



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 71 | Number 6

Article 1

9-1-1993

Liberty, the Law of the Land, and Abortion in North Carolina

Louis D. Billionis

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Louis D. Billionis, *Liberty, the Law of the Land, and Abortion in North Carolina*, 71 N.C. L. REV. 1839 (1993).

Available at: <http://scholarship.law.unc.edu/nclr/vol71/iss6/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

LIBERTY, THE "LAW OF THE LAND," AND ABORTION IN NORTH CAROLINA

LOUIS D. BILIONIS*

Does the North Carolina Constitution safeguard a woman's right to make "the highly personal choice whether or not to terminate her pregnancy"?¹

There has been no definitive ruling from the state courts, so this interesting question² may be admitted as open. If women in North Carolina should ever need to enlist the state constitution in their effort to retain control of the abortion decision, however, they will discover text, precedent, principle, and tradition to support them. This essay makes no attempt to brief the case for abortion rights under the North Carolina Constitution in detail; there will be time and lawyers enough for that if the need arises.³ It does spotlight, however, two critical premises of

* Associate Professor of Law, University of North Carolina at Chapel Hill. A.B. 1979, University of North Carolina at Chapel Hill; J.D. 1982, Harvard University.

1. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 n.1 (1983).
2. In recent years, several profitable inquiries into state constitutional law's potential to protect abortion rights have been undertaken. *See, e.g.*, Michael R. Braudes, *State Constitutional Regulation of Abortion*, 19 U. BAL. L. REV. 497 (1990); John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?*, 51 LA. L. REV. 685 (1991); Amy Johnson, *Abortion, Personhood, and Privacy in Texas*, 68 TEX. L. REV. 1521 (1990); Janice Steinschneider, *State Constitutions: The New Battlefield for Abortion Rights*, 10 HARV. WOMEN'S L.J. 284 (1987); Darin E. Tweedt, *The Validity of Legislative Restrictions on Abortion Under the Oregon Constitution*, 65 TEMPLE L. REV. 1349 (1992); Kimberley A. Chaput, Comment, *Abortion Rights Under State Constitutions: Fighting the Abortion War in the State Courts*, 70 OR. L. REV. 593 (1991); Martha M. Ezzard, Comment, *State Constitutional Privacy Rights Post Webster—Broader Protection Against Abortion Restrictions?*, 67 DENV. U. L. REV. 401 (1990); *see also* Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMPLE L. REV. 1279 (1992) (examining case law interpreting state constitutional privacy rights); J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327 (1992) (examining privacy law under the California Constitution); Timothy Stallcup, Comment, *The Arizona Constitutional "Right to Privacy" and the Invasion of Privacy Tort*, 24 ARIZ. ST. L.J. 687 (1992) (surveying Arizona's privacy law).
3. Several factors operate to make it unlikely that the Supreme Court of North Carolina will have to face the question directly any time soon. First, if past patterns persist, anti-abortion proposals should fare poorly in the North Carolina General Assembly, foreclosing the occasion for a state constitutional challenge. *See* Rachele Kanigel, *Odd Mix Creates Liberal N.C. Abortion Laws*, NEWS & OBSERVER (Raleigh, N.C.), July 4, 1992, at 1A, 12A ("In the past eight years, legislators opposed to abortion have proposed nearly a dozen bills that would have put restrictions on abortion. Despite sometimes considerable legislative support, none of them passed the General Assembly."). Second, there is the possibility that Congress might enact legislation to protect abortion rights, thereby removing the issue from the state political arena. Third, there is the possibility that scrutiny under the Federal Constitution pursuant to

North Carolina constitutional law which any respectable inquiry into the state constitutional status of abortion rights in North Carolina must accept as given. Properly understood, they point in favor of a broadly protective right of choice.

I. THE BREADTH OF CONSTITUTIONALLY PROTECTED LIBERTY IN NORTH CAROLINA

One objection commonly raised against the constitutionalization of abortion rights is that such action requires an impermissible extratextual excursion on the part of the courts.⁴ Whatever the strength of that argument at the federal level—it was decisively rejected by a majority of the United States Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵ and its theoretical premises have consistently proved unavailing in the high court⁶—it is difficult to see any merit in it under the North Carolina Constitution. Simply put, a woman's interest in retaining authority over the decision whether to carry her pregnancy to term falls comfortably within the ambit of personal "liberty" secured by the North Carolina Declaration of Rights.⁷ The provisions of the Declaration of Rights relevant to the inquiry are section 1,⁸ which reads:

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness[;]

and section 19,⁹ which in pertinent part provides:

the standards set forth in *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791 (1992), might resolve some questions in favor of abortion rights and thus obviate the need to address the state constitution.

4. See, e.g., *Casey*, 112 S. Ct. at 2858-60 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (advocating, for such reasons, that *Roe v. Wade*, 410 U.S. 113 (1973), should be overruled); *id.* at 2873-75 (Scalia, J., concurring in the judgment in part and dissenting in part) (same).

5. 112 S. Ct. 2791, 2804-16 (1992).

6. See *id.* at 2804-06 (affirming the validity of unenumerated rights jurisprudence under the Due Process Clause; rejecting the hypothesis that the clause "protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified"; referring to the hypothesis advanced by Justice Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (opinion of Scalia, J.)); *Michael H.*, 491 U.S. at 132 (O'Connor, J., joined by Kennedy, J., concurring in part) (rejecting Scalia's position); *id.* at 136-47, 156-57 (Brennan, J., joined by Marshall, J., and Blackmun, J., dissenting) (same).

7. The consequences of this conclusion—in particular, the amount of protection to be afforded this liberty interest by the courts in the name of the state constitution—is quite another matter, and one to which we will turn in Part II of this essay.

8. N.C. CONST. art. I, § 1.

9. N.C. CONST. art. I, § 19.

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.

To say that a woman has a "liberty" interest in retaining authority over procreative and childbearing matters, including abortion, surely does no violence to the plain language of these provisions. "Liberty" is a spacious term standing alone, and it is made no less so when used in conjunction with other more or less commodious constructs like "privileges," "property," "the enjoyment of the fruits of [one's] own labor," and "the pursuit of happiness." As the United States Supreme Court has established in cases from *Roe v. Wade*¹⁰ to *Casey*, and as some of North Carolina's sister states likewise have demonstrated through decisions rendered under their own constitutions,¹¹ the concept of constitutional liberty easily embraces the personal interest underlying abortion rights.

