Partisanship, Election Reform and Decision-Making in the North Carolina Supreme Court: A Case Study

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ABSTRACT

In 2002, the North Carolina General Assembly made several changes to the system of popular elections for the state's appellate courts, including the removal of partisan labels from the ballot, starting with the 2004 elections. This particular change presents an opportunity for a natural experiment in which to observe any differences that may have appeared between how the North Carolina Supreme Court ruled before and after the reform, contributing to a line of literature on the impact of institutional arrangements (including selection systems) on judicial decision-making. The thesis examines whether any detectable differences appeared between judicial behavior and the decisional output of the North Carolina Supreme Court in its partisan era (1995-2004) and in its nonpartisan era (2005-2011). Based on analysis of several different characteristics of the Court's decisions and individual justices' votes in these eras, I find no evidence to suggest that the nonpartisan system was associated with justices behaving in more "nonpartisan" ways. If there was any change, it was that during the nonpartisan era, the behavior of the justices was *more* in line with what would be expected of partisans than it had been in the partisan era. At least in North Carolina, changing the selection method of state supreme court justices from partisan to nonpartisan elections was not followed by less partisan behavior.

Dedication

To my wife, my son, and my parents, with gratitude

and

To the justices of the North Carolina Supreme Court (past and present), with admiration for their public service

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CHAPTER ONE

Introduction

Purpose

This introductory chapter provides readers with a brief overview of judicial selection reform and the particular form it has taken in North Carolina. Following that overview is a description of the research question that this thesis investigated, and why the study is significant. The chapter concludes with a summary and a description of how the remainder of the thesis is organized.

North Carolina and Judicial Selection Reform

How state judges are selected has been a topic of much discussion at various times in American history, especially in recent decades. As Roy Schotland put it, "no subject in American law has drawn as much ink, and sweat, as the debate and fight over which method of selecting judges is least unsatisfactory" -- some type of appointment, some type of popular election, or some combination, including merit selection with retention elections, also known as the Missouri Plan (Schotland, 2003, p. 1398). ***Caperton v. A.T. Massey Coal Co.*** in West Virginia again reminded lawyers, scholars and citizens alike of the importance of the issue of judicial elections. In ***Caperton***, the U.S. Supreme Court found "a 'serious risk of actual bias' when a litigant has 'a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent'" (qtd. in Leroy, 2010, p. 1572). West Virginia uses popular *partisan* elections to select its appellate judges. Today, only six other states share this once-common system, which

differs from its federal counterpart, appointment with life tenure,[1] because over the years judicial elections have drawn scrutiny and calls for reform.

North Carolina is among the states in which citizens and lawmakers not only have discussed the topic but also have made changes. In several stages between 1996 and 2004, the state abandoned its partisan judicial election system (which took place alongside all the state's partisan elections for legislative and executive offices) that had existed since the Reconstruction era. In 2002, the North Carolina General Assembly passed the Judicial Campaign Reform Act (JCRA), which completed the process by instituting nonpartisan elections for the seven justices of the North Carolina Supreme Court (the court of last resort) and the 15 judges of the North Carolina Court of Appeals. The stated aim of the law was "to mitigate a rising tide of partisan politics in judicial elections, both in terms of the fundraising and campaigning required to win office, and in terms of political ideology threatening the impartiality of members of the bench" (Troutman, 2008, p. 1763). At the time of the JCRA, North Carolina was among a small group of states still using partisan elections for judges, with many more using nonpartisan elections (DeBow et al., 2002, p. 395). Reformers have favored taking partisan labels out of the judicial election process, as such a change reflects both "the political reality that there is strong popular support for electing judges and for limiting the party-driven, polarizing, and quid pro quo politics that characterize partisan elections" (Reid and Moog, 2011, p. 224). The "conventional wisdom" that such elections *will actually be less partisan* has been challenged as lacking empirical evidence to support it (Rotunda, p. 3).

Ironically, partisan politics had a great deal of influence on the decision to make appellate judicial races nonpartisan, despite the JCRA's ostensibly laudable "good government"

[1] Note that only federal judges of courts established by Congress under Article III of the U.S. Constitution serve "during good behavior," i.e. with life tenure. Judges of tribunals established under Articles I or IV do not necessarily enjoy life tenure.

motivations (especially in an era when hyper-partisanship is roundly criticized in legislative and other settings). Consider the historical context: "Between 1995 and 2002, the registered voters of the state used [their voting power] to transform the [North Carolina Supreme] court from one dominated by Democrats to one controlled by Republicans" (Ryan, 2004, p. 894). In 1998, in 2000, and in 2002, Republicans won all the Supreme Court seats that were on the ballot (Troutman, 2008, p. 1768). This shocked the state's political establishment, as Democrats had dominated the state Supreme Court (and the lower courts) since the early 20th century. A saying in the state's legal community was that "more Republicans have been on the moon than on the North Carolina bench" (Schotland, 2003, p. 1414). In fact, in North Carolina, "there were no competitive races for either appellate or supreme court judgeships until the 1980s" (Abbe and Herrnson, 2002, p. 287). Democrats, who continued to hold a majority in both chambers of the state legislature, sought to inhibit Republican success in these judicial races, which had such a low profile that voters' decisions turned on little more than party affiliation. The JCRA passed on essentially a party-line vote in 2002 and became effective for the 2004 election cycle (Reid and Moog, 2011, pp. 226-227). Such a *partisan* push for a *nonpartisan* reform was not unprecedented in American history. Republicans in Idaho, for example, successfully urged voters to remove partisan labels from the state's judicial elections in 1934, in response to the "pro-Democratic sweep in Idaho and the rest of the country in the early 1930s" (American Judicature Society, 2012).

Democrats assumed reasonably that changing the electoral system could change the election results. In 1979, Philip Dubois found that "voters in the partisan states are more likely to cast their votes along party lines than voters in the mixed and nonpartisan [states]…it is much more difficult for voters in states utilizing the nonpartisan judicial ballot to cast their votes along

party lines. Indeed, this was precisely the intent of Progressive reformers in their drive for the adoption of nonpartisan ballots" (Dubois, 1979, p. 765). It is worth noting that North Carolina gives voters the option of straight-ticket voting for all offices (including judgeships prior to the JCRA) except for U.S. president (National Conference of State Legislatures, 2011). Democrats could with justification surmise that the Republican partisan label by itself could be a boon to some statewide judicial candidates. This was an era in which Republican George W. Bush carried the state's electoral votes by large margins in both 2000 and 2004, even while Democrat Mike Easley won election and re-election as governor. Although many elections across the state were becoming increasingly competitive between the two major parties, it was in the state Supreme Court where Republican candidates were having the most success. Republicans first captured a majority on the court in 1998, prior to many of their successes in other state elections (Reid and Moog, 2011, p. 226). Republicans won a bare majority in the North Carolina House of Representatives in 2002 (sharing power with Democrats in that body in the subsequent legislature), and in 2004 the Party's nominees won statewide races for Commissioner of Agriculture, State Auditor, and Commissioner of Labor (all executive offices that Democrats had held for decades).

Although Democrats in the legislative branch may have been apprehensive about Republicans controlling judicial decision-making on any number of public policy issues, there is evidence that one issue stood out above all others: legislative redistricting, which has a direct impact on legislators' political fortunes. In 2002, "the political consequences of having a Republican-controlled Supreme Court became evident to the Democrats when all five Republican justices sided substantially" with Republican plaintiffs in ***Stephenson v. Bartlett*** (later also known as ***Stephenson I***), overturning the Democrats' redistricting plan for the

impending election and ultimately leading to districts that were less favorable to Democrats (Reid and Moog, 2011, p. 227). Seth Warren Whitaker wrote that observers at the time characterized the Court's decision as pure partisan politics, although he argued that not only partisanship but a desire by the Court to "alter the institutional balance of power between the courts and the legislature in the redistricting process" (in contrast to the Court's "very strong tradition of judicial deference to the legislature") could explain the ruling (Whitaker, p. 238). Such a power grab also could have partisan motivations, of course, since it would involve taking power away from Democrats (the legislature) and giving it to Republicans, who at the time seemed to have a firm lock on the Court majority. In any event, possibly with the ruling in mind, the legislature passed the JCRA between that Court decision and the 2002 general election. One interpretation of those events would be as follows: legislators believed they had to make changes to the Court because though it had long been conservative, it was now both conservative *and* partisan, and was acting in threatening ways toward the legislative majority.

Following the electoral law change, the new nonpartisan regime's consequences for the partisan make-up of the North Carolina Supreme Court have been real but not dramatic. That is to say, candidates of one party have not won all of the seats on the court that have been up for election; the Court's majority has not changed from one party to the other since the new system went into effect. On its face, the most important consequence has been clear: not one Supreme Court incumbent has been defeated for re-election under the new regime. Both Republicans and Democrats have been elected in the nonpartisan era, so the change helped incumbents regardless of party affiliation. On the other hand, one can see some sort of partisan effect, because the last years of the partisan regime saw a decided advantage for Republican candidates (whether they were incumbents or not). The switch to the new system was accompanied by an evident

weakening of the Republican edge. Two scholars concluded that "Republican success has been reversed since the shift to nonpartisan elections in 2004" (Reid & Moog, 2011, p. 231). Two Democrats served on the court at the time of the JCRA's passage in 2002; by mid-2012, there were three.

That loss of Republican advantage makes it unsurprising that, ten years after the passage of the JCRA, the parties still have differing views of the reform. Article VI of the 2012 North Carolina Republican Party platform expressed support for judicial elections generally, and partisan elections specifically: "We recognize the independence of the judiciary and oppose the appointment of state judges to full terms.…The party affiliation of judicial candidates should appear on the ballot" (North Carolina Republican Party, 2012). The North Carolina Democratic Party's 2011-2012 platform was vague on the matter, but did not call for a return to partisan elections. It called upon "Democrats to support North Carolina Democrats in every race - from local contests to…judicial elections" and supported "a judicial selection process that focuses on experience and qualifications, and enables qualified candidates for judicial positions to compete in a manner consistent with the Canons of Judicial Conduct" (North Carolina Democratic Party, 2011, p. 6).

Since the JCRA went into effect, North Carolina voters have voted in four sets of nonpartisan elections for the state Supreme Court. Several effects have been noted, including a significant drop-off in voter participation in the elections, suggesting that the judiciary is now "accountable to a narrower subset of the electorate because fewer voters are involved" (Troutman, 2008, p. 1778). Those who do vote now have little information on the ballot in the absence of party labels. They do have some cues about the candidates' sex (and on occasion, ethnicity) embedded in the names on the ballot, of course, and they have shown apparent

willingness to use that information. "Starting with the election in 2004 and continuing in 2006, the overwhelming indicator of electoral success has been a candidate's gender…North Carolina voters have thus far opted to seat women to the bench in disproportionate numbers" (Troutman, 2008, p. 1780). Therefore, one could hypothesize that the nonpartisan era has had an effect on who serves on the court in terms of the judges' sex (although such a hypothesis is not within the scope of this thesis); indeed, in 2011, the court for the first time had a female majority (Curliss, 2011). Other factors, such as the increasing percentage of female attorneys in the state, changing voter attitudes, or an increase in the frequency of females running for all offices could also play roles, of course.

Brian P. Troutman has written that what the JCRA has *not* done is to "remove partisanship from elections," since parties continue to endorse candidates who are party members, and campaigns have many issues in common with their partisan predecessors (Troutman, 2008, p. 1781). Reid and Moog agreed that "party affiliation remained an important factor for most voters in these races" following the change, which was, they wrote, "not unexpected" considering that the JCRA had emerged as a result of partisan politics, and that "the reforms contained few statutory or ethical constraints on candidates engaging in partisan activities and partisan rhetoric" (Reid and Moog, 2011, p. 242). Former Texas Supreme Court Chief Justice Thomas Phillips, who is against judicial elections generally, wrote that even if North Carolina had such constraints, any "safeguards installed in certain states to keep contested or retention elections truly non-partisan have been compromised" by the U.S. Supreme Court decision in ***Republican Party of Minnesota v. White***, which gave broad protections to judicial candidates' First Amendment rights. Phillips added, "The experiences of Michigan and Ohio, where parties dominate the nominations of and campaigns for technically non-partisan

candidates, may become the norm in those states which have chosen non-partisan ballots because they believe that party interference compromises both the appearance and reality of judicial impartiality" (Phillips, 2009, p. 85). At the same time, scholars who support partisan elections contend that retaining at least some level of partisanship is not only inevitable but helpful. As Troutman wrote, "research has proven [*sic*] voters' intuition that a judge's party identification matters. Generally speaking, Democratic judges tend to support a more liberal viewpoint than their Republican counterparts" (p. 1786).

The most recent election for a North Carolina Supreme Court seat (in November 2012) brought into sharp focus the issue of the level of partisanship not only in the state's judicial elections but also in the Supreme Court's decision-making. Media coverage of the election (pitting first-term Justice Paul Newby, a Republican, against North Carolina Court of Appeals Judge Sam Ervin IV, a Democrat) provided at least anecdotal evidence that political elites (including current and former elected officials and state party leaders) believe that the Court is just as partisan as ever -- that at least in some cases, Republican justices will vote one way and Democratic justices another. J. Russell Capps, a former Republican state legislator, wrote an op-ed column for a weekly newspaper with the hyperbolic title, "The most important election ever," in August 2012. "In November we will decide the fate of the North Carolina Supreme Court by a single vote," Capps wrote dramatically. "Supreme Court Justice Paul Newby is the only member of the court who is up for election. There is no finer judicial representative than Paul Newby. As the court now stands, there is a one-vote majority of conservatives. Should [Newby] lose, the highest court in our state would switch 180 degrees to liberal majority control" (Capps, 2012). Without hesitation, Capps equated Republicans (like Newby) with "conservatives" and Democrats (like Newby's opponent) with "liberals," and he implied that he knew the way that

these candidates would vote on issues important to conservatives. Meanwhile, prominent conservatives including the former chairman of the state Republican Party, Tom Fetzer, formed a "super PAC" to promote Newby's candidacy. Seeming to agree with Capps, Fetzer was quoted as saying of the Supreme Court race, "I happen to think that this election is one of the most important in the state this year" (Jarvis, 2012a).

In an article in one of the state's largest newspapers, the Raleigh *News & Observer*, journalist Craig Jarvis wrote:

> Although judicial elections are officially nonpartisan, there are strong partisan stakes in the outcome of this race. In the balance is the current 4-3 split on the state Supreme Court that currently tips conservative. Newby is a registered Republican and Ervin a Democrat. While the court, by definition, decides the most contentious and far-reaching legal questions of the day, the overshadowing controversy headed its way will be the legislative and congressional redistricting that has given state Republicans a great deal of control (Jarvis, 2012b).

In the same article, candidate Ervin described the ideal of the nonpartisan judge as he communicated "his belief that someone sitting on the bench should not have a political or ideological agenda" and was quoted as saying, "I think I've got a reputation for not having a persistent pattern of ruling for or against any particular type of party" (Jarvis, 2012b). Ervin implied that identifying such a persistent pattern would be the sign of a more partisan judge. Newby went on to win the general election with 51.9 percent of the vote.[2]

While some of the enthusiasm behind Newby and Ervin could be attributed to simply a desire by committed Republicans and Democrats to see a member of their "team" win an important position, surely some of it must be attributed to hopefulness that these men would rule in ways that Republicans or Democrats would prefer. That begs the question: considering the potential outcomes of the judicial decisions that could be made, are these partisans correct in

[2] Election results are available from the State Board of Elections at www.ncsbe.gov.

treating a nonpartisan race for the North Carolina Supreme Court as essentially another partisan race, as though nothing has changed since the enactment of the JCRA? Will Democrats and Republicans, who may be inclined to make different decisions as judges, act substantially the same, regardless of the nature of the ballot? More broadly, does a choice (by a legislature or by a state's voters) to change the system of judicial selection make a difference in a court's decisions, and if so, in what way(s)? Considerable scholarship has examined the relationships of partisanship, differences in selection mechanisms, and judicial decision-making (see Chapter Two). Although it has been well-established that Democratic and Republican judges exhibit sometimes notable differences in their decisions, *the influence of the selection system on those judges* has been less clear.

Research Question

The recent history of the North Carolina Supreme Court provided an opportunity for a kind of natural experiment in which to observe any differences between how the Court ruled before and after the change. The purpose of the thesis is to examine whether in a relatively short span of time, any detectable differences appeared between judicial behavior and the decisional output of the North Carolina Supreme Court in its partisan era and in its nonpartisan era. I examined both the Court as a whole and the individual justices, focusing in particular on those who served during both eras, to see if justices' voting behavior changed, if such changes were similar among the Democrats and Republicans on the Court, if partisan "blocs" were stronger or weaker, if the justices overturned legislation more or less frequently, and if the Court issued relatively more or fewer unanimous decisions. Using existing research on nonpartisan and partisan institutions,[3] I tried to determine if the justices' behavior during the Court's partisan and

[3] Here and elsewhere I use the word "institution" in its everyday sense, as a synonym for an "organization," especially one that is well-established. The North Carolina Supreme Court itself is the "institution" in question.

nonpartisan eras matched what one might expect to see in either era, and whether and how decision-making has changed in expected ways since the JCRA. My approach is essentially institutional or neo-institutional. Paul Brace and Melinda Gann Hall described institutionalism as "focusing on structural or environmental characteristics of courts as determinants of the judicial vote…[including] such contextual variables as the presence or absence of an intermediate appellate court…and the degree of partisan competition." Neo- institutionalism is a more nuanced version of institutionalism, which "proposes that institutional arrangements, which consist of internal and external rules as well as organizational structures, determine the aggregation of individual preferences within any given decisionmaking body" (Brace and Hall, 1993, p. 916). This approach "bridges the gap" between traditional jurisprudence, which saw the law as determining judicial outcomes; attitudinal theory, which focused on the individual judges' personal beliefs and values; and earlier forms of institutional analysis (Brace and Hall, 1993, p. 916). Brace, Langer and Hall summarized it well when they wrote that "scholars of judicial politics now are proceeding theoretically from a rationality assumption and are focusing particularly on how purposive behavior is structured by institutional context" (Brace, Langer and Hall, 2000, p. 388). My approach also fits (or at least does not conflict with) a more recently developed model of judicial decision-making, "public choice theory," which focuses on how judges' self-interest influences their decisions (Shepherd, 2011, pp. 1754-1755). That is to say, I am considering in part how the changes in the election system for North Carolina Supreme Court justices changed the incentives that they confront. If justices changed their behavior based on this new environment, they might do so in order to satisfy their own goals, whether those goals are advancing particular public policies or simply maximizing their tenure on the bench.

The laws governing elections to the Court are "institutions" in another sense of the word, but to avoid confusion I will consider the laws part of the court's "institutional arrangements."

Importantly, my research did *not* seek to study North Carolina's judicial elections *per se*, but rather the consequences of those elections -- what happens after the votes are tallied and the winners installed on the bench. Substantial research has been conducted on judicial electoral campaigns and the various pros and cons of different methods of judicial selection, but I was more interested in following in the footsteps of those who have compared the decisions that these courts produce. After all, since more of the justices' time is spent actually making judicial decisions and drafting opinions than it is in campaigning once every eight years, I believed it would be more illuminating to study what it is they are elected to do. Retired U.S. Supreme Court Justice Sandra Day O'Connor (herself a former partisan politician who favors eliminating judicial elections altogether) has warned that "judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the constitution" (qtd. in Brandenburg and Schotland, 2008, p. 1250). That implicates not only the propriety of the partisan electoral process, but also the outcomes of the decisions made by those elected. She suggests that if judges are less beholden to parties and special interests, their decisions are likely to be closer to "the law and the constitution."

Significance of Thesis

If it is true that "the choices justices make" (the title of a book by Lee Epstein and Jack Knight) are based not only on their ideological preferences but also on the institutional and other strategic contexts in which they find themselves, then the significance of this thesis lies in observing whether and how changes to the state supreme court as an institution result in any changes in the choices these justices make. This will be significant not only to scholars of judicial decision-making but also to lawyers and law professors, and to those who take sides in the debate over judicial selection.

That debate is supposed to be about more than mere constitutional tinkering. We dwell on the topic of judicial selection, according to Brian P. Troutman, out of a desire to combat "disillusionment with our society's judicial system" by finding a way to produce "a judiciary that is independent, accountable, and qualified to administer society's laws. An independent judiciary is one marked by freedom from political pressures, ***including party platforms*** [emphasis mine] and campaign finance solicitations, while an accountable judiciary is one that is responsive enough to the electorate's needs to avoid issuing idiosyncratic rulings" (Troutman, 2008, p. 1762). Scholars like Dubois have long argued that "the conflict between the values of judicial accountability on the one hand and judicial independence on the other that is at the heart of the debate" -- a "normative clash" that cannot be settled empirically (Dubois, 1979, p. 777).

