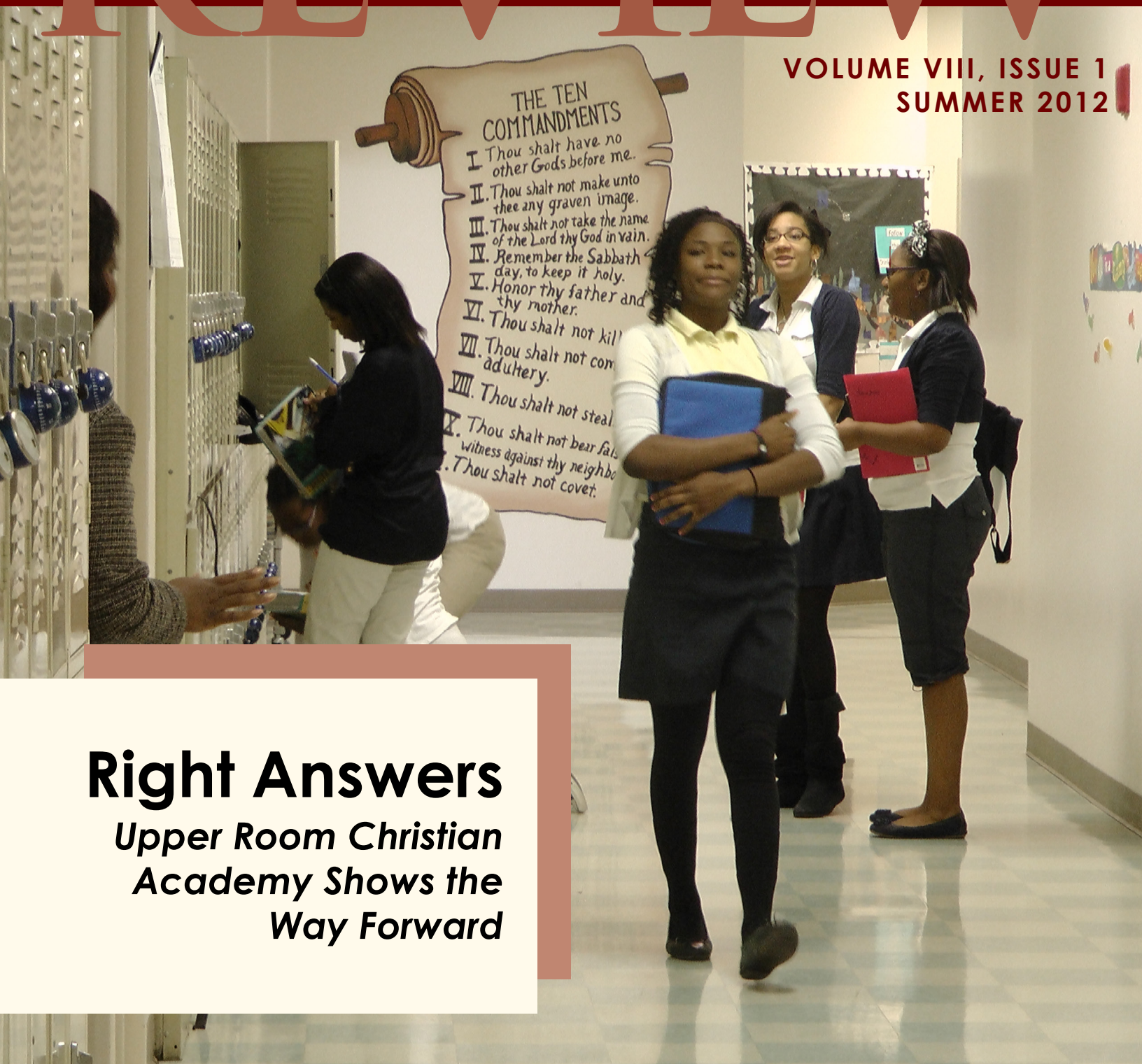
Excerpted from

CIVITAS REVIEW

VOLUME VIII, ISSUE 1
SUMMER 2012



Right Answers

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People Power

Judicial 'Reforms' Would Rob Citizens of a Vital Right



by Robert T. Numbers, II

An organized effort is under way to strip North Carolina's citizens of their power to select judges, and instead turn that authority over to an unelected and unaccountable commission of attorneys and special-interest groups. If anything, this process, called the Missouri Plan, will make the judiciary even more politicized, and will make it nearly impossible for the people to remove a judge from office. It is vital that the people and their elected representatives turn back this scheme to deny the people such a vital right.

