Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges

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I. INTRODUCTION

North Carolina has chosen its judges through partisan elections for over 130 years. So far, this method has provided North Carolina with a steady supply of competent and qualified judges. Yet on December 6, 1996, the Commission for the Future of Justice and the Courts in North Carolina ("Futures Commission") delivered a report to North Carolina Supreme Court Chief Justice Burley Mitchell which sought to change the status quo. Past Chief Justice James Exum created the Futures Commission in 1994 and charged the group with examining the needs and challenges facing North Carolina's court system in the twenty-first century. After two years of studying the court system, the Futures Commission concluded that fundamental judicial reform was necessary to ensure that the courts could meet the public's demand for a better judicial system. One of the principal reforms proposed was the abandonment of partisan elections for North Carolina's judges in favor of a system of merit.
North Carolina, like many states across the country, has recently experienced a growing trend of intensely competitive and expensive judicial elections that involved behavior more akin to the highly partisan races for state and national legislators. According to the Futures Commission, North Carolina "can expect increasing criticism of the courts as part of campaigns, which will lead to even more negative perceptions and greater public distrust." 

In general, judicial merit selection begins with a neutral nominating committee made up of lawyers and non-lawyers that creates and screens a list of potential judicial nominees. An executive official then selects the final appointee from that list. Merit-based selection of judges is not a new idea in North Carolina. Although merit selection has not been warmly received by North Carolina's legislators in the past, the current effort at judicial reform may be more welcome. 

This Comment examines the current movement to reform the judicial selection system in North Carolina. In Part II, this Comment begins by explaining the importance of how judges are selected and by reviewing the history of judicial selection in North Carolina. After discussing in Part III the growing problems with judicial elections in North Carolina today, Part IV explores the history of

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7. See id.
9. WFDD, supra note 4, at 6. John G. Medlin, Jr., Chairman of the Futures Commission, in a preamble to the Commission's report, observed that the courts are intended to serve the public. See id. at 1. Consequently, if the public is dissatisfied, "then something needs to change, because in the final analysis, one of the cornerstones of democracy and civil society is support for and confidence in the court system." Id. at 1.
12. Efforts to reform North Carolina's method of judicial selection have been introduced in almost every session of the General Assembly since 1971 with little success. See N.C. LEG. 1996, supra note 2, at 3-2 to -3. However, North Carolina could amend its constitution to provide for the appointment of all state judges without violating any provision of the Federal Constitution. See Holshouser v. Scott, 335 F. Supp. 928, 934 (M.D.N.C. 1971), aff'd, 409 U.S. 807 (1972) ("[T]he election of Superior Court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. Anyway, . . . this would be a political rather than a judicial question.").
13. See infra notes 498-502 and accompanying text.
14. See infra notes 21-113 and accompanying text.
15. See infra notes 114-266 and accompanying text.
judicial reform efforts in North Carolina over the past twenty-five years, focusing on the reasons for failure. Part V examines the Futures Commission’s proposed merit selection plan and weighs the arguments for and against merit selection in general. Part VI then evaluates the current reform proposal in light of these past failures. Part VII considers barriers that will continue to obstruct changes to the judicial elective system, and this Comment concludes in Part VIII by suggesting that although a switch to a merit selection system may be in the state’s best interest, it is unlikely that such a change will happen in the near future.

II. JUDICIAL SELECTION METHODS

A. Why We Should Care How Judges Are Selected.

It is commonly believed that judges apply the law, not make it. Former North Carolina Supreme Court Chief Justice Susie Sharp subscribed to this ideal and once delineated four steps in deciding a case: “1) state the facts; 2) state the issue raised by the facts; 3) state the law relevant to the issue; and 4) decide the issue in light of the law.” Using this method, any two judges should come to the same conclusion on any given matter. If so, it would not seem to be very important who wears the robe.

However, even the first step of Justice Sharp’s formula—stating the facts—involves a great deal of subjective and intellectual interpretation on the part of the judge. Indeed, in the context of a trial, a judge is often called upon to serve as the final arbiter of

16. See infra notes 267-336 and accompanying text.
17. See infra notes 337-403 and accompanying text.
18. See infra notes 404-62 and accompanying text.
19. See infra notes 463-90 and accompanying text.
20. See infra notes 491-502 and accompanying text.
21. See, e.g., John V. Orth, The Role of the Judiciary in Making Public Policy, in NORTH CAROLINA FOCUS: AN ANTHOLOGY ON STATE GOVERNMENT, POLITICS, AND POLICY 339 (Mebane Rash Whitman & Ran Coble eds., 1996) (noting that “[t]he ideal that judges should enforce the law, not make it, has attracted many judges”). Walter Clark, Chief Justice of the North Carolina Supreme Court in the early 19th century, put it more bluntly: “Whatever tendency to increase the power of the judiciary over the legislature diminishes the control of the people over their government.” Id. (quoting Chief Justice Clark).
22. Id. (paraphrasing an often expressed opinion of Chief Justice Sharp).
23. See id.
politically and emotionally charged factual issues. This role is crucial because the disposition of most cases will depend on the resolution of factual disputes rather than legal arguments. Further, courts of appeal rarely set aside the factual findings of trial judges unless clearly erroneous, thus placing additional importance on the initial findings of fact. Therefore, without making any decisions concerning the applicable law, a judge’s interpretation of the facts will have a significant influence on the outcome of the case.

In addition to the importance of factual determinations in the day-to-day judicial routine, judges must be able to handle complex legal issues when they arise. Judges not only determine what law is relevant in a particular instance, whether codified by the legislature into statutes or set out by other judges as precedent, but must come to a conclusion about what the law means in a given situation. Statutes, which any student of the law knows are not always clear, must be construed and interpreted. Moreover, the common law must be evaluated and updated periodically. And occasionally, the judiciary must interpret and enforce the limitations on legislative and executive power contained in both the federal and state constitutions. These types of legal determinations are made by

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26. See White, supra note 24, at 6, 7.
27. See id. at 7.
28. See id. at 7-8; cf. BARBARA M. YARNOLD, POLITICS AND THE COURTS: TOWARD A GENERAL THEORY OF PUBLIC LAW 5 (1992) (observing that “courts were relatively unconstrained in their decision making by the law because the standards they were called on to interpret were vague”).
29. See Orth, supra note 21, at 340. Professor Orth notes:
Since a statute is produced in the political give-and-take of legislative bargaining, many gaps and inconsistencies may be left for the courts to deal with, as best they may. Charged with the duty of carrying out the will of the legislature, the modern judge must read the statute in such a way that public policy will be effectuated, not stymied.
Id. Some scholars have even pointed to the institutional advantages of the judiciary in policy-making. See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976) (arguing that judges have certain advantages in policy-making situations because they are more isolated from direct political or public opinion, traditionally try to be as neutral as possible in making decisions, are given a great deal of information through the adversarial process, and can develop ad hoc policies tailored to remedy specific problematic situations).
30. See Orth, supra note 21, at 340 (“The common law is ... law made by past judicial decisions in keeping with the then current views of public policy. As society changes, so does the common law in order to conform to changed conditions.”). In this capacity, the court is often called upon to make a decision that effectively acts like a statute, although it was neither passed by the legislature nor signed by the governor. See id. at 341.
31. See White, supra note 24, at 8. The duty to enforce limits on the legislative and executive branches, which ensures the protection of citizens from arbitrary official action,
judges in trials each and every day.

As a result of these important factual and legal determinations, the judiciary clearly influences laws every day, even if judges do not actually make laws in the technical sense. Accordingly, the judicial branch serves an important function in making public policy. The courts' role as shapers of public policy is most apparent at the state level, simply because the majority of everyday legal issues are decided by trial judges in state courts. In this respect, state trial court judges have "the greatest impact on our citizens and on our citizens' views of how justice is delivered in this country." To perform their duties satisfactorily and live up to these expectations, the quality and characteristics of those who sit on the state bench becomes important. A state's method of judicial selection is often entails making decisions in particular cases that run against the public opinion. See id. This judicial duty is one of the American innovations that sets our system apart from the English principle of legislative supremacy. See id.


33. See Orth, supra note 21, at 341. One commentator notes that:

In its policy-making function, the judicial branch allocates values for society through structured settlements and judges' decisions that determine governmental policies in education, housing, employment, and other important areas of public policy. Although judges frequently claim that they merely follow the law and do not create public policy, the consequences of judicial actions can unquestionably shape large-scale governmental actions.

SMITH, supra note 32, at 9. The issue of whether judges are policy-makers has even been the focus of legal disputes concerning the applicability of mandatory retirement ages for state judges. See Gregory v. Ashcroft, 501 U.S. 452, 456, 465 (1991) (holding that state judges could be forced to retire after a certain age). In Gregory, Missouri state judges challenged that state's mandatory retirement age under the Federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (1994 & Supp. 1995). See Gregory, 501 U.S. at 456. Petitioners argued that state judges did not make public policy and therefore were protected by the ADEA and could not be held to mandatory retirement ages. See id. at 465 ("[J]udges merely resolve factual disputes and decide questions of law; they do not make policy."). The U.S. Supreme Court avoided directly deciding whether judges were policy-makers, determining only that, due to the broad statutory language of the ADEA, judges fall under the "policymaking-level exception." Id. at 467.

34. See White, supra note 24, at 6 ("[S]tate law looms much larger than federal law in the lives of our nation's citizens. Consequently, state trial judges play an integral part in the determination of justice in this country.").

35. Id. Similarly, state supreme courts have re-emerged as "major policy-making institutions in our political-legal system." HARRY P. STUMPF & JOHN H. CULVER, THE POLITICS OF STATE COURTS 149-50 (1992) ("[W]hereas only a decade or two ago American constitutional law was almost exclusively the province of the federal courts, it is now impossible to understand the leading edge of American legal doctrine without serious attention to developments in state constitutional law.").

36. Cf. Baker, supra note 25, at 898 ("So it is that we demand that those among us who would be judges be better than we, learned, impartial, and, above all, correct.").
therefore important because the selection process can affect the quality of the judges who serve\textsuperscript{37} as well as "limit the risk of excessive judicial influence on public policy."\textsuperscript{38}

B. Different Methods of Judicial Selection

Methods of judicial selection vary from state to state and often reflect unique political factors within each state.\textsuperscript{39} Scholars and politicians, as well as the general public, have debated over the most appropriate method of judicial selection for more than 200 years.\textsuperscript{40} Following the American Revolution, all thirteen original colonies,\textsuperscript{41} as well as the federal government,\textsuperscript{42} created appointive judicial selection systems.\textsuperscript{43} Eight of the colonies vested the appointment power in one or both houses of the state legislature.\textsuperscript{44} The remaining five allowed the governor to make appointments.\textsuperscript{45} Political leaders

\textsuperscript{37} See id. at 898-99. But see STUMPF \& CULVER, supra note 35, at 48 (arguing that, in fact, there seems to be little, if any, difference among the professional qualifications of judges recruited by various methods of judicial selection).

\textsuperscript{38} SMITH, supra note 32, at 295. Smith notes that:

In states with electoral systems, the voters have the opportunity to replace judicial officers whose decisions are regarded as too extreme or as inappropriately influencing public policy. Governors, legislatures, and selection committees seek to appoint new judges with appropriately restrained conceptions of judicial power—especially if previous appointees have seemed to push the limits of judicial authority beyond proper boundaries.

\textit{Id.} Thus, the judicial selection process helps to keep the judiciary's decisions from deviating too far from the general preferences of the voters. See \textit{id.}

\textsuperscript{39} See STUMPF \& CULVER, supra note 35, at 37-43.

\textsuperscript{40} See ASHMAN \& ALFINI, supra note 10, at 7-9.


\textsuperscript{42} See MARVIN COMISKY \& PHILIP C. PATTERSON, THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 3 (1987). The U.S. Constitution grants the President the power to appoint judges to the Supreme Court and federal bench, subject to confirmation by the Senate. See U.S. CONST. art. II, § 2, cl. 2.


\textsuperscript{44} See COMISKY \& PATTERSON, supra note 42, at 3-5. Connecticut, Delaware, Georgia, New Jersey, North Carolina, Rhode Island, South Carolina, and Virginia gave their legislatures the power to appoint judges. See \textit{id.} South Carolina and Virginia still use legislative appointments for most judgeships. See S.C. CONST. art. V, §§ 3, 8, 13 (amended 1985); VA. CONST. art. VI, § 7; Deja, supra note 43, at 905. In these states, the appointment process involves a joint vote by the members of the legislature, with the candidate receiving the most votes getting the appointment. See STUMPF \& CULVER, supra note 35, at 42.

\textsuperscript{45} See COMISKY \& PATTERSON, supra note 42, at 3 (noting that judges were appointed by governors in Maryland, Massachusetts, New Hampshire, New York, and Pennsylvania). Eighteen states currently use gubernatorial appointments. See Deja,
of that time subscribed to the belief that the electorate was not capable of evaluating the professional qualities of judicial candidates.\textsuperscript{46} Appointments were usually for long periods of time, often life.\textsuperscript{47}

A dramatic shift in selection practices occurred throughout the states in the early 1800s with the advent of Jacksonian democracy.\textsuperscript{48} The movement advocated the subjection of all public officials, including judges, to the direct approval of the people.\textsuperscript{49} In a short period of time, a majority of the states switched to the partisan election of judges.\textsuperscript{50} However, partisan elections were designed "to


47. Some states along the eastern seaboard still maintain this practice. For example, Delaware provides initial 12-year terms before reappointment. Massachusetts provides that, once appointed, judges serve until age 70. New Hampshire, likewise, provides for service until age 70, and Rhode Island allows judges to serve for life. See DEL. CONST. art. IV, § 3; MASS. CONST. pt. 2, ch. 3, art. I; N.H. CONST. pt. 2, art. 78; R.I. CONST. art. 10, § 5 (amended 1994).

48. Advocates of Jacksonian democracy, a movement with "its genesis in populist thought," felt state judiciaries should no longer favor the landed elite, but "should be more sympathetic to the needs of debtors, manual laborers, and other disenfranchised people." DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY 2 (1995).


50. \textit{See id.} Mississippi became the first state to elect all judges in 1832. \textit{See id.} New York was next to move towards the direct popular election of judges, making the change during its constitutional convention in 1846. \textit{See id.} All new states subsequently entering the Union did so with an elected judiciary. \textit{See id.} Twenty-four of 34 states chose their judges through direct elections by the time of the Civil War. \textit{See id.} North Carolina made the transition to an elective judiciary shortly after the Civil War. \textit{See infra} notes 68-71 and accompanying text. Twelve states continue to use partisan elections today in some form: Alabama, Arkansas, Illinois, Indiana, Louisiana, Mississippi, New Mexico, New York, North Carolina, Pennsylvania, Texas, and West Virginia. \textit{See} ALA. CODE §§ 17-2-6, 17-2-7 (1997); ARK. CONST. art. VII, §§ 6, 17; ILL. CONST. art. VI, § 12; IND. CONST. art. VII, § 7; LA. CONST. art. V, § 22 (amended 1983); MISS. CODE ANN. § 23-15-193 (1997); N.M. CONST. art. VI, § 33 (amended 1988); N.Y. CONST. art. VI, § 6(c); N.C. CONST. art. IV, §§ 10, 16; PA. CONST. art. V, § 13 (amended 1979); TEX. CONST. art. V,
insert populist ideology into the staffing of the courts," but not to actually improve the quality of judges on the bench.\textsuperscript{51} Political machines soon gained control of the judicial selection process.\textsuperscript{52} Citizens came to view the judiciary as corrupt, incompetent, and controlled by special interests.\textsuperscript{53} In an attempt to remedy the situation, many elective states, still desiring to maintain the elective process, adopted nonpartisan elections for judges between 1870 and 1930.\textsuperscript{54} Dissatisfaction soon arose with nonpartisan elections as well, however, because political parties still selected the candidates.\textsuperscript{55} Furthermore, the electorate was more uninformed than ever about judicial candidates, no longer having party labels on which to rely.\textsuperscript{56}

To address these problems, a movement began within the legal profession to develop a method of judicial selection that would reduce the influence of partisan politics while focusing on qualifications and accountability.\textsuperscript{57} Professor Alex Kales, director of research for the American Judicature Society, conceived an elective-appointive system which became known as the merit selection plan.\textsuperscript{58} First adopted by Missouri in 1940,\textsuperscript{59} some form of the merit selection plan is currently used by twenty states in choosing their judges.\textsuperscript{60} Although the merit plans employed by various states are not identical, most contain three common features: (1) a judicial

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\textsuperscript{51} STUMPF & CULVER, supra note 35, at 38.

\textsuperscript{52} See id.

\textsuperscript{53} See LARRY BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 4 (1980).

\textsuperscript{54} See COMISKY & PATTERSON, supra note 42, at 4. Eighteen states currently use some form of nonpartisan elections: California, Florida, Georgia, Idaho, Kansas, Kentucky, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin. See CAL. CONST. art. VI, § 16; FLA. CONST. art. V, § 10(b) (amended 1976); GA. CONST. art. VI, § 7, ¶ 1; IDAHO CONST. art. V, §§ 6, 11; KAN. CONST. art. 3, § 6; KY. CONST. § 117; MICH. CONST. art. VI, §§ 2, 8, 12; MINN. CONST. art. VI, § 7; MONT. CODE ANN. § 13-14-211 (1997); NEV. CONST. art. VI, §§ 3, 5; N.C. GEN. STAT. § 7A-41.2 (1997); N.D. CONST. art.VI, §§ 7, 9; OHIO CONST. art. IV § 6; OR. CONST. art. VII, § 1; S.D. CONST. art. V, § 7 (amended 1980); WASH. CONST. art. IV, § 3; WIS. CONST. art. VII, §§ 4, 5, 7 (amended 1977); Deja, supra note 43, at 906 n.13.

\textsuperscript{55} See COMISKY & PATTERSON, supra note 42, at 4.

\textsuperscript{56} See id.

\textsuperscript{57} See SMITH, supra note 32, at 106.

\textsuperscript{58} See STUMPF & CULVER, supra note 35, at 41.

\textsuperscript{59} See COMISKY & PATTERSON, supra note 42, at 10. Thus, the system is often called the "Missouri Plan" as well as the "merit plan" for judicial selection. See STUMPF & CULVER, supra note 35, at 41.

