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***Baker v. Martin* and the Constitutionality of Partisan Qualifications for Appointment to District Courts**

Independence and accountability are the "twin, if somewhat incompatible goals" of many state judicial systems.¹ To realize these goals, numerous states provide for the election of judges.² North Carolina is one of these states that elects its judges,³ through the somewhat unique process of partisan judicial elections.⁴ This selection process has generated considerable controversy and criticism, especially from members of the judiciary,⁵ but it remains the law.

Closely related to the partisan judicial election process is the method by which mid-term vacancies on the bench are filled. In 1981 the North Carolina General Assembly enacted General Statutes section 7A-142, which mandates that only persons of the same political party affiliation as a vacating judge may fill vacancies in elected district court judgeships.⁶ Last year, in *Baker v. Martin*,⁷ the North Carolina Supreme Court rejected arguments that the party affiliation requirement is an unconstitutional limitation on eligibility for elective office.⁸ Although the North Carolina Constitution expressly delineates qualifications for elective office,⁹ the court held that these constitutional limitations are applicable only to persons seeking election to office, and not to persons appointed to vacancies.¹⁰

This Note analyzes the holding in *Baker* and concludes that while section 7A-142 pursues the worthy goal of protecting the electoral mandate of North Carolina voters, the statute violates the state constitution.

1. Bradley C. Canon, *Commentary on State Selection of Judges*, 77 KY. L.J. 747, 749 (1988-89).

2. By the late 1980s, 42 states elected some or all of their judges in partisan, nonpartisan, or retention elections. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 163-65 (1988-89).

3. N.C. CONST. art. IV, §§ 9, 10, 16; N.C. GEN. STAT. §§ 7A-10, -16, -140 (1989).

4. To be eligible to file as a candidate in a primary election, one must be a registered member of the political party that holds the election. N.C. GEN. STAT. § 163-106(b) (1991).

5. Justice Webb, writing for the majority in *Baker v. Martin*, stated: "We may not like this method and [there have been] efforts by members of this Court and others to move away from political partisanship in the selection of judges." 330 N.C. 331, 341, 410 S.E.2d 887, 893 (1991).

6. Act of July 1, 1981, ch. 763, § 1, 1981 N.C. Sess. Laws 1122, 1122 (codified at N.C. GEN. STAT. § 7A-142 (1989)).

7. 330 N.C. 331, 410 S.E.2d 887 (1991).

8. *Id.* at 334-42, 410 S.E.2d at 889-93.

9. N.C. CONST. art. VI, § 6.

10. *Baker*, 330 N.C. at 335-36, 410 S.E.2d at 889-90; see *infra* notes 19-27 and accompanying text.

If this statute is desirable, North Carolina should implement it by constitutional amendment, not by judicial legislation.

The Honorable Phillip Ginn, a Democratic district judge in the twenty-fourth judicial district,¹¹ resigned his office effective March 29, 1991.¹² James L. Baker, a Republican assistant district attorney and a resident of the twenty-fourth judicial district, sought the district bar's nomination for Judge Ginn's seat.¹³ Citing section 7A-142, the bar expressly refused to consider Baker as a replacement because of his affiliation with the Republican Party.¹⁴ After Baker filed suit, the superior court granted the defendant's motion for summary judgment.¹⁵ The case came to the North Carolina Supreme Court on discretionary review prior to consideration by the North Carolina Court of Appeals.¹⁶

The supreme court, after establishing that the plaintiff had standing to bring the case,¹⁷ noted that although the court possesses the power to review an act of the General Assembly, it was powerless to overturn the statute unless it was manifestly unconstitutional. If any reasonable doubt exists as to a statute's constitutionality, the judiciary will show great deference to the legislature, and the statute will stand.¹⁸ This presumption

11. The 24th judicial district encompasses Avery, Madison, Mitchell, Watauga, and Yancey Counties. N.C. GEN. STAT. § 7A-133 (1989).

12. *Baker*, 330 N.C. at 333, 410 S.E.2d at 888.

13. *Id.* State district judges are elected pursuant to Article IV, § 10 of the state constitution and General Statute § 7A-140. N.C. CONST. art. IV, § 10; N.C. GEN. STAT. § 7A-140 (1989). Should a district judge die, retire, or otherwise vacate the office, the judicial district bar submits nominations for a replacement to the Governor, who appoints someone to fill the vacancy for the remainder of the elected term. N.C. GEN. STAT. § 7A-142 (1989).

14. *Baker*, 330 N.C. at 333, 410 S.E.2d at 888. The governing statute states in part: If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge N.C. GEN. STAT. § 7A-142 (1989) (emphasis added).

