Campbell Law Review

Volume 42
Issue 2 *Spring 2020*

Article 1

2020

From Aristocracy to Democracy: The Legislative Ascent to General Statute in the Moral Science of the Law in North Carolina

Thomas P. Davis

From Aristocracy to Democracy: The Legislative Ascent to General Statute in the Moral Science of the Law in North Carolina[Ψ]

THOMAS P. DAVIS

INTRODUCTION 215
I. DEMOCRACY IN ENGLAND: THE EARLY NINETEENTH CENTURY ASCENT TO GENERAL STATUTE 219
II. DEMOCRACY IN NORTH CAROLINA: THE EARLY TWENTIETH CENTURY ASCENT TO GENERAL STATUTE 222
A. Background 222
B. Legislating More Democratically 230
1. Political History 230
2. Legislative Supervision 232
C. Judging More Democratically 235
1. Precedents 236
2. Judicial Review 238
D. Executing More Democratically 241
III. DEMOCRACY NATIONALLY AND INTERNATIONALLY 244
CONCLUSION 251
APPENDIX 254

INTRODUCTION

North Carolina in the early twentieth century enjoyed a resurgence of democratic spirit not unlike the intellectual milieu of Europe and America in the early nineteenth century.[1] The political watch words again were

---

[Ψ]By Thomas P. Davis, Librarian, North Carolina Supreme Court Library. The Author thanks Mr. Daniel Benson and Mr. F. Pete Wells for serving as readers of this essay. Opinions expressed herein are those of Mr. Davis, and not the opinions of the Supreme Court of North Carolina or of North Carolina's judicial branch of government.

1. Thomas P. Davis, *School Days: The Supreme Court of North Carolina and the Moral Science of Law, 1819–1931*, 96 N.C. HIST. REV. 373, 406–07 (2019) [hereinafter *School Days*] (comparing the ideals of English philosopher Jeremy Bentham with the ideals of Chief Justice Walter Clark of the Supreme Court of North Carolina and noting the

equality and efficiency and activity by the people assembled. Yet, law and government had changed in North Carolina over the course of a century. While the power of governor and council of state had remained insignificant, the jurisprudential primacy of the state supreme court, so prominent in antebellum North Carolina, had come and gone, and the thrust of the work of the general assembly had shifted from a long tradition of governing by private, special, and local act to supervising government by general statute. This primacy of general statute was an abandonment of particularized decision making by acquiescing members of house and senate, as in the granting of divorce or the privilege of incorporation by private or special act, and an adoption of general principle declaring by the people's representatives.[2]

The supreme court had exercised just this principle-declaring role in antebellum North Carolina. The general assembly in 1818 had forestalled a surge of democratic sentiment by establishing the modern supreme court as a purely appellate court of law whose function it was to let develop a common law for the state from the inherited colonial common law. The court would set precedent timely[3] by reasoned opinion,[4] deviating incrementally from tradition as local circumstances required.[5] The lawyers selected to serve on the court by the general assembly were conservative, always keeping in mind the natural rights jurisprudence and the English

---

amendment of 1917 to the Constitution of North Carolina which restricted the power of the general assembly to pass private, special, and local acts or resolutions). For an explanation of "democracy" as used in this Article, as well as a contrasting definition of "aristocracy," see *infra* notes 84–85.

2. *See* discussion *infra* Sections II.B.

3. REPORT OF SELECT JOINT COMMITTEE ON THE JUDICIARY, JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA AT ITS SESSION IN 1819, at 113, 114 (Raleigh, Thomas Henderson Jr., State Printer 1820) ("Every decision on a question of law made in the State may be here [in the newly-organized supreme court] reviewed on appeal, and upon every question thus brought before them, they are compelled to act finally and without delay."); *id.* at 115 ("All the cases now receive a prompt attention . . . . The docket is kept down, causes are disposed of at the first term . . . .").

4. *See, e.g.*, *School Days*, *supra* note 1, at 378 (noting that the newly-organized supreme court "would rest the opinions of the court on the 'reason of the thing' as well as on precedent").

5. *Id.* at 405 (concluding that the "[i]ncremental adaptation of inherited colonial common law [by the newly-organized supreme court] would create a common law for the state"). An example of a local deviation from the English common law recognized by the newly-organized supreme court—a deviation still pertinent in contemporary litigation—is North Carolina's test for the navigability of waters. Cassie A. Holt, Comment, *Just Around the Riverbed: Reconciling Navigability Rules in North Carolina*, 41 CAMPBELL L. REV. 503, 512 (2019) (describing North Carolina's deviation from the common law test of navigability of waters in Wilson v. Forbes, 13 N.C. (2 Dev.) 30 (1828) (*seriatim*)).

legal history advanced by William Blackstone in his *Commentaries on the Laws of England*.[6] And though its judges held their offices during good behavior,[7] the court remained a creature of the general assembly,[8] consciously respecting the deviations from the common law advanced in occasional legislation.[9]

The legal relationship between court and assembly, though, changed after the Civil War. The North Carolina Constitution of 1868 established a constitutionally grounded supreme court, setting the stage for conflict in the reconstructed state between rulings by the court and governing acts by the representatives of the people. And so, it came to pass. When the justices of the supreme court could not see around an antebellum precedent that blocked the general assembly's will in making statutory appointments, the general assembly turned to the radical remedy of impeachment.[10] Before long that precedent was overruled, and within a decade of that overruling a proposed constitutional amendment would encourage more complete displacement of the antebellum science of common law with a modern science of statute law.[11] Soon the general assembly established agencies to write, apply, and interpret highly detailed sets of regulations,[12] while confining itself to the supply of general legal principles of its own making to guide these agencies.[13] With its focus more fully on general statute,[14] the

6. Thomas P. Davis, *Reading* Smith v. Campbell *at the 200th Anniversary of the Supreme Court of North Carolina: The Constitutional Right to Trial by Jury in Original Proceedings in Civil Cases in North Carolina*, 27 J. S. LEGAL HIST. (forthcoming 2019) [hereinafter *Reading* Smith v. Campbell] (deconstructing the argument of counsel and the opinion of Judge Leonard Henderson in Smith v. Campbell, 10 N.C. (3 Hawks) 590 (1825), to show its reliance upon *Blackstone's Commentaries*).

7. An Act concerning the Supreme Court, ch. 1, § 1, 1818 Laws of N.C. 3 (POTTER'S REVISAL ch. 962).

8. Walter F. Pratt Jr., *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW & HIST. REV. 129, 156 (1986) (noting that in Hoke v. Henderson, 15 N.C. (4 Dev.) 1 (1833), Chief Justice Ruffin admitted that the general assembly had the power to abolish statutory public offices when in its judgment public necessity no longer required those offices).

9. *School Days*, *supra* note 1, at 378 (noting that the court always paid "due respect to deviations [from the inherited colonial common law] introduced by the general assembly").

10. *See* discussion *infra* Part II.C–D.

11. Regarding the thesis that initiatives of the Progressive Era revived the codification movement of the early nineteenth century, see, for example, *infra* note 94 (noting the exchange of letters between codifier David Dudley Field, II, and Justice Walter Clark) and *infra* note 137 (tying the uniform law movement to the codification movement).

12. *See infra* notes 76–93 and accompanying text.

13. *See infra* note 65.

14. Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. REV. 340, 359–60 (1967) [hereinafter *Local Legislation*] ("While the legislature was

general assembly now ceded the meting of particularized justice to these agencies, to local officials, and to inferior courts,[15] leaving review and supervision of the last of these institutions to the supreme court by appeal and remedial writ.[16]

The remodeling of the jurisprudential roles of supreme court and general assembly was a remarkable local effect of law reform that had begun in the nineteenth century and had culminated in the early-twentieth century in North Carolina, but it did not exhaust the progressive program for modernizing law and government. The jurisprudence which countenanced the legislative ascent to general statute also recognized the need for law reform on the national and international scales. It was thought that a uniformity which promotes mechanized efficiency should characterize legal relations among the states of the nation and among the nations of the world.[17]

And in fact, North Carolina began the progressive course traced in this Article[18] in imitation of a reformed nation, taking as its paradigm for a science of legislation the initiatives of the English Parliament, where the

---

to be prevented from enacting local laws on an individual basis, it was to accomplish the same ends by 'general laws.'").

15. *See infra* note 65.

16. N.C. CONST. of 1868, art. IV, § 8 (1917) (setting the jurisdiction of the supreme court). While the North Carolina constitution recognized the state supreme court's supervision of inferior courts by means of remedial writ in 1868, such supervision in England had been entrusted to the superior courts of common law. 1 THOMAS W. POWELL, THE LAW OF APPELLATE PROCEEDINGS, IN RELATION TO REVIEW, ERROR, APPEAL, AND OTHER RELIEFS UPON FINAL JUDGMENTS 71 (Philadelphia, T. & J.W. Johnson & Co. 1872) (describing the English Court of King's Bench as keeping inferior courts "in due administration of the law, by means of writs of certiorari, mandamus, prohibition and other remedial writs"). *But c.f.* FORREST G. FERRIS & FORREST G. FERRIS JR., THE LAW OF EXTRAORDINARY LEGAL REMEDIES: HABEAS CORPUS, QUO WARRANTO, CERTIORARI, MANDAMUS, AND PROHIBITION § 310, at 418 (1926) (noting that the writ of prohibition "is primarily and principally a preventative rather than a remedial or corrective remedy," but admitting that "the writ is, perhaps, more remedial in character than it was originally").

17. *See* discussion *infra* Part III.

18. This Article is one of four essays written by the Author in celebration of the 200th Anniversary of the Supreme Court of North Carolina, the other three being: (1) *Summer Session: The Morganton Decisions, 1847–1861*, N.C. ST. B. J., Winter 2018, at 12; (2) *School Days: The Supreme Court of North Carolina and the Moral Science of the Law, 1819–1931*, 96 N.C. HIST. REV. 373 (2019); and (3) *Reading* Smith v. Campbell *at the 200th Anniversary of the Supreme Court of North Carolina: The Constitutional Right to Trial by Jury in Original Proceedings in Civil Cases in North Carolina*, 27 J. S. LEGAL HIST. (forthcoming 2019). Since the purpose of this essay is to celebrate the anniversary of the supreme court, citation to its opinions will be to the *North Carolina Reports* only and will identify the judges who wrote the opinions cited.

ascent from private, special, and local acts to general statute had occurred during the early nineteenth century.

I. DEMOCRACY IN ENGLAND: THE EARLY NINETEENTH CENTURY ASCENT TO GENERAL STATUTE

Since the English Revolution of 1689, according to one renowned legal historian writing in the early-twentieth century, Parliament had not only *legislated* by general law, as one nowadays might expect, but had also *governed* England by non-legislative powers. It had governed by compelling ministers to answer to it on threat of withholding supplies[19] and by exercising an inquisitorial power that allowed for the investigation of public affairs.[20] For the first century and a half after this revolution, Parliament had also governed England by means of private, special, and local acts.

Parliament's private or special acts affected only particular persons, while its local acts affected only particular things at particular places.[21] The power of its statutes to descend to particulars[22] was the power to govern.[23]

---

19. F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED 380 (H.A.L. Fisher ed., 1919).

20. *Id.*

21. *Act*, BLACK'S LAW DICTIONARY (7th ed. 1999) ("A 'special' or 'private' act is one operating only on a particular person and private concerns. A 'local act' is one applicable only to a particular part of the legislative jurisdiction."); *special law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "special law" or "special act" as "[a] statute that pertains to and affects a particular case, person, place, or thing, as opposed to the general public"); MAITLAND, *supra* note 19, at 383 (describing private acts, such as "an act to dissolve the marriage between Jonathan Twiss and Francis Dorrill," and local acts, such as "an act for establishing a workhouse at Havering," in eighteenth-century England). The origins of private acts in the history of English law are much older, of course, than the English Revolution. 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY: COMPRISING ITS RISE, PROGRESS, AND FINAL ESTABLISHMENT 331–32 (Philadelphia, Lea & Blanchard 1846) (tracing the origin of private acts to the medieval history of the meetings of the king's great council or parliaments).

22. The expression, "power of a statute to descend to particulars," is Professor Maitland's brilliant way of describing these private, special, and local acts. MAITLAND, *supra* note 19, at 386.

23. *Id.* at 382–86 (noting that the functions of statutes are not confined to legislating but may extend to other aspects of government; classifying a vast number of statutes "rather as *privilegia* than as *leges*, the statute lay[ing] down no general rule, but deal[ing] only with a particular case"; and providing such examples as acts of pains and penalties, acts of attainder, and acts of indemnity).

It was Parliament's exercise of the ordaining and dispensing powers[24] by which English monarchs had granted privileges[25] to subjects for centuries.[26]

To govern by this substitute for the monarch's ordaining and dispensing powers was to Parliament's advantage because private, special, and local acts could be executed without extensive reliance upon the discretion of ministers of the queen or king, such as executive commissions or executive officers, and with reliance instead upon local officials.[27] The prevalence of private, special, and local acts in eighteenth-century England served to consolidate governing power in Parliament and to wither that power in the monarch.

In the nineteenth century, with the Reform Act of 1832,[28] Parliament shifted its focus from private, special, and local acts to general legislation.[29] This shift to general legislation was made possible by the gradual acquiescence in the sovereignty of the crown-in-Parliament[30] and ultimately

---

24. *Id.* at 302–05 (explaining that the ordaining power is the power to govern by proclamation or ordinance, rather than by act approved by a parliament, while the dispensing power is akin to the power to suspend laws but narrowed to suspension for an individual); *id.* at 386 (explaining that the power to "descend to particulars" is also evident in acts of attainder, some such acts of parliament punishing individuals by death, banishment, and disenfranchisement).

25. *Privilegium*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("1. *Roman law.* A law passed against or in favor of a specific individual. . . . 3. *Civil law.* Every right or favor that is granted by the law but is contrary to the usual rule.").

26. The controversial exercise of the dispensing power by King James II in the 1680s caused the unchecked executive exercise of these powers to be condemned in the English Bill of Rights. *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, THE AVALON PROJECT, https://perma.cc/T3E3-AAK6 ("Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom; By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament . . . ; That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal . . . .").

27. MAITLAND, *supra* note 19, at 384 (mentioning that administration of eighteenth-century poor law was "a local affair entrusted to the parochial overseers of the poor and the county justices").