Nor will the stock rejoinder, original intent,¹² disturb this conclusion. The founders in question are the people of North Carolina who ratified the current state constitution, North Carolina's third, in 1970.¹³ When they reaffirmed their commitment to the principles of sections 1 and 19 twenty-three years ago,¹⁴ the people endorsed texts with an established interpretive understanding. By the time of North Carolina's latest

10. 410 U.S. 113 (1973).

11. See, e.g., *Doe v. Maher*, 40 Conn. Supp. 394, 449-50, 515 A.2d 134, 162 (Super. Ct. 1986) (relying, *inter alia*, on state constitutional guarantee of due process, pursuant to CONN. CONST. art. I, § 10, to invalidate limits on state funding of abortion to cases involving danger to the life of the mother); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 654-55, 417 N.E.2d 387, 402 (1981) (relying on the state constitutional guarantee of due process to invalidate limits on state funding of abortion to cases involving danger to the life of the mother); *Right to Choose v. Byrne*, 91 N.J. 287, 310, 450 A.2d 925, 937 (1982) (relying on N.J. CONST. art. I, par. 1, which is similar to N.C. CONST. art. I, § 1, to invalidate limits on state funding of abortion to cases involving danger to the life of the mother); *Hope v. Perales*, 150 Misc. 2d 985, 994-97, 571 N.Y.S.2d 972, 978-80 (N.Y. Sup. Ct. 1991) (relying, *inter alia*, on state constitutional guarantee of due process, pursuant to N.Y. CONST. art. I, § 6, to invalidate limits on state funding of abortion to cases involving danger to the life of the mother).

12. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143, 158-59, 169-70 (1990) (espousing "the original understanding" as the sole theory of constitutional interpretation that can reconcile judicial review and democracy, and arguing for the overruling of *Roe v. Wade*, 410 U.S. 113 (1973), as unsupportable by original intent).

13. Voters adopted the current North Carolina Constitution in 1970; it became effective in July 1971. For a discussion of the import of the 1970 ratification and of the circumstances surrounding it, see John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1789-91 (1992) [hereinafter Orth, *Constitutional History*].

14. Section 1 was first received into the state's organic law with the ratification of the 1868 constitution. See N.C. CONST. of 1868, art. I, § 1; see also John V. Orth, *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges*, 70 N.C. L. REV. 1825, 1844-45 n.27 (1992) (discussing the adoption of language now appearing in § 1). Section 19

constitutional founding, it was long and firmly settled that liberty is a designedly open-ended and capacious constitutional expression—a term to be interpreted expansively to encompass those newly discernible aspects of personal freedom that emerge in an ever-evolving society.

This point should not pass without full appreciation. Consider the following exposition on the breadth of constitutional liberty from the 1949 decision in *State v. Ballance*,¹⁵ a leading case in the North Carolina Supreme Court's substantive due process *oeuvre* under the state constitution:

These fundamental guaranties, [sections 1 and 19,] are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State *extensive individual rights*, including that of personal liberty. The term "liberty," as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is "deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. . . . It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to successful conclusion."¹⁶

When Justice Ervin penned that testimonial to liberty, he was not writing on a clean slate. Undoubtedly, he was aware of Justice Seawell's declaration nearly a decade earlier, in the pivotal case of *State v. Harris*,¹⁷ that there "is a fundamental canon o[f] construction that a Constitution should receive a liberal interpretation in favor of a citizen, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen in regard to both person and property."¹⁸ The

may be traced to the state's original Declaration of Rights; for a discussion of § 19's origins, see Orth, *Constitutional History*, *supra* note 13, at 1766.

15. 229 N.C. 764, 767, 51 S.E.2d 731, 732 (1949) (invalidating, under what now are cited as §§ 1 and 19, legislation requiring licensing of photographers), *overruling* *State v. Lawrence*, 213 N.C. 674, 197 S.E. 586 (1938).

16. *Id.* at 769, 51 S.E.2d at 734 (emphasis supplied) (citation omitted).

17. 216 N.C. 746, 6 S.E.2d 854 (1940) (invalidating legislation requiring licensing of dry cleaners). See *infra* text accompanying notes 45-51 for a discussion of the *Harris* decision's significant place in the history of substantive due process adjudication under the North Carolina Constitution.

18. *Harris*, 216 N.C. at 764-65, 6 S.E.2d at 866 (quoting 11 AM. JUR. § 59, at 670 (1937)). Justice Ervin thought the decision in *Ballance* was controlled by the "well considered holding" of *Harris*. *Ballance*, 229 N.C. at 767, 51 S.E.2d at 733.

year before *Harris*, Justice Seawell authored the opinion in *Eli Lilly & Co. v. Saunders*,¹⁹ wherein he offered a hearty defense of the principle that liberty must be read expansively:

It is as little as we can do, out of respect to [the Declaration of Rights'] framers, and the obvious purposes of such an instrument, to regard it as a forward-looking document, anticipating economic as well as political conditions yet to emerge. It is not a statute. Its concepts worthy of surviving are fundamentally stated and must be sufficiently generic and comprehensive to allow adjustment to the current needs of humanity. In this way only can we interpret it in terms of social justice so necessary to maintain its usefulness and to continue it in the public respect.²⁰

Similar thoughts may be found in cases of older vintage, handed down before it had become unfashionable to speak of unenumerated constitutional freedoms as matters of "higher law." In *State v. Darnell*,²¹ a unanimous 1914 decision invalidating a racially restrictive housing ordinance enacted by the Town of Winston, the justices had no difficulty with the notion that these provisions protect rights "not conferred by the Constitution, but exist[ing] of natural right."²² This merely echoed Justice Douglas' turn-of-the-century observation in *State ex rel. Wilson v. Jordan*²³ that section 1 "is an express declaration that there remain in the citizen certain inherent rights that are independent even of constitutional recognition."²⁴ The justice understandably thought this conclusion was fortified by the assertion elsewhere in the Declaration of Rights that "[t]he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people."²⁵ Justice Douglas did not gild the lily by stressing a semantic feature of section 1 that would seem

19. 216 N.C. 163, 4 S.E.2d 528 (1939) (upholding North Carolina Fair Trade Act against state constitutional challenge), *overruled by* *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

20. *Id.* at 176, 4 S.E.2d at 537.

