

Judicial Selection in North Carolina, 1776-2016



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Judicial Selection in North Carolina



“That the General Assembly shall, by joint ballot of both houses, appoint judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney-General, who shall be commissioned by the Governor, and hold their offices during good behavior.”

- N.C. Constitution of 1776, § 13

Judicial Selection in North Carolina



N.C. Constitution of 1776

- Based on state constitutions of Pennsylvania, Maryland, Virginia
- None of the 13 original states had popular election of judges
- Pennsylvania, Maryland: executive appointment
- Virginia: legislative election
- Language of § 13 identical to comparable provision of Virginia Constitution of 1776

Judicial Selection in North Carolina



Legislative election of judges under Constitution of 1776 – principal features

- Life tenure (“during good behavior”)
- Judges tended to be former legislators
- Council of State filled vacancies that occurred between legislative sessions
- General Assembly did not always agree with Council of State’s choice and sometimes unseated Council’s appointees

Judicial Selection in North Carolina



1776-1868: Two principal courts

○ Superior Court

- ✦ Judges rode circuit among eight Superior Court towns (Edenton, New Bern, Wilmington, Fayetteville, Raleigh, Hillsborough, Salisbury, Morganton)
- ✦ Few Superior Court judges served more than a few years at a time, due to the onerousness of circuit riding and relatively low compensation
- ✦ Service was a way to build reputation for a return to lucrative practice

○ Supreme Court

- ✦ Created as separate appellate court by statute in 1818
- ✦ Three judges; expanded to five after Civil War

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1776-1868: 92 years

- Relatively tranquil period for judicial service
- N.C. had nationally regarded judges, especially on the Supreme Court bench
- Judicial service (especially on the Supreme Court) was a part-time job

Judicial Selection in North Carolina



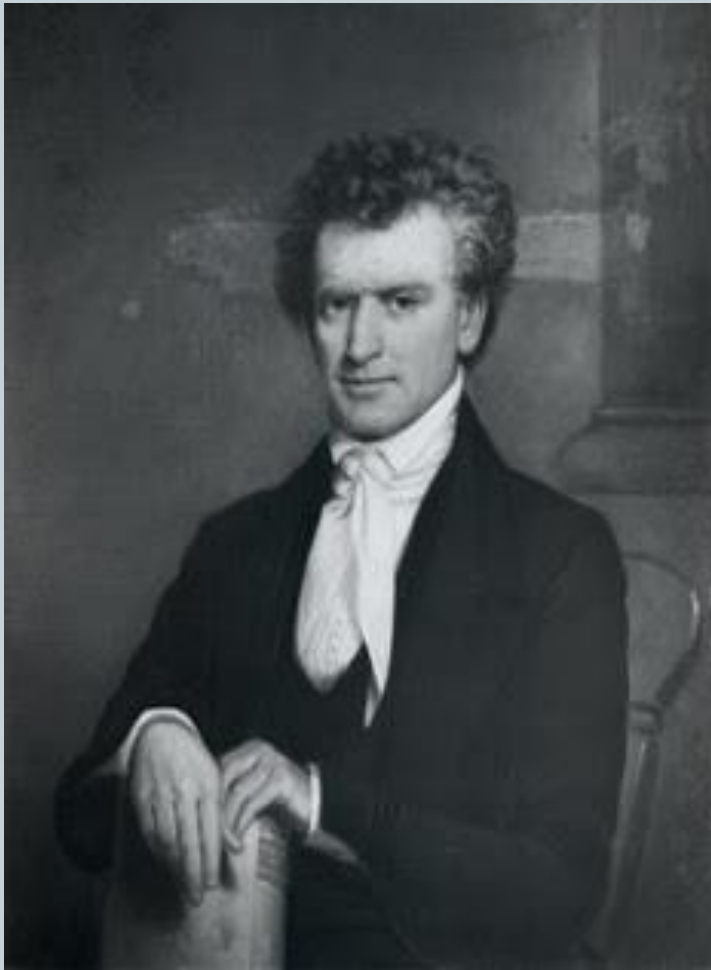
**John Louis Taylor
(1769-1829)**

Member, House of
Commons, 1794-1798

Superior Court Judge,
1798-1818

Chief Justice, Supreme
Court, 1819-1829

Judicial Selection in North Carolina



**Thomas Ruffin
(1787-1870)**

Speaker, House of Commons, 1816

Superior Court Judge, 1818-1820,
1826-1828

Judge, Supreme Court, 1829-1833,
1858-1859

Chief Justice, Supreme Court,
1833-1852

Judicial Selection in North Carolina



William Gaston (1778-1844)

Member, House of Commons and
State Senate (numerous terms)

Member, U.S. Congress, 1813-17

Introduced bill to establish N.C.
Supreme Court as separate
appellate tribunal

Judge, Supreme Court, 1833-1844

Judicial Selection in North Carolina



William Horn Battle
(1802-1879)

Member, House of Commons

Superior Court Judge

Judge, Supreme Court, 1848,
1852-1866

Founding Professor, UNC School
of Law, 1843-1879

Judicial Selection in North Carolina



“The Justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The Judges of the Superior Courts . . . shall be elected in like manner . . . , and shall hold their offices for eight years.”

