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IN DEFENSE OF *ASTON PARK*: THE CASE FOR STATE SUBSTANTIVE DUE PROCESS REVIEW OF HEALTH CARE REGULATION

JOSHUA A. NEWBERG†

States now stand at a crossroads, reexamining their roles in regulating construction of hospital bed space and other health care facilities. With the retreat from federal control of the field, states are likely to be amending their existing regulatory schemes. Joshua A. Newberg envisions an activist role for state courts in assessing the validity of such schemes under state constitutional law. Adopting a 1973 North Carolina Supreme Court opinion as his analytical model, Mr. Newberg mounts a justification for substantive due process review of health-care regulation. The Article argues that the bases for rejecting economic due process review under the United States Constitution do not carry over to analogous state constitutional provisions. Mr. Newberg sees state courts as tools for vindication of the public interest when state legislatures fall captive to special interests and enact anticompetitive laws.

I. INTRODUCTION

In re Aston Park Hospital, Inc.,¹ decided in 1973 by the North Carolina Supreme Court, is a leading case supporting the proposition that substantive due process review of economic regulation persists in some state courts² decades after the federal judiciary abandoned such review.³ In *Aston Park*, the North Carolina court struck down a 1971 state statute⁴ under which the state had denied a

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1. 282 N.C. 542, 193 S.E.2d 729 (1973).

2. See, e.g., C. HAVIGHURST, HEALTH CARE LAW & POLICY 226 (1988); T. MORGAN, J. HARRISON & P. VERKUIL, ECONOMIC REGULATION OF BUSINESS 49-52 (1985) [hereinafter ECONOMIC REGULATION]; Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 885 (1976); Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case For Realism*, 48 TENN. L. REV. 241, 256 (1981); Comment, *Hospital Regulation After Aston Park: Substantive Due Process in North Carolina*, 52 N.C.L. REV. 763, 765-66 (1974).

3. For examples of the United States Supreme Court's extreme deference to legislative judgment, see *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("under the system of government created by our constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation"); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

4. N.C. GEN. STAT. § 90-291 (Supp. 1971) (repealed 1973).

certificate of need (CON)⁵ to a hospital for the expansion of its facilities.⁶ The holding was doctrinally based on an economic substantive due process rationale, informed by a presumption in favor of market competition.⁷ By adopting this approach, the Court in *Aston Park* decisively rejected a national trend in state regulation of health care that had resulted in a proliferation of CON statutes across the United States between 1966 and 1973.⁸

A second wave of state CON statutes⁹ passed in response to the National Health Planning and Resource Development Act of 1974¹⁰ (NHPRDA or 1974 Health Planning Act) effectively eclipsed *Aston Park*. Nevertheless, it may be instructive to reexamine *Aston Park* in light of the 1986 repeal of the 1974 Health Planning Act¹¹ and the recent emergence of a national movement toward increased competition in the health care industry and the partial deregulation of health care facilities construction.¹² The *Aston Park* decision should interest both state legislatures considering whether to maintain in whole or in part the

5. For purposes of this discussion, the author adopts the definition of "certificate of need" legislation employed by Professor Payton and (then) Clinical Instructor Powchner of the University of Michigan. Payton & Powchner, *Regulation Through the Looking Glass: Hospitals, Blue Cross, and Certificate-of-Need*, 79 MICH. L. REV. 203, 203 n.1 (1980) ("We use the term 'certificate of need' broadly to mean any exercise of state licensing authority with respect to health care facilities or services where the standards for the exercise of such authority are described in terms of the 'need' for the facilities or services.").

6. *Aston Park*, 282 N.C. at 548, 193 S.E.2d at 733.

7. *Id.* at 549-50, 193 S.E.2d at 734-735.

8. See, e.g., Act of August 30, 1967, ch. 1597, 1967 Cal. Stat. 3826 (codified as amended at 38a CAL. HEALTH & SAFETY CODE § 437 (West Supp. 1989)); Act of March 21, 1972, ch. 228, 1972 Kan. Sess. Laws 911 (codified as amended at 65 KAN. STAT. ANN. § 2(a)(01)-2(a)(14) (1985) (repealed 1976)); Act of May 8, 1970, ch. 617, 1970 N.Y. Laws 2257 (codified as amended at 45 N.Y. PUB. HEALTH § 2801(a) (Supp. 1989)).

9. See, e.g., Act of Sept. 9, 1976, ch. 854, § 8, 1976 Cal. Stat. 1931, 1937-39 (codified as amended at 38a CAL. HEALTH & SAFETY CODE § 437.10 (West 1979)) (outlining projects requiring certificate of need); Act of June 26, 1974, ch. 74-323, § 23, 1974 Fla. Laws 997, 1009 (codified as amended at FLA. STAT. ANN. § 154.245 (West 1989)) (certificate of need required as a condition to bond validation and project construction); Act of Mar. 30, 1978, ch. 687, § 304, 1978 Me. Laws 3067, 3071-72 (repealed 1981) (certificate of need required); Act of Aug. 6, 1979, Pub. Health and Welfare, § 4, 1979 Mo. Laws 383, 385-86 (codified as amended at MO. ANN. STAT. § 197.315 (Vernon 1983)) (certificate required); Act of Dec. 13, 1979, No. 1979-118, 1979 Pa. Laws 532 (codified as amended at PA. STAT. ANN. tit. 35, § 448.701 (Purdon 1989)); Act of Apr. 9, 1977, ch. 105, § 16-2D-3, 1977 W. Va. Acts 448, 453-55 (codified as amended at W. VA. CODE § 16-2D-3 (1985)) (certificate of need required). For a number of illuminating perspectives on state certificate of need regimes after the 1974 Health Planning Act, see *Symposium: Certificate-of-Need Laws in Health Planning*, 1978 UTAH L. REV. 1 (1978). After some resistance, see *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532, 535-36 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978), the North Carolina legislature passed a second certificate of need statute, Act of July 15, 1983, ch. 775, § 1, 1983 N.C. Sess. Laws 895, 941-57 (codified as amended at N.C. GEN. STAT. § 131E-175 to -191 (1988)), to conform with the requirements of the 1974 Health Planning Act. See also Havighurst & McDonough, *The Lithotripsy Game in North Carolina: A New Technology Under Regulation and Deregulation*, 19 IND. L. REV. 989, 992 n.12 (1986) (comparing access to and costs of nonsurgical treatment for urinary stones under a restrictive state regulatory regime and under a market-oriented regulatory regime).

10. Pub. L. No. 93-641, 88 Stat. 2225, 2584 (1974), *repealed by* Act of Nov. 14, 1986, Pub. L. No. 99-660, § 701(a), 100 Stat. 3799.

11. See Act of Nov. 14, 1986, Pub. L. No. 99-660, § 70(a), 100 Stat. 3799.

12. For a discussion of the future of health care regulation, see C. HAVIGHURST, *supra* note 2, at 935; Havighurst, *The Changing Locus of Decision Making in the Health Care Sector*, 11 J. HEALTH POL., POL'Y & L. 697, 720-30 (1986); Simpson, *Full Circle: The Certificate of Need Regulation of Health Facilities to State Control*, 19 IND. L. REV. 1025, 1079-87 (1986).

CON regimes that still exist in most states and, more importantly for purposes of this Article, state courts as they weigh the merits of challenges to CON statutes in the context of a more competitive health care market.

