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North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate

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ARTICLES

NORTH CAROLINA'S DECLARATION OF RIGHTS: FERTILE GROUND IN A FEDERAL CLIMATE

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"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."[1]

PART I. INTRODUCTION

Article I of the North Carolina Constitution declares thirty-seven rights to its citizens.[2] Although a number of these rights have analogs in the Federal Constitution—particularly in the Bill of Rights and in the Reconstruction Amendments—the State's constitutional protections are more numerous, more detailed, and often textually distinct from their federal counterparts.[3] Indeed, many of these declared rights predate the Bill of Rights, while others are responsive to them.[4]

This departure from the Federal Constitution is not unique to North Carolina. In fact, North Carolina's Constitution, particularly Article I's Declaration of Rights, is very similar to the constitutions of her sister states.[5] Since the 1970s, and for a variety of reasons, the unique-

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1. N.C. CONST. art. I, § 35.

2. *See id.* §§ 1–37 (collectively, the "Declaration of Rights").

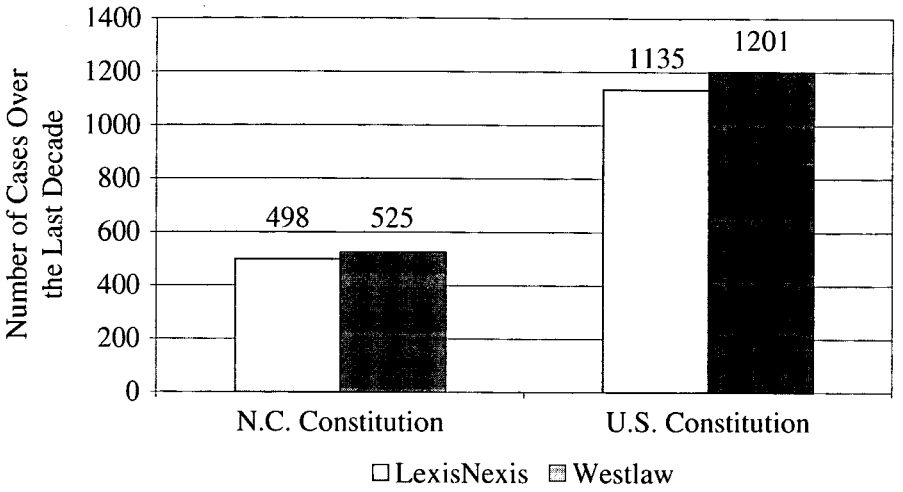
3. *Compare, e.g.*, U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."), *with* N.C. CONST. art. I, § 30 ("A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.").

4. *See* JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 3–85 (Oxford Univ. Press 2011). To trace the historical sources for the original Declaration of Rights, adopted December 17, 1776, see John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1797–802 (1992).

5. *See* Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989 (1996) (reviewing the origins and history of state constitutions).

ness of state constitutions has been the foundation for a renaissance in state constitutional interpretation and scholarship.[6]

It would seem plain, then, that the Declaration of Rights is fertile ground for state constitutional claims.[7] However, despite the obvious differences between the Declaration of Rights and the Federal Constitution, and notwithstanding the insistence of legal scholars, constitutional adjudication in North Carolina invariably deals with federal questions. To illustrate this point, consider Figure 1.[8]



6. *See* Randall T. Shepard, *The Renaissance in State Constitutional Law: There are a Few Dangers, But What's the Alternative?*, 61 ALB. L. REV. 1529 (1998) (chronicling, critiquing, and defending the movement). *See also* William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977) (representing a clarion call for the movement).

7. And, to be sure, there have been many North Carolina legal scholars and jurists who have reached this conclusion. *See, e.g.*, James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1748 (1992) ("I hope this issue of the *North Carolina Law Review* will make all who read it aware of the fertility of the field of state constitutional law. It is, indeed, time to dust off these hallowed documents and use them in the service of freedom and justice for all."); Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1749 (1992) ("The North Carolina Supreme Court has made it clear that practitioners may, and should, look to the North Carolina Constitution as a rich and vibrant source of personal liberties."); Mark D. Martin & Daniel F.E. Smith, *Recent Experience with Intermediate Scrutiny Under the North Carolina Constitution: Blankenship v. Bartlett and King ex rel. Harvey-Barrow v. Beaufort County Board of Education*, 59 U. KAN. L. REV. 761, 766 (2010) ("Th[e] combination of greater detail and increased responsiveness in North Carolina's constitution provides a potentially 'fertile ground' for litigants to plant their claims.").

8. The data in Figure 1 was gathered by performing the following searches: (1) LexisNexis: N.C. Federal and State Cases Combined: Opinion ("N.C. Const." or "N.C.Const."), restricted to previous 10 years; and (2) Westlaw: N.C. State and Federal Cases: op ("N.C. Const." or "N.C.Const."), restricted to previous 10 years. "U.S." replaced "N.C." to perform the federal search in both databases. The searches were conducted on April 26, 2013 and follow a procedure similar to that used by Martin & Smith, *supra* note 7, at 768 n.41.

Over the last decade, North Carolina state and federal courts have cited the U.S. Constitution in far more opinions than the North Carolina Constitution.[9] There are at least two good reasons for this.