28. Representation of the People Act 1832, 2 & 3 Wm. IV, c. 45 (Eng. & Wales).

29. *See, e.g.*, FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 161–62 (1915) ("The writings of Bentham and his school and the example of foreign nations have called forth the desire for comprehensive and symmetrical legislation. . . . Thus every year has produced a volume of statutes. Some of these statutes exceed in bulk the whole legislation of a mediaeval reign.").

30. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *49 ("[A]ll the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end."). Regarding the naming of this sovereign legislative power as

in the supremacy of the House of Commons,[31] but became necessary only when Parliament committed itself to the creation of elaborate legislative schemes in displacement of the common law.[32] Not surprisingly, the commitment to general legislation arose when philosophers and professors zealously advocated law reform through the codification of common law in England[33] and when intellectuals throughout Europe[34] advocated more democratic forms of government.[35] This acquiescence in the sovereignty of

"Parliament" or the "crown-in-Parliament," see H. BELLOC, THE HOUSE OF COMMONS AND MONARCHY 143–44 (1922) ("We might put up some quite new thing—with the old name 'Parliament,' or, better still, 'King in Parliament,' attached to it—and that new thing might be given such vigour and reality as to govern with real moral authority. . . . The classic example . . . in English history is the change in the function of kingship, the old-established authority of which was taken away and given to the Aristocratic rule of Parliament, while the name 'King' and some few ritual trappings of the old kingly function were retained."), and see FREDERIC A. OGG & HAROLD ZINK, MODERN FOREIGN GOVERNMENTS 54 (1922) ("[T]he lawmaking function is vested in the 'king in Parliament,' which means historically the king acting in conjunction with the two houses . . . even though as a rule the sovereign personally has had little or nothing to do with the matter.").

31. BELLOC, *supra* note 30, at 9–10 ("From the House of Commons proceeded ultimately all laws, all the appointments of those who interpret and administer laws, and all execution of laws. The Ministers who are still in constitutional theory its servants and responsible to it, nominate all new candidates to the Second Chamber. They not only decide the general lines of foreign and domestic policy, but have absolute power over their details.").

32. MAITLAND, *supra* note 19, at 384 (listing the statutory overhaul of criminal law, property law, and the law of procedure); *id.* at 501 ("The new movement set in with the Reform Bill of 1832: it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes."); *see also* MAITLAND & MONTAGUE, *supra* note 29, at 161–62 (pointing to the influence of Bentham for the increase in legislation).

33. *See, e.g.*, JAMES HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY; WITH THE OUTLINES OF A CODE (London, J. Murray 1826); JEREMY BENTHAM, THE THEORY OF LEGISLATION (C.K. Ogden ed., Richard Hildreth trans., 1931).

34. *Liberation Movements in Europe*, *in* THE COLUMBIA HISTORY OF THE WORLD 799, 804 (John A. Garraty & Peter Gay eds., 1972) ("The revolutions of 1848 failed . . . . The opposite ends of the social scale . . . resisted the penetration of liberal ideas . . . . Thus the characterization 'revolution of the intellectuals' is . . . largely justified.").

35. 13 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 242–59 (A.L. Goodhart & H.G. Hanbury eds., 1952) (arguing that in England, the Reform Act of 1832 introduced a "very moderate measure of democracy" into government and set conditions under which it could be increased); John V. Orth, *Jeremy Bentham: The Common Law's Severest Critic*, 68 A.B.A. J. 710, 715 (1982) ("On June 7, 1832, the day after Bentham died, the first English Reform Act became law. The new law in effect extended the vote to the prosperous middle class. . . . Whether or not Bentham's ideas were responsible for the reform, they were certainly influential during the succeeding era.").

the crown-in-Parliament and the shift away from private, special, and local acts encouraged Parliament to entrust "the power of dealing with particular cases to the king's ministers, to boards of commissioners, to courts of law."[36]

On this reading of our English heritage, the old proliferation of private, special, and local acts by Parliament had demonstrated a determination to castrate the monarchy and to govern by imperious insinuation of its aristocratic judgments into every particularity of the realm, while a new obsession with legislation by general rule allowed Parliament to forget its former overbearing self and to distribute executive power and delegated-legislative authority by general statutory law.[37] Even during its retreat from direct and minute executive action, though, the crown-in-Parliament remained wholly sovereign, all other governing institutions flinching subordinately to it.

II. DEMOCRACY IN NORTH CAROLINA: THE EARLY TWENTIETH CENTURY ASCENT TO GENERAL STATUTE

A. Background

The legislative ascent to general statute occurred not only in England, but also in American jurisdictions. For instance, North Carolina in the late-eighteenth and the nineteenth centuries sought the impotence of its executive, so it is unsurprising that after the American Revolution, North Carolina's general assembly acted privately, specially, and locally[38] in imitation of the course Parliament had taken after England's revolution.[39]

---

36. MAITLAND, *supra* note 19, at 385.

37. *Id.* at 498 ("[O]n the one hand we get new organs of local government, on the other hand we get new organs of central government . . . .").

38. *Local Legislation*, *supra* note 14, at 421–23 (providing tables that illustrate the volume of private and public-local legislation in North Carolina for the periods, 1788-'89 to 1834-'35, 1836 to 1909, and 1911 to 1965). On the distinction between public laws and private, special, or local acts of the general assembly, see *id.* at 344 n.22 (contrasting public laws with private or local acts in rules of the general assembly and contrasting public laws with private, special, or local acts in the publishing process).

39. While the English Bill of Rights had condemned the monarch's unilateral exercise of the dispensing and suspending powers, *see supra* note 26, the freemen of North Carolina declared that all powers of suspending laws or their execution by any authority *without legislative consent "ought not to be exercised."* N.C. CONST. of 1776, art. I, § 5 (emphasis added). According to the state's Chief Justice John Taylor, this declaration circumscribed the power to pardon, N.C. CONST. of 1776, art. I, § 19, which is a constitutionally sanctioned executive power to dispense with the law and is a type of suspending power. JOHN LOUIS TAYLOR, A CHARGE DELIVERED TO THE GRAND JURY OF EDGECOMBE SUPERIOR COURT AT

Likewise, North Carolina's general assembly thereafter engaged in the ascent from private, special, and local acts to general statute. That ascent proceeded in stages, each stage consisting of an initiative in the codification of the law and a restriction on the general assembly's power to enact private, special, or local acts. Codification sought to reduce public laws to a rational system,[40] while constitutional restrictions on the power of the general assembly encouraged its members to adopt public laws.

The first stage in the ascent to general statutes occurred in the mid-1830s when the general assembly approved a codification of the public laws known as the *Revised Statutes*.[41] While this statutory codification was not itself an ascent from the particular to the general, given that it took public laws—laws of general applicability—as its raw material, still it rationalized the state's public laws in force, somewhat like the supreme court at the time was systematizing its precedents into a moral science.[42] Also at this time, the state's constitutional convention of 1835 restricted the general assembly's power to act in individual cases of divorce,[43] name change,

---

THE SPRING TERM OF 1817: EXHIBITING A VIEW OF THE CRIMINAL LAW OF NORTH-CAROLINA 5 (Raleigh, 1817) ("If one criminal is pardoned for this reason, alone [that the punishment of death is too severe for horse stealing], it follows, that all must be. What is this but the exercise of a dispensing power, against which our Bill of Rights contains a positive provision?"). Whether Taylor thought the exercise of the pardon power for the wrong reason was immoral or illegal—whether "ought" here meant "shall"—is less clear. *See infra* note 115. Because on its face this declaration did not restrict the general assembly, either morally or legally, the general assembly remained free to act privately, specially, and locally.

40. See *infra* note 168 for an observation on the commitment to general statute of English, French, and German Enlightenment jurisprudence.

41. 1 THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA (Raleigh, Turner & Hughes 1837).

42. *See, e.g.*, *School Days*, *supra* note 1, at 378 (noting that the newly-organized supreme court "would treat law as a moral science, keeping faith that authoritative judgments of the court could be arranged systematically to reveal their reason or operation from principle"); *id.* at 394 ("And since this science [of the common law] was not concerned with predictions about the motions of matter, but rather with the preservation of human ideals within courses of action, one might say that the method produced moral science."). The rational system imposed upon statute law differed from the scientific system of common law, though, because statute law did not comprehensively cover the spheres of property, rights, and duties in private law and was not comprehensive in the subjects it did cover. At best, statute law in North Carolina in the 1830s was an appendage or a spotty set of revisions to the moral science of the law. The commissioners of the *Revised Statutes* divided the public laws into 115 subjects, organizing the legislation assigned to each of these topics in a logical manner. *See generally supra* note 41.

43. *Amendments to the Constitution*, art. I, sec. 4, § 3, *in* PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA, CALLED TO AMEND THE CONSTITUTION OF THE STATE, WHICH ASSEMBLED AT RALEIGH, JUNE 4, 1835, at 418, 421 (Raleigh, 1836); *see*

legitimization, and restoration of citizenship,[44] while preserving the general assembly's right to pass general laws on these subjects.[45]

The ascent to general statute continued with the adoption of the state's Reconstruction constitution, passed as a condition of North Carolina's readmission to the Union after the Civil War.[46] This new constitution committed the state to codification of the common law, establishing a commission that would promptly codify procedure for new forms of civil and criminal action[47] and would "as soon as practicable" codify the state's substantive law.[48] This intended break with the state's common law

---

generally Joseph S. Ferrell, *Early Statutory and Common Law of Divorce in North Carolina*, 41 N.C. L. REV. 604 (1962).

44. *Amendments to the Constitution*, *supra* note 43, at art. I, sec. 4, § 4.

45. *Id.* at §§ 3, 4.

46. JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 12 (1993) (noting that North Carolina's 1868 constitutional convention was called on the initiative of Congress).

47. N.C. CONST. of 1868, art. IV, § 2 (providing for the appointment of three commissioners to report to the general assembly rules of practice and procedure for civil and criminal actions).

48. *Id.* § 3 ("The same Commissioners shall also report to the General Assembly as soon as practicable, a code of the law of North Carolina."). That the constitutional convention intended the commissioners to codify the entire body of the state's statute law and common law is evident from its description of this "code of the law of North Carolina." CONSTITUTION OF THE STATE OF NORTH-CAROLINA, TOGETHER WITH THE ORDINANCES AND RESOLUTIONS OF THE CONSTITUTIONAL CONVENTION, ASSEMBLED IN THE CITY OF RALEIGH, JAN. 14TH, 1868, at 79–80 (Raleigh, Joseph W. Holden, Convention Printer 1868) (ratified March 13, 1868) ("Be it further ordained, That the first division of the Code of Law must embrace the laws respecting the government of the State, its civil polity, the functions of its public officers and duties of its citizens. The Second must embrace the laws of personal rights and relations of property and obligations. The third shall define crimes and prescribe their punishments."); *cf.* 1 REVISAL OF 1905 OF NORTH CAROLINA, at vii (1905) ("In 1868 a new Constitution of the State was adopted, which greatly changed the State's judicial system and contemplated a complete codification of the statute laws, and possibly the unwritten law."). That the commissioners initially took this constitutional directive to "report . . . a code of the law of North Carolina" to mean codification of the entire body of the state's statute law and common law is evident from the *General Analysis of the Civil Code* which they submitted to the general assembly with their first report. *General Analysis of the Civil Code*, *in* DOCUMENTS OF THE CODE COMMISSION, 1868–1871 (attachment to First Report of the Code Commissioners, Raleigh, July 15th, 1868), *microformed on* BR 0345.2 N87c (Univ. of N.C. Library at Chapel Hill) (relying heavily upon Blackstone's scientific arrangement of the common law of England for the outline of a civil code of law); *see also* OTTO H. OLSON, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE 139 (1965) (recounting the opinion of Chief Justice Richmond Pearson that commissioners Albion Tourgée and William Rodman had sought "to reduce the entire common law to a written code"). The report of the commissioners of March 12, 1870, though, revealed a retreat to the position that the commissioners would merely codify "the whole statute law of the State,

heritage succeeded only in small part,[49] the economically-wracked state having little interest in streamlined civil procedure[50] and even less interest in unsettlement of the state's traditional remedial rights.[51] The Reconstruction constitution also restricted the general assembly's power to

---

arranged in convenient form for reference, and making a single volume about the size of the Revised Code." *Report of the Code Commissioners*, *in* EXECUTIVE AND LEGISLATIVE DOCUMENTS LAID BEFORE THE GENERAL ASSEMBLY OF NORTH CAROLINA, 1869-'70, Doc. No. 28 (Raleigh, J.O. Holden 1870).

49. The general assembly moved to disband the code commission in January 1872 and February 1873. Act of Feb. 24, 1873, ch. 87, 1872-'73 N.C. Pub. Laws 117 (referencing An Act to Alter the Constitution of North Carolina, ch. 53, § 1, 1871-'72 N.C. Pub. Laws 81, 82). The people approved the amendment on August 7, 1873. NORTH CAROLINA GOVERNMENT 1585–1979: A NARRATIVE AND STATISTICAL HISTORY 872 (John L. Cheney, Jr. ed., rev. prtg. 1981) [hereinafter NORTH CAROLINA GOVERNMENT].

50. While the common law forms of action in civil cases were immediately displaced by the civil action and special proceedings, the general assembly quickly suspended some provisions of the code of civil procedure in order to slow its expedited processes. *See, e.g.*, HANDBOOK FOR COUNTY OFFICERS 3 (Nichols & Gorman, Book & Job Printers, 2d ed. 1869) ("Our Supreme Court, at January Term, 1869, having decided the Ordinance of the Convention of March, 1868, familiarly known as the 'Stay law,' to be unconstitutional, the General Assembly, in order to obviate the distress which would have inevitably followed the summary collections of debts as provided for in the Code of Civil Procedure, suspended many provisions of that Code in relation to suits on contracts, until the 1st of January, 1871."); Chief Justice Clark, Address on Reform in Law and Legal Procedure Before the State Bar Association at Wrightsville Beach (June 30, 1914), *in* PROCEEDINGS OF THE SIXTEENTH ANNUAL SESSION OF THE NORTH CAROLINA BAR ASSOCIATION HELD AT SEASHORE HOTEL, WRIGHTSVILLE BEACH, N.C., JUNE 29–30 AND JULY 1, 1914, at 55 (Thomas W. Davis ed., 1914) [hereinafter Address at Wrightsville Beach] ("When the Code of Civil Procedure was adopted in 1868, it provided . . . that all the pleadings should be made up before the clerk, and that only issues of fact should be transferred to the docket at term time to be passed upon by the jury, and that the judgment of the clerk upon issues of law should be appealed to the judge at chambers. This was stricken out in 1870 because, owing to the condition of the country, instead of expediting the trial of causes it was considered advisable to delay judgment.").

