April 2005

The Rising Tide of North Carolina Constitutional Protection in the New Millennium

J. Michael McGuinness

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Part of the Constitutional Law Commons

Recommended Citation


This Article is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.
THE RISING TIDE OF NORTH CAROLINA CONSTITUTIONAL PROTECTION IN THE NEW MILLENNIUM

J. MICHAEL McGUINESS

These fundamental [state constitutional] guarantees are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the state extensive individual rights, including that of personal liberty.²

The new millennium has brought new governmental dangers and significant developments in both federal and North Carolina constitutional law. While many federal developments appear to track changes in political ideology, North Carolina constitutional law has served as a more stable bedrock foundation for the protection of individual rights. During the Warren and Burger Courts, most litigants with governmental disputes or civil liberties claims sought constitutional protection in federal forums. However, many historically recognized federal constitutional rights have recently been eroded and some have been obliterated.³ At the same time, the North Carolina Constitution became

1. J. Michael McGuinness represents individuals in constitutional litigation. Mr. McGuinness is a board certified civil trial advocate, National Board of Trial Advocacy. Mr. McGuinness practices from his offices in Elizabethtown, N.C. and Washington, D.C. He may be reached at: jmichael@mcguinnesslaw.com or 910-862-7087. This article is dedicated to the late Senator and Justice, Sam J. Ervin Jr., who recognized the values and broad scope of the North Carolina Constitution in the 1940s. Justice Ervin's work and scholarship laid the foundations for North Carolinians to use our State Constitution to challenge the growing abuse of government power. © All Rights Reserved. 2005


"a beacon of civil rights. . . ."  

Unlike many federal courts, the North Carolina appellate courts have generally avoided rapid doctrinal changes in constitutional law. In North Carolina, the path of state constitutional law has been more stable and predictable, maturing gradually as circumstances have evolved under growing government regulation and abuse. In 1992, following Corum v. University of North Carolina, 5 Justice Harry Martin explained:

The Constitution of North Carolina offers especially fertile ground for practitioners seeking to protect their clients' civil rights because the document itself provides certain protections that do not appear in the federal counterpart . . . . The Constitution of North Carolina is a beacon of civil rights . . . . The North Carolina Constitution is the people's timeless shield against encroachment on their civil rights. During the past decade, North Carolina practitioners and the North Carolina Supreme Court have shaken the cobwebs from the state's fundamental charter, making it clear that the state constitution is a living, breathing document.  

The Declaration of Rights in the North Carolina Constitution provides rich text for potentially broad application in many contemporary contexts. The preamble emphasizes "the existence of our civil, political and religious liberties . . . ." 7 In Article I, the Declaration of Rights recognizes "the great, general, and essential principles of liberty. . . ." 8 Various provisions of the North Carolina Constitution afford greater and more specific protection than provided by the United States Constitution. 9 Due to the perpetual growth and abuse of government power by local and state government in North Carolina, the need for


7. N.C. CONST. pmbl.

8. Id. at art. 1.

North Carolina constitutional protection for individuals has never been greater.

In 1980, the United States Supreme Court, speaking through Justice Rehnquist, reaffirmed that a State may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." North Carolina has continued to enforce the core of its own constitutional backbone. North Carolina courts have interpreted the State Constitution to grant rights broader than the Federal Constitution. Federal decisions do not bind North Carolina courts on issues of North Carolina constitutional law. In Lowe v. Tarble, our Supreme Court observed that relief may be granted under our State Constitution where no relief is available under the Federal Constitution. Our Supreme Court has mandated that the North


11. See Chief Justice James Exum, Symposium: "The Law of the Land": The North Carolina Constitution and State Constitution: Rediscovering State Constitutions, 70 N.C.L. Rev. 1741, 1743 (1992); Martin, supra note 4, at 1757; Boutwell, The Cause of Action for Damages Under The North Carolina Constitution: Corum v. University of North Carolina, 70 N.C. L. Rev. 1899, 1899 (1992), and other authorities cited herein. In Whaley v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969), the Court of Appeals relied upon the North Carolina Constitution in striking down an ambulance regulation as unconstitutional. The Court reasoned that the "state, cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unnecessary or unreasonable restrictions on them . . . .". Id. at 324, 168 S.E.2d at 414. The Court concluded that the ordinance invaded "the personal and property rights guaranteed by" the State Constitution. Id. at 327, 168 S.E.2d at 416.


14. 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985). One of the justifications for our federal system of multiple constitutions is to provide the people of each state with a system of double protection from encroachment by either the state or federal governments. See THE FEDERALIST, Number 45 (J. Madison). There are hundreds of cases in which state appellate courts have found that state constitutions provide greater protections than those afforded under the Federal Constitution. Teachout, Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law, 13 Vermont L. Rev. 13, 15 (1988).
Carolina Constitution must be liberally construed, especially those provisions safeguarding individual liberty.\footnote{15} This article outlines a number of recent developments in North Carolina constitutional law, focusing primarily upon the most common areas where individuals need protection from abusive government power. Recent cases have demonstrated the growth and abuse of government power in North Carolina, from the smallest municipalities to the massive North Carolina state government bureaucracy. State constitutional checks and balances are necessary.

I. THE PROBLEM OF ABUSIVE GOVERNMENT POWER IN NORTH CAROLINA

As Judge Robert Bork demonstrated in his authoritative treatise, governmentally imposed "political correctness" is rampant.\footnote{16} James Bovard explains:\footnote{17}

Americans' liberty is perishing beneath the constant growth of government power. Federal, state and local governments are confiscating citizens' property, trampling their rights and decimating their opportunities more than ever before. . . . Discretionary authority on the part of the government means insecurity for legal freedom on the part of the subjects . . . . Freedom of speech and freedom of the press are increasingly under assault by ambitious bureaucrats and spiteful politicians. . . .

North Carolinians, from all walks of life, need constitutional protection from increasingly retaliatory, arbitrary and discriminatory government power, more often at the local level.\footnote{18} Perhaps the greatest threat to civil liberties arises close to home, in Raleigh, in county seats, and in town halls. North Carolinians are pervasively regulated by growing local governments more than ever before. Sheriffs, police

\footnote{15} See State v. Harris, 216 N.C. 746, 764-65, 6 S.E.2d 854, 866 (1940); Corum, 330 N.C. at 781-83, 413 S.E.2d at 290.

\footnote{16} R. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 54, 90, 203, 215, 247, 255, 262 and 333 (1996). See also Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999), where the City of Goldsboro retaliated against and suspended Officer Edwards for teaching an off-duty course under the N.C. concealed handgun law. The Chief of Police opposed the law and attempted to justify his conduct because he claimed it was "a bad law." The Fourth Circuit recognized Edwards' expression and association claims.

