Campbell Law Review

Volume 33
Issue 2 *North Carolina 2010*

Article 1

January 2010

What Exactly is a "Substantial Constitutional Question" for Purposes of Appeal to the North Carolina Supreme Court?

Justice Robert Orr

Campbell Law Review

Volume 33 North Carolina 2011 Number 2

What Exactly Is a "Substantial Constitutional Question" for Purposes of Appeal to the North Carolina Supreme Court?

JUSTICE ROBERT ORR*

INTRODUCTION

Once the North Carolina Court of Appeals has filed a decision, there are two separate grounds for seeking a review as of right to the North Carolina Supreme Court.[1] If there is a dissent at the court of appeals, the issue or issues upon which the dissent is based are automatically eligible for review by the supreme court.[2] Also, when a decision from the court of appeals "directly involves a substantial question arising under the Constitution of the United States or of this State," an appeal lies of right to the North Carolina Supreme Court.[3] There is perhaps no aspect of appellate practice in North Carolina that has left practitioners as perplexed as the question of what exactly constitutes a substantial constitutional question, particularly as it applies to the North Carolina Constitution.

This Article will examine the history of the statutory right of appeal based upon a substantial constitutional question; highlight the interpretation and application of this provision, particularly over the

* Justice Robert F. Orr (Ret.) is executive director and senior counsel at the North Carolina Institute for Constitutional Law. He retired from the North Carolina Supreme Court after nearly ten years of service and previously had served on the North Carolina Court of Appeals for eight years. He wishes to thank Campbell Law Review staff members Weston Davis, Joe Frost and Ashley Reger for their assistance on this Article.

1. N.C. GEN. STAT. § 7A-30 (2010).

2. *Id.* § 7A-30(2). Note: Only the issues upon which the dissent is based are eligible for review by the supreme court in this instance.

3. *Id.* § 7A-30(1).

past five years; provide a look at a few of the cases in which the North Carolina Supreme Court has accepted the notice of appeal ("NOA") based upon a substantial constitutional question or instead has dismissed and not retained; and propose an appropriate test for applying this provision and potential statutory amendments that will better define and more uniformly address the question of what constitutes a substantial constitutional question.

I. THE HISTORICAL BASIS FOR THE STATUTORY RIGHT TO APPEAL BASED UPON A SUBSTANTIAL CONSTITUTIONAL QUESTION

The primary source material for the historical background of the right to appeal provision comes from the 1967 report to the North Carolina General Assembly by the Courts Commission for the state ("Commission Report").[4] The commission, a group chosen from among North Carolina's legal elite and appointed in 1963, worked for several years on reforming the state's judicial structure and sought to determine the best way for handling appeals from the trial level.[5] The North Carolina Supreme Court was consistently considered as "perhaps the busiest in the entire country" and was on the verge of crisis.[6] At that time, the supreme court handled all appeals from the trial level.[7] In addition to the myriad of other duties imposed upon the court, each justice was responsible for writing over fifty opinions each year.[8] The Courts Commission concluded that the solution was to amend the North Carolina Constitution to create an intermediate court of appeals within

4. STATE OF N.C. COURTS COMM'N, REPORT OF THE COURTS COMMISSION TO THE NORTH CAROLINA GENERAL ASSEMBLY (1967).

5. *Id.* The Courts Commission was created by a 1963 resolution entitled: "Resolution 73. A JOINT RESOLUTION PROVIDING FOR THE APPOINTMENT OF A COMMISSION WHICH SHALL BE CHARGED WITH THE RESPONSIBILITY OF MAKING RECOMMENDATIONS TO THE GENERAL ASSEMBLY NECESSARY TO IMPLEMENT THE JUDICIAL ARTICLE OF THE CONSTITUTION." It was ratified in the General Assembly on June 11, 1963.

6. *Id.* at 2.

7. The commission report states:

> Under our pre-1965 Constitution, all appellate jurisdiction above the trial division was vested in the Supreme Court, and such jurisdiction as is now to be given to the Court of Appeals is necessarily taken from the Supreme Court. However, the exercise of jurisdiction given to the Court of Appeals may still be subject to review by the Supreme Court . . . .

Id. at 11.

8. N.C. BAR ASS'N, REPORT OF THE COMMITTEE ON IMPROVING AND EXPEDITING THE ADMINISTRATION OF JUSTICE IN NORTH CAROLINA 9 (1958).

the appellate division of the general court of justice.[9] The commission noted:

> The proposal to amend the Constitution to permit the establishment of a Court of Appeals, supported by the Governor, the Courts Commission, the Supreme Court, and the organized bar, was adopted by the General Assembly. It was submitted to the people in the general election of 1965. The people responded with an overwhelming majority for the amendment.[10]

From 1966 through 1967, the Courts Commission worked to develop legislation to redesign the appellate division.[11] The Commission Report represents the official recommendations of the commission to the General Assembly setting out the specific proposals for adoption.

Having the legislative and constitutional mandate to create a court of appeals, the commission sought to establish the fundamental principles that would govern the creation of the new court. The guiding principles established by the Commission Report set the stage for the question posed by this Article.

The first principle enunciated by the commission was: "One trial on the merits, and one appeal on the law, as of right, in every case."[12] The commission noted that this is a "traditional principle of Anglo-Saxon and North Carolina jurisprudence, and must be preserved."[13] It was further noted "that double appeals, as of right, are to be avoided, except in the most unusual cases, the importance of which can be said to justify a second review."[14]

The second principle set forth was: "The Supreme Court must remain the court entrusted with the final decision on all truly important questions of law."[15] The cases that do not involve jurisprudence of interest or importance to the state as a whole or those involving only routine determination of issues of importance only to the litigants involved must have their final resolution at the court of appeals level.[16] According to the Commission Report: (1) capital cases and (2) cases

9. N.C. COURTS COMM'N, *supra* note 4, at 2.
10. *Id.*
11. *Id.* at 2–3.
12. *Id.* at 4.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

involving constitutional interpretations should, by statute, have direct access to the supreme court.[17]

After lengthy explication of the structure for the new court of appeals, the commission turned to the question of the jurisdictions of the court of appeals and the supreme court.[18]

> Under our pre-1965 Constitution all appellate jurisdiction above the trial division was vested in the Supreme Court, and such jurisdiction as is now to be given to the Court of Appeals is necessarily taken from the Supreme Court. However, the exercise of jurisdiction given to the Court of Appeals may still be subject to review by the Supreme Court, and hence it is possible to speak with accuracy and clarity only of the jurisdiction of the Appellate Division . . . .[19]

The 1965 amendment to article IV of the constitution gave authority to the General Assembly to set the jurisdiction of the court of appeals.[20] The commission noted, however, "[I]t is clear that the Supreme Court is empowered directly by the Constitution (though not compelled by it) to review any and all cases . . . ."[21] The commission's approach, as they noted in the Commission Report, was thus unhindered in setting out a system of jurisdiction that reflects the hierarchy of the supreme court and court of appeals.

The Commission Report states:

> [the] functions of appellate courts in general are two-fold. First, they correct error committed at the trial level which is prejudicial to a litigant . . . . Second, they develop the jurisprudence of the state through their reported decisions, i.e., they serve the precedential function of the common law system by declaring, expanding, and clarifying the case law of the state.[22]

The Commission Report then includes an observation of considerable significance to the purpose of this Article: "Obviously, those cases having this added dimension of general jurisprudential significance should be reviewed by our highest, our most prestigious, court. As a corollary, those cases which, in great numbers, do not have this added dimension seem the natural basic material for the other appellate court."[23]

---

17. *Id.*
18. *Id.* at 4–11.
19. *Id.* at 11.
20. *See* N.C. CONST. art. IV, § 12(2).
21. N.C. COURTS COMM'N, *supra* note 4, at 11.
22. *Id.* at 12.
23. *Id.* at 13.

