The North Carolina Supreme Court:

A Special Issue Report

by Scott Gaylord & Joshua Davey

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The 2008 election campaigns are in full force in North Carolina. The airwaves abound with advertisements for President, Governor, United States Senate, and various other state offices. Amidst all of the media attention devoted to these important executive and legislative positions, it is easy to forget about the third branch in our state democratic system—the judiciary. Unlike their federal counterparts on the United States Supreme Court, who are nominated by the President and confirmed by the Senate, North Carolina Supreme Court Justices are elected. On November 4, 2008, North Carolina voters will elect one Justice to an eight year term on the North Carolina Supreme Court. Moreover, because North Carolina Supreme Court elections became non-partisan in 2002, North Carolina voters will elect the next state supreme court Justice without political party affiliations of the judicial candidates on the ballot.[1]

Whatever one's political or jurisprudential leanings, the 2008 election comes at a critical juncture for our state supreme court. In the early part of this decade, six of the seven justices on the court were Republicans. By 2005, the Republican majority had been reduced to 5-2. Following the 2006 election, which was the first non-partisan election for the North Carolina Supreme Court, it was perceived that the Democrats gained another seat, leaving the Republicans with a slim 4-3 majority. In 2008, Justice Edmunds, who is one of the Republican justices on the court, is seeking re-election against Suzanne Reynolds, who is considered to be a Democrat.

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Despite receiving much less attention than the elections for state and federal executives and legislators, the North Carolina Supreme Court elections are extremely important. At the time of the founding, Alexander Hamilton contended that the judiciary was the "least dangerous branch" because it had "no influence over either the sword or the purse."[2] But Hamilton did not foresee the ever-increasing role that the federal and state courts would play in our federalist system. Following Chief Justice John Marshall's famous decision in *Marbury v. Madison*, the United States Supreme Court garnered the exclusive authority "to say what the law is," i.e., to interpret the Constitution and federal and state legislation passed pursuant to its provisions (which is known as the "power of judicial review").[3] Consistent with *Marbury*, our state supreme court has the power not only to interpret and apply federal law, but also to serve as the final authority on the meaning of state legislation and our state constitution.

The power of judicial review, therefore, provides a critical check on the executive and legislative branches. The North Carolina courts may review challenges to executive and legislative authority and, in the process, determine whether either branch has violated the state or federal constitutions or infringed on individual rights. Yet, just as it is critical for the courts to keep the other branches within their constitutionally proscribed limits, so the court must not extend beyond its proper bounds or usurp the authority of the executive or legislative branch.

In North Carolina, there are two primary checks on the judiciary. First, the individual Justices and judges are charged with policing themselves, i.e., making sure that they adhere to the constitutional and statutory limits imposed on the judiciary. As Chief Justice John Roberts has noted, "[w]hen the other branches of government exceed their constitutionally-mandated limits, the courts can act to confine them to the proper bounds. It is judicial self-restraint, however, that confines judges to their proper constitutional responsibilities."[4] Second, if a North Carolina justice fails to exercise self-restraint or otherwise fulfill her judicial function, the voters of North Carolina can vote the justice out of office and elect someone who more accurately reflects their judicial philosophy. As a result, the voters of North

Carolina play a central role in our system of checks and balances—determining who should serve (and for how long) in each of the executive, legislative, and judicial branches.

Pursuant to its broad authority to interpret the state and federal constitutions as well as statutes, the North Carolina Supreme Court decides issues each year that are of critical import to the citizens of North Carolina. For example, since 2007, the court has resolved disputes on a wide range of important topics, including voter rights, church-state relations, workers' compensation, the substantive and procedural rights of criminal defendants, and the rights of parties to make enforceable contracts. Moreover, given that North Carolina adheres to the principle of "stare decisis"—which "proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on courts and should be followed in similar cases"[5]—each decision of the court may have long-lasting effects on North Carolina's economy, government, and citizens.

For these reasons, it is critical that North Carolinians learn about the role of the courts. This Special Issue Report is intended to assist in that regard by providing an overview of important recent decisions of the North Carolina Supreme Court that highlight the different views that the Justices have regarding the proper role of the judiciary in our constitutional system. In particular, this Report focuses on those decisions that reveal differences in the Justices' judicial philosophies and that have a significant impact on the rights of North Carolinians in five areas: redistricting, the First Amendment, workers' compensation, criminal law, and contracts. It is the authors' hope that this Report will help (1) foster public debate and discussion about the proper role of the judiciary in our system of checks and balances, and (2) provide a better understanding of the current judicial philosophy of the North Carolina Supreme Court.