\footnote{17} J. BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY 1-3 (1995).

\footnote{18} SENATOR SAM J. ERVIN, JR., PRESERVING THE CONSTITUTION 165, 213 - 214 (1984); Bovard, supra note 17, at 1-6, 49 - 51; Browning-Ferris Indus. v. Wake County, 905 F. Supp. 312 (E.D.N.C. 1995)(recognizing the availability of substantive due process protection to challenge arbitrary, capricious and irrational government action; court granted summary judgment for Plaintiff because of indisputably arbitrary and capricious governmental conduct).
chiefs, town managers, building inspectors, educational superintendents, planners, administrators, technicians, and many other local and state bureaucrats are more subject to direct political pressures. Therefore, local bureaucrats appear more prone to violate fundamental constitutional rights such as free expression, association, privacy, due process, and equal protection. 19

In a variety of cases, the North Carolina Constitution has been used to restrain North Carolina governments from retaliatory, arbitrary and discriminatory actions. 20 From Manteo to Murphy, cases have demonstrated that North Carolina state and local governments commit acts of abusive misconduct against citizens in their zeal to control, oppress and retaliate. 21


21. E.g., Edwards, 178 F.3d 231 (concerning a municipal employer who attempted to prevent off-duty teaching and protected conduct); Worrell, 110 F.3d 62 (alleging deputy sheriff was terminated for having reported malfunctioning police equipment); Piver, 835 F.2d 1076 (addressing a teacher who was transferred for having publicly supported a colleague); Brewington, 1993 WL 819885 (involving a deputy sheriff who was terminated for appearing at a City Council meeting and for having earlier confirmed retaliation by another police agency; partial summary judgment for Plaintiff), and other cases cited herein.

In Browning-Ferris Indus., Judge Britt addressed the contours of substantive due process and granted summary judgment for the Plaintiff in an action against Wake County. The Court reasoned that the governmental action violated substantive due process:

[If it is arbitrary or capricious, lacks a rational basis, or is undertaken with improper motives. Walz v. Smithtown, 46 F.3d 162 (2d Cir. 1995) (improper motive); Marks v. City of Chesapeake, Va., 88 F.2d 308 (4th Cir. 1989)
Small towns generate the most interesting scenarios and horror stories. Small diners and coffee shops frequently cook up more than grits and barbeque; they are often places where the seeds of governmental misconduct are planted. For example, recently in the small town of Marshall, the town government did not like how plaintiff danced at a town community center and consequently banned her from the facility and threatened her with a trespass charge if she danced there again. Marshall held public events including dances every Friday night. After a decade of dancing there, Ms. Willis, a fifty-six-year-old woman, was warned to "tone it down," apparently in reference to her style of dance. She was accused of dancing "exuberantly and flamboyantly," which upset "certain members of the community." Without charges or a hearing, Ms. Willis was then banned from dancing at the facility.

Many local governments continue to tread into the most prohibited areas. For example, in Elizabeth City, up until 2003 following litigation, the City required police officers to adhere to the following policy: "Criticism of any department, operation, employee or policy of local government will not be made outside of this department. Criticisms shall be transmitted through the chain of command for appropriate consideration."

In Elizabethtown, the Town promises a panoply of employment rights to employees through its personnel policy including the right to have a grievance hearing. However, rather than providing a hearing, 


22. E.g., Bell v. Carteret County, (E.D.N.C. 87-37-CIV-4) (Political employment retaliation case arising from plans originating from the "liars table" in a Beaufort diner; a defendant acknowledged relying upon the antiquated proposition "to the victors go the spoils.").


25. Id.

26. Id.

27. Id. at *1-2.

the Town substituted a novel proceeding known as an “offering.”\(^{29}\) Under the Town’s “offering” procedure, the employee is barred from calling any witness, is barred from testifying, and may not cross examine or challenge the decision maker. The “offering” allows the decision maker to consider “secret” information not known or provided to the grievant, refuse to provide a written factual statement even where the decision maker is the key fact witness in the controversy, and expressly bars other willing employee witnesses from providing written statements to the grievant so that he can submit them at the “offering.”\(^{30}\) The Town allows the grievant to write up what he or she wants and offer it to the town manager. The Town calls this “due process” and “fairness.”\(^{31}\)

A broad range of cases, including government contracts, land use disputes, building permit squabbles, business regulation, education, licensing and permit schemes, law enforcement disputes, occupational licensing and regulation, public employment, and other governmental disputes, necessitate application of North Carolina constitutional principles. Some state agencies have promulgated undefined “morals” codes which subject licensees to career deprivation without notice of prohibited conduct or any definition of “good moral character.”\(^{32}\) One state regulatory agency refers to regulated public employees as “targets.”\(^{33}\) These and other areas of government regulation are where meaningful state constitutional protection is sorely needed.

II. SOME KEY PROVISIONS WITHIN THE DECLARATION OF RIGHTS

A glimpse at the text of the Declaration of Rights in Article I of the North Carolina Constitution reveals numerous provisions which afford substantial constitutional rights for North Carolinians. The Equality of Rights provision provided in Article I, Section 1 provides a sweeping constitutional guarantee that all persons enjoy “inalienable rights . . . [including] life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.”\(^{34}\) Section 12 provides for rights of assembly and petition, which is analogous to the Petition Clause in the

---

29. In re Roger Paschal (Employee Grievance; unpublished).
30. Id.
31. Id.
32. See, e.g., N.C. ADMIN. CODE tit. 12 r. 9B. 0101 (2004).
33. Wood v. N.C. Criminal Justice Training and Standards Commission, 01 DOJ 0478, (deposition testimony of agency investigator).
34. N.C. CONST. art. I § 1.
First Amendment and the right to freedom of association.\textsuperscript{35} Section 13 provides for religious liberty.\textsuperscript{36}

Section 14 guarantees freedom of speech and of the press.\textsuperscript{37} This text is especially compelling: “freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.”\textsuperscript{38} Section 15 allows for a constitutional “privilege of education.”\textsuperscript{39} Section 16 provides a constitutional prohibition against \textit{ex post facto} laws.\textsuperscript{40} Section 18 contains the “Open Courts” Clause.\textsuperscript{41}

Section 19, generally known as the “Law of the Land Clause,” enumerates multiple protections.\textsuperscript{42} First, it provides that no person shall be deprived of liberties or privileges or otherwise deprived of life, liberty or property except by the law of the land.\textsuperscript{43} This guarantees both \textit{procedural} and \textit{substantive} due process.\textsuperscript{44} It further provides that “no person shall be denied the equal protection of the laws.”\textsuperscript{45} Finally, it grants protection against suspect class discrimination on the basis of race, color, religion, or national origin.\textsuperscript{46}