\textsuperscript{60} See Jack Betts, The Debate over Merit Selection of Judges, in NORTH CAROLINA FOCUS, supra note 21, at 316; see also Deja, supra note 43, at 906 (noting, for example, Alaska, Colorado, Iowa, Nebraska, Tennessee, and Utah).
nominating committee, generally composed of lawyers, judges, and citizens, that screens potential judges and recommends a list of worthy candidates; (2) an elected appointing official who is obligated to choose judges from the nominating committee’s list; and (3) a noncompetitive retention election in which the judge must receive the majority of a public vote to remain in office.

C. Judicial Selection in North Carolina

1. Origins of Judicial Elections in North Carolina

Not until the ratification of North Carolina’s second constitution in 1868 did the voters of the state have the opportunity to elect judges directly. The British Crown initially had appointed judges in colonial North Carolina. This practice angered both the Lords Proprietors and the colonists, although for different reasons. The American Revolution presented an opportunity for change, and the newly written North Carolina Constitution gave the General Assembly the power to select both general and appellate jurisdiction judges. For the next century, the legislature appointed North Carolina’s judges to “hold their offices during good behaviour.”

After the Civil War, North Carolina was required to adopt a new constitution in order to reenter the Union, and, given the opportunity, chose to revisit the issue of judicial selection.

61. See COMISKY & PATTERSON, supra note 42, at 10.
63. See Betts, supra note 3, at 15.
64. The Lords Proprietors were eight Englishmen who controlled colonial North Carolina between 1663 and 1729 under the authority of a charter granted by King Charles II. See DEPARTMENT OF THE SECRETARY OF STATE, NORTH CAROLINA MANUAL 1995-1996, at 2 (Lisa A. Marcus ed., 1996).
65. See Betts, supra note 3, at 15. The Lords Proprietors viewed the Crown’s influence in judicial matters as infringing upon the powers granted by the Royal Charter. See id. In contrast, the colonists believed they should be able to control their own affairs. See id.
66. See N.C. CONST. of 1776, § 13. The governor appointed the justices of the peace, who served on lower courts in each county, based upon recommendations made by members of the General Assembly for that county. See James C. Drennan, Judicial Reform in North Carolina, in JUDICIAL REFORM IN THE STATES 19, 22 (Anthony Champagne & Judith Haydel eds., 1993).
68. See Debate Transcript, supra note 62, at 1826. The methods of judicial selection
Delegates to North Carolina's constitutional convention embraced "Jacksonian democracy," the new philosophy calling for popular election of all public officials, including judges.69 For the first time, the citizens of North Carolina possessed the ability to elect trial and appellate judges,70 a power they have retained ever since.71

Population growth and the effects of industrialization quickly put new strains on the judicial system.72 Although local communities responded by creating intermediate courts when needed, no organized plan controlled this growth in the court system.73 By 1950, there were more than 250 local courts with at least eight different methods of judicial selection.74 Consequently, by the late 1950s and early 1960s, court reform had become a central public issue.75

Members of state government and the business and legal communities joined forces in supporting major court reform.76 A study funded by the North Carolina Bar Association in the late 1950s proposed a constitutional amendment that would eliminate all independent local courts in favor of a single, state-run, state-financed court system.77 Some members of this group even favored a switch to a merit selection plan for judicial selection at that time.78 But in 1961, when the General Assembly passed a proposed constitutional amendment, the new judicial act called for the continued election of

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69. Cf. BERKSON ET AL., supra note 53, at 4 (discussing movement towards nonpartisan judicial elections); supra notes 48-51 and accompanying text (discussing Jacksonian democracy).

70. See N.C. CONST. of 1868, art. IV, § 21. The new constitution provided for statewide elections for trial and appellate judges, see id., while justices of the peace were elected locally. See Drennan, supra note 66, at 22.


72. See Drennan, supra note 66, at 22.

73. See id. The legislature did not act to reform the structure of the court system during this period, but allowed piecemeal remedies to address the legal needs of North Carolina's citizens. See id.

74. See id. Many of these courts had their own jurisdiction levels, costs and fee structures, and methods of compensation for the judges. See id. Compensation for justices of the peace often depended upon the amount of fees they collected in court. See id.

75. See id.

76. See id.


all judges. Failure to change North Carolina's method of judicial selection at this time essentially shut the "window of opportunity" for those seeking to eliminate judicial elections.


In 1962, the citizens of North Carolina voted to amend the North Carolina Constitution in order to create a unified statewide and state-operated court system. The present General Court of Justice consists of three divisions: the Appellate Division (made up of the North Carolina Supreme Court and the North Carolina Court of Appeals), the Superior Court Division, and the District Court Division. The North Carolina Constitution requires that all judgeships be filled by elections.

The supreme court serves as North Carolina's court of last resort and consists of a chief justice and six associate justices. All supreme court justices are elected in statewide partisan elections and serve eight-year terms. The supreme court hears cases involving questions of constitutional law, major legal questions, and appeals from murder convictions. The court of appeals is North Carolina's

80. Drennan, supra note 66, at 23. The failure to change the way judges were selected at this time meant that judicial selection would be a constitutional issue for future reformers. See id. Elections were the only constitutionally approved method of selecting judges. See N.C. CONST. art. IV, § 16. In order to eliminate judicial elections in the future, three-fifths of both houses of the General Assembly must vote to change the method of judicial selection, not just a majority of those present. See id. art. XIII, § 4 (setting out procedure for amending the constitution).
81. See JOAN G. BRANNON, THE JUDICIAL SYSTEM IN NORTH CAROLINA 3 (1994). Since 1970, the court system has been exclusively financed by the state, with the exception of local court facilities, which local governments still provide. See Drennan, supra note 66, at 19.
82. See N.C. CONST. art. IV, § 5. Initially, the Appellate Division entailed only the supreme court. In 1965, the General Assembly proposed amending the Judicial Article to create the court of appeals to relieve the supreme court's heavy caseload. See BRANNON, supra note 81, at 3. Voters approved the proposed amendment in a constitutional referendum in 1966. See N.C. CONST. art. IV, § 7. The court of appeals began operating in 1967. See BRANNON, supra note 81, at 3.
83. See N.C. CONST. art. IV, § 2.
84. See id. § 16. However, a statutory exception applies for vacancies that occur between elections, allowing the governor to fill the vacancy by appointment. See N.C. GEN. STAT. § 163-9 (1997); infra notes 107-13 and accompanying text (noting that a majority of North Carolina's judges originally reached the bench as gubernatorial appointees filling vacancies).
85. See BRANNON, supra note 81, at 3.
86. See N.C. CONST. art. IV, § 6, cl. 1.
87. See id. § 16.
88. See BRANNON, supra note 81, at 3.
intermediate appellate court. It was created in 1967 to help ease the supreme court's case load. The court consists of twelve members who sit in panels of three, with rotating membership on the panels. Court of appeals judges are also elected in statewide partisan elections and serve eight-year terms. The court initially hears most appeals unless the case is certified directly to the Supreme Court or involves a first-degree murder conviction.

The Superior Court Division serves as the trial court of general jurisdiction in North Carolina, having original jurisdiction over all felonies and appellate jurisdiction over misdemeanors. Superior courts generally entertain all civil matters involving more than $10,000. There are just over ninety regularly-elected superior court judges and four special superior court judgeships. Superior court judges are chosen in nonpartisan elections by the voters of each judicial district and serve eight-year terms. The District Court Division consists of district court judges and magistrates. District courts have original jurisdiction over misdemeanors and most civil actions involving less than $10,000. District courts also have
exclusive jurisdiction over juvenile actions, domestic relations actions, and involuntary commitments. District court judges are chosen in partisan elections by voters in each judicial district and serve four-year terms. There are currently about 190 district court judges in North Carolina.

Despite North Carolina’s electoral system, the majority of North Carolina’s judges initially were appointed to the bench. Judgeship vacancies typically arise during a term due to death, resignation, or retirement. The governor fills vacancies by appointment, with the new judge standing for re-election at the next general election more than sixty days after the appointment. The governor is required to fill district court vacancies with a candidate from the same political party, but otherwise has complete discretion in making these appointments. Until recently, incumbent appointees rarely faced opposition at the polls and almost always were victorious when they did stand for re-election. Consequently, a "system that

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have concurrent jurisdiction over all civil matters, no matter the amount in controversy. See id. § 7A-242. However, the General Assembly designated the district court as the "proper" division for cases involving less than $10,000 and superior court as the "proper" division for cases involving more than $10,000. See id. § 7A-243.

104. See id. §§ 7A-244, 246, 523. District courts also have magistrates who serve as officers of the district court, and there must be at least one in every county. See id. § 7A-171(a). The senior resident superior court judge appoints the magistrates for two-year terms from a list of nominees submitted by the clerk of superior court. See id. § 7A-171(b).

105. See id. § 7A-140; BRANNON, supra note 81, at 12.

106. See WFDD, supra note 4, at 79.

107. See Betts, supra note 60, at 315, 323. In 1995, 154 of the 296 judges, or 52%, were appointed to their current offices. See id. at 322-23.

108. See BRANNON, supra note 81, at 12. Judges often retire during the term of a governor from their political party, thus creating the opportunity for the appointment of a new judge from the same party. See STUMPF & CULVER, supra note 35, at 43 (noting that the "rules" of the game often require retirement during a time when the same party controls the state house).

109. See N.C. CONST. art. IV, § 19; N.C. GEN. STAT. § 163-9 (1997). Thus, if a general election is scheduled within sixty days of an appointment, the judge does not have to stand for re-election until the next general election.

110. See N.C. GEN. STAT. § 7A-142 (1995). In Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991), the North Carolina Supreme Court held that the Constitution of North Carolina did not prohibit the General Assembly from requiring the governor to give preference to a member of the same political party as the vacating judge. See id. at 341, 410 S.E.2d at 894. For further discussion of the constitutionality of partisan qualifications for appointments, see Matthew P. McGuire, Note, Baker v. Martin and the Constitutionality of Partisan Qualifications for Appointment to District Courts, 70 N.C. L. REV. 1916 (1992).


112. See Exum, supra note 71, at 5.
purport[ed] to give voters complete control over the selection of judges [gave] them almost no control.”

III. PROBLEMS WITH JUDICIAL ELECTIONS IN NORTH CAROLINA

Voters in North Carolina have chosen their judges in partisan elections for the past 130 years. In the next section, this Comment will explore the main problems with North Carolina's judicial selection system, looking at: (1) controversies surrounding the election of superior court judges; (2) the growing political nature of judgeships; and (3) the uninformed electorate.

A. Disputes over the Election of Superior Court Judges

1. Voting Rights Act of 1965

In 1985, North Carolina's superior court election laws came into direct conflict with the Voting Rights Act of 1965. Between 1900 and 1986, only two African-Americans were elected as superior court judges in North Carolina, even though African-Americans represented twenty-two percent of the voting population. These results were due in part to state election laws that often utilized

113. Id.
114. See id.
115. See infra notes 118-83 and accompanying text.
116. See infra notes 184-248 and accompanying text.
117. See infra notes 249-58 and accompanying text.
118. Pub. L. No. 89-110, 79 Stat. 437 (1965) (amended by Pub. L. No. 97-205, 96 Stat. 134 (1982)) (codified as amended at 42 U.S.C. § 1973 (1994)). Congress intended the Act to "eradicate invidious discrimination against racial minorities in the electoral process." Kirsten Lundgaard Izatt, Note, The Voting Rights Act and Judicial Elections: Accommodating the Interests of States Without Compromising the Goals of the Act, 1996 U. ILL. L. REV. 229, 229. In order to prevent changes in election laws that have a discriminatory purpose or effect, § 5 of the Voting Rights Act requires covered jurisdictions to obtain either judicial preclearance from the U.S. District Court for the District of Columbia or administrative preclearance from the Department of Justice before implementing new voting practices. See 42 U.S.C. § 1973(c). Section 2 of the Voting Rights Act is broader in scope and disallows methods of electing judges that impermissibly dilute minority voting strength. As amended in 1982, § 2(a) prohibits the imposition of a voting qualification or prerequisite that "results in a denial or abridgment of the right . . . to vote on account of race or color." Id. § 1973(a) (emphasis added). Section 2(b) states that the test for determining such a practice is whether, based on the totality of the circumstances, minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Id. § 1973(b).
119. See Betts, supra note 3, at 18. But see Katherine White et al., The Demographics of the Judiciary: No Longer a Bastion of White Male Democrats, N.C. INSIGHT, Sept. 1990, at 39, 39 (discussing the increasing number of African-Americans on the bench).
staggered terms of office and multi-judge districts, particularly in large urban counties.\textsuperscript{120} These practices diluted the voting power of African-Americans in judicial elections.\textsuperscript{121} Therefore, even though African-Americans comprised the majority in certain areas within judicial districts, they were unable to consistently elect candidates of their own choosing.\textsuperscript{122}

By 1987, a number of factors forced the General Assembly to enact legislation that redrew the district lines for superior court judgeships in a manner that would benefit African-American judicial candidates.\textsuperscript{123} One factor was two lawsuits that raised various voting rights issues under the Voting Rights Act of 1965, specifically with regard to North Carolina's judicial election laws.\textsuperscript{124} The new restructuring legislation addressed many of the issues raised by the African-American plaintiffs and sought to render moot two still-pending lawsuits.\textsuperscript{125}

In the first case, \textit{Haith v. Martin},\textsuperscript{126} African-American voters challenged several state legislative acts passed in the 1960s and 1970s that created new superior court judgeships.\textsuperscript{127} One act also required

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\textsuperscript{121} Cf. Anna M. Scruggs et al., \textit{Recent Voting Rights Act Challenges To Judicial Elections, 79 JUDICATURE 34, 34} (1995) (discussing challenges to judicial elections under the Voting Rights Act in 15 states). If multiple candidates are elected from one judicial district in a plurality election, a minority group is able to concentrate all of their votes on one candidate—a process known as “single-shot voting”—and thus better ensure minority representation on the bench. \textit{See} M. Elaine Hammond, Comment, \textit{Toward a More Colorblind Society?: Congressional Redistricting After Shaw v. Hunt and Bush v. Vera, 75 N.C. L. REV. 2151, 2159 n.64} (1997) (citing Chandler Davidson, \textit{The Voting Rights Act: A Brief History, in CONTROVERSIES IN MINORITY VOTING 23-25} (Bernard Grofman & Chandler Davidson eds., 1992)). However, when staggered terms of office are allowed, only one judgeship may be on the ballot during any given election. \textit{See id.} Therefore, minority groups cannot concentrate their votes on a chosen candidate and are very limited in their ability to elect their own candidate to the bench. \textit{See id.}
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\textsuperscript{122} Cf. N.C. LEG. 1987, supra note 120, at 49 (discussing allegations that the then-current elections procedures violated the Voting Rights Act of 1965 because they diluted African-Americans' ability to elect their own candidates).
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\textsuperscript{123} \textit{See infra} notes 125-51 and accompanying text (discussing the developments which led to the legislation); \textit{Act of June 29, 1987, ch. 509, § 1, 1987 N.C. Sess. Laws 769, 769} (eliminating staggered terms for superior court judges and redrawing district lines to eliminate numerous multi-judge districts).
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\textsuperscript{124} \textit{See Drennan, supra} note 66, at 28; \textit{infra} notes 126-50 and accompanying text (discussing North Carolina cases challenging judicial election laws).
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\textsuperscript{125} \textit{See N.C. LEG. 1987, supra} note 120, at 49.
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\textsuperscript{127} \textit{See id.} at 411-12. The district plan for superior court judgeships had been drawn in 1955 and set out thirty judicial districts, with all but six of these districts including more than one county. \textit{See N.C. LEG. 1987, supra} note 120, at 49. The legislative acts in
certain superior court judges to run for designated ("numbered") seats within their districts instead of running at-large. The plaintiffs claimed that North Carolina had failed to submit these voting changes to the federal government for preclearance under § 5 of the Voting Rights Act, which requires certain jurisdictions with a history of low minority-voter turnout in past elections to obtain prior approval from the federal government before implementing any change that affects voting. The court agreed with the plaintiff's claim, and in compliance with the court's decision, the state submitted the judicial restructuring acts to the Justice Department for preclearance. The Justice Department determined that the numbered seating law, as well as the creation of new judgeships in six districts, violated the Voting Rights Act because both resulted in staggered terms for judges within the same districts. In conjunction with the numbered seating law, these staggered terms effectively eliminated minority voters' ability to elect minority candidates because minority voters could not concentrate their voting power on a single candidate in a multi-judge race.

North Carolina conceded that the numbered seat requirement created some voting rights concerns, and the General Assembly eliminated that provision from the state's election laws. However, at the urging of the state's superior court judges, the state attorney general challenged the Justice Department's decision on the staggered term issue in North Carolina v. United States. Both sides expended a great deal of effort on the suit prior to trial, which by

every indication was going to be hotly contested. However, *North Carolina v. United States* never reached trial. The North Carolina Attorney General dropped the suit for a number of reasons. First, the seven sitting judges whose judgeships had not been precleared by the Justice Department became uneasy with the idea of prolonged litigation. The lawsuit cast the validity of their elections in doubt, and any new elections would be delayed until the controversy was settled. Further, parties appearing in court were questioning the validity of the judges’ actions.

