricted traffic but conferred an exemption in favor of a certain set of persons,<sup>52</sup> the court held that an exclusive benefit is not an unconstitutional emolument or privilege if the benefit is “intended to promote the general welfare rather than the benefit of the individual” and if “there is a reasonable basis for the legislature to conclude the granting of the [benefit] serves the public interest.”<sup>53</sup>

The decision of the North Carolina Court of Appeals in *Town of Highlands v. Hendricks*,<sup>54</sup> involving an unusual condemnation proceeding, illustrates North Carolina’s dual approach to emoluments. After reciting the definition in *Black’s Law Dictionary*—“[a]ny perquisite, advantage, profit, or gain arising from the possession of an office”<sup>55</sup>—the court upheld the condemnation without further mention of office or employment,<sup>56</sup> using the “two-prong test” outlined in *Town of Emerald Isle* for determining the existence of an unconstitutional emolument: “the exemption or benefit is intended to promote the general welfare rather than the benefit of the individual, and . . . there is a reasonable basis for the legislature to conclude that the granting of the exemption or benefit serves the public interest.”<sup>57</sup> In 2011, in *Saine v. State*,<sup>58</sup> the court of appeals upheld grants to a private, nonprofit school, holding that they did not constitute unconstitutional emoluments because they served “a public purpose.”<sup>59</sup> As these cases illustrate, in the analysis of unconstitutional emoluments or privileges in North Carolina, the requirement of public services to support such benefits

50. 320 N.C. 640, 360 S.E.2d 756 (1987).

51. *See id.* at 654, 360 S.E.2d at 764.

52. *See id.* at 652, 655, 360 S.E.2d at 763–65.

53. *See id.* at 654, 360 S.E.2d at 764.

54. 164 N.C. App. 474, 596 S.E.2d 440 (2004).

55. *Id.* at 478, 596 S.E.2d at 444. Although the court cited to the seventh edition of *Black’s Law Dictionary*, the language quoted by the court is part of the definition of emolument in the sixth edition, *see Emolument*, BLACK’S LAW DICTIONARY (6th ed. 1990), and does not appear in the definition of emolument in the seventh edition, *see Emolument*, BLACK’S LAW DICTIONARY (7th ed. 1999).

56. *Hendricks*, 164 N.C. App. at 479–80, 596 S.E.2d at 445.

57. *Id.* at 479, 596 S.E.2d at 444–45 (citing *Peacock v. Shinn*, 139 N.C. App. 487, 495, 533 S.E.2d 842, 848 (2000)).

58. 210 N.C. App. 594, 709 S.E.2d 379 (2011).

59. *Id.* at 607, 709 S.E.2d at 389.

may be satisfied by results that promote “the general welfare,” serve “the public interest,” or further “a public purpose.”<sup>60</sup>

In deciding whether a particular service furthers a public purpose, a court may also be guided by decisions concerning the “public purposes” that have been held to support the state’s exercise of the taxing power. The Finance Article, Article V of the North Carolina Constitution, provides that “[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.”<sup>61</sup> Although this section literally limits only the state’s power to tax, it has also been construed to limit as well the state’s power to spend the money raised by taxation: “The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury.”<sup>62</sup>

In a 1999 advisory opinion concerning proposed government grants to hurricane victims, the North Carolina Attorney General’s Office described the test for determining violations of the emoluments clause as “very similar to the test for determining violations of the public purpose clause of Article V, Section 2(1) of the Constitution.”<sup>63</sup> Although the North Carolina Supreme Court has “expressly declined to ‘confine public purpose by judicial definition,’”<sup>64</sup> a grant of emoluments will generally be upheld if it is reasonably connected to a legitimate aim of government and if the ultimate benefit of the program accrues to the benefit of the general public and not to special interests or particular persons.<sup>65</sup>

60. The expansive meaning of “public services” in the exclusive emoluments clause of the North Carolina Constitution is reminiscent of the expansive meaning of “public use” in the Takings Clause of the Fifth Amendment to the U.S. Constitution. *See Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (stating that the United States Supreme Court applies “the broader and more natural interpretation of public use as ‘public purpose’”).

61. N.C. CONST. art. V, § 2(1).

62. *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 143, 159 S.E.2d 745, 749–50 (1968).

63. N.C. DEP’T OF JUSTICE, PROPOSED DISASTER RELIEF PROGRAMS; CONSTITUTIONALITY WITH RESPECT TO THE PUBLIC PURPOSE AND EXCLUSIVE EMOLUMENT CLAUSES (Dec. 13, 1999), <http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Proposed-Disaster-Relief-Programs.aspx> [<https://perma.cc/9UN9-R6AR>].

64. *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (quoting *Stanley v. Dep’t of Conservation & Dev.*, 284 N.C. 15, 33, 199 S.E. 641, 653 (1973)) (holding that a municipality may operate its own cable television system, so long as there is a “reasonable connection with convenience and necessity of the [State]” and the service benefits the public generally). For additional commentary on *Madison Cablevision*, see generally Edward Hardy Lewis, *Municipal Ownership of Cable Television Systems*: *Madison Cablevision, Inc. v. City of Morganton*, 68 N.C. L. REV. 1295 (1990).

