The N.C. Supreme Court at 175: Slow on Civil Rights but Fast on Free Speech?

by Katherine White

What follows is a look at some of the highs and lows of the North Carolina Supreme Court during its first 175 years. The General Assembly, originally viewing the court only as a money-making venture for lawyers, voted it into existence in 1818. It succeeded a series of earlier, similar tribunals, one of which operated under the provision that "no attorney shall be allowed to speak or be admitted as counsel in the aforesaid court."[1] That much has changed, but much about the state's highest court has remained the same over the years. Unlike the General Assembly, which often makes sudden or sweeping legal changes in the give-and-take of politics, the Court makes law slowly, by interpreting the constitution, the legislature's statutes, and its own past decisions. The Court's work is seen primarily through its published review of cases, raising issues of particular import to the life and times in which the justices served.

The North Carolina Supreme Court, now celebrating its 175th anniversary, has an august—if sometimes notorious—history. It has promoted prison reform, abolished certain invasion of privacy torts, advanced women's rights, and determined whether chickens fall within the protection of a statute prohibiting cruelty to animals.

On its less noble side, the court has defended slavery and it was often a necessary, but useless, step for those litigating civil rights issues in the 1950s and 1960s. Its refusal to recognize certain constitutional rights during that period resulted in at least one landmark decision by the U.S. Supreme Court that continues to benefit all Americans—the right to a speedy trial.[2]

Because the Court has dealt with such a range of issues, it is difficult to draw sweeping themes from its history. In most cases, the Court's decisions have reflected the status quo. There are, however, exceptions to this rule. The Court, for example, traditionally has been ahead of its time on free speech issues and behind the times on civil rights issues.

Eighty white men have shaped the course of the state's legal history, with three white women joining their ranks since 1962 and only one black man, appointed in 1983.[3] The number of justices in office at one time has varied from three to seven. Almost all of the justices in this century have been Democrats, two of the turn-of-the-century Republican members having faced impeachment charges for defying the General Assembly by ordering the State Treasurer to pay out money that had been forbidden by legislation.[4]

The North Carolina high court traditionally reflects the state's power structure, its members being appointed or elected from a group with

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impeccable political credentials. Its opinions have mirrored the state's evolving political and social development, not making wholesale legal changes as other states' courts have, and taking few steps that alter the way business is done.

A Foot Firmly Rooted in the Past

The Court is one of tradition. Tradition governs the way justices file into the courtroom, parcel out their workloads, assign seats at the bench, vote their opinions, and take their midday meals.[5] And until it made the switch in 1940, the Court was the last appellate court in the United States where the members wore ordinary clothes instead of robes while on the bench.[6]

Ties to the past are, in a sense, part of the Court's function. The six men and one woman now serving as justices sit at the highest level in the judicial branch of government.[7] They are the guardians of several centuries of North Carolina law.

The Court's early years were marked by informality, according to Judge Rich Leonard, currently a U.S. bankruptcy judge who studied the Court's work of 1841 and 1897.[8] Citizens argued their own cases without using an attorney in about half of the 1841 cases. Most of these disputes involved property: land repossession, for example, or a case in which a homemade canoe was punctured by a borrower. The few criminal matters of the early Court seem minor by today's standards, though perhaps appropriate for the times: indictments for crimes like selling rotten bear meat as food and changing the identifying markings on sheep.

But by 1897, the Court had become more formal. Attorneys argued nearly every case for their clients. A 30-day deadline on appeals was by then being enforced, compared to an 1841 practice of letting appeals miss their deadlines by two years or more.

Yet much about the Court has resisted change. The Court's dealings with capital punishment reflect its constancy.[9] Retired Justice Harry C. Martin, in a history prepared for the 1994 celebration, notes that the Court today spends nearly half its time on death penalty cases. He observes that in 1919, T.T. Hicks, a lawyer involved in the Court's Centennial Celebration, predicted that the Court would steer away from the death penalty. "Will not the conscientious men and women who meet to celebrate the next centennial of this court blush, as they turn these pages, to think that their ancestors in 1919 condemned human beings to death by law in North Carolina?"[10] But deliberations on death sentences are as much a part of the Court's work today as they were in 1919.