Recent North Carolina Supreme Court Decisions

I. Redistricting

Although certain executive and legislative positions are filled by state-wide elections, (e.g., President, Governor, and United States Senate), other positions are determined locally in district races. The drawing of congressional and legislative districts is a difficult and often times highly-charged political process. Incumbents have the incentive, and often the power, to draw districts that guarantee their incumbency, a practice frequently referred to as "gerrymandering." Given the central role that elections play in our representative democracy and the possibility for abuse in creating districts, both federal and state laws impose requirements for the creation of voting districts. Because the courts have the power to determine "what the law is," the responsibility for interpreting and harmonizing these two sources of law falls to the courts. Hence, the North Carolina Supreme Court plays a critical role in determining the nature of our voting rights and the size and make-up of the voting districts in North Carolina.

Perhaps the most important source of federal law on this issue is the Voting Rights Act of 1965, which outlawed discriminatory voting practices that had been used by states to disenfranchise minority voters, particularly African-Americans. Although the Act helped to eliminate certain discriminatory voting practices (such as literary tests), minority candidates continued to have difficulty getting elected to state and federal offices. As a result, subsequent court rulings applying the Act placed threshold requirements on how new districts could be drawn in order to protect the right of minority populations to elect representatives from their constituent areas, thereby giving a voice to their concerns in the public debate.

More than forty years after enactment of the Voting Rights Act, the courts still are called on to resolve legal issues under the Act. In particular, the North Carolina and United States Supreme Courts' decisions continue to have a tangible impact on the creation of voting districts and accordingly on the ability of candidates and voters to participate in the political process.

Pender County v. Bartlett, 694 S.E.2d 364 (N.C. 2007)

In *Pender County*, the North Carolina Supreme Court considered a claim involving the intersection of the federal Voting Rights Act and the North Carolina Constitution. Under the North Carolina Constitution, no county may be divided in the creation of a legislative district. Under the Supremacy Clause of the United

States Constitution, such state-imposed requirements are subject to the requirements of federal law, including the Voting Rights Act. Thus, federal law in some circumstances requires drawing of legislative districts that the North Carolina Constitution normally would preclude. Relying on the Voting Rights Act, the North Carolina General Assembly had created House District 18, which included portions of Pender and New Hanover Counties.

The plaintiffs in *Pender County*—Pender County and its commissioners—challenged the configuration of House District 18 under the North Carolina Constitution. The defendants responded by arguing that, under the United States Supreme Court's decision in *Thornburg v. Gingles*,[6] Section 2 of the Voting Rights Act required the configuration of House District 18 in order to increase minority voters' ability to elect a candidate of their choice. In *Thornburg*, the United States Supreme Court reviewed North Carolina's use of multi-member districts and held that Section 2 requires "majority-minority" districts if three conditions are met. First, the minority population must be "sufficiently large and geographically compact to constitute a majority in a single-member district." Second, the minority population must be "politically cohesive" such that it votes as a bloc. Third, the majority population in the district must vote "sufficiently as a bloc to enable it... usually to defeat the minority's preferred candidate."

The court in *Pender County*, was presented with a challenge only to the first condition—whether the minority population constituted a "majority" in a single-member district. In a majority opinion by Justice Robert Edmunds and joined by Justices Mark Martin, Edward Brady, and Paul Newby, the court held that for purposes of this requirement, the minority population of a Section 2 voting district must constitute a numerical majority of that district's total population—in other words, the district must contain a minority population of greater than 50%. In reaching this conclusion, the court relied on the language of the United States Supreme Court's decision in *Thornburg* that in order for a Section 2 district to be required, the minority population must "constitute a *majority*" in that district. It also relied on the fact that most of the other courts addressing the question had concluded that more than 50% of the district's population must be minority for the Voting Rights Act to require a Section 2 district. Based on the plain language of the statute, the court rejected the defendants' argument that *Thornburg* also allowed for the creation of "effective minority" districts under Section 2, districts in which less than 50% of the population is comprised of minority voters but in which minority votes—through the creation of coalitions or reliable support from the majority—are nevertheless able to elect their preferred candidates.

Because the population of House District 18 was only 42.89% African-American, the supreme court concluded that Section 2 did not require the creation of District 18. Accordingly, because District 18 violated the North Carolina Constitution's requirement that no county be divided in the creation of a voting district, the court ordered the General Assembly to redraw that district.

Chief Justice Sarah Parker, joined by joined by Justice Patricia Timmons-Goodson, dissented, arguing that *Thornburg* should not be read to require a numerical 50% majority of minority voters prior to the creation of a Section 2 district. She argued that in *Thornburg* the Supreme Court had left this question open and that in other cases had explained that the *Thornburg* factors "cannot be applied mechanically and without regard to the nature of the claim." The chief justice then argued, based on prior voting patterns in North Carolina showing that districts having African-American populations of more than 41.54% consistently elected African-American representatives, that the General Assembly's configuration of House District 18 was reasonable and in compliance with federal law.