In *Alexander v. Martin*, another suit raising concerns similar to those raised in *Haith*, the state chairman of the NAACP challenged North Carolina’s method for electing judges under § 2 of the Voting Rights Act. The NAACP contended that staggered terms and the use of large multi-judge districts in the primaries prevented African-Americans from successfully seeking nominations for superior court judgeships. The plaintiffs also alleged that the statewide election of superior court judges discouraged African-Americans from seeking office. The NAACP sought much broader remedies in *Alexander* than those at issue in *Haith*. Specifically, the organization wanted North Carolina to redraw judicial boundaries to create smaller districts that would be more likely to elect African-American judges. The plaintiffs also sought the end of statewide elections for superior court judges in favor of district elections. Thus, *Alexander*

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139. See Drennan, *supra* note 66, at 29.
140. See id.
141. See id.
142. See id. Criminal defendants had begun to file motions raising the issue of whether the seven sitting judges even had the authority of their office. See id.
144. See 42 U.S.C. § 1973(a) (1994). Section 2, as amended in 1982, “prohibits election practices that result in racial discrimination.” Scruggs et al., *supra* note 121, at 34 (emphasis added). In one of the stranger combinations in North Carolina politics, the NAACP was represented by an attorney who had previously run for state attorney general as the Republican candidate. See Drennan, *supra* note 66, at 29.
146. See id. at 30.
147. Section 5 of the Voting Rights Act, at issue in *Haith*, applies only to new voting practices in designated areas, and its remedies are limited solely to preventing those changes from taking place. See 42 U.S.C. § 1973(c); see also *supra* notes 126-42 and accompanying text (discussing *Haith*). However, § 2 applies throughout the United States and is violated when any voting practice abridges the rights of minorities to elect representatives of their own choosing. See id. § 1973(a). Further, § 2 provides much broader remedies, and can be proactive rather than responsive. See *supra* note 118 and accompanying text (discussing §§ 2 and 5 of the Voting Rights Act).
148. See Drennan, *supra* note 66, at 50.
149. See id. Superior court judges are no longer elected statewide. See Act of Aug. 2,
was broader in scope than *Haith* and had the potential to affect North Carolina's entire judicial system.\(^{150}\)

A coalition formed between African-American legislators, the judges affected by *Haith*, and those fearful of the potential remedies from *Alexander*.\(^{151}\) The resulting legislation ("Chapter 509") implemented major changes to the district lines used to determine residence and to nominate superior court judges.\(^{152}\) In six large urban counties, Chapter 509 subdivided the former single-county, multi-judge districts into two or more districts with at least one judgeship having a majority of minority voters.\(^{153}\) Chapter 509 also split ten other multi-county, multi-judge districts into twenty single-judge districts, with two containing a majority of minority voters.\(^{154}\) Staggered terms for all judges in each new district were eliminated.\(^{155}\)

The passage of Chapter 509\(^{156}\) eliminated the need to resort to legal means to secure greater minority representation on the bench in North Carolina. The plaintiffs dismissed their complaint in *Alexander* because they were satisfied with the General Assembly's solution to the problem.\(^{157}\) True to its purpose, Chapter 509 increased the number of African-Americans on the superior court


151. See id.


153. See id. at 770-73; N.C. LEG. 1987, supra note 120, at 50.

154. See Act of June 29, 1987, ch. 509, 1987 N.C. Sess. Laws 769. For example, the former Seventh district, which had included three counties, was divided into three separate districts. See N.C. LEG. 1987, supra note 120, at 50. Nash County made up one district, while Wilson and Edgecombe Counties were split into two districts, one district with a majority of white voters and the other with a majority of African-American voters. See id.

155. See Act of June 29, 1987, ch. 509, § 1, 1987 N.C. Sess. Laws 769, 776-80. The staggered terms were eliminated by extending the term which expired first to coincide with the term expiring later. See N.C. LEG. 1987, supra note 120, at 50.

156. The act itself was subject to preclearance under § 5 of the Voting Rights Act of 1965. See N.C. LEG. 1987, supra note 120, at 50. The U.S. Justice Department precleared the act on September 25, 1987. See id. at 51. North Carolina Governor Jim Martin challenged the reorganization of the superior court under Chapter 509 in *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). The North Carolina Supreme Court determined that Chapter 509 served a beneficial public purpose by bringing North Carolina's election laws into compliance with the Voting Rights Act and was therefore valid under the state constitution. See id. at 456, 385 S.E.2d at 479.

157. See Drennan, supra note 66, at 31.
If there had been any question as to whether the Voting Rights Act applied to judicial elections, the United States Supreme Court emphatically resolved the question with three decisions in 1991, determining that the Voting Rights Act of 1965 does apply to judicial elections.59

2. Statewide Versus Local Election of Superior Court Judges

Although the General Assembly has had the authority to approve local elections for superior court judges since 1868,160 these candidates were elected on a statewide basis until 1994.161 Prior to that time, only nominations were decided at the local level.162 The Republican Party had taken issue with this system for decades163 and had assisted African-Americans in challenging the manner in which North Carolina Superior Court judges were elected.164 Although the NAACP was satisfied with the 1987 reform of the election system under Chapter 509, which primarily benefited African-Americans,165 Republicans were not; consequently, in 1988, the state Republican Party brought suit against the Governor and the Board of Elections

158. By 1990, 24 African-American judges were elected to the bench in North Carolina, including three appellate judges. See White et al., supra note 119, at 42. By 1995, 35 African-Americans were serving as judges, constituting 12% of North Carolina's judiciary (14 of these 35 sat on the superior court bench). See Betts, supra note 60, at 322.

159. See Chisom v. Roemer, 501 U.S. 380, 404 (1991) (holding that § 2 of the Voting Rights Act was violated in a case involving a Louisiana challenge to the election of supreme court justices in a multi-member district); Clark v. Roemer, 500 U.S. 646, 655 (1991) (holding that judicial elections should have been enjoined when the Attorney General of Louisiana brought forth objections under § 5 of the Voting Rights Act and, in addition, these judgeships had not been precleared); Houston Lawyers' Ass'n v. Attorney Gen. of Tex., 501 U.S. 419, 428 (1991) (holding that the at-large method of electing trial court judges in certain Texas counties violated § 2 of the Voting Rights Act); see also supra note 118 and accompanying text (discussing §§ 2 and 5 of the Voting Rights Act).

160. See N.C. CONST. of 1868, art. IV, § 21. The General Assembly retained this authority through a similar provision in the current constitution. See N.C. CONST. art. IV, § 16 (“Regular Judges of the Superior Court may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.”). The General Assembly did not exercise this power until the 1996 legislative session. See infra notes 333-34 and accompanying text.

161. See BRANNON, supra note 81, at 12 (describing the selection of superior court judges as of August 1993).

162. See id.

163. See N.C. LEG. 1987, supra note 120, at 49. The Republicans justifiably contended that the statewide election of superior court judges unfairly worked to the advantage of Democratic candidates. See White et al., supra note 119, at 40. A 1980 survey of appellate and superior court judges showed that 84 out of 85 judges were Democrats, despite the fact that 30% of North Carolinians were registered Republicans. See id.

164. See supra notes 126-50 (discussing cases which challenged the methods of electing superior court judges in North Carolina as unfair to racial minorities).

165. See supra notes 151-55 and accompanying text.
challenging the statewide election of superior court judges.\textsuperscript{166} The original suit eventually was dismissed for lack of venue,\textsuperscript{167} but the Republicans continued pressing the issue in a lengthy legal battle.\textsuperscript{168} Finally, in \textit{Republican Party v. Hunt},\textsuperscript{169} the Republicans met with some success: the Eastern District of North Carolina agreed that statewide elections of superior court judges were unconstitutional because such elections diluted Republican voting power.\textsuperscript{170} Reality seemed to support the court's conclusion because only one Republican had ever been elected to a superior court judgeship in a statewide election.\textsuperscript{171} The court ordered that candidates for superior court judgeships be elected by voters in their home districts.\textsuperscript{172} But the court also provided that the candidates appear on the statewide ballot in case the decision was reversed by a higher court, thereby voiding the results of the district elections and requiring new statewide elections to determine the actual winner.\textsuperscript{173} Ironically, Republican candidates in North Carolina did exceptionally well in the 1994 general elections, winning all four court of appeals seats and carrying the statewide vote in eight superior court races.\textsuperscript{174}

\textsuperscript{167} See id. at 837.
\textsuperscript{169} 841 F. Supp. 722 (E.D.N.C. 1994), aff'd as modified sub nom. Republican Party of N.C. v. N.C. State Bd. of Elections, 77 F.3d 563 (4th Cir. 1996), remanded sub nom. \textit{Republican Party v. Hunt}, 77 F.3d 470 (4th Cir. 1996). The plaintiffs in \textit{Hunt} again asserted that Republicans could elect their own candidates in several areas if superior court elections were held district-wide rather than statewide. See id. at 726. Because the Democratic Party held a wide margin in voter registration, the Republicans argued that the Democratic candidates would always win in statewide elections. See \textit{id.}
\textsuperscript{170} See \textit{id.} at 732 ("Plaintiffs have made a sufficient showing that they have been and will continue to be irreparably harmed by the present superior court electoral process.").
\textsuperscript{171} See \textit{id.} at 726. Prior to 1988, no Republican candidate had won a statewide judicial election in the 20th century. See \textit{JSSC, supra} note 3, at 6.
\textsuperscript{172} See \textit{Hunt}, 841 F. Supp. at 733-34.
\textsuperscript{173} See \textit{id.} at 734.
\textsuperscript{174} See Joseph Neff, \textit{Republicans Win Every Race for Seats on Appellate Courts}, \textit{NEWS & OBSERVER} (Raleigh, N.C.), Nov. 9, 1994, at B3 [hereinafter \textit{Republicans Win}]. The new election procedure actually disadvantaged the Republican party in two superior court races in Eastern North Carolina in which the Republican candidates rode the overall success of their party to a victory on the statewide ballot, but lost close races to Democratic opponents in their home district. See \textit{Hunt}, 841 F. Supp. at 734. Republican
In light of the success of Republican candidates in the 1994 elections, the Fourth Circuit reconsidered *Hunt* in early 1996.\(^{175}\) Before the court of appeals, the State Board of Elections argued that the Republican Party had "failed to carry its burden of showing unconstitutional discriminatory effects resulting from the statewide election of superior court judges."\(^{176}\) The Board of Elections also contended that in making the ruling the district court ignored the growing strength of the Republican Party.\(^{177}\) The Republican Party argued that the court of appeals should not overturn the decision, claiming that it would be inappropriate to consider the results of the 1994 election.\(^{178}\) The court of appeals determined that the results of the 1994 elections "were directly at odds with the recent prediction by the district court that Republican electoral exclusion would continue unabated into the future."\(^{179}\) The court of appeals remanded *Hunt* to the district court for further consideration.\(^{180}\)

This reversal cast doubt on the outcome of the 1994 elections and, with the 1996 general elections quickly approaching, left undecided the question of how North Carolina could choose its superior court judges.\(^{181}\) In the 1996 legislative session, the General Assembly acted to settle the uncertainty by validating the results of the 1994 election and by declaring that all superior court judges would be elected from local districts starting in 1996.\(^{182}\) The General Assembly also declared that, beginning in 1998, all superior court judges would be elected in non-partisan elections.\(^{183}\)

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\(^{176}\) *Hunt*, 1996 WL 60439, at *3.

\(^{177}\) See *id*.

\(^{178}\) See *id*.

\(^{179}\) *Id*.

\(^{180}\) See *id.* at *4*.


\(^{182}\) See Act of Aug. 2, 1996, ch. 9, § 1, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 536; see also *infra* notes 332-36 and accompanying text (discussing 1996 legislative action in the General Assembly). Recall that the General Assembly had possessed the power to declare that superior court judges were to be elected by the local district since 1868. See *supra* note 160 and accompanying text.

B. Growing Political Nature of Judges

Another serious problem with North Carolina’s judicial election system is the growing political nature of judges and judicial elections, a problem which manifests itself in a number of different ways. Observers view partisan elections as inconsistent with an independent and accountable judiciary. The back-and-forth exchanges so common in non-judicial political races threaten to demean the courts and undermine their respect. Moreover, public confidence in the fairness of judicial decisions wanes as elections force judges to raise large amounts of money for political campaigns. These concerns all have been realized recently to some extent in North Carolina.

1. Fiercely Contested Judicial Elections

Prior to the 1980s, the Democratic Party completely dominated the ranks of the judicial branch in North Carolina. Although judges officially were chosen through partisan elections, in reality most Democratic candidates rarely faced any opposition, and then only in party primaries. As a result, judicial elections were

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184. See WFDD, supra note 4, at 6 (“[W]e can expect increasing criticism of the courts as part of campaigns, which will lead to even more negative perceptions and greater public distrust. We can also expect, as we already are beginning to see, the restraints on the political decorum of the past begin to fade in these elections.”).

185. See infra notes 188-205 and accompanying text (discussing the fiercely contested nature of judicial races in North Carolina).

186. See infra notes 206-25 and accompanying text (discussing the lifting of the gag order which allows judges to express publicly their views on political issues).

187. See infra notes 226-48 and accompanying text (discussing the increasing costs of judicial campaigns).

188. See Exum, supra note 71, at 5.

189. See H. Park Helms, The Case for Judicial Election Reform, N.C. INSIGHT, June 1987, at 22, 22 (“[O]nce [judges] were nominated in the Democratic primary, the politicking was over and they ran without opposition—and seldom with an issue—in the general election in November.”). Thus, North Carolina’s method of selecting judges was an elective system in name only:

Almost all judges have been Democrats, initially appointed [to fill vacancies] by Democratic Governors, and, once appointed, almost never challenged electorally. Democratic judges were rarely challenged in Democratic primaries because the nature of judicial elections made it difficult to identify any real issues and any real reasons for ousting an incumbent judge. . . . [They] were rarely challenged by Republicans for the same reason[s] . . . [and because] Democratic judicial candidates always won [statewide elections]. [Thus,] the system for judicial selection and retention in North Carolina has for the most part and for almost all judges been gubernatorial appointment and tenure for life or [until] retirement.

Exum, supra note 71, at 5.
essentially free of partisan political pressure.\textsuperscript{190} However, as the Republican party gained popularity among North Carolina voters in the late 1970s and early 1980s, it became clear that uncontested judicial elections would no longer be the rule in the emerging two-party state.\textsuperscript{191} For the first time, characteristics more common to regular political contests, such as active campaigning, aggressive political advertising, and closely contested races, became prevalent in North Carolina's judicial elections.\textsuperscript{192}

For example, the 1986 race for chief justice of the supreme court, in which two supreme court justices faced each other, became "the most bitter election in N.C. Supreme Court history."\textsuperscript{193} Many observers contend that the race, eventually won by Democrat James Exum, served as an indication of the increased partisan nature of judicial elections in North Carolina.\textsuperscript{194} One of the primary concerns in this race was the role of a special interest group, headed by a former Governor, which fiercely attacked Justice Exum's record on the death penalty.\textsuperscript{195} Specifically, the group featured families of murder victims in news conferences in which they criticized Justice Exum's decisions.\textsuperscript{196} Exum's opponent, outspoken in her criticism of

\textsuperscript{190} See Helms, supra note 189, at 22.

\textsuperscript{191} See Judicial Races Drawing Hopeful GOP Challengers, N.C. LAW. WKLY., Apr. 1, 1996, at 1, 4 [hereinafter GOP Challengers]. Currently, many incumbent Democratic judges even face challengers from within their own party in the primary before confronting a Republican opponent in the general election. See id. Contested primaries, of course, make for longer campaign seasons and call for heftier campaign budgets.


\textsuperscript{193} Betts, supra note 3, at 20. When then-Chief Justice Joseph Branch retired from office in mid-1986, Republican Governor Jim Martin appointed a fellow Republican, Associate Justice Rhoda Billings, to fill the vacancy. See id. at 19. The appointment of Billings violated the longstanding tradition, used since 1900, of elevating the senior associate justice to the top spot. See Drennan, supra note 66, at 27. In this case, the next person in line was Associate Justice James Exum, a Democrat. See id. Governor Jim Hunt had been the last governor to abide by this tradition when in 1977, somewhat against his will, he appointed Joseph Branch to the head position instead of Hunt's college friend, Phil Carlton. See Betts, supra note 3, at 19. Billings served as the chief justice from September until the November election, when the law required her to run for the remainder of Branch's term. See id. Justice Exum resigned his post to campaign for the position as well. See id. at 20.

\textsuperscript{194} See Helms, supra note 189, at 22-23; Robert Moog, Campaign Financing for North Carolina's Appellate Courts, 76 JUDICATURE 68, 69-70 (1992); Ruffin, supra note 8, at J1.

\textsuperscript{195} Former Republican Governor Jim Holshouser headed a group known as the Citizens for a Conservative Court, which vigorously attacked Justice Exum's record, particularly with regard to his stance on the death penalty. See Betts, supra note 3, at 20.

\textsuperscript{196} See Drennan, supra note 66, at 28.
the tactics, noted that the Code of Judicial Conduct prohibited Exum from responding. Nevertheless, Exum prevailed, due in part to a backlash of voters who resented the politicizing of the courts. However, the controversial campaign had upset the trend of lightly contested judicial elections, and with the Republican party growing in power, the future promised more of the same.

The 1990 judicial elections displayed another undesirable characteristic typical of non-judicial political campaigns: aggressive political advertisements. Republican candidates asserted that aggressive campaign advertisements were necessary to highlight differences between the candidates. Democrats argued that these tactics resembled then-presidential candidate George Bush's Willie Horton advertisement. Once again, non-judicial officials entered the campaign fray as the chairman of the State Republican Party openly criticized the Democratic supreme court as soft on crime in television advertisements.

The general elections of 1994, in which a record number of judicial races were contested throughout the state, firmly cemented North Carolina as a two-party state in which Republicans were more


198. See Betts, supra note 3, at 20. Justice Exum's victory was the first defeat of a sitting chief justice since Democrat Walter Clark defeated Republican Chief Justice David Furches in 1902. See id.

199. See Drennan, supra note 66, at 41.

200. See id.

201. See id. at 41 n.41 (citing Ruffin, supra note 8, at J1). For example, one television advertisement produced by the Republican Party specifically criticized several supreme court opinions. See id. The most prominent of the cases in question dealt with the granting of a new trial to a defendant sentenced to death. See id. The supreme court recognized a violation of the defendant's right to be present while jurors were questioned by the judge about the jurors' request to be excused. See id. Allen Adams, the campaign director for Democratic judicial candidates, criticized the Republican campaign strategy as an attempt to "Willie Horton-ize" the election. See id.

202. See id. at 41. At that time, the Code of Judicial Conduct still prohibited sitting judges or candidates from any announcement of their stances on political issues. See id.; see also 1998 JUDICIAL CODE, supra note 197, Canon 7 (setting out amended rules which now allow a judicial candidate to announce her stance). Consequently, non-candidates could freely criticize the decisions of the sitting judges, while the incumbents were precluded from defending or explaining their own records. See infra notes 206-25 and accompanying text (discussing the "announce" clause, which prohibits judges from expressing political views during campaigns).
than capable of competing. Republicans captured the one available seat on the supreme court, both available seats on the court of appeals, and eight of the ten available superior court judgeships. The 1994 elections marked the end of apolitical, uncontested judicial races and signaled that future judicial campaigns may resemble the less dignified legislative and gubernatorial elections.

2. Gag Rule Lifted

Canon 7 of the Code of Judicial Conduct contains restrictions on political activity deemed inappropriate for a judicial officer. Until recently, this included the “announce” clause, or gag rule, which prohibited judges from stating their opinions on “disputed legal or political issues.” One of the intended and actual effects of this rule was to limit what a judge or candidate could say while campaigning for office, thereby minimizing the political nature of judicial races. However, the North Carolina Supreme Court recently amended Canon 7 of the Code of Judicial Conduct and dropped the gag rule.