The commission then points out that the principle of one appeal rather than two is the ideal:

> This is to say that, in principle, double appeals ought to be avoided in all cases . . . . And if the case does not have this added measure of general significance, then only waste of time and added expense with no sufficient counterbalancing value will result from allowing such a case to be subject to a second review by the highest court at the option of the litigants.[24]

Thus, the "central feature" of the jurisdictional approach taken by the commission was that every case, civil or criminal, from either of the trial divisions would be initially appealed directly to the court of appeals.[25] While all cases without a motion seeking higher review would go to the intermediate court, "[t]he Supreme Court is empowered either on its own motion or on motion of either party, and either prior to or after determination of any such case by the Court of Appeals, to call the case up ("certify" it) for final determination by the Supreme Court."[26]

North Carolina General Statutes sections 7A-30 and 31 set out the standards that guide the supreme court in making this determination. Section 7A-31(b) delineates four issues for the supreme court to consider in taking a case prior to determination by the court of appeals:

> (1) The subject matter of the appeal has significant public interest, or
>
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
>
> (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or
>
> (4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.[27]

Section 7A-31(c) next addresses the criteria to be considered subsequent to a decision by the court of appeals.[28] Sections 7A-31(c)(1) and (2), which deal with significant public interest and legal principles of major significance to the jurisprudence of the state, contain the exact language of sections 7A-31(b)(1) and (2).[29] However, section 7A-31(c)(3) differs and states that a case may be brought before the

---

24. *Id.*

25. *Id.* at 15.

26. *Id.*

27. N.C. GEN. STAT. § 7A-31(b) (2010); *see also* N.C. COURTS COMM'N, *supra* note 4, at 15–19.

28. N.C. GEN. STAT. § 7A-31(c).

29. *Id.* §§ 7A-31(c)(1), (2).

supreme court if "[t]he decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court."[30] The impression of the commission was that this language served as a directive to the supreme court "that it should ordinarily call up to itself" for second review any decisions of the court of appeals that meet these criteria.[31]

While the discretionary provisions for jurisdiction by the supreme court provides an opportunity for litigants to petition the state's highest court to review a lower court decision, it is the automatic right of appeal that is of primary concern in this Article, specifically the automatic right of petitioners to bring claims involving a substantial constitutional question before the state's highest court.

II. CONSTITUTIONAL QUESTIONS ARISING UNDER THE CONSTITUTION OF THE UNITED STATES OR OF THIS STATE

Since the inception of the court of appeals and the new jurisdictional standards articulated in the statutes, little case law has addressed the interpretation of a "substantial question arising under the Constitution of the United States or of this State."[32] Nothing has been set out that distinguishes questions arising under our state constitution as opposed to the federal Constitution. One can argue that the federal courts have and will continue to answer questions conclusively under the United States Constitution, and thus it is reasonable to anticipate that the North Carolina Supreme Court would take few cases dealing with federal constitutional issues that have already been conclusively determined by other courts. On the other hand, it would seem far more likely that the North Carolina Supreme Court would aggressively accept and even seek out constitutional questions arising under the North Carolina Constitution about which it would, and should, be the final

30. *Id.* § 7A-31(c)(3).

31. N.C. COURTS COMM'N, *supra* note 4, at 16. Of course, it is the supreme court's ultimate decision to interpret these factors and apply them to the issues decided at the court of appeals. Based upon the numbers set forth above, it appears as though the supreme court has been increasingly reluctant to allow petitions for discretionary review either prior to or subsequent to a decision by the court of appeals.

32. N.C. GEN. STAT. § 7A-30(1); *see* State v. Colson, 163 S.E.2d 376, 380 (N.C. 1968) (noting the creation of the court of appeals in 1967 and subsequent enactment of the statutory right of appeal to the supreme court based upon a substantial constitutional question).

arbiter. That, however, has not been the case as evidenced by the numbers, particularly over the past five years.[33]

A. Trends in Case Load in the Appellate Courts

The implementation of the new appellate system began in 1967 upon the passage of legislation setting forth the organization of the new court of appeals, the new jurisdictional requirements, and new North Carolina Rules of Appellate Procedure.[34] It would be some time before the handiwork of the courts commission would actually kick in. Over time the process that was created has served the state well. We have seen the court of appeals workload expand significantly and the number of judges increase from the original six to the current fifteen.[35] However, as the number of cases decided by the court of appeals continues to be in the thousands, the number of cases decided by the supreme court has dramatically dropped.[36] The table below shows the trend in the number of opinions written by the court of appeals ("COA") versus the supreme court ("N.C. Sup. Ct.") since 2000.

Year	COA[37]	N.C. Sup. Ct.[38]
2000	1317	102
2001	1386	105
2002	1613	107
2003	1310	103
2004	1452	93
2005	1638	96

33. In the last five years, the North Carolina Supreme Court has retained only two cases where a party asked the court to review a substantial constitutional question pursuant to section 7A-30(a) of the North Carolina General Statutes. Those two cases were *Libertarian Party of N.C. v. State*, 690 S.E.2d 700 (N.C. 2010), and *Riverpointe Homeowners Ass'n v. Mallory*, 666 S.E.2d 487 (N.C. 2008).

34. N.C. GEN. STAT. § 7A. Note: The 1965 constitutional amendment to article IV was approved by the voters in November 1965 and became effective on October 1, 1967.

35. *Id.* § 7A-16.

36. This phenomena is particularly striking when the opinions of the supreme court are broken down by written opinions and per curiam opinions.

37. These numbers reflect the total number of opinions from the court of appeals. Approximately 60 percent of the court of appeals opinions over the last ten years were unpublished, with the remaining 40 percent being published.

38. N.C. Appellate Courts, Supreme Court Opinions, http://appellate.nccourts.org/opinions/ (last visited Feb. 21, 2011). These numbers reflect the total number of opinions from the North Carolina Supreme Court, including one-page per curiam opinions.

2006	1495	88
2007	1596	90
2008	1444	86
2009	1391	71

Part of the numerical imbalance, particularly over the past several years, has arisen as a result of the decreasing number of dissents at the court of appeals. Perhaps one can attribute this decrease to the retirement of several judges noted for frequent dissents.[39] However, this decrease also may have been driven by an appropriate emphasis on "collegiality" and working towards a unanimous court of appeals decision. As dissents at the court of appeals have decreased, reducing the number of cases in which an automatic right of appeal exists to the supreme court, other factors have also come into play. Life sentences are no longer sent directly to the supreme court for review, thus substantially reducing the number of decisions by the supreme court.[40] Additionally, North Carolina has seen a dramatic drop in the imposition of the death penalty, and thus fewer and fewer capital cases are being sent to the supreme court for review.[41]

39. The judges noted for frequent dissents who have recently retired include: Judge K. Edward Greene and Judge John Tyson.

40. The Commission Report articulated only one area for direct appeal to the supreme court, thus automatically bypassing the court of appeals, and that exception involved cases in which a death sentence or a life sentence was imposed. *See* N.C. COURTS COMM'N, *supra* note 4, at 19. Later, the General Assembly added general rate cases to this category, and in 1995 the life sentence cases were removed from the statute allowing a direct appeal. Now life sentence cases go first to the court of appeals, rather than the supreme court. *See* N.C. GEN. STAT. § 7A-27. The life imprisonment cases were struck from this statute by the 1995 Session Laws of North Carolina. 1995 N.C. Sess. Laws 204, § 1.

41. Over the past ten years, there has been a steady decline in the number of death cases heard by the North Carolina Supreme Court, as indicated in the table below. *See* N.C. Appellate Courts, *supra* note 38.

