

# Perpetuities and the Genius of a Free State

*Joshua C. Tate\**

Commentary on Steven J. Horowitz & Robert H. Sitkoff,  
*Unconstitutional Perpetual Trusts*<sup>1</sup>

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## I. INTRODUCTION

Legal history, like all history, is inevitably a speculative affair. No one can be sure what the editors of Justinian’s *Digest* might have excised from long-lost works of classical Roman law; nor can one know for certain what went through the minds of certain justices of the U.S. Supreme Court in the mid-twentieth century when they formed and reformed their views on Roosevelt’s New Deal. Of course, scholars can try to chip away at this uncertainty: great progress can be made through educated guesses and learned theories. But certainty about the past is reserved for those who lived in it.

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1. Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769 (2014).

What is true for history in general is true for the history of state constitutional prohibitions of perpetuities, and in particular for the curious prohibition in the 1776 North Carolina Constitution and Declaration of Rights. The North Carolina prohibition is particularly important because it came first, and its language influenced later state constitutions.<sup>2</sup> As Horowitz and Sitkoff demonstrate in their Article, many good reasons can be offered for the provision.<sup>3</sup> It is nevertheless a curious prohibition, because it is absent from the constitutions of the twelve other original states. Why did this provision emerge only in North Carolina, and not in Virginia, Massachusetts, Pennsylvania, or any of the other “free states” that together rose up against their colonial masters?

This Comment will suggest a possible answer to that question. Although the problems with perpetuities were well known to learned inhabitants of all the newly independent American states, those problems were particularly salient in North Carolina in 1776 due to that colony’s unique history as a former proprietary colony. King Charles II created the original province of Carolina to reward eight men who had offered vital assistance while he was in exile.<sup>4</sup> The decision by the heir of one of these original Lords Proprietors not to sell his share back to the British Crown gave rise to specific grievances in North Carolina—grievances that did not exist in the other twelve former colonies.<sup>5</sup> Moreover, North Carolina was unique in witnessing a violent confrontation between the colonial authorities and backcountry farmers that stemmed, in part, from those grievances.<sup>6</sup>

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2. For example, the Tennessee Constitution of 1796 drew heavily upon the North Carolina example because the territory of Tennessee was previously part of North Carolina and thus subject to the North Carolina Constitution. See LEWIS L. LASKA, *THE TENNESSEE STATE CONSTITUTION* 5 (2011). Of the fifty-nine delegates to the Texas Convention of 1836, ten were born in North Carolina and nine were born in Tennessee. See LOUIS WILTZ KEMP, *THE SIGNERS OF THE TEXAS DECLARATION OF INDEPENDENCE* xxii (1944). Thus, at least one-third of the framers of the 1836 Constitution of the Republic of Texas were likely to have been directly or indirectly familiar with the language of the North Carolina provision. Decades later, Arkansas and Oklahoma adopted constitutional language almost identical to that of Texas, their geographical neighbor. See ARK. CONST. of 1874, art. II, § 19; OKLA. CONST. of 1907, art. II, § 32. See generally Horowitz & Sitkoff, *supra* note 1 (explaining the historical evolution of state constitutional prohibitions of perpetuities).

3. See Horowitz & Sitkoff, *supra* note 1, at 1788–91. In the case of *Brown Bros. Harriman Trust Co. v. Benson*, the North Carolina Court of Appeals upheld the current North Carolina perpetual trust statute against a constitutional challenge. 688 S.E.2d 752, 757 (2010). However, the *Benson* opinion is controversial, and the issue has not yet been decided by the North Carolina Supreme Court. See Horowitz & Sitkoff, *supra* note 1, at 1810–14.

