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Do Nonpartisan, Publicly Financed Judicial Elections Enhance Relative Judicial Independence?

Hon. Robert N. Hunter Jr.

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DO NONPARTISAN, PUBLICLY FINANCED JUDICIAL ELECTIONS ENHANCE RELATIVE JUDICIAL INDEPENDENCE?*

JUDGE ROBERT N. HUNTER, JR.**

Twenty-one states elect appellate judges, while the others use gubernatorial appointment, legislative elections, or merit selection plans.¹ In 1996, North Carolina changed its superior court elections from partisan to nonpartisan elections.² Partisan elections for district court judges were later eliminated in 2001 in lieu of nonpartisan elections.³ By 2004, North Carolina made the same switch to nonpartisan elections for appellate judge seats, along with a voluntary public campaign financing system for appellate judges.⁴ This Article compares judicial elections before and after the adoption of a nonpartisan, publicly funded election system and concludes that, while public financing was widely utilized by candidates and equalized funding, these changes have only marginally achieved their goals of reducing the influence of outside money, promoting public interest in judicial elections, and enhancing relative judicial independence. This Article also argues that any system short of selection with tenure during good behavior will compromise judicial independence.

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** Judge Robert N. Hunter, Jr. is a former Justice of the Supreme Court of North Carolina and presently a Judge at the North Carolina Court of Appeals. He received his Juris Doctor in 1973 from the University of North Carolina School of Law and his L.L.M. in 2014 from Duke Law School. This Article is a revision of the thesis submitted for his L.L.M. degree. Thanks to my law clerk Molly Martinson for her excellent research assistance.

1. See DIV. OF PUB. EDUC., AM. BAR ASS'N, *Judicial Selection Methods—An Overview*, in 2003 LAW DAY PLANNING GUIDE 29 (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/publiced/lawday/schools/lessons/pdfs/judicialhandout3a.pdf>.

2. See Act of Aug. 2, 1996 ch. 9, § 7, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 541–47 (codified as amended in scattered sections of N.C. GEN. STAT. § 163).

3. See Act of Sept. 6, 2001, ch. 403, sec. 1, 2001 N.C. Sess. Laws 1548, 1548–49 (codified as amended in scattered sections of N.C. GEN. STAT. § 163).

4. See Act of Oct. 10, 2002, ch. 509, 2002 N.C. Sess. Laws 615, 616–23 (repealed 2013) (establishing a public campaign financing fund); 2002 N.C. Sess. Laws at 626 (codified as amended in scattered sections of N.C. GEN. STAT. § 163 (2014)) (providing for nonpartisan elections of appellate judges to begin in the 2004 election).

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INTRODUCTION

In his account of the rise of judicial elections in the United States, J. H. Shugerman chronicles the spread of elections as a means of selecting judges in state courts.⁵ His history narrates how the

5. See generally JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012) (describing how events in the

founders' vision for appointment of completely independent judges secured by tenure during good behavior was replaced in some states by judicial elections with fixed term limits, creating a less independent judiciary, but providing for accountability to the people.⁶ Shugerman measures this cost to judicial independence in two metrics:

Judicial independence has different meanings, but at its core, it refers to a judge's insulation from the political and personal consequences of his or her legal decisions. This historical account contrasts *relative* judicial independence (independence *from whom?*) with *general* judicial independence (*how much* independence from political pressure generally?). Some reforms foster "general" judicial independence: most importantly, length of tenure and job security, but also protection of jurisdiction, salary, and other resources. General independence does not mean absolute autonomy; a judge might still be influenced informally by public opinion, elite opinion, reputation, and ambitions for promotion. General independence simply means a judge is more insulated from direct political pressure from any source. By contrast, reforms in methods of judicial selection produce relative judicial independence. In the switch from one form of selection to another, judges become more independent from one set of powers but more accountable to another. The principal-agent problem is one key to understanding the history of judicial elections. Judicial appointments gave presidents, governors, and legislators (the agents) control over the courts instead of giving that power to the people (the principals). Many critics argued that short-term appointments made the judges agents of the agents, not agents of the people.⁷

Shugerman theorizes that no perfect model exists when it comes to selecting judges.⁸ The concepts of judicial independence and judicial accountability are contextual and change over time.⁹ Recent academic discussions illustrate this debate. In the summer of 1998, Duke University held a symposium on judicial independence.¹⁰ In

early 1800s led to the dramatic increase in the number of states using popular elections for judges in the 1840s and 1850s).

6. *See id.* at 57.

7. *Id.* at 7.

8. *See id.* at 12.

9. *See id.* at 5–7.

10. *See generally* Symposium, *Judicial Independence and Accountability*, 61 *LAW & CONTEMP. PROBS.*, Summer 1998, available at <http://scholarship.law.duke.edu/lcp/vol61/iss3/> (last visited Aug. 17, 2015) (examining various aspects of judicial independence, discipline, and accountability).

that symposium, Professor Paul Carrington suggested the following explanation for the crisis between independence and accountability:

[It] may have been caused by the failure of some of the highest state courts to keep faith with democratic traditions. We have experienced an age of judicial heroism; during that time, judges were encouraged to exercise their powers in disregard of legislative prerogatives. As a consequence, many high courts are highly visible objects of political interest and concern.¹¹

Shugerman notes “the story of judicial elections is also the story of the ongoing American pursuit of judicial independence—and the changing understandings of what judicial independence means.”¹²

These changing understandings reflect the political energies placed on the judicial branch by the other coordinate branches of government through changes in court structure and by the people through elections. By examining the changes in judicial structure and elections and their effect on relative and general independence, one can determine the value a state puts on judicial independence.

Using Shugerman’s metrics of structural and relative judicial independence, this Article describes the ongoing pursuit of judicial independence and the changing understandings of what judicial independence means in North Carolina. Part I begins by describing the historical conditions that shaped North Carolina’s judicial system from the colonial period until 1990. Next, Part II examines the political and legal changes that led the legislature to adopt a nonpartisan, publicly financed system in 2002. Part III examines the success of the nonpartisan, publicly financed system in enhancing relative judicial independence by reducing the influence of outside money and promoting public education and participation in judicial contests.¹³ Finally, Part IV examines some of the notable failures of the nonpartisan, publicly financed system and the causes of these failures.

11. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 79, 79–80.

12. SHUGERMAN, *supra* note 5, at 5.

13. In 2013, Republicans controlled both the general assembly and the Governor’s office for the first time in over a century. See Kim Severson, *G.O.P.’s Full Control in Long-Moderate North Carolina May Leave Lasting Stamp*, N.Y. TIMES (Dec. 11, 2012), <http://www.nytimes.com/2012/12/12/us/politics/gop-to-take-control-in-long-moderate-north-carolina.html>. The general assembly then abolished publicly financed elections. See VIVA/Election Reform, § 38.1(a), 2013 N.C. Sess. Laws 381, 1549. North Carolina now has a system of privately financed nonpartisan elections. *Id.* Because 2014 is the first year in which such a system will be used, this change is only discussed in the postscript because there is insufficient empirical data on which to base any conclusions.

I. HISTORY OF NORTH CAROLINA'S JUDICIAL SYSTEM PRIOR TO 1986

Part I analyzes the development of North Carolina's judicial system before 1990. This Part is divided into four time periods based on major historical events affecting the judicial system: (a) the antebellum period, prior to 1867; (b) the Reconstruction Act era, from 1867–1900; (c) the “solid south” period, from 1900–1964; and (d) the Voting Rights Act era, from 1964–1986.

The history of judicial independence in this state illustrates the interplay between the branches of state government and how judicial independence expands and contracts over time depending on the political climate.¹⁴ As the political climate changes, relative judicial independence changes as well.¹⁵ This fluctuation or responsiveness is natural to any governmental structure in a democracy and reveals the context in which the value of judicial independence changes over time.¹⁶

A. *Antebellum Courts in North Carolina*

In colonial times, North Carolina had a weak, largely ineffective colonial judiciary appointed by the Lord's Proprietors or the Crown.¹⁷ This structure politicized the courts by enforcing unpopular royal mandates on a widely disbursed population.¹⁸ Because of this colonial period experience, revolutionary-era framers created a constitution that evidenced their strong distrust of executive power.¹⁹ This constitution created the beginnings of our independent judiciary by establishing independent judicial offices, but within a system designed

14. See McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105, 108 (2006) (generally describing “judicial independence as an outcome that emerges from strategic interactions among the judiciary, the legislature, and the executive”).

15. See *id.* (“[J]udicial independence waxes and wanes with changes in the political composition of our three branches of government.”).

16. See Lydia Brashear Tiede, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. CONTEMP. LEGAL ISSUES 129, 134–35 (2006).

17. 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2533, 2743–53 (Francis Newton Thorpe ed., 1906) (citing CHARTER OF CAROLINA of 1663 (Mar. 24, 1663)).

18. See William E. Nelson, *Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660–1775*, 88 N.C. L. REV. 2133, 2133, 2153–54 (2010).

19. John L. Sanders, *A Brief History of the Constitutions of North Carolina*, in NORTH CAROLINA GOVERNMENT, 1585–1974, A NARRATIVE AND STATISTICAL HISTORY 795, 795 (John L. Cheney, Jr. ed., 1975).

by the legislature.²⁰ Following the American Revolution, the Fifth Provisional North Carolina Congress adopted the constitution of 1776, which provided that “Judges of the Supreme Courts of Law and Equity, [and] Judges of Admiralty” were to be appointed by joint ballot of the legislature; to “hold their offices during good behaviour”;²¹ to receive “adequate salaries during their continuance in office”;²² and to “not be removed from office by the General Assembly, unless for misbehaviour, absence, or inability.”²³ These provisions of the North Carolina Constitution of 1776 contained all three of the central tenants of judicial independence: (1) a judiciary separate from the other branches of government; (2) life terms for judges during good behavior; and (3) adequate judicial salaries.²⁴

These courts, created by the constitution of 1776, enhanced judicial independence by first establishing constitutional judicial review—the legal principal that the judicial branch is the final arbiter of the constitution.²⁵ *Bayard v. Singleton*²⁶ established constitutional judicial review in North Carolina sixteen years before *Marbury v. Madison*²⁷ established it at the federal level.²⁸ After *Bayard* was decided, the general assembly refused to grant to judges the salary increases given to other state officials as punishment for voiding its act.²⁹

To prevent the legislature from using salary decreases as a weapon, three additional provisions strengthening the structural independence of the North Carolina judiciary were added to the constitution in 1835.³⁰ The first provision declared that judges’ salaries shall not decrease during their continuance in office.³¹ The second and third provisions mandated that judges may only be removed from office either by impeachment or for “mental or physical inability,

20. *Id.*

21. N.C. CONST. of 1776, art. XIII.

22. *Id.* art. XXI.

23. *Id.* art. XXXIII.

24. See Scott D. Gerber, *The Origins of an Independent Judiciary in North Carolina, 1663–1787*, 87 N.C. L. REV. 1771, 1774 (2009).

25. *Id.* at 1816–18.

26. 1 N.C. (Mart.) 5 (1787) (refusing to enforce against the defendant a law that was contrary to the North Carolina Constitution).

27. 5 U.S. (1 Cranch) 137 (1803).

28. See John V. Orth, *Thinking About Law Historically: Why Bother?*, 70 N.C. L. REV. 287, 291 (1991).

29. See Jeff Broadwater, *Bayard v. Singleton*, N.C. HIST. PROJECT, <http://www.northcarolinahistory.org/commentary/117/entry> (last visited Aug. 17, 2015).

30. See Walter F. Pratt, Jr., *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW & HIST. REV. 129, 131–32 (1986).

31. *Id.* at 131.

upon a concurrent resolution of two-thirds of both branches of the General Assembly.”³² These amendments were added at the request of two of the three sitting justices of the Supreme Court of North Carolina, Justice Ruffin and Justice Gaston.³³ After ratification of the 1835 constitution, North Carolina had achieved complete relative and structural judicial independence because no judge could be removed from office on the basis of politically unpopular decisions unless that judge was formally impeached.

Regardless of the mechanisms intended to enhance judicial independence, there is little likelihood of removal if the judiciary exercises judicial restraint and does not declare any statutes unconstitutional.³⁴ As Shugerman contends, a measure of the vigor of judicial independence is the frequency in which a supreme court will use judicial review to overturn statutes.³⁵ Thus by Shugerman’s measure, judicial independence was only theoretical in the antebellum period. For example, during the period in which judges were appointed by the legislature in North Carolina from 1780 to 1859, the Supreme Court of North Carolina heard a total of 5,908 reported cases.³⁶ But up until 1859, the supreme court only voided thirteen statutes as unconstitutional.³⁷

This result can be foreseen because of the structure of the court in the antebellum period. At this time, nearly every judge on the Supreme Court of North Carolina had a strong connection to the general assembly; even Leonard Henderson, one of only two judges selected to the court without service in the general assembly, had a brother in the legislature at the time of his election.³⁸ Thus, the low

32. *Id.* at 131–32.

33. SHUGERMAN, *supra* note 5, at 80–81.

34. *Cf.* William H. Pryor, Jr., *Judicial Independence and the Lesson of History*, 68 ALA. LAW. 389, 392 (2007) (“[T]he judiciary has a responsibility to safeguard its own independence by being cautious about the exercise of its jurisdiction and power.”).

35. SHUGERMAN, *supra* note 5, at 124.

36. *Id.* at app. C.

37. *Id.* at app. B.

38. *See* Wm. H. Battle, *Memoir of Leonard Henderson*, 2 N.C. L.J. 197, 203 (1901); U.S. Cong., *Henderson, Archibald*, BIOGRAPHICAL DIRECTORY U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000475> (last visited Aug. 17, 2015). These judges and their respective tenures are as follows: John Louis Taylor (1818–1829); Leonard Henderson (1818–1833); John Hall (1818–1832); John D. Toomer (1829–1829); Thomas Ruffin (1829–1852, 1858–1859); Joseph J. Daniel (1832–1848); William Gaston (1833–1844); Frederick Nash (1844–1858); William H. Battle (1848–1848, 1852–1865, 1866–1868); Richmond M. Pearson (1848–1865, 1866–1878); Matthias E. Manly (1859–1865); Edwin Godwin Reade (1866–1879). Kemp P. Battle, *Address on the History of the Supreme Court* (Feb. 4, 1889), *in* 103 N.C. 339, 378–79 (1889) [hereinafter *Battle, Address*]. All were elected to the general assembly before or after ascending the bench,

number of statutes overturned by the court is not surprising since a sitting justice would be unlikely to rule as unconstitutional any statutes that one helped to create.

In post-revolution America, judicial independence was still an evolving concept.³⁹ Three men were elected by the general assembly as trial court judges: Samuel Ashe, Samuel Spencer, and James Iredell.⁴⁰ Iredell was subsequently replaced by John Williams.⁴¹ Until 1819, there was no established supreme court as we understand the court today.⁴² Instead, from the revolution until 1818, the Supreme Court of North Carolina consisted of a “Court of Conference,” composed of trial court judges that served to hear appeals in a method similar to *en banc* procedures used today.⁴³ In 1818, when the legislature passed a statute enabling a supreme court, it consisted of three judges: a chief justice and two associate justices.⁴⁴ But given life tenure during good behavior and a three-judge court, it is not surprising that during the fifty-year period from 1818 until 1868 only twelve men were appointed by the legislature and served as justices of the Supreme Court of North Carolina.⁴⁵

Although *Bayard* established the ability of the judiciary to withhold its enforcement of a statute on constitutional grounds,⁴⁶ practical employment of this concept was rare.⁴⁷ While Shugerman’s measure suggests that the frequency with which a court overturns decisions of the legislature reflects the health of judicial

except Leonard Henderson and John Hall. See WALTER CLARK, HISTORY OF THE SUPREME COURT OF NORTH CAROLINA 8–14 (1919).

39. See generally Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 114–15 (1970) (describing various proposals for judicial independence at the Constitutional Convention).

40. Battle, Address, *supra* note 38, at 354.

41. *Id.*

42. See CLARK, *supra* note 38, at 8; Pratt, *supra* note 30, at 134.

43. See Raymond B. Mallard, *Inherent Power of the Courts of North Carolina*, 10 WAKE FOREST L. REV. 1, 7–8 (1974).

44. Act of Nov. 17, 1818, ch. 1, 1818 N.C. Sess. Laws 3, 3 (1818).

45. The 1868 constitution increased the number of justices to five. N.C. CONST. of 1868, art. IV, § 8. The 1875 amendments to the constitution reduced the number to three. *Id.* amend. XII (1875). In 1888, the court was again increased to five members. JOHN V. ORTH, THE NORTH CAROLINA CONSTITUTION: A REFERENCE GUIDE 18 (1993). Then in 1937, the court was increased by statute to seven, its present size. Act of Feb. 3, 1937, ch. 16, § 1, 1937 N.C. Sess. Laws 47, 47.

46. See *supra* notes 25–29 and accompanying text.

47. See SHUGERMAN, *supra* note 5, at app. D, at 281 (indicating that judicial review by state courts was rare until the mid-1800s); *supra* notes 36–37 and accompanying text.

independence,⁴⁸ the heart of his theory is that once a judge secures office, his opinions cannot cause his removal.⁴⁹

If measured by this alternative standard, a measure of relative independence, then this period of North Carolina history was a high watermark of judicial independence. During this time in North Carolina's judicial history, only one petition for removal was considered.⁵⁰ Motivated by ill feelings of disappointed attorneys and minority legislators, the petition was presented in 1786 and considered by a joint legislative session.⁵¹ The judges were declared innocent of the charges outlined in the petition, and the legislature subsequently adopted a resolution praising the judges for their "long and faithful services."⁵² This result may not be surprising since the legislature elected the judges and each judge was a member of the majority party in the legislature at that time.⁵³

The federal and state judicial systems during the antebellum period were substantially identical.⁵⁴ Modeled after royal courts in which judges were appointed by the sovereign,⁵⁵ the antebellum courts were modified based upon the democratic ideals of John Adams and Alexander Hamilton.⁵⁶ From these ideals, an archetype arose of what a judge should be and how a judge should be selected. This archetype supposed an independent force whose sole duty was to protect the constitutional rights of individuals and resolve conflicts between other branches of government. In this context, a judge should be like Plato's philosopher-king or King Solomon displaying practical wisdom in resolving common problems.⁵⁷

This model for judges and judicial selection was predominant from the American Revolution until the 1830s.⁵⁸ States adopting a constitution during this time followed the federal model by adopting a

48. See *supra* note 35 and accompanying text.

49. See Tiede, *supra* note 16, at 143–44, 148–50 (discussing judicial tenure and the ability of courts to take stances in opposition to the other branches of government as theories of judicial independence).

50. See Edward B. Clark, *The Discipline and Removal of Judges in North Carolina*, 4 CAMPBELL L. REV. 1, 4–5 (1981).

51. *Id.* at 5–8 & n.30.

52. *Id.* at 8 (citing 18 State Rec. 461).

53. *Id.* (citing 1 R. CONNOR, NORTH CAROLINA: REBUILDING AN ANCIENT COMMONWEALTH 395–96 (1929)).

54. See Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1595–96 (2009).

55. See *supra* note 17 and accompanying text.

56. See SHUGERMAN, *supra* note 5, at 18–23.

57. 1 Kings 3:16–28.