Beginning with Section 20 of Article I, the North Carolina Constitution conveys a number of specific requirements applicable to criminal defendants and criminal proceedings.\textsuperscript{47} Section 25 grants the right of jury trial in civil cases.\textsuperscript{48} Section 30 gives the state constitutional right to bear arms.\textsuperscript{49} Section 35 provides a rule of constitutional construction that “a frequent recurrence to fundamental principles is absolute necessary to preserve the blessings of liberty.”\textsuperscript{50}

Section 36 explains that “the enumeration of rights in this article shall not be construed to impair or deny others retained by the people.”\textsuperscript{51} This section is similar to the Ninth Amendment of the Federal

\textsuperscript{35} \textit{Id}. at § 12.
\textsuperscript{36} \textit{Id}. at § 13.
\textsuperscript{37} \textit{Id}. at § 14.
\textsuperscript{38} \textit{Id}.
\textsuperscript{40} N.C. \textit{Const}. art. I, § 16.
\textsuperscript{41} \textit{Id}. at § 18.
\textsuperscript{42} \textit{Id} at § 19.
\textsuperscript{43} \textit{Id}.
\textsuperscript{44} \textit{In re} Moore, 289 N.C. 95, 97-98, 221 S.E.2d 307, 309 (1976).
\textsuperscript{45} \textit{Id}.
\textsuperscript{46} \textit{Id}.
\textsuperscript{47} \textit{Id}. at § 20.
\textsuperscript{48} \textit{Id}. at § 25.
\textsuperscript{49} \textit{Id} at § 30.
\textsuperscript{50} \textit{Id}. at § 35.
\textsuperscript{51} \textit{Id} at § 36.
Constitution, which provides for other rights not specifically enumerated in the Federal Bill of Rights. Finally, Section 37 provides a number of specific rights for victims of crime.

Several provisions of the North Carolina Constitution are ripe for application to a broad range of governmental conduct which deprives individuals of liberty. Article I, Section 1 is a source of direct protection for employee rights and for liberty generally. Justice Ervin's brilliant opinion in *State v. Ballance* broadly defines constitutional liberty.

These fundamental guarantees are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the state extensive individual rights, including that of personal liberty. The term "liberty," as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is "deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator," subject only to such restraints as are necessary for the common welfare. . . . it includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion.

Justice Ervin's teachings molded solid foundations of liberty and constitutional construction that have well served for over a half a century.

The North Carolina Supreme Court has held that "[a]ny exercise by the State of its police power is, of course, a deprivation of liberty." For example, in *Howell v. Town of Carolina Beach*, the Court of Appeals recognized the deprivation of a liberty interest in a public employment case. Officer Howell was allegedly fired for reporting malfunctions in police weapons and because of his political campaign

---

52. *Id.* at amend. IX.
53. *Id.* at § 37.
activities.\textsuperscript{58} Howell's interests in expression and political activities were held to constitute viable constitutional liberty interests.\textsuperscript{59} The Court of Appeals reversed summary judgment for the defendants and held that Howell enjoyed expression, liberty and due process claims.\textsuperscript{60}

III. FUNDAMENTALS OF STATE CONSTITUTIONAL HISTORY

Even before federal recognition of judicial review, North Carolina was out front asserting judicial authority to strike unconstitutional legislation, as North Carolina constitutional heritage predates \textit{Marbury v. Madison}.\textsuperscript{61} In 1787, with the case of \textit{Bayard v. Singleton},\textsuperscript{62} our Supreme Court declared a North Carolina statute unconstitutional under the State Constitution. Over two hundred years later, in \textit{State Ex Rel. Martin v. Preston},\textsuperscript{63} the North Carolina Supreme Court highlighted some state constitutional legal history. After analyzing \textit{Bayard v. Singleton}, the Court explained that in 1805, \textit{University v. Foy}\textsuperscript{64} "became one of the first courts to define the modern concept of due process of law."\textsuperscript{65} North Carolina was an early leader in constitutional law and has continued that proud heritage into the new millennium.\textsuperscript{66}

Early cases demonstrated the broad reach of the North Carolina Constitution.\textsuperscript{67} In \textit{Bizzell v. Board of Alderman}\textsuperscript{68} in 1926, the plaintiff contended that an ordinance was unconstitutional because it vested arbitrary discretion in public officials without prescribing uniform regulations.\textsuperscript{69} The ordinance provided that no gasoline filling or storage station should be located, conducted or operated in the City "without

\textsuperscript{58} Id. at 420-21, 417 S.E.2d at 283-84.
\textsuperscript{59} Id. at 421, 417 S.E.2d at 283.
\textsuperscript{60} Id.
\textsuperscript{61} 5 U.S. 137 (1803).
\textsuperscript{64} 5 N.C. (1 Mur.) 58 (1805) (recognizing the supremacy of rights protected by Article I of the North Carolina Constitution). See Corum, 330 N.C. at 783, 413 S.E.2d 290.
\textsuperscript{65} Preston, 325 N.C. at 448, 385 S.E.2d at 478.
\textsuperscript{66} E.g., Martin, supra note 4, at 1752-57.
\textsuperscript{67} E.g., State v. Tenant, 110 N.C. 609, 14 S.E. 387 (1892).
\textsuperscript{68} 192 N.C. 348, 353-54, 135 S.E. 50, 52-53 (1926).
\textsuperscript{69} Seventy years later, the City of Elizabeth City still had a direct anti-speech regulation in effect up until litigation in 2003 which provided direct prohibitions on police officer speech: "Criticism of any department, operation, employee or policy of local government will not be made outside of this department. Criticisms shall be
first obtaining consent from the board of aldermen..."70 Bizzell held that the ordinance was unconstitutional:

The ordinances are far-reaching, and the law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials, however well-meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike.

No ordinance is enforceable in matters of this kind, a lawful business, that does not make a general or uniform rule of equal rights to all and applicable to all alike- then there can be no special privilege or favoritism. The ordinance gives the power to the board of aldermen at their pleasure to grant one person a license and refuse another under the same circumstances. . . . The right of individuals to engage in any lawful calling and use their property for lawful purposes is guaranteed to them, and any unreasonable restraint or oppressive exaction upon the use of property and utmost liberty of business growth and advancement is contrary to the fundamental law of the land.71

IV. JUSTICE ERVIN LED THE STATE CONSTITUTIONAL CHARGE IN THE 1940S AND THEREAFTER

Justice Sam Ervin vigorously applied North Carolina constitutional law as Justice of the North Carolina Supreme Court.72 He earned national respect as a leading constitutional scholar. As Justice Ervin explained in his authoritative treatise,73 North Carolina courts have made "rich contributions to good government, the rule of law and liberty." He observed "the struggle of the people against arbitrary governmental power. . . ."74 He also explained how "freedom of speech is in great peril."75 Justice Ervin's concerns about arbitrary government power and its dangers to free speech have been demonstrated in case after case in the twenty years since his treatise.76

transmitted through the chain of command for appropriate consideration." See Eley, (2:02-CV-27-B0-1).