Justice Timmons-Goodson filed a separate dissenting opinion, in which she argued that "in overriding our legislature's decisions... the majority has given insufficient deference to the legislature's considered judgment." For that reason, in addition to those argued by Chief Justice Parker, she disagreed with the majority's conclusion.

II. First Amendment

The text of the First Amendment highlights the importance of religion to the founders of our nation. As ratified, the First Amendment provides that "Congress shall make no law respecting an establishment of

religion, or prohibiting the free exercise thereof." This prohibition is commonly understood as consisting of two distinct clauses: the "establishment" clause and the "free exercise" clause. As is apparent from the text, however, the founders did not specify the precise scope of these provisions. Moreover, subsequent events did not resolve the uncertainty. In 1802, Thomas Jefferson sent a letter to the Danbury Association of Baptists famously stating that the religion clauses "buil[t] a wall of separation between Church & State."[7] But neither Congress nor the courts have taken the First Amendment to impose an absolute ban on religion in the public sphere, as evidenced by prayer at the opening sessions of Congress, the presence of "In God we trust" on our currency, and the use of benedictions at inaugurations.[8]

Rather, since the ratification of the First Amendment, it has fallen to the courts to determine the proper relationship between government and religion. The United States Supreme Court first imported Jefferson's "wall of separation" metaphor into its religion clause jurisprudence in 1878.[9] Subsequently, state and federal courts across the country, including the North Carolina Supreme Court, have used the metaphor in deciding how to draw a constitutionally permissible line between church and state interaction. As a result, an individual justice's views on how high and wide the wall should be—and whether there are any permissible passageways between religion and government—directly affects both the role that religion might play in the public arena and the role that the government might play in managing or directing religious activities.

Harris v. Matthews,
643 S.E.2d 566 (N.C. 2007)

In *Harris v. Matthews*, the North Carolina Supreme Court addressed whether the First Amendment precluded the court's hearing and deciding a controversy related to internal church governance. In particular, the court was called on to resolve whether the religion clauses of the First Amendment prevented the court from intervening in a property dispute between members of the church and the leadership of that church, including the pastor and the governing council.

In 2001, the members of Saint Luke Missionary Baptist Church adopted a new set of bylaws, which created an internal governing body called the "Council for Ministry." Pursuant to the bylaws, the Council for Ministry had wide-ranging authority to govern the "business and affairs" of the church. Certain members of the church, including the plaintiffs, were concerned about these changes and asked to see the church's financial records. After reviewing these documents, plaintiffs filed suit claiming that the defendants had converted church funds, breached their fiduciary duties, and participated in a civil conspiracy.

Defendant Matthews, who was the pastor of Saint Luke, moved to dismiss the complaint, claiming that the First Amendment religion clauses precluded the court's hearing the action. The trial court denied the pastor's motion, and he appealed. After a prolonged procedural process, the North Carolina Supreme Court ultimately agreed to hear the case, and, in a 4-2 decision (in which Justice Mark Martin did not participate), the court held that it was "constitutionally forbidden" from intervening in an action where, as here, "a party challenges church actions involving religious doctrine and practice."

Writing for the majority, Justice Paul Newby acknowledged that under United States Supreme Court precedent, the First Amendment "severely circumscribes the role that civil courts may play in resolving church property disputes." This is so because "the First Amendment prevents courts from becoming entangled in internal church governance concerning ecclesiastical matters." Thus, although civil courts are not precluded from hearing every dispute involving church property, the First Amendment shuts the doors of the courts "when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."

Emphasizing the court's "severely circumscribed role" in internal church grievances, Justice Newby held that plaintiffs' claims required the court to analyze the church's view on the proper roles of church leaders, their authority and compensation, and internal church governance. But, given that "a church's religious doctrine and practice affect its understanding of each of these concepts," a court could no more decide this issue than "determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the

congregation's beliefs." Consequently, the majority determined that the court must defer to the Council of Ministry to avoid any impermissible entanglement and, therefore, declined to hear this dispute.

Justice Edward Brady concurred fully in the majority opinion but wrote separately to voice his concerns with using Jefferson's metaphor of a "wall of separation between church and state" in First Amendment religion jurisprudence. Noting that the "separation between church and state" is not found in the Constitution, Justice Brady provided a brief overview of the Establishment Clause to demonstrate the long-standing interaction of government and religion throughout our nation's history. In addition, he analyzed the context of Jefferson's correspondence with the Danbury Baptist Association to show that Jefferson was concerned only with keeping the government out of religious affairs, not purging government of any and all vestiges of religion.

According to Justice Brady, "[o]ur Founding Fathers never intended that we utilize the Establishment Clause of the United States Constitution or any other laws to sterilize our public forums by removing all references to our religious beliefs." Rather, Justice Brady used his concurrence to emphasize that "the gate to the 'wall of separation' only swings one way, locking the government out of ecclesiastical matters" but not religion out of the government.

