

Snake Oil and Second Chances: A Legal Analysis of Political Party Switching and a Framework for Stakeholder Remedies in North Carolina*

Post-election party switching occurs when an elected official switches their party affiliation while in office after being elected as a member of the other party for the same term. The essential issue of post-election party switching is that it leads to betrayal of voter expectations because voters select candidates based on expectations about how that candidate will behave while in office, and politicians who switch parties diverge from expected behavior. Ultimately, post-election party switching can lead to voter disenfranchisement and a lack of accountability for elected officials.

Nonetheless, countervailing factors caution against and prevent the total elimination of party switching. The constitutionally protected freedom of association creates a wall beyond which party affiliation cannot be curtailed. Still, at other times, state laws tend to show hostility towards party switching. This indicates the general discomfort felt by state courts and legislatures towards our current system of liberal party realignment but does nothing to address post-election party switching. Private causes of action under civil and contract theories are also mostly inapplicable.

Despite these constraints, there are still viable remedies available to treat the ill of post-election party switching. State legislatures may engage in prospective self-regulation by passing election laws that create mechanisms for voter accountability, which could include expulsion, recall, and filling a “vacancy” via appointment or special election. The use of each as a check on politician behavior varies among the states, and each comes with its own benefits and drawbacks due to logistical, pragmatic, and theoretical variables.

Democrats in the North Carolina Senate introduced the Voter Fraud Prevention Act (“the Act”) in June 2023. Although transparently politically motivated, this proposed legislation aims to address the issue of post-election party switching and provide redress for North Carolinians. The Act suffers some shortcomings but could be improved significantly by replacing special elections with politically constrained appointments. Although the bill stalled in committee soon after it was introduced, the Act represents an opportunity for North

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Carolina legislators to demonstrate commitment to preserving representative democracy in North Carolina for their constituents.

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INTRODUCTION

Although many of the Framers of the United States political system were emphatically anti-political party,¹ by the 1790s the political elite had split into

1. See George Washington, *Farewell Address* (Sept. 19, 1796), reprinted in S. PUB. 115-5, at 13 (2017) (“Let me . . . warn you in the most solemn manner against the baneful effects of the spirit of

two ideological factions,² and after 250 years of American history, the two-party system is now deeply entrenched in American politics.³ Today, independents represent a larger share of the American public than registered partisans of either party,⁴ but among politicians, partisanship prevails. As of 2023, there are 7,971 United States senators and congresspeople, state senators and representatives, and governors—only 24 of them (less than one percent) are not members of the Democratic or Republican parties.⁵

As institutions, political parties serve the crucial functions of maintaining continuity in governance, setting navigable expectations for voters, and allowing minorities to create majority coalitions.⁶ Practically, there are significant advantages to politicians in being associated with one of the two major political parties, chief of which is the availability of financial, logistical, and relational support from national conventions and state parties.⁷

party, generally.”); Alexander Hamilton, *The Defence No I, [1792-1795]*, NAT’L ARCHIVES FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-13-02-0217> [https://perma.cc/XN5U-DBHK] (“Party-Spirit is . . . [a government’s] most fatal disease.”). *But see* Letter from James Madison to Henry Lee (June 25, 1824), in *From James Madison to Henry Lee, 25 June 1824*, NAT’L ARCHIVES FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-03-02-0333> [https://perma.cc/J3SW-JTR3] (“[P]arties . . . seem to have a permanent foundation in the variance of political opinions in free states . . .”).

2. *About Parties and Leadership | Historical Overview*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/parties-leadership/overview.htm> [https://perma.cc/6E6F-2JLW] (“In the 1790s and early 1800s, senators divided into rival parties based on support of and opposition to the policies of presidents George Washington and John Adams.”).

3. Ryan J. Silver, Note, *Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy*, 10 DREXEL L. REV. 239, 256 (2017). Silver stated that social and political reforms were “commandeered by the major parties in order to both draw support from a larger base of voters and to use them as direct attacks against their competitor party.” *Id.* He concluded that this had the effect of “solidifying the two-party system’s grip on the American political system,” and the “grip appears unlikely to loosen given that state law and courts protect the two-party system.” *Id.*

4. Carroll Doherty & Rachel Weisel, *A Deep Dive into Party Affiliation*, PEW RSCH. CTR. (Apr. 7, 2015), <https://www.pewresearch.org/politics/2015/04/07/a-deep-dive-into-party-affiliation/> [https://perma.cc/DNN9-9FP5] (“The share of independents in the public, which long ago surpassed the percentages of either Democrats or Republicans, continues to increase.”).