70. Bizzell, 192 N.C. at 350, 135 S.E. at 51.
71. Id. at 358, 135 S.E. at 55.
73. Ervin, supra note 18, at 49.
74. Id. at 112.
75. Id. at 214.
Another esteemed North Carolina jurist, who served both as a North Carolina and federal judge, strongly encouraged use of the North Carolina Constitution. Judge Braxton Craven explained:

It is strangely sad to me that scarcely anyone even thinks of a state constitution when he speaks of constitutional law. It is too bad. There is gold in the state constitutions. . . the result has been an almost complete reliance upon the federal Constitution for the protection of individual liberty and the instrument is not well adapted to the undertaking.77

Recent cases illustrate the independent and specific nature of the North Carolina Constitution.78 These cases derive substance from many historic cases.79 They demonstrate how North Carolina courts have been open to resolve constitutional disputes between citizens and government at all levels in North Carolina. Justice Harry Martin observed that "North Carolina has been at the head of the movement to energize state constitutional law."80

In In Re Application of Ellis,81 our Supreme Court held that the action of county commissioners denying an application for a permit to establish a mobile home park as a special exception was arbitrary and capricious where all ordinance requirements were met. The Court reasoned that the commissioners could not deny a permit "solely because, in their view, a mobile-home park would 'adversely affect the public interest.'82 The commissioners must also proceed under stan-

77. Ervin, supra note 18, at 384.
80. Martin, supra note 4, at 1751, citing among many cases, State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988) (holding that the North Carolina constitutional clause forbidding unreasonable searches and seizures is not subject to a good faith exception); State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).
82. Id. at 425, 178 S.E.2d at 81.
dards, rules, and regulations, uniformly applicable to all who apply for permits."\(^{83}\) In *Ellis*, the Court explained that decisionmaking based upon "the arbitrary will of the governing authorities . . . is unconstitutional, and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of [government officials]. . . ."\(^{84}\)

In a leading public employee case, Judge Eugene Gordon reaffirmed that the North Carolina Constitution forbids arbitrary and capricious governmental employment action by public employers.\(^{85}\) These equal protection and anti-arbitrariness principles are traced to many North Carolina cases, from *State v. Tenant* in 1892\(^{86}\) to more modern cases, such as *Maines v. City of Greensboro* in 1980.\(^{87}\) In *Maines*, the Court held that "an ordinance which vests unlimited or unregulated discretion in a municipal officer is void."\(^{88}\)

V. AUTHORITIES FROM THE 1980S AND BEYOND

In 1986, Former Chief Justice Exum authored *Dusting Off Our State Constitution*,\(^{89}\) where he explained that "there is a growing national trend in which state courts look more to their own state constitutions and less to the federal constitution to resolve legal disputes." Justice Exum observed how the North Carolina Constitution contains "language [that] is richer, more detailed, and more specific."\(^{90}\) He observed that Article I, Sections 12 and 13 of our Constitution "contained broad grants of power to the people."\(^{91}\) He explained that "the ground in these richly detailed grants of individual liberties" is much more fertile "than in the mere prohibitions against abridgement of them found in the federal document."\(^{92}\) He also observed how the use of North Carolina constitutional law will help our state courts be more creative and original, and will keep state law constant even in the face

\(^{83}\) Id. at 425, 178 S.E.2d at 81.

\(^{84}\) Id. at 425, 178 S.E.2d at 80.

\(^{85}\) See *Wall v. Stanly County Bd. of Educ.*, 259 F. Supp. 238, 249 (M.D.N.C. 1966)(stating citizens "are not at the mercy of any whimsical or arbitrary decision" of a governmental employer; government must act "in good faith and not arbitrarily, capriciously."); rev'd on other grounds, 378 F.2d 275 (4th Cir. 1967).

\(^{86}\) 110 N.C. 609, 14 S.E. 387 (1892).

\(^{87}\) 300 N.C. 126, 265 S.E.2d 155 (1980).

\(^{88}\) 300 N.C. at 131, 265 S.E.2d at 158.

\(^{89}\) N.C. ST. BAR Q., Spring 1986, at 6.

\(^{90}\) Id.

\(^{91}\) Id. at 7.

\(^{92}\) Id.
of changing winds which sometimes blow out of Washington.\(^9\) Justice Exum's reasoning was adopted six years later by the Supreme Court in *Corum v. University of North Carolina*.\(^9\)

In the last decade, North Carolina courts have reaffirmed the breadth of the North Carolina Constitution in a series of public employee constitutional cases.\(^9\) Public employment relationships are particularly susceptible to bureaucratic power struggles, local politics and other conditions which breed oppression, retaliation and discrimination, therefore necessitating constitutional protection. Each of the cases in the foregoing note reaffirmed application of the North Carolina Constitution to public employees and precluded employer abuses and retaliation. In *Debnam v. N.C. Dept. of Corrections*,\(^9\) our Supreme Court reaffirmed traditional constitutional protection for public employees during internal investigations.

The North Carolina Constitution has even been held to constitute a source of public policy for application in common law wrongful discharge cases premised upon the public policy exception. In *Vereen v. Holden*,\(^9\) the Court of Appeals recognized the North Carolina Constitution as an enforceable basis of common law public policy protection precluding political considerations in employment terminations.

A. Toomer v. Garrett

In *Toomer v. Garrett*,\(^9\) the Court of Appeals addressed several North Carolina and federal constitutional claims in a records disclosure dispute involving a former state employee, Algie Toomer. In 1997, Toomer settled an employment claim with his former employer, the North Carolina Division of Motor Vehicles.\(^9\) Following his settlement, the Secretary of the Department of Transportation retaliated by releasing Toomer's personnel, medical and other records directly to the news

\(^{93}\) Id. at 8.

\(^{94}\) 330 N.C. at 783, 413 S.E.2d at 290.


\(^{97}\) 121 N.C. App. 779, 468 S.E.2d 471 (1996).

\(^{98}\) 155 N.C. App. 462, 574 S.E.2d 76 (2002).

\(^{99}\) Id. at 467, 574 S.E.2d at 82. Toomer's first settled claim generated embarrassing evidence to the government, revealing massive patronage and retaliation in North Carolina government.
media. Toomer’s records included his entire personnel history including his home address, photograph, social security number, educational history, transcripts, testing data, credit history, financial information, retirement data, names and addresses of his family members, and medical information including medical diagnoses. He was singled out for disparate treatment but other state employees who settled claims were not similarly subjected to wholesale personnel file disclosures. The trial court dismissed Toomer’s complaint for failure to state a claim.