The North Carolina Supreme Court. Standing (l-r): Justices Willis Whichard, Henry Frye, John Webb, and Sarah Parker. Seated (l-r): Justice Louis Meyer, Chief Justice James Exum Jr., Justice Burley Mitchell.

Michael Lewis

A Voice for Better Jail Conditions

Despite its inherent conservatism, the Court has had isolated bursts of activism. In 1875, for example, the Court displayed an activist nature when upholding damages of $2,000 for the death of John Godwin in the Raleigh City Jail. The court concluded that his death "was accelerated by the noxious atmosphere" and that his 8x14 foot cell had "no opening connecting with the outer air or light," "no ventilation even." "Nature teaches us that any person kept in such a place must soon die, and any person 'lodged' in such a place is injured by the first breath . . . . Not a chair, nor a bed, nor a blanket, nothing but the cold, hard floor in 'a hole like Calcutta's.'"[11]

A Beacon on Free Speech Issues

Another area in which the Supreme Court historically has embraced change is that of issues affecting free speech. The first recorded prejudicial pre-trial publicity case, prior to the Supreme Court we know now, resulted in the court's concluding that the publicity meant nothing to the trial's outcome. "[T]he people of this country do not take for truth everything that is published in a newspaper."[12]

In 1962, the Supreme Court anticipated the U.S. Supreme Court's decision in *New York Times v. Sullivan* that gave protections to some false statements made about public officials. *Ponder v. Cobb* involved voting irregularities in Madison County and concluded that false accusations about public officials were not actionable if they were made in good faith and without malice.[13]

In the last decade, the North Carolina court has gained national recognition for its curbing invasion of privacy claims. In 1984, in *Renwick v. News & Observer Publishing Co.*, the Court concluded that false light invasion of privacy would not be part of the state's law in part because of its closeness to libel claims.[14] The Court also opined that allowing damages for such publication would add to the tension between freedom of the press—protected by both the state and federal constitutions—and the law of torts, which permits recovery of damages against the media.[15]

Following Renwick, in 1988, the Court went a step further when it ruled that North Carolina will not recognize yet another tort of invasion of privacy—when true private, personal facts are published.[16] The Court reasoned that the first Amendment of the U.S. Constitution, guaranteeing free speech and a free press, runs counter to a claim that can result in the recovery of damages for truthful publications.

But Behind the Times on Civil Rights

But if the Court consistently has broken new ground on free speech issues, it has been equally insistent on dragging its feet in the area of civil rights. In an 1830 decision, for example, the Court ruled that slave owners and overseers could not be prosecuted for how they treated slaves. The case stemmed from an incident in which a Chowan County slave owner named John Mann shot a slave in the back who had fled from him while he was whipping her. He was convicted of assault for inflicting punishment "cruel and disproportionate" to her transgression, but the

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—Lawyer T.T. Hicks
at the Centennial Celebration of
the State's Highest Court

Key Dates in the History of the N.C. Supreme Court

1819: The Supreme Court, meeting at the North Carolina State House, hears its first case as an appeals-only court.

1830: *State v. Mann.* Court rules that slaveowners and overseers cannot be prosecuted for how they treated slaves. Harriett Beecher Stowe later would cite the case as background for *Uncle Tom's Cabin.*

1834: *Hoke v. Henderson.* Court rules that a state officeholder has a property right in his office—a right found nowhere else in the nation. The ruling proves troublesome for both the state and the jurists who issued it and is overruled in 1903.

1834: *State v. Will.* Court gives slaves the right of self-defense against cruel and unjust punishment by owners. Overturned by 1857 *Dred Scott* ruling that slaves are not citizens.

1868: The Supreme Court is expanded from three to five members.

1873: *State v. Linkshaw.* Court reverses conviction of man charged with disturbing public worship by singing too loud and too long during church service.

1878: The Court licenses Tabithia Holton as the first woman to practice law in North Carolina.