Year	Capital Cases Decided
2000	24
2001	20
2002	19
2003	13
2004	11
2005	8
2006	5
2007	4
2008	5
2009	5

With the number of dissents and death penalty cases declining, the supreme court's docket has become more dependent on the supreme court's granting of petitions for discretionary review and, most importantly, appeals of right based upon a constitutional question arising under the United States Constitution or the North Carolina Constitution.[42] Unfortunately, the supreme court has been remarkably reserved in granting petitions for discretionary review. Attempts to secure review under the guaranteed statutory right of appeal based upon a substantial constitutional question have resulted in all but a few of these NOAs being dismissed.[43] These dismissals are a result of a motion to dismiss by the opposing party of the court's own motion to dismiss.[44]

A basic review of court statistics reveals that in the term beginning in fall 2004 and running through spring 2010 there were 482 NOAs of right to the supreme court based upon an issue or issues involving a substantial constitutional question.[45] Of these NOAs, the records reflect that the supreme court has retained only two, and dismissed, either on a party's motion or the court's motion, the other 480.[46] This staggering disparity raises the fundamental question puzzling practitioners of what, exactly, has to be shown in exercising the absolute statutory right of appeal for the court to actually retain and decide an issue.

In all fairness to the court, the appealing party often addresses the issue of retaining a substantial constitutional question in a combination of ways. First, there may be a dissent that touches on or directly addresses the constitutional issue, and thus, that issue reaches the supreme court by automatic right of appeal.[47] Second, it is common practice to file an NOA based upon a substantial constitutional question—alleging an absolute statutory right—but then hedge the

42. N.C. GEN. STAT. §§ 7A-30, -31.

43. A LexisNexis search for section 7A-30 (excluding 7A-30(2)) notices of appeals retained by the court for approximately the past five years (from January 1, 2004 to July 30, 2010) revealed only three cases: *Libertarian Party of N.C. v. State*, 690 S.E.2d 700 (N.C. 2010), *Riverpointe Homeowners Ass'n v. Mallory*, 666 S.E.2d 487 (N.C. 2008), and *State v. Bowes*, 592 S.E.2d 699 (N.C. 2004).

44. *See, e.g.*, State v. Fisher, 547 S.E.2d 420 (N.C. 2001) (dismissing notice of appeal *ex mero motu* and denying petition for discretionary review); Blinson v. State, 661 S.E.2d 280 (N.C. 2008) (dismissing notice of appeal upon motion of the respondents-appellees).

45. This search was conducted on LexisNexis with the assistance of members of the staff of the North Carolina Supreme Court.

46. Libertarian Party of N.C. v. State, 690 S.E.2d 700 (N.C. 2010); Riverpointe Homeowners Ass'n v. Mallory, 666 S.E.2d 487 (N.C. 2008).

47. N.C. GEN. STAT. § 7A-30(2).

possibility of the court disagreeing and alternatively petition for discretionary review.[48] Using this approach, the appellant gives the court two different options by which it may take up the issue. Should the court conclude that the constitutional question is not "substantial" or that it has been conclusively determined previously, the appellant can still attempt to make an argument that the case merits review under the statutory guidance dealing with petitions for discretionary review.[49] In practice, however, these circumstances appear to be few and far between.[50]

B. *Case law in North Carolina on Substantial Constitutional Questions*

The case law that has developed over the years, articulating the definition of a substantial constitutional question, is limited in its usefulness and articulates a standard of interpretation that raises more questions than it answers. In *State v. Colson*,[51] the earliest case on point, the defendant was convicted of manslaughter in the death of his wife.[52] In response to the defendant's effort to obtain supreme court review of the decision below, the court set forth a test requiring the appellant to allege and show the involvement of a substantial constitutional question, or else have the appeal dismissed.[53] The court announced: "The question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination."[54] The court further explained that the:

> [m]ere mouthing of constitutional phrases like 'due process of law' and 'equal protection of the law' will not avoid dismissal. Once involvement of a substantial constitutional question is established, the Court will retain the case and may, in its discretion, pass upon any or all

48. *See, e.g.*, NOA of Right & Petition for Discretionary Review, *Blinson*, No. 546P06-2 (N.C. Nov. 19, 2007).

49. N.C. GEN. STAT. § 7A-31.

50. Thomas L. Fowler, *Appellate Rule 16 (b): The Scope of Review in an Appeal Based Solely upon a Dissent in the Court of Appeals*, 24 N.C. CENT. L.J. 1, 5 (2001) ("[I]n practice supreme courts actually grant discretionary review in only a small percentage of the cases where it is requested.").

51. State v. Colson, 163 S.E.2d 376 (N.C. 1968).

52. *Id.* at 378.

53. *Id.* at 383.

54. *Id.*

> assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented . . . for review.[55]

Throughout the 1970s, the court occasionally addressed this issue, but simply re-articulated the *Colson* standard for determining what a substantial constitutional question is.[56] Over the past thirty years, the supreme court has not announced any new decisions on this issue. The old standard, as previously set out, remains to this day the test to be applied, both by appellants trying to secure review of a court of appeals decision that involves a purported substantial constitutional question, and likewise by the supreme court in deciding whether to dismiss or retain a case brought upon the statutory right of appeal.[57]

One of the primary causes of uncertainty in this area is the fact that the court does not articulate its reasoning for dismissing an appeal of right based upon a substantial constitutional question. As previously noted, the court can, on its own motion, dismiss an appeal — a practice that regularly occurs.[58] Once the appeal is dismissed, the practicing bar has no grounds for understanding the court's actions because no opinion is written addressing the court's rationale.[59] Moreover, because the losing party is stuck with the supreme court's decision and has no further recourse, short of petitioning the United States Supreme Court if a federal constitutional issue is raised, the resulting dismissal creates more confusion and uncertainty in pursuing this statutory right of appeal.[60]

---

55. *Id.* Note: Assignments of error are now eliminated.

56. *See* Ward v. Daily Reflector, 393 S.E.2d 907, 908 (N.C. 1990); Thompson v. Thompson, 215 S.E.2d 606, 607 (N.C. 1975); State v. Brown, 215 S.E.2d 150, 153 (N.C. 1975); State v. Cumber, 185 S.E.2d 141, 144 (N.C. 1971); Bundy v. Ayscue, 171 S.E.2d 1, 3 (N.C. 1969); State v. Cavallaro, 164 S.E.2d 168, 171 (N.C. 1968).

57. There has been no new authority on the issue past *Thompson*, and rule 14(b)(2) of the North Carolina Rules of Appellate Procedure reflects this standard. *See* N.C. R. App. P. 14(b)(2).

58. *See, e.g., In re* Jones, 279 N.C. 616, 618 (1971) (dismissing the case, *ex mero motu*, because there was no substantial constitutional question).

59. *See, e.g.*, State v. Fisher, 547 S.E.2d 420 (N.C. 2001) (dismissing notice of appeal *ex mero motu* without explanation).

60. *See generally* Fowler, *supra* note 50, at 1–5, nn.1–18 (discussing the law development function of appellate courts).