My thesis cannot demonstrate that the nonpartisan reform is normatively "good" or "bad" for the people of North Carolina. It may, however, suggest implications for judicial accountability and independence. Considering accountability, for example, the question could be framed in this way: if a North Carolina voter knows the partisan affiliation of a candidate for the state Supreme Court (even though the affiliation does not appear on the ballot) and desires to keep the judiciary accountable to him/her by electing only members of Party X, does s/he obtain court decisions with which s/he would likely agree, to a greater or lesser extent than s/he did when the court's elections were *formally* partisan? If s/he cannot obtain court decisions s/he wants by means of following partisan cues, and if (like most voters) s/he pays little attention to most of the court's decisions on a regular basis, then her/his exercise of accountability has been significantly weakened. On the other hand, if a voter values an independent judiciary over an accountable one, s/he may actually appreciate that s/he cannot precisely obtain certain types of decisions by voting for justices who happen to be Democrats or Republicans.

It seems reasonable to hypothesize that citizens (directly or through their elected legislators) in any state would make reforms to judicial selection out of a belief that such reforms would make a difference in the courts' decision-making (since, after all, courts are intended to make decisions). I find it difficult to imagine any other objective the voters would have in making the reforms, presuming, as I do, that most citizens do not spend an inordinate amount of time studying political or legal theory. Clearly, seeking to help a particular party's candidates to be more successful is a rational objective for partisans (and partisans may be larger and larger percentages of an electorate that has seemingly become more polarized in recent years). It seems likely that less partisan voters (and those whose favored candidates would stand to lose under such changes to the system) would find that a weak rationale, and therefore, to succeed, a party would need other, less self-serving justifications for making reforms.

In my view, scholars and citizens should demand to find out what they are getting from such electoral system changes. An obvious difficulty is that even if one wanted to, one could not re-argue cases in different court systems in order to see what difference it makes. But in the case of North Carolina, one can at least study what happened before and after the reforms of the same court, leaving many other variables the same, including many of the same justices and litigators, albeit at different points in their careers. Other studies have compared different states, usually at the same times in history. This is indeed valuable research, but studying the same judicial system longitudinally permits one to hold many variables (e.g., state political culture, state laws) roughly constant, permitting attention to focus on the single change of interest. As Chapter Two elaborates, scholars have found evidence to support both theories that there are, and that there are not, noticeable differences between courts whose judges are elected in partisan elections and those selected by nonpartisan vote. Although my contributions will not be able to definitively

answer the question, I can at least add evidence from a single state to the discussion in a way that eliminates the "peculiarities of states" (Jacob, 1964, p. 113) as variables.

As I illustrate in Chapters Four and Five, this case study found some differences between the Court's decision-making before and after the imposition of the nonpartisan reform, although I could not attribute these differences to the reform. Therefore, the significance of the thesis lies, in part, in that it could indicate that removal of partisan label from the ballot is a rather inconsequential judicial selection reform. It may also weaken (or at least be inconsistent with) the theory that institutional arrangements impact judicial decision-making; one could always argue, of course, that more years must go by (and more justices must be selected under the new system) until one could see whether the change has made a difference.

This thesis also is significant because of its possible implications (albeit tentative ones) beyond studies of state courts. Voters in the U.S. elect many members of other collegial bodies, such as city councils, via both partisan and nonpartisan ballots. This research could suggest the possible effects on such bodies in situations in which their electoral rules changed.

Chapter Summary and Organization of Thesis

In this chapter, I have provided context for my thesis by discussing the recent changes to how North Carolina Supreme Court justices are elected, and I have argued that the case of North Carolina presents an opportunity to consider important questions about the consequences of those changes. The remainder of this thesis is organized as follows. First, in Chapter Two, I will review relevant scholarly literature. In Chapter Three, I will introduce and explain the various hypotheses to be tested, and I will describe the research design that was used to test those hypotheses. Chapter Four presents the findings, and Chapter Five concludes with my

interpretation of my findings, a discussion of the implications of my findings, and avenues for possible future research.

CHAPTER TWO

Overview of Relevant Scholarship

Purpose

The purpose of this chapter is to review scholarly literature that is relevant to the subject of this thesis: judicial decision-making and judicial selection, particularly the use of nonpartisan elections. I begin by examining earlier research that laid the foundations for scholarship that came later, before moving on to more recent work that is more narrowly focused on issues of the impact of institutional arrangements on state courts and their decisions. I briefly summarize findings that institutional arrangements have minimal consequences before devoting more study to those scholars who have found that those arrangements have made differences in who serves on the bench and how they vote. After considering how nonpartisan and partisan judicial elections differ, I include a brief description of research that purported to show that in the absence of party labels, a candidate's race may serve as an important substitute cue in nonpartisan elections. Then, I review a few studies that focused exclusively on one particular state's court of last resort. Next, I turn to particularly relevant literature that spotlighted the North Carolina Supreme Court and the Judicial Campaign Reform Act as an example of judicial selection reform. Finally, I briefly examine what studies of non-judicial political bodies whose members were chosen by nonpartisan elections might have to say about the behavior of political actors in those systems.

Foundational Scholarship on Judicial Decision-Making

Inquiry into the voting patterns of judges begins with the assumption that there will be patterns of some sort to study and votes that will be meaningful to scholars. Under the classic legal model of judicial behavior (or "traditional jurisprudence"), this would not necessarily have

been the case, since votes would have been determined by the law, precedent, and the facts of the cases that came before a tribunal. The work of C. Herman Pritchett successfully challenged that view and provided a foundation for much of the political science scholarship on the judiciary that has been produced since then. Lee Epstein, Jack Knight, and Andrew Martin wrote: "what Pritchett did, in some sense, was to move legal realism from the sole province of law schools to the corridors of political science departments. Like some proponents of socio-legal jurisprudence, he argued that judges are 'motivated by their own preferences'" (Epstein, Knight, and Martin, 2003, p. 786). Pritchett's conclusions came not from mere speculation but from data, as he saw the pattern of increasing dissent in the United States Supreme Court, which did not fit with the idea that precedent (independent of each justice's ideological views) drove decision-making. He was led "to the same solution upon which the realists happened: rules based on precedent were little more than smokescreens behind which judges hide their values" (p. 786). Thus, attitudinal theory was born. The next step was to add analysis of judges' ideological preferences to a comparison of judges across different selection systems.

In that vein, Stuart Nagel laid the groundwork for the type of inquiry this thesis undertook, when his analysis of votes by federal and state appellate court judges helped to establish the expectation (since reinforced by other researchers) that Democratic and Republican judges vote differently. Across a range of 15 different types of cases, "the Democratic judges were above the average decision score of their respective courts (in what might be considered the liberal direction) to a greater extent than the Republican judges" (Nagel, 1961, p. 845). He also took the opportunity to see if any of several judicial selection "reforms" had any impact on decision-making, including the appointment of judges and nonpartisan elections. He discovered that institutional arrangements made a difference, but only when it came to comparing appointed

versus elected judges. Appointed judges were more likely than their elected counterparts to vote in a way "contrary to their party patterns," but a similar, statistically significant difference between judges elected in partisan and nonpartisan systems could not be found (p. 848). Nagel speculated that this was because nonpartisan ballots were "near-meaningless," since political parties were still "running the elections behind the scenes," especially in states with nonpartisan general elections that followed partisan primaries (p. 850). He also wrote that "regardless of judicial tenure and modes of selection, there probably will always be a residue of party-correlated judicial subjectivity so long as political parties are at least partly value-oriented and so long as court cases involve value-oriented controversies" (p. 850).

Judicial reform advocates like Roy Schotland argue that "an offer of "Democratic" or "Republican" judging [is] artificial, even misleading; and worse, a threat to public confidence in judicial neutrality"; partisan elections mean that "a number of fine judges will lose their seats simply because, in X year, they are in the "wrong" party" (Schotland, 2003, p. 1415). Unfortunately for Schotland, the evidence gathered by social scientists is that differences frequently do appear between Democratic and Republican judges. Indeed, Sidney Ulmer's study of the Michigan Supreme Court started from "the premise that Republican justice and Democratic justice do, indeed, differ….that certain voting and opinion groupings can be explained by party affiliation, that in some specific subject-matter areas Democrats go in one direction and Republicans in another" (Ulmer, 1962, p. 355). His research using workers' and unemployment compensation cases found that "Democratic justice is more sensitive to the claims of the unemployed and the injured than Republican justice" (p. 362).

Next, Herbert Jacob determined that "the formal characteristics of the selection process clearly affect the kind of men who become judges" (Jacob, 1964, p. 117). Although dated,

Jacob's work reports several fascinating findings, including that "partisan elections gave preference to locally born men; nonpartisan elections distinctly favored those not born in their district" (p. 107) and that "few Missouri plan or nonpartisan judges held prior office; almost all legislatively selected judges, and most partisan-elected and gubernatorially appointed ones held prior political office" (p. 110). Intriguingly for the purposes here, he found that Missouri Plan and nonpartisan elected judges often would not "overtly" identify with a political party at all, so in that way the selection system did affect their behavior (p. 113). Jacob encouraged future scholars to find out whether these "different sorts of judges" produced by "the several selection systems" actually decided "cases in a systematically different pattern" (p. 117). That, of course, is the type of inquiry my research undertakes.

Kathleen Barber took it for granted that Democratic and Republican judges differed and that partisanship plays a role in decision-making in any system. That being the case, she argued that nonpartisan electoral and Missouri Plan systems simply make judicial staffing "invisible" to the voters, who cannot hold either judges (or, in some systems, the executives who appoint them) accountable (Barber, 1971, p. 767). She found that Ohio's nonpartisan system (which contained some significant differences from North Carolina's) had been more favorable to Republicans than Democrats, despite the fact that the state's partisan elections were competitive. Many potential effects on judicial decisions could result from such a clear Republican advantage. This type of research anticipated my own, in that it established that institutional arrangements must be considered when looking at a court's decisional output. Barber could only guess at what her state courts would look like if judges were elected on a partisan basis, but she believed that they would be a good deal more responsive to the public. Her reasoning was that in a partisan system, judges would have to answer to a broader electorate (as "lower-income, less-educated voters"

would be more likely to vote in the partisan elections rather than skip the nonpartisan races on their ballots), while at the same time judges would no longer be insulated from strong popular trends that result in numerous simultaneous victories for one party or the other, up and down the ballot (pp. 776, 781). Since Barber was limited to a single state, she called for "further analysis of the decisional output of state appellate courts, carefully controlled for party affiliation of the judges and for the method of judicial selection" (p. 789).

For a time, scholarly interest focused on identifying differences in the characteristics of judges among the different selection systems (following in the footsteps of Jacob). Bradley Canon downplayed any differences, finding that "institutional mechanisms surrounding recruitment to state supreme courts do not have the impact on personal characteristics which advocates of competing selection systems often imply that they have-or even the impact which investigators such as Jacob seemed to find." Canon preferred to attribute differing characteristics of judges to "regional factors" (1972, p. 588). His findings were later reinforced by Henry Glick and Craig Emmert, who found "little evidence that selection systems produce judges with markedly different or superior judicial credentials or that they vary on most other background characteristics"; rather, differences were "due mainly to region" (Glick and Emmert, 1987, p. 235). Among those regional differences were that southern states (including North Carolina) almost exclusively used the partisan election system, which was not as common in other parts of the country.

Research on Relationship between Institutional Arrangements and Decision-Making

Subsequent researchers have been divided over the question of the impact of institutional arrangements on judicial decisions. One school of thought, typified by Eugene Flango and Craig Ducat, concludes: "there is little variation in the characteristics of judges or courts, regardless of

the selection procedure which brought them to office" (Flango and Ducat, 1979-1980, p. 35). At the same time, they emphasize the importance of the party affiliation of a judge, which they write "has been the variable most consistently associated with judicial decision-making," more than variables such as race, type of education, or type of experience prior to becoming a judge (p. 34). Several scholars have observed that "efforts to discover relationships between selection methods and the decisions of state supreme courts" have produced "weak relationships" (Dudley, 1997, p. 2). Robert Dudley found small differences between states using partisan and nonpartisan elections in turnover and length of tenure, but the differences were not statistically significant (Dudley, 1997, pp. 7-8, 13). Burton Atkins and Henry Glick concluded from their research "that formal judicial recruitment processes have little impact upon the kinds of decisions that courts make" (Atkins and Glick, 1974, p. 447). John Blume and Theodore Eisenberg wrote that they "did not find a statistically significant relation between judicial selection method" and the rate at which state supreme courts affirmed or threw out death sentences imposed by lower courts (Blume and Eisenberg, 1998, p. 488). They had hypothesized that "partisan election of judges correlates with death penalty affirmance," a hypothesis supported by data from several states, including North Carolina.

Nevertheless, another body of literature has found that institutional arrangements *do* impact courts and their decisions -- at least when studies compared courts in which judges were elected and those in which they were appointed by governors or other elites. Canon and Dean Jaros found that "appointive courts are decidedly lower in their dissent rates than elective courts," while differences between nonpartisan and partisan elected courts were few (Canon and Jaros, 1970, p. 190). Other scholars have agreed that the election of judges or justices may give

them “a direct and more exclusive sense of popular constituency than appointed [judges or justices],” leading to a higher rate of dissent (Flango and Ducat, 1979-1980, pp. 34-35).

Gerald Gryski, Eleanor Main and William Dixon found differences between appointed and elected state supreme courts in how they ruled on sex discrimination issues (Gryski et al, 1986, p. 153). Andrew Hanssen concluded that appointed state high court judges, owing to their enhanced level of independence, were “less predictable” in their decision-making than their elected counterparts, leading to heightened uncertainty and therefore to more litigation. (Hanssen, 1999, p. 232).

Michael Leroy hypothesized that “judges who run in partisan elections will rule more often for employers than judges who are appointed or who run in nonpartisan elections” (Leroy, 2010, p. 1575). His results were mixed: he found that at the trial level, “employees won only 32.1% of cases before party-affiliated judges compared to winning 52.7% of cases before judges who were appointed or elected in nonpartisan races” (p. 1575), but at the appellate level, “a state’s method of selecting judges did not significantly impact employee win-rates” (p. 1604). He hastened to add that he thought his appellate results were “not conclusive” (p. 1614).

Nonpartisan vs. Partisan Judicial Elections

Complicating matters for the purpose of this thesis is that too many studies, including those of Leroy (2010), Eric Helland and Alexander Tabarrok (2002), and Madhavi McCall (2004), lump together nonpartisan election systems with appointive merit selection as if they are one category. Their likely justification is that typically, a retention election is indeed nonpartisan, but it is both nonpartisan and noncompetitive (i.e., there is but one candidate). Both these election types deprive the voter of the important partisan cue, while the retention election overtly emphasizes the “incumbency” cue. Hall once noted that, looking only at

statistics related to the electoral performance of incumbents, "Nonpartisan elections bear a striking resemblance to retention elections" (Hall, 2001, p. 324). Still, dividing court election regimes

> into either partisan and nonpartisan categories, or competitive and noncompetitive categories…mask[s] some of the finer distinctions between the different types of electoral systems…it has long been established that judges running for reelection in competitive systems behave differently than those in noncompetitive (retention) systems…[but] these studies by and large do not differentiate between competitive partisan and competitive nonpartisan elections (Hollibaugh, 2011, pp. 1-2).

Although this is a reason to test whether nonpartisan systems resemble appointive merit selection systems in judicial decision-making, it does not provide a large amount of data on the specific differences between partisan and nonpartisan election systems (Caldarone et al., 2009).

Fortunately, Richard Caldarone, Brandice Canes-Wrone and Tom Clark focused on comparing partisan and nonpartisan selection systems. Moreover, in contrast to Hanssen, they contended that nonpartisan election may make judges less, not more, independent from popular opinion than partisan election, especially if the case upon which they are voting attracts attention from interest groups, the media, and voters. The authors noted that 21 states use some form of nonpartisan elections for judicial offices, and nonpartisan elections are used for many other local and state offices across the nation. The original purposes behind replacing partisan elections with nonpartisan ones were to "enable 'statesmen' to replace politicians" and to "encourage independence from political influence," but many scholars have questioned whether or not this is actually the result (Caldarone et al., 2009, p. 561). These authors quoted research that suggested that nonpartisan elected judges are actually "more susceptible to attacks by interest groups" because a single decision on a case could unpredictably lead to their defeat, without the partisan

voting cue giving their party's voters an additional reason to vote for them (p. 562). Caldarone et al. gathered data on abortion-related cases in a number of state courts and found that

> a judge is significantly more likely to vote with the electorate's leanings if he or she faces a nonpartisan election….these results refute the conventional wisdom that partisan elections encourage more accountability than nonpartisan ones. Across all specifications, the judges in nonpartisan systems are the ones more likely to issue popular decisions (p. 568). [4]

Nonetheless, the authors conceded that "it is certainly possible that on issues unlikely to emerge as campaign matters, judges in nonpartisan systems are less likely—or at least similarly likely—to issue popular decisions" (p. 571).

David Adamany and Philip Dubois reminded us that "in nonpartisan elections, turnout is generally smaller," nonpartisan races favored Republican candidates as a general rule (1976, p. 735); moreover, electorates in such low-turnout elections tended to disproportionately represent "upper socioeconomic groups" (p. 746). It is only logical to suggest that if nonpartisan election systems produce different sorts of electorates, then the office-holders those electorates choose and the decisions that such office-holders make might somehow differ than if the election system were partisan. Adamany and Dubois concluded that not enough research had been done on judicial electorates because of "the traditional view of courts and judges that 'they make no law, they make no policy'…but the mechanical theory of jurisprudence has not been credible, at least among social scientists, since the Realist revolution of the 1920's. Modem students of state courts recognize that judges do indeed make policy" (p. 736). These authors aptly summarized what one should expect to see in a nonpartisan court, using the case of Wisconsin, which has had the nonpartisan election system for decades. In Wisconsin's state supreme court, they found

[4] This specific hot-button issue, abortion, has come before the North Carolina Supreme Court very rarely. In fact, I found only one case involving abortion (*Rosie J. v. North Carolina Dep't of Human Resources*) in the years covered by my research.

> no evidence of the partisan voting that occurred strongly or moderately in other state courts…Dissent did not increase as Democratic justices joined a formerly all Republican court. Only weak blocs appear in the Wisconsin court, and membership in these blocs tends to shift over time. Most dissenting blocs include some justices with prior Democratic affiliations and some who were formerly Republicans. Even on workmen's [sic] and unemployment compensation cases, where the traditional affiliation of labor with the Democrats and business with the Republicans might be expected to divide the justices along partisan lines, there was no party bloc voting on the Wisconsin court (p. 765).[5]

Adamany and Dubois speculated that partisan election of judges "reinforced" their "commitment to party values" each time they campaigned, but such commitments would fade: "if the selection process is nonpartisan in fact as well as ballot form;" a judge would have "a strong incentive to act in ways that show he is not a partisan" (Adamany and Dubois, 1976, p. 766). That last qualifier, "in fact as well as ballot form," clearly referred to systems in Michigan and elsewhere in which particular state practices made ostensibly nonpartisan races quite partisan.

Like Adamany and Dubois, Helland and Tabarrok wrote about "incentives" present in different selection systems, which they believed affected outcomes. Their data supported their hypothesis that trial judges produced awards for damages "against out-of-state businesses" that were "42% larger in partisan than in nonpartisan states," as the partisan elected judges had incentives to rule in favor of state voters (Helland and Tabarrok, 2002, p. 359).

Hollibaugh focused on the incentives created by subjecting a justice to a partisan primary, which typically is found only in states with partisan general elections. He wrote of the "two-constituency problem" that is well-known to those holding any sort of partisan office: "in order to stand for (re)election in partisan systems, judges must endure primary elections during which they will be judged by an electorate whose opinions and values are much closer to their party

[5] More recent observations of Wisconsin's Supreme Court (including an all-Republican majority deciding to uphold a Republican-backed anti-public-sector-union law in 2011) suggest that this description is dated and no longer holds, even though the election system has not changed.

base than those of the (much broader) electorate that will end up judging them in the general election" (Hollibaugh, 2011, p. 6). His evidence showed that "judges chosen under nonpartisan (including Merit Plan) systems generally do not respond to political pressures in ways that manifest themselves in the form of election-year behavior change," while "judges in partisan systems do respond to pressures in ways that protect them from primary challengers, shifting their behavior and ideological position more towards their so-called 'party base,' and thus away from where one would expect to locate the median voter of the electorate at large" (p. 29).

