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Party Over - The Politics of North Carolina's Nonpartisan Judicial Elections

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Party Over? The Politics of North Carolina’s “Nonpartisan” Judicial Elections*

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INTRODUCTION

It is often said in legal circles that a judge is a lawyer who has a politician for a friend. This observation, often repeated by critics of the judicial system and the judges who preside over it, expresses an all too common and spreading sentiment today.¹ Central to combating disillusionment with our society’s judicial system is finding a method of judicial selection that produces a judiciary that is independent, accountable, and qualified to administer society’s laws. An independent judiciary is one marked by freedom from political pressures, including party platforms and campaign finance solicitations, while an accountable judiciary is one that is responsive enough to the electorate’s needs to avoid issuing idiosyncratic rulings.

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1. See NAT’L CTR. FOR STATE COURTS, TRENDS IN STATE COURTS 1996–1997, at 43 (1997), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=429>.

While both state and national governments strive to ensure the impartiality of judges and their method of selection, a number of options have arisen for choosing judges. The most prominent choices include elections, both partisan and nonpartisan, as well as appointments.

Since the Reconstruction Era, North Carolina has opted for elections for choosing its judges instead of the previously used appointment system.² In 1996 and 2001, the state established nonpartisan elections for its superior and district court elections.³ These changes took effect in the 1998 and 2002 elections, respectively.⁴ Since 2002, North Carolina has used a system of nonpartisan elections for statewide judicial races with the aim to mitigate a rising tide of partisan politics in judicial elections, both in terms of the fundraising and campaigning required to win office, and in terms of political ideology threatening the impartiality of members of the bench.⁵ This law is known as the Judicial Campaign Reform Act of 2002 ("JCRA").⁶

While the stated goal of the JCRA was to ensure fairness and improve the quality of the North Carolina judiciary, the JCRA has done little to ameliorate increasing partisanship in North Carolina judicial elections. Rather than trying to reform a broken system that creates a judiciary produced by a largely uninformed electorate, North Carolina should instead examine other avenues for selecting its judiciary, including a return to the antebellum practice of judicial appointments or the more recent practice of partisan elections. This argument is predicated upon the success and failure of alternative selection methods in other states, as well as North Carolina's own experiences in choosing its judges, from its colonial roots to the present day.

Section I of this Comment will provide the historical framework for North Carolina's judicial selection processes, specifically discussing

2. See Stahle Linn, *The History of the North Carolina Judiciary from the Time of the Revolution to the Present Date* 13 (1907) (unpublished Ph. B. thesis, University of North Carolina at Chapel Hill) (on file with Wilson Library, University of North Carolina at Chapel Hill) (discussing the judiciary produced by North Carolina's antebellum appointment system).

3. American Judicature Society, *History of Reform Efforts: Formal Changes Since Inception*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm (last visited Aug. 29, 2008) [hereinafter American Judicature Society].

4. *Id.*

5. See N.C. GEN. STAT. § 163-278.61 (2007); *see also* § 163-322.

6. See Democracy North Carolina, *N.C. Judicial Campaign Reform Passes State Legislature*, <http://www.democracy-nc.org/nc/judicialcampaignreform/govsigns.html> (last visited Aug. 29, 2008).

the successes of the appointment system and the historical circumstances surrounding the move to an elected judiciary. The post-Reconstruction partisan elections regime is the focus of Section II, which picks up the North Carolina story in the years immediately prior to the JCRA's passage in 2002. While the partisan election system lasted for over a hundred years, Section II discusses the increasing importance of party affiliation and fundraising in judicial campaigns that motivated lawmakers when drafting and passing the JCRA. Section III provides the provisions of the JCRA itself and analyzes its impact on the two post-JCRA election cycles of 2004 and 2006. This Section also details the unintended consequences of the JCRA, its viability into the future, and the potential for the JCRA's measures to frustrate its stated purpose. Section IV discusses alternate methods of judicial selection and why they might better fit North Carolina. This Section includes discussion of voter participation, judicial independence, and accountability viewed through the experiences of other states that follow different judicial selection approaches. Finally, Section V concludes with the argument that repealing the JCRA and moving to either partisan elections or an appointment system to achieve judicial independence and accountability is consistent with the judicial philosophy of our nation's Founding Fathers and Constitutional Framers.

I. HISTORICAL OVERVIEW

An examination of judicial selection in North Carolina should properly begin with a brief discussion of its historical evolution and the pitfalls and successes of each method previously used. As was the case in the other English colonies, judges in colonial North Carolina were initially appointed by the governor,⁷ with the narrow exception that chief justices were often "appointed by the crown directly."⁸ These appointments lasted for a period of "good behavior"—meaning that removal was only allowed for cause.⁹ The practical effect of this tenure system was that it produced a kind of judicial independence, because governors could not dismiss at will judges who issued unfavorable rulings.¹⁰

7. See EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 111, 135 (1898).

8. *Id.* It should be noted that the governors were also appointed by the Crown and were not democratically elected officials. *Id.* at 134.

9. *Id.*

10. *Id.*

However, as English officials sought to tighten their grip on the colonies, this system of "good behavior" tenure was replaced with a system in which judges served merely at the whim of their governors and could be removed at any time.¹¹ Judges lost their limited independence and became beholden to the colony's executive, functionally serving as mere rubber stamps to the will of the executive.¹²

Colonial assemblies bristled at these executive power plays. In 1760, when North Carolina's Governor Dobbs received instructions from the Crown that judges should only serve at the pleasure of the governor, the colonial assembly acted quickly to restore "good behavior" tenure and safeguard the independence of the judges.¹³ However, these acts restoring "good behavior" tenure were in turn swiftly disallowed by the Crown.¹⁴ Thus, this system of a governor-appointed and pleasure-tenure judiciary persisted until North Carolina's independence, when the North Carolina Constitution of 1776 put into place a system in which the General Assembly appointed judges to be commissioned by the governor.¹⁵

Though the appointment system came under attack in other states during the era of so-called "Jacksonian democracy," North Carolina deliberately rejected the reforms undertaken by other states and retained its appointed judiciary.¹⁶ Indeed, rather than ride the growing wave of popular democracy, North Carolina's judicial reforms during that period actually served to reinforce the appointment system and

11. *Id.* at 135–37.

12. *Id.*

13. *Id.* at 135.

14. *See id.*

15. Linn, *supra* note 2, at 1. Under this system, judges still only "h[e]ld office during good behavior." *Id.*

16. *See generally* Walter F. Pratt, Jr., *The Struggle for Judicial Independence in Antebellum North Carolina: The Story of Two Judges*, 4 LAW & HIST. REV. 129 (1986) (discussing trends in state judicial selection during the era of Jacksonian democracy). Following independence, many states abolished the appointment method in favor of judicial elections. The first such state to move from appointment to democratically elected judgeships was Georgia in 1812 for inferior court judges, while Mississippi became the first state to move to democratic elections for all judges in 1832. *Id.* at 130. Most of these early moves toward elections were in direct response to court decisions invalidating popular state laws such as debtor relief provisions in Georgia or pro-nullification laws in South Carolina. *Id.* This period of "Jacksonian democracy" roughly ranged from the 1820s until the 1830s and was characterized by the belief that universal (white manhood) suffrage was a panacea for institutionalized, immoral, and elitist government. *See* PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 329–52 (1997) (describing "the advent of Jacksonian democracy"). Thus, the prevailing view during this period was that greater voter accountability in government was the key to honest government. *Id.*

shore up the judiciary's independence and insulation from both the people and their democratically elected representatives.¹⁷ The constitutional reforms of 1835, for example, provided that judges' salaries could not be decreased while they served in office, giving the judiciary an important shield against an often-used tool of improper political influence.¹⁸ The reforms also stated that judges could only be impeached for corruption, willful acts contrary to the law, or mental and physical incapacity.¹⁹ This strengthening of the appointment system arguably had a very positive effect on the North Carolina judiciary at the time. From 1832 until 1865, the North Carolina judiciary boasted towering figures in American jurisprudence, such as William Gaston and Thomas Ruffin. During that period

there was displayed in the decisions of the Court a well-nigh perfect consummation of learning and ability, acuteness and industry. No court could have boasted of a more brilliant intellect, more persevering energy, a more profound knowledge of the law than the Court which gave to North Carolina Judiciary the most brilliant period of its existence²⁰

Despite the impassioned arguments in favor of judicial appointments during this period, strong counterpoints in favor of elections existed too. First and foremost, legislative appointments produced a judiciary more representative of the legislature and its members than the state's population.²¹ Second, sitting judges often lobbied friends to sit on the bench with them, something that, if abused, could afflict the judiciary with an incestuous spoils system.²² Rather than promoting an independent judiciary, critics saw

17. See Pratt, *supra* note 16, at 131–32.

18. *Id.* at 131. The reform prohibiting the decrease of judicial salaries during a judge's term of office is also found in the U.S. Constitution as a protection intended for the federal courts. See U.S. CONST. art. III, § 1.