58. See Shepherd, *supra* note 54, at 1595–96.

system of appointed judges.⁵⁹ But, dissatisfaction with the federal form reached a height during the Jacksonian era, culminating when the United States Supreme Court, still led by Chief Justice John Marshall, frustrated President Andrew Jackson's Native American policies in Georgia.⁶⁰

This spurred a "reform" movement toward state election of judges, which began after the Jacksonian era and addressed popular frustration with the federal archetype.⁶¹ Starting in New York in 1846, the reform movement spread as western states entered the Union and "reconstructed" Southern states adopted new constitutions to meet the requirements of the Reconstruction Acts.⁶² Despite this movement away from the federal model, the archetype of the judge as being above politics and having tenure during good behavior remained systematically employed by a majority of states.⁶³

B. 1867 to 1900: The Reconstruction Judiciary

The Reconstruction Acts of 1867 required the Southern states to enact a new state constitution as a precondition to readmission to the Union.⁶⁴ These acts led North Carolina to call a constitutional convention to draft a new social contract, providing the opportunity to reconsider its method of selecting judges.⁶⁵

Recently elected Republicans were in control of the 1868 convention with a majority of 107 delegates.⁶⁶ Their political goal was to implement an abolitionist strategy to empower a unionist and black electorate, which Republicans assumed would favor their interests.⁶⁷ This electoral advantage was due in part to the military registration of electors, including at least 70,000 newly enfranchised African-American voters, and a reduction in the number of ex-Confederate voters.⁶⁸ The convention was held from January to March in 1868.⁶⁹

59. *See id.*

60. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832) (holding that Georgia did not have the authority to regulate commerce between its citizens and the Cherokee Nation).

61. *See* Shepherd, *supra* note 54, at 1597.

62. SHUGERMAN, *supra* note 5, at 84–87, 149, 276–77.

63. *Id.* at 57–58.

64. Act of Mar. 2, 1867, ch. CLIII, § 5, 14 Stat. 428, 429; Act of Mar. 23, 1867, ch. VI, § 5, 15 Stat. 2, 3.

65. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA, AT ITS SESSION 1868, at 483, 486 (Joseph W. Holden ed., 1868).

66. WILLIAM S. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 392 (1989).

67. *See id.* at 392–94.

68. *Id.* at 391–92.

The Republican delegates did not favor a completely independent judiciary because of their discomfort with the unaccountable, life-tenured federal judiciary in the antebellum period.⁷⁰ In their view, the federal judiciary had been the key to unpopular enforcement of the fugitive slave law in northern states,⁷¹ where federal judges were the means to enforce the return of fugitive slaves.⁷² The delegates were also intimately familiar with *Dred Scott v. Sandford*,⁷³ which prohibited African-Americans from obtaining citizenship.⁷⁴ During and after the Civil War, life-tenured Democrats and Whigs, who were not friendly to the abolitionist cause, populated the United States Supreme Court.⁷⁵ In contrast, Republicans sought state judges who would enforce a new political order in North Carolina.⁷⁶ This order would go further than recognition of “black codes” granting freed blacks limited civil rights.⁷⁷ Republicans desired judges who would ensure full rights for former slaves and unionists.⁷⁸ The drafters of the 1868 constitution must have been keenly aware that these groups could become insular minorities in North Carolina should the majority of rebelling native whites regain control.

The flavor of this debate over judicial independence is captured in the minutes of the 1868 convention.⁷⁹ The committee drafting the

69. *Id.* at 392.

70. See John V. Orth ed., *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges: A Transcript of the Debates from the 1868 Constitutional Convention*, 70 N.C. L. REV. 1825, 1842, 1848–50 (1992) (cataloging the delegates’ votes against the election of judges by the general assembly, against the appointment of judges by the governor, and for the election of judges by the people).

71. See, e.g., *id.* at 1846–47 & n.30 (describing how one Republican delegate used the example of Chief Justice Taney, the author of *Dred Scott*, as an argument for popular election and against life-tenured, appointed judges).

72. Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1035–36 (1997).

73. 60 U.S. (19 How.) 393 (1857).

74. *Id.* at 412–13.

75. For example, during the constitutional debate, Del. S.S. Ashley specifically referred to former Chief Justice Taney as an example of the result of the federal system of selection:

Chief Justice Taney . . . outraged the whole country by his iniquitous decisions. Even death itself would not take him for a long time, and if it had not been for the great love of the Northern people for the Union, they would, on his account, have burst asunder the bonds that held the Union together.

Orth, *supra* note 70, at 1847.

76. See POWELL, *supra* note 66, at 388.

77. See *id.* at 383, 388.

78. See *id.* at 388.

79. See Orth, *supra* note 70, at 1846–47.

article of the constitution governing the judicial branch sought instructions as to which of three methods of selecting judges the convention would prefer: popular election, legislative appointment, or gubernatorial appointment with senate confirmation. In sequential votes, the delegates instructed the drafters of article IV of the 1868 constitution as follows: for popular election (enacted 56–34); for legislative appointment (defeated 72–30); and for gubernatorial appointment with senate confirmation (defeated 63–38).⁸⁰ The persuading argument appears to have been forwarded by A.W. Tourgée, a Guilford County delegate, as follows:

Mr. [A.W.] TOURGÉE said he was a Republican by habit, instinct and reason. The people were best able to govern themselves, and he believed with Aristotle that in a Republic was the greatest wisdom. If the people were competent [to] choose officers to make and execute the laws, he held that they were competent to choose officers to interpret the laws. He would be untrue to the highest principles of free government if he should ever be led to approve anything less than that.

The delegate just seated had admitted that the people were competent to choose the makers of the law, and were the people then incompetent to choose the interpreters of the law? He held that the maker of the law was higher than the interpreter. To his mind the whole principle was plain. Not only have the people the virtue and intelligence to elect a part of their officers, but the virtue and intelligence to select all. If incompetent to choose one, they were incompetent to choose all, for the principle applies to all offices.

Now as to the proposed remedy that the Governor appoint and the Senate confirm he would simply reply by asking a question. Are the people more corrupt than their representatives? Are the people more easily bought than the Governor? If the people are corrupt all the departments of government are even more corrupt than they are.⁸¹

80. *Id.* at 1848–50.

81. *Id.* at 1839. Tourgée was subsequently elected a code commissioner and a superior court judge. Robert N. Hunter, Jr., *The Past as Prologue: Albion Tourgée and the North Carolina Constitution*, 5 ELON L. REV. 89, 99, 101–02 (2013). His prolific pen wrote *roman à clef* accounts of his experiences as a judge in North Carolina in *A Fool's Errand* and *The Invisible Empire*, in which he recounts the difficulties experienced by a trial court judge upholding the rights of freedmen in Reconstruction North Carolina, specifically the right to serve on a jury, the right to give evidence, and the right to vote. *Id.* at 90–94. Tourgée himself was the subject of death threats, and two of his close associates were assassinated. See MARK ELLIOT, *COLOR BLIND JUSTICE: ALBION TOURGÉE AND THE QUEST FOR*

Conservatives in the convention argued for retaining the former system wherein judges were to be appointed by the governor, to receive confirmation from the legislature, and to hold office during good behavior.⁸² Nonetheless, the constitution of 1868 was ratified in April by a vote of 93,086 to 74,016.⁸³ At that same time, candidates for elective offices created under the constitution also ran for election,⁸⁴ and a new Republican governor, judiciary, and legislature were elected.⁸⁵ Ironically, had the Conservatives' proposal been adopted, Republican judges would have likely secured the future of the court with life-tenured positions since nearly all Republican candidates won both legislative and judicial races in 1868.⁸⁶ However the Republican majority desired to have a judiciary that was accountable to the electorate.⁸⁷

The convention of 1868 expanded the supreme court to five members elected for eight-year terms.⁸⁸ In the election of 1868, former pro-Union Whigs—Chief Justice R.M. Pearson (an incumbent jurist) and Judge Edwin Godwin Reade—were elected along with three other Republicans—William B. Rodman, Robert P. Dick, and Thomas Settle.⁸⁹ From 1868 to 1879, every justice on the Supreme Court of North Carolina was a Republican, with one exception.⁹⁰ But on January 1, 1879, Democratic candidates took control and remained in control thereafter when the court was reduced to three justices.⁹¹

In the election of 1894, Republican David M. Furches was elected to the Supreme Court of North Carolina.⁹² Robert M. Douglas, a Republican, followed Furches in 1896.⁹³ In 1896,

RACIAL EQUALITY FROM THE CIVIL WAR TO PLESSY V. FERGUSON 35–36, 156–57 (2008); *see also* OTTO H. OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION TOURGÉE* 161–64 (1965) (describing the lynching of Wyatt Outlaw, a black Republican leader, outside of Tourgée's courthouse and the assassination by strangling and stabbing of John "Chicken" Stephens).

82. *See* Orth, *supra* note 70, at 1837–38 (documenting commentary from Conservative William B. Rodman, who noted at the convention of 1868 that "it was not intended for [judges] to reflect the wishes of the people, but merely to administer that justice which the State owes to every citizen").

83. Sanders, *supra* note 19, at 796.

84. *See* JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION* 19–21 (2011).

85. *See* POWELL, *supra* note 66, at 395.

86. *See id.*

87. *See supra* notes 70–77 and accompanying text.

88. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA, AT ITS SESSION 1868, *supra* note 65, at 259–60, 263–64.

89. *See* Battle, Address, *supra* note 38, at 378–79.

90. *See* CLARK, *supra* note 38, at 628.

91. *Id.*

92. *Id.* at 23–24.

93. *Id.* at 24; Clark, *supra* note 50, at 12.

Republican Daniel L. Russell was elected governor.⁹⁴ At the time of Russell's election, there were three Democratic members of the supreme court and two Republicans.⁹⁵ In 1900, Democrat Charles B. Aycock was elected governor.⁹⁶ Before he could take office, however, Justice Faircloth, the Democratic chief justice, died, and Russell appointed Furches as chief justice and Charles A. Cook, a fellow Republican, to take Furches' vacant seat.⁹⁷

Shortly thereafter, the court heard the case of *White v. Worth*⁹⁸ in which the court, by a four-to-one vote, mandated that the North Carolina Treasurer pay in part the salary of the state shellfish inspector (a Russell appointee whose post had been abolished by the 1899 general assembly) during the remainder of his term.⁹⁹ Chief Justice Furches wrote the opinion, joined by Justice Faircloth, and Justice Douglas concurred. The court based its decision to demand payment upon its view that the inspector's right to compensation had vested as a property right upon appointment by the Republican governor, and that property right could not be abolished by a subsequent legislature without just compensation.¹⁰⁰ A political controversy ensued.

Subsequently, the Democrat-controlled house of representatives voted along party lines 62–33 for impeachment articles against Chief Justice Furches and Justice Douglas for violation of their oath of office.¹⁰¹ All but one of the members of the supreme court appeared as witnesses and were questioned extensively about their court conference.¹⁰² The implication was that the impeached Republican justices were influenced by party politics, because the governor who appointed the shellfish inspector was Republican.¹⁰³ The prosecution

94. Sanders, *supra* note 19, at 423.

95. See Clark, *supra* note 50, at 13.

96. Sanders, *supra* note 19, at 432.

97. Clark, *supra* note 50, at 13.

98. 126 N.C. 570, 36 S.E. 132 (1900).

99. *Id.* at ___, 36 S.E. at 136.

100. See *id.* at ___, 36 S.E. at 135–36.

101. See Special to the New York Times, *To Impeach Southern Judges, North Carolina House Votes to Oust the Chief and Associate Justice from Office*, N.Y. TIMES, Feb. 19, 1901, at 1.

102. See Clark, *supra* note 50, at 14 (“All of the members of the Supreme Court, except the recently appointed Justice Cook, appeared as witnesses and they were questioned extensively and in detail about what occurred during the court conferences relating to *White v. Ayer*.”).

103. See *White*, 126 N.C. at 573, 36 S.E. at 132 (“[O]n the 23d day of February, 1897, the plaintiff was duly appointed by the governor of North Carolina.”); *North Carolina Governor Daniel Lindsay Russell*, NAT'L GOVERNORS ASS'N, <http://www.nga.org/cms>

obtained a majority vote of the senate for removal but failed to reach the required two-thirds.¹⁰⁴ The impeachment effort was in part an opportunity to remove two of the three sitting Republican justices. It was unnecessary to impeach the third Republican justice—Justice William Faircloth—because he died on December 29, 1900.¹⁰⁵

This impeachment trial, unlike its predecessor in 1786,¹⁰⁶ had strong ramifications for the independence of the judiciary. Because of the political context in which it was conducted, the trial marked a rapid decline in relative judicial independence. This was in part due to the era of disenfranchisement of black voters, which occurred in 1901 and had the effect of eliminating political competition in statewide offices.¹⁰⁷ Moreover, the legislative intrusion of the impeachment process into the conferences of the supreme court could only have had a chilling impact on the other judges when considering the possibility of confronting the legislature.¹⁰⁸

This impeachment was a small part of the Democratic Party's larger plan throughout the South during Reconstruction to remove Republicans from office and eliminate any political competition. By controlling the voting process through registration qualifications such as literacy and grandfather clauses, the general assembly effectively ended all political competition for statewide offices in North Carolina until the mid-1970s.¹⁰⁹ Democrats held every superior court judicial

/home/governors/past-governors-bios/page_north_carolina/col2-content/main-content-list/title_russell_daniel.html (last visited Aug. 17, 2015).

104. See Doug Clark, *When N.C. Justices Were Impeached*, HERALD SUN (Durham Aug. 23, 2013), <http://www.heraldsun.com/opinion/guestcolumnists/x2042201068/When-N-C-justices-were-impeached>.

105. See POWELL, *supra* note 66, at 445.

106. See *supra* notes 50–53 and accompanying text.

107. POWELL, *supra* note 66, at 443–44.

108. See Clark, *supra* note 50, at 14.

109. POWELL, *supra* note 66, at 443; see also John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1785–86 (1992) (“Undoubtedly, the most important to succeed in those years was the first: the suffrage amendment of 1900, which added a literacy test and a poll tax requirement for voting. . . . Copied from an earlier scheme developed in Louisiana, the literacy test included a ‘grandfather clause’ to protect illiterate white male voters: whether one was literate or not, he was entitled to vote if he or a lineal ancestor—the amendment did not actually specify a ‘grandfather’—had been qualified to vote on January 1, 1867, a date artfully chosen. . . . To take advantage of the grandfather clause, illiterate white men had to register by December 1, 1908; white males coming of age thereafter would have to pass the literacy test to qualify to vote. . . . Although in 1915 the United States Supreme Court ruled grandfather clauses unconstitutional, North Carolina’s had by then safely accomplished its mission. As later described by Henry Groves Connor, one of the architects of the suffrage amendment: ‘With the qualification imposed by this amendment the political power of the State practically passed to the white voters—certainly for the present generation.’ ” (citations

seat from 1900 until Judge Howard Manning, Jr.'s appointment and subsequent election in 1988.¹¹⁰

C. *1900 to 1964: The Solid South Period*

The “Solid South” system is defined as the period in the political history of the South lasting from the end of Reconstruction in 1877 to the passage of the Civil Rights Act of 1964.¹¹¹ During this time, the Democratic Party elected the majority of federal, state, and local officials.¹¹² Leaders had a self-referential sense of *noblesse oblige*, believing that those who have high social rank or wealth have a responsibility to be generous to those of a lower social rank with less wealth.¹¹³ Political scientist V.O. Key, writing in 1949, coined the phrase “progressive plutocracy” to describe this attitude.¹¹⁴ By this phrase, Key meant that North Carolina’s leaders had a “[w]illingness to accept new ideas, [a] sense of community responsibility toward the Negro, [a] feeling of common purpose, and relative prosperity [that has] given North Carolina a more sophisticated politics than exists in

omitted)); William Alexander Mabry, *White Supremacy and the North Carolina Suffrage Amendment*, 13 N.C. HIST. REV. 1, 1-5 (1936) (describing efforts to maintain the disenfranchisement of black voters during the late 1800s).

110. See *Republican Party of North Carolina v. Hunt*, 841 F. Supp. 722, 726 (E.D.N.C. 1994) (“Until Judge Howard Manning, Jr.’s election, no Republican candidate for Superior Court judge had been elected in this century.”); see also Todd Silberman & Tim Simmons, 2004: *Howard Manning Jr.*, NEWS & OBSERVER (Raleigh Dec. 26, 2004), <http://www.newsobserver.com/news/local/article10355150.html> (describing Manning’s political affiliations, appointment to the superior court, and successful election in 1988).

111. See generally DEWEY W. GRANTHAM, *THE LIFE & DEATH OF THE SOLID SOUTH: A POLITICAL HISTORY* (1988) (describing the political landscape surrounding the formation and termination of the “Solid South” and the mechanics of the one-party system used to implement continued racial segregation, disenfranchisement of African-Americans, and malapportioned legislatures).

112. POWELL, *supra* note 66, at 438 (“The powerful single party was strongly in control and provided little opportunity for debate, opposition, or the presentation of alternate plans. . . . Victory in the spring primary nearly always was tantamount to election in November. Issues might be debated and programs presented before the primary, but once the primary was over the party unified to defeat the weak Republican opposition.”).

113. Sheldon Hackney, *Origins of the New South in Retrospect*, 38 J. S. HIST. 191, 191 (1972) (“It is the story of the decay and decline of the aristocracy, the suffering and betrayal of the poor whites, and the rise and transformation of a middle class The declining aristocracy are ineffectual and money hungry, and in the last analysis they subordinated the values of their political and social heritage in order to maintain control over the black population. The poor whites suffered from strange malignancies of racism and conspiracy-mindedness, and the rising middle class was timid and self-interested even in its reform movement.”).

114. See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 205, 211 (1949).

most southern states.”¹¹⁵ Modern observers now describe this attitude as a myth.¹¹⁶

In the judicial sphere, the “progressive plutocracy” had the effect of creating a system of judicial selection that was very stable in that, once appointed, judges served for life and faced little, if any, practical competition:

Until the 1970s nearly all judges were first appointed to the bench. All judges were Democrats, as were all Governors. It was expected that incumbent judges would time their resignation or retirement at some point in the middle of a term to allow the Governor to appoint a successor. New judgeships were created in such a fashion that the initial occupant of the judgeship was appointed by the Governor. Typically, that judge then ran unopposed in both the primary and the general election.¹¹⁷

The effect of this system was to create a judiciary dependent upon the majority (Democratic) party for its employment. Judges could repay this debt by refraining from taking cases that would create political disruption of the system or by deciding cases in ways that would advance the interests of the Democratic Party. While the Solid South was considered to end nationally with the passage of the Civil Rights Act in 1964, this mutual dependency lingered in the judicial system for decades.¹¹⁸

One example of this mutual dependency dilemma is found in *State ex rel. Martin v. Preston*.¹¹⁹ The Supreme Court of North Carolina in *Preston* upheld a statutory requirement that trial court judges must reside in a judicial district *prior* to announcing their

115. *Id.* at 210.

116. JACK BASS & WALTER DEVRIES, *THE TRANSFORMATION OF SOUTHERN POLITICS: SOCIAL CHANGE AND POLITICAL CONSEQUENCE SINCE 1945*, at 219 (1995) (“The progressive image the state projected in the late 1940s has evolved into a progressive myth that remains accepted as fact by much of the state’s native leadership, despite ample evidence to the contrary.”).

117. James C. Drennan, *Judicial Reform in North Carolina*, in *JUDICIAL REFORM IN THE STATES* 19, 26 (Anthony Champagne & Judith Haydel eds., 1993).

118. See Nate Cohn, *Demise of the Southern Democrat is Now Nearly Complete*, N.Y. TIMES (Dec. 4, 2014), http://www.nytimes.com/2014/12/05/upshot/demise-of-the-southern-democrat-is-now-nearly-compete.html?_r=0&abt=0002&abg=1 (“[While the Democratic Party began shifting its position on civil rights in 1948,] Southern Democrats would continue to dominate state and local politics for decades longer, slowly yielding to Republicans only after the enactment of the Civil Rights Act, after which Mr. Thurmond switched to the Republicans and became the first senator from the party to represent the Deep South since Reconstruction.”).