In more recent decades, Melinda Gann Hall, sometimes working alone and at times with other scholars, has been the leader in scholarship on judicial elections and decisions. In her notable 1987 case study of the Louisiana Supreme Court, she argued that previous literature that found no significant differences between judicial voting across different selection systems was insufficient because it "only examined aggregate voting patterns" and did not drill down to the level of the individual justice's behavior (Hall, 1987, p. 1118). Her research, including interviews with members of the Court, found that certain Louisiana justices who were elected by partisan ballot "seem to fear the prospect of electoral sanction and consequently alter their behavior" by strategically voting against their own inclinations to side with pro-death penalty majorities (p. 1123). Hall expanded this line of investigation with an article that included criminal decisions by the North Carolina Supreme Court and other courts of last resort, finding confirmation for the Louisiana study. "[E]lected justices in state supreme courts adopt a representational posture," leading more liberal justices to vote in conservative directions (Hall, 1992, p. 442). "Justices behave much more strategically than originally believed," Hall wrote. "Instead of public policy goals driving judicial decisions, basic self-interest may also be an important consideration to the state supreme court justice when rendering decisions…Subjecting

justices to electoral processes may produce behavior consistent with the accountability model as modified for the judiciary" (p. 443). Hall's 1995 research reinforced these earlier results: not only do electoral politics evidently influence death penalty opponents to avoid dissenting from conservative majorities, but the outcomes of these cases (literally life and death decisions) are shaped in part by concerns about re-election. "Decisions about the imposition of the death penalty in the American states are highly political … The willingness of supreme court justices actually to condemn individual defendants to death may rest, at least to some extent, on general electoral conditions and the justices' individual experiences with electoral politics" (Hall, 1995, p. 498).

Some of Hall's work has provided a foundation for comparisons between nonpartisan and partisan elected state courts, showing the incentives that these institutional arrangements create for justices. Hall and Paul Brace, for example, used death penalty votes from supreme courts in several states (North Carolina not among them) to show that the nature of the ballot (partisan or nonpartisan) interacts with other features, such as the level of competition between parties in the state, to "exert an important influence on judicial choice" (Hall & Brace, 1992, p. 164). Specifically, the authors found that "the probability of dissenting against majority decisions upholding the death penalty decreases as a function of competition in states with partisan ballots…..[while]…competition works to increase the likelihood of dissents favoring the death penalty in states with partisan judicial ballots" (p. 163).

As noted earlier, Hall also found that nonpartisan electoral systems tend to be less competitive than their partisan counterparts. She reported that 18.8 percent of state supreme court incumbents were defeated for re-election in partisan elections between 1980 and 1995; during the same time period, only 8.6 percent of state supreme court incumbents were defeated

in nonpartisan elections (Hall, 2001, p. 319). Meanwhile, only 44.2 percent of incumbents were challenged for re-election in nonpartisan elections, while 61.1 percent of incumbents in partisan elections faced opponents (Hall, 2001, p. 317).

Furthermore, Chris Bonneau and Hall found that incumbents in partisan elections are not only more likely to be challenged but also "to attract quality challengers than incumbents in nonpartisan elections," with "quality" challengers defined by their prior judicial experience (Bonneau and Hall, 2003, p. 343). In a subsequent study, the authors confirmed that "challengers [of any sort] are more likely to appear in statewide partisan elections" than in statewide nonpartisan elections (Hall and Bonneau, 2006, p. 28). Bonneau similarly found that "incumbents running in partisan elections perform about 3 percentage points worse than incumbents running in nonpartisan elections, other things being equal" (Bonneau, 2007, p. 497).

If nonpartisan elections are, as Bonneau and Hall and others have reported, less competitive than their partisan counterparts, the question becomes: what effect does that lack of competition have on justices who are therefore more secure in their seats? Brent Boyea studied competitiveness as it relates to the ideology of the justices who are elected, finding "a significant and positive relationship between greater electoral competition and increased ideological polarization" and that "increased competition encourages a wider range of candidates" (Boyea, 2007, p. 658). In turn, in states with elected supreme courts, "diverse justice preferences display more significant patterns of disagreement suggesting that where personal preferences are diverse, consensus is difficult to reach" (p. 662).

Race as Substitute Cue in Nonpartisan Judicial Elections

At least two studies examined how voters might make their decisions in nonpartisan judicial elections in the absence of party labels on the ballot. Burton Atkins et al. hypothesized

that “a candidate's racial identification may act as a surrogate conceptual cue” (Atkins et al. 1985, p. 215); data from a Florida election supported the hypothesis, as the black candidate mobilized black voters (p. 224). Similarly, Nicholas Lovrich et al. wrote that voters in nonpartisan judicial elections “rely more than ever on visible (perhaps irrelevant) attributes of candidates in their voting choices” (Lovrich et al, 1988, p. 807). These authors concluded that racial/ethnic “minority cues by and large substitute for the supposedly irrelevant political party affiliations and ideological labels,” making the vote by race a “rational” one for many voters who lean “liberal” and want increased minority representation on the bench (p. 816). Since African Americans today identify primarily with the Democratic Party, an African-American candidate’s race would make sense as a “substitute” cue. It should be noted that during the period studied here, all of the African-American justices on the North Carolina Supreme Court (Justices Frye, Wynn, Butterfield, and Timmons-Goodson) were indeed Democrats. All of their colleagues on the bench were Caucasian, with no other races represented.

Studies of Individual High Courts

Focusing on individual state supreme courts, as this thesis does, also has led to important findings. Even when patterns appear across all state courts of last resort, they might not be present in a given state. For example, Brent Bateman’s 1999 study of the Michigan Supreme Court (a state that, much like Ohio, uses partisan nomination and nonpartisan election of justices) found that the party affiliations of four justices were related to their “judicial disposition” but those of the three others were not, leading him to conclude that “reliance on political affiliation can sometimes be deceiving” (Bateman, 1999, p. 389).

Elaine Martin and Barry Pyle’s study of the Michigan Supreme Court is also instructive, since it focuses on a court whose members are elected in nonpartisan races. As stated earlier,

however, Michigan's unusual system -- in which candidates are nominated by party conventions, even though their party affiliations are not listed on the ballot -- does not quite live up to the nonpartisan label. "Both political parties agree that the ideological makeup of the Court is crucial…Michigan has a reputation, dating back at least forty years, of being a highly partisan court" (Martin and Pyle, 1999, p. 1209). Martin and Pyle found statistically significant relationships between justices' party affiliation, sex, and race on their votes in cases categorized as "discrimination," "divorce" and "feminist issues." On the supposedly nonpartisan court, "party affiliation was a better predictor of judicial voting than gender in two of the three issue areas" (p. 1235). The authors theorized that partisanship was maintained by "the need for re-election," creating "a situation in which party continues as an important reference group for the judge," since Michigan's justices serve "a relatively short eight-year term" (the same term length as in North Carolina) (p. 1235). It should be reiterated that even though the general elections were nonpartisan, justices had to first go through a partisan nomination process in order to have a chance at another term.

A study of the Tennessee Supreme Court by Daniel Foley offers an interesting parallel to the study here. Foley examined not a shift in the method of judicial selection but instead a perceived political/ideological shift from "conservative" to "liberal," resulting from turnover on that state's high court (circa 1990, when the state used partisan judicial elections). He sought to explore whether this shift led to a detectable change in judicial decision-making. His coding of cases was similar to that used in this thesis, coding victories for the following parties as "liberal": "criminal defendant" over "prosecution," "individual" over "government," "individual" over "business/institution," "government" over "business/institution," "employee" over "employer/insurer," "injured" over "insurer/insured," and favoring "civil rights" and "civil

liberties" claims over opposing said claims. Foley also disregarded cases that did not fit into this type of analysis, including divorce cases and cases pitting one corporation against another (Foley, 1996, p. 160). He found that 90 percent of this high court's opinions were unanimous during the period he studied, which he attributed in part to all the justices being Democrats (p. 163). He did, however, find that the 1990 replacement of three justices made the Court's decisions more liberal; their replacement "was initiated by Democratic party leaders" largely with that purpose in mind (p. 178). Foley attempted to improve upon other studies that characterized state justices as "simply liberal or conservative" by using five categories: "liberal, leaning liberal, moderate, leaning conservative and conservative" (p. 186).

Meanwhile, moving from North Carolina's neighbor to the west to its neighbor to the south, Kimberly Petillo found that the South Carolina Supreme Court's decision-making changed following an institutional change. After the Palmetto State added a Judicial Merit Selection Commission to limit the candidates who could be elected under the state's unusual process of judicial selection by the legislature, the high court decided cases "with a sense of independence from the General Assembly, resulting in decisions based upon their individual ideologies, rather than the political tides of the General Assembly" (Petillo, 2004, p. 938). She argued that post-reform, the Court more often overturned precedent and defied the United States Supreme Court, and justices were "probably not overly concerned with any political backlash, primarily because of the buffer created by the Commission" (p. 942). Petillo characterized this as the Court's "loss of accountability to any body, be it legislative, public, or judicial" (p. 960). Her approach, tapping the overturning of precedent instead of using a liberal-conservative spectrum, can make it difficult to compare to other high court studies, since she cites precedents that were overturned in a liberal (pro-criminal defendant) direction, at least one precedent that was overturned in a

conservative direction, and others that were unclear in that regard (pp. 949-957). In this article, the word "conservative" is used at times to mean "conservative in ideology" and at other times to mean "favoring stare decisis," making this analysis more suited to the law review in which it was published than to a political science journal. It does, however, support the institutionalist perspective that institutional arrangements make a difference to how courts rule.

Research on North Carolina and JCRA

Several scholars have focused on the North Carolina Supreme Court within the last decade. In her study of the Court, Rachel Ryan reached a conclusion similar to that of Bateman regarding Michigan, finding that party labels were not necessarily good indicators of a particular judge's voting behavior. She emphasized that all justices "have unique approaches and particular causes they champion, none of which can be surmised simply by looking at their political party affiliations" (Ryan, 2004, p. 933). Ryan found that the North Carolina Supreme Court was, between 1995 and 2002, "fairly conservative," using examples of its jurisprudence both in criminal cases (pro-defendant "liberal," pro-prosecution "conservative") and in torts (pro-plaintiff "liberal," pro-defendant [often a business] "conservative") (p. 917). Although somewhat limited in its scope, criminal cases and torts make up a large proportion of the Court's typical output. At the same time, the strength of the study was that with her smaller dataset, Ryan could take the time to closely examine the legal reasoning that was evident in justices' written opinions, finding, for example, that the conservative voting of Justice Parker, a Democrat, reflected her adherence to precedent, even when she disagreed with certain prior rulings. Ryan also found that some justices were conservative in criminal cases while simultaneously liberal in torts, or vice versa. She did not find major differences in the degree of

conservatism when the Court shifted from Democratic to Republican dominance in the late 1990s and early 2000s.

In a different context, the North Carolina Supreme Court was also featured in Bonneau and Hall's important book, *In Defense of Judicial Elections*. In that book, the authors expressed concerns about nonpartisan elections (although they preferred elections of some sort over any less democratic selection systems). Bonneau and Hall focused almost exclusively on making their pro-election argument, so they did not write in any detail about the decisions that judges made under the various selection systems. They did, however, proceed from the same institutionalist premise as this thesis, namely that "institutional arrangements affect how justices approach the issues and strategy" (Bonneau and Hall, 2009, p. 14). Bonneau and Hall argue that nonpartisan elections simply strengthen the incumbency advantage and make judges less accountable to the electorate (p. 8). They noted that in North Carolina at least through 2004 (when nonpartisan elections began), state supreme court seats had been among the "least secure electorally" of high courts nationwide (p. 87) and that "North Carolina…has produced some of the most contentious elections in the nation" (p. 107). The authors specifically examined the recent North Carolina changes (as well as those in Arkansas), but with an eye to "their consequences or likely consequences on the democratic process," not on the justices' decisions (p. 104). They argued that North Carolina's partisan Supreme Court elections compared favorably with the rest of the nation, with greater competition indicated by the incumbents' average vote share of 56.8 percent (compared to the national average of 70.2 percent) and more voter engagement indicated by a ballot roll-off rate of 14.1 percent (versus the national average of 22.9 percent). Bonneau and Hall noted that polls indicated that North Carolina voters "do not feel that they have enough information to participate" in judicial elections, which struck the

scholars as "an odd finding, considering the significantly below-average rates of roll-off in North Carolina Supreme Court elections" (p. 109). I would argue that this finding is not odd at all, because voters under the partisan system were likely to be just as ignorant of the state judiciary and the candidates as under any other system; yet under the partisan system, they still participated in the only way they knew how, by turning to partisan cues. In fact, under the old system, some voters might not even have consciously participated in judicial elections if they voted a straight-party ticket and did not bother to read the ballot carefully. Although Bonneau and Hall admitted that their conclusions were "highly tentative" because the reforms were still fairly new, they found that the numbers of candidates opposing incumbents in North Carolina were decreasing and that voter participation had sharply decreased after the switch to nonpartisan elections (pp. 110-112). Again, the latter finding makes sense when one considers the number of straight-ticket voters who ceased to vote in judicial elections after the reforms (particularly when the nonpartisan system was new, and low-information voters had not yet become accustomed to voting separately for judges).

Ryan Souders also wrote about North Carolina, but his point of view was diametrically opposed to that of Bonneau and Hall. He opposed elections generally and favored merit selection. Souders argues that "a truly nonpartisan election free from the stain of politics would dramatically improve the current partisan election system," but that such a "truly nonpartisan" electoral system had never been (and perhaps could never be) created (2006, p. 565). Writing that North Carolina had recently moved to publicly-financed, nonpartisan elections in order "to take politics and the appearance of partiality out of its failed election system,"[6] Souders concluded this "effort has not found success" (p. 566). While his arguments were normative and

[6] He did not explain why the system "failed," except to the extent that he expressed his belief that all judicial election systems were failures.

not empirical, his point was that partisanship had not left the system simply because party labels no longer appeared on the ballot. Souders illustrated this with the first nonpartisan election in 2004, in which "the people chose to elect an assistant federal prosecutor with no judicial experience to the state Supreme Court over several other candidates with more quantitative [read: "years of"] experience. Successful candidate Paul Newby was chosen by a paltry twenty-three percent plurality, and some speculate that his Republican Party endorsement fueled his win" (p. 566). Souders characterized the efforts to publicize candidates' party as "subversive political affiliations," and he argued that the election of Justice Newby was evidence that "those who choose to abide by the spirit of the elections" were punished (p. 566). Souders did not offer any data that Democratic candidates in the same race were any less likely to communicate their party ties to Democratic voters. He simply noted that the other major Republican candidate in that particular race, Superior Court Judge Howard Manning, disavowed party affiliation and tried to run a nonpartisan race. Souders did not report that this unusual election (which had no primary due to the small amount of time between Justice Robert Orr's decision to resign and the general election) simply featured more Democratic candidates than Republican candidates, and the resulting split among Democratic votes also might account for Newby's election.

The expected drop in voter turnout suggested by Adamany and Dubois and by Bonneau and Hall did occur after North Carolina switched from partisan to nonpartisan judicial elections. To attempt to compensate for voters' lack of information about candidates' partisan affiliations, the JCRA mandated the creation of "voter guides," which are mailed to all registered voters and include biographies of the judicial candidates as well as personal statements (in which candidates may choose to identify as members of a party or at least give strong hints). Traciel Reid and Robert Moog reviewed the state's first few years using the new nonpartisan system. They found

that “despite the availability of the voter guides, roll-off in the North Carolina appellate court races is characteristic of voter roll-off found in other nonpartisan judicial election states” (Reid and Moog, 2011, p. 236). Furthermore, the authors conducted a survey in which “majorities of all groups…indicated a desire to have the party identifications of appellate court candidates returned to the ballot” (p. 242). This was a surprising finding, since other opinion polls had shown voters preferred “nonpartisan” elections; perhaps they merely liked the sound of the word “nonpartisan” in an increasingly partisan age. Reid and Moog asked: “what does ‘nonpartisan’ mean in this context, and should reformers be concerned?....It appears that rather than serving as a model of judicial election reform, the early results from North Carolina serve as an additional warning for advocates of nonpartisan elections” (p. 243).

Nonpartisan Political Bodies

Finally, some scholarship that explores nonpartisan institutions beyond courts is potentially illuminating for this thesis. Wayne Swanson et al. studied the nonpartisan Maryland Constitutional Convention of 1968 and concluded that indeed there were differences between partisan and nonpartisan legislative bodies. They found that, first, “when legislators are left without the guidance of party and other organized forces to act as reference groups or disciplinary agents, voting patterns are considerably more random, making the process of categorization difficult” (Swanson et al., 1972, p. 47). In addition, some voting cohesion appeared to be based on “shared attitudes on specific policy spheres” (p. 48). Similarly, Susan Welch and Eric Carlson studied what is today the only state legislature elected on a nonpartisan basis, the Nebraska unicameral legislature; they found “relatively little structure in voting” (Welch and Carlson, 1973, p. 865). Nearly four decades later, scholars fretted that the Nebraska legislature was becoming increasingly partisan, but they still found “a somewhat chaotic

environment" in which "coalitions form around particular issues, including abortion and urban/rural issues, but those coalitions regularly transcend party lines" (Masket and Shor, 2011, p. 11). It seems reasonable to consider whether this model of voting -- not predictably partisan but rather based on ad hoc coalitions for each area of policy (e.g. a pro-death penalty coalition) -- could apply not only in legislative but in judicial settings.

Chapter Summary

This chapter has set the scholarly "stage" for my thesis by reviewing what previous researchers have found. I have discussed the early work that established that Democratic and Republican judges tend to vote in different ways, but I have noted that scholars have been divided on the issue of whether institutional arrangements such as selection systems have much impact on how judges vote. I have reported on a great deal of research that suggests that at least nonpartisan and partisan judicial elections differ, and quite possibly the decisions made by judges in these two different types of electoral systems differ, as well. Other case studies of individual high courts have been used as examples of how other researchers have analyzed their decision-making, sometimes in conjunction with institutional changes. I have also highlighted articles that specifically dealt with the North Carolina Supreme Court, including one that found the Court (in its partisan era) conservative but not precisely partisan, and others that questioned whether the state's imposition of nonpartisan judicial elections accomplished anything other than decreasing voter turnout. Finally, I found evidence that nonpartisan elected legislative bodies have often been characterized by more unpredictable voting patterns than their partisan counterparts. With this supply of previous research in mind, the next chapter proceeds to explain the hypotheses I made to continue the exploration of changes to judicial selection and decision-making.

CHAPTER THREE

Propositions, Hypotheses, and Research Design

Purpose

In Chapter Three, drawing inspiration and guidance from some of the scholarship presented in Chapter Two, I will describe the framework I used to make certain propositions, which I converted into testable hypotheses in order to carry out this "natural experiment." To study the relationship between the change in North Carolina's judicial selection system and the North Carolina Supreme Court's decision-making, I sought to pinpoint certain measurable characteristics of the Court's decisions and individual justices' votes which, taken together, might yield a basis for comparison of the Court over a number of years. The first section of this chapter deals with my propositions and hypotheses. Then, in a second section, I will outline the research design I used and how the data I collected were used to test each hypothesis, while also describing the design's limitations.

Propositions and Associated Hypotheses

In this section, I will describe my propositions and hypotheses, which are summarized in Table 1. After some introductory material about the bases for examining particular characteristics, I advance a proposition and then describe the hypothesis(es) associated with that proposition.

PROPOSITION ONE

First, I considered what exactly changed for North Carolina Supreme Court justices with the introduction of nonpartisan elections, beyond the obvious removal of party labels from the general election ballot. One change I focused upon was the removal of the partisan primary from the election process, and the implications that change might have on justices' behavior. As I

discussed earlier, Hollibaugh (2011) wrote that the "two-constituency problem" could apply to justices in a system in which they must run for a party nomination.

As described in Chapter One, North Carolina Supreme Court justices examining the election returns in recent years (during the "nonpartisan era") would have more reason to feel secure in their positions than in the last years of partisan elections, when several incumbents went down to defeat. Furthermore, a specific threat to a justice's re-election -- being defeated by a fellow partisan in a primary -- has been eliminated, since the new North Carolina selection system eliminated party primaries for judicial candidates. Today, a liberal Democrat might, for example, challenge a more moderate Democrat in a judicial primary, but because the liberal would be running in the nonpartisan primary, he or she would be facing an electorate that included Democrats, Republicans, and unaffiliated voters. The candidate's strategy would have to be significantly different from what it would have been under the former system (which allowed only Democrats and unaffiliated voters to vote in the Democratic primary). In 2010, something along these lines occurred in the campaign for the seat of incumbent North Carolina Court of Appeals Judge Rick Elmore (elections for this court follow the same format as those for the Supreme Court). Steven Walker, who had only graduated from law school five years earlier and then served as a law clerk for then-Justice Brady, challenged Elmore, running as a conservative. Two Democrats also filed for the seat. In the nonpartisan primary, Walker was the top vote-getter, far outpacing incumbent Elmore. Under the previous partisan system, Walker would have won the Republican nomination and Elmore would have been turned out of office. Under the nonpartisan system, however, since Elmore's votes surpassed those of either Democrat, he came in second and advanced to the next round to face Walker again in the general

election. In November 2010, facing the general rather than the primary electorate, Elmore beat Walker.

