JUDICIAL INDEPENDENCE REVISITED: JUDICIAL ELECTIONS AND MISSOURI PLAN CHALLENGES*

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In Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court, *Professor Paul Carrington provides a thorough overview of the history of judicial selection in North Carolina as well as the alleged problems with judicial elections. In particular, Professor Carrington argues that recent Supreme Court decisions affecting the speech rights of judicial candidates and their supporters have created a "national crisis" and have rendered North Carolina's election of judges "unworkable." As a result, Professor Carrington contends that North Carolina should amend its constitution to adopt a merit-based selection system based on the Missouri Plan.*

Fortunately, North Carolina has not experienced a crisis of judicial independence or integrity. While there may be no perfect way to select judges, judicial elections in North Carolina have ensured that the judiciary remains independent of the other branches of government and that judges remain directly accountable to the people. The merit-based proposal championed by Professor Carrington and the State Bar Association removes that accountability, giving an unelected nominating committee of legal elites the authority to determine who will serve as judges in North Carolina. As a result, voters should be cautious before amending a provision of the North Carolina Constitution that has served them well for more than 140 years.

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INTRODUCTION

Although Alexander Hamilton thought that the judiciary was "the least dangerous" branch because it had "no influence over either the sword or the purse,"[1] state and federal courts have assumed an ever-increasing role in our governmental system. By recent estimates, state courts handle approximately ninety-five percent of the cases nationwide, deciding issues that touch on all facets of our lives—family law, business disputes, contract claims, education, criminal law, free speech, religion, and everything in between.[2] Moreover, because it is the "province and duty of the judicial department to say what the law is,"[3] the judiciary provides a critical check on the executive and legislative branches, making sure they stay within their constitutionally prescribed limits. As a result, the selection of state court judges, especially state supreme court justices who are the last arbiters of state constitutional and statutory law, is of critical importance to our system of government. But if the judiciary guards against encroachments by the other two branches, who guards the judiciary to ensure that it does not overstep its boundaries?

North Carolina, along with thirty-seven other states, uses judicial elections to check the judiciary, making judges directly accountable to its citizens.[4] But North Carolina is only one of twenty-two states that use

1. THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

2. ROBERT C. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 4 (2011), *available at* http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

4. *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www

contested elections, pursuant to which judicial candidates must run against each other in a traditional campaign.[5] In the wake of the Supreme Court of the United State's recent decisions in *Caperton v. A.T. Massey Coal Co.*[6] and *Citizens United v. FEC*,[7] though, the efforts to change North Carolina's method of judicial selection have intensified.[8] In his recent Article, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, Professor Paul D. Carrington has added his voice to the calls to change the current system, contending that popular elections threaten the independence of the judiciary and potentially undermine the public's confidence in the judicial system.[9] In particular, Professor Carrington has argued that the General Assembly should adopt a North Carolina Bar Association proposal pending in the North Carolina Senate ("SB 458"),[10] which seeks to amend the North Carolina Constitution in favor of a modified Missouri Plan, a merit-based system under which the

.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Jan. 21, 2012).

5. *Id.* In a non-contested or "retention" election, an incumbent judge stands for election but does not have an opponent. Citizens decide by majority vote whether to retain the incumbent for another specified term or to dismiss the judge at the end of the current term. Retention elections typically are non-partisan, *i.e.*, the judge's political party affiliation is not listed on the ballot. Contested elections can be either partisan or non-partisan.

6. 129 S. Ct. 2252 (2009).

7. 130 S. Ct. 876 (2010).

8. Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1975–79 (2011) (providing a detailed account of the history of judicial selection in North Carolina and raising concerns about the present system); *see also NCBA Targets Judicial Causes*, N.C. LAW., May–June 2011, at 1, 1 *available at* http://www.ncbar.org/about/communications/nc-lawyer/2011-nc-lawyer-editions/mayjune-2011/ncba-targets-judicial-causes.aspx (questioning whether "there has ever been a time when so many members have worked so hard to advance the cause" of judicial selection in North Carolina).

9. Carrington, *supra* note 8, at 1984 ("[T]here 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."); *see also* Justice Sandra Day O'Connor, *Foreword* to JAMES SAMPLE ET. AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE (Charles Hall ed., 2010), *available at* http://www.justiceatstake .org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf__ ("Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold."); NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION, at 7 (expanded ed. with commentary 2002), *available at* http://www.ncsconline.org/d_research /CallToActionCommentary.pdf ("[J]udicial election campaigns pose a substantial threat to judicial independence . . . and undermine public trust in the judicial system.").

10. S.B. 458, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011), *available at* http://www.ncleg .net/Sessions/2011/Bills/Senate/PDF/S458v1.pdf.

governor selects a judge from a list of nominees chosen by a nominating committee.[11]

Although I agree with Professor Carrington that "the selection of judges is an extraordinarily sensitive task for which no very good method has yet been found,"[12] recent research indicates that judicial elections may not threaten judicial independence to the extent previously suggested.[13] Furthermore, although not the focus of Professor Carrington's Article, SB 458 threatens judicial independence in its own way. Therefore, North Carolinians should carefully balance these competing methods of judicial selection before amending a provision of the North Carolina Constitution that has served the state's citizens well for more than 140 years.

Accordingly, Part I of this Article sets forth responses to the three most significant criticisms that Professor Carrington levels against contested judicial elections: (1) campaign promises interfere with a judge's independent assessment of future cases; (2) there is the appearance that increased campaign spending fosters corruption; and (3) there is a lack of an informed electorate, which leads to voters choosing unqualified judges.[14] Although not a perfect system, judicial elections have provided a time-tested means for ensuring that North Carolina judges are independent, accountable, and well qualified. Part II analyzes SB 458, highlighting two important problems with the plan that have not received much attention amid the current efforts to alter the method of judicial selection in North Carolina. This Article concludes that (i) while there is no perfect system for selecting judges, North Carolinians should carefully weigh the strengths and weaknesses of the current system and SB 458, and (ii) when this balancing is done, judicial elections may appear as the better option. In fact, North Carolinians should retain their current system of judicial elections, ensuring that the judicial branch is independent of the executive and legislative branches and that judges remain accountable to the people.

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11. Although there are variations among the thirteen states with Missouri Plans, generally the governor appoints a judge from a list of candidates whom are chosen by a nominating committee. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 761–62 (2009). The newly appointed judge serves for a specified period and then stands for a retention election where the sitting judge runs for reelection unopposed and "the voters choose simply to retain or reject that particular judge." *Id.* at 770.