4. See *infra* Section II.A.

5. See *infra* Section II.B.

6. See *infra* Section II.C.

The peculiar case of the Earl Granville and assorted problems in his Granville District shifted the problem of perpetuities from the periphery to the center of North Carolina politics in the late eighteenth century, and thus warranted an explicit mention of perpetuities in the 1776 North Carolina Constitution and Declaration of Rights. For the framers of that document, the social ills caused by tying up land indefinitely in the hands of the few were of paramount importance, and had to be addressed to build a successful coalition for independence. This Comment first discusses the political and social history of the province of North Carolina, focusing in particular on the Lords Proprietors and Earl Granville. The Comment then addresses how that history likely impacted the 1776 Constitution and Declaration of Rights, which created a conservative system of government despite radical instructions from some backcountry counties, and finally offers a few concluding thoughts about the aspirations of many North Carolina patriots at the dawn of independence.

## II. POLITICS AND SOCIETY IN COLONIAL NORTH CAROLINA

### *A. The Lords Proprietors*

The legal entity now known as the State of North Carolina traces its origins to the restoration of the monarchy following the English Civil War. After returning to England as king in 1660, Charles II rewarded his supporters with land, titles, and other benefits. Among those singled out for particular favor were the Lords Proprietors, eight men to whom Charles granted an immense tract of land in North America named Carolina in his honor.<sup>7</sup> These men, most of whom had no knowledge of America, included Edward Hyde, First Earl of Clarendon and Lord Chancellor; George Monck, First Duke of Albemarle, a general who switched to the royalist side at a crucial moment in the war; and Sir George Carteret, a naval officer who sheltered exiled members of the royal family at his home on the Isle of Jersey.<sup>8</sup> Despite their tenuous or nonexistent ties to the New World, the Lords Proprietors and their heirs and successors attempted to rule their distant colony for almost seven decades.<sup>9</sup>

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7. WILLIAM S. POWELL, *NORTH CAROLINA THROUGH FOUR CENTURIES* 53 (1989).

8. *Id.* at 54–55.

9. Seven of the eight Lords Proprietors had no intention of ever visiting America. See NOELEEN MCILVENNA, *A VERY MUTINOUS PEOPLE: THE STRUGGLE FOR NORTH CAROLINA, 1660–1713*, 12 (2009) (“[O]nly William Berkeley had any plans for spending time anywhere near his new endowment, and he imagined that he could control it safely from Jamestown.”).

The early history of Carolina was marked by numerous difficulties, including Indian wars, piracy, and border disputes with the neighboring colony of Virginia.<sup>10</sup> Moreover, overzealous or incompetent administration by the colonial governors fomented several uprisings and rebellions.<sup>11</sup> In 1729, ten years after the division of the original colony into the separate provinces of South and North Carolina, the owners of seven of the original eight proprietary shares were persuaded to sell their interests back to the Crown.<sup>12</sup> All of the owners, including the proprietor who declined to sell his share of the land, abandoned their claims to a voice in the government of the colony.<sup>13</sup>

The sole holdout was John, Lord Carteret, who would later acquire the title Earl Granville, and who had inherited the share originally granted to Sir George Carteret.<sup>14</sup> Granville's share, which would come to be known as the Granville District, was allocated entirely within the province of North Carolina, and the division was so favorable to the earl that the governor complained in 1743 that Earl Granville had not only half the province, but "much the better half."<sup>15</sup> It was a source of great consternation for the governor that the provincial government would thenceforth be responsible for governing all of North Carolina, but would receive quitrent revenue (i.e., land taxes) from only the southern counties, with the revenue from the northern counties being sent to Earl Granville instead.<sup>16</sup>

### *B. The Granville District*

In keeping with the tradition of the Lords Proprietors, the Earl Granville never visited his district, instead employing agents to manage the land on his behalf.<sup>17</sup> However, it would have been unwise to replicate the failed experiment in proprietary governance from which Granville's title ultimately derived. North America had no shortage of unoccupied land, and Granville's district would have to compete against

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10. *Id.* at 77–78, 122, 149–58.

11. POWELL, *supra* note 7, at 60–84.

12. *Id.* at 86.