19. See Pratt, *supra* note 16, at 131–32.

20. Linn, *supra* note 2, at 12. It should be noted that, in stark contrast to these glowing remarks, a recent symposium entitled "The Perils of Public Homage: Thomas Ruffin and *State v. Mann* in History and Memory" was hosted at the University of North Carolina at Chapel Hill on November 16, 2007. See Ctr. for the Study of the Am. South, Conferences and Performances, <http://www.unc.edu/depts/csas/Conferences/ruffin.html> (last visited Aug. 1, 2008). This symposium explored the darker side of the North Carolina Supreme Court's jurisprudence during the Ruffin Court era, specifically its groundbreaking decision in *State v. Mann*, which provided an important, albeit unfortunate, justification for the absolute rights of masters over their slaves. *Id.*

21. Linn, *supra* note 2, at 8–9. Many prominent figures in the history of the early North Carolina judiciary were themselves former members of the legislature. *Id.* Among them were Justices Ruffin and Gaston, both of whom enjoyed careers in the legislature shortly before ascending to the state's highest court. *Id.*

22. See Pratt, *supra* note 16, at 145.

appointments as producing a system of patronage in which judges had thrown off the shackles of their executive branch masters from the colonial era only to acquire a new set of legislative masters as independent states.²³ Thus, these critics have remarked that

[t]he choice of elections was not (as myth holds) “an unthinking ‘emotional response’ rooted in . . . Jacksonian democracy”. [sic] On the contrary, the history of constitutional conventions shows that the move to elections was led by moderate lawyer-delegates to increase judicial independence and stature. Their goal was a judiciary “free from the corrosive effects of politics and able to restrain legislative power.”²⁴

These critics got their chance to change the judiciary and move to elections following the Civil War. The defeat of the Confederate States of America left North Carolina under federal occupation.²⁵ The reform packages sought by the Reconstruction governments aimed to reorganize and change the state’s judiciary in order to promote their new civil rights programs.²⁶ The Reconstruction government drafted a new constitution in 1868 that, among other things, placed the election of judges in the hands of the people.²⁷ These were nominally partisan elections, though the one-party rule system in the state (initially Republican and then replaced by the “redeemer” Democratic governments) made them effectively nonpartisan.²⁸

II. MOVING FROM “PARTISAN” TO “NONPARTISAN” ELECTIONS

The system of nominally partisan, contested general elections continued to exist more or less unchanged for over a hundred years. However, changes to the structure of the state’s courts began in earnest in 1967 when the legislature created a statewide court of

23. Roy A. Schotland, *Judicial Elections in the United States: Is Corruption an Issue?*, in GLOBAL CORRUPTION REPORT 2007, at 26, 27 (2007).

24. *Id.* (alteration in original) (citation omitted).

25. See Linn, *supra* note 2, at 12.

26. See also Richard Wormser, *The Rise and Fall of Jim Crow: Reconstruction (1865–77)*, PBS, http://www.pbs.org/wnet/jimcrow/stories_events_reconstruct.html (last visited Aug. 29, 2008).

27. Linn, *supra* note 2, at 13.

28. See Wormser, *supra* note 26; see also Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1416 (2001) (referencing the relatively nonpartisan nature of officially partisan elections in contrast with judicial elections that took place in the late 20th century). The fact that Republicans during Reconstruction and, later, Democrats into the twentieth century held electoral monopolies made general elections mere formalities to confirm the majority party’s primary election result. See *id.*

appeals.²⁹ This shake-up continued in 1977 when Governor James Hunt created a merit selection committee to fill vacancies by appointment in a partial return to the appointment process.³⁰ Small-scale reform came to lower court judges as well, when the state's superior court judgeships went to nonpartisan and local, rather than statewide, elections in 1996.³¹ District court elections followed suit and became nonpartisan in 2001.³²

It was in 2002 that the real paradigm shift in North Carolina judicial selection took place with the passage of the JCRA.³³ Any discussion of the provisions and effects of the new law warrants a discussion of the realities that existed prior to its enactment. Indeed, if the chief concern of the reforms was to diminish the growing influence of partisan politics on the North Carolina judiciary, then the years immediately leading up to the JCRA's passage gave rise to some serious concerns.

A look at the state's election returns from 1998–2002 reveals a number of troubling trends already in place. In 1998, Republican candidates for statewide judicial office—the supreme court and the court of appeals—won only three out of seven races, though they won both seats on the supreme court.³⁴ By 2000, Republicans made modest gains, prevailing in four of seven statewide races, again sweeping the supreme court races and this time taking two of five seats on the court of appeals.³⁵ Finally, by the last election prior to the JCRA becoming law, Republicans won four of five seats on the court of appeals and, again, both of the contested supreme court seats.³⁶

These increasingly partisan trends in which one party won nearly all of the contests also corresponded with increasing costs for the candidates. According to one report, the cost of running for the

29. See American Judicature Society, *supra* note 3.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. See STATE BD. OF ELECTIONS, CERTIFICATION OF THE RESULTS OF THE GENERAL ELECTION HELD ON NOVEMBER 3, 1998 BY THE STATE BOARD OF ELECTIONS, <http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/98generl/narative.pdf> (last visited Aug. 28, 2008) [hereinafter 1998 RESULTS].

35. Official Results Summary: General Election of the State of North Carolina 11/07/2000, <http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/y2000elect/stateresults.htm> (last visited Aug. 28, 2008) [hereinafter 2000 Results].

36. See 11/05/2002 Official General Election Results, http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/main_primary.asp?ED=11xx05xx2002&EL=GENERAL&YR=2002&CR=A (follow Statewide Results menu; then follow links to each respective seat on the drop-down menu) (last visited Aug. 28, 2008) [hereinafter 2002 Results].

supreme court increased by eleven percent between 1998 and 2002, while the cost of a campaign for the court of appeals jumped sixty percent during the same period.³⁷ Perhaps even more troubling is where these funds were coming from and what effects they were having (or not having) on the electoral outcomes. In 2002, candidates for the supreme court and the court of appeals raised \$1.3 million, with two thirds of this bounty coming from "attorneys, attorney-backed committees, and special interest donors frequently involved in court cases."³⁸

Although funding was increasing, it was not an indicator of success in the elections. The vast majority of donations went to incumbent Democratic judges.³⁹ Continuing a pattern beginning with Republican candidate I. Beverly Lake's victory over incumbent Henry E. Frye in 2000, Republican candidates beat their better-funded Democratic opposition for three of the five court of appeals seats in 2002.⁴⁰ All in all, Republicans won six out of seven judicial elections that year, regardless of whether or not they were outspent by their Democratic rivals.⁴¹ This represented a big turnaround from 1998. In that year, all seven of the candidates who raised more money than their opponents won their elections.⁴² What is particularly interesting about this turnaround is not merely that the Republican candidates were outspent, but also the degree to which they were outspent during their electoral routs from 2000–2002. For example, incumbent Democrats Frye and Freeman outspent their opponents by margins of four to one and two to one, respectively, in losing efforts.⁴³

37. Press Release, Democracy North Carolina, Choosing Judges: Money Given in Past Races is Restricted, Replaced Under New Program (Feb. 2004), <http://www.democracy-nc.org/nc/judicialcampaignreform/whosfunding.shtml> [hereinafter Choosing Judges].

38. *Id.* In particular, out of the nearly \$1.3 million raised in 2002, \$86,855 came from the political action committees (PACs) of trial and defense attorneys. DEMOCRACY NORTH CAROLINA, FUNDS RAISED BY APPELLATE COURT CANDIDATES IN 2002 ELECTION THAT WOULD BE RESTRICTED IN 2004, <http://www.democracy-nc.org/nc/judicialcampaignreform/funds%20restricted.pdf> (last visited Aug. 29, 2008). State political parties chipped in an additional \$198,588, and special interest groups, including the PACs of Wachovia Bank, BB&T Bank, the NC Medical Society, the Eastern Band of the Cherokee Indians, and the Communications Workers of America, collectively donated a total of \$38,816. *Id.*

39. See Choosing Judges, *supra* note 37.

40. *Id.* It also bears mentioning that the Republicans' losing Democratic rivals for the three court of appeals seats for which they were outspent were also African Americans. This adds a racial component to the analysis that might complicate the simple Republican-Democratic dichotomy. *Id.*

41. *Id.*

42. *Id.*

43. DEMOCRACY NORTH CAROLINA, SPENDING BY CANDIDATES FOR APPELLATE COURT SEATS IN NORTH CAROLINA, 1998–2002 (Feb. 2004), <http://www.democracy-nc.org/nc/judicialcampaignreform/spendingbycandidates.pdf>.

Even if fundraising prowess had been indicative of electoral success, it is questionable as to whether or not this success would have translated into impartiality on the bench. Looking to the numbers for the supreme court seats up for election in 2002, forty percent of all donations came from lawyers, with an additional twelve percent coming from businesses.⁴⁴ Thus, under the electoral regime that existed from at least 1998 until 2002, voters in North Carolina were faced with seemingly impossible choices—Democratic candidates appeared to be caught by the Scylla of special interest campaign donations in order to compete, while Republicans were beholden to the Charybdis of their partisan affiliations in order to win.⁴⁵ Neither of these choices seemed to bode well for the long-sought goals of judicial independence and accountability.

III. THE JUDICIAL CAMPAIGN REFORM ACT OF 2002

A. *The JCRA and its Provisions*

Faced with the specter of either an increasingly partisan bench or one whose members owed their positions to special interest groups, state lawmakers attempted to reverse these trends by passing the JCRA in 2002. The JCRA's stated purpose was to "ensure the fairness of democratic elections in North Carolina" by protecting voters "from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections."⁴⁶

nc.org/nc/judicialcampaignreform/spendingappellate.pdf. The above statistics are hardly unrepresentative of the trend in 2000. In the races for seats on the court of appeals, two winning Democrats outspent their Republican opponents by margins of over nine to one, while one outspent the GOP challenger by twenty-four to one. *Id.* One Democratic candidate, Judge Clarence Horton, was not so lucky, outspending Republican Doug McCullough by over thirteen to one and still losing the race. *Id.*

44. North Carolina Center for Voter Education, Graphic: How the Public Campaign Fund Has Reduced the Role of Private Money in Elections for the N.C. Supreme Court, http://www.ncjudges.org/jcra/graphic_contributions.html (last visited Aug. 1, 2008) [hereinafter North Carolina Center for Voter Education].