12. Carrington, *supra* note 8, at 1969.

13. *See, e.g.*, CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 2–3 (2009); Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 676 (2009); Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary* 3–4 (Univ. of Chicago, John M. Olin Law & Econ. Working Paper No. 357, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008989.

14. Carrington, *supra* note 8, at 1980–86.

I. IN DEFENSE OF JUDICIAL ELECTIONS

Since the adoption of North Carolina's post-Civil War constitution in 1868,[15] the citizens of the state have elected the members of its judiciary. The shift to judicial elections in North Carolina, though, was not simply an unprincipled expression of Jacksonian democracy. Rather, by moving to judicial elections, North Carolina sought to insulate the judiciary from "the corrosive effects of politics and . . . to restrain legislative power."[16] That is, judicial elections were seen as a way to ensure that the judiciary remained independent from the executive and legislative branches.[17]

In recent years, however, some commentators have become concerned that judicial elections threaten judicial independence in their own way.[18] In particular, these commentators have identified several purported threats to judicial independence, including campaign promises, the appearance of corruption, and the lack of an informed electorate.[19]

A. Disclosing Views on Disputed Issues Versus Campaign Promises

According to Professor Carrington, the Supreme Court's decision in *Republican Party of Minnesota v. White*[20] permits "judicial candidates to make campaign promises bearing on the resolution of future cases."[21] In *White*, the Court held that Minnesota's "announce clause," which prohibited judicial candidates from stating their "views on disputed legal or

15. N.C. CONST. art. IV, § 26 (1868).

16. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 337, 343 (1983).

17. Carrington, *supra* note 8, at 1974 ("Supreme Court of Ohio Justice Frederick Grimke . . . 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."); William H. Pryor, Jr., *Not-So-Serious Threats to Judicial Independence*, 93 VA. L. REV. 1759, 1764 (2007) (noting that the Founders understood judicial independence to mean independence from the other branches of government).

18. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring) ("I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines [the government's interest in an actual and perceived impartial judiciary]."); Carrington, *supra* note 8, at 1967 (decrying "the perils to judicial independence created by these Supreme Court activist extensions of the First Amendment"); Gerard J. Clark, Caperton*'s New Right to Independence in Judges*, 58 DRAKE L. REV. 661, 706 (2010) (acknowledging "the incompatibility of elected judges and the ideal of an independent judiciary" and stating that "[j]udges tethered to the electorate . . . will sacrifice justice and rule of law to public opinion").

19. *See* Carrington, *supra* note 8, at 1980–86; *supra* text accompanying note 14.

20. 536 U.S. 765 (2002).

21. Carrington, *supra* note 8, at 1980.

political issues," violated the First Amendment.[22] In particular, the Court found that limiting the speech of candidates during an election "sets our First Amendment jurisprudence on its head" because " '[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.' "[23] Under Professor Carrington's interpretation of *White*, though, judicial candidates not only are free to express their views on disputed legal or political issues, but also are able to make campaign promises about how they will decide such disputed issues in future cases.[24] But campaign promises threaten the independence of the judiciary—because judges will feel obligated to conform to such promises—and violate due process: "A judge rendering a decision in conformity with a campaign promise is visibly denying a fair hearing to the losing party, and thus offending the most elementary feature of due process of law."[25]

There are at least two reasons why allowing judicial candidates to express their views on disputed legal or political issues may not undermine judicial independence as Professor Carrington suggests. First, post-*White*, states still may be able to limit campaign promises even though they cannot restrict all political speech of judicial candidates. While striking down Minnesota's "announce clause," which prohibited a judicial candidate from " 'announc[ing] his or her views on disputed legal or political issues,' "[26] the Supreme Court expressly reserved the question of whether a ban on campaign promises would violate the First Amendment rights of judicial candidates.[27] Thus, although the Roberts Court has shown little tolerance for any type of speech restriction,[28] the Court has not yet prohibited states

22. *White*, 536 U.S. at 788; *see also* MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000) (prohibiting judicial candidates from announcing their views on disputed political or legal issues).

23. *White*, 536 U.S. at 781–82 (quoting Wood v. Georgia, 370 U.S. 375, 395 (1962)).

24. Carrington, *supra* note 8, at 1980.

25. *Id.*

26. *Id.* (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

27. *See White*, 536 U.S. at 770 ("[T]he Minnesota Code . . . *separately* prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,'—a prohibition that is not challenged here and on which we express no view." (internal citation omitted)).

28. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (holding that Arizona's matching funds provision, which provided publicly funded candidates additional public campaign moneys if their privately funded opponents spent more than a statutorily prescribed amount, violated the First Amendment speech rights of the privately funded candidates and their supporters); Snyder v. Phelps, 131 S. Ct. 1207 (2011) (shielding protestors at military funerals from tort liability based on broad First Amendment speech protection); Citizens United v. FEC, 130 S. Ct. 876 (2010) (striking down on First Amendment grounds a statute that

from imposing limits on campaign promises. Moreover, in North Carolina and other states that do not expressly prohibit campaign promises in their judicial codes of conduct, provisions that require judges to remain impartial[29] may preclude certain promises, including any promise that demonstrates a particular bias or favoritism for a party.[30]

Second, provided judicial candidates remain impartial, there are reasons to permit them to discuss their judicial philosophies and views regarding general legal issues. As the legal realists established in the early twentieth century, when interpreting constitutions and legislation or resolving novel cases, judges frequently *make* law. At the time of the founding of America, the judiciary was viewed as the weakest branch because it lacked the ability to render important *political* decisions that might warrant public scrutiny and review.[31] Over time, however, the courts became viewed as political actors, exercising the power of judicial review and invalidating democratically passed legislation. In fact, both Professor Carrington[32] and the Supreme Court of the United States have recognized this lawmaking function of the state courts: "Not only do state-court judges possess the power to 'make' common law [like a legislator], but they have

limited the ability of corporations and unions to make independent expenditures freely from their general treasury funds).

29. *See, e.g.*, N.C. CODE OF JUDICIAL CONDUCT Canon 2(A) (2011) ("A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

30. According to the Supreme Court, a judge's deciding all cases consistently with a legal position set out in a prior decision or in a campaign reflects evenhandedness and impartiality, not bias. *See White*, 536 U.S. at 776–77 ("To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.").

