PUBLIC FUNDING OF JUDICIAL CAMPAIGNS: THE NORTH CAROLINA EXPERIENCE

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In recent years, the problem of selecting judges to sit on highest state courts has become a national crisis. The constitutional law made by the Supreme Court of the United States in recent decades has seriously imperiled the independence and integrity of judges elected to those important courts.¹ The Court’s 2010 decision in *Citizens United v. Federal Election Commission*² has further extended its recent practice of invoking the First Amendment to advance the interests of those seeking to deploy their wealth to influence or even control the conduct of elected officials. Little room is left for hope that a reasonably honorable system for electing judges can be maintained. Not only is money a form of speech,³ but, the Court tells us, free speech is not only a right of citizens, but it is also the right of immortal corporations to spend money to advance their special interests in the political campaigns of public officers who will by their decisions advance or impede those interests.

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¹ For a brief and questioning account of the relevant constitutional law made by the Court in recent years, see Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 101, 122-130 (2009).

² 2010 U.S. Lexis 766.

And there seems to be no room for an exception to be made with respect to judicial elections. Indeed, a majority of the present Court have manifested disdain for the idea of popular election of judges.\(^4\) Those expressing such disdain seem to envision that the manifestly corrupting effect of unconstrained use of private money to control judicial elections will force the states to accept the wisdom of putting an end to such elections. For better or worse, that seems not to be happening.

The gravity of the perils to judicial independence created by the Court’s activist extensions of the First Amendment has been visible in many states. In no state has the effort to meet the challenge to its legal system been more vigorous than in North Carolina. This essay is primarily an account of that effort. But first it briefly recounts the problems shared by all states in which judges are elected by vote of the people.

THE ENIGMA OF JUDICIAL INDEPENDENCE

In 1912, President Taft, while campaigning for re-election, proclaimed that he loved judges and loved courts. “They are my ideals,” he said. “They typify on earth what we shall meet hereafter in heaven under a just God.”\(^5\) Alas, would that it were so! Judges of all ranks and jurisdictions are afflicted with the usual array of human failings.\(^6\) Even the best and most professional judges, who carefully read and faithfully

\(^4\) For a candid expression of this view, see the opinion of Justice O’Connor in Republican Party v White, 536 U.S. 765, 788-789 (2005).


enforce legal texts, are inevitably influenced by the moral and political values they bring to the task and by their emotional conditions, including those underlying their moral and political values. And even the best judges are not immune to self-centered concerns for their own professional reputations, or their personal effectiveness in influencing public affairs, or their continued employment, or their possible promotion to a higher office. Indeed, it has been aptly said that jurors are the only public officials lacking ambition.

We hope that our judges will suppress consideration of such personal interests. But somewhat inconsistently we all prefer that our judges bring our own shared values to the tasks of interpreting and enforcing legal texts. Given the human failings that our judges share with the rest of us, the conflicting values that shape their and our understandings of what legal texts mean, and also given the large political role acquired by high courts in the American constitutional scheme, the selection of judges is an extraordinarily sensitive task for which no very good method has yet been found. Indeed, this author once heard an eminent jurist proclaim that “there is no way to pick judges that is worth a damn.”

A WORD OF HISTORY: THE ADVENT OF JUDICIAL ELECTIONS

The Founders who drafted the 18th century state and federal constitutions reflected only briefly on the problem of judicial independence and integrity. For the federal judiciary, they simply agreed to a system resembling that established by the English Parliament for the judges selected by the Crown who sat in the common law courts. The Founders preferred the 18th century model English judge to their colonial judges selected by the Privy Council, who had served at its pleasure. Many of the colonial judges had been dutifully hostile to the War for Independence and had fled the country. As a group, they were so mistrusted by the revolutionaries as to be the subject of protest in the Declaration of Independence. Federal judges, whose roles, it was assumed, would be narrowly confined, could therefore be selected by the President and confirmed by the Senate (in lieu of appointment by the King), and would, like common law judges, hold office “during good behavior.”

Imperfections in this federal scheme were almost immediately revealed. Two of President Washington’s appointments, Judge John Pickering and Justice Samuel Chase, were appointed, respectively, as a favor to their Senators seeking the approval of voters in New Hampshire.

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9 “He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.”

10 Article III, Section 1, of the Constitution.

11 Efforts had been made to remove Pickering from his position as Chief Justice of New Hampshire for reasons of insanity perhaps associated with alcoholism. RICHARD ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 70 (1971) That matter was apparently compromised by his appointment to the federal bench where the workload was light. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 at 198-200 (1997) (describing efforts to remove Pickering’s predecessor to the federal bench where he might do less harm.)
and Maryland\textsuperscript{12} who sought to get these two disrespected and unwelcome judges out of their more important states’ courts because of widely shared doubts about their sobriety, competence or integrity. Both were later impeached; Pickering was removed from the federal bench,\textsuperscript{13} but Chase survived by one vote in the Senate.\textsuperscript{14}

Meanwhile, John Marshall invented the novel “opinion of the Court” to replace the individual oral responses of judges to arguments that had been the practice of the common law judges on whom the federal officers were modeled.\textsuperscript{15} The signed opinion of the Court, especially when employed to resolve detected ambiguities in constitutional texts, was a lawmaking device that massively enlarged the political role not only of the Supreme Court, but also of the state courts that universally adopted that same instrument of lawmaking. Whose moral and political tastes would be reflected in the constitutional and other law made in their published opinions? Diverse groups had reason for concern.

For many decades, the political role of the federal courts remained a relatively minor issue. Those courts, whose dockets were largely devoted to diversity and admiralty cases, seldom decided matters of great

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\textsuperscript{12} JAMES HAW, STORMY PATRIOT: THE LIFE OF SAMUEL CHASE 162-176 (1980); CURRIE, note 9, at 32.


\textsuperscript{14} HAW, note 10, at 191-208 Richard Ellis, The Impeachment of Samuel Chase, in AMERICAN POLITICAL TRIALS 57-78 (Michael R. Belknap ed., 1981)

\textsuperscript{15} The first appearance of the opinion of the court came in the first decision rendered after the appointment of Marshall. The story is told in G. HASKINS & H. JOHNSON, op. cit. n. 11 at 383-387. There was a precedent for such a device in the opinions of the Privy Council giving advice to the Crown, but the Council was not primarily a judicial institution. See generally John Dawson, The Privy Council and Private Law, 48 MICH. L. REV. 627 (1950).
public concern. And devices were found to undo those few Supreme Court decisions that were widely disapproved.16

State courts were otherwise. North Carolina may have been one of the more peaceable jurisdictions when it came to selecting those who would exercise the greater and more obviously political power of the state judiciaries. The Kentucky legislature set the standard for others in 1824 by abolishing its highest court in order to punish its judges’ tendency to favor creditors against debtors, but that action was only a sequel to earlier feuds over who should control the judicial power of that commonwealth.17 Issues of debtor-creditor relations were unpleasant everywhere because economic deflation impeded the repayment of debt. These issues tended to divide Whigs, who often favored the protection of the interests of creditors, from Democrats, who often sought to protect improvident debtors from losing their farms and homes. Other legislatures were more constrained but were under continuing pressure to take steps in the same direction.18 And governors were soon subjected to public mistrust of their willingness and ability to pick judges who would faithfully enforce the law.

One reason for popular mistrust of judges appointed by politicians was the state of the legal profession. During the century following the Revolution it was generally unregulated and open in all but a few states to anyone who was politely introduced to a local judge by a local lawyer. That included just about any literate white male who asked to be

16 A fuller statement of the history with more references may be found in Paul D. Carrington, Judicial Independence and Democratic Accountability in Highest State Courts, 61 L. & CONTEMP. PROB. 79, 81-99 (1998).


introduced, and, in time, some others as well. Both the inherited English idea that law was an enterprise reserved for the upper class and the more ancient Roman idea that law is a science known only to the intellectual elite were simply unacceptable to 19th century Americans. But that popular premise left governors and legislators with very little basis for the selection of judges. So why not appoint a friend or political ally? Thus, a farmer with no legal training and who expressed contempt for professional lawyers served as chief justice of New Hampshire from 1785 to 1797.19

Dissatisfaction with the judicial appointments made by governors was reinforced by a shared sense that judges should be made to know that they serve the public and ought therefore be accountable to voters. Especially so as it became clear to many citizens that all American appellate judges were following the model of John Marshall, were making new law in their judicial opinions. By the middle of the 19th century, in recognition of their political role, judges were elected in many states.20

19 Chief Justice Dudley urged jurors to disregard the talk of lawyers; "be just and fear not" was his instruction. As far as the law was concerned, he said, "It is our business to do justice between the parties, not by any quirks of the law out of Coke or Blackstone, books that I never read and never will, but by common sense and common honesty as between man and man." In a famous charge to a jury, Dudley said:

Gentlemen, you have heard what has been said in this case by the lawyers, the rascals! They talk of law. Why gentlemen, it is not the law we want, but justice. They would govern us by the common law of England. Common sense is a much safer guide. . . . A clear head and an honest heart are worth more than all the law of the lawyers.