21. 166 N.C. 300, 81 S.E. 338 (1914).

22. *Id.* at 304, 81 S.E. at 340.

23. 124 N.C. 683, 33 S.E. 139 (1899). The case involved an application of the rule established in *Hoke v. Henderson*, 15 N.C. (1 Dev.) 1, 18-19 (1833), *overruled by* *Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903), that a public office holder enjoys a property right in the office which could not be withdrawn by legislative action. See *infra* notes 40-44.

24. *Jordan*, 124 N.C. at 719, 33 S.E. at 147 (Douglas, J., concurring). Justice Douglas was evidently impressed by the natural law underpinnings of the North Carolina Constitution's protection of individual liberties. See *State v. Hay*, 126 N.C. 999, 1006, 35 S.E. 459, 462 (1900) (Douglas, J., concurring) (noting that § 1 "does not profess to confer these rights, but recognizes them as pre-existing and inherent in the individual by 'Right Divine'").

25. N.C. CONST. art. I, § 36; see *Jordan*, 124 N.C. at 719, 33 S.E. at 147 (Douglas, J., concurring).

to bolster his argument. By its own terms, section 1 does not purport to delineate exhaustively the "inalienable rights" of the people, but instead recites only a few of the more notable "among" them.²⁶

These being the sentiments of the original intent behind the concept of constitutional liberty under sections 1 and 19—sentiments, it might be added, that have been reiterated in contemporary cases²⁷—it is neither surprising nor consequential that the people of North Carolina have refrained from amending their constitution to specify a right of privacy or personal autonomy.²⁸ North Carolinians have not been immune from the peculiar American urge to amend state constitutions.²⁹ They have, however, generally resisted the temptation to tinker with their Declaration of Rights and instead have directed most of their modifications to the document's political and governmental provisions.³⁰ "[B]y far the

26. See Louis D. Bilonis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1823-24 n.70 (1992) (discussing how the language of § 1, in conjunction with N.C. CONST. art. I, § 36, supports a jurisprudence of unenumerated fundamental rights).

27. See, e.g., *Corum v. University of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.") (citing *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940)); *Kiser v. Kiser*, 325 N.C. 502, 510, 385 S.E.2d 487, 491 (1989) (noting that the "great ordinances" of the state constitution—those relating to individual rights—merit liberal interpretation, in contrast to provisions of a structural nature); *Stam v. State*, 47 N.C. App. 209, 216-17, 267 S.E.2d 335, 341 (1980) ("[O]ur State Constitution is an organic document, and . . . interpretation of its language is subject to change to include new things and new conditions of the same class as those specified which were not known or contemplated when it was adopted."), *aff'd in part and rev'd in part on other grounds*, 302 N.C. 357, 275 S.E.2d 439 (1981).

28. Five states amended their state constitutions between 1972 and 1980 to add express language protecting a right to privacy over personal decisions. See ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."); HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."); MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); Gormley & Hartman, *supra* note 2, at 1282-83 (discussing these amendments to state constitutions, as well as amendments relating to privacy in the search and seizure context).

29. See Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 Miss. L.J. 223, 233-56 (1984) (noting the spate of recent amendments to state constitutional bills of rights and surveying examples); see also James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 819-21 (1992) (pointing to the frequent amendment of state constitutions as a sign that such documents are unlikely sources of fundamental values).

30. See Orth, *Constitutional History*, *supra* note 13, at 1781-83, 1791, 1795. As a practical matter, of course, there had been no need to amend the Declaration in these respects so long as

most stable provisions of North Carolina's organic law," John Orth noted in these pages a year ago, "have been those safeguards of due process expressed in the declaration of rights, now Article I."³¹ This commendable sign of constitutional maturity is attributable, at least in part, to the Declaration's generality, its abstractness, and its capacity for growth through the process of judicial review.³²

II. THE "LAW OF THE LAND," JUDICIAL REVIEW, AND THE NORTH CAROLINA TRADITION OF HEIGHTENED SCRUTINY

One rightly may question how long an all-encompassing vision of constitutional liberty would last if the courts took *verbatim* section 1's observance that the freedoms it recognizes are "inalienable." Were every governmental intrusion upon a liberty interest subject to a judicial declaration of unconstitutionality, the concept of liberty under section 1 surely would be rethought and somehow narrowed; courts are loath to deny, after all, that a civilized society must make some demands upon its citizenry to advance the greater good. But rather than narrow the range of liberty interests entitled to constitutional protection—standing at the threshold of the Declaration of Rights, granting admission to those interests thought desirable and denying entry to the rest—North Carolina has underemphasized the word "inalienable" and accented, instead, section 19's recognition that liberty may be infringed, provided the infringement is accomplished "by the law of the land."³³

Adherence to the "law of the land," however, means much more than compliance with the formal dictates of the legislative process.³⁴ Since very early in their state's constitutional history, North Carolinians have understood the safeguards of the "law of the land" to include the protections of a rigorous, yet responsible, judicial review. In the modern argot, this is akin to the heightened judicial scrutiny of official action associated with substantive due process jurisprudence under the federal

the federal courts held resolute in their support of abortion rights under the Fourteenth Amendment to the United States Constitution.

31. *Id.* at 1795.

32. *Id.* at 1762.

33. *E.g.*, *State v. Harris*, 216 N.C. 746, 755, 6 S.E.2d 854, 861 (1940) (noting that the concept of constitutional liberty does not confer upon the individual an "absolute right to choose and pursue any occupation he pleases, regardless of the public interest"); *London v. Headen*, 76 N.C. 72, 74-75 (1877) (noting that liberty is not absolute, and may be infringed consistent with the "law of the land").

34. *Hoke v. Henderson*, 15 N.C. (1 Dev.) 1, 15 (1833) ("Those terms 'law of the land' do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated."), *overruled on other grounds by Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903).