45. See JOHN H. FINLEY, JR., HOMER'S ODYSSEY 131–38 (Harvard Univ. Press 1978) (1904). In Greek mythology, Scylla and Charybdis were the two sea beasts that guarded the narrow Strait of Messina. *Id.* The two mythological creatures have come to be synonymous with "being caught between a rock and a hard place." CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS 56 (1997).

46. N.C. GEN. STAT. § 163-278.61 (2007). The full text of this section reads as follows:

The purpose of this Article is 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, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to

In short, lawmakers sought the dual and paramount ideals of judicial selection—independence and accountability. The two methods by which the JCRA sought to attain its goals were simple. First, the JCRA eliminated partisan affiliations from the ballots.⁴⁷ Second, the JCRA changed the campaign finance landscape by limiting campaign contributions and establishing a public campaign fund in an effort to level the playing field between judicial candidates.⁴⁸

While eliminating party affiliations was an important change, perhaps the more drastic change of the two principal reforms was the JCRA's overhaul of judicial campaign finance law. Under the new provisions in the JCRA, candidates are barred from accepting contributions in excess of \$1,000 from each non-family donor who contributes,⁴⁹ and donations from family members are capped at \$2,000.⁵⁰ Previously there had been no cap for family members, while non-family donors were limited to \$4,000 in contributions.⁵¹ This lowering of the cap on contributions makes opting into the public financing regime, a program in which taxpayers foot the bill for qualifying candidates' campaigns, an enticing alternative, because fundraising on the levels seen in previous elections is no longer permitted. The JCRA also mandates a prohibition on contributions received within twenty-one days of the general election.⁵² This provision was put in place to fight last minute fundraising drives by candidates not participating in the public financing program, though it

the integrity and credibility of the courts. Accordingly, this Article establishes the North Carolina Public Campaign Fund as an alternative source of campaign financing for candidates who demonstrate public support and voluntarily accept strict fund-raising and spending limits. This Article is available to candidates for justice of the Supreme Court and judge of the Court of Appeals in elections to be held in 2004 and thereafter.

Id.

47. See § 163-322.

48. See § 163-278.63.

49. See § 163-278.13(e2)(1). This changed the previous cap of \$4,000 for donations per person, political action committee, and entity. See North Carolina Public Campaign Financing Fund, ch. 163, § 2, 2002 N.C. Sess. Laws 615, 623 (codified as amended at N.C. GEN. STAT. § 163-278.13 (2007)), available at <http://www.ncga.state.nc.us/Sessions/2001/Bills/Senate/PDF/S1054v10.pdf>. Family members are defined here as a candidate's parent, child, brother, and/or sister. § 163-278.13(e2)(2).

50. See § 163-278.13(e2)(2). Previously, candidates' spouses, parents, and siblings could donate an unlimited amount. See North Carolina Public Campaign Financing Fund, ch. 163, § 2, *supra* note 49.

51. See *supra* notes 49–50.

52. See § 163-278.13(e2)(3).

does not bar candidates from spending more of their personal funds on their own campaigns.⁵³

Thus, at the forefront of the battle to maintain integrity in the political process is the public financing program. While the actual effects of increasing contributions on election outcomes and, subsequently, on judges' impartiality are debatable,⁵⁴ the public is nevertheless skeptical of a system with rising outside financing costs. One report states that more than seventy percent of Americans believe that campaign contributions have an impact on judges' decisions.⁵⁵ To combat this perception, the JCRA established the North Carolina Public Campaign Financing Fund in part to foster greater public faith in the accountability of judges and judicial independence from special interest money.⁵⁶

To elect into the program and receive public funds, a candidate must declare his or her intent to participate in the fund, obtain 350 qualified contributions from registered voters in North Carolina that are not below thirty times the filing fee and not above sixty times the filing fee, and obtain a certification of candidacy.⁵⁷ The JCRA also places a hard cap on initial fundraising and campaign expenditures of \$10,000 from outside donors and \$1,000 in initial financing from a candidate's personal funds.⁵⁸ A candidate's spouse, parent, child, brother, or sister is also eligible to give a maximum of \$1,000 each under the JCRA.⁵⁹ After declaring their intent to participate and raising no more than the initial contributions above, candidates are barred from raising more than \$500 from any individual contributors, with minimum qualifying contributions set at \$10.⁶⁰ Thus, the minimum amounts to be raised to qualify are \$34,500 and \$33,000 for the supreme court and court of appeals, respectively, while the

53. *See id.*; *see also* DEMOCRACY NORTH CAROLINA, LEGISLATIVE SUMMARY—SENATE BILL 1054, <http://www.democracy-nc.org/nc/voeact/jcraFinalSum.pdf> (last visited Aug. 29, 2008) [hereinafter LEGISLATIVE SUMMARY—SENATE BILL 1054].

54. *See supra* notes 39–45 and accompanying text. As indicated above, the deciding factor in partisan, privately-funded campaigns from 1998 trended away from the amount of funds raised by a candidate and more toward partisan affiliation. *Id.*

55. *See* Schotland, *supra* note 23, at 29.

56. *See* § 163-278.63.

57. *See* § 163-278.64; *see also* § 163-107 (filing fee rules); § 163-278.64(c) (certification rules).

58. *See* § 163-278.64(d)(1), (4).

59. *See* § 163-278.64(d)(1), (4).

60. *See* LEGISLATIVE SUMMARY—SENATE BILL 1054, *supra* note 53, at 2 (providing the definition for a “qualifying contribution”).

maximums are \$69,000 and \$66,000.⁶¹ After qualifying for public funds, each candidate is barred from using any funds other than these initial contributions and any funds disbursed from the public fund.⁶²

The disbursement that each candidate receives under the fund is also a function of the filing fee. For the court of appeals, qualifying candidates are eligible to receive \$137,500, whereas supreme court candidates reap the benefit of \$201,300 in campaign money.⁶³ In addition to these modest amounts, participating candidates are eligible for so-called rescue funds to match spending up to twice the initial disbursement, (either \$137,500 or \$201,300 depending on the race) if they are challenged by a non-participating candidate who spends more than the initial amount given to participating candidates.⁶⁴

The entire system of public financing would collapse without adequate capital. The program is, of course, not without expense to the state and its taxpayers, costing a total of “\$1.8 million per year or \$3.6 million per election cycle.”⁶⁵ Thus, the JCRA’s public financing program is contingent upon receiving adequate support from taxpayers. Indeed, to date there has been some reason to doubt taxpayers’ willingness to fund the program.⁶⁶ For the time being, however, the program is funded primarily by a voluntary fifty dollar contribution requested from lawyers at the time they pay their privilege license tax, as well as a three dollar elective donation on individual state income tax returns.⁶⁷

Participation in the three dollar tax donation system is especially important because it draws upon the tax base of the entire state and ends up costing the taxpayer no additional tax liability.⁶⁸ By simply

61. *Id.* The figures above are arrived at by multiplying the filing fees of \$1,150 for the supreme court and \$1,100 for the court of appeals by thirty to arrive at the minimum and by sixty to arrive at the maximum allowed in qualifying contributions under the statute. *Id.*

62. See § 163-278.64(d)(3).

63. See LEGISLATIVE SUMMARY—SENATE BILL 1054, *supra* note 53, at 2. The distribution for court of appeals candidates is 125 times the filing fee, while supreme court candidates get 175 times the filing fee. *Id.*

64. See N.C. GEN. STAT. § 167-278.67 (2007); see also LEGISLATIVE SUMMARY—SENATE BILL 1054, *supra* note 53, at 1 (“In a contested primary, [a candidate can receive] rescue funds to match opposition spending that exceeds about \$67,000—up to a total of about \$135,000 in rescue funds.”).

65. Press Release, Democracy North Carolina, N.C. Judicial Campaign Reform Passes State Legislature (Oct. 10, 2002), available at <http://www.democracync.org/nc/judicialcampaignreform/govsigns.html> [hereinafter Reform Passes State Legislature].

66. See *infra* notes 88–100 and accompanying text for a discussion on the poor public participation in public campaign financing.

67. See N.C. GEN. STAT. § 105-159.2 (2007); see also LEGISLATIVE SUMMARY—SENATE BILL 1054, *supra* note 53, at 2.

68. See § 105-159.2(b).

checking a box labeled "Yes" on his or her tax returns, the state agrees to set aside three dollars of the taxpayer's taxes to fund the North Carolina Public Campaign Fund.⁶⁹ Further, the system is set up so that only ten to twelve percent taxpayer participation is needed to make the campaign fund financially viable.⁷⁰ As far as the legal establishment in North Carolina is concerned, moral support for the nascent public financing program seems to be remarkably strong.⁷¹ Beyond the legal profession, this system has enjoyed strong bi-partisan support, with two former governors spearheading efforts to raise public awareness of the campaign and increase voter participation in the financing program.⁷²

This is not to say that the JCRA's campaign contribution and public financing provisions have been met with unanimous praise. In fact, opponents of the JCRA brought suit to overturn parts relating to contribution reporting requirements, its rescue provisions, and the prohibition on private contributions twenty-one days in advance of the election.⁷³ Thus far, however, the JCRA has survived this attempt to bring it down through judicial review.⁷⁴

On top of this effort to strike down the JCRA in the courts, there have been vigorous and continued efforts by Republican lawmakers in the General Assembly to do away with the electoral reform package.⁷⁵ While GOP lawmakers initially supported blanket provisions for public financing of elections, they have since turned against the JCRA.⁷⁶ However, though many elected Republicans oppose the JCRA, support amongst party members at large is strong, with more than seventy percent of Republican voters favoring public financing,

69. *Id.*

70. See Reform Passes State Legislature, *supra* note 65.

71. See DEMOCRACY NORTH CAROLINA, ATTORNEYS FOR JUDICIAL INDEPENDENCE AND A PUBLIC FINANCING ALTERNATIVE, <http://www.democracy-nc.org/nc/judicialcampaignreform/attylst.pdf> (last visited Aug. 28, 2008) for a list of hundreds of members of the state bar who have signed on to a formal statement of support for the new law. Among the proponents of the new public financing regime are the thirteen past state bar presidents from 1990–91 through 2002–03. *Id.*

72. See Former N.C. Governors on the Public Campaign Fund, <http://www.ncjudges.org/index.html> (follow "Video: Former N.C. Govs. Jim Hunt (D) and Jim Holshouser (R) agree that the Public Campaign Fund can help protect the integrity of our state's courts") (last visited Aug. 29, 2008).