5. The total number of elected officials was calculated by tallying the officials from the 50 states (excluding the territories and D.C.)—7,386, then adding 50 governors, 100 U.S. senators, and 435 U.S. representatives. *Number of Legislators and Length of Terms in Years*, NAT’L CONF. ST. LEGISLATURES (June 19, 2024), <https://www.ncsl.org/resources/details/number-of-legislators-and-length-of-terms-in-years> [https://perma.cc/X53B-L9AW]. The number of independents likewise excludes officials from the territories and D.C. but includes independents who caucus with one of the two major parties. *Current Independent and Minor Party Federal and State Officeholders*, BALLOTPEdia, https://ballotpedia.org/Current_independent_and_minor_party_federal_and_state_officeholders [https://perma.cc/PGY7-J273].

6. *See* A. JAMES REICHLEY, *THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES 1-2* (1992) (describing the institution of the American political party as essential in performing major civic functions).

7. *See Support from Political Parties*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/support-political-parties/> [https://perma.cc/6K2C-7GPC] (describing special legal treatment for contributions to candidates from political parties).

Although—or perhaps because—the two-party system demands that successful politicians proclaim a party affiliation, politicians in federal and state government, and in the legislative and executive branches, regularly switch parties.⁸ This party switching might occur “pre-election,”⁹ when a candidate changes their political party affiliation before they run for election, or between terms of office. For example, since 1994, 177 state legislators have engaged in pre-election party switching,¹⁰ which begs the question: Why might a politician elect to change their party affiliation?

There are several possible explanations. First, switching may allow a politician to wield more political power. If a politician switches from the minority to the majority party and is reelected, the politician gains the benefits of belonging to the party in power, including preferential committee assignments.¹¹ Second, a politician may also have a better chance of election to a higher political office as a member of their new party than their original party.¹² If a politician is running in a district where voters are trending away from their current party, that politician may switch for the sake of political survival, as a last-ditch effort to be reelected.¹³ Third, a pre-election switch may be due to a genuine change in political alignment, either because the politician’s

8. See *State Legislators Who Have Switched Political Party Affiliation*, BALLOTPEDIA, https://ballotpedia.org/State_legislators_who_have_switched_political_party_affiliation?_wscid=CA4EED934FD9080A21723AC4859B1054D9FF8E691117628C [<https://perma.cc/9HZG-MRSX>] [*State Legislators*, BALLOTPEDIA]; *Senators Who Changed Parties During Senate Service (Since 1890)*, U.S. SENATE, <https://www.senate.gov/senators/SenatorsWhoChangedPartiesDuringSenateService.htm> [<https://perma.cc/QW3A-H34Z>]; *Charlie Crist and 21 Most-Famous Political Party Switchers of All Time*, ABC NEWS (Nov. 5, 2013, 10:02 AM), <https://abcnews.go.com/Politics/charlie-crist-21-famous-political-party-switchers-time/story?id=20788202> [<https://perma.cc/FK9V-SVLG>].

9. See generally James S. Wrona & L. Francis Cissna, *Switching Sides: Is Party Affiliation a Tie That Binds*, 28 ARIZ. ST. L.J. 735 (1996) (distinguishing post-election from pre-election party switches due to their unique impacts on voters).

10. *State Legislators*, BALLOTPEDIA, *supra* note 8. Of these switches, 91 (52%) switched to the Republican Party, 30 (17%) switched to the Democratic Party, and 54 (31%) switched to other minority parties, including 39 switches to independent, 9 to Libertarian, and 1 each to the Green Party, no affiliation, and undeclared. *Id.* There were at least four “double-dippers” who changed their party affiliation more than once. *Id.* Georgia, Louisiana, and Mississippi saw the most switches, with 15 (+13 Republicans, +1 Democrat, +1 Independent), 17 (+15 Republicans, +1 Independent, +1 Democrat), and 20 switches (+15 Republicans, +5 Independents), respectively. *Id.*

11. For a discussion of the majority party advantage for individual legislators, see, for example, Henry A. Kim & Justin H. Phillips, *Dividing the Spoils of Power: How Are the Benefits of Majority Party Status Distributed in U.S. State Legislatures?*, 9 ST. POL. & POL’Y Q. 125, 125–26 (2009).

12. See Dylan Scott Rickards, *Predicting Party Switching in U.S. State Legislatures 8* (May 2004) (M.A. thesis, Louisiana State University and Agricultural and Mechanical College) (on file with the North Carolina Law Review), https://repository.lsu.edu/gradschool_theses/3553 [<https://perma.cc/AU5X-RU3A>] (describing how political ambition for higher office may lead an elected official to switch parties).