III. TWO CASES IN WHICH THE SUPREME COURT HAS DISMISSED THE NOTICE OF APPEAL BASED UPON A SUBSTANTIAL CONSTITUTIONAL QUESTION AND ALSO DENIED THE PETITION FOR DISCRETIONARY REVIEW

It must be acknowledged that many of the cases appealed to the supreme court based upon a substantial constitutional question fail to meet the test established by case law, either because the question is clearly not substantial, or the court correctly concludes that the issue has been conclusively determined. Many of these cases are criminal appeals and primarily involve federal constitutional questions that arguably have been conclusively decided by the federal courts.[61] One caveat should be noted, in particular, in dealing with cases in which a provision of the United States Constitution is involved. If there is a similar provision in the North Carolina Constitution, North Carolina courts can extend even greater protection to an individual under the state constitution than is concomitantly granted under the federal Constitution.[62] However, even giving great deference to the North Carolina Supreme Court's decision-making process, the numbers reflect a massive resistance on the part of the court to accept these issues that are statutorily guaranteed the right of appeal to the state's highest court.[63]

A. *Blinson v. State of North Carolina (The Dell Case)*

In November of 2004, the General Assembly of North Carolina was called into special session by then Governor Michael Easley for the purpose of passing a legislative package of so-called "incentives" to induce an unnamed corporate entity to locate a facility in the state.[64] In this one-day session, legislation was introduced, briefly debated with no amendments to the legislation, accepted and ultimately passed.[65] The

61. A LexisNexis search in the date range of January 1, 2000 to December 31, 2010 for "7A-30" and "substantial constitutional" returns 887 cases. A focus search of "5" or "6" or "Fifth Amendment" or "Sixth Amendment" returns 278 cases. A second focus search of "denied" returns 220 cases.

62. *See* State v. Carter, 370 S.E.2d 553 (N.C. 1988).

63. A LexisNexis search in the date range of January 1, 2000 to December 31, 2010 for "7A-30" and "substantial constitutional" returns 887 cases. A focus search of "denied" returns 701 cases. The North Carolina Supreme Court denied review on 701 of 887 cases (79%) asserting a substantial constitutional issue.

64. Then Governor Michael Easley called the General Assembly into special session on November 4, 2004 to consider an incentives package for Dell. *See* Computer Manufacturing Tax Incentives, 2004 N.C. Sess. Laws 204.

65. *See id.* The "Dell Legislation" created article 3G of chapter 105, Tax Incentives for Major Computer Manufacturing Facilities (codified at N.C. GEN. STAT. §§ 105-129.60

new law enhanced existing tax incentives and provided tax credits for qualifying major computer manufacturing facilities.[66]

Following the passage of this legislation, Dell announced plans to build a major computer assembly plant in the Piedmont Triad region of the state.[67] At the time, it was estimated that the value of the incentives package provided by the state over the course of a number of years would approximate $270,000,000.[68] Following this announcement, Dell proceeded to negotiate with three counties in the Piedmont Triad region—Davidson, Guilford and Forsyth, as well as certain municipalities within those counties—for local incentives to locate the plant in one of those counties.[69] During the next several months, Dell secured approximately $30,000,000 in local incentives from Forsyth County and the City of Winston-Salem in agreement for locating the facility in the Alliance Science and Technology Park in Forsyth County.[70]

---

to 66). Sections 105-129.60 to .66 of the North Carolina General Statutes were repealed effective July 1, 2010 by the 2010 session laws. 2010 N.C. Sess. Laws 166, § 2.2.

66. N.C. GEN. STAT. § 105-129.64 (2010).

67. On November 9, 2004 Dell announced its plans to accept the incentives package and build a PC manufacturing plant in North Carolina. John G. Spooner, *Dell to Spend $115 Million on New Plant*, CNET NEWS, Nov. 9, 2004, *available at* http://news.cnet.com/Dell-to-spend-115-million-on-new-plant/2100-1003_3-5445055.html.

68. *See* David Rice, *Dell Picks Triad for New Plant Company Plans to Hire 700 in First Year*, THE WINSTON-SALEM JOURNAL, Nov. 10, 2004, *available at* http://www2.journalnow.com/news/2004/nov/10/dell-picks-triad-new-plant-company-plans-hire-700--ar-94793/.

69. *See* Dell Timeline, News-Record.com, Oct. 8, 2009, *available at* http://www.news-record.com/content/2009/10/08/article/dell_timeline ("Nov. 19, 2004: Guilford lays out its offer of $7.1 million in incentives. Dec. 7, 2004: The Greensboro City Council votes to offer $5.3 million in cash grants and other incentives. Dec. 13, 2004: Forsyth County passes largest economic incentives package in county history, offering $14.8 million in cash and services. Dec. 14, 2004: Davidson County approves a $23.1 million incentives package. Dec. 20, 2004: The Winston-Salem City Council approves an $18.9 million package. Combined with the Forsyth County offer and free land, the total package is $37.2 million. Dec. 22, 2004: Dell selects Forsyth County site for the plant.")

70. *See* Complaint at 14–15, Blinson v. State, No. 05 CVS 8378, 2005 WL 6340135 (N.C. Super. Ct., Wake County June 23, 2005), *available at* http://www.ncicl.org/assets/uploads/brief/2005.06.23-dell-complaint-w-exhibits.pdf. "On or about December 20, 2004, the County, by and through its duly elected Board of Commissioners adopted a resolution entitled: 'Resolution Authorizing the Expenditure of County General Funds for an Economic Development Project and Authorizing Execution of an Agreement with Winston-Salem Business, Inc. and Dell, Inc.,' ('County Resolution') approving and authorizing an economic development project to assist Dell

On June 23, 2005, in the case of *State v. Blinson*,[71] a group of seven individual taxpayers filed a declaratory judgment action against the State of North Carolina, Forsyth County, and the City of Winston-Salem, as well as various state and local officials in their official capacities.[72] The complaint asserted that the state and local acts awarding the incentives to Dell violated various provisions of the federal and state constitutions.[73] The complaint was subsequently amended on September 9, 2005,[74] and the defendants filed motions to dismiss under rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of standing and under rule 12(b)(6) for failure to state a claim for relief.[75] The defendants never filed an answer, and the trial court subsequently granted the defendants' motions, concluding that the plaintiffs lacked standing to challenge the actions and had failed to state a claim for relief.[76] The plaintiffs appealed to the North Carolina Court of Appeals.

The plaintiffs narrowed the number of issues brought forward from the trial court on appeal to the court of appeals. Of course, the underlying issue was whether the trial court had erred in dismissing the case under rules 12(b)(1) and 12(b)(6). On appeal, however, the defendants acknowledged that the plaintiffs had standing under rule 12(b)(1) as to certain claims based upon the supreme court's decision in *Goldston v. State*.[77] Under two of the plaintiffs' claims, the Uniformity of

---

in an amount up to $14,760,000 from available revenues in the County's General Fund over a fifteen-year period." *Id.* at 14. "On or about December 20, 2004, the City, by and through its duly elected City Council adopted a resolution agreeing to provide Dell $18,926,250 in economic development grants and to convey 209.388 acres of land in the Alliance Science and Technology Business Park to WSBI for site preparation and for the construction of a computer assembly plant for Dell. Upon information and belief, the fair market value of the aforementioned property is at least $7,000,000." *Id.* at 15. "In total, the City and County agreed to provide at least $37,000,000 in public funds and foregone tax revenue to Dell." *Id.* at 15.

71. *Blinson*, No. 05 CVS 8378, 2006 WL 6342964 (N.C. Super. Ct., Wake County May 10, 2006).

72. *See id.*

73. *See* Complaint, *supra* note 70.

74. *See* Amended Complaint, *Blinson*, No. 05 CVS 8378, 2005 WL 6340135 (N.C. Super. Ct., Wake County Sept. 9, 2005).

75. *See* Motion for Defendant, *Blinson*, No. 05 CVS 8378, 2005 WL 6340118 (N.C. Super. Ct., Wake County Oct. 12, 2005).

76. Blinson v. State, No. 05 CVS 8378, 2006 WL 6342964 (May 10, 2006). By order of Judge Robert H. Hobgoodall, all of plaintiffs' claims were dismissed. *Id.*

77. *See* Blinson v. State, 651 S.E.2d 268, 273–74 (N.C. Ct. App. 2007) (citing Goldston v. State, 637 S.E.2d 876 (N.C. 2006) (holding that taxpayers had standing to seek declaration as to constitutionality of withdraws, and declaratory judgment was an appropriate remedy).