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

74. *Id.* at 530. In *Jackson*, Judge Britt dismissed plaintiffs' claims challenging the JCRA for lack of standing as well as lack of jurisdiction. *Id.*

75. See Reform Passes State Legislature, *supra* note 65 (noting that "Republicans inside the general assembly locked arms against the bill").

76. *Id.*

while eighty-eight percent support the idea of nonpartisan judicial elections in general.⁷⁷

B. Consequences of the JCRA—The 2004 and 2006 Election Campaigns

Whatever the merits and pitfalls of the JCRA, supporters and opponents alike hardly argue that the JCRA has not had a measurable impact on the composition of the state's judiciary. On the financing side of the equation, the law has had a dramatic effect. While donations from lawyers and businesses accounted for more than half of all campaign contributions in 2002,⁷⁸ by 2004, the first election following the passage of the JCRA, donations from lawyers had fallen to eleven percent of the total.⁷⁹ Similarly, donations from businesses declined from twelve percent in 2002 to a mere four percent in 2004.⁸⁰ Thus, independence from special interest dollars and accountability to the public through the financing regime appears, at least on the surface, to have been served by nearly ridding statewide judicial campaigns of these sources of funding.

Beyond the financing consequences, however, the JCRA has arguably had a real effect on who wins a seat on the bench. While the leading indicator of success prior to the JCRA seemed to be partisan affiliation,⁸¹ the new order created by the JCRA seems to produce prejudices based on who opts in to the program.⁸² In 2004, four of five judges elected statewide participated in the public financing program.⁸³

77. *Id.* The poll was sponsored by the NC Center for Voter Education and was taken by Republican polling firm American Viewpoint. *Id.*

78. See North Carolina Center for Voter Education, *supra* note 44.

79. *Id.* On top of the drop in percentage, the absolute dollar value of attorney contributions dropped dramatically as well, from \$321,284 in 2002 to \$136,153 in 2004. *Id.*

80. *Id.* Similar to the figures for attorney contributions, the absolute dollar value of business contributions fell from \$94,860 to \$54,979 from 2002 to 2004. *Id.*

81. See *supra* notes 34–36 and accompanying text.

82. See *Reinventing Democracy: Results of the Public Financing Program in NC Court of Appeals and Supreme Court Races*, DEMOCRACY NORTH CAROLINA, <http://www.democracy-nc.org/nc/judicialcampaignreform/2004results.html> (last visited Aug. 28, 2008) [hereinafter *Results of the Public Financing Program*].

83. See *id.* Not only were all but one of the winners participants in the program, but all the second place finishers, save one, were also the recipients of public campaign funds. *Id.* There are several potential explanations for these results. First, the fundraising restrictions in the JCRA, discussed *supra* notes 48–53 and accompanying text, make it more difficult for non-participating candidates to raise adequate funds to run a viable campaign against those receiving hundreds of thousands of dollars in public funds. A more optimistic interpretation of these results is that the JCRA is having its intended result—mainly that candidates opting into the public financing system have more time to connect with voters than those who must solicit funds from private donors.

The sole non-participating winner sought public funds but failed to raise enough qualifying contributions.⁸⁴ This trend continued in 2006 as participants in the program won every single head-to-head match-up against opponents opting to forego public financing.⁸⁵ In fact, the only race in which a candidate choosing not to participate won was contested by another candidate who also opted out of public financing.⁸⁶

C. *The Judicial Campaign Reform Act Going Forward—Issues and Trends*

The lifeblood of the JCRA is its financing regime,⁸⁷ and, if preliminary indications are correct, the JCRA faces some serious questions about its sustainability. For example, though supporters claim that the public campaign fund will require only about eleven percent voter participation under the tax check-off to remain viable,⁸⁸ statistics show that participation has yet to meet these goals. Figures published by proponents of the JCRA indicate only seven percent voter participation in the public fund so far.⁸⁹ In order to cover the shortfalls in the program in 2004, the state General Assembly was forced to allocate additional money to the program and its rescue fund.⁹⁰

In addition to the seven percent of the general population who participated in the check-off method,⁹¹ attorney support for the program failed to meet expectations. While over a thousand attorneys signed on in support of the program,⁹² only twelve percent actually

84. *Id.* Barbara Jackson sought public funds but failed to qualify for them in her race against incumbent Alan Thornburg. *Id.*

85. *See Unofficial Results of 2006 NC Judicial Elections*, DEMOCRACY NORTH CAROLINA, <http://www.democracy-nc.org/nc/judicialcampaignreform/2006results.html> (last visited Aug. 28, 2008).

86. *Id.* In his successful race for a seat on the Supreme Court of North Carolina, Mark Martin did not participate in the program. His opponent, Rachel Lea Hunter, did not participate either. *Id.*

87. *See Reform Passes State Legislature*, *supra* note 65 and accompanying text.

88. *See id.*

89. DEMOCRACY NORTH CAROLINA, JUDICIAL CAMPAIGN REFORM SUCCESSSES, BY THE NUMBERS, <http://www.democracy-nc.org/nc/judicialcampaignreform/JCRAsuccess.pdf> (last visited Aug. 28, 2008). This seven percent participation in the program amounted to just over \$1 million taxpayer dollars used to finance the fund. *Id.*

90. *Id.* In 2004, the General Assembly allocated \$725,000 to the rescue fund and gave \$138,467 of unused Board of Elections funds from fiscal year 2003 to the general public campaign fund. *Id.*

91. *Id.*

92. *See DEMOCRACY NORTH CAROLINA, ATTORNEYS FOR JUDICIAL INDEPENDENCE AND A PUBLIC FINANCING ALTERNATIVE*, *supra* note 71.

bothered to tender their voluntary contributions of fifty dollars.⁹³ Also, if other states' experiments with voluntary voter check-offs are any indication, then North Carolina might have good reason to fear the program's future fiscal health. Public campaign financing for state supreme court races has existed in Wisconsin since 1979.⁹⁴ From 1979 until 1998, public participation in the voluntary check-off declined from 19.9 percent at the outset to 8.7 percent during the last year measured.⁹⁵ Since 1989, lower participation in Wisconsin's program forced the fund to pay out amounts below those promised by the statute, leading many candidates to voluntarily opt out of the system.⁹⁶ The results were little better in Minnesota, another state that has experimented with public financing. From 1980 to 1994, taxpayer participation in that state's public campaign fund declined by three percent.⁹⁷

These declines are consistent with trends nationwide, which show that voter participation in public financing for presidential campaigns has declined from a high of twenty-eight percent in 1980 to below eighteen percent in 1992.⁹⁸ These trends of declining taxpayer participation portend a potential drop in candidate participation, as found in Wisconsin, unless the state takes measures to cover shortfalls in the fund.⁹⁹ Considering the extensive publicity given to the campaign in North Carolina at its inception, including a full-court press by former North Carolina governors James Hunt and James Holshouser and national campaign finance proponent Senator John McCain of Arizona,¹⁰⁰ it is questionable that North Carolina can do much more to increase voter awareness of the program.

Putting aside the difficulty of encouraging voters to sustain the public financing fund, others oppose taxpayer-funded campaigns for different reasons. First, the program has somewhat paradoxical requirements given its goals to increase judicial accountability and independence. While the program seeks to encourage candidates to use public financing and remove special interest contributions from

93. Doug Bend, Current Development, *North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597, 604 (2005).

94. *See id.* at 605.

95. *See id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* at 605–06 (noting that “North Carolina should consider additional sources of revenue for the program to ensure that it meets its obligations to participating candidates in future elections”).