1901: Republican Justices David Furches and Robert Douglas are impeached by the House of Commons. The trial centers on the 1834 *Hoke* decision. The House refuses to convict.

1914: *State v. Darnell.* Court, citing "natural law," rejects an ordinance prohibiting persons of a particular race from moving onto a street where a majority of the residents are of another race. The anti-segregation ruling goes largely unused.

1937: Court is expanded to seven members and becomes the last in the nation that doesn't wear robes. The Court dons robes in 1940.

1962: Susie Sharp becomes the first woman appointed to the Supreme Court.

1967: *Rabon v. Hospital.* Court abolishes charitable immunity for hospitals in malpractice and other damage cases.

1968: The creation of the 12-member Court of Appeals lightens the workload of the Supreme Court by taking on most trial court appeals.

1975: Susie Sharp becomes the first woman chief justice in the nation.

1983: Henry Frye becomes the first black appointed to the state's highest court.

1988: *Hall v. Salisbury Post.* The Court bars people from suing for invasion of privacy when true, personal facts are published.

1991: *Woodson v. Rowland.* Court rules that injured workers can sue their employers for gross negligence. Prior to this ruling, workers or their survivors would have been limited to collecting workers' compensation.

Sources include "N.C. Supreme Court 175th Anniversary," The News & Observer, *Raleigh, N.C., Jan. 7, 1994, p. 3A , and "Key Dates for the N.C. Supreme Court,"* The Charlotte Observer, *Jan. 4, 1994, p. 1C.*

Supreme Court threw out Mann's conviction on grounds that slavery demanded the total and unquestioning obedience of slaves. Harriet Beecher Stowe cited the case as background for *Uncle Tom's Cabin*.[17]

One justice was credited by Josephus Daniels, publisher of *The News & Observer*, as being the founder of the Ku Klux Klan in North Carolina. Daniels, at a ceremony unveiling the portrait of Justice Alphonzo Calhoun Avery in 1933, told of an encounter when Daniels asked the justice why he had supported a candidate for statewide office whose views on an important issue did not match the justice's. Justice Avery, pulling Daniels off to the side, whispered that the candidate had, like himself, been a night-rider.[18]

During the Civil Rights movement of the 1950s and 1960s, the Supreme Court was but a way station for cases en route to the U.S. Supreme Court. Daniel Pollitt, professor emeritus of constitutional law at the University of North Carolina School of Law, recalls, "The whole thing was to avoid the state courts as far as possible."[19]

The first such civil rights case grew out of a black Durham minister's 1956 effort to take children from his church group to the Royal Ice Cream store. The minister charged that the Durham ordinance requiring segregated facilities was unconstitutional. The North Carolina Supreme Court refused to consider the ordinance, stating that the defendants had failed to introduce it into evidence and that the Court could not take judicial notice of it, something clearly possible had the Court wished to do so.[20]

"While he may be a proper subject for discipline of the church, he is not for the discipline of the courts."

—N.C. Supreme Court in 1873 on overzealous churchgoer's joyful noise

A Few Progressive Voices

Still, the Court's predilection has not always been to preserve the status quo, and some of its jurists have shown a penchant for the progressive. Among them was Chief Justice Walter Clark, who served from 1889 to 1924 and retains a fabled and venerable reputation. Passed over as too young by Jefferson Davis, he was not made a Confederate general . And he was thought to be too old to be appointed by Woodrow Wilson to the U.S. Supreme Court in 1916, when Louis Brandeis was appointed in his stead, an appointment Clark supported.