Although advocates of a competitive health care market may approve of the *Aston Park* result, Justice Lake's concise opinion raises a number of troubling issues. These issues concern, most significantly, the role of the court and the propriety of economic substantive due process review of state health care regulation. The *Aston Park* court, however, did not articulate a rigorously developed rationale for its conclusions. This Article examines some of the fundamental issues raised by *Aston Park* and sets forth a rationale for the decision that is firmly rooted both in the history of state CON regulation of health care and in constitutional, political, and economic theory. It argues that certain circumstances of "legislative failure" justify state substantive due process review of economic legislation such as that engaged in by the North Carolina Supreme Court in *Aston Park*. The Article concludes that a state statutory CON regime for the restriction of health care facilities construction presents a particularly strong case for substantive due process review.

Section II of this Article briefly sketches the history of state CON regulation of health care and reviews the *Aston Park* case in detail. Section III focuses on the constitutional doctrine of substantive due process and the rationale for substantive due process review of economic regulation by state courts. Section IV explores the theoretical and empirical possibilities of conceptualizing state CON regulation of health care facilities construction as an example of industry "capture" and legislative failure. The Article concludes in Section V by briefly examining *Aston Park*'s implications for current public policy.

II. ASTON PARK IN HISTORICAL CONTEXT

A. The Law Before *Aston Park*

The CON regime enacted by the North Carolina legislature in 1971¹³ was part of a national trend in health care regulation originating in the late 1940s and 1950s.¹⁴ That period saw both an unprecedented boom in the construction¹⁵ of hospital facilities and an alarming increase in health care cost inflation.¹⁶ Concern over rising health care costs and a growing interest in government planning of health care investment¹⁷ combined with a number of

13. Act of July 27, 1971, ch. 1164, 1971 N.C. Sess. Laws 1715 (codified at N.C. GEN. STAT. § 90-291 (Supp. 1971) (repealed 1973)).

14. Payton & Powsner, *supra* note 5, at 238-39; Simpson, *supra* note 12, at 1033.

15. R. STEVENS, IN SICKNESS AND IN WEALTH 229 (1989); Payton & Powsner, *supra* note 5, at 236-38.

16. Per capita expenditures on health care rose from \$82 to \$146 between 1950 and 1960. Increases in health care expenditures significantly outpaced the increase in Gross National Product during the same period as health-care costs rose from 4.4% of GNP in 1950 to 5.3% of GNP in 1960. C. HAVIGHURST, *supra* note 2, at 69. The factors contributing to health-care inflation included increasing labor costs, expensive new medical technologies, and rapidly increasing demand for health services. Payton & Powsner, *supra* note 5, at 238-39.

17. See REGULATING HEALTH FACILITIES CONSTRUCTION (1974) [hereinafter HEALTH FACILITIES] (collection of papers presented at a 1974 conference sponsored by the American Enterprise

other factors to bring about the passage of state CON regimes to regulate hospital construction.¹⁸ The passage of the Comprehensive Health Planning and Health Services Amendments of 1966¹⁹ (CHPHSA), as well as the Partnership for Health Amendments of 1967,²⁰ accelerated the movement that began in the states. Both pieces of legislation provided federal funding for state and local agencies charged with planning capital expenditures for health care construction.²¹ In 1968, the American Hospital Association and its affiliates expressed enthusiastic support for the passage by state legislatures of state CON statutes.²² These statutes would authorize state and local commissions not just to advise and consult, but also to bar hospital construction found to exceed local "need." "Between 1969 and 1972, twenty states adopted various forms of CON regulation, typically at the urging of the voluntary hospitals, the public health establishment, and the Blue Cross, and always on the premise that it would help to contain costs."²³

Although generalization necessarily entails some oversimplification, the commonly articulated purposes of the state CON statutes may be summarized as follows: 1) to prevent capital investment in "excess" hospital capacity;²⁴ 2) to preserve and improve the quality of institutional health care;²⁵ 3) "to achieve a uniform geographic distribution of health services or an equitable distribution of health services among social and economic groups;"²⁶ and 4) to facilitate public participation in health care investment decisions.²⁷ State CON regimes, then, theoretically were based on several interdependent arguments. The threshold claim was that the private market failed to provide for optimal capital invest-

Institute for Public Policy Research and the Committee on Legal Issues in Health Care at Duke University School of Law); Simpson, *supra* note 12, at 1035; *see also* R. STEVENS, *supra* note 15, at 213-83 (explaining the close relation between institutional advocates of the voluntary hospital and the efforts of federal government health care facilities planners in the two decades immediately following World War II).

18. R. STEVENS, *supra* note 15, at 305-08; Payton & Powsner, *supra* note 5, at 258.

19. Pub. L. No. 89-749, 80 Stat. 1180 (1966) (codified as amended at 42 U.S.C. § 246 (1982)).

20. Pub. L. No. 90-174, 81 Stat. 533 (1967) (codified as amended in scattered sections of 42 U.S.C.).

21. R. STEVENS, *supra* note 15, at 306 ("Comprehensive health-planning . . . agencies, set up under [CHPHSA], provided federal funding to states for statewide planning, [and] for the establishment of areawide or metropolitan health planning agencies at the local level."); Simpson, *supra* note 12, at 1034 ("The comprehensive health planning agencies were expected to provide consultation, not to control or regulate facility expenditures," but the distance from consultation to regulation proved to be no more than a few years.)

22. Curran, *A National Hospital Survey and Analysis of State Certificate-of-Need Laws for Health Facilities*, in HEALTH FACILITIES, *supra* note 17, at 89; R. STEVENS, *supra* note 15, at 307 ("The American Hospital Association, although strongly supporting voluntary health planning in the late 1960s as a means of achieving a middle position, pushed for controlled competition of new construction through state-mandated certificate-of-need (CON) legislation.")

23. Payton & Powsner, *supra* note 5, at 213.

24. Havighurst, *Regulation of Health Facilities and Services by "Certificate of Need"*, 59 VA. L. REV. 1143, 1149 (1973); Simpson, *supra* note 12, at 1028 n.16.

25. Payton & Powsner, *supra* note 5, at 257; Simpson, *supra* note 12, at 1029.

26. Simpson, *supra* note 12, at 1030-31.

27. Grosse, *The Need For Health Planning*, in HEALTH FACILITIES, *supra* note 17, at 27-31; Simpson, *supra* note 12, at 1032; *see also* R. STEVENS, *supra* note 15, at 306 (referring to "the urge to democratize the [health care facilities construction] planning process" animating the decisions of health policy planners in the late 1960s and early 1970s).

ment in hospital facilities and that if left to itself the market would produce substantial excess capacity.²⁸ From this claim followed the argument that the excess capacity was substantially responsible for rising hospital costs²⁹ and that a government body should therefore impose legally enforceable restrictions on hospital construction.³⁰ Advocates of state CON regimes—either implicitly or in express terms—drew an analogy between hospital facilities investment decisions and those faced in public utility regulation.³¹ In numerous speeches and articles in the late 1960s and early 1970s, the hospital was categorized as a “‘public utility’ subject to . . . control by the government.”³² There was, moreover, a “widely-held expectation among health policy makers [during this period] . . . that prevailing economic and social forces would lead to centralized control of health services delivery in the United States along the lines of the national health . . . systems of western European countries.”³³ Confounding these predictions, however, a decisive trend toward deregulation gathered momentum in the late 1970s and early 1980s.³⁴

B. *The Aston Park Case*

In 1971, at the height of this first wave of state CON regulation, Aston Park Hospital, Inc. filed an application for a certificate of need with the North Carolina Medical Care Commission to permit the construction of a 200-bed general hospital in Asheville, North Carolina.³⁵ The 200-bed facility was to replace a 50-bed hospital that Aston Park had operated for many years.³⁶ Although Aston Park did not intend to use local, state, or federal funds in constructing the facility,³⁷ the Commission denied the certificate of need. The Commission of-

28. C. HAVIGHURST, *supra* note 2, at 931; Payton & Powsner, *supra* note 5, at 209; Posner, *Certificates of Need for Health Care Facilities: A Dissenting View*, in HEALTH FACILITIES, *supra* note 17, at 117; Simpson, *supra* note 12, at 1028-29.