119. 325 N.C. 438, 385 S.E.2d 473 (1989).

candidacy, despite clear constitutional authority stating otherwise.¹²⁰ Similarly, the supreme court has more recently upheld a statute enacted during the administration of a Republican governor requiring that, in the event of a judicial vacancy in a district court judgeship, a governor appoint a replacement judge sharing the political affiliation of the vacating judge.¹²¹ In addition to judicial preferences, the general assembly enacted electoral statutes, such as counting rules for crossover ballots, to advantage Democratic candidates in elections until such measures were declared unconstitutional.¹²²

This mutual dependency phenomenon has also been observed in the federal system, where federal judges support the results in cases that correspond with the interests of the party of the president that appointed them.¹²³ Finley Peter Dunne, a popular American humorist in the early twentieth century, coined the apt phrase, “No matter whether th’ constitutions follows th’ flag or not, th’ Supreme Court follows th’ election returns.”¹²⁴ But unlike the justices of the United States Supreme Court and other appointed federal judges who may follow the returns, a judge in the state system is dependent upon the election returns for continued employment.¹²⁵

In North Carolina during this time period, the absence of a strong Republican Party led to a system in which sitting judges from

120. See N.C. CONST. art. IV, § 9 (“Each regular Superior Court Judge shall reside in the district for which he is elected.”); *Preston*, 325 N.C. at 461–62, 385 S.E.2d at 486.

121. See *Baker v. Martin*, 330 N.C. 331, 341, 410 S.E.2d 887, 893 (1991); see also Matthew P. McGuire, Note, *Baker v. Martin and the Constitutionality of Partisan Qualifications for Appointment to District Courts*, 70 N.C. L. REV. 1916, 1928 (1992) (arguing in favor of the dissenting opinions in *Baker* because the presumption of constitutionality of the statute in question was overcome); cf. Charles H. Winfree, Note, *State ex rel. Martin v. Melott: The Separation of Powers and the Power to Appoint*, 66 N.C. L. REV. 1109, 1109–10 (1988) (discussing the court’s decision in *State ex rel. Martin v. Melott* where the court upheld a statute creating appointment powers in the Supreme Court of North Carolina despite contrary constitutional authority in the executive branch).

122. *Hendon v. N.C. State Bd. of Elections*, 633 F. Supp. 454, 459, 471 (W.D.N.C. 1986).

123. See RICHARD A. POSNER, *HOW JUDGES THINK* 277–78 (2008) (“Evidence of the powerful influence of politics on constitutional adjudication in the Supreme Court lies everywhere at hand. Consider the emphasis placed in confirmation hearings on the nominee’s ideology to the exclusion of his legal ability. Not a single question directed to John Roberts in his hearing for confirmation as Chief Justice of the United States was designed to test his legal acumen.”).

124. F.P. Dunne, *Mr. Dooley Reviews the Supreme Court’s Decision*, SUNDAY CHAT (Paducah), June 9, 1901.

125. See POSNER, *supra* note 123, at 274 (“The usual external constraints on judicial discretion [for federal courts] are severely attenuated except for public opinion . . .”).

the Democratic Party were rarely challenged.¹²⁶ Thus, in my opinion, any state litigation challenging the electoral structure in state court would have been inconceivable because partisan elected judges would ratify decisions of the legislature disadvantageous to political opponents of the existing order.

In sum, relative judicial independence is easily achieved in a one-party state, such as North Carolina from 1900 to 1960. Judges, once elected, are secure from challenge so long as they do not upset the existing order. A one-party government in which appointment follows elections secures judges from competition. However, in my opinion, the price of such stability is to give undue deference to legislative decisions, presuming constitutionality of measures where political rights are concerned, leaving insular minorities to seek relief from federal instead of state courts. In a system where state constitutions recognize rights not acknowledged in the federal constitution, this presumption erodes the power of constitutional judicial review.

D. 1964 to 1986: The Voting Rights Act Era

The forces that shaped the one-party state system during the period of “progressive plutocracy” unconsciously recreated the archetypical system of judicial independence originally established during the founding of the republic.¹²⁷ Judges enjoyed relative judicial independence because there was no political competition, hence judges would effectively serve for life or during good behavior.¹²⁸ With the arrival of political competition this system would change, albeit gradually.

Structural and political change in a long-established state government is the functional equivalent of tectonic plates shifting beneath the earth’s crust. Minor tremors and adjustments, individually insignificant in themselves, eventually lead to a major earthquake in which the landscape that we once observed as unchanging takes a new form. In political observation, most attention is focused upon electoral battles in the legislative and executive branches. But election law—centered in the First Amendment freedoms of speech, of the press, to assemble, and to petition—and the Fourteenth and Fifteenth Amendments provide the practical

126. See John J. Korzen, Comment, *Changing North Carolina’s Method of Judicial Selection*, 25 WAKE FOREST L. REV. 253, 265 (1990) (discussing the de facto control by the Democratic Party over judicial selection and retention throughout North Carolina’s history).

127. See *supra* notes 54–57, 113–15 and accompanying text.

128. See *supra* notes 119–26 and accompanying text.

framework in which the core constitutional political liberties are effectuated. Thus, a change in the electoral laws and the application of these fundamental freedoms foreshadows an adjustment in the tectonic plates of the broader governmental structure.

While shifts in legislative and executive branches can be obvious to the neutral observer, the shifts occurring in judicial elections are not so clear, because they may only reflect trends occurring in the “political” branches. Nevertheless, election law decisions designed to address legislative election imbalances have parallel, and unintended, consequences for judicial elections.

For example, beginning in the 1960s, the United States Supreme Court held in *Baker v. Carr*¹²⁹ and *Reynolds v. Sims*¹³⁰ that state legislative and congressional redistricting is subject to federal constitutional review under the Equal Protection Clause.¹³¹ The Court reasoned that this would assure that in any apportionment plan enacted by the legislature, the districts would be populated so that votes of citizens have an equivalent weight in elections.¹³² *Reynolds* also held that decennial legislative redistricting would meet the minimum constitutional requirements for “maintaining a reasonably current scheme of legislative representation.”¹³³ These principles were applied to North Carolina in *Drum v. Seawell*¹³⁴ and resulted in a tectonic shift that created a tremor throughout the country by shifting political voting power in the legislative branches from rural to urban areas.¹³⁵

In 1965, Congress passed the Voting Rights Act of 1965, which prohibited racially discriminatory voting devices such as literacy tests and poll taxes.¹³⁶ Congress has since expanded or renewed the Act five times, including the last reauthorization in 2006.¹³⁷

129. 369 U.S. 186 (1962).

130. 377 U.S. 533 (1964).

131. *Id.* at 583–84; *Baker*, 369 U.S. at 186, 237.

132. *Reynolds*, 377 U.S. at 555–56; *Baker*, 369 U.S. at 207–08.

133. *See Reynolds*, 377 U.S. at 583–84.

134. 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd*, 383 U.S. 831 (1966).

135. *See generally* Stephen Ansolabehere & James M. Snyder, Jr., *Reapportionment and Party Realignment in the American States*, 153 U. PA. L. REV. 433 (2004) (describing how reapportionment of state legislatures during the 1960s caused a decline in rural political power and an increase in urban and suburban representation).

136. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

137. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2012)). Section 4 of the 1965 Voting Rights Act, the coverage formula, 79 Stat. at 438, was declared unconstitutional in

Prior to the passage of the Voting Rights Act, North Carolina began reforming its judiciary in the 1960s at the recommendation of a North Carolina Bar Association panel known as the “Bell Commission.”¹³⁸ The reforms led to consolidation of the judiciary, replacing the justice of the peace, county, and municipal courts with a modern administrative whole.¹³⁹ This model established district trial courts for handling domestic cases, misdemeanors, and low-dollar civil cases while providing for the election of district court judges by local judicial districts consisting of one or more counties.¹⁴⁰

A second tier of trial courts—superior courts—was designed to handle the trials of felonies, criminal appeals from district courts, and other civil litigation.¹⁴¹ At the time of the Bell Commission, superior court judges were nominated by judicial districts and elected in statewide elections.¹⁴² This system remained unchanged in the 1960s. The Bell Commission reforms increased the appellate courts by adding an intermediate court of appeals, which was nominated and elected statewide.¹⁴³ While this intermediate appellate court has grown from an initial six judges to fifteen judges today, the system retained a seven justice supreme court.¹⁴⁴ However, elections for all judges and justices were by partisan primary until the early 2000s.¹⁴⁵

Shelby County v. Holder, 133 S. Ct. 2612 (2013), and revisions to reauthorize Section 5 of the Act are currently pending in Congress.

138. N.C. ADMIN. OFFICE OF THE COURTS, *THE JUDICIAL SYSTEM IN NORTH CAROLINA* 3 (2007). (“The committee, named the Committee on Improving and Expediting the Administration of Justice in North Carolina, was known as the ‘Bell Commission’ because its chairman was J. Spencer Bell, an attorney from Charlotte. After a thorough study, the Bell Commission recommended a complete restructuring of the judicial system to the general assembly. In 1962, the voters of North Carolina approved a constitutional amendment creating North Carolina’s present court system. The system began operation in 1966.”).

139. *See* N.C. BAR ASS’N, *REPORT OF THE COMMITTEE ON IMPROVING AND EXPEDITING THE ADMINISTRATION OF JUSTICE IN NORTH CAROLINA* 1–6 (1958).

140. *See id.*; N.C. ADMIN. OFFICE OF THE COURTS, *THE NORTH CAROLINA JUDICIAL SYSTEM* 4 (2008), www.nccourts.org/citizens/publications/documents/judicialsystem.pdf.

141. *See* N.C. BAR ASS’N, *supra* note 139, at 11.

142. *See* N.C. GEN. STAT. § 163-1 (1960); *see also* Act of Aug. 2, 1996, ch. 9, § 7, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 541–47 (codified as amended in scattered sections of N.C. GEN. STAT. § 163) (changing the election of superior court judges from statewide to by superior court district); N.C. ADMIN. OFFICE OF THE COURTS, *supra* note 140, at 20 (supporting the assertion of nomination by judicial districts).

143. *See* sources cited *supra* note 142.

144. *See* sources cited *supra* note 142.

145. *See* Act of Oct. 10, 2002, ch. 509, 2002 N.C. Sess. Laws 615, 626 (codified as amended in scattered sections of N.C. GEN. STAT. § 163) (changing the election of appellate court judges and justices from partisan to nonpartisan); 1996 N.C. Sess. Laws 2d Extra Sess. at 541–47 (changing the election of superior court judges from partisan to nonpartisan).

The first elections following the passage of the Bell Commission reforms were conducted in 1966. In the 1968 election, Elreta Alexander, a black female Republican lawyer, won an at-large election as a district court judge in Guilford County for a four-year term.¹⁴⁶ After her success, the 1969 general assembly amended the judicial elections act, changing district court judicial elections from at-large to numbered seats.¹⁴⁷ Despite this change, Judge Alexander was subsequently reelected in 1972 and served thereafter until 1981.¹⁴⁸ In 1974, she entered the Republican primary for Chief Justice of the Supreme Court of North Carolina to challenge then-sitting Chief Justice Susan Sharp.¹⁴⁹ However, Judge Alexander was defeated in the primary by a fire extinguisher salesman and Chief Justice Sharp went on to win the general election.¹⁵⁰ As a result of this election, the North Carolina General Assembly proposed—and the people ratified—a constitutional amendment requiring all elected justices and judges to be licensed to practice law in North Carolina.¹⁵¹

Following the Bell Commission and the passage of the Voting Rights Act, equal protection litigation applying the principles of *Baker* and *Reynolds* successfully sought changes in election districting in city councils and county commissions,¹⁵² school boards,¹⁵³ and other units of local government dependent upon elections for their governing bodies. Yet, the principles of vote dilution by districting were not then applied to judicial elections by federal courts.¹⁵⁴

An early attempt by Republicans to apply the principles of *Baker* and *Reynolds* to judicial elections was *Holshouser v. Scott*.¹⁵⁵ In *Holshouser*, James Holshouser, then-chairman of the state Republican Party, sought a declaratory judgment that North

146. KAYE R. WEBB ET AL., N.C. ASS'N OF BLACK LAWYERS, 3 CHRONICLE OF BLACK LAWYERS IN NORTH CAROLINA: AFRICAN AMERICAN FEMALE PIONEERS IN SEARCH OF JUSTICE AND EQUALITY: 1947–1990, at 25–26 (Robin N. Michael et al. eds., 1990).

147. See Korzen, *supra* note 126, at 265.

148. See Virginia Summey, *Redefining Activism: Judge Elreta Alexander Ralston and Civil Rights Advocacy in the New South*, 90 N.C. HIST. REV. 237, 251, 256 (2013).

149. Patricia Timmons-Goodson, “Darlin’, *The Truth Will Set You Free*,”—A Tribute to Judge Elreta Melton Alexander, 4 ELON L. REV. 151, 170 (2012).

150. *Id.* at 170–72.

151. N.C. CONST. art. IV, § 22; see Timmons-Goodson, *supra* note 149, at 172.

152. *Avery v. Midland Cnty.*, 390 U.S. 474, 474–86 (1968).

153. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 621–22, 633 (1969).

154. See, e.g., *N.Y. State Ass’n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 154 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, *judgment vacated on procedural grounds*, 400 F.2d 882 (6th Cir. 1968); *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

155. 335 F. Supp. 928 (M.D.N.C. 1971), *aff’d*, 409 U.S. 807 (1972).

Carolina's system of nomination by districts and statewide election of judges violated the Equal Protection Clause.¹⁵⁶ Following other federal precedent cited above, a three-judge panel held that:

While *Buchanan* and *Rockefeller* deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but to interpret the law. They do not govern nor represent people, nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice, and not upon the popular view prevailing at the time.¹⁵⁷

The court's opinion that judges do not make, but only interpret, the law became the predominant view in all subsequent litigation involving judicial election and appointment. But this view demonstrates a misunderstanding of the role of state judges insofar as it presumes that state judges are not distinguishable from federal judges when, *inter alia*, state judges are "representatives." Once federal judges obtain office, they need not bother about popular accountability, except for impeachable offenses. State judges, by contrast, do not enjoy this luxury. The resulting cost of popular accountability to state judges is a loss of relative independence. The benefit is that elected state judges may have legitimacy in disputes involving separation of powers because they, like the coordinate branches of government, are elected by the people to enforce the state constitution.

By concentrating on the characteristics of the job once obtained, federal courts missed the proper focus on the central inquiry in equal protection analysis. The focus should be on the mechanism by which one becomes a judge and maintains office. The focus of the judicial inquiry is not how the judge performs the job once elected, but instead whether the electoral mechanism being employed is "fair" as determined by the Equal Protection Clause. This misstep is the equivalent of saying that one need not be concerned with "one person, one vote" analytics for legislative elections if legislators act properly once in office. Furthermore, the analysis misses the point of retention. Maintaining office presents an entirely different set of

156. *Id.* at 929.

157. *Id.* at 932.

questions for sitting judges—raising fundamental questions of relative judicial independence.

In 1966, *Seawell* opened the door for litigation of electoral districts in North Carolina based on the Equal Protection Clause.¹⁵⁸ By the late 1960s, the effects of the *Seawell* litigation in the North Carolina General Assembly augmented the representation of urban counties by increasing the number of legislators elected from urban areas.¹⁵⁹ This increase enabled Henry Frye to be elected to the general assembly in 1968 as the first African-American legislator in the twentieth century.¹⁶⁰ It also provided an opportunity for urban Republicans to be elected. In the 1970s redistricting, the same effect occurred in other urban counties so that by the beginning of the 1980 redistricting cycle, the legislative branch had allocated more seats to urban counties with significant populations of African-Americans and Republicans.¹⁶¹

However, the 1970 legislative districts as drafted were at-large elections for numbered seats, which in operation favored white candidates from the majority party.¹⁶² During the 1970s, voting rights groups across the country initiated a series of cases to end at-large elections of legislators through the Fourteenth and Fifteenth Amendments.¹⁶³ The efforts to end at-large elections based on the Fourteenth Amendment were unsuccessful.¹⁶⁴ However, efforts to end at-large elections based on the racial discrimination theories of the Fifteenth Amendment were successful in *White v. Regester*.¹⁶⁵ In *Regester*, the United States Supreme Court reviewed the 1970

158. See *Drum v. Seawell*, 249 F. Supp. 877, 879 (M.D.N.C. 1965), *aff'd*, 383 U.S. 831 (1966).

159. See RESEARCH DIV., N.C. GEN. ASSEMBLY, LEGISLATOR'S GUIDE TO NORTH CAROLINA LEGISLATIVE AND CONGRESSIONAL REDISTRICTING 25–26 (2011), available at http://www.ncleg.net/GIS/Download/Maps_Reports/2011RedistrictingGuide.pdf (discussing the North Carolina General Assembly's revisions to the state's legislative and congressional redistricting plans throughout the 1960s as a result of the *Seawell* litigation and examining the impact on elections from the revised plans' reductions in the population deviation across election districts).

160. Adrienne Dunn, *Henry Frye (1932–)*, N.C. HIST. PROJECT, <http://www.northcarolinahistory.org/encyclopedia/319/entry/> (last visited Aug. 17, 2015).

161. See Paul T. O'Connor, *Reapportionment and Redistricting: Redrawing the Political Landscape*, N.C. INSIGHT, Dec. 1990, at 35, available at http://www.nccppr.org/drupal/system/files/protected/insight_article/pdf/Reapportionment_and_Redistricting.pdf.

162. *Id.* at 35–36.

163. See, e.g., *Zimmer v. McKeithen*, 485 F.2d 1297, 1301 (5th Cir. 1973).

164. *Whitcomb v. Chavis*, 403 U.S. 124, 142–43 (1971) (reaffirming its position that multimember districts are not unconstitutional per se).

165. 412 U.S. 755, 769–70 (1973).

reapportionment plan for the Texas House of Representatives.¹⁶⁶ The Court initially held that the variations in population among the districts were not invidiously discriminatory.¹⁶⁷ Nevertheless, the Court upheld the dismantling of two of the districts because of the history of discrimination against minorities residing in those two districts.¹⁶⁸

Accordingly, litigants began challenging at-large multimember districts based upon theories grounded in *Regester* with some success.¹⁶⁹ But, any initial success ended in 1982, when the United States Supreme Court issued its decision in *Mobile v. Bolden*.¹⁷⁰ *Mobile* held that, if enacted without discriminatory intent, at-large multimember districts that submerge minority votes do not violate either Section 2 of the Voting Rights Act or the Fifteenth Amendment.¹⁷¹ In reaction to this decision, Congress amended the Voting Rights Act in 1982 to revise Section 2.¹⁷² Congress substituted a totality of the circumstances test in lieu of the Fifteenth Amendment test that *Mobile* announced.¹⁷³ This case history shows that while the Fourteenth Amendment's guarantee of equal protection might be insufficient to reach judicial elections, the Fifteenth Amendment's proscription against racial discrimination was not.

The Court's combined use of Section 5 and Section 2 in *Mobile* is instructive to explain how the Voting Rights Act altered judicial elections. Unlike Section 2, which requires lengthy litigation involving fact-intensive proof, Section 5 gives plaintiffs the ability to obtain rapid injunctive relief by determining whether or not a "covered jurisdiction" like North Carolina has made a voting change and

166. *Id.* at 756.

167. *Id.* at 769–70.

168. *Id.*

169. See, e.g., *Paige v. Gray*, 538 F.2d 1108, 1110–12 (5th Cir. 1976) (citing *Regester* and remanding "to determine whether any at-large elections at all should be allowed"); *Kendrick v. Walder*, 527 F.2d 44, 49–51 (7th Cir. 1975) (successfully challenging at-large municipal elections in Illinois); *Hendrix v. McKinney*, 460 F. Supp. 626, 637 (M.D. Ala. 1978) (holding that the at-large plan for the election of county commissioners was "constitutionally deficient").

170. 446 U.S. 55 (1980).

171. *Id.* at 78–80.

172. S. REP. NO. 97-417, at 28–29 (1982) (amending Section 2 and allowing for violations of the Voting Rights Act without proof of a discriminatory intent or purpose).