Justice Robin Hudson, joined by Justice Patricia Timmons-Goodson, dissented, contending that the property dispute between members of the church and its leadership did not implicate First Amendment concerns. Drawing on many of the same United States and North Carolina Supreme Court decisions as the majority, Justice Hudson found that the facts of this case did not give rise to impermissible entanglement. In particular, she disagreed with the majority's claim that the First Amendment is applicable simply because a party "asserts that a civil court action cannot proceed without impermissibly entangling the court in religious matters." According to Justice Hudson, the court must make its own independent review, which in this case showed that the dispute bore "entirely on defendant's exercise of personal and fiscal responsibility toward the very secular assets of the church."

Moreover, the dissent voiced its concern that no party had alleged that this property dispute involved any doctrinal or ecclesiastical issues. Instead, contrary to the majority's contention, the dissent argued that the plaintiffs' claims—relating to conversion, breach of fiduciary duty, and civil conspiracy—could be resolved by applying neutral principles of law, and Justice Hudson noted that there was no threat of the court becoming entangled in ecclesiastical affairs where, as here, the property dispute did not raise such doctrinal issues. As the North Carolina Supreme Court held in *Atkins v. Walker*, neither the federal nor state constitutions deprived "those entitled to the use and control of church property of protections afforded by government to all property owners alike... [including] access to the courts for the determination of contract and property rights." Thus, Justice Hudson concluded that the North Carolina courts could and should hear this property dispute.

III. Workers' Compensation

For nearly 80 years, The North Carolina Workers' Compensation Act has provided benefits to employees who suffer injuries arising out of their employment that prevent them from working. Thus, the law governing workers' compensation benefits has an immediate and very practical impact on all of those involved in the employment relationship: the many people who will claim these benefits at some point during their working lives, the employers who must purchase workers' compensation coverage, and the insurers who provide that coverage. While the North Carolina General Assembly has created the basic framework for awarding workers' compensation benefits, the North Carolina courts play a central role in interpreting the Workers' Compensation Act and determining how to calculate workers' compensation benefits under its provisions. Several recent decisions of the North Carolina Supreme Court illustrate differences among the Justices' approaches to resolving novel, undecided questions under the Act.

Shaw v. U.S. Airways, Inc.,
--- S.E.2d ---, 2008 WL 3915184 (N.C. 2008)

In *Shaw v. U.S. Airways*, the supreme court addressed the issue of whether employer contributions

to an employee's retirement accounts were to be included in the calculation of the employee's "average weekly wage" under the North Carolina Workers' Compensation Act.

In 2000, Plaintiff Curry Shaw was employed as a fleet service worker for U.S. Airways when he injured his back at work. U.S. Airways agreed that Shaw was entitled to workers' compensation but disagreed with Shaw as to the amount. U.S. Airways reported that Shaw's average weekly wage was $825.55, excluding the $51.87 that it contributed each week to Shaw's retirement plans. Shaw disagreed, arguing that his average weekly wage under the Act also included the retirement contributions.

Under the Act, the average weekly wage is the starting point for calculating the compensation to which injured employees are entitled. The Act defines "average weekly wage" as "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, divided by 52." Thus, the question before the supreme court was whether U.S. Airways' contributions to Shaw's retirement plans constituted part of Shaw's "earnings" at the time of his injury.

In a 5-2 decision, the North Carolina Supreme Court concluded that the retirement plan contributions were not part of Shaw's earnings under the Act and thus were not to be used in calculating his workers' compensation benefits.

In the majority opinion, authored by Justice Paul Newby, the court first examined the statutory text to determine what amounts were to be included in the average weekly wage. Because the term "earnings" is not defined in the Act, the court looked at the meaning of the word at the time the Workers' Compensation Act was adopted in 1929. The court explained that, in 1929, fringe benefits such as retirement plan contributions were rare and would not have been understood to be included in "earnings." Moreover, the court noted, the North Carolina legislature had never amended the Act to include or address fringe benefits, despite their proliferation since 1929. Thus, the court concluded that "[b]ased on the plain language" of the statute, "employer contributions to an employee's retirement accounts are not included in the calculation of the employee's average weekly wage."

The court also observed that fringe benefits traditionally have not been considered to be part of a worker's "wages" during the more than eighty years that workers' compensation programs have existed in the United States. Finally, the court cited the fact that U.S. Airways' contributions to Shaw's retirement plans were not subject to federal income, Medicare, or Social Security taxation as additional support for its conclusion.

Although the court acknowledged the importance of how fringe benefits are treated under the Act, it stressed that the court was not free to "enlarge the ordinary meaning of the terms used by the legislature or engage in any method of 'judicial legislation'" and should avoid "ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced." While recognizing that "a more modern and fair notion of 'earnings' might logically include the cash value of fringe benefits," the court stressed that "[w]eighing these and other public policy considerations is the province of our General Assembly, not this court."