First, North Carolina Law schools—like most around the nation—focus on federal constitutional law in their curriculum.[10] North Carolina Court of Appeals Judge Robert N. Hunter, Jr., who often teaches at various law schools in the state, has lamented on this very subject in a recent issue of the *Elon Law Review*:

> Each year I ask my upper-level students if they have read or seen a copy of the Constitution of North Carolina. Most have not read or seen the state's Constitution and do not have an understanding of the historical context within which it was formed. This is particularly unfortunate because the Constitution is tested on the bar examination and because most graduates of North Carolina's law schools will begin practice in the state without a fundamental grounding in the state's organic legal document.[11]

The situation is even more troubling when one considers the fact that many law clerks, tasked with writing opinions for state judges, are almost exclusively trained in federal constitutional law. As James Acker and Elizabeth Walsh have put it, "[r]eliance upon state constitutions, either by litigants pressing claims or the courts deciding them, [has become] a forgotten art."[12]

Second, the North Carolina Supreme Court has largely adopted a lockstep method of state constitutional interpretation[13]—meaning, the Court interprets parallel state constitutional provisions in keeping with the federal courts' interpretation of their federal counterparts.[14] This "non-approach" to state constitutional interpretation results in deferential conformity to the Supreme Court of the United States and diminishes the identity of the state constitution as a separate legal document.[15]

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9. Figure 1 does not distinguish cases that merely offer a parallel citation to the North Carolina Constitution. Thus, it is likely that a portion of the cases citing to the North Carolina Constitution do so in a cursory fashion without serious state constitutional interpretation.

10. *See* Shepard, *supra* note 6, at 1533–34 ("Lawyers, who might be expected to inform citizens of the present potential inherent in state constitutions, also appear to be all too ill-informed about the substance of their state charter. In their defense of course, one need acknowledge that classes on state constitutional law are not a ubiquitous feature of American law school curricula.").

11. Robert N. Hunter, Jr., *The Past as Prologue: Albion Tourgée and the North Carolina Constitution*, 5 ELON L. REV. 89, 93 (2013).

12. James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1312 (1989).

13. Martin & Smith, *supra* note 7, at 771.

14. *Id.* ("The lockstep model construes state constitutional provisions identically with analogous provisions in the U.S. Constitution.").

15. *See* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States*

Even so, it is the central thesis of this article that the Declaration of Rights is fertile ground for the North Carolina bench and bar. Accordingly, the purpose of this exposition is to urge application of the Declaration of Rights on behalf of North Carolinians in the state's courts. To this end, Part II of this article provides a brief historical and descriptive overview of the Declaration of Rights, including a comparison to the analogous provisions in the Federal Constitution. Part III lays out the argument proper, setting forth multiple bases to accept the central thesis. Part IV serves as a call to action, detailing the importance of this endeavor and the steps that can be taken to see it through.

PART II. THE DECLARATION OF RIGHTS IN CONTEXT

Abraham Lincoln is often credited as saying, "give me six hours to chop down a tree and I will spend the first four sharpening the axe."[16] Accordingly, given the relative neglect of the North Carolina Constitution as compared to the Federal Constitution, it is essential to provide a brief overview of the Declaration of Rights, its origin, and its application by the North Carolina Supreme Court.[17] With this context in hand, the importance of its application can be understood and appreciated. Let us sharpen our axe.

A. *Historical and Descriptive Overview*

Two months before the signing of the Declaration of Independence, in May of 1776, the Continental Congress passed a resolution advising the colonies to form new governments.[18] With independence from the Crown declared on July 4, 1776, and with the newly vested authority of general sovereignty, each new state drafted its own constitution.[19] In North Carolina, a constitutional convention passed the Declaration of Rights on December 17, 1776, one day before the State's first constitution was adopted.[20] "Although treated separately, the two documents form[ed] a single whole, the latter expressly declaring the former 'Part of the Constitution of this State.'"[21]

Importantly, and unlike the Federal Constitution, the Declaration of Rights has always appeared before the structural portions of the

and Minnesota Constitutions, 70 ALB. L. REV. 865, 880–81 (2007) (describing and critiquing the lockstep approach).

16. Abraham Lincoln, 16th President of the United States (1809–1869).

17. For a comprehensive historical treatment of the North Carolina Constitution, see ORTH, *supra* note 4.

18. Holland, *supra* note 5, at 989.

19. *Id.* at 989–90.

20. ORTH, *supra* note 4, at 5.

21. *Id.* (quoting N.C. CONST. of 1776, § 44).

constitution.[22] Justice Harry Martin, writing for the North Carolina Supreme Court, indicated that this ordering "manifest[s] the primacy of the Declaration in the minds of the framers."[23] Indeed, a stated purpose of the Declaration is "[t]hat the great, general, and essential principles of liberty and free government may be recognized and established."[24] Thus, in the minds of the framers, a free government cannot be established without certain defining and binding principles.

Since the original Declaration of Rights was adopted in 1776, the North Carolina Constitution has been amended numerous times, and has been replaced twice.[25] The first replacement came in 1868, when the "Reconstruction Constitution" was approved in a state election.[26] The Declaration of Rights largely reappeared as Article I, where it has remained since.[27] The second replacement, and North Carolina's current constitution, was approved by voters in 1970 and made effective on July 1, 1971.[28]

The provisions found in the current Declaration of Rights are of both the general and specific variety. For example, compare the general announcement of Article I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.") with the specific command of Article I, § 26 ("No person shall be excluded from jury service on account of sex, race, color, religion, or national origin."). However, whether general or specific, all 37 of these declarations are "rights" of the people, and all point to the "ideological premises that underlie the structure of government."[29]

As a testament to the importance and the primacy of the Declaration of Rights over the years, it is significant that most of its provisions can be traced back through the Reconstruction Constitution to the original constitution of 1776.[30] Indeed, "by far the most stable provisions of North Carolina's organic law have been those safeguards of

22. *Id.* at 6 ("North Carolina's declaration of rights, like those of her sister states, is logically, as well as chronologically, prior to the constitutional text, providing a statement of general and abstract principles given particular and concrete realization in the constitution proper.").