The Court of Appeals reversed and found that Toomer stated several state and federal constitutional claims, as well as common law claims for tortious invasion of privacy, negligence and breach of contract. Toomer alleged deprivation of his substantive due process, equal protection, expression and privacy rights. The Court observed that substantive due process protects individuals from government action that unreasonably deprives one of a liberty or property interest. The Court concluded that Toomer’s privacy interest in his personnel records did not fall within the recognized fundamental constitutional right to privacy. However, the Court held that Toomer enjoyed a substantive due process claim against arbitrary action that is so egregious that it “shocks the conscience” or “offends a sense of justice.” Toomer’s successful substantive due process claim was grounded in disparate treatment and privacy principles.

The Court of Appeals held that Toomer enjoyed both North Carolina and federal equal protection claims because he was singled out for disparate treatment when the government publicly released his personnel, medical and other records following his settlement whereas other employees were not subjected to such retaliation. Finally, the Court

100. Id.
101. Id. at 467, 574 S.E.2d at 82-83.
102. Id. at 479, 574 S.E.2d at 89.
103. Id. at 476, 574 S.E.2d at 88.
104. Id. at 484, 574 S.E.2d at 93.
105. Id. at 466, 574 S.E.2d at 82.
106. Id. at 469, 574 S.E.2d at 84.
107. Id.
108. Id. at 470, 574 S.E.2d at 84.
109. Id. at 478, 574 S.E.3d at 89. Toomer adopted the “class of one” equal protection doctrine from Village of Willowbrook v. Olech. See 528 U.S. 562 (2000). Many cases have applied Willowbrook to various types of governmental misconduct. See Cobb v. Pozzi, 363 F.3d 89, 110 (2d Cir. 2003); Cruz v. Town of Cicero, 275 F.3d 579, 587 (7th Cir. 2001); Engquist v. Oregon Dep’t of Agriculture, 2004 WL 2066748 at *4 (D. Or. 2004) (applying class of one equal protection theory to public personnel case); Montanye v. Wissahickon School District, 327 F. Supp. 2d 510, 518-
found that Toomer had stated several valid common law claims for relief including tortious invasion of privacy.\textsuperscript{110} Toomer reaffirmed, clarified and expanded state constitutional protection for North Carolina public employees.

VI. \textit{Corum and Principles of State Constitutional Interpretation}

In \textit{Corum v. University of North Carolina},\textsuperscript{111} our Supreme Court issued the watershed state constitutional decision of the 1990s. \textit{Corum} reaffirmed the importance of free expression for public employees and held that damage remedies are available for violations of the North Carolina Constitution. The Court explained:

Our Constitution is more detailed and specific than the federal Constitution in the protection of rights of its citizens. . . . We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to person and property. This Court has recognized a direct cause of action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights.\textsuperscript{112}

\textit{Corum} grew from bedrock cases such as \textit{State v. Ballance},\textsuperscript{113} where our Supreme Court explained, “These fundamental [state constitutional] guarantees are very broad in scope, and are intended to


\textit{Toomer}, 155 N.C. App. at 484, 574 S.E.2d at 93. Following the Court of Appeals decision, the state settled with Toomer again.


\textit{Corum} grew from bedrock cases such as \textit{State v. Ballance}, where our Supreme Court explained, “These fundamental [state constitutional] guarantees are very broad in scope, and are intended to
secure to each person subject to the jurisdiction of the State *extensive individual rights*, including that of personal liberty."

*Corum* involved alleged retaliation against a faculty member at Appalachian State University, and involved claims under Article I, Sections 14, 19 and 35 of the North Carolina Constitution, as well as federal claims. The *Corum* Court enunciated several fundamental principles as well as rules of state constitutional construction.

Construing Article I, Section 14, the Court held that the constitutional text providing that speech "shall never be restrained" is a direct personal guarantee of each citizen’s right of freedom of speech. The Court reasoned that free speech is a "great bulwark of liberty [and] is one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution." It also reasoned that "it is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the state." The *Corum* Court went on to explain that "our Constitution is more detailed and specific than the Federal Constitution in the protection of the rights of its citizens."

In *Treants Enterprises, Inc.* v. *Onslow County*, the North Carolina appellate courts declared the right to earn a livelihood is a "fundamental" constitutional right under the North Carolina Constitution. In *Treants*, the Court illustrated the broad scope of Article I, Section 1, which declares that among the inalienable rights of the people are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. *Treants* recognized an expanded basis of state constitutional protection, particularly for public employees where the right to earn a living is directly in issue, and reaffirmed that citizens can

---

114. *Id.* at 769, 51 S.E.2d at 734 (emphasis added). *In re Martin* demonstrated that "[i]t is well established that, in construing either the federal or State Constitution, what is implied is as much a part of the instrument as what is expressly stated." 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978).


116. *Id.*

117. *Id.* at 781, 413 S.E.2d at 289.

118. *Id.* at 782, 413 S.E.2d at 289.

119. *Id.* at 783, 413 S.E.2d at 290.

120. *Id.* (citing Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983)).

121. 83 N.C. App. 345, 350 S.E.2d 365.

122. *Id.* at 354, 350 S.E.2d at 371.
enforce state constitutional rights to prohibit "irrational and arbitrary" governmental conduct.\textsuperscript{123}

\textbf{A. The Speech Clause}

The North Carolina Free Speech Clause contained in Article 1, Section 14 provides that: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse."\textsuperscript{124} This rich text lends itself for rigorous application.\textsuperscript{125} Government often appears to be unable to resist retaliation against perceived unpopular speech.\textsuperscript{126}

In 1903, the North Carolina Supreme Court emphasized that "[t]he Constitution and laws of this State guarantee freedom of speech . . ."\textsuperscript{127} In \textit{State v. Wiggins},\textsuperscript{128} the North Carolina Supreme Court observed that "[f]reedom of speech and protest against the administration of public affairs . . . is a fundamental right which has been cherished in this State since long before the adoption of the Fourteenth Amendment to the United States Constitution."\textsuperscript{129} Where fundamental rights to expression, association or liberty are in issue, \textit{strict}

\begin{flushright}
\textsuperscript{123.} \textit{Id.}\textsuperscript{.} In \textit{Wall v. Stanley County Bd. of Educ.}, 259 F. Supp. 238, 249 (M.D.N.C. 1966), \textit{rev'd on other grounds}, 378 F.2d 275 (4th Cir. 1966), the Court held that the North Carolina Constitution requires that public employers "must act 'in good faith' and not 'arbitrarily, capriciously, or without cause' or be 'activated by selfish motives,'" quoting \textit{Cody v. Barrett}, 200 N.C. 43, 156 S.E. 146 (1930); \textit{see} \textit{Harris v. Bd. of Educ. of Vance County}, 216 N.C. 147, 4 S.E.2d 328, 330 (1939).