But Clark made his mark at the state level. He advanced the rights of women, too often treated as "infants, idiots, lunatics and convicts."[21] He also supported making industry accountable for its actions, for example, requiring that a bottler of carbonated beverages be responsible for damages when the bottle exploded, even though there was no contract between the bottler and the ultimate consumer.[22] The Court under Justice Clark also held for the first time that a wife could sue her husband for damages, removing the bar of interspousal immunity.[23]

And it was Justice Clark who wrote into state law the common law principle that one's home is one's castle. In his opinion, he traced the concept from early England to a 1901 incident on South Street in Raleigh. There, a woman was accused of hitting a creditor of her husband's with her son's baseball bat. The defendant:

> knew naught of legal lore, but she had an instinctive sense of her rights, and, by means of the wooden wand touched to the back of the (creditor's) head she communicated electrically to his brain the same conception more effectually than if she had read to him the above citations.[24]

When Justice Clark died in 1924, the president of Southern Railroad came to his grave, relates Pollitt. Asked why he was there despite his legendary dislike for the Chief Justice and his pro-worker views, the railroad official replied, "I just want to make sure the son-of-a-bitch is dead."

Another notable justice was William Gaston, a vehement opponent of slavery and a Catholic, which meant he was technically prohibited from sitting on the Supreme Court by an N.C. Constitutional provision that limited officeholding to those of the Protestant faith. An 1835 change to the Constitution lifting that prohibition is attributed to the high regard in which Justice Gaston was held. Serving with him at the time was Justice Joseph Daniels, described as a man "of large brain,

but no ambition."[25] While Judge Gaston personally was opposed to slavery, he was unable to move the Court, which remained steadfast in its support of the institution.

Poetic Justice?

The Court has not been without scandal. A judge on an earlier court that functioned as a *de facto* Supreme Court was Samuel Spencer of Anson County, a polygamist. Spencer's death was chronicled in an official Supreme Court history after he was caught napping under the shade of a tree and pecked to death by a "turkey gobbler enraged by the red handkerchief which the judge had placed over his face to keep off the flies."[26] The document failed to mention Spencer's domestic proclivities or whether any related fatigue may have contributed to his nap and, thus, his untimely demise.

Strength in Times of Trial

Another notable characteristic of the Court is that it has often shown strength in the face of political adversity. After the Civil War, for example, the Court upheld the unpopular administration of W.W. Holden. Holden, appointed provisional governor after the Confederate defeat at Appomattox, was later elected and then impeached. The Court observed that without Holden's provisional term, there would be no state government.

> No one of the State officers was bound by an oath to support the Constitution of the United States and consequently no one of them was qualified to discharge the duties of their respective offices. There was no governor, no members of the General Assembly, no Judges. Every office in the state was politically dead, and the effect [was] the same as if they had all died a natural death. . . . Here, then, was a state of anarchy.[27]

And Protection for the Least Among Us

If it has upheld un-elected governors, the state Supreme Court also has shown a soft spot for bad singing. In 1873, while children continued to pray in public schools, the Court supported a different version of separation of church and state. W.M. Linkshaw was convicted at the trial level of disturbing public worship because his singing disrupted the congregation, causing laughter among some worshipers and indignation among others.

A summary of testimony at the trial revealed that "[a]t the end of each verse his voice is heard after all other singers have ceased and the disturbance is decided and serious; the church members and authorities have expostulated with him about his singing and the disturbance growing out of it, to all of which he replied that he will worship God according to the dictates of his heart and that a part of his worship is singing." The Supreme Court, reversing his conviction, concluded that "while he may be a proper subject for discipline of the church, he is not for the discipline of the courts."[28]

As for whether chicken abuse falls within the purview of a cruelty to animals statute, the answer is yes. The defendant in this case, enraged that his neighbor's chickens had dug up all his garden peas, chased down the chickens and dispensed his own brand of frontier justice. The Court, impressed by the intentional and vicious assault on the chickens, affirmed the perpetrator's $1 fine.

> He pursued one of the prosecutor's chickens clear across the lot of another neighbor and intimidated it into seeking safety in a brush pile; pulled it out ignominiously by the legs, and putting his foot on the victim's head, by muscular effort, pulled its head off. Then, in triumph he carried the lifeless body and threw it into the prosecutor's yard. Another he jabbed with a stick until it was dead and knocked another over, throwing their bodies into the neighbor's yard also, and then he on another occasion beat a hen that had young chickens, which, with maternal solicitude, she was caring for, so that she died and the biddies, lacking her fostering care, likewise perished.[29]

So the Court has had its say on issues large and small over the course of its 175 years. Former Justice Martin observes that the Court has at times been progressive, particularly with regard to workers' compensation issues.[30] The Court also has allowed recovery for injuries to unborn children and has expanded individual rights granted under the federal Constitution through reliance on state constitutional provisions. On criminal law, Justice Martin believes the Court is conservative, reflecting the social desires of the people who live in North Carolina.