31. *See* THE FEDERALIST NO. 78, *supra* note 1, at 433; *see also* Letter from John Jay to John Adams (Jan. 2, 1801), *in* THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: VOL. 1 PART I: APPOINTMENTS AND PROCEEDINGS 146, 147 (declining reappointment as Chief Justice of the Supreme Court of the United States because "under a System so defective, it would not obtain the energy weight and Dignity which are essential to its affording due support to the national Government; nor acquire the public Confidence and Respect, which, as the last Resort of the Justice of the nation, it should possess").

32. Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002) ("Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences, there is virtually no one who thinks that today.").

the immense power to shape the States' constitutions as well."[33] As a result, in the post-legal realism world, "[i]t is a commonplace that law is 'political.' "[34]

But if judges are political actors, then letting the public know about their views on political issues related to the judiciary is important. As most attorneys quickly learn, which judge (or panel of judges) hears their client's case frequently is dispositive. But just because a judge previously ruled on a particular issue—or a candidate spoke about that issue during a campaign—does not mean that due process has been violated. In fact, as Justice Scalia points out in *White*, simply having views on legal issues does not disqualify judicial candidates; it may be a prerequisite for being a judge:

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[35]

Nor should it be surprising that "the basic political preferences of judges influence their votes."[36] After all, presidents pick candidates in large

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33. *White*, 536 U.S. at 784; *see also* Ware, *supra* note 11, at 767 ("So honesty requires defenders of the Missouri Plan to acknowledge frankly that judges are not merely technicians; they are also lawmakers.").

34. Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1152 (1985); *see also* Carrington & Long, *supra* note 32, at 469 (discussing the political consequences of many high court state decisions, and therefore, the political motivations behind judicial selection).

35. *White*, 536 U.S. at 777–78 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).

36. BONNEAU & HALL, *supra* note 13, at 14. Studies have shown that there is a strong correlation between the ideological preferences of judges and their judicial decisions. *See, e.g.*, FRANK B. CROSS, DECISION MAKING IN THE U.S. COURT OF APPEALS 38 (2007) (summarizing results of a study showing that the ideological propensities of judges in the federal appellate courts are associated with their judicial decision-making); C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 40 (1996) (reporting that partisan differences among district judges are evident in several litigation areas); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 244–55 (1993) (analyzing the voting patterns and ideologies of Justices on the Warren, Burger, and Rehnquist courts); Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 66–67 (1990) (evaluating voting patterns of state supreme court justices in death penalty cases and determining that the justices respond differently to the facts of death

part because they believe their nominees have particular views on certain legal issues and will decide cases in conformity with those views.[37] Since this is true, judicial elections ensure that a candidate's "political" views about the law and the role of the judiciary—which the candidate has regardless of the method of judicial selection—are made known to the public.[38] Moreover, if North Carolinians believe that a judge has failed to exercise proper judicial restraint or otherwise perform his constitutional responsibilities, they can elect someone else, thereby making the judge directly accountable to the citizens of North Carolina.

B. Campaign Spending and the Appearance of Corruption

The second problem with judicial elections that Professor Carrington discusses is the increasing cost of judicial campaigns.[39] As individuals and corporations spend more on judicial elections, "[c]itizens often perceive [these] large contributions as bribes."[40] That is, many believe that judicial elections undermine judicial independence and public confidence in the judiciary because of the potentially corrupting influence of large campaign contributions and expenditures.[41] As Justice Sandra Day O'Connor, who has become a leading critic of contested judicial elections since retiring from the Supreme Court, has stated, "Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are

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penalty cases depending on their own partisan leanings as well as the political climate at the time of the decision).

37. BONNEAU & HALL, *supra* note 13, at 138 ("Moreover, there is an intense battle between Democrats and Republicans over Supreme Court nominations during every presidential election and vacancy on the Court. Why? Because we know that Democratic judges interpret the law differently than Republican judges. If this were not true, then it would not matter who sits on the Court as long as these candidates have adequate legal training and experience.").

38. Judicial candidates, like their counterparts in the other branches, may avail themselves of a variety of different forms of communication to educate the public about their backgrounds and their views on relevant issues: newspapers, radio, television, the internet, personal appearances, speeches, debates, pamphlets, and more. The increased use of television to reach the public, though, has been a driving force behind the increased costs of judicial campaigns. *See, e.g.*, Carrington, *supra* note 8, at 1979 ("[T]he advent of television . . . vastly elevates the cost of political campaigns.").

39. SAMPLE ET AL., *supra* note 9, at 8 (stating that overall spending on judicial elections in state supreme court races from 2000–2009 was $206.9 million, which is approximately 2.5 times more than the total amount spent in the previous decade).

40. Carrington, *supra* note 8, at 1982.

41. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2830 (2011) (Kagan, J., dissenting) ("Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system."); Clark, *supra* note 18, at 706 (pointing out the "incompatibility of elected judges and the ideal of an independent judiciary").

supposed to uphold."[42] The Supreme Court's recent decisions in *Caperton*[43] and *Citizens United*[44] have served only to increase these concerns.[45]

But some commentators have begun to challenge the conventional wisdom—that expensive campaigns jeopardize the independence of and public confidence in the judiciary. For example, Professors Chris W. Bonneau and Melinda Gann Hall, whose research has focused on the impact of judicial elections on the independence and integrity of the judiciary,[46] contend that there is no empirical evidence supporting the critics' claims that judges must be viewed as being removed from politics and campaigning to preserve the integrity of the judiciary in the eyes of the public.[47] According to these political scientists:

> [G]iven the notable absence of any identifiable crises of legitimacy in the states that have hosted competitive judicial elections for decades, we wonder if the real crisis is not the unrelenting assaults on the democratic process by judicial reform advocates and their never-ending cries that elections are poisoning the well of judicial independence and legitimacy.[48]

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42. O'Connor *Foreword*, *supra* note 9; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) ("Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."); NAT'L CTR. FOR STATE COURTS, *supra* note 9, at 7 ("[J]udicial election campaigns pose a substantial threat to judicial independence and impartiality, and undermine public trust in the judicial system.").

43. For critics of judicial elections, *Caperton* confirms that campaign expenditures can create a "probability of bias" that violates the due process rights of litigants appearing before judges who have benefitted from campaign spending by one or more of the parties. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64, 2267 (2009).