100. *See id.* at 604–05.

the electoral cycle, it also requires candidates first to raise these later discouraged private funds in order to qualify for public money.¹⁰¹ This has the effect of disqualifying some candidates who wish to participate in the public funding program but cannot raise the requisite number of initial contributions.¹⁰²

Still other critics attack the JCRA's public financing program as antithetical to the democratic process because it forces taxpayers to "donate" (through their taxes) to candidates whose views they may not endorse.¹⁰³ These critics also argue that the law's restrictions on political contributions constitute an unreasonable restraint on the freedom of speech.¹⁰⁴ Indeed, by placing limits on campaign spending, offering rescue funds to candidates who face privately-funded opposition spending in excess of public funds, and prohibiting donations twenty-one days in advance of the election,¹⁰⁵ the law limits a non-participating candidate's ability to viably educate the voters and spread his or her message. At a minimum, the JCRA's campaign finance provisions are arguably heavy-handed on candidates unwilling or unable to participate in the public, as they inhibit spending and fundraising for candidates not participating in the program.¹⁰⁶

Further, criticism of the JCRA does not end with its public campaign fund. In fact, it may be its establishment of nonpartisan elections that creates a more subtle, yet serious problem for the state in its goal of producing a quality judiciary. If the rationale for judicial elections is that they produce a judiciary accountable to the people, then nonpartisan elections produce a judiciary accountable to a narrower subset of the electorate because fewer voters are involved. One study revealed that partisan ballots create voter participation levels of over ninety percent in judicial elections.¹⁰⁷ Results for

101. See *id.* at 603.

102. Two of the fourteen candidates in 2004, including winner Barbara Jackson, failed to qualify for public funds. See DEMOCRACY NORTH CAROLINA, A PROFILE OF THE JUDICIAL PUBLIC FINANCING PROGRAM 2004-06, at 1 (Jan. 12, 2007), <http://www.democracy-nc.org/nc/judicialcampaignreform/overviewjan07.pdf> [hereinafter PROFILE OF THE PUBLIC FINANCING PROGRAM]. In 2006, court of appeals candidate Kris Bailey failed to qualify in his race against incumbent Bob Hunter. *Id.* Proponents of the JCRA argue that it strikes a balance between enabling qualified candidates to participate in the process while also creating a minimum threshold of support for those seeking to push their views using taxpayer money. See Bend, *supra* note 93, at 603.

103. See Bend, *supra* note 93, at 604.

104. *Id.*

105. See *supra* notes 49-52, 58-62, 64, and accompanying text.

106. See *supra* notes 49-51.

107. Philip L. Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. POL. 865, 872 (1979). The study reflected voter turnout in state judicial elections between the years 1948 and 1974. *Id.* at 872 tbl. 1.

nonpartisan elections are not nearly as encouraging. During the same period, nonpartisan elections averaged participation rates of less than seventy percent.¹⁰⁸

In general, the removal of party affiliation from the ballot drives down voter participation because of the importance to voters of long-term party attachment.¹⁰⁹ While voters will break party ranks to vote for candidates with personal appeal, or who support their stance on the issues, in the absence of any sort of meaningful information on the candidates, voters tend to rely on their partisan sympathies.¹¹⁰ Without party labels as a cue, some voters rely on other information present on the ballot, such as name, gender, incumbency status, etc.; others abstain from voting entirely.¹¹¹ In fact, critics who simultaneously praise the election process as one of the cornerstones of an accountable judiciary and deride partisan elections as producing biased results neglect arguments that party labels on judicial ballots are no more threatening to accountability for judges than they are for candidates in other types of races.¹¹²

An examination of the state's election returns from 1998 through 2006 reveals that North Carolina is no exception to this general trend of decreasing participation in nonpartisan elections. In comparing elections between 1998 and 2006, it is important to compare presidential election years and non-presidential election years, as increased interest in the national campaign has a tendency to drive voters to the polls. In 1998, a non-presidential election year, there were over 1.8 million votes cast in each of the statewide judicial elections.¹¹³ In 2002, another non-presidential election year and the last mid-term election year in which the state held a partisan contest,

108. *See id.*

109. *See id.* at 873.

110. *Id.* This criticism of the JCRA is slightly muted by the fact that the JCRA provides for the public funding and mailing of a voter information guide that provides information to voters. *See* N.C. GEN. STAT. § 163-278.69 (2007). In 2004, one candidate took advantage of the voter guide to identify his party affiliation to voters. *See* Results of the Public Financing Program, *supra* note 82. In this author's opinion, the efficacy of this voter guide in providing useful information to voters is arguably no greater than any other type of mass advertisement that one receives through the mail.

111. *See* Dubois, *supra* note 107, at 873. To be fair, there are numerous factors influencing voter participation in a race. According to Dubois, chief among these is the phenomenon known as "voter fatigue," in which voters are much less likely to vote in contests that appear near the bottom of the ballot. *Id.* at 872.

112. *See id.* at 886 (noting that "there are good reasons to believe that the voters in partisan judicial elections make their decisions much as they do in other low salience partisan contests").

113. *See* 1998 RESULTS, *supra* note 34.

the number rose to more than 2 million votes per contest, perhaps a function of the state's growing population.¹¹⁴

Rather than growing with the state's population, however, 2006 revealed a noticeable decline in voter participation in judicial races. In spite of the fact that the state's overall population had grown from 8,049,313 at the time of the 2000 census to a projected 8,856,505 in 2006,¹¹⁵ voter participation dropped across the board in judicial races.¹¹⁶ Participation across all contests ranged from roughly 1.5 million voters to 1.7 million voters, depending on the contest.¹¹⁷

Perhaps one could attribute this decline in voter participation to a one-time fluke that drove down voter turnout in North Carolina in 2006. However, the statistics do not support that argument. Indeed, a comparison of numbers between 2000 and 2004, the two presidential election years examined before and after the JCRA's passage, reveals the same trend. In 2000, an average of about 2.7 to 2.8 million voters cast votes for candidates for the supreme court and court of appeals.¹¹⁸ By 2004, that number had declined to between 2.5 to 2.7 million voters.¹¹⁹ Given this decline, it seems that the JCRA is having the effect of reducing the number of voters to whom North Carolina judges are accountable.

Declining voter participation is hardly the only unintended side effect of the JCRA. In fact, the choices made by the voters who decided to vote in the nonpartisan races are perhaps even more interesting. Participation in the public financing program is not the only trait that is positively linked to winning noticed since the first publicly financed election in 2004.¹²⁰ Starting with the election in 2004 and continuing in 2006, the overwhelming indicator of electoral success has been a candidate's gender. In the absence of party labels or other meaningful voter information, North Carolina voters have thus far opted to seat women to the bench in disproportionate

114. See 2002 Results, *supra* note 36.

115. U.S. Census Bureau, North Carolina QuickFacts, <http://quickfacts.census.gov/qfd/states/37000.html> (last visited Aug. 29, 2008).

116. See 11/07/2006 Official General Election Results, http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/main_primary.asp?ED=11xx07xx2006&EL=GENERAL&YR=2006&CR=A (follow Statewide Results menu; then follow each link to each respective seat on the drop-down menu) (last visited Aug. 29, 2008) [hereinafter 2006 Results].

117. *Id.*

118. See 2000 Results, *supra* note 35.

119. See 11/02/2004 Official General Election Results, http://www.app.sboe.state.nc.us/NCSBE/Elec/Results/main_primary.asp?ED=11xx02xx2004&EL=GENERAL&YR=2004&CR=A (follow Statewide Results menu; then follow links to each respective seat on the drop-down menu) (last visited Aug. 29, 2008) [hereinafter 2004 Results].

120. See *Unofficial Results of 2006 NC Judicial Elections*, *supra* note 85.

numbers.¹²¹ Election returns for 2004 and 2006 show that female candidates won all but one of the head-to-head match-ups against their male opponents.¹²² One party headhunter, whose job is to recruit judicial candidates, has said that he actively recruits female candidates with last names that will put them at the top of the ballot in order to take advantage of a purported six to eight percent advantage enjoyed by women whose names appear first on the ballot under the new nonpartisan system.¹²³ Without passing judgment on the merits of a judiciary comprised disproportionately of one gender, one is left to wonder if gender and last name as labels are any better than partisan affiliation in helping voters to make an informed choice when voting.

One final critique of the JCRA is that it simply fails to remove partisanship from elections, merely whitewashing party labels from the ballot, but not from the actual campaigns. For example, in 2004, both the Republican and Democratic Parties endorsed competing slates of candidates.¹²⁴ Much as before the JCRA's enactment, candidates endorsed by the Republican Party ran issue campaigns little different from the partisan campaigns of the past.¹²⁵ Same-sex marriage, gun rights, and the death penalty were all featured prominently in those candidates' campaigns.¹²⁶

Given the already politically-polarized campaigns, it would not be surprising to see partisanship inject itself into the races, and, in fact, that is what happened in at least one case. A Republican candidate sought to circumvent the party affiliation-free ballot entirely by

121. See 2004 Results, *supra* note 119 (showing that in a contest which pitted men against women, women won over men three times to one); see also 2006 Results, *supra* note 116 (showing that, in contests which pitted men against women, women won two times to one).

122. See 2004 Results, *supra* note 119; 2006 Results, *supra* note 116. In 2004, female candidates won three out of three head-to-head match-ups with male counterparts. 2004 Results, *supra* note 119. The race for retiring Justice Bob Orr's seat has not been included in this analysis since that seat involved an eight-way contest, pitting a number of women against a number of men, with Paul Newby emerging victorious. *Id.* Results for 2006 show that female candidates won two out of three seats, with the only male win coming in Justice Mark Martin's race against challenger Rachel Lea Hunter. See 2006 Results, *supra* note 116. Martin was the recipient of strong bipartisan support in the race. See Andrea Weigl, *Money to Fight Judge Ad Refused; Elections Board Does Call for Probe*, NEWS & OBSERVER (Raleigh, NC), Nov. 4, 2006, at B5.

123. E-mail from Paul Stam, Representative, North Carolina House of Representatives, to Brian Troutman (Feb. 13, 2008, 8:38 PM) (on file with the North Carolina Law Review).

124. See Results of the Public Financing Program, *supra* note 82. In 2004, the Republican Party endorsed "a slate of five" candidates in statewide judicial races. *Id.* Unlike 2002, however, the party saw only two of its preferred candidates win seats. *Id.*

125. See *id.* (noting that "[s]everal [Republican] candidates promoted their stances on issues such as same-sex marriage, gun rights, and the death penalty").