Justice Robin Hudson, joined by Justice Patricia Timmons-Goodson, dissented, arguing that when employer contributions to a retirement plan are "fully paid, vested, and quantifiable," they should be deemed "earnings" under the Workers' Compensation Act. Justice Hudson based her opinion on the North Carolina Supreme Court's earlier decision in *Bailey v. State*.[10] In *Bailey*, the court held that that a state statute imposing a cap on the tax exemption granted for retirement benefits paid to state and local employees was unconstitutional under the contracts clauses of the North Carolina and United States Constitutions. The *Bailey* Court stated that "[a] pension paid... is a deferred portion of the compensation earned for services rendered." Relying on this language, Justice Hudson argued: "Having already held that retirement accounts for state employees are sufficiently sacrosanct to invoke the Contracts Clause of the state and federal constitutions... I cannot agree with a holding that consigns similar rights for an injured worker to some ephemeral realm not encompassed in the universe of 'earnings.'"

In addition, Justice Hudson argued that the language of the Workers' Compensation Act required inclusion of employer retirement contributions, especially in light of the general principle that the Act should be liberally construed. She argued that because the General Assembly used both the term "wages" and the term "earnings" in the Act, it intended to give a broader meaning to the latter. She also pointed out that, in a different part of the statute, the Act states that "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." In rejecting the majority's reasoning that fringe benefits were not included in the meaning of "earnings" in 1929, she stated: "It is not realistic, in my view, to require the legislature to amend this section of the Act whenever a new form of benefit comes into existence, in light of the broad language of the existing statute." Moreover, in closing, she noted that "[w]hile it is not for us to expand the benefits the legislature has prescribed under the Workers' Compensation Act, it is equally inappropriate for us to shrink them in the absence of a statutory mandate to do so."

Frost v. Salter Path Fire & Rescue,
639 S.E.2d 429 (N.C. 2007)

In *Frost v. Salter Path Fire & Rescue*, the supreme court addressed the question of whether the North Carolina Workers' Compensation Act, which provides compensation for injuries arising out of one's employment, covers an employee's injuries sustained during recreational activities that her employer had arranged.

Plaintiff Tammy Frost was a volunteer emergency medical technician with Salter Path Fire & Rescue. In September 2001, she attended a "Fun Day" that Salter Path had sponsored at a private amusement park. While operating a go-cart, Frost was injured, leaving her with neck and back pain that prevented her from working.

In an opinion by Justice Edward Brady, the court explained that the Workers' Compensation Act provides benefits to employees only for injuries "arising out of and in the course of the employment." The purpose of this limitation, the court noted, is to keep the Act "within the limits of its intended scope, that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." Although Frost was a volunteer, the parties stipulated that the Workers' Compensation Act applied to her service with Salter Path. Thus, the central question before the court was whether Frost's injuries arose out of her employment.

The court concluded that Frost's injuries did not arise out of her employment with Salter Path. In particular, the court relied on its earlier decision in *Perry v. American Bakeries Co.*,[11] in which the court held that a salesman's injuries, which he sustained by diving into a hotel pool while attending a sales conference at his employer's instructions, did not arise out of his employment. Like the plaintiff in *Perry*, the court concluded that Frost was invited, but not required, to attend the Fun Day event. And Frost's operation of the go-cart was not a function of her duties or responsibilities to Salter Path, but rather was for her personal pleasure while she was off-duty. The supreme court declined to adopt a six-factor test formulated by the North Carolina Court of Appeals in *Chilton v. Boman Gray School of Medicine*.[12]

In dissent, Justice Patricia Timmons-Goodson criticized the majority for failing to give deference to the findings of fact of the Industrial Commission, which had earlier ruled in Frost's favor. Justice Timmons-Goodson pointed out that Salter Path urged its volunteers and their families to attend Fun Day, if possible, and received a benefit from sponsoring Fun Day in the form of increased morale and goodwill among its volunteers. Moreover, the chief of Salter Path had told Frost specifically that he wanted her to attend Fun Day. Finally, Justice Timmons-Goodson pointed out that Frost drove herself to Fun Day in a Salter Path ambulance and, like other attendees, signed in at the main window of the amusement park before entering. On the basis of these facts, Justice Timmons-Goodson argued that Frost's attendance at Fun Day was not "wholly voluntary and that the event benefited Salter Path in a tangible way." For these reasons, she concluded that Frost's injuries arose out of her employment with Salter Path such that her injuries were covered by the Workers' Compensation Act.