44. Those opposed to judicial elections contend that *Citizens United* ensures corporations can—and will—spend freely from their corporate treasuries to support judicial candidates, thereby increasing the likelihood (or at least the appearance) of judicial bias. *See generally* Citizens United v. FEC, 130 S. Ct. 876 (2010) (holding that a statute that limited the ability of corporations to make independent expenditures from their general treasury funds violated the First Amendment).

45. Carrington, *supra* note 8, at 1968 (contending that "reasonable citizens of North Carolina have no choice but to recognize that the Court's 'activist' decisions have rendered unworkable the provisions of their state constitution governing the election of judges").

46. BONNEAU & HALL, *supra* note 13, at 15 (stating that their research "address[es] a number of issues central to the judicial election controversy by testing hypotheses derived from the broader debate using econometrics applied to data on state supreme court elections from 1990 through 2004").

47. *Id.* at 128.

48. *Id.* In this way, Professors Bonneau and Hall anticipated Chief Justice Roberts's dissent in *Caperton*, in which he stated that the probability of bias rule "provides no guidance to judges and litigants about when recusal will be constitutionally required" and, as a result, "will inevitably lead to an increase in allegations that judges are biased, however groundless those

Hall and Bonneau's research indicates that, rather than alienating voters, increased spending in state supreme court races actually strengthens the public's confidence in the judicial branch:

> [Our] study documents that increased spending in elections to state supreme courts has the effect of substantially enhancing citizen participation in these races. . . . [And] it is reasonable to postulate that by stimulating mass participation and giving voters greater ownership in the outcomes of these races, expensive campaigns significantly strengthen the critical linkage between citizens and courts and enhance the quality of democracy.[49]

Moreover, if judicial candidates or concerned third parties are limited in the amount that they can spend on a judicial election, then the problem of an uninformed electorate becomes a self-fulfilling prophecy. Without sufficient money to get their message out, candidates—especially challengers—cannot adequately educate voters about the central issues or even the candidates' credentials and accomplishments:

> Without advertising and other forms of political information dissemination, challengers are incapable of discussing their credentials with voters and because of the incumbency advantage are highly likely to lose, regardless of their merits. In this way, the mere presence of money in an election is not reasonably a cause for concern.[50]

Furthermore, as Professor Carrington notes, candidates spending the most money do not always win.[51] And third parties who expend large sums on behalf of one candidate may actually harm that candidate,[52] which is precisely what the Supreme Court held in striking down the limits on individual expenditures: "Unlike contributions, such independent

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charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case." *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

49. Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457, 468 (2008). In addition, their research, which is based on data from all state supreme court elections from 1990 through 2004, indicates that nonpartisan elections actually increase the costs of judicial campaigns: "Contrary to conventional wisdom, nonpartisan elections increase the costs of campaigns, whereas partisan elections significantly decrease these costs, other things being equal." BONNEAU & HALL, *supra* note 13, at 132.

50. BONNEAU & HALL, *supra* note 13, at 133.

51. According to Professor Carrington, "[u]nderfunded judicial candidates" for state supreme court seats in Michigan, West Virginia, and North Carolina all won despite being outspent by their opponents. Carrington, *supra* note 8, at 1999, 2006.

52. *See id.* at 1999 ("And there was some evidence that this result was a reaction of voters against the efforts of Chambers of Commerce to buy favorable election results.").

expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[53]

Finally, contrary to the assertions of the Justice at Stake Campaign,[54] the total amount of money spent on judicial elections appears to have decreased in the last decade when adjusted for inflation:

> In fact, the amount of money spent in real terms has been falling substantially since the beginning of the decade. Using 2008 dollars, the amount of money spent in the 1999–00 election-year cycle was $57 million; in 2003–04, it was $52 million; and by 2007–08, it had dropped to $45 million, a 21 percent drop from eight years before.[55]

North Carolina seems to have followed this trend. In 2000, two candidates for the Supreme Court of North Carolina raised over $2 million, while the other two candidates running in the 2007 and 2008 elections raised a total of $178,273.[56] Thus, while campaign spending needs to be monitored, judicial independence can be protected by *Caperton*'s newly fashioned "probability of bias" rule and by relying on state codes of judicial conduct[57] to otherwise "maintain the integrity of the judiciary and the rule of law."[58]

C. *Lack of an Informed Electorate*

The third problem that Professor Carrington identifies is the lack of voter information or interest. On this view, judicial elections (i) fail to

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53. Buckley v. Valeo, 424 U.S. 1, 46 (1976).

54. The Justice at Stake Campaign describes itself as "a nonpartisan national partnership working to keep our courts fair, impartial and free from special-interest and partisan agendas." SAMPLE ET AL., *supra* note 9. The Justice at Stake Campaign has advocated for merit-based selection and against judicial elections, especially in response to *Citizens United*: "The *Citizens United* ruling of the Supreme Court in 2010 raised the threat facing elected courts to an unprecedented level. Where there is public support, states may need to consider the appointment of judges or public financing of judicial elections, as possible ways to protect courts from campaign cash." *Justice at Stake and Judicial Elections*, JUSTICE AT STAKE CAMPAIGN, http://www.justiceatstake.org/issues /state_court_issues/justice_at_stake__judicial_elections.cfm (last visited Jan. 21, 2012).

55. Ric Simmons, *Cost No Reason to Shun Judicial Elections*, COLUMBUS DISPATCH, Oct. 16, 2010, at 10A, *available at* http://www.dispatch.com/live/content/editorials/stories /2010/10/16/cost_judicial_elections.html?sid=101.

56. SAMPLE ET AL., *supra* note 9, at 20, 82.

57. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009). For example, West Virginia, along with most other states, has adopted the American Bar Association's objective standard for judicial conduct: "A judge shall avoid impropriety and the appearance of impropriety . . . . " MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004). In addition, the West Virginia Code of Judicial Conduct "requires a judge to 'disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.' " *Caperton*, 129 S. Ct. at 2252, 2266 (quoting W. VA. CODE OF JUDICIAL CONDUCT Canon 3E(1) (2009)).