\textsuperscript{124.} N.C. CONST., art. I §14.


\textsuperscript{126.} \textit{Ervin, supra note 18}, at 214; \textit{Bovard, supra note 17}, at 3; \textit{Edwards}, 178 F.3d 231. As demonstrated in \textit{Brewington}, 1993 WL 819885, a Fayetteville City Councilman told a Cumberland County Commissioner that he would "see to it that the little [expletive] Randy Brewington would have his [expletive] fired." The Commissioner then asked the councilman about Brewington's right to free speech. The councilman responded "[expletive] it doesn't mean anything."

\textsuperscript{127.} \textit{Seawell v. Carolina}, 133 N.C. 515, 515, 45 S.E. 850, 851 (1903) (involving an incident where a mob pelted a political candidate for lieutenant governor with eggs on the face and head, in a region where the candidate's political party was unpopular).

\textsuperscript{128.} 272 N.C. 147, 158 S.E.2d 37 (1967).

\textsuperscript{129.} \textit{Id.} at 157, 158 S.E.2d at 45.
\end{flushright}
scrutiny is required and the government cannot restrict expression without a compelling governmental interest.\textsuperscript{130}

In \textit{Lenzer v. Flaherty},\textsuperscript{131} the Court of Appeals addressed claims under Article I, Sections 14 and 19 of the North Carolina Constitution in a speech retaliation case involving a public employee. Lenzer, a physician's assistant, was fired by her state employer, the Alcohol Rehabilitation Center in Butner, for reporting suspected patient abuse to the State Bureau of Investigation and the State Department of Human Resources.\textsuperscript{132} The Court of Appeals reversed summary judgment for the Defendants on several claims including Lenzer's free speech claim.\textsuperscript{133} The Court of Appeals relied heavily upon Corum's analysis in recognizing the whistleblower theory of constitutional protection for public employees.\textsuperscript{134}

In \textit{Howell v. Carolina Beach},\textsuperscript{135} the Court of Appeals reversed summary judgment for the defendants in a speech retaliation case arising out of Officer Howell's job termination for reporting deficiencies in police equipment and because of Howell's off-duty political activities. The court explained how a police officer's communications addressing police equipment problems was of public concern and constitutionally protected.\textsuperscript{136} The court found expression, due process and liberty interests for Officer Howell.\textsuperscript{137}

B. Vagueness and Overbreadth Principles

Constitutional issues of vagueness and overbreadth often arise from poorly drafted local and state legislation, regulations, ordinances and policy. Such ill defined regulatory provisions create uncertainty and inefficiency, and often constitute prior restraints on free expression and other constitutional rights.

\begin{footnotesize}
\begin{enumerate}
\item 131. 106 N.C. App. 496, 418 S.E.2d 276.
\item 132. Id. at 500, 418 S.E.2d at 279.
\item 133. Id. at 515, 418 S.E.2d at 288.
\item 134. Id. at 506-10, 418 S.E.2d at 283-85.
\item 135. 106 N.C. App. 410, 417 S.E.2d 277 (1992). In \textit{Mansoor v. Trank}, 319 F.3d 133 (4th Cir. 2003), the Court held that police officer speech "about various department policies, ranging from a proposed pay plan to lack of overtime opportunities protected."
\item 136. \textit{Howell}, 106 N.C. App. at 419, 417 S.E.2d at 283.
\item 137. Id. at 420-421, 417 S.E.2d at 283-284.
\end{enumerate}
\end{footnotesize}
North Carolina has long prohibited the enactment of regulatory provisions which are unduly vague or overbroad.\(^\text{138}\) The North Carolina test for vagueness provides that "a statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or 2) fails to provide explicit standards for those who apply the law."\(^\text{139}\) A regulation is "unconstitutionally vague if [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application."\(^\text{140}\) "The overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibitions the practice of a protected constitutional right."\(^\text{141}\)

In Lewis v. City of Kinston,\(^\text{142}\) the Court of Appeals invalidated a public employee residency requirement on North Carolina constitutional grounds. There, the challenged policy contained a provision allowing the city manager to grant "extensions" from the residency requirement but contained no standards or criteria, which essentially afforded the city manager "practically unlimited discretion..."\(^\text{143}\) The Court explained that "[a]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void."\(^\text{144}\)

C. The Open Courts Clause

The Open Courts Clause in Section 18 guarantees access to state courts and provides remedies.\(^\text{145}\) It provides that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, etc., shall have remedy..."\(^\text{146}\) The Court has explained that "[a]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void."\(^\text{147}\) Brown v. Allen, 344 U.S. 443, 496 (1953).


\(^{142}\) 127 N.C. App. 150, 488 S.E.2d 274 (1997).

\(^{143}\) Id. at 155, 488 S.E.2d at 277.

\(^{144}\) Id. at 154, 488 S.E.2d at 277.

\(^{145}\) N.C. CONST. art. 1, § 14.
or reputation shall remedy any due course of law; and right and justice shall be administered without denial or delay."\textsuperscript{146} It has been recognized as fundamental\textsuperscript{147} and has been construed as creating a "public policy... that private litigants have free access to the court... . . ."\textsuperscript{148} The Open Courts Clause may preclude our courts from closing their doors in the name of standing or other obstacles that federal courts have been using with increasing frequency to keep from hearing cases.\textsuperscript{149} This provision may also serve to limit politicized tort reform efforts where damages caps are being legislatively proposed to limit tort recoveries.

D. The Law of the Land Clause

Article I Section 19, commonly known as the "Law of the Land Clause," guarantees procedural and substantive due process\textsuperscript{150} as well as equal protection.\textsuperscript{151} "Due process expresses the requirement of fundamental fairness."\textsuperscript{152} Due process analysis under the Federal Consti-

tution is persuasive but not controlling in construing the Law of the Land Clause.\textsuperscript{153}

In \textit{Dombrowlski v. Wall},\textsuperscript{154} a near treatise on disparate treatment and North Carolina constitutional law, the Court of Appeals found a violation of equal protection and reaffirmed numerous fundamental principles:

The Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression." . . . Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action. \textit{Hurtado v. California}, 110 U.S. 516, 527 (1884).

We have emphasized time and again that "the touchstone of due process is protection of the individual against arbitrary action of government," \textit{Wolfe v. McDonnell}, 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, see, e.g., \textit{Fuentes v. Shevin}, 407 U.S. 67, 82 (1972) . . . , or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, e.g., \textit{Daniels v. Williams}, 474 U.S. 327, 331. . . .