This decision to delete the “announce” clause came on the heels of a constitutional challenge to the clause in federal court. During
an unsuccessful bid for a district court judgeship, attorney Mark Brooks announced in a candidates' forum that he was "pro-life."\textsuperscript{212} When the North Carolina State Bar sought to sanction him for violating Canon 7, Brooks sued in federal court claiming that the gag rule was an overbroad restriction on free speech in violation of his constitutional rights under the First and Fourteenth Amendments.\textsuperscript{213} The judge issued a temporary restraining order in Brooks' favor.\textsuperscript{214} Although this order was later dissolved for procedural reasons,\textsuperscript{215} the court made it clear that it did not favor "broad and vague restrictions on free speech" and that "citizens have the right to be informed about the qualifications and views of candidates for judicial office."\textsuperscript{216} The court's reasoning comports with other courts' decisions regarding similar challenges to judicial gag rules in other states.\textsuperscript{217}

Consequently, Canon 7 now allows judicial candidates in North Carolina to reveal their stances on such issues as abortion, the death

\textsuperscript{212} See Ertel Berry, Judicial Candidate Takes on Gag Rule, N.C. LAW. WKLY., Oct. 28, 1996, at 1, 1.
\textsuperscript{213} See id.
\textsuperscript{215} The court declined to extend the temporary restraining order through the November elections because the Judicial Standards Commission, which is responsible for regulating the campaign conduct of incumbent judges, had not been joined as a necessary party to the lawsuit. See Gag Rule Fight On Hold, N.C. LAW. WKLY., Nov. 4, 1996, at 1, 2. Only the State Bar, which incorporated the Judicial Code into its Rules of Professional Conduct, would have been affected by the restraining order. See id. Therefore, the injunction would have freed only non-incumbents from the gag rule, leaving incumbent judges still prohibited from announcing their views during the campaign. See id.
\textsuperscript{217} See, e.g., Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993) (holding that a rule regulating the speech of judicial candidates violated the First Amendment); ACLU v. Florida Bar, 744 F. Supp 1094, 1099-100 (N.D. Fla. 1990) (granting preliminary injunction preventing the enforcement of the "announce" clause). But see Stretton v. Disciplinary Bd. of the Supreme Court, 944 F.2d 137, 142-44 (3d Cir. 1991) (recognizing state interest in assuring that judges are and appear to be impartial). The U.S. Supreme Court has long made it clear that the First Amendment's guarantees of free speech apply with particular vigor in political campaigns, see Buckley v. Valeo, 424 U.S. 1, 14-15 (1975), including campaigns of state elective officials, see Brown v. Hartlage, 456 U.S. 45, 53-54 (1982) (holding that the First Amendment forbids the states from barring candidates for public office from promising to conduct their office in a way that benefits a particular class of voters). However, the Supreme Court has not decided whether the particular limitations on judicial election campaign speech in the Model Code of Judicial Conduct violate the First Amendment. See Matthew J. O'Hara, Note, Restriction of Judicial Election Candidates' Free Speech Rights After Buckley: A Compelling Constitutional Limitation? 70 CHI.-KENT L. REV. 197, 198 (1994).
penalty, and victim's rights. Observers disagree as to whether this change will help or hurt the quality of the judiciary. On one hand, the rule change will allow judges to express their personal views on current legal and political issues of the day, thus resulting in a better-informed electorate and increasing judicial accountability. Despite these advantages, many scholars do not favor any relaxation of rules prohibiting judges from discussing issues that may be litigated in the judges' courtrooms. Certainly, many members of the judiciary fear that the lifting of the gag rule will force them to run more partisan and aggressive campaigns akin to those run by other elected officials.

The real difficulty with judicial candidates discussing views on disputed legal and political issues is that the voting public might believe that such opinions are relevant to the performance of judicial duties, which in theory they are not. Consequently, judges might feel compelled to ensure that their decisions conform to their campaign promises. Likewise, candidates who discuss their

218. See Dayton, supra note 197, at 1.
219. See Brooks v. North Carolina State Bar, No. 2:96CV00857 (M.D.N.C. Oct. 28, 1996) (order dissolving temporary restraining order); see also O'Hara, supra note 217, at 236 (suggesting that reasoned free speech by judicial candidates may be in the interest of a well-informed electorate); Michele Radosevich, Comment, Toward Meaningful Judicial Elections: A Case for Reform of Canon 7, 17 U. PUGET SOUND L. REV. 139, 149-54 (1993) (arguing that the muzzle should be taken off of judges because it undermines the accountability intended to be achieved through judicial elections).
221. For example, Chief Justice Burley Mitchell warned that the change "will probably cause judicial elections to look more like elections for the General Assembly ... with some of the same campaign tactics. I don't think that it will be healthy for the judiciary." Dayton, supra note 197, at 1 (quoting Chief Justice Mitchell). However, some restraints on free speech will still apply. For instance, "[c]andidates will not be able to stake themselves out on particular cases. Nor will they be permitted to make promises about their conduct in office—other than to say [they will] be impartial." Id.; see also 1998 JUDICIAL CODE, supra note 197, Canon 7 (discussing other restrictions on candidate actions during judicial campaigns).
222. See MCFADDEN, supra note 41, at 89.
223. See Sethi, supra note 220, at 719-20. ("When a judicial candidate makes a statement regarding her beliefs on an important public issue ... and is subsequently elected, there is an impermissible risk that the judge will no longer view that issue impartially."). As elected officials, judges already respond to public opinion concerning sensitive political and legal issues; perhaps increasingly they will base their decisions on political concerns if they have staked out specific positions on the campaign trail. Such a situation could raise serious issues about the independent role of the judiciary and its duty to act as a countermajoritarian force. See generally Sara Wyche Higgins, Note, State v. Jennings: Public Fervor, the North Carolina Supreme Court, and Society's Ultimate
personal views will appear to have pre-judged particular types of issues, even if the candidates maintain their neutrality while on the bench.224 Because the perception that justice is being served is often as important as the reality, the integrity of the courts likely will be threatened when judicial candidates begin to assert their views.225

3. Increasing Campaign Costs

Perhaps the most disturbing trend in judicial elections in North Carolina is the growing importance of money in the electoral process. Judicial campaigns were once low-profile contests that involved little campaigning and small amounts of money.226 But the cost of campaigning for a seat on the bench in North Carolina is increasing,227 forcing many judges to "manage professional, extensive, and expensive campaigns in order to attract a statewide electorate."228 The movement of North Carolina to a two-party state, with competitive elections between Republican and Democratic candidates, has played a significant role in this increase.229 The rising campaign costs in North Carolina parallel a potentially dangerous trend seen around the country.230

The costs of judicial elections in 1986 and 1994 were particularly

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*Punishment*, 72 N.C. L. REV. 1672 (1994) (arguing that the North Carolina Supreme Court in *Jennings* allowed the death penalty to stand under constitutionally questionable circumstances). Given the "current popular sentiment demanding harsh and swift punishment for violent offenders," Higgins suggests that North Carolina's Supreme Court justices "may be responding more to public sentiment than to reasoned judicial principles; [thus,] *Jennings* may lead one to ask whether an elected judiciary may be counted on to protect the constitutional rights of criminal defendants in the face of political winds calling for constricting of those rights." *Id.* at 1690-91.

224. See MCFADDEN, supra note 41, at 89.

225. Cf. 1987 COURTS COMMISSION, supra note 192, at 3 ("[Judges] are impaired in their ability to be judges if the court system in which they work is perceived as political.").


This total represented a $145,000 increase over the totals for statewide judicial elections in 1980, 1982, and 1984 combined. *See id.*


229. See Moog, supra note 194, at 68.

230. See Levien & Fatka, supra note 226, at 72. Levien and Fatka argue that escalating campaign expenditures are undermining public confidence in the political process. *See id.* This problem is particularly true in judicial elections in which increased costs of judicial campaigns in combination with the rising demand for campaign contributions are "creating the perception, if not the reality, of impropriety." *Id.*
excessive. In the 1986 election, Republican Governor Jim Martin mounted an aggressive campaign to fill five of the seven seats on the North Carolina Supreme Court with Republicans. Special interest groups sought to characterize the sitting Democratic court as being soft on the death penalty. Democratic candidates responded with television, radio, and newspaper advertisements emphasizing the importance of judicial independence and integrity. In all, candidates for the supreme court spent $367,988 in the 1986 campaign. In 1994, only two North Carolina Supreme Court seats were up for election, and yet the total campaign expenditures for those races soared to nearly $600,000. Republican Bob Orr spent almost $130,000 in winning a seat on the supreme court, while his Democratic opponent spent over $240,000 in a losing effort. Expensive campaigns were not limited to the supreme court that year, as Republican Mark Martin and his opponent for a seat on the court of appeals together spent over $300,000. A recent study indicates that although judicial election spending has not "escalated out of control," the cost of judicial campaigns in North Carolina will continue to rise as the number of contested and competitive judicial elections increases.

Rising campaign costs create difficulties because judicial candidates become increasingly dependent on campaign expenditures and must devote more time and effort to fundraising. The Code of Judicial Conduct, however, already limits a judge's ability to raise

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231. See Reid, supra note 228, at 24.
232. See Moog, supra note 194, at 69; see also supra notes 193-98 and accompanying text (discussing the 1986 race for chief justice of the supreme court and the attacks on the political views of the Democratic candidate).
233. See Betts, supra note 3, at 20.
234. See Reid, supra note 228, at 23.
235. See id. at 24. As mentioned previously, this total represented a significant increase over all three previous elections combined. See supra note 227. Furthermore, the 1986 totals did not even include funds spent by the Campaign for a Conservative Court, the conservative group headed by a former Governor, which campaigned against the incumbent Democrats. Cf. Reid, supra note 228, at 24.
236. See Reid, supra note 228, at 24.
237. See id.
239. See Moog, supra note 194, at 76.
240. See Levien & Fatka, supra note 226, at 75. Some studies indicate that judges in the aggregate typically must supply from 10 to 30 percent of their own campaign funds, often by taking out personal loans. See MCFADDEN, supra note 41, at 29-30. In the costly 1986 elections, a number of candidates for the North Carolina Supreme Court were forced to take out loans and to rely on family assets to supplement individual contributions. See Reid, supra note 228, at 29.
campaign contributions. Nevertheless, a judicial candidate's success depends on greater access to money. Naturally, the people most interested in giving money to judicial campaigns are attorneys and other groups who seek relief through the courts. This increased role of money in judicial elections threatens to have an adverse effect on judicial impartiality, whether actual or perceived. It is possible that a successful judicial candidate will have to decide a case in which an attorney and litigant appearing before him contributed to his campaign. In this situation, even if the judge is able to remain impartial, it may appear that she cannot. Possible solutions to the growing campaign finance dilemma include implementing individual campaign contribution limits through campaign finance laws or restricting litigants' ability to contribute to

241. See 1998 JUDICIAL CODE, supra note 197, Canon 7B(2). Like judges in most states, North Carolina judges are prohibited from soliciting their own campaign funds under Canon 7B(2) of the Code of Judicial Conduct. See id.; MCFADDEN, supra note 41, at 31. As a result, judicial candidates form committees to raise and manage their campaign funds, theoretically insulating the candidates from "charges or suspicions of bias." Id. at 32. In reality, however, most candidates have a working knowledge of the supporters of their campaigns, thus rendering the rule ineffective. See id.

242. See JSSC, supra note 3, at 6. Historically, judicial races have generated less voter and contributor interest than other elective races. See MCFADDEN, supra note 41, at 26. Because of this low profile, fundraising for judicial candidates is more difficult. Candidates are often forced to turn to the small segment of the electorate that takes a special interest in judicial races, namely lawyers and members of business and professional groups that frequently litigate. See id. at 26-27.

243. See Levien & Fatka, supra note 226, at 76. In North Carolina, most campaign contributions to judicial candidates come from trial lawyers and businesses that often appear before the court. See Neff, supra note 238, at A3. Senator Fountain Odom, sponsor of a 1995 judicial reform bill, Senate Bill 971, noted that such contributions tended "to corrupt the image of an impartial judiciary." Id.

244. Political action committees ("PACs") have played a relatively limited role so far in North Carolina judicial elections, with the largest contributor being North Carolina's Academy of Trial Lawyers. See Reid, supra note 228, at 27 (noting that this organization contributed about $48,000 to supreme court judicial campaigns over the course of four election cycles from 1986-1994, averaging about $4,000 per candidate). However, the increasing costs of judicial campaigns and the growing competitiveness of judicial races will provide PACs with an incentive to become significant contributors to judicial candidates. See id. at 22. Conservative business PACs and the North Carolina Medical Society, which has a vested interest in the area of tort liability, may soon become heavily involved in contributing to judicial campaigns. See id. at 28. As a result, PACs will play an increasing role in financing judicial elections. See id. at 29. How their involvement will change the character of judicial campaigns remains to be seen.

245. See JSSC, supra note 3, at 6-7.

246. See id. at 6.

247. See id. at 6-7. In theory such bias could be remedied by recusal, but "routine judicial disqualification on the basis of campaign contributions would be too frequent when fund raising is such an integral element of the judicial selection process." John W. Reed, Judicial Selection in Michigan—Time for Change?, 75 MICH. B.J. 900, 902 (1996).
judicial campaigns through ethical rules.\textsuperscript{248}

C. Uninformed Electorate

In 1995, the North Carolina Futures Commission conducted an in-depth public survey to determine the fitness of the judiciary in the eyes of the people.\textsuperscript{249} The results showed that the general public knows little about the courts and the judicial elective process.\textsuperscript{250} Few voters even knew the names of judges who sit in courthouses in their counties.\textsuperscript{251} To the extent that voters do seek to inform themselves about judicial races, their efforts largely focus only on the candidate's party, race, or gender, but not on legal qualifications or capabilities.\textsuperscript{252} The 1974 election for chief justice of the supreme court is a notable example of the counter-intuitive results that may occur when an uninformed electorate selects the judiciary. Republican voters in the primary had the option of choosing between District Court Judge Elreta Alexander, an African-American woman and experienced trial court judge, and James Newcombe, a fire extinguisher salesman with neither a law degree nor any judicial experience.\textsuperscript{253} Newcombe
managed to win the Republican nomination, taking fifty-nine percent of the vote, before falling to the Democratic candidate, Associate Justice Susie Sharp, in the general election.\textsuperscript{254}

Another consequence of this ignorance about judicial candidates is that voters may base their decisions on the candidates' party affiliation alone.\textsuperscript{255} This type of voting can result in partisan sweeps in judicial races based upon the success of a party's high-profile candidates in presidential, senatorial, or gubernatorial races.\textsuperscript{256} The resulting partisan flip-flopping of judges may waste resources, create instability, and undermine public confidence in the courts.\textsuperscript{257}

\begin{quote}
"Republican Party hierarchy" refused to support Newcombe in the general election. \textit{See id.}
\end{quote}

254. \textit{See id.} In 1913, the North Carolina Supreme Court, in \textit{State ex rel. Spruill v. Bateman}, 162 N.C. 486, 77 S.E. 768 (1913) (note that this is the case name as it appears in the North Carolina Reporter; it is entitled \textit{Spruill v. Bateman} in the South Eastern Reporter), held that a statute requiring a judgeship to be filled by a licensed attorney was unconstitutional, determining that the statute added a requirement for office-holding not authorized in the constitution. \textit{See id.} at 488-89, 77 S.E. at 769. Since \textit{Bateman}, judges without law degrees have held numerous positions on lower courts in North Carolina, although never serving on the supreme court or court of appeals. \textit{See C.E. Hinsdale, in NORTH CAROLINA LEGISLATION 1975, at 67 (Joan G. Brannon ed., 1975) [hereinafter N.C. LEG. 1975]. Prior to 1974, three efforts to amend the constitution to require that judges be licensed attorneys had failed in the General Assembly. \textit{See id.} But after the 1974 primary race, the North Carolina Constitution was amended to require that all judges be licensed to practice law in North Carolina. \textit{See N.C. CONST. art. IV, § 22 (first passed by the legislature as Act of May 24, 1979, ch. 638, 1979 N.C. Sess. Laws 670, and later approved by voters Nov. 4, 1980). The amendment allowed then-current non-lawyer judges to retain their positions as long as they continued to be elected. \textit{See id.}
\end{quote}

255. \textit{See 1985 COURTS COMMISSION, supra note 111, at 27.}

256. \textit{See John J. Korzen, Comment, Changing North Carolina's Method of Judicial Selection, 25 WAKE FOREST L. REV. 253, 262 (1990). It has not been uncommon for entire slates of judges to be voted out of office in one election. \textit{See Exum, supra note 71, at 8. Naturally, such a result does not contribute to consistency on the bench and obviously has a detrimental effect upon those considering whether to serve on the bench. \textit{See id.} Other factors that play prominent roles in the decision process are incumbency, name recognition, inferences about race or gender drawn from the name, and even the location of the name on the ballot. \textit{See id.}
\end{quote}

257. \textit{Cf. Exum, supra note 71, at 8. (noting the ill-effects of partisan sweeps on the judiciary). The following is a glaring example is North Carolina's 25th Judicial District, consisting of Burke, Caldwell, and Catawba counties:}

\begin{quote}
In 1966 all Democratic District Court judicial candidates won. In 1970 they were all defeated by Republicans. In 1974 the Republicans were all defeated by Democrats; and the District Court bench remained entirely Democratic until 1986 when four of the five candidates running were again defeated by Republicans. . . .

Needless to say this kind of fruit-basket-turn-over in the judiciary is not healthy. Yet . . . what has happened and is continuing to happen in the 25th Judicial District could become a statewide reality.
\end{quote}

\textit{Id. at 8.}

Partisan sweeps have also caused trouble on the statewide level. Chief Justice
addition, the prospect of being voted out of office based upon the performance of a political party in any given year discourages good lawyers from leaving the stability of private practices and seeking spots on the bench.258 Thus, voter ignorance can not only have detrimental effects on actual judicial elections, but it can lower the quality of the pool of candidates interested in judgeships.