51. The adamant rejection by the people of the code commission, *see supra* note 49, may have been as much a rejection of the radicalism of Republican Commissioner Albion Tourgée as it was a hesitancy to abandon the science of common law in favor of a science of legislation. In any event, the failure to adopt legislatively-imposed, *a priori* principles of substantive law for the state left the supreme court in its primary role of declaring legal principles and rules of law even after the court's jurisdiction had moved beyond the control of the general assembly. *See School Days*, *supra* note 1, at 403–04 (noting that the general assembly sat content to have the supreme court discover principle, respect precedent, and acknowledge legislative deviation from the common law beyond the Reconstruction constitution and into the early 1890s).

create non-municipal corporations by special act, while preserving its right to form these corporations under general laws.[52]

The final stage in the ascent to general statute occurred during the Progressive Era in state and national politics. In the last quarter of the nineteenth century, the general assembly had turned its attention to general statute with more vigor.[53] But its sputtering ascent toward general law, while a movement in the right direction, left Progressive politicians impatient. Justice Walter Clark, who would run for the United States Senate on a Progressive platform in 1912 while leading the Supreme Court of North Carolina,[54] had dreamt of a re-invigorated codification movement that would promptly displace the common law of the state[55]—a common law which the court continued to guard vigilantly and to deviate from only incrementally.[56] But comprehensive codification of the common law never again proceeded by commission in North Carolina, such radical attacks on the state's legal heritage being left instead to national movements for

52. N.C. CONST. of 1868, art. VIII, § 1 (1868) (restricting the power of the general assembly to create non-municipal corporations by special act but providing broad exceptions to this restriction).

53. *Local Legislation*, *supra* note 14, at 421–23 (providing tables that contrast the volume of private and public-local legislation to total legislation in North Carolina for the periods, 1788-'89 to 1834-'35, 1836 to 1909, and 1911 to 1965). While Ferrell's tables show that total legislation increased after the Civil War, the tables do not distinguish between public laws of general applicability and public-local laws until 1911. The Author's spot-check of the public laws of 1828-'29, 1852, 1879, and 1891, though, shows an increase in the number of public laws of general applicability after the Civil War: 89 in 1828-'29, 89 in 1852, 157 in 1879, and 253 in 1891.

54. Clark served as an Associate Justice of the Supreme Court of North Carolina from 1889 to 1902, then as its Chief Justice from 1903 to 1924. His biographers describe one aspect of his progressivism as follows:

> Having written the last chapter in the law emancipating woman as to her property rights, Clark enlisted in her 'battle for ballots.' In June 1911, he delivered the first prepared address favoring woman suffrage that was made by any leader in the state. From then on he was recognized as its most distinguished advocate in North Carolina.

2 THE PAPERS OF WALTER CLARK: 1902–1924, at 54 (Aubrey Lee Brooks & Hugh Talmage Lefler eds., 1950). Clark supported the entire Progressive platform, including such mundane initiatives as the adoption of Torrens title. John V. Orth, *Torrens Title in North Carolina—Maybe A Hundred Years Is Enough*, 39 CAMPBELL L. REV. 271, 276 n.31 (2017) (citing AUBREY LEE BROOKS, WALTER CLARK: FIGHTING JUDGE (1944)).

55. *See infra* notes 94–95 (mentioning Clark's correspondence with the great codifier David Dudley Field, II, and his later publications, which blamed the works of Sir Edward Coke and Sir William Blackstone for the difficulties encountered by political progressivism).

56. See discussion *infra* Section II.C, which explains that after Walter Clark became a justice on the supreme court, its role in guarding the state's common law heritage began to change.

uniform laws and restatements of law.[57] Meantime, Progressive Governor William Kitchin,[58] in his biennial messages to the general assembly of 1911 and 1913, insisted that the general assembly existed to pass general legislation and not to handle private, special, and local matters.[59] Kitchin argued that local laws had increased at an alarming rate near the end of the first decade of the twentieth century, distracting the part-time general

57. Regarding the reinvention of the codification movement on a national scale, see discussion *infra* Part III.

58. Kitchin's political progressivism is alluded to in a brief sketch of his governorship:

> If his years in Congress were lackluster, his tenure as governor was highly successful. It was a time of tremendous increases in expenditures for public education, public health service to the feebleminded, and expansion of swampland affected by significant drainage laws. In addition, those years saw great expansion of railroads and general improvement in the stability of the state's banking institutions.
>
> During his last year as governor, Kitchin's was one of four names mentioned in the state's first regular popular election to the U.S. Senate: Charles Brantley Aycock (d. 1912), who was mentioned early; Chief Justice Walter Clark of the North Carolina Supreme Court, a jurist of great wisdom and poise; Furnifold M. Simmons, the incumbent U.S. senator who had in his term scored a distinctive record in Washington; and Kitchin, who had served a dozen years in Congress and over three years as a progressive governor.

Kitchin, William Walton, *in* 3 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 376 (William S. Powell ed., 1988).

59. W.W. Kitchin, Governor of N.C., Biennial Message to the North Carolina General Assembly, Session 1913, *in* PUBLIC DOCUMENTS OF THE STATE OF NORTH CAROLINA, SESSION 1913, at 3, 11 (1915) ("The General Assembly is for general legislation, and should be relieved of all local and private matters."). In objecting to inappropriate focus upon special acts by the general assembly, Progressives pitted an aristocratic instinct to govern (special acts granting privileges or immunities to particular interests) against a democratic impulse to legislate (general statutes providing remedies to the people for social ills). *See, e.g.*, *Local Legislation*, *supra* note 14, at 410 n.308 (explaining that Progressives attacked local legislation as "a rallying point for the indifference many legislators exhibited toward pressing public issues"); *see also* Kornegay v. City of Goldsboro, 180 N.C. 441, 458–59 (1920) (Clark, C.J., dissenting) (arguing that special legislation was a "waste of time of the General Assembly" and was "controlled and influenced by local influences in favor of special interests"). According to the state supreme court, even before passage of the state's constitutional amendments encouraging the general assembly to focus its work on general laws, the ban on exclusive or separate emoluments or privileges found in the declaration of rights had injected a democratic principle into the meaning of general laws. State v. Fowler, 193 N.C. 290, 292 (1927) (Adams, J.); Simonton v. Lanier, 71 N.C. 498, 503 (1874) (Bynum, J.) (tying "emoluments or privileges" and "perpetuities and monopolies" to "partial and class [i.e., special] legislation, the insidious and ever working foes of free and equal government"); *see also* John V. Orth, *Unconstitutional Emoluments: The Emoluments Clauses of the North Carolina Constitution*, 97 N.C. L. REV. 1727, 1737–38 (2019) (citing *Fowler*, 193 N.C. at 290, and State v. Felton, 239 N.C. 575 (1954) (Bobbitt, J.)).

assembly[60] from legislating on matters of general import.[61] Law reformers in North Carolina in the early twentieth century therefore sought a constitutional amendment to restrict the power of the general assembly to enact private, special, and local acts or resolutions concerning many matters relating to local government[62] and to encourage the general assembly to pass instead general laws on these subjects.[63] The matters the general assembly would have to treat by general legislation included manufacturing, labor, health, and trade, all of which might implicate more than the concerns of local government and which were destined to encourage the general assembly to encroach upon broad swathes of the common law.[64] The matters needing treatment with particularity, on the other hand, would be handled by various departments, inferior courts, and local officials.[65] And

60. To this day, North Carolina has a part-time general assembly. *See* David B. McLennan, *The Case for a Full-time Legislature in North Carolina*, NEWS & OBSERVER (Sept. 1, 2015), https://perma.cc/HAD7-KLM3 ("The main argument for a full-time legislature is that House and Senate members need more time to fully deliberate public policy issues.").

61. *But see Local Legislation*, *supra* note 14, at 349 n.39 ("[I]t is difficult to believe that the governor could have been too serious in his suggestion that a reduction in the local bill load would leave the General Assembly with more time to devote to public matters.").

62. *See generally* Joseph F. Steelman, *Origins of the Campaign for Constitutional Reform in North Carolina, 1912–1913*, 56 N.C. HIST. REV. 396, 396, 402 (1979) (describing efforts at state constitutional reform of the early twentieth century as "significant manifestations of the progressive movement" and including among them the effort in North Carolina to restrict private, special, and local legislation).

63. The constitutional amendments of 1917 would refer to general laws in four places. N.C. CONST. of 1868, art. II, § 29 (1917) ("The General Assembly shall have power to pass general laws regulating matters set out in this section."); *id.* art. IV, § 11 ("[A]nd the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county or district, when the judge assigned thereto by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same."); *id.* art. VIII, § 1 ("[T]he General Assembly shall provide by general laws for the chartering and organization of all corporations . . . ."); *id.* § 4 ("It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages . . . .").

64. *Local Legislation*, *supra* note 14, at 411 (observing that the 1917 amendments to the North Carolina Constitution "has encouraged the enactment of several comprehensive general laws"); *id.* at 400–01 (suggesting that the health and trade clauses of the 1917 amendment to article II of the North Carolina Constitution might encourage legislation on a broad array of topics, much as health, safety, and welfare legislation had burgeoned and federal Commerce Clause precedents had multiplied in the twentieth century); *cf.* Jessica Inscore, Comment, *The Amazon Argument: An Examination of* South Dakota v. Wayfair *and a Discussion of its Implications*, 41 CAMPBELL L. REV. 531, 532 (2019) (observing that Congress could reach nearly "any aspect of American life through the Commerce Clause").

65. Kitchin, *supra* note 59, at 3, 11 ("The General Assembly . . . should be relieved of all local and private matters. By general laws these matters should be handled by the various

the people acceded to this demand for change in the tenor of government, though it took two shots fired in rapid succession to convince them.[66] The amendment took effect in January 1917.[67]

---

departments, by the courts or by local bodies."). And by general laws the general assembly did in fact guide or maintain some influence over the departments, courts, and local bodies which would take care of local and private matters. For example, in displacing a portion of common law tort remedies by "The North Carolina Workmen's Compensation Act" of 1929, the general assembly provided the pertinent "department" with general principles as well as particular rules. It provided the presumptive general principle that "every employer and employee . . . shall be presumed to have accepted the provisions of this act," and the presumptive particular rule that "any injury to a minor while employed contrary to the laws of this State shall be compensable under this act the same and to the same extent as if said minor employee was an adult." Act of Jan. 9, 1929, ch. 120, §§ 4, 11, 1929 N.C. Public Laws 117, 120, 122. The constitutional amendments that turned Governor Kitchin's vision of a refocused general assembly into a reality, which went into effect in 1917, also gave the general assembly some influence over the makeup of the superior courts by empowering it to provide by general laws for the selection of special and emergency judges. Act of Jan. 6, 1915, ch. 99, sec.1(II), 1915 N.C. Pub. Laws 148, 149 (proposing additional language to article IV, section 11 of the state's 1868 constitution). The general assembly implemented this constitutional provision in the 1920s. Act of Jan. 5, 1921, ch. 125, 1921 N.C. Pub. Laws 383 (creating a pool of special or emergency judges from which the governor may appoint temporary replacement judges for sick, disabled, or otherwise unavailable superior court judges); Act of Mar. 9, 1927, ch. 206, 1927 N.C. Pub. Laws 553 (authorizing up to three special judges from the Eastern Judicial Division and up to three from the Western Judicial Division). Another of the amendments that went into effect in 1917 gave the general assembly some influence over local bodies by clarifying its power to organize cities, towns, and incorporated villages by general laws. Act of Jan. 6, 1915, ch. 99, sec.1(IV), 1915 N.C. Pub. Laws 148, 149.

66. Section 1 of An Act to Amend the Constitution of the State of North Carolina, chapter 99 of the North Carolina public laws of 1915, was ratified by the people on November 7, 1916 by a vote of 57,465 to 22,171 and went into effect January 10, 1917. NORTH CAROLINA GOVERNMENT, *supra* note 49, at 901. The bill had been introduced by Senator Henry Augustus Gilliam of Tarboro, who was a lawyer and a Democrat. JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA, SESSION 1915, at 5, 61 (1915); A MANUAL OF NORTH CAROLINA 302–03 (R.D.W. Connor ed., 1915). The 1915 act had been preceded by an almost identical act in 1913. Section 3 of An Act to Amend the Constitution of the State of North Carolina, chapter 81 of the North Carolina public laws of the extra session 1913, was rejected by the people on November 3, 1914 by a vote of 62,953 to 54,727. NORTH CAROLINA GOVERNMENT, *supra* note 49, at 898. This act matched the one finally ratified by the people in 1916, except it also prohibited the general assembly from passing private, special, or local acts or resolutions relating to game or hunting. The bill had been introduced by Representative Robert Ransom Williams of Buncombe, who was a lawyer and a Democrat. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA EXTRA SESSION 1913, at 3, 14 (1913); A MANUAL OF NORTH CAROLINA 279–80 (R.D.W. Connor ed., 1913).

67. NORTH CAROLINA GOVERNMENT, *supra* note 49, at 901.

B. Legislating More Democratically

1. Political History

The people of North Carolina accepted this 1917 amendment just two years after having rejected it. Trends in the political history of the nation and state in that era help to explain this singularity.

In national politics, the presidency shifted from William Howard Taft to Woodrow Wilson in the fall of 1912.[68] President Taft had sympathized more with the conservative wing of the Republican Party,[69] while President Wilson was a progressive Democrat who encouraged the legislative approval by a democratic Congress of massive executive centralization.[70]

---

68. *Wilson, Woodrow*, *in* 20 DICTIONARY OF AMERICAN BIOGRAPHY 352, 356 (Dumas Malone ed., 1936) ("In 1912, because of the personal quarrel between Roosevelt and Taft and the political split between Republican progressives and conservatives, the Democratic nomination was tantamount to election. On Nov. 5 Wilson was elected president with 435 electoral votes as against 88 for Roosevelt and 8 for Taft.").