- N.C. Constitution of 1868, art. IV, § 21

Judicial Selection in North Carolina



N.C. Constitution of 1868

- Constitutional Convention met in U.S. Army-occupied Raleigh from 14 January to 17 March 1868
- Congress ordered N.C. to adopt a new constitution containing certain provisions as a condition to full restoration into the Union
- Delegates were overwhelmingly Republicans: Northern “carpetbaggers,” newly enfranchised former slaves, and native whites who had joined the Republican Party

Judicial Selection in North Carolina



N.C. Constitution of 1868 (cont'd)

- Constitutions of Ohio and New York were models for some provisions, including Judiciary article (Art. IV)
- Judicial selection was debated for less than one day
- Leading arguments for three basic approaches to judicial selection were articulated and debated by handful of delegates
- Arguments are a blend of positive and negative (against other proposals)

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William Blount Rodman (1817-93)

Associate Justice, Supreme
Court, 1868-1878

Chairman, Judiciary
Committee, 1868
Constitutional Convention

Staged debate over judicial
selection on 11 February

Judicial Selection in North Carolina



N.C. Constitution of 1868 (cont'd)

Three approaches debated

1. Gubernatorial appointment with confirmation by State Senate (= federal system; W.B. Rodman argued)
2. Popular election (= OH/NY: Albion W. Tourgée argued)
3. Election by legislature (= N.C. Const. of 1776; E.W. Jones, Heaton and Abbott argued)

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Constitution of 1868 (cont'd)

Gubernatorial appointment/legislative confirmation:

Argument #1: Independence

- Judges are different from legislators, Executive officials
- Not supposed to consider the wishes of the people
- “Judges should be proof to any temptation, for not infrequent popular clamor has denounced an honest judge for the fearless enforcement of the law, when afterwards at cooler moments candid men have confessed a higher respect for him”

Judicial Selection in North Carolina



Constitution of 1868 (cont'd)

Gubernatorial appointment/legislative confirmation:

Argument #2: Public ignorance

- “great mass of the people are unacquainted with those whose qualifications are superior”

Judicial Selection in North Carolina



Constitution of 1868 (cont'd)

Gubernatorial appointment/legislative confirmation

Argument #3: If you allow popular elections, partisan politics will take over

- Party conventions will nominate judges, who will become partisans
- Conventions will nominate influential politicians for the sake of votes

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Constitution of 1868 (cont'd)

Gubernatorial appointment/legislative confirmation

Argument #4: Senatorial confirmation will prevent the Governor from appointing bad judges

- Less danger of the Governor appointing bad judges than of “a mere party convention” doing so

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Constitution of 1868 (cont'd)

Gubernatorial appointment/legislative confirmation

Argument #5: States that have adopted popular election of judges (e.g., New York) have seen the quality of their judiciaries decline

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Albion W. Tourgée
(1838-1905)

Native of Ohio; Union Army officer; Greensboro lawyer

Early civil rights activist; founder, Bennett College

Lawyer for Homer Plessy in *Plessy v. Ferguson* (U.S. Supreme Court, 1896)

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Constitution of 1868 (cont'd)

Popular Election

Argument #1: The people are more than capable of governing themselves

- “If the people were competent to choose officers to make and execute the laws, . . . they were competent to choose officers to interpret the laws”
- “The maker of the law is higher than the interpreter”

Judicial Selection in North Carolina



Constitution of 1868 (cont'd)

Popular Election

Argument #2: The people are less easy to corrupt than the Governor or the legislature

Argument #3: “From my experience, the courts in New York (at least western New York) are excellent”

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Constitution of 1868 (cont'd)

Popular Election

Argument #4: The people of North Carolina “clamor for an elective judiciary” and “know who are best prepared to be Judges”

- Popular election would be a step towards establishing government “of the people, by the people, for the people”

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Constitution of 1868 (cont'd)

Legislative Election

Argument #1: The old system worked well for N.C. We shouldn't change it unless we're sure another system will work better.

Argument #2: “The judicial ermine should be as far removed as possible from popular contests, and from the taint of partizan (sic) contact”

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Constitution of 1868 (cont'd)

Legislative Election

Argument #3: Popular election will “have a tendency to lower the standards of integrity and public virtue; and also the high order of intellectual qualifications and talent” needed to fill judicial office

Argument #4: The legislature is “more responsible than the mass of the people”

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Constitution of 1868 (cont'd)

Legislative Election

Argument #5: Allowing the Governor to appoint consolidates too much power in one person.