58. *Caperton*, 129 S. Ct. at 2266.

provide any meaningful level of accountability because, as the American Bar Association sees it, "voters often are unable to cast an informed ballot,"[59] and (ii) result in unqualified judges being elected to the bench.[60] Furthermore, critics of North Carolina's current election system claim that this holds true in North Carolina as well. According to the co-chairs of the Judicial Independence Committee,[61] "North Carolina's nearly 10 million citizens have no meaningful way of evaluating judges' vital work. . . . [I]t's virtually impossible for voters to discern whether judicial candidates have" the traits necessary to be a good judge.[62] In particular, although voters "do have an interest in who serves . . . they just don't know who the candidates are. If they know their names, they don't know sufficient detail about them."[63] As a result, given that the electorate generally is uninformed about judicial candidates, the quality of our judiciary suffers.[64]

Recent studies, however, have cast doubt on this common criticism of judicial elections.[65] For example, after reviewing all state supreme court elections from 1990 through 2004, Bonneau and Hall determined that voters not only evaluated candidates for judicial office, but also

59. AM. BAR ASS'N., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 27 (2003); *see also* NAT'L CENTER FOR STATE COURTS, *supra* note 9, at 38 (stating that voters ascribe "limited importance . . . to the work of the judicial branch of government" and thus, frequently decline to vote).

60. *See* Carrington, *supra* note 8, at 1986 ("One recurring result [of an uninformed electorate] has been the occasional success of grievously unqualified candidates who happened to share a name with a popular figure.").

61. The Judicial Independence Committee was established by the North Carolina Bar Association to work "for the establishment of an appointive system for selecting judges in North Carolina" to promote "the principle of judicial independence." *Judicial Selection in North Carolina*, N.C. B. ASS'N, http://www.ncbar.org/about/communications/judicial-selection.aspx (last visited Jan. 21, 2012). The Judicial Independence Committee helped to draft SB 458, which proposes a modified Missouri Plan and is discussed more fully in the next Section. *See* discussion *infra* Section II.

62. James G. Exum, Jr. & John R. Wester, *We Should Screen Judicial Candidates Before Elections*, GREENSBORO NEWS & REC., May 1, 2011, at H1. According to Exum and Wester, "the traits our best judges possess" are "[i]ndependence, integrity, reverence for the rule of law, courtesy and patience, dignity, open-mindedness, impartiality, thorough scholarship, decisiveness and, not least, an understanding heart." *Id.*

63. Eric Johnson, *A Strong Bench*, SCHOLAR, Spring 2011, at 48, 51, *available at* http://moreheadcain.org/magazine/article/a_strong_bench/; *see also* Editorial, *Keep Partisan Politics Out of Court Elections*, CHARLOTTE OBSERVER, Mar. 20, 2011, at 24A ("A lot of legislators don't like the way appellate judges and trial court judges are elected in this state, and for good reason. Many voters don't know who the candidates for judgeships are.").

64. *See* Carrington, *supra* note 8, at 1986.

65. *See* BONNEAU & HALL, *supra* note 13, at 137; Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 231–33 (1987) (concluding that appointed and elected judges have similar credentials based on a comparison of the undergraduate and law schools attended, years of legal experience, and years of experience in government, judicial, and private practice).

distinguished between different types of experience: "[w]hen casting votes among supreme court candidates, voters distinguish challengers who have experience on the bench from challengers who lack it and thus are less suitable alternatives to incumbents."[66] But, "the 'progressive' reforms in North Carolina, which have limited the amount spent on elections by candidates receiving public funding"[67] and removed a candidate's party affiliation from the ballot,[68] serve only to aggravate the alleged problem of an inattentive or uninformed electorate. By seeking to reduce the amount of money spent in judicial elections while removing party affiliation, North Carolina's reforms may make it more difficult for voters to learn about particular candidates and issues. As a result, to the extent that voters lack sufficient information about the people seeking to serve as judges, voters may (reasonably) opt not to vote in judicial races.[69]

Despite the reform efforts to limit campaign spending, recent research has "failed to detect any statistically discernable differences in various measures of quality across selection systems in the states."[70] For example, a 2008 University of Chicago Law School study evaluated the quality of state supreme court judges based on their productivity, opinion quality, and independence.[71] These authors found that these measures of quality do not support "the conventional wisdom" that elected judges are not as good as their appointed counterparts.[72] In fact, the authors concluded, based upon previous research, that although "[a]ppointed judges write more frequently-cited opinions than elected judges do . . . elected judges are more productive, while there seems to be no difference between their levels of independence."[73] Based on these University of Chicago studies and their own research, Bonneau and Hall concluded that "the highly negative portrayals of judges chosen by popular election are unfair and inaccurate. Indeed, the available empirical evidence suggests precisely the opposite: the best judges may, in fact, be the product of democratic politics."[74] As a

66. BONNEAU & HALL, *supra* note 13, at 133.

67. N.C. GEN. STAT. § 163-278.61 (2009).

68. Act of Oct. 10, 2002, ch. 158, § 7, 2002 N.C. Sess. Laws 615, 626 (2002) (to be codified at N.C. GEN. STAT. § 163-322).

69. *See* BONNEAU & HALL, *supra* note 13, at 130 ("[C]itizens participate in state supreme court elections in high proportions when the races are interesting because of aggressive challengers and well-financed campaigns.").

70. *Id.* at 136 (citing Glick & Emmert, *supra* note 65, at 231–33).

71. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Which States Have the Best (and Worst) High Courts?* 9 (Univ. of Chicago, John M. Olin Law & Econ. Working Paper No. 405, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130358.

72. Choi et al., *supra* note 13, at 1.

73. Choi et al., *supra* note 71, at 4 (citing Choi et al., *supra* note 13, at 3).

74. BONNEAU & HALL, *supra* note 13, at 137.

result, the empirical data suggests that there is no readily apparent difference in quality between judges selected via appointments and those selected through elections. Furthermore, this research even indicates that elected judges may be "better" under certain measures.[75]

II. SENATE BILL 458: A MODIFIED MISSOURI PLAN

SB 458 is a variant of what has become known as the Missouri Plan, named for the state that first adopted this form of "merit" selection.[76] Under this proposal, any vacancy on an appellate court in North Carolina would be filled by the governor, who would select one of the two nominees chosen by a nominating committee.[77] The nominating committee would consist of sixteen members who are appointed by various constituencies.[78] After an initial term, the appointee would either face the unsuccessful nominee in a contested election or, if the other nominee chose not to run, stand for a retention election.[79] If the incumbent was retained or the other nominee won, then that person would be subject only to retention elections every eight years.[80] However, if the incumbent was not retained after a retention election, the nomination and appointment process would begin all over again.[81]

Even though North Carolina and other states initially moved to judicial elections to make the judiciary independent of the executive and legislative branches, SB 458 marks a return to an executive appointment system. As a result, given that this appointment system requires retention elections, SB 458 threatens the judiciary's independence from the executive branch while magnifying the alleged problems with judicial elections.