69. President Taft also took a very lawyerly view of the United States Constitution that contrasted with the views of both his predecessor and his successor in office:

> But Wilson's views, and equally his practical success at bending Congress to his will early in his administration, were a challenge to Taft of similar importance to Roosevelt's assaults. Wilson's account of the presidency almost as a function of the individual president's personality . . . was, if unanswered, an implicit rebuke to Taft's quite different practice when in office. Wilson's dismissive attitude toward constitutional law . . . could only be an intellectual and political affront to a man like Taft . . . . [Wilson praised the Constitution] in terms that came close to divorcing the Constitution from anything that might resemble law. . . . For Taft, Wilson no less than Roosevelt had misdescribed the presidency in ways Taft believed pernicious . . . .

H. Jefferson Powell, *Introduction* to WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, at xx–xxi (H. Jefferson Powell ed., Duke Univ. Press 2002) (1924). Regarding Taft's general conception of law, one of his students at Yale Law School recounts that "'he brought clearly to the understanding of the student the fact that law is a matter of human experience and growth and not an abstract and purely scientific study.'" FREDERICK C. HICKS, WILLIAM HOWARD TAFT: YALE PROFESSOR OF LAW & NEW HAVEN CITIZEN: AN ACADEMIC INTERLUDE IN THE LIFE OF THE TWENTY-SEVENTH PRESIDENT OF THE UNITED STATES AND THE TENTH CHIEF JUSTICE OF THE SUPREME COURT 56 (1945) (quoting Letter from William M. Gager to Yale Law School Librarian Frederick C. Hicks, May 20, 1940).

70. See, for example, the Federal Reserve Act of Dec. 23, 1913, ch. 6, Pub. L. No. 63-43, 38 Stat. 251 (codified at 12 U.S.C. ch. 3); the Federal Trade Commission Act of Sept. 26, 1914, ch. 311, Pub. L. No. 63-203, 38 Stat. 717 (codified at 15 U.S.C. §§ 41–58); the Clayton Antitrust Act of Oct. 15, 1914, ch. 323, Pub. L. No. 63-212, 38 Stat. 730 (codified at 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53); the Federal Farm Loan Act of July 17, 1916, ch. 245, Pub. L. No. 64-158, 39 Stat. 360.

Politics in North Carolina shifted more slowly. In 1912, Chief Justice Walter Clark, a Progressive, lost his bid to the United States Senate, while conservative Locke Craig was elected governor of the state.[71] In the next general election, North Carolinians refused to amend their constitution to restrict further the use of private, special, and local acts or resolutions.[72] The amendment again came before the people in the fall of 1916, when North Carolinians overwhelmingly approved it.[73] That fall they also elected a less conservative governor, Thomas Bickett.[74] While himself a modest reformer, Governor Bickett foreshadowed the achievements of his immediate successors, who led North Carolina to a "nation-wide reputation as the most progressive state in the South."[75]

Soon this more progressive political focus would allow for the growth of executive agencies and commissions in North Carolina. For example, in the early 1920s, Governor Cameron Morrison was instrumental in leading the general assembly to enlarge the powers of the Highway Commission; to spend lavishly on institutions of higher learning, insane asylums, reformatories, sanatoriums, and schools for the deaf and blind; and to increase the budget for both the state Board of Health and the Department of Public Instruction.[76] In the mid-1920s, Governor Angus W. McLean overhauled the entire executive branch of state government and called for the formation of a state department of conservation and development.[77] O. Max Gardner, North Carolina's governor from 1929–1933, pushed through the Workmen's Compensation Act under which the Industrial Commission was established.[78] The progressive political focus even resulted in a limited role for the governor in the exercise of the general assembly's most

71. *Craig, Locke, in* 1 Dictionary of North Carolina Biography 452, 452–53 (William S. Powell ed., 1979).

72. *See* NORTH CAROLINA GOVERNMENT, *supra* note 49, at 898 (rejecting the proposed amendment by a narrow margin).

73. *Id.* at 901.

74. *Bickett, Thomas Walter, in* 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 149, 150 (William S. Powell ed., 1979).

75. *Id.*

76. *Morrision, Cameron, in* 4 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 328, 329 (William S. Powell ed., 1991) (noting various successful initiatives of Governor Morrison and noting as well his failed initiatives to establish a State Department of Commerce and Industry and to build a ship and port terminal).

77. *McLean, Angus Wilton, in* 4 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 168, 168–69 (William S. Powell ed., 1991).

78. *Gardner, Oliver Maxwell, in* 2 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 274, 279 (William S. Powell ed., 1986); *see* Act of Mar. 11, 1929, ch. 120, 1929 N.C. Pub. Laws 117, 136.

fundamental power, budgeting,[79] though Progressives in North Carolina remained deeply skeptical of executive power.[80]

2. Legislative Supervision

The shift in legislative focus to general statute did not result in a radical shift in governing power away from the general assembly. The 1917 amendment did not aim to enhance the governing power of the state's multi-headed executive,[81] nor to promote local self-government[82] or home rule.[83] What Progressives aimed to do was to kill what remained of old-world,

79. *McLean, Angus Wilton*, *supra* note 77 (stating that when McLean called for the establishment of an executive budget system under which the governor was *ex officio* director of the budget, the general assembly obliged).

80. *See, e.g.*, Walter Clark, Chief Justice of the Supreme Court of N.C., Response to Addresses (Jan. 4, 1919), *in* 176 N.C. 821, 824 ("North Carolina in this particular stands ahead of all her sister States, for it is the only one which so far has refused to confer the veto power upon the Governor."). Many decades would pass before the veto power was extended to the governor of North Carolina. Act of Mar. 8, 1995, ch. 5, 1995 N.C. Sess. Laws 6 (adopted Nov. 5, 1996).

81. N.C. CONST. of 1868, art. III, § 1 ("The Executive Department shall consist of a Governor, . . . a Lieutenant Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Works, a Superintendent of Public Instruction, and an Attorney General, who shall be elected for a term of four years by the qualified electors of the State . . . .").

82. *Local Legislation*, *supra* note 14, at 358 ("Third, the primary purpose of the amendments was to relieve the legislature of the burden of local bills. That the amendments would have the incidental effect of strengthening local self-government was recognized, but given little attention.").

83. *Id.* at 359–60 ("Finally, there was to be no constitutional home rule in North Carolina. While the legislature was to be prevented from enacting local laws on an individual basis, it was to accomplish the same ends by 'general laws.'"); *cf. id.* at 340 (noting that initiatives for home rule failed at the general assembly in 1949 and 1955).

aristocratic institutions[84] and to promote democracy[85] and scientific spirit in government.[86] Executive and local agents would enforce law on the ground

84. In this Article I use "aristocracy" to mean a "form[] of government . . . in which more than one, but not many, rule." *See* Aristotle, *Politics* bk. III, ch. 7, 1279a26–40, *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 2030 (B. Jowett trans., Jonathan Barnes ed., 1984). Thus, when speaking narrowly, I mean by aristocracy the rule by representatives of the eastern counties in the state's pre-1835 general assembly. *Cf.* Thomas P. Davis, *Summer Session: The Morganton Decisions, 1847–1861*, N.C. ST. B. J., Winter 2018, at 12 n.3, 15 (noting in passing the resentment of the burgeoning population of the western part of the state at the power in the general assembly of the established eastern counties during the early nineteenth century). Within this narrow meaning of aristocracy, I include the jurisdiction of the statutory supreme court which these aristocratic assemblymen established to forestall an early nineteenth-century surge of democratic spirit, as well as the court's science of the common law, which took its inspiration from the systematic-historical view of the common law described by the great Tory politician and jurist, Sir William Blackstone. *See School Days*, *supra* note 1, at 380–81 (recognizing the profound influence of Blackstone's work upon the development of the common law in North Carolina). When speaking broadly, I also include in the meaning of aristocracy the state's general assembly as it stood after the constitutional amendments of 1835, so long as that body continued to govern the state directly and personally by private, special, and local acts. *See Local Legislation*, *supra* note 14, at 422 (providing a chart which shows private legislation as the predominant activity of the general assembly through 1868). This method of government does not imply rule through offices inherited among a privileged class of people, yet it hesitates to share public responsibilities with the executive and judicial branches of government and deprives the people of radical and immediate change by exercise of the legislative power to pass general statutes. In other words, in the latter part of North Carolina's antebellum period, the general assembly's reliance upon private, special, and local act continued to support an aristocratic government even after its foundation had cracked.

85. In this Article, I do not use "democracy" simply to mean a form of "rule by the many," see Aristotle, *supra* note 84, at 1279a25–40, 1279b5–10 (using the term "democracy" to describe a form of vile, self-interested rule), nor to mean reprehensible mob rule, see THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 65–66 (Perry Miller ed., Cornell U. Press 1969) (1962) (pitting "law" against "the transitory and ravaging passions of the mob"), but rather I have in mind rule by the people insofar as they are led by self-anointed intellectual experts—i.e., by demagogues of the Progressive Era. During World War I, when progressivism flourished, English writer T.E. Hulme suggested from the trenches of France that "democracy" was the perfection toward which contemporary political liberalism took history to evolve naturally and inevitably. BRADLEY J. BIRZER, RUSSELL KIRK: AMERICAN CONSERVATIVE 229 (2015). Professor George Santayana, writing from England just after World War I, added that when contemporary political liberalism merges the notions of progress and evolution—which, as Hulme pointed out and Santayana agreed, means evolution toward democracy—then political liberalism ceases to be empirical in order to become transcendental, ceases to pursue liberty in order to pursue "a single spirit in all life," and ceases to respect what is sincerely desired by the individual in order to respect only what *all* individuals must really or ultimately desire, at least if properly guided, which turns out to be the desires of the *best people*—in other words, political liberalism then adopts what Santayana dubbed "the principle of the higher

just to the extent the general assembly allowed. General statutes would define governmental powers, control appointments to statutory offices,[87] and appropriate monies to agencies. And happily, University of North Carolina law professor Albert Coates[88] would found an Institute of Government[89] and establish a magazine, *Popular Government*, which would assure that unsophisticated government agents learn a uniform lesson on the statutory initiatives of Progressives.[90] Meanwhile, the judiciary, in pursuing justice in particular judgments, would construe and sometimes specify the grand statutory schemes deployed to displace the common law, but would no longer presume that the legislative product fit within an overarching and complete common law tradition which sat snugly beneath a sphere of natural law, equity, and morality, much less would it regain the classical common law[91] duty to declare which living customs were

---

snobbery." GEORGE SANTAYANA, SOLILOQUIES IN ENGLAND AND LATER SOLILOQUIES 181–83 (1922) (musing on liberalism in a chapter entitled, "The Irony of Liberalism"); *see also* 1 FREDERIC WILLIAM MAITLAND, *A Historical Sketch of Liberty and Equality as Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge*, *in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 1–116 (H.A.L. Fisher ed., 1911) (contrasting the ideals of liberty and equality). Thus, democracy after the nineteenth century, insofar as it is the natural goal of political liberalism, may morph into the notion of rule by the philanthropic, scientific expert and may then easily edge into bureaucracy.

86. *See infra* notes 134–143 and accompanying text.

87. *See* discussion *infra* Section II.D.

88. John Sanders, *Albert Coates: Institution Builder*, 67 N.C. L. REV. 747, 747 (1989) (describing University of North Carolina Law Professor Albert Coates, who joined the faculty in 1923 and founded the state's Institute of Government in 1931, as coming "to maturity in the hopeful years of the Progressive Era of American politics, when the conviction was widely shared that the public institutions of the nation were perfectible, and that perfecting them was worthy of the best efforts of the best citizens.").

89. HOWARD E. COVINGTON, JR., THE GOOD GOVERNMENT MAN: ALBERT COATES AND THE EARLY YEARS OF THE INSTITUTE OF GOVERNMENT 115, 120 (2010). *See generally* ALBERT COATES, THE STORY OF THE INSTITUTE OF GOVERNMENT, THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (1981) (describing the founding of the Institute of Government by Coates).

90. COATES, *supra* note 89, at 24 (explaining that a "monthly journal" would report the results of governmental studies, interpret successive legislative changes, provide updates to governmental guidebooks, and bring current improvements in government and its administration to the immediate attention of officials); *id.* at 53 ("In 1934, we turned *Popular Government* into a monthly magazine . . . going to eighty-five hundred government officials operating in the territorial limits of North Carolina.").

91. Gerald J. Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 590 (Jules Coleman & Scott Shapiro eds., 2002) ("Common law was '*reasonable usage*' observed and confirmed in a public process of reasoning in which practical problems of daily social life were addressed. 'Custom' and 'reason' were the twin foci of this conception of law." (citation omitted)).

enforceable as law. The legislative branch of government—and this latest spur to legislative action was the key to the 1917 amendment—would spend less time on the minutiae of governing by private, special, and local act and more time on social engineering by general statute.[92] From this loftier height the general assembly might not govern with particularity, but would nonetheless supervise government and justice in North Carolina.[93]

C. Judging More Democratically

Achieving legislative supervision of government and justice by general statutory schemes was not an accomplished fact at the approval of the 1917 amendment in North Carolina. Meantime, while dragging the state into the light, the Progressives had to harness the other two branches of government. The judiciary, for instance, was an institution that had construed acts of the general assembly to conform to common law precedents—precedents which continued to determine the bulk of private rights. And it was an institution that had asserted the power to void legislation for lack of conformity to the state constitution. To some extent, then, the judiciary had supervised the general assembly, so the question of the times was how to invert those roles.

---

92. Locke Craig, *Biennial Message to the General Assembly, Session 1917*, *in* PUBLIC LETTERS AND PAPERS OF LOCKE CRAIG, GOVERNOR OF NORTH CAROLINA, 1913–1917, at 43–44 (May F. Jones ed., 1916) (noting that by recently passed constitutional amendment, the general assembly was "relieved of a vast amount of local legislation, and [would] have time for the consideration of problems of general importance").

93. In a speech during the Progressive Era advocating the incorporation of the North Carolina State Bar, President Thomas Davis of the North Carolina Bar Association objected to a similar view of legislative supervision in democracy, quoting its definition by professor of political science and librarian of foreign law, Walter Fairleigh Dodd:

> "To make plain the meaning, it may be well to define closely what democracy is. Democracy is equality, economic, political and even social in large measure. Democracy is much the same thing as Christianity, as it was in the beginning, a social organization in which all men and women have their proportionate voice in the determination of public policy, in which all have free opportunity to earn a livelihood, share according to capacity in the common prosperity, and bear their just proportions of the burdens of war or other disaster. *In such a society government flows from the decisions of the majority whether those decisions are wise or not and administration is not hindered or obstructed by executives or judiciaries*."