Taxation claim under the North Carolina Constitution and the Dormant Commerce Clause under the United States Constitution, the court of appeals determined that the plaintiffs did not have standing.[78]

Based upon allegations in their complaint, three of the substantive claims pursued at the court of appeals by the plaintiffs were based upon the North Carolina Constitution. This reliance included: (1) the "Public Purpose Clauses," which says in essence that the power of government to tax citizens and ultimately spend that tax revenue must be done for a public purpose only;[79] (2) the "Exclusive Emoluments Clause of the Declaration of Rights," which says that government cannot give exclusive emoluments to anyone except in exchange for public service;[80] and (3) the "Uniformity of Taxation Clauses," which says that laws imposing taxes should be applied in a uniform manner.[81] The plaintiffs also raised issues under the United States Constitution's Dormant Commerce Clause and the local government acts.[82]

Blinson was argued at the court of appeals on April 25, 2007, and decided by a unanimous panel on October 16, 2007.[83] The decision, written by Judge Martha Geer and concurred in by Judges Wynn and Elmore, stated that the court agreed with the trial court that the plaintiffs lacked standing under the state Uniformity of Taxation Clauses and the federal Dormant Commerce Clause, but also concluded that the plaintiffs did have standing to bring their claims under the Public Purpose and Exclusive Emoluments Clauses.[84] The opinion thus focused on these two claims.[85]

The first part of the Public Purpose Doctrine, article V, section 2(1) of the North Carolina Constitution, provides that "the power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away."[86]

78. *Id.* at 274. The supreme court however granted a petition for discretionary review on October 7, 2010 in *Munger v. State* (The Google Case), No. 130PA10, on the issue of standing under the Uniformity of Taxation Clause. Munger v. State, 702 S.E.2d 303 (N.C. 2010).

79. N.C. CONST. art. V, §§ 2(1), (7).

80. *Id.* art. I, § 32.

81. *Id.* art. V, §§ 2(2), (3).

82. *See* U.S. CONST. art I, § 8; N.C. GEN. STAT. § 158-7.1 (2010).

83. Blinson v. State, 651 S.E.2d 268 (N.C. Ct. App. 2007).

84. *Id.* at 279.

85. *Id.* at 274–79.

86. N.C. CONST. art V, § 2(1).

The starting point for the public purpose analysis began with *Maready v. City of Winston-Salem*.[87]

The *Maready* decision arguably played a critical role in the supreme court's determination not to review *Blinson*. *Maready* was a 1996 decision by the North Carolina Supreme Court arising out of a "challenge[] [to] twenty-four economic development incentive projects entered into by the City [of Winston-Salem] or [Forsyth] County."[88] The trial court below held that section 158-7.1 of the North Carolina General Statutes, under the authority of which the incentives had been granted, was in violation of the Public Purpose Clauses of the North Carolina Constitution and hence unconstitutional.[89] The state submitted a petition to the supreme court for discretionary review that was allowed, along with an expedited briefing and oral argument schedule, prior to a determination by the court of appeals.[90] The supreme court split 5–2 in reversing the trial court and held "that [section] 158-7.1 [of the North Carolina General Statutes], which permits the expenditure of public moneys for economic development incentive programs, does not violate the public purpose clause of the North Carolina Constitution."[91] The *Maready* opinion distinguished prior cases that would appear to be in conflict with the court's decision and addressed, in some depth, the test for determining whether a particular undertaking by a municipality is for a public purpose.[92] The *Maready* Court stated that two guiding principles had been established for making that determination, citing *Madison Cablevision, Inc. v. Morganton*.[93] Those two principles were: "(1) [the activity] involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons."[94]

87. Maready v. City of Winston-Salem, 467 S.E.2d 615, 619–20 (N.C. 1996).

88. *Id.* at 618–19.

89. *Id.* at 618. A judgment entered on August 28, 1995 by Judge Rousseau in Forsyth County Superior Court enjoined defendants from making incentive grants or otherwise committing public funds for economic incentive purposes pursuant to section 158-7.1 of the North Carolina General Statutes. *Id.*

90. *Id.* ("All parties appealed, and on 2 November 1995 this Court granted defendant-appellants' petition for discretionary review prior to a determination by the Court of Appeals.").

91. *Id.* at 627.

92. *Id.* at 627–28.

93. *Id.* at 624 (citing Madison Cablevision, Inc. v. Morganton, 386 S.E.2d 200, 207 (N.C. 1989)).

94. *Id.* at 624 (quoting *Madison Cablevision*, 386 S.E.2d at 207) (citations omitted).

In *Blinson*, Judge Geer reviewed the *Maready* court's application of the *Madison Cablevision* test. "*Maready* concluded that economic development incentives authorized by [section] 158-7.1 [of the North Carolina General Statutes] satisfied the first prong of the test because '[e]conomic development has long been recognized as a proper governmental function.'"[95] As to the second prong, Judge Geer quoted from the *Maready* decision that:

> an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose. [The Maready court] held that, under Madison Cablevision, 'section 158-7.1 clearly serves a public purpose.'[96]

Then, after quoting the holding in the *Maready* opinion that section 158-7.1 of the North Carolina General Statutes did not violate the Public Purpose Clause of the North Carolina Constitution, the *Blinson* Court stated: "We can find no meaningful distinction between the present case and *Maready*."[97]

Judge Geer stated that the plaintiffs had "made no attempt to demonstrate how the incentives in [*Blinson* were] legally different from the 24 local economic incentive packages offered in *Maready* pursuant to [North Carolina General Statute section] 158-7.1."[98]

The computer legislation enacted by the General Assembly provided substantial tax incentives to Dell that were not authorized by section 158-7.1 of the North Carolina General Statutes, which deals only with local government economic development.[99] However, the court of appeals, relying on the legislative findings recited in the Dell legislation, concluded that since the General Assembly had determined that the state should make an effort to transition from traditional manufacturing industries to a more contemporary base of computer manufacturing,[100] such incentives served the same economic purposes identified by *Maready* and therefore were conclusively for a public purpose.[101] Thus, the effect of the *Blinson* decision was to effectively abandon judicial

95. Blinson v. State, 651 S.E.2d 268, 275 (N.C. Ct. App. 2007) (quoting *Maready*, 467 S.E.2d at 624).

96. *Id.* (quoting *Maready*, 467 S.E.2d at 625) (internal quotation marks omitted).

97. *Id.* at 276.

98. *Id.*

99. *Compare* 2004 N.C. Sess. Laws 204 *with* N.C. GEN. STAT. § 158-7.1 (2010).

100. However, the Dell plant was not a manufacturing plant but rather an assembly plant.

101. *Blinson*, 651 S.E.2d at 277–78.

determination of whether an expenditure of public money was for a public purpose in favor of simple reliance on legislative conclusions—all while failing to apply the second prong of the *Madison Cablevision* test.

After the Public Purpose analysis, the *Blinson* Court turned to the plaintiffs' claims under the Exclusive Emoluments provision of article I, section 32.[102] This provision of the North Carolina Constitution says, "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."[103] The court relied on *Peacock v. Shinn,*[104] a court of appeals decision that evaluated a contractual relationship between the City of Charlotte and the ownership of the Charlotte NBA franchise.[105] *Peacock* held "that when legislation is determined to 'promote the public benefit' under the Public Purpose Clauses, it necessarily is not an exclusive emolument."[106] Thus, the *Blinson* Court summarily disposed of the Exclusive Emoluments argument with no further substantive discussion, holding, in essence, that if the legislation is determined to promote a public purpose (in other words: a legislative finding of a public purpose), *ipso facto*, the expenditure cannot be an Exclusive Emolument. Of particular note, the issue of Exclusive Emoluments was never raised nor considered in *Maready*.[107]

In a timely fashion, the plaintiffs filed a NOA based upon a substantial constitutional question and, in the alternative, a petition for discretionary review under section 7A-31 of the North Carolina General Statutes.[108] The NOA set out four specific contentions as to why there was a substantial constitutional question raised by the court of appeals' decision in *Blinson*. Specifically, petitioners argued that the court of appeals decision:

> (1) "effectively eliminate[d] judicial review of Public Purpose Clause claims by allowing the State to establish a 'public purpose' by mere [legislative] recitation;"[109]
>
> (2) "[held] that analysis of the public purposes requirements of Article V §§ 2(1) and 2(7) focuses only on the *aim* of government action and that

102. *Id.* at 278.