173. For a discussion of the first case to apply the new Section 2 of the Voting Rights Act, see *infra* notes 183–90 and accompanying text. See also Robert Hunter, *Racial Gerrymandering in North Carolina*, 9 CAMPBELL L. REV. 255, 277–78 (1986).

whether that change has been submitted to and received preclearance from the Department of Justice.¹⁷⁴

In order to receive preclearance, the voting change must overcome a presumption of racial discrimination in purpose and effect.¹⁷⁵ If a jurisdiction cannot overcome the presumption, then the voting change will be rejected, or “objected to,” and a federal court should enjoin its administration.¹⁷⁶ For example, in 1981, the North Carolina General Assembly submitted its first redistricting plans for preclearance.¹⁷⁷ The plan did not receive preclearance, and it was thus “objected to” for failing to provide legislative districts in which minorities constituted a majority of the electorate.¹⁷⁸ After the Department of Justice objected to two additional plans, the legislature enacted a plan that met Section 5 preclearance in the covered areas of North Carolina by creating “black single-member” districts in the house and senate.¹⁷⁹ Subsequently in *Gingles v. Edmisten*,¹⁸⁰ black plaintiffs challenged the legislative districting scheme.¹⁸¹ The district court ordered the legislature to redistrict, demanding seven more black single-member house districts and two more black single-member senate districts.¹⁸² The United States Supreme Court reversed as to one district, but affirmed the redistricting order as to the other districts.¹⁸³ In *Thornburg v. Gingles*,¹⁸⁴ the Court used amended Section 2 of the Voting Rights Act to uphold redistricting, holding that “the language of [Section 2] and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a [Section 2] claim.”¹⁸⁵

The elimination of multi-member districts provided electoral opportunities for insular minorities submerged under the at-large system.¹⁸⁶ The creation of single-member, heavily Democratic black

174. See 52 U.S.C. § 10101 (2012).

175. See *Clark v. Roemer*, 500 U.S. 646, 652–54 (1991).

176. *Id.*

177. See O’Connor, *supra* note 161, at 30–31.

178. See *id.* at 35–36.

179. *Id.*

180. 590 F. Supp. 345 (1984), *aff’d in part, rev’d in part sub nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

181. *Id.* at 349; O’Connor, *supra* note 161, at 36.

182. See O’Connor, *supra* note 161, at 36.

183. *Thornburg*, 478 U.S. at 77.

184. 478 U.S. 30 (1986).

185. *Id.* at 75.

186. See Michael E. Lewyn, *When is Cumulative Voting Preferable to Single-Member Districting?*, 25 N.M. L. REV. 197, 200 (1995) (arguing that in the decade since the

districts created Republican-leaning districts elsewhere. The practical effect of this application is to show how the legislative landscape was altered dramatically from 1981 until 1993. The number of black legislators in the North Carolina House rose from three to eleven after the 1982 election.¹⁸⁷ By 1993, there were eighteen black legislators in the house and six in the senate.¹⁸⁸ Similar growth occurred in Republican numbers, which rose from twenty-four in the house and ten in the senate in 1981, to thirty-nine in the house and fourteen in the senate by 1991.¹⁸⁹ *Gingles* thus illustrates how minority groups used Section 5 and Section 2 to bring about electoral changes that the Equal Protection Clause could not achieve.¹⁹⁰

A parallel strategy was used to change judicial elections in North Carolina. In *Haith v Martin*,¹⁹¹ Terry Haith, an African-American Republican voter obtained a Section 5 injunction preventing elections for state superior court judgeships created after November 1, 1964,

Supreme Court decided *Thornburg v. Gingles*, “Section 2 [of the Voting Rights Act of 1965] has revolutionized electoral laws in areas with large minority populations”). Indeed, as Lewyn notes, “[m]any state and local governments have remedied Section 2 violations by abolishing multimember and at-large systems and replacing them with single-member districting, thereby ensuring that minorities could elect at least one municipal legislator.” *Id.* (citations omitted).

187. QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 166 (Chandler Davidson & Bernard Grofman eds., 1994).

188. See THAD EURE, N.C. DEP’T OF THE SEC’Y OF STATE, NORTH CAROLINA MANUAL 1981–1982, at 219, 292, 306, 357 (John L. Cheney, Jr. ed., 1981) [hereinafter 1981 MANUAL] (providing descriptions of the four black legislators in the 1981 North Carolina General Assembly and Senate); RUFUS L. EDMISTEN, N.C. DEP’T OF THE SEC’Y OF STATE, NORTH CAROLINA MANUAL 1993–1994, at 362 (Lisa A. Marcus ed., 1994) [hereinafter 1993 MANUAL] (“Twenty-four African-Americans have been elected to serve in the 1993 legislature—six in the Senate and [eighteen] in the House of Representatives.”).

189. See 1981 MANUAL, *supra* note 188, at 199–200 (listing members of the North Carolina Senate in 1981); *id.* at 273–75 (listing members of the North Carolina House of Representatives in 1981); RUFUS L. EDMISTEN, N.C. DEP’T OF THE SEC’Y OF STATE, NORTH CAROLINA MANUAL 1991–1992, at 223–24 (Julie W. Snee ed., 1991) [hereinafter 1991 MANUAL] (listing members of the North Carolina Senate in 1991); *id.* at 297–99 (listing members of the North Carolina House of Representatives in 1991). The North Carolina House of Representatives has 120 members and the North Carolina Senate has 50 members. N.C. CONST. art. IV, § 22; *id.* art. II, §§ 2, 4.

190. See *supra* notes 129–35, 169–85 and accompanying text. The Court in *Thornburg* observed that the “overall rate of black electoral success has been minimal in relation to the percentage of blacks in the total state population,” noting that from 1971 to 1982, “only 1.6% to 3.3% of House members were black” and that from 1975 to 1983, “only 2% to 4% of State Senators were black.” 478 U.S. at 40. “By contrast,” the Court continued, “at the time of the District Court’s opinion [in *Gingles*], blacks constituted about 22.4% of the total state population.” *Id.*

191. 618 F. Supp. 410 (E.D.N.C. 1985), *aff’d*, 477 U.S. 901 (1986).

that had not been precleared.¹⁹² The court agreed with Haith that the legislature had not appropriately submitted these voting changes for preclearance.¹⁹³ Key to this case and subsequent Section 5 litigation was the holding that Congress meant “to reach any state enactment which altered the election law of a covered State in even a minor way,”¹⁹⁴ and “that the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5.”¹⁹⁵

The state subsequently submitted the superior court judicial districts to the Justice Department for preclearance. After submission, the Justice Department objected because of the use of numbered seats in combination with staggered terms in judicial elections.¹⁹⁶ This plan failed to meet the requirements of Section 5 because it eliminated minority voters’ ability to concentrate their voting power on a single candidate in a multi-judge race.¹⁹⁷

The next case in this line of challenges to North Carolina’s system of judicial elections, *Alexander v. Martin*,¹⁹⁸ was a Section 2 case. Kelly Alexander, the state chairman of the NAACP, challenged North Carolina’s method for nominating superior court judges by district and electing such judges statewide.¹⁹⁹ Alexander contended that district nominations combined with statewide elections of superior court judges, staggered terms, and the use of large multi-judge districts in the primaries submerged African-Americans’ local majorities, preventing them from successfully obtaining election to the superior court bench.²⁰⁰

The end of statewide elections of superior court judges had the political potential to eradicate all sitting incumbent Democratic judges in Republican-leaning judicial districts. In addition, there was

192. *Id.* at 411–12, 414.

193. *Id.* at 414.

194. *Id.* (quoting *Dougherty Cnty. Bd. of Educ. v. White*, 439 U.S. 32, 37 (1978)).

195. *Id.*

196. James C. Drennan, *Judicial Reform in North Carolina*, in *JUDICIAL REFORM IN THE STATES* 19, 28–29 (Anthony Champagne & Judith Haydel eds., 1993).

197. See ANITA S. EARLS, EMILY WYNES & LEEANNE QUATRUCCI, *VOTING RIGHTS IN NORTH CAROLINA 1982–2006*, at app. 2 (2006), available at <http://www.protectcivilrights.org/pdf/voting/NorthCarolinaVRA.pdf>.

198. No. 86-1048-CIV-5 (E.D.N.C. 1987) (unpublished), discussed in Milton C. Jordan, *Black Legislators: From Political Novelty to Political Force*, N.C. INSIGHT, Dec. 1989, at 40, 43, 58 n.10.

199. See *Republican Party of North Carolina v. Hunt*, 841 F. Supp. 722, 725 (E.D.N.C. 1994) (discussing the court’s unpublished decision in *Alexander*), *aff’d as modified sub nom.* *Republican Party of North Carolina v. N.C. State Bd. of Elections*, 27 F.3d 563, 1994 WL 265955 (4th Cir. June 17, 1994) (unpublished table decision).

200. *Id.*

some concern that judgments entered by judges elected improperly might be subject to collateral attack. Because of these potential consequences, the parties in *Alexander* decided to settle the lawsuit.²⁰¹

The legislature settled *Alexander* by passing Chapter 509 of the Session Laws of 1987.²⁰² Chapter 509 further subdivided the state's six largest urban counties into subdistricts and eliminated staggered terms.²⁰³ These changes led to an increase in the number of African-Americans on the superior court bench from one in 1986²⁰⁴ to twelve in 1994.²⁰⁵ Also by 1994, three African-American state appellate court judges had been elected.²⁰⁶ Later in *Chisom v. Roemer*,²⁰⁷ the United States Supreme Court ratified the decisions in *Haith* and *Martin*, as well as the logic of settling the *Alexander* litigation, when it determined that Section 2 of the Voting Rights Act was violated in a case involving a challenge to the election of superior court judges from multi-member districts.²⁰⁸

II. 1986–2002: EVENTS THAT LED THE LEGISLATURE TO ADOPT A NONPARTISAN, PUBLICLY FINANCED SYSTEM

The final assault on the state's trial court system of judicial elections came in *Republican Party of North Carolina v. Martin*.²⁰⁹ While *Alexander* addressed the concerns of racial minorities, it did not address the concerns of North Carolina's Republicans. Republican judges had been successfully elected to district court offices in North Carolina, but the statewide election feature of superior court elections still prevented political minorities from winning statewide. This submergence, and the prospect of sure defeat,

201. See EARLS ET AL., *supra* note 197, at 26–27.

202. *Id.*

203. Act of June 29, 1987, ch. 509, sec. 1, § 7A-41, 1987 N.C. Sess. Laws 769, 769–76 (codified as amended at N.C. GEN. STAT. § 7A-41 (2013)).

204. THE JOINT CTR. FOR POLITICAL STUDIES & THE JUDICIAL COUNCIL OF THE NAT'L BAR ASS'N, ELECTED AND APPOINTED BLACK JUDGES IN THE UNITED STATES 68 (1986) (identifying Special Judge James E. Beady, Jr.).

205. JUDICIAL ADMIN. DIV., AM. BAR ASS'N, THE DIRECTORY OF MINORITY JUDGES IN THE UNITED STATES 70–71 (1st ed. 1994).

206. *Id.* at 70.

207. 501 U.S. 380 (1991).

208. *Id.* at 402–04; see also *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419, 428 (1991) (holding that the VRA's coverage encompasses the election of executive officers and trial judges); *Clark v. Roemer*, 501 U.S. 646, 659–60 (1991) (reversing decision of federal district court in Louisiana that failed to enjoin state elections for judicial seats pursuant to voting statutes that had not obtained preclearance).

209. 980 F.2d 943, 961 (4th Cir. 1992).

had the effect of crippling party efforts to recruit candidates, raise funds, and electioneer.

To remedy this crippling effect, in *Martin*, the Republican Party of North Carolina filed suit against the North Carolina State Board of Elections, alleging that the method of electing superior court judges in North Carolina deprived members of the Republican Party of rights under the First and Fourteenth Amendments of the United States Constitution.²¹⁰ The district court granted the state board of election's motion to dismiss for absence of a justiciable question,²¹¹ but the Fourth Circuit reversed, holding that the Republican Party did state a claim upon which relief may be granted under the Fourteenth Amendment.²¹² The opinion effectively reversed *Holshouser v. Scott*, which held that the one-person one-vote rule "does not apply to the state judiciary, and therefore a mere showing of disparity . . . would not be sufficient to strike down th[e] election procedure."²¹³ The Fourth Circuit's reversal in *Martin* was based upon *Davis v. Bandemer*,²¹⁴ where the United States Supreme Court held vote dilution claims of political parties to be justiciable. On remand, the district court entered a preliminary injunction before the 1994 superior court elections were filed, ordering that the defendant state board of elections keep statistics showing the outcome of elections of superior court judges in both districts and statewide.²¹⁵ This result was substantially affirmed by the Fourth Circuit in an unpublished opinion, *Republican Party of North Carolina v. North Carolina State Board of Elections*.²¹⁶

The *Republican Party* lawsuit was eventually settled by legislation to avoid the consequences of having judicial elections without certainty of the outcomes.²¹⁷ Subsequent legislation validated the elections of 1994, decreed local elections in both primary and general elections, and after two election cycles determined that superior court judicial elections beginning in 1998 would be

210. *Id.* at 946–47.

211. 682 F. Supp. 834, 837 (M.D.N.C. 1988).

212. 980 F.2d at 961.

213. 335 F. Supp. 928, 932 (M.D.N.C. 1971) (holding that the one-person, one-vote rule "does not apply to the state judiciary").

214. 478 U.S. 109, 143 (1986).

215. *Republican Party of North Carolina v. Hunt*, 841 F. Supp. 722, 733–34 (1994), *aff'd as modified sub nom. Republican Party of North Carolina v. N.C. State Bd. of Elections*, 27 F.3d 563, 1994 WL 265955 (4th Cir. June 17, 1994) (unpublished table decision).

216. 27 F.3d 563, 1994 WL 265955 (4th Cir. June 17, 1994).

217. Act of Aug. 2, 1996, ch. 9, § 1, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 536 (codified as amended at N.C. GEN. STAT. § 7A-41.2 (2013)).

conducted on a nonpartisan basis.²¹⁸ This change in selecting judges was the first fundamental change in the way North Carolina selected its superior court judges since 1868.

About the same time as the legislature settled the *Republican Party* lawsuit in 1994, a commission headed by John Medlin and former Chief Justice Rhoda Billings, entitled the “Commission on the Future of Justice and the Courts in North Carolina,” was formed to make recommendations to the general assembly for modernizing the judicial branch.²¹⁹ Replacing elections with judicial appointment was among the recommendations.²²⁰ But, these recommendations met the same fate as other merit proposals.²²¹

Despite these procedural advances that promoted competition in judicial elections, Democrats continued to dominate the North Carolina appellate division elections. Aside from Republicans Robert Orr and Howard Manning—each winning elections for the North Carolina Court of Appeals and superior court respectively—no other Republican judicial candidate had yet won an election in modern times.²²² In 1992, Democratic Justices Henry Frye and Burley Mitchell both ran unopposed for election.²²³ The Republican lack of success may have been due in part to the lack of party financial assistance to judges and the widely held view that statewide judicial races were hopeless.

Nevertheless, elections for statewide judicial offices became more competitive. For example, Republican supreme court candidate I. Beverley Lake, Jr. (the son of a former supreme court justice and the 1980 Republican gubernatorial candidate) lost his bid for election to the Supreme Court of North Carolina in both 1990 and again in 1992 after being appointed to the court in 1992 by Governor

218. *Id.* § 24, 1996 N.C. Sess. Laws 2d Extra Sess. at 555.

219. For the Commission’s findings and recommendations, see COMM’N FOR THE FUTURE OF JUSTICE AND THE COURTS IN N.C., WITHOUT FAVOR, DENIAL OR DELAY: A COURT SYSTEM FOR THE 21ST CENTURY (1996), available at <http://www.ncleg.net/Library/studies/1996/st12134.pdf>.

220. *See id.* at 9, 12.

221. *See* Michael Cromwell, *Back to the Future: Revisiting the Recommendations of the Commission for the Future of Justice and Courts in North Carolina*, N.C. ST. B.J., Summer 2009, at 8, 8–11, 15; *see also* Samuel Latham Grimes, Comment, “Without Favor, Denial or Delay”: Will North Carolina Finally Adopt the Merit Selection of Judges?, 76 N.C. L. REV. 2266 *passim* (1998) (detailing recommendations put forward by the Futures Commission and comparing the Commission’s reform proposal to past efforts at judicial reform in North Carolina).

222. *See* Joseph Neff, *Republicans Win Every Race for Seats on Appellate Courts*, NEWS & OBSERVER (Raleigh), Nov. 9, 1994, at 1B.

223. *See* Thad Beyle, *The NC Supreme Court Power Shift, 1990–2000*, N.C. DATANET (Program on S. Politics, Media & Pub. Life, Chapel Hill, N.C.), Sept. 2002, at 10, 10 tbl.1.

Martin.²²⁴ However, Lake's 1990 race was very close and foreshadowed that a change was occurring in Republican fortunes.²²⁵ In 1994, the Republican drought in judicial races ended with four Republican candidates winning appellate elections.²²⁶ These Republican victories were dubbed the GOP's "biggest court wins of the century."²²⁷

While Republicans enjoyed a victory in 1994, the pattern of shifting tides along partisan lines continued. In 1996, a presidential year in which Bill Clinton won nationally, two Democratic incumbent candidates were reelected to the Supreme Court of North Carolina: Chief Justice Burley Mitchell and Justice Sarah Parker.²²⁸ The fortunes of judicial candidates closely followed the national popularity of the party with which they were affiliated.²²⁹ This pattern

224. See Joseph Neff, *Parker Elected to State High Court*, NEWS & OBSERVER (Raleigh), Nov. 4, 1992, at 14A.

225. *Lake v. N.C. State Bd. of Elections*, 798 F. Supp. 1199, 1199 n.1 (M.D.N.C. 1992) ("After a recount, incumbent John Webb had a 15,405-vote margin in Durham County and a 2,641-vote margin in Guilford County. In the remaining ninety-eight counties, Lake had a margin of 16,169 votes over Webb. The State Board concluded by a vote of 3–2 that irregularities in Durham County could have affected the state-wide results and that a new election should be held in that county. The Board voted unanimously that the irregularities in Guilford County could not have affected the statewide results and that the results in that county be certified. The Board then voted 3–2 to certify the results as counted in all 100 counties. Under North Carolina General Statute § 163-22.1 four members of the five-member State Board must vote for a new election before one can be held. Therefore, the Board's 3–2 conclusion concerning Durham County did not result in a new election in that county."). Lake lost the 1990 election to Democratic incumbent John Webb by only 1,897 votes. See *Lake Drops Legal Challenge to 1990 Election*, TIMES-NEWS (Hendersonville), June 4, 1992, at 10A. An election protest followed the election when a superior court judge ordered polling officials in Guilford County and Durham County, a heavily Democratic county, to keep its polls open later in the state to accommodate voters who were allegedly experiencing long lines because of the United States Senate race between Harvey Gantt and Jesse Helms. See *Lake*, 798 F. Supp. at 1202; see also Steve Riley, *Problems Frustrate Some Voters*, NEWS & OBSERVER (Raleigh), Nov. 7, 1990, at 1A.

226. See Neff, *supra* note 222, at 1B.

227. *Id.*

228. See N.C. STATE BD. OF ELECTIONS, 1996 GENERAL ELECTION RESULTS: SUPREME COURT, ASSOCIATE JUSTICE, ftp://alt.ncsbe.gov/data/ElectResults/1996_11_05/19961105_results_Associate_Justice_NC_Supreme_Court.pdf (last updated Dec. 6, 2011); N.C. STATE BD. OF ELECTIONS, 1996 GENERAL ELECTION RESULTS: SUPREME COURT, CHIEF JUSTICE, ftp://alt.ncsbe.gov/data/ElectResults/1996_11_05/19961105_results_Chief_Justice_NC_Supreme_Court.pdf (last updated Dec. 6, 2011).

