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## ESSAY

# “FUNDAMENTAL PRINCIPLES” IN NORTH CAROLINA CONSTITUTIONAL HISTORY

JOHN V. ORTH\*

*A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.*<sup>1</sup>

In May 1786 the North Carolina Superior Court, which then functioned as the state's supreme court, confronted a ticklish issue. Plaintiff had brought an action of ejectment to try title to a valuable lot, which had been seized during the Revolution. Defendant held under a title derived from the state through a deed by a commissioner of confiscated estates. An act of the last session of the general assembly directed state courts to dismiss forthwith all suits concerning titles originating as defendant's had.<sup>2</sup> The problem was that the North Carolina Constitution of 1776 declared that “in all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.”<sup>3</sup> The statute, ordering automatic dismissal, and the constitution, securing plaintiff's right to a jury trial, were in conflict with one another.

As judges are wont to do when confronted with a difficult choice, the three judges of the superior court played for time (although, of course, their failure to dismiss the suit at once was an indication of where their sympathies lay). Speaking through Judge Samuel Ashe, the court temporized, throwing out what the reporter, Francois Xavier Martin, called “a few observations on our constitution and system of government”:<sup>4</sup>

[A]t the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority . . . [B]eing thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system or [sic] those fundamental principles comprised in the constitution, dividing the powers of government into separate and distinct branches, to wit: The legisla-

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1. N.C. CONST. art. I, § 35.

2. Act of Dec. 29, 1785, ch. 7, reprinted in 24 STATE RECORDS OF NORTH CAROLINA 730 (W. Clark ed. 1904).

3. N.C. CONST. of 1776, Declaration of Rights, § 14.

4. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 5 (1787).

tive, the judicial and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaries.<sup>5</sup>

With the freedom of early reporters, Martin testily concluded: "[T]his he said without disclosing a single sentiment upon the cause of the proceeding, or the law introduced in support of it."<sup>6</sup> For the time being, *curia advisare vult*, the court would think about it.

Although the "country" Judge Ashe had in mind was North Carolina and the "Congress" the Fifth Provincial Congress that met at Halifax in November and December of 1776, his general description would apply to any of Great Britain's rebellious thirteen colonies. Once independence was declared on July 4, 1776, Americans were like so many Robinson Crusoes, "shipwrecked and cast on a maroon'd island." Having cut themselves off from the Crown, the historic source of constitutional legitimacy, they were strictly speaking "without laws, without magistrates, without government, or any legal authority." When delegates to the North Carolina Provincial Congress appointed a committee (including Delegate Samuel Ashe) to prepare a declaration of rights and a constitution,<sup>7</sup> the committee benefited from copies of constitutions recently adopted by other states, finding those of Virginia, Maryland, and Pennsylvania particularly helpful. In addition, the committee reviewed the lessons of England's long constitutional history, enshrined in great documents from Magna Carta in 1215 to the English Bill of Rights in 1689.<sup>8</sup>

After barely a month's work the drafting committee presented proposals to the full congress, which speedily approved the final product. The declaration of rights was adopted on December 17, 1776,<sup>9</sup> and the constitution (narrowly so called) the next day.<sup>10</sup> Although treated separately, the two documents form a single whole, the latter expressly declaring the former "part of the constitution of this State."<sup>11</sup> Like all other contemporary state declarations and constitutions, neither was submitted to the voters for approval. In part this omission reflected an unfamiliarity with constitution-making: the distinction between ordinary and fundamental law was not yet clearly marked. When the North Carolina provisional government had announced the election for the Fifth Provincial Congress, the resolution informed voters that "it will be the Business of the Delegates then Chosen, not only to make Laws for the good Government of, but also to form a Constitution for this state."<sup>12</sup>

The declaration of rights and the constitution are an effective blend of revo-

5. *Id.* at 6.

6. *Id.*

7. 10 COLONIAL RECORDS OF NORTH CAROLINA 918 (W. Saunders ed. 1890) [hereinafter COLONIAL RECORDS].

8. See Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. HIST. REV. 213 (1929).

9. 10 COLONIAL RECORDS, *supra* note 7, at 973.

10. *Id.* at 974.