Due Process Clause.³⁵ The seeds of the doctrine were planted in *Bayard v. Singleton*,³⁶ the landmark 1787 case establishing the legitimacy of judicial enforcement of the state constitution as against legislative will.³⁷ The seeds held fast in *Trustees of the University of North Carolina v. Foy*,³⁸ despite a strong plea for deference to the people's elected representatives,³⁹ as well as in *Hoke v. Henderson*,⁴⁰ an 1833 decision whose well-developed defense of judicial review remains instructive even though its formal holding has long since been abandoned.⁴¹ The answer to the charge that judicial review is anti-democratic, Chief Justice Ruffin reasoned in *Hoke*, lies in the court's obligations to the principle of popular sovereignty.⁴² When a court scrutinizes governmental action under the

35. It is often said that the "law of the land," as used in § 19, is "synonymous" with due process of law. *E.g.*, *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990); *Bulova Watch Co. v. Brand Distribs. of N.Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974). This does not mean, however, that the due process decisions of the United States Supreme Court demarcate the full meaning of the "law of the land." The North Carolina Supreme Court repeatedly has made clear that the scope of the "law of the land" clause raises a question of state constitutional law that must be resolved independently by the state judiciary. *E.g.*, *McNeill*, 327 N.C. at 563, 398 S.E.2d at 481; *Bulova Watch*, 285 N.C. at 474, 206 S.E.2d at 146; *see also* *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 351-52, 350 S.E.2d 365, 369 (1986) (noting that while the "law of the land" clause is synonymous with due process, the state provision may afford relief in cases where federal constitutional doctrines do not), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987).

36. 1 N.C. (Mart.) 5, 6-7 (1787).

37. Discussions of *Bayard* and its influence on the United States Supreme Court's affirmation of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), may be found in James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1742-45 (1992), and John V. Orth, "Fundamental Principles" in *North Carolina Constitutional History*, 69 N.C. L. REV. 1357, 1357-58, 1363-64 (1991).

38. 5 N.C. (1 Mur.) 58, 87-89 (1805) (invalidating, under the "law of the land" clause, legislation that repealed a grant to trustees of the university of "all the property that had theretofore or should thereafter escheat to the State").

39. *Id.* at 89 (Hall, J., dissenting) ("[When] one branch of the Government undertak[es] to decide whether another branch of the same Government has or has not transcended its constitutional powers . . . , although a difference of opinion may sometimes exist, it will be an honest one, and cannot fail to find its remedy in mutual tolerance and concession. . . . Before a law enacted by the Legislature should be pronounced unconstitutional, it ought to appear to the Court to be palpably so.").

40. 15 N.C. (1 Dev.) 1 (1833), *overruled on other grounds by* *Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903).

41. *Hoke* established the curious proposition that a public office holder enjoyed a property right in the office which could not be withdrawn by legislative action. *Id.* at 18-19. Application of the rule of *Hoke* in *State ex rel. Wilson v. Jordan*, 124 N.C. 683, 695, 33 S.E. 139, 142-43 (1899), earned the state supreme court substantial political controversy and brought the justices to the brink of removal by impeachment. Shortly thereafter, *Hoke's* holding was overruled in *Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903). For discussion of the political history associated with *Hoke*, see Walter F. Pratt, Jr., *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW & HIST. REV. 129, 133-48 (1986).

42. *Hoke*, 15 N.C. (1 Dev.) at 6-10.

constitution, the task (properly conceived) "involves no collateral considerations of abstract justice or political expediency."⁴³ To the contrary:

It depends upon the comparison of the intentions and will of the people as expressed in the Constitution, as the fundamental law, unalterable except by the people themselves, with the intentions and wills of the agents chosen under that instrument, to whom is confided the exercise of the powers therein delegated or not prohibited. Such agents are all public servants in this State; and the agency is necessarily subordinate to the superior authority of the Constitution, which emanated directly from the whole people. . . . [W]hen the representatives pass an act upon a subject upon which the people have said in the Constitution, they shall not legislate at all; or when upon a subject on which they are allowed to legislate, they enact that to be law which the same instrument says shall not be the law, then it becomes the province of those who are to expound and enforce the laws, to determine which will, thus declared, is the law. . . . [A]nd if upon that comparison it be found that the act is without warrant in the Constitution, and is inconsistent with the will of the people as there declared, the Court cannot execute the act, but must obey the superior law, given by the people alike to their judicial and to their legislative agents.⁴⁴

Such was the early faith in judicial review.⁴⁵ However, in the late 1930s, when the United States Supreme Court began its retreat from the substantive due process jurisprudence identified with *Lochner v. New York*,⁴⁶ there was some question whether that faith would give way to wholesale deference to the political departments. Indeed, initial signs indicated that the North Carolina Supreme Court might follow the federal lead, as the justices upheld economic legislation of dubious distinction in

43. *Id.* at 6.

44. *Id.* at 7-8; see also *State v. Harris*, 216 N.C. 746, 763, 6 S.E.2d 854, 865-66 (1940) (advancing a similar justification for judicial review); *State ex rel. Wilson v. Jordan*, 124 N.C. 683, 718-21, 33 S.E. 139, 146-47 (1899) (Douglas, J., concurring) (same). Readers interested in a contemporary articulation of the theory will profit from Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

45. Late-19th and early-20th century cases evidencing the same faith include *State v. Moore*, 113 N.C. 698, 709, 18 S.E. 342, 347 (1893) (invalidating legislation prohibiting solicitation of North Carolina laborers to work out-of-state), *overruled by State v. Hunt*, 129 N.C. 686, 689, 40 S.E. 216, 217 (1901); *State v. Hay*, 126 N.C. 999, 1002-04, 35 S.E. 459, 461 (1900) (upholding compulsory vaccination provided that exceptions are permitted where individual's health at risk); and *State v. Biggs*, 133 N.C. 729, 742, 46 S.E. 401, 405 (1903) (prohibiting the criminalization, as unauthorized practice of medicine, of provision of nonmedical natural healing methods, such as massage).

46. 198 U.S. 45 (1905). The retreat was sounded in *West Coast Hotel v. Parrish*, 300 U.S. 379, 390-400 (1937).