I sought to investigate the extent to which justices' decisions bear the marks of their partisan affiliations and the extent to which they vote with their colleagues on the bench as members of the same partisan "team." I proposed that in this new environment, justices would be more likely to vote differently from party-based expectations (at least on certain issues) than they did when they faced the possibility of a hostile primary. Furthermore, I expected that this change would take place gradually over time; as one moves further away from the enactment of the JCRA, justices' votes would be more and more unpredictable, because larger and larger percentages of the justices would assume the bench having won election under the nonpartisan system, supposedly setting them "free" from their partisan ties.

I also believed that the types of cases in which I would find more evidence of change would be those types in which past scholars found the most partisan differences. Adamany and Dubois wrote, for example, that "party affiliation is most strongly related to judges' values and to their votes in cases involving economic issues" (1976, p. 763). I expected that more changes would be seen in judges' votes on economic distribution cases as well as those involving civil rights and civil liberties, and those involving redistricting. I did not expect significant differences between the partisan and nonpartisan eras on cases involving capital punishment, an issue that some studies (e.g. Blume and Eisenberg, 1998; Hall, 1992; Hall & Brace, 1992) have used to compare partisan differences. North Carolina's citizenry has traditionally been conservative on the death penalty, and this evident consensus has included members of both major parties. A 2011 opinion poll of North Carolina residents showed 71 percent support for capital punishment for first-degree murder, with majority support among Democrats,

Republicans, and unaffiliated voters (Trout, 2011). Another reason to expect state Supreme Court justices to uphold death sentences (no matter their personal beliefs) is that they will recall the experience of former Chief Justice James Exum, who had opposed the death penalty as a legislator before joining the Court and then had to wage unusually tough campaigns to win and retain his seat on the Court, while his opponents emphasized his anti-capital punishment views. Exum was quoted as saying on the question of "whether elected state judges can survive if they sometimes overturn death sentences, the answer is yes, they can, but I believe it is becoming more and more difficult" and he announced that he would resign before his term expired, saying, "I'm glad I will not have to run again" (Redlich, 1993, pp. 272-273).

Therefore, my first proposition was this: ***the nonpartisan election system will be associated with justices being more likely to vote in ways that differ from those predicted by their political party affiliations***. That is, a justice's party affiliation will be less of a predictor of how s/he votes, and all the justices of a particular party will be less likely to vote in accord with each other.

The following hypotheses flow from this proposition.

HYPOTHESIS ONE: The individual votes of North Carolina Supreme Court justices in non-unanimous decisions will be less likely to correspond with the vote that would be expected based solely on their partisan affiliation between January 1, 2005 and December 31, 2011[7] than during the period of January 1, 1995 through December 31, 2004. Furthermore, votes will be increasingly less likely to correspond with such partisan expectations from Jan. 1, 2005 through Dec. 31, 2011.

[7] The first nonpartisan elections were held in 2004 and justices elected in November 2004were sworn in on or about January 1, 2005.

HYPOTHESIS TWO: Decisions of the whole Court will be less likely to correspond with the type of decision that would be expected based solely on the partisan makeup of the Court (i.e. a decision expected of a "Republican-majority" court or a "Democratic-majority" court) between January 1, 2005 and December 31, 2011 than during the period of January 1, 1995 through December 31, 2004.[8]

HYPOTHESIS THREE: From January 1, 2005 through December 31, 2011, all justices of the same party will be less likely to vote together as a bloc in non-unanimous decisions than they were between January 1, 1995 and December 31, 2004.

PROPOSITION TWO

As I described in Chapter Two, Hollibaugh (2011) found differences between judges in partisan and nonpartisan systems regarding whether they modified their voting behavior in election years. Working on the notion that this is an actual difference between partisan and nonpartisan systems, I determined that finding a difference on this measure between the Court's two eras could help to determine if the Court truly showed the expected change from one era (and one system) to the other. I expanded my window of time beyond simply the election year, however, because in North Carolina, filing for election takes place quite early in the election year, in February, with primary elections (whether partisan or nonpartisan) occurring in May.[9] Under the partisan system, if justices changed their behavior to avoid a primary opponent, they would therefore have to change their behavior before February (and realistically, before the year begins). If justices changed their behavior to appeal to their party's primary electorate under the old system, a May primary still gives a justice only four months to change his or her behavior, which hardly seems like enough time considering the sometimes-slow court processes and the

[8] To test this hypothesis, I include unanimous decisions.
[9] See North Carolina General Statutes, Chapter 163, sections 1 and 106.

fact that cases which attracted public notice in, for example, November or December of the previous year could still be fresh in voters' minds when they cast ballots in May (and earlier, since early voting has become increasingly popular). Following Hollibaugh's lead but making my own modification, my second proposition was this: ***under the nonpartisan regime, not only will justices vote more unpredictably, but also, justices' voting tendencies will not change noticeably in the year before or in the year of their next election***.

> ***HYPOTHESIS FOUR***: Beginning on January 1, 2005, justices will be less likely than between January 1, 1995 and December 31, 2004 to modify their voting in a more "liberal" (for Democrats) or a more "conservative" (for Republicans) direction in the year before or the year of their next election.

PROPOSITION THREE

The first two propositions dealt primarily with measuring votes as "liberal" and "conservative," but I also sought to determine if there were other ways of measuring the Court's judicial output for this thesis. One of the most important duties of any court of last resort in the United States is to exercise judicial review to determine if statutes or official actions of the executive branch comply with the state or federal constitutions.[10] Although little scholarship evidently addresses the issue of judicial review in the context of partisan and nonpartisan election systems, I believed that justices might come to identify less with their fellow partisans in the other branches once their elections no longer officially involve parties. From this perspective, justices might become bolder and more willing to challenge the decisions of elected officials. My third proposition was therefore that ***the imposition of the nonpartisan reform will***

[10] The state of North Carolina's history of using judicial review predates the United States Supreme Court's decision in ***Marbury v. Madison***. In ***Bayard v. Singleton***, 1 NC (Martin) 5 (1787), the Court of Conference, predecessor to the North Carolina Supreme Court, ruled that a state law could not be enforced because it was inconsistent with the North Carolina Constitution.

prompt a greater willingness on the part of the North Carolina Supreme Court to exercise judicial review and overturn an act of one of the other branches.

> ***HYPOTHESIS FIVE***: The North Carolina Supreme Court will strike down acts of the legislature or of the executive branch as violations of the North Carolina Constitution or the United States Constitution more frequently during the period January 1, 2005 through December 31, 2011 than between January 1, 1995 and December 31, 2004.

PROPOSITION FOUR

Melinda Gann Hall suggested that certain justices facing "the pressures of re-election" may vote in ways inconsistent with their own views on "highly controversial issues of public policy," leading to unanimous opinions (Hall, 1987, p. 1123). Meanwhile, Foley (1996) associated unanimous opinions in part with partisanship, finding that an all-Democratic Tennessee Supreme Court (that often ruled unanimously) might not only consist of justices who agree ideologically but also that, in a partisan election system, they might have partisan incentives to try to reach unanimity -- perhaps to support each other as members of the same "team." If justices in North Carolina's nonpartisan regime face less re-election pressure (while simultaneously having less "partisan reinforcement" that might keep them voting in line with their fellow partisans), then there should be less of an incentive for an uncertain justice to vote with his or her fellow justices on a close question. With that in mind, my fourth and final proposition was this: ***a nonpartisan North Carolina Supreme Court will be less likely to reach unanimous decisions than the same court was during the partisan era***.

> ***HYPOTHESIS SIX***: A smaller percentage of decisions of the North Carolina Supreme Court will be unanimous during the period Jan 1, 2005 through Dec 31, 2011 than between Jan. 1, 1995 and Dec. 31, 2004.

Table 1: Summary of Propositions and Hypotheses

PROPOSITION	**ASSOCIATED HYPOTHESIS(-ES)**
PROPOSITION ONE	1-3
PROPOSITION TWO	4
PROPOSITION THREE	5
PROPOSITION FOUR	6

Research Design

To test the hypotheses listed in the previous section, it was necessary to examine all of the cases that the North Carolina Supreme Court decided during the calendar years 1995 through 2011 (the last full calendar year available when I began my research). This section examines how I went about doing so. First, I will provide details on the nature of the North Carolina Supreme Court that influenced how I conducted the research and the time period I studied. Next, I describe the sources of data, how I collected them, and the bases on which I coded the data. That is followed by a description of how I analyzed my data to test each hypothesis. Finally, I consider the limitations of this thesis.

Nature of the Court

Unlike the U.S. Supreme Court, the North Carolina Supreme Court does not officially have "court terms" consisting of certain months of each year. The North Carolina court system website (http://appellate.nccourts.org/opinions/) simply uses calendar years to divide the history of the Court's decisions. I chose to include every non-*per curiam* opinion of the Court during these years. The number of opinions the Court issues annually made this a manageable task. In fact, some conservative writers have decried the Court's low level of "productivity"; the high-water mark for total annual opinions on the merits (including some *per curiam* opinions) between 2006 and 2010 was 80, in 2008 (Bakst et al., 2011, p. 2).

My research began with cases in January 1995 because it was at that time that it became the norm rather than the exception to have more than one party represented on the bench. Prior to January 1995 (when two Republicans who won in the 1994 general election assumed their seats on the Court), Republican justices on the Court generally were appointees of sitting

Republican governors, and these justices served for a limited time, inevitably being defeated when they ran for election in their own right.

The seven-member Court includes six Associate Justices and the position of Chief Justice, each elected by North Carolina voters in even-numbered years to staggered eight-year terms. The Court, established by statute in the nineteenth century, is today enshrined by Article IV of the North Carolina Constitution, which established the "Appellate Division of the General Court of Justice" (the other component of the division is the North Carolina Court of Appeals; North Carolina Constitution, Art. IV, sec. 5). In the case of a vacancy on the Supreme Court, the Governor of North Carolina appoints a replacement to serve through the "next election for members of the General Assembly," at which time a justice will be elected for a new eight-year term (North Carolina Constitution, Art. IV, sec.19). The Constitution gives the Court the authority to "review upon appeal any decision of the courts below" and to review decisions of the North Carolina Utilities Commission (North Carolina Constitution, Art. IV, Sec. 12). Furthermore, state law has developed guidelines for how the Court accepts cases, as explained in the court system's annual report:

> Appeals from the Court of Appeals to the Supreme Court are by right in cases involving constitutional questions, and cases in which there has been dissent in the Court of Appeals. In its discretion, the Supreme Court may review Court of Appeals decisions in cases of significant public interest or cases involving legal principles of major significance…. As a matter of right, appeals go directly to the Supreme Court in first degree capital murder cases in which the defendant has been sentenced to death, and in Utilities Commission general rate cases. In all other cases appeal as of right is to the Court of Appeals. In its discretion, the Supreme Court may hear appeals directly from the trial courts in cases of significant public interest, in cases involving legal principles of major significance, where delay would cause substantial harm, or when the Court of Appeals docket is unusually full. (North Carolina Administrative Office of the Courts, 2011, p. 4)

The Court has undergone significant political change during the years included in this case study. Table 2 shows the changes in the numbers of Democrats and Republicans on the

North Carolina Supreme Court bench that have taken place between January 1995 and December 2011. For consistency, I divide time into two-year increments, since elections to at least one seat are held in November every two years, with winners taking the oath of office shortly after the start of the new year. Only once during this span of years (in 2006) did the partisan split change between elections, when Chief Justice I. Beverly Lake, Jr. was forced into retirement by a state law mandating that state judges leave office shortly after turning 72 years old. Lake was a Republican; his successor, then-Associate Justice Sarah Parker, a Democrat, was appointed by Democratic Governor Mike Easley. Parker vacated her seat as an Associate Justice to become Chief Justice, and her former seat was filled by another Democrat. I include in the table my own description of the result of the partisan breakdown, including whether the Court at the time was officially partisan and whether one party was numerically dominant (with more than twice as many seats as the other party) or had a slim (4-3) majority.

Table 2: Partisan Compositions of the North Carolina Supreme Court (1995-2011)

TIME	REPUBLICANS	DEMOCRATS	DESCRIPTION
Jan. 1995-Dec. 1996	2	5	Partisan with Democratic Dominance
Jan. 1997-Dec. 1998	2	5	Partisan with Democratic Dominance
Jan. 1999-Dec. 2000	4	3	Partisan with slim Republican majority
Jan. 2001-Dec. 2002	5	2	Partisan with Republican Dominance
Jan. 2003-Dec. 2004	6	1	Partisan with Republican Dominance
Jan. 2005-Dec. 2006	6 until Feb. 6, 2006; 5 thereafter	1 until Feb. 6, 2006; 2 thereafter	Nonpartisan with Republican Dominance
Jan. 2007-Dec. 2008	4	3	Nonpartisan with slim Republican majority
Jan. 2009-Dec. 2010	4	3	Nonpartisan with slim Republican majority
Jan. 2011- Dec. 2011	4	3	Nonpartisan with slim Republican majority

[Sources: Ryan (2004); Election results available from the State Board of Elections at http://www.ncsbe.gov/content.aspx?id=69]

Thus, in the space of 16 years, the Court has had what I consider to be four different partisan balances (5-2 Democratic, 4-3 Republican, 5-2 Republican and 6-1 Republican), including two different balances during the nonpartisan era. Only one justice has remained during the entire time, (Chief) Justice Parker.

For the purposes of this study, I defined the Court as "nonpartisan" beginning in January 2005, when the first justices elected under the nonpartisan scheme (appropriately enough, one Democrat, Justice Parker, and one Republican, Justice Newby) took their seats. I grant that there is some imprecision with giving the Court this "nonpartisan" label, since a majority of the justices who on the bench in 2005 had most recently been elected in partisan elections. Still, at this point, all justices held offices that formally were nonpartisan. It would not be until January

2011 (with the installation of newly elected Justice Barbara Jackson) that the Court was made up entirely of justices who had been elected under the new system.

Data Collection and Coding

Data for this thesis were derived from the opinions of the North Carolina Supreme Court, with those from 1995 through 1998 found via Lexis and those from 1998 through 2011 found on the Court website (http://appellate.nccourts.org/opinions/). I started my data collection by performing a cursory reading of all published cases in the specified time-frame and identifying those that did not feature *per curiam* decisions. *Per curiam* decisions tend to be very brief and typically are unanimous. On the rare occasions that they are not unanimous, it tends to be because the Court considered other cases with similar central questions nearly simultaneously, and the justices delivered their signed, detailed decision in only one case, while issuing *per curiam* decisions on the others that simply refer to the signed, detailed decision. Occasionally, *per curiam* decisions are also released in cases in which the justices are equally divided (with one justice not participating), but these decisions do not list the justices' votes. At the same time that I eliminated *per curiam* decisions, I also eliminated cases in which the Court ruled on admission to the Bar or on disciplining a judge, because although these cases may be important in many senses, they differ dramatically from the cases I examined; in any event, it would be nearly impossible to meaningfully code such decisions as "liberal" or "conservative."

With 937 non-*per curiam* decisions forming my dataset, I examined each decision. Each was coded by category and by whether the decisions were unanimous (See ***Appendix*** for a complete description of my method of data recording).

To categorize cases, I began with previous schemes. Nagel (1961) divided cases into seven categories of law: Criminal, Administrative, Civil Liberties, Tax, Family, Business

Relations, and Personal Injury. Dubois (1979) divided cases into six categories: Criminal, Domestic and Private Disputes, Economic Distribution, Government Regulation, Civil Rights and Liberties, and Residual (cases not falling into any other category). As Bateman (1999, p. 374) noted, Dubois found "no way to rank the justices along the liberal-conservative continuum" in the "Domestic and Private Disputes" category, so I disregarded that category for the purposes of coding justices' votes as Democratic/liberal or Republican/conservative; I placed those cases in the "Residual" category.

Relying more on Dubois, I started with the following umbrella categories: Criminal (including juvenile crime/delinquency); *Capital* Criminal (I sought to highlight and separate death penalty appeals, because of their significance in the judicial system and in popular opinion and because the Court handles them with specific procedures not used with other criminal cases); Government Regulation/Administrative law; Civil Rights and Liberties; Economic Distribution (encompassing Nagel's Business Relations and Personal Injury categories, workers' compensation, and unemployment compensation); Redistricting (a small but politically significant category); and Residual. In Table 3, I list these categories and how they correspond with Nagel's and with Dubois's, and I characterize what an expected Democratic vote will be in each category (with expected Republican votes expected in the opposite direction).

Table 3: Umbrella Categories

BEAL UMBRELLA CATEGORY	NAGEL CATEGORY	DUBOIS CATEGORY	DEMOCRATS' EXPECTED VOTE
Criminal	Criminal	Criminal	for the defendant/prisoner
Capital Criminal	Criminal	Criminal	for the defendant/prisoner
Government Regulation/Administrative law	Administrative; Tax	Government Regulation	for the government agency (which, for example, seeks to protect its power or pursue regulation) over an individual or business (commonly, these include claims of the state's restrictions on property rights)
Civil Rights and Liberties	Civil Liberties	Civil Rights and Liberties	for broadly protecting "First Amendment" rights such as the freedom of speech, voting, privacy (except in "search and seizure" disputes, included under Criminal cases), and for broadly protecting minorities (based on race/ethnicity, age, disability, religion, sex, sexuality) from discrimination
Economic Distribution	Business Relations; Personal Injury	Economic Distribution	for the plaintiff in a tort, a consumer (over a manufacturer, for example), a patient (over a physician, hospital, or insurance company, for example), a worker in a workers' compensation case, or any otherwise "economically disadvantaged" entity seeking monetary damages
Redistricting[11]	N/A	N/A	for the side favored by the state's Democrats

For the first four categories, the positions expected of Democrats are those found to be most common among "liberals," and the positions expected of Republicans are those found to be most common among "conservatives." For redistricting, it is not clear what a "liberal" or

[11] Redistricting cases represent a very small subset of cases for the Court, but they have an outsized importance for the state's partisan actors, and therefore deserve special attention. There were five redistricting cases in my dataset, with four of them decided on non-unanimous votes.

"conservative" stance on a particular map would be; rather, I expect that Democrats would favor the position on redistricting advocated by Democratic legislators and litigants (taking part in the redistricting suit), while Republicans would favor the position advocated by Republican legislators and litigants. Meanwhile, as Bateman noted, there is no way to characterize what a Democratic/liberal or Republican/conservative vote would be in the Residual category. More generally, "Unlike a legislature where accountability is often a reflection of a legislator's doctrinal purity to the party line, a judge is often asked to issue rulings on matters upon which neither party has a stated position" (Troutman, 2008, p. 1786). It is necessary to keep "Residual" cases as part of the data, however, because the results of votes on these types of cases can still be used to test Hypotheses Three, Five and Six.

As I continued coding, it soon became apparent that some umbrella categories were too broad to make sweeping ideological characterizations, in part because of the way that public policy issues have evolved since Nagel and Dubois wrote. Therefore, I refined the categorizations, allowing for more precise definitions of what is "liberal" and what is "conservative." I decided, for instance, that although "gun rights" could be classified as "civil rights and liberties" (or as "government regulation"), it would be incorrect to code a vote for "broadly protecting" gun rights as "liberal." Broad protections under the Second Amendment have been more closely associated with conservative politicians in recent decades. I coded decisions accordingly as "conservative" if they broadly construed the right to bear arms against state power. Similarly, cases that hinge on the place of religion in the public sphere and the rights of the majority religion (Protestant Christianity in North Carolina) could be placed in the category of "civil rights and liberties." Again, decisions that protect the freedom of those (majority) individuals and groups to practice their religion in ways that might tend to favor them

over minority religious or non-religious individuals and groups[12] were coded as "conservative"-leaning. Decisions in which the majority focused on preventing the "establishment" of religion -- in other words, those that seek to maintain the separation of church and state – were coded as "liberal." Similarly, cases in which the issue is either commercial or campaign speech differ from other free speech cases, because Republicans would be expected to favor the rights of a commercial interest or a political campaign, and would not be expected to applaud the efforts of government reformers.

One case in the dataset, for example (***Hensley v. N.C. Dep't of Env't & Natural Resources***), involved a dispute among the state, private citizens and an environmental advocacy group. The environmental group opposed the state's position. To code a decision that sided with the environmentalists (and therefore against the state) as "conservative" simply because other government regulation cases the state won were coded as "liberal" did not make sense. This and other cases called for a more nuanced, individualized approach to coding. A case involving the public funding of abortion also is one that earlier broad categorizations did not anticipate. In the case in question (***Rosie J. v. North Carolina Dep't of Human Resources***), the Court ruled that (in the words of the Lexis case summary) "placing severe restrictions on the funding of medically necessary abortions for indigent women was valid." Restricting public funding of abortion services corresponds with "conservative" policy; a "liberal" decision would be one that did not restrict access to abortion for indigent women.