North Carolina is one of 22 states that provides citizens with the ability to directly elect judges. The ability of citizens to have a role in selecting those who govern them is at the heart of our democratic system of government. As James Madison explained in Federalist 39, one of the most important characteristics of a government that is designed to resist tyranny is that "the persons administering it be appointed, either directly or indirectly, by the people[.]" Unfortunately, there are efforts in both the executive and legislative branches to deny North Carolina's citizens control over the composition of the judicial branch.

Executive Order 86

The North Carolina Constitution provides the governor with the ability to appoint judges to fill vacancies that arise between judicial elections. Citizens then have the ability to hold the Governor accountable if they are not happy with the Governor's judicial appointments by voting the Governor out of office. Governors frequently utilize this power, which has resulted in a substantial number of North Carolina's sitting judges reaching the bench through gubernatorial appointment.

In April 2011, Governor Perdue issued an executive order that modified how such interim vacancies would be filled. Executive Order 86 created an 18-person Judicial Nominating Commission that is tasked with nominating candidates to fill vacancies that occur in North Carolina's Superior Courts, Court of Appeals, and Supreme Court. Eight of the Commission's members are nominated by various legal special-interest groups. These individuals will serve one four-year term. The remaining 10 Commission members are selected by the Governor. These individual may serve up to two two-year terms. The members of the Commission, regardless of whether they were nominated by a special interest group or the Governor, are not removable except for cause. The Executive Order explicitly provides that it remains in effect until it is repealed, so it will be binding upon the State's next Governor unless it is repealed.

When a judicial vacancy arises, the Commission sends the Governor a slate of three individuals to fill the vacancy. The Governor — regardless of whether she believed any of the nominees was the best candidate for the job — is legally bound to appoint one of the nominees to the bench.

Senate Bill 458

A similar proposal is percolating in the General Assembly to eliminate regular judicial elections in favor of a judicial nominating commission. Under the system envisioned by the proponents of Senate Bill 458, the people of North Carolina would no longer have the ability to directly elect Superior Court and appellate judges. Instead, a 16-person judicial nominating commission would determine who could preside over these courts. Eight of the Commission's members would be nominated by various legal special-interest groups. The remaining eight Commission members would be selected by the Governor and the leadership of the General Assembly. The Commission would send the Governor a slate of two individuals to fill each seat. Once again, the Governor — regardless of whether she believed either nominee was the best candidate for the job — would be legally bound to appoint one of the nominees to the bench.

While the initial appointment under Senate Bill 458 is fairly easy to follow, the process through which a judge would retain his or her seat on the bench is somewhat more bizarre and convoluted.

When a judge is initially appointed, he or she must run in a contested election during the next statewide election for members of the General Assembly that is held more than 210 days after the vacancy occurs. For example, if a judge had been appointed under this sys-

tem on April 9, 2012, 211 days before the next statewide election for members of the General Assembly, he or she would have to run in a contested election on November 6, 2012 — the fall election. However, if a judge were appointed under this system on April 10, 2012, 210 days before the next statewide election for members of the General Assembly, he or she would not have to run in a contested election until 2014.

Regardless of when the judge must run in this contested election, the only individual who is allowed by law to challenge the appointed judge is the individual nominated by the Judicial Nominating Commission who was not selected by the Governor. However, the unappointed nominee is not required to challenge the appointed judge. If the unappointed nominee chooses not to run, the judge must participate in a nonpartisan retention election.

Under a retention election, a judge runs unopposed and the voters can vote to retain or not retain the judge. If a majority of voters vote to retain the judge, he or she will have earned an additional eight-year term on the bench. If a majority vote not to retain the judge, the judicial nominating commission will select another two judges to submit for the Governor's approval, and the process begins again. All judges who win a contested or retention election will serve eight-year terms, then face another retention election.

The Fatal Flaw of the Missouri Plan

The Missouri Plan was designed by Progressive Era reformers who believed that members of the judicial branch should be selected by a commission dominated by professional bar associations. The principal flaw in the Missouri Plan is that it removes the citizens from the process of selecting their judges and instead empowers a panel of unelected and unaccountable commissioners. If North Carolina citizens do not like the judges appointed to their courts, they are powerless to affect the appointment process: The Governor must choose one of the Commission's nominees, and citizens have no ability to remove Commission members. Allowing a handful of politicians and special-interest groups to select the members of our judicial branch is an unacceptable substitute for the democratic process.