15. *Baker*, 330 N.C. at 333, 410 S.E.2d at 888. Baker sought to have § 7A-142 declared unconstitutional since it precluded him from consideration as a candidate for district court judge, even though he satisfied the North Carolina Constitution's eligibility requirements for a district court judgeship. *Id.* at 333-34, 410 S.E.2d at 888-89; see N.C. CONST. art. IV, § 22 ("Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a . . . Judge of District Court."); *id.* art. VI, § 6 ("Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office.").

16. *Baker*, 330 N.C. at 332, 410 S.E.2d at 888; see N.C. GEN. STAT. § 7A-31 (1989).

17. The barring of the plaintiff from consideration due to his Republican Party affiliation was sufficient injury to give him standing to sue. *Baker*, 330 N.C. at 333, 410 S.E.2d at 888.

18. *Id.* at 334, 410 S.E.2d at 889; accord *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("[W]e will find acts of the legislature repugnant to the Constitution only 'if the repugnance do [sic] really exist and is plain.'") (quoting *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 9 (1833), overruled on other grounds by *Mial v. Ellington*, 134 N.C. 131, 46

is crucial to the majority's holding, for it presents a difficult standard to meet.

The majority's analysis of the merits began with a review of Article VI, Section 6 of the North Carolina Constitution.¹⁹ The court observed that while the section is entitled "Eligibility to elective office,"²⁰ the text of the section mentions only "eligibility 'for election by the people to office.'" ²¹ There is no mention of eligibility for *appointment* to office, even though other provisions of the constitution clearly identify the possibility of election or appointment in certain circumstances.²² Thus, the court stated, "the words 'by the people' . . . make it clear the section refers to the process of election."²³ As a result, the constitutional provision in no way covers these appointments to office.²⁴

The supreme court next commented that a historical analysis of Article VI supports a narrow construction of the provision. Specifically, the court noted that the earlier version of Article VI, Section 6 was entitled "Eligibility to Office," and its text read: "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office"²⁵ Thus, 1971 amendments adding the word "elective" to the section's heading and the qualification "for election by the people" to its text²⁶ represented a narrowing of the section's scope so that it subsequently applied only to elections to office.²⁷

The court found further support for its holding in other sections of the constitution. Article IV, section 10, which governs the establishment of district courts, provides that both the election of judges and the filling of vacancies on the bench be conducted "in a manner prescribed by

S.E. 961 (1903)); *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967) (quoting *American Equitable Assurance Co. v. Gold*, 249 N.C. 461, 463, 106 S.E.2d 875, 876 (1959)); *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 892 (1961).

19. See *supra* note 15 for the text of this section.

20. N.C. CONST. art. VI, § 6.

21. *Baker*, 330 N.C. at 335, 410 S.E.2d at 889 (quoting N.C. CONST. art. VI, § 6).

22. See, e.g., N.C. CONST. art. IV, § 19 ("If any person *elected or appointed* to any of these offices shall fail to qualify") (emphasis added); N.C. CONST. art. IV, § 22 ("Only persons duly authorized to practice law . . . shall be eligible for *election or appointment*") (emphasis added).

23. *Baker*, 330 N.C. at 335, 410 S.E.2d at 890. This argument is self-proving since "[a] gubernatorial appointment requires no participation 'by the people.'" *Id.*

24. *Id.* at 336, 410 S.E.2d at 890.

25. N.C. CONST. of 1868, art. VI, § 7 (1900); *Baker*, 330 N.C. at 336, 410 S.E.2d at 890.

26. Act of July 2, 1969, ch. 1258, § 1, 1969 N.C. Sess. Laws 1461, 1478. In 1969 the General Assembly proposed a complete editorial revision of the North Carolina Constitution, which was adopted by popular vote at the general election of November 3, 1970. The new constitution took effect July 1, 1971. See Act of July 2, 1969, ch. 1258, § 4, 1969 N.C. Sess. Laws 1461, 1484.