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

24. N.C. CONST. art. I, introduction.

25. *See* ORTH, *supra* note 4, at 3–37.

26. *Id.* at 19. Notably, "[r]atification of the 1868 Constitution and of the Fourteenth Amendment to the U.S. Constitution earned North Carolina readmission to representation in Congress and the end of Reconstruction." *Id.* at 23.

27. *Id.* at 19. A few changes and additions were made to the Declaration of Rights at this time, largely addressing concerns raised by the Civil War and Reconstruction. *Id.* at 20.

28. *Id.* at 4.

29. *Id.* at 44.

30. *Id.* at 43.

due process expressed in the declaration of rights."[31] It is for this reason that the state's constitutional directives "must be observed by all," as "[i]t is not in accord with the nature of written constitutions to incorporate nonessential or unimportant details which may be dispensed with."[32]

B. *State Constitutional Interpretation in North Carolina—The Lockstep Approach*

Although in many ways this article seeks to distinguish the provisions in the Declaration of Rights from their federal counterparts, it is necessary at this point to compare them. To this end, consider the analogous provisions, presented side-by-side, in Table 1.[33]

Table 1. The United States Constitution and the Declaration of Rights: Side-by-Side Comparison of the Analogous Provisions.

U.S. CONST. amend. I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.	**N.C. CONST. art I, § 12:** The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated. **N.C. CONST. art I, § 13:** All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience. **N.C. CONST. art I, § 14:** 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.
U.S. CONST. amend. II: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.	**N.C. CONST. art I, § 30:** A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under

31. *Id.* at 36.

32. Advisory Op. *in re* H.B. No. 65, 227 N.C. 708, 713, 43 S.E.2d 73, 76 (1947).

33. Table 1 contains only the analogous provisions, and therefore not every provision, found in the Declaration of Rights.

	strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.
U.S. CONST. amend. III: No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.	**N.C. CONST. art I, § 31:** No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner prescribed by law.
U.S. CONST. amend. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.	**N.C. CONST. art I, § 20:** General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.
U.S. CONST. amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.	**N.C. CONST. art I, § 22:** Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases. **N.C. CONST. art I, § 23:** In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty. **N.C. CONST. art I, § 24:** No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.
U.S. CONST. amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime	**N.C. CONST. art I, § 18:** All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.	justice shall be administered without favor, denial, or delay. **N.C. CONST. art I, § 23:** In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.
U.S. CONST. amend. VII: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.	**N.C. CONST. art I, § 25:** In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.
U.S. CONST. amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.	**N.C. CONST. art I, § 27:** Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.
U.S. CONST. amend. IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.	**N.C. CONST. art I, § 36:** The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people.
U.S. CONST. amend. XIII, § 1: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.	**N.C. CONST. art I, § 17:** Slavery is forever prohibited. Involuntary servitude, except as a punishment for crime whereof the parties have been adjudged guilty, is forever prohibited.
U.S. CONST. amend. XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.	**N.C. CONST. art I, § 1:** We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness. **N.C. CONST. art I, § 19:** No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by

	the State because of race, color, religion, or national origin.
U.S. CONST. art. I, § 9, cl. 2: The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.	**N.C. CONST. art I, § 21:** Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed. The privilege of the writ of habeas corpus shall not be suspended.
U.S. CONST. art. I, § 9, cl. 3: No Bill of Attainder or ex post facto Law shall be passed. **U.S. Const.** art. I, § 10, cl. 1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.	**N.C. CONST. art I, § 16:** Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.

Table 1 displays, in the left-hand column, the Bill of Rights, the Reconstruction amendments, and other federal constitutional provisions to which there is, in the right-hand column, an analogous state provision in the Declaration of Rights.[34] The fact that a number of rights are dually protected in both constitutions raises a question of interpretation when litigants bring claims under one, or both, of the provisions.[35]

A review of the literature reveals that there are four major approaches that courts use when reviewing a state constitutional provision that has a federal analog—primacy, dual-sovereignty, interstitial, and lockstep.[36] Under the primacy approach, the court examines the

34. That this table is organized sequentially according to the federal provisions (for ease of interpretation) is perhaps evidence of the prevailing federal climate in the field of constitutional law.

35. The easiest question of interpretation arises, of course, when a litigant raises a state constitutional claim to which there is no federal counterpart. Take for example, Article 1, § 15: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15. Under such provisions, the North Carolina Supreme Court has no choice but to engage in independent state constitutional interpretation, and indeed, this is what has been done. *See, e.g.*, Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997) (recognizing the constitutional right of every child in the state to receive a "sound basic education" in the public schools).

36. A comprehensive treatment and evaluation of these four approaches is beyond the scope of this article. For more information about these approaches, including a critique, see generally Anderson & Oseid, *supra* note 15, at 879–86; and Acker & Walsh, *supra* note 12, at 1315–19.

state constitution first and considers it the fundamental source of individual rights.[37] Federal constitutional provisions and precedent are only considered if the individual right at issue is not protected under the state's constitutional provisions.[38] Under the dual-sovereignty approach, the court examines the claim simultaneously under both the state and federal provision, deciding the case based on the provision that offers the greatest protection.[39] Under the interstitial approach, the court looks first at the federal provision and precedent, deeming it presumptively correct, and then raises the federal floor of protection using the state constitution where appropriate.[40]

The North Carolina Supreme Court generally takes the final approach to state constitutional interpretation—the lockstep approach.[41] Under the lockstep approach, the court construes state constitutional provisions identically with federal court interpretations of their federal counterparts.[42] Thus, interpretation of the state constitution moves "lockstep" with the Federal Courts' interpretation of the federal constitution.