IV. Criminal Law

Criminal law is an area, like workers' compensation, in which the decisions of the courts have immediate and practical effects on the lives of many North Carolina citizens. Frequently, the North Carolina courts are called upon to interpret the scope of the rights that the United States and North Carolina Constitutions grant to those accused of crimes. These cases often involve disputes over application of the "exclusionary rule," which generally prohibits the government from using evidence obtained as the result of actions that violate the constitutional or statutory rights of the accused. While the exclusionary rule may produce the harsh result of letting a "guilty" defendant go free, it is defended as necessary to deter law enforcement personnel from violating the rights of criminal suspects. Two recent cases before the North Carolina Supreme Court involved the exclusionary rule and highlight important differences among the Justices in their approach to these questions of criminal law.

State v. Oglesby, 648 S.E.2d 819 (N.C. 2007)

In *Oglesby*, the supreme court interpreted a state statute granting juveniles in police custody the right to have a "parent, guardian, or custodian" present during any questioning by law enforcement officials. Jaamall Oglesby, the juvenile defendant in the case, was arrested on murder charges. During his interrogation while in police custody, Oglesby, then aged 16, asked for permission to telephone his aunt. The police officers denied his request, and the interrogation continued. After the interrogation resumed, Oglesby confessed to first-degree murder and other offenses in the shooting death of Scott Jester. At trial, Oglesby argued that the incriminating statements he made to police during that subsequent interrogation should be suppressed under North Carolina law.

The question before the supreme court was whether Oglesby's aunt was his "parent, guardian, or custodian" such that the interrogation should have stopped after his request. On appeal, the parties did not dispute that Oglesby's aunt was not his legal guardian or custodian, that Oglesby had never stayed with her for any considerable length of time, and that she had never signed any school papers for him. The majority, in an opinion by Justice Edward Brady, concluded that Oglesby's aunt was not his "parent, guardian, or custodian" under the statute, and thus that Oglesby did not have a right to have her present during questioning. The court relied on the generally accepted meanings of those terms, reasoning that "interpretation of the term 'guardian' to encompass anything other than a relationship established by legal process would unjustifiably expand the plain and unambiguous meaning of the word."

Justice Patricia Timmons-Goodson dissented, arguing that, in juvenile proceedings, the state's obligation to protect the rights of the accused are higher than in an ordinary criminal prosecution. She contended that the court should focus not on whether Oglesby's aunt was, as a factual matter, his legal guardian, but rather on what the police's understanding of her status was at the time of the interrogation. Viewed through this lens, she argued it would be appropriate to conclude that Oglesby's aunt was his guardian "within the spirit and meaning of the juvenile code." Taken to its logical conclusion, she contended, the majority's reasoning would permit "police to decline a defendant's request for counsel and still use his subsequent statements as evidence if the requested attorney turned out to have unrelated professional licensing problems such as a shortfall in CLE credits or a delinquency in bar dues."

State v. Barnard, 658 S.E.2d 643 (N.C. 2008)

The issue before the supreme court in *Barnard* was whether a police officer's stop of a driver violated the driver's right to be free from unreasonable search and seizure under the Fourth Amendment of the United States Constitution. The defendant, Kenneth Barnard, was driving in a high-crime area of Asheville, North Carolina at approximately 12:15 a.m. After stopping at a red light, Barnard waited about 30 seconds after the light turned green before proceeding to make a legal left turn. Based only on Barnard's delay in proceeding after the light changed from red to green, Officer Brent Maltby stopped Barnard, which led to the discovery of crack cocaine and to Barnard's conviction for cocaine possession.

Before the supreme court, Barnard challenged the legality of the stop under the Fourth Amendment.

The Fourth Amendment, as interpreted by the United States Supreme Court, requires a police offer to have a "reasonable, articulable suspicion" that an individual is engaged in criminal activity before the officer may legally stop that person. Barnard argued that his 30 second delay in turning at the traffic light, standing alone, did not satisfy this standard.

The North Carolina Supreme Court, in an opinion written by Justice Paul Newby, disagreed and concluded that, given the specific facts of the case, Barnard's 30 second delay gave rise to a reasonable, articulable suspicion that Barnard might have been driving while impaired. Officer Maltby's stop and Barnard's subsequent conviction, therefore, were constitutional. The court explained that the reasonable suspicion standard requires only "some minimal level of objective justification" based on the "totality of the circumstances," and concluded that Officer Maltby's testimony showed that "based on his training and experience, he made a rational inference from the thirty-second delay that [Barnard] might be impaired."