27. *Baker*, 330 N.C. at 336, 410 S.E.2d at 890.

law.”²⁸ This phrase, the court decided, necessarily implies that the General Assembly has authority to codify the election procedures not enumerated in the constitution.²⁹ Assuming the phrase applies similarly to the appointment process, contended the court, the General Assembly must play some role in the appointment of district judges, because Article IV, section 19 does not establish *all* of the necessary procedures.³⁰ General Statute section 7A-142, therefore, is a manifestation of that role.³¹

The supreme court’s final argument on behalf of section 7A-142 was policy-oriented: The statute protects the electoral mandate of voters.³² Given that the voters in the twenty-fourth judicial district chose to elect a Democrat, it was reasonable and fair to ensure that a Democrat filled the seat for the duration of the elected term. To allow the Governor to appoint a Republican or even an independent attorney to the bench would subvert the electoral process. The majority all but admitted that it “[does] not like” the partisan election of judges, but the court felt obligated to support and protect the existing system from abuse.³³

Justices Mitchell and Martin dissented,³⁴ each citing Article VI,

28. N.C. CONST. art. IV, § 10. The plaintiff argued that Article IV, § 19 of the constitution, which establishes guidelines for filling vacancies in judicial offices, exclusively “prescribes the manner in which district court judges are appointed.” *Baker*, 330 N.C. at 340, 410 S.E.2d at 893. This section does not contain a political party qualification; therefore, according to prior supreme court holdings, it should be unconstitutional to add this qualification. *Id.*; see *infra* notes 52-57 and accompanying text.

29. *Baker*, 330 N.C. at 340-41, 410 S.E.2d at 893.

30. *Id.* at 341, 410 S.E.2d at 893.

31. See *id.* In dissent, Justice Martin’s response to this argument was simple: Article IV, § 19 “is a clear, complete, and detailed manner of filling judicial vacancies for the office of district judge. No implementing legislation is required; the General Assembly has no part to play . . .” *Id.* at 346-47, 410 S.E.2d at 895 (Martin, J., dissenting).

32. *Id.* at 341, 410 S.E.2d at 893. The court cited *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 13 (1982), to support its argument that protecting the electoral mandate is a valid concern, but the court admitted that *Rodriguez* is of limited usefulness because it concerns a federal constitutional issue and a legislative appointment, whereas *Baker* concerns a state constitutional issue and a judicial appointment. *Baker*, 330 N.C. at 341, 410 S.E.2d at 893. Even the illustrative value of *Rodriguez* is minimal, however, because the Supreme Court held that protecting the electoral mandate was important largely because Puerto Rico, the jurisdiction involved, had a compelling interest in ensuring minority representation in its legislature. *Rodriguez*, 457 U.S. at 13. Such interests are not implicated in *Baker*.

33. *Baker*, 330 N.C. at 341, 410 S.E.2d at 893. Justice Martin, however, aptly noted that regardless of the rationality or benevolence of the General Assembly’s goals, they may not be achieved at the expense of the constitution. *Id.* at 346, 410 S.E.2d at 895 (Martin, J., dissenting).

34. Justice Mitchell authored a dissenting opinion in which Chief Justice Exum and Justice Martin joined, *id.* at 342, 410 S.E.2d at 895 (Mitchell, J., dissenting), and Justice Martin authored a dissenting opinion in which Chief Justice Exum and Justice Mitchell joined. *Id.* at 344, 410 S.E.2d at 894 (Martin, J., dissenting).

Section 8 of the state constitution, entitled "Disqualifications for office."³⁵ Justice Mitchell argued that under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the integrated and comprehensive list of disqualifications contained in section 8 precludes any other disqualifications.³⁶ Justice Mitchell noted that although this doctrine has never been applied to constitutional interpretation in North Carolina,³⁷ the supreme court has stated that "[q]uestions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments."³⁸

In a separate dissent, Justice Martin argued that the court could not simply ignore the heading to a section of the state constitution,³⁹ even if there is a discrepancy between the scope of the heading and the text of the section.⁴⁰ Furthermore, he argued, since the office of district court judge is undoubtedly an elective office,⁴¹ the qualifications enumerated in Article VI, Section 6 of the constitution apply whether a person is elected

35. *Id.* at 342, 410 S.E.2d at 896 (Mitchell, J., dissenting); *id.* at 345, 410 S.E.2d at 894 (Martin, J., dissenting). This section disqualifies three groups of candidates: 1) those who deny the existence of God; 2) those who are "not qualified to vote in an election for that office" which is filled by election; and 3) those who are convicted felons, who have been found guilty of corruption or malpractice in any office, or who have been successfully impeached. N.C. CONST. art. VI, § 8.

36. *Baker*, 330 N.C. at 343, 410 S.E.2d at 896 (Mitchell, J., dissenting). For cases applying the doctrine, see *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991); *Lemons v. Old Hickory Council*, 322 N.C. 271, 276-77, 367 S.E.2d 655, 658 (1988); *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498-99 (1987).

37. *Baker*, 330 N.C. at 343, 410 S.E.2d at 896 (Mitchell, J., dissenting).