A. The Threat of Political Partisanship Remains with an Unelected Nominating Committee

Under the appointment system set forth in SB 458, partisan politics are likely to remain in the selection of the members of the nominating committee as well as in their selection of judicial nominees. As Professor

75. *Id.*

76. Fitzpatrick, *supra* note 13, at 678. Missouri Plans are used to select the justices to the highest courts in twenty-four states and the District of Columbia. *Id.* at 680.

77. S.B. 458, 2011 Gen. Assemb., Reg. Sess. § 1 (N.C. 2011), *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S458v1.pdf.

78. *Id.* § 4.

79. *Id.* § 1.

80. *Id.*

81. *Id.*

Carrington has stated, " '[m]erit selection' is seen by many as a masquerade to put political power in the hands of the organized bar and other members of the elite."[82] Because the electorate is allegedly unwilling or incapable of selecting qualified judges, SB 458 requires that a nominating committee comprised of "experts" in the field, namely lawyers and politicians, select the nominees.[83] Elite organizations, such as the North Carolina Bar Association, have a privileged role in selecting committee members under SB 458, appointing at least half of the committee members.[84] Presumably, these unelected committee members will share the political goals and interests of the organizations that appointed them. Yet North Carolinians will have no way to replace the appointed committee members if the committee makes partisan nominations. Further, because the governor will be required to choose one of the two judicial nominees whom the unelected commission proposes without legislative confirmation, SB 458 further insulates the process of judicial selection from the electorate.[85]

Moreover, given that the nominating committee will consist of political and legal elites, the nominees are apt to reflect the partisan leanings of the unelected members of the nominating committee.[86] Of course, if the committee members represented a broad cross section of North Carolina, then the shift from judicial selection to appointments

82. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 79, 106.

83. *See* Fitzpatrick, *supra* note 13, at 677–78 ("Like other Progressive Era reforms, merit selection was designed to remove government decision-making from electoral control and place it instead in the hands of 'experts.' The 'experts' identified by progressives to select judges were lawyers and, in particular, state bar associations.").

84. *See* Ware, *supra* note 11, at 755 ("Indeed the rationale for giving lawyers special powers over judicial selection—lawyers are better than their fellow citizens at identifying who will be a good judge—is openly elitist.").

85. *See* Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 146 (2007) ("In particular, many commissions have lawyer members that gain their seats, either through election by a minority of the persons, i.e. lawyers in their area, or through nomination by special interest groups. The composition of nominating commissions thus raises some serious concerns with regard to legitimacy."); Ware, *supra* note 11, at 758–59 ("By contrast, the third common method of supreme court selection, the 'Missouri Plan,' has the early-stage elitism without the later-stage democracy. The Missouri Plan gives disproportionate power to the bar in selecting the nominating commission, while eliminating the requirement that the governor's pick be confirmed by the senate or similar popularly elected body.").

86. *See* Romer v. Evans, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

would not dramatically alter the ideological balance of the courts.[87] But there is reason to believe that the legal profession, which is responsible for appointing at least half of the committee members,[88] is itself partisan. According to Professor Brian Fitzpatrick, the Missouri Plans used in Tennessee and Missouri have resulted in partisan results.[89] Since 1995, 87% of the appellate nominees in Missouri who made any campaign contributions gave more money to Democrats than to Republicans, and only 13% gave more to Republicans than to Democrats.[90] Furthermore, out of all the money that appellate nominees contributed in these elections, only 7% went to Republican candidates.[91] Consequently, because half of the committee members in North Carolina will be selected by lawyers and the rest by political elites, SB 458 will not reflect the political ideology of the majority of North Carolinians. Rather, SB 458 "may simply move the politics of judicial selection into closer alignment with the ideological preferences of the bar."[92]

Furthermore, it is unreasonable to assume that committee members will ignore the ideological propensities of potential judicial nominees given that all committee members have their own views on the contentious issues of the day[93] and some of these members—especially the lawyers on the committee—will appear before the nominees they select. In fact, the comments of SB 458's supporters show how the appointment process might shift the political ideology of the judiciary into alignment with the

87. The nominating committee in Massachusetts that consists of twenty-one members, none of whom are required to be lawyers or judges, might provide a better cross section of the population. *See* Fitzpatrick, *supra* note 13, at 680 tbl.1. Yet, given that the progressives who championed merit selection believed that experts—i.e., legal professionals—should select judges, the desire for a broad cross section of the population is at odds with the underlying motivations for merit-based selection. In fact, out of the twenty-five states that use nominating committees to select judicial nominees to the states' highest courts, fifteen states mandate that more than half of the committee members be lawyers or judges. *Id.*

88. S.B. 458, 2011 Gen. Assemb., Reg. Sess. § 4 (N.C. 2011), *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S458v1.pdf.

89. Fitzpatrick, *supra* note 13, at 692–97.

90. *Id.* at 696.

91. *Id.* at 697. According to Professor Fitzpatrick, the same type of partisan partiality is visible in Tennessee as well. In particular, Professor Fitzpatrick found that 67% of the nominees of Tennessee's merit selection committee voted more frequently in Democratic primaries, while 33% of those nominees voted more often in Republican primaries. *Id.* at 694. During this same period, only 51% of the votes for the Tennessee state house and 49% for Tennessee's federal House of Representatives were for Democrats. *Id.*

92. *Id.* at 676.

93. To recognize this is not to call into question the character or integrity of members of the nominating committee. Rather, it is to simply recognize that, as Professor Carrington puts it, "we all prefer that our judges bring our own shared values to the tasks of interpreting and enforcing legal texts." Carrington, *supra* note 8, at 1969.

nominating committee.[94] Although the nominating committee is unlikely to frame its decision in overtly political terms, the qualities that the committee determines are essential for a well-qualified judge can often be construed as political.[95]

According to the co-chairs of the Committee for Judicial Independence, the "core characteristics" of a well-qualified judge are "[i]ndependence, integrity, reverence for the rule of law, courtesy and patience, dignity, open-mindedness, impartiality, thorough scholarship, decisiveness and, not least, an understanding heart."[96] Although some of these qualities are not controversial—integrity, reverence for the rule of law, impartiality, and thorough scholarship—others are. After all, "open-mindedness" and an "understanding heart" might be viewed as code words for judicial activism and disregard for the rule of law.[97] Thus, in selecting judges that decide cases based on an understanding heart—as opposed to the rule of law—the committee could transform the nature of the judiciary to reflect its ideological views. This is exactly why Bonneau and Hall contend that "appointment schemes are characterized by intense partisanship, cronyism, and elitism . . . . In many ways, the pathologies of appointment systems are worse."[98]