103. N.C. CONST. art. I, § 32.

104. Peacock v. Shinn, 533 S.E.2d 842 (N.C. Ct. App. 2000).

105. *Id.* at 848.

106. *Blinson*, 651 S.E.2d at 278 (citing *Peacock*, 533 S.E.2d at 848).

107. *See* Maready v. City of Winston-Salem, 467 S.E.2d 615 (N.C. 1996).

108. NOA of Right & Petition for Discretionary Review, *Blinson*, No. 546P06-2 (N.C. Nov. 19, 2007).

109. *Id.* at 7.

> a violation of those requirements may be determined exclusively by reference to the 'motivation, aim or intent' of challenged government action, without any regard whatsoever to the *actual, likely,* or even *possible* effects . . . thus, in essence, the mere recitation of an intent to benefit the public is sufficient as a matter of law to comply with the constitutional limitation that taxes be collected and used only for a public purpose;"[110]
>
> (3) "[held] that when legislation is determined to promote the public benefit under the Public Purpose Clauses, it necessarily is not an exclusive emolument and thereby confuses the analysis of the Exclusive Emoluments Clauses, N.C. Const. art. I, § 32, with that of the Public Purposes Clauses;"[111] and,
>
> (4) "foreclose[d] potential constitutional challenges based on the Uniformity of Taxation clause, N.C. Const. art. V, § 2(2) and 2(3), and [was] in conflict with decisions of the Supreme Court by dismissing certain claims based on lack of standing despite clear allegations in the Amended Complaint of grounds for taxpayer standing."[112]

The appeal raised substantial constitutional questions about the scope and application of the Public Purpose Clauses, the Exclusive Emoluments Clause, and the Uniformity of Taxation Clause which had either not been considered precisely by the court of appeals or which highlighted conflict between the court of appeals' opinion and supreme court precedent.[113]

The NOA then set forth a brief recitation of the arguments advanced on each of the issues, beginning with a discussion of the *Madison Cablevision* test for determining violations of the public purpose clause.[114] Next, the NOA discussed the scope and application of the Exclusive Emoluments Clause and the *Blinson* Court's application of it.[115] The plaintiffs argued that the decision below "render[ed] the Exclusive Emoluments Clause superfluous."[116] Plaintiffs further contended: "The constitutional question for this Court to resolve is whether [the Public Purpose and Exclusive Emoluments] constitutional provisions overlap and, if so, to what extent are their scope and application common or unique, an issue not precisely considered by this

110. *Id.* (citation omitted).

111. *Id.*

112. *Id.*

113. *Id.* at 8.

114. *Id.* at 8–9. For the public purpose test, see *Madison Cablevision, Inc.* v. *Morganton*, 386 S.E.2d 200, 207 (N.C. 1989).

115. NOA of Right & Petition for Discretionary Review, *supra* note 108, at 9–10.

116. *Id.* at 9.

Court."[117] Finally, the NOA raised the question of the scope and application of the Uniformity of Taxation Clause in article V of the North Carolina Constitution.[118] While the trial court and court of appeals dismissed this claim on standing grounds, the underlying claim raised a substantial and important question regarding the application of the Uniformity rule to the unique facts of *Blinson*.[119] Subsequent to the plaintiffs' filing of both the notice of appeal and the alternative petition for discretionary review, the defendants filed motions to dismiss the appeal along with briefs supporting that motion and opposing the petition for discretionary review.[120] As to the constitutional issue involving the Public Purpose Clause, the defendants relied primarily on an argument that *Maready* had settled the law.[121] They argued that the *Maready* holding, contrary to the arguments advanced by the plaintiffs, resolved the constitutionality of each of the twenty-four individual projects challenged in the case. The defendants further contended that

117. *Id.* at 10.

118. *Id.* at 10–11.

119. While not directly applicable to the standard for a NOA based upon a substantial constitutional question, plaintiffs' alternative petition for discretionary review set out in great detail certain issues of major significance to the jurisprudence of the state: "(A) Whether limitations exist on the extent to which economic development constitutes a 'public purpose' as contemplated by Article V, § 2(1) and 2(7) and interpreted by *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996), and if so, what those limitations are? (B) Whether analysis of legislative action for purposes of the Public Purpose Clauses of the State Constitution focuses exclusively on legislative declarations of purposes without further inquiry? (C) Whether economic incentives tailored to a particular business constitute an unconstitutional exclusive emolument? (D) Whether economic incentives offered by the State and local governments to out of state businesses relocating to North Carolina violate the Commerce Clause of the United States Constitution? (E) Whether taxpayers have standing to challenge a taxation scheme, particularly special tax exemptions, on the grounds that that scheme violates the state and/or federal constitution even where such taxpayers have not been discriminated against or otherwise injured by the unconstitutional taxation scheme? [and] (F) Whether an individual must allege discrimination in order to establish standing to challenge legislative action on the grounds that that action violates the state constitutional requirement of uniformity of taxation?" *Id.* at 14.

120. The North Carolina Court of Appeals' opinion came down on January 16, 2007. The plaintiffs-appellants' NOA and petition for discretionary review was filed on November 19, 2007 at the supreme court. Dell filed its motion to dismiss on November 30, 2007, and local and state defendants' motions to dismiss were filed on December 3, 2007.

121. Defendant-Respondent Dell's Motion to Dismiss & Response at *passim*, *Blinson*, No. 546P06-2 (N.C. Nov. 30, 2007); State-Defendants' Motion to Dismiss & Response at *passim*, *Blinson*, No. 546P06-2 (N.C. Dec. 03, 2007); Local-Defendants' Motion to Dismiss & Response at *passim*, *Blinson*, No. 546P06-2 (N.C. Dec. 3, 2007).

the appeal concerned a political question and not a constitutional question.[122] They also attacked the scope of the ruling sought by the plaintiffs as overbroad, claiming that it would apply to the use of any public money given to private companies for economic incentives.[123]

The defendants' defense of the Exclusive Emoluments claim failed to address why the constitutional issue was not a substantial constitutional question (and not addressed in *Maready*), but instead made a substantive argument that the Dell legislation was not "exclusive" to Dell and thus could not violate the Emoluments provision.[124] The defendants ignored the allegations in the complaint that the legislation was, in fact, crafted exclusively for Dell and that virtually no other entity in the country could qualify. Additionally, the defendants argued, again on the merits, that the court of appeals had properly applied the two-part test for Exclusive Emoluments in *Town of Emerald Isle v. State*.[125]

Finally, the defendants argued that the plaintiffs had no standing to advance their constitutional claim under the Uniformity Provision.[126] While the plaintiffs acknowledged that the standing question did not raise a substantial constitutional question, they claimed that the underlying issue did, and one could perhaps also argue that a rule effectively eliminating the right to challenge a tax break given to a corporation and no one else also implicated substantial constitutional principles.