13. Henry G. Connor, *The Granville Estate and North Carolina*, 62 U. PA. L. REV. 671, 673 (1914).

14. Thornton W. Mitchell, *The Granville District and Its Land Records*, 70 N.C. HIST. REV. 103, 103–07 (1997).

15. Letter from Gabriel Johnston, Governor of N.C., to the Lords of the Bd. of Trade (June 6, 1746), in 4 WILLIAM L. SAUNDERS, *THE COLONIAL RECORDS OF NORTH CAROLINA*, at 792–93 (1886); Mitchell, *supra* note 14, at 105–07.

16. A. ROGER EKIRCH, "POOR CAROLINA": POLITICS AND SOCIETY IN COLONIAL NORTH CAROLINA, 1729–1776, at 92–98 (1981).

17. Mitchell, *supra* note 14, at 107.

the southern counties of North Carolina—as well as South Carolina, Virginia, and the other colonies—in order to attract settlers. Granville therefore offered favorable terms to prospective settlers to lure them away from other land offices.<sup>18</sup> Rather than grant leases, the Granville District office offered settlers fee simple title at a reasonable price and without onerous restrictions on cutting timber, fishing, hunting, and other activities important to prospective settlers.<sup>19</sup> Granville also directed his land agents to show “[i]ndulgence” in the collection of quitrents “when it shall appear that Poverty or some unfortunate accident had disabled any Tennant from paying.”<sup>20</sup>

Granville’s progressive approach was initially quite successful, and settlers eagerly purchased more than two million acres in the Granville District between 1751 and 1762.<sup>21</sup> The success of the district, however, depended on the competency, trustworthiness, and good behavior of the local agents Granville selected to administer his land office, and it did not take long for serious problems to emerge.<sup>22</sup> Francis Corbin, appointed as Granville’s agent in 1749, proved to be a particularly incompetent and untrustworthy administrator.<sup>23</sup> Among other misdeeds, Corbin and his subordinates exacted excessive fees from the settlers, failed to promptly deal with complaints, and made political enemies by granting land to which Granville lacked legitimate title.<sup>24</sup> The last of these was particularly vexing to the settlers, for the resulting uncertainty of title frustrated their primary purpose in immigrating to the frontier and limited their attachment to the area.<sup>25</sup>

The angry backcountry settlers initially sought the assistance of the North Carolina General Assembly, but their complaints against Corbin were not redressed until after the so-called Enfield Riot of 1759, when a group of men kidnapped Corbin from his house and took him to

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18. EKIRCH, *supra* note 16, at 129.

19. *Id.* at 128–30.

20. *Id.* at 130 (quoting Granville’s instructions to his agents).

21. *Id.*

22. Mitchell, *supra* note 14, at 111.

23. Although some of the misdeeds in the Granville office were the fault of Corbin’s subordinates, the responsibility for the abuses that occurred ultimately lies with Corbin for failing properly to execute the office assigned to him. George Stevenson, *Corbin, Francis*, in 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 431, 432 (William S. Powell ed., 1979).

24. *See, e.g.*, EKIRCH, *supra* note 16, at 135; Stevenson, *supra* note 23, at 432; Mitchell, *supra* note 14, at 111–14. The inability of a property owner to monitor his agent is a classic example of an agency costs problem. *See, e.g.*, Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 636–37 (2004).

25. *See* Daniel Fredrick Blower, *The Orange County and Mecklenburg County Instructions: The Development of Political Individualism in Backcountry North Carolina, 1740–1776*, at 248 (1984) (unpublished Ph.D. dissertation, University of Michigan) (on file with University Microfilms International).

the town of Enfield. There, Corbin promised under duress to fire various deputies and was compelled to give bond to guarantee a court appearance.<sup>26</sup> Although Granville dismissed and replaced Corbin soon after the riot, problems continued, and the situation became even worse when Granville died in 1763 and the Granville District land office shut down completely, leaving settlers unable to obtain land.<sup>27</sup>