38. *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953). The majority in *Baker* criticized Justice Mitchell's application of this doctrine to the constitution. Although it is a widely acknowledged tool of statutory construction, North Carolina courts have never expressly applied it to the constitution. *Baker*, 330 N.C. at 337, 410 S.E.2d at 890-91. The majority asserted that the dearth of case precedent is due to the doctrine's contradiction with the long-accepted notion that the North Carolina Constitution limits, rather than grants, power. *Id.* Thus, "[u]nless the Constitution expressly or by necessary implication restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision." *Id.* at 338-39, 410 S.E.2d at 891-92. Because there is no express or necessarily implied constitutional restriction on the state legislature to limit disqualifications to appointed office to those found in the constitution, the court reasoned that the General Assembly may enact additional qualifications. *Id.* at 339, 410 S.E.2d at 892. The majority added that adopting Mitchell's interpretation of Article VI, § 8 would invalidate many appointive positions with partisan qualifications in all branches of government, because that section applies to all branches, not merely the judiciary. *Id.*

39. The North Carolina Supreme Court has held that every provision of the state constitution is significant, and no part of it can be "disregarded, ignored, suspended, or broken in whole or in part." *State v. Patterson*, 98 N.C. 660, 661, 4 S.E. 350, 350 (1887).

40. *Baker*, 330 N.C. at 345, 410 S.E.2d at 894 (Martin, J., dissenting).

41. See N.C. CONST. art. IV, § 10 ("District Judges shall be elected").

or appointed to the bench.⁴² To interpret this constitutional provision differently would permit the appointment of persons who would be constitutionally ineligible for election to the same office.⁴³ "Surely," Justice Martin stated, "this is contrary to the genius of the people in framing this article of our Constitution."⁴⁴ Both dissents argued that the supreme court has long held that the General Assembly "cannot add to the disqualifications from state office prescribed in the Constitution of North Carolina."⁴⁵ Justice Mitchell also noted that the disqualification of those not authorized to practice law from election or appointment to the state courts was accomplished only by amending the state constitution, not by legislative acts.⁴⁶ The goal of North Carolina General Statutes section 7A-142 was not inherently unconstitutional, but the means used to accomplish the goal were.

Prior to 1981, there was no partisan limitation on appointments to district court vacancies. The provisions of section 7A-142 at issue in *Baker* closed this political loophole.⁴⁷ Other elective offices have similar statutory limitations on the political party affiliations of people nominated to fill vacant seats. Most notably, vacancies in the North Carolina General Assembly must be filled by someone from the same political party as the vacating legislator.⁴⁸ Significantly, however, there is no similar requirement for judicial vacancies in either the superior courts, the court of appeals, or the supreme court.⁴⁹ Only at the district court level does political partisanship play a role in filling judicial vacancies. Why the General Assembly has not extended the requirements of section 7A-

42. *Baker*, 330 N.C. at 344-45, 410 S.E.2d at 894 (Martin, J., dissenting).

43. *Id.* at 345, 410 S.E.2d at 894 (Martin, J., dissenting). The majority responded cryptically to this theoretical possibility by quoting a dated case that ignored a similarly troubling hypothetical situation. *Id.* at 342, 420 S.E.2d at 893-94 (quoting *Spruill v. Bateman*, 162 N.C. 588, 592, 77 S.E. 768, 769 (1913) ("The Constitution contains no prohibition, in terms, as to this.")).

44. *Baker*, 330 N.C. at 345, 410 S.E.2d at 894 (Martin, J., dissenting).

45. *Id.* at 343, 345, 410 S.E.2d at 894, 896 (Mitchell, J., and Martin, J., dissenting); see *infra* notes 52-57 and accompanying text.

46. *Baker*, 330 N.C. at 343-44, 410 S.E.2d at 896 (Mitchell, J., dissenting); see N.C. CONST. art. IV, § 22 (adopted by vote of the people at the election held November 4, 1980). State constitutional amendments may be proposed by a constitutional convention or by a three-fifths majority of both houses of the General Assembly. Voters must then ratify the proposed amendment. *Id.* art. XIII, §§ 2-4.

47. Act of July 1, 1981, ch. 763, § 1, 1981 N.C. Sess. Laws 1122, 1122 (codified as amended at N.C. GEN. STAT. § 7A-142 (1989)).

48. N.C. GEN. STAT. § 163-11 (1991).

49. See N.C. GEN. STAT. § 163-9 (1991). At these levels of the state court system, Article IV, § 19, and Article VI, § 6 of the North Carolina Constitution govern the appointment procedure. See Appellant's Brief at 21, *Baker* (No. 246PA91).