The practice led the French tourist Alexis de Tocqueville to observe that American politicians, including American judges, were greater sycophants than European courtiers, so quick were they to profess their belief in the superior wisdom of the electorate. But this faith in the voters was comparative; it reflected not so much admiration for voters and the judges whom they elected as disdain for the limited wisdom and integrity of the legislators and governors who were widely deemed unsuited for the task of selecting and governing politicized judges.

Judicial elections were also a product of a time when most lawyers and judges were well known to the agrarian communities of voters who would elect them. And they were also a product of a time in which political campaigns were the best available form of public entertainment and received the full attention of many voters, most of whom could be expected to show up at the polls on election day with some information about those for whom they voted. And campaigning was relatively inexpensive. Thus fashioned in the 19th century was the practice of electing judges by vote of the people, a practice that remains almost unique to America. The leaders who actively devised and promoted judicial elections were adherents of the populist politics espoused by President Jackson. They shaped other legal institutions as well as the courts. They also led the assault on apprenticeship requirements for admission to the bar, which


22 For comparisons, see EUROPEAN AND U.S. CONSTITUTIONALISM (G. Nolte ed. 2005). Well, there is an exception: Western Samoa, but theirs is a constitution that cannot be difficult to amend. A compilation is CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flantz eds., 1990).
they rejected as undemocratic sanctuaries of privilege. They advocated the simplification of civil procedure by abolishing the ancient common law forms of action in order to reduce the amount of arcane knowledge needed to present a case in court. They were the champions of the contingent fee and the American Rule forbidding routine fee-shifting against losing parties to protect the access of impecunious plaintiffs to judicial forums. They disfavored the mysteries of judge-made law and promoted codification to make the law’s texts equally accessible to all.

State constitutions grew in length and many came to provide much more elaborate texts constraining their judiciaries than could be found in the very succinct federal Constitution. Of all the initiatives to revise constitutions, the campaign to elect judges was perhaps the strongest and most keenly favored by the people. The most lucid explanation of the

23 For brief accounts of their efforts in this field, see SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750-1900 91-116 (1991); MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1876 32-58 (1976).


25 F. B. MACKINNON, CONTINGENT FEE FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 42044 (1964); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 527 (1986).


time was provided by a former elected justice of the Ohio Supreme Court, Frederick Grimké. Grimké explained that elected judges have greater independence from the unworthy influence of other officials and their mischievous partisan managers, and might thus be expected to secure greater trust of the people. He acknowledged the difficulty faced by voters in discerning the professional competence of judicial candidates, but endorsed as imperative the need to subordinate the judicial power to the collective will of self-governing citizens. He explained that it was not the primary aim of a judicial election to identify the professionally best-qualified person available to fill the office, or even the person whose political views or jurisprudence are preferred by voters. The primary aim was to assure that any person holding high judicial office will ever remember that he or she is merely a humble citizen of a republic representing his fellow citizens in the interpretation and enforcement of legal texts, a perspective less frequently detected in those appointed to judicial office “for life”, as federal judges were seen to do. That constitutional aim has not been abandoned by voters in many states.

The considerations identified by Grimké were not without weight. Tocqueville was impressed by the relative measure of trust vested by Americans in their courts. Francis Lieber, the Prussian immigrant and mid-century comparatist, shared that impression, although he was skeptical that electing judges could be made to work over the longer


But the high purpose of electing judges was expressed more recently by the late eminent federal judge, Richard Arnold, who observed that “the courts, like the rest of the government, depend on the consent of the governed," and they need often to be reminded of that dependence. That was, and is, indeed the point of judicial elections.

ESTABLISHING JUDICIAL ELECTIONS IN NORTH CAROLINA

Until 1799, there was no appellate court in North Carolina and hence no right to appeal an adverse judgment. That year, the trial judges appointed by the governor were authorized to form a “court of conference” to meet twice a year to review one another’s decisions. In 1805, that body was renamed as the Supreme Court, and in 1810 it was directed to reduce its decisions to written opinions, for which they were paid a modest additional fee. And the judges were authorized to designate one of their number as chief justice. In 1818, a separate institution was established. The justices were then appointed by the Governor but with the assent of two thirds of both houses of the General Assembly. Although there were ample expressions of Jacksonian political views favoring the election of North Carolina judges in the antebellum years, it was not until the 1868


32 Address of Richard Arnold, SYMPOSIUM ON THE JUDICIARY 12, 12 (Arkansas Bar Foundation 1989). Judge Arnold’s view of his role was almost surely influenced by his earlier experience as an elected office holder. He affirmed that “running for office [was] one of the biggest parts of [his] education,” and that he found it “very helpful as [he sat] on the bench to have had some experience in politics.”

constitution was adopted that North Carolina judges were elected and limited to eight-year terms.  

The political importance of the state’s supreme court was fully revealed in 19th century struggles over the size of that court that foretold the 1937 dispute over the “packing” of the Supreme Court of the United States. In 1894 and 1896, North Carolina judicial elections were bitterly contested by partisan rivals. In 1900, the state’s supreme court declared unconstitutional legislation enacted in 1899 by the Democratic General Assembly. The General Assembly responded by impeaching the two Republican members of the court deemed responsible for this indignity, but the impeachment did not receive the two-thirds vote necessary to remove the justices from office.  

Notwithstanding such troubled moments as these in North Carolina, Lord James Bryce at the end of the 19th century assessed American institutions for an audience of English barristers and counselors as roughly equal in professional respect with those who were appointed by the President even though they lacked the royal affect associated with “life

34 Id.  
35 See Kemp P. Battle, An Address on the History of the Supreme Court, 103 N.C. 339 (1883).  
38 Id at 14.
tenure”, a trait often attributed to Article III judges serving “during good behavior.”

**PROGRESSIVE REFORMS**

The Progressive Movement of the early 20th century transformed judicial elections in many states. Progressives of that time rested great hope in the ability of trained professionals to do the right thing in all fields of endeavor, but they also generally confided in the judgment and integrity of citizen-voters. Reformers of the Progressive era favored public elections, referenda, and partisan primaries, and even recall elections. A notable event of the era was President Taft’s veto of the admission of Arizona to statehood because its constitution, approved by the territory’s voters, included a provision for popular recall of a judge deemed responsible for an unpopular judgment. That constitution was amended to delete the offending clause so that President Taft might sign the statehood resolution. But the Progressive people of the new state then promptly amended their constitution to provide for popular recall of judges. This provision is the most extreme application of the principle favoring judicial accountability as a constraint on misuse of judicial

39 1 American Commonwealth 486-488 (2d ed.1891).

40 See Charles Edward Merriam & Louise Overacker, Primary Elections (1928).

41 Recall was first adopted in Oregon in 1908, and little consideration was given to the possible exclusion of judges from that provision. Allen H. Eaton, The Oregon System: The Story of Direct Legislation in Oregon (1912).

independence. It is available in California and several other western states, but has rarely been used.\textsuperscript{43}

Another Progressive reform, the partisan primary, was intended to weaken political party leadership and empower individual citizen-voters, but it had the unintended effect of increasing the likelihood that an unknown and seriously under-qualified individual with a familiar or attractive name might capture a judicial office. With rare exception, the smoke-filled room of partisan politics, whatever its failings, seldom results in the nomination of candidates who are a sordid embarrassment to the party, as can happen with open primaries. And the likelihood that a corrupt or incompetent judge would be elected was increased as the number of elected offices grew, spreading voter attention ever thinner.\textsuperscript{44}

Leaders of the organized legal profession that emerged in the late 19\textsuperscript{th} century reacted against contestable judicial elections.\textsuperscript{45} Still, many Progressives of the early 20\textsuperscript{th} century acknowledged the wisdom and


\textsuperscript{44} For example, in 1900, there were 19 judges sitting in North Carolina courts. 127 NORTH CARolina REPORTS. The number in 2000 was 138. NORTH CARolina Judges DIRECTORY (2001).