Arbitrary and capricious acts by government are also prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions. . . . "The purpose of the Equal Protection Clause . . . is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." \textit{Edward Valves, Inc. v. Wake County}, 343 N.C. 426, 433, 471 S.E.2d 342, 346 (1996).

In \textit{Toomer v. Garrett}, the Court of Appeals reaffirmed the principles of non-suspect class disparate treatment and selective enforcement.\textsuperscript{155} Arbitrary and capricious acts by government are prohibited under the Equal Protection Clauses of the United States and the North


\textsuperscript{154} 138 N.C. App. 1, 13, 530 S.E.2d 590, 599 (2000) (internal citations omitted).

\textsuperscript{155} \textit{Toomer v. Garrett}, 155 N.C. App. 462, 574 S.E.2d 76 (2002) Toomer was singled out for disparate treatment in post-settlement treatment by North Carolina government. One of the most illuminating selective enforcement cases in North Carolina appears in \textit{Jetstream Aero Services, Inc. v. New Hanover County}, 884 F.2d 1388 (4th Cir. 1989). The elements of a selective enforcement claim are: 1) selective treatment; 2) intent to harm or injure. \textit{Id. See also Houck & Sons v. Transylvania County}, 852 F. Supp. 442, 452 (W.D.N.C. 1993).
Carolina Constitutions. The North Carolina Supreme Court has held that:

The purpose of the Equal Protection Clause . . . is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

Article 1, Section 19 also provides for procedural due process protection. Procedural due process requires notice and opportunity to be heard before governmental deprivation of a property or liberty interest. Substantive due process affords protection against arbitrary or capricious deprivations, or where the government acts pursuant to political, personal or trivial reasons.

Procedural due process requires that a meaningful opportunity to be heard must be afforded before one can be deprived of a property, liberty or life interest. These procedural rights are particularly important because procedural due process is often the only pre-litiga-


160. See Scott v. Greenville, 716 F.2d 1409, 1420-21 (4th Cir. 1983), and other cases cited herein.

161. See Fournier v. Reardon, 160 F.3d 754, 757 (1st Cir. 1998). In recent years, the Supreme Court has decided several cases involving the procedural due process rights of public employees. The modern cases employ a multipart test. First, whether there is a sufficient interest grounded in state or local law or practice and second, a balancing test to determine what particular process is due. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); Friendly, “Some Kind Of Hearing”, 123 U. Pa. L. Rev. 1267 (1975); Developments In The Law – Public Employment, 97 Harv. L. Rev. 1611, (1984).
tion check on an erroneous governmental decision that may cause severe injury. The essence of procedural due process "reflects a fundamental value in our American constitutional system."\textsuperscript{162} The North Carolina Supreme Court has reaffirmed that "it is fundamental that both unfairness and the appearance of unfairness should be avoided."\textsuperscript{163}

"Due process expresses the requirement of fundamental fairness."\textsuperscript{164} The Court of Appeals recently reaffirmed this requirement of fundamental procedural and substantive fairness in the leading case of \textit{Dombrowski v. Wall}\textsuperscript{165}:

Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action. [citations omitted].

We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," [citation omitted] whether the fault lies in a denial of fundamental procedural fairness, [citation omitted]. . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective. [citation omitted].

While the cases have established a general framework for determining when and what process is due, the Supreme Court has declined to specify any litmus test as to what procedural safeguards must be afforded prior to or after the deprivation. Historically, the Supreme Court has emphasized a flexible procedural due process standard whereby a balancing test is employed on a case-by-case basis to determine what particular process is due in a given situation.\textsuperscript{166}

The critical importance of procedural due process protections has long been emphasized. Many cases have "[r]ecognize[ed] and respect[ed] the role that procedural due process has played in preventing arbitrary deprivations of individual liberty and property. . . ."\textsuperscript{167}


\textsuperscript{163}. \textit{Crump}, 326 N.C. at 624, 392 S.E.2d at 590.


\textsuperscript{165}. 138 N.C. App. 1, 530 S.E.2d 590 (2000).

\textsuperscript{166}. See Matthews v. Eldridge, 424 U.S. 319, 334 (1976). The precise requirements of procedural due process depend upon the circumstances, Morrissey v. Brewer, 408 U.S. 471, 481 (1972), but the fundamentals remain constant. There must be "a 'meaningful' opportunity to be heard." James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996); Cinea v. Certo, 84 F.3d 117, 121 (3d Cir. 1996).

\textsuperscript{167}. Fields v. Durham, 909 F.2d 94, 98 (4th Cir. 1990).
"In America, with the object of preventing an arbitrary government, procedural safeguards were guaranteed to all persons by the inclusion of 'due process' clauses. . . ."168 This logic, underscored by such historic decisions as Joint Anti-Fascist Refugee Committee v. McGrath,169 and McNabb v. United States,170 emphasize the importance of the time-honored American tradition of procedural due process protection.

In Thomas v. Ward,171 Judge Ward enunciated a list of "minimal procedural due process" protections applicable to public employment disputes. Those include:

1) adequate notice; 2) sufficient specification of the charges to permit the showing of error;172 3) an opportunity to confront and cross examine one's accusers; 4) a list of the names and the nature of the testimony of witnesses testifying against the employee; 5) a fair hearing before an impartial board with sufficient expertise where the employee may present evidence in his own defense;173 6) the right to have coun-

169. Joint Anti-Fascist Refugee Comm, 341 U.S. 123, 179 (1951) (Douglas, J. concurring) ("It is procedure that spells much of the difference between rule by law and rule by whim or caprice.").
170. McNabb, 318 U.S. 332, 347 (1947) ("The history of liberty has largely been the history of observance of procedural safeguards.").
171. Thomas, 374 F. Supp. 206, 211 (M.D.N.C. 1973), aff'd in pertinent part, 529 F.2d 916 (4th Cir. 1975). In Roanoke Chowan Reg'l Hous. Auth., 81 N.C. App. 354, 359, 344 S.E.2d 578, the Court enunciated a similar list of procedural due process components: 1) timely and adequate notice detailing the reasons for the deprivation, 2) an opportunity to confront and cross examine adverse witnesses, 3) the right to legal counsel and participation by counsel, 4) a decision based on the evidence adduced at the hearing with the reasons for the decision and evidence relied upon in writing, and 5) an impartial decision maker. See, e.g., Chung v. Park, 514 F.2d 382, 386 (3rd Cir. 1975), where the court enumerated six components: 1) notice, 2) disclosure of the evidence supporting termination, 3) right to confront and cross examine, 4) an opportunity to be heard and to present witnesses, 5) a neutral and detached hearing body, and 6) a written statement from the fact finder as to the evidence relied upon.
sel present; and 7) the right to have findings based on substantial evidence before a tribunal making written findings. 174