The Court is a living entity. In its next 175 years it will continue to grow and change, although—if the past is any guide—perhaps more slowly than the times in which it operates.[31]

FOOTNOTES

[1] Walter Clark, "History of the Supreme Court of North Carolina," reprinted from the *North Carolina Booklet*, Uzzell & Co., Raleigh, 1919.

[2] *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). Peter Klopfer, a zoology professor at Duke University, was charged with criminal trespass during a sit-in at a Chapel Hill restaurant. The Orange County District Attorney placed the case on an inactive docket but could have it reinstated by a judge at any time. Klopfer claimed the district attorney's practice violated his right to a speedy trial. The North Carolina Supreme Court held that the practice did not violate any rights. The U.S. Supreme Court disagreed, noting that the North Carolina court's position had been rejected by every other state court in the nation that had addressed the question, and concluded that "the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the United States."

[3] The female justices were Susie Sharp, appointed in 1962; Rhoda Billings, appointed in 1985; and current Justice Sarah Parker, who in 1992 became the first woman elected to the state's highest court without being appointed first. Justice Henry Frye, appointed by Gov. James B. Hunt Jr. in 1983, is the sole African-American to have served on the state's highest court.

[4] Robert E. Williams, "High Court Gives Impression of Permanence," *The News & Observer*, Raleigh, N.C., April 26, 1942, p. C1; Walter Clark, *History of the Supreme Court of North Carolina*, 177 N.C. 617, 631–32 (1919). Chief Justice Clark does not mention political party affiliation in his history of the court's first 100 years. He does, however, reveal that most of the justices during that time—23—were Episcopalians. The remaining justices included three Roman Catholics, two Baptists, four Methodists, seven Presbyterians, and one Freethinker. *Id.* at 634. For a more recent discussion of the demographics of the state's judiciary as a whole, see Katherine White, et al., "The Demographics of the Judiciary: No Longer a Bastion of White Male Democrats," *North Carolina Insight*, Vol. 12, No. 4 (September 1990), pp. 39–48.

[5] At approximately 11:50 a.m. each day, the chief justice or a justice whose hunger pangs require immediate attention picks up the telephone and buzzes each justice in his or her chambers. The group then proceeds en masse down the capital's pedestrian mall as they discuss which of their regular spots they will choose for that particular day. Two favorites are the Hudson Belk cafeteria and a Greek-American eatery called the Mecca that is at least a third as old as the court itself.

[6] See Williams, footnote 4 above.

[7] The justices are: Chief Justice James Exum Jr., who has announced his retirement at the end of 1994; and Justices Louis Meyer; Burley Mitchell; Henry Frye; John Webb; Willis Whichard; and Sarah Parker.

[8] As cited in Joseph Neff, "Justices loosen up, toss a birthday party," *The News & Observer*, Raleigh, N.C., Jan. 7, 1994, pp. 1A & 3A.

[9] Only a hiatus granted by the U.S. Supreme Court has interrupted the state Supreme Court's near-constant deliberations over the death penalty. The U.S. Supreme Court held in 1972 that the Georgia death penalty statute was unconstitutional. Legislatures nationwide then redrafted their laws. In North Carolina, it took two attempts to enact a law that met constitutional standards, the current version being adopted in 1977. (*Furman v. Georgia*, 1972, *Woodson v. North Carolina*, 1976.)

[10] 176 N.C. 791 (1918).

[11] M. Lancaster, Raleigh, *An Unorthodox History of North Carolina's Capitol*, Down Home Press, 1992, p. 39.

[12] *State v. Norris*, 2 N.C. 430 (1789).