65. *See Maready v. City of Winston-Salem*, 342 N.C. 708, 712, 727, 467 S.E.2d 615, 618, 627 (1996) (holding that incentive grants to private corporations for economic development satisfied the public purpose requirement). For a recent analysis of economic incentives, see

## IV. EMOLUMENTS AND FUNDAMENTAL PRINCIPLES

Although emolument is an unfamiliar—even peculiar—word,<sup>66</sup> the emoluments clauses of the North Carolina Constitution express fundamental principles of state government. The original placement of the exclusive emoluments clause in the Declaration of Rights put it in close proximity to the basic principle of popular sovereignty.<sup>67</sup> All power is from the people, and the state would not create privileged classes among free men.<sup>68</sup> Even before its relocation in 1971, the exclusive emoluments clause—in conjunction with the hereditary emoluments clause and the perpetuities and monopolies clause—was seen as essential to “the genius of a free state.”<sup>69</sup> “The meaning and purpose” of the three provisions was, as Justice Richmond Pearson observed in 1855, “to put in motion the ‘new state’ . . . as a free representative republican government, relieved from all fetters and trammels previously existing by which its action might be cramped or circumscribed, and fully authorized to do everything necessary and proper to accomplish its mission, that is, promote the general welfare.”<sup>70</sup>

In the years before the state constitution specifically defined “general laws,”<sup>71</sup> the Supreme Court of North Carolina relied on the exclusive

---

generally C. Tyler Mulligan, *Economic Development Incentives and North Carolina Local Governments: A Framework for Analysis*, 91 N.C. L. REV. 2021 (2013).

66. The origin of “emolument” is traced to the Latin *emolumentum*, “profit, gain, lit[erally], sum paid to have grain ground up.” *Emolument*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971).

67. See *supra* notes 10–20 and accompanying text.

68. See *supra* notes 10–20 and accompanying text.

69. N.C. CONST. art. I, § 34 (“Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.”); see also *Genius*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971) (giving, as one of the definitions of genius, “peculiar, distinctive, or identifying character: essential nature or spirit”).

70. *McRee v. Wilmington & Raleigh R.R.*, 47 N.C. (2 Jones) 186, 190 (1855).

71. A definition of general laws first appeared in the North Carolina Constitution in 1961 as part of a general revision of the Judicial Article. See N.C. CONST. of 1868, art. IV, § 20 (amended 1961). The section was amended and moved to the Miscellaneous Article in 1969. See N.C. CONST. of 1868, art. XIV, § 3 (amended 1969). It attained its present form in the new constitution in 1971. See N.C. CONST. art. XIV, § 3 (“Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district,

emoluments clause for the definition: “There are Constitutions,” Justice William Adams observed in 1927, “which provide in express terms that general laws shall have a uniform operation; ours embodies the principle in the following language: ‘No man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.’”<sup>72</sup>

The court declared that the ban on exclusive emoluments—coupled with the ban on perpetuities and monopolies—embodies a “fundamental democratic principle: ‘Equal rights and opportunities to all, special privileges to none.’”<sup>73</sup> The two clauses, said the court, guarantee

that every valid enactment of a general law applicable to the whole State shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions.<sup>74</sup>

#### CONCLUSION

Both the United States Constitution and the North Carolina Constitution include emoluments clauses, but the function and wording of the respective clauses are significantly different. The emoluments clauses of the Federal Constitution are designed to prevent federal office holders from being distracted from their duties by the possibility of benefits conferred by foreign states, Congress, or the states. By contrast, the emoluments clauses of the North Carolina Constitution implement fundamental principles of state government: popular sovereignty, uniform laws, and equal protection. Although some North Carolina cases limit emoluments to compensation for public employment, many others uphold

---

shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act.”); *see also* N.C. CONST. art. II, § 24 (prohibiting local, private, or special acts on a variety of subjects).

72. *State v. Fowler*, 193 N.C. 290, 292, 136 S.E. 709, 710 (1927) (quoting N.C. CONST. of 1868, art. I, § 7).

73. *State v. Felton*, 239 N.C. 575, 587, 80 S.E.2d 625, 634 (1954) (holding an act allowing one county to permit betting on horse or dog racing to be an unconstitutional emolument or privilege).

74. *Id.* at 583, 80 S.E.2d at 631; *see also* N.C. DEP’T OF JUSTICE, ADVISORY OPINION; TREE CUTTING IN FRONT OF BILLBOARDS (Feb. 10, 1995), <http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Tree-Cutting-in-Front-of-Billboards.aspx> [<https://perma.cc/Z559-33S2>] (“The test for constitutionality generally applied to the granting of special privileges and immunities [under article I, section 32 of the state constitution] is substantially similar to that used in determining whether the equal protection of the laws have [sic] been denied by the state.”).

state-granted payments or privileges in consideration of public services more generally. With respect to the grant of emoluments or privileges, the public services required to support such grants may in some cases be satisfied by benefits that are intended to promote the general welfare, serve the public interest, or further a public purpose. In these cases, the granting of the emoluments or privileges is not dependent on services provided by the benefited individual or group.

While the public services required to support the grant of emoluments or privileges cannot be defined with precision, guidance may be found in an examination of prior cases, not only those construing emoluments and privileges as used in article I, section 32, but also those construing other phrases used in the state constitution: public purposes, uniform laws, and equal protection. Throughout, the meaning to be given to the emoluments clauses is informed by returning to the fundamental principles of North Carolina government.