\textsuperscript{45} E.g., Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, reprinted in 20 JUDICATURE 178 (1937); William H. Taft, The Selection and Tenure of Judges, 38 A. B. A. REP. (1913). An antecedent to the Progressive efforts to reform judicial elections was led by the Association of the Bar of the City of New York, which sought in 1873 to replace the judicial election provisions of the state constitution of 1876. For an account, see, Renee Lettow Lerner, From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York, 15 GEO. MASON L. REV. 109, 156-59 (2007).
virtue of the electorate. The American Judicature Society was organized to marshal the support of the bar organizations to advance a compromise with the Progressive sentiment favoring democratic elections; the compromise was labeled “merit selection.” The “Missouri Plan” became a model of that scheme. It conferred the appointment power on the governor but limited that officer’s choice to a list of nominees selected by a panel, preferably comprised of professional elites. The scheme limited judges to terms, but required them to stand for retention by the voters without an opposing candidate, a scheme that made them accountable but not subject to the hazards of political competition.

That Progressive scheme or numerous variations on it have been over time adopted by about thirty states, most commonly only for the

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49 This last feature continues to evoke opposition from the less elite, not least including business interests. See, e.g. Without Judicial Merit, Wall Street Journal, August 23, 2008 at A10:

Though the Missouri Plan is supposed to keep politics out of the process, it has instead transferred power from voters to state bar associations and legal groups that control the judicial commission. The result is a system that’s contentious and opaque -- and has tipped the state courts steadily to the left.

A significant difference in “Missouri Plans” lies in the mode of selecting the panel. For a consideration of the options, see Tillman James Finley, Note, Judicial Selection in Alaska: Justifications and Proposed Courses of Reform, 20 Alaska L. Rev. 49 (2002); for a skeptical assessment, see Michael R. Domino, The Futile Quest for A System of Judicial “Merit” Selection, 67 Ala. L. Rev. 803 (2004).
judges sitting on highest state courts. The thirty nominating commissions vary in their memberships and the process by which their members are selected. A simple example is Wyoming’s. Its group has seven members: the Chief Justice, three lawyers elected by the bar and three non-lawyers appointed by the Governor. The Tennessee commission has seventeen members including six appointed by each speaker of a house of the legislature and representatives of diverse bar groups.

Three New England states continue to authorize gubernatorial appointments, while Virginia and West Virginia vest the initial selection in the legislature. These longstanding methods do avoid arousing resistance to elitism without incurring the disadvantages of judicial campaigns. But it remains true that over eighty percent of the trials conducted in all American courts are conducted by judges who were elected or who are subject to the risk of non-retention by vote of the people.

North Carolina remains among the states whose constitutions require competitive election of all judges. And they must, as earlier Progressives insisted, first compete in primaries in order to maximize the

50 California, for example, created a panel to select judges from a list supplied by the Governor. Cal. Gov’t Code §12011.5 (2001).
54 An advocate of this scheme is Stephen J. Ware, The Missouri Plan in National Perspective, 74 Mo. L. Rev. 751 (2009).
power of citizen-voters.\textsuperscript{56} Some observers have continued to celebrate judicial elections as an honorable democratic empowerment,\textsuperscript{57} while others have not.\textsuperscript{58}

There are four enduring problems with electing judges in the North Carolina manner. These are (1) campaign promises by candidates bearing on future judicial decisions, (2) other actions by candidates aimed at raising campaign funds, (3) voter inattention and disinformation, and (4) the opportunity and temptation of candidates to engage in degrading campaign practices. None of these problems are alleviated by the device of the non-partisan primary introduced in 2002.\textsuperscript{59} Some are reduced but not eliminated by the North Carolina scheme of public funding also

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\item E.g. \textit{Michael DeBow, The Case for Partisan Judicial Elections} (2002).


\item N.C. Gen Stat. §163-278.61.
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introduced in 2002. All are magnified by the 2010 decision of the Supreme Court of the United States.

All four of these problems have also been magnified in the last half century by two developments: the advent of television that vastly elevates the cost of political campaigns and the simultaneous elevation of the political role of highest courts that increases the importance of ideological considerations. At least partly in response to these developments, Arizona, Colorado, Connecticut, Florida, Indiana, Maryland, New York, Oklahoma, South Dakota, and Tennessee were inspired in the decade 1967-1977 to adopt variations on the Missouri Plan for their highest courts. But North Carolina stuck to general elections with primaries, although not without reconsideration of the Missouri Plan.

THE PROBLEM OF CAMPAIGN PROMISES

The first and most obvious problem is the need to constrain campaign promises limiting the independence of the judge if elected. To impose such constraint, the American Bar Association promulgated its Canons of Judicial Ethics in 1924, and in 1972 it published its Model Code of Judicial Conduct intended to be enforced by a disciplinary

60 Id.
63 REPORT OF COMMISSION ON THE FUTURE OF COURTS AND JUSTICE IN NORTH CAROLINA (1996).
64 AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, 29 (1936).
65 The Code was re-written in 1990 in ways not important to the present discussion.
system. In 2002, the Supreme Court affirmed the constitutional right of judicial candidates to make campaign promises bearing on the resolution of future cases invalidating a Minnesota law enacted pursuant to the Model Code to shield the state’s elected judges from the duties and obligations generally associated with campaign politics. The Minnesota law had provided that a “candidate for a judicial office, including an incumbent judge,” shall not “announce his or her views on disputed legal or political issues.”

A possible implication of the Court’s decision is that a state choosing to elect judges must simply forfeit the integrity and independence of its judiciary. But as J. J. Gass has forcefully affirmed, “due process rights of individual litigants are not the state’s to forfeit.” Justice O’Connor was moved by this consideration to publish a concurring opinion expressing doubt that it is possible to have an election of a disinterested judiciary deserving the public’s respect. She explained that:

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. Even if


judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public’s confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.69

Justice O’Connor had a point. And as a person who was herself once elected to such an office by the voters of Arizona,70 her view may be entitled to added weight. On the other hand, as one who was appointed to office “for life” her implication that such appointments are the only way to select independent judges has a self-congratulatory ring. That system liberating judges from any accountability for their politically motivated decisions has its problems, too.71

The Court did not join in Justice O’Connor’s proclamation,72 But its ruling was further elaborated by the United States Court of Appeals on remand, when it invalidated other Minnesota rules advanced by the American Bar Association that foreclosed partisanship of judicial


71 See generally REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds. 2006).

72 Although all the Justices are seen to share her distaste for judicial elections. George T. Patton, Caperton Ruling Is Expected to Spur States to Enhance Their Process for Judicial Recusal, 77 U.S. LAW WEEK 1780 (2009).
candidates and forbidding them to make direct requests to contributors for campaign funds.  

THE PROBLEM OF CAMPAIGN CONTRIBUTIONS

The second and closely related problem with judicial elections, greatly increased in the age of television, is the funding of vastly more expensive campaigns. Citizens often perceive large contributions as bribes. On that account, some states enacted laws limiting the size of individual campaign contributions. These provisions present a different issue under the First Amendment, and may not even work. Even under the best of circumstances, raising money for judicial candidates is problematic because of the unsuitability of judicial campaign promises


76 For reasoned skepticism about the effectiveness of these limitations, see Roy Schotland, Campaign Finance: Just an Illusion of Reform, NATIONAL L. J., Sept. 1, 2003 at 30.
made in exchange for financial support.\textsuperscript{77} And there is a related problem of a candidate’s temptation to raise excessive campaign funds or even to continue raising money after the election has been held.\textsuperscript{78} It may be possible to spend excessive campaign contributions on items such as country club dues or a new car to be used while campaigning.

The elevation of campaign expenditures was assisted by Section 527 of the Internal Revenue Code as enacted in 2001.\textsuperscript{79} By that law, Congress encouraged organizations to engage in public education that may be aimed at issues presented in judicial campaigns, and indirectly at candidates. The law allows deductions from taxable income for contributions to educational organizations.\textsuperscript{80} As long as such groups refrain from “express advocacy” of specific candidacies, their supporters can claim deductions for “soft money” campaigns addressed to issues.\textsuperscript{81}

The resemblance of big campaign contributions to bribes is most visible when a judge is asked to disqualify himself or herself from deciding a case in which a major contributor is a party. The Chamber of Commerce has the advantage of having no direct stake in cases or the


judges who decide cases. But the issue of contributions as bribes was forcefully presented in 2005 by the conduct of Justice Lloyd Karmeier of the Supreme Court of Illinois. After accepting over $350,000 from diverse employees of State Farm Insurance Company for his 2004 campaign, he denied a motion to disqualify himself from casting the deciding vote in favor of State Farm on its appeal from an adverse judgment requiring it to pay punitive damages. His court in effect held in effect that a judge cannot be disqualified merely because of a large campaign contribution. Certiorari was denied.