I also consulted the State Supreme Court Data Project created by Hall and Brace and employed the codes that they used for the North Carolina cases. I coded each case employing both an umbrella category and a subcategory based on Hall and Brace's individual codes. This

[12] See, e.g., two United States Supreme Court cases, ***Lynch v. Donnelly***, 465 U.S. 668 (1984), concerning Christmas decorations on public property, and ***Van Orden v. Perry***, 545 U.S. 677 (2005), concerning a display of the Ten Commandments at the Texas State Capitol.

provided me with greater flexibility going forward. If a sizable number of cases matched one of Hall and Brace's individual codes, then those cases could be compared and contrasted. If, however, very few cases emerged with a particular code, then those cases could always be placed in an umbrella category. For example, Hall and Brace's codes fall within my Criminal umbrella included "assault - aggravated," "driving under the influence," "murder," "rape/sexual assault," and "sex offenses other than rape and prostitution. Likewise, codes falling under the Economic Distribution umbrella included "contract enforcement," "debtor/creditor," "tenant/landlord," "workers' compensation/injury to employee," "medical malpractice," "premises liability," and "product liability."

Ultimately, as I focused on the 162 non-unanimous cases in the dataset, I found that very few subcategories created by following Hall and Brace's codes generated enough cases to allow for meaningful comparisons between the partisan and nonpartisan eras. Only the workers' compensation (15 non-unanimous cases), non-capital murder (11 non-unanimous cases) and drug subcategories (eight non-unanimous cases) had enough cases for me to analyze them in a meaningful way, and the drug subcategory is quite small.

Using these categories and subcategories, I analyzed the content of each published opinion to determine how to code each. Criminal cases were most quickly recognizable because their names begin with "STATE OF NORTH CAROLINA v." For civil cases, the category could typically be determined by a quick review of the notes at the opening of the opinion. For example, ***Conner v. N.C. Council of State***, 365 NC 242, used the key words "Administrative Law" at the outset, so I placed the case in the category "Government Regulation/Administrative law." I also used the one-line descriptions provided by the court system's website (http://appellate.nccourts.org/opinions/). For example, capital cases tend to have the one-line

description, “First-degree murder (capital/death).” One case, ***Libertarian Party v. State***, 365 NC 41, had the description, “Constitutionality of N.C. ballot access statute,” which indicated an appropriate placement was in the category “Civil Rights and Liberties” since it deals with the political rights of third parties to be placed on ballots. Meanwhile, ***McCaskill v. Dept. of State Treasurer***, 365 NC 69, had the description, “Whether former state employee accrued five years in the Retirement System before seeking long-term disability benefits.” The words “accrued” and “disability benefits” suggested categorization as “Economic Distribution,” with the former state employee in this case being the “economically disadvantaged” actor in relation to the state treasurer’s office.

The next step was to determine which party in the case the Court’s decision favored and comparing that outcome to the hypothesized expected votes; at times, I had to make judgments about which type of outcome was more “conservative” and which one more “liberal.” I could not classify some outcomes in that way, including all cases coded in the “Residual” umbrella and a few cases under other umbrellas. In six cases (falling under various umbrellas), the Court’s decision was mixed, favoring one party in part and the other in part; these were treated as if they were “residual” cases, in that justices’ votes could not be classified as “conservative” or “liberal.”

The summaries provided by Lexis (which are not parts of the official court opinions) often were instructive. They indicated the way that the case was decided by a lower court before it reached the Supreme Court, as well as the outcome in the Supreme Court. By identifying who won the case at the lower level and then checking whether the Supreme Court reversed or affirmed the lower court, I could classify the outcomes and then assign the appropriate codes in a rather straightforward way for many cases. Capital cases, which in North Carolina are appealed

directly from the superior (trial) court to the Supreme Court, have a particular convention in which the label "NO ERROR" is used to denote that the Court sides with the State (a position expected of Republican or "conservative" justices). With capital cases, I coded the outcome as expected of Democrats, or "liberal," if the Court found error with only the sentencing phase of the trial and not the guilt-innocence phase (as often happened). That is to say, a capital case decision did not have to result in the prisoner's verdict being set aside for it to be coded as "liberal."

After determining the outcomes, I continued reading to see if there was only one opinion listed (the majority opinion) or if there were one or more dissenting opinions as well. Concurring opinions were not of interest here, although they sometimes helped to clarify the issues before the Court. In the North Carolina Supreme Court, justices must write or join a dissent to be counted as dissenting. If their names are nowhere to be found on the opinion, they are presumed to be in agreement with the Court opinion. I confirmed this rule by corresponding with the clerk of the Court, Christie Cameron Roeder.

Data Analysis

After I had established my dataset and coded the cases, the next step was to use my data to test the various hypotheses. To test ***Hypothesis One***, I recorded the votes of each individual justice (following in the footsteps of Bateman) during the established time frame. I noted whether each vote was the expected Democratic ("liberal") or expected Republican ("conservative") type of vote, and compared the vote to the justice's actual partisan affiliation.[13]

[13] Determining partisan affiliation is straightforward for those justices who once were elected under the partisan system under certain party labels and then re-elected under the nonpartisan system. Four justices were *never* elected to the Supreme Court under the partisan system. Two of them, however, Justices Timmons-Goodson and Hudson, had both been elected to the North Carolina Court of Appeals as Democrats under the partisan system. Meanwhile, Justice Newby has been identified as a Republican in numerous newspaper articles (see, e.g., "Ervin leads Newby, with huge undecided" at http://projects.newsobserver.com/under_the_dome/ervin_leads_newby_with_huge_undecided_poll_shows), as has

I do not mean to presume that these types of votes should be "expected" of each individual justice, as North Carolina's Democratic justices are not necessarily always "liberal" and Republican justices are not necessarily always "conservative." (Indeed, Rachel Ryan specifically found such generalizations could not be applied usefully to North Carolina Supreme Court justices). Rather, as noted in Chapters One and Two, scholars have found that nationwide, Democratic judges tend to vote in more "liberal" ways, while Republican judges tend to vote in more "conservative" ways. Such findings provide a benchmark for examining each justice by party, asking whether his or her voting pattern matched the prediction for his or her party, to greater or lesser degrees, over time. This is particularly relevant for the justices who served on the Court during both the partisan and nonpartisan regimes, but it can be examined for the rest as well.

To begin, I calculated the percentages of votes that each justice cast (in non-unanimous decisions) that were "expected" and "unexpected" for a member of his/her party, and calculated the percentages of votes cast by each justice that were "liberal" and "conservative." This permitted me to track an individual justice's voting patterns over time. Later, I also combined these percentages for all of the justices of the same party for a given year, examining the years individually and between the two different selection "eras."

To test ***Hypothesis Two***, I coded each Court decision (here including unanimous decisions) as that expected of a Republican Court, or expected of a Democratic Court or as indeterminate, if I could not classify the decision in terms of ideology. Aggregating these findings by year permitted me to examine the Court's annual output as being expected to be

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Justice Jackson (see, e.g., "Supreme Court candidate makes stop in Anson" at http://ansonrecord.com/view/full_story/9707200/article-Supreme-Court-candidate-makes-stop-in-Anson). In any event, a voter's partisan affiliation is a matter of public record in North Carolina and is easily accessible through the State Board of Elections website (ncsbe.gov).

more liberal or more conservative. Then, I examined the percentages of actual decisions that were consistent with the Court's majority party each year; Democrats constituted a Court majority in calendar years 1995 through 1998, and Republicans constituted a Court majority for the rest of the time studied.

To test ***Hypothesis Three***, I measured the extent to which the Court split along party lines each year. This measurement followed in the footsteps of Ulmer's bloc analysis techniques, which sought to answer two questions: "(1) whether a judge voted in accordance with that individual's party affiliation, and (2) whether that vote is linked to a party" (Bateman, 1999, p. 372). Following former North Carolina Supreme Court Justice Harry Martin (Martin, 1993, p. 1457) and Bakst et al. (2011), I created tables for each year, showing the percentage of the time that each justice voted in agreement with each other justice in non-unanimous decisions.

Using data on the individual justices' votes (as described earlier regarding the testing of Hypothesis One), I went on to test ***Hypothesis Four*** by comparing a justice's voting pattern over his or her entire tenure with the same justice's voting pattern during the year before and the year that justice ran for election or reelection. The following justices fit the criteria for this hypothesis: Chief Justice Burley Mitchell, who ran for a full term in his new office (after having been appointed by the Governor) in 1996; Justice Sarah Parker, who ran for re-election in 1996; Chief Justice Henry Frye, who ran for a full term in his new office in 2000; Justice Robert Orr, who ran for re-election in 2002; Justice Parker, who ran for re-election in 2004; Chief Justice Parker and Justice Patricia Timmons-Goodson, who both ran for full terms in their new offices in 2006; Justice Mark Martin, who ran for re-election in 2006; and Justice Robert Edmunds, who ran for re-election in 2008.

To test ***Hypothesis Five***, I noted when the Court exercised judicial review and, when it did whether it used the power to strike down government acts as invalid under either the state or federal Constitutions or to uphold them. This analysis included unanimous decisions. Since constitutional questions are quite important to any court of last resort, each justice writing a majority opinion made it very clear to the reader when and how the Court chose to use its power of judicial review. In one instance, for example -- ***In re Appeal of Springmoor, Inc***., 348 N.C. 1 -- Justice Frye wrote for the Court majority near the very end of the opinion, "we hold that N.C.G.S. § 105-275(32) is unconstitutional." I found a total of 44 cases involving judicial review (4.7 percent of the entire dataset of 937 cases).

As I indicated earlier, ***Hypothesis Six*** was perhaps the simplest hypothesis to test. I counted the numbers of unanimous and non-unanimous decisions, indicated by the presence or absence of a dissenting opinion. Cases in which one or more justice did not participate (for whatever reason, which was never disclosed) but that still had no dissenting opinion were counted as unanimous. Most researchers of state supreme courts have limited their studies to the non-unanimous opinions. In the words of Canon and Jaros, "it is dissent, after all, which produces variance in the observations to be explained" (1970, p. 178). However, I included unanimous opinions, especially because they tend to make up a majority of the Court's decisions each year (Bakst et al., 2011, p. 4). In addition to testing Hypothesis Six, I also sought to determine the direction of the unanimous opinions ("liberal" or "conservative") just as I did of non-unanimous opinions, to create a more complete picture of the ideological nature of the Court's decisional output.

Limitations

A study of this sort has several limitations. First, justices of the North Carolina Supreme Court have limited control of their agenda. They cannot decide what sorts of cases will wind their way through the state court system and finally reach the level of the Supreme Court at a certain time. Justices do have a certain amount of discretion to eliminate many cases from their potential calendar, although others come to the Supreme Court "by right," (including cases that involve constitutional questions and those in which the death penalty is imposed). Since the types of cases on the agenda can vary considerably from year to year, comparisons across time will never be completely satisfactory.

In addition, cases may fall into the same category but still be quite different and demonstrate numerous idiosyncrasies, so categories will necessarily be rather crude. Another limitation is related to the inability to establish causation even if I find evidence of association between the change in election system and changes in voting. A variety of other influences on vote outcome may have been present. McCall, for instance, found evidence to support hypotheses that both the sex of the judge and the type of institution in which the judge sits (appointed vs. elected) make significant differences in the judge's behavior in a variety of types of cases. For part of the time span included in this study, all of the Democratic justices on the Court were women, and all of the Republican justices were men; since 2011, this has no longer been true, because there has been a Republican female justice. It is useful to remember, then, that a justice's sex (along with his or her religion, age, race/ethnicity, occupation before becoming a judge, and other characteristics) can play a role in how each justice votes. It will never be possible to know precisely to what extent party and, in this example, sex, work in concert or against each other in shaping a justice's values, policy goals, and priorities.

Contributing even more complexity along with those factors, as indicated by institutional and strategic models of judicial behavior, judges cannot always vote in line with their own ideological preferences but have other constraints, particularly precedent.

By the same token, because my data collection did not look in depth at any particular case, I cannot examine the reason(s) that the justices voted in a particular way (or rather, the reason[s] that they *declared* in writing); I only am able to determine with which party in the case they sided. I do this in the tradition of Harold Spaeth, who once said, "I find the key to judicial behavior in what justices do, [others] in what they say. I focus upon their votes, [they] upon their opinions" (in Shapiro, 2009, p. 12).

Chapter Summary

In this chapter, I have explained how I developed a multi-faceted case study approach to explore the question of the effect of an institutional change on a state supreme court's decision-making. I have described the rationale behind my four propositions and six associated hypotheses and outlined my methods for attempting to test the hypotheses. The next chapter will report what I found by using my data to test each hypothesis.

CHAPTER FOUR

Findings

Purpose

This chapter will describe the findings of my research and analysis of the North Carolina Supreme Court's decisions and individual justices' votes from 1995 through 2011. I have organized the chapter by hypothesis, starting with Hypothesis One (all hypotheses were explained in Chapter Three). I will highlight particularly interesting results and briefly discuss the extent to which the data support each hypothesis, and if they do not support the hypothesis, how and why they do not.

Hypothesis One

To test Hypothesis One, I analyzed the data in several different ways. I will begin the report of my findings for this hypothesis with data at the aggregate level, combining all votes from each era and then combining the votes of all justices of a particular party, before presenting my analysis of votes by subject category and then by individual justice. If Hypothesis One had been supported, then the data would have shown evidence that, first, justices' votes (in non-unanimous decisions) were less consistent with what would be expected based on their partisan affiliation during the more recent "nonpartisan era" (2005-2011) than during the "partisan era" (1995-2004), and second, that as time went on, those votes became less and less consistent. Table 3 shows that, contrary to the first part of the hypothesis, justices' votes corresponded more often with what would be expected based on their partisan affiliations during the nonpartisan era than during the partisan era. To address the second part of Hypothesis One, I examined the percentage of votes cast that were consistent with justices' partisan affiliation for each year during the nonpartisan era. Again, the data did not support the hypothesis, with no discernible

trend. The percentage of "expected" votes actually increased from 49.3% in 2005 and 48.2% in 2006 to as high as 80.4% in 2009. The percentage decreased in 2010 to 73.8%, and then sharply decreased to 33.3% in 2011. However, I discount the 2011 data since the Court issued only one non-unanimous decision.

Figures 1 and 2 depict trends in justices' votes over the entire period by combining the votes cast by all justices of each party. To create these graphs, I calculated the percentages of each partisan group's votes that were "liberal" (expected of Democrats) and that were "conservative" (expected of Republicans) each year.[14] The figures indicate that on the whole (although not in every year), Democratic justices have tended to vote more liberally than their Republican counterparts; that pattern has become more pronounced in the most recent years, during the nonpartisan era. Data from the year 2011 are anomalous, because (as stated earlier) they are drawn from votes in the single non-unanimous decision from that year (***Libertarian Party v. State of North Carolina***), in which all Democratic justices (and all but one Republican justice) voted "conservatively." It is not possible to infer that there has been a sudden shift toward conservative voting behavior by the Democratic justices, based on only a single case.

The medians of each year's percentages (see Table 4) suggest both that Democratic justices became more consistently liberal voters and that Republican justices voted conservatively more regularly after the switch to nonpartisan elections. The change from one era to the other is more pronounced among Democratic justices. During the partisan era, Democrats as a group confounded expectations by tending to cast more conservative votes than liberal ones. Republicans, meanwhile, tended to cast more conservative votes than liberal ones in both eras.

[14] Here (as elsewhere), percentages do not add up to 100 in some years, because some votes were not able to be classified as liberal or conservative.

Table 3: Justices' Votes by Party and Time

YEARS	% CONSISTENT WITH PARTY AFFILIATION	% INCONSISTENT WITH PARTY AFFILIATION
1995-2004	47%	41%
2005-2011	56%	28%

Figure 1

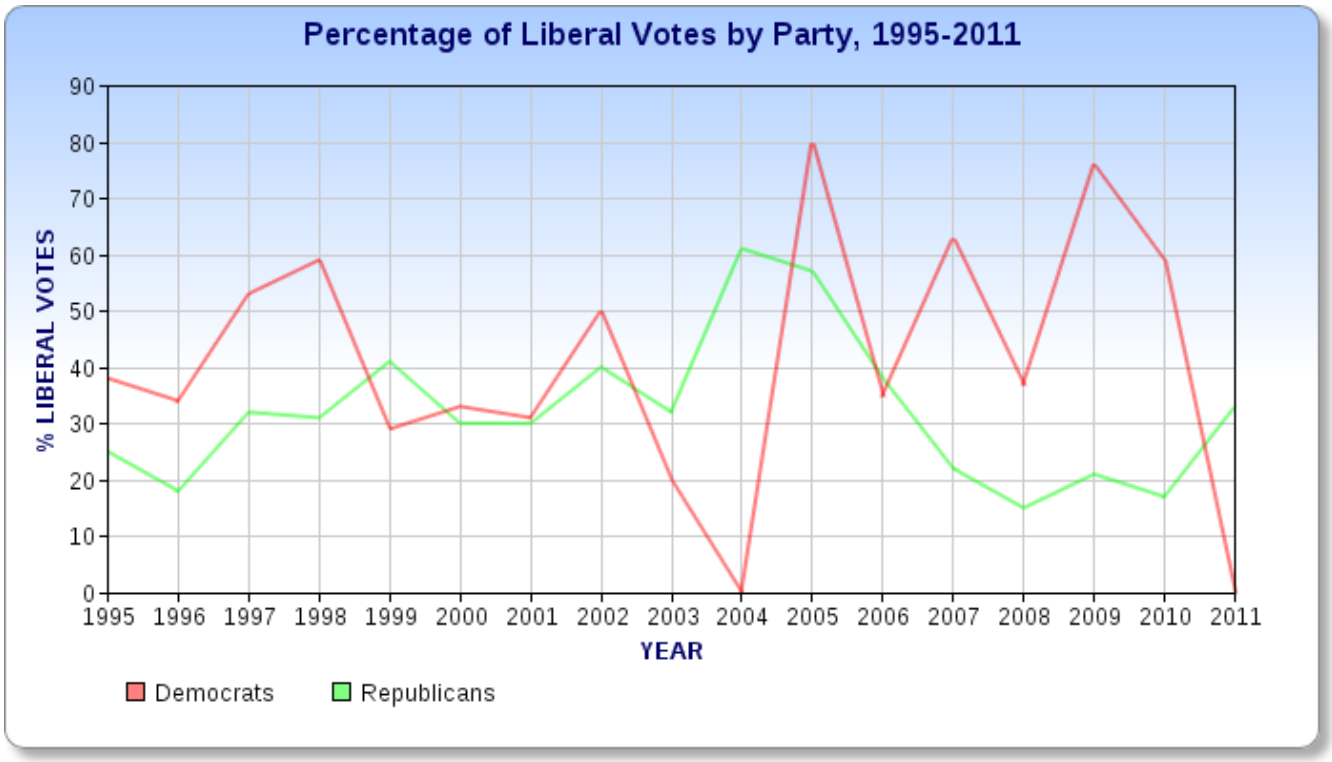


Figure 2

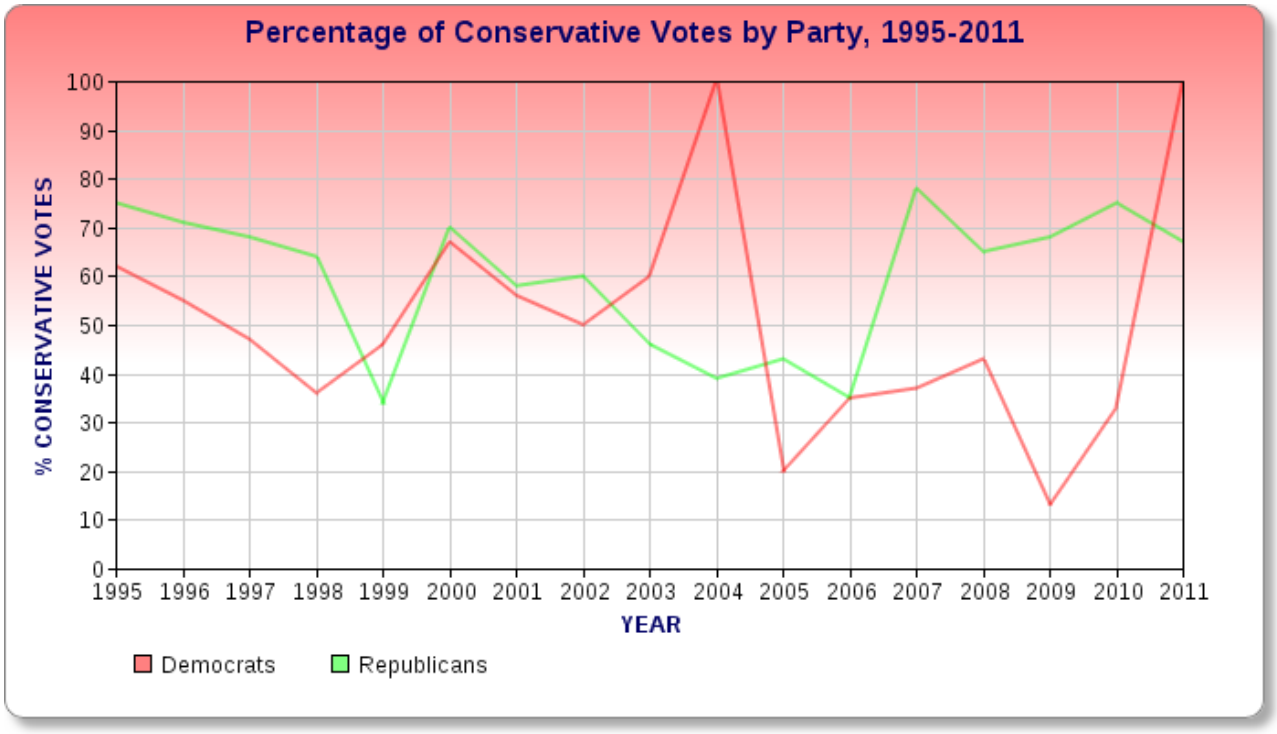


Table 4: Justices' Liberal and Conservative Voting by Time

YEARS	PARTY	MEDIAN % LIBERAL VOTES PER YEAR	MEDIAN % CONSERVATIVE VOTES PER YEAR
1995-2004	DEMOCRATS REPUBLICANS	33.5% 31.5%	55.5% 62%
2005-2011	DEMOCRATS REPUBLICANS	59% 22%	35% 67%

Decisions by Category

Thus far, the findings have included all non-unanimous cases in the aggregate. Analyzing non-unanimous cases by subject category (see Chapter Three, particularly Table 3, for details on categories) reveals a mixed picture. In Table 5, I present data in terms of partisan

expectations, while in Table 6, I present data in terms of liberal and conservative decision-making (reflecting court decisions rather than individual justices' votes), in order to better understand the actual outcomes of the justices' consistency with partisan expectations (and/or lack thereof). Most categories saw increases in justices' percentages voting consistently with partisan expectations from the partisan era to the nonpartisan era. During the nonpartisan era, there was no category (or subcategory, for that matter) in which less than a majority of votes were cast consistently with partisan expectations, whereas in the partisan era, one umbrella category (Economic Distribution) had less than 50 percent of votes cast in the expected directions. Such changes in the nonpartisan era did not, however, necessarily translate into outcomes that were consistently more likely to be conservative or more liberal.

