No. _____ TENTH DISTRICT

****

SUPREME COURT OF NORTH CAROLINA

****

Jay Singleton, D.O.; and Singleton Vision Center, P.A.,

Plaintiffs,

v.

North Carolina Department of Health and Human Services; Roy Cooper, Governor of the State of North Carolina, in his official capacity; Kody H. Kinsley, North Carolina Secretary of Health and Human Services, in his official capacity; Phil Berger, President Pro Tempore of the North Carolina Senate, in his official capacity; and Tim Moore, Speaker of the North Carolina House of Representatives, in his official capacity,

Defendants.

From Wake County
No. COA21-558

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BRIEF OF THE JOHN LOCKE FOUNDATION AND PROFESSOR JOHN V. ORTH IN SUPPORT OF PLAINTIFFS-APPELLANTS

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BRIEF OF THE JOHN LOCKE FOUNDATION AND PROFESSOR JOHN V. ORTH IN SUPPORT OF PLAINTIFFS-APPELLANTS[1]

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[1] No person or entity other than the undersigned amici curiae and their counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

STATEMENT OF INTEREST OF THE JOHN LOCKE FOUNDATION

The John Locke Foundation (Locke) was founded in 1990 as an independent, nonprofit think tank committed to individual liberty and limited, constitutional government. Locke has opposed North Carolina's Certificate of Need (CON) law for many years, not only because it is unconstitutional and violates the rights of North Carolinians, but also because it directly harms patients, employers, insurers, and taxpayers by making health care more expensive and less accessible. Locke therefore has an interest in presenting to this court the best and latest research pertaining to the origin, meaning, and application of the North Carolina Constitution's law of the land, exclusive emoluments, and anti-monopoly clauses.

STATEMENT OF INTEREST OF PROFESSOR JOHN V. ORTH

Amicus John V. Orth is a constitutional law scholar and legal historian. He is the William Rand Kenan, Jr. Professor of Law (emeritus) at the University of North Carolina School of Law, where he taught from 1978 until 2021.[2] He is the author of numerous books and scholarly articles. His work has been cited by state and federal courts, including the United States Supreme Court and the North Carolina Supreme Court. Amicus has a strong scholarly and professional interest in the proper development of North Carolina constitutional law.

INTRODUCTION

During the second half of the 20th century, North Carolina's courts adopted the

[2] Law school affiliation is provided for informational purposes only. The views expressed in this brief are the author's own.

"tiers of scrutiny" approach to constitutional adjudication that had previously been developed by the federal courts to deal with constitutional adjudication involving the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Under that approach, the highest level of scrutiny is applied to laws that interfere with fundamental rights. Such laws may only be upheld if the government can show they are necessary to serve a compelling governmental purpose. The lowest level of scrutiny, on the other hand, is applied to laws that regulate ordinary economic activity. Such laws are presumed to be constitutional unless they are plainly irrational, and—because the governmental bodies that enact such laws are presumed to be in the best position to strike the right balance between individual liberty and the common good—courts are supposed to defer to those governmental bodies rather than make an independent determination about whether the "rational basis" test is satisfied.

The present case illustrates what happens when state courts casually apply federal tiers of scrutiny doctrine to claims arising under state constitutions without taking into consideration the text and the history of the state constitution itself. That practice, which is sometimes called "lockstepping," can lead to dangerous error, as it has in this case.[3]

In the decision under review, the Court of Appeals treated the plaintiffs' claims under the law of the land, exclusive emoluments, and anti-monopoly clauses of the North Carolina Constitution as if they were based on a vaguely defined right to substantive due process. Following federal tiers of scrutiny practice, it assumed that, as species of economic regulation, the CON law is subject only to minimal, rational

[3] *See,* Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L.J. 1, 1-36 (2022).

basis scrutiny, and instead of conducting its own review to determine whether the rational basis test was satisfied, it simply deferred to the legislative findings that the General Assembly had appended to the current version of the CON law.

All of that was error. The plaintiffs' claims in this case are not based on a vaguely defined right to substantive due process. They are, instead, based on what the North Carolina Constitution explicitly declares to be "great, general, and essential principles of liberty and free government." Preface to N.C. Const. art. I. Not only are those principles clearly defined and affirmed in the Constitution itself; they also have deep historical roots in our state. By any definition, therefore, those principles and the rights they protect are *fundamental*.