Importantly, the lockstep approach comes in two varieties: "strict" or "binding lockstep" and "persuasive lockstep."[43] Adherents to strict lockstep allow federal interpretations of the Federal Constitution to dictate the meaning of the analogous state provision.[44] The state courts effectively assume a position of absolute deference to, and conformity with, the federal courts.[45] By contrast, adherents to persuasive lockstep, while acknowledging federal precedent as highly persuasive, reserve the right to deviate in certain situations.[46] North Carolina falls into the persuasive lockstep camp.[47]

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37. Anderson & Oseid, *supra* note 15, at 885.

38. *Id.*

39. *Id.* at 884.

40. *Id.* at 881–82.

41. *See* Martin & Smith, *supra* note 7, at 771 ("The approach of the Supreme Court of North Carolina is best characterized a lockstep . . . ."). A co-author of this cited work, Justice Mark Martin, is currently the Senior Associate Justice on the North Carolina Supreme Court.

42. *Id.*

43. *Id.* at 772–73.

44. Acker & Walsh, *supra* note 12, at 1316.

45. Anderson & Oseid, *supra* note 15, at 880.

46. Martin & Smith, *supra* note 7, at 773. To some extent, the persuasive lockstep method seems very similar to the interstitial method. *See supra* note 40 and accompanying text. However, perhaps the distinguishing factor is the court's focus. Under the interstitial method, "state courts recognize the federal doctrine as the floor and focus the inquiry on whether the state constitution offers a means of supplementing or amplifying federal rights." Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028 (1985). Under persuasive lockstep, "supplementing or amplifying federal rights" can be seen as a side effect of deviating from federal precedent, not an explicit focus or endgame.

47. Martin & Smith, *supra* note 7, at 772. *See also* Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc., 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974) ("[I]n the construction of [a]

State v. Petersilie[48] provides an example of the North Carolina Supreme Court's usage of persuasive lockstep. In that case, the defendant was convicted of eleven counts of publishing unsigned materials about a candidate for public office in contravention of a state statute.[49] The defendant challenged his conviction on free speech grounds, alleging violations of the First Amendment of the United States Constitution and Article I, § 14 of the North Carolina Constitution.[50] In deciding how to interpret the claim under both provisions, Chief Justice Exum, writing for the majority, stated:

> In some of our cases, the Court has found the guarantees in the state and federal constitutions to be parallel and has addressed them as if their protections were equivalent. We have also recognized that in construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States. We do, however, give great weight to decisions of the Supreme Court of the United States interpreting provisions of the Constitution of the United States which are parallel to provisions of the State Constitution to be construed. In this case, for the purpose of applying our State Constitution's Free Speech Clause we adopt the United State's Supreme Court's First Amendment jurisprudence.[51]

Thus, *State v. Petersilie* generally stands for the interpretive approach utilized by the North Carolina Supreme Court in construing analogous state constitutional provisions—remaining deferential to federal precedent while reserving the right to be the ultimate interpreter of the state constitution.

PART III. THE DECLARATION OF RIGHTS IS FERTILE GROUND FOR THE NORTH CAROLINA BENCH AND BAR

It is now time to cut down our tree, that is, to demonstrate that the Declaration of Rights is fertile ground in which to plant state constitutional claims in North Carolina. The following section asserts ten arguments in favor of this thesis. The arguments are grouped into three categories to provide a framework for the discussion: (A) Basic Considerations, (B) Strategic Considerations, and (C) Practical Considerations.

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provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court.").

48. State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

49. *Id.* at 169, 432 S.E.2d at 834.

50. *Id.* at 179, 432 S.E.2d at 838.

51. *Id.* at 184, 432 S.E.2d at 841 (internal quotation marks and citations omitted).

A. *Basic Considerations*

Argument 1. The North Carolina Constitution Enumerates Rights for Which There is No Federal Counterpart

The most obvious reason to assert a state constitutional claim is necessity. When the federal constitution is silent on a claim of right that a state constitution protects,[52] the choice is clear—assert the state claim. An example of this type of litigation, in the education context, was discussed previously.[53] Another example relates to the most recent addition to the Declaration of Rights, a provision guaranteeing certain basic rights to the victims of crime.[54] Article I, § 37 has no federal constitutional analog.[55] Thus, as far as state criminal proceedings are concerned, § 37 is of vital importance to victims of crime in North Carolina. Deprivations of these rights, and other rights unique to the Declaration, must be vindicated by asserting state constitutional claims.

Argument 2. Dually Protected Rights are Often Described in More Detail Under The North Carolina Constitution

A second rationale for asserting a state constitutional claim is that the individual rights at issue are often described in greater detail, making their contours more intelligible and predictable as compared to their federal counterparts. Explaining this phenomenon, a former Chief Justice of the North Carolina Supreme Court has noted:

> The narrower scope of protections in the United States Constitution may be attributed to the political realities that brought about its existence. The sparse language of the Bill of Rights suggests that federal delegates, representing a diverse and widely dispersed population and wielding the power to dispute every word in the document, found it difficult to agree on details or a greater number of specified rights. By contrast, delegates to individual state constitutional conventions, who represented more homogeneous local populations, may have found the going somewhat easier.
>
> As a result, state constitutions generally contain a longer list of individual rights than the Federal Constitution, and their language is generally richer, more detailed, and more specific than that of the federal document.[56]

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52. This inquiry involves an examination of the constitutional texts and the precedent construing those texts.

53. *See supra* note 35.