142 to other levels of the judicial system is unknown.⁵⁰

The case for statutory regulation of appointments to judicial vacancies is further complicated by modern editorial revisions of the North Carolina Constitution. Between 1868 and 1900, Article VI, Section 4 of the constitution provided: "Every voter, except as hereinafter provided, shall be eligible to office."⁵¹ Based on this language, the North Carolina Supreme Court held in *Lee v. Dunn*⁵² that the state legislature could not impose additional qualifications for eligibility to any state office other than those enumerated in the constitution.⁵³

The court echoed this holding roughly forty years later in a pair of decisions. In *Spruill v. Bateman*,⁵⁴ the court stated that "[t]he Legislature is . . . forbidden by the organic instrument [the North Carolina Constitution] to disqualify any voter, not disqualified by that article, from holding any office."⁵⁵ And in *Cole v. Sanders*,⁵⁶ the court wrote:

50. Appellant argued that this disparate treatment of the various courts is nothing more than partisan political gamesmanship. Appellant's Brief at 21, *Baker* (No. 246PA91). North Carolina is not alone in its use of political party affiliation as a qualification for appointment to certain offices. Although no other state has a statute identical to § 7A-142, some states have similar provisions. See, e.g., WASH. CONST. art. II, § 15 (appointing replacements to vacancies in the legislature and in partisan county elective offices); OR. REV. STAT. § 236.100 (1991) (limiting appointees to vacant partisan elective state offices to people of same political party). Oregon elects its judges, with the exception of county judges, on non-partisan ballots. OR. CONST. art. VII, § 1; OR. REV. STAT. § 254.135 (1991). Vacancies on the supreme court, the court of appeals, and circuit courts are filled by gubernatorial appointments, with no political party qualifications involved. OR. CONST. art. V, § 16. Oregon Revised Statute § 236.100 thus does not apply to most judicial offices, but it nevertheless provides a useful comparison to North Carolina General Statute § 7A-142. The Oregon Attorney General has stated that the Oregon statute might violate equal protection principles, 29 OR. ATT'Y GEN. REP. 113, 114 (1959), and more importantly for comparative purposes, that it might "unlawfully add[] a qualification for serving in a[n] . . . office beyond that prescribed in the constitution." 37 OR. ATT'Y GEN. REP. 505, 507 (1975). In *State ex rel. Powers v. Welch*, 198 Or. 670, 259 P.2d 112 (1953), the Oregon Supreme Court held, just as North Carolina's has, that the state legislature cannot add qualifications for offices created by the constitution when the constitution enumerates the qualifications for such offices. *Id.* at 672-73, 259 P.2d at 114. While stopping short of declaring Oregon Revised Statute § 236.100 unconstitutional, the Oregon Attorney General did state that the state constitution and the *Powers* holding "raise[] a doubt covering the validity" of the statute. 37 OR. ATT'Y GEN. REP. 505, 508 (1975).

51. N.C. CONST. of 1868, art. VI, § 4.

52. 73 N.C. 595 (1875). In *Lee*, the sheriff of Wake County refused to pay over previously collected taxes, as required by statute. *Id.* at 596-97. Upon his re-election, the Wake County Board of Commissioners refused to induct him. *Id.* The sheriff challenged the Board's action, asserting that he was constitutionally qualified to serve, and that requiring the payment of the taxes imposed an additional, unconstitutional qualification on him. *Id.*

53. *Id.* at 605. The court distinguished between "eligibility or qualifications for office," which are found in the constitution, and "assurances for the faithful discharge of the duties of the office," such as the statute in question in this case. *Id.*

54. 162 N.C. 588, 77 S.E. 768 (1913). *Spruill* concerned the constitutionality of a statute that required the recorder of court to be a licensed attorney. *Id.* at 589, 77 S.E. at 768.

55. *Id.* at 591, 77 S.E. at 769. The court added: "Whoever is entitled under our Constitu-

The provision in the Constitution, Art. VI, sec. 7, that "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office," was especially intended to prevent any action by the Legislature disqualifying any voter from holding office on account of race or color. The disqualifications in that article provided are set out in section 8 thereof. . . . The Legislature is disabled, therefore, to disqualify any other "voter" from holding office.⁵⁷

The precedential value of *Lee* and its progeny is brought into question, however, by the General Assembly's 1969 editorial revision of the North Carolina Constitution. Adopted by the people in 1971, the revised document added the word "elective" to the title of Article VI, Section 6 and the phrase "for election by the people" to the text of the provision:⁵⁸ "Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office."⁵⁹ Why these changes were made is unclear. The majority in *Baker* speculated that the amendment was intended to narrow the scope of the section to apply only to the process of election.⁶⁰

The root of the dispute in *Baker* is an incongruity in the state constitution. Two types of offices are discussed in the constitution: elective

tion to vote is entitled to hold office, except where restricted by that instrument. The constitutional provision in these matters cannot be abridged by requiring any qualifications whatever in addition to those set out in the Constitution." *Id.* at 593, 77 S.E. at 769. Article VI, § 4 of the 1868 constitution was amended in 1901 to read: "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office." N.C. CONST. of 1868, art. VI, § 7; see Act of June 13, 1900, ch. 2, § 1, 1900 Public Laws 54, 56 (amended 1971).