13. See Nicole Narea, *Why These Democrats Are Defecting to the GOP*, VOX, <https://www.vox.com/politics/2023/4/11/23679162/louisiana-north-carolina-cotham-thompson-lacombe> [<https://perma.cc/5E9M-P25B>] (last updated Apr. 17, 2023, 4:15 PM) (“Switching parties can also be a means of political survival if a seat is trending in the direction of the opposite party.”).

beliefs have shifted since the last election, or because the politician feels their former party left them.¹⁴

Party switching can also occur “post-election,”¹⁵ when an elected official switches their party affiliation while in office, after being elected as a member of the other party for the same term. In the legislative context, stories of post-election party switching, regardless of party affiliation, consistently make headlines and provoke anger among constituents.¹⁶

For example, in August 2022, Republican Colorado State Senator Kevin Priola announced that he would switch his affiliation to the majority-holding Democratic Party for the remainder of his term.¹⁷ After several years of backing Democratic-led legislation, Priola cited the January 6th insurrection attempt as the “last straw,” which prompted his switch.¹⁸ One of his former colleagues in the Republican Party labeled Priola a “self-serving coward.”¹⁹ Although his district leans Democratic, his constituents were outraged by his defection and championed a recall, gathering over 20,000 signatures in support of holding a recall election.²⁰

In North Carolina, in April of 2023, formerly Democratic State Representative Tricia Cotham announced that she would switch her affiliation to the Republican Party.²¹ At her press conference announcing the switch, Cotham cited bullying by her party colleagues and her perception that the Democratic Party had become “unrecognizable” to her and others in the state.²² Just six short months earlier, Cotham ran on the Democratic Party platform and was elected to the North Carolina House of Representatives as a member of the

14. As Ronald Reagan famously uttered, and which has since become a political platitude, “I didn’t leave my party; my party left me.” Ronald Reagan, President, U.S., Remarks at a Republican Campaign Rally in Mount Clements, Michigan (Nov. 5, 1988) (transcript available in the Ronald Reagan Presidential Library & Museum), <https://www.reaganlibrary.gov/archives/speech/remarks-republican-campaign-rally-mount-clements-michigan> [<https://perma.cc/A3N8-GELH>].

15. See generally Wrona & Cissna, *supra* note 9 (distinguishing post-election from pre-election party switches due to their unique impacts on voters).

16. See *infra* notes 63, 121–23 and accompanying text; Section III.B.2.

17. Seth Klamann, *Renewed Recall of Party-Switching Colorado Lawmaker “More Unlikely” in Wake of GOP’s Election Losses*, DENVER POST (Nov. 18, 2022, 6:00 AM), <https://www.denverpost.com/2022/11/18/kevin-priola-recall-colorado-state-senate/> [<https://perma.cc/L58A-Z47S>].

18. Marianne Goodland, *Sen. Kevin Priola to Switch Party Affiliation, Bolstering Democrats in Colorado’s Senate*, COLO. POLS. (Aug. 22, 2022), https://www.coloradopolitics.com/elections/sen-kevin-priola-to-switch-party-affiliation-bolstering-democrats-in-colorados-senate/article_9bf27350-2229-11ed-95c7-8fe529896062.html [<https://perma.cc/FRB8-E9D3>].

19. *Id.*

20. The recall was ultimately halted by the courts due to redistricting and was never revived. *Id.*

21. Queen City News, *NC Rep. Tricia Cotham Confirms Switch from Democrat to Republican*, YOUTUBE, at 02:34–03:02 (Apr. 5, 2023), https://youtu.be/-PWxsWJg_6w?si=ZLTfhvLVhIr3_vD [<https://perma.cc/8WPG-ZLKW>] (on file with the North Carolina Law Review). Representative Cotham will serve as the primary case example of post-election party switching throughout the remainder of this Comment.

22. *Id.* at 03:39–43, 04:15–25.

Democratic Party by her constituents in Mecklenburg County with a nineteen-point lead over her Republican opponent.²³

The effect of Cotham's switch on the legislative agenda was significant. With Cotham in their caucus, the Republicans in the legislature gained the supermajority necessary to override Democratic Governor Roy Cooper's veto.²⁴ With that power, Republicans passed a bevy of legislation over Governor Cooper's veto, including abortion restrictions,²⁵ anti-LGBTQIA+ legislation,²⁶ election law changes,²⁷ reductions to executive power,²⁸ and loosening of firearm restrictions.²⁹ Predictably, vocal opposition in North Carolina and among Cotham's majority-Democratic constituents suggests that this switch was

23. *Official General Election Results – Mecklenburg, N.C. ST. BD. ELECTIONS* (Nov. 8, 2022), https://er.ncsbe.gov/?election_dt=11/08/2022&county_id=60&office=NCH&contest=0 [<https://perma.cc/AY3T-3F5D> (staff-uploaded archive)].