By failing to recognize that the plaintiffs' claims are based on fundamental principles protecting fundamental rights, the Court of Appeals committed a dangerous error. If its reasoning is allowed to stand, it will mean that the General Assembly has effectively nullified several express provisions of the state constitution simply by enacted a statute with an appended list of legislative findings. That cannot be right. This court has an opportunity not only to correct the Court of Appeals error, but to rectify tiers of scrutiny practice in North Carolina in a way that brings it into proper alignment with the history and text of the North Carolina Constitution.

ARGUMENT

I. The Principles Defined and Affirmed and the Rights Protected by §§ 19, 32, & 34 of Article I of the North Carolina Constitution Are Fundamental.

A. Textual Analysis Shows that the Principles Defined and Affirmed and the Rights Protected by §§ 19, 32, & 34 Are Fundamental.

Article I of the North Carolina Constitution is more than a mere miscellany of

rights; it is a declaration of "the great, general, and essential principles of liberty and free government." *Id.* Such principles are, by definition, fundamental. *Collins Online Dictionary*, https://www.collinsdictionary.com/us/dictionary/english/fundamental. The fact that the North Carolina Constitution uses those words to describe the principles enumerated in the Declaration of Rights should be sufficient to show that those principles and the rights they protect—including the rights protected by sections 19, 32, and 34—must be afforded maximum protection by the courts, and that conclusion is reinforced by section 35, which reminds us that, "A recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I.

The text of section 19 also supports the conclusion that it, and sections 32 and 34 as well, express fundamental principles and protect fundamental rights. Section 19 declares unequivocally, "No person shall be ... in any manner deprived of life, liberty, or property but by the law of that land." *Id.* If that declaration means anything at all, it means that all three branches of North Carolina government, including the General Assembly, must obey the law in its entirety, including sections 32 and 34 of the constitution. And that, in turn, means that the General Assembly may not grant exclusive privileges except in consideration of public service and may not create monopolies under any circumstances. If the General Assembly grants exclusive privileges or creates monopolies, it is violating the law of the land, and if the courts of North Carolina allow them to do it, then those courts are violating it

too.[4]

Those textual considerations ought to be enough to show conclusively that sections 19, 32, and 34 express fundamental principles and protect fundamental rights that merit heightened protection under tiers of scrutiny doctrine. However, North Carolina's constitutional history provides further corroboration.

B. The Historical Record Plainly Shows that the Principles Defined and Affirmed and the Rights Protected by §§ 19, 32, & 34 Are Fundamental.

We may begin by noting that the Law of the land Clause that appears in section 19 gives expression to the oldest and most fundamental principle in Anglo-American jurisprudence: that everyone, including those who wield political power, must obey the law. The principle itself has been handed down from generation to generation for more than 800 years, and the language in which it is currently expressed in the North Carolina Constitution is almost identical to the language in which it was originally expressed in Magna Carta in 1215.[5] For centuries, the countries that have adopted and implemented that principle have led the world in freedom, happiness, and prosperity. Without it, liberal, democratic governance is impossible. In short, history shows that the principle defined and affirmed by the Law of the land Clause is as fundamental as any principle of law could possibly be.

---

[4] It should be noted that the courts or North Carolina have often treated the law of the land clause of the state constitution as analogous to the due process clauses of the federal constitution. In fact, however, the law of the land clause is both broader and clearer. By its own terms, "due process of law" pertains to process only. For historical and policy reasons, the federal courts have expanded the meaning to include so-called "substantive due process," and because the phrase itself is so vague, decisions about which rights it protects has been arbitrary and driven by policy considerations rather than by objective criteria. "The law of the land," on the other clearly encompasses both the law itself, and the procedures it specifies. As explained below, that has important benefits as far as tiers of scrutiny practice is concerned. *See*, *supra*, at 15,16.

[5] See, John V. Orth, *The Past Is Never Dead: Magna Carta in North Carolina*, 94 *N.C. L. Rev.* 1635, 1637-39 (2016).

One could, of course, still argue about whether any particular law restricting economic liberty infringes on that principle, much as federal judges are inclined to do with regard to the principle that underlies the due process clauses of the federal constitution. On its face, section19 would appear to permit most such regulations so long as they are promulgated and enforced in accordance with the pertinent laws. The same cannot be said, however, of laws and regulations that grant exclusive privileges other than in consideration of public service or create monopolies under any circumstances. Sections 32 and 34 impose categorical bans on such practices. N.C. Const. art. I. As part of the state constitution, sections 32 and 34 are unquestionably part of the law of the land. It could therefore be argued that the fundamental principle expressed by section 19 requires heightened scrutiny of laws that infringe rights protected by sections 32 and 34 was well.