### *C. Violence and Revolution*

North Carolina was a relatively poor colony, and the undeveloped state of its economy made it particularly vulnerable to civil unrest.<sup>28</sup> In contrast to their counterparts in South Carolina, the planter class in North Carolina was relatively weak and unrefined, and poorer white farmers were less deferential to the plantation elite, with resentment always bubbling under the surface.<sup>29</sup> In the frontier counties of Orange and Rowan, the closing of the Granville land office in 1763 fed the flames of an increasingly unstable political situation.<sup>30</sup> The late 1760s witnessed the rise of the Regulators, which began as a peaceful movement opposed to unfair taxation, corruption, and abuse of power, but quickly turned toward open and violent disregard of civil authority.<sup>31</sup> Regulators engaged in armed confrontations with provincial officials from 1768 to 1771, when they were ultimately subdued by Governor Tryon and the provincial militia at the Battle of Alamance.<sup>32</sup>

The Battle of Alamance pitted Governor Tryon and a force of eleven hundred men, mostly from the eastern counties and including many “gentlemen volunteers” who would later achieve prominence as patriots in the Revolution, against a force of approximately two thousand Regulators.<sup>33</sup> In the battle, the Regulators had some initial success using “Indian style” tactics, such as firing from behind rocks

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26. See EKIRCH, *supra* note 16, at 141; Mitchell, *supra* note 14, at 114; Blower, *supra* note 25, at 249–51.

27. See Mitchell, *supra* note 14, at 114–17.

28. See EKIRCH, *supra* note 16, at 219.

29. See MCLIVENNA, *supra* note 9, at 162 (2009) (noting that “no one displayed Charleston’s powdered wigs or porcelain,” and “Eastern planters could not command the outward signs of deference from less wealthy white farmers”).

30. See EKIRCH, *supra* note 16, at 177–78; Mitchell, *supra* note 14, at 117.

31. See BILL CECIL-FRONSMAN, *COMMON WHITES: CLASS AND CULTURE IN ANTEBELLUM NORTH CAROLINA* 56 (1992).

32. See RICHARD R. BEEMAN, *THE VARIETIES OF POLITICAL EXPERIENCE IN EIGHTEENTH-CENTURY AMERICA* 169–77 (2004).

33. See MARJOLEINE KARS, *BREAKING LOOSE TOGETHER: THE REGULATOR REBELLION IN PRE-REVOLUTIONARY NORTH CAROLINA* 197–99 (2002).

and trees, but they lacked organization and were short on ammunition.<sup>34</sup> The governor's forces prevailed, but at a cost of nine dead and sixty-one wounded militiamen, along with nine dead and an uncertain number of wounded Regulators.<sup>35</sup> Although the Regulators were defeated, the violent dispute between the backcountry settlers and the eastern provincial elite cast a shadow over North Carolina that made its political landscape unique among the colonies at the dawn of independence.<sup>36</sup> In no other colony prior to the Revolution did colonists wage war against other colonists in the way they did in North Carolina.<sup>37</sup>

In October 1776, less than six years after the Battle of Alamance, the counties of North Carolina elected delegates to the Fifth Provincial Congress, which was to serve as a constitutional convention for the newly independent government of North Carolina.<sup>38</sup> Two of the backcountry counties, Mecklenburg and Orange, gave written instructions to their delegates that set forth an explicitly democratic theory of governance.<sup>39</sup> The delegates from Mecklenburg were instructed that “[p]olitical power is of two kinds, one principal and superior, the other derived and inferior,” and that “[t]he principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.”<sup>40</sup> The instructions given to the delegates from Orange County contain almost identical language.<sup>41</sup> The Mecklenburg instructions further commanded the delegates to “oppose everything that leads to aristocracy or power in the hands of the rich and chief men exercised to the oppression of the poor,” and urge the enactment of legislation under the new constitution “to

34. *Id.* at 201.

35. See HUGH T. LEFLER & WILLIAM S. POWELL, *COLONIAL NORTH CAROLINA: A HISTORY* 238 (1973).

36. See POWELL, *supra* note 7, at 159; see also BEEMAN, *supra* note 32, at 176:

But whatever confusion there may be about the underlying patterns of allegiance in the Carolina backcountry, there is no doubt that the Revolution in that region really was an “uncivil war,” one which turned neighbor against neighbor, community against community, and significant regions of the Carolina backcountry against the patriot and provincial governments to the east.