11. N.C. CONST. of 1776, § 44. The text of the original North Carolina Constitution and all amendments can be found in NORTH CAROLINA GOVERNMENT 1585-1979: A NARRATIVE AND STATISTICAL HISTORY 809-1026 (J. Cheney ed. 1981)

12. 10 COLONIAL RECORDS, *supra* note 7, at 696 (misnumbered 996).

lutionary theory and practical politics. The relationship is not exactly that exhibited by the federal Constitution with its appended Bill of Rights, the latter adding civil rights to a document establishing the framework of government. Instead, North Carolina's declaration of rights (like those of her sister states) is logically, as well as chronologically, prior to the constitutional text, and includes many general and abstract principles given particular and concrete realization in the constitution proper. The abstractness of the declaration has allowed much of it to survive (with modifications and additions) in the state's two later constitutions of 1868 and 1971, where it appears in the body of the text as Article I.

The declaration of rights began, appropriately enough, with a categorical assertion of popular sovereignty: "That all political power is vested in, and derived from, the people only."<sup>13</sup> The people, in other words, displaced the Crown as the source of lawful authority. As Judge Ashe pointed out, the declaration also provided for separation of powers: "That the legislative, executive and supreme judicial powers of government, ought to be forever separate and distinct from each other."<sup>14</sup> On the perennially divisive subject of religion, it roundly declared: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own conscience."<sup>15</sup> With language substantially unchanged, these three fundamental principles are still found in the North Carolina Constitution today.<sup>16</sup>

The meaning the framers attached to these great phrases is, however, far from clear. Consider the clause on religious freedom. Although the constitution proper provided for the disestablishment of the Church of England,<sup>17</sup> it went on to impose a religious test for office: "[N]o person who shall deny the being of God, or the truth of the Protestant religion, or the divine authority of either the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office, or place of trust or profit, in the civil department, within this State."<sup>18</sup> The test was designed to exclude (respectively) atheists, Roman Catholics, Jews, and Christian pacifists like Quakers and Moravians.<sup>19</sup>

In fact, the constitutional stricture was relaxed in practice. In 1809 Jacob Henry, a Jew from Carteret County, was elected to the house of representatives (then known as the house of commons) and was challenged on the basis of his religion. The house, which under the constitution was the judge of its members' qualifications,<sup>20</sup> refused to exclude him, without reported explanation. Later

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

14. *Id.* § 4.

15. *Id.* § 19.

16. N.C. CONST. of 1971, art. I, §§ 2, 6, 13.

17. N.C. CONST. of 1776, § 34.

18. *Id.* § 32; see Govert, *Something There Is that Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office*, 64 N.C.L. REV. 1071 (1986).

19. The list of those excluded by the religious test for office is drawn from W.S. POWELL, *NORTH CAROLINA THROUGH FOUR CENTURIES* 273 (1989). It has long been recognized, however, that the test was obscure. See, e.g., H.G. CONNOR & J.B. CHESHIRE, JR., *THE CONSTITUTION OF THE STATE OF NORTH CAROLINA ANNOTATED* xxvii (1911).

20. N.C. CONST. of 1776, § 10.

William Gaston, himself a Roman Catholic and judge of the state supreme court, justified the result in an ingenious—one is tempted to say a talmudic—distinction: that a seat in the general assembly was not an “office in the civil department,” but *above* all offices.<sup>21</sup> However appealing, the decision irresistibly calls to mind the ingratiating query of the old Tammany Hall politician: “What’s the Constitution between friends?”<sup>22</sup>

In 1835 the state constitution was amended to admit Roman Catholic officeholders: “Protestant” was replaced with the more generic “Christian,”<sup>23</sup> apparently to relieve doubts concerning Judge Gaston, who by then had served a year on the supreme court. In 1861 the Secession Convention found time to remove the obstacles to Jewish officeholders by deleting the word “Christian” and amending the biblical test to exclude only those who denied “the divine authority of *both* the Old and New Testaments.”<sup>24</sup> Finally in 1868 when Reconstruction dictated a new constitution, the religious test for office was shrunken to its first clause only, excluding those “who shall deny the being of Almighty God.”<sup>25</sup> Although the current constitution contains the same test,<sup>26</sup> it is now of dubious validity under the United States Constitution as interpreted by federal judges.<sup>27</sup>