The history of reinforces that conclusion. As John V. Orth and Paul Martin Newby explain in *The North Carolina Constitution*, the exclusive emoluments and anti-monopoly clauses (and the law of the land clause as well) were included in the original Declaration of Rights that was adopted in 1776, and all three clauses were reincorporated in the constitutions of 1868 and 1971 and given pride of place in Article I. Oxford Univ. Press 45-93 (2013).

In a subsequent publication, moreover, Prof. Orth elaborates on what this history implies about the meaning and importance of the exclusive emoluments and anti-monopoly clauses in particular:

> These clauses, read in combination, make it clear that in the "free state" of North Carolina, there would be only one class of citizen: free men who would compete equally for political and economic advantage. John V. Orth, *Unconstitutional Emoluments: The*

> *Emoluments Clauses of the North Carolina Constitution*, 97 N.C. L. R. 1727, 1729-30.

That the exclusive emoluments and anti-monopoly clauses have always been part of North Carolina's constitutional law and have always occupied a prominent place in our founding documents is powerful evidence that the principles they express and the rights they protect have long been understood to be fundamental. There is, however, much more in the way of corroborative historical evidence.

In "Monopolies and the Constitution: A History of Crony Capitalism," Steven G. Calabresi and Larissa C Liebowitz describe the intense opposition to special privileges and monopolies in colonial America and the role that opposition played on political developments before, during, and after the War of Independence. Here are some excerpts:

> England enacted an extensive set of laws granting English merchants monopolies in colonial trade for a variety of markets—from manufactured goods to all kinds of raw materials. ... [B]lack markets arose [in] response, [and] English mercantile laws were enforced with great intrusiveness. ... The havoc wreaked by the English monopoly system on England's relationship with the American colonies cannot be overstated. 36 Harvard J.L. & Pub. Pol'y. 984, 1008 (2017). ...
>
> The right to compete, and, more fundamentally, the right to earn an honest living, is a basic right embodied in U.S. constitutional law. There is substantial evidence, from the English and colonial history ... to support this thesis. However, the longstanding use of rational basis review has meant that the courts have too often surrendered to a legislative process that is dominated by well-entrenched interest groups seeking monopoly rents from the state. It means that fundamental economic liberties too often go unprotected by the courts. In short, the use of rational basis review has meant that "property is at the mercy of the pillagers." *Id.* at 1097

An extended history dealing specifically with North Carolina's anti-monopoly

clause in particular is provided in the Appendix to this brief. Here is an excerpt:

> In 1603, England's highest court held that monopolies are "against the Common Law." In 1624, Parliament enacted the Statute of Monopolies, which stated that monopolies are "altogether contrary to the laws of this realm." In 1776, North Carolina's first constitution declared that monopolies "ought not to be allowed." In 1868, the state's second constitution made the same declaration in the same words, and, in 1971, North Carolinians ratified the current constitution, which declares, even more emphatically, that monopolies "shall not be allowed." And, in 1973, the State of North Carolina Supreme Court held that a law giving existing medical facility operators the exclusive right to provide medical services violated the anti-monopoly clause.
>
> None of that, however, has deterred North Carolina's state government from granting legal monopolies. ... In 1978, just five years after the North Carolina Supreme Court struck down the original CON law, the General Assembly enacted a new CON law that is substantially similar to the old one. Unless the General Assembly repeals the new law or the Supreme Court strikes it down, the State of North Carolina will go on protecting the hospital cartel's monopoly on the provision of medical services.
>
> Clearly, the fight against government-granted monopolies can never be decisively won. The potential rewards are huge, and would-be monopolists and politicians will never stop trying to secure and share those rewards. Those who wish to exercise their right to lawfully earn a living and compete with other service providers will, therefore, have to go on fighting. App. at 7-8.

Dr. Singleton is carrying on that fight on behalf of all independent medical service providers. Thanks to the foresight of North Carolina's founders, our state constitution provides him with powerful weapons to use in that fight.

II. Under Both Federal and State Tiers of Scrutiny Doctrine, Laws that Violate Fundamental Principles or Infringe Fundamental Rights Are Subject to Heightened Scrutiny.

From the start, even the most ardent advocates of applying rational basis scrutiny to laws that regulate ordinary economic economic have conceded that a

higher standard must apply when laws infringe fundamental rights. In the dissent that paved the way for modern tiers of scrutiny Oliver Wendell Holmes explained:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. *Lochner v. New York*, 198 U.S. 45, 79 (1905) (Holmes, J. dissenting).