*State v. Lawrence*⁴⁷ and *Eli Lilly & Co. v. Saunders*.⁴⁸ Strident dissents in each case, however, argued for rigorous review under the state constitution,⁴⁹ and those views eventually won over the court in *State v. Harris* in 1940.⁵⁰ Judicial review in the name of the "law of the land" blossomed anew as the state supreme court proceeded to strike down various pieces of economic legislation.⁵¹ The tradition has continued in more recent years, with cases like *In re Aston Park, Inc.*,⁵² *Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*,⁵³ and *Treants Enterprises, Inc. v. Onslow County*.⁵⁴

Important for our purposes is not merely North Carolina's commitment to judicial review as an essential means of guaranteeing liberty, but the nature of the review that has been performed over the years. The "law of the land," it has been said, imposes "*flexible restraints . . . which are satisfied if the act in question is not 'unreasonable, arbitrary or capricious, and . . . [if] the means selected . . . have a real and substantial relation to the object sought to be obtained.'*"⁵⁵ Whether a challenged

47. 213 N.C. 674, 680-81, 197 S.E. 586, 590 (1938) (upholding, against state constitutional attack, regulations requiring the licensing of photographers by a trade board), *overruled by State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949).

48. 216 N.C. 163, 181-82, 4 S.E.2d 528, 540-41 (1939) (rejecting state and federal constitutional challenges to North Carolina's Fair Trade Act), *overruled by Bulova Watch Co. v. Brand Distrib. of N. Wilkesboro, Inc.*, 285 N.C. 467, 481, 206 S.E.2d 141, 151 (1974).

49. *Eli Lilly*, 216 N.C. at 182-97, 4 S.E.2d at 541-50 (Barnhill, J., dissenting); *Lawrence*, 213 N.C. at 681-86, 197 S.E. at 590-94 (Barnhill, J., joined by Seawell, J., dissenting).

50. 216 N.C. 746, 765, 6 S.E.2d 854, 866 (1940) (invalidating legislation requiring the licensing of dry cleaners).

51. See *Little Pep Delmonico Restaurant, Inc. v. City of Charlotte*, 252 N.C. 324, 327, 113 S.E.2d 422, 424 (1960) (affirming an injunction against the enforcement of ordinance prohibiting maintenance of business signs in designated area of city), *overruled by State v. Jones*, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982); *State v. Brown*, 250 N.C. 54, 59-60, 108 S.E.2d 74, 78 (1959) (invalidating an ordinance requiring junkyard owner to erect fence for aesthetic reasons), *overruled by State v. Jones*, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982); *Roller v. Allen*, 245 N.C. 516, 526, 96 S.E.2d 851, 859 (1957) (invalidating legislation requiring the licensing of tile layers); *State v. Ballance*, 229 N.C. 764, 772, 51 S.E.2d 731, 736 (1949) (invalidating regulations requiring the licensing of photographers by a trade board), *overruling State v. Lawrence*, 213 N.C. 674, 197 S.E. 586 (1938); *Palmer v. Smith*, 299 N.C. 612, 616, 51 S.E.2d 8, 11-12 (1948) (invalidating legislation forbidding opticians from duplicating and replacing optical lenses without prescription).

52. 282 N.C. 542, 551, 193 S.E.2d 729, 736 (1973) (invalidating legislation prohibiting hospital construction without a certificate of need).

53. 285 N.C. 467, 481, 206 S.E.2d 141, 151 (1974) (invalidating North Carolina Fair Trade Act), *overruling Eli Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939).

54. 320 N.C. 776, 778-79, 360 S.E.2d 783, 785-86 (1987) (invalidating ordinance that imposed licensing requirements on businesses purveying male or female "companionship"; the ordinance was deemed overly broad and hence not rationally related to a substantial government purpose).

55. *McNeill v. Harnett County*, 327 N.C. 552, 564, 398 S.E.2d 475, 482 (1990) (emphasis added) (quoting *State v. Whitaker*, 228 N.C. 352, 360, 45 S.E.2d 860, 866 (1949)). A good

governmental regulation violates the "law of the land" raises "a question of degree and of reasonableness in relation to the public good likely to result from it."⁵⁶ A regulation's validity "depends on whether under all the surrounding circumstances and particular facts of the case [it] is . . . reasonably calculated to accomplish a purpose falling within the legitimate scope of the police power, *without burdening unduly the person or corporation affected.*"⁵⁷

These words mandate heightened judicial scrutiny, and they have been so understood by the courts. They call for judicial scrutiny that gives respectful consideration to the judgments of the legislature,⁵⁸ but not the kind of exorbitant deference to the political branches afforded by the "mere rationality" standard that federal courts follow under the Due Process Clause.⁵⁹ They demand judicial review that courageously questions the real motivations underlying onerous legislation;⁶⁰ accordingly, laws that have the curtailment of individual liberty as their purpose, and not merely as their necessary incident, will not be tolerated.⁶¹ They re-

part of the formulation, of course, derives from United States Supreme Court decisions rendered during the *Lochner* era. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 525 (1933).

56. *McNeill*, 327 N.C. at 564, 398 S.E.2d at 481-82 (quoting *State v. McCleary*, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983), *aff'd*, 311 N.C. 397, 316 S.E.2d 870 (1984)); see also *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 478, 206 S.E.2d 141, 149 (1974) (speaking of judicial review under the "law of the land" clause as requiring the court to ascertain the "location of the point of reasonable balance" between liberty and governmental regulation).

57. *McNeill*, 327 N.C. at 565, 398 S.E.2d at 482 (emphasis added) (quoting *City of Winston-Salem v. Southern Ry.*, 248 N.C. 637, 642, 105 S.E.2d 37, 40 (1958)).

58. E.g., *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) (stating that "great deference will be paid to acts of the legislature"); *Hoke v. Henderson*, 15 N.C. (1 Dev.) 1, 9 (1833) (noting that legislation should be set aside only when its unconstitutionality is "plain"), *overruled on other grounds by Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903).

59. E.g., *State v. Ballance*, 229 N.C. 764, 769-71, 51 S.E.2d 731, 734-36 (1949) (rejecting justifications for legislation that would suffice under minimal "rational relationship" scrutiny called for by the Fourteenth Amendment); *State v. Harris*, 216 N.C. 746, 758-62, 6 S.E.2d 854, 862-65 (1940) (same; refusing to accord excessive deference to the legislative determination of public interest; applying heightened scrutiny to economic legislation); *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 355, 350 S.E.2d 365, 372 (1986) (same; invalidating an ordinance that "goes far beyond what is necessary to accomplish [its] objective"), *aff'd*, 320 N.C. 776, 777-80, 360 S.E.2d 783, 785-86 (1987).