As a result, SB 458 will not take the politics out of judicial selection and may actually jeopardize both the accountability of judges (because voters will be entirely removed from the selection process) and the independence of the judiciary (because judges will ultimately be dependent on the nominating committee). If the results in the states that have implemented similar Missouri plans are any indicator, neither the governor nor North Carolina voters will be able to stop the committee from nominating partisan individuals who reflect the committee's ideological

94. Exum & Wester, *supra* note 62, at H1.

95. A recent Wall Street Journal editorial describes how politics may enter the nomination process even if the nominating committee refrains from being overtly political. According to the editors, judicial nominating committees in Missouri Plan states have "handed disproportionate power to trial lawyers and state bar associations" thereby "insulat[ing] the backroom-dealing from public scrutiny while stocking state courts with liberal judges." *Missouri Compromised: Judicial Selection the Trial Lawyer Way*, WALL ST. J., Sept. 15, 2011, at A16. To illustrate their point, the Journal editors noted that Missouri's judicial nominating commission recently selected three candidates, from which the governor is required to pick one. *Id.* Two of the three candidates were allegedly connected to the plaintiffs' bar and one was "a state appeals-court judge and African American who received the fewest votes (four) from the seven nominators." *Id.*

96. Exum & Wester, *supra* note 62, at H1.

97. *See* Carrington, *supra* note 8, at 1968 (decrying the Supreme Court's " 'activist' decisions" that have made state judicial elections "unworkable").

98. BONNEAU & HALL, *supra* note 13, at 137–38.

preferences, as Professor Fitzpatrick's work suggests has happened in Tennessee and Missouri.[99]

B. *Retention Elections Preserve Many of the Alleged Problems with Contested Elections While Removing Accountability*

Supporters of SB 458 contend that retention elections preserve the right of North Carolinians to vote for their judges and, therefore, hold them accountable.[100] But there are at least two problems with championing retention elections while claiming that our current system of contested elections must be replaced.

First, retention elections appear to suffer from the same alleged institutional failings—campaign promises, the need to raise money for an election, and an electorate that is uninformed about candidates—as contested elections and actually undermine accountability, which is one of the main reasons states implemented judicial elections in the mid-nineteenth century.[101] Under SB 458, judges will still be required to stand for an election, raise money for their campaigns, and worry about how their decisions in particular high profile cases might be perceived by the electorate, who will ultimately decide whether they retain their jobs.[102]

Moreover, if, as supporters of SB 458 suggest, North Carolinians are generally ill-informed and unable to make a meaningful choice in a contested election,[103] then there is no reason to believe that they are suddenly going to start researching candidates in retention elections and go to the polls to cast informed ballots. Given the fact that retention elections forego opposition candidates who would be most likely to highlight the weaknesses of the incumbent and tend to be non-partisan, voters are apt to

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99. *See* Fitzpatrick, *supra* note 13, at 690.

100. Carrington, *supra* note 8, at 2006 ("The critical feature is that [SB 458] maintains the retention of election and so assures a measure of accountability to deter excesses of judicial activism.").

101. *Id.* at 1972 ("By the middle of the nineteenth century, in recognition of their political role, judges were elected in many states.").

102. Critics of judicial elections contend that the recent developments in Iowa illustrate the problem of having a judge's job security depend on how difficult or unpopular decisions are viewed by the public. Carrington, *supra* note 8, at 1992. In 2009, the Iowa Supreme Court unanimously held that the equal protection clause of the Iowa Constitution protects the right of same-sex couples to marry. Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009). Three of the Justices faced retention elections in 2010, and all three lost their seats on the court as a result of the public's disagreement with that decision. Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG. (Nov. 3, 2010), http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/-1/NEWS04/Iowans-dismiss-three-justices.

103. *See* Carrington, *supra* note 8, at 1984–85; Exum & Wester, *supra* note 62, at H1.

learn even less about an incumbent than under the current system.[104] Furthermore, if the state bar or any other organization issues a recommendation that voters should or should not retain a particular judge,[105] then judges might seek to curry favor with that group. Given that the group's review would be one of the few things that voters learn about an incumbent state court judge, judges might feel pressure to rule in ways that either benefit members of the reviewing group directly or, at a minimum, evince a judicial view with which that group agrees.[106] Finally, if the committee does not favor retention, the incumbent will need to raise considerable amounts of money to respond to the unfavorable recommendation, which would inject the threat of large campaign expenditures—and, therefore, the "probability of bias"—back into the process.[107]

Furthermore, the empirical evidence suggests that retention elections do not actually afford any meaningful level of accountability. According to one study, from 1980 through 2000 incumbents in retention elections were retained 98.2% of the time.[108] In contrast, incumbents in contested partisan

104. Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 805 (2004) ("By removing challengers from the ballot, retention races eliminate the public figures most likely to motivate and organize opposition to the incumbent."); Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 433 (2007) ("Political scientists have established that the most important cue for voters is political party affiliation. Party labels are signals, albeit imperfect ones, and voters rely heavily on them.").

105. As Professor Carrington notes, the North Carolina Bar Association currently is engaged in a program to formally evaluate North Carolina judges. Carrington, *supra* note 8, at 1996; *see also What is JPE?*, N.C. B. ASS'N, http://jpe.ncbar.org/what-is-jpe.aspx (last visited Jan. 21, 2012) ("The Judicial Performance Evaluation Program . . . strives to educate the public about the many qualities that make a person a good judge and assist the electorate in casting more informed ballots in judicial elections.").

106. If the state bar is responsible for issuing the recommendations for incumbent judges, then the bar will exert tremendous influence over the selection and retention of judges. Not only will the bar appoint at least half of the members on the committee, but it also will be a primary filter of information about the judges once appointed. Accordingly, if the critics of judicial elections are correct that judges' decisions are influenced when their livelihood is decided by popular elections, then there is a threat that the judges will issue decisions that are meant to curry favor with the state bar—either as a "thank you" for the appointment or in an attempt to garner a positive recommendation heading into the retention election.

107. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009).