In return for sacrificing their right to directly select their judges, citizens are promised a less-politicized judiciary. However, judicial nominating commissions do not remove politics from the judicial selection process. Rather, the opposite is true: They are nothing more than politics by a different — and less democratic — means. North Carolina's prior experiment with judicial nominations and the recent experience of other states bears this out.



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As Elon University School of Law Professor Scott Gaylord recently noted, until 1868 North Carolina utilized an appointment system to select judges. However, this system was one of many ill-advised policies abandoned in the aftermath of the Civil War. The decision to place the power of judicial selection directly in the hands of the citizens was made because the appointment system resulted in a politically polarized judiciary.

More recent academic research supports the contention that the Missouri Plan results in a more politicized judiciary. Vanderbilt Law Professor Brian Fitzpatrick has conducted extensive research into appointments by judicial nominating commissions. Professor Fitzpatrick's research demonstrates that judicial nominating commissions produce a more politically polarized judiciary. For example, in Missouri, since 1995, 87 percent of judicial nominees who made campaign contributions made them to Democrats. Similarly, in Tennessee, of the nominees whose primary voting records were publically available, two-thirds of the nominees voted in Democrat primaries.

These figures would be unremarkable if they reflected the general voting preferences of the citizens of Missouri and Tennessee, but they do not. During the same time period, citizens of both states voted for the Democratic candidate for seats in the state and federal House races approximately 50 percent of the time. This evidence is consistent with the conclusion that the Missouri Plan results in a judiciary that is much further to the left than it would be if members of the bench were selected directly by the people.

Moreover, the process has provided a significant incentive for one particular special-interest group — trial attorneys — to capture the nominating process, perhaps in an effort to ensure that like-minded judges are appointed to the bench. As judicial selection expert Carrie Severino has noted, the Missouri Association of Trial Attorneys (the professional plaintiffs bar in Missouri) has had a lopsided influence over the nominating commission in Missouri, leading to judicial nominations that reflect the preferences of that particular organization.

Worse, the defects in the Missouri Plan do not stop with the initial appointment process. The retention-election format built into the Missouri Plan system ensures that once the judiciary is out of step with the views of the public, it is very difficult to remove wayward judges. Political science professors Melinda Gann Hall and Chris W. Bonneau analyzed the results of retention elections for state supreme court justices from 1990-2004. Their research found that during that period incumbents were successful in their retention elections 98.7 percent of the time. The near unanimous success of justices running in retention elections stands in stark contrast to justices running in contested partisan elections, who were reelected only 68.6 percent of the time. Retention elections also result in dramatic decreases in voter knowledge and participation. The retention election system envisioned by Missouri Plan proponents is, effectively, a system of life tenure for members of the bench.

Let the People Decide

The proponents of the Missouri Plan in North Carolina are putting forward a solution that is in search of a problem. There is no indication that the people of North Carolina are not up to the task of selecting the members of their judiciary. North Carolina's Supreme Court is one of a handful of states that has a female majority. The Supreme Court's political balance, currently four Republicans and three Democrats, is generally in line with the state's political balance.

In fact, the primary complaints about the North Carolina Supreme Court is not that its members are

unqualified, that it lacks diversity, or that it is overly partisan. Instead, the criticism that is most frequently leveled at the Supreme Court is that it does not issue enough opinions. If our state faced a judicial crisis that justified dramatically overhauling the manner in which the judiciary is selected, it would hardly make sense for there to be an outcry for more opinions from the Court.

In the absence of meaningful evidence that the voters of North Carolina are not able to select a qualified judiciary, there is no compelling reason to strip them of this fundamental right. Although the judicial branch is distinct from its executive and legislative counterparts in that its duty is to say what the law is, rather than what the law should be, its authority to do so is still based upon a grant of power from the citizenry. When the judiciary makes decisions, it is either applying laws enacted by the citizens' representatives or enforcing the restrictions the citizens have placed on their government through the state and federal constitutions.

Because the judicial branch exercises power granted to it by the people and enforces laws and limitations on government enacted by the people, North Carolina's citizens — and not political appointees and special interest groups — should determine who will exercise this authority. North Carolina's next Governor should immediately repeal Executive Order 86 and resist any efforts by the General Assembly to remove the citizens of North Carolina from the process of judicial selection.

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