D. Problems in the Future

The emergence of North Carolina as a two-party state has transformed the judicial election system, which previously consisted of what amounted to mock elections for Democratic judges originally appointed to the bench by the governor.259 As Republican power has continued to grow, and their candidates have begun to win seats on the bench, judicial races have become fiercely contested and campaign costs have skyrocketed. This increased competition has played out in front of a continually uninformed electorate. These new trends do not bode well for the level of public confidence in North Carolina’s judicial system, as evidenced by the more than seventy percent of voters who claim dissatisfaction with some aspect of the court system.260

Two recent reforms to the election system—the lifting of the gag restriction on judicial candidates standing for election and the switch to local, nonpartisan elections for superior court judges—purport to address some of the problems with North Carolina’s judicial election system.261 In theory, the electorate will have more information available to them about judicial races, as the candidates will be able

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Mitchell, in an address to the General Assembly in 1995, noted that the supreme court had to cancel court in November and December of 1994 after two justices lost in the general election, the third time court had been canceled since 1984 due to partisan sweeps. See Betts, supra note 60, at 323.

258. See 1985 COURTS COMMISSION, supra note 111, at 27. Supporters tout nonpartisan elections as a way to avoid partisan sweeps in judicial races because a voter cannot select judges through straight ticket voting. See Exum, supra note 71, at 8. North Carolina began using nonpartisan elections in 1998 for superior court judges. See supra note 334. However, voters will continue to select appellate and district court judges through partisan elections. See supra note 335. Although nonpartisan elections eliminate the threat of partisan sweeps in the superior court division, the result is just one less piece of information available for the voter. See infra notes 261-63 and accompanying text (discussing the effect of the new rule on superior court races).

259. See supra notes 107-13 and accompanying text.

260. See WFDD, supra note 4, at 8. Specifically, 70% of the voters felt “the courts were too lenient to criminals, that victims are treated worse than criminals, and that people with money get preferential treatment.” Id.

261. See supra notes 184-286 and accompanying text (discussing the growing political nature of judges and judicial elections).
to express their views on current issues. Likewise, the switch to nonpartisan elections could help combat the growing political nature of judgeships by reducing the role of partisanship in judicial elections.

Unfortunately, these reforms may not lead to any substantive change in the judicial selection system, and could even exacerbate the present situation. In the best case scenario, the lifting of the gag order provides more information about the stances of specific judicial candidates. But it could easily add fuel to the fire by allowing judicial candidates to engage in fierce political and ideological campaigns.\footnote{262} With the gag order lifted, and the recent rise of the Republican Party in North Carolina, even uglier judicial campaigns quickly could become the rule, not the exception.\footnote{263} In addition, judicial candidates’ ability to speak out on political issues may offset any benefits which would have been realized by the nonpartisan election of superior court judges. Superior court judicial candidates can easily align themselves with their favored party based upon simple statements on a few issues in accordance with party platforms. Thus, the effects of the recent reforms could be cosmetic improvements at best, and have the potential to actually worsen the current situation.

The real concern with North Carolina’s judicial election system is that the caliber of the bench ultimately will suffer. The quality of judges on the bench is merely a reflection of the candidates who seek the position. Whether the quality of the bench suffers because poor or unscrupulous candidates are being elected by an uninformed or apathetic electorate, or simply because stronger candidates are discouraged from seeking positions on the bench, is unimportant. In either event, the result is bad judges on the bench potentially making bad law. Until now, North Carolina’s one-party de facto appointive system has managed to provide good judges,\footnote{264} but it is possible that this trend will not continue if the problems with the judicial selection system persist.

\footnote{262} See Editorial, supra note 251, at A14.
\footnote{263} See supra notes 206-25 and accompanying text (discussing the lifting of the announce clause from Canon 7 of the North Carolina Code of Judicial Conduct). Races could be particularly ugly for appellate and district court judges, who will continue to be chosen in partisan elections. Since 1994, district court elections historically have been the most heavily contested races between the two major parties. See GOP Challengers, supra note 191, at 4. And appellate judges running in statewide elections will continue to be the highest profile judicial contests. Thus, partisan elections will continue to play a significant role in selection of judges in North Carolina.

\footnote{264} See Exum, supra note 71, at 5 (noting that “[w]e have a good judiciary in North Carolina” because “[w]e are . . . still reaping the benefits of a system that, practically, has been appointed by the Governor with tenure for life or until retirement”).
In an effort to address these growing problems, and to create "a
court system for the 21st century," the Futures Commission proposed
a merit selection plan for choosing all of North Carolina's judges.265
However, the Futures Commission proposal is not the first time such
a plan has been suggested in this state.266 Before closely examining
the Commission's merit selection plan, an in-depth examination of
the legislative history of merit selection in North Carolina is
warranted.

IV. LEGISLATIVE HISTORY OF MERIT SELECTION DEBATE IN
NORTH CAROLINA SINCE 1971

The North Carolina General Assembly has entertained bills
intended to alter the method of judicial selection in almost every
session since 1971.267 North Carolina first began considering a change
to some form of judicial merit selection in 1971 when the North
Carolina Courts Commission recommended replacing the partisan
election of judges with a nonpartisan merit selection plan.268 Over
the next four years, groups in the General Assembly pushed for a
constitutional amendment to adopt the merit selection of judges, but
the efforts met with little success.269 In 1975, the proposed
amendment's failure was due in part to a lack of support from then-
Lieutenant Governor Jim Hunt.270

Another serious effort to adopt a nonpartisan merit plan was
mounted in 1977,271 this time with the North Carolina Bar

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265. See WFDD, supra note 4, at 22. For further discussion on the other reforms
suggested in the Futures Commission proposal, see infra notes 346-51 and accompanying
text.

266. See Betts, supra note 60, at 326-27 (highlighting the "Recent History of the Merit
Selection Debate in the North Carolina General Assembly").

267. See id. (noting, however, that no substantial reform initiative was introduced in
the 1993 session).

268. See 1971 COURTS COMMISSION, supra note 11, at 11-16. The plan called for a
nominating commission of lawyers, appointed by the chief justice and governor, charged
with recommending two or three names for judicial vacancies. See id. The governor
would select a candidate from that list, with the appointee serving a one to three year trial
period before facing a retention election. See id.

269. In 1974, the bill actually emerged from the legislative committee and passed two
readings on the House floor before failing on the third reading. See N.C. LEG. 1975,
supra note 254, at 66; see also Betts, supra note 60, at 326-27 (listing history of merit
selection debate in North Carolina General Assembly).

270. See Betts, supra note 3, at 16.

271. Attempts in the previous three legislative sessions to adopt a plan similar to the
one first proposed by the Courts Commission in 1971 had met with little success. See C.E.
Hinsdale, in NORTH CAROLINA LEGISLATION 1977, at 91 (Joan G. Brannon ed., 1977)
[hereinafter N.C. LEG. 1977].
Association as the principal sponsor.\textsuperscript{272} This plan resembled previous efforts, except that it attempted to address the controversy surrounding the composition of the nominating committee by providing for an almost equal number of appointments to the committee by the chief justice, the governor, and the General Assembly.\textsuperscript{273} In addition to the bar association, then-Chief Justice Susie Sharp endorsed the legislation.\textsuperscript{274} The House bill reached the floor, but failed by several votes to secure the three-fifths majority required for passage of a constitutional amendment.\textsuperscript{275} Opponents of the bill claimed that merit selection departed from the principles of Jacksonian democracy\textsuperscript{276} and also felt that the composition of the nominating committee was still insufficiently representative.\textsuperscript{277} Governor Jim Hunt waited until after the bill had been defeated to voice support for the initiative.\textsuperscript{278}

That same summer, however, political allies informed Governor Hunt that his tentative selections to fill judicial vacancies could be potentially embarrassing.\textsuperscript{279} The Governor responded by signing an executive order that created a merit selection plan for filling superior court judge vacancies that arose mid-term.\textsuperscript{280} Governor Hunt used the plan to fill dozens of superior court judgeships until he left office in 1985,\textsuperscript{281} although he never extended the process to the court of

\begin{footnotes}
\item[272] See id.
\item[273] See id. The previous plans had only provided for the governor and chief justice to appoint the members of the nominating commission. See id.
\item[274] See Betts, supra note 3, at 16.
\item[275] See N.C. LEG. 1977, supra note 271, at 91.
\item[276] See id.; see also supra notes 62-71 and accompanying text (discussing the impetus behind the original move to partisan elections).
\item[277] See N.C. LEG. 1977, supra note 271, at 91.
\item[278] See Betts, supra note 3, at 16. Governor Hunt voiced his support for merit selection as a proposal worth further discussion. See id.
\item[279] See id.; see also Ned Cline, Hunt Was Warned on Judge Selection, CHARLOTTE OBSERVER, Sept. 1, 1977, at A1 (discussing how Governor Hunt could have avoided embarrassing appointments by creating his own merit nominating process).
\item[280] See Exec. Order No. 12, by James B. Hunt Jr., Governor of North Carolina, (July 28, 1977), amended by Exec. Order No. 24 (May 15, 1978), extended by Exec. Order No. 30 (Dec. 31, 1978). These executive orders were North Carolina's only experiment with the merit selection of judges. See Drennan, supra note 66, at 24. Critics of the plan complained that the process was too political and that the nominating panel frequently omitted clearly qualified candidates, yet included those candidates favored by the Governor. See id. However, there were several instances in which political allies of Governor Hunt were not nominated by the merit selection panel. See id. Supporters of the plan contended that in these situations, the panel performed a valuable service by allowing the Governor to refrain from appointing political allies. See id.
\item[281] See Drennan, supra note 66, at 24. At that time, North Carolina was actually listed as a merit selection state for superior court judges by the American Judicature Society, which considered a state to have a merit selection plan regardless of how the
\end{footnotes}
appeals or supreme court.\textsuperscript{282}

The push for merit selection slowed during the 1980s until the fiercely contested race for chief justice between Rhoda Billings and Jim Exum in 1986.\textsuperscript{283} This heated race, along with the General Assembly’s 1987 redrawing of the superior court district lines in response to the \textit{Alexander v. Martin}\textsuperscript{284} suit, rekindled the debate over North Carolina’s method of judicial selection. Then-Chief Justice Exum used the increased focus on the issue to persuade the General Assembly to create a study commission to examine the issue of judicial selection.\textsuperscript{285} The General Assembly responded by creating the Judicial Selection Study Commission ("JSSC").\textsuperscript{286} The Chief Justice, Governor, Lieutenant Governor, Speaker of the House, and Attorney General each appointed four of the commission’s twenty members.\textsuperscript{287} The General Assembly charged the Commission to “study the method of selecting Judges in North Carolina and recommend any changes needed to improve the system.”\textsuperscript{288} The JSSC report, the most recent comprehensive study of North Carolina’s judicial selection methods prior to the Futures Commission, helped instigate two strong pushes for judicial appointment, one in 1989 and another in 1991.\textsuperscript{289}

The JSSC recommended that North Carolina adopt a straight appointive system, with the governor making appointments subject to the advice and consent of the General Assembly.\textsuperscript{290} Senator Dennis

\textsuperscript{282} See Betts, supra note 3, at 16.

\textsuperscript{283} See supra notes 193-98 and accompanying text (discussing this heated contest).

\textsuperscript{284} No. 86-1048-CIV-5 (E.D.N.C., Oct. 2, 1986); see supra notes 151-59 (discussing Chapter 509).

\textsuperscript{285} See Drennan, supra note 66, at 32. The North Carolina Courts Commission had made a similar suggestion in its report to the General Assembly in 1987. See 1987 COURTS COMMISSION, supra note 192, at 4-5 (recommending “that the special commission be directed to investigate how other states select their judges ... and to determine the views of the citizens of this state about how their judges should be selected”).


\textsuperscript{287} See id. § 19A.1, 1987 N.C. Sess. Laws at 2216.

\textsuperscript{288} Id. § 19A.2, 1987 Sess. Laws at 2216. The JSSC met and studied the issue of judicial selection throughout 1988, interviewing numerous representatives from New Jersey, Maryland, and Texas, who testified concerning how various judicial selection methods worked in their states. See Drennan, supra note 66, at 32.

\textsuperscript{289} See Drennan, supra note 66, at 32-36, 43-45.

\textsuperscript{290} See JSSC, supra note 3, at 12. The JSSC plan was shaped by an understanding of the political reality of the situation. First, the JSSC recognized that any proposal had to avoid a partisan fight over the makeup of nominating committees, so they eliminated the need for such a committee. See Drennan, supra note 66, at 33. Second, the Commission
Winner, a co-chair of the Commission, introduced the proposed constitutional amendments and statutory authorization into the Senate in 1989.\(^{291}\) No identical judicial selection bill was introduced into the House.\(^{292}\) The State Bar association strongly supported the plan, and many appellate judges also supported the initiative.\(^{293}\) However, special interest groups representing trial lawyers, African-American attorneys, and female attorneys did not.\(^ {294}\)

The judicial selection bills met with resistance on two primary issues: the inclusion of trial judges in the appointment process and the unlimited discretion given to the governor in the straight appointment system.\(^{295}\) The General Assembly eventually excluded trial judges from the legislation, thus providing only for appointment of supreme court justices and court of appeals judges.\(^{296}\) An additional compromise required the governor to choose his appointees from a list submitted by a screening panel, making the plan more agreeable to lawyers.\(^{297}\) Although the judicial selection reform passed the Senate with the needed majority by a vote of thirty to sixteen,\(^ {298}\) the exclusion of trial judges caused many of the judges who had supported the plan to lose interest,\(^ {299}\) and the bill was sent to the House Rules Committee for consideration in 1990 with little
momentum. Ultimately, the proposal died in the House without any official discussion in a committee.

The 1990 judicial elections showed that some of the growing problems with partisan judicial elections were not going away. Therefore, in 1991, the legislature again discussed eliminating judicial elections, and sponsors introduced similar bills in both the House and Senate. Proponents of election reform, fresh off of their failure in 1989, avoided the controversial issue of appointing trial judges and chose instead to concentrate their effort on the appellate courts. Having omitted trial judges from the proposal, the prospects for passing the reform looked promising.

The Senate bill called for the governor to appoint appellate judges from a list composed of local bar nominees as well as active and former lower court judges. After the governor had selected three to five names from this list, the Judicial Selection and Nomination Committee would report whether these candidates were qualified to serve as judges. The governor would then choose an appointee from among the approved candidates, and the appointee would be subject to confirmation by the General Assembly. This proposal eventually passed the Senate by a forty-one to six vote.

However, the plan again died in the House in 1992, never even

300. See Betts, supra note 60, at 327; Drennan, supra note 66, at 36.
301. See Betts, supra note 60, at 327.
302. See supra notes 199-202 and accompanying text (discussing the gutter tactics used in campaign ads for judicial elections in 1990).
304. See Drennan, supra note 66, at 43. Resistance from minorities who were not anxious to jeopardize their recent gains in the superior court and general distrust of shifting political control from localities to Raleigh necessitated leaving trial judges out of the proposals. See id.
305. See, e.g., Justice Exum Renews the Call for Merit Selection, N.C. LAW. WKLY., Mar. 4, 1991, at 1, 1; Merit Selection to be the Prime Lawyer Topic on 1991 Legislative Agenda: Bar Group May Be Waivering, N.C. LAW. WKLY., Feb. 4, 1991, at 1, 1. The negative campaigning associated with the 1990 elections helped to soften the Academy of Trial Lawyers’ official position on the issue of judicial selection reform. See Drennan, supra note 66, at 43. This change in position was especially significant, as the Academy of Trial Lawyers had been an ardent supporter of judicial elections for some time. See id. Both the African-American and women’s lawyer groups supported change, but not the specific reforms represented by the Senate bill. See id.
307. See id.
308. See id. The Senate Bill also gave the General Assembly the power to decide how to retain judges and justices for subsequent eight-year terms after the initial four-year term. See id.
making it out of committee.\textsuperscript{310} A number of circumstances contributed to this failure. First, Democrats generally were happy with the election results in 1990.\textsuperscript{311} Second, the advent of contested elections among the judiciary forced the Democratic appellate judges to become more visible and active within the party.\textsuperscript{312} Although many judges viewed this activity negatively, some legislators felt that the party benefited from the added presence of the judges on the campaign trail.\textsuperscript{313} Third, a major obstacle for the legislation in the House was the inability of interested parties to agree on the appropriate means for selecting the judicial candidates.\textsuperscript{314} The Governor did not want to be limited by a set list of potential candidates, preferring complete discretion.\textsuperscript{315} On the other hand, lawyers’ groups, other than the bar association, wanted the Commission to select the three to five names in order to limit the governor’s discretion.\textsuperscript{316} Ultimately, the ability or inability to trust the governor to make good appointments became a point of contention which proved fatal to the entire reform effort.\textsuperscript{317}

Although the General Assembly did not consider the judicial selection issue during the 1993 legislative session,\textsuperscript{318} events in 1994

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\footnotetext{310}{See Betts, supra note 60, at 327. The approved Senate version of the plan, S.B. 71, made its way to the House Committee on Courts, Justice, Constitutional Amendments, and Referenda for consideration in 1992, but did not make it out of the committee. See id. at 327.}
\footnotetext{311}{See Drennan, supra note 66, at 41. Then-Chief Justice James Exum, a Democrat, and two other Democratic supreme court justices ran in contested elections and were victorious. See Abstract of Votes Cast for Justice of Supreme Court in the General Election Held on November 6, 1990. Seven court of appeals judges also stood for re-election, six Democrats and one Republican, and the Democrats won all seven races. See Abstract of Votes Cast for Court of Appeals Judges in General Election Held on November 6, 1990. The Democrats also took seven contested superior court judgeships. See Abstract of Votes Cast for Superior Court Judges in General Election Held on November 6, 1990. These judicial successes were a highlight for the Democratic Party, especially considering the Republicans handily won the U.S. Senate race between Jesse Helms and Harvey Gantt. See Drennan, supra note 66, at 41.}
\footnotetext{312}{See Drennan, supra note 66, at 44.}
\footnotetext{313}{See id. These legislators viewed active campaigning by judges not only as a benefit to the party as a whole, by displaying Democratic strength on the bench, but also as “a helpful antidote to judicial arrogance and ivory towerism.” Id.}
\footnotetext{314}{See id.}
\footnotetext{315}{See id. The Governor argued that complete discretion would allow him to attract and recruit better candidates. See id.}
\footnotetext{316}{See id. This selection method resembles the initial selection method favored by the Futures Commission merit selection plan, although without the legislative approval. See infra notes 346-51 and accompanying text (discussing the Futures Commission merit selection plan).}
\footnotetext{317}{See Drennan, supra note 66, at 45.}
\footnotetext{318}{See Betts, supra note 60, at 327.}
\end{footnotesize}
quickly returned the issue to the forefront. Chief Justice Exum created the Futures Commission, which began its two-year study of North Carolina’s judicial system. The federal district court decision declaring North Carolina’s statewide election of superior court judges unconstitutional also occurred in 1994. Additionally, the elections of 1994 saw record campaign expenditures by candidates for judgeships, with Republicans faring very well in statewide judicial races. And in late 1994 in Raleigh, just prior to the 1995 legislative session, the state’s trial and appellate judges held their first-ever conference. At this conference, North Carolina’s judges adopted a nearly unanimous resolution recommending judicial appointment. Finally, in an address to the 1995 General Assembly, Chief Justice Burley Mitchell endorsed reform of the judicial selection process.