The Supreme Court was finally browbeaten into adopting the tiers of scrutiny approach in 1937, but throughout all the permutations through which that doctrine has evolved, and even after it was adopted in states like North Carolina, one principle has endured: laws that infringe fundamental rights are subject to strict rather than rational basis review. Here in North Carolina, the Court of Appeals itself has affirmed that principle on numerous occasions, e.g.:

> [I]f the right infringed upon is a "fundamental" right, then the law will be viewed with strict scrutiny and the party seeking to apply the law must demonstrate a compelling state interest for the law to survive constitutional attack; if the right infringed upon is not a fundamental right then the party applying the law need only demonstrate that the statute is rationally related to a legitimate state interest. *Clark v. Sanger Clinic, P.A.*, 142 N.C. Ct. App. 350, 357-8 (2001), 542 S.E.2d 668, 675 (2001).

This bedrock principle is and must remain an essential part of tiers scrutiny doctrine. Without it, the entire doctrine would be untenable and unjust.

III. In the Opinion Below, the Court of Appeals Failed to Recognize that the Principles Defined and Affirmed and the Rights Protected by §§ 19, 32, and 34 Are Fundamental.

In 1973, this court struck down North Carolina's original CON law. It found that the law constituted "a deprivation of liberty without due process of law, in

violation of Article I, § 19 of the Constitution of North Carolina." It also found that the law "establishe[d] a monopoly in the existing hospitals contrary to Article I, 34 of the Constitution of North Carolina" and was "a grant to them of exclusive privileges forbidden by Article I, 32." *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 551, 193 S.E. 2d 729, 736.

In 1978, the General Assembly enacted a new CON law that was similar in most respects to the old one. While the hospital associations and other interested parties had their own reasons to support it, the 1978 CON law was initially predicated on two facts about federal health care law, both of which were included in a list of legislative findings appended to the Act: (1) the fact that the cost-plus system used for Medicare and Medicaid reimbursements encouraged an over-provision of medical services, and (2) the fact that—in a ham-fisted attempt to discourage over-provision—Congress had passed the National Health Planning and Resource Development Act (NHPRDA) which required states to adopt CON laws in order receive federal funding. (R pp 17-18, ¶¶ 44-480). These facts would no doubt have sufficed to preserve the new CON law from constitutional challenge even under the highest level of scrutiny. The State of North Carolina clearly had a compelling interest in the continued receipt of Medicare and Medicaid funding, and under the NHPRDA, the creation of a CON law system was the only way the state could protect that interest.

The adoption of a fixed fee-for-service system for Medicare and Medicaid reimbursement and the repeal of NHPRDA in 1986 completely undermined the CON law's rationale, and those two findings were removed from the statute in 1987. (*Id.*,

pp. 18-19, ¶¶ 49-52). Given the implausibility of the remaining legislative findings and given the already large and growing body of research refuting those findings, it is doubtful the new law could have withstood challenge under any level of scrutiny that did not require an extreme level of judicial deference.

Nevertheless, when the Court of Appeals considered a challenge to the new law in 2010, it applied the rational basis test and granted the state legislature an extreme level of deference. *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 359, 693 S.E.2d 673, disc. review denied, 364 N.C. 614, 754 S.E.2d 166 (2010). And, of course, the court misapplied tiers of scrutiny doctrine in the same ways in the present case.

In both cases the court assumed the plaintiffs' claims under the North Carolina Constitution were perfectly analogous to the kinds of claims that might be made under one or the other of the federal due process clauses. In *Hope* the plaintiffs made a claim under § 19, which the court characterized as a "substantive due process argument." *Id.* at 374, 688. In the present case plaintiffs made claims under sections 19, 32, and 34. The court characterized the first as "a substantive due process claim," and, somewhat bizarrely, it characterized the latter two claims as "procedural due process constitutional challenges."[6] *Singleton v. DHHS*, 284 N.C. App. 104, 111, 874

[6] The former is not surprising. There is plenty of precedent for eliding the differences between the two phrases. The latter, however, *is* surprising because neither clause makes any reference to process, due or otherwise, and it is hard to imagine how any constitutional provision could be more substantive than these. Regardless, while the distinction between procedural due process and substantive due process is important for the opinion because it enable the court to dismiss the plaintiffs' § 32 and 34 claims because of his supposed failure to exhaust his administrative remedies, for the purposes of this analysis that does not matter. Even if the court had recognized the substantive nature of the §§ 32 and 34 claims, it presumably would have applied the rational basis test to those claims and dismissed them as casually as it dismissed the plaintiffs' claim under § 19.