29. Payton & Powsner, *supra* note 5, at 268-69.

30. See R. STEVENS, *supra* note 15, at 284-309; Curran, *supra* note 22, at 108-11; Payton & Powsner, *supra* note 5, at 268-71; Simpson, *supra* note 18, at 1028-29.

31. See Curran, *supra* note 22, at 85, 91-92; Priest, *Possible Adaptation of Public Utility Concepts in the Health Care Field*, 35 LAW & CONTEMP. PROBS. 839, 840-41 (1970); Grad, *Commentary on the Papers*, in HEALTH FACILITIES, *supra* note 17, at 89, 121. Prominent among the traditional economic rationales for regulatory interference with the private market is the perceived necessity of preventing wasteful duplication of facilities in those situations in which the market will not correct the problem of overinvestment in unneeded capacity. See generally ECONOMIC REGULATION, *supra* note 2, at 4-135 (discussing the economic and legal considerations typically raised by the “wasteful duplication” argument for government regulation of the provision of a given good or service).

32. Curran, *supra* note 22, at 89.

33. Simpson, *supra* note 12, at 1035.

34. See generally C. HAVIGHURST, *supra* note 2, at 934-35 (“Congress’s enthusiasm for regulating the health care sector began to wane in the late 1970s, reflecting both political trends and pragmatic assessments of regulation’s achievements both in health care and in other regulated industries”); R. STEVENS, *supra* note 15, at 308-09 (“[B]y 1980 effective regulation had not been achieved. President Carter, abandoning a major fight for hospital cost-control legislation in 1978, blamed the ‘selfish concerns’ of the hospital and medical lobby for its failure. But from the hospitals’ point of view government regulation piled on additional costs and harassment. Government and the hospitals were now antagonists.”).

35. *Aston Park*, 282 N.C. at 542, 193 S.E.2d at 730.

36. *Id.* at 543, 193 S.E.2d at 730.

37. *Id.* at 543, 193 S.E.2d at 731.

ferred the following explanation: "[T]he insertion into the Asheville health community of a new, 200-bed general hospital would be an unnecessary and weakening duplication of services and undesirable dilution of physicians' time in treating patients at widely separated hospitals."³⁸ In making its decision the Commission acted pursuant to a state statute³⁹ typical of those enacted during this period.⁴⁰ The statute mandated in relevant part:

No certificate of need shall be issued unless the action proposed in the application . . . is necessary to provide new or additional inpatient facilities in the area to be served, can be economically accomplished and maintained, and will contribute to the orderly development of adequate and effective health services.⁴¹

Having determined earlier that between 1971 and 1977 the area served by Aston Park Hospital needed to add only 94 beds, the Commission would not permit the construction of a new 200-bed facility.⁴²

In reversing the Commission and striking the certificate of need statute, the North Carolina Supreme Court clearly indicated that the state legislature has the authority to subject hospital construction to reasonable regulation.⁴³ Nevertheless, Article I, Section 19 of the North Carolina Constitution constrains this legislative authority. The state constitution provides in pertinent part: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty, or property, but by the law of the land."⁴⁴ According to the court,

Article I, Sec. 19 . . . does not permit the Legislature to authorize a State board or commission to forbid persons, with the use of their own property and funds, to construct adequate facilities and to employ therein a licensed professional and quasi-professional staff for the treatment of sick people, who desire the service, merely because to do so endangers the ability of other, established hospitals to keep all their beds occupied.⁴⁵

The court cited pre-1937 United States Supreme Court authority for the proposition that the police power over public health is not limitless.⁴⁶ It also cited slightly more recent North Carolina cases⁴⁷ for the proposition that the exercise of the state's police power "must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare."⁴⁸ Applying

38. *Id.* at 543, 193 S.E.2d at 730.

39. N.C. GEN. STAT. § 90-291 (Supp. 1971) (repealed 1973).

40. *See* Curran, *supra* note 22, at 94-95.

41. N.C. GEN. STAT. § 90-29(c) (Supp. 1971) (repealed 1973).

42. *Aston Park*, 282 N.C. at 543, 193 S.E.2d at 730.

43. *Id.* at 551, 193 S.E.2d at 735.

44. N.C. CONST. art. I, § 19.

45. *Aston Park*, 282 N.C. at 549, 193 S.E.2d at 734.

46. *Id.* at 551, 193 S.E.2d at 735 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 273 (1932)). 1937 marked the end of the *Lochner* era, during which the Supreme Court engaged repeatedly in the economic substantive due process analysis. *See infra* note 65 and accompanying text.

47. *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735 (quoting *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 735 (1949)).

48. *Id.*

that test, the court reached a conclusion clearly within the doctrinal tradition of substantive due process:

We find no such reasonable relation between the denial of the right of a person, association or corporation to construct and operate upon his or its own property, with his or its own funds, an adequately staffed and equipped hospital. . . . Consequently, we hold that the [CON statute] . . . is a deprivation of liberty without due process of law in violation of . . . the Constitution of North Carolina insofar as it denies Aston Park the right to construct and operate its proposed hospital except upon the issuance to it of a certificate of need.⁴⁹

In support of the holding, Justice Lake made two closely related points that highlight both the court's economic assumptions and the divergence of those assumptions from those prevailing in the health care community at the time. "In the ordinary businesses," the court explained, "it has been the common experience in America that competition is an incentive to lower prices, better service and more efficient management."⁵⁰ Hospital construction, according to the court, was no less amenable to competition than any other industry.⁵¹ In anticipation of the counterargument that the statute under review might be justified as public utility regulation, the court stated that public utility regulation is distinguished first by its undertaking to control the potential abuses of a monopoly and second by public determination of the utility's rates.⁵² Because hospital construction in Asheville was not, in the judgment of the court, a monopoly, and because the CON statute did not entail public rate-making, the analogy to public utility regulation did not pertain.⁵³

C. *The Law After Aston Park*

In the year after the *Aston Park* decision, Congress passed the National Health Planning and Resources Development Act of 1974.⁵⁴ Although the 1974 Health Planning Act did not mandate state passage of CON statutes, it conditioned the receipt of federal funding for numerous health programs on state adoption of a comprehensive CON regime.⁵⁵ Thus, the federal legislation effectively forced states either to pass such statutes or to bring existing CON statutes into compliance with the 1974 Health Planning Act.⁵⁶ North Carolina challenged this effective requirement in *North Carolina ex rel. Morrow v. Califano*,⁵⁷ wherein the United States District Court for the Eastern District of North Caro-

49. *Id.*

50. *Id.* at 549, 193 S.E.2d at 734.

51. *Id.*

52. *Id.* at 550, 193 S.E.2d at 734.

53. *Id.* at 550, 193 S.E.2d at 734-35. It is interesting to note that the author of the only contemporary, article-length critique of *Aston Park* implies that he does find the analogy between hospital construction and utility regulation persuasive. See Comment, *supra* note 2, at 799-802.

54. Pub. L. No. 93-641, 88 Stat. 2225 (1974) *repealed by* Act of Nov. 14, 1986, Pub. L. No. 99-660, § 701(a), 100 Stat. 3799.

55. *Id.*

56. Simpson, *supra* note 12, at 1042.

57. 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978).

lina upheld the CON provisions of the Health Planning Act in a decision affirmed by the United States Supreme Court.⁵⁸ Although the North Carolina Supreme Court never expressly overruled *Aston Park*, in 1977, shortly before the *Morrow* decision, the North Carolina legislature enacted a new certificate of need statute that brought the state into compliance with the 1974 Health Planning Act.⁵⁹ The *Morrow* decision, thus, merely confirmed the legislature's federally endorsed circumvention of *Aston Park*.