229. See sources cited *supra* note 228. For example, in 1996, a majority of North Carolinians voted for the Democratic candidates for the nonjudicial positions of attorney general (Mike Easley), governor (Jim Hunt), and secretary of state (Elaine Marshall), among others. See, e.g., N.C. STATE BD. OF ELECTIONS, CERTIFICATION OF THE RESULTS OF THE GENERAL ELECTION HELD ON NOVEMBER 5, 1996 BY THE STATE

of judicial election outcome based on party affiliation had been noted in competitive local district court races where all Republican candidates would oust Democratic incumbents and vice-versa.²³⁰

Subsequently, in 1998, two wins by Mark Martin and George Wainwright created a four-justice Republican majority on the supreme court for the first time since 1900.²³¹ Nonetheless, other Democratic candidates won in 1998,²³² providing evidence that national trends may not perfectly forecast partisan judicial election results. Still, the Republican ascendancy continued in the 2002 judicial election cycle, which produced a six-to-one Republican majority on the supreme court.²³³

BOARD OF ELECTIONS AT THE CANVASS, ftp://alt.ncsbe.gov/data/ElectResults/1996_11_05/19961105_elected_candidate_list.pdf (last visited Aug. 17, 2015).

230. See Louis Alfred Trosch, Sr., *Is it Time to Change the Way North Carolina Selects Judges?*, 36 BUS. L. REV. 197, 210 (2003) (describing this phenomenon as occurring from the 1960s to the 1980s).

231. See N.C. STATE BD. OF ELECTIONS, RECOUNTS CONDUCTED ON NOVEMBER 17 AND 18 (Nov. 24, 1998), ftp://alt.ncsbe.gov/data/ElectResults/1998_11_03/19981103_results_Justice_NC_Supreme_Court_Webb.pdf (documenting Republican Wainwright's win over Democrat Wynn); N.C. STATE BD. OF ELECTIONS, 1998 GENERAL ELECTION RESULTS: JUSTICE NC SUPREME COURT—WHICHARD [hereinafter 1998 GENERAL ELECTION RESULTS: JUSTICE NC SUPREME COURT—WHICHARD], available at ftp://alt.ncsbe.gov/data/ElectResults/1998_11_03/19981103_results_Justice_NC_Supreme_Court_Whichard.pdf (last visited Aug. 17, 2015) (documenting Republican Mark Martin's win over Democrat Jim Martin). Thus, the political makeup of the court became four Republicans—Lake, Orr, Martin, and Wainwright—and three Democrats—Frye, Parker, and Freeman.

232. For example, John Edwards won the United States Senate seat for North Carolina in 1998. N.C. STATE BD. OF ELECTIONS, U.S. SENATE ELECTION RESULTS, ftp://alt.ncsbe.gov/data/ElectResults/1998_11_03/19981103_results_us_senate.pdf (last visited Aug. 17, 2015).

233. In the 2002 election, sitting Democratic Justice Butterfield was defeated by Republican Justice Brady. N.C. STATE BD. OF ELECTIONS, 2002 GENERAL ELECTION RESULTS, <https://www.ncsbe.gov/ncsbe/Elections/Election-Results-Display?ED1=11xx05xx2002&EL1=GENERAL&YR1=2002&CR1=A> (last visited Aug. 17, 2015). Republican Justice Bob Orr won reelection over Democratic challenger Bob C. Hunter. *Id.* As a result, the political makeup of the court was six Republicans—Lake, Wainwright, Orr, Edmunds, Martin, Brady—and one Democrat—Parker. See 356 N.C. at vii (2004), available at <http://www.aoc.state.nc.us/www/public/html/volumes/ncsct356.pdf> (providing a list of sitting supreme court justices); N.C. STATE BD. OF ELECTIONS, 1996 GENERAL ELECTION RESULTS: ASSOCIATE JUSTICE NC SUPREME COURT, available at ftp://alt.ncsbe.gov/data/ElectResults/1996_11_05/19961105_results_Associate_Justice_NC_Supreme_Court.pdf (last visited Aug. 17, 2015) (showing Sarah Parker as a Democratic candidate); N.C. STATE BD. OF ELECTIONS, 1998 GENERAL ELECTION RESULTS: JUSTICE NC SUPREME COURT – WEBB, available at ftp://alt.ncsbe.gov/data/ElectResults/1998_11_03/19981103_results_Justice_NC_Supreme_Court_Webb.pdf (last visited Aug. 17, 2015) (showing George Wainwright as a Republican candidate); 1998 GENERAL ELECTION RESULTS: JUSTICE NC SUPREME COURT—WHICHARD, *supra* note 230 (showing Mark Martin as a Republican candidate); N.C. STATE BD. OF ELECTIONS, 2000 GENERAL ELECTION RESULTS: ASSOC JUSTICE NC SUPREME COURT, available at ftp://alt.ncsbe.gov/data/ElectResults/2000_11_07/20001107_results_Assoc_Justice_NC_Supreme_Court.pdf

These explanations do not take into account the role that campaign expenditures play in judicial elections. Before and during the 1990s, election results could logically be related to national political trends when the costs of judicial elections were modest. In other words, individual expenditures by candidates failed to impact the elections when opposition party candidates were riding a wave of general party success:

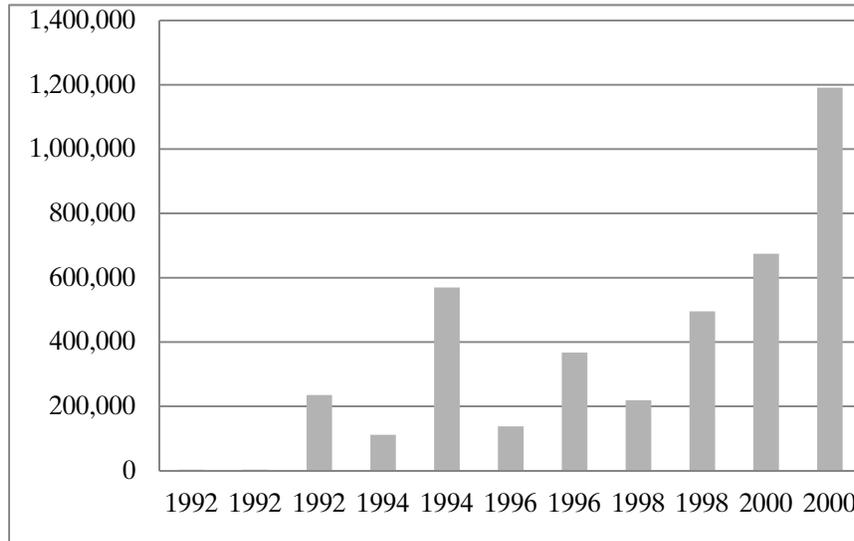
The three most expensive races over the period were won by candidates spending [between] 20.4% to 31.3% of the total amounts spent by all candidates in their races. Overall, five of the winners spent less than their opponents, [and] seven winners spent more than their opponents.²³⁴

Over this decade, the costs of electioneering for judicial seats increased dramatically, as shown by the following chart:

(last visited Aug. 17, 2015) (showing Robert Edmunds as a Republican candidate); N.C. STATE BD. OF ELECTIONS, 2000 GENERAL ELECTION RESULTS: CHIEF JUSTICE NC SUPREME COURT, *available at* ftp://alt.ncsbe.gov/data/ElectResults/2000_11_07/20001107_results_Chief_Justice_NC_Supreme_Court.pdf (last visited Aug. 17, 2015) (showing Beverly Lake as a Republican candidate).

234. Beyle, *supra* note 223, at 11.

**Chart A. Total Costs, N.C. Supreme Court Elections
1992 to 2000²³⁵**



Despite the rising and falling tide of partisan-identified success in judicial elections, Democrats maintained control of the governor's office from 1993 until 2012.²³⁶ Democrats also controlled at least one house of the general assembly during this same period and controlled both houses for most of this period.²³⁷ Neither political parties nor special-interest groups were particularly interested in the judicial branch elections—and thus they were unwilling to invest large sums of money in such elections—until the 2000 redistricting cycle began.²³⁸ This disinterest from political donors was soon to change when donors realized many of the legislative issues they had an interest in

235. *Id.*

236. See *North Carolina: Past Governors Bios*, NAT'L GOVERNORS ASS'N, http://www.nga.org/cms/home/governors/past-governors-bios/page_north_carolina.html (last visited Aug. 17, 2015).

237. See Gary D. Robertson, *State Republicans Win Majorities in NC Legislature*, TIMES-NEWS ONLINE (Nov. 3, 2010), <http://www.blueridgenow.com/article/20101103/ARTICLES/101109939> (documenting the historic Republican win in the legislature in 2010). "Republicans haven't led both chambers together since their Fusion coalition with farmers got defeated in 1898. That includes a 112-year losing streak in the Senate and only four years of House control in the 1990s." *Id.*

238. See Beyle, *supra* note 223, at 11 (noting that the 2000 elections corresponded with an increase in election spending and showing that the winning candidate's share of campaign spending has decreased over time).

could be resolved through the judiciary. Put differently, why try to influence a majority of two bodies of a total of 170 people, when getting a majority of four in the supreme court would do as well or better?

For example, the North Carolina Republican Party must have realized the daunting task of challenging the 2000 state legislative and congressional redistricting plans and seeking to enact a reapportionment plan while the Democratic Party dominated the state's legislative bodies.²³⁹ In 1993, the United States Supreme Court held in *Grove v. Emison*²⁴⁰ that federal courts had to abstain from considering constitutional challenges to state legislative redistricting plans when federal and state courts were simultaneously considering such an issue.²⁴¹ Given that the only branch of government that was controlled by the Republicans in 2001 was the judicial branch,²⁴² this gave the Republicans a more favorable forum than the legislature.

After the 2000 census, Ashley Stephenson, a Republican plaintiff, sought to enjoin and have declared unconstitutional the 2001 redistricting plans enacted by the Democratic-controlled general assembly.²⁴³ He began his challenge in state rather than federal court using a new constitutional theory based upon the “whole county” clause of the North Carolina Constitution.²⁴⁴ This theory required the general assembly in drafting districts to “harmonize” the federal requirements of the “one-person, one-vote” rule and Voting Rights Act with article II, sections 2 and 4, of the Constitution of North Carolina, which require that districts be based on “whole counties.”²⁴⁵ In *Stephenson v. Bartlett (Stephenson I)*,²⁴⁶ the Supreme Court of North Carolina reversed its long-standing precedent of abstaining from redistricting disputes on grounds of justiciability and entered the

239. See ELAINE F. MARSHALL, N.C. SEC'Y OF STATE, NORTH CAROLINA MANUAL 2001–2002, at 409–10 [hereinafter 2001 MANUAL] (listing the membership of the North Carolina Senate as 15 Republicans and 37 Democrats in 2001); *id.* at 473–76 (listing the membership of the North Carolina House of Representatives as 57 Republicans and 67 Democrats in 2001).

240. 507 U.S. 25 (1993).

241. *Id.* at 32–34.

242. See 2001 MANUAL, *supra* note 239, at 186 (listing Democratic Governor Michael Easley); *id.* at 409–10 (listing political makeup of the North Carolina Senate); *id.* at 473–76 (listing political makeup of the North Carolina House of Representatives); *id.* at 637–43 (listing Supreme Court of North Carolina justices). For a description of the political makeup of the Supreme Court of North Carolina in 2002, see *infra* note 249.

243. See *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 781 (E.D.N.C. 2001).

244. See *id.*

245. *Stephenson v. Bartlett (Stephenson I)*, 355 N.C. 354, 359–60, 562 S.E.2d 377, 382 (2002), *stay denied*, 525 U.S. 1301, *aff'd*, 357 N.C. 301, 582 S.E.2d 247 (2003).

246. 355 N.C. 354, 562 S.E.2d 377 (2002).

political thicket.²⁴⁷ This decision established redistricting standards, under which the legislative branch must decennially draft electoral districts that satisfy the requirements of both federal and state constitutional law.²⁴⁸ The Supreme Court of North Carolina, at the time composed of five Republican-affiliated justices and two Democratic, approved a court-drawn plan for the 2002 elections.²⁴⁹ This plan, drafted by a single judge in lieu of the legislature's plan, was the result of preliminary relief in *Stephenson I* and far more favorable to Republican candidates.²⁵⁰

In decisions following *Stephenson I*, the Supreme Court of North Carolina established a state constitutional standard by which the harmonizing of federal and state law should be conducted.²⁵¹ This litigation was to underscore the problem for the Democratic legislature that a Republican judiciary could create. If the Republican Party was in ascendency, what could happen to the overwhelmingly Democratic trial bench or possibly improve the party's ability to compete in judicial elections? The solution, as explained hereinafter, was to expand nonpartisan elections to the appellate bench and publicly fund the elections.

Given the results of the *Stephenson* litigation and the potential rising cost of judicial campaigns, the legislature sought a solution to moderate both high costs and the partisanship of the judiciary. A logical solution would have been to adopt merit proposals giving the governor control over judicial appointments for the remainder of the decade. However, this alternative was not politically possible because the majority did not have the three-fifths of votes necessary to submit a constitutional amendment for referendum, even if all Democrats voted for it.²⁵² Thus, the North Carolina Bar Association and other groups interested in a merit selection plan came to the legislature with

247. *Id.* at 358–63, 375, 562 S.E.2d at 381–85, 392.

248. *Id.* at 362–63, 375, 562 S.E.2d at 384–85, 392.

249. *Id.* at 385, 562 S.E.2d at 398; SCOTT GAYLORD & JOSHUA DAVEY, THE FED. SOC'Y FOR LAW & PUB. POLICY STUDIES, THE NORTH CAROLINA SUPREME COURT: A SPECIAL ISSUE REPORT 3 (2008), available at http://thehill.com/sites/default/files/federalistsociety_ncspecialissuereport_0.pdf. In April 2002, the five Republican justices on the court were Lake, Orr, Wainwright, Edmunds, and Martin, and the two Democrats were Parker and Butterfield. 2001 MANUAL, *supra* note 239, at 637–43.

250. *Stephenson I*, 355 N.C. at 386.

251. *Stephenson v. Bartlett (Stephenson II)*, 357 N.C. 301, 305–14, 582 S.E.2d 247, 249–54 (2003).

252. See 2001 MANUAL, *supra* note 239, at 409–10.

the next best alternative, the Judicial Campaign Reform Act of 2002 (“JCRA”).²⁵³

A. *The Judicial Campaign Reform Act of 2002*

Adoption of the JCRA was motivated by a mix of reasons. Some observers suggested that the JCRA was designed to reverse the electoral trend that favored Republican candidates in the elections between 1994 and 2000.²⁵⁴ If so, the North Carolina General Assembly’s partisan interest in judicial election reform was not unique to North Carolina. According to one observer, in states where party parity was a political reality, the majority party was often willing to sacrifice short-term political advantage in the control of courts in favor of a long-term goal of maintaining incumbents of the majority party.²⁵⁵

At the time of its adoption, the support for the JCRA appears to fit this pattern. In the final reading in the house, all of the Democrats, and only one Republican, supported the bill.²⁵⁶ In the final reading in the senate, the vote was thirty-four to twelve, with all of the Democrats supporting the bill and only two Republicans voting in favor of it.²⁵⁷ The political landscape could hardly have been worse for Democratic interests after the election of 2002, and any change would have been for the better insofar as their partisan interests were concerned.

Nevertheless, the legislature’s concern over the cost of judicial elections seems factually based. The trend of increasing expenditures in judicial elections was well documented in other states prior to and during the 1990s. For example, in 1999, the ABA Standing Committee on Judicial Independence established the ABA

253. Act of Oct. 10, 2002, ch. 509, 2002 N.C. Sess. Laws 615 (codified as amended in scattered sections of N.C. GEN. STAT. § 163).

254. See, e.g., John Davis, *NC Supreme Court: 4 of 7 Seats Up in 2014. Rule #5: Lose the Courts, Lose the War*, JOHN DAVIS CONSULTING (Feb. 10, 2014), <http://www.johndavisconsulting.com/2013/02/10/nc-supreme-court-4-of-7-seats-up-in-2014-rule-5-lose-the-courts-lose-the-war/>.

255. F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 460 (2004).

256. House of Representatives Roll-Call Transcript for S.B. 1054, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2001&sChamber=H&RCS=1854> (last visited Aug. 17, 2015) (reporting that the house vote was fifty-seven to fifty-four with nine excused absences).

257. *Id.*

Commission on Public Financing of Judicial Campaigns.²⁵⁸ The commission recommended that judicial elections be financed with public funds in states that select judges by contested elections.²⁵⁹ The commission made this recommendation because of “the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide.”²⁶⁰

Contributing to the perceived need for judicial reform was the United States Supreme Court decision on judicial campaign speech in *Republican Party of Minnesota v. White*.²⁶¹ The Court held the “announce” clause of the Minnesota canons of judicial conduct unconstitutional on First Amendment grounds.²⁶² This canon had previously hindered judicial candidates from announcing their positions on public policy issues that may come before them for consideration.²⁶³ Opening the doors to debate public issues placed judges in roles more familiar to aspirants to office in municipal elections or the nonpartisan election of superior court judges.²⁶⁴

As enacted, the JCRA replaced partisan elections with an open primary system and limited the nonpartisan general election to two contestants.²⁶⁵ All voters could participate in the primaries regardless of party affiliation.²⁶⁶ The JCRA also introduced reform to judicial campaign donations. Prior to its adoption, donors could contribute up to \$4,000 to judicial candidates in each election cycle (primary and general).²⁶⁷ Under the JCRA, the maximum allowable contribution to any one judicial candidate was reduced to \$1,000 for nonparticipating candidates and \$500 for candidates who participated in the program.²⁶⁸ Finally, the JCRA provided for a voter guide to be

258. See COMM’N ON PUB. FIN. OF JUDICIAL CAMPAIGNS, AM. BAR. ASS’N STANDING COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS, at viii (2002).

259. See *id.* at 30.

260. *Id.*

261. 536 U.S. 765 (2002).

262. *Id.* at 787–88.

263. *Id.* at 787 (providing that prior to *White*, Minnesota’s “announce clause . . . place[d] most subjects of interest to the voters off limits”).

264. J. Christopher Heagarty, *North Carolina in the Post White Decision World: Where We Are, How We Got There, and Where To Go Next*, 3 FIRST AMEND. L. REV. 109, 120 (2004).

265. See Act of Oct. 10, 2002, ch. 158, § 7, 2002 N.C. Sess. Laws 615, 626 (codified as amended at N.C. GEN. STAT. § 163-322 (2012)).

266. *Id.*

267. N.C. GEN. STAT. § 163-278 (2000).

268. § 2, 2002 N.C. Sess. Laws at 621 (setting the private contribution limit at \$1,000).

distributed to all voters in the primary and general election.²⁶⁹ The guide would contain information on all judicial candidates and would be edited by the state elections board staff.²⁷⁰ All candidates, both participating and nonparticipating, would be eligible to place information in this program.²⁷¹

In order to qualify for public financing, a candidate first needed to file a declaration of intent to participate in the program.²⁷² In this declaration, a candidate pledged not to spend more than \$10,000 in private funds to raise qualifying funds,²⁷³ which are discussed below. The pledge could be made as early as September 1 of the year prior to the election year.²⁷⁴ In addition, the candidate pledged to abide by the administrative rules published by the state board of elections and promised to spend only public funds and qualifying donations in the general election.²⁷⁵

The \$10,000 maximum on private funds was considered seed money and was allowed to come from any source.²⁷⁶ After raising the seed money, a candidate seeking to qualify for public financing was to raise certain “qualifying contributions.”²⁷⁷ To meet the requirements of “qualifying contributions,” the candidate had to raise a minimum of thirty times the filing fee for candidacy for the office.²⁷⁸ A requirement of the fundraising was that funds had to come from at least 350 donors, ensuring a broad base of support.²⁷⁹ The JCRA also added a maximum cap for these funds of sixty times the filing fee.²⁸⁰ If these requirements were met, then the candidate would be entitled to receive public funds.²⁸¹ The amounts varied. For example, \$144,000 in public campaign funds would be available for candidates for the state court of appeals, and up to \$216,675 for candidates for chief justice of the supreme court.²⁸² These amounts were computed based on a

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* (codified as amended at N.C. GEN. STAT. § 163-278.64 (2014)).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*, 2002 N.C. Sess. Laws at 618; see CTR. FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING: NORTH CAROLINA JUDICIARY 1 (2009), available at <http://research.policyarchive.org/20313.pdf>.