S.E.2d 669 (2022).

In both cases the court failed to take into consideration the various ways in which the analogy between federal due process claims and claims under Art. I of the North Carolina Constitution breaks down. Unlike the due process clauses of the United States Constitution, section 19 of the North Carolina Constitution does not use the phrase "due process of law"; it refers, instead, to "the law of the land." Furthermore, unlike the United States Constitution, which imposes no clearly articulated limits on economic regulation, sections 32 and 34 specifically forbid the state from regulating economic activity in certain ways. The failure to recognize these differences between the federal and state constitutions is presumably the reason the court also failed to recognize the fact that sections 19, 32, and 34 all express fundamental principles and protect fundamental rights.

Having made that first mistake, additional mistakes followed as a matter of course. In each case, the court applied the rational basis test rather than some higher standard of review, and in each case, it accepted the General Assembly's legislative findings as proof that that rational basis standard had been met.

In each case, the Court of Appeals justified its choice by quoting portions of this court's opinion in *Poor Richard's Inc., v. Stone*:

> Article I ... Section 19 of [the North Carolina Constitution] provides that "[n]o person shall be... deprived of his ... liberty, or property, but by the law of the land." The "law of the land," like "due process of law," serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare. ...
>
> These constitutional protections have been consistently interpreted to permit the state, through the exercise of its police

> power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose. 322 N.C. 61, 64, 366 S.E.2d 697, 698-699.

In neither case did the court make an independent assessment of whether the rational basis test had been satisfied; it simply took the General Assembly's word for it instead. In *Hope* the court found that the test was satisfied because:

> The current CON law is distinguishable from the one invalidated in *Aston Park*. Most significantly, the current law contains detailed explanations as to how the requirement of a CON based on need determinations promotes the public welfare. *Hope* at 381, 695.

And in the present case it found the test was satisfied because:

> [T]he earlier codification has been amended ... to include additional legislative findings to show ... that if left to the marketplace to allocate health service facilities and health care services, geographical maldistribution of these facilities and services would occur. ¶ 42.

In short, even under the terms of its own restatement of tiers of scrutiny doctrine, the Court of Appeals erred in both cases by failing to recognize that the current CON law violates fundamental principles enumerated in the Declaration of Rights and infringes fundamental rights protected by those principles.

IV. This Court Should Correct the Court of Appeals' Error in a Way that Brings Tiers of Scrutiny Practice in North Carolina into Better Alignment with the Text and History of the State Constitution.

As noted in the Introduction, the Court of Appeals reasoning in the opinion below leads to an absurd result, namely, that by appending so-called legislative findings to an enacted law, the General Assembly can effectively nullify restrictions on its power that are explicitly enumerated in the North Carolina Constitution. This court

can prevent that result by finding that sections 19, 32, and 34 express fundamental principles and protect fundamental rights, and by remanding the case for reconsideration under a heightened level of scrutiny.

On its own, however, that finding would not solve the deeper problem exposed by this case. Unless tiers of scrutiny practice in North Carolina is brought into closer alignment with the text and history of the state constitution, the same line of reasoning will lead to similarly absurd results whenever some economic regulation infringes on rights protected by express provisions of the North Carolina Constitution.

This court could wait and deal with the underlying problem on an ad hoc basis whenever an instance comes before it. It would be better, however, to solve the problem once and for all by holding that Art. I of the North Carolina Constitution does what it says it does, i.e., defines and affirms "the great, general, and essential principles of liberty and free government." Preface to N.C. Const. art. I. Such a holding would establish a bright line for determining the appropriate level of scrutiny in constitutional adjudication. If the law violates any of the principles defined and affirmed in Art. I, the state must convince the court that the deprivations of life, liberty, or property it entails are necessary to serve a compelling governmental purpose. If the law does not violate any of those principles, rational basis scrutiny will suffice.

The primary downside of such a holding is that it would require the court to recognize that North Carolina's law of the land Clause is *not* synonymous with the due process clauses of the United States Constitution. Because so many previous decisions have assumed that it *is* synonymous. that would create a certain amount of tension between new cases decided under heightened scrutiny and old cases decided under the

old standard. Still, the degree of tension would probably be limited. Most economic regulations do not clearly violate any of the principles explicitly or violate any of the rights enumerated in Art. I. Furthermore, adjusting tiers of scrutiny doctrine in the manner proposed would be substantially less disruptive than the alternative ways of solving the problem presented by this case.