In the criminal category (excluding the cases that involved capital punishment), justices' votes became more predictable in terms of party during the nonpartisan era, as simultaneously decisions became less likely to be conservative. Unusual circumstances resulting from the U.S. Supreme Court's decision in ***Blakely v. Washington*** played a part in this result.[15] Four cases involved ***Blakely*** in 2005, all of which saw Republican Justices Wainwright, Edmunds and Brady vote with Democratic Justice Parker in a "liberal" (pro-criminal defendant) direction in order to, as they saw it, comply with ***Blakely***. When these cases are removed from the non-unanimous criminal cases, 59 percent of the remaining decisions were conservative. Even so, the Court in its nonpartisan era appears somewhat more liberal on criminal non-capital cases than the Court in its partisan era. The largest subcategory of criminal cases (again excluding capital cases) was "murder" (non-capital), in which the maximum sentence was life imprisonment without the possibility of parole. In these cases, the Court became both more partisan and

[15] In ***Blakely v. Washington,*** 542 U.S. 296 (2004), the U.S. Supreme Court held that the Sixth Amendment requires that only juries, not judges, can determine aggravating factors that increase the length of a criminal sentence above the minimum required by law.

slightly more conservative in the nonpartisan era. The second-largest subcategory of criminal cases was "drugs"-related cases.[16] In these cases, the justices voted consistently with partisan expectations less often in the nonpartisan era than they had in the partisan era (as Hypothesis One expected); in the nonpartisan era, because the cases were heard during the time of a near-even partisan split on the court, half of the six cases were decided in favor of the defendant and the other half in favor of the state. I hesitate to make strong conclusions, however, because of the small number of cases (two in the partisan era and six in the nonpartisan era).

Similarly, in the capital case category, the results presented in the tables should not be taken at face value. It was not appropriate to compare the two eras because in the nonpartisan era, the Court reached non-unanimous decisions in only two cases (cf. 16 cases in the partisan era). The only clear pattern was that capital cases became almost entirely unanimous in the nonpartisan era. At the same time, the total number of non-*per curiam* decisions in capital cases trended lower. There were 223 capital cases in my dataset from the partisan era (a mean of 22.3 per year), but only 32 in my dataset from the nonpartisan era (4.6 per year).

In cases involving government regulation, justices became less consistent with partisan expectations in the nonpartisan era (again seeming to support Hypothesis One), but the change between the two eras was slight. Also of note is that other than redistricting cases, no other category had as high a percentage of "expected" votes during the partisan era. Coupled with the small change from one era to the other, this category seems to be, along with redistricting and civil rights/civil liberties, a consistently "partisan" category for this Court. Also like civil rights/civil liberties, the government regulation category went from being one of the Court's

[16] It should be noted that most of these drug cases involve "search and seizure" issues, although following the lead of Brace and Hall's State Supreme Court codebook, I did not code them that way.

most liberal categories during the partisan era to a rather conservative category in the nonpartisan era.

The umbrella category of civil rights/civil liberties suffered from a relatively small number of cases (three in the partisan era and five in the nonpartisan era), so it is difficult to make sweeping judgments. As in the government regulation category, the difference between the two eras in partisan consistency was slight, but here in the opposite direction. By contrast, the difference in the Court's decision-making in this category was not slight. No other category saw as large an increase in the percentage of conservative decisions from the partisan to the nonpartisan era. The particular subject matter of cases was somewhat different from one era to the next. Each era featured one case involving the right to an education guaranteed by the North Carolina Constitution, and each era featured one case involving the freedom of religion. The partisan era included a case involving abortion and public funding (the aforementioned ***Rosie J.***), however, while the nonpartisan era included a gun rights case, a case implicating the adoption and child custody rights of same-sex couples, and a case challenging the state's ballot access law (related to First Amendment rights).

In economic distribution-related cases, justices were less consistent with partisan expectations during the partisan era than in any other umbrella category (or subcategory).[17] Despite becoming quite a bit more consistent in the nonpartisan era, justices still cast a smaller percentage of their votes consistently with partisan expectations than in any other umbrella category. Meanwhile, their decisions became less likely to be conservative during the nonpartisan era. An examination of only workers' compensation cases (the largest single subcategory of economic distribution cases) reveals the same types of changes as in the umbrella category. In the nonpartisan era, Democratic justices more often sided with the worker (voting

[17] In this category, the sample size is relatively large; *n*=357 votes and *n*=58 decisions.

"liberally") in these cases than they had in the partisan era. Since the nonpartisan era decisions were made when there was an almost-even partisan split among the justices, this enhanced consistency translated into better odds for the workers. In the partisan era, all eight non-unanimous workers' compensation cases were decided in favor of the employer, while in the nonpartisan era only five of the seven non-unanimous workers' compensation cases were decided in the employer's favor.

The Court decided few redistricting cases: two in each period. During both the partisan and nonpartisan eras, all votes were consistent with the justice's party. Such consistency was not found in any other case category or sub-category, and only government regulation and civil rights/civil liberties came close to matching redistricting for consistency. Since the redistricting cases came between 2002 and 2009, when Republicans held a majority on the Court, the cases were decided in favor of the Republicans (as stated in Chapter Three, "pro-Republican" must serve as the equivalent of "conservative"). These results lend credence to the notion that the state's two parties battle over Supreme Court seats largely because of the justices' influence on redistricting, since the justice's party affiliation has corresponded so closely with his or her vote.

Table 5: Justices' Votes by Party and Era, Separated by Category

CATEGORY	**% CONSISTENT WITH PARTY AFFILIATION - *PARTISAN ERA***	**% CONSISTENT WITH PARTY AFFILIATION - *NONPARTISAN ERA***
CRIMINAL	53.6%	64.8%
Murder (non-capital)	57.1%	69.4%
Drugs	64.3%	59.5%
CAPITAL	53.4%	85.7%
GOVERNMENT REGULATION	70.3%	67.3%
CIVIL RIGHTS/CIVIL LIBERTIES	66.7%	70.6%
ECONOMIC DISTRIBUTION	43.4%	60.9%
Workers' compensation	48.2%	71.4%
REDISTRICTING	100%	100%

Table 6: Non-Unanimous Court Decisions by Ideological Direction, Separated by Category

CATEGORY	**% LIBERAL DECISIONS - *PARTISAN ERA***	**% CONSERVATIVE DECISIONS - *PARTISAN ERA***	**% LIBERAL DECISIONS - *NONPARTISAN ERA***	**% CONSERVATIVE DECISIONS - *NONPARTISAN ERA***
CRIMINAL	14.3%	85.7%	50%	50%
Murder (non-capital)	50%	50%	42.9%	57.1%
Drugs	0%	100%	50%	50%
CAPITAL	11.8%	82.4%	50%	50%
GOVERNMENT REGULATION	68.75%	31.25%	44.4%	55.6%
CIVIL RIGHTS/CIVIL LIBERTIES	66.7%	33.3%	20%	80%
ECONOMIC DISTRIBUTION	33.3%	63.6%	28%	52%
Workers' compensation	0%	100%	28.6%	71.4%
REDISTRICTING	0%	100%	0%	100%

Behavior of Justices as Individual Voters

Attention turns next to analyzing the voting behavior of each of the North Carolina Supreme Court justices. In Table 7, I use the data to summarize each justice's behavior over his or her entire tenure during the time period studied. For ease of comparison, I ordered the justices from those having the highest median annual percentage of conservative votes to the lowest.

Immediately apparent is the fact that (as Rachel Ryan observed) North Carolina Supreme Court justices' partisan identities are not a sure indication of voting tendencies, since, for example, the second-highest median annual conservative percentage belonged to a Democrat (Chief Justice Mitchell). Also, the ranges, interquartile ranges, and standard deviations for each justice's percentages of conservative votes and of liberal votes demonstrate that some justices were quite ideologically consistent from year to year, while others were not. Justice Whichard had the smallest range of any justice for annual conservative percentage, while Justice Newby had the smallest range of any justice for annual liberal percentage. On the other end of the spectrum, (Chief) Justice Parker compiled a record that includes very conservative and very liberal years, and accordingly had the largest range for both annual conservative and liberal percentages.

In the remainder of this section, I will briefly describe the justices who only served during the partisan era (grouped by party), those whose tenures included years during both eras, and those who only served during the nonpartisan era.

Partisan Era Only

Five Democratic members of the Court during the time period studied served exclusively during the partisan era. Justice Burley Mitchell joined the Court in 1982, having been appointed by Governor Jim Hunt (a fellow Democrat), and was subsequently elected several times; Governor Hunt appointed him Chief Justice in January 1995. He resigned in 1999. As indicated earlier, Mitchell's voting record was very similar to that of a conservative Republican justice. Justice Henry Frye joined the Court in 1983, also after being appointed by Governor Hunt, and was subsequently elected several times. Appointed Chief Justice by Governor Hunt in 1999, he was defeated for a term in that office in the 2000 election. His voting record marked him as one of the Court's most liberal members. Justice Willis Whichard joined the Court after being

elected in November 1986, was elected to a full term in 1990[18], and served until his retirement at the end of 1998. Whichard's voting record was decidedly moderate. Justice John Webb also joined the Court after being elected in November 1986, was elected to a full term in 1990, and resigned in 1998, months before his term was to end. Ideologically, Webb sat to the left of Whichard, but still near the center. Justice Franklin Freeman joined the Court in 1999 by appointment by Governor Hunt. He only voted in one non-unanimous decision that year (a decision that could not be coded either liberal or conservative), meaning that only one year of his service is reflected in Table 7. That year, 2000, he was the only justice in the study whose votes were split evenly between "liberal" and "conservative." Freeman was defeated for election to a full term in the November 2000 election. Justice G.K. Butterfield was appointed by Governor Easley in January 2001, but he was defeated for election to a full term in the November 2002 election. Although Butterfield's record consists of a small number of votes in non-unanimous decisions, he appeared to have been, like Freeman, in the ideological center of the Court.

In addition, two Republican justices' tenures took place completely during the partisan era, or nearly so. Justice Robert Orr joined the Court in January 1995 following his election in November 1994; he was re-elected in 2002 but resigned in late 2004. He proved to be a rather unpredictable voter, with high percentages of conservative votes in some years and equally high percentages of liberal votes in others (his standard deviation for annual conservative percentage was the highest recorded). Justice I. Beverly Lake, Jr. joined the Court in January 1995 following his election in November 1994. He was elected chief justice in 2000 (taking office in January 2001) and was forced to retire in early 2006 due to the state's mandatory judicial

[18] At the time, North Carolina judges sometimes ran only to fill out the remainder of a term for a vacant seat, as Whichard did in 1986. State law later changed (via Senate Bill 448 in 1995) so that each time a justice runs, he or she runs for a full eight-year term. This prevents situations in which a judge might be forced to run in two back-to-back general elections to stay in office.

retirement at age 72. Lake only served one full year (2005) under the nonpartisan regime, so comparing his voting between the partisan and nonpartisan eras seems unhelpful. He did not vote in any non-unanimous decision in 2006. Overall, Lake was among the Court's most conservative voters.

Spanning Both Eras

Four Republican justices served for at least two full years during both the partisan and nonpartisan eras, allowing for meaningful comparisons. Justice George Wainwright joined the Court in January 1999 following his election in November 1998; he served one term before retiring. While his all-time median annual percentage of liberal votes was 30 percent, his median percentage during the partisan era was 26.5 percent. Similarly, his median annual percentage of conservative votes was 55 percent, but his median percentage during the partisan era was 63.5 percent. Wainwright's tendency to vote more liberally during the nonpartisan era makes him the only justice (of either party) whose record actually matches the expectations of Hypothesis One. Justice Mark Martin joined the Court in January 1999 following his election in November 1998, and he was re-elected in 2006. Over the course of his tenure on the Court, Martin's median annual percentage of liberal votes was 35.5, 39 percent during the partisan era and 30.5 percent after the change in elections. Likewise, his overall median annual percentage of conservative votes was 60 percent, 50 percent during the partisan era and 64 percent during the nonpartisan era. Like the Court's Republicans as a whole, Martin's voting behavior tended to be more conservative, not less, in the nonpartisan era. Justice Robert Edmunds joined the Court in January 2001 following his election in November 2000 and was re-elected in 2008. His overall median annual percentage of liberal votes was 33 percent, with little change between the time periods (35.5 percent during the partisan era and 33 percent during the nonpartisan era).

Similarly, his median annual percentage of conservative votes was 58 percent overall, 55 percent during the partisan era, and 61.5 percent during the nonpartisan era. Finally, Justice Edward Brady joined the Court in January 2003 following his election in November 2002; he served one term before retiring.[19] His median annual percentage of liberal votes was 33 percent all-time, 53.5 percent during the partisan era, and 26.5 percent during the nonpartisan era. Brady's median annual percentage of conservative votes was 45 percent overall (the lowest percentage among all Republicans in the study), 36.5 percent during the partisan era, and 58.5 percent during the nonpartisan era. Like Martin, Brady was more conservative in the nonpartisan era. His large range, interquartile range, and standard deviation for annual conservative percentage (among the largest of any Republican) owes in part to two liberal years early in his term (2004 and 2005) -- years in which some of his fellow Republicans also recorded some of their highest percentages of liberal votes.

Justice Sarah Parker was the only Democrat whose tenure spanned both eras. She was first elected to fill a vacancy in November 1992, defeated for election to a full term in November 1994, appointed by Governor Hunt to a different seat in 1995, and elected to a full term in November 1996 (see footnote in the paragraph on Justice Whichard, above). Governor Mike Easley appointed her Chief Justice in 2006, and subsequently she was elected to a full term in that office. Like Mitchell, Parker has accumulated a somewhat conservative voting record, which has continued into the nonpartisan era. Her median annual percentage of liberal votes was 29 percent overall, 26.5 percent during the partisan era and 29 percent during the nonpartisan era. Her median annual percentage of conservative votes was 61 percent all-time, 63.5 percent during the partisan era, and 53.5 percent during the nonpartisan era. Her voting has become somewhat

[19] Brady's reason for retiring is unknown, but he would have reached the mandatory retirement age in the middle of his second term.

more liberal (closer to the expectation of a Democrat) during the nonpartisan era, but the difference between her voting pattern in the two eras is small. As indicated earlier, Parker has demonstrated great variability from year to year. During both eras, her liberal votes outnumbered her conservative votes in some years and conservative votes outnumbered liberal ones in others.

Nonpartisan Era Only

Justice Paul Newby is the only Republican whose service has been entirely in the nonpartisan era. He joined the Court in January 2005 following his election in November 2004. Newby's voting record was the most conservative in the study.

The two Democrats who have joined the Court since the nonpartisan era began are the two most liberal justices in this study. Justice Patricia Timmons-Goodson was yet another appointment by Governor Easley, joining the Court in 2006 and serving through the end of the period studied here, before retiring in late 2012. Justice Robin Hudson joined the Court in January 2007 following her election in 2006. Her median annual percentage of liberal votes was 83 percent -- the highest of any justice recorded, although the median conceals the fact that in 2008, the percentages of her liberal and conservative votes were the same (40 percent), placing her to the right of Timmons-Goodson. Hudson's median annual percentage of conservative votes was 12.5 percent, higher only than Timmons-Goodson's.

Table 7: Summary of Justices' Overall Voting Behavior, Ordered from Highest Median Annual Conservative Percentage to Lowest

JUSTICE	YEARS OF SERVICE STUDIED	PARTY	MEDIAN ANNUAL CONSERVATIVE PERCENTAGE	RANGE	IQR	SD	MEDIAN ANNUAL LIBERAL PERCENTAGE	RANGE	IQR	SD
Newby	2005-2011	REP	82.5	44	19	15.4	10.5	27	12	8.7
Mitchell	1995-1999	DEM	71	28	20	10	27	30	18	9.8
Lake	1995-2006	REP	67	45	15	11.9	28	37	20	11
Parker	1995-2011	DEM	61	80	37	22.3	29	80	30.5	21
Martin	1999-2011	REP	60	43	23	13.6	35.5	40	16	11.3
Edmunds	2001-2011	REP	58	59	37	19.6	33	65	35	21
Whichard	1995-1998	DEM	55.5	22	11.5	8.3	44.5	28	14.5	10
Wainwright	1999-2006	REP	55	63	29.5	19.3	30	67	25.5	20.5
Freeman	2000	DEM	50	*n/a*	*n/a*	*n/a*	50	*n/a*	*n/a*	*n/a*
Orr	1995-2004	REP	50	75	46	23.7	44	57	40	19.9
Butterfield	2001-2002	DEM	48	30	30	15	46	42	42	21
Brady	2003-2010	REP	45	79	33.5	23.3	33	79	31	24.5
Webb	1995-1998	DEM	39	29	25.5	12.9	55.5	34	28.5	14.5
Frye	1995-2000	DEM	30	50	14	16	66	45	35	17.2
Hudson	2007-2011	DEM	12.5	34	21.5	13.5	83	45	22.5	18.9
Timmons-Goodson	2006-2011	DEM	10	31	26.5	12.3	70	56	41.5	19.8

Summary for Hypothesis One

To summarize, neither an analysis of all of the non-unanimous decisions in the aggregate nor an analysis of the cases by category yields strong support for Hypothesis One. Instead, the Court became more "partisan" in its "nonpartisan era," according to the overall trends observed. The expected changes did not appear between the eras in justices' voting patterns on economic distribution, civil rights/civil liberties, or redistricting cases. Where there were large changes following the shift to nonpartisan ballots, they were in the opposite direction than expected. The economic distribution umbrella and the workers' compensation categories had the largest changes of any of the categories, both becoming more consistent with votes based on the justices' party affiliations. The change in civil rights/civil liberties cases was smaller than that in most categories; no change appeared at all in redistricting decisions. In only two of the categories did the change Hypothesis 1 predicts appear: drugs and government regulation. The

Court's decisional output, meanwhile, has been generally conservative in both eras. Conservative decision-making has not characterized all categories equally, however. Some categories during the partisan era had more liberal non-unanimous decisions than conservative ones, while some categories in the nonpartisan era had equal numbers of liberal and conservative non-unanimous decisions. From the partisan era to the nonpartisan era, the Court grew less conservative in five categories (including subcategories), more conservative in three others, and remained exactly in the same in one (redistricting).