54. *See* N.C. CONST. art. I, § 37.

55. The provision does have a federal statutory analog, applicable to criminal proceedings in federal court. *See* The Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (2006).

56. Exum, *supra* note 7, at 1746.

North Carolina's constitution is no exception.[57] As the North Carolina Supreme Court has noted, "[o]ur Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens."[58]

By way of example, consider the comparison of the Second Amendment right to bear arms with Article I, § 30 in Table 1. It is unclear from the text of the Second Amendment, and the Supreme Court of the United States has not decided, whether the right to bear arms includes the right to carry a concealed weapon in public.[59] However, Article I, § 30 explicitly states that "[n]othing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice."[60] Thus, the North Carolina Constitution makes clear what the Second Amendment leaves open to judicial interpretation—that the right to bear arms does not necessarily include the right to carry a concealed weapon in public.

The Declaration of Rights is a rich and detailed source of fundamental liberties. We should seek to take advantage of that detail.

Argument 3. Dually Protected Rights are Often Textually Distinct

The third reason to file a state constitutional claim is that the state provision is often textually distinct from the federal analog, possibly altering the plain meaning of the text.[61] Indeed, the presence of textual differences is a neutral criterion that could persuade even a lockstep court to deviate from the prevailing federal precedent.[62]

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57. *See* Martin & Smith, *supra* note 7, at 765 ("A comparison of North Carolina's constitution with the U.S. Constitution—including its twenty-seven amendments—reveals that the North Carolina Constitution, at 17,082 words, is just over twice as long as the U.S. Constitution, at 7708 words. While word count does not necessarily translate directly into significant constitutional text, the larger size of the North Carolina Constitution is suggestive of more plentiful opportunities for litigants to make claims and for the judiciary to find guidance in resolving legal controversies.") (internal footnotes omitted).

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

59. The Tenth Circuit has recently concluded there is no such right. *See* Peterson v. Martinez, 707 F.3d 1197, 1201 (10th Cir. 2013) ("[W]e conclude that the carrying of concealed firearms is not protected by the Second Amendment . . . ."). For an extensive survey of this issue, see Tracey B. Farrell, Annotation, *Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons*, 33 A.L.R.6th 407 (2008 & Supp. Feb. 2013).

60. N.C. CONST. art. I, § 30.

61. *See* State v. Webb, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004) ("Issues concerning the proper construction of the Constitution of North Carolina are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments. In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere.") (internal quotation marks and citations omitted).

62. Acker & Walsh, *supra* note 12, at 1320–21 ("[T]he legitimacy of state courts premising decisions upon state constitutions is most apparent and least often questioned when different

For example, compare the Eighth Amendment's prohibition of "cruel *and* unusual punishments" with Article I, § 27's prohibition of "cruel *or* unusual punishments" in Table 1. This textual difference (i.e., the conjunctive "and" vs. the disjunctive "or") suggests that the scope of the protected right is broader under the North Carolina Constitution. Consider the following excerpt from a concurring opinion in a case dealing with these parallel provisions:

> While the federal Constitution prohibits "cruel *and* unusual punishments," our State Constitution prohibits "cruel *or* unusual punishments." The conjunction in the federal Constitution has been interpreted to limit the Eighth Amendment's prohibition to punishments that are *both* cruel and unusual. The disjunctive term "or" in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment.[63]

Such a textual distinction, and others like it, "illustrate the point that differently worded provisions may at least provide a logical point of departure in the quest to have different interpretations placed upon state and federal constitutions."[64] Even if federal precedent is on a litigant's side in a given case, the federal courts can always change course. It is therefore vitally important to raise the parallel state claim, particularly where textual distinctions could be to the litigant's advantage.

B. *Strategic Considerations*

Argument 4. Parallel State Constitutional Provisions Can Give More, but Never Less, Protection than their Federal Counterparts

"[I]t is axiomatic in a union founded on the principle of federalism that states may elevate civil rights *above* the federal constitutional floor."[65] The Federal Constitution, as the supreme law of the land, sets a minimum threshold of protection that the states must respect.[66]

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substantive provisions, or significantly different statements of rights, distinguish the state and federal documents.") (internal footnotes omitted).

63. Medley v. N.C. Dep't of Corr., 330 N.C. 837, 845–46, 412 S.E.2d 654, 660 (1992) (Martin, J., concurring) (internal quotation marks and citations omitted).

64. Acker & Walsh, *supra* note 12, at 1322.

65. Martin, *supra* note 7, at 1750 (emphasis in original). Indeed, in the words of former Chief Justice Rehnquist, pronouncements of the Unites States Supreme Court do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

66. *See* U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

North Carolina's Constitution acknowledges this aspect of federalism explicitly in the Declaration of Rights.[67] However, "[e]ach state . . . may construe its own constitution differently from the United States Supreme Court's construction of analogous federal constitutional provisions as long as the rights the state affords its people are no less comprehensive than those guaranteed by the parallel federal provision."[68]

The North Carolina Supreme Court has explicitly acknowledged its ability to raise individual liberty protections under parallel state provisions:

> [B]ecause the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state Constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision.[69]

Strategically, advocates are bound to recognize the ability of North Carolina courts to afford greater protections under the Declaration of Rights and to assert state constitutional claims on behalf of their clients. There are rights to be gained if they are timely asserted and rights to be lost if they are not.