108. BONNEAU & HALL, *supra* note 13, at 9. The incumbency advantage in retention elections also may be increased because voters do not get to know who the replacement will be if the incumbent judge is not retained. Thus, voters may follow the old proverb and determine "better the Devil you know than the Devil you don't." RICHARD A. SPEARS, MCGRAW-HILL DICTIONARY OF AMERICAN IDIOMS AND PHRASAL VERBS 44 (2002).

elections were retained only 77% of the time.[109] As a result, retention elections provide a de facto lifetime appointment for the committee's nominee.[110] As Professor Charles Geyh, who is a leading critic of judicial elections, notes, "it is somewhat disingenuous to say that merit selection systems preserve the right to vote. Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents."[111]

In fact, some scholars have questioned whether the American Bar Association, although disparaging contested elections generally,[112] supports retention elections in the Missouri Plan context simply to give voters the illusion of electoral participation so as to avoid the claim that such systems remove the electorate's right to vote: "The presence of retention elections in merit selection systems can only be explained as a concession to the entrenched political necessity of preserving judicial elections in some form, so that merit selection proponents have an answer for detractors who oppose plans that 'take away our right to vote.' "[113]

This seems to be true in North Carolina as well. The drafters of SB 458 included retention elections " 'because we are paying attention to the idea that North Carolinians may not be willing to give up the opportunity to vote for judges completely.' "[114] Thus, retention elections actually do not provide any meaningful level of accountability; rather, as Professor

109. *See* Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, *in* RUNNING FOR JUDGE 165, 177 (Matthew Streb ed., 2007).

110. As the retention elections in Iowa demonstrate, incumbents do not always win. *See* Schulte, *supra* note 102. But, this is the rare exception rather than the rule. Moreover, those advocating judicial reform invoke the Iowa elections as an example of why elections improperly politicize the judicial selection process and, therefore, why those results cannot be used to distinguish contested and retention elections.

111. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 55 (2003).

112. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) cmt. (2000) ("[M]erit selection of judges is a preferable manner in which to select the judiciary."); AM. BAR ASS'N, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 96 (1997) ("The American Bar Association strongly endorses the merit selection of judges, as opposed to their election . . . .").

113. Geyh, *supra* note 111, at 55; *see also* Dimino, *supra* note 104, at 806 ("Merit selection uses the public as participants in what is predetermined to be a useless exercise designed to ensure the retention of the incumbent."); G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 609 (2009) (stating that retention elections were "not a fundamental feature" of the Missouri Plan, but instead were "originally offered only to quiet the fears of devotees . . . of the elective method").

114. Paul Tharp, *Should NC Voters Elect Judges?*, N.C. LAW. WKLY., May 30, 2011, at 4 (quoting John Wester, former President of the North Carolina Bar Association and co-chair of the Committee for Judicial Independence); *see also* Exum & Wester, *supra* note 62, at H1 ("The Bar Association proposal . . . respects polling data indicating the public does not want to give up electing judges . . . .").

Michael Dimino suggests, "retention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy."[115]

CONCLUSION

Although "the selection of judges is an extraordinarily sensitive task for which no very good method has yet been found,"[116] North Carolina has used elections to select the members of its judiciary since 1868.[117] But Professor Carrington and others contend that the election of judges to the "highest state courts has become a national crisis . . . as a result of decisions of the Supreme Court of the United States extending the meaning and application of the First Amendment."[118] Because corporations are free to spend without limit from their general treasury funds[119] and candidates can speak openly about their views on legal and political issues,[120] judicial independence is threatened. Some judicial candidates will be—or at least appear to be—beholden to big campaign spenders. Once on the bench, others will feel obligated to live up to their campaign promises when deciding future cases, thereby threatening the due process rights of litigants. And, while Professor Carrington provides some thoughtful and important suggestions on how to improve North Carolina's current system, he ultimately advocates for a new system of judicial selection—a merit-based system pursuant to which the governor would select a judge from a list of nominees created by a nominating committee. Such a system is purported to take the politics out of judicial selection by having legal experts select judges based on their merits instead of partisan affiliation.

The situation, however, is not as bleak as Professor Carrington suggests. Since 1812,[121] states have used judicial elections without sacrificing the independence and integrity of their judiciaries. Given that state courts provide a critical check on the legislative and executive branches, state judges need to be independent of the other branches. Given

115. Dimino, *supra* note 104, at 811.

116. Carrington, *supra* note 8, at 1969.

117. Walter Clark, History of the Supreme Court of North Carolina, 177 N.C. 617, 620 (1919).

118. Carrington, *supra* note 8, at 1966.

119. *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2009).

120. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) ("The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.").

121. Larry C. Berkson, AM. JUDICATURE SOC'Y, *Judicial Selection in the United States: A Special Report*, at 1 (Aug. 2004), *available at* http://www.judicialselection.us/uploads /documents/Berkson_1196091951709.pdf (stating that Georgia amended its constitution in 1812 to provide for judicial elections).

the political nature of the judicial enterprise,[122] the people need a way to "oblige [the judiciary] to control itself."[123]

But, judicial elections do both of these things—ensure that the judiciary is independent of the other branches of government and that it is directly accountable to the people. In reviewing the actions of government officials and interpreting legislation, North Carolina judges do not have to worry about their jobs depending on those for whom the courts are a check. In addition, if a particular judge fails to follow the rule of law or otherwise perform properly, North Carolinians can vote that person off the bench at the next election.

Moreover, the solution that the North Carolina Bar Association proposed to the alleged crisis, SB 458, creates a different and more unmanageable set of problems. Pursuant to SB 458, an unelected nominating committee will determine who can serve as a judge in North Carolina. Yet, because these committee members are unaccountable to the public or anyone else, they are free to nominate individuals who reflect their personal, political, and legal viewpoints. That is, instead of having the majority determine who should serve in key government roles such as the judiciary, unelected legal and political elites will populate the state judiciary with judges who reflect the committee's view of who should serve as a judge.

Finally, SB 458 attempts to preserve accountability through retention elections. But retention elections aggravate the purported problems with contested elections because judges still might consider the impact of their decisions on their reelection prospects, but when the election occurs, there is no opposition candidate to highlight important issues or decisions by the incumbent. And because retention elections typically are non-partisan, voters cannot even use party affiliation as a stand-in to determine how a judge might view the judicial process. Thus, North Carolina should retain judicial elections to keep judges directly accountable to the public and to avoid the problems that may flow from political patronage.

122. *White*, 536 U.S. at 784 ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well.").

123. THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999).