In effect, *Aston Park* has been a legal dead letter since 1978.⁶⁰ Nevertheless, it may be that its time has come, gone, and come again. In the post-1974 Health Planning Act world, the potential for substantive due process review⁶¹ of state CON regulation of hospital construction takes on a new relevance.

III. THE MERITS OF ECONOMIC DUE PROCESS REVIEW

A. Federal Substantive Due Process

Although the search for a precise and generally acceptable definition of substantive due process may be a quixotic endeavor, Professor Perry's terse formula will serve for purposes of this Article. According to Professor Perry, substantive due process is "the judicial practice of constitutionalizing values that cannot fairly be inferred from the constitutional text, the structure of the government ordained by the Constitution, or historical materials clarifying otherwise vague constitutional provisions."⁶² The doctrine is highly controversial, frequently maligned, and closely associated with United States Supreme Court decisions invalidating numerous pieces of social and economic legislation in the first third of the twentieth century.⁶³ The paradigmatic economic due process case of this era is of course *Lochner v. New York*.⁶⁴

58. North Carolina *ex rel. Morrow v. Califano*, 435 U.S. 962 (1978) (mem.).

59. North Carolina Health Planning and Resource Development Act of 1978, ch. 1182, 1977 N.C. Sess. Laws 71 (codified as amended at N.C. GEN. STAT. § 1E-175 to -191 (1988)).

60. Given the substantial level of academic interest in the case, it is remarkable how rarely it is cited in later decisions. Searches of *Shepard's Citations* and several computer databases revealed no more than a handful of subsequent citations. See *Wall & Ochs, Inc. v. Hicks*, 469 F. Supp. 873, 882 (E.D.N.C. 1979) (mentioning *Aston Park* in passing as a potential alternative basis for plaintiff's constitutional claim); *Mount Royal Towers, Inc. v. Alabama Bd. of Health*, 388 So. 2d 1209, 1211, 1214-15 (Ala. 1980) (reaffirming legitimacy of substantive due process review, but declining to apply *Aston Park* reasoning to reverse a denial of a certificate of need to a nursing home); *Hospital Group of Western North Carolina, Inc. v. North Carolina Dept. of Human Resources*, 76 N.C. App. 265, 267, 332 S.E.2d 748, 750 (1985) (referring to *Aston Park* only to explain that plaintiff's constitutional question was not properly before the court). No court outside of North Carolina has unambiguously adopted the *Aston Park* holding. See, e.g., *Goodin v. State ex rel. Oklahoma Welfare Comm'n*, 436 F. Supp. 583, 585 n.2 (W.D. Okla. 1977) (declining to follow *Aston Park*); *Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty*, 131 N.J. Super. 412, 420, 330 A.2d 370, 374 (1974) (expressly rejecting *Aston Park*).

61. In the interests of brevity, this Article will borrow from Professor Wonnell the shorthand "economic due process" in place of "substantive due process review of economic regulation." See Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91, 92 (1983).

62. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 419 (1976) (footnote omitted).

63. For an excellent review of the Court's *Lochner* era economic due process decisions, see Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 269-80.

64. 198 U.S. 45 (1905).

In *Lochner* and other substantive due process cases decided between 1897 and 1937,⁶⁵ the Supreme Court relied upon the due process clauses of the fifth and fourteenth amendments⁶⁶ to strike statutes such as the famous New York law limiting bakers to sixty hours of work per week. The Court struck these measures after finding them inconsistent with the Court's understanding of the economic liberties of American citizens.⁶⁷ These Supreme Court decisions interfered with early state efforts to enact economic and social regulation and obstructed President Franklin Roosevelt's New Deal legislative program.⁶⁸ In short, the *Lochner* approach gave the application of substantive due process analysis to social and economic legislation a bad name. Critics have charged that economic substantive due process constitutes an antidemocratic exercise of authority by unelected federal judges in contravention of the popular will embodied in legislation.⁶⁹ As Justice Holmes wrote in his frequently quoted *Lochner* dissent: "This case is decided upon an economic theory which a large part of the country does not entertain."⁷⁰ Another more recently articulated argument against economic substantive due process, focusing on the relative institutional competence of the judicial and legislative branches of government, contends that legislatures are better able to investigate and evaluate complex economic and social policy questions than are the courts.⁷¹ As a matter of institutional competence, then, courts have been urged to treat economic legislation with the greatest possible deference.

Although the United States Supreme Court has continued to generate substantive due process decisions concerning noneconomic issues involving rights of a personal nature,⁷² since 1937 the Court has abandoned economic substantive due process entirely.⁷³ Given life tenure among the appointed federal judiciary

65. The *Lochner* era began in earnest with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and ended with *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Phillips, *supra* note 63, at 270-81.

66. U.S. CONST. amend. V; id. amend. XIV, § 1; see, e.g., *West Coast Hotel*, 300 U.S. at 391 (relying on fourteenth amendment).

67. See *Lochner*, 198 U.S. at 61; *Allgeyer*, 165 U.S. at 597; see also Phillips, *supra* note 63, at 270-71 (an "important aspect of economic substantive due process is its inclusion of economic rights, especially freedom of contract, within the 'liberty' protected by the fifth and fourteenth amendments"). For a critique of the *Lochner* approach, see Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure, and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

68. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (striking provisions of the National Industrial Recovery Act).

69. Phillips, *supra* note 63, at 290-91; see also Strong, *supra* note 67, at 449-55 (describing the United States Supreme Court's relatively rapid abandonment of *Lochner* in the mid-1930s, emphasizing in part the Court's rediscovery of the policy-making prerogatives of legislatures).

70. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

71. See, e.g., Perry, *supra* note 62, at 423; see also Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) ("[J]udges have not been charged with imposing their substantive views on the economic system. Judges' claim to authority rests on a plausible demonstration that they are faithfully executing decisions made by others.").

72. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); see Phillips, *supra* note 63, at 282.

73. The Court subjects economic regulation to a "rational basis" scrutiny: if the regulation could have a rational basis, it is upheld. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730-32 (1963); *Williamson v. Lee Optical, Inc.* 348 U.S. 483, 487-88 (1955); *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941); see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7 (1988); see also Phillips, *supra* note 63, at 282 (noting increased judicial reliance on substantive due process after a 50-year line of decisions nullifying economic substantive due process).

and the exceeding difficulty and infrequency with which the United States Constitution is amended,⁷⁴ the standard political critique of the *Lochner* approach—that it is antidemocratic—has understandably carried substantial weight. It is worth noting, nonetheless, that although our political culture has reached a rough consensus that federal substantive due process will be restricted to certain issues of public morality,⁷⁵ there is no iron logic dictating the point at which this line should be drawn.

Indeed the criticism that substantive due process is antidemocratic, while appealing in its evocation of grade school civics and class values, rings rather hollow when placed in the context of everyday political practice. As a preliminary matter, few students of politics would argue that all legislation reflects the democratic will, in that the electorate would approve each measure if presented as a referendum.⁷⁶ Moreover, ours is a constitutional system riddled with filters, limitations, and occasional outright denials of democratic will.⁷⁷ If unelected judges may declare that the Constitution constrains state legislatures from enacting certain restrictions on the availability of abortions, it is not at all theoretically clear why the same judges may not declare that the same Constitution prohibits state legislatures from limiting the number of hours a baker may work in one week to sixty.

The institutional competence argument is also rather facile. Even conceding that legislatures are better able to collect data and produce reports on questions of economic policy, it does not follow that legislators are necessarily more

74. The United States Constitution has been amended only 26 times since the document went into effect, and only 16 times in the 198 years between 1791 and 1989. See U.S. CONST. amends. I-XXVI; J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1113 app. B at 1121-31 (1986) (presenting each amendment with the date of ratification and historical notes).