Argument 5. Cases Decided on Independent and Adequate State Grounds are Not Reviewable in Federal Court

Strategic case planning involves considerations of appellate review, which provides yet another reason to assert a parallel state constitutional claim. "Questions concerning the proper construction and application of the North Carolina Constitution can be answered with finality only by [the Supreme Court of North Carolina]."[70] Thus, if a case is decided on independent and adequate state grounds, the decision is completely insulated from federal review.[71] In the words of Justice Brennan, "[t]he Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal

67. *See* N.C. CONST. art. I, § 5 ("Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.").

68. Martin, *supra* note 7, at 1750–51.

69. State v. Jackson, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998) (emphasis in original).

70. *Id.*

71. Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.").

law. It cannot review state court determinations of state law even when the case also involves federal issues."[72] Accordingly, litigants seeking a level of individual protection above the "federal floor" are better off relying on the state constitution, as any expansive interpretation approved by the state's highest court will be final.

Argument 6. Federal Jurisdictional and Justiciability Barriers are Not Present in State Court

The final strategic consideration that warrants the assertion of state constitutional claims is the litigant's ability to have his claim decided on the merits. Indeed, an alleged deprivation of right cannot be vindicated if a litigant's case is dismissed on procedural grounds. With this concern in mind, two characteristics of the North Carolina state courts warrant our attention.

First, the North Carolina trial courts, unlike the federal district courts, are courts of general jurisdiction.[73] Thus, North Carolina courts are not subject to the jurisdictional limitations imposed on the federal district courts in Article III, Section 2 of the Federal Constitution.[74] As the Declaration of Rights makes clear, all North Carolina courts "shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."[75]

Second, North Carolina courts are not subject to the justiciability requirements imposed by the "case or controversy" language[76] in the Federal Constitution.[77] This is why the North Carolina Supreme Court has, on occasion, issued advisory opinions[78]—a practice strictly forbidden in federal court.[79] Accordingly, advocates would do well to assert

72. Brennan, *supra* note 6, at 501 n.80.

73. *See* N.C. CONST. art. IV § 12(3) (asserting the general jurisdiction of the Superior Court).

74. U.S. CONST. art. III, § 2. The North Carolina trial courts are also free from the federal statutory limitations imposed on the Federal District Courts by Congress. *See, e.g.*, 28 U.S.C. §§ 1331, 1332 (2006).

75. N.C. CONST. art. I, § 18.

76. *See* U.S. CONST. art. III, § 2.

77. *See* Sharpe v. Park Newspapers of Lumberton, Inc., 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986) ("[W]hile we may look for guidance to federal court decisions regarding the existence or absence of a justiciable controversy, jurisdiction within the state courts of North Carolina is not controlled by those federal decisions but is determined by our own statutes and court decisions."). *See also* Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 112–16, 574 S.E.2d 48, 51–52 (2002) (distinguishing the federal and state justiciability requirements).

78. *See, e.g.*, *supra* note 32.

79. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.4 (4th ed. 2011) (discussing the prohibition against advisory opinions).

constitutional claims in state court, where federal jurisdictional and justiciability limitations do not exist.

C. *Practical Considerations*

Argument 7. State Constitutional Decisions Can be Rooted in Local Interests and Public Policy

"There is no place like home."[80] Dorothy's familiar refrain, while whimsical, helps to orient our focus on exactly what a state constitution is—a document that is *constitutive* of those who call the state home. Accordingly, the state constitutions, and the judicial decisions interpreting those documents, can be closely tied to the interests and public policies of the state.[81]

Moreover, "[t]he fact that they are often both comparatively easy to amend and more recently written or rewritten makes them much more reflective of current and local values than the federal charter and much more responsive to changes in those values."[82] In this regard, state constitutional decisions can have a legitimizing effect, particularly on new or controversial issues. Indeed,

> [w]hen only the federal judiciary is involved in adjudicating the myriad conflicts of constitutional dimension occasioned by the diversity of values in the country, the entire nation is forced to accept a single viewpoint and apply it in all areas and jurisdictions. Such unitary, exclusive constitutional interpretation is unduly constraining and ill-suited to our diverse society, as shown by the persistent, significant opposition to the Supreme Court's federal constitutional mandates.[83]

It follows then, that litigants who wish to have their rights vindicated based on the values and interests near and dear to their home state should assert state constitutional claims in state court.

Argument 8. Direct Claims Against the State are Available Under the Declaration of Rights Where There is No Other Adequate State Remedy

In *Corum v. University of North Carolina,*[84] the Supreme Court of North Carolina gave all constitutional claimants a strong incentive to

80. L. FRANK BAUM, THE WONDERFUL WIZARD OF OZ 45 (Geo. M. Hill Co. 1900).

81. Acker & Walsh, *supra* note 12, at 1329 ("State supreme courts are familiar with the unique traditions and conditions within their states and can interpret and apply their state constitutions accordingly, rather than comporting with the conditions that prevail in the nation generally.").

82. Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 442 (1996) (internal quotation marks omitted).

83. Hon. James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1518–19 (1998).

84. Corum v. Univ. of North Carolina, 330 N.C. 761, 413 S.E.2d 276 (1992).

assert their claim under the Declaration of Rights. In that case, Corum, a Dean at Appalachian State University, was discharged from his deanship for vocalizing opposition to the relocation of an important collection of books, music, research reports, and artifacts.[85] After exhausting his administrative remedies, Corum filed suit against the University alleging, among other things, violations of his free speech rights under Article I, § 14 of the North Carolina Constitution.[86]

The question presented to the Supreme Court was "whether a plaintiff has a direct cause of action under the State Constitution against governmental defendants for alleged violations of the plaintiff's free speech rights."[87] The Court, in landmark fashion, answered the question presented with a resounding yes.[88] Specifically, the Court held that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution."[89] Even more, the Court went on to hold that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights."[90]

Even under a narrow reading, Corum represents a major victory for state constitutional claimants in North Carolina. The availability of a direct cause of action against the State, and the inability of the State to assert the defense of sovereign immunity, is a strong incentive to assert state constitutional claims under the Declaration of Rights.