From 1776 until now, the North Carolina declaration of religious freedom has remained; only the test for office has changed. The framers in the Fifth Provincial Congress obviously saw nothing inconsistent in declaring the “natural and unalienable right to worship” and simultaneously imposing a religious qualification for office. Their object, I think, was not to stigmatize any religion but to exclude from public office categories of men whose trustworthiness was suspect by contemporary standards. As misunderstandings of other religions were dispelled, in part by the example of upright men like Jacob Henry and William Gaston, the spirit of tolerance prevailed over the letter of the law. The “original intent,” if I may use that much-abused term, worked itself clear over time, which should come as no surprise to lawyers who have always known that it takes particular cases to give meaning to legal texts.

An example of the declaration of popular sovereignty discloses a similar development. Despite the radical claim of “all power in the people,” effective political power was confined in 1776 to certain “freeman of the age of twenty-one years”: to vote for members of the senate, one had to possess a freehold of fifty acres;<sup>28</sup> to vote for members of the house of commons, one had to at least be

21. *Proceedings and Debates of the Convention of North Carolina, Called to Amend the Constitution of the State, which Assembled at Raleigh, June 4, 1835* at 281 (1836).

22. J. BARTLETT, *FAMILIAR QUOTATIONS* 703 (13th ed. 1955).

23. N.C. CONST. of 1776, amend. of 1835, art. IV, § 2.

24. N.C. CONST. of 1776, amend. of 1861, IX (emphasis added).

25. N.C. CONST. of 1868, art. VI, § 5.

26. N.C. CONST. of 1971, art. VI § 8.

27. See *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding unconstitutional Maryland religious test for office requiring declaration of belief in the existence of God); 41 Op. N.C. Att’y Gen. 727 (1972).

28. N.C. CONST. of 1776, § 7.

a taxpayer.<sup>29</sup> To be eligible for legislative service there were higher property qualifications: membership in the senate was restricted to men with "not less than three hundred acres of land in fee,"<sup>30</sup> while each member of the house of commons had to hold "not less than one hundred acres of land in fee, or for the term of his own life."<sup>31</sup> The governor had to be a man of still more substantial property, possessed of "a freehold in lands and tenements, above the value of one thousand pounds."<sup>32</sup>

Over the years the property qualifications for voting and holding office were whittled away,<sup>33</sup> but a racial qualification was added in 1835: a voter had to be white as well as free, thus disenfranchising free blacks.<sup>34</sup> Although the Reconstruction constitution ended the racial test per se, night-riding and later the literacy test and accompanying grandfather clause<sup>35</sup> reinstated it by other means. In the twentieth century women,<sup>36</sup> blacks,<sup>37</sup> and persons between eighteen and twenty-one<sup>38</sup> respectively were added to the roster by federal action. Today it is difficult to imagine any further extension of the franchise, unless the minimum age were to be lowered by a few more years. Throughout its history, of course, the constitution has uninterruptedly proclaimed popular sovereignty. To us the story seems strangely discordant with the revolutionary cry: "No taxation without representation!" The disenfranchised were as regularly taxed in the State of North Carolina as they had been in the colony of the same name. To the founders it must have looked different. Among the charms of history is that one suddenly discovers that one has wandered unawares into a foreign country, and that it is in some senses one's own!

Separation of powers reveals much the same thing. Legislative, executive, and supreme judicial powers may have remained forever separate and distinct, but were equal only in the Orwellian sense: one was more equal than the others. The general assembly, not the voters, chose the governor<sup>39</sup> and members of the council of state,<sup>40</sup> the state treasurer,<sup>41</sup> the state secretary,<sup>42</sup> the attorney gen-

29. *Id.* § 8.

30. *Id.* § 5.

31. *Id.* § 6.

32. *Id.* § 15.

33. In 1857 an amendment eliminated the higher property qualification for voting for senators. See N.C. CONST. of 1776, amend. of 1857. The 1868 constitution dropped the property qualifications for voting and office-holding. N.C. CONST. of 1868, art. I, § 22.