Thomas W. Davis, The President's Address: The Bar, Its Duties and Burdens, *in* PROCEEDINGS OF THE TWENTY-THIRD ANNUAL SESSION OF THE NORTH CAROLINA BAR ASSOCIATION HELD AT SELWYN HOTEL, CHARLOTTE, NORTH CAROLINA, JULY 5, 6, AND 7, 1921, at 6, 11 (H.M. London ed., 1921).

1. Precedents

According to Progressive Justice Walter Clark, the principles and rules of the common law were reactionary[94] and stood in the way of popular government.[95] To his great dismay, treatises on the English common law by Sir Edward Coke and by Sir William Blackstone had had a substantial influence on the state's jurisprudence during the nineteenth century.[96] By the mid-1890s, though, justices newly-elected to the supreme court[97] had joined Clark in his disgruntlement with the past and in his up-to-date views on the role of the court in society and government:

> The day of the idealistic judge who concurred with Hooker that law is the perfection of reason, her seat the bosom of God, was soon to end; the time for testing and trying out all things was come. As science had been changed from mere ratiocination to experimentation, so *law, cut loose from precedent*, should adjust itself to human needs from day to day. Whatever is, is wrong, became the slogan of the radical members of the [state] Supreme Court, now divided 2-2 on disputed social and political issues,

94. Clark's sentiment echoed the diatribes of the pro-democracy codifiers of the 1820s. *See, e.g.*, MILLER, *supra* note 85, at 119–34 (containing an excerpt of *An Anniversary Discourse*, delivered by William Sampson in New York in 1823, which contrasted our "law of a free people" with the English common law). Clark's intellectual and political interests demonstrate just how directly Progressives descend from early nineteenth-century codifiers. As a Progressive candidate for the United States Senate before World War I, Clark attacked the common law as vehemently as William Sampson had attacked it in the 1820s, *see infra* note 95, while in the 1890s Clark had maintained a correspondence with the elderly codifier, David Dudley Field, II, *see, e.g.*, Letter from David Dudley Field, II, to Justice Walter Clark, January 21, 1892, *in* 4 SELECTED DOCUMENTS RELATING TO LAW REFORM IN NORTH CAROLINA DURING THE 19TH CENTURY (Thomas P. Davis & J. Barrett Fish eds.) (unpublished draft on file at the North Carolina Supreme Court Library) ("It would be a great pleasure to see all the codes prepared for New York adopted in North Carolina. You seem to be the very man to take the lead as law-reformer in your State.").

95. Walter Clark, *Coke, Blackstone, and the Common Law*, 24 CASE & COMMENT 861, 872 (1918) ("But it is largely due to the influence of Coke and Blackstone, who were [the two pillars of the common law tradition and] intense Reactionaries, that the Bench and Bar in this country have not always been receptive of those progressive ideas which are necessary to the development of popular government.").

96. William J. Adams, *Evolution of Law in North Carolina*, 2 N.C. L. REV. 133, 143 (1924) ("To the common law the [newly-established] Supreme Court [of North Carolina] generally adhered . . . ."); *School Days*, *supra* note 1, at 397, 401 (providing illustrations that show works by Coke and Blackstone as contained in the supreme court's list of required readings for applicants for law license in 1849, but as absent from the list in 1895).

97. *School Days*, *supra* note 1, at 399 ("During the decade of Fusion politics in North Carolina, a good number of non-Democratic judges sat on the supreme court, including David M. Furches, William T. Faircloth, Walter A. Montgomery, Robert M. Douglas, and Charles A. Cook, while Democrat Walter Clark, the great disdainer of the English common law, retained his seat.").

> putting it up to a fifth judge to break the tie. Consciously or unconsciously, the doctrine of William James: "Try it out and see if it will work"—the "Monte Carlo doctrine"—was supplanting idealistic philosophy.[98]

This new-fangled jurisprudence would clear the way for scientific legislation to displace the "barbarous" precedents of the common law.[99] And while the general assembly took its first steps in establishing the administrative state, enlightened judges and legislators advanced the Progressive cause by engaging in a three-fold attack on the state's common law precedents.[100] First, the general assembly encouraged the appellate judges to write full opinions only when necessary.[101] Second, the "Great Dissenters" of the North Carolina Supreme Court emerged during the Progressive Era,[102] weakening unpalatable precedents and perhaps sowing

---

98. Robert Watson Winston, *Chief Justice Shepherd and His Times*, 3 N.C. L. REV. 1, 10 (1925) (emphasis added) (describing the state supreme court during the era of fusion politics in North Carolina).

99. Clark, *supra* note 95, at 870, 872 (describing the common law as a product of barbarous times).

100. *See* Adams, *supra* note 96, at 143 (describing the rigid adherence to the common law of the antebellum supreme court as having caused lapses in judgment by the court in some appeals).

101. Act of Mar. 6, 1893, ch. 379, §§ 4-5, 1893 N.C. Pub. Laws 383 (declaring that no requirement exists for the judges of the supreme court to write their opinions in full, and funding once again the position of reporter of opinions for the supreme court). Chief Justice Walter Clark advertised this early Progressive act shortly after the constitutional amendment of 1917 was approved by the people. Walter Clark, *History of the Supreme Court Reports of North Carolina and of the Annotated Reprints* (mentioning this act in this historical essay in the following reprint volumes of the *North Carolina Reports*: (a) 52 N.C. xxi, xxiv (3d prtg. 1920) (dating this history as Aug. 1, 1920), (b) 104 N.C. 37, 40 (3d prtg. 1920) (dating this history as Dec. 1, 1920), (c) 148 N.C. xxvii, xxx (2d prtg. 1921) (dating this history as Dec. 1, 1920), (d) 2 N.C. 11, 14 (4th prtg. 1921) (dating this history as Sept. 1, 1921), (e) 133 N.C. 38, 41 (3d prtg. 1921) (dating this history as Sept. 1, 1921), and (f) 22 N.C. 9, 12 (4th prtg. 1922) (dating this history as May 1, 1922)) ("The General Assembly had [passed an act] providing that 'The justices shall not be required to write their opinions in full, except in cases in which they deem it necessary.' C.S., 1416.").

102. James L. Hunt, *Dissent on the North Carolina Supreme Court*, 2 JURIDICUS 31, 33 (1997) (picking out the boom era of dissents in North Carolina as 1890–1923). No judge weakened precedent more thoroughly than did Chief Justice Walter Clark, who signed over 400 dissents during his thirty-five-year tenure on the court. *Id.* Clark dissented dramatically in State Prison of N.C. v. Day, 124 N.C. 362, 378 (1899) (Montgomery, J.), one of a series of cases labelled by Justice Douglas as the "office-holding cases." White v. Ayer, 126 N.C. 570, 585 (1900) (Douglas, J., concurring). Justice Montgomery noted that it was Justice Clark who had raised the first dissenting voice in this line of cases:

> And that proposition [the doctrine of Hoke v. Henderson, 15 N.C. (4 Dev.) 1 (1833) (Ruffin, C.J.)] was not doubted by this court until sixty-six years had elapsed, when the dissenting opinion in *Prison v. Day*, 124 N.C. 362 [(1899) (Montgomery, J.)], was filed by Justice Clark, the present Chief Justice.

seeds for one day overruling them. And third, the appellate judges of the Progressive Era overruled North Carolina's common law precedents whenever possible,[103] including the overruling of *Hoke v. Henderson*, the state's most important antebellum precedent of the nineteenth century.[104]

2. Judicial Review

Supervision of the state judiciary during the Progressive Era also proceeded by repeated attack on the doctrine of judicial review. In a handful of speeches both before and after passage of the 1917 amendment, Chief Justice Walter Clark condemned judicial review as "judicial veto," pointing out that neither the United States Constitution nor any state constitution authorized it.[105] The doctrine, he reported, had gained its foothold by state[106] and federal[107] precedent, both amounting in Clark's view to judicial

---

Mial v. Ellington, 134 N.C. 131, 168–69 (1903) (Montgomery, J., dissenting).

103. More than half of all overrulings occurred during Clark's long tenure on the court. W.R. Allen, *A Table of Cases Overruled in Whole or in Part, or Modified, or Reversed by the Supreme Court of the United States,* 171 N.C. 857 (1915) (showing that 87 of the court's 167 overrulings by the Supreme Court of North Carolina occurred after Clark joined the court in 1889); *c.f.* Robert W. Winston, *A Century of Law in North Carolina*, 176 N.C. 763, 788 (1919) (stating that the Supreme Court of North Carolina had overruled itself 170 times).

104. Hoke v. Henderson, 15 N.C. (4 Dev.) 1 (1833) (Ruffin, C.J.), *overruled by* Mial v. Ellington, 134 N.C. 131, 168 (1903) (Connor, J.). For discussion of the overruling of *Hoke*, *see infra* Section II.D.

105. Hon. Walter Clark, Address by Chief Justice Walter Clark Before the University Law School, Chapel Hill, 13 (Jan. 25, 1924) (on file with *Campbell Law Review*) [hereinafter Address at Chapel Hill] ("The Constitution gives the President authority to veto an act of Congress . . . , which has often happened; but there is not a line in the Constitution which authorizes, either directly or inferentially, the court to veto an act of Congress, and neither in England nor in any other country has such power been recognized to exist in any court."); Hon. Walter Clark, Government by Judges, Address by Chief Justice Walter Clark of the North Carolina Supreme Court at Cooper Union, New York City (Jan. 27, 1914) (on file with *Campbell Law Review*) [hereinafter Government by Judges] ("*There is not a line in the Constitution* which authorises the assumption of this unlimited power by the Court. Nor is there a line in any State Constitution which so authorises it."). Clark supplemented this textualist argument in support of this Progressive plank with a condemnation of the reliance upon the due process and equal protection clauses of the Constitution by supporters of Conservative jurisprudence. *See infra* note 109.

106. Government by Judges, *supra* note 105, at 11 ("[S]hortly before the [Federal] Convention met the courts of four states, either because avid of power or because they thought themselves a substitute for the authority which before the Revolution had been exercised by the Privy Council in England of refusing approval to the statutes of our Provinces, had asserted such authority.").

107. *See, e.g.*, Clark, *supra* note 80, at 824 (noting that the judicial veto "is not conferred by the Constitution, either Federal or State, but is an assumption of authority by the ruling of the Court in its own favor in *Marbury v. Madison* in 1803").

usurpation of the power to govern.[108] After all, it was judicial review that had blocked Progressive legislation in the economic sphere.[109] Witness *Lochner*.[110] Progressives like the Chief Justice aimed to sidestep this unjustified judicial interference in policy decisions. Given that long acquiescence had left the doctrine of judicial review nearly invulnerable,[111] perhaps the people might limit its exercise by formal restriction[112] or the judiciary might heed a stronger presumption of constitutionality of

108. Government by Judges, *supra* note 105, at 6 (noting that the assumption of judicial review "has practically made the courts the dominant power in every State and in the Union."); Address at Wrightsville Beach, *supra* note 50, at 60 ("It is impossible that we should continue to permit 3 judges at Raleigh or 5 judges at Washington to set up their views in opposition to the Executive, to the legislature and the public opinion that is behind the latter and by a majority of one vote negative the public will.").

109. Government by Judges, *supra* note 105, at 6–7 ("Whenever any progressive statute has not been in accord with the economic views entertained by the courts, it has always been in their power, which has been very generally exercised, to declare that the statute in question was unconstitutional because it was not 'due process of law,' or 'deprives of the equal protection of the law,' and there are other phrases which the judges use at will. . . . These phrases are very elastic and mean just whatever the court passing upon the statute thinks most effective for its destruction. . . . A power so great and so irreviewable, and therefore so irresponsible, has become the mainstay of the antiprogressive element."). Clark supplemented this condemnation of the reliance upon the due process and equal protection clauses of the Constitution by supporters of Conservative jurisprudence with a textualist argument against judicial review. *See supra* note 105.

110. Lochner v. New York, 198 U.S. 45 (1905) (cited in Address at Chapel Hill, *supra* note 105, at 14 and in Government by Judges, *supra* note 105, at 13).

111. *See* Government by Judges, *supra* note 105, at 17.

112. *Id.* at 21 ("[Ohio now provides in its Constitution] that the courts shall hold no statute unconstitutional if more than one judge dissents."); WALTER CLARK ET AL., REPORT OF THE COMMISSION ON LAW REFORM AND PROCEDURE 12 (1917?) (on file with *Campbell Law Review*) ("In connection with the court system, Maj. W. A. Graham and Chief Justice Clark recommend for the consideration of the public and the General Assembly the submission of a constitutional amendment as follows: 'No act of the Legislature shall be set aside as unconstitutional except by the unanimous opinion of the Supreme Court.' The people themselves, as the only sovereign power, and not a bare majority of five lawyers should reverse the action of the representatives of the people in the General Assembly."). These suggestions by Chief Justice Clark were recycled from the era of pro-democracy codifiers. Honorable Walter F. George, U.S. Senator from Ga., Address: General Welfare—The Government Aim (May 1930), *in* PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, HELD AT THE CAROLINA HOTEL, PINEHURST, N.C., MAY 1, 2, 3, 1930, at 36, 44 (H.M. London ed. 1930) ("It also has been suggested, since 1823, that the Supreme Court be denied the power to declare any act of state or national legislature unconstitutional unless by unanimous vote or by unanimous vote save one or by total vote of the Court save two or three . . . .").

legislation.[113] Or perhaps some state constitutional texts might be read as not declaring law for the courts to apply, contra *Bayard v. Singleton,*[114] but rather as offering fundamental political ideals[115] for the members of the general assembly to apply, subject to review by the people in convention or by election.[116]

---

113. Government by Judges, *supra* note 105, at 21 ("[T]he United States Supreme Court has always held that no statute should be declared unconstitutional unless it was so 'beyond all reasonable doubt.' Ogden v. Saunders, 12 Wheat., 269 [1827]."); Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 8–9 (1833) (Ruffin, C.J.), *overruled by* Mial v. Ellington, 134 N.C. 131, 168 (1903) (Connor, J.) ("Nor ought it to be, nor is it ever exercised, unless upon such deliberation, the repugnance between the legislative and constitutional enactments be clear to the court, and susceptible of being clearly understood by all. In every other case, there is a presumption in favor of the general legislative authority, recognized in the constitution. The court distrusts its own conclusions of an apparent conflict between the provisions of the statute and the constitution, because the former has the sanctions of the intelligence of the legislators, equal to the apprehension of the meaning of the constitution, of their equal and sincere desire, from motives of patriotism and conscientious duty, to uphold that instrument in its true sense; and of the present and temporary inclinations, at least, of a majority of the citizens, which must be supposed to be known to their representatives, and to be expressed by them.").