Argument 9. Independent State Constitutional Interpretation is a Movement for Everyone

Some critics of independent state constitutional interpretation argue that the movement is a liberal, results-oriented attempt to continue the Warren Court's expansion of civil liberties protections.[91] The basis of this objection is undoubtedly Justice Brennan's 1977 article in the *Harvard Law Review,* calling for a resurgence in state constitutional interpretation.[92] Commenting on the article's impact, two North Carolina legal scholars have noted that "[w]hat Justice Brennan did,

85. *Id.* at 766–70, 413 S.E. 2d at 280–82.

86. *Id.*

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

88. *Id.*

89. *Id.* The Court, after emphasizing the "supremacy of rights protected in Article I," reiterated the central holding by recognizing "a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights." *Id.* at 782, 413 S.E.2d at 290.

90. *Id.* at 785–86, 413 S.E.2d at 291.

91. *See generally* Heiple & Powell, *supra* note 83, at 1508–11 (acknowledging this criticism and providing a cogent response to it).

92. *See* Brennan, *supra* note 6.

of course, was conscript state constitutional law into the Warren Court cause, outlining the integral role that it can play in perpetuating and perfecting the constitutional revolution begun in the 1950s."[93]

However, even if the impetus for the movement was a desire to continue the trajectory of the Warren court,[94] one need not align with that goal to support independent state constitutional interpretation. In the words of a former Chief Justice of the Indiana Supreme Court, "the continuing strength of this movement does not derive from a desire to continue, at the state level, the agenda of the Warren-Brennan Court. It derives from the aspiration of state court judges to be independent sources of law."[95] Indeed, state constitutional interpretation is "independent" in the sense that it is distinct from federal jurisprudence, but also because it can produce results that fall at both sides of the political spectrum.

To prove the point that independent state constitutional interpretation is a movement for everyone, a couple of local examples, one "conservative" and one "liberal," warrant our attention. First, consider Article I, § 1's declaration that "[w]e hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness."[96] The North Carolina Supreme Court, using the "fruits of their own labor" language, in conjunction with the "law of the land" clause,[97] has recognized[98] a heightened level of scrutiny in economic due process cases akin to the bygone *Lochner v. New York*[99] era of the United States Supreme Court. Such an interpretation is "conservative" in the sense that it favors a vibrant, free economic marketplace.

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93. James G. Exum, Jr. & Louis D. Bilionis, *The Warren Court and State Constitutional Law*, *in* THE WARREN COURT: A RETROSPECTIVE 313, 317 (Bernard Schwartz ed., 1996).

94. *See* Shepard, *supra* note 82, at 421–29 (asking the question, "Whose Movement Is This, Anyway?" and suggesting there are other starting points beyond Justice Brennan's 1977 article).

95. *Id.* at 421.

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

97. *See id.* § 19.

98. *See, e.g.*, Roller v. Allen, 245 N.C. 516, 518–19, 96 S.E.2d 851, 854 (1957) ("The right to work and earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare. The right to conduct a lawful business or to earn a livelihood is regarded as fundamental."); Treants v. Onslow Cnty., 320 N.C. 776, 778–79, 360 S.E.2d 783, 785 (1987) ("[T]he [government action] must be rationally related to a substantial government purpose. This is the requirement article I, section 1 [of the North Carolina Constitution] imposes on government regulation of trades and business in the public interest."). *See also* Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. Rev. 1803, 1807 n.13 (1992) (collecting cases).

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

Second, the North Carolina Supreme Court, in *State v. Carter*,[100] concluded that there is no "good faith" exception to the exclusionary rule under Article I, § 20.[101] Previously, the Supreme Court of the United States, in *United States v. Leon*,[102] held that the Federal Constitution permitted the admission of evidence obtained in violation of the Fourth Amendment where the officer acted in reasonable reliance on a subsequently invalidated search warrant.[103] Thus, using an independent interpretation of the North Carolina Constitution, the North Carolina Supreme Court extended additional protection to criminal defendants, a decidedly "liberal" result.

Accordingly, irrespective of the movement's alleged origin and motivation, independent state constitutional interpretation is for everyone, left and right. Using neutral principles, we can extend individual liberties for the conservative, the moderate, and the liberal—a result that benefits us all.

Argument 10. The North Carolina Supreme Court Has Shown a Willingness to Deviate From Lockstep in the Past

The final argument in favor of asserting state constitutional rights need not detain us long, because it has been implicitly supported throughout this article by frequent citation to cases where the text[104] and holdings[105] indicate the Supreme Court of North Carolina's willingness to deviate from its persuasive lockstep stance.[106] Notably, there is a more recent example as well—*Blankenship v. Bartlett*.[107] In *Blankenship*, the North Carolina Supreme Court interpreted the state equal protection clause to afford greater protection to voters than the Fourteenth Amendment.[108] Furthermore, this article has cited with regularity scholarly works by sitting and retired North Carolina ju-

100. State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

101. *Id.* at 724, 370 S.E.2d 553, 562 (1988) ("We are not persuaded on the facts before us that we should engraft a good faith exception to the exclusionary rule under our state constitution.").

102. United States v. Leon, 468 U.S. 897 (1984).

103. *Id.* at 926 ("In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.").

104. *See, e.g.*, *supra* notes 51, 69 and accompanying text.

105. *See, e.g.*, *supra* notes 98, 100-01 and accompanying text.