37. See EKIRCH, *supra* note 16, at xviii–xix.

38. See Robert L. Ganyard, *Radicals and Conservatives in Revolutionary North Carolina: A Point at Issue, The October Election, 1776*, 24 WM. & MARY Q. 568, 568 (1967).

39. Blower, *supra* note 25, at 97.

40. Instructions to the Delegates from Mecklenburg to the Provincial Congress, in 10 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 15, at 870b.

41. See Instructions to the Delegates from Orange in the Halifax Congress, in 10 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 15, at 870f (“Political power is of two kinds, one principal and supreme the other derived and inferior. . . . The principal and supreme power is possessed only by the people at large, the derived and inferior power by the servants they employ.”).

secure men from being disturbed by old and foreign claims against their landed possessions.”<sup>42</sup>

Although the instructions from Mecklenburg and Orange were most likely drafted by educated men, they took inspiration from the history of the backcountry counties and the specific problems that the settlers encountered there.<sup>43</sup> Insecurity in land titles was a critical and widespread problem in colonial North Carolina that “directly undermined the government’s fundamental justification in contemporary political thought as well as in purely practical terms.”<sup>44</sup> The settlers’ resort to vigilante tactics against Lord Granville’s agent in 1759 reflected a fundamental breakdown of the compact between the government and its citizens.<sup>45</sup> Given that background, the principle stated in the Mecklenburg and Orange declarations regarding the supreme power of the people was no mere platitude.

### III. PERPETUITIES AND THE NORTH CAROLINA CONSTITUTION OF 1776

Despite the democratic mandate given to the delegates from Orange and Mecklenburg, the constitution produced by the Fifth Provincial Congress “was an essentially conservative document.”<sup>46</sup> Although the first clause of the Declaration of Rights provided that “all political power is vested in and derived from the people only,”<sup>47</sup> the constitution limited voting rights to freemen who possessed varying amounts of land, depending on the importance of the office in question, and imposed even more burdensome property qualifications on men seeking election to office.<sup>48</sup> The governor and various other key executive officials were elected by the General Assembly, not directly by the people, and the same was true of all the judges.<sup>49</sup> The nature of the constitution suggests that the balance of power at the Fifth Provincial Congress was held by men of conservative views, not those who subscribed to the democratic theories communicated to the Mecklenburg and Orange delegates.<sup>50</sup>

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42. Instructions to the Delegates from Mecklenburg, *in* 10 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 15, at 870b, 870f.

43. *See* Blower, *supra* note 25 at 536–37.

44. *See id.* at 558.

45. *See id.* at 559–60.

46. Ganyard, *supra* note 8, at 570.

47. N.C. CONST. of 1776, Declaration of Rights, § 1.

48. *See* JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 6 (2d ed. 2013) (citing N.C. CONST. of 1776 §§ 5–8, 15).

49. *See id.* (citing N.C. CONST. of 1776 §§ 13, 15–16, 22, 24).

50. *See* Ganyard, *supra* note 38, at 582.



If the overall system of government established by the North Carolina Constitution of 1776 was essentially conservative, the specific provision regarding perpetuities and monopolies in Clause 23 of the Declaration of Rights—that “perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed”—seems more in line with the democratic theory of the Mecklenburg and Orange instructions.<sup>51</sup> The language of Clause 23 is quite similar to Section 39 of the Declaration of Rights of the Maryland Constitution of 1776, which provides that “monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered.”<sup>52</sup> The Maryland Declaration of Rights was first circulated on August 27 and ratified on November 3, 1776, and thus predated the North Carolina Declaration of Rights, the drafting committee for which was not appointed until November 13 of the same year.<sup>53</sup> While scholars have offered differing explanations for the Maryland prohibition of monopolies, it echoes the position of the English common law at that time and reflects the consensus view among American supporters of independence that artificial barriers to equality of opportunity should be removed.<sup>54</sup>