56. 174 N.C. 112, 93 S.E. 476 (1917).

57. *Id.* at 114, 93 S.E. at 477 (Clark, C.J., concurring).

58. See Act of July 2, 1969, ch. 1258, § 1, 1969 N.C. Sess. Laws 1461, 1478.

59. N.C. CONST. art. VI, § 6.

60. *Baker*, 330 N.C. at 336, 410 S.E.2d at 890. Prior to *Baker*, no North Carolina court had considered the impact of the amendment. A 1972 North Carolina Attorney General's opinion commented only that "[t]here is now no requirement in the Constitution that a person holding a non-elective public office be a qualified voter. . . . Consequently, a deputy sheriff who is appointed to his position need not be a resident of the county in which he is to serve." 41 N.C. ATT'Y GEN. REP. 754, 755 (1972). This opinion does not affect the holding in *Baker*, because the post of deputy sheriff is a purely appointive position, whereas a district judgeship is an elective office with the possibility of appointment to the bench.

The sole challenge to § 7A-142 occurred in 1987, when a situation nearly identical to that in *Baker* arose. In *Pearson v. Martin*, 319 N.C. 449, 355 S.E.2d 496, *disc. rev. denied*, 319 N.C. 678, 356 S.E.2d 789 (1987), a Republican attorney sought to have § 7A-142 declared unconstitutional solely to permit him to be considered as a candidate to replace a retiring Democratic district judge. *Id.* at 451, 355 S.E.2d at 497. However, the plaintiff filed his complaint four days after the district bar meeting in which he wished to participate had been held. *Id.* at 451, 355 S.E.2d at 497. As a result, the court ruled the plaintiff's action moot. *Id.* at 451-52, 355 S.E.2d at 497-98. Thus, *Baker v. Martin* decided a question of first impression in North Carolina.

and appointive.⁶¹ Prior to 1971, this lawsuit would never have arisen because Article VI, Section 7 entitled "Eligibility to office," clearly covered both types of offices.⁶² Unfortunately, when the framers of the amendment narrowed the scope of the section in 1971 to apply only to elective offices, they overlooked the possibility of appointments to vacancies in elective positions.

Despite this constitutional loophole, however, the office of district judge remains indisputably an elective *office*.⁶³ That someone may be appointed to the bench under particular circumstances does not alter the elective nature of the office itself. The fixed nature of elective judicial office, in and of itself, proves very little. The supreme court has held, however, that "when the Constitution prescribes and directs in terms, or by *necessary implication*, that a particular power shall be exercised in a specific way, . . . such direction cannot be disregarded—a due observance of it is essential."⁶⁴ *Baker* makes it possible for elected district judges and appointed district judges to be subject to different qualifications.⁶⁵ This constitutional incongruity *necessarily implies* that Article VI, Section 6 must apply uniformly to the elective *office* of district judge, whether one is appointed or elected to the bench.

This result is supported by the decisions in *Lee*,⁶⁶ *Spruill*,⁶⁷ *Cole*,⁶⁸ and *Starbuck v. Havelock*.⁶⁹ The *Baker* majority's arguments notwithstanding,⁷⁰ each of these cases interpreted the "Eligibility to office" sec-

61. See, e.g., N.C. CONST. art. IV, § 19 ("If any person elected or appointed to any of these offices"); *id.* § 22 ("eligible for election or appointment"); *id.* § 7 ("a person elected or appointed to the office"); *id.* § 9 ("any combination of elective and appointive offices"). Appellees in *Baker* relied exclusively on examples of appointive offices to justify the General Assembly's ability to add qualifications beyond those enumerated in the constitution. Appellees' Brief at 13, *Baker* (No. 246PA91). These examples are neither determinative nor illustrative, for the office of district court judge is explicitly elective. See *infra* note 63 and accompanying text.

62. See 41 N.C. ATT'Y GEN. REP. 754, 755 (1972).

63. See N.C. CONST. art. IV, § 10 ("District Judges shall be elected").

64. *State v. Patterson*, 98 N.C. 660, 662 (1887) (emphasis added). The majority in *Baker* likewise acknowledged this guideline. See *Baker*, 330 N.C. at 338-39, 410 S.E.2d at 892.