75. See Perry, *supra* note 62, at 424.

76. See generally K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 59-60 (1951) (postulating that, to encompass a wide range of individual preferences excluding interpersonal utility comparisons, social welfare judgments must be either "imposed or dictatorial"); 3 F. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 1-8 (1979) (defending the democratic form of government despite the majority's tendency to support legislation that favors special groups at the expense of the common will); Wonnell, *supra* note 61, at 100 ("The developing theory of public choice . . . postulates certain conditions under which a properly functioning democratic political process consistently may thwart majority values." (footnote omitted)).

77. Representative government (as opposed to direct voting on all measures as referenda) for fixed terms, bureaucratic discretion, gerrymandering (effectively diluting the votes of some citizens), and judicial elaboration of the Bill of Rights provide four prominent examples. See generally Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 31 (1985) (arguing that the American constitutional structure reflects the Madisonian ideal of deliberative democracy in which elected officials may pursue their understanding of the "public interest," distinguished from the aggregation of private interests). According to one student commentator,

Since most of the framers of state and federal constitutions were steeped in the Lockean tradition they probably did believe that all government is established to accomplish certain limited objects of mutual concern to members of the political community. If they had been asked to define those objects, it seems likely that they would have defined them in terms of traditional ends of government which were familiar to them Therefore, the originators of substantive due process may have been carrying out the spirit of these constitutions when they decreed that legislators could not act beyond the scope of the police powers, even if their position did depart from the historic meaning of the phrase "due process of law."

Note, *Counterrevolution in State Constitutional Law*, 15 *STAN. L. REV.* 309, 329-30 (1963).

competent than judges in evaluating the data, once it has been collected, and in making policy decisions.

B. *Economic Due Process and the State Courts*

Although most states have adopted the United States Supreme Court's highly deferential approach to economic legislation, a number of states, including North Carolina, have continued to subject such legislation to economic due process review.⁷⁸ This is not to suggest that there is a logically consistent body of state economic due process doctrine that is applied predictably and systematically. On the contrary, inconsistent results and conclusory reasoning are not uncommon in such cases.⁷⁹

State courts vary as to which types of economic regulation are subjected to substantive due process review, but one of the most prominent themes in state economic due process decisions is hostility toward statutes creating monopolies, restrictive licensing requirements, and other barriers to economic competition.⁸⁰ Anticompetitive regulations are particularly likely to be invalidated as exceeding the police power of state legislatures or as failing to bear a substantial relation to a legitimate legislative purpose.⁸¹ The theoretical basis for hostility to anticompetitive regulation is, perhaps not surprisingly, quite reminiscent of the *Lochner* Court: State economic due process cases frequently presume a right to engage freely in any lawful calling.⁸² There is, moreover, a strong presumption in favor of competitive markets.⁸³

Although the case for federal economic due process review is politically problematic, the case for state economic due process is, under appropriate circumstances, quite compelling. When conducted properly, state economic due process review serves a number of salutary public purposes. First, economic due

78. See generally Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. L. REV. 227, 229-34, 239 (1958) (reviewing numerous post-1937 state economic due process decisions particularly in the areas of professional licensing and legislative price-fixing). According to Professor Kirby, the substantive due process doctrine has been used by the state courts to strike down a variety of anticompetitive measures by way of "judicial determinations that serve no legitimate public purpose. These measures have included legislative regulation of prices charged for haircuts, dry cleaning, cigarettes, business franchises, and milk." Kirby, *supra* note 2, at 253-54; see also Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 92 (1950) ("Since 1937 some state supreme courts when interpreting the due process clause or its equivalent in their state constitutions have continued to interfere freely with legislative policies."); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1479 (1982) [hereinafter *Developments*] (judicial review "of the substantive content of economic regulations takes place at the state level under both due process and equal protection" clauses).

79. See Hetherington, *supra* note 78, at 241 (state substantive due process review "has produced a large body of decisions which cannot be harmonized"); Howard, *supra* note 2, at 886-887 (often, grounds of state substantive due process decisions are unclear or "state courts do not explore the justifications for their creation of a body of substantive due process law independent of federal constitutional law").

80. See Howard, *supra* note 2, at 885, 890 (citing *Aston Park*); Paulsen, *supra* note 78, at 105; *Developments, supra* note 78, at 1469-71.

81. See *Developments, supra* note 78, at 1467-70.

82. Hetherington, *supra* note 78, at 241; Paulsen, *supra* note 78, at 104; *Developments, supra* note 78, at 1471.

83. See Howard, *supra* note 2, at 890; *Developments, supra* note 78, at 1469.

process imposes the procedural requirement that the legislature bear the burden of articulating a "public value"⁸⁴ as a justification for an act of economic regulation.⁸⁵ While mere rationality review requires only that a court might be able to conceive of a public purpose for a given statute, substantive due process requires both the articulation of a public value and a demonstration of the connection between that public value and the legislative measure.⁸⁶ As a procedural matter, this hardly seems burdensome. It is, moreover, consistent with other types of constitutional analysis, such as equal protection review of racial classifications,⁸⁷ that require the government to have an articulable public purpose (other than prejudice or the raw political power of one group in relation to another) for giving an advantage to Group *A* at the expense of Group *B*.⁸⁸

A second, related benefit of economic due process is that it provides a substantive check on the power of legislatures to regulate economic affairs.⁸⁹ Although it is commonly argued that popular voting provides such a check,⁹⁰ the general election is a very crude and cumbersome political tool for dealing with specific and often unnoticed examples of legislative overreaching in the realm of economic regulation.⁹¹ Unless one is prepared to argue that such legis-

84. The phrase is borrowed from Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984).

85. Comment, *State Economic Substantive Due Process: A Proposed Approach*, 88 YALE L.J. 1487, 1505 (1979) ("Courts should require the state to articulate the ends that justify economic legislation."). For the argument that federal legislation should be subject to federal judicial review to enforce a constitutional requirement that congressional statutes serve public-regarding purposes, see Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980).

86. See *Developments*, *supra* note 78, at 1467-69; Note, *supra* note 77, at 327-28.

87. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 532, 548-54 (1984) (Stevens, J., dissenting); Hampton v. Mow Sun Wong, 426 U.S. 88, 103, 114-16 (1976).

88. One commentator argues that federal constitutional review under the dormant commerce, privileges and immunities, equal protection, due process, contract, and eminent domain clauses is "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Sunstein, *supra* note 84, at 1689; see also Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 351-54 (1988) (arguing that courts should require federal legislation to articulate both a public purpose and a plausible relation between the articulated public purpose and the means adopted in the legislation).

89. Epstein, *The Active Virtues*, REGULATION, Jan.-Feb. 1985, at 16; Comment, *supra* note 85, at 1489-90.

90. See *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976); *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487 (1955); see also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 19 (1962) ("[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system."); P. BOBBITT, *CONSTITUTIONAL FATE* 59-73 (1982) (describing a school of "prudential" constitutional jurisprudence that finds virtue in the Court's passive accommodation of the policy determinations of the elected branches of government); J. ELY, *DEMOCRACY AND DISTRUST* 4, 68, 131-34 (1980) (echoing Bickel and arguing further that it is the role of courts to make sure that it is the democratic political process that actually makes public policy decisions).