Analyses of justices as individuals also do not yield support for Hypothesis One. Only one justice who served during both eras demonstrated behavior resembling that which was expected by the hypothesis, and justices who served only during the nonpartisan era happened to be those who were the most in line with their partisan expectations (i.e. "most liberal" or "most conservative," as the case may be).

Hypothesis Two

Hypothesis Two concerned decisions of the Court (including unanimous decisions), predicting that they would be less consistent with the Court's partisan majority during the nonpartisan era than during the partisan era.

Table 8: Consistency of Court Decisions with Partisan Expectations, by Era

YEARS	% CONSISTENT	% INCONSISTENT
1995-2004	34%	55%
2005-2011	59%	26%

As Table 8 indicates, the Court's decisions became much *more* consistent with what would be expected of the Court's partisan majority during the nonpartisan era. Therefore, Hypothesis Two is not supported. Overall, the Court's decision-making has tended to be conservative during both the partisan and nonpartisan eras, albeit with some yearly variation (see

Table 9). Since Republicans controlled the Court for *all of* the nonpartisan era, but for only *part of* the partisan era, decisions during the second era necessarily are more consistent with partisan expectations.

Figures 3 and 4 show that over the entire span of time studied, no clear relationship appeared between the number of Democratic justices and the percentage of "liberal" decisions. This can be attributed to the conservative voting patterns of several of the Democrats (such as Chief Justice Mitchell) who made up the 5-2 majority in the partisan era, when some of the lowest percentages of liberal decisions were recorded. In addition, the year in which there was the highest recorded percentage of liberal decisions, 2004 (the last year of the partisan era), was one in which only one Democratic justice was serving. Despite the varying numbers of Democrats on the Court, the median annual percentages of liberal decisions were quite similar in the two eras: 27 percent in the partisan era and 28 percent in the nonpartisan era.

Table 9: Court's Decisions by Year and by Ideological Orientation

YEAR	MAJORITY	NUMBER OF DEMOCRATS	% LIBERAL DECISIONS	% CONSERVATIVE DECISIONS
1995	D	5	13 %	80 %
1996	D	5	19	77
1997	D	5	25	68
1998	D	5	33	52
1999	R	3	27	55
2000	R	3	28	63
2001	R	2	27	66
2002	R	2	33	59
2003	R	1	24	54
2004	R	1	50	34
2005	R	1	34	55
2006	R	2[20]	28	53
2007	R	3	29	62
2008	R	3	24	56
2009	R	3	29	52
2010	R	3	21	67
2011	R	3	15	70

Note: Percentages do not add up to 100 because some decisions could not be classified.

[20] Justice Timmons-Goodson joined the Court in February 2006, so for a small part of the year, there was only one Democrat on the Court.

Figure 3

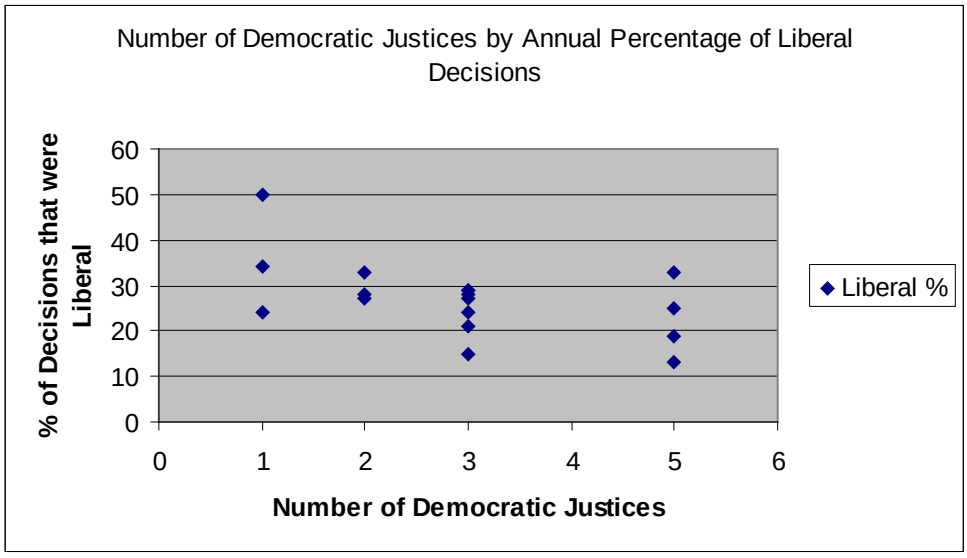
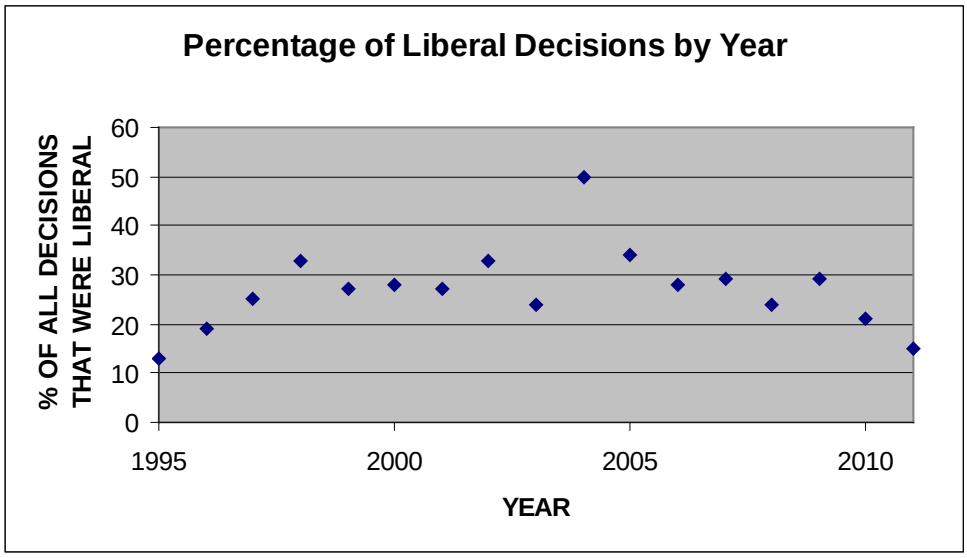


Figure 4



Hypothesis Three

In Hypothesis Three, I focused on bloc voting by political party, anticipating relatively less voting as a bloc during the nonpartisan era. The first and most straightforward way to operationalize bloc voting was to define a party-line vote as one in which each side (majority and minority) was made up entirely of members of the same political party (see Table 10). Taken as

a whole, the non-unanimous decisions of the Court during the nonpartisan era featured a higher percentage of party-line votes than did those during the partisan era, a finding that does not support Hypothesis Three. However, party-line votes were exceedingly rare during both periods, and the difference between the two eras is quite small, making these findings mostly inconclusive.

Seeking a more meaningful way to gauge partisan voting than simply finding the rare party-line votes, I created tables (Table 11 is provided as an example) of the percentages of votes in which a justice agreed with each other justice on a case's disposition. Using these data, I found the mean "agreement" between all the justices belonging to each party for each year, as well as medians and standard deviations.[21] (See Table 12; 2011 is italicized to reiterate that this year featured only one non-unanimous decision, making comparisons difficult.) During the partisan era, the median of Democrats' mean annual percentages of agreement was 53 percent, and the median of Republicans' mean annual percentages of agreement was 64 percent. During the nonpartisan era, Republicans were still more likely to agree with each other than were Democrats, but the difference between the two parties actually increased. The median of Democrats' mean annual percentages of agreement during this era was 37 percent, while for Republicans, the median of their mean annual percentages of agreement was 71 percent.[22] The sharp decrease in Democratic agreement during the nonpartisan era, which might be an indicator that Hypothesis Three is supported, seems to stem primarily from the divergence between the more conservative Justice Parker, on the one hand, and the more liberal Justices Timmons-Goodson and Hudson (who agreed with each other relatively often), on the other. During the

[21] This, of course, was not possible for Democrats during the years when Justice Parker was the only Democrat on the Court.

[22] For purposes of finding these medians, I discarded the data from the year 2011, because it reflected votes in only one case.

partisan era, Parker sat alongside other conservative Democrats such as Mitchell. If Parker had not been on the Court, or had not been voting as conservatively, the likely result would have been slightly increased levels of party unity among both parties on the Court after the change to nonpartisan elections. Still, the percentage of Republican agreement did not increase dramatically; overall, the change to nonpartisan elections seems to have made little difference to party unity.

The findings do not support Hypothesis Three; indeed, if anything, they point toward the opposite conclusion. As I elaborate in Chapter Five, the data support an interpretation that the two political parties in North Carolina have become more internally homogeneous (with "Democrat" becoming increasingly synonymous with "liberal," and "Republican" becoming increasingly synonymous with "conservative), as their national counterparts have similarly become more polarized.

Table 10: Party-Line Votes by Year

YEAR(S)	NON-UNANIMOUS CASES WITH PARTY-LINE VOTES	% NON-UNANIMOUS CASES WITH PARTY-LINE VOTES
1995	0	0%
1996	1	5.5%
1997	0	0%
1998	2	11%
1999	1	12.5%
2000	0	0%
2001	0	0%
2002	1	33%
2003	1	20%
2004	1	25%
2005	0	0%
2006	0	0%
2007	1	11%
2008	0	0%
2009	3	16.7%
2010	2	15.4%
2011	0	0%
1995-2004	**7**	**7.8%**
2005-2011	**6**	**8.3%**

Table 11: Illustration: Frequencies of Agreement between justices in Non-Unanimous Cases, 1995

JUSTICES	Lake	Orr	Mitchell	Parker	Frye	Whichard	Webb
Lake		44%	67%	56%	56%	33%	44%
Orr	44%		33%	33%	22%	11%	11%
Mitchell	67%	33%		89%	33%	33%	44%
Parker	56%	33%	89%		22%	44%	44%
Frye	56%	22%	33%	22%		56%	56%
Whichard	33%	11%	33%	44%	56%		33%
Webb	44%	11%	44%	44%	56%	33%	

Table 12: Frequency of Agreement among Justices of the Same Party in Non-Unanimous Cases, by Year

YEAR	MEAN DEMOCRATIC AGREEMENT	MEDIAN	SD	MEAN REPUBLICAN AGREEMENT	MEDIAN	SD
1995	45%	44%	17.7	44%	N/A[23]	N/A
1996	54%	50%	15.1	72%	N/A	N/A
1997	52%	55%	13.8	82%	N/A	N/A
1998	68%	67%	12	61%	N/A	N/A
1999	41%	38%	23.4	88%	88%	7.2
2000	78%	83%	7.5	52%	50%	13.9
2001	50%	N/A	N/A	57%	50%	15.7
2002	67%	N/A	N/A	85%	100%	16.4
2003	N/A	N/A	N/A	60%	60%	27.5
2004	N/A	N/A	N/A	66%	67%	20.4
2005	N/A	N/A	N/A	49%	45%	25.3
2006	22%	N/A	N/A	54%	59.5%	12.2
2007	37%	17%	32.6	82%	78%	8.2
2008	33%	40%	17	70%	70%	19.1
2009	67%	56%	19.5	72%	72%	5.3
2010	64%	69%	13.1	89%	89%	7.2
2011	*100%*	*100%*	*0*	*33.3%*	*0%*	*47.1*

Hypothesis Four

For Hypothesis Four to find support, the data would need to provide evidence of justices' modifying their voting in a more "liberal" (for Democrats) or a more "conservative" (for Republicans) direction as they approached elections to retain their seats. In order to test Hypothesis Four, I tabulated the votes for justices who sought election or re-election during the time period being studied. Here, I included the unanimous as well as non-unanimous decisions, reasoning that if justices voted with an election in mind, they would not necessarily confine their voting behavior to the subset of cases that were non-unanimous but might also change their

[23] Where a mean but neither a median nor a standard deviation is listed, that reflects that there were only two justices from that party during that year.

behavior in cases they believed could be high-profile, such as (the often unanimous) capital murder cases. I compared the mean and median percentages of liberal votes (for Democrats) or conservative votes (for Republicans) cast by each justice during his or her entire tenure with the corresponding mean percentages (which are also, of course, the median percentages) during the year before and the year of the election in question. I discarded data on justices who sought election but whose entire tenure was two years or less (Justices Butterfield and Freeman), since the data would be the same.

Table 13: Changes in Voting Behavior by Justice, Election Proximity

JUSTICE (PARTY) /YEARS	MEAN YEARLY % LIBERAL OR CONSERVATIVE VOTES, OVERALL	MEDIAN YEARLY % LIBERAL OR CONSERVATIVE VOTES, OVERALL	MEAN % LIBERAL OR CONSERVATIVE VOTES DURING YEAR BEFORE AND YEAR OF JUSTICE'S RE-ELECTION
Mitchell (D)/1995-96	23% liberal	24% liberal	17% liberal
Parker (D)/1995-96	27.1% liberal	27% liberal	15% liberal
Frye (D)/1999-2000	28.5% liberal	29% liberal	31.5% liberal
Orr (R)/2001-02	59.4% conservative	58.5% conservative	60% conservative
Parker (D)/2003-04	27.1% liberal	27% liberal	34% liberal
Parker (D)/2005-06	27.1% liberal	27% liberal	30.5% liberal
Timmons-Goodson (D)/2005-06	37.7% liberal	37% liberal	29% liberal
Martin (R)/2005-06	57.4% conservative	59% conservative	57.5% conservative
Edmunds (R)/2007-08	58.5% conservative	57% conservative	59% conservative

The results of the comparison, shown in Table 13 (the heavy line is used to easily indicate the separation between the two eras), are inconclusive. During the partisan era, two Democratic justices were more liberal in their voting behavior in the run-up to an election, while two others became less liberal, and one Republican justice showed no change. No evidence suggests that justices modified their voting behavior in the year before or the year of their next election during the partisan era. During the nonpartisan era, the picture is similar. Only one justice of the four who met the criteria in the nonpartisan era (Parker in the year before and the year of her election as Chief Justice) showed evidence of voting more consistently with her party

affiliation. The other Democratic justice became slightly less liberal, and the two Republicans showed only a small amount of change.

To summarize, the data do not support Hypothesis Four or any firm conclusions. The proximity to an election does not seem to systematically drive justices to change their behavior, and the imposition of the nonpartisan election reform has no effect in any event. There is also not an apparent difference between Republican and Democrats from these data, although the small number of cases available (for example, there was only one Republican in the partisan era) make any partisan comparison difficult.

Hypothesis Five

Hypothesis Five involved the Court's propensity to use its power of judicial review to overturn governmental acts. Such "acts" were North Carolina statutes and official policies or actions of the executive branch, such as executive orders of the governor, rules issued by state administrative agencies or boards, and ordinances adopted by counties and municipalities. This definition does not include, for example, the actions of individual law enforcement officers or individual law enforcement agencies, but it did include or formal policies governing their conduct. I counted the numbers of cases in which the Court's majority opinion specifically announced that a governmental act did or did not run afoul of the state or federal constitutions. As Tables 14 and 15 detail, such decisions by the North Carolina Supreme Court were rare during the time period studied. During the partisan era, the Court made a total of 10 such decisions, for a mean and a median of one per year (standard deviation of 1.2). During the nonpartisan era, the Court made a total of four such decisions, for a mean of .6 per year and a median of 0 per year (standard deviation of .7). Over the course of both periods, the Court invalidated governmental acts as violations of the North Carolina Constitution eight times, the

United States Constitution five times, and both constitutions once; it did so less frequently after the change to nonpartisan elections (contrary to the expectations of Hypothesis Five). During the partisan era, the Court invalidated a governmental act in 35.7 percent of the 28 cases in which it had an opportunity to do so, while in the nonpartisan era the Court invalidated a governmental act in 25 percent of the 16 cases in which it had an opportunity to do so. The data do not support Hypothesis Five, but the small sample and the small degree of change from one era to the other lead me to hesitate before drawing sweeping conclusions.

Table 14: Judicial Review Decisions by Year, 1995-2011

YEAR	NUMBER OF DECISIONS INVALIDATING GOVERNMENTAL ACTS	NUMBER OF DECISIONS UPHOLDING GOVERNMENTAL ACTS
1995	0	1
1996	0	1
1997	1	6
1998	4	3
1999	1	0
2000	0	0
2001	0	3
2002	1	1
2003	2	1
2004	1	2
2005	1	2
2006	0	1
2007	2	1
2008	0	1
2009	1	1
2010	0	4
2011	0	2
OVERALL TOTAL	**14**	**30**

Table 15: Judicial Review Decisions by Era

ERA	TOTAL DECISIONS INVALIDATING GOVERNMENTAL ACTS	MEAN NUMBER OF ANNUAL DECISIONS INVALIDATING GOV'TAL ACTS	MEDIAN NUMBER OF ANNUAL DECISIONS INVALIDATING GOV'TAL ACTS	SD	TOTAL DECISIONS UPHOLDING GOV'TAL ACTS	MEAN NUMBER OF ANNUAL DECISIONS UPHOLDING GOV'TAL ACTS	MEDIAN NUMBER OF ANNUAL DECISIONS UPHOLDING GOV'TAL ACTS	SD
Partisan (1995-2004)	10	1	1	1.2	18	1.8	1	1.7
Nonpartisan (2005-2011)	4	.6	0	.7	12	1.7	1	1

Hypothesis Six

The sixth and final hypothesis predicted less unanimity in the Court following the start of the nonpartisan era. Alone among the hypotheses, Hypothesis Six is supported: The Court issued a smaller percentage of unanimous non-*per curiam* opinions during the nonpartisan era than it did during the partisan era (See Table 16). Furthermore, the large ranges and standard deviations of the annual percentages of unanimous decisions during the nonpartisan era indicate a high degree of volatility in how unanimous the Court has been. It is important to note that in both eras, unanimous decisions (defined as those in which only majority and concurring opinions are filed, even if one or more justices did not participate in the decision) have made up the majority of the Court's published opinions each year except for 2009, when only 42 percent of decisions had no justices filing dissents.

During the partisan era, the Court evidently followed a norm of unanimity, with the low point in 1998, when 81 percent of its decisions were unanimous. By contrast, during the nonpartisan era, the percentage of unanimous decisions was lower than 81 percent in every year except one. That very curious year, 2011, was one in which the Court issued only one non-unanimous opinion; 95 percent of its opinions were unanimous. Whether this indicates that the

Court (now composed entirely of justices elected under the nonpartisan system) will return to the norm of unanimity will be for future researchers to determine. The relative decrease in unanimity coincided with (and may have been caused by) the addition of the more liberal Justices Timmons-Goodson and Hudson. Since Democrats during the earlier era were more likely to vote conservatively than Timmons-Goodson and Hudson, it stands to reason that earlier Democratic justices would more often agree with their Republican colleagues than the more ideologically polarized Court of the nonpartisan era. This is consistent with my analysis of the results under Hypothesis Three regarding less ideological diversity within the political parties.

Table 16: Unanimity on the North Carolina Supreme Court by Partisan Era

YEARS	% UNANIMOUS DECISIONS	MEAN/YR	MEDIAN/YR	STANDARD DEVIATION	RANGE
1995-2004	87%	87%	87%	4.4	12
2005-2011	69%	70%	71%	15.6	53

Chapter Summary

In this chapter, I have reported and analyzed what I found as I tested six hypotheses that together produce a case study of the North Carolina Supreme Court during a time of institutional change. The hypotheses performed rather poorly; I could characterize only one, Hypothesis Six, as being supported by the data that I collected and analyzed (with the results of Hypotheses Four and Five being clouded by the small amount of data). Meanwhile, interestingly, the data often suggested the opposite of my expectations, in that the Court's decision-making seemed more in line with partisan expectations following the change to nonpartisan elections. In Chapter Five, I will further explore why that may have been the case, as I conclude this thesis with an interpretation of the implications of my findings.

CHAPTER FIVE

Conclusions

The primary purpose of this thesis was to study whether there were clear differences between how the justices of the North Carolina Supreme Court voted during the Court's "partisan" and "nonpartisan" eras. Through this case study, I sought to determine if the change in the Court's institutional arrangements -- the ballot form – was followed by changes in judicial decision outcomes. The data I collected paint a mixed picture, but when I examine my findings in totality, I conclude that the nonpartisan judicial reform has made little difference to the Court's decision-making (at least based on the parameters of my hypotheses). In this final chapter, I interpret the findings of the thesis, comparing the propositions that I made in Chapter Three with the actual results and considering why they differ. Then, I will close by discussing the study's limitations and suggesting the types of research that should be explored in the future.