Feeling the pressure mount to reform the judicial selection process, the Senate in 1995 again tried to implement a judicial appointment bill. The plan called for gubernatorial nomination of appellate judges, legislative confirmation of the nominees, and

319. See WFDD, supra note 4, at iii.
321. See supra notes 231-39 and accompanying text (discussing the record 1994 campaign expenditures).
322. See N.C. LEG. 1995, supra note 320, at 7-5.
323. See id.
324. See Betts, supra note 60, at 323. To support his endorsement, Chief Justice Mitchell pointed to: (1) the expense and time involved in running for judgeships in strongly contested partisan races; (2) the supreme court’s cancellation of court in November and December due to election losses by two justices, the third such cancellation in ten years; and (3) the 1994 resolution by North Carolina judges endorsing an appointive system for judges. See id.
326. Senate Bill 971, as introduced, included trial judges in the appointment process. However, the final version that was sent to the House dealt only with appellate judges and justices. See N.C. LEG. 1995, supra note 320, at 7-5. Apparently, this move indicated that the Republicans had faith in their growing electoral power and wished to try and gain more superior and district court judgeships at the polls. See id. For their part, the Democrats were not yet ready to concede their domination of the judicial ranks at the polls, feeling that the recent Republican successes were flukes. See id.
periodic retention elections.\textsuperscript{327} Senate Bill 971 passed the Senate with bipartisan support.\textsuperscript{328} Although merit selection received the support of a majority of support in the House, it failed to get the required number of votes for a constitutional amendment.\textsuperscript{329} Despite continued pleas from the state's appellate judges and a last-minute appearance by Governor Hunt on behalf of the measure,\textsuperscript{330} the effort at judicial reform ultimately failed due to a lack of Democratic support.\textsuperscript{331}

Soon after this defeat, however, judicial reform garnered a victory. In 1996, during the last days of the short legislative session, the General Assembly passed legislation ("Chapter 9") which required superior court judges to stand for election in their home districts starting in 1996.\textsuperscript{332} The superior court elections would remain partisan for the 1996 elections.\textsuperscript{333} Then, beginning with the

\begin{itemize}
\item \textsuperscript{327} See id.
\item \textsuperscript{328} See id.
\item \textsuperscript{329} See John L. Sanders, in N.C. LEG. 1995, supra note 320, at 6-5. The number needed to put a constitutional amendment on the ballot before the public is both 30 (out of 50) in the Senate and 70 (out of 120) in the House. See N.C. CONST. art. XIII, § 4 (requiring a three-fifths approval in each house). The Senate version of the bill did not reach this three-fifths threshold in the House, failing on the second reading with 62 votes for and 43 votes against. See Sanders, supra, at 6-5.
\item \textsuperscript{330} See N.C. LEG. 1995, supra note 320, at 7-5.
\item \textsuperscript{331} See Betts, supra note 60, at 327. One key factor in the failure of this judicial appointment amendment was the House's failure to confirm Governor Hunt's appointment of the wife of a former Democratic state senator to a seat on the State Board of Education. See N.C. LEG. 1995, supra note 320, at 7-5. House Republicans voted as a block and defeated the nomination. See id. Opponents of merit selection within the Democratic Party pointed to the vote as an example of the role partisan politics would play if judicial candidates had to be confirmed by the General Assembly. See id. Other reasons for voting the bill down included concerns that an appointive system would "[take] votes away from the people" and create a system that "would act like a close cousin to the federal system, where judges are appointed for life." Judicial Bill May Get Benched, NEWS & OBSERVER (Raleigh, N.C.), July 26, 1995, at A3. Chief Justice Mitchell responded to the defeat by stating that "[i]t will be well into the next century before we get an opportunity to get hard partisan politics out of the judiciary." Id.
\item \textsuperscript{332} See Act of Aug. 2, 1996, ch. 9, 1996 N.C. Sess. Laws 2d Extra Sess. 536. This legislation, in effect, codified the federal district court's decision of litigation initiated by the Republican Party that sought to force the state to hold local elections for superior court judges. See N.C. LEG. 1996, supra note 2, at 3-3; see supra notes 166-80 and accompanying text (discussing the federal district court decision in Republican Party v. North Carolina and the Fourth Circuit reversal). Because the Fourth Circuit's reversal of that decision left the question of how superior court judges would be elected unsettled, and the outcomes of the 1994 elections in question, the General Assembly acted to resolve the uncertainty by declaring that all superior court judges would henceforth be elected by district. See N.C. LEG. 1996, supra note 2, at 3-3. The bill also ratified the results of the 1994 election, which used local districts as the electoral unit, because two incumbents had won in their districts but had lost in the statewide voting. See id.
\item \textsuperscript{333} See Act of Aug. 2, 1996, ch. 9, §§ 1-6, 1996 N.C. Sess. Laws 2d Extra Sess. 536,
1998 general election, all superior court judges would be elected using a nonpartisan primary election. Appellate and district court judges would continue to be selected through partisan elections. This legislation was the first fundamental change in the way North Carolina had selected its superior court judges for over 125 years.

536-41; N.C. LEG. 1996, supra note 2, at 3-3. Chapter 9 also made changes in the term length for persons appointed to fill vacancies in certain superior court districts. See id. at 3-3. In the past, the term of office had attached to "the position, not the person," for superior court and appellate judgships. Id. Thus, if a person was appointed to fill a vacant superior court judgeship, she would only stand for election to serve the remainder of her predecessor's term, not a full eight-year term. See id. The General Assembly changed this rule for appellate judges in 1995, such that the eight-year term attached to the person, not the office. See id. Chapter 9 made this rule applicable to superior court judges as well, but only in districts with only one judge and districts not covered by Section 5 of the Voting Rights Act of 1965. See Act of Aug. 2, 1996, ch. 9, § 21(b), 1996 N.C. Sess. Laws 2d Extra Sess. 536, 554-55; N.C. LEG. 1996, supra note 2, at 3-3; see also supra note 129 (noting that 60 of North Carolina's 100 counties are not covered by Section 5). Thus, in multi-member districts covered by Section 5, no change in terms of office occurred. See N.C. LEG. 1996, supra note 2, at 3-3. Although the distinction resulted in judges being treated differently based simply on where they lived, over time the new rule would result in staggered terms in multi-member districts. See id. The Justice Department had determined that staggered terms violated the Voting Rights Act because they made it impossible for minorities to engage in single-shot voting. See id. The North Carolina General Assembly had eliminated all staggered terms for superior court judges in 1987 in response to litigation under § 5. See Act of June 29, 1987, ch. 509, 1987 N.C. Sess. Laws 769; see also supra notes 151-59 and accompanying text (discussing the General Assembly's response to Voting Rights litigation). Therefore, because the General Assembly did not wish to seek preclearance in order to implement the voting change, it simply excluded any counties which would require preclearance. See N.C. LEG. 1996, supra note 2, at 3-3.

334. See Act of Aug. 2, 1996, ch. 9, §§ 7-20, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 541-54. A nonpartisan primary election is similar to the method used in many municipal elections. See N.C. LEG. 1996, supra note 2, at 3-3. The legislation calls for the holding of a primary, if necessary, to narrow down the field of candidates to two for each open seat in the district. See Act of Aug. 2, 1996, ch. 9, §§ 7-20, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 551-54. The remaining candidates would then meet in the general election, with the winners determined by a plurality of the votes—meaning candidates would not run versus a specific opponent; whoever gets the most votes wins. See id. For example, four candidates run for two open seats. The two highest vote-getters win.

335. See Act of Aug. 2, 1996, ch. 9, § 22, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 555. An interesting question is why the General Assembly suddenly decided to take this step. Switching to the local election of superior court judges was not surprising, considering the uncertainty surrounding superior court elections and the still-pending litigation on the issue. See supra note 332 and accompanying text. However, adopting nonpartisan elections for superior court judges was true judicial reform, even if it fell short of adopting a merit selection plan.

V. SUGGESTION OF THE FUTURES COMMISSION—MERIT SELECTION

A. “Without Favor, Denial or Delay: A Court System for the 21st Century”

Two years prior to the General Assembly’s first successful efforts at judicial reform,338 then-Chief Justice Exum had created the Commission for the Future of Justice and the Courts (“Futures Commission”) and charged it with identifying the weaknesses of the North Carolina judicial system and finding solutions.339 The Futures Commission was an independent body consisting of a diverse group of twenty-seven members representing lawyers, business people, newspaper publishing, social services, law enforcement, academia, and the legislature.340 The entire commission met at least once a month for two years and held hearings across the state in an attempt to understand the problems facing North Carolina’s judicial branch.341

Based upon this broad inquiry into the health of North Carolina’s judicial system, the Futures Commission concluded that the system’s deficiencies could not be fixed by mere adjustments. Instead, the entire system needed to be redesigned.342 To this end, the Futures Commission made eleven core recommendations for changing the current judicial system in North Carolina.343 Although

337. WFDD, supra note 4 (quoting title of the report).
338. See supra note 4 and accompanying text (discussing judicial reform bill of 1996).
340. See WFDD, supra note 4, at 10. The Futures Commission members served without pay. See id. Staff and administrative expenses were funded by the Governor’s Crime Commission and the private Z. Smith Reynolds Foundation. See id.
341. See Crowell, supra note 339, at 21. The Futures Commission sought broad input by holding six public hearings in various cities across the state, conducting ten focus groups and organizing an 805-person telephone survey. See id. Questionnaires were sent to all North Carolina judges and numerous parties appeared before the Futures Commission, including representatives from other states who talked about similar projects in their states. See id.
342. See WFDD, supra note 4, at iii.
343. See id. at 17. In addition to the appointment of judges, the Futures Commission plan recommends: (1) allowing courts to have self-control over organization and resource allocation; (2) establishing a single trial court level (called the Circuit court); (3) reducing the number of judicial districts from 40 to between 12 and 18; (4) establishing a family court in each district; (5) creating a State Judicial Council; (6) providing court administrators in each district; (7) shifting prosecutors and public defenders from the
many of the recommendations focused on concerns of administrative and economic efficiency, the main thrust of the Futures Commission's proposal dealt with granting the judiciary the independence befitting a separate and equal branch of government.\textsuperscript{344} According to the Commission, the need to free judges from the negative consequences of elections is essential to the goal of an independent judiciary.\textsuperscript{345}

The Futures Commission plan for judicial selection calls for the elimination of contested elections for all judges, both appellate and trial level.\textsuperscript{346} The governor would fill judicial vacancies by making an appointment from a list of three qualified candidates nominated by a neutral panel.\textsuperscript{347} The new judge would stand for a retention election at the first general election that is more than one year after her appointment.\textsuperscript{348} If retained, each judge would serve an eight-year term, facing another retention election at the end of each term.\textsuperscript{349} Prior to a retention election, a neutral committee would evaluate the judge's performance; this information would aid the electorate in making an informed decision in the election.\textsuperscript{350} Thus, the Futures Commission plan resembles a traditional merit selection plan followed by a retention election.\textsuperscript{351} This Comment will now consider the arguments for and against merit selection based upon how the system has performed in addressing many of the problems North Carolina faces today.

B. Arguments for Merit Selection

Advocates of merit selection point to four general benefits in support of the system: (1) those persons selecting the judges are able

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\footnote{judicial to the executive branch; (8) increasing emphasis on alternative dispute resolution; (9) developing a long-range technology plan; and (10) improving public education about the courts. \textit{See id.}}
\footnote{344. \textit{See id.} at 12.}
\footnote{345. \textit{See id.} (noting that every group that has studied North Carolina's courts in the last thirty years has reached the same conclusion).}
\footnote{346. \textit{See id.} at 32.}
\footnote{347. \textit{See id.} For further discussion of neutral nominating commissions, see \textit{infra} notes 419-29 and accompanying text.}
\footnote{348. \textit{See WFDD, supra note 4, at 32.} For further discussion of retention elections, see \textit{infra} notes 430-50 and accompanying text.}
\footnote{349. \textit{See WFDD, supra note 4, at 32.}}
\footnote{350. \textit{See id.} For further discussion on performance evaluations, see \textit{infra} notes 451-58 and accompanying text.}
\footnote{351. \textit{See supra notes 57-61 and accompanying text} (discussing basic merit selection system).}
\end{footnotes}
to make more informed choices than voters could;\textsuperscript{352} (2) the judicial selection process is depoliticized;\textsuperscript{353} (3) better and more qualified judges are ultimately selected;\textsuperscript{354} and (4) the judiciary becomes more independent.\textsuperscript{355} As discussed previously, the voting public is generally uninformed when making a decision between judicial candidates,\textsuperscript{356} and partisan elections have not proved successful in informing North Carolina's electorate of judicial candidates' qualifications for office.\textsuperscript{357} Merit selection systems, however, do not rely upon an uninformed electorate to make the choice between various judicial candidates.\textsuperscript{358} Rather, a judicial nominating committee makes this choice.\textsuperscript{359} The nominating committee can make a better selection than voters because it has more information about the candidates, as well as a better understanding of the qualifications necessary to make a good judge.\textsuperscript{360} Thus, the committee can select those candidates who are most qualified in terms of training, experience, ability, temperament, and character.\textsuperscript{361} Conversely, the committee will screen out candidates who are unfit or merely mediocre.\textsuperscript{362}

Although no system of judicial selection eliminates political considerations completely,\textsuperscript{363} a merit selection system minimizes the effects of partisan politics on the judicial selection process and allows judges to concentrate on the business of the courts.\textsuperscript{364} Merit selection eliminates bitter election contests, inappropriate fundraising by judges, and the need to take a stand on political issues that may come before the court as litigation.\textsuperscript{365} Politicized judicial campaigns

\textsuperscript{352} See infra notes 356-62 and accompanying text.
\textsuperscript{353} See infra notes 363-66 and accompanying text.
\textsuperscript{354} See infra notes 367-74 and accompanying text.
\textsuperscript{355} See infra notes 375-79 and accompanying text.
\textsuperscript{356} See supra notes 249-58 and accompanying text.
\textsuperscript{357} See Helms, supra note 189, at 24.
\textsuperscript{358} See STUMPF & CULVER, supra note 35, at 41.
\textsuperscript{359} See id.
\textsuperscript{360} Cf. 1985 COURTS COMMISSION, supra note 111, at 27 (arguing that the voting public is uninformed).
\textsuperscript{361} See Helms, supra note 189, at 25.
\textsuperscript{362} See id. at 30. Likewise, candidates are unable to merely capitalize on their party affiliations to reach the bench. See 1985 COURTS COMMISSION, supra note 111, at 30.
\textsuperscript{363} See id. at 26 (arguing that "[t]he problem with North Carolina's system is that it does not encourage other non-political considerations").
\textsuperscript{364} See Barry F. McNeil, State Judges: Merit Selection, Not Partisan Politics, LITIGATION, Summer 1996, at 1, 64 (noting former Texas Supreme Court Justice John Hill's concern that elections make judicial candidates overly partisan and unable to uphold an oath of impartiality).
\textsuperscript{365} See 1985 COURTS COMMISSION, supra note 111, at 26.
demean both the office and the candidate, merit system proponents argue, and should no longer be tolerated.\footnote{366}{See id. at 27.}

A merit selection plan also attracts more qualified candidates, many of whom would not seek a position on the bench if exposed to a partisan election process.\footnote{367}{Cf. Edmund V. Ludwig, Another Case Against the Election of Trial Judges, PA. LAW., May-June 1997, at 33, 36 (“The independence of the federal judge, which includes, most importantly, never having to stand for election, is a powerful incentive to attract well-qualified candidates to the bench.”).} Indeed, one of the most frequently cited reasons among highly qualified lawyers in refusing to seek positions on the bench is partisan politics.\footnote{368}{See 1985 COURTS COMMISSION, supra note 111, at 26.} Ordinarily, the threat of losing an election is daunting, but it is particularly unappealing where the loss could result from an uninformed electorate or a bad candidate at the top of the party ticket.\footnote{369}{See id. Such a notion is even more unappealing if the ousted judge is forced to rebuild a private practice after years on the bench. See id.} A merit selection plan eliminates these concerns, making the bench more attractive to a larger pool of candidates.\footnote{370}{A 1987 study by the American Judicature Society showed that less than 1.2% of judges lost retention elections. See William K. Hall & Larry T. Aspin, What Twenty Years of Judicial Retention Elections Have Told Us, 70 JUDICATURE 340, 347 (1987) (noting that only 22 incumbent judges were defeated in 1864 judicial elections analyzed in 10 states over 20 years).} By attracting better candidates through a merit selection process, the quality of the judges on the bench improves.\footnote{371}{The screening function of merit selection systems also helps improve the quality of the bench, by keeping unqualified or unscrupulous candidates off the bench. See Ludwig, supra note 367, at 37. Judge Edmund V. Ludwig (E.D. Pa.), who previously served as an elected state trial judge, argues that “the appointment process at least exposes the candidate to a great deal of scrutiny.” Id. at 37; see also id. at 36 (discussing the thorough scrutiny one receives before appointment to a federal bench).}

Implementing a merit selection plan for judges also promotes the advancement of groups historically disadvantaged under an elective system, such as African-Americans and women.\footnote{372}{See John Engler & Lucille Taylor, Judicial Selection: A View from the Governor’s Perspective, 75 MICH. B.J. 910, 912 (1996). Michigan Governor John Engler notes that he is “especially proud of the women and African-Americans I have appointed, many to courts or in communities where neither had served either by election or appointment.” Id. But see supra note 158 (discussing statistics indicating that North Carolina’s judiciary is no longer a bastion of white males).} Presumably, nominating committees are more mindful of the need to include minorities and women on the bench and therefore may be more likely to select them than the voting public in an election.\footnote{373}{See 1985 COURTS COMMISSION, supra note 111, at 30. Merit selection plans in other states have enhanced the prospects for women and minorities seeking positions on the bench. See Alexander Stille, Election v. Appointment: Who Wins?, NAT’L L.J., Dec.
increased minority and female presence among judges improves the quality of the bench by helping to maintain the confidence and respect of the public at large.\footnote{374}

Finally, merit selection systems help produce a more independent judiciary, free from election concerns and the need to curry favor within a political party.\footnote{375} The costs of campaigning in terms of time, money, and personnel are simply too high, unnecessary, and ethically suspect.\footnote{376} Merit selection supporters "question how it is possible for judges to remain objective and impartial in settling disputes when they know that past campaign support or future campaign challenges oblige them to decide in a particular self-protective way."\footnote{377} Free from campaigning, judges can focus on the business of the courts and on deciding their cases in a fair and impartial manner.\footnote{378} Furthermore, voters can direct their attention to the judge's record, instead of her political affiliation or stance on political issues.\footnote{379}

C. Arguments Against Merit Selection

Critics of merit selection point to the ambiguity of the word "merit" when applied to qualifications for judges, which implies that judicial candidates can be compared and contrasted based purely on the results of a study of nearly every judicial retention election between 1980 and 1990, which showed almost no correlation between whether a judge was African-American or Hispanic and the percentage of affirmative votes).