Justice Edward Brady dissented. He pointed out that Officer Maltby had testified that he stopped Barnard in part because Barnard was "impeding traffic," which Maltby believed to be a violation of North Carolina law. Contrary to Maltby's belief, impeding traffic is not a crime in North Carolina. In light of this fact, Justice Brady concluded that the stop was unconstitutional because it was based on Officer Maltby's mistake of the law. Justice Brady also argued that the mere fact that Barnard remained stopped 30 seconds after the light changed to green did not provide reasonable articulable suspicion for a stop. Justice Brady noted that Barnard's "thirty second delay was entirely consistent with any number of innocent explanations, such as changing a radio station, consulting a map for directions, indecision as to which direction one wishes to travel, placing or receiving a call on a cellular phone, or even, *as Officer Maltby himself testified*, a natural nervous reaction to observing an approaching law enforcement vehicle in the rearview mirror."

In closing, Justice Brady stated: "Lest the American people, and the people of North Carolina in particular, forget the foundational importance of the Fourth Amendment right to be secure against unreasonable searches and seizures, we should recall that the cherished liberties enjoyed in our brief historical moment have been inherited by this generation only because they have been nurtured and protected by earlier generations of Americans so driven in their pursuit of liberty that life itself was not too great a cost to purchase liberty for themselves and for their posterity. If the Framers of the first ten amendments of the Federal Constitution thought it worthy to enshrine this liberty into the Bill of Rights, conscious as they were of the abuses they endured under British colonial rule, this Court should not be so quick to make a short sighted and imprudent decision to render it obsolete."

Justice Robin Hudson, joined by Justice Patricia Timmons-Goodson, also wrote a short dissenting opinion. She too argued that because the stop was based in part on Officer Maltby's false belief that impeding traffic was prohibited by North Carolina law and because Barnard's conduct was "easily explained as innocent," the stop violated the Fourth Amendment and was therefore unconstitutional.

V. Contracts

Contracts are a daily feature of life in our society. Individuals routinely enter contracts relating to credit cards, mortgages, cellular telephones, internet search engines, gym memberships, insurance, the purchase or lease of vehicles, and a myriad of other things and activities. In so doing, the parties to these contracts create "private law," i.e., binding, enforceable agreements the breach of which may result in, among other things, the imposition of damages on the breaching party. Not surprisingly, when a dispute occurs, the parties frequently look to the courts to interpret and enforce their agreements. Thus, the courts play a central role in determining the scope of private contractual obligations and the consequences for breaching one or more of those obligations (e.g., the recent dispute involving Wachovia, Wells Fargo, and Citibank regarding the meaning and effect of an alleged exclusivity provision).

Generally, the North Carolina courts recognize the freedom of parties to contract and to determine the terms that will govern their relationship. Moreover, just as citizens are presumed to know what our criminal laws are, so parties to contracts are presumed to know and understand the terms of their contract. As a result, courts typically are wary to invalidate a contract or one of its

provisions because to do so intrudes on the rights of the parties to specify the terms and conditions governing their relationship and, in the process, undermines the stability of contracts. However, in rare cases, a court may invalidate some or all of a contract if the court believes that there is a defect in the creation of the contract (procedural unconscionability) and/or the terms of the contract impermissibly favor one party (substantive unconscionability). The frequency with which a court intrudes on the parties' freedom to contract depends in large measure on the judicial philosophy of the judge or justices hearing the case.

Tillman v. Commercial Credit Loans, Inc.,
655 S.E.2d 362 (N.C. 2008)

In *Tillman*, the supreme court took up the question of whether a lender could enforce an arbitration provision in a loan contract, which required the plaintiffs to arbitrate their claims rather than to pursue those claims in court. The plaintiffs had borrowed money from defendant Commercial Credit Loans and sought to challenge the legality of credit insurance premiums that the defendant charged in connection with those loans. The defendant argued that, based on an arbitration clause in the loan agreements, the plaintiffs were barred from bringing their claims in state court, and the North Carolina Supreme Court took the case to decide whether the plaintiffs were required to arbitrate their claims.

In an opinion joined by Justices Edward Brady and Robin Hudson, Justice Patricia Timmons-Goodson held that the arbitration clauses were unenforceable because they were unconscionable. Justice Timmons-Goodson first addressed the issue of procedural unconscionability—that is, the disparity in bargaining power between the parties in the formation of the arbitration agreement. She emphasized the evidence showing that the loan closings were rushed, that there was no mention of the arbitration clause, that the defendant would not have agreed to make the loans without the arbitration clause, and that, whereas the plaintiffs were relatively unsophisticated consumers, the defendant was a large corporation that drafted the arbitration clause and included it in all of its loan agreements. For these reasons, she concluded, the plaintiffs had demonstrated procedural unfairness resulting in unconscionability in the formation of the agreement.

Next, Justice Timmons-Goodson addressed the issue of substantive unconscionability, i.e., whether the contract terms unreasonably favored one party. She concluded that, under the terms of the agreement, the costs of arbitration were excessive because, if they ultimately lost their case, the plaintiffs would be required to pay those costs beyond the first eight hours of the arbitration. She also relied on the fact that the arbitration clause did not apply to foreclosure disputes or to disputes involving less than $15,000, which she contended unfairly favored Commercial Credit Loans. Finally, she took the fact that the arbitration clause prohibited the plaintiffs from bringing their suit as a class action as evidence that it was substantively unconscionable.