91. See Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1583-84 (1988) ("While legal scholarship once focused on the bias of the majority as perhaps the central dilemma of constitutional law, now the bias and power of narrow special interest groups may have become a greater constitutional worry."); Rose-Ackerman, *supra* note 88, at 350 ("In a legislative deal, a high proportion of affected parties need not agree to the terms. Only majority support in the legislature is needed, and even supporters may

lative abuses never occur, that only those abuses for which popular voting imposes political accountability require a remedy, and that the legislature should be the sole judge of the limits of its own economic power in every case not raising an election issue, the argument for economic due process as a political check cannot be dismissed out of hand. It should be noted, moreover, that the concept of political checks on legislative authority is consistent with the tradition of separation of powers⁹²—as opposed to the limitless parliamentary sovereignty found in the British political system—that runs through two centuries of American state and federal constitutional history.⁹³

A third potential benefit of economic due process is that it may provide for the vindication of the public interest in those frequent cases of legislative failure in which the legislative process has been captured by minority or special interest.⁹⁴ Paradoxically, then, economic due process may serve a distinctly democratic or majoritarian function. Even when the legislature provides a forum for a broad range of well-represented interests, the result reached as the product of pluralist struggle and compromise may be antithetical to the majority interest.⁹⁵ It is a debatable proposition of pluralist ideology, not a self-evident truth, that the general public interest necessarily coincides with the aggregation of represented private and public interests in the legislative process of a democratically elected legislature.⁹⁶ Experience and the illuminative perspectives of public choice theory⁹⁷ suggest, moreover, that in practice there are gross inequalities in

represent many people who are opposed to the new law.”); Wonnell, *supra* note 61, at 100-11 (“even an ‘ideal’ democratic political process may be inherently unable to weigh the competing values embodied in [such economic measures as] monopoly legislation.”).

92. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (“Steel seizure case” turning on distinctions between executive and legislative authority); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury v. Madison* for the proposition that “it is emphatically the province and duty of the judicial department to say what the law is”); *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 176 (1803) (positing that the United States constitutional system is characterized by three separate “departments,” each with a defined and limited role); see also Cutler, *Party Government under the American Constitution*, 134 U. PA. L. REV. 25, 26-27 (1985). See generally A. BICKEL, *supra* note 90 (reviewing authority and propriety of judicial review); L. TRIBE, *supra* note 73, at 18-400 (presenting a unified analysis of constitutional law).

93. See Epstein, *supra* note 89, at 16. The appealing myth of boundless legislative supremacy is consistent with democratic majoritarian political ideology, but it does not describe the American political system. In practice, there are numerous checks on the authority of Congress and the state legislatures in our written and unwritten constitutions. See generally H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* 4-455 (1981) (discussing substantive and procedural limitations on the legislative authority of state legislatures and the Congress of the United States).

94. Hetherington, *supra* note 78, at 249; *Developments, supra* note 78, at 1488-89; Comment, *supra* note 85, at 1489-90.

95. Professor Sunstein, addressing the interest group problem, is one prominent contemporary legal scholar who rejects the notion that the public good emerges from the pluralist competition of political factions. He favors instead a Madisonian conception of a deliberative legislative process in which legislators all pursue the public interest, rather than pursuing myriad special interests. Professor Sunstein suggests, moreover, that this deliberative ideal would be facilitated by the judicial application of a heightened rationality standard in constitutional review of legislation. Sunstein, *supra* note 77, at 31-33, 69.

96. *Id.* at 31-49.

97. See R. HARDIN, *COLLECTIVE ACTION* (1982) (collective action analyzed as an economic theory of individual contribution to group action); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) (examining group dynamics and presenting a new theory of pressure groups); Wonnell, *supra* note 61, at 100-11. Professor Michael Fitts defines public choice theory as “the application of eco-

the representation of public and private interests in the legislative process. Legislative results frequently reflect not the open competition of all segments of society potentially affected by legislation under consideration, but rather the disproportionate influence of highly organized and politically sophisticated special interests.⁹⁸

As a general matter, the dynamics of collective action are such that the interests of the average voter or consumer in economic regulation are likely to be consistently underrepresented in the legislative process, while the interests of the relatively small pressure group are likely to be overrepresented.⁹⁹ In the case of economic regulation, the industry groups for whom the regulation has a large potential cost or benefit will have a disproportionately large incentive to organize, to obtain relevant information, and to bring political pressure to bear on legislators.¹⁰⁰ Given the large individual benefit or cost and the relatively small size of the industry group, the smaller group is better able to enforce organizational unity and to dissuade free riders.¹⁰¹ A large and diffuse group, such as consumers potentially affected by anticompetitive legislation, will have a very difficult time organizing to exert political pressure. Because the average detriment of a higher price is likely to be relatively modest, especially when compared to the average potential benefit for members of the industry group, the individual consumer has little incentive to incur the costs of organizing, obtaining information, and exerting political pressure. Moreover, since the consumer goal (the lower price) is a public good, no consumer can be excluded from the benefit, even if free-rider consumers fail to contribute to the costs of political action.¹⁰² It is, therefore, in the interest of the individual consumer to be a free rider and to eschew contributing to the costs of political action.¹⁰³ Thus, "even an 'ideal' democratic political process may be inherently unable to weigh the competing values embodied in monopoly legislation."¹⁰⁴

In combination, the advantages of the procedural requirement that a legislature articulate a public value, the concern that the legislature not be the sole judge of the extent of its own regulatory power, and the value of allowing the vindication of a general public interest in cases in which the legislative process has produced a result antithetical to the interests of most citizens constitute a

conomic models and principles to the study of political behavior." Interview with Professor Michael Fitts (Sept. 13, 1989); see also Rose-Ackerman, *supra* note 88, at 344 (1988) ("Public choice theory attempts to provide realistic positive models of politics and to find methods of making collective choices that have desirable normative characteristics."); *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988) (presenting various commentators' analyses and applications of public choice theory).

98. For a concise summary of the problem and references to the literature on special interests in the legislative process, see Fitts, *supra* note 91, at 1572; *supra* notes 11-23 and accompanying text.

99. See M. OLSON, *supra* note 97, at 36; Wonnell, *supra* note 61, at 100-11.

100. See M. OLSON, *supra* note 97, at 2; Wonnell, *supra* note 61, at 100-11.

101. See M. OLSON, *supra* note 97, at 9-16; Wonnell, *supra* note 61, at 100-11. A "free ride" is defined as "a benefit . . . gained or accepted at another's expense or without cost to or effort by the one benefitting." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 907 (1976).

102. Wonnell, *supra* note 61, at 107.

103. M. OLSON, *supra* note 97, at 5-52; Goldin, *Price Externalities Influence Public Policy*, 23 PUB. CHOICE 1, 3 (1975); Wonnell, *supra* note 61, at 100-11.

104. Wonnell, *supra* note 61, at 100.

powerful set of arguments that support substantive due process review of state economic regulation.¹⁰⁵ The most troublesome counterargument, as in the case of federal substantive due process review, is that even when it may be rational, substantive due process review is antidemocratic.¹⁰⁶ Although this point may fundamentally undermine the legitimacy of federal substantive due process review, several factors make it difficult to accept the majoritarian argument against *state* substantive due process review. First, in all but three states¹⁰⁷ the judges of the highest state courts are subject to various forms of majoritarian review, either through competitive elections, noncompetitive approval elections upon the expiration of fixed terms, or through popular recall of sitting judges.¹⁰⁸ Thus, to the extent that voting checks the authoritarian imposition of values and lends legitimacy to the exercise of political authority, state judges act with considerably more democratic legitimacy than do federal judges and with not much less legitimacy than state legislators.¹⁰⁹ Second, although amendment of the United States Constitution is difficult and infrequent, amendment of state constitutions is neither: "Between 1970 and 1979, the states adopted a total of 946 amendments to their state constitutions."¹¹⁰ For voters in many states, the process of amending the state constitution is no more cumbersome than that of voting on a referendum or an initiative.¹¹¹ Given the nature of state constitutional systems, then, the majoritarian argument against substantive due process review is severely weakened. As one commentary notes:

The availability of such channels for popular revision of state constitutions has clear implications for the legitimacy of judicial review. The document that judges enforce is likely to reflect recent popular attitudes and goals and if a court's interpretation of the constitution devi-

105. For two general judicial endorsements of state supreme court "activism" in the interpretation of state constitutional provisions, see Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985) and Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983). For two critiques of state supreme court "activism," see Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985), and Cameron, *The Place for Judicial Activism on the Part of a State's Highest Court*, 4 HASTINGS CONST. L.Q. 279 (1977).