\footnote{374}{See Helms, supra note 189, at 25.}
\footnote{375}{See 1985 COURTS COMMISSION, supra note 111, at 30.}
\footnote{376}{See Lawrence H. Averill, Jr., The Continuing Case for Merit Selection of Judges in Arkansas, Ark. Law., Spring 1996, at 1, 39. Averill, in fact, argues that the process of electing judges attracts "[c]andidates having undistinguished careers and even ethical committee reprimands . . . because of the electorate's interest in nonqualification criteria." Id.}
\footnote{377}{Nicholas P. Lovrich et al., Citizen Knowledge and Voting in Judicial Elections, 73 JUDICATURE 28, 28 (1989). U.S. Supreme Court Justice John Paul Stevens, in a speech to the American Bar Association, compared the election of judges to " 'allowing football fans to elect their referees.' " Ludwig, supra note 367, at 34 (quoting speech by Justice Stevens). One commentator suggested that judicial elections make fair and impartial adjudication so difficult as to violate the constitutional requirement of procedural due process. See Scott D. Wiener, Note, Popular Justice: State Judicial Elections and Procedural Due Process, 31 HARV. C.R.-C.L. L. REV. 187, 188-89 (1996).}
\footnote{378}{See 1985 COURTS COMMISSION, supra note 111, at 30.}
\footnote{379}{See id.}
objective criteria. Indeed, even professional competence is not a totally objective concept. Reasonable people can easily disagree over how to evaluate past academic performance, not to mention later success in legal practice. And these supposedly objective determinations do not even include the more subjective evaluations about temperament and character that merit selection supporters purport to consider in their decisions.

More specifically, critics of merit selection dispute the theory that the electorate has too little information to make an informed choice. They view voters, in the aggregate, as intelligent enough to make meaningful choices in judicial elections. In fact, some studies show that although the average voter may not be well-informed, voters who are sufficiently knowledgeable about judicial candidates are far more likely to cast votes in those contests than their unknowledgeable counterparts. As the amount of information about judicial elections increases, difficulties associated with an uninformed electorate should decline. Past problems with voter apathy in North Carolina's judicial elections can be viewed as by-products of the numerous uncontested races that resulted from the Democratic party's dominance throughout the state. Now that North Carolina has emerged as a two-party state, more judicial candidates can expect to run in contested elections. Further, with the lifting of the gag rule, judges may now announce where they stand on issues of public importance and defend their positions in the face of attacks from unscrupulous opponents. As a result of these changes, the voting public should have more information about judicial candidates, allowing the electorate to make informed choices.

381. See id.
382. See id.
383. See Lovrich, supra note 377, at 28, 30.
384. See id.
385. See id.
386. See Rosch & Rubin, supra note 3, at 33.
387. See Moog, supra note 194, at 70.
388. See supra notes 206-25 and accompanying text (discussing lifting of the gag rule).
389. Cf. Dayton, supra note 197, at 1 (discussing how judicial candidates may now air their views on disputed legal or political issues). Justice Exum found himself in such a position in his 1986 race for supreme court chief justice against Rhoda Billings. The Committee for a Conservative Court repeatedly and misleadingly attacked Justice Exum's stance on the death penalty. See Betts, supra note 3, at 20. However, under Canon 7 of the Code of Judicial Conduct, Justice Exum was unable to respond and speak publicly about his position on the issue. See Drennan, supra note 66, at 28; supra notes 193-98 and accompanying text (discussing the 1986 supreme court election).
Critics of merit selection also contend that politics will always be a part of judicial selection. A move to judicial appointment merely shifts the political nature of judicial selection from open elections to secret nominating committees. Judges are still selected based on their political alliances with those in power; they merely have to campaign among a select few. Further, an appointment plan does not necessarily eliminate bitter campaign battles because fierce contests can still develop when controversial judges come up for retention elections, as happened in the California Supreme Court retention elections in 1986.

Opponents of merit selection also urge that this system is unnecessary in North Carolina because the state already has very capable judges serving in its courts, all of whom were chosen through the current election system. There have been only isolated instances of judicial scandal and few complaints of judicial incompetence. Further, despite arguments to the contrary, there is no evidence that merit selection plans have actually improved the quality of the judges in the states that have adopted such plans.

Finally, in the quest to create a more independent judiciary, appointive systems take the power to choose judges out of the hands of the people. Instead, the choice of judges depends upon a nominating process vested in the hands of a small, elite, and perhaps secretive group. Some states have even faced controversy due to

390. See Keeping the Process Open, supra note 380, at 236 ("[C]ompeting interests will inevitably seek a say in governmental decisions, and it is better to let them compete for attention than to suppress them.").
391. See Betts, supra note 3, at 27 (listing arguments for and against merit selection).
392. See id.
393. See id.
394. See infra notes 445-47 and accompanying text (discussing the heated 1986 California retention race which resulted in the removal of three justices because of their "liberal" views toward the death penalty). North Carolina has already had some unpleasant experiences with special interest groups getting involved in judicial campaigns. See supra notes 193-202 and accompanying text. It is possible that under an appointment system with retention elections, such special interest campaigns could become more prevalent in North Carolina. See Rosch & Rubin, supra note 3, at 29.
395. See JSSC, supra note 3, at 15 (minority report). But see Betts, supra note 60, at 322 (noting that 52% of North Carolina judges sitting in 1985 were appointed to their current term in office, and that many more first reached the bench through appointment).
396. See Rosch & Rubin, supra note 3, at 29.
397. See id. at 30 (pointing to the experiences of a dozen states over the last 45 years, which arguably shows no evidence that judges chosen through merit selection are any better than those chosen through partisan elections).
398. See Betts, supra note 60, at 324 (noting that this sentiment has played a role in the defeat of past judicial reform efforts in North Carolina).
399. See Rosch & Rubin, supra note 3, at 29. Critics of merit selection in North
scandals in the selection of judicial candidates through merit selection, including Missouri, the first state to adopt such a plan. In contrast, elections are open to the public and thus embody our republican tradition. They provide a means to educate the public about candidates and produce judges who can be held accountable. Additionally, elections increase judges’ stature and credibility.

VI. COMPARING THE FUTURES COMMISSION PROPOSAL TO PAST EFFORTS AT JUDICIAL REFORM

The judicial selection plan of the Futures Commission differs from previous legislative attempts to reform the judiciary in both its scope and approach. Further, the Futures Commission’s merit selection proposal seeks to overcome some of the obstacles that perhaps defeated judicial reform in the past, while still addressing the problems of the election system that raised the need for court reform in the first place. Therefore, a look at each facet of the Futures Commission’s judicial selection proposal is warranted and gives insight into its ultimate potential for success.

Carolina have suggested that such a system would give too much power over who becomes a judge to bar associations. See id. In particular, the North Carolina Academy of Trial Lawyers voiced this concern, worried that bar associations, which are traditionally dominated by corporate attorneys, would be able to control the selection process. See id. A Missouri Supreme Court justice accused the Chief Justice of attempting to “pack” the court by influencing the nominating committee. See Paul Wenske, Dissension Rocks Missouri Justices, NAT’L L.J., May 27, 1985, at 1, 26. The scandal undermined public confidence in Missouri’s judicial selection system, as well as the courts as a whole. See id.

400. See id. A Missouri Supreme Court justice accused the Chief Justice of attempting to “pack” the court by influencing the nominating committee. See Paul Wenske, Dissension Rocks Missouri Justices, NAT’L L.J., May 27, 1985, at 1, 26. The scandal undermined public confidence in Missouri’s judicial selection system, as well as the courts as a whole. See id.

401. See Averill, supra note 376, at 39.

402. See id.

403. See id.

404. The Futures Commission plan attempts to include trial judges in the merit selection system. See WFDD, supra note 4, at 22. Reform plans in 1989, 1991, and 1995 only addressed appellate judgeships in the end. See supra notes 290-96, 303-17, 325-31, and accompanying text. In addition, the appointment of judges is merely one of numerous improvements the Futures Commission envisions for North Carolina’s court system, see WFDD, supra note 4, at 69, which may draw some of the attention away from the judicial selection component. Other specific recommendations that also would require constitutional amendments include: (1) establishing a State Judicial Council; (2) granting the supreme court authority to set the rules of trial procedure; (3) merging superior and district courts; (4) granting the court system control over its budget; (5) allowing juries of six members; (6) eliminating the constitutional right to trial by jury for petty misdemeanors; and (7) transferring prosecutors and public defenders to the executive branch. See id.

405. Comparisons with the 1989, 1991, and 1995 proposals are most informative. The switch to nonpartisan elections for superior court judges in 1996, while technically judicial reform, was more of a reactive measure in the face of continued lawsuits and legal
A. Appointment by the Governor

The judicial reform proposals of 1989, 1991, and 1995 all provided for the gubernatorial selection of a candidate followed by some kind of legislative confirmation.\footnote{See supra note 332.} This suggestion met with stiff resistance for a number of reasons. First, there was a dispute over the extent of the governor's discretion in choosing the candidates.\footnote{See supra notes 295, 314-17 and accompanying text.} One fear was that the governor would resort to political cronyism in making appointments.\footnote{See supra notes 316-317 and accompanying text.} A neutral screening panel to evaluate the list of candidates chosen by the governor and make a non-binding report about the candidates' qualifications was suggested as a compromise in 1989.\footnote{See S.B. 219, 1989 General Assembly, 1st Sess. (N.C. 1989).} In 1991, the reform proposal required the governor to select candidates from a list provided to him by law, thus restricting gubernatorial discretion even more.\footnote{See S.B. 71, 1991 N.C. General Assembly, Reg. Sess. (1991).} However, under both the 1989 or 1991 proposals, the list of potential candidates from which the governor could choose remained fairly broad.\footnote{See Drennan, supra note 66, at 36, 44.} Thus, neither of these concessions convinced special interest groups that the gubernatorial discretion would be restricted in any substantial way.\footnote{See id. at 45.}

Another problem with the previously proposed systems of appointment was the requirement of legislative confirmation. Many observers believed politics would always intercede in those legislative approval deliberations, creating a system that would too closely resemble the federal system of judicial selection.\footnote{See Betts, supra note 60, at 324-25 (citing Judicial Bill May Get Benched, supra note 331, at A3).} A bitter confirmation fight in the House in 1995 over a gubernatorial appointment to the State Board of Education merely reinforced this view among legislators.\footnote{See N.C. LEG. 1995, supra note 320, at 7-5.}

The Futures Commission proposal avoids both of these problems by bypassing legislative confirmations and allowing judicial nominating committees to compile the lists of candidates.\footnote{See WFDD, supra note 4, at 32.} Aside
from input into the composition of the nominating committee, the General Assembly ultimately does not have any say in who becomes a judge. Thus, there would be no bitter political fighting over judicial candidates. Although the proposal grants the governor the power to appoint a candidate to the bench, it restricts the governor’s discretion by requiring that the choice come from a list of three candidates compiled by the nominating commission. Thus, there would be no overt political cronyism by the governor in making the appointments.

B. Nominating Commissions

The nominating commission is “the heart” of any merit selection plan. Its purpose is “to minimize the political patronage in judicial appointments and maximize the quality of those appointments.”

Much concern had arisen in 1989 about the composition of any nominating committee which would compile a list of candidates. This concern was sufficient to warrant abandoning the nominating committee plan in favor of allowing the governor to select the candidates, subject to a screening panel. The similar 1991 judicial reform legislation also avoided a nominating committee in favor of a screening panel. In both cases, disputes arose over the extent of the governor’s discretion in making appointments, with some concern that the governor would award judgeships on the basis of loyalty and political alliances.

416. See id. at 32, 34. However, the president pro tempore of the Senate and the speaker of the House would each get to appoint three members of the proposed State Judicial Council. See id. at 34.

417. See id.

418. In some respect, the governor may actually benefit from a reduced role in the selection of judicial appointees because she is relieved of the occasional embarrassment of having to choose political favorites, some of whom may be less than well-qualified. Yet, the governor can still take credit for any outstanding appointments she makes from the list supplied by the nominating commission. See 1985 COURTS COMMISSION, supra note 111, at 30.

419. See id. at 29.


421. See Drennan, supra note 66, at 36. Many legislators figured that the governor simply would appoint his cronies to any such committee, and that they generally would nominate the candidates that the governor wanted. Thus, the neutral nominating committee would result in the governor essentially having the power to “choose” the candidates he wanted. Cf. id. (discussing the sentiment that prevailed during both the 1989 and 1991 reform efforts).

422. See id.

423. See id.

424. See id. at 36, 44-45.
The Futures Commission attempted to avoid political bickering over the composition and power of the nominating committee by recommending the creation of the State Judicial Council.\footnote{425} In addition to nominating judicial candidates, this council would serve a variety of other functions.\footnote{426} The Futures Commission envisioned an "important, influential body [whose] prestige rank[s] with the university system's board of governors."\footnote{427} The eighteen members of the State Judicial Council would be selected based on input from the governor, the chief justice, the Senate, the House, the state bar, and local circuits.\footnote{428} The chief justice would chair the council, which would include both lawyers and non-lawyers.\footnote{429} Presumably, a powerful, visible, and accountable body like the proposed council would not be very susceptible to the influence of any one branch and would approach the nomination of judicial candidates as one of its many responsibilities involving the management of the judicial branch.

C. Retention Elections

One major argument against an appointment system for judges is that the system takes away the public's voting power and clashes with

\footnote{425. The role of the State Judicial Council would be to serve as a "sounding and advisory board for managing the courts." WFDD, supra note 4, at 34.}

\footnote{426. For example, the council would establish performance standards for the courts, periodically evaluate the operation of the courts, advise the chief justice on budget matters, alter district lines when necessary, and review suggested changes to rules of procedure. See id. at 35.}

\footnote{427. Id.}

\footnote{428. See id. at 34. Thus, the Futures Commission proposal would allow for a broader range of input concerning the makeup of the nominating committee than the prior plans. The committee would consist of eighteen members: (1) the chief justice; (2) the chief judge of the court of appeals; (3) a local prosecutor chosen by them from among their ranks; (4) a public defender chosen by that group; (5) a trial judge chosen by that group; (6-7) two lawyers appointed by the State Bar; (8-9) one lawyer and one non-lawyer appointed by the chief justice; and (9-18) three members (two non-lawyers and one lawyer) appointed by each of the governor, the president pro tempore of the Senate, and the Speaker of the House. See id. Members of the State Judicial Council would serve staggered, four year terms. See id. Note that no legislator could be appointed to the council. See id.}

\footnote{429. See id. The council would include judges, lawyers, civic leaders, business and professional people, and others, thereby offering perspectives from other parts of the court system and the general public. The report claims that "[g]eographic, gender and racial balance would be sought" in the composition of the council. Id. at 34. Whether this implied promise to include minorities on the council will satisfy minority legislators is questionable. More importantly, it is unclear whether this change in the elective system will satisfy § 5 of the Voting Rights Act, because there is no guarantee that minorities will receive appointments. See infra notes 501-02 and accompanying text; see also supra notes 118-59 and accompanying text (discussing § 5 of the Voting Rights Act).}
the Jacksonian democracy ideal.\textsuperscript{430} The Futures Commission recognized that the elimination of voter participation in the judicial selection process would isolate the judiciary from the people, leaving no effective check on judicial power.\textsuperscript{431} Therefore, the plan retains a role for the voters by calling for new judges to face a noncompetitive retention election one year after their initial appointment.\textsuperscript{432} The public would vote only on whether the judge should remain in office. If victorious, the judge would serve an eight-year term before facing another retention election.\textsuperscript{433} In theory, retention elections would create an effective means for removing those appointed judges who were performing poorly.\textsuperscript{434} The power of the people would derive from the knowledge that any judge could be voted off the bench if desired.\textsuperscript{435}

Fourteen states currently use some form of judicial retention elections.\textsuperscript{436} Retention elections serve as a way to avoid the problems associated with contested judicial elections.\textsuperscript{437} However, critics argue that retention elections are prone to the same kinds of problems as contested elections.\textsuperscript{438} The uncontested nature of retention elections, ethical restraints on judicial campaign conduct, and voters' general

\begin{itemize}
\item \textsuperscript{430} For discussion of Jacksonian democracy, see supra notes 48-50 and accompanying text.
\item \textsuperscript{431} See WFDD, supra note 4, at 32.
\item \textsuperscript{432} See id.
\item \textsuperscript{433} See id.
\item \textsuperscript{434} Cf. Larry T. Aspin & William K. Hall, \textit{Retention Elections and Judicial Behavior}, 77 JUDICATURE 306, 315 (1994) (noting that a survey of judges in 10 states showed that "the behavior of retained judges is shaped by the existence of retention elections even though the probability of losing is low").
\item \textsuperscript{435} The prospect of ultimately answering to the electorate will have a beneficial effect on the humility and conduct of judges. See 1985 COURTS COMMISSION, supra note 111, at 28-29.
\item \textsuperscript{436} See Deja, supra note 43, at 905-06. Ten states utilize retention elections in conjunction with a merit selection system. See supra note 45. Illinois, Indiana, New Mexico, and Pennsylvania use retention elections following initial contested elections. See Deja, supra note 43, at 906.
\item \textsuperscript{437} See Editorial, \textit{Anti-Incumbency's Threat to Judicial Merit Selection}, 76 JUDICATURE 56, 56 (1992) [hereinafter Anti-Incumbency] (arguing that one of the primary purposes of merit selection and retention elections is "to remove the bench from the vagaries of partisan politics and emphasize professional credentials"); see also Aspin & Hall, supra note 434, at 315 ("[A]voiding partisan politics is one of the most often-cited benefits of retention elections.").
\item \textsuperscript{438} See Ludwig, supra note 367, at 34 ("Given the demands of a partisan election and convolutions of party politics, the retention election is a beneficial device, but it does not remedy the basic problem."); cf. Editorial, \textit{The Need for Judicial Performance Evaluations for Retention Elections}, 75 JUDICATURE 124, 124 (1991) [hereinafter Need for Judicial Performance Evaluations] (noting that retention elections often suffer from an uninformed electorate).
\end{itemize}
lack of knowledge combine to create an "information vacuum." 439 The natural consequences of this vacuum are voter apathy and uninformed voting without regard to a candidate's record or qualifications. 440 Another potential danger is the ability of organized special interest groups to campaign against retention of a judge based upon a single issue. 441 Under these circumstances, the voter receives only one-sided information which has little to do with the judge's qualifications. Such anti-retention campaigns, which usually focus on hot-button issues like the death penalty or abortion, can threaten the independence of the judiciary by forcing judges to consider the impact of their court decisions on their chances for re-election. 442 Likewise, a general anti-incumbency voting pattern can have a detrimental effect on judges standing for retention election. 443 Additionally, retention elections may include the "'same kind of political shenanigans'" as in other general elections. 444 The judicial retention elections for the California Supreme Court in 1986 demonstrate just how political retention elections can become. 445 In that contest the voters removed Chief Justice Rose Bird and two other justices from the supreme court because of their liberal views concerning the death penalty, thus allowing the Governor to replace them with more conservative justices. 446 Special interest groups campaigned heavily against the incumbents, spending in excess of seven million dollars. 447

This type of negative, single-issue campaigning in retention elections could also occur in North Carolina. 448 Former Chief Justice Exum has long supported a straight appointive system for the judiciary, believing that any exposure of judges to elections is

440. See id.
441. See id.
442. See id.
443. See Anti-Incumbency, supra note 437, at 56. But see Aspin & Hall, supra note 434, at 315 (providing the results of a 10-state survey which suggests that judges who face retention elections view them very favorably).
445. See STUMPF & CULVER, supra note 35, at 149.
446. See id.
447. See Levien & Fatka, supra note 226, at 76. The incumbent justices spent $4.5 million in their unsuccessful attempt to retain their seats, including $1 million in television and radio advertising in the final week alone. See id.
448. But see 1985 COURTS COMMISSION, supra note 111, at 28 (arguing that the extremely high success rate of judges in retention elections—over 98%—indicates that retention elections will not expose good judges to defeat by single-issue voting blocks).
He cites the campaigning conducted by non-judicial groups in North Carolina's 1986 supreme court elections as an example of how special interest groups could wage ugly, expensive campaigns against candidates standing for a retention vote.