34. N.C. CONST. of 1776, amend. of 1835, art. I, § 3, cl. 3.

35. N.C. CONST. of 1868, amend. of 1899-1900, art. VI, § 4. See generally Mabry, "White Supremacy" and the North Carolina Suffrage Amendment, 13 N.C. HIST. REV. 1 (1936) (tracing the growth of popular white support for black disenfranchisement).

36. U.S. CONST. amend. XIX, § 1.

37. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1988)).

38. U.S. CONST. amend. XXVI, § 1.

39. N.C. CONST. of 1776, § 15.

40. *Id.* § 16.

41. *Id.* § 22.

42. *Id.* § 24 (three-year term).

eral<sup>43</sup> and all of the judges,<sup>44</sup> as well as the officers of the state militia.<sup>45</sup> This contrast of principle and practice did not escape contemporary observers: James Madison remarked on it in *The Federalist Papers*.<sup>46</sup> It was only in 1835 that the governorship became directly elected,<sup>47</sup> and it was not until 1868 that the modern tripartite structure appeared, complete with an elective judiciary.<sup>48</sup>

North Carolina's third century seems likely to witness further shifts. The recent proposals to restore an appointive judiciary would reconfigure the separated powers, this time in favor of the executive and legislative branches together.<sup>49</sup> The continued lack of a gubernatorial veto may not endure, although it reflects the state's unbroken practice and is actually consistent with the principle of separation of powers. Indeed, if it were not for the fact that the other forty-nine state governors all have veto power, we would doubtless assume its absence was the only logical arrangement!

Keeping one branch out of the proper business of another is, after all, the essential meaning of separation of powers. It was respect for that principle in 1786 that caused the superior court judges (with whom we began) to hesitate before deciding their troublesome case, known to history as *Bayard v. Singleton*.<sup>50</sup> And it was because *Bayard* raised fundamental questions about separation of powers that Judge Ashe featured the principle in his brief observations. Was the judiciary the special keeper of the constitution? Today the answer is a foregone conclusion, but if we listen attentively to the past, we can detect what gave the judges pause. Was the constitution, including the section concerning jury trials in all cases respecting property, a "law" in the sense that the courts were bound to enforce it? Could it be that the section in question, declaring that jury trials "ought" to be preserved in such cases, was merely precatory—and a prayer, moreover, directed to another branch?

Even if it was a "law" in the necessary sense, did the fact that the general assembly had passed a later inconsistent law repeal or amend the section *pro tanto*? After all, the constitution itself had been passed by no higher authority than the Fifth Provincial Congress, the functional equivalent of the general assembly. Was the guarantee of trial by jury different from the principle of popu-

43. *Id.* § 13 (good behavior tenure). The attorney general enjoyed the same tenure as the judges, apparently on the theory that he was an officer of the court.

44. *Id.* (good behavior tenure).

45. *Id.* § 14.

46. If we look into the constitutions of the several states, we find that, notwithstanding the emphatical, and, in some instances, the unqualified terms in which this axiom [separation of powers] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. . . . The constitution of North Carolina which declares, that the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other, refers at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

THE FEDERALIST No. 47, at 248, 251 (J. Madison) (M. Beloff ed. 1987).

47. N.C. CONST. of 1776, amend. of 1835, art. II, cl. 1.

48. N.C. CONST. of 1868, art. IV, § 26.

49. See Comment, *Changing North Carolina's Method of Judicial Selection*, 25 WAKE FOREST L. REV. 253, 275-85 (1990).

50. 1 N.C. (1 Mart.) 5 (1787).

lar sovereignty, the implementation of which was indisputably a political question? Was it not like the declaration of religious freedom, which (as we now know) could be safely left to the common sense of the people's elected representatives? After thinking about such things for a whole year, until May 1787, the judges finally ruled that the law dispensing with jury trials was contrary to the constitution and therefore void, a ruling that anticipated by sixteen years Chief Justice Marshall's more famous decision under the federal Constitution in *Marbury v. Madison*.<sup>51</sup> I have no doubt that they were right: the judiciary is the special custodian of certain fundamental principles, especially those concerning proper trial procedures. The real problems of judicial activism have arisen from substantive, not procedural, due process.