- The Governor “must have favorites as well as all men”
- The legislature is harder to corrupt

Judicial Selection in North Carolina



1868-1901: 32 years

- Period of turbulence in N.C. politics, especially 1868-1875 (Reconstruction Era) and 1894-1900 (“Fusion” Era)
- Political parties begin nominating judicial candidates
- Judiciary becomes a revolving door
 - 6 Chief Justices (compared to 5 between 1819 and 1868)
 - 23 Associate Justices (compared to 9 between 1819 and 1868; size of court increased from three to five and then shrank again)

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1901-1986: 85 years

- Democratic Party in sole control
- De facto appointive system
 - Governor filled nearly all vacancies as an initial matter
 - Appointees usually ran unopposed, or with token Republican opposition (de facto “retention elections”)
 - With few exceptions, campaigns were sleepy affairs

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N.C. Constitution of 1971
≅ N.C. Constitution of 1868

“District Judges shall be elected for each district for a term of four years, in a manner prescribed by law.”

“Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified.”

- N.C. Constitution of 1971, art. IV, §§ 10, 16

Judicial Selection in North Carolina



Popular election of judges under the Constitutions of 1868/1971 – principal features

- All Supreme Court justices, Court of Appeals judges and Superior Court judges are elected “by the qualified voters of the state”
- Elected for terms of 8 years, not “during good behavior”
- No reference to election “as is provided for members of the General Assembly”
- Only licensed lawyers may serve as judges (art. IV, § 22)

Judicial Selection in North Carolina



1970-71: N.C. Bar Association begins efforts to reform judicial selection by advocating for abandonment of popular elections in favor of gubernatorial appointment followed by retention election

- Mid 1970s: NCBA begins to introduce reform bills at regular intervals in General Assembly
- Efforts continue until 2010s

Judicial Selection in North Carolina



1986: Beginning of the current era

- Republican Governor James G. Martin begins appointing Republicans to full vacancies
- Makes three appointments to Supreme Court
- All three are challenged and defeated by Democrats in 1986 general election
- 1868-1901 reprise?

Judicial Selection in North Carolina



Late 1980s-mid 1990s

- After 1986 election experience, Chief Justice James G. Exum, Jr. urges Democratic-controlled General Assembly to abandon popular election in favor of “merit selection” proposals
- Medlin Commission, created by Exum, recommends appointive/merit selection system → no action

Judicial Selection in North Carolina



Late 1980s-mid 1990s (cont'd)

- N.C. Bar Association continues to support reform vigorously
- Other special interest bar groups oppose reform
- Various NCBA-sponsored bills narrowly fail to garner 3/5 majority (in House) required for legislation proposing constitutional amendment
- NCBA bills pass Senate by required 3/5 majority on several occasions
- Republicans (then minority party) favor reform; Democrats split

Judicial Selection in North Carolina



1990s-early 2000s: General Assembly (still mainly under Democratic control) begins instituting “reforms” after Republicans start winning elections

- Eliminates partisan elections at all levels of courts
- Adopts public financing of appellate judicial campaigns
- Reforms perceived as politically motivated reaction to Republican Party electoral gains
- N.C. Bar Association reform efforts begin to lose steam; all reform perceived as politically tainted

Judicial Selection in North Carolina



2010: Gov. Perdue creates Judicial Nominating Commission by Executive Order

- Fails to adhere to N.C. Bar Association recommendation for balanced, bipartisan commission with some members appointed by legislative leadership
- General Assembly objects to commission composition
- Executive Order not renewed by Gov. McCrory

Judicial Selection in North Carolina



Today

- All 7 Justices of the Supreme Court obtained their seats by running for them in the first instance
- Court of Appeals almost evenly divided between judges who were initially appointed and those who were elected in the first instance
- Most Superior and District Court judges continue to be appointed in the first instance; many run unopposed

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Today (cont'd)

- Bitter partisan divide
- Cynicism about motivation for reforms → hostile environment
- Reforms perceived as political tools intended merely to preserve/deny power

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Today (cont'd)

- 2010: *Citizens United* decision empowers “super PAC” independent expenditure groups to pour money into N.C. appellate court elections anonymously
- 2013: General Assembly repeals public financing of appellate judicial campaigns

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Today (cont'd)

2015: Governor McCrory signs legislation that:

1. Changes Supreme Court elections from “open season” to retention elections (lawsuit challenging constitutionality currently pending)
2. Creates “open judicial elections with party designations” for Court of Appeals

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Questions?