North Carolina was not the first state to specifically mention perpetuities in its declaration of rights. Section 37 of the Pennsylvania Constitution of 1776 provided that “[t]he future legislature of this state shall regulate intails in such a manner as to prevent perpetuities.”<sup>55</sup> The Pennsylvania constitution also predated that of North Carolina, having been ratified on September 28, 1776.<sup>56</sup> This section of the Pennsylvania Constitution was adopted verbatim as Section 43 of the North Carolina Constitution of 1776.<sup>57</sup> The innovation of the North Carolina Constitution was to add perpetuities to the prohibition of monopolies in the Maryland Declaration of Rights as being “contrary to

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51. N.C. CONST. of 1776, Declaration of Rights, § 23.

52. MD. CONST. of 1776, Declaration of Rights, § 39.

53. See 10 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 15, at 916–18; DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION 5 (2011).

54. Compare FRIEDMAN, *supra* note 53, at 75 n.258 (2011) (concluding that the historical disdain for monopolies in the English common law is the most plausible explanation for the provision), with GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 72 (1993 ed.) (associating early republican prohibitions on monopolies such as the Maryland provision with a broader campaign against impediments to equality of opportunity).

55. PA. CONST. of 1776, Declaration of Rights, § 37.

56. See MURRAY DRY, CIVIL PEACE AND THE QUEST FOR TRUTH: THE FIRST AMENDMENT FREEDOMS IN POLITICAL PHILOSOPHY AND AMERICAN CONSTITUTIONALISM 34 (2004).

57. N.C. CONST. of 1776, § 43.

the spirit of a free State” (or “free government”).<sup>58</sup> North Carolina was the only state to claim explicitly in its 1776 Constitution that perpetuities were an obstacle to freedom.<sup>59</sup>

How, then, can the language of Clause 23 of the North Carolina 1776 Declaration of Rights be explained? Less than six years had passed since the colonial government took the battlefield against a restless band of vigilantes in the backcountry, whose grievances included their inability to obtain land due to the closing of the Granville District land office, as well as the incompetent or malicious administration of some of Earl Granville’s agents.<sup>60</sup> In a letter written in 1771, Josiah Martin, the last royal governor of North Carolina, had attributed the political disorder in the province to “[t]he proprietary right of the Earl Granville” since, in the absence of a land agent, the settlers could not “establish freeholds,” and therefore “set themselves down where they please[d]” and “refuse[d] to pay Taxes which ha[d] been and still [were] a source of perpetual discord and uneasiness.”<sup>61</sup> This problem would have been a high priority not only for the backcountry delegates at the Fifth Provincial Congress, but also for the representatives of the eastern elite who needed the support of backcountry settlers in the cause of independence.<sup>62</sup>

Even if Earl Granville’s proprietary right could not be called a perpetuity in the technical sense, since the heirs of the other Lords Proprietors were able to sell their shares back to the Crown, it had caused some of the same evils attributed to perpetuities by Blackstone, who explained in his *Commentaries* that “the law abhors [perpetuities] because by perpetuities . . . estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was first established.”<sup>63</sup> Another rationale for the law’s abhorrence of perpetuities, offered by Lord Nottingham in the *Duke of Norfolk’s Case*, is that the associated remainders “pretend to such a Stability in human affairs, as the Nature of them admits not of.”<sup>64</sup> This might equally be said of the proprietary interest of Earl Granville in distant North Carolina, an interest that

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58. MD. CONST. of 1776, Declaration of Rights, § 39; N.C. CONST. of 1776, Declaration of Rights, § 23.

59. Horowitz & Sitkoff, *supra* note 1, at 1788–90.

60. See *supra* notes 24–30 and accompanying text.

61. Letter from Josiah Martin, Governor of N.C., to the Earl of Hillsborough (Nov. 10, 1771), in 9 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 15, at 48–49.

62. See generally BEEMAN, *supra* note 32, at 176 (explaining the complex politics of the Revolution in North and South Carolina).

63. 2 WILLIAM BLACKSTONE, COMMENTARIES at \*174.

