POLITICAL ECONOMY
IN THE CAROLINAS

NORTH CAROLINA'S ANTI-MONOPOLY CLAUSE: STILL RELEVANT AFTER ALL THESE YEARS

Notes & Commentary by:
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Monopolies in times past were ever without law, but never without friends.

Sir Edward Coke, 1644

I. INTRODUCTION

In 2017, a North Carolina surgeon named Gajendra Singh opened a diagnostic-imaging center in Forsyth County. The center currently provides x-rays, ultrasound, and CT imaging seven days a week at low, fixed prices. Dr. Singh would like to offer low-cost MRI scans seven days a week as well, but he can't. Under North Carolina's certificate-of-need (CON) law, only the owners and operators of existing medical facilities are allowed to provide certain types of medical services, including MRI scans. Rather than accept this lying down, Dr. Singh filed a complaint last summer asking the Wake County Superior Court to declare that the CON law violates several provisions of the state constitution, including Article I, Section 34, which declares, "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

Commonly known as the "anti-monopoly clause," that declaration has been part of North Carolina's constitutional endowment from the very beginning. It was part of the original state constitution, which was adopted by the Fifth Provincial Congress in 1776. It was part of the post–Civil War constitution, which was ratified by the voters in 1868. And, as noted, it is part of the current constitution, which was ratified in 1971.

As I will explain in this note, the anti-monopoly clause was originally adopted for the specific purpose of forbidding government-granted monopolies such

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as the one created by North Carolina's CON law. Fortunately for Dr. Singh—and for the thousands of other North Carolinians whose right to earn a living has been violated by state laws that confer monopoly privileges on politically favored groups—the anti-monopoly clause can still serve that purpose today.

II. WHAT THE ANTI-MONOPOLY CLAUSE MEANT IN 1776

There's nothing in the official record to indicate what the members of the Fifth Provincial Congress had in mind when they added the anti-monopoly clause to the state constitution in 1776 (Minutes, 969, 971). Nevertheless, the target of the clause 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, the colonists had learned that government-granted monopolies violated their rights and diminished their welfare. It seems clear, therefore, that the original purpose of the anti-monopoly clause was to forbid government-granted monopolies in the newly formed state of North Carolina.

1. WHAT THE COLONISTS LEARNED 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. In the words of legal historian Thomas Barnes, "Our Founding Fathers had no doubt which side Lord Coke was on, and none questioned the magnitude of the aid he gave them" (quoted in Calabresi and Liebowitz 2018, 1007).[1] 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.

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" (Coke 1644, 181).

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 it was the first time a monopolies case had been heard in a common-law court, and despite the fact that it happened more than four hundred years ago—the arguments and analysis are depressingly familiar.

1. While some modern scholars have cast doubt on Coke's reliability as a guide to legal developments in early-modern England (Letwin 1954; Malament 1967; Nackbar 2005), nobody doubts that the colonists regarded him as authoritative.

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" (*Darcy* 1603, 85b). 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" (*Darcy* 1603, 86a). 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* 1603, 86b).

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, 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. (Statute of Monopolies 1623, Sect. 1)

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.

2. WHAT THE COLONISTS LEARNED 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" (Statute of Monopolies 1623, Sect. 1). 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. (Calabresi and Leibowitz 2013, 1008)

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 that the members of the Fifth Provincial Congress had government-granted monopolies specifically in mind when they added the anti-monopoly clause to the state constitution in 1776. By declaring that such monopolies ought not to be allowed, 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 IT 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. (Forrest 1896, 414)

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.[2] What could not be seriously argued, 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

2. Even if it were successful, such an argument would have little substantive impact because federal antitrust law preempts state law in this area.

century all the way up to the present day, dictionary definitions for the word "monopoly" have invariably included something like the following: "an exclusive privilege of engaging in a particular business or providing a particular service granted by a ruler or by the state" (Collins 2019). 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. Ironically enough, that monopoly was created under an earlier version of the law that is being challenged by Dr. Singh.

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. (*Aston Park* 1973, 551, quotations and citations omitted)

IV. 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, and, 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.

None of that, however, has deterred North Carolina's state government from granting legal monopolies on a scale that would have made Elizabeth and James (and even Charles I) blush. On average, between 1970 and 2008 North Carolina created a new licensing board every ten months, and, because some of those boards were given control over more than one occupation, the number of newly licensed occupations—each of which is, in effect, a government-granted monopoly—grew considerably faster than that (Sanders 2018). In 2078, just five years after the North Carolina Supreme Court handed down its decision in *Aston Park*, the General Assembly enacted a new CON law, and, unless Gajendra Singh succeeds in getting that law struck down, the state 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.

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