114. Bayard v. Singleton, 1 N.C. (Mart.) 5, 7 (1787) (*seriatim*) ("[T]he judicial power was bound to take notice of [the Constitution] as much as of any other law whatever . . . ."); *c.f.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–78 (1803) (asserting that the federal constitution is paramount law and that it is the province of the federal judiciary to say what the law is).

115. *See, e.g.*, Kornegay v. City of Goldsboro, 180 N.C. 441, 448 (1920) (Allen, J.) (holding that the general assembly is morally obliged to confine certain of its acts to general law under article 8, section 4 of the North Carolina Constitution of 1868, as amended effective 1917). The use of "ought" in North Carolina's original declaration of rights might also serve as a precedent for reading North Carolina's 1776 constitution as imposing moral obligations. *See generally Reading* Smith v. Campbell, *supra* note 6 (discussing at various places the ought/shall dichotomy); *see also, e.g.*, N.C. CONST. of 1776, art. I, § 6 (imitating the 1689 English Bill of Rights—which had declared "That election of members of Parliament ought to be free"—in providing "That Elections of members, to serve as Representatives in the General Assembly, ought to be free."); *id.* § 5 (imitating the 1689 English Bill of Rights—which had condemned the suspension of laws by King James II, *see An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, *supra* note 26—in providing "That all powers of suspending Laws, or the Execution of Laws, by any Authority, without Consent of the Representatives of the People, is injurious to their Rights, and ought not to be exercised"). *But see* Smith v. Campbell, 10 N.C. (3 Hawks) 590, 591, 598 (1825) (Henderson, J.) (adopting the opinion of counsel that in the declaration of rights, "*ought* was used as synonimous [sic] with *shall*," and thus language which might be read to allow for discretion in the acts of the general assembly was rather "a positive command requiring unconditional obedience").

116. Given the purpose of the 1917 amendment to the North Carolina Constitution (i.e., to focus the general assembly on adopting general statutes in displacement of the common law) and the Progressive disdain for judicial review (as discussed in this Part of this Article),

D. Executing More Democratically

A recalcitrant executive branch of government might also frustrate the legislative reshaping of society to the most current enlightened conditions. Progressives wished for the state to participate in the new learning of the social sciences as well as in the contemporary re-envisioning of the physical sciences. In fact, Chief Justice Walter Clark thought that legislators served short terms in order to assure just such participation.[117] But the passage of enlightened general statutes by Progressive legislators in displacement of barbarous common law would do little good unless agents of the government administered the ever-changing and ever-burgeoning legislative schemes whole-heartedly and in good faith. In order to succeed in their efforts at law reform, then, Progressive legislators serving short terms would need to control public officers appointed to statutory offices for long terms or for life.

Prior to Walter Clark becoming chief justice in North Carolina, the general assembly could not assure the allegiance of government agents. Decades-old precedent had established that a state statutory officer appointed for life had an estate in his office which the general assembly could not transfer to another person without violating the law of the land.[118]

---

it is a nice question whether the voidness provision of the 1917 amendment was meant to be enforced by the courts or by the general assembly. The provision states that "[a]ny local, private or special act or resolution passed in violation of the provisions of this section shall be void." N.C. CONST. of 1868, art. II, § 29 (1917). Might the voidness provision mean merely to guide the general assembly in its consideration of bills? On this reading, the provision would not justify the judiciary in voiding any act, but rather would demand that legislators consider on their oaths whether the passage of certain bills, for example, local bills relating to health to some small degree, would violate the constitution. The general assembly might struggle in interpreting this broad expression, "relating to health," as any court would, and so it might reconsider its judgment in future sessions. If a local law primarily were to relate to health, though, the people might exercise a veto, so to speak, via frequent elections. *See id.* art. I, § 9; *see also* Address at Wrightsville Beach, *supra* note 50, at 60 ("If a legislature should not observe the Constitution in the enactment of statutes the supervision lies with the people in electing another legislature or congress [i.e., not with the judiciary]."). On the other hand, Chief Justice Clark would have judicially reviewed a statute for compliance with article 8, section 4 of the state's 1868 constitution, which declared it a duty that the general assembly provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation and other related powers, even where the majority had held that that constitutional provision described only a moral obligation of the general assembly. *Kornegay*, 180 N.C. at 455 (Clark, J., dissenting).

117. Mial v. Ellington, 134 N.C. 131, 162, 164 (1903) (Clark, C.J., concurring) ("The Legislature shapes the administrative and political policy of the State, and its members are elected at short intervals for the purpose of conforming the direction of public affairs to the changing sentiment of the people and the progress of events.").

118. *Hoke*, 15 N.C. (4 Dev.) at 15–16 (citing *Bayard*, 1 N.C (Mart.) at 5).

Subsequent applications of this doctrine, combined with a judicial mandate to pay tenured statutory officers, led Chief Justice Clark to announce that the judiciary, with its unbending adherence to outmoded precedent and its less-than-deferential review of legislation, threatened to destroy the legislative power to govern.[119]

Insofar as aristocratic antebellum precedent protected executive officers from legislative change, then, Progressives had to attack that precedent. Two obvious modes of attack were now foreclosed by the state constitution. The general assembly no longer could threaten to eliminate the court[120] because the state constitution of 1868 had placed the supreme court on a constitutional basis.[121] And the general assembly no longer could engage in court packing[122] because the state constitution of 1868 set with precision the number of justices comprising the court.[123]

---

119. White v. Ayer, 126 N.C. 570, 607 (1900) (Clark, J., dissenting) ("If to this indestructibility of a legislative office, for the term of the incumbent, however long, the Court has the power, now asserted for the first time in the history of jurisprudence, to coerce by its writ payment by the State of the old officer, legislative power over government, which is most largely exercised by the shaping of public agencies, is at an end."); *Mial*, 134 N.C. at 164 (Clark, C.J., concurring) ("The Legislature shapes the administrative and political policy of the State. . . . This policy must be put into operation through officers, who are simply agents of the government. If a legislature, elected for two years, can put in its agents for life or long terms, and keep them in by the court's holding that office is a contract and incumbents are irremovable, such temporary legislature can dominate the people for any period it may see fit to fix for the duration of offices filled or created by it.").

120. Threats to either prostrate or eliminate North Carolina's statutory supreme court had occurred in the 1820s and 1830s, though the selection of Thomas Ruffin as chief justice and the election of William Gaston as judge, as well as the court's opinion in Hoke v. Henderson, 15 N.C. (4 Dev.) 1, dampened these attacks. *See* Pratt, *supra* note 8, at 147–59.

121. N.C. CONST. of 1868, art. IV, § 2 (1901) ("The judicial power of the State shall be vested in a Court for the Trial of Impeachments, a Supreme Court, Superior Courts, Courts of Justices of the Peace, and such other Courts inferior to the Supreme Court as may be established by law.").

122. During England's ascent to general statute in the nineteenth century, see *supra* text accompanying notes 19–36, the English King had threatened to pack the House of Lords when it considered blocking the democratic Reform Bill in 1832. MAITLAND, *supra* note 19, at 348 (observing that the threat of eighty new peerages coerced the House of Lords into passing the Reform Bill of 1832). Similarly, Prime Minister Herbert Asquith had advised King George V to reform the House of Lords by adding liberal peers if the Parliament Bill of 1911 were to fail. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 94–95 (1995). Decades later in America, President Franklin D. Roosevelt would famously threaten to pack the United States Supreme Court when conservative Justices blocked Congress' Progressive "New Deal" legislation. *Id.*

123. N.C. CONST. of 1868, art. IV, § 6 (1901) ("The Supreme Court shall consist of a Chief Justice and four Associate Justices."). Under the constitution of 1776, Governor Reid

The only feasible method of attacking the antebellum precedent was to impeach the justices,[124] and this is what the North Carolina House of Representatives did in response to the state supreme court's office-holding decisions. The democratic general assembly of 1901 impeached Chief Justice David Furches and Associate Justice Robert M. Douglas, both Republicans, for majority and concurring opinions filed in an appeal which let stand the issuance of a mandamus against the state auditor and treasurer.[125] Article V of the articles of impeachment asserted that the judges had violated the state constitution and had brought contempt upon the state legislature by their numerous decisions in the office-holding

had suggested packing the state's statutory supreme court to address the too-frequent overruling of trial judges in North Carolina. David Reid, Governor, Message to Legislature of North Carolina (Nov. 20, 1854), *in* 2 THE PAPERS OF DAVID SETTLE REID 1853–1913, at 81, 90 (Lindley S. Butler ed., 1997). The judges of the supreme court at that time were Chief Justice Frederick Nash, Judge Richmond Pearson, and Judge William Battle, three of the great professor-judges of the antebellum era in North Carolina. *See School Days*, *supra* note 1, at 392–93.

124. Perhaps the general assembly might have attacked one of the court's four offices—clerk, marshal, librarian, or reporter—in anger at the court's refusal to distinguish or to overrule *Hoke*. Attack upon the court's offices was not unprecedented. Shortly after power had shifted to the Democrats during Reconstruction, the general assembly had eliminated the statutory power of the constitutionally grounded supreme court to appoint a reporter, shifting that office's duties to the attorney general. Act of Feb. 8, 1872, ch. 112, 1871-'72 N.C. Pub. Laws 159. The general assembly restored that power of appointment to the court in 1894. Act of March 6, 1893, ch. 379, §§ 4-5, 1893 N.C. Pub. Laws 383. Not only did the court regain and then maintain control over its reporter during this fusion era of state politics, but also an associate justice of the court, Justice Walter Clark, gained editorial control of the project to reprint the exhausted volumes of the *North Carolina Reports* in the latter part of the 1890s. Walter Clark, *History of the Supreme Court Reports of North Carolina and of the Annotated Reprints*, 2 N.C. 11, 14 (4th prtg. 1921) (describing the delegation of editorial control of the reprint project to Justice Clark by the secretary of state). Clark brought to this project a determination to preserve the decisions of the court and the opinions of its judges but to eliminate many of the arguments of the attorneys who had appeared before it, *id.* at 12 (noting that Clark "reduce[d] the expense of the work . . . by condensing prolix statements [of the facts of the cases] and omitting briefs of counsel."), thereby recasting the work of his predecessors more paternalistically and less as a collaborative effort of bench and bar to discover common law principle from the reasonable resolution of particular legal issues brought to the court by appeal.

125. White v. Ayer, 126 N.C. 570, 584 (1900) (Furches, J.) (letting stand a writ of mandamus issued by the trial court to enforce the office-holding case of White v. Hill, 125 N.C. 194 (1899) (Faircloth, C.J.) (upholding the doctrine of Hoke v. Henderson, 15 N.C. (4 Dev.) 1 (1833) (Ruffin, C.J.))).

cases.[126] Neither Douglas nor Furches were convicted by the Senate.[127] The third justice in the majority of these cases, former Chief Justice William T. Faircloth, had died before articles of impeachment against him had passed the House.[128] Within two years of these impeachments Democrats had taken the places of two Republican justices,[129] progressive Democrat Walter Clark had been elected chief justice, and the court had overruled the antebellum precedent which had blocked the general assembly's power to appoint the executive agents it currently preferred.[130]

With statutory executive agents now under the control of the legislature and with judges on the state supreme court subjecting precedent to attack, the general assembly could make better progress in the science of legislation. New initiatives in the codification of the public laws would complete this last stage in the ascent to general statute.

III. DEMOCRACY NATIONALLY AND INTERNATIONALLY

Law reform did not end with North Carolina's adoption during the Progressive Era of constitutional restrictions on government by private, special, and local acts or resolutions. Once victory in that battle became irrepealable in 1917, law reformers mounted an even more fundamental attack on traditional state government by re-invigorating the movement for common law codification that the Reconstruction constitution had introduced in the state. Since nineteenth-century efforts to displace the common law had failed both in North Carolina[131] and in other states,[132] law

126. TRIAL OF DAVID M. FURCHES, NOW CHIEF JUSTICE, AND FORMERLY ASSOCIATE JUSTICE, AND ROBERT M. DOUGLAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS, at xliii–xlv (1901).

127. *Furches, David Moffatt*, *in* 2 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 254–55 (William S. Powell ed., 1986).

128. *Fairthcloth, William Turner*, *in* 2 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 175, 176 (William S. Powell ed., 1986).

129. Conservative Democrat Henry G. Connor was elected to Republican C. A. Cook's seat and Democrat Platt D. Walker was elected to the seat vacated by Walter Clark when Clark was elected to Republican Furches' open seat as chief justice. The Populist, W.A. Montgomery, remained on the bench, as did un-convicted Republican Robert M. Douglas. *See* Justice Harry C. Martin, *Members of the Supreme Court of North Carolina—1819–1989*, 323 N.C. 732, 735 (1989).

130. Mial v. Ellington, 134 N.C. 131, 164 (1903) (Connor, J.) (overruling Hoke v. Henderson, 15 N.C. (4 Dev.) 1 (1833) (Ruffin, C.J.)).

131. *See supra* note 49 and accompanying text.

132. *See, e.g.*, Letter from David Dudley Field, II, to Justice Walter Clark, *supra* note 94 ("The Civil Code and Code of Evidence I send you. They have passed both Houses [in New

reformers initiated an attack on the common law at the national level. That attack was dual pronged,[133] one front beginning its advance in the 1890s and the other front advancing shortly after approval of North Carolina's constitutional amendments of 1917.

Beginning in the 1890s, academic and legal bigwigs led the state's aristocratic-leaning general assembly away from its personal governance of the Old North State by coaxing it into adopting myriad model acts[134] prepared by experts.[135] Adoption of model acts would not infringe upon the individuality of states, said the promoters of uniformity, as the acts would deal with national issues, such as "purity of morals, the preservation of the family, [and] furtherance of justice."[136] But even if local representatives

York] more than once, but failed for want of the Governor's signature, having been generally passed in the last days of the Session. . . . It would be a great pleasure to see all the codes prepared for New York adopted in North Carolina.").