60. See, e.g., *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957) (invalidating an act requiring the licensing of tile layers, concluding that the act "has as its main and controlling purpose not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business"); *Harris*, 216 N.C. at 762, 6 S.E.2d at 864-65 (invalidating legislation requiring licensing of dry cleaners, noting that the act's tendency to favor certain individuals "raises a suspicion as to its public purpose" that "invites the scrutiny of the Court as to the public nature of the objectives really pursued, which might readily be found in a desire to limit the field of competition").

61. E.g., *Roller*, 245 N.C. at 525, 96 S.E.2d at 859 (noting that the state cannot, under the

quire judicial review that insists on correspondingly greater showings of governmental need as the intrusions upon individual liberty increase,⁶² culminating in the strictest of scrutiny when interests at the core of constitutional liberty are infringed.⁶³ They demand searching judicial inquiry to ensure that the regulatory means chosen by government promote the public ends sought without needless overinclusion or suspicious underinclusion, thereby favoring the use of the least restrictive alternative.⁶⁴ In sum, the "law of the land" seeks to keep individual liberty safe from the pluralist fray by demanding that infringements upon liberty be justified—in the contemplative environment of judicial review—by credible assertions of a genuine public need that bears a proportionate relationship to the individual sacrifices entailed.

Although the judicial review contemplated by the "law of the land" clause challenges judges, it has not proved unmanageable. To guide them in their search for the "location of the point of reasonable balance,"⁶⁵ and to minimize the influence of personalized preferences that have no fair basis in the state's constitutional culture, North Carolina's judges, like judges across the land, draw upon reliable external indicia of societal norms in performing their "law of the land" calculus. Federal constitutional decisions, while not conclusive, are quite persuasive,⁶⁶ and the opinions delivered by the courts of other states can also prove en-

guise of advancing a public purpose, legislate with the intent to interfere with protected liberty).

62. *E.g.*, *In re Aston Park Hosp., Inc.*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973) (noting that as deprivation of liberty increases, a "substantially greater likelihood of benefit to the public" is necessary for regulatory measure to withstand attack under the "law of the land" clause).

63. *E.g.*, *Texfli Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 12-13, 269 S.E.2d 142, 149-50 (1980) (acknowledging the need for strict scrutiny under the state constitution when fundamental rights are implicated); *In re Moore*, 289 N.C. 95, 102-04, 221 S.E.2d 307, 311-13 (1976) (same).

64. *Treants Enters., Inc. v. Onslow County*, 320 N.C. 776, 779, 360 S.E.2d 783, 786 (1987) (invalidating regulation that "encompasses an indefinitely large number of salutary enterprises, along with the meretricious adult-entertainment establishments at which county officials took aim"); *State v. Harris*, 216 N.C. 746, 760, 6 S.E.2d 854, 864-65 (1940) (invalidating legislation, noting that "it would be our duty to hold that the danger suggested might be met with less drastic regulation"); *see also Jones v. McDowell*, 53 N.C. App. 434, 436-42, 281 S.E.2d 192, 194-97 (1981) (recognizing a mother's liberty interest in having her child keep her surname; applying heightened scrutiny to gender-based classification; invalidating statute that gave the natural father a conclusive right, upon legitimation, to have the child's name changed).

65. *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 478, 206 S.E.2d 141, 149 (1974).

66. *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990); *Bulova Watch*, 285 N.C. at 474, 206 S.E.2d at 146; *see supra* note 35.

lightening.⁶⁷ North Carolina public policy, as evinced in its common law⁶⁸ or its legislative enactments,⁶⁹ certainly bears studied consideration. Established local traditions can likewise provide valuable insights into the state's enduring values.⁷⁰ Of course, the state constitutional precedents rendered by the North Carolina courts bear heavily on the inquiry as well.

If the North Carolina Supreme Court gives fair measure to these fundamental precepts of the "law of the land," it will have a hard time denying meaningful state constitutional protection for a woman's liberty interest in retaining authority over the decision whether to carry her pregnancy to term. Today, even (or, perhaps, *particularly*) after *Casey*, federal constitutional principles establish that the liberty interest at stake is a heavy one not easily overcome, not even by any interest in safeguarding pre-viable fetal life which a state might choose to assert.⁷¹ Upon what conceivable premises could the North Carolina Supreme Court refuse to admit at least that much, let alone more, under sections 1 and 19 of the North Carolina Constitution—provisions that promise a deep allegiance to personal liberty and which, it should be added, the courts have been decidedly unwilling to interpret as affording less protection for individual rights than the Due Process Clause provides?⁷² And by what pos-

67. *E.g.*, *Bulova Watch*, 285 N.C. at 479, 206 S.E.2d at 149 ("Obviously, the popularity or non-popularity of legislation in other states does not determine its constitutionality in North Carolina, but it does constitute some evidence as to the relation between the legislation and the public's . . . welfare.").

68. *E.g.*, *London v. Headen*, 76 N.C. 72, 74-75 (1877) (noting that common-law practices permitting certain infringements upon liberty may validate governmental action under the "law of the land"); *Trustees of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 88 (1805) (same).

69. *See, e.g.*, *State v. Carter*, 322 N.C. 709, 718-19, 724, 370 S.E.2d 553, 559, 562 (1988) (relying upon public policy, established by legislation, to reaffirm state constitutional exclusionary rule and to reject proposed "good faith exception" to the rule).

70. *Id.*; *see also* Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1751-52 (1992) (discussing the significance of local practices, policies, and traditions to the decision in *Carter*).

71. As Justice Blackmun noted in *Casey*, the Court's reaffirmation of *Roe v. Wade*'s essential holding—that a woman has a constitutional right to choose to have an abortion before viability and to obtain it without undue interference from the State—reflects a "ferve[n]t view of individual liberty and the force of *stare decisis*" and "should serve as a model for future Justices and a warning to all who have tried to turn th[e] Court into yet another political branch." *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2844, 2845 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

72. *See* *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 477, 206 S.E.2d 141, 148 (1974) ("The term 'liberty,' as used in [the state constitution], is as extensive as is the same term used in the Fourteenth Amendment to the Constitution of the United States."); *Treants Enters., Inc. v. Onslow County*, 83 N.C. App. 345, 351-52, 350 S.E.2d 365, 369 (1986) (interpreting state supreme court decisions as supporting the proposition that rights protected under the "law of the land" clause must at least equal, but may exceed, those afforded by the Due Process Clause), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987).

sible reasoning might North Carolina, with its liberty-loving tradition of heightened judicial review, differentiate itself from the growing number of states that are finding room in their state constitutions for a woman's right to choose?⁷³ Answers to these questions are not readily apparent, and it is doubtful they will be found in North Carolina's precedents, policies, or traditions.