126. *Id.*

labeling his yard signs with the word "Conservative" and identifying himself as "your conservative Republican candidate" in the publically-funded voter guide.¹²⁷ Even worse, this happened using taxpayer funds since the candidate in question participated in the public financing program.¹²⁸ Thus, rather than banishing partisanship from the election, at least in this instance, the JCRA was responsible for the state funding it with taxpayers' money.

The 2006 campaign was similarly partisan. Both parties were heavily involved yet again, with the Republicans doling out \$91,000 in mailings to support their slate of candidates, while the Democrats spent a staggering \$235,000 to endorse their candidates in mass mailings.¹²⁹ These mailings contained language telling voters to "Know your Democratic judges."¹³⁰ On the Republican side, four of six candidates' websites identified the candidates as Republicans and noted their party's endorsement.¹³¹ Republican candidate Rusty Duke was quoted as saying, "Even though the legislature has made this a 'non-partisan' election, I want the voters to know that I am a Republican."¹³² Given recent statewide trends showing that voters tend to prefer Republicans in judicial races, one political scientist has noted that Republican candidates are disproportionately benefited when voters identify them with the Republican Party.¹³³

In addition to candidates' attempts to re-attach partisan labels, the JCRA has also failed to keep special interest groups from influencing voters. During the week before the 2006 election, Democratic candidates were the beneficiaries of a television ad campaign from a newly-formed, tax-exempt 527 organization known as FairJudges.net.¹³⁴ The group promoted candidates who it said

127. *Id.* (describing John Tyson's losing campaign efforts against Sarah Parker for a seat on the Supreme Court).

128. *Id.*

129. Andrea Weigl, *State Judicial Races Are Only Nominally Nonpartisan*, NEWS & OBSERVER (Raleigh, NC), Nov. 4, 2006, at B5. Because these expenditures were independent of the candidates' campaigns, *see id.*, the parties were able to circumvent the contribution restrictions, *see supra* note 57.

130. *See* Weigl, *supra* note 129.

131. *Id.*

132. *Id.*

133. *Id.* This observation comes from noted political scientist Andrew Taylor at North Carolina State University. *See id.*

134. Andrea Weigl, *TV Ads Highlight 4 Candidates*, NEWS & OBSERVER (Raleigh, NC), Oct. 31, 2006, at B5. The ad's script urged voters to support candidates Sarah Parker, Patricia Timmons-Goodson, Robin Hudson, and Mark Martin. All but Martin are Democrats. *Id.* However, Martin's campaign enjoyed bipartisan support. Weigl, *supra* note 122.

would “treat all people fairly.”¹³⁵ However, the group’s definition of “fair” might have been compromised given its funding and leadership. Organized by state Democratic Party operatives, the group received the bulk of its funding from the Democratic Party of North Carolina, the N.C. Academy of Trial Lawyers PAC, the Teamsters’ Union PAC, individual trial lawyers, and others.¹³⁶

FairJudges.net, which raised a total of \$207,000, used its funding to run television ads in the final week of the 2006 campaign.¹³⁷ This campaign was remarkably successful as all of the FairJudges.net-endorsed candidates won their contests.¹³⁸ Since “the ads avoided certain ‘magic words’ of ‘express advocacy,’ ” the state declined to get involved and issue candidates disadvantaged by the ads any rescue funds typically earmarked for such challenges to publicly-financed candidates.¹³⁹ Thus, by establishing a shell group under the control of the state’s Democratic Party, Democratic activists, in effect, found a way to game the system and take advantage of a loophole permitting outside tax-exempt groups to run issue ads on behalf of the party’s candidates.

This partisan meddling has led some prominent supporters of the JCRA to lose hope that the goals of the JCRA can be achieved through the law’s substance alone.¹⁴⁰ Opponents of the JCRA agree, indicating that the JCRA’s goals may be more quixotic and less than practical in a politically charged climate.¹⁴¹ The fact that election results have changed since the JCRA became law is undeniable.¹⁴² Far less clear is whether these changes are caused by the JCRA and whether they are consistent with its stated goals. While supporters of

135. Weigl, *supra* note 134.

136. See *id.* (noting that FairJudges.net was “organized by Scott Falmlen, former executive director of the state Democratic Party, and Democratic consultants Bob Havely, Peter Reichard, and Tim McKay”).

137. Weigl, *State Judicial Races are Only Nominally Nonpartisan*, *supra* note 129; see also Profile of the Public Financing Program, *supra* note 102 (“In the final week of the 2006 campaign, a group organized under IRS section 527 spent about \$200,000 on ads promoting four Supreme Court candidates as ‘fair.’ ”).

138. See 2006 Results, *supra* note 116 (showing Parker, Timmons-Goodson, Hudson, and Martin as victors in their respective races).

139. See PROFILE OF THE PUBLIC FINANCING PROGRAM, *supra* note 102, at 2.

140. See Weigl, *supra* note 129 (quoting Chris Heagarty, executive director of the N.C. Center for Voter Education, who, in reference to the elections of 2004 and 2006, stated, “[a]ctivities from the past two election cycles make me less hopeful that North Carolina’s political parties would take the high road”).

141. See *id.* (quoting then-state GOP chief of staff, Bill Peaslee, as saying that “[t]hey haven’t taken politics out of the courtroom,” and that the JCRA’s real effect was to “remove a valuable piece of information for voters”).

142. See *supra* notes 81–86 and accompanying text.

the JCRA insisted that its passage was necessary in order to ensure impartiality and promote a quality judiciary,¹⁴³ it is extremely debatable whether the preliminary election results since 2004 have produced these effects.

What the JCRA has produced is a system which elects more female candidates and fewer Republican males to the bench.¹⁴⁴ If these were its goals, then the JCRA has been a rousing success. In fact, there is some reason to think that these consequences were foreseen and encouraged by state Democratic lawmakers as an added bonus to securing the passage of the JCRA. Given the strict party-line Republican opposition to the JCRA in the State Senate, its narrow passage in a Democratically-controlled General Assembly, and even comments by supporters of the JCRA, it is questionable that the JCRA's aims are as altruistic as they may seem at first glance.¹⁴⁵ The simple truth is that, as long as elections are involved, political parties will have an interest in influencing the outcome and likely will become involved in the electoral process. Thus, given the ingenuity of operatives on both sides, there is reason to doubt that the JCRA will be able to diminish the metastasizing influence of partisan politics on judicial elections. Of course, this ignores the bigger question of whether partisan elections are a desirable way to increase judicial accountability to the voters.

IV. MOVING BEYOND THE JCRA—ALTERNATIVE METHODS OF SELECTING A JUDICIARY

Even if the JCRA proves to be a failure in terms of producing a judiciary that is impartial and accountable, there are numerous other options from which North Carolina can choose to select its judiciary. Among these are a return to partisan elections, a system of appointments, and, finally, a system of appointments with retention elections.

143. See generally N.C. GEN. STAT. § 163-278.61 (2007) (stating that the purpose of the JCRA is to "ensure the fairness of democratic elections in North Carolina").

144. See *supra* notes 120–22 and accompanying text.

145. See Reform Passes State Legislature, *supra* note 65 (indicating that the vote in the state senate was 34 to 12, with only two Republican lawmakers joining Democrats in voting for the JCRA); see also S.B. 1054, 2001–2002 Gen. Assemb., Reg. Sess. (N.C. 2002), available at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2001&BillID=S1054&submitButton=Go> (stating that the JCRA passed on its third reading in the House by a vote of 57–54); Results of the Public Financing Program, *supra* note 82 (noting that one prominent supporter of the JCRA, the group Democracy North Carolina, published a press release heralding the "good news" that three of five candidates supported by the Republican Party were defeated).

A. *Partisan Elections—Taking a Step Back or Moving Forward?*

Given the criticisms that the JCRA does not effectively and proportionately diminish the importance of party loyalties, it might seem somewhat contradictory to argue in favor of bringing back the partisan election system. However, central to arguments in favor of an electoral system is the belief that elections make judges more accountable to the will of the people and reduce the potential for idiosyncratic rulings.¹⁴⁶ Partisan elections are at the heart of ensuring accountability since they

are much more likely to assure the existence of opposition, vigorous criticism of those in power, and effective presentation of alternative policies. Political party leaders feel an obligation to recruit qualified candidates for each partisan office contested in an election, if for no other reason than to fill out and balance the party ticket.¹⁴⁷

Also, in light of arguments made by political scientists that the only information that most voters crave is party affiliation,¹⁴⁸ then, logically, the most effective way to provide voters with this information and help them make an “informed” choice is a return to partisan elections. While some could see this as a dangerous reversal inviting the politicization of the judiciary, fears that partisan elections introduce the scourge of political faction into the judiciary are overblown. Unlike the inherently political legislative branch, the judiciary lacks the institutionalized tools of political control that legislatures possess, such as appointed whips and caucuses to set party doctrine.¹⁴⁹ Thus, unlike a legislature where accountability is often a reflection of a legislator’s doctrinal purity to the party line, a judge is

146. See Michael DeBow et al., *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 396 (2002) (arguing that elections reduce idiosyncratic rulings by fostering accountability).

147. David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 774 (1976).

148. DeBow et al., *supra* note 146, at 403 (noting that the “party label is probably the most important factor in voters’ decisions in judicial races”). This argument ignores whether or not it is a good idea for voters to base their decisions on party labels. However, in considering the rationale for elections (to make judges accountable to voters and reflect their personal values), partisan elections no doubt provide voters with a solid, if incomplete, picture of where a candidate stands on different issues. *Id.* at 403–04 (noting that “the political party labels may give most voters all the information they seek” and arguing that “[t]here is much empirical support” for the proposition that voters can often get adequate information about candidates based solely on their political affiliation).