But the event resonated with the rising cry of “Payola Justice”, and seemed contrary to earlier decisions of the Supreme Court holding that it is a denial of due process of law to submit a case to the decision of a judge having a stake in outcome. It was followed in 2008 by a similar West Virginia case. In an extraordinary gesture, the Conference of Chief Justices was among the many groups seeking as amici to convince the Supreme Court that excessive campaign support disqualifies the judge receiving it from sitting on cases in which his benefactor is a party. The Supreme Court, by a 5-4 vote, decided in 2009 that it was indeed a denial of due process to a litigant for a judge to cast a deciding vote in favor of a


84 547 U.S. 1003 (2006)

85 The term was circulated in TEXANS FOR PUBLIC JUSTICE, PAYOLA JUSTICE: HOW TEXAS SUPREME COURT JUSTICES RAISE MONEY FROM COURT LITIGANTS (1998). The subject in Texas was examined by CBS “60 Minutes” in 1987 and 1998. For comment, see Texas Justice: The Needs for Reform and Reality Are Both Great, HOUSTON CHRONICLE, July 12, 1998 at 2C.


former client who had invested three million dollars in his election campaign. But maybe one million would be OK? The dissenters expressed concern that the decision would invite many more motions to disqualify a sitting judge. The Wall Street Journal vigorously protested the decision as a threat to the freedom of institutions to invest money in securing an amiable judiciary. But it remains the law of most states, and is now the state law of West Virginia, that judges have a duty to disqualify themselves in such circumstances.

While few doubt that much of the money contributed to judicial candidates is given for benign public motives, there can also be no doubt that such big contributions have an appearance gravely prejudicial to public confidence in the disinterest and integrity of the judiciary. Some recall the defensive utterance attributed to Chancellor Francis Bacon, and diverse judges found guilty of accepting inappropriate favors, that they only accept gifts from litigants whose cases they favored on the merits. And there are visible correlations between contributions and judicial


\[89\] 129 S.Ct. 2267-2274 -(Roberts, C.J., dissenting) (“This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be.”) and id., 2274-2275(Scalia, J., dissenting) (noting that lawyers would “contest[] nonrecusal decisions through every available means”).

\[90\] Judges and ‘Bias’: The Supremes trample on state courts, WALL STREET JOURNAL, JAN. 10, 2009 at A13.


\[92\] DANIEL R. COQUILLETTE, FRANCIS BACON 222 (1992) (“As Bacon himself said, ‘of my offense, I will say [which] I have good warrant for, they were not the greatest sinners in Israel upon whom the wall of Shilo fell . . . I was the justest judge that was in England these fifty years . . .’")
decisions that do suggest that the judicial office, if not the judge, may be purchased with campaign contributions.\textsuperscript{93} Contrary to the Supreme Court’s leanings, it is surely time for all states to join West Virginia in strengthening rules of judicial conduct requiring disqualification in cases in which a party, or his counsel, or an organization committed to the party’s interests, has made a substantial monetary investment in the judge’s election.\textsuperscript{94}

**THE PROBLEM OF VOTER INATTENTION**

The third problem with elections is that, despite the Progressive belief in the wisdom of informed voters, we are seldom sufficiently interested to know much about the candidates for whom we vote. Primaries increase the number of candidates whom we are expected to recognize, but of whom we are likely to be ignorant.\textsuperscript{95} Judicial elections are at risk of being governed by the axiom of eighty percent attributed to Charles Geyh:\textsuperscript{96} it dictates that: eighty percent of voters support the continued election of judges, eighty percent will not vote in judicial


\textsuperscript{94} See Brennan Center for Justice, Recusal Reform in the States, note 90.

\textsuperscript{95} On the demography of those who vote on judicial elections. See Lawrence Baum & David Klien, *Voter Responses to High-Visibility Judicial Campaigns*, in RUUNIG FOR JUDGE 140 (Matthew J. Streib ed., 2007).

elections; eighty percent of those who do are unable to identify the judicial candidates for whom they vote; and eighty percent suppose that judges are influenced by the campaign contributions they receive.

North Carolina has so far escaped the worst consequences of this problem of voter ignorance; these have been the occasional successes of grievously unqualified candidates who happened to share a name with a popular figure. In 1964, as an Ohioan, I rang door bells in a futile effort to help re-elect an able but doomed Justice of the Ohio Supreme Court who was opposed by a candidate who shared the name of the legendary coach of the Cleveland Browns. The worst case of misrecognition was that of Donald Burt Yarborough, who was elected in 1976 at the age of thirty-five to the Texas Supreme Court because voters thought that he was the same Don Yarborough for whom they had voted in races for other state offices (who was in turn mistaken for Ralph Yarborough, a United States Senator). But he was not. His unsuitability was not revealed until he had won the primary election and was in a commanding position in the general election. Shortly after his election, he was indicted for diverse frauds and fled to Granada. In 1986, he was convicted of bribery in a federal court and served a six-year prison term. As it happened, Justice Yarborough did not decide many cases, but that was just a lucky break for the people of Texas.

THE PROBLEM OF DEGRADING CAMPAIGNS

Finally, the advent of television dramatically elevated the availability and effectiveness of campaign methods demeaning the public office, perhaps especially judicial office, and the candidates seeking it.\textsuperscript{98} An important aim of the ABA Code was to maintain public trust in the law by forbidding those campaign practices most likely to call the integrity of judicial candidates into public question or otherwise demean the office being contested.\textsuperscript{99} And judges have been subjected to discipline for gross violations of such rules.\textsuperscript{100} But the constraints abide in the shadow of the Court’s extensions of the First Amendment that may be held to bar their enforcement.\textsuperscript{101}

Defamatory advertising in contested judicial elections has flourished in Alabama in 1996,\textsuperscript{102} in Nebraska in 1996,\textsuperscript{103} Ohio in 2000,\textsuperscript{104}


\textsuperscript{99} Other problems with private funding are recounted by Deborah Goldberg, Public Funding of Judicial Elections: The Role of Judges and the Rules of Campaign Finance, 64 Ohio St. L. J. 95, 98 (2003)

\textsuperscript{100} William Glaberson, States Reign in Truth-Bending in Court Races, NEW YORK TIMES, August 23, 2000, p.A1.


\textsuperscript{102} Stan Bailey, Ingram’s Ads Likely Caused Voter Disgust, Analyst Says, THE BIRMINGHAM NEWS, NOV. 7, 1996, P. 1A


in West Virginia in 2004,\textsuperscript{105} in Georgia in 2006,\textsuperscript{106} in Wisconsin in 2008,\textsuperscript{107} and perhaps elsewhere. In Wisconsin in 2008, a justice won election to the state supreme court by accusing his incumbent adversary of responsibility for a rape committed by a former client whom he had long ago as a public defender unsuccessfully defended against a charge of rape. The client had then served a prison term and, on his release, committed another rape. The false attribution of responsibility to the incumbent for the second rape by his former client was expressed with an investment of many, many campaign dollars so that the adversary incumbent and his former client, who are both African Americans, could be united on voters’ television screens, where their images were placed side by side while the voice-over explained the incumbent’s vicarious guilt for his client’s crime.\textsuperscript{108} The newly elected Justice Gableman invoked the First Amendment as a defense to the accusation of professional misconduct.\textsuperscript{109} The Wisconsin Judicial Commission commenced a proceeding to discipline the Justice who won his office in this way,\textsuperscript{110} but he remains on the court.


\textsuperscript{106} See Jill Young Miller, Hunstein Wins Supreme Court Race, ATLANTA JOURNAL CONSTITUTION, November 8, 2006, http://www.ajc.com/metro/content/shared-blogs

\textsuperscript{107} See Mark Pitsch, Gableman Charged with Misconduct by Jujdicial Commission over Campaign Ad, WISCONSIN STATE J., October 8, 2008.


\textsuperscript{110} A proceeding was commenced by the Wisconsin Judicial Commission on October 7, 2008 in the Supreme Court of Wisconsin.. http://www.jsonline.com/story/index.aspx?id=803843
SECONDARY EFFECTS OF HIGH COURT POLITICS

All of these problems with judicial election campaigns have been magnified by the rise of the administrative state in the 20th century that has tended to blur the distinction between judges and the executive branches, as well as by numerous judicial decisions in the last half of the century further blurring the distinction between judges and legislators. The notion of constitutional separation of powers has lost much of its claim on the popular mind. In the 1960s, the Warren Court led the way in constitutionalizing issues for resolution by Justices that voters had long assumed were subject to their popular democratic control.

For example, the Supreme Court was for a time in the 1970s clearly headed toward the abolition of capital punishment. Justices prudently detected that the voters and state legislatures were not ready to accept such a reform, but the Supreme Court of California and other state courts were inspired by its “activist” role model. There was strong criticism of the California court for diverse other decisions, but Chief Justice


112 Although not so confused as it would become when Congress undertook to determine the medical condition and decided the case of Theresa Schiavo. See, e.g., An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 STAT. 15 (2005); Schiavo ex rel Schindler v. Schiavo 403 F. 3d 1259 (2005).