Although the state judiciary has not passed on the validity of an abortion restriction under the North Carolina Constitution, the relevant state precedent that does exist is congenial to a well-defended right of choice. An individual's interest in procreative liberty already has been recognized as fundamental under the North Carolina Constitution, prompting strict scrutiny of the state's involuntary sterilization legislation on its face⁷⁴ and as applied.⁷⁵ Moreover, an unwanted pregnancy resulting from the negligent provision of contraceptive devices has been held to constitute "a medical condition that gives rise to compensable damages."⁷⁶ While this holding rests on state tort law grounds, Justice Harry Martin noted in concurrence that it is invited by "the right of couples to practice contraception" that comprises one dimension of the fundamental right to privacy secured by both the federal and, in Justice Martin's view, the state constitution.⁷⁷ Interesting too is a 1900 holding of the North Carolina Supreme Court that the Declaration of Rights protects an individual's right to be free from unduly burdensome forced medical treatment,⁷⁸ a ruling that takes on considerable significance

73. See cases cited *supra* note 11; see also *Committee to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252, 285, 625 P.2d 779, 799, 172 Cal. Rptr. 866, 886 (1981) (recognizing state constitutional protection of abortion rights pursuant to CAL. CONST. art. I, § 1, which is similar to N.C. CONST. art. I, § 1, but explicitly mentions a right to privacy); *American Academy of Pediatrics v. Van de Kamp*, 214 Cal. App. 3d 831, 843, 263 Cal. Rptr. 46, 52 (1989) (same); *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) (invalidating parental consent statute under FLA. CONST. art. I, § 23, which explicitly articulates a "right to be let alone and [to be] free from governmental intrusion into [one's] private life").

74. *In re Moore*, 289 N.C. 95, 102, 104, 221 S.E.2d 307, 311, 313 (1976) (recognizing a fundamental right to privacy which embraces a right to abortion and to procreation, citing *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1964); and *Skinner v. Oklahoma*, 316 U.S. 535 (1942); upholding compulsory sterilization legislation as facially valid under both federal and state constitutions due to compelling state interest).

75. *In re Truesdell*, 63 N.C. App. 258, 268, 279-80, 304 S.E.2d 793, 800, 806 (1983) (recognizing a fundamental interest in procreation; holding that compulsory sterilization statute, to be applied constitutionally, must be interpreted to require judicial findings which ensure that sterilization occurs only when necessary and when it is the least drastic alternative), *aff'd*, 313 N.C. 421, 329 S.E.2d 630 (1985).

76. *Jackson v. Bumgardner*, 318 N.C. 172, 181, 347 S.E.2d 743, 748 (1986) (emphasis omitted).

77. *Id.* at 187-88, 347 S.E.2d at 752 (Martin, J., concurring in part and dissenting in part).

78. *State v. Hay*, 126 N.C. 999, 1002, 35 S.E. 459, 461 (1900) (holding that compulsory

when it is remembered that the unwanted childbearing that anti-abortion laws seek to compel can be more dangerous to the health of the mother than abortion itself.⁷⁹ None of these authorities, of course, ineluctably dictates a sweeping abortion right under the state constitution, but they are of no help to those who would oppose one.

Similarly, North Carolina's public policy and relevant traditions would seem to favor rather than militate against the recognition of significant abortion rights under the state constitution. As the North Carolina Supreme Court's decision in *State v. Carter*⁸⁰ demonstrates, established practices, developed understandings, and settled expectations can shed light on problems of state constitutional analysis, and those considerations all illuminate a salient truth: A substantial number of North Carolinians have come to regard the decision to seek and obtain an abortion as a matter of personal right. For more than twenty years now, North Carolinians have held to that belief and acted upon it. For all but a curious few, the precise source of the right—the Due Process Clause, the Equal Protection Clause, the penumbras of the Bill of Rights, or sections 1 and 19 of the Declaration of Rights—has been utterly inconsequential. It is the substance of the right, and the assurance that it will be honored and protected by courts of law, that has mattered to the citizenry. The repeated failure of legislative initiatives to impose abortion restrictions⁸¹ and the consistent legislative resolve to fund abortions for those in need of public assistance⁸² are indications that it matters greatly

vaccination regulations must permit exceptions for cases of danger to individual health in order to pass muster under the state constitution).

79. As Walter Dellinger and Gene Sperling have noted:

A competent adult's decision to have an abortion in the early weeks is clearly a decision to "refuse unwanted medical intrusion." Compelled childbirth is a major medical event and far more dangerous than aborting an early pregnancy. Moreover, a quarter of all pregnancies end with Cesarean section, a major medical procedure.

Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 96-97 (1989).

80. 322 N.C. 709, 718-19, 724, 370 S.E.2d 553, 559, 562 (1988) (refusing to alter the long-established practice of excluding unconstitutionally seized evidence, the good faith of the offending officers notwithstanding).

81. See Kanigel, *supra* note 3, at 1A, 12A (discussing failed attempts to impose abortion restrictions in North Carolina).

82. See Rachele Kanigel, *Both Sides Expect Little Change in N.C. Abortion Laws*, NEWS & OBSERVER (Raleigh, N.C.), June 29, 1992, at 1A (noting that North Carolina remains "one of 13 states—and the only one in the South—that uses public money to fund abortions for poor women," although funding has been cut twice in recent years and restrictions apply). See generally *Stam v. Hunt*, 66 N.C. App. 116, 310 S.E.2d 623 (1984) (setting aside challenge to the State Abortion Fund); *Stam v. State*, 47 N.C. App. 209, 218-19, 267 S.E.2d 335, 342-43 (1980) (upholding use of state tax monies for the funding of elective abortions through the State Abortion Fund), *aff'd in part and rev'd in part on other grounds*, 302 N.C. 357, 275 S.E.2d 439 (1981) (approving and adopting the decision of the court of appeals).

and matters still.