With the potentially substantial constitutional issues framed by the respective parties, the supreme court responded on April 10, 2008.[127] In a summary notification and order, the supreme court denied the plaintiffs' petition for discretionary review on all issues and then granted

---

122. Defendant-Respondent Dell's Motion to Dismiss & Response, *supra* note 121, at 3.

123. *Id.* at 3–5. The local-defendants suggested that plaintiffs' arguments were "policy debates" rather than a "substantial constitutional question." *See* Local-Defendants' Motion to Dismiss & Response, *supra* note 121, at 10–11.

124. Defendant-Respondent Dell's Motion to Dismiss & Response, supra note 121, at 12; State-Defendants' Motion to Dismiss & Response, supra note 121, at 18–20; Local-Defendants' Motion to Dismiss & Response, *supra* note 121, at 20–21.

125. Defendant-Respondent Dell's Motion to Dismiss & Response, supra note 121 at 13; State-Defendants' Motion to Dismiss & Response, *supra* note 121, at 18; Local-Defendants' Motion to Dismiss & Response, supra note 121, at 20–21. See *Town of Emerald Isle v. State*, 360 S.E. 2d 756, 764 (N.C. 1987), for the Emerald Isle test.

126. Defendant-Respondent Dell's Motion to Dismiss & Response, *supra* note 121, at 16–19; State-Defendants' Motion to Dismiss & Response, *supra* note 121, at 20–25.

127. Blinson v. State, 651 S.E.2d 268 (N.C. Ct. App. 2007), *notice dismissed and cert. denied*, 661 S.E.2d 240 (N.C. 2008).

the defendants' motions to dismiss the notice of appeal.[128] No explanation was given, and no recourse remained for the plaintiffs.[129] The statutory right of appeal had been, for all practical purposes, eliminated. The decision of the court of appeals was left standing without ever having been reviewed by the state's highest court.

B. *A&F Trademark v. Tolson*

One particularly troubling area of the law that has had minimal review by the supreme court in recent years is the area of corporate taxation. One prominent attorney in the corporate tax field noted that the court had not issued a single decision in a major corporate tax case since 2000.[130] Two cases in particular fall with the purview of the question posed by this Article. The first to be discussed is *A & F Trademark v. Tolson*,[131] a 2004 opinion of the court of appeals. The case involved the assessment of corporate franchise and income taxes against A & F Trademark and other corporate entities.[132] Each of the taxpayers in the case was a wholly owned, non-domiciliary subsidiary corporation of an Ohio corporation known as The Limited, Inc. ("The Limited").[133] The Limited was engaged in the retail clothing business and had nine separate, but related, retail subsidiaries operating 130 locations in North Carolina.[134]

Under certain licensing and loan agreements, the related retail companies collectively paid to the taxpayers over $300 million in royalties and over $120 million in interest in 1994.[135] The court noted, "[t]he related retail companies deducted these royalty and interest expenses for tax purposes."[136] The taxpayers to whom these funds were paid had no employees and shared office space, equipment, and supplies at one centrally located office out of state.[137]

The taxpayers failed to file corporate franchise and income tax returns in North Carolina for the fiscal year ending January 31, 1994,

128. *Id.*

129. *Id.*

130. Sylvia Adcock, *Writer's Block?: Some in NC's Legal Community Say Supreme Court Issues Too Few Opinions*, NORTH CAROLINA LAWYERS WEEKLY, Oct. 29, 2010, at 8.

131. A & F Trademark v. Tolson, 605 S.E.2d 187 (N.C. Ct. App. 2004).

132. *Id.* at 189.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 189–90.

maintaining that they did not transact business in the state, and the state's secretary of revenue assessed them with taxes.[138] The taxpayers protested and the secretary issued a final decision sustaining the assessment against them.[139] The final decision was appealed and affirmed by the tax review board.[140] The taxpayers then filed a petition in Wake County Superior Court.[141] The trial court subsequently affirmed the decision of the tax review board.[142]

The taxpayers appealed to the court of appeals raising two issues, one of which challenged the actions below as violating the Commerce Clause of the United States Constitution.[143] The taxpayers contended that they did not have the necessary "substantial nexus with North Carolina on the grounds that they have no physical presence within the State."[144]

The court of appeals, with Judge Calabria writing for a unanimous panel, reviewed the current state of Commerce Clause jurisprudence as articulated in the federal courts. At issue in particular was the United States Supreme Court's decision in *Quill Corp. v. North Dakota*.[145] The *Quill* Court, "ultimately concluded that, for purposes of sales and use taxes assessed against vendors whose only contact with a state is by mail or common carrier, the substantial nexus prong of *Complete Auto* could appropriately be determined by application of a 'bright-line, physical-presence requirement.'"[146] The court of appeals articulated the taxpayers' position as suggesting "this requirement applies to *all taxes* employed by the states for Commerce Clause nexus analyses and, specifically, must be used in determining whether the taxes in the present case are constitutionally infirm."[147] The court of appeals then held that it declined "to adopt the broad reading of *Quill* suggested by the taxpayers for numerous reasons."[148] The opinion went on to give the legal reasoning behind the intermediate appellate court's ruling.[149]

138. *Id.* at 190.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 193 (internal quotation marks omitted).
145. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
146. *A & F Trademark*, 605 S.E.2d at 194 (citing *Quill*, 504 U.S. at 317).
147. *Id.* at 194.
148. *Id.*
149. *Id.* at 194–95.

The plaintiffs-appellants filed their NOA based upon a substantial constitutional question and in the alternative filed a petition for discretionary review.[150] The NOA noted that the court of appeals decision had distinguished the United States Supreme Court's decision in *Quill*.[151] The NOA posed the question of whether, under *Quill*, "the Commerce Clause permit[ted] North Carolina to impose income taxes or franchise taxes on a foreign corporation with no physical presence in [the] State?"[152] The plaintiffs-appellants noted that the issue had been raised, briefed, and decided by both the trial court and court of appeals.[153] In reviewing *Quill*, the plaintiffs-appellants noted that the court below had distinguished *Quill* on the basis that *Quill* involved use taxes, whereas this case involves franchise and income taxes.[154] The NOA went on to state: "But as Petitioners will explain in their brief on the merits, the policy considerations underlying *Quill's* physical presence requirement apply with equal in not greater force in the context of income and franchise taxes."[155]

The state countered both the NOA (and the petition for discretionary review) by arguing that the case primarily involved questions of statutory and regulatory interpretation, not constitutional interpretation.[156] In addition, the state argued three points in its response and motion to dismiss the appeal: (1) that the case law was settled in this area, (2) that *Quill* merely carved out an exception limited to use taxes, and (3) that the court of appeals had properly decided the case. Plaintiffs-appellants wrote: "The opinion below properly held that *Quill* did not create a new physical presence standard applicable to income and franchise taxes, as Petitioners maintain. 'The *Quill* court merely carved out a narrow exception in the area of use tax collection duties.'"[157]

One can easily contend that the notice of appeal and petition for discretionary review, along with the state's response to each, comprehensively framed the issues and presented valid arguments for

150. NOA, *A & F Trademark*, No. 23P05 (N.C. Jan. 11, 2005); Petition for Discretionary Review, *A & F Trademark*, No. 23P05 (N.C. Jan. 11, 2005).

151. NOA, *A & F Trademark*, No. 23P05.

152. NOA at 2, *A & F Trademark*, No. 23P05.

153. *Id.*

154. *Id.*

155. *Id.*

156. Response to NOA & Petition for Discretionary Review, *A & F Trademark*, No. 23P05 (N.C. Jan. 24, 2005).

157. *Id.* at 9 (quoting Borden Chemicals & Plastics v. Zehnder, 726 N.E.2d 73, 80 (Ill. App. Ct. 2000)).

the court to consider. However, the court granted the State's motion to dismiss and denied the petition for discretionary review.[158] Once again, no explanation for the refusal to review the decision was articulated.[159]

IV. RECOMMENDATIONS AND SOLUTIONS

While a sampling of two cases certainly does not present an overwhelming body of evidence on this issue, these two decisions by the court of appeals and the rejection for review by the supreme court are symptomatic of the concern practitioners have. As previously noted, many of the NOAs based upon a substantial constitutional question have no merit, but it is statistically likely that only a few out of nearly 500 filed with the court over the past five years meet the test.[160] Short of a miraculous change of perspective by the members of the court, what can be done to address the problem?