65. *Baker*, 330 N.C. at 345, 410 S.E.2d at 894 (Martin, J., dissenting).

66. See *supra* notes 52-53 and accompanying text.

67. See *supra* notes 54-55 and accompanying text.

68. See *supra* notes 56-57 and accompanying text.

69. 252 N.C. 176, 113 S.E.2d 278 (1960). *Starbuck* held, *inter alia*, that a statute that required a nominee for mayor or the board of commissioners of a proposed municipality to have resided in the area for at least one year violated Article VI, §§ 2 and 7 of the state constitution. *Id.* at 179, 113 S.E.2d at 280 ("The legislature was without power to so limit the class which could qualify for office.").

70. The court argued that these cases concerned only elections to office, and thus were not germane to the facts of *Baker*. 330 N.C. at 341, 410 S.E.2d at 893.

tion of the constitution when it applied to *all* offices, not just elective ones as Article VI, Section 6 does today. If article VI, section 6 applies to the office of district judge, whether the judge is appointed or elected, the proposition that additional disqualifications for office may not be added to those enumerated in the constitution⁷¹ remains true.

Further, the reasoning behind this result is clear:

The General Assembly cannot render any "voter" ineligible for office by exacting any additional qualifications . . . any more than it could prescribe that he should own a specified quantity of property, or should be of a certain age, or race, or religious belief, or possess any other qualification not required to make him a voter.⁷²

Requiring disqualifications from office to be enumerated in the constitution is thus a procedural safeguard for minority interests. The *Spruill* court acknowledged the importance of this limitation: "The purpose of [Article VI, Section 6] is well known by everyone. A newly emancipated element [former slaves] had been admitted to suffrage, and it was rightly anticipated that at some future day there might be a majority in the General Assembly unfavorable to their holding office"⁷³ New reluctances may have replaced those foreseen by the North Carolina Supreme Court in *Spruill*; one can certainly imagine members of the General Assembly being hostile towards members of the minority political party. Qualification for office is a fundamental right closely linked to the right to vote,⁷⁴ and equal protection safeguards notwithstanding, it is important to limit the General Assembly's power to disqualify someone or some group from holding elective public office. This rationale applies whether the public office is gained by election or appointment.

The *Baker* court's reliance on the history of Article VI, Section 6 of the constitution is also misplaced.⁷⁵ The majority cited the 1971 changes

71. "[T]here can be no disqualifications for office added by the Legislature as to offices created by the Constitution." *Cole v. Sanders*, 174 N.C. 112, 116, 93 S.E. 476, 478 (1917) (Clark, C.J., concurring).

72. *Spruill v. Bateman*, 162 N.C. 588, 591, 77 S.E. 768, 769 (1913). The supreme court reemphasized the necessity of this constitutional safeguard in *Cole*:

It is very apparent that if the Legislature can prescribe that a part of the commission must belong to the opposite political party; if it can take into consideration as qualification, or disqualification, the political or religious or other views of candidates, it can prescribe that all the members of the commission or candidates for any office, even members of the Legislature, shall be of the same party, or of the same race, or of the same church affiliations as the majority of the General Assembly.

174 N.C. at 115, 93 S.E. at 477 (Clark, C.J., concurring).

73. *Spruill*, 162 N.C. at 592, 77 S.E. at 769.

74. See N.C. CONST. art. VI, § 6.

75. See *supra* notes 25-27 and accompanying text.

in Article VI, Section 6⁷⁶ to buttress its interpretation. There is, however, no way to deduce the legislative intent behind the rewritten section. All that is clear is that the section was indeed narrowed to deal with elective offices. It is not clear that it was narrowed further to apply only to the process of elections.

Other arguments of the *Baker* majority are similarly flawed. The court based its rebuttal of the *expressio unius est exclusio alterius* doctrine on the contention that the state constitution limits, rather than grants power.⁷⁷ Even if one assumes that the majority is correct on this point, Article VI, Section 6 of the constitution acts *expressly* as a limitation of power in that it qualifies *all* voters to hold elective office except as *constitutionally* disqualified.⁷⁸

The majority also explained that the inclusion of the phrase "in a manner prescribed by law" in Article IV, Section 10 of the constitution indicates that the General Assembly must play some further part in both the elective and appointive processes; Article IV, Section 19 cannot be the sole guideline for judicial appointments.⁷⁹ Even if this interpretation of the constitution is correct, however, and further implementing legislation is needed, such legislation should be *procedurally* oriented and not concerned with the constitutional matter of disqualifications from office. The majority assumes that *any* legislative action would be warranted under its interpretation of Article IV, but this interpretation opens the door for further constitutional violations.⁸⁰