One of those alternative solutions would be abandon tiers of scrutiny doctrine altogether. Jurists and legal scholars have raised important questions about the legitimacy of tiers of scrutiny doctrine itself, and about the wisdom of applying it to adjudication under state constitutions,[7] and this court may need to address those questions at some point. Abandoning tiers of scrutiny would indeed be a radical change. However, as explained above, the court does not need to address the questions that have been raised about the doctrine to arrive at a satisfactory resolution of the present case.

Another alternative would be to relax the level of deference in rational basis cases.[8] Deference, after all, does not mean abject, unquestioning servility. There is nothing rational about allowing a pro forma listing of legislative findings to permanently immunize legislation against judicial scrutiny, especially when, as in this case, those findings were implausible to begin with and have since been thoroughly refuted. However, relaxing the level of deference in rational basis cases would also constitute a radical break from the past and create tensions between new

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[7] Regarding the former, *see, e.g.*, Justice Thomas's dissent in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016); Regarding the latter *see, e.g.*, *See,* Dietz, *supra*, at 1-36 (2022) and Jeffery S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, Oxford Univ. Press, 174–78 (2018).

[8] It has, in fact, been suggested that this court's opinion in *Aston Park* could be read as a less than fully deferential application of the rational basis test. Dietz, *supra*, at 15-16.

and old decisions. Moreover, it would probably take years of litigation to work out in detail how a semi-deferential standard should work in practice. All things considered, therefore, a bright line holding that requires heightened scrutiny for laws that violate the principles and infringe the rights enumerated in Art. I would appear to be the least disruptive and most effective solution.

Neither those who want the courts to protect unenumerated rights nor those who want the state to have unbridled power over economic activity will be altogether happy about such a holding. The former, however, could be mollified by pointing out that such a holding would not rule out the possibility that there might be other, unenumerated rights that also deserve heightened protection. The latter could be mollified by pointing out that most economic regulations do not infringe rights protected by Art. I. And both groups could take comfort in the fact that, unlike the United States Constitution, the North Carolina Constitution is easy to amend. More than forty proposed amendments have been placed before the voters since the current constitution took effect in 1971, and more than three dozen have been ratified. Orth and Newby, *supra*, at 33-35.

Both groups could also take comfort in the fact that, by making the text of the Constitution the primary basis for determining which principles and rights are fundamental and which are not, such a holding would take that determination out of the hands of judges and deliver it into the hands of the people, where it belongs. As the Constitution has always declared:

> All political power is vested in and derives from the people; all government of right originates from the people, is founded upon their will, and is instituted solely for the good of the whole. N.C. Const. art. I, § 2.

CONCLUSION

This court should bring tiers of scrutiny doctrine in North Carolina into alignment with the text and history of the state constitution by holding that the principles set forth in the Declaration of Rights—including specifically §§ 19, 32, and 34—are all fundamental and that laws infringing on rights protected by those principles are subject to strict scrutiny. Having done so, this court should remand this case for reconsideration under an appropriate standard of review.

Respectfully submitted this first day of November 2023.

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APPENDIX[9]

> Monopolies in times past were ever without law, but never without friends.
>
> Sir Edward Coke, 1644

There's nothing in the official record to indicate what the members of the Fifth Provincial Congress had in mind by including the anti-monopoly clause in the Declaration of Rights that they adopted in 1776. Nevertheless, the target of the clauses is clear from the intellectual and political context. In the eighteenth century—in North Carolina and throughout British North America—the colonists were literally up in arms about the British practice of granting exclusive trade privileges to certain companies. From their reading and from their direct experience, those colonists had learned that government granted monopolies violated their rights and diminished their welfare.

I. What the Colonists Learned About Monopolies from Their Reading

When it came to English law and English legal history, the colonists relied, above all, on the voluminous works of the great seventeenth century jurist Sir Edward Coke. For them, Coke was more than just a legal authority; he was a heroic advocate for liberty. If, therefore, we want to know what the members of the Fifth Provincial Congress had in mind when they added the anti-monopoly clause to the North Carolina constitution, a good place to start is by considering what they would have learned about monopolies from their reading of Edward Coke.

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[9] This Appendix is an abridged and amended version of Jon Guze, *North Carolina's Anti-Monopoly Clause: Still Relevant After All These Years*, 2 Political Economy in the Carolinas 103 (2019) (Citations are omitted from this abridgement but can be found in the original.)