The primary recommendation that this Author would submit is a legislative remedy amending the statute. Since a right of appeal founded upon a substantial constitutional question is legislatively based as well as a guaranteed statutory right of litigants,[161] it is only logical that the first place to turn is to the General Assembly. In looking back at the purpose underlying this right of appeal, it is clear that the framers of this provision were relying on the Courts Commission's emphasis on making sure the most important legal questions coming up on appeal, particularly those involving a substantial constitutional question, would be reviewed by the state's highest court.[162] Whether on appeal from a decision by the court of appeals, or either on its own motion or a party's motion to bypass the court of appeals, it is the supreme court's responsibility to review cases involving substantial constitutional questions.

Thus, the first legislative change is to refine the language in section 7A-30 of the North Carolina General Statutes to demonstrate the mandatory aspect of this provision. Currently the statute simply states that "an appeal lies of right to the Supreme Court."[163] This may appear

158. A & F Trademark v. Tolson, 611 S.E.2d 168 (N.C. 2005).

159. *Id.*

160. Section 7A-30 of the North Carolina General Statutes requires that the constitutional issue be both substantial and one not covered by the NCSC before, two hurdles that lessen the likelihood of review. *See* State v. Colson, 163 S.E.2d 376, 383 (1968).

161. N.C. GEN. STAT. §§ 7A-30, 31 (2010).

162. *See supra* notes 4–31 and accompanying text.

163. N.C. GEN. STAT. § 7A-30.

to be self-explanatory, but in light of the current practice, more specific language might be beneficial.[164] This Author would suggest rewriting section 7A-30 to provide: "Any party which has properly raised on appeal a substantial constitutional question, as defined and explained below, has an absolute right to have the constitutional question or questions reviewed and decided by the North Carolina Supreme Court."

Secondly, the General Assembly should consider amending section 7A-30 to provide a definition for what constitutes a substantial constitutional question. While the language this Author proposes would track to some degree the case law reviewed previously,[165] a more precise definition should be used. This Author would suggest the following:

> A substantial constitutional question raised under either the United States Constitution or the North Carolina Constitution is one calling for the interpretation and application of the constitutional provision at issue which involves one or more of the following considerations: (1) if, in the case of a provision of the United States Constitution, the interpretation as to the meaning and intent of the framers has not been conclusively reviewed by the United States Supreme Court; (2) if a provision of the United States Constitution is at issue and its meaning and intent have been conclusively determined by the United States Supreme Court but the factual circumstances in the appeal to the North Carolina Supreme Court are sufficiently unique and different from the federal courts' application of the constitutional provision; (3) if, in the case of a provision of the North Carolina Constitution, the interpretation as to the meaning and intent of the framers has not been conclusively reviewed by the North Carolina Supreme Court; (4) if a provision of the North Carolina Constitution is at issue and the interpretation as to the meaning and intent of the provision has been conclusively determined by the North Carolina Supreme Court but the factual circumstances are sufficiently unique from those cases determined under that provision by the North Carolina Supreme Court; (5) if a provision of the North Carolina Constitution is at issue and the interpretation as to the meaning and intent of the provision has been conclusively determined by the North Carolina Supreme Court but there is only one decision on that provision and a dissenting opinion was filed and the appealing party contends that the prior decision of the North Carolina Supreme Court should be reversed; (6) if, when dealing with a provision of the North Carolina Constitution that grants a right or rights to the citizens of the state and there is parallel provision in the United States Constitution, the interpretation of the parallel provision in the United States Constitution being the basis for the interpretation of the provision in the North

164. *See supra* notes 45–50 and accompanying text.

165. *See supra* Parts II.B, III.A–B.

> Carolina Constitution, and the appealing Party contends that the North Carolina provision should be interpreted to give greater rights to North Carolina citizens than those afforded under the United States Constitution.

Thirdly, from a procedural standpoint this Author would recommend amending section 7A-30 to require certain procedural pleadings by the appealing party or parties requiring that the specific categories applicable to the appeal be set forth with specificity and brief argument as to their application. This change would make sure that the NOA based upon a substantial constitutional question is properly focused and documented for the supreme court. This change should also include an opportunity for the opposing party, if the opposing party disagrees with the contentions made by the appellant, to counter those arguments as to why the issue or issues do not meet the test for a substantial constitutional question. Such a requirement would possibly eliminate a number of baseless NOAs asserting a substantial constitutional question issue since greater clarity would be required of the appellant.

Finally, this Author would amend section 7A-30 to require the supreme court, in dismissing an appeal of right based upon a substantial constitutional question, to enter with the order of dismissal a brief explanation of why the appeal did not meet any of the criteria set forth above. Without making too much additional work for the court, it would seem easy enough for an order entered dismissing the NOA based upon a substantial constitutional question to provide some guidance to practitioners as to the grounds for dismissal of the appeal.

By way of example as to how these changes would work, one need only look at one of the issues raised in *Blinson* concerning the constitutionality of incentives awarded to Dell. Plaintiffs contended that the application of the Public Purpose Clause in the North Carolina Constitution was violated by the Dell incentives when the *Madison Cablevision* two-part test was applied and that the court of appeals decision had erroneously characterized the test and applied it in a way as to eviscerate the meaning of the Public Purpose Clause.[166] Defendants countered that the *Maready* decision had resolved all questions and thus there was no substantial constitutional question.[167] Plaintiffs contended in their NOA that *Maready* had only resolved whether section 158-7.1

166. NOA of Right & Petition for Discretionary Review, *supra* note 115, at 7–9.

167. Defendant-Respondent Dell's Motion to Dismiss & Response, supra note 121, at *passim*; State-Defendants' Motion to Dismiss & Response, *supra* note 121, at 11–17; Local-Defendants' Motion to Dismiss & Response, *supra* note 121, at *passim*.

was constitutional under the Public Purpose Clause and that none of the specific projects receiving incentives in *Maready* had been specifically analyzed under the *Madison Cablevision* test.[168] In addition, the *Maready* decision was a 5–2 split and was the only case decided by the supreme court on the application of economic development and the use of incentives.[169] Using the proposed definition of "substantial constitutional question" set out above, the issue raised in *Blinson* would have arguably met two of the criteria for a substantial constitutional question. While *Maready* addressed the overall question of the public purpose use and the statute authorizing local governments to use incentives for economic development, the *Dell* case presented a unique set of facts that merited review by the supreme court. Also, since *Maready* was a split decision and the North Carolina Supreme Court had not revisited the issue and plaintiffs contended that *Maready* should be overruled, the issue would be considered a substantial constitutional question.

V. CONCLUSION

The purpose of this Article is to be neither critical of the North Carolina Supreme Court, nor to recommend unnecessary ways to increase the court's workload. Instead, this Article hopefully has highlighted a growing level of concern and confusion among the North Carolina Bar as to what exactly a substantial constitutional question embraces and how the supreme court is and should be applying the standard. Our state's highest court has an obligation, as articulated by the courts commission, to aggressively reach out to address substantial constitutional questions. Hopefully, this Article will assist the court in meeting this important responsibility.

168. NOA of Right & Petition for Discretionary Review, *supra* note 115, at 7–9.

169. Maready v. City of Winston-Salem, 467 S.E.2d 615 (N.C. 1996).