133. The two prongs of the attack were advanced by the National Conference on Uniform State Laws and the American Law Institute. Lawrence Schlam, *Federalism and the Question of Uniform Laws: The Case of Third Party Custody "Standing" Provisions*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 157, 182–83 (2012) ("The 'Uniform Law Movement' began in the latter part of the nineteenth century when prominent leaders of the legal profession argued that there was confusion or 'uncertainty and complexity' in the common law among the states. Many academics took the view that there was a need for a national common law. This growing sense, at least in some quarters, that significant problems resulted from inter-state doctrinal inconsistencies resulted in the formation of the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1892, and the American Law Institute (ALI) in 1923." (footnotes omitted)); Richard E. Coulson, *Private Law Codes and the Uniform Commercial Code—Comments on History*, 27 OKLA. CITY U. L. REV. 615, 626 (2002) (explaining that David Dudley Field turned his attention to the newly formed American Bar Association shortly after abandoning hope of getting a codification of private law—a "civil code"—passed into law in New York, and tying Field's presidency of the A.B.A. in 1889 to "a committee on Uniform Laws, which eventually evolved into the Uniform Laws movement.").

134. The Uniform Law Commission has drafted many of the model acts intended for use by the various state legislatures. Before the end of World War II, North Carolina had adopted twenty-five model acts. *See infra* Appendix.

135. REPORT OF PROCEEDINGS OF THE FIRST CONFERENCE OF THE STATE BOARD OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LAW IN THE UNITED STATES 3 (1892), *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS, 1892–1901 (Boston, Addison C. Getchell 1892) [hereinafter NCCUSL] (describing New York's 1889 statute establishing the first commission on uniform laws as "creating an expert commission of three to consider this subject and advise with similar commissions that might be appointed in other States"); GRANT GILMORE, THE AGES OF AMERICAN LAW 70–71 (1977) (stating that it was the American Bar Association who sponsored the National Conference of Commissioners on Uniform State Laws in the 1890s, not a pack of "wild-eyed revolutionaries").

136. State Boards of Commissioners for Promoting Uniformity of Legislation in the United States, Report of the Ninth National Conference Held at Buffalo, N.Y., August 25,

might have identified exactly those issues with what makes for the individuality of a state, how could faithful part-time legislators resist the attack? After all, North Carolina boasted no staff of professional bill drafters, no masters of the supposed science of legislation.[137] Was a farmer-representative[138] even qualified to legislate when other elected officials, say Woodrow Wilson, boasted a resume that included the presidency of an Ivy League college[139] and when geniuses, say John Dewey,[140] Max Weber,[141]

26, and 28, 1899, app. at. 20, 23–24, *in* NCCUSL, *supra* note 135 ("The first objection raised is the fear that a systematic movement in the direction of uniformity may destroy the autonomy or at least the individuality of the States . . . . [But it is obvious that the proposed subject matters for which we would draft uniform acts] are in no sense matters of mere local significance or convenience. Facility of intercourse, . . . purity of morals, the preservation of the family, furtherance of justice—these are not things that detract from the dignity, power and true independence of any state.").

137. *See, e.g.*, R. FLOYD CLARKE, THE SCIENCE OF LAW AND LAWMAKING: BEING AN INTRODUCTION TO LAW, A GENERAL VIEW OF ITS FORMS AND SUBSTANCE, AND A DISCUSSION OF THE QUESTION OF CODIFICATION 449–50 (New York, Macmillan & Co. 1898) (accepting the uniform law movement as a new incarnation of the nineteenth-century codification movement and objecting that complete codification of the common law—i.e., the science of legislation—"would be the forging of fetters on the Science of Law precluding its true development."). Regarding the science of law in the work of the Supreme Court of North Carolina, see generally *School Days*, *supra* note 1.

138. According to the *North Carolina Manual*, members of the general assembly who specified an occupation often specified "farmer": 34/170 in 1913, 51/170 in 1915, and 41/170 in 1917. A MANUAL OF NORTH CAROLINA 1913, *supra* note 66, at 256–315, 1031–39; A MANUAL OF NORTH CAROLINA 1915, *supra* note 66, at 296–354; NORTH CAROLINA MANUAL 395–452 (R.D.W. Connor ed., 1917). A Progressive general assembly in the late 1880s had founded the state university in Raleigh to help the children of farmers:

> When NC State University was founded in 1887, the school embodied ideals that were rapidly transforming the field of higher education. Chief among them was the belief that colleges should not be reserved for a select few and that the children of farmers, mechanics and other workers should have access to the opportunities and benefits of higher education. A new generation of progressive thinkers founded the college, known then as the North Carolina College of Agriculture and Mechanic Arts.

History and Tradition, N.C. ST. UNIV., https://perma.cc/2VNS-GUN7.

139. WILLIAM BAYARD HALE, WOODROW WILSON: THE STORY OF HIS LIFE 110–11 (1912).

140. *Dewey, John*, 2 THE ENCYCLOPEDIA OF PHILOSOPHY 380 (Paul Edwards ed., 1967) (describing "the famous laboratory school, commonly known as the Dewey School" for "testing and developing [Dewey's] . . . hypotheses" about educating one's children).

141. *Weber, Max*, 8 THE ENCYCLOPEDIA OF PHILOSOPHY 282–83 (Paul Edwards ed., 1967) (describing Weber as "squarely in the tradition of Hegel" and as holding that "[e]mpirical scientific investigation could lead to the discovery of the ultimate motives of human behavior").

Albert Einstein,[142] and Bertrand Russell,[143] seemingly unsettled common-sense judgments at the snap of a finger in divers fields of social and physical science? And when North Carolina's down-to-earth representatives turned to their newly chartered bar association for advice, they heard their local experts in law reform also recommend the adoption of nationalizing uniform acts.[144] So much for the first prong of the attack.

Law reformers also attacked the other bastion of aristocracy in North Carolina, its judiciary.[145] Lovers of democratic reform[146] posed the question

142. *Relativity Theory, Philosophical Significance of*, 7 THE ENCYCLOPEDIA OF PHILOSOPHY 131 (Paul Edwards ed., 1967) ("Einstein emphasized that the crucial logical step in his development of the [special theory of relativity] was the repudiation of the Newtonian conception of simultaneity.").

143. *Russell, Bertrand Arthur William*, 7 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 142, at 235 (describing how Russell's influential writings on marriage, childhood education, and morals were "put into practice in Russell's experimental school, the Beacon Hill School").

144. Edwin C. Bryson, *The North Carolina State Bar: 1933–1950*, 30 N.C. ST. B. Q. no. 3, 1983, at 8–9 (noting that among the purposes of the general assembly in chartering the bar association, as stated in chapter 335 of North Carolina Private Laws of 1899, were the promotion of reform in law and the facilitation of the administration of justice, and reporting that the bar association's Committee on Uniform Laws "played an important part in securing the adoption of approximately eighteen uniform acts by the state of North Carolina"); *cf.* Report of the Committee on Cooperation with the American Law Institute, *in* PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL SESSION OF THE NORTH CAROLINA BAR ASSOCIATION, HELD AT OCEANIC HOTEL, WRIGHTSVILLE BEACH, N.C., JULY 6, 7, 8, 1933, at 61, 63 (H.M. London ed., 1933) ("Professor Albert Coates . . . [had] . . . been working on the North Carolina annotations to the Model Code of Criminal Procedure."). Local experts also assisted the American Law Institute with annotations for its restatement projects. *Id.* at 61–63 (reporting that the Bar Association and the law school of the University of North Carolina had entered into an agreement to provide annotations for the Restatement of Contracts, which was undertaken by Professor M. T. Van Hecke, who chaired the bar association's Committee on Cooperation with the American Law Institute).

145. Pratt, *supra* note 8, at 130, 139 (noting that during the first half of the nineteenth century in America, those who wished to check the democracy of general assemblies hoped to secure the judiciary as a separate, independent branch of government with a purely appellate court at its head, while lovers of democracy thought that all governmental officials should be elected by the people for limited terms and feared the creation of an "elite group of judges, distanced in fact and thought from the people"); *see supra* note 84 (explaining the use of "aristocracy" in this Article); *see also Summer Session*, *supra* note 84, at 12 (describing the compromises made in the founding and development of the modern Supreme Court of North Carolina to make the new institution more palatable to reformers).

146. G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 2 (1997) (disputing that the story of the American Law Institute is fairly captured either as conservative or as progressive, but noting that the "ALI founders' diagnosis of jurisprudential 'uncertainty' and 'complexity' also took place in the particular cultural context of the first two decades of the twentieth century. Prominent

to the court, *Why not rely upon model principles of justice in reaching the court's decisions*?[147] And they offered three related reasons for the court to answer affirmatively: the black letter law, expressed in the form of a code,[148] held the imprimatur of professors who were expert in those fields of the common law which had not yet been displaced by the science of legislation[149]; the work of the professors had proven the near-uniformity of principle in the appellate decisions of the states[150]; and, given this uniform American Common Law and this expertise brought to bear on the project of restating its principles, it would be perfectly safe, scientifically sound, and admirably efficient to rely upon the model principles of justice in discharging the work of the court.[151] Perhaps the court would more eagerly have accepted this noble cure for its implied parochialism[152] had national

features included . . . the increased prominence of a set of ideas, conventionally encapsulated in the label 'progressivism,' that emphasized the possibilities of law as an agent of human-directed, governmentally sponsored reform.").

147. William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law*, *in* RESTATEMENT IN THE COURTS 1, 9–11 (perm. ed. 1945) ("The desire of the legal profession for an orderly statement of our Common Law led to the formation of the ALI in 1923" and to its authoritative restatement over the next two decades of eight fields of the common law administered in the states); BENJAMIN N. CARDOZA, THE GROWTH OF THE LAW 9 (1924) (stating that the proposed restatement of American law "will be something less than a code and something more than a treatise," but that it will "unify our law").

148. Lewis, *supra* note 147, at 19 ("Though the rules are expressed in the form of a code, except in sporadic instances, there never has been any desire to give them statutory authority.").

149. GILMORE, *supra* note 135, at 72 (describing the members of the American Law Institute as "the most distinguished lawyers, judges, and law professors of the time"); *see* Wachovia Bank & Tr. Co. v. Jones, 210 N.C. 339, 345 (1936) (Stacy, C.J., dissenting) (observing that the statement of principle in the Restatement of the Law of Trusts was "prepared by noted scholars, judges, and lawyers, after an exhaustive study of the subject").

150. Lewis, *supra* note 147, at 20 ("One of the most interesting results of the annotations work is to dispel the idea very prevalent at the start . . . that the decisions of our courts are to a considerable degree full of conflicts. . . . A careful survey of the State Annotations already published shows that on the average less than two per cent of the cases are contra to the statements in the Restatement text.").

151. In this era of scientific progress, efficiency by uniformity was admired in law as much as it was in the assembly of manufactures by industry or in the deployment of troops by militaries. *See, e.g.*, Address at Wrightsville Beach, *supra* note 50, at 48 ("Civilization is simply a search for greater efficiency."); *id.* at 61 ("To render the courts more efficient is the demand which the people are making and the bar must respond.").

152. GILMORE, *supra* note 135, at 70–71 (arguing that the uniform acts were designed to cure the parochialism of state appellate courts by making the expertise of law professors accessible to them; describing the Uniform Sales Act as too loose and vague to provide any rules of decision, but a perfect mechanism to encourage national reliance on the drafter's treatise on the law of sales).

treatises[153] and national legal encyclopedias[154] not already won the trick.[155] But this is not to deny all effect to the second prong of the attack. Direct citation to the Restatements occurred without much delay[156] and worship of jurisprudential trends among the states, as if one need consciously assure

153. *See, e.g.*, Rules of Practice in the Supreme Court of North Carolina, *in* 174 N.C. 827–28 (1917) (requiring that applicants for law license in North Carolina have read "some approved text-book on each of the following subjects: Agency. Carriers. Equity. Partnership and Sales. Bailments. Corporations. Executors. Negotiable Instruments."). The North Carolina Supreme Court Library still holds over 90% of the titles required by reading lists ordered between 1849 and 1931, although not always in the editions first required. *See generally* THE SUPREME COURT OF NORTH CAROLINA AND THE LICENSURE OF ATTORNEYS, 1849–1931 (Thomas P. Davis ed.) (unpublished draft on file with *Campbell Law Review*).

154. The North Carolina Supreme Court Library still holds encyclopedic sources published during the Progressive Era. *See, e.g.*, THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW (John Houston Merrill ed., New York, Edward Thompson Co. 1887); CYCLOPEDIA OF LAW AND PROCEDURE (1901); THE AMERICAN DECISIONS (1910); CORPUS JURIS (1914); R.C.L. (1914).

155. In his speech at the Centennial celebration of the Supreme Court of North Carolina, Judge Winston recounted the pyrrhic victory of the encyclopedias over nineteenth-century treatises. Winston, *supra* note 103, at 782 ("Well do I remember with what scorn these black-letter lawyers looked upon the coming out of the Encyclopedia of Law—a mechanical and alphabetical arrangement to supply the place of brains."). This victory of encyclopedias published during the Progressive Era is evidenced in the case law of North Carolina, for example: (1) North Carolina's test for a constitutionally-required civil jury described in Groves v. Ware, 182 N.C. 553, 558 (1921) (Adams, J.) (pilfering the test found at 16 R.C.L. *Jury* § 14, at 194 (1917)); (2) North Carolina's two-part test for a fiduciary relationship described in Abbitt v. Gregory, 201 N.C. 577, 598 (1931) (Connor, J.) (quoting 25 C.J. *Fiduciary* § 9, at 1119 (1921)); and (3) North Carolina's former four-part test for summary ejectment, understood by Charlotte Hous. Auth. v. Fleming, 123 N.C. App. 511, 513 (1996) (Wynn, J.) to have been introduced into the law of North Carolina by Morris v. Austraw, 269 N.C. 218, 223 (1967) (Parker, C.J.) (quoting 32 AM. JUR. *Landlord and Tenant* § 848, at 720–21 (1941)). In fact, one encyclopedia from the Progressive Era, *Ruling Case Law*, was cited by the supreme court more than 1,000 times between World War I and World War II. Westlaw search, performed Dec. 13, 2019, 8:00 a.m. (searching "adv: "rcl" and da(aft 1913 and bef 1946)" for jurisdiction of "North Carolina").