In his concurring opinion, Justice Robert Edmunds, joined by Justice Mark Martin, agreed with the conclusion that the arbitration clause was unenforceable and unconscionable but applied a slightly different analysis. Rather than analyzing the procedural and substantive aspects of unconscionability separately, Justice Edmunds argued that the contract should be analyzed under a more general "totality of the circumstances" test.

In dissent, Justice Paul Newby, joined by Chief Justice Sarah Parker, denied that the arbitration clause at issue was unconscionable and therefore unenforceable. Justice Newby first argued that under federal law, which favors arbitration agreements, the arbitration clause at issue was enforceable. Moreover, he challenged Justice Timmons-Goodson's claim that the arbitration clause was procedurally unconscionable. Justice Newby explained that in nearly all consumer transactions the consumer is less sophisticated than the corporate lender and rarely has the opportunity to negotiate the contract's terms, which are almost always determined by the lender and offered on a "take it or leave it" basis. He noted that the arbitration agreement at issue here was prominently set apart in the loan agreement using capital letters, bolding, and underlining. He argued further that the fact that a loan closing is rushed or that a specific provision is not specifically discussed does not make that provision unenforceable. Rather, under North Carolina law, individuals who can read

are presumed to have read the documents they sign and should not be excused from their agreements for failing to read them.

In addition, Justice Newby disagreed with the majority's conclusion that the arbitration clause was substantively unconscionable. He argued that the most that the plaintiffs could be required to pay for arbitration was $375, which was not an unreasonable amount. He also emphasized that the exclusions from arbitration for foreclosure actions was required by North Carolina law and that the exclusion for suits under $15,000 benefited potential plaintiffs as much as it did Commercial Credit Loans. Finally, he disagreed with Justice Timmons-Goodson's argument that the exclusion of class actions would make it less likely that plaintiffs could bring their claims, arguing that this conclusion was not supported by evidence. In closing, Justice Newby observed that because 68,000 loans were made containing that arbitration provision since 1996, it was wrong for the court to conclude that the arbitration clause was unconscionable as something no reasonable, honest, and fair person would offer or agree to.

CONCLUSION

This election marks only the second time that North Carolinians will vote for a supreme court justice without having the candidates' party affiliations on the ballot. The long-term impact of non-partisan elections is not yet known, though it is worth noting that the decisions discussed above do not uniformly break along the current justices' party affiliations. The majority opinions and dissents in these cases frequently consist of varying combinations of Republican and Democrat justices. Under our current non-partisan election system, North Carolina voters have the opportunity to serve as a "check" on the judiciary. But that necessarily should involve an understanding of the role of the courts and judges' competing judicial philosophies. This Special Issue Report is meant to help facilitate the availability of such information and, hopefully, will intensify the public debate about—and reflection on—these issues.

Endnotes

1 In addition to electing one justice to the North Carolina Supreme Court, North Carolina voters will elect six judges to the Court of Appeals, 14 superior court judges, and 152 district court judges. Although prior to 1996 all of these judicial positions were filled by partisan elections, since 2002, all judicial elections in North Carolina are non-partisan. However, the fact that the party affiliations of judicial candidates are not placed on the ballot does not preclude judicial candidates from engaging in some forms of political activity. Pursuant to the North Carolina Code of Judicial Conduct, judicial candidates may, among other things, identify themselves as members of a political party, attend and speak at political party events, and make financial contributions to political parties and organizations. For more information on the history of judicial elections in North Carolina, see the North Carolina Bar Association's web page on Judicial Selection in North Carolina at http://www.ncbar.org/public/communications/judicialSelection.aspx?print=true.

2 Alexander Hamilton, *Federalist No. 78*.

3 Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958): "[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

4 *See* Chief Justice Roberts's response during his confirmation hearings to question 28 from the Senate Judiciary Committee, which is available at http://www.cfif.org/htdocs/legislative_issues/federal_issues/__hot_issues_in_congress/supreme_court_watch/RobertsQuestions2.pdf. *See also Federalist No. 78* ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

5 State v. Styles, 665 S.E.2d 438, 446 (N.C. 2008) (citation and internal punctuation omitted).

6 478 U.S. 30 (1986).

7 Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802).

8 *See*, *e.g.*, Wallace v. Jaffree, 472 U.S. 38, 102-05 (1985) (Rehnquist, J., dissenting).

9 *See* Reynolds v. United States, 98 U.S. 145, 164 (1878).

10 500 S.E.2d 54 (N.C. 1998).

11 136 S.E.2d 643 (N.C. 1964).

12 262 S.E.2d 347 (N.C. App. 1980).

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