113 E.g., Furman v. Georgia, 408 U. S. 238 (1972); see generally MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973).


115 Especially in the years 1970-78, under the leadership of Chief Justice Donald Wright, the court had made a number of decisions of extraordinarily high salience, causing Governor Ronald Reagan, who had appointed Wright, to despise the court and his appointee. BETTY MEDSGER, FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE BIRD AND THE COURTS 20, 28-29 (1983). Further reactions were evoked by
Rose Bird nevertheless took up the cause against capital punishment, persuading her colleagues to invoke an implied meaning of the text of the state constitution to forbid it. Her court was, however, soon reversed by the voters with an amendment to that text. And the advent of the capital punishment issue led to a sustained and ultimately successful popular struggle to rid the California courts of Chief Justice Bird. She and two sympathetic colleagues were not retained in a warmly contested election in 1986. That event was rightly alarming to the organized bar and others concerned for the professional independence of the judiciary. The campaign costs for and against the three justices exceeded the sums invested in contemporary gubernatorial elections. The campaign against Bird also elevated awareness of the ease with which voters can sometimes be influenced by the suggestion that a judge or candidate


116 Cal Const. Art I §27. This experience was repeated in 2008 on the issue of gay marriage. The court held that such marriages were protected by the state constitution. In re Marriage Cases, 43 Cal. 4th 757. And it was promptly reversed by a referendum, Proposition 8, Eliminates Right of Same-Sex Couples to Marry Act, amending the constitution, by adding §7.5 to Article I of the state constitution that borrowed the text of the statute invalidated by the court. Litigation challenging the validity of the amendment continues. John Schwartz and Jesse McKinley, California Court Weighing Gay Marriage Ban, NEW YORK TIMES, March 8, 2009 at B12.


might be “soft on crime.” Many who spent money to unseat Bird and her colleagues were not fans of capital punishment, but that was the issue most discussed by her critics. And others in other states would make use of the same tactic.

Thus, while these matters raged in California, the elected judiciary became “a political football”\(^{119}\) in numerous other states.\(^ {120}\) In the 1980s, contests in funding judicial elections between tort lawyers and defense interests became highly visible in several states, most notably Texas\(^ {121}\) and Alabama.\(^ {122}\) Much of the money for contested judicial campaigns then came from lawyers and litigants who expected to appear in court. A notable example was provided in the case of \textit{Pennzoil v. Texaco} when plaintiff’s counsel made a $25,000 contribution to the judge’s campaign fund at the very moment of filing the case.\(^ {123}\)

In 1987, in light of these developments, a major effort was made to amend the Ohio constitution to provide for merit selection.\(^ {124}\) The reform was widely supported by political parties and organizations as well as the


\(^{124}\) For an account, see John Felice, John Kilwein, and Eliot Slotnick, \textit{Judicial Reform in Ohio} in \textit{JUDICIAL REFORM IN THE STATES} 51 (Champagne & Haydel eds. 1993).
organized bar, but was soundly rejected by the electorate. In light of the demise in the public mind of the clarity of the professional role of the judiciary, voters were reluctant to surrender their power over the courts. Judicial independence from ill-informed voters was no longer a winning argument.

In 1988, the United States Chamber of Commerce established its Institute for Legal Reform and began to invest many millions of dollars each biennium to secure the election of state court judges who favor and are likely to advance the cause of “tort reform.” The Chamber was not alone; in Texas, for example, the state medical association invested significant resources and efforts to secure election of judges sympathetic to their concerns. Such sources of funding are not technically objectionable as corrupt because the organizations almost never litigate and cannot be accused of seeking favor for themselves, an accusation that could not be denied in the recent West Virginia case. But the funding groups are associations of future litigants who are quite obviously


128 Caperton v. A. T. Massey Coal Co. supra n. 87.
buying future favor for their members, not because of judges’ sense of obligation to contributors, but because of their judges’ selection as persons trusted to share the political aims favoring tort reform or the social values of their fund-providers.

The Chamber of Commerce is only one example of the “soft money” effect. Furor over abortion, gun control, and gay marriage rights has elevated the resistance of many voters to any reform that makes judges less accountable to the electorate for decisions having such moral and political content and consequences. In addition, the rise of religious fundamentalism, coupled with growing popular resentment of high visibility judicial decisions of divisive moral content (such as rulings regarding the right to life or gay marriage) has steadily elevated popular dissatisfaction with the ideal of judicial independence. 129 An extreme example was the proposed amendment to the South Dakota constitution limiting judicial immunity to expose judges to civil and criminal liability for certain unpopular decisions. 130 That proposal was soundly defeated by the voters in November 2006, 131 but its proponents hold similar ambitions in other states. 132 And many who vote in judicial elections are chiefly interested in


reversing the outcomes in a specific class of cases, never mind the qualifications of the judge.\footnote{Richard David, Electing Justice: Fixing the Supreme Court Nomination Process 103 (2005); Anthony Champaign, Interest Groups and Judicial Elections, 34 Loyola L. Rev. 1391, 1402 (2001)}

As a result of these developments, it came to be that, even in a state of average size such as Alabama, a campaign for a six-year term on the Supreme Court could cost millions of dollars\footnote{Mark Hansen, A Run for the Bench, 84 A.B.A. J. 68, 70 (1998).} and the price is similar or higher in Texas, California, Ohio, and Pennsylvania.\footnote{Id. Illinois and Michigan may have been equally expensive.} Indeed, by 2000, candidates for seats on highest state courts sometimes spent more on their campaigns than did candidates for the United States Senate running for office on the same ballot.

The Chamber’s Institute has been responsible for some of the ugliest judicial campaigns. In the 2000 Ohio campaign,\footnote{The story is told by Gottlieb, note 125.} its local group established and funded Citizens for a Strong Ohio\footnote{Citizens for a Strong Ohio, http://www.ohiochamber.com/Citizens/about.asp.} that ran attack ads against Justice Alice Resnick who was seeking re-election. Among its commercials was one showing a female judge switching her vote after someone dropped a bag of money on her desk, with a voice calling attention to the trial lawyers’ contributions to her campaign. The Institute also arranged for the Michigan Chamber of Commerce to run ads in Ohio inviting business to relocate in Michigan in order to secure the services of its courts said to be more congenial to business interests than those in
Justice Resnick was re-elected and the Ohio Elections Commission imposed a modest penalty on the Institute for its misdeed.\(^{139}\)

The approach was nevertheless replicated elsewhere in 2004, but with somewhat greater restraint. The Chamber identified states whose “legal environments” were less forgiving of business practices, and then the Institute ran campaign commercials publicizing its negative assessments of Illinois, West Virginia, and Mississippi. This was explained as “voter education.”\(^{140}\) In Mississippi, it was followed by a million dollar campaign (a sum previously unheard of in Mississippi) that succeeded in unseating Justice Charles McRae.\(^{141}\) In Illinois, the members of the Chamber contributed $2.3 million to the campaign of Lloyd Karmeier (who refused to recuse himself)\(^ {142}\) for a seat on the state supreme court; the contribution was made through a group called the American Taxpayers Alliance. The Institute claimed to have won every race that it tried to influence in 2004, but this cannot be confirmed because the Institute was not required in most states to make the necessary disclosures, and the money usually passes through multiple hands. A similar level of expenditure on judicial campaigns was achieved by the Institute in the 2006 elections, but with less impressive results.\(^ {143}\)

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\(^ {140}\) See Gottlieb, note 125.


\(^ {142}\) Surpa note 81.

It is not only partisan judicial campaigns of the North Carolina model that have been adversely affected by the advent of technology and the elevation of the political role of courts. These developments have also called into question the wisdom of the “Missouri Plan” retention election that is now a feature of the selection of appellate judges in thirty states. Since 1992, four state supreme court justices were “not retained” by the voters in campaigns in which there was no opposing candidate, and a fifth had a very close call. These were results of campaigns investing substantial funds in the derogation of the judge seeking retention by the judge’s political adversaries.