Initial Propositions versus Results

The first proposition suggested that changing from partisan to nonpartisan elections would be associated with justices being more likely to vote in ways that differed from those predicted by their party affiliations. This proposition went to the heart of the matter: if this Court had become more nonpartisan, then justices' votes would have been less predictable; in other words, justices would have resembled members of a partisan legislative body less and less. Yet I found almost precisely the opposite of what the proposition predicted: in the nonpartisan era overall, Democrats voted more "liberally" and Republicans voted more "conservatively." To be sure, in neither era was the partisan makeup of the Court reflected in all, or even *almost* all, decisions. Many surely would consider such a finding to be a striking level of partisan voting; no fair-minded jurist would, for example, find every criminal case to be identical and vote

accordingly. Even in the nonpartisan era, nearly 30 percent of votes cast were not consistent with the justices' partisan expectations.

My innovation in this thesis was that I coded votes not only as "liberal" and "conservative," but also as "expected" and "unexpected" (that is, "consistent" and "inconsistent" with partisan expectations), allowing for a comparison that spanned all years and all justices, regardless of party. It is clear that in the partisan era studied here, the North Carolina Supreme Court was rather conservative overall in its decision-making, and the votes of the justices were split fairly evenly between those that were "expected" or "unexpected." During the nonpartisan era, the Court was still rather conservative but justices' votes were much more likely to be "expected," i.e. the Court was "more partisan." The clear conclusion is that the change to nonpartisan elections has not had a profound effect on justices' voting patterns. Instead, other factors, from the justices' ideologies to the particular issues of the day, must be more important drivers of voting decisions.

Moreover, it is clear that while the justices of both parties voted more consistently with party expectations in the more recent era, more change appeared among Democrats. Using Foley's classifications of "liberal, leaning liberal, moderate, leaning conservative and conservative" and examining only non-unanimous decisions during the partisan era,[24] Democratic Justices Mitchell and Parker would be classified as "conservatives," and Whichard, Webb, Freeman, and Butterfield would be classified as "moderates" (Foley, 1996, p. 176); only Frye would be classified as "liberal." In the nonpartisan era, Democratic Justice Parker would be

[24] Using an approach similar to my own, Foley coded votes as "liberal" or "conservative" (as described in Chapter Two). He calculated each justice's percentage of liberal and conservative votes and then categorized the record of each as follows: "A voting record that is five percentage points on either side of fifty percent is considered 'moderate.' A voting record that is six to ten percentage points above or below fifty percent is considered 'leaning liberal' or 'leaning conservative.' A voting record that is eleven or more percentage points above or below fifty percent is considered 'liberal' or 'conservative'" (Foley, p. 176). Foley also included unanimous decisions in his study.

classified as a "moderate," while Timmons-Goodson and Hudson would be classified as "liberals." Among Republicans, no justice would ever have been classified as a "liberal." During the partisan era, Republican Justices Lake and Wainwright would be classified as "conservatives," while Orr, Martin, Edmunds, and Brady would be classified as "moderates." During the nonpartisan era, Wainwright would be classified as a "moderate," Brady as "leaning conservative," and Martin, Edmunds and Newby as "conservatives."

One can speculate that as the two political parties have become more distinct on the national level in recent years -- with fewer liberal Republicans and fewer conservative Democrats, at least among elected officials (in Key's and Sorauf's terms, the "party-in-government") -- they also have become more distinct on the state level in North Carolina. Certainly, this is consistent with the observation that there was more change for the Democratic justices, since the southern United States has a long history of conservative Democrats. North Carolina may be joining the nation in becoming more polarized, with each party more ideologically homogeneous than in the past. It seems that what Foley reported happening in Tennessee is similar to what has occurred in North Carolina. In Tennessee, the Democratic Party establishment (the "party organization" in Key's and Sorauf's terms) replaced more conservative Democratic justices with more liberal ones. Meanwhile, over time in North Carolina, voters and Democratic governors (making appointments to fill vacancies) have installed more liberal Democrats on the Court; Justice Parker, of course, has remained from the earlier era. Just as Bakst et al. reported in their article on the North Carolina Supreme Court's decisions between 2006 and 2010, I found that the nonpartisan era has seen the formation of a conservative bloc, which included Brady, Edmunds, Martin, and Newby, and a liberal bloc, which included

Timmons-Goodson and Hudson, with Parker voting unpredictably but often joining the four conservatives (Bakst et al., 2011, p. 1).

Largely because of Parker's moderate conservatism, the Court continues to demonstrate some of the "nonpartisanship" that existed during the partisan era. Rachel Ryan reminded us not to judge the "book" of the justices' decision-making by the "cover" of their individual partisan labels during the partisan era, and her observation still rings true, albeit to a lesser extent. I certainly did not find the level of partisanship that Martin and Pyle found on the formally nonpartisan Michigan Supreme Court in 1999, when, in the first six months of that court's new Republican majority, 13 of the 22 non-unanimous decisions were decided strictly along party lines (Martin and Pyle, 1999, p. 1235).

Meanwhile, one of my objectives was to look for changes in behavior by the justices whose tenures included both the partisan and nonpartisan eras. Results from this subset match the results of the Court in general: only one -- Republican Justice Wainwright – voted less consistently with partisan expectations during the second era. That there was only one Democratic justice (Parker) compared to five Republicans who served during both eras makes it difficult to say that party is or is not associated with changes in behavior.

The second proposition was that in the nonpartisan era, justices' voting tendencies would not change in the year before or in the year of their next election, compared to changes during the partisan era. Yet no patterns emerged at all, contrary to the findings of Hollibaugh. The most straightforward interpretation may be that in North Carolina, there has been no history of justices consistently looking toward their primary electorates and changing their voting pattern accordingly. If anything, justices may have been just as likely to look to their general election electorates and shifted their voting toward the center. On the other hand, many justices may

simply have not made conscious efforts to vote more "conservatively" or "liberally" with an election approaching. Although numerous studies have found evidence that elections do make a difference in how judges vote, it is reasonable to hypothesize that elections would weigh most heavily on judges' minds as they contemplate a highly visible case (one that will "generate headlines"). The numbers of such visible cases may simply be so small in a given year that modifications in such votes did not register in my data.

My third proposition was that the imposition of the nonpartisan reform would prompt a greater willingness on the part of the North Carolina Supreme Court to exercise judicial review. I did not find support for this proposition, but the small difference between the two eras and the relatively small number of cases involved led me to draw no conclusions. Nevertheless, I found nothing to persuade me that the election system had anything to do with the Court's eagerness to overturn acts of the so-called "political" branches of state government.

Finally, I proposed that a nonpartisan North Carolina Supreme Court would be less likely to issue unanimous decisions than it had been in its partisan era. This was the sole proposition for which I found support. It does not seem that the partisan election system incentivized justices to reach consensus or tow the "party line" (incentives that presumably would be lacking in a nonpartisan system). Although that may have happened to some extent, the lack of unanimity evidently resulted instead from the greater likelihood that the liberals -- Justices Timmons-Goodson and Hudson, dissenting singly or together -- would disagree with the conservative majority. Consensus would be more difficult to reach on the nonpartisan era's increasingly partisan Court. The flaw in this interpretation is, of course, the most recent year studied (2011), when the Court demonstrated a surprising ability to speak with one voice. Less clear is whether this was an anomaly or a signal of continuing change. Taking all of the year's

decisions as a whole, 2011 was among the Court's most conservative years. The chances seem remote that Justices Timmons-Goodson or Hudson would join that many conservative opinions in another year. Another possible source of the Court's increased unanimity in 2011, however, remains: the absence of Justice Brady (who was replaced by Justice Jackson, a fellow Republican, following her November 2010 election). Generally conservative but somewhat unpredictable, Brady often separated from his fellow Republicans and was the lone dissenter on four cases during his eight-year tenure (with his party in the majority for his entire term). Jackson, who did not participate in any non-unanimous opinions in her single year on the Court studied here, could be less willing to dissent than Brady; she also could have added a new dynamic to the Court that I could not measure, such as helping to forge compromise opinions that can gain the votes of all seven justices.

The most likely conclusion from all of my findings is that the judicial selection mechanism in North Carolina is not in fact nonpartisan, but is more accurately described as a partisan system without partisan labeling. Justices and candidates for the Court likely know that the system is not nonpartisan, and therefore have no obvious reasons to behave differently. Even before reaching the Court's decision-making, the elections to the Court do not seem to resemble what one might expect of nonpartisan elections. Several researchers have described nonpartisan elections as less competitive than their partisan counterparts, but a lack of competition has not been consistently the case in North Carolina, as evidenced by the 2012 election. As in earlier studies by Nagel, Atkins and Glick, and others that compared states, I found little difference in decision-making in this one state that can be explained by the judicial selection system's change. A fully "nonpartisan" North Carolina Supreme Court has not emerged since 2005; instead, the Court either is *more* partisan or has a relatively stable level of partisanship. Perhaps a less

partisan Court may evolve over time. As it stands today, however, it seems unlikely that jurists who actually are nonpartisan will find their way onto the Court. This is particularly true for those who reach the Court by gubernatorial appointment, since governors are partisan politicians, and they typically make appointments with some partisan motivations in mind. Even those who are elected rather than appointed are likely to be associated in one way or another with the state's partisan political system. The changes in the electoral system have not yet dramatically changed the justices' behavior; rather, changes on the Court appear to continue to be related to the preferences of the individuals who serve on it, preferences that often reflect partisan affiliations.

Nevertheless, it is worth considering that the nonpartisan election reform did in fact have important consequences that were not directly measured in this natural experiment. The failure of all but one of my hypotheses may indicate that searching for changes in the Court's formal decision-making due to the institutional change was not fruitful, but the success of one hypothesis does point toward another, more fundamental phenomenon. Since the presence of Justices Timmons-Goodson and Hudson largely produced the decreased level of unanimity on the Court, it may be that the nonpartisan reform did in fact make the key difference, because without the reform those two justices might not have served on the Court at all, or in one case, not for long. When Timmons-Goodson and Hudson were elected in 2006, they became, respectively, the first and only first-time Democratic Supreme Court candidate to win election following her appointment and the first and only Democrat to win an open seat on the Court during the period studied here. It is, of course, impossible to know whether Timmons-Goodson and Hudson would have been elected under the partisan system, but the difference between their electoral success and the many electoral failures of Democrats in the last three partisan elections (1998, 2000, and 2002) is stark. It is possible that North Carolina voters' preferences for

conservative Republicans on the state's highest court completely changed in the late 2000s, but that notion strains credulity. What seems more likely is that a combination of the incumbency advantage, a potential advantage for female candidates, and general voter ignorance (as well as more idiosyncratic factors and the ability of Democratic governors to make appointments to the Court), made a noticeable difference in who occupied seats on the Court. The staffing of the Court with more Democrats may be the nonpartisan reform's clear legacy -- leading to less unanimity and potentially to many individual votes that were different from what would otherwise have been the case, though not to many different decisional outcomes (as Democrats never gained a majority).

Limitations of Thesis and Potential Future Research

In addition to the limitations I discussed in Chapter Two, another drawback for this thesis is that the JCRA took effect only several years ago. Sufficient time has elapsed to make some initial judgments. Still, this type of study should be conducted again, perhaps a decade from now, after the state has held more nonpartisan elections. That would make this research a baseline for future studies. Moreover, it would have been beneficial to have included data from at least as many years after the change as preceding it. That also would help alleviate the problem of having insufficient numbers of non-unanimous cases in particular categories to make meaningful comparisons within and between the two eras.

Meanwhile, another phenomenon that ought to be studied is the history of the other major component of the JCRA, a voluntary public financing program for candidates for the North Carolina Supreme Court. The campaign for reform of state judicial selection, "Justice at Stake," declared in 2011,

> North Carolina's public financing system has been a national model. About 75 percent of all candidates have participated in the voluntary system, including

> women, minorities and members of both parties. Public financing is popular with North Carolina judges and voters because it frees up candidates to talk with voters instead of campaign donors, greatly reducing the perception of special-interest bias (Skaggs et al., 2011, p. 22).

Troutman noted that candidates who opted to participate in the public financing program tended to win their races in the system's first two election cycles (2008, pp. 1775-1776). It would be worth seeing if that continues to be the case, and if in turn that affects the types of candidates who run for office, those who win, and the decisions they make. The 2012 Newby-Ervin contest, which featured expenditures by a "super PAC" (with virtually unrestricted contributions in the wake of ***Citizens United v. Federal Election Commission***), raises questions about the future of the public financing system, which also could be explored. The ironic consequence of imposing a nonpartisan election system could be that it encourages, or requires, more advertising by partisan and other interest groups because those groups cannot rely on like-minded voters to simply vote a straight party ticket. Since candidates who participate in the public financing program are limited in the amount of funds they can expend, super PACs have the ability to dwarf the advertising activities of the actual candidates. The implications of this development are clear in light of the aforementioned ***Caperton*** decision, which found that due process required a West Virginia Supreme Court justice to recuse himself from a case involving a particular businessman who personally contributed "three times the amount spent by [Justice] Benjamin's own [campaign] committee" to support independent expenditures on the justice's behalf (Caperton, 2009, p. 2257). It would be valuable to study judicial elections in the context of how important campaign finance is in both partisan and nonpartisan elections, who makes financial contributions during such elections, and how contributions might lead to real or perceived conflicts of interest for justices vis-à-vis those who support them. Scholars like Hall have legitimately questioned the value of low-visibility, low-turnout nonpartisan elections that

inhibit accountability of the justices to the broader electorate but might increase their accountability to a relatively small group of high-information voters and powerful groups who have vested interests in who sits on the Court (and who have clear ideas of how justices will vote).

Another potential topic for study, inspired by the (admittedly meager) data I have collected on judicial review, would be the relationships among the three branches in North Carolina. For most of the years included in this study, Democrats held the upper hand in the other two branches of government, with a Democratic governor and at least one house of the General Assembly under Democratic Party control. As I have mentioned already, redistricting lawsuits (following the 2000 Census) took place in that political context. In 2010, however, Republicans gained majorities in both houses of the legislature, and in 2012, a Republican was elected governor. The implications of these changes for judicial review, redistricting, appointments to office, and perhaps even appropriations could be ripe for investigation, especially after several years in the post-2010 partisan environment. Perhaps, in 2013, the Court will show itself to be less partisan when it rules on redistricting (that is to say, we will not be able to accurately predict the votes based solely on the justices' party affiliation), and the story told by this thesis will have a different ending.[25] Until that occurs, the aims of the Democratic-led legislature that passed the JCRA -- which may have included making the appellate courts less partisan, making them less threatening to the legislature, and making it possible for Democrats to win seats (and hopefully, a majority) on the Court -- seem not to have been fully realized.[26]

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[25] As of February 2013, a suit brought by Democrats against the redistricting maps (drawn by Republicans following the 2010 Census) was pending before the Court. See Biesecker, Michael. (2012, Nov. 21). "Motion: Recuse justice from NC redistricting case" (Associated Press). Biesecker writes that Democrats filed a motion arguing that "Justice Paul Newby should be recused because the outsized partisan spending on his reelection campaign undermines his impartiality."

[26] Although Democrats have recovered from their nadir of one seat, they have never regained the majority they enjoyed for so long.

Other possibilities for future research certainly should include conducting similar analyses of justices' votes and their associations with party affiliation on courts of last resort in other states. Comparisons involving southern states would be particularly appropriate, since many such states share political, cultural and historical features, and it is possible to study several different selection systems in the same region. As Bonneau and Hall noted, Arkansas also changed its judicial elections from partisan to nonpartisan in the 2000s, making that state a prime candidate for studying judicial decision-making (Bonneau and Hall, 2009). It would be especially important to note what the consequences of that change were, since, unlike in North Carolina, the Arkansas Republican Party rather than the Democratic Party strongly supported the reform (American Judicature Society, 2012). As Hall and Brace wrote, "state supreme courts are a comparativist's paradise, presenting variation in every major determinant identified to date of judicial behavior…[and]…a wide array of institutional features and configurations, both in terms of external structures and internal operating rules and procedures" (Hall & Brace, 1992, p. 148). Continuing to study the panoply of state judicial systems longitudinally and across states could reveal first, whether there are such things as *nonpartisan* state supreme courts, and second, under what conditions institutional changes actually influence decision-making. If researchers continue to detect no differences in outcomes that are associated with institutional changes, then the lesson to be learned is that changes to formal selection systems impact who serves on courts, but not (in any systematic ways) the decisions they make once they sit on those courts.

APPENDIX A: Method of Data Recording

I created a spreadsheet for recording data on all the cases being studied, with a different worksheet for each calendar year. I recorded codes in the following columns:

- "UNAN," i.e. whether or not the decision was unanimous (coded "Y" for Yes/unanimous or "N" for No/non-unanimous)
- "DECISION" ("D" for decision expected of Democratic-majority Court, "R" for decision expected of Republican-majority court, or "I" for indeterminate)
- Each justice's last name, indicating his or her vote ("Maj" for voting with the Majority, "Diss" for Dissenting, or "NP" for not participating)
- Each justice's last name plus "-ex," indicating whether each justice's vote was the type of vote expected for a Democrat, or a Republican, depending on the justice ("E" for Expected, "Un" for Unexpected). For example, in a case in which the majority opinion was "liberal" (expected of a Democratic court), a vote with the majority would be "E" for a Democratic justice but "Un" for a Republican justice. It was important not only that I could later count how many votes (of all justices) were expected or unexpected by partisan affiliation, but also whether the votes were liberal or conservative, in order to paint a complete picture of the Court's decision-making during these years. If the case's DECISION was coded "I," then all votes for all participating justices were also coded "I." If a justice did not participate in the particular case, this field was coded "N/A."
- "CAT," for Category (one of the umbrella categories listed above)
- "FINECAT," for sub-categories (modeled on Hall and Brace's codes)
- Margin (e.g. 4-3)

- “JR,” for Judicial Review (coded “upheld” if the challenged statute/governmental act was upheld, “invalidated” if it was invalidated as in violation of the U.S. or North Carolina Constitutions, or “n/a” if no such challenge was considered as part of the case’s decision)

APPENDIX B: Tables Recording Percentages of Liberal and Conservative Votes Cast Per Year by North Carolina Supreme Court Justices

1. Lake (R)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
1995	25	75
1996	18	71
1997	36	64
1998	28	67
1999	38	38
2000	17	83
2001	13	75
2002	33	67
2003	20	60
2004	50	50
2005	40	60

2. Orr (R)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
1995	25	75
1996	18	71
1997	27	73
1998	33	61

1999	50	25
2000	50	50
2001	38	50
2002	67	33
2003	75	0
2004	75	25

3. Newby (R)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
2005	20	80
2006	27	45
2007	11	89
2008	10	70
2009	0	89
2010	8	85

4. Wainwright (R)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
1999	38	38
2000	17	83
2001	13	75
2002	33	67

2003	20	60
2004	50	50
2005	80	20
2006	27	45

5. Martin (R)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
1999	38	38
2000	40	60
2001	50	38
2002	33	67
2003	25	50
2004	50	50
2005	40	60
2006	45	27
2007	33	67
2008	10	70
2009	28	61
2010	23	69

6. Edmunds (R)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"

2001	38	50
2002	33	67
2003	20	60
2004	75	25
2005	70	30
2006	55	18
2007	33	67
2008	10	70
2009	33	56
2010	15	77

7. Brady (R)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
2003	40	40
2004	67	33
2005	90	10
2006	36	36
2007	11	89
2008	30	50
2009	22	67
2010	23	69

8. Frye (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST	% VOTES (IN NON-UNANIMOUS

	THAT WERE "LIBERAL"	DECISIONS) CAST THAT WERE "CONSERVATIVE"
1995	67	33
1996	65	24
1997	73	27
1998	78	17
1999	38	38
2000	33	67

9. Mitchell (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
1995	22	78
1996	28	61
1997	27	73
1998	44	50
1999	14	71

10. Whichard (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
1995	44	56
1996	28	61

1997	45	55
1998	56	39

11. Webb (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
1995	44	56
1996	39	50
1997	73	27
1998	67	28

12. Parker (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
1995	11	89
1996	11	78
1997	45	55
1998	50	44
1999	38	38
2000	17	83
2001	38	50
2002	33	67
2003	20	60
2004	0	100

2005	80	20
2006	27	45
2007	11	89
2008	0	80
2009	56	33
2010	31	62

13. Freeman (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
2000	50	50

14. Butterfield (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
2001	25	63
2002	67	33

15. Timmons-Goodson (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
2006	44	22

2007	100	0
2008	70	10
2009	89	0
2010	62	31

16. Hudson (D)

YEAR	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "LIBERAL"	% VOTES (IN NON-UNANIMOUS DECISIONS) CAST THAT WERE "CONSERVATIVE"
2007	83	17
2008	40	40
2009	83	6
2010	85	8

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