To begin with, they would have learned something important about seventeenth-century semantics. As defined by Coke, "*A monopoly is an institution, or allowance by the King . . . to any person or persons, bodies politick or corporate, of or for the sole buying, selling, making, working, or using of any thing.*"

They would also have learned about the long fight—led for many years by Coke himself—to put a stop to such monopolies in England. And they would have learned, specifically, about two major victories in that fight: the Court of King's Bench's holding in *Darcy v. Allen* in 1603, and Parliament's passage of the Statute of Monopolies in 1624.

Coke's report of *Darcy v. Allen*—published as *The Case of Monopolies*—was widely read in the colonies. According to the report, Edward Darcy ("a Groom of the Chamber to Queen Elizabeth") had purchased the exclusive right to manufacture, import, and sell playing cards. He accused Thomas Allen ("Haberdasher of London") of violating that monopoly and sought damages for loss of income. The court found in favor of Allen, and—despite the fact that the case was heard more than four hundred years ago—the arguments and analysis are depressingly familiar.

Darcy attempted to justify his monopoly by suggesting that, because playing cards were "things of vanity" and subject to "great abuse," it was right and proper for the Queen to "take such order for the moderate use of them as shall seem good to her." The court, however, found that "the end of all these monopolies is for the private gain of the patentees," and it held that the Queen's grant to Darcy was void because "the same is a Monopoly, and against the Common Law." In addition to citing scriptural support and legal precedents going all the way back to Magna Carta, the

court noted that monopolies violate the "liberty of the subject," are "against the freedom of Trade and Traffick," and "leadeth to the impoverishment of divers artificers and others." It also noted that once a monopoly is granted, "the price of the said commodity shall be raised" and "the Commodity is not so good and merchantable as it was before."

Darcy was decided at the very end of Elizabeth's reign. Her successor, James I, ignored the decision and continued to grant monopolies as a source of revenue. In response to James's obstinacy, Coke, who was by that time a member of Parliament and chairman of the Committee of Grievances, led a successful campaign to impose a statutory remedy. The Statute of Monopolies, which Coke himself drafted, declared:

> All monopolies and all commissions, grants, licences [sic.], charters and letters patents heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working or using of any thing ... are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution.

In the short term, the Statute of Monopolies was no more successful than *Darcy v. Allen* had been. James's successor, Charles I, ignored them both, and the practice did not come to an end in England until royal prerogative itself came to an end under the settlement of 1688 as recorded in the Bill of Rights. Nevertheless, those early victories had a large and lasting impact. They established the law of the land by which William and Mary and their successors were bound; they provided the foundation for the subsequent development of monopoly and patent law in England and America; and, most importantly for our purposes, they provided the legal basis for the colonists' opposition to government-granted monopolies.

II. What the Colonists Learned About Monopolies from Their Direct Experience

While the Glorious Revolution and the Bill of Rights may have put a stop to the abuse of government-granted monopolies in England, they did not put a stop to them in the colonies, and this became a source of increasingly bitter resentment. The colonists regarded themselves as Englishmen, and they believed English common law and English statutes—including *Darcy v. Allen* and the Statute of Monopolies—applied to them. However, the authorities in eighteenth-century England saw things differently. The official position was that the colonial charters superseded English common law within the colonies and that English statutes only applied to the colonies when the statutory language explicitly said so.

Unfortunately, the Statute of Monopolies did not include such a statement, and, making matters worse, by its own terms it applied only to monopolies "within this realm, or the dominion of Wales." As a result, Britain continued to grant legal monopolies on the colonial trade, with dire consequences for the imperial project in North America.

In a recent law review article, Steven G. Calabresi and Larissa C. Leibowitz describe the resulting spiral of escalating hostilities:

> England enacted an extensive set of laws granting English merchants monopolies in colonial trade for a variety of markets—from manufactured goods to all kinds of raw materials, . . . black markets arose [in] response, . . . [and] English mercantile laws were enforced with great intrusiveness. ... The havoc wreaked by the English monopoly system on England's relationship with the American colonies cannot be overstated.

One particularly vivid example of that havoc would have been fresh in the minds of members of North Carolina's Fifth Provincial Congress in 1776: the Boston Tea Party.

While it is often described as a tax protest, what happened at Boston Harbor in 1773 was also very much a protest against the British East India Company's monopoly on the tea trade.