The 1996 defeat of Justice Penny White in Tennessee was particularly troubling. She was heartily recommended for retention by the state’s Judicial Evaluation Commission and was well regarded by the bar. She was nevertheless attacked by a group that had been organized and funded to cause her defeat. Its purpose was to assure Republican control over the state’s redistricting decisions that were soon to be made by the court of which she was the swing member. The organization’s attack was mounted on spot commercials calling attention to her vote with a majority of the court requiring a rehearing on the sentencing phase of a celebrated capital case at which her court modified the process to meet requirements imposed by the Supreme Court of the United States. She was portrayed in television ads as the defender of a vicious murderer. That event demonstrated the power of advertising to falsify a sitting judge’s record as

one “soft on crime” when it suits the desires of an interest group to unseat her.\textsuperscript{145} The demonstration has since been repeated in other retention elections, in 2004 in a Missouri retention election, resulting in a very “close call.”\textsuperscript{146}

The temptation to defame and demean may be even more threatening to the judiciary in a retention election because the defamers are less subject to the deterrent effect of competition in which a competitor may give as good as he gets. Perhaps if the advertising is blatantly false, and the defamer can be identified (which is not always easy) this form of outrage could be deterred by the disciplinary process,\textsuperscript{147} but, again, the Supreme Court’s First Amendment jurisprudence casts doubt.\textsuperscript{148} It seems clear that the Court’s jurisprudence protects the right of a hostile organization to dredge up a single vote that some voters are likely to disapprove and call public attention to it over, and over, and over. And the claim is made that such organizations, having no connection to a candidate are outside the reach of election laws and are merely exercising their First Amendment rights.\textsuperscript{149}

\begin{footnotes}
\item See Bright, note 144.
\item For elaboration, see Paul D. Carrington, \textit{Our Imperial First Amendment}, 34 U. RICHMOND L. REV. 1167, 1188 (2000).
\item For a defense of this principle see \textsc{Douglas Johnson and Mike Beard’s “Campaign Reform” Let’s Not Give Politicians the Power to Decide What We Can Say About Them}, (Cato Institute 1997) http://www.cato.org/pub_display.php?pub_id=1470.
\end{footnotes}
And degradation of the candidate for retention may not be necessary. A member of the Pennsylvania Supreme Court was not retained in 2005 as an outcry of public indignation over a pay raise for judges and other elected officials of the state, notwithstanding the fact that the unretained judge had nothing to do with the pay raise other than an apparent willingness to receive it.\footnote{150}{Morello, note 144.}

2002, the American Bar Association partially conceded a point when it acknowledged the possibility of public financing of elections as an alternative less attractive than “merit selection”, but as a “viable alternative.”

In 2005, the American Bar Association amended its guidelines for the evaluation of judges in the hope that voters mindful of its guidelines will resist the urge to vote ideologically on the basis of the outcome in a celebrated case.

Several states now employ systems of evaluation and the North Carolina Bar has a project underway that is intended to provide judicial evaluations that will become a part of an official voters’ guide.

The effect of these efforts remains uncertain. But the judicial elections of 2008 provided a cheerful moment for those attentive to the concern that money was being used to buy the judiciaries of many states. Underfunded judicial candidates in Michigan and West Virginia gained seats on their highest state courts despite large investments in their rivals’ campaigns by business interests. And there was some evidence that this

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result was a reaction of voters against the efforts of chambers of commerce to buy favorable election results.\textsuperscript{159}

**SEARCHING FOR A SOLUTION IN NORTH CAROLINA: THE 2002 ACT**

These events in other states were in due course noticed in North Carolina. In 1989, a Judicial Selection Study Commission appointed by the North Carolina Governor recommended replacing the system of electing judges with a gubernatorial appointment system with retention elections.\textsuperscript{160} The proposal, coming not long after the resounding defeat of the idea in Ohio, was approved by the state Senate but was never acted on by the House.\textsuperscript{161} By that time, it was evident that the financing of judicial campaigns was a growing threat to the respect of North Carolinians for their state's judiciary, even though big money campaigns had not yet been experienced in their state.\textsuperscript{162} In 1986, an average of $73,600 was spent on each North Carolina supreme court seat that was up for election. By 1994, the average was $300,000,\textsuperscript{163} and the price continued to rise, although not to levels experienced in many other states. The Supreme Court of the United States had not then yet extended the First Amendment to invalidate laws applicable to judicial election campaigning, but that prospect was also clearly seen on the horizon in the

\begin{footnotes}
\footnote{161} N.C. Senate Bills 218 and 219, filed February 20, 1989.
\end{footnotes}
light of other decisions bearing on the right to spend money to influence elections. But no action was then taken to avoid pending doom.

In 1994, Chief Justice James Exum appointed an array of eminent citizens to a Commission for the Future of Justice and the Courts in North Carolina. It published its report in 1996 and joined in proposing a “merit selection” scheme of “the Missouri plan” sort. The stated aim was to insulate the judiciary from partisan politics. That proposal, like others advanced by the Commission for enhancement of the state court system, gained little support in the state legislature and was not seriously considered, perhaps partly in recognition of the considerations causing the similar proposal to fail in Ohio.

In 2001 a North Carolina Committee on Judicial Elections appointed itself to develop a more marketable proposal. The Committee sought a method of facilitating low-budget campaigns for judicial office and a means of deterring the high cost methods employed with increasing frequency in other states. Although fully sensitive to the considerations that had led the organized bar to support the Missouri Plan, it recommended the establishment of a publicly-funded voter’s guide of the sort in use in some other states, that would contain much information about every candidate for judicial office who agreed to accept constraints on high-cost campaigns. It was proposed that the guide would be


165 Its members included eight former members of the state’s appellate courts (one of whom has since been appointed to the United States Court of Appeals), a former Governor, a former United States Senator, a former president of the American Bar Association, two former university presidents, and three former law school deans.

distributed by mail to every registered voter in the state and would be posted on a website whose existence might be publicized in the press. The committee’s recommendations were, like those of the previous Commissions not seriously considered by the state’s legislature.

While this committee proposal failed to gain traction, it did resonate with another under consideration by the legislature. The other was a proposal for public finance of legislative campaigns that was modeled on laws then recently enacted in Arizona, Maine and Vermont. The legislature was willing to consider the proposal because it was sponsored by a group of organizations having significant political clout, such as the American Association of Retired Persons and the North Carolina Academy of Trial Lawyers. That group of influential organizations had been assembled by two others, Democracy North Carolina and the North Carolina Center for Voter Education. Their cry was for “voter-owned” elections. 167

The timing of these two proposals facilitated a compromise of sorts in the North Carolina legislature when it enacted a law providing for public funding of judicial campaigns. That reform was less than the advocates for voter-owned elections sought, and not what either the Commissions, the Committee, or the Bar had advocated to shield the state’s judiciary from the worst features of privately financed campaigns, but it was better for both initiatives than outright rejection would have been. The Judicial

Campaign Reform Act was signed by the Governor on October 10, 2002.\textsuperscript{168}

The Act first directed the State Board of Elections to publish a voters’ guide providing information about the candidates. The legislation failed to appropriate sufficient funds for that purpose. A Guide was nevertheless published for the 2004 election,\textsuperscript{169} with help from several non-profit organizations, private foundations, and federal funds for voter education. It was distributed to every household at a cost of approximately $500,000. A subsequent poll revealed that it was favorably received by the voters.\textsuperscript{170}

That Act also created a form of semi-non-partisan election to be held following partisan primaries.\textsuperscript{171} This reform led the Republican Party to circulate a voters’ guide identifying its candidates. The wisdom of the non-partisan judicial election has been questioned by the recent work of Chris W. Bonneau and Melinda Gann Hall, whose data indicate that voters are better informed about candidates in partisan judicial elections than in non-partisan ones.\textsuperscript{172} But no substantial protest was raised against this mixing of partisan and non-partisan politics.

\footnotetext[168]{N.C. Gen Stat. §163-278.61.}
\footnotetext[170]{The poll was conducted for the Center for Voter Education by American Viewpoint of Alexandria, Virginia. Study: N.C. Judicial Voter Guide a Success, http://www.ncjudges.org/media/news_releases/2_16_05.html.}
\footnotetext[171]{On the issue of partisan selection of judicial candidates, see Lawrence Baum, \textit{Judicial Elections and Judicial Independence: The Voter’s Perspective}, 64 OHIO ST. L. J. 13 (2003); Ryan L. Souders, \textit{A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States}, 25 REV. OF LITIGATION 529 (2006).}
\footnotetext[172]{IN DEFENSE OF JUDICIAL ELECTIONS 109 (2009).}
Of greatest interest to those in other states, the Act created a Public Fund for use in the 2004 and subsequent elections for the purpose of deterring large campaign contributions. Candidates who raised a threshold amount of money and who agreed to strict spending and fundraising limits are entitled to receive a lump sum of public funding to run their campaign. The law also provides for rescue money in the event that a publicly financed candidate is outspent by a non-publicly-financed opponent. To gain this public subvention, judicial candidates had first to raise $35,000 from at least 350 voters, with no contribution greater than $500.

The Public Fund was barely sufficient to meet the needs for the 2004 election. In response, legislation in 2005 added an important new source of money for the Public Fund, a surcharge of fifty dollars a year on the dues attorneys pay to the regulatory state bar. The private North Carolina Bar Association protested this funding technique, but the money lawyers or lawyer organizations paid in the form of voluntary campaign contributions to appellate-level judicial candidates dropped from $744,000 in 2002 to $302,000 in 2004. The $442,000 saved did not equal the proceeds from the $50 tax imposed after that election, but it did make a dent.