[13] 257 N.C. 281 (1962). The case was cited favorably by Justice Brennan in *New York Times v. Sullivan*, 376 U.S 272, 280 (1964).

[14] False light invasion of privacy is a civil claim for damages arising from the publication of false information about a person. The information usually is not defamatory, but it makes the person look like something he's not. Thus, he is put in a false light.

[15] *Renwick v. News and Observer Publishing Co.*, 310 N.C. 312, 312 S.E.2d 405 (1984), cert. denied, 469 U.S. 858 (1984).

[16] *Hall v. Post*, 323 N.C. 259 (1988).

[17] *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829). See also Joseph Neff, "In the court of history, law review comes out a winner," *The News & Observer*, Raleigh, N.C., Jan. 9, 1994, p. 1C.

[18] Lancaster, supra, p.140–141. 204 N.C. 818, 824–825 (1933). Daniels was quick to point out that Justice Avery's Klan was far different from the KKK of the 1930s, which Daniels described as "spurious." The earlier version, he claimed, operated "for the protection of womanhood."

[19] With the conservative trend on the U.S. Supreme Court that began with former Chief Justice Warren Burger's term in 1969, the N.C. high court has begun using the *state* constitution to advance human rights issues. For more on this topic, see Katherine White, "North Carolina's Constitution Comes of Age," *North Carolina Insight*, Vol 10, Nos. 2–3 (March 1988), pp. 118–120.

[20] *State v. Clyburn*, 247 N.C. 455 (1958).

[21] *Weather v. Burdens*, 124 N.C. 610, 617 (1899).

[22] Martin, supra, p.4, citing *Grant v. Graham Chero-Coke Bottling Co.*, 176 N.C. 256 (1918).

[23] *Crowell v. Crowell*, 180 N.C. 516 (1920), cited by Justice Martin in *A Historical Review of the Supreme Court of North Carolina*, 1919–1994 (1994). 335 N.C. _____ (1994).

[24] *State v. Goode*, 130 N.C. 651, 654 (1902), described in Lancaster, supra, p. 27. The creditor was bent on repossessing a bed which Goode's husband was buying on time. Justice Clark wrote that he "laid his profane hands on the paraphernalia of her bed and began to throw back the bed covers and to lift the mattress, all of which would speedily have gone, of course, upon the floor."

[25] Rich Leonard, "Two Years in the Life of the Supreme Court of North Carolina," 1975, not published, Supreme Court Library Archives. See also Samuel Ashe, *Biographical History of North Carolina*, Volume II, VanNoppen Publishing, Greensboro, 1905, pp. 99–107, and Kemp P. Battle, *Address on the History of the Supreme Court*, Edwards & Broughton, Raleigh, 1889.

[26] Clark, *Ibid*, 177 N.C. 617, 619 (1919). His marital status is discussed in M. Lancaster, *Raleigh, An Unorthodox History of North Carolina's Capitol*, Down Home Press, 1992, p. 235.

[27] In the matter of William Hughes, 61 N.C. 65, 73 (1867).

[28] *State v. Linkshaw*, 69 N.C. 215, 216 (1873).

[29] *State v. Neal*, 120 N.C. 613 (1897).

[30] *Woodson v. Rowland*, 329 N.C. 330, 407 S.E. 2d 222 (1991). In this case, the court allowed workers to bring civil claims against their employers for injury caused by reckless and wanton acts of their employers. For more on the case, see Katherine White, "Work Place Injury Claims: Beyond Workers' Comp," *North Carolina Insight*, Vol. 14, No. 1 (May 1992), pp. 102–105.

[31] The Futures Commission for Justice and the Courts, a public-private panel, has been appointed to conduct a two-year study of what the structure of the state court system should be for North Carolina. An initiative of the Z. Smith Reynolds Foundation, the study was motivated by a perception of loss of public confidence in the criminal justice system. It remains to be seen what the impact of this study will be for the state Supreme Court. For more, see The Associated Press, "Study of State Courts Planned," *The News & Observer*, Raleigh, N.C., Jan. 25, 1994, p. 3A.