106. See, e.g., Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 986, 994, 1009-10 (1979); McKnight, *Minnesota Rational Relation Test: The Lochner Monster in the 10,000 Lakes*, 10 WM. MITCHELL L. REV. 709, 736-38 (1984).

107. 26 COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF STATES* 161-63 (1986). Massachusetts, New Hampshire, and Rhode Island have no majoritarian review of judges. *Id.*

108. See *Developments, supra* note 78, at 1351.

109. It may be argued that because state legislators must seek reelection every few years, they are more democratically accountable than state judges. Perhaps, but the actual differences between state legislators' and state judges' electoral accountability varies enormously from state to state. See *supra* notes 107-08 and accompanying text. Moreover, the point concerning frequent elections cuts both ways. Constantly seeking reelection can make it difficult for legislators to take the long view. Frequent campaigns also leave many state legislators especially vulnerable to special interest groups that provide much of the financing needed to run frequent popular elections. State judges are insulated from many of the corrupting pressures of frequent campaigns so that they may be better able to consider the long-term, overall public interest than their counterparts in the legislatures. In this sense, state courts may approximate the Madisonian ideal of "deliberative democracy" more closely than state legislatures. See Sunstein, *supra* note 77, at 31.

110. *Developments, supra* note 78, at 1354 n.108.

111. *Id.* at 1354.

ates sufficiently from public sentiment, a majority vote can overrule the court's reading.¹¹²

C. *A Theory of Legislative Failure*

The foregoing discussion suggests that state economic due process review can protect the public interest and that such state court review does not necessarily conflict with democratic values. Indeed, on some occasions such review may be indispensable to the vindication of democratic values.¹¹³ A question naturally arises as to *when* a state court should engage in substantive due process review of economic regulation and when it should defer to legislative judgment.¹¹⁴ While a general theory of substantive due process is beyond the scope of this Article, it is necessary to develop some guidelines for deciding when it is appropriate for a state court to subject state economic regulation to substantive due process review¹¹⁵—that is to formulate a theory of “legislative failure.”¹¹⁶ Because the legislation reviewed in *Aston Park* is fairly categorized as anticompetitive, and because there is a long tradition of state court review of such statutes, the theory developed here will be confined to anticompetitive legislation.¹¹⁷ The theory is as follows: A state court is justified in subjecting anticompetitive legislation to economic substantive due process review when the statute before the court suggests 1) that the political process which led to the passage of the regulatory legislation reflects the triumph of organized special interests over the interests of the relatively unorganized majority; and 2) the content of the regulatory regime suggests the phenomenon of industry capture of the political machinery of the state.¹¹⁸ Of necessity, this requires an impressionistic judgment for which the factual basis rarely will be unequivocal. Nevertheless, if the *Aston*

112. *Id.*

113. *See id.* at 498 (suggesting that state supreme courts engage in a kind of “majoritarian review” of special interest legislation).

114. *See generally* Deukmejian & Thompson, *supra* note 106, at 981-86 (discussing “the need for [state] courts to exercise self-restraint in expanding state constitutional interpretation and to develop principled neutral bases for invoking the state, rather than the federal, constitution”); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 321 (1977) (arguing that “independent [state supreme court] interpretation should be applauded as a useful source of constitutional interpretation . . . provided that it is done in a careful and principled way”).

115. The author is indebted in this endeavor to ideas presented in Wonnell, *supra* note 61, and Comment, *supra* note 85, both of which suggest guidelines for economic due process review. This Article's approach, though in some respects conceptually similar to Professor Wonnell's, addresses the state courts, while Professor Wonnell's is directed toward the federal judiciary. Although this Article borrows the suggestion that state courts require legislatures to articulate a public value for any state economic regulation, *see* Comment, *supra* note 85, at 1505, it does not attempt to construct a general approach to all state economic legislation, but rather has restricted itself to a detailed discussion of the merits of state court review of a specific type of legislation—anticompetitive state statutes.

116. The term appears in Epstein, *supra* note 89, at 15.

117. Professor Wonnell's discussion also focuses on judicial review of anticompetitive legislation but in the context of *federal* law. *See* Wonnell, *supra* note 61, at 92.

118. The concept of industry capture is derived from Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (“as a rule, regulation is acquired by [an] industry and is designed and operated primarily for its benefit”) and Posner, *Theories of Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335-36 (1974) (rejecting a public interest theory of legislation in favor of an interest group model favored by economists). *See also* Wonnell, *supra* note 61, at 105 n.58 (acknowl-

Park court is at all representative, state courts generally should be able to recognize this type of legislative failure.

IV. STATE CON REGULATION: A CASE OF LEGISLATIVE FAILURE?

A. *Collective Action Problems and Interest Group Influence*

Faced with the type of CON statute that the Supreme Court of North Carolina reviewed in *Aston Park*, would a court suspect that the statute reflects the relative strength of organized special interests in the legislative process? In some respects, the arcane issue of hospital construction presents an exceptionally strong case for suspecting a disproportionate influence of organized special interests. The subject is complex, and the costs of obtaining information are correspondingly high. Interest groups that stand to gain or lose substantially depending on the details of such legislation include hospital administrators, health insurance providers, physicians, and public health officials. At stake for members of these groups may be employment, status, professional autonomy, and the opportunity to shape the nature of the institutions that deliver health care.¹¹⁹ The members of these groups are exceptionally well informed and are well organized to influence the legislative process.¹²⁰ By contrast, the average consumer gives little thought to the issue of hospital construction.¹²¹ The stakes for the consumer in the struggle over state CON regulation are generally unnoticed unless the consumer requires extensive hospital care. Although the consumer has a financial stake in the legislation (even if only in potentially higher or lower health insurance premiums), he must incur information costs to obtain information and form his opinion. If he wants to influence the political process, he must be prepared to contribute resources to defray the costs of political action.¹²² Although many factors influence the legislative process, health care industry groups can be expected to manifest an interest in hospital construction

edging that the author's analysis of political process is based in part on Professor Stigler's *The Theory of Economic Regulation*).

119. Payton and Powsner explain at length the extent to which the legislative battles over state CON regulation were struggles over the institutional future of health care and who would control it. See Payton & Powsner, *supra* note 5, at 203-14. In their assessment, the battle was won—at least, as of the 1960s and early 1970s—by the Blue Cross health insurance organizations and the partisans of the large, voluntary, teaching hospital. *Id.* Professor Stevens documents the development from the 1930s of the voluntary teaching hospital as the dominant medical institution in the American health care system. R. STEVENS, *supra* note 15, at 140-70. Her research is consistent with the Payton and Powsner view that the large voluntary hospitals supported CON regimes to gain public subsidies while retaining professional dominance of the provision of health care. *Id.* at 305-09.

120. See generally Curran, *supra* note 22, at 86-90 (discussing the health care interest groups supporting state CON legislation in the late 1960s and early 1970s); Schramm, *State Hospital Cost Containment: An Analysis of Legislative Initiatives*, 19 IND. L. REV. 919, 926-36 (1986) (discussing the current legislative initiatives of various health care interest groups).