The court observed that these rights "may be basic to every due process hearing, still, in every case the adequacy of the hearing must be judged on its own facts." 175

A fair hearing and a fair tribunal is a fundamental requirement for administrative agencies in North Carolina. 176 An agency making a decision must review and consider the evidence produced at the hearing. 177 "[O]ur system of law has always endeavored to prevent even the probability of unfairness." 178

The North Carolina Supreme Court has reaffirmed that "it is fundamental that both unfairness and the appearance of unfairness should be avoided." 179 Even an appearance of bias or partiality may result in a deprivation of due process. 180 Prejudgment of the dispute has long been constitutionally prohibited. 181 North Carolina recognizes the one member bias rule which provides that a showing of prejudgment by only one member of a decision making tribunal is sufficient to deprive one of procedural due process. 182

174. Thomas, 374 F. Supp. at 211.
175. Id.
178. In Re Murchison, 349 U.S. 133, 136 (1955) (holding that it is impermissible for one to act in a charging capacity and then try the accused).
181. See Morgan, 298 U.S. at 481-82 ("there must be a hearing in a substantial sense. . . the officer who makes the determinations must consider and appraise the evidence. . . ."); Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995) (occupational licensing applicant's due process rights violated because of prejudgment); Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983) (demonstrating "subtle distortions of prejudice.")
182. Crump, 326 N.C. at 618-20, 392 S.E.2d at 587-88 (where only one member prejudges or is biased, entire tribunal is constitutionally tainted thereby violating procedural due process).
E. Residual Protections: Sections 35 and 36

Article I, Sections 35 and 36 provide broad residual constitutional protections. Section 35 proclaims that "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessing of liberty." However, the text provides no guidance as to what constitutes "fundamental principles." Thus, the term is left to gather meaning from history, tradition, and other constitutional guarantees. Justice Ervin's opinion in Ballance is instructive: "These fundamental guarantees are very broad in scope, and are intended to secure to each person . . . extensive individual rights including that of personal liberty."

Section 36 provides that "the enumeration of rights in this article shall not be construed to impair or deny others retained by the people." This is almost identical language employed by the Ninth Amendment to the Federal Constitution. Section 36 is potentially applicable to a broad range of conduct not explicitly covered by other provisions in the Declaration of Rights. It suggests the framers' intent was that other unenumerated personal liberties should also be protected from governmental infringement. Section 36 serves as an independent source of protection for unenumerated constitutional rights. It reflects the essence of constitutions generally, a limitation on the scope and power of government.

F. Constitutional Privacy Protection

The right to privacy was recognized over one hundred years ago and has been recognized by the United States Supreme Court and

---

183. N.C. Const. art. I, § 35.
185. Ballance, 229 N.C. at 769, 51 S.E.2d at 734.
North Carolina. The right to privacy may prohibit governmental intrusion in a number of areas where there is a legitimate expectation of privacy. The constitutional right of privacy protects the privacy of individuals against unlawful government invasion.

North Carolina constitutional privacy doctrine is not well developed or clearly defined. The North Carolina Constitution does not contain an expressly stated guarantee of constitutional privacy. However, some North Carolina cases, like numerous federal cases, have implied a constitutional right to privacy from other constitutional texts. There are numerous North Carolina statutory sources of privacy protection. There are also a number of statutory cases which recognize privacy protection under North Carolina statutes.

In S.E.T.A. UNCS-CH v. Huffines, the Court of Appeals relied on privacy grounds to preclude the disclosure of the identity of researchers and staff members as confidential personnel information. The Court ordered that the personnel information about the staff members be omitted from documents which were otherwise allowed to be disclosed. The Court ordered this redaction after observing that “we are sensitive to the needs of researchers to protect their privacy and the


195. See In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748 (2001); Boesche v. Raleigh-Durham Airport Authority, 111 N.C. App. 149, 153, 432 S.E.2d 137, 140 (1993) (observing that government employees retain "an expectation of privacy and a right to be free from government intrusion . . ."); In re Swantee Brooks, 143 N.C. App. 601, 548 S.E.2d 748 (2001) (recognizing privacy protection for personnel files of police officers). In Elkin Tribune v. Yadkin County Bd. of Comm., a case involving county employees and application of N.C. GEN. STAT. 153A-98, the Court held that the names and applications of applicants for the position of county manager enjoyed privacy protection and were governed by the statute which makes employee personnel files generally confidential. 331 N.C. 735, 417 S.E.2d 465 (1992).

privacy of their staffs." The breadth of the various personnel privacy provisions under North Carolina law was reaffirmed in *Durham Herald v. County of Durham*, where the Court concluded that applications for a vacancy in the office of sheriff were also governed by N.C. Gen. Stat. § 153A-98 and enjoyed privacy protection. These limited statutory privacy provisions do not preclude discovery in employment litigation.

**VII. CONCLUSION**

The North Carolina Constitution was neglected in the 1960s and 1970s. North Carolina has enjoyed gradual state constitutional rediscovery since the 1980s, affording additional protection commensurate with the need to restrain growing abuse of government power. Federal courts were once thought to be the mainstream forum for protection for individual rights, thus many litigants continued to use federal courts while the North Carolina Constitution laid somewhat dormant. However, the history of North Carolina constitutional law reveals that North Carolina courts have usually afforded more meaningful constitutional protection than federal courts have granted. North Carolina has not retreated to rapidly changing ideological constitutional law, which has promoted predictability and *stare decisis* in North Carolina constitutional law. The teachings of Justice Ervin, Judge Craven, Chief Justice Exum, Justice Martin, and other North Carolina jurists offer a promising framework of state constitutional protection for the new millennium.

Many new challenges and dangers lie ahead in light of the growing abuse of government power in North Carolina. Ms. Willis should be allowed to dance in Marshall without banishment by the town government. Fortunately, government did not ban Elvis from dancing and singing in the 1950s. North Carolina law enforcement officers should be free of retaliatory discipline for not writing a minimum five tickets per day as sanctioned by the Fourth Circuit. State employees should be allowed to settle a claim without the retaliatory wrath of the state bureaucracy as inflicted on Algie Toomer. The North Carolina Constitution is available to remedy these and other growing abuses of power.

The North Carolina Constitution is a sacred text; it is the foundation of our governmental structure; it is the essential guarantor of our basic civil liberties. The North Carolina Constitution must be used by counsel and vigorously enforced by North Carolina Courts as man-

197. *Id.* at 296, 399 S.E.2d at 343.
dated by Ballance, Corum, and their rich antecedents and progeny. North Carolina citizens will consequently be better protected from abuse of government power.