106. *See also Corum*, 330 N.C. 761, 783, 413 S.E.2d at 290 ("We give our Constitution 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 both person and property.").

107. Blakenship v. Bartlett, 363 N.C. 518, 681 S.E.2d 759 (N.C. 2009). Indeed, in many ways, the North Carolina Supreme Court has been in the business of independent state constitutional adjudication from the very beginning. *See, e.g.*, Bayard v. Singleton, 1 N.C. (Mart.) 5 (1787) (recognizing the power of judicial review in North Carolina years before *Marbury v. Madison*).

108. *Blankenship*, 363 N.C. at 522–27, 681 S.E.2d at 763–65.

rists.[109] There can be no more persuasive proof to assert state constitutional claims under the Declaration of Rights than an explicit invitation by the Court.

PART IV. THE IMPORTANCE OF INDEPENDENT STATE CONSTITUTIONAL INTERPRETATION (AND STEPS TO SEE IT THROUGH)

The preceding section asserted ten arguments to make the North Carolina bench and bar *want* to rediscover the Declaration of Rights. The present section asserts why they *should.*

A. *The Constitutional Imperative*

"North Carolina lawyers have an obligation to be conversant with the North Carolina Constitution and to urge upon the courts consideration of its provisions in the resolution of issues to which they pertain."[110] Indeed, the obligation is an ethical one, rooted both in our oath[111] to the Constitution itself and in our promise to be competent,[112] diligent[113] advocates.

Importantly, this obligation is no less important for members of the judiciary.[114] Without pulling any punches, former Justice Harry Martin said that

> when the state court merely parrots the United States Supreme Court in decisions involving rights guaranteed by the state constitution, it forsakes its duty to develop a body of state constitutional law necessary to protect the rights of the people. Such failure would frustrate the very purpose of having a state constitution. The rights of the people of North Carolina are protected by two constitutions; common sense dictates that two bodies of law should implement those protections.[115]

Accordingly, our ethical duty conscripts us into the business of independent state constitutional interpretation.

Even more, we need independent state constitutional interpretation because "[a] frequent recurrence to fundamental principles is abso-

109. *See, e.g.*, *supra* notes 7, 11, 93.

110. James G. Exum, Jr., *Foreword* to JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION xv (Oxford Univ. Press 2011).

111. The North Carolina State Bar Oath of Office, http://www.ncbar.com/PDFs/oath.pdf (last visited April 29, 2013).

112. N.C. RULES OF PROF'L CONDUCT R. 1.3 (1997) (amended 2003). *See also* Christine M. Durham, *Filling a Scholarly Void*, NAT'L L.J., Sept. 29, 1986, at S-6 ("[W]hen attorneys neglect to brief a pertinent legal point, including a state constitutional one, they are flirting with malpractice.").

113. N.C. RULES OF PROF'L CONDUCT R. 1.3.

114. Exum, *supra* note 110 at xv-xvi ("North Carolina Courts have an obligation to deepen their understanding of the [North Carolina Constitution].").

115. Martin, *supra* note 7, at 1752.

lutely necessary to preserve the blessings of liberty."[116] The North Carolina Constitution in general, and the Declaration of Rights in particular, is the *fons et origo* of our fundamental principles.[117] Thus, "state courts no less than federal are and ought to be the guardians of our liberties."[118] Indeed, the framers responsible for the Federal Constitution and the Bill of Rights explicitly recognized the limitations of that document, leaving it to the states and to the people to further protect individual liberties.[119] We must not, and cannot, abdicate that responsibility.

B. *Next Steps*

With the clarion call sounded, there are three actions that the North Carolina bench and bar can take to usher in a new resurgence of independent state constitutional interpretation. First, all North Carolina attorneys need to familiarize themselves with the document. "Its intelligent use requires at a minimum that lawyers and judges know its text, its structure and, above all, its history."[120] Second, North Carolina attorneys should assert state constitutional claims in their client's complaint alongside parallel federal claims and argue for greater protection under the state provisions using neutral principles.[121] Indeed, "[a]s a practical matter, the frequency of state constitutional adjudications ultimately rests with the bar."[122] Third, North Carolina judges should cite North Carolina constitutional provisions in their opinions at a greater frequency and decide cases based on the state constitutional provisions as the law allows.[123] Together, these three steps can make an immediate and lasting impact in the field of state constitutional law.

PART V. CONCLUSION

The Declaration of Rights is deeply rooted in our state's history. The thirty-seven rights it declares are to be held and guarded by all

116. N.C. CONST. art. I, § 35.

117. In the words of Justice Brennan, "[s]tate constitutions, too, are a font of individual liberties . . . for without [them], the full realization of our liberties cannot be guaranteed." Brennan, *supra* note 6, at 491.

118. *Id.*

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

120. Exum, *supra* note 110, at xvi. For the authoritative source of North Carolina Constitutional history, see ORTH, *supra* note 4. I would also commend the other scholarly works cited herein as useful resources for this endeavor.

121. Notably, Martin & Smith report a trend of increased reliance on and citation of the North Carolina Constitution since the 1970s. *See* Martin & Smith, *supra* note 7, at 768.

122. *Id.* at 769.

123. *See* Shepard, *supra* note 6 (providing examples and analysis of what Chief Justice Shepard calls "legitimate" and "illegitimate" state constitutional decisonmaking).

North Carolinians. However, the lawyers and judges that serve North Carolina have the greater responsibility to nurture them. Over the years, we have seen a few North Carolina lawyers and jurists ably cultivate this field and plant the seed. The climate may be federal, but North Carolina's legal profession must ensure that the ground in North Carolina remains fertile.