277. Act of Oct. 10, 2002, ch. 158, § 1, 2002 N.C. Sess. Laws 615, 616 (repealed 2013).

278. *Id.*

279. *Id.*, 2002 N.C. Sess. Laws at 617–18.

280. *Id.*, 2002 N.C. Sess. Laws at 616.

281. *Id.*, 2002 N.C. Sess. Laws at 617–18.

282. These numbers were obtained by multiplying court of appeals candidate filing fees by 125 and supreme court candidate fees by 175. See *id.*, 2002 N.C. Sess. Laws at 620.

formula dependent upon the filing fee for the office sought and remained static.²⁸³

Finally, as originally envisioned, the program provided for rescue funds for publicly funded candidates who were outspent by last-minute “surprise attacks.”²⁸⁴ This provision intended to remedy the situation where a nonfunded candidate or an “independent committee” spends in excess of the public funds allocated to a qualified candidate.²⁸⁵ After the JCRA, the state board of elections was authorized to distribute rescue funds to candidates to meet this challenge.²⁸⁶

At the time of its enactment the JCRA was seen as a panacea for increasing relative judicial independence by its sponsors. Unfortunately, the Act did not enjoy wide bipartisan support. Key features necessary for its success would ultimately be undone by both the United States Supreme Court²⁸⁷ and political winds at home.²⁸⁸ Nevertheless, it did improve the competitiveness of elections and placed candidates at parity in funding.

B. Nonpartisan Elections 2004 to 2012

After the JCRA was enacted, the judicial elections of 2004 were the first to employ the public financing mechanism and eliminate party affiliation on the ballot. These elections were marked by several practical complications that were not anticipated by the drafters. First, the JRCA was a popular program; many judicial candidates participated in the program and were successful in raising the qualifying funds. This popularity likely increased the need for funding resources beyond what the drafters had anticipated. Secondly, the rise of outside money began shortly after the public funding took effect as independent expenditure committees sought to influence the election of judges through third-party ads, diluting the effect of public

283. *Id.*, 2002 N.C. Sess. Laws at 619–20. The public funding program was later expanded to include some council of state offices in a similar program entitled “Clean Elections,” but it has since been repealed. *See* Current Operations and Capital Improvements Appropriations Act of 2013, ch. 21, § 21.1, 2013 N.C. Sess. Laws 965, 1325 (providing that the North Carolina Public Campaign Fund is eliminated).

284. § 1, 2002 N.C. Sess. Laws at 620–21.

285. *Id.*

286. *Id.*

287. *See* *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. ___, 131 S. Ct. 2806, 2813 (2011) (holding matching funds unconstitutional).

288. *See* Adam Smith, *North Carolina Legislature Repeals Popular ‘Voter Owned Elections’ Program*, HUFFINGTON POST (July 26, 2013), http://www.huffingtonpost.com/adam-smith/nc-campaign-finance_b_3660472.html (citing the desire to have “voters to count less and money to count more” as a reason for its repeal).

financing. Third, the JRCA program required flexibility in its administration, which was not anticipated by the drafters.

Among the successful candidates for public office during the six-year period in which the program was available, in seventy-three contested elections, forty of the candidates qualified for public financing; in all contested elections, only two candidates who did not use the program were successful.²⁸⁹ Given that the required threshold amount of fundraising was small, the program was very popular among the candidates.

There were two legal challenges involving the JCRA. The first was a federal challenge on First Amendment grounds, brought by Barbara Jackson and W. Russell Duke.²⁹⁰ Duke and now-Justice Jackson argued that the JCRA was unconstitutional on First Amendment grounds because the act imposed campaign disclosure requirements on nonparticipating candidates.²⁹¹ The case was dismissed.²⁹² The second challenge in 2006 involved the administration of rescue funds and the consequences of candidates coordinating with third-party campaign groups.²⁹³ In the 2006 campaign, Robin Hudson was the beneficiary of assistance from a “fair judges” independent committee, which may have contributed to her narrow win over her colleague Judge Ann Marie Calabria.²⁹⁴ Calabria sought a stay of certification of the election until the challenge could be resolved, but this effort was also unsuccessful.²⁹⁵ However, the influx of third-party money was only beginning in 2006.

In the election of 2012, incumbent Justice Paul Newby ran for reelection and was challenged by court of appeals Judge Sam J. Ervin,

289. *Participation in the Judicial Campaign Program: Profile in the Top Courts for 2011*, DEMOCRACY N.C. (Dec. 21, 2010), <http://www.democracy-nc.org/downloads/JudicialPublicFinPRDec2010.pdf>. Supreme Court Justice Mark Martin did not seek to enroll in the program, and court of appeals Judge Rick Elmore won the 2010 election but failed to qualify for the program. *Id.*

290. *Jackson v. Leake*, 476 F. Supp. 2d 515, 518 (E.D.N.C. 2006).

291. *Id.*

292. *Id.* at 530.

293. See Verified Complaint, *Calabria v. N.C. State Bd. of Elections*, 640 S.E.2d 61 (N.C. Super. 2006) (No. 06CVS17353), 2006 WL 6627503 (denying Calabria’s request for rescue funds after Robin Hudson received nearly \$300,000 in funds from Fairjudges.net).

294. See *id.*; see also Mark Binker, *Big Business Spends to Unseat NC Supreme Court Justice Hudson*, WRAL (Apr. 30, 2014), <http://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/> (“In 2006, Fairjudges.net, a group backed by Democrats, spent more than \$250,000 on advertisements on behalf of judicial candidates, including Hudson.”).

295. *Calabria*, 640 S.E.2d at 61.

IV.²⁹⁶ Justice Newby won reelection.²⁹⁷ Both candidates were the object of independent expenditure committees, and although outside spending is hard to calculate, the spending in support of Justice Newby was estimated to exceed \$3 million while the outside spending for Judge Ervin was only \$300,000.²⁹⁸ Both candidates also qualified for funding, and by this time “rescue funding” had been outlawed by the United States Supreme Court’s decision in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*.²⁹⁹ Similar outside funds were spent in 2014,³⁰⁰ but this was after the public financing program ended.

The program also faced unexpected challenges from unexpected circumstances. Following Justice Orr’s resignation in the summer of 2004, Paul M. Newby, an Assistant United States Attorney, won election after besting seven other candidates for the seat, including appointed Justice James Wynn.³⁰¹ Here, the program had to address the problem of funding eight candidates for one seat when it appeared that more than two candidates may be eligible for public funds.³⁰²

296. N.C. STATE BD. OF ELECTIONS, 2012 GENERAL ELECTION RESULTS [hereinafter 2012 GENERAL ELECTION RESULTS], available at <http://www.ncsbe.gov/ncsbe/Elections/Election-Results-Display?ED1=11xx06xx2012&EL1=GENERAL&YR1=2012&CR1=A> (last visited Aug. 17, 2015).

297. See *id.* (displaying the results of the election between incumbent Newby and Ervin for the “Newby Seat—NC Supreme Court Associate Justice”).

298. ALICIA BANNON ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2011–12, at 11 (Laura Kinney & Peter Hardin eds., 2013), available at <http://newpoliticsreport.org/content/uploads/JAS-NewPolitics2012-Online.pdf>. (“Driving this election spending was the newly created North Carolina Judicial Coalition, a conservative Super PAC that spent an estimated \$2.9 million in TV advertisements promoting Newby and ranked as the fourth highest spender nationally in 2011–12. Independent spending on behalf of Ervin came mainly from a group called N.C. Citizens for Protecting Our Schools and totaled some \$270,000. The candidates raised a combined \$173,011 and benefitted from \$480,020 in public financing.”).

299. 564 U.S. ___, 131 S. Ct. 2806, 2813 (2011).

300. Outside funds were particularly present during the 2014 judicial primaries. See generally Erik Eckholm, *Outside Spending Enters Arena of Judicial Races*, N.Y. TIMES (May 5, 2014), http://www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html?_r=0 (describing the significant sums spent in the 2014 North Carolina judicial primaries, much by outside independent groups).

301. See Michael Cromwell, *That Court of Appeals Ballot*, N.C. CRIM. L. BLOG (Aug. 14, 2014), <http://nccriminallaw.sog.unc.edu/that-court-of-appeals-ballot/> (“Paul Newby led with 583,000 votes out of almost 2.6 million cast and got a full eight-year term.”); DEBORAH GOLDBERG ET AL., BRENNAN CTR. FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 22 (Jesse Rutledge ed., 2004), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_10569.pdf.

302. See *Results of the Public Financing Program in NC Court of Appeals and Supreme Court Races*, DEMOCRACY N.C., <http://nc-democracy.org/reports>

In 2013, both the general assembly and the governor's office became Republican controlled for the first time since the 1800s,³⁰³ and the general assembly abolished publicly financed elections.³⁰⁴ The voter guide and nonpartisan elections are the only remnants of the JCRA remaining, and North Carolina now has a system of privately financed nonpartisan elections.³⁰⁵

III. SUCCESSES OF THE NONPARTISAN, PUBLICLY FINANCED SYSTEM OF JUDICIAL ELECTIONS

When a jurisdiction determines to elect judges for terms rather than appoint them during good behavior, it makes a policy decision that judges are accountable to the public. This policy choice makes the judiciary relatively less independent. The enactment of the JCRA was an effort to make the best of judicial elections and to relieve judges from partisan political pressure. The JCRA achieved some measure of success.

A. *Perception of Fairness*

At the time the JCRA was enacted, proponents of public funding contended that the purpose of the Act was “to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections.”³⁰⁶ The potential for corruption or the appearance thereof is especially problematic in judicial elections, since impartiality is uniquely important to the integrity and

/researchreports/ResultsPublicFinancingSupremeCourtRaces.pdf (last visited Aug. 17, 2015) (noting that the eight candidates in the race for Newby's seat “were offered a limited amount of the total public financing package”).

303. Nia-Malika Henderson, *Groups Use ‘War on Women’ Strategy To Bolster Hagan in N.C. Senate Race*, WASH. POST (June 18, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/06/18/groups-use-war-on-women-strategy-to-bolster-hagan-in-n-c-senate-race/>.

304. See Current Operations and Capital Improvements Appropriations Act of 2013, ch. 21, § 21.1, 2013 N.C. Sess. Laws 965, 1325 (providing that the North Carolina Public Campaign Fund is eliminated and noting that the Judicial Voter Guide requirement will be repealed upon exhaustion of funds for publication of the Guide); see also Voter Information Verification Act, ch. 381, § 1, 2013 N.C. Sess. Laws 1505, 1551 (codified as amended at N.C. GEN. STAT. § 163-278.23 (2013)) (eliminating the \$50 annual attorney's fee used to fund the Judicial Voter Guide).

305. See *supra* notes 265–71 and accompanying text.

306. Act of Oct. 10, 2002, ch. 158, § 1, 2002 N.C. Sess. Laws 615, 615 (repealed 2013) (providing that the North Carolina Public Campaign Fund is eliminated and noting that the judicial voter guide requirement will be repealed upon exhaustion of funds for publication of the guide).

credibility of the courts. Polls conducted immediately before the JCRA was enacted suggested that the privately financed system of judicial elections was not perceived as “fair” because attorneys and other litigants funded the elections of candidates by whom their legal claims would be decided.³⁰⁷ The mechanics of the public financing scheme dramatically changed this reality so far as contributions to candidates are concerned.

B. Reduced Emphasis on Private Funding of Judicial Campaigns

Against a “fairness standard,” empirical research is difficult to measure because fairness is subjective. Because public funds were substituted for private funds in the mechanism established by the JCRA, there has been an obvious shift in the percentage of funds provided by special interests, such as the legal profession. For example, according to North Carolina Voters for Clean Elections, “[i]n the 2002 election, 73% of the nonfamily funds raised by appellate judicial candidates came from attorneys, attorney groups, business PACs and special interests that often appear in court[, but] [t]hat figure dropped to 14% after public financing became an option.”³⁰⁸ Furthermore, the public financing program had a requirement that a candidate show broad base support by obtaining at least 350 contributors.³⁰⁹ Thus, candidates for office had twin goals: to meet the threshold of funds and to do so from at least 350 donors.³¹⁰ As a result, contributions from small donors benefited the candidates even after the threshold amount was raised.

Comparing these percentages remains ephemeral because the contribution limits for public versus private funding are very different. The maximum private contribution limits changed from \$4,000 in 2002 to \$1,000 in 2004.³¹¹ Thus while the amount of judicial contributions from attorneys and special-interest groups may be

307. *Poll: Voters Lack Information on Elected Officials, Fear Influence of Money over Politics, Support Reform*, N.C. CTR. FOR VOTER EDUC. (June 23, 2005), http://ncvotered.com/research/2005/6_23_05_voters_lack_info.php (“North Carolina voters believe money influences political behavior and keeps good people from running from office.”).

308. *NC Judicial Public Financing: A Success Story*, N.C. VOTERS FOR CLEAN ELECTIONS, <http://www.ncvce.org/content/nc-judicial-public-financing-success-story> (last visited Aug. 17, 2015).

309. *See* § 1, 2002 N.C. Sess. Laws at 618.

310. *Id.*

311. *Compare* N.C. GEN. STAT. § 163-278 (2000) (providing that the private contribution limit was \$4,000), *with* § 2, 2002 N.C. Sess. Laws at 621 (setting the private contribution limit at \$1,000).

reduced, outside spending was not entirely eliminated under the publicly funded campaign system.

C. Equality of Funding

If fairness is measured in terms of equality of access to campaign funds, then the program was generally a success as measured by the number of candidates that qualified for public funding. The following chart shows the participation of candidates in the fund and their success in qualifying:

Table 1. Candidates Qualifying for Public Funding³¹²

Year	Total Candidates ³¹³	Declared and Qualified	Declared but Did Not Qualify	No Declaration or Ran Unopposed
2004	16	12	2	2
2006	12	8	1	3
2008	13	11	0	2
2010	22	8	5	9
Total	65	39	8	16

During the life of the program, two candidates opted out of the program and successfully raised more campaign money than that which would have been provided by the public funding program. In 2006, Justice Mark Martin was opposed by attorney Rachel Lea Hunter.³¹⁴ Neither Hunter nor Martin participated in the public funding program. Justice Martin listed receipts of \$446,493.89 in

312. The list of candidates who enrolled and who qualified for public funds has been compiled by Democracy North Carolina. See *Special-Interest Funding Declines in State Court Elections as 77% of the Top Judges Qualify for Public Funds*, DEMOCRACY N.C. (Dec. 21, 2010), <http://www.democracy-nc.org/downloads/JudicialPublicFinPRDec2010.pdf> (listing “Who Enrolled & Who Qualified for Public Funds, by Election Cycle” from 2004 to 2010).

313. The total number of candidates represents the number of candidates on the ballot for appellate court positions in the general election.

314. See N.C. STATE BD. OF ELECTIONS, 2006 GENERAL ELECTION RESULTS [hereinafter 2006 GENERAL ELECTION RESULTS], available at [ftp:// alt.ncsbe.gov/data/ElectResults/2006_11_07/20061107_results_statewide.pdf](ftp://alt.ncsbe.gov/data/ElectResults/2006_11_07/20061107_results_statewide.pdf) (last visited Aug. 17, 2015).

2006,³¹⁵ far above the \$201,775 that would have been provided by public funding for supreme court races that year.³¹⁶ Also in 2006, Justice Sarah Parker was opposed by Judge Russell Duke for Chief Justice.³¹⁷ Justice Parker participated in the program, but Judge Duke did not. Judge Duke raised \$368,502—exceeding the \$201,775 he would have been allotted through public funding.³¹⁸ Because Judge Duke raised more money than the fund-raising limit that Justice Parker accepted through the public funding program, the program distributed \$155,000 in rescue funds to Justice Parker.³¹⁹

D. Increased Competition in Judicial Elections

If fairness is measured in competitive elections for judicial office, then the program is at least as successful as the privately financed partisan system. In the period of elections from 2002 to 2012, only two appellate court candidates have run unopposed, John Martin in 2008³²⁰ and Sanford Steelman in 2010.³²¹ Winning margins have also been narrow, with many contests decided by less than ten percent.³²²

315. See N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, REELECT JUSTICE MARK MARTIN COMMITTEE, available at http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=84987&TP=SUM (last visited Aug. 17, 2015).

316. See *Petition for Writ of Certiorari, North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008) (No. 08-120), 2008 WL 2900047, at *4, available at <https://www.brennancenter.org/sites/default/files/legacy/Democracy/DukevLeakeCertPetition.pdf>.

317. See 2006 GENERAL ELECTION RESULTS, *supra* note 314.

318. See N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, RUSTY DUKE COMMITTEE, available at http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=84746&TP=SUM (last visited Aug. 17, 2015).

319. See Philip G. Rogers et al., *Voter-Owned Elections in North Carolina: Public Financing of Campaigns*, POPULAR GOV'T, Winter 2009, at 30, 36–37.

320. N.C. STATE BD. OF ELECTIONS, 2008 GENERAL ELECTION RESULTS [hereinafter 2008 GENERAL ELECTION RESULTS], available at <http://results.enr.clarityelections.com/NC/7937/21334/en/summary.html#> (last visited Aug. 17, 2015).

321. N.C. STATE BD. OF ELECTIONS, 2010 GENERAL ELECTION RESULTS [hereinafter 2010 GENERAL ELECTION RESULTS], available at <http://results.enr.clarityelections.com/NC/22580/41687/en/summary.html> (last visited Aug. 17, 2015).

322. For example, in the 2012 judicial election cycle, two appellate court seats were decided by less than 10%, the Newby/Ervin race for supreme court had a 3.8% margin and the Dillon/Thigpen race for court of appeals had a 5.48% margin. Similarly, in 2010, the Bob C. Hunter/Jackson race for supreme court was decided by a 3.72% margin. 2012 GENERAL ELECTION RESULTS, *supra* note 296; 2010 GENERAL ELECTION RESULTS, *supra* note 321.

E. Relative Judicial Independence as Measured by Incumbent Success

As discussed at the outset of this Article, one measure of the strength of relative judicial independence is the frequency with which elected incumbent judges remain on the bench.³²³ During the period from 1994 to 2002, two out of four of the elected incumbents retained their seats in elections for the supreme court.³²⁴ In the eight-year period from 2004 to 2014 all four of the previously elected, incumbent North Carolina Supreme Court justices retained their seats.³²⁵

Therefore, if fairness can be measured by “relative judicial independence,” then the public financing scheme was a success. The measure of this success is to see how many elected “incumbent” judges are retained in offices. North Carolina’s nonpartisan system seems to have assisted incumbents in retaining their own seats. However, open seats have been competitive. This pattern suggests a public satisfaction with incumbents that have been elected. Arguably, if someone is experienced in a job, then he or she should be retained.³²⁶ In other words, the challenger should bear the burden of proving that an incumbent should be unseated.

IV. FAILURES OF THE NONPARTISAN, PUBLICLY FINANCED SYSTEM OF JUDICIAL ELECTIONS

While there are obvious successes of the JCRA, there are also practical problems in its administration. Most of these failures are a result of a system that reduces most issues to political calculation. The judiciary now finds itself embroiled in the effects of that system. This Section discusses five issues associated with judicial elections that the JCRA did not effectively resolve: (1) the prevalence of “outside” money in judicial races, (2) the inadequacy of funds provided to

323. See Tiede, *supra* note 16, 143–44 (“The logic is that the longer judges hold office, the less likely they will be concerned about job security and thus the more likely they will make decisions based on the law rather than on personal career goals.”).

324. See Beyle, *supra* note 223, at 10 tbl.1.

325. See 2012 GENERAL ELECTION RESULTS, *supra* note 296; Biography of Associate Justice Edmunds, NCCOURTS.ORG, <https://appellate.nccourts.org/Bios/index.php?c=1&Name=Edmunds> (last visited Sept. 3, 2015); Biography of Associate Justice Hudson, NCCOURTS.ORG, <https://appellate.nccourts.org/Bios/index.php?c=1&Name=Hudson> (last visited Sept. 3, 2015); Biography of Chief Justice Martin, NCCOURTS.ORG, <https://appellate.nccourts.org/Bios/index.php?c=1&Name=Martin> (last visited Sept. 3, 2015).

326. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 307 (1994) (“An overwhelming 86.5 percent of judges surveyed favor retaining retention elections.”).

candidates by the public financing system, (3) low electoral participation in judicial races, (4) a lack of meaningful voter information on judicial candidates, and (5) the influence of partisan politics in judicial elections.

A. “*Outside*” Money

Equality of funding among candidates under the JCRA did not equate with a lack of influence from outside money on judicial elections in North Carolina. Still, while it was legal to do so, rescue funds were awarded to candidates for judicial office to combat outside funding by private groups in support of publicly funded candidates.³²⁷ For instance, Justice Parker was eligible to receive rescue funds in 2004 in her contest with Judge Duke.³²⁸ Candidates in the 2008 election received rescue funds, as did candidates in 2010.³²⁹

Public funding and rescue funds are in theory an answer to outside money. But in practice they lack the flexibility an outside group can use to sway an electorate with last-minute advertising. The Brennan Center reported that, in 2004, independent groups purchased no television ads.³³⁰ Similarly, the Center did not uncover any other active committees spending money independent of candidates’ campaigns for that year.³³¹ Nevertheless, in 2006, Fairjudges.net, a Democrat-funded campaign organization, organized an independent expenditure committee to assist the candidacy of Judge Robin Hudson and three other judicial candidates.³³²

327. See Act of Oct. 10, 2002, ch. 158, § 1, 2002 N.C. Sess. Laws 615, 620 (repealed 2013).

328. See Justin Moore, *The Battleground 2012: The Public Financing of Judicial Candidates in North Carolina after Arizona Free Enterprise v. Bennett*, ST. ELECTIONS (Nov. 6, 2012), <http://electls.blogs.wm.edu/2012/11/06/the-battleground-2012-the-public-financing-of-judicial-candidates-in-north-carolina-after-arizona-free-enterprise-v-bennett/>.

329. See G. ALAN TARR, WITHOUT FEAR OR FAVOR 160 (2012) (noting that rescue funds were disbursed to Robert Edmunds in the 2008 election); see generally DEMOCRACY N.C., SPECIAL-INTEREST FUNDING DECLINES IN STATE COURT ELECTIONS (2010) (documenting rescue funds in the 2010 elections).

330. GOLDBERG ET AL., *supra* note 301, at 6 fig.5.

331. See BANNON ET AL., *supra* note 298, at 6 (finding that political parties did not spend any money on North Carolina judicial elections independently of supreme court candidates’ campaigns in 2011–2012 election year).

332. See *FairJudges.Net: Top Contributors (2006)*, OPENSECRETS.ORG, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2006&ein=205204162 (last visited Aug. 17, 2015) (showing the Democratic Party of North Carolina as the organization’s largest contributor).

Fairjudges.net expended \$270,470 in this effort.³³³ Outside money did in fact flow to judicial candidates—particularly Democrats—during the time period the JCRA was in effect. Between 2000 and 2009, the North Carolina Democratic Party made contributions to judicial candidates totaling \$196,359.³³⁴ In contrast, the Republican Party spent \$16,000,³³⁵ which was less than the \$20,000 spent by the other “top” spender, the North Carolina Academy of Trial Lawyers.³³⁶ The Brennan Center suggests that this pattern of independent expenditure in North Carolina is likely to be repeated in successive judicial elections, as has occurred in other states.³³⁷

Thus, the public financing program was not successful in curbing the influence of outside spending. Furthermore, in 2010 and 2011, the United States Supreme Court issued two opinions making it easier for “outside” money to flow into judicial campaigns. *Citizens United v. Federal Election Commission*³³⁸ prohibited state governments from restricting political independent expenditures by corporations, associations, or labor unions.³³⁹ This decision was followed by *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, which eliminated state rescue funds (called “matching funds” in Arizona) from being expended to combat outside spending by third-party groups.³⁴⁰ These United States Supreme Court decisions have largely crippled campaign reforms, such as public funding for judicial candidates. Public funding in the United States is rare and is premised upon the belief that it will eliminate or minimize the adverse effects of private money entering the public discussion.³⁴¹ A key ingredient of the public funding mechanism is the ability of a candidate who relies on public funding to be able to timely respond to privately funded

333. See JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006*, at 21 fig.13 (Jesse Rutledge ed., 2006), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48787.pdf.

334. See JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009*, at 82 (Charles Hall ed., 2010), available at http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

335. *Id.* (providing that the North Carolina Republican Party spent \$16,000 on candidate contributions for appellate judges between the years 2000 and 2009).

336. *Id.*

337. *Id.* at 36.

338. 558 U.S. 310 (2010).

339. *Id.* at 319.

340. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. ___, 131 S. Ct. 2806, 2813 (2011).

341. See *Public Financing*, JUST. AT STAKE, http://www.justiceatstake.org/issues/state_court_issues/public-financing/ (last visited Aug. 17, 2015) (“In order to help combat the influence of special interest money on their judicial elections, two states have adopted permanent public financing programs.”).

attack ads. Without rescue funds, one is unable to raise money in a timely fashion to respond to private funds.

B. Inadequacy of Funds

Another criticism of the public funding mechanism is it became inadequate over time. Costs of campaigning have risen in North Carolina due to the state's competitiveness in nonjudicial elections, which drives the cost of television advertising up. In 2014, for example, the United States Senate candidates Kay Hagan and Thom Tillis spent more than \$70 million on statewide television advertising alone.³⁴² These amounts dwarf the public funding amounts that would be provided by the act.³⁴³ These funds not only crowd out judicial candidates from obtaining favorable ad placement, but also increase the cost by creating scarcity of television time in the period after voting begins. Furthermore, the elimination of rescue funds³⁴⁴ and the rise of super PACs and 527-group advertisers³⁴⁵ has allowed public interest groups, like the Advocates for Justice or the chambers of commerce, to further enhance their favored candidates' chances of winning.

As a result, the state public funding mechanisms suffer from the same inadequacies as presidential public funding. If all candidates in a race are participating in the fund and are equally limited, then there is less of a problem. However as discussed above, where independent expenditures enter the contest, the inadequacy of funds is problematic.

Both candidates for whom outside funding was heavily employed—Robin Hudson in 2006 and Paul Newby in 2012—won in close races.³⁴⁶ Yet it is empirically difficult to measure whether the outcome of the election would have been different had the spending

342. This money was spent by both the candidates themselves and their PACs. See Jason deBruyn, *How Much Did Hagan and Tillis Spend on Their U.S. Senate Campaigns in NC?*, TRIANGLE BUS. J. (Nov. 5, 2014), <http://www.bizjournals.com/triangle/news/2014/11/05/hagan-tillis-us-senate-campaign-spending-nc.html>.

343. See *supra* Section II.A.

344. See *Bennett*, 564 U.S. at ___, 131 S. Ct. at 2828.

345. For a discussion of the effect of PACs and 527-group advertisers on judicial elections, see Chris Kromm, *5 Players Behind the Big Money Attacks in NC Supreme Court Election*, INST. FOR S. STUD. (May 2, 2014, 2:00 PM), <http://www.southernstudies.org/2014/05/5-players-behind-the-big-money-attacks-in-nc-supre.html>.

346. See JAMES SAMPLE ET AL., *supra* note 333, at 11 n.8 (describing a 2006 advertisement run by Fairjudges.net in support of Hudson); 2012 GENERAL ELECTION RESULTS, *supra* note 296 (showing Newby's election results); 2006 GENERAL ELECTION RESULTS, *supra* note 314 (showing Hudson's election results); Eckholm, *supra* note 300 (describing outside spending entering the Newby election).

not taken place. In the 2006 election, Robin Hudson won by about 20,000 votes cast, or by 50.1% of the vote.³⁴⁷ The failure of the state board of elections to distribute rescue funds may have made a difference.³⁴⁸ In the 2012 election, it is clear that Justice Newby's name recognition benefited from the nearly \$2.9 million poured into the campaign.³⁴⁹ Justice Newby won by 133,099 votes, receiving 51.9% of the vote.³⁵⁰

Given that the disparity in spending on behalf of the two candidates did not result in a similar disparity in outcome in the vote, one has to question if large amounts of spending in judicial races reaches a point of diminishing returns. Some election observers have opined that outside spending may have a marginally decreasing effect on the electorate as funding passes a certain threshold.³⁵¹ But, these observations do not diminish the effect of campaign spending on elections. Instead, they point to the failure of public funding to stem the increase in campaign spending by outside groups.

C. Electoral Participation

The biggest disappointment of public financing of judicial elections is the measurable lack of participation in judicial elections conducted in the nonpartisan context. "Roll-off," or undervoting, is a political phenomenon whereby voters cast ballots in prestige races and avoid making decisions in lower information contests.³⁵² In multiple-vote U.S. ballots, "voter roll-off" is calculated by subtracting the number of votes cast for a "down-ballot" office, such as mayor, from the number of votes cast for a "top-of-the-ballot" office, such as president.³⁵³ When the election jurisdiction does not report voter turnout, roll-off can be used as a proxy for residual votes.³⁵⁴ Thus,

347. See 2006 GENERAL ELECTION RESULTS, *supra* note 314.

348. Hudson's 2006 opponent, Ann Marie Calabria, sought rescue funds from the state board of elections after the FairJudges.net ad ran, but the board refused. See *Calabria v. N.C. State Bd. of Elections*, 198 N.C. App. 550, 559, 680 S.E.2d 738, 746 (2009).

349. BANNON ET AL., *supra* note 298, at 4.

350. See 2012 GENERAL ELECTION RESULTS, *supra* note 296.

351. See John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 606 (2005) ("Social science studies have shown that, once a requisite minimum has been collected, money in a political war chest does not substantially affect election outcomes.").

352. See Matthew J. Streb et al., *Voter Rolloff in a Low-Information Context: Evidence from Intermediate Appellate Court Elections*, 37 AM. POL. RES. 644, 647 (2009) (defining ballot roll-off as "the percentage of the electorate casting votes for the major office on the ballot who do not vote in each [intermediate appellate court] race").

353. *Id.* at 657, 663 n.5.

354. *Id.* at 664. Residual votes are the total number of votes that are uncounted in an election.

some voters may only be interested in voting for the major offices without bothering to vote down ballot, resulting in a partially valid ballot.

If the JCRA truly achieved its goal of increasing electoral participation, then roll-off should be measurably lower during the years in which the JCRA was in effect. Bonneau and Hall “compar[ed] average rates of ballot roll-off before and after the [JCRA] reforms.”³⁵⁵ They found that voter participation sharply decreased from 2000 to 2004, after the enactment of the JCRA, with “far fewer voters participating in state supreme court elections after the purported improvements in judicial selection relative to the period immediately before the changes.”³⁵⁶

355. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 112 (Matthew J. Streb ed., 2009).

356. *Id.*

Table 2. Undervote in N.C. Judicial Elections³⁵⁷

	Turn-out ³⁵⁸	Top State-wide Judicial Race ³⁵⁹	Under-vote	Under-vote, % of Total	Lowest State-wide Judicial Race ³⁶⁰	Under-vote	Under-vote, % of Total
1992	2,611,850	2,419,438	192,412	7.37%	2,282,947	328,903	12.59%
1994	1,533,728	1,533,728	0	0.00%	1,464,209	69,519	4.53%
1996	2,513,357	2,380,910	132,447	5.27%	2,347,666	165,691	6.59%
1998	2,012,149	1,920,687	91,462	4.55%	1,824,783	187,366	9.31%
2000	3,015,964	2,828,859	187,105	6.20%	2,699,824	316,140	10.48%
2002	2,349,966	2,177,198	172,768	7.35%	2,128,901	221,065	9.41%
2004	3,551,675	2,710,260	841,415	23.69%	2,541,424	1,010,251	28.44%
2006	2,036,451	1,707,326	329,125	16.16%	1,546,172	490,279	24.08%
2008	4,354,052	3,092,764	1,261,288	28.97%	2,876,932	1,477,120	33.93%
2010	2,700,393	2,012,869	687,524	25.46%	1,778,349	922,044	34.14%
2012	4,542,488	3,510,025	1,032,463	22.73%	3,374,705	1,167,783	25.71%
Avg.	2,838,370	2,390,369	448,001	13.43%	2,260,537	577,833	18.11%

This drop in voter participation in judicial elections after the JCRA may be explained in part by North Carolina's reliance up until 2014 on "straight-ticket" balloting, which allowed voters to vote for all party candidates with one vote.³⁶¹ The following chart shows the

357. N.C. STATE BD. OF ELECTIONS, STATISTICS FOR PRESIDENTIAL AND NON-PRESIDENTIAL ELECTION YEARS 1972 TO 2012, available at <https://www.ncsbe.gov/ncsbe/voter-turnout> (last visited Aug. 17, 2015).

358. This figure represents the total of the largest statewide election.

359. This figure is the sum of votes in the highest voted judicial race.

360. This table uses only contested elections, so it does not include the smaller turnout figures from uncontested races.

361. See Bob Hall, *End of Straight-Ticket Voting in NC Tinged with Racial, Age Bias*, NEWS & OBSERVER (Raleigh Aug. 27, 2014), <http://www.newsobserver.com/2014/08/27/4101329/end-of-straight-ticket-voting.html>.

number of voters who cast a straight-party ballot in 2008, 2010, and 2012 according to public records:

Table 3. Voters Casting Straight-Party Ballots by Party³⁶²

	2008	2010	2012
Democratic	1,283,486	599,985	1,418,430
Republican	881,856	561,878	1,110,390
Libertarian	19,054	9,135	25,146

Prior to the JRCA, judicial candidates received the benefit of straight-ticket votes because they were on a partisan ballot. After the enactment of the JRCA, because judicial elections became nonpartisan, the candidates lost that benefit. Nonpartisan races, such as judicial races, are not automatically counted on a straight-ticket ballot. Therefore one explanation of the drop in voting is that voters do not continue to vote after casting a straight-party ballot.

A further explanation of reduction in votes in judicial races is ballot design. If a race is a partisan race, it is placed at the top of every ballot.³⁶³ Nonpartisan ballots, on the other hand, are listed at the bottom of the ballot in North Carolina.³⁶⁴ A long ballot produces voter fatigue where some voters stop after completing only some of the ballot.³⁶⁵ This kind of roll-off was likely to occur when judicial races were moved from near the top of the ballot in partisan elections before 2002 to the bottom of ballots after 2002 with the passage of the JRCA.³⁶⁶

362. 2008 GENERAL ELECTIONS RESULTS, *supra* note 320; 2010 GENERAL ELECTION RESULTS, *supra* note 321; 2012 GENERAL ELECTION RESULTS, *supra* note 296.

363. N.C. GEN. STAT. § 163-165.6(b)(3) (2014). For an example, see Lawrence Norden & Margaret Chen, *How Bad is North Carolina's Ballot Flaw? The Numbers Say, Pretty Bad*, BRENNAN CTR. FOR JUSTICE (Oct. 21, 2008), <http://www.brennancenter.org/blog/how-bad-north-carolina's-ballot-flaw-numbers-say-pretty-bad> (displaying PDF of a ballot with partisan section at the top).

364. See sources cited *supra* note 363.

365. Elizabeth Garrett, *The Law of Economics and Elections: The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1579 (1999).

366. See *supra* Section II.A.

D. Voter Information and Campaign Advertising

North Carolina has a long ballot.³⁶⁷ An examination of ballot position and the number of votes casts in any contest shows that as one descends down ballot, the total votes counted declines.³⁶⁸ In judicial races, each registered voter obtains a voter guide with detailed information about the competing candidates. In other races, the only official information distributed is name and party affiliation. Thus, in the two systems we are comparing, the public does not always resort to information available about judicial candidates to make a decision about the choices offered. This phenomenon is not limited to judges. Even if one were to get detailed information regarding a candidate's education and experience, evaluating the information obtained is problematic. As a result many voters choose not to vote in the race.³⁶⁹ Public opinion polls support the notion that voters describe themselves as having little information on the judicial candidates.³⁷⁰ Because of the difficulty of information evaluation and the inability to rely on party cues, low information voters may decide to vote on gender or name cues, or fail to vote entirely.

Voters generally do not vote randomly, even in low-information elections.³⁷¹ Although the extent to which voters take cues from ballot information has not been studied in North Carolina judicial elections, out of the nineteen nonpartisan appellate races that place one man against one woman, women have won fifteen of those contests.³⁷² The

367. Compare Sarah Wheaton, *Comparing Ballot Lengths Around the Country*, N.Y. TIMES: THE CAUCUS (Feb. 6, 2013, 12:04 PM), http://thecaucus.blogs.nytimes.com/2013/02/06/comparing-ballot-lengths-around-the-country/?_r=1 (indicating that the average state ballot contains seventeen elective offices), with CONSOLIDATED 2014 SAMPLE BALLOT PITT COUNTY, NC, NOV. 4, 2014, available at <http://www.pittcountync.gov/depts/elections/documents/sample-ballot.pdf> (last visited Aug. 17, 2015) (showing thirty-four elective offices).

368. See Garrett, *supra* note 365, at 1579 (noting that "voter fatigue" can cause a voter to stop voting for offices and questions before they reach the end of the ballot).

369. See generally *id.* (noting the probable effects of ballot notations).

370. See *History of Reform Efforts: Opinion Polls and Surveys*, NAT'L CENTER FOR ST. COURTS (2002), http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state= (providing that, in North Carolina, "57% reported having little or no information about judicial candidates in the last election").

371. See generally Monika L. McDermott, *Race and Gender Cues in Low-Information Elections*, 51 POL. RES. Q. 895 (1998) (noting earlier research establishing that voters use party-identification and incumbency cues when voting in low-information elections and arguing that voters also use gender and racial cues).

372. N.C. STATE BD. OF ELECTIONS, 2004 GENERAL ELECTION RESULTS, available at <http://www.ncsbe.gov/ncsbe/Elections/Election-Results-Display?ED1=11xx02xx2004&EL1=GENERAL&YR1=2004&CR1=A> (last visited Aug. 17, 2015) (Sarah Parker, Linda McGee, and Barbara Jackson defeated their male opponents); 2006 GENERAL ELECTION RESULTS, *supra* note 314 (Sarah Parker and Patricia Timmons-Goodson

Supreme Court of North Carolina went from six men and one woman in 2002³⁷³ to four women and three men in the beginning of 2012.³⁷⁴ Similarly, the North Carolina Court of Appeals has gone from eleven men and one woman in 1992 to seven women and eight men today.³⁷⁵

There is also evidence that voter information and partisan judicial elections are affected by partisan sweeps in other branches of government.³⁷⁶ For example, in 1994, Republicans swept the North Carolina House of Representatives.³⁷⁷ Simultaneously, all four Republican candidates for state appellate court seats won handily, even though three of the four candidates were outspent by their opponents.³⁷⁸ Partisan sweeps also sometimes indicate partisan polarization. Particularly in communities like North Carolina, in which most African-Americans are Democrats, partisan sweeps would tend to indicate racial polarization.³⁷⁹ But, nonpartisan elections have been remarkably free of both kinds of polarization. For example, in winning elections in 2012, 2010, and 2008, some Republican candidates obtained more than 30% of the black vote, a

defeated their male opponents while Rachel Lea Hunter did not); 2008 GENERAL ELECTION RESULTS, *supra* note 320 (Jewel Ann Farlow, Cheri Beasley, and Linda Stephens defeated their male opponents while Suzanne Reynolds and Kristin Ruth did not); 2010 GENERAL ELECTION RESULTS, *supra* note 321 (Barbara Jackson and Martha Geer defeated their male opponents); 2012 GENERAL ELECTION RESULTS, *supra* note 296 (Linda McGee and Wanda Bryant defeated their male opponents); N.C. STATE BD. OF ELECTIONS, 2014 GENERAL ELECTION RESULTS [hereinafter 2014 GENERAL ELECTION RESULTS], available at http://enr.ncsbe.gov/ElectionResults/?election_dt=11/04/2014&county_id=0&office=JUD&contest=0 (last visited Aug. 17, 2015) (Robin Hudson, Cheri Beasley, and Lucy Inman defeated their male opponents while Ola M. Lewis did not).