121. See Schramm, *supra* note 120, at 932 (noting consumer apathy on hospital cost-containment issues); see also Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1416, 1419-21 (1980) (referring to consumer ignorance regarding important but complex information on health care as one of the "endemic problems of the health care industry").

122. Economists such as Professor Stigler, *supra* note 118, at 10-13, and Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212-13 (1976), usefully conceptualize the legislator as the "seller" of the resources of government. The consumer, then, is in a bidding war with producers who also bid for the services of politicians to harness the resources of the state.

decisions and to engage in political action to shape the applicable legislation. Most health care consumers, by contrast, can be expected to adopt the posture of free riders,¹²³ perhaps hoping to benefit from the political action of others on behalf of consumer interests. The rational health care consumer is likely to calculate, to the extent that any conscious choice is made, that the potential marginal benefit to each individual discounted by the possibility that he will not receive any benefit at all, does not exceed the individual cost of political action.

While the purpose of this Article is not to develop a legislative history of the passage of state CON statutes in North Carolina and elsewhere, the historical sources tend to bear out the expectation suggested by the theory, namely that special interests typically prevail over the general public interest in commanding legislative attention.¹²⁴ Thus, under the first prong of the theory of legislative failure articulated in this article, state CON regulation of the type at issue in *Aston Park* presents a strong circumstantial case for substantive due process review by state judges.

B. Cartelization By Any Other Name

The second element of the theory of legislative failure, evidence of industry capture, is derived from Professor George Stigler's article, *The Theory of Economic Regulation*¹²⁵ and from subsequent elaborations of Stigler's work.¹²⁶ Professor Stigler's theory builds, in part, on the public choice understanding of collective action¹²⁷ and develops the implications of industry political power as that power relates to the interaction between politically powerful industry interest groups and the machinery of the state.¹²⁸ Challenging an earlier view that economic regulation may be understood primarily as a public-interest response to instances of market failure, Stigler argues that "as a rule, regulation is acquired by . . . industry and is designed and operated primarily for its benefit."¹²⁹ Although there are several forms of regulatory aid that industry may seek to acquire from government, the theory holds that *every industry or occupation that has enough political power to utilize the state will seek to control entry*.¹³⁰ In addition, the regulatory policy often will be fashioned so as to retard the growth rate of new firms.¹³¹ If an industry successfully obtains regulation controlling entry, the legal authority of the state is employed to enforce a cartel of industry

123. See *supra* note 103 and accompanying text.

124. See Payton & Powsner, *supra* note 5, at 206-14; Posner, *supra* note 28, at 116.

125. Stigler, *supra* note 118.

126. See, e.g., Peltzman, *supra* note 122, at 211 (analysis of *The Theory of Economic Regulation* and Stigler's subsequent influence in the field); Posner, *supra* note 118, at 343 (Stigler's theory "insists with the political scientists that economic regulation serves the private interests of politically effective groups.").

127. Discussed *supra* notes 114-20 and accompanying text.

128. Stigler, *supra* note 118, at 10-13. Posner contrasts the "public interest" and "capture" theories in his *Theories of Economic Regulation*. Posner, *supra* note 118, at 335-50.

129. Stigler, *supra* note 118, at 3.

130. *Id.* at 5.

131. *Id.*

incumbents.¹³² Potentially more efficient producers are barred in whole or in part from entering the cartelized market. Industry incumbents, thus insulated from competition, can restrict supply or extract higher prices than would be the case in a competitive market.¹³³

Although Stigler's analysis has been corroborated by a number of empirical studies of regulated industries,¹³⁴ it is not argued here that the theory accurately describes the relation between anticompetitive legislation and the affected industries in all cases. Rather, the argument is that when a legislative regime appears to reflect industry capture, that regime is ripe for substantive due process review by state courts.

Circumstantial evidence regarding the type of state CON regulation reviewed by the *Aston Park* court suggests that such legislation is likely to fit the model of industry capture.¹³⁵ State CON statutes do indeed create state-enforced cartels of industry incumbents.¹³⁶ Certificate of need statutes establish administrative mechanisms for restricting market entry and limiting the expansion of capacity. It is also worth recalling as a historical point that the wave of state CON statutes enacted in the late 1960s and early 1970s had the enthusiastic support of the American Hospital Association and the Blue Cross.¹³⁷ Whether state CON regulation allows industry incumbents to extract monopoly or oligopoly rents is a more complicated empirical question, given the myriad factors that contribute to inflation in hospital costs. It has not been established anywhere, however, that these regimes did anything to control hospital costs.¹³⁸ A state judge, therefore, would have substantial justification for viewing state CON statutes of the type at issue in *Aston Park* as suspiciously indicative of industry capture.¹³⁹

V. IMPLICATIONS FOR CURRENT POLICY

With the repeal of the 1974 Health Planning Act¹⁴⁰ and the emergence of a trend toward deregulation of the health care industry, state officials once again face fundamental questions concerning the appropriate role of market forces in

132. See Posner, *supra* note 118, at 344-47; Wonnell, *supra* note 61, at 97; see also Emshwiller, *Agencies Block Competition By Small Firms*, Wall St. J., Jul. 26, 1989, at B1, col. 6 (documenting the continuing vitality of cartel legislation at the state level).

133. Wonnell, *supra* note 61, at 97.

134. See Posner, *supra* note 118, at 337 n.3 (collecting empirical studies).

135. In 1972, then-Professor Posner cogently drew the close parallels between CON statutes for health care facilities construction and state-enforced cartelization regimes in other regulated industries. Posner, *supra* note 28, at 113-17. Moreover, Payton and Powsner concluded in their historical study that state CON regimes are textbook examples of industry capture. Payton & Powsner, *supra* note 5, at 209, 211; see also Sloan & Steinwald, *Effects of Regulation on Hospital Costs and Input Use*, 23 J.L. & ECON. 81, 105 (1980) ("there is some support in these findings . . . for believing that regulatory agencies are subject to capture").

136. Havighurst, *supra* note 24, at 1149.

137. See *supra* notes 17, 22-23 and accompanying texts.

138. See, e.g., Sloan & Steinwald, *supra* note 135, at 105 ("the bulk of this evidence has to be taken as generally unfavorable to regulatory solutions to hospital cost inflation").

139. But see Havighurst, *supra* note 24, at 1178-88 (asserting that the capture analysis provides only a partial explanation of the relation between the hospital industry and state CON regimes).

140. Act of Nov. 14, 1986, P.L. 99-660, § 701 (a), 100 Stat. 3799.

the provision of health care.¹⁴¹ Although it is likely that state legislatures will make most policy choices regarding the future of state CON regulations, the courts may also have a voice in evaluating the continued validity of government restriction on investment in hospital capacity. This Article has argued, by means of an exploration and development of a theoretical rationale for the *Aston Park* decision, that under some circumstances state courts are entirely justified in subjecting state CON regulation to substantive due process review.

If and when state courts engage in substantive due process review of state legislation restricting competition in the health care industry, the foregoing discussion advocates the application of a legislative failure analysis to determine whether the legislation is entitled to the judicial deference with which economic legislation is generally treated. When a state court is presented with evidence suggesting legislative failure and industry capture, the court should require, at a minimum, that the state articulate a coherent rationale based both on a public value and on a demonstrated consideration of the empirical evidence relevant to the policy choice. If, upon its own evaluation of the relevant legislative facts, the state court finds that the legislation establishes a cartel at the expense of the public interest, the court would be justified in striking the statute as violative of substantive due process.

141. See, e.g., Johnson, *3 States Weigh New Hospital Price-Setting Rules*, N.Y. Times, May 24, 1989, at A1, col. 2. (reporting on the debate over revision of hospital regulations in New York, New Jersey, and Connecticut).