The other wrinkle in the scheme was a provision allowing state income taxpayers a choice in the amount of three dollars. If they check the right box on the form, three dollars goes to the Public Fund, but if they do not check the box, the three dollars goes into the General Fund with their other tax dollars. This choice posed a public relations challenge for those favoring the program. Many taxpayers do not see the box at all, or

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assume that if they check it, their taxes will increase by three dollars. So it forced supporters of public funding to keep reminding their acquaintances to check the box, that it would cost them nothing to do so.

Despite its flaws and limitations, the scheme was pronounced “the nation’s number-one model for reform” by the executive director of the Justice at Stake Campaign, a Washington-based group that monitors judicial elections across America. It has now been replicated in New Mexico, Wisconsin, and West Virginia.

**EXPERIENCE WITH THE 2002 ACT:**

**ITS PROBLEMS AND PROPOSALS FOR REFORM**

While three other states have now followed its lead in the public funding reform, North Carolina has continued to struggle with the issues. Its experience may be informative not only to those states that have replicated the public funding law, but also to those is numerous other states in need of reforms to resolve the crises imposed on them by the decisions of the Supreme Court.

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176 Act of November 5, 2009; see ‘Big Victory in Wisconsin, Justice at Stake, justiceatstake.org/.../justice_at_stake_hails_public_financing_breakthrough_in_wisconsin’? It was promptly challenged by Wisconsin Right to Life for its “chilling effect” on its right to influence elections with campaign contributions. www.csmonitor.com/.../Wisconsin-lawsuit-tests-a-pioneering-campaign-finance-law.

In 2003, the Supreme Court of North Carolina, invoking Republican Party v. White, without prior notice or hearings, announced an amendment to its canons governing judicial campaigning in the state to affirm that “a judge may engage in political activity consistent with his status as a public official. And it repealed provisions similar to those of Minnesota that the Eighth Circuit would soon hold unconstitutional.\textsuperscript{178} Thus, public finance did not fully resolve the problem of campaign promises, nor address the problem of defamatory campaigning.

In 2004, there were two contested seats on the state’s Supreme Court, and three on the intermediate Court of Appeals. There were sixteen candidates for the five offices. Twelve qualified for public funding. Four of the five who won offices qualified for, and received, public funding. Court of appeals candidates received $137,500 and were permitted to raise an additional $66,000. Supreme Court candidates received $201,300 and were permitted to raise an additional $69,000.\textsuperscript{179} No rescue funds were needed in 2004, so the Public Fund survived the challenge.

It thus remained that no candidate seeking a judicial office in North Carolina engaged in big spending of the sort experienced in Texas, Alabama, Ohio, Michigan, Illinois, Missouri, and other states. Chris Heagerty, the Executive Director of the Center for Voter Education explained that “[b]ecause the new law gave our candidates the ability to respond to special interest attacks, from the political left or right, I think many groups stayed out of North Carolina because they knew that our


candidates now had the resources to fight back and set the record straight."\(^{180}\)

Barbara Jackson won a seat on the Court of Appeals in 2004. She had failed to qualify for public funding and in 2006 brought an action in the federal court seeking a declaration that the scheme is unconstitutional.\(^{181}\) Is it a violation of the First Amendment to provide public funds to a rival candidate?\(^{182}\) The North Carolina Bar Association (a voluntary organization) also appeared to challenge the fifty dollar tariff on lawyers as an unjust discrimination. The Brennan Institute at the New York University Law School undertook to represent the state in defending the program and acquired the services of former Chief Justice Exum for that purpose. The district court dismissed, the court of appeals affirmed,\(^{183}\) and the Supreme Court denied certiorari.\(^{184}\)

Others in addition to Judge Jackson and some lawyers aggrieved to pay fifty dollars were not happy with the 2002 legislation. As soon as the 2004 election was held, the North Carolina Bar Association resolved to deal with the problem with a new initiative. A committee was appointed to study the matter and make a different proposal. Its specific proposal to the 2005 legislature was a constitutional amendment providing for gubernatorial appointments, an early confirmation election in which no

\(^{180}\) http://www.ncjudges.org/media/news_releases/11_11_04.html


\(^{182}\) As noted, that issue has been raised again in Wisconsin. See n. 176.


rival candidacy would be presented, and thereafter longer terms than the present eight-years.\footnote{NCBA Board of Governors Holds Spring Meeting, April 19, 2005, http://www.ncbar.org/news/1/615/index.aspx Full text of Senate Bill 523 at http://www.ncleg.net/Sessions/2005/Bills/Senate/PDF/S523v3.pdf.} At least some of its lobbying effort was invested in an unsuccessful protest against the fifty dollar contribution. Its proposal was at least for the moment resisted by the North Carolina Academy of Trial Lawyers (now the North Carolina Advocates for Justice), whose members were prone to mistrust the proposal as elitist in its aims. No action was taken by the legislature on the Bar’s proposal.

In June, 2006, because Justice Sarah Parker’s rival in the campaign for the Chief Justiceship spent more than allowed by the scheme, Parker was permitted to draw from the Public Fund an additional rescue grant enabling her more nearly to match his expenditures. Even though she was still outspent, she won the election.\footnote{Gary D. Robertson, Campaign Funds Stir up Debate, News & Observer, June 21, 2006, available at http://www.newsobserver.com/news/story/452854.html} Also, in 2006, for the first time a substantial sum was spent by an independent group advocating the election of some of the candidates.\footnote{Andrea Weigl, TV Ads Highlight 4 Candidates: Some Question Legality of Contributions to FairJudges.net, News & Observer, Oct. 31, 2006, available at http://www.newsobserver.com/news/story/504597.html.} This money was expended in the last weeks of the campaign by members of the trial lawyers’ organization. Others feared that this exercise of rights under Section 527 of the Internal Revenue Code by a group of trial lawyers would evoke a massive response by the Chamber of Commerce in later elections, but this did not happen in 2008. The Board of Elections was asked to provide rescue funds for those candidates who were disfavored.
by the 527 interjection, but concluded that it was not authorized to do so.\footnote{188}

Despite its moderate success, there are continuing frailties in the scheme enacted in 2002. One is the delicate sufficiency of the Public Fund. Whether additional rescue grants will be needed is not known in 2010. In 2006, the legislature did approve a one-time only contribution from the current excess revenue of $750,000 to shore up the Fund against possible needs to make rescue payments.\footnote{189} It also modified the taxpayer check off to make it less dependent on the taxpayer’s momentary understanding of the consequences of the contribution. The funds provided were adequate for the needs of 2008. But perhaps the time has come to reverse the effect of the check-off so that the three dollars is used for the campaign fund unless the taxpayer objects by checking the box. Or perhaps to eliminate entirely the need of taxpayers to check a box on the tax form. Singling out the Public Fund as the one activity of the state government that is subject to the will of individual voters is not reasonable.

A second enduring frailty is the Official Voters’ Guide. Although well-received by voters, it is not as informative as it could be. The Guide should provide the voters with the important excerpts from the American Bar Association guidelines promulgated in 2005\footnote{190} to counsel against simplistic ideological voting. And in accord with recommendations of a subcommittee of the North Carolina Bar Association, it would also be more useful and more effective if it was enlarged to incorporate endorsements by pre-existing organizations (including the political parties) that agreed to


\footnote{190} See note 156.
refrain from spending on judicial campaigns. A website could then be supplied to which every contribution would be reported instantaneously. That would provide an additional disincentive to spend large sums.

Also, the public funding program could be still further strengthened if only candidates agreeing to the campaign finance rules were permitted to make brief campaign statements in the Guide. And if organizations endorsing candidates could be permitted to make brief statements explaining their endorsement provided that they limit other forms of communicating with voters and make an appropriate contribution to the Public Fund. This last suggestion is not without risk; some organizations could give reasons so inappropriate as to diminish the utility of the guide to produce an informed electorate.\textsuperscript{191}

The North Carolina Bar Association is in the early stages of conducting a program to formally evaluate its judges. The American Bar Association recommended such a program in 1985.\textsuperscript{192} Some states use the ABA standards to guide a formal evaluation process that produces a report that can be made available in a voters’ guide when a sitting judge stands for retention. The institution performing the evaluation is generally the same as that responsible for the discipline of miscreant judges. As the Penny White case in Tennessee exemplified, a favorable report does not assure retention even when there is no rival.\textsuperscript{193} But a program of this sort will add weight to the Guide. Experience in the state of Washington tends

\textsuperscript{191} For example, Oklahomans for Judicial Excellence was a business organization in disguise. Chuck Ervin, \textit{Oklahoma Judges Rated by Coalition}, \textsc{Tulsa World}, April 5, 1998.