149. See generally U.N. Dev. Programme [UNDP], *Political Parties in the Legislature*, <http://www.undp.org/governance/docs/Parl-Pub-political.htm> (last visited Aug. 1, 2008) (describing the role of party whips).

often asked to issue rulings on matters upon which neither party has a stated position.

Indeed, if accountability is a paramount aim of judicial elections, then it could be strongly argued that we should embrace elections that produce the highest voter participation. The greater the participation, the greater the accountability is in a diverse electorate such as North Carolina's. Having seen that nonpartisan elections actually have a tendency to depress voter participation,¹⁵⁰ it would seem that nonpartisan elections are not the most efficient means to achieve accountability.

Further, research has proven voters' intuition that a judge's party identification matters. Generally speaking, Democratic judges tend to support a more liberal viewpoint than their Republican counterparts.¹⁵¹ A strong argument could be made that voters would benefit from easy access to a candidate's party affiliation because it would give them a quick, albeit incomplete, snapshot of a candidate's views on issues that are relevant to the voter. In the event that a judicial candidate did not share stereotyped views commensurate with his or her party affiliation, then the impetus would be placed on the candidate to work harder to educate voters on where he or she really stands.¹⁵² All citizens would arguably win by forcing candidates whose party affiliation could find a less than sympathetic electorate to engage and educate their potential constituencies.

Related to arguments for accountability is an increasing realization that judges have become policymakers, for better or for worse.¹⁵³ Since judges' rulings have real world policy consequences such as price increases, restrictions on product availability, and general changes in fundamental rights, it follows that voters should have at least a minimum of information on where a judge is likely to stand on issues that matter to voters.¹⁵⁴ Thus, in order to have true accountability, the electoral system should provide the information that most concisely conveys a candidate's views and allows voters to

150. See *supra* notes 107-11 and accompanying text.

151. See DeBow et al., *supra* note 146, at 404 (noting that in recent years "the trial bar's influence within the Democratic party has grown significantly").

152. See Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. (SPECIAL ISSUE) 31, 43 (1986) (noting that "when judicial elections are highly competitive and controversial, voters demonstrate a remarkable ability to learn about candidates . . . and to vote accordingly").

153. DeBow et al., *supra* note 146, at 404.

154. See *id.* Concrete examples of where judges have made policy to effectively raise the price or decrease the availability of consumer products are found in many products liability claims, including, but not limited to, tobacco class action suits. *Id.*

assess these views against the majority's norms.¹⁵⁵ One weakness of this position is that party labels are a gross simplification of a candidate's nuanced views on a variety of issues and also that the candidate's personal views on political issues may not (and often should not) inform their judicial rulings. However, rather than placing a "burden of information" on voters to actively seek out information on the candidates' views, it is arguably fairer to place this burden on the candidates seeking office themselves. After all, it is the candidates who are running and wish to serve the public interest and, perhaps more importantly, draw a public salary. Rather than encumbering citizens with the duty to find out more about the candidates, the burden should fall on those who seek to be civic leaders.

B. Merit Appointment—Blast from the Past or New Way Forward?

In addition to bringing back partisan elections, another option to consider is a return to the antebellum practice of judicial appointments. While the appointment process would have to be updated to take into account 21st century political realities, there is reason to hope that such a system would produce a judiciary that could be worthy of comparison to such legal giants as Ruffin and Gaston in quality and honesty, if not in renown. In fact, North Carolina has flirted with a move towards an appointment system several times in recent history.¹⁵⁶ Support for the merit system in North Carolina is stronger than one might think, with even prominent backers of the JCRA preferring a merit selection system.¹⁵⁷

One of the more serious threats to judicial impartiality and judicial elections in recent years is the rise of so-called "values

155. *Id.* (noting that voters more than ever want to know the party affiliations of judicial candidates).

156. See American Judicature Society, History of Reform Efforts: North Carolina, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state=NC (last visited Aug. 29, 2008). In 1974, a merit appointment bill nearly gained passage, succeeding in two readings on the floor of the North Carolina House of Representatives before failing in its third reading. See *id.* In 1977, both the North Carolina Bar Association and the chief justice of the state supreme court endorsed an appointment bill that ultimately failed in the House. *Id.* Successive measures passed by the North Carolina Senate in 1989, 1991, 1995, and 1999 that would have allowed for appointment fell short in the House, in part because of opposition from trial lawyers. *Id.*

157. See Reform Passes State Legislature, *supra* note 65. Former North Carolina Supreme Court Justices Burley Mitchell, James Exum, Francis Parker, and Henry Frye have all come out in support of the JCRA, though they favor a system of merit appointments. *Id.*

voters.”¹⁵⁸ These voters, rather than seeking judges who will adhere to the laws as written, instead are looking for judges who will sacrifice competence, neutrality, and faithfulness to the law upon the altar of some “higher” source of values.¹⁵⁹ Arguably the best way to combat this polarized and increasingly powerful voting bloc is to take the decision making power out of the voters’ hands completely. Critics of the appointment system, rather than attacking the method for producing an unqualified and biased judiciary, often critique the system primarily because it is outside of their ability to directly influence.¹⁶⁰

Indeed, there is a new system of judicial appointments that is replete with checks and balances to ensure that the judiciary appointed is qualified and of the highest integrity.¹⁶¹ This new system employs commissions, which are typically composed of laypeople and lawyers, with the non-lawyers usually appointed by the governor as a combination of people from within the governor’s own party and people from other groups.¹⁶² In some states, including Arizona, non-lawyers outnumber lawyers on the commission, with members of the public at-large being entitled to nominate qualified candidates to the bench.¹⁶³ Thus, this mutes some of the criticisms that appointment processes do not foster accountability to the public.¹⁶⁴ Any complaints that the commission’s meetings are secretive can be easily mitigated by opening them to members of the public.¹⁶⁵ Finally, after completing the nominating and vetting process, the state’s governor is then required to choose a candidate from a list approved by the nominating commission.¹⁶⁶ While the governor’s ultimate choice may be no less political than a partisan judicial election, the screening process is designed to ensure that the list of candidates from which the governor

158. Ted A. Schmidt, *Fair Courts Under Fire: Part I: Merit Selection of Judges: Under Attack Without Merit*, 42 ARIZ. ATT’Y 13, 14 (2006).

159. *Id.*

160. *Id.* at 15.

161. *Id.* at 16.

162. *Id.* at 16–17.

163. *Id.* at 17.

164. *Id.* In fact, the argument could easily be made that it is judicial elections that do not effectively promote accountability since surveys show that voters typically know little to nothing about the candidates for whom they vote. See Steven Zeidman, *Issues Facing the Judiciary: Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713, 717–18 (2005) (arguing that New York City voters “know virtually nothing about their judicial candidates” and suggesting that this is true of the rest of the country as well).

165. Schmidt, *supra* note 158, at 17.

166. See *id.*

makes his or her selection contains only jurists who are beyond reproach.¹⁶⁷

Thus far, recent history has shown a lasting fondness for the appointment process. Since Missouri devised the modern system in 1940, thirty-one states have followed its lead.¹⁶⁸ Nearly seventy years later, not a single state has abandoned the system since adoption.¹⁶⁹ Not only has the system endured domestically, but it has also been used by the United States abroad as a model for other countries seeking to reform their own judiciaries.¹⁷⁰

One of the strongest arguments for an appointment system is that it produces a more diverse bench than elections do since nominating commissions and state political leaders are more likely to consider diversity when composing an entire state judiciary than voters choosing judges piecemeal in elections.¹⁷¹ In order to have a truly impartial judiciary, we should also strive for a judiciary that is most reflective of our population as a whole. A 1997 study revealed that eighty-three percent of Caucasian judges believed that African Americans were treated fairly by the courts while only eighteen percent of African American members of the bench held the same opinion.¹⁷² The figures relating to gender mirror these results. While less than nineteen percent of male judges see gender discrimination as a major issue, eighty-one percent of women disagree with their male counterparts.¹⁷³ Though advocacy groups for women and minorities are presently suspicious of appointment systems as simply reinforcing the white male majority position, the facts presently do not tend to support this fear. Indeed, it actually seems to be the case that judicial elections generally reinforce white male dominance on the bench.¹⁷⁴

167. *Id.* at 17–18.

168. *Id.* at 16.

169. *Id.*

170. *Id.*

171. See generally Arizona Judicial Nominating Commissions, Frequently Asked Questions, <http://www.supreme.state.az.us/jnc/faq.htm> (last visited Aug. 1, 2008) (noting that Arizona's state constitution requires nominating commissions to consider diversity in choosing candidates for the bench).

172. James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 783 (2004).

173. *Id.* at 784.

174. See Zeidman, *supra* note 164, at 721 (noting that New York State's elected judiciary was still overwhelmingly white and male). While electoral regimes have tended to favor men, the experience in North Carolina has not been the same, at least under the nonpartisan regime put in place by the JCRA. For a discussion of this phenomenon, see *supra* notes 121–23.

Lastly, merit appointments avoid the vagaries produced by a fickle electorate. While the pitfalls of North Carolina's election system have been discussed above, it is important to note that North Carolina's experience is hardly unique. During the 1970s and 1980s, Texas discovered the perils of popular elections combined with a largely uninformed electorate.¹⁷⁵ In 1976, an ethically-challenged, upstart candidate defeated a well-respected jurist who was supported by ninety percent of the state bar for a seat on the Texas Supreme Court.¹⁷⁶ The often cited explanation for this candidate's victory is his last name—virtually identical to that of a popular U.S. senator from Texas.¹⁷⁷

Texas' problems did not end there, however. In the 1980s, plaintiffs' attorneys funneled large campaign contributions to candidates who would be sympathetic to their issues in order to create a successfully pro-plaintiff bench.¹⁷⁸ While North Carolina's campaign finance laws should help to mitigate this particular concern, they may be ill-equipped to deal with a determined plaintiffs' bar since the rescue fund provision only funds a candidate up to twice the originally allotted amount.¹⁷⁹ It is true that the state could raise the cap on potential rescue funds, but such a move would further endanger the public fund's fiscal health.¹⁸⁰ By doing away with elections entirely, North Carolina could avoid the potential problems produced by an uninformed pool of voters and save the rescue fund money currently needed to mitigate these concerns.