D. Performance Evaluations

North Carolina could seek to avoid the potential dangers of retention elections by using judicial performance evaluations. Several merit selection jurisdictions have established performance evaluation programs that provide meaningful and objective information to voters in retention elections. Performance evaluations have proven an effective way to address many of the concerns presented by non-competitive retention elections, namely voter apathy, uninformed voting, and the potential for well-funded opposition groups to present negative, one-sided information on a candidate. States that have successfully used performance evaluations for a number of years include Alaska, Colorado, and Utah.

Under the Futures Commission proposal, the State Judicial Council would set forth procedures for evaluating the performance of all judges, including assessments from other judges, litigants, jurors, and attorneys, as well as a self-evaluation by the judge. The council would also determine how these evaluations could best be presented.

449. See Exum, supra note 71, at 8.
450. See id. at 6; see also supra notes 193-98 and accompanying text (discussing the 1986 supreme court race in North Carolina). The 1990 supreme court elections, which featured numerous television and radio ads criticizing the decisions of sitting judges, serves as another example. See supra notes 199-202 and accompanying text (discussing the tactics of non-judicial actors in the 1990 elections).
452. See Need for Judicial Performance Evaluations, supra note 438, at 124. These performance evaluations also have provided sitting judges with valuable feedback about the quality of their job performance. See id.
454. See Need for Judicial Performance Evaluations, supra note 438, at 124. All of these states use a combination of lawyers and non-lawyers in evaluating the judges. See id. Alaska has used performance evaluations since 1976. See Keilitz & McBride, supra note 451, at 4. The Colorado legislature established an evaluation program in 1990, thereafter distributing nearly 2 million informative fliers in newspaper supplements at each election. See id. at 10. Utah uses performance evaluation primarily as a tool for judicial self-improvement, but also recognizes its value as a voter education program. See Need for Judicial Performance Evaluations, supra note 438, at 124.
455. See WFDD, supra note 4, at 32.
to the public prior to each retention election, along with a recommendation for or against retention.\textsuperscript{457} The neutral status of the State Judicial Council, and the set procedures for evaluating judicial performance would be key factors in the validity and usefulness of the evaluations.\textsuperscript{458}

E. The Present State of the Futures Commission Proposal

The Futures Commission delivered its report to Chief Justice Burley Mitchell in early December 1996.\textsuperscript{459} Both the proposed constitutional amendment and the enabling act were introduced into the General Assembly in April 1997.\textsuperscript{460} The Futures Commission plan called for the General Assembly to pass the constitutional amendment and enabling legislation in time for the proposal to be put on the ballot in the general election of 1997.\textsuperscript{461} Special committees were established in each house to consider the bills, but no action was taken on either bill before the end of the 1997 session.\textsuperscript{462}

VII. SUCCESS FOR MERIT SELECTION IN NORTH CAROLINA: OBSTACLES TO CHANGE

James Drennan, the former director of the Administrative Office of the Courts, noted five obstacles which hindered the 1989 and 1991 reform efforts aimed at eliminating the election of judges.\textsuperscript{463} These obstacles are just as relevant today, and unless proponents of merit selection overcome them, it is unlikely that there will be a significant change in the way judges are selected.

\textsuperscript{457} See WFDD, supra note 4, at 32.

\textsuperscript{458} No prior judicial reform plans in North Carolina contained a performance evaluation procedure.

\textsuperscript{459} See Legislature Goes Slow on Courts, NEWS \& OBSERVER (Raleigh, N.C.), May 16, 1997, at A3.


\textsuperscript{461} See WFDD, supra note 4, at 69.


\textsuperscript{463} See Drennan, supra note 66, at 37-40. These same obstacles also seemed to play a role in the defeat of the 1995 reform effort. Cf. Betts, supra note 3, at 324-25 (discussing reasons that the 1995 reform effort failed).
First, those seeking to adopt a merit selection system must communicate a very complex argument. They must convince the General Assembly, and ultimately the voters, that the following are true: (1) there is a growing problem with the election of judges which eventually will lead to poor judges on the bench and a lack of public confidence in the courts; (2) this problem has not been readily apparent because most current judges first reached the bench by appointment; and (3) an appointive system will not usurp power from the people in favor of the governor's office or the bar association. This is an extraordinary amount of information to communicate, particularly given that the issue ultimately must be put to the people as a simple constitutional referendum.

Second, proponents of judicial reform are dealing with a constitutional issue, meaning they will have to convert more than a mere majority of the General Assembly to their viewpoint. Before an issue may be put before the public, three-fifths of the General Assembly must approve a constitutional amendment. Hence, a two-fifths minority can effectively block any proposal. Even if the measures pass the General Assembly, a referendum still would have to be approved by a majority of the public.

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464. *See id.* at 37.
465. *See Drennan, supra* note 66, at 37.
466. Illustrative of the complexity of the argument, and the potential consequences of such complexity, are two polls that sought to gauge the level of public support for a switch to an appointment system. In a 1989 Gallup poll, registered voters were asked a total of 35 questions about the intricacies of judicial selection and the proposed appointment system. Sixty-five percent of those polled indicated they would support a switch to an appointment system. *See id.* at 37. However, a different poll conducted by a marketing and public relations firm asked a number of different questions on political issues, but only a single question on judicial selection. In that poll, 73% opposed changing to an appointment system. *See Hunt Has Edge on Helms in Poll, News & Observer* (Raleigh, N.C.), Mar. 14, 1989, at A1. One possible explanation for the differing results in the two polls is that when a group of voters received a good deal of information about judicial selection, such as a 35 question survey, they favored merit selection. Voters asked only if they supported an appointment system felt differently. A constitutional referendum put before the voting public would more closely resemble the one-question poll in which a strong majority of voters disfavored judicial appointment. *See Drennan, supra* note 66, at 37.
467. *See Drennan, supra* note 66, at 37.
468. *See supra* note 80 (discussing vote requirements for constitutional amendment). Judicial appointment bills have garnered the necessary number of votes on three occasions in the Senate. *See Betts, supra* note 60, at 327 (noting the years 1989, 1991, 1995). However, no such bill has passed the House, with the most successful effort to date being the 1995 bill that drew 62 votes. *See id.*
Third, judicial selection is basically a lawyer's issue. While non-lawyers should and do care about who sits on the bench, lawyers care the most passionately. Lawyers intimately understand that a judge can have a tremendous impact on the outcome of a case. This is particularly so for trial judges, whose decisions are usually final because the cost and a low level of success often make appeals prohibitively difficult. This heightened level of concern among lawyers results in their inordinate influence on the issue of how to select judges. The difficulty, however, is that lawyers in North Carolina have not yet reached a firm consensus on how to deal with the judicial selection issue. Three special interest legal groups in North Carolina—African-American lawyers, female lawyers, and trial lawyers—have all at one time opposed a switch to an appointment system. This opposition contradicts the firm and active support of the North Carolina Bar Association, which purports to represent all of North Carolina's lawyers. Until North Carolina's lawyers can reach a consensus, it is doubtful that the General Assembly will make any change in the judicial selection system unless forced to do so by litigation.

Fourth, any change in the judicial selection process obviously will have partisan implications. The party that benefits from the current system will naturally resist any change. Ten years ago, the Democratic Party had no real reason to tamper with the election system because they dominated the judicial ranks as a result of their relative advantage in voter registration.

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238, 240 (1990) (analyzing the results of 28 separate elections in various states held to determine whether to adopt some form of merit selection plan: 18 efforts succeeded and 10 failed).

470. See Drennan, supra note 66, at 38.

471. See id.

472. See id.

473. Cf. White, supra note 24, at 7 ("[I]t is the exception, rather than the rule, that decisions of trial courts are appealed, to say nothing of the countless civil cases that are settled without trial . . .").

474. See Drennan, supra note 66, at 38.

475. See id.

476. See supra note 294 and accompanying text.

477. See Drennan, supra note 66, at 38. But see Rosch & Rubin, supra note 3, at 29 (arguing that the bar association is dominated by corporate interests and would therefore choose judges favorable to their clients).

478. See Drennan, supra note 66, at 38; see also supra notes 151-59 and accompanying text (discussing changes made in the judicial election system in response to litigation by African-Americans and Republicans).

479. See Drennan, supra note 66, at 38.

480. See supra notes 188-90 and accompanying text (noting past Democratic political dominance).
Republican success at the polls, as evidenced by the 1988 and 1994 elections, may cause Democrats to reconsider their position. For their part, Republicans may think they are now in a position to benefit from the partisan election of judges. In addition, the possibility of a Republican governor in 2000 is also a factor, as that person will fill all judicial vacancies if the present judicial selection system is not changed.

Fifth, the United States Supreme Court has made it clear that the Voting Rights Act of 1965 applies to judicial elections. Any shift from an electoral to an appointive system constitutes a change affecting voting and thus falls within the Act. Therefore, the change must be precleared by the Justice Department under § 5. If the change to an appointive system adversely impacts African-Americans or other minorities, preclearance may not be granted. The problem is that judicial appointment advocates cannot guarantee that a sufficient number of African-Americans and minorities would be appointed to the bench by the governor. As a result, the Voting Rights Act essentially gives African-American legislators a veto, or at least significant leverage, over any appointive system which the General Assembly attempts to implement.

The supermajority requirement for constitutional amendments is not likely to be met, and judicial reform will not be achieved, unless these obstacles are overcome. Namely, the special interest legal groups must come to view the appointment of judges as beneficial to their interests. Unfortunately, such a result may only come from increasingly competitive partisan elections and a significant

481. See supra notes 203-05 and accompanying text (noting recent Republican success).
482. Republicans have won three of the last seven gubernatorial races, with Jim Hunt owning all four of the Democrats' victories. See DEPARTMENT OF THE SECRETARY OF STATE, supra note 64, at 209. Recall that a majority of all judges currently on the bench in North Carolina were initially appointed by the governor to fill vacancies. See Betts, supra note 60, at 322. For further discussion see supra notes 107-13 and accompanying text.
484. See supra note 118 (discussing § 5 of the Voting Rights Act).
485. See Drennan, supra note 66, at 39.
486. This problem is particularly so in the Superior Court Division where, under Chapter 509, ten superior court districts should produce African-American judges under an election system. See Act of June 29, 1987, ch. 509, 1987 N.C. Sess. Laws 769; N.C. LEG. 1987, supra note 120, at 50 ("[T]he result of the new districting system is expected to be 10 non-white resident judges of the superior court.").
487. See Drennan, supra note 66, at 40.
488. See id.
politization of the judiciary. Further, both Democrats and Republicans must agree on a solution because neither holds the necessary three-fifths majority in both houses of the General Assembly.\textsuperscript{489} An agreement will be reached only if both parties simultaneously view an appointment system as in their best interests. Lastly, any proposed plan must withstand the scrutiny of the Justice Department, because preclearance will be necessary under § 5 of the Voting Rights Act to ensure that African-Americans have an adequate way of securing representation under the new system.\textsuperscript{490}

VIII. CONCLUSION: PROSPECTS FOR SUCCESS OF THE FUTURES COMMISSION PROPOSAL

The Futures Commission spent two years studying the courts of North Carolina in an effort to forge a better and more effective justice system\textsuperscript{491} Its members were well aware of North Carolina's failed attempts to adopt some form of merit selection over the past twenty-five years.\textsuperscript{492} Yet, they made the merit selection of judges one of the central features of their redesigned court system.\textsuperscript{493} Perhaps the Futures Commission plan, which seems crafted to avoid many of the difficulties that plagued past reform efforts, will meet with success. At least according to the Futures Commission poll, the voters of North Carolina support a change in the current system of judicial selection.\textsuperscript{494}

The judicial nominating council is integral to the overall success of the Futures Commission proposal, as it is the heart of a merit selection plan.\textsuperscript{495} Past reform efforts have failed, in part, due to disputes over the composition of such councils and the possibility of partiality in the selection of judicial candidates.\textsuperscript{496} However, the Futures Commission proposal of a nominating council high in stature and visibility seeks to thwart notions of secret group meetings

\textsuperscript{489} Prior to the 1998 elections, Democrats controlled the Senate by a 30-20 margin. See Rob Christensen, Election Forecast: 1998 Will Be the Year of the Status Quo, NEWS & OBSERVER (Raleigh, N.C.), Nov. 10, 1997, at A3. The Republicans controlled the House by a slimmer 61-59 margin. See id.

\textsuperscript{490} See Drennan, supra note 66, at 40.

\textsuperscript{491} See WFDD, supra note 4, at iii.

\textsuperscript{492} See supra notes 267-336 and accompanying text (discussing this legislative history).

\textsuperscript{493} See WFDD, supra note 4, at iii.

\textsuperscript{494} See id. at 9. But see note 466 (looking at the level of voter support for judicial appointment when the voters are relatively uninformed about the subject).

\textsuperscript{495} See 1987 COURTS COMMISSION, supra note 192, at 6.

\textsuperscript{496} See supra notes 406-12 and accompanying text.
dominated by any group or special interest. Indeed, the make-up of the proposed council seems to draw from a sufficiently diverse pool to ensure that bickering between political parties, special interest groups, and even different branches of the government should be minimized.

In terms of the current political environment, the General Assembly seems more open to reform of the judicial selection process than ever before, indicating that dissatisfaction with the current selection system may be reaching a critical mass. The recent change to nonpartisan elections for superior court judges is a good example of this willingness to change. Although there may be legislators who wish to wait and see the effect of the switch to nonpartisan elections, it is unlikely that this sentiment would be a fatal impediment to a strong push for a merit selection system, particularly considering the limited applicability of the latest reform effort. Given the broad input into the appointment process afforded by the proposed nominating council, and the general distaste for the continuing trends in judicial elections, the Futures Commission proposal may well succeed.

One negative aspect of the Futures Commission proposal, which could ultimately prove fatal, is its failure to address racial issues in the appointment of judges. Under § 5 of the Voting Rights Act, a switch to the appointment of judges requires Justice Department clearance, as the change would have the potential to affect adversely the ability of minorities to secure adequate representation on the bench. The only mention of racial matters in the Futures Commission report is the assurance that “gender and racial balance would be sought” in the nominating council. Such an assurance

497. See WFDD, supra note 4, at 34-35.
498. Recall, however, that these reforms were essentially in response to litigation and therefore may not be a reliable indicator of the General Assembly’s willingness to change the current system. See N.C. LEG. 1996, supra note 2, at 3-3.
499. Appellate judgeships, which are obviously the highest profile judicial campaigns, and district court judgeships, which are usually the most heavily contested, continue to be decided in partisan elections. See Act of Aug. 2, 1996, ch. 9, 1996 N.C. Sess. Laws 2d Extra Sess. 536.
500. As mentioned previously, the proposal was not adopted during the 1997 session, as urged by the Futures Commission. See supra notes 461-62 and accompanying text. However, the fierce battle over the budget took center stage, and the matter of judicial selection will likely be addressed in the short session in 1998. See supra note 462 and accompanying text.
501. Minorities currently comprise a majority of the electorate, and thus are “safe” in eight superior court districts as designed by the 1987 changes. See supra note 118 (discussing the Voting Rights Act).
502. WFDD, supra note 4, at 34. The assurance offered in the proposed implementing
alone might not meet the approval of minority legislators in the General Assembly or Justice Department officials. However, it is possible that the Futures Commission intentionally chose not to include specific information concerning the potentially divisive issue of race in the hopes that the proposal would garner broad support and momentum going into the legislative session. At that time, a more acceptable provision concerning the race issue could be added during the legislative process.

Ultimately, the Futures Commission proposal, or any other type of judicial reform, will only succeed to the extent that political parties, special interest groups, and the public deem such reform to be in their best interests. Only then will the numerous obstacles to judicial reform be overcome. Profound distaste for the current state of judicial elections, as well as concern over the quality of judges on the bench in the future, may well provide the spark.

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