64. (1682) 22 Eng. Rep. 931, 949 (ch); 3 Chan. Cas. 1, 30.

originated as a reward for a supporter of the king and served a useful purpose in the early settlement of the province, but eventually became a clog on commerce and a source of civil unrest. In other words, while the policy reasons that justified a ban on perpetuities were known to all the colonists, those reasons were more salient for the constitutional delegates from North Carolina in 1776 because of their recent experience of instability caused by the hereditary title of an absentee English lord.

#### IV. CONCLUSION

If the specific ban against perpetuities in the North Carolina Constitution of 1776 was rooted in political and social ills unique to that colony prior to independence, what ramifications might that have for the interpretation of the provision today? Perhaps none. The inclusion of a separate clause, copied from the Pennsylvania Constitution, providing that the legislature “shall regulate entails, in such a manner as to prevent perpetuities” shows that the framers of the North Carolina Constitution of 1776 were hostile to perpetuities as conventionally defined; they were not simply motivated by the unique circumstances surrounding the Granville District.<sup>65</sup> On the other hand, when the North Carolina legislature in 1784 spoke out against the ills associated with entails as proving to be “in manifold instances the source of great contention and injustice,”<sup>66</sup> it is not too much of a stretch to imagine that the framers were thinking about the grievances of backcountry farmers and the Battle of Alamance.

As the elite of North Carolina well knew, the violence in their province on the eve of independence was to some extent the byproduct of a political structure that extracted great wealth for the private benefit of Earl Granville and the Lords Proprietors before him. Independence eliminated those specific problems, but the leaders did not want a homegrown aristocracy to cause similar problems in the future by taking advantage of ancient tools available in the English common law.<sup>67</sup> The provisions relating to entails and perpetuities in the

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65. See N.C. CONST. of 1776, § 43. The revolutionary government quickly seized the papers of the Granville land office in 1777, and the Granville District ceased to exist for all practical purposes, although lawsuits brought on behalf of the Granville heirs after independence dragged on for more than a century afterward. See Mitchell, *supra* note 14, at 122–26 (discussing the effects of the American Revolution on the Granville District and its records).

66. N.C. Act of 1784, ch. 22, § 5, *reprinted in* 24 STATE RECORDS OF NORTH CAROLINA 574 (W. Clark ed., 1905).

67. John Orth has argued that the 1784 legislation extended only to possessory estates in fee tail, not to future interests. See John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767, 792–95 (1988).

1776 Constitution and Declaration of Rights signaled that the relics of English feudalism had no place in the new American state.

Paul Newby and John Orth have suggested that the word “genius” in the 1776 North Carolina Declaration of Rights means “special character.”<sup>68</sup> What did the representatives at the Fifth Provincial Congress and other North Carolina republicans consider to be the distinctive character of a free state? Many of those who fought to free themselves from British colonial rule were driven, at least in part, by a desire to strike out against familial influence, patronage, hierarchy, and the other trappings of a hereditary aristocracy.<sup>69</sup> Of course, the planter class of the southern states was not opposed to privilege: to point out the obvious, their power depended on slavery, and their descendants would eventually fight and die in a doomed attempt to preserve that institution. In order to win support from the backcountry settlers for the cause of independence, however, the planters promised a future in which the sons and grandsons of all patriots could eventually rise to high office regardless of their family origins. It may be impossible to achieve equality of condition, but a republic can at least strive to ensure equality of opportunity.<sup>70</sup> Perhaps that was what the patriots of North Carolina meant by the “genius of a free state,” and what persists today, with some modifications, as the American dream.

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68. ORTH & NEWBY, *supra* note 48, at 90; *see also* John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399, 401 n.9 (2009) (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993)). The *Oxford English Dictionary* defines “genius,” as applied to a nation, to mean its “prevailing feeling, opinion, sentiment, or taste; distinctive character or spirit.”

69. *See* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 169–89 (1991).

70. On the distinction between equality of condition and equality of opportunity in republican thought, *see* WOOD, *supra* note 54, at 70–72.