156. *See, e.g.*, Beam v. Wright, 224 N.C. 677, 679 (1944) (Devin, J.) (citing the Restatement of the Law of Contracts); Wachovia Bank & Tr. Co. v. Jones, 210 N.C. 339, 345 (1936) (Stacy, C.J., dissenting) (citing the Restatement of the Law of Trusts); Harts v. Raney Chevrolet Co., 202 N.C. 807, 808 (1932) (Brogden, J.) (referring to the Restatement of the Law of Agency); *cf.* Report of the Committee on Cooperation with the American Law Institute, *in* PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL SESSION OF THE NORTH CAROLINA BAR ASSOCIATION, HELD AT OCEANIC HOTEL, WRIGHTSVILLE BEACH, N.C., JULY 6, 7, 8, 1933, at 61, 62 (H.M. London ed., 1933) ("Your committee urges the bench and bar of North Carolina to utilize these restatements [of contracts, agency, torts, conflict of laws, business associations, property, trusts, and quasi-contracts] in their work. They constitute the highest persuasive authority available.").

that the alleged American Common Law remain common, became semi-respectable, too, as the decades passed.[157]

These two initiatives, the uniform law project and the restatements project, aim to promote efficiency and uniformity of law among the states. Insofar as they succeed, little will remain of the unique government of the Old North State or of any other state: distinction and identity will be lost in the name of scientific progress. Who knows, maybe when the statutes of the American states mostly mirror one another and the customary common law of each state is mostly molded by nationally acclaimed law professors, then the states may safely abandon the burden of separately licensing their attorneys.[158]

But law reform has not ended even there. Uniformity of local law within a state and of states' laws within the American nation may be followed by the confluence of nations' laws within an international community. This ultimate drive toward indistinction, still prominent today, had confronted English politicians even before their Reform Act of 1832, when democracy was in the air in Europe.[159] Might not one offer general

157. *See, e.g.*, Smith v. State, 289 N.C. 303, 310–11, 320 (1976) (Sharp, C.J.) (quoting a national legal encyclopedia at length for the meaning of sovereign immunity, noting the recent trend in state courts to abolish that defense in contract actions, and abolishing that defense in North Carolina beginning "after the filing date of this opinion, 2 March 1976"); Rabon v. Rowan, 269 N.C. 1, 23 (1967) (Parker, C.J., dissenting) ("The majority opinion states in effect that the tide of judicial decisions [among the states] is in favor of the extinction of charitable immunity. In some of the courts extinguishing the doctrine of charitable immunity it seems to me that the tide is also flowing in favor of the extinction in a large measure of the doctrine of *stare decisis*.").

158. In North Carolina, the high court—at first the superior court, then later the supreme court—had licensed attorneys until late in the Progressive Era, when the general assembly moved that duty to the newly-established North Carolina Board of Law Examiners in 1933. Then in February 2019, the Board of Law Examiners administered the Uniform Bar Examination for the first time. Cody Davis, *The Uniform Bar Exam, Next Stop: North Carolina*, CAMPBELL L. OBSERVER (Feb. 6, 2017), https://perma.cc/ZG2T-6YML ("The North Carolina Board of Law Examiners announced in an October 27, 2016 meeting that the Board voted to approve the adoption of the Uniform Bar Exam with the first administration of the exam scheduled for February 2019."). That examination contains graded elements tested in all participating jurisdictions, as well as a pass/fail element which nods to the law of North Carolina.

159. MAITLAND, *supra* note 85, at 133 ("The question of how far the interests of all men are harmonious is of fundamental importance . . . . Bentham, writing on international law, had said that there is a difficulty as to whose happiness the statesman should seek. Shall it be that of his subjects or that of the whole human race? The answer is, that practically the two are to be obtained by the same means."); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 116 (1980) ("Jeremy Bentham oscillated and equivocated for sixty years about whether his utilitarianism was to maximize his own happiness or the happiness of 'everybody'.").

statutes to all the peoples of the world?[160] So it was suggested in the early nineteenth century in Europe and America. And one might reasonably conclude that this same drive toward indistinction motivated state general assemblies to legislate by general statute, the United States to institute popular election of Senators,[161] and western nations to experiment with a League of Nations[162] during the Progressive Era in American jurisdictions.

CONCLUSION

Reform by early-twentieth-century Progressives trumpets the moral truth of generally applicable positive law and seeks progress in the social sciences of law and government akin to the progress enjoyed by the modern physical sciences. It was not North Carolina's Progressive Chief Justice Walter Clark who had said, "The age we live in is a busy age; in which knowledge is rapidly advancing towards perfection" and "every thing teems with discovery and with improvement,"[163] but it might have been he.[164] And it was not Clark who had proclaimed that moral science should improve at

160. *See generally* JEREMY BENTHAM, LEGISLATOR OF THE WORLD: WRITINGS ON CODIFICATION, LAW, AND EDUCATION (Philip Schofield & Jonathan Harris eds., 1998).

161. U.S. CONST. amend. XVII; *see also* Government by Judges, *supra* note 105, at 3–4 ("[I]t took 90 years for the people to win the right to choose the Senators who should represent them. The fight was not won until less than a year ago. The astonishing change in the tone of the Senate has already vindicated the wisdom of the people in persistently demanding this great change."). An analogous movement from aristocracy to democracy continued into the early twentieth century in England. *See, e.g.*, Parliament Act 1911, 1 & 2 Geo. 5, c. 13 (Eng.) (limiting the powers of the House of Lords and announcing an intention to eliminate the hereditary basis of Parliament's second chamber).

162. President Woodrow Wilson was awarded the 1919 Nobel Peace Prize for his peace-making efforts at the end of World War I, which included his determination to establish a League of Nations. *Wilson, (Thomas) Woodrow*, 12 THE NEW ENCYCLOPÆDIA BRITANNICA, MICROPÆDIA 690, 692 (15th ed. 1985); James Brown Scott, *The Nobel Peace Prize*, 15 AM. J. INT'L L. 562, 562–63 (1921).

163. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT; OR, A COMMENT ON THE COMMENTARIES: BEING AN EXAMINATION OF WHAT IS DELIVERED ON THE SUBJECT OF GOVERNMENT IN GENERAL, IN THE INTRODUCTION TO SIR WILLIAM BLACKSTONE'S COMMENTARIES: WITH A PREFACE, IN WHICH IS GIVEN A CRITIQUE ON THE WORK AT LARGE, at v (2d ed., London, T. White & Co. 1823) ("The age we live in is a busy age; in which knowledge is rapidly advancing towards perfection. In the natural world, in particular, every thing teems with discovery and with improvement. The most distant and recondite regions of the earth traversed and explored—the all-vivifying and subtle element of the air so recently analyzed and made known to us,—are striking evidences, were all others wanting, of this pleasing truth.").

164. *See supra* note 151 (quoting Chief Justice Walter Clark's views on the progress of civilization by efficiency).

a corresponding rate to physical science[165] and might now so improve due to the newly-discovered moral axiom, "*it is the greatest happiness of the greatest number that is the measure of right and wrong,*"[166] though some suggest it might as well have been he, too.[167] The theme of modern law reform is the same on all scales of government. The abhorrence of descending to the particular is in the nature of the scientific philosophies of law and government rooted in the eighteenth century and matured in the nineteenth century,[168] as well as in the political descendants of these

---

165. Like his contemporary Jeremy Bentham, Thomas Jefferson accepted this fundamental principle of Enlightenment thought, though in a moment of despondency Jefferson expressed doubt about the necessity of the moral and physical sciences progressing at corresponding rates. 1 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 179 (New York, Charles Scribner's Sons 1889) (recording that in 1815 Thomas Jefferson had written that "I fear from the experience of the last twenty-five years that morals do not of necessity advance hand in hand with the sciences." (internal quotation marks omitted)).

166. BENTHAM, *supra* note 163, at v–vi ("Correspondent to *discovery* and *improvement* in the natural world, is reformation in the moral: . . . perhaps among such observations as would be best calculated to serve as grounds for [moral] reformation, are some which . . . appear capable of bearing the name of discoveries: with so little method and precision have the consequences of this fundamental axiom, *it is the greatest happiness of the greatest number that is the measure of right and wrong*, been as yet developed.").

167. *See* AUBREY LEE BROOKS, WALTER CLARK: FIGHTING JUDGE 82 (1944) (characterizing Clark's jurisprudence as Benthamite); Willis P. Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C. L. REV. 287, 332–33 (1985) (detecting elements of Benthamite positivism, natural law, sociological jurisprudence, and realism in Clark's thought). Clark's writings also suggest his sensitivity to other strands of thought that had developed in the nineteenth century, as when he obliquely alludes to the fight for freedom from autocracy in Russia, which began in the month after the 1917 amendment to the constitution of North Carolina:

> Of late years, while plutocracy has been gaining considerable control in the practical operations of our government, there has been a steady advance in the power of the proletariat, and among the middle classes there is a hesitation with which to take sides in the great struggle which is inevitable and not far in the future.

Walter Clark, *The Origin and Development of Law and Government*, 7 VA. L. REV. 103, 109 (1920).

168. While the commitment to general statute notoriously characterized the agenda of the English codifiers, the abhorrence of descending to the particular also featured prominently in at least one vein of French Enlightenment thought. *See* MAITLAND, *supra* note 85, at 47, 79, 82 (noting that Rousseau, who goes further towards democracy than Locke and who sets up the will of the majority as an idol, "does try to insist that the popular assembly must do nothing but pass general laws, for *la volonté générale* cannot descend to particulars"). Both of these schools of thought had international ambitions in law and government, the one offering codes of law applicable to any and all countries, from America to Russia, see *supra* note 160, and the other inspiring the international brotherhood of man, so talked about during our Progressive Era. And while pseudo-quantitative formulae of moral science, tying

Enlightenment philosophies that straddle the nineteenth and twentieth centuries in American jurisdictions, such as North Carolina.

---

numbers to rightness, hypnotized the English Utilitarians in the late-eighteenth and nineteenth centuries, see *supra* text accompanying note 166, the continental *a priori* schools of the time also formulated culturally-independent, universally-applicable, pseudo-quantitative formulae, though in their systems freedom of will firmly nudged aside the pleasure or happiness of individuals. *See, e.g.*, 1 FREDERIC WILLIAM MAITLAND, *Mr Herbert Spencer's Theory of Society*, *in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 247, 275, 278–79 (H.A.L. Fisher ed., 1911) (noting that Spencer's first principle of political society in his *Social Statics*, that "*Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man*," had been "stated and adopted by no less a person than Kant" in an essay of 1793, in which Kant contrasted it with utilitarianism, and in his *Rechtslehre* of 1797 (footnote omitted) (variously translated as the Doctrine of Right, the Science of Right, or the Metaphysical Elements of Justice)).

APPENDIX

Uniform Laws Adopted in North Carolina before 1946.[169]

1. Uniform Negotiable Instruments Act[170]
2. Uniform Warehouse Receipts Act[171]
3. Uniform Bills of Lading Act[172]
4. Uniform Fiduciaries Act[173]
5. Uniform Arbitration Act[174]
6. Uniform Motor Vehicle Registration Act[175]
7. Uniform Act Regulating Traffic on Highways[176]
8. Uniform Veterans' Guardianship Act[177]
9. Uniform Aeronautics Act[178]
10. Uniform Declaratory Judgments Act[179]
11. Uniform Criminal Extradition Act[180]
12. Amendments to Warehouse Receipts Act[181]
13. Uniform Narcotic Drug Act[182]
14. Uniform Principal and Income Act[183]
15. Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings[184]
16. Uniform Criminal Extradition Act (as revised)[185]

---

169. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-FIRST YEAR, SAN FRANCISCO, CALIFORNIA, SEPTEMBER 8–13, app. at 588 (1952).

170. Act of Mar. 8, 1899, ch. 733, 1899 N.C. Pub. Laws 926.

171. Act of Feb. 14, 1917, ch. 37, 1917 N.C. Pub. Laws 89.

172. Act of Feb. 21, 1919, ch. 65, 1919 N.C. Pub. Laws 84.

173. Act of Feb. 27, 1923, ch. 85, 1923 N.C. Pub. Laws 259.

174. Act of Mar. 4, 1927, ch. 94, 1927 N.C. Pub. Laws 313.

175. Act of Mar. 7, 1927, ch. 122, 1927 N.C. Pub. Laws 366.

176. Act of Mar. 7, 1927, ch. 148, 1927 N.C. Pub. Laws 428.

177. Act of Feb. 18, 1929, ch. 33, 1929 N.C. Pub. Laws 24.

178. Act of Mar. 16, 1929, ch. 190, 1929 N.C. Pub. Laws 238.

179. Act of Mar. 12, 1939, ch. 102, 1931 N.C. Pub. Laws 133.

180. Act of Mar. 17, 1931, ch. 124, 1931 N.C. Pub. Laws 162.

181. Act of May 4, 1931, ch. 358, 1931 N.C. Pub. Laws 451.

182. Act of May 11, 1935, ch. 477, 1935 N.C. Pub. Laws 837.

183. Act of Mar. 15, 1937, ch. 190, 1937 N.C. Pub. Laws 403.

184. Act of Mar. 17, 1937, ch. 217, 1937 N.C. Pub. Laws 428.

185. Act of Mar. 20, 1937, ch. 273, 1937 N.C. Pub. Laws 490.

17. Uniform Act Regulating Traffic on Highways[186]
18. Uniform Motor Vehicle Registration Act[187]
19. Uniform Trusts Act[188]
20. Uniform Common Trust Fund Act[189]
21. Uniform Limited Partnership Act[190]
22. Stock Transfer Act[191]
23. Uniform Partnership Act[192]
24. Veteran's Guardianship Act (as revised)[193]
25. Uniform Unauthorized Insurers Act[194]

186. Act of Mar. 23, 1937, ch. 407, 1937 N.C. Pub. Laws 787.
187. *Id.*
188. Act of Mar. 28, 1939, ch. 197, 1939 N.C. Pub. Laws 445.
189. Act of July 1, 1939, ch. 200, 1939 N.C. Pub. Laws 453.
190. Act of Mar. 15, 1941, ch. 251, 1941 N.C. Pub. Laws 354.
191. Act of Mar. 15, 1941, ch. 353, 1941 N.C. Pub. Laws 500.
192. Act of Mar. 15, 1941, ch. 374, 1941 N.C. Pub. Laws 567.
193. Act of Mar. 4, 1943, ch. 424, 1943 N.C. Sess. Laws 462.
194. Act of Mar. 6, 1945, ch. 386, 1945 N.C. Sess. Laws 481.