175. See Kyle Cheek, *Issues Facing the Judiciary: Reconciling Normative and Empirical Approaches to Judicial Selection Reform: Lessons from a Bellwether State*, 68 ALB. L. REV. 577, 580–81 (2005).

176. *Id.* at 580. In 1976, Don Yarbrough won a seat on the Texas Supreme Court despite ethical complaints and pending civil litigation, some of which later became the basis for a criminal charge against Mr. Yarbrough. *Id.*

177. *Id.* Don Yarbrough's last name was one letter removed from popular Texas Senator Ralph Yarborough. *Id.*

178. *Id.* at 581.

179. See *supra* note 64 and accompanying text.

180. See *supra* notes 89–93 and accompanying text.

C. *Appointments with Retention Elections—An Old Idea with a New Twist*

Finally, North Carolina might want to consider appointments with retention elections—an increasingly attractive option pursued by seventeen states, including California, Florida, Indiana, Maryland, Missouri, Tennessee, and Utah, among others.¹⁸¹ This system includes an appointment process but with the added element of a judge running in an uncontested election with a yes or no vote to retain his or her seat.¹⁸² The arguments in support of appointments with retention elections are numerous, but most prominently include the belief that they involve the best of both worlds—on the one hand, there is the alleged independence of an appointed judiciary and, on the other, the accountability of an election in which voters must vote to keep an appointed judge.¹⁸³

The rationale behind appointments with retention elections is similar to the rationale for merit appointments. The use of judicial nominating commissions helps screen potential judges.¹⁸⁴ Though some criticize nominating commissions comprised of lawyers and government officials as elitist and unrepresentative of the electorate, supporters counter that the members of nominating commissions are better qualified to evaluate a candidate's credentials and fitness for the bench.¹⁸⁵ Not only do commissions arguably make more informed decisions than voters, but they also have a larger pool of applicants from which to choose.¹⁸⁶ The concern with elections is that the rigors and expenses of campaigning often keep many qualified potential candidates from throwing their hats into the electoral ring.¹⁸⁷

Statistics tend to support the contention that commissions produce a better qualified judiciary. According to one report on Florida judges,

[s]ince 1970, the Judicial Qualifications Commission (the commission charged with investigating and disciplining state court judges) has disciplined sixty-nine judges. Seventy percent

181. Zach Patton, *Robe Warriors*, GOVERNING.COM, Dec. 14, 2007, <http://www.governing.com/articles/0603judges.htm>.

182. Martha W. Barnett, *The 1997–98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 416 (2000).

183. *Id.* at 423.

184. *Id.* at 418.

185. *Id.* at 418–19.

186. *Id.*

187. *See id.* at 417–18 (noting that judicial elections “cost money” and highlighting ways campaigns are financed).

of the reprimanded judges first came to the bench by election rather than by appointment. Eighty-three percent of the judges who were removed from the bench, or who resigned with charges pending against them, were elected to those positions.¹⁸⁸

Additionally, the judiciary produced by commissions is often more diverse than that chosen by the voters. While women's and minorities' groups often criticize merit selection commissions for adversely impacting their ability to seat qualified members to the bench, at least some studies have shown that merit selection commissions are responsible for most judgeships held by minorities.¹⁸⁹

The other advantage of this system is the retention election. Unlike contested elections which pit candidates against each other, retention elections are elections in which an appointed candidate runs un-contested, seeking the blessing of the voters for a continued term of service.¹⁹⁰ Judges must garner more affirmative than negative votes in order to retain their judgeships.¹⁹¹ Thus, rather than facing another candidate in their retention election, judges face a yes or no vote in which voters may vote "yes" to keep them in office or "no" to expel them.¹⁹² Of course, this system of voting is likely to create a bias in favor of keeping appointed judges in office and only removing judges with serious ethical lapses since a mere plurality of yes votes is needed to stay in office.¹⁹³ Due to its hybrid features of offering the careful vetting and expertise of a commission, which examines a candidate's record and interviews a candidate's friends, family, acquaintances, and enemies, as well as the popular accountability provided by a retention election,¹⁹⁴ the appointment system with retention elections is endorsed by the American Bar Association.¹⁹⁵

CONCLUSION

In closing, though the JCRA was passed to improve North Carolina's judiciary and safeguard its impartiality, preliminary results

188. *Id.* at 423. For further support for the notion that appointed judges are sanctioned less often than elected ones, see also Zeidman, *supra* note 164, at 721.

189. Barnett, *supra* note 182, at 419.

190. *Id.* at 416.

191. *Id.*

192. *Id.*

193. See generally Shira J. Goodman and Lynn A. Marks, *Lessons from an Unusual Retention Election*, PENNSYLVANIANS FOR MODERN COURTS, http://www.pmconline.org/files/Lessons_From_An_Unusual_Retention_Election.pdf. (discussing the practical effects of the judicial retention election system in Pennsylvania).

194. Barnett, *supra* note 181, at 416.

195. *Id.* at 423.

give reason to doubt that the JCRA will be able to live up to its goals. With the viability of its public financing regime questionable at best, and the effects of nonpartisan elections on judicial accountability to voters in doubt due to falling voter participation and insufficient voter information from which to distinguish the candidates, North Carolina should consider repealing the JCRA.

In moving to another system of judicial selection, North Carolina should consider a return to partisan judicial elections or a system of judicial appointments. Partisan elections would help increase participation in elections by giving voters the simplest piece of information upon which many are comfortable with voting—partisan affiliation. While party labels surely will not accurately and fully inform the voters about a candidate's views and qualifications, the party nominating procedure should help vet the candidates to produce a qualified judiciary or one that at least more accurately reflects the voters' values. At a minimum, placing party labels back on the ballots will impose a burden of information on the candidates. Because the purpose of a campaign is to inform voters about a candidate's stance on salient issues and his or her qualifications for office, party affiliation provides a quick, if incomplete, statement of candidates' positions for opposing candidates to vigorously rebut or confirm in their campaigns. In short, it removes the campaigns from the vacuums in which they currently operate and encourages the candidates to ameliorate their perceived partisan weaknesses and trumpet their respective strengths. Given potential resistance to any move away from elections and towards appointments, the partisan election system would be the easiest alternative to the current regime.

As another potential solution, North Carolina could replace the electoral system entirely with a merit appointment system, either with or without retention elections. North Carolina has had experience with an earlier form of this system in its history, a system which arguably seated some of the best and brightest legal minds in the state's history to the bench. A move to such a system would avoid Tocqueville's fears about judicial elections in which he said: "I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period, that the attack which is made upon the judicial power has affected the democratic republic itself."¹⁹⁶ The move to appointments would also be consistent with the intent of our federal Constitution's framers. Writing in *The Federalist Nos. 78–82*, Alexander Hamilton posited that

196. See Cheek, *supra* note 175, at 577–78 (citation omitted).

an appointed judiciary is a necessity to insulate the bench from the evils of partisan strife.¹⁹⁷

Beyond these historical arguments, however, an appointed bench enjoys the added benefits of being more diverse, and thus more reflective of the population as a whole. The modern system also has the benefit of an intense screening process that protects the public against rogue jurists who would seek to impose laws outside of the legal mainstream. While critics may slam the commissions that appoint judicial candidates, there are several democratic checks in the process to ensure that the candidates selected are in tune with the voters' values.

First, the commissions that select the candidates can involve lay persons in addition to members of the bar. Another option would be to involve the state legislature, either in the screening process to function as the commission itself, or as a body that exercises the same "advice and consent" power as the U.S. Senate does at the federal level after the commission or governor has nominated a candidate.¹⁹⁸ By involving the legislature in some capacity, voters would retain accountability over the officials who have ultimate say in appointing the judiciary. With recurring elections for General Assembly candidates, members of the legislature would likely be wary of allowing jurists outside of the mainstream to take a seat on the bench. As a further hedge for accountability, the appointment system can be augmented with retention elections, ensuring that appointed judges will face the public and be beholden to the voters for a continued term of office.

Appointments would also help to remove the cloud placed over candidates' integrity inherent in all elections involving outside campaign contributions. While the current regime attempts to mitigate this concern with a public financing program, candidates are not required to participate and, in fact, to do so requires private fundraising to qualify.¹⁹⁹ An appointment system would obviate the need to mitigate the influence of special interest contributions and instead would allow policymakers to eliminate this voter fear entirely.

Therefore, in order to realize Alexander Hamilton's dream of making the judiciary our government's "least dangerous branch,"²⁰⁰ North Carolina should abolish its nonpartisan judicial election system

197. See generally THE FEDERALIST NOS. 78-82 (Alexander Hamilton) (approving a appointed federal judiciary).

198. See U.S. CONST. art. II, § 2.

199. See *supra* notes 57-62 and accompanying text.

200. See THE FEDERALIST NO. 78 (Alexander Hamilton).

under the JCRA and move to either an appointment system or partisan elections. Such moves would not only be consistent with the goal of an independent judiciary, free from the passions of fickle partisan factions, but also with the goal of a judiciary accountable to North Carolina's diverse and growing population.

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