\textsuperscript{192} \textsc{American Bar Association Guidelines}, note 156.

to confirm that many voters take such reports seriously and that they tend to strengthen judicial independence.\textsuperscript{194} Those who participate in judicial evaluations in the state of Washington are the lawyers, witnesses and jurors who have appeared in the incumbent’s court. For appellate judges, only advocates are enlisted as evaluators. The usual problems associated with efforts to quantify the ineffable persist; no one engaged in the process can be confident in their own judgment, based as it is on narrowly limited experience. To some extent, that problem can be diminished by receiving written comments, but if circulated to voters, these may be likely to weigh too heavily. With respect to appellate courts,\textsuperscript{195} the crudely quantified appraisals of lawyers over time and across cases, when compared to responses of lawyers to other judges, would seem to have some value. Shared with voters, they could provide a more rational basis for choice than much of the other information shared in a voters’ guide of the sort distributed in 2004, 2006, and 2008, and would have the effect of reducing the ability of partisan voter guides to compete with the disinterested official guide.

That wrinkle in the existing scheme evokes comparison with the scheme proposed by Bruce Ackerman and Ian Ayres, who would give each voter a fund of fifty “Patriot” dollars to distribute to any candidate they might choose.\textsuperscript{196} They propose that this could be done with a private visit to an ATM machine, where all contributions would be made, so that the candidate would not know the source of the contributions. The hope would be that secret contributions like secret votes would immunize both


\textsuperscript{195} On the difficulties with publicizing results for trial judges, see Marilyn Cavicchia, Judicial Evaluations: Hennepin County, Minnesota, THE JUDGES JOURNAL, Winter 2005 at 43.

\textsuperscript{196} VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002)
candidates and voters against any sense of obligation or entitlement derived from their contributions. Their stated aim was to disrupt the market for political influence.

North Carolina is unlikely to be the state to experiment with the Ackerman-Ayres proposal. While it has theoretical attraction, its practical implications and consequences are complex and difficult to foretell. Its authors rest their advocacy in part on the futility they perceive in efforts to reconstruct the present regime in light of what the Supreme Court has done with the First Amendment.

Another possible reform in the present system of judicial selection worthy of consideration is the “instant runoff.” By allowing voters to express a second choice in the general election, the possibility of a runoff might be eliminated, thus sparing the candidates some additional expense.

There remains a problem posed by the Supreme Court’s 2008 decision in Davis v. Federal Election Commission affirming the right of a candidate to spend his or her own money to secure judicial office. So far


200 128 S. Ct. 2759.
as is known, no judicial candidate in North Carolina has invested a huge sum in his or her campaign, but it is a timely source of concern.

The North Carolina public funding system has continued to win praise and replication in other states faced with the horrors experienced elsewhere from expensive television advertising. But given the constitutional constraints imposed by the Supreme Court on legislation enacted to protect the integrity of judicial elections, it remains vulnerable.

**POSSIBLE IMPROVEMENTS: BACK TO THE MISSOURI PLAN?**

Its vulnerability suggests to many a possible need for North Carolina seriously to consider a variation on the Missouri Plan such as that proposed in 2005 by the North Carolina Bar Association which might diminish the opposition of Section 527 “educators of voters,” such as the Institute for Law Reform or bands of trial lawyers.

The Missouri Plan, whatever may be said about the legitimacy of “merit selection” has been successful in limiting the amount of money that supreme court candidates have had to raise. From 1993 to 2000, the average state supreme court candidate raised $455,657 in partisan elections, $114,507 in non-partisan elections, and only $18,863 in retention elections. The Bar Association’s 2005 proposal has been made more palatable to the voters and other organizations with two revisions being advanced in 2009 by a Joint Committee of the Bar Association and the Advocates for Justice.

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This 2009 proposal would recast the candidate selection process in a form resembling that employed in Tennessee that vests the nomination power in a diverse body including numerous non-lawyers. It proposed that a selection panel consisting of fifteen members, including three laymen and twelve lawyers appointed to represent diverse bar groups would be responsible for nominating two candidates to fill each vacancy on an appellate court from among those lawyers applying for the appointment.\textsuperscript{203} The groups proposed for inclusion were the voluntary bar association, the trial lawyers, the women lawyers, the black lawyers and the defense attorneys. The lay members would be appointed by the Governor. Objection was made to the use of unofficial organizations. Perhaps on that account, the proposal was not approved by the Governing Council of the Advocates for Justice.\textsuperscript{204} Hence, the joint committee proposal is in 2010 on hold.

A suggested alternative would be to vest the power to appoint the merit selectors in numerous public officials.\textsuperscript{205} A question presented is whether that revision would lose the support of interest groups needed to secure enactment of a constitutional amendment.

In either version, the selection panel would be empowered to establish criteria such as those suggested by the American Bar Association’s Judicial Selection and Retention Criteria, but would be directed also to foster diversity of race, gender, ethnicity and geography. The panel would select two candidates to fill a vacancy. If election were timely, they would compete in a non-partisan general election, with access

\textsuperscript{203} REPORT OF THE JOINTS TASK FORCE ON JUDICIAL SELECTION, MARCH 26, 2009. On file with the author.

\textsuperscript{204} Resolution June 24, 2009 on file with the author.

\textsuperscript{205} Jonathan Rhyne to Wade Barber, June 18, 2009. On file with the author.
to public financing of their campaigns. The role of the Governor would be limited to filling vacancies that occur before the term of the incumbent expires, and the Governor’s choice would be limited to the two nominees proposed by the panel. The nominee selected would face the other at the next general election, and the winner of that competitive election would then face a retention election at the end of each eight-year term.

One aim of the 2009 proposal was to make the public financing scheme much less vulnerable than it is at present because it would substantially reduce the number of candidates to fund and protect. A second aim was to reduce or eliminate the possible election of a seriously underqualified judge such as those running on a famous name such as that of a notable senator or football coach. And it would continue to serve the historic purpose of assuring that judges take office knowing that they are selected to serve the public, not the governor or any “special interest.”

It is also envisioned that a subcommittee of the panel would, before any retention election, publish an evaluation of the incumbent’s performance. This would serve to reduce but not eliminate the threat of a campaign to unseat an incumbent by partisan or defamatory advertising on television or websites.

This 2009 proposal makes no distinction between those seeking office on the state’s highest court and those seeking office on the intermediate court of appeals. It bears notice that the work of the intermediate court is of less interest to voters; Professor Geyh’s eighty percent axiom is surely an apt account of campaigns for positions on that court. Its judgments are substantively important and not lacking in political content, but they are at least potentially subject to review by the

206 See note 92.
Supreme Court. It is not the intermediate court that will decide the politically explosive issues of capital punishment, gay marriage or their like. Accordingly the intermediate court is much less of a threat irrevocably to decide cases of great public interest contrary to the desires and expectations of voters. If the court of appeals races were not on the agenda so that the governor could simply appoint one of the panel’s two nominees to an eight-year term, it would be still easier for the Public Fund to marshal the financial resources needed to protect the process of electing the justices of the state’s Supreme Court from this kind of mischief. But this would fail to alert those selected of their relationship to the electorate. And it was thought that this additional precaution was not needed in North Carolina in 2009.

The wisdom of such thinking is called into still greater question by the 2010 decision of the Supreme Court of the United States in *Citizens United*\(^{207}\) constitutionalizing the rights of corporations to enjoy the status of citizens entitled to spend money on campaigns as if they were speaking as citizens. That decision has been promptly and accurately characterized as an example of strong judicial activism of just the sort so strenuously protested by many citizens,\(^{208}\) mostly those on the political “right” offended by the decision in *Roe v. Wade*\(^ {209}\). The present majority of the Court seem bent on doing what they can to assure that those with money to spend will have substantial control over our governments at all levels.

\(^{207}\) Supra n. 2.

\(^{208}\) Jeffrey Toobin, THE NEW YORKER, January 28, 2010, ***. The present author applied the same term to the prospect of the decision; my comment is Paul D. Carrington, *No Such Thing As A Corporate Citizen*, NATIONAL LAW JOURNAL. January 18, 2010 at 39.

\(^{209}\) 410 U.S. 113 (1973).
CONCLUSION

North Carolina’s judiciary is, as Justice Brandeis suggested that it should be, an “experiment in government.” It is at the present time an unfinished experiment. And it remains open to doubt whether any scheme can work to achieve a wholesome balance between the indispensable public confidence in the integrity and independence of the judiciary and its accountability to the people it presumes to govern. But in light of the 2010 decision of the Supreme Court, it seems to this author reckless for the state to maintain a system of judicial election that is so vulnerable to the corrupting influences supported by the high Court.

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