Judge Ashe's opening remarks in *Bayard* were not so wide of the mark as the supercilious reporter thought. Confronted with a new and momentous issue, a question of "first impression" as we say, Judge Ashe reviewed the relevant history and the circumstances surrounding the making of the state's first constitution, at which he had assisted. Similarly, the constitution-makers had reviewed English and colonial history. It is a distinctively human characteristic to look to the past for guidance as we confront problems in the present.

Judicial review—a fundamental principle, albeit an unwritten one—made the judges at once the guarantors of jury trials and of all the other justiciable rights enshrined in the constitution. In time, it was to give them an important role in the implementation of the principle of separation of powers itself. So accustomed to scrutinizing the behavior of the other branches did the judges become that in 1982 they issued their *Advisory Opinion in re Separation of Powers*, in which they announced (among other things) their doubts about whether the general assembly could claim to receive federal block grants on behalf of the state.<sup>52</sup> The historic breach thus intimated in the legislature's hard-won power of the purse may be noted in passing with the fervent hope that it never leads to the financial independence of the executive; the Tudor and Stuart monarchs demonstrated the perils of that arrangement. For present purposes the *Advisory Opinion* is relevant for the unremarked irony of judges lecturing the other branches on the proprieties of separation of powers. The "case or controversy" requirement applied by the courts of all other states (except the handful with explicit constitutional or statutory authority to issue advisory opinions, not including North Carolina) is usually thought to be necessary to keep the judges within bounds. Last year the court seemed to hint that it was coming to agree, referring to "advisory opinions *formerly* issued on occasion."<sup>53</sup>

Fundamental principles come in a variety of styles, and, while none may be more fundamental than any other, each works itself out in a distinctive way. All power is from the people, but the implementation has always been specified in

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51. 5 U.S. (1 Cranch) 137 (1803).

52. 305 N.C. 767, 779-80, 295 S.E.2d 589, 595-96 (1982). See generally Orth, "Forever Separate and Distinct": *Separation of Powers in North Carolina*, 62 N.C.L. REV. 1, 19-23 (1983) (discussing advisory opinion).

53. *State ex rel. Martin v. Preston*, 325 N.C. 438, 454, 385 S.E.2d 473, 481 (1989) (emphasis added).

the constitution. It is difficult to imagine that the courts would ever be called upon to decide a case solely upon the principle of popular sovereignty. At the other extreme, the declaration in favor of trial by jury in civil cases concerning property can readily become justiciable; it happened in *Bayard* before the first state constitution was ten years old. In the same category are all the safeguards of proper criminal procedure, such as jury trial<sup>54</sup> (again) and the rights of the accused.<sup>55</sup> In between lie principles such as separation of powers, largely but not perhaps completely provided for in the constitutional text. Religious freedom, though once dealt with in part elsewhere, is now fully justiciable. Concentrating as I am on the declaration of rights (Article I), I have not even mentioned the sections in the constitution proper that require legislative action, such as the provisions calling for the regulation of entails<sup>56</sup> and the establishment of schools and a university.<sup>57</sup> Any comprehensive scheme would have to include these as well.

The lesson of this brief account of constitutional history is not particularly intended to be that any given result was right or wrong, but rather to illustrate the complex role of fundamental principles. For over two centuries North Carolinians have solemnly agreed on popular sovereignty, separation of powers, and religious freedom, but they have just as solemnly agreed on varying applications of each. The answer to where the state has been and where it should go cannot be found only by the application of logical analysis, legal education's much-touted skill. History can immensely enrich our understanding, showing us the trend of development and suggesting the likely lines of advance. Of course, to take control of our destiny we need more than a knowledge of history. A trained moral sense is also required, but even logic informed by morals cannot operate effectively in the darkness that encloses those with no sense of the past. And if the blind lead the blind, as we know, what awaits them both is the inevitable ditch.

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54. N.C. CONST. of 1776, Declaration of Rights, § 9.

55. See *id.* §§ 7, 10, 24.

56. N.C. CONST. of 1776, § 43. See also *id.*, Declaration of Rights, § 23 ("perpetuities . . . ought not to be allowed"). On the legislation ultimately adopted, see Orth, *Does the Fee Tail Exist in North Carolina?* 23 WAKE FOREST L. REV. 767, 779-82 (1988).

57. N.C. CONST. of 1776, § 41. For a dispute concerning this section, see *Trustees of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805).