What is more, there is no credible indication that the one interest that would clash irreconcilably with a woman's interest in choice—the preservation of pre-viable fetal life—has been considered an important, let alone compelling, concern of the State of North Carolina. The civil cases recognizing a state interest in fetal life do not establish a compelling interest in pre-viable fetal life,⁸³ and neither, significantly, do the state's criminal abortion laws. The statutes carefully distinguish between the abortion of a fetus at any stage of gestational development⁸⁴ and the abortion of a fetus that is "quick."⁸⁵ It is well settled that the latter are made criminal in an expression of the state's interest in fetal life,⁸⁶ whereas the former are criminalized in furtherance of the state's interest in the wellbeing of the mother.⁸⁷ When North Carolina liberalized these laws in 1967 to permit therapeutic abortions—assuming a position of national leadership in this regard—it surely did nothing to detract from this conclusion.⁸⁸ Viable fetuses, it might be added, are not deemed human

83. See *DiDonato v. Workman*, 320 N.C. 423, 431, 358 S.E.2d 489, 493 (1987) (holding that Wrongful Death Act allows recovery for the death of a viable but unborn child, although recoverable damages are limited); *id.* at 435-36, 358 S.E.2d at 496 (Martin, J., concurring in part and dissenting in part) (emphasizing the significance of fact that fetus has reached viability); *Jackson v. Bumgardner*, 318 N.C. 172, 181, 347 S.E.2d 743, 748 (1986) (allowing suit for damages from negligent provision of contraceptive devices giving rise to unwanted pregnancy); *Azzolino v. Dingfelder*, 315 N.C. 103, 109, 110-17, 337 S.E.2d 528, 532, 533-37 (1985) (denying action for "wrongful life," brought in the name of child, on ground that "life, even life with severe defects, cannot be an injury in the legal sense"; denying action for "wrongful birth," brought on behalf of the parents, because of intractable practical problems associated with such suits, but not on ground that abortions are to be avoided as a matter of public policy); see also *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 89 N.C. App. 154, 159-61, 365 S.E.2d 909, 912-14 (1988) (noting that *DiDonato* extended a wrongful death remedy only to the death of a viable fetus, and that the case did not answer the question whether injuries inflicted upon the fetus before viability are recoverable), *aff'd on other grounds*, 327 N.C. 283, 309 S.E.2d 85 (1990).

84. N.C. GEN. STAT. § 14-45 (1992) (criminalizing the use of drugs or instruments to produce miscarriage or injure a pregnant woman).

85. N.C. GEN. STAT. § 14-44 (1992) (criminalizing the use of drugs or instruments to destroy an unborn child). With regard to the quickening of a fetus: "[A] woman is not considered to be quick with child until she has herself felt the child alive and quick within her." *State v. Forte*, 222 N.C. 537, 539, 23 S.E.2d 842, 843-44 (1943) (citation omitted). "Neither in popular nor in scientific language is the embryo in the early stages called a human being. Popularly it is regarded as such for some purposes, only after it has become 'quick,' which does not occur until four or five months of pregnancy have elapsed." *Id.* (citation omitted).

86. *State v. Jordon*, 227 N.C. 579, 580, 42 S.E.2d 674, 675 (1947) (N.C. GEN. STAT. § 14-44 "is designed to protect the life of a child *in ventre sa mere*"); accord *State v. Hoover*, 252 N.C. 133, 135, 113 S.E.2d 281, 283 (1960).

87. *Jordon*, 227 N.C. at 580, 42 S.E.2d at 675 (stating that N.C. GEN. STAT. § 14-45 "is primarily for the protection of the woman"); accord *State v. Mitchner*, 256 N.C. 620, 624, 124 S.E.2d 831, 834 (1962); *Hoover*, 252 N.C. at 135, 113 S.E.2d at 283.

88. For an excellent discussion of North Carolina's 1967 abortion reforms—which, along

beings for purposes of the state's homicide laws.⁸⁹ Nor are they "persons" entitled to constitutional protection under the Declaration of Rights.⁹⁰

Scrutiny under the "law of the land" clause must account for these facts, and they suggest that the scale of North Carolina values leans strongly in favor of a woman's liberty interest in choice.

III. CONCLUSION

The concept of constitutional liberty advanced by sections 1 and 19 of the North Carolina Constitution's Declaration of Rights brings a broad range of individual interests under the protection of the state's organic law. In turn, the principles articulated under section 19's "law of the land" clause dictate a prominent role for the state judiciary in the protection of those individual interests. These principles compel the courts to scrutinize governmental acts rigorously to ensure that liberty is neither unduly restricted nor unjustifiably infringed.

Any sound discourse about civil liberties under the North Carolina Constitution must begin with these two fundamental tenets. In years past, they served to protect the average North Carolina workingman from nettlesome governmental restrictions that impeded him in his quest to secure his economic station in life.⁹¹ More recently, they have been applied to free corporate entities from unnecessarily burdensome or otherwise ill-conceived strictures.⁹² In times yet to come, they may be expected to safeguard dimensions of liberty heretofore unforeseen as needy of constitutional protection. Today, there is no reason to think that they cannot secure the women of North Carolina an extensive state constitutional right of choice.

with similar enactments in Colorado and California, constituted the vanguard of abortion liberalization in the late 1960s—see H. Hugh Stevens, Jr., Comment, *The New North Carolina Abortion Statute*, 46 N.C. L. REV. 585 (1968).

89. *State v. Beale*, 324 N.C. 87, 93, 376 S.E.2d 1, 4 (1989) ("Nothing in any of the statutes or amendments shows a clear legislative intent to change the common law rule that the killing of a viable but unborn child is not murder.").

90. *Stam v. State*, 47 N.C. App. 209, 214, 267 S.E.2d 335, 340 (1980) ("[W]e hold that a fetus is not a 'person' within the meaning of Article I §§ 1 and 19 of the Constitution of North Carolina."), *aff'd in part and rev'd in part on other grounds*, 302 N.C. 357, 275 S.E.2d 439 (1981) (expressly approving and adopting decision of court of appeals relating to definition of "person" under §§ 1 and 19).

91. See cases cited *supra* notes 50-51.

92. See cases cited *supra* notes 52-54.