Although the majority and the dissents wrangle principally over constitutional semantics, the issue in *Baker* has significant practical implications as well. As suggested by the majority, a broad interpretation of Article VI, Section 6 could be construed to invalidate existing party-affiliation restrictions on appointments to vacancies in certain nonjudicial offices.⁸¹ Arguably, however, judicial office is significantly different from positions in the state's legislative and executive branches and thus war-

76. See *supra* note 26 and accompanying text.

77. See *supra* note 38.

78. N.C. CONST. art. VI, § 6 ("except as in this Constitution disqualified").

79. See *supra* notes 28-31 and accompanying text.

80. The imposition of additional qualifications for office, beyond those enumerated in the constitution, clearly constitutes a constitutional violation. See *supra* notes 52-57 and accompanying text. While it is difficult to imagine the General Assembly instituting a race-, gender-, or wealth-based qualification on eligibility to office, other subtler limitations, such as the one validated in *Baker*, remain a distinct possibility.

81. Invalidating existing restrictions would affect replacements for vacancies in the General Assembly and on numerous state licensing boards. *Baker*, 330 N.C. at 339-40, 410 S.E.2d at 892.

rants different constitutional treatment.⁸² Further, even if all offices are considered similar in nature, to justify the majority's holding in *Baker* by arguing that it avoids invalidating other equally unconstitutional statutes would be to allow the General Assembly to avoid the constraints of the constitution for the sake of convenience. The court should not decide constitutional issues on the basis of whether its holding would inconvenience the legislature by invalidating a number of laws.

Finally, although party-affiliation restrictions arguably protect the electoral mandate of voters,⁸³ protecting the mandate of the people in a judicial election provides no overwhelming justification for *Baker*'s decision because judges are supposed to be non-partisan.⁸⁴ As a federal district court stated: "Manifestly, judges . . . are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency."⁸⁵ Thus, the majority cannot utilize public policy reasons to justify its tenuous constitutional interpretation.

Further, as Justice Martin appropriately argued in his dissent, the pursuit of even a worthy goal cannot be at the expense of the constitution.⁸⁶ As noted by Justice Mitchell, an appropriate analogy can be drawn between General Statute section 7A-142 and Article IV, Section 22 of the constitution, which disqualifies those not authorized to practice law from election or appointment to state courts:⁸⁷ "[T]he people of North Carolina . . . recognized that they could add such [a] disqualification *only by* an amendment to the Constitution of North Carolina."⁸⁸

By upholding the constitutionality of General Statute section 7A-142 in *Baker*, the North Carolina Supreme Court protected the electoral mandate of North Carolina voters, but it also judicially legislated a constitutional amendment. The proper recourse for the General Assembly would be to propose the contested portion of section 7A-142 as a constitutional amendment and submit it to the voters of North Carolina. If approved, it would become a constitutionally enumerated disqualification and would avoid conflict with Article VI, Section 6.

82. See Appellees' Brief at 17-19, *Baker* (No. 246PA91).

83. See *supra* note 32 and accompanying text.

84. The United States Supreme Court has rejected the one-person, one-vote rationale for judicial elections. See *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (noting that judges *serve* people but do not *represent* them), *aff'd*, 409 U.S. 1095 (1973).

85. *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

86. *Baker*, 330 N.C. at 346, 410 S.E.2d at 895 (Martin, J., dissenting).

87. N.C. CONST. art. IV, § 22.

88. *Baker*, 330 N.C. 331, 343-44, 410 S.E.2d 887, 896 (1991) (Mitchell, J., dissenting). See also N.C. CONST. art. XIII, § 2 (constitution may be amended only in enumerated manner, and in "no other way").

Both the majority and the dissents in *Baker* make compelling arguments for their respective interpretations, but the dissents' are based more soundly in precedent and logic. The presumption of constitutionality asserted by the majority is overcome in this case. The majority's interpretation of the constitution would allow people not constitutionally qualified to be elected to an office to be appointed to that same office. This illogical result clearly demonstrates that the portion of section 7A-142 in question is unconstitutional. It has taken twenty years for this ambiguity in Article VI, Section 6 to come to light, and now that it has it should be addressed on the constitutional rather than the statutory level. By upholding the constitutionality of section 7A-142 in *Baker v. Martin*, the North Carolina Supreme Court protected the electoral mandate of North Carolina voters, but the constitutional ambiguity which spawned this dispute remains essentially unanswered.

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