Given this intellectual and political context, there can be little doubt what the members of the Fifth Provincial Congress had in mind when they added the anti-monopoly clause to the state constitution in 1776. They meant to secure for themselves and their posterity the same right that *Darcy v. Allen*, the Statute of Monopolies, and the Glorious Revolution had secured for their cousins back in England: the right to earn an honest living by engaging in a lawful occupation.

III. What The Anti-monopoly Clause Means Today

While the original understanding of the anti-monopoly clause seems clear, one might nevertheless ask: two constitutions and 243 years later, does it still mean today what it meant in 1776? To be more specific, does it still forbid government-granted monopolies? Perhaps surprisingly, the answer is yes.

If that answer seems surprising, it is because—in addition to eliciting a political response in the form of state and federal antitrust legislation—the emergence of the great trusts in the late nineteenth century inspired a semantic change as well. Here's how a contemporary observer described that change:

> Monopoly now means something vastly different from that which [was] so vigorously opposed in the times of Elizabeth and James, and against which the founders of our nation had such a deep-rooted antipathy. Then it meant an institution founded and kept in existence by royal favoritism; now it means an institution which may have come into existence without direct governmental assistance, and which may have maintained itself in spite of administrative and legislative opposition.

Given that the word "monopoly" retained that new meaning in 1971 when the current constitution was ratified, and given that it has continued to retain that new meaning ever since, it could be argued that the Anti-monopoly clause should now be understood to forbid, not just the government granted monopolies that were its original target, but organizations that have achieved monopoly power without government assistance as well. What could not be argued seriously, however, is that the clause should now be understood to apply *only* to businesses such as Google and Facebook and *not at all* to monopolies such as the one created by North Carolina's CON law. From the late nineteenth century all the way up to the present day, dictionary definitions for the word "monopoly" have invariably included something like, "An exclusive privilege of engaging in a particular business or providing a particular service granted by a ruler or by the state." It would be strange indeed for a court to conclude that the voters who ratified North Carolina's current constitution intended to narrow the scope of the Anti-monopoly clause in a way that both excluded a conventional meaning of the word "monopoly" and frustrated the purpose for which the clause was originally adopted, and, indeed, no court has done so. On the contrary, in a case decided soon after the current constitution was ratified, the North Carolina Supreme Court did not hesitate to apply the anti-monopoly clause to a government granted monopoly.

North Carolina enacted its original CON law in 1971. Like the current version, the 1971 law gave existing health care providers the power to exclude competing medical-service providers in their regions. It was immediately challenged by a private hospital that wanted to replace its existing facility with a new and larger one. In an

opinion more than a little reminiscent of *Darcy v. Allen*, the North Carolina Supreme Court rejected the state's attempt to defend the law on public health grounds and held the following:

> The right to work and to earn a livelihood is a . . . right that cannot be taken away except . . . for reasons of health, safety, morals, or public welfare. . .. We find no . . . reasonable relation between the denial of the right . . . to construct and operate . . . an adequately staffed and equipped hospital and the promotion of the public health. . .. [Denying] the right to construct and operate [a] hospital except upon the issuance . . . of a certificate of need . . . establishes a monopoly in the existing hospitals, contrary to Art. I, Sec. 34 of the Constitution of North Carolina.

Conclusion

In 1603, England's highest court held that monopolies are "against the Common Law." In 1624, Parliament enacted the Statute of Monopolies, which stated that monopolies are "altogether contrary to the laws of this realm." In 1776, North Carolina's first constitution declared that monopolies "ought not to be allowed." In 1868, the state's second constitution made the same declaration in the same words. In 1971, North Carolinians ratified the current constitution, which declares, even more emphatically, that monopolies "shall not be allowed." And, in 1973, the North Carolina Supreme Court held that a law giving existing medical-facility operators the exclusive right to provide medical services violated the anti-monopoly clause.

Displaying a contempt for law and history that would have made Elizabeth, James, and Charles I blush, North Carolina's state government has continued to grant and defend legal monopolies. In 1978, just five years after the North Carolina Supreme Court struck down the original CON law, the General Assembly enacted a new CON law, and, unless the General Assembly reconsiders or the North Carolina

Supreme Court strikes it down, the State of North Carolina will go on protecting the hospital cartel's monopoly on the provision of medical services for the foreseeable future.

Clearly, the fight against government-granted monopolies can never be decisively won. The potential rewards are huge, and would-be monopolists and politicians will never stop trying to secure and share those rewards. Those who wish to exercise their right to engage in lawful occupations will, therefore, have to go on fighting. Fortunately, the anti-monopoly clause of the North Carolina constitution gives them a powerful weapon to use in that fight.