373. See 2001 MANUAL, *supra* note 239, at 637–43.

374. ELAINE F. MARSHALL, N.C. SEC^Y OF STATE, NORTH CAROLINA MANUAL 2011–2012, at 489–96.

375. See *NC Court of Appeals Judges Biographies*, N.C. CT. SYS., <http://appellate.nccourts.org/Bios/?c=2> (last visited Aug. 17, 2015) (listing the current members of the North Carolina Court of Appeals).

376. See Trosch, *supra* note 230, at 209 (discussing the “sweep factor” of judicial elections where judicial candidates benefit from the popularity of their party’s other candidates for nonjudicial offices, as exemplified in North Carolina’s judicial elections in 1988 and 1994).

377. Dan Balz, *After the Republican Sweep*, WASH. POST (Nov. 10, 1994), <http://www.washingtonpost.com/archive/politics/1994/11/10/after-the-republican-sweep/7d5ffc36-3904-40c9-809a-2c18cd12d53e/>.

378. Trosch, *supra* note 230, at 209.

379. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACKS & THE 2012 DEMOCRATIC NATIONAL CONVENTION 3, 9 (2012), available at <http://jointcenter.org/sites/default/files/Blacks%20and%20the%202012%20Republican%20National%20Convention.pdf>.

result that was not present in similar elections during the 1994–2002 period.³⁸⁰

Meanwhile, campaign advertising is used to inform voters about candidates. The failure of the state to provide sufficient funds for statewide coverage by television is theoretically offset by the judicial voter guide, which the state board of elections has provided for all voters since the enactment of the JCRA in 2004.³⁸¹ Each voter in the state receives a voter guide briefly describing the judicial contests in the primary and general elections.³⁸² The voter guide does not contain partisan identification cues but does contain photographs, biographical information, and nonpartisan endorsements.³⁸³ Although edited by the staff at the state board of elections, candidates provide the information.³⁸⁴ Thus, the voter guide identifies the name, race, and gender of candidates, as well as other information that the candidates consider persuasive. Unfortunately, the effectiveness of the voter guide to the voters has not been empirically tested in North Carolina. But voter roll-off suggests that voter guides may not be particularly effective.³⁸⁵

E. Partisanship

The final criticism of public financing is that it did not eliminate partisanship in judicial elections, but simply moved the discussion underground.³⁸⁶ In my experience, political parties generally endorse their affiliates in the nonpartisan judicial races and help voters to identify their affiliates through informational tools such as flyers at polling places. As a result, candidates of both parties tend to garner more votes in areas in which their affiliate parties hold a majority of the electorate. Since it is very difficult for a statewide judicial candidate to create a personal campaign network across the state, the candidate must tap into the network of one of the two major parties in order to have a realistic chance at winning.

380. *See id.* at 13. For an opinion discussing the relationship between the importance of partisan “cue” for black minorities in nonpartisan elections, see *LaRoque v. Holder*, 831 F. Supp. 2d 183 (2011), *reversed in part, vacated in part*, 679 F.3d 905 (D.C. Cir. 2012).

381. Act of Oct. 10, 2002, ch. 158, § 1, 2002 N.C. Sess. Laws 615, 622 (codified as amended at N.C. GEN. STAT. § 163-278.69 (2014)) (providing for the judicial voter guide).

382. *Id.*

383. *Id.*

384. *Id.*

385. *See supra* notes 352–56 and accompanying text.

386. Brian P. Troutman, *Party Over? The Politics of North Carolina’s “Nonpartisan” Judicial Elections*, 86 N. C. L. REV. 1762, 1786 (2008).

Nevertheless, in my experience, the partisan polarization that party identification brings is not as extreme as when the partisanship is indicated on the ballot. Similarly, neither is the racial polarization that partisanship can bring in heavily black or white areas of the state. On a positive note, the experience of an open primary system where all voters participate in nominating and electing candidates can serve as a model to reduce the adverse effects of partisan polarization in elections.

CONCLUSION

For the past thirty years, North Carolina has been a laboratory for a number of electoral experiments to improve our democracy, including the elimination of at-large elections, nonpartisan district election of judges, and voter guides for judicial candidates. In terms of judicial independence, the JRCA is on balance a successful experiment. While it did not meet all the goals of its proponents, it had sufficient benefits to highlight the need for reform of our judicial elections.

North Carolina has historically provided a constitutional structure that has ensured general judicial independence. Terms are for eight years, salary and jurisdiction are secured according to the constitution, and as a result, there is institutional judicial independence. Election of judges, however, is always problematic because elections introduce accountability to a constituency whose popular will is subject to change. A judge's duty, once elected, is to apply the law fairly. These two forces—democratic accountability and judicial responsibility—create a conflict, and thus, a double bind for a judge seeking office.

Nevertheless, the history of North Carolina shows that relative judicial independence has been secured for most of its judiciary—first through legislative election of judges who served “during good behavior,” and later through democratic, one-party political domination. Since political competition began in the 1960s, the professional bar organizations pressed first for merit selection and later for publicly financed campaigns or appointment schemes that eliminate elections. The energy behind these organizations is to return North Carolina to the archetype of judicial selection—appointment for good behavior.

It was the failure of the professional bar to convince the general assembly that an inherent problem exists in any judicial election

scheme.³⁸⁷ The result of this continued failure was a commitment to make the best of a bad situation and eliminate the worst features of an elective system. This led to the JCRA. The JCRA was designed to achieve two goals: first “to ensure the fairness of democratic elections in North Carolina,” and second “to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections.”³⁸⁸

The JCRA fairness goals were achieved in part and elusive in part. Public funding was utilized by most candidates and equalized campaign resources among both incumbents and challengers. In 2008, 2010, and 2012, for example, the JCRA moderated wide partisan swings in election results by ameliorating severe partisan and racially polarized voting. Furthermore, nonpartisan elections freed both candidates and political organizations from the prejudices of organized politics so that crossover voting can more easily occur. However, roll-off in judicial elections shows that, without party cues, the electorate does not participate in judicial elections and that, despite the presence of a voter guide, voters choose not to vote based on the information the board of elections provides.

Finally, the JCRA has not reduced the potential influence of money on the elections. The Fairjudges.net campaign and independent expenditures by various groups in 2012 show that the national trend of outside money in elections will continue. What effects this will have on relative judicial independence will depend on the electorate and its willingness to continue to employ jurists who are experienced in their positions and whom they have previously elected.

Reflecting on these conclusions, I conclude that, whatever system North Carolina selects in which to place qualified people in judicial office—whether by popular election, legislative election, gubernatorial appointment, or some other plan—most selectees perform well and rise to the occasion. The structural independence a judge enjoys protects him while in office from political pressure. However the retention of a judge in office after an initial term can be problematic because it causes a judge to audition for renewal to the public, interests groups, and others of influence. This auditioning comes at a price. In my view, retention elections would resolve this

387. The problem is eloquently described by Chief Justice Roberts in his opinion in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666–67 (2015).

388. Act of Oct. 10, 2002, ch. 158, pmb., 2002 N.C. Sess. Laws 215, 616.

tension and provide an incentive for judges to audition in a manner that would further ensure judicial independence.

The best alternative would be to return to the Founders' view that once appointed, a judge would serve for a term of good behavior. This alternative would be the only plan that would fit the archetype of judicial behavior, and it is one that is used throughout the world.

POSTSCRIPT

In the election of 2014, I announced as a candidate for the Supreme Court of North Carolina and was opposed by sitting court of appeals Judge Sam J. Ervin, IV.³⁸⁹ Prior to the election, I was appointed to the supreme court by Governor McCrory, and I took office on September 6, 2014.³⁹⁰

Elections were held for four seats on the Supreme Court of North Carolina and four seats on the court of appeals.³⁹¹ An at-large election was held for one of those court of appeals seats after Chief Justice John Martin retired in August 2014.³⁹² The Martin seat on the court of appeals drew nineteen contestants.³⁹³

The annual salary (exclusive of retirement benefits) as a first-term supreme court justice in 2014 was \$139,896 per year for the first five years of the term, then \$146,611 for the last three years of the term.³⁹⁴ The annual salary as a first-term court of appeals judge was \$134,109 per year for the first five years of the term, then \$140,546 for the last three years of the term.³⁹⁵ The present value of these jobs, then, was \$1,074,372.16 per term for a supreme court justice and \$1,029,928.50 per term for a court of appeals judge.³⁹⁶ The following chart compares the amount spent by the candidates campaigning for these offices in 2014 to obtain the right to earn these salaries.

389. 2014 GENERAL ELECTION RESULTS, *supra* note 372.

390. Justice Robert N. Hunter, Jr. *To Be Installed as 95th Associate Justice of Supreme Court on Friday*, N.C. CT. SYS. (Sept. 9, 2014), <http://www.nccourts.org/News/NewsDetail.asp?id=1466&type=1&archive=False>.

391. 2014 GENERAL ELECTION RESULTS, *supra* note 372.

392. Ann Blythe, *A Whopping 19 Candidates Vying for One NC Court of Appeals Seat*, CHARLOTTE OBSERVER (Oct. 18, 2014), <http://www.charlotteobserver.com/news/local/crime/article9203663.html>.

393. 2014 GENERAL ELECTION RESULTS, *supra* note 372.

394. HUMAN RES. DIV., N.C. ADMIN. OFFICE OF THE COURTS, JUDICIAL OFFICIAL SALARIES INCLUDING LONGEVITY PAY EFFECTIVE JULY 1, 2014 (on file with the North Carolina Law Review).

395. *Id.*

396. See N.C. GEN. STAT. § 8-47 (2014) (providing the calculation for present cash value of annuities).

Table 4. Total Expenditures per Candidate in 2014³⁹⁷**Chief Justice (Parker)**

Mark Martin	\$655,125.22 ³⁹⁸	*
Ola M. Lewis	\$212,964.84 ³⁹⁹	

Associate Justice (Martin)

Bob Hunter	\$404,211.07 ⁴⁰⁰	
Sam J. Ervin, IV	\$664,957.59 ⁴⁰¹	*

Associate Justice (Hudson)

Eric Levinson	\$566,775.76 ⁴⁰²	
Robin Hudson	\$733,403.94 ⁴⁰³	*
Jeannette Doran	\$11,690.23 ⁴⁰⁴	

Associate Justice (Beasley)

Mike Robinson	\$395,586.82 ⁴⁰⁵	
Cheri Beasley	\$347,918.02 ⁴⁰⁶	*

397. “*” denotes winning candidate.

398. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, MARTIN FOR CHIEF JUSTICE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132391&TP=SUM (last visited Aug. 17, 2015).

399. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT JUDGE OLA M. LEWIS SUPREME COURT, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132279&TP=SUM (last visited Aug. 17, 2015).

400. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, BOB HUNTER FOR JUSTICE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132421&TP=SUM (last visited Aug. 17, 2015).

401. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, ERVIN FOR SUPREME COURT, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132443&TP=SUM (last visited Aug. 17, 2015).

402. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, LEVINSON COMMITTEE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132212&TP=SUM (last visited Aug. 17, 2015).

403. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, RE-ELECT JUSTICE HUDSON, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132464&TP=SUM (last visited Aug. 17, 2015).

404. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, JEANNETTE DORAN FOR JUSTICE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132743&TP=SUM (last visited Aug. 17, 2015).

405. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, MICHAEL ROBINSON FOR NC SUPREME COURT, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132101&TP=SUM (last visited Aug. 17, 2015).

2015] *ELECTIONS & JUDICIAL INDEPENDENCE* 1887**N.C. Court of Appeals Judge (Hunter)**

Bill Southern	\$49,278.50 ⁴⁰⁷	
Lucy Inman	\$401,615.40 ⁴⁰⁸	*

N.C. Court of Appeals Judge (Stroud)

Donna Stroud	\$8,536.41 ⁴⁰⁹	*
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N.C. Court of Appeals Judge (Davis)

Mark Davis	\$394,820.22 ⁴¹⁰	*
Paul Holcombe	\$53,450.89 ⁴¹¹	

406. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, JUSTICE CHERI BEASLEY COMMITTEE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132247&TP=SUM (last visited Aug. 17, 2015).

407. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT JUDGE BILL SOUTHERN, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=131849&TP=SUM (last visited Aug. 17, 2015).

408. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT JUDGE LUCY INMAN, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132403&TP=SUM (last visited Aug. 17, 2015).

409. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO RE-ELECT JUDGE STROUD, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132102&TP=SUM (last visited Aug. 17, 2015).

410. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, JUDGE MARK DAVIS COMMITTEE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=133247&TP=SUM (last visited Aug. 17, 2015).

411. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, FRIENDS OF JUDGE PAUL HOLCOMBE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132268&TP=SUM (last visited Aug. 17, 2015).

N.C. Court of Appeals Judge (Martin)

John M. Tyson	\$75,723.58 ⁴¹²	*
John S. Arrowood	\$129,489.80 ⁴¹³	
Marty Martin	\$13,056.01 ⁴¹⁴	
Marion Warren	\$11,130.49 ⁴¹⁵	
Hunter Murphy	\$63,423.76 ⁴¹⁶	
Elizabeth D. Scott	\$42,420.02 ⁴¹⁷	
Ann Kirby	\$4,776.00 ⁴¹⁸	
Chuck Winfree	\$14,447.87 ⁴¹⁹	
Daniel Donhue	Unclear	
Valerie Zachary	\$10,212.64 ⁴²⁰	
Tricia Shields	\$57,630.43 ⁴²¹	
Keischa Lovelace	Unclear	
Jody Newsome	\$5,287.03 ⁴²²	

412. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, TYSON FOR COURT COMMITTEE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132189&TP=SUM (last visited Aug. 17, 2015).

413. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, THE JUDGE ARROWOOD COMMITTEE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132870&TP=SUM (last visited Aug. 17, 2015).

414. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, ELECT MARTY MARTIN JUDGE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132335&TP=SUM (last visited Aug. 17, 2015).

415. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT MARION WARREN FOR JUDGE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132110&TP=SUM (last visited Aug. 17, 2015).

416. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, HUNTER MURPHY FOR JUDGE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=131988&TP=SUM (last visited Aug. 17, 2015).

417. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT ELIZABETH SCOTT, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132572&TP=SUM (last visited Aug. 17, 2015).

418. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, KIRBY FOR COURT OF APPEALS, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=131724&TP=SUM (last visited Aug. 17, 2015).

419. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT WINFREE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=133007&TP=SUM (last visited Aug. 17, 2015).

420. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT VALERIE JOHNSON ZACHARY TO NC COURT OF APPEALS, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132078&TP=SUM (last visited Aug. 17, 2015).

421. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, ELECT TRICIA SHIELDS COMMITTEE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132446&TP=SUM (last visited Aug. 17, 2015).

Jeffrey M. Cook	\$1,331.00 ⁴²³
Lori G. Christian	\$22,957.17 ⁴²⁴
Betsy Bunting	Unclear
J. Brad Donovan	\$17,714.75 ⁴²⁵
Abe Jones	\$22,873.01 ⁴²⁶
Sabra Jean Faires	\$62,854.00 ⁴²⁷

These figures do not include money spent by independent expenditure committees. Although figures for independent expenditure committees are difficult to verify, press reports and independent expenditure media filings report that an estimated \$1,300,000 was spent on the elections for the Supreme Court of North Carolina.⁴²⁸ If so, the total sum of expenditures for many appellate seats approximately equaled or exceeded the present value of the jobs sought. Does this system make economic sense? Could not the funds donated to candidates and the independent expenditure committee funds be more beneficially spent on elections in the “political” branches of government in which political and budgetary policies are made?

422. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, NEWSOME FOR COURT OF APPEALS, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132337&TP=SUM (last visited Aug. 17, 2015).

423. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT JEFFREY M. COOK, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_doc_results.aspx?ID=STA-918WXZ-C-001&OGID=29080 (last visited Aug. 17, 2015).

424. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, ELECT JUDGE LORI CHRISTIAN, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132096&TP=SUM (last visited Aug. 17, 2015).

425. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, DONOVAN FOR COURT OF APPEALS, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132336&TP=SUM (last visited Aug. 17, 2015).

426. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, COMMITTEE TO ELECT JUDGE ABE JONES, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132241&TP=SUM (last visited Aug. 17, 2015).

427. N.C. STATE BD. OF ELECTIONS, POLITICAL COMMITTEE DISCLOSURE REPORT, SABRA JEAN FAIRES COMMITTEE, *available at* http://app.ncsbe.gov/webapps/cf_rpt_search_org/cf_report_detail.aspx?RID=132185&TP=SUM (last visited Aug. 17, 2015).

428. See Chris Kromm, ‘Banjo Ad’ Player is Back, *Hawking a Different NC Court Candidate*, INST. FOR S. STUD. (Oct. 29, 2014, 4:00 PM), <http://www.southernstudies.org/2014/10/banjo-ad-player-is-back-hawking-a-different-nc-cou.html> (“In addition to the money raised directly by candidates, more than \$1.3 million has been spent by outside groups on the N.C. Supreme Court contests, with more expected in the final days before the campaign.”).

The chief difference I have noted between the public financing systems and the privately financed systems is the time candidates must spend raising funds. Had the publicly financed system been in place for the 2014 elections, all candidates for the supreme court would have qualified for support and most of the candidates for the court of appeals would have qualified for public support.⁴²⁹ Most importantly, there would have been an equality of resources for candidate expenditures, excluding the funds expended by independent campaigns. Under the former system, the entitlement to funds would have occurred five days after a candidate wins the primary in May. Because a candidate would have access to funds as early as May, the campaigning would have taken place without regard to fundraisers in which the judicial candidates were competing against each other and other candidates for limited resources.⁴³⁰

I only cite these figures to suggest that the economics of contesting judicial offices are askew and that the return on investment for the public is problematic. Put differently, when the cost of obtaining office is greater than the benefits that accrue to the person should that person win, then the decision to run is not economic or rational. When a rational economic actor is contemplating raising the amounts of money seen as necessary to win an election, the return on investment of time and money compared with that of private practice is impractical. Comparing my thoughts about running for office and the economics of such a venture, it does not seem a wise investment for a state to have elections, other than to have a commitment to social democracy.

When compared with the former public financing statutes, it is clear that the amount of money to be raised by a judge is more in proportion to the values he received and does not, during the election period, require him to focus his efforts completely on fundraising, as does the private funding system. Furthermore, the costs to the other “political” branches, which are also fundraising at the same time, is the diversion of resources that could otherwise be utilized by their campaigns.

In 2015, the general assembly passed a bill providing for retention elections for Supreme Court of North Carolina Justices who

429. See Act of Oct. 10, 2002, ch. 158, § 1, 2002 N.C. Sess. Laws 615, 617 (repealed 2013) (describing the requirements for qualifying for public support under the JCRA).

430. *Id.*

were previously elected by popular vote.⁴³¹ The bill dictates that the question on the ballot will be “for” or “against” the retention of the particular justice.⁴³² If the voters approve the retention, the justice is retained for another eight-year term.⁴³³ If the voters fail to approve the retention, then the seat is deemed vacant and is filled as provided by law.⁴³⁴ Retention elections will enhance both structural and relative independence by removing the financial calculations from the judicial process while still allowing public oversight and accountability for judicial decision makers.

431. See Act of June 11, 2015, ch. 66, § 1, 2015 N.C. Sess. Laws ___, (to be codified at N.C. GEN. STAT. §§ 7A-4.1 to 7A-4.2), available at <http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H222v6.pdf>.

432. *Id.*

433. *Id.* at § 1–2 (to be codified at N.C. GEN. STAT §§ 7A-4.2, -10(a)).

434. *Id.*