24. This is not the first time that a post-election party switch has shifted control of the legislature in North Carolina—in 2003, State Representative Michael Decker switched his affiliation from Republican to Democrat, removing control of the North Carolina House of Representatives from the Republicans and creating a 60-60 stalemate in that chamber. *Decker Switches to Democrats, Making House Even Split*, WRAL NEWS, <https://www.wral.com/news/local/story/1089942/> [<https://perma.cc/BT55-969G>] (last updated Apr. 6, 2011, 10:00 AM). Decker was later found to have taken bribes in return for switching parties and was convicted on federal charges of conspiracy to commit extortion, honest services mail fraud, and money laundering. Don Carrington, *Decker Pleads Guilty to Conspiracy*, CAROLINA J. (Aug. 2, 2006), <https://www.carolinajournal.com/decker-pleads-guilty-to-conspiracy/> [<https://perma.cc/4FCB-JSCJ>].

25. Abortion Laws, ch. 14, § 1, 2023 N.C. Sess. Laws __, __ (codified as amended at N.C. GEN. STAT. §§ 90-21.81A, -21.81B) (criminalizing abortion after twelve weeks gestation, except in cases of medical emergency, rape, incest, or to save the life of the mother).

26. An Act to Protect Opportunities for Women and Girls in Athletics, ch. 109, § 1, 2023 N.C. Sess. Laws __, __ (codified at N.C. GEN. STAT. § 115C-407.59) (prohibiting transgender children from participating in school athletics on the team which matches their gender identity); An Act to Prohibit Gender Transition Procedures for Minors, ch. 111, § 1, 2023 N.C. Sess. Laws __, __ (codified at N.C. GEN. STAT. § 90-21.151) (eliminating access to gender affirming care for minors in North Carolina); An Act to Enumerate the Rights of Parents to Direct the Upbringing, Education, Health Care, and Mental Health of Their Minor Children, ch. 106, § 2, 2023 N.C. Sess. Laws __, __ (codified at N.C. GEN. STAT. §§ 115C-76.45, -76.55) (censoring gender and sexuality content from school curricula and compelling disclosure of student sexuality and gender identity to parents).

27. An Act to Make Various Changes Regarding Elections Law, ch. 140, § 35, 2023 N.C. Sess. Laws __, __ (codified in scattered sections of N.C. GEN. STAT. chapter 163) (requiring absentee ballots to be turned in by election day); Act of Oct. 10, 2023, ch. 139, § 2.1, 2023 N.C. Sess. Laws __, __ (codified at N.C. GEN. STAT. § 163-19) (giving appointment power of state board of elections to the state legislature).

28. Act of Oct. 10, 2023, ch. 136, §§ 2.1(a), 3.1(a), 4.1(a), 5.1(a), 6.1(b), 7.1(a), 10.1(a), 2023 N.C. Sess. Laws __, __ (codified as amended in scattered sections of N.C. GEN. STAT. chapters 62, 113, 124, 130, and 143) (removing or reducing the governor's appointment power for seven state executive boards).

29. Act of Mar. 29, 2023, ch. 8, §§ 1.1(a), 2, 2023 N.C. Sess. Laws __, __ (codified in scattered sections of N.C. GEN. STAT. chapters 14 and 122C) (allowing handguns on religious school property and making optional sheriff-issued permits for handgun purchases).

incredibly unpopular.³⁰ Despite popular sentiment reflecting a desire to hold Cotham accountable for her switch, no remedy is currently available to Cotham's former-party colleagues or her constituents short of voting her out of office in the next election, a remedy which is itself insufficient due to gerrymandered redistricting.³¹ Cotham's Democratic former colleagues introduced a bill which would seriously disincentivize post-election party switches, but it has not gained traction.³²

Despite the predictable backlash, politicians continue to engage in post-election party switching under either of two scenarios: pre-meditated or *post-factum* action. If the switch was pre-meditated (before the election), the politician sold their constituents snake-oil on the campaign trail to gain short-lived power by switching to the majority party once in office.³³ If the decision truly occurred *post-factum* (after the election), the politician may be seeking a second chance at finding the political affiliation which best represents their beliefs. Both motives risk alienating voters and causing them to second-guess their understanding of the person they elected.

Regardless of the impetus, a post-election party switch poses a serious risk of eroding representative democratic principles, stifling faith among voters in their elected official, and increasing mistrust of elections and our political system.³⁴ These harms to voters are currently without a legal or political remedy in North Carolina, where there is no effective means of redress for post-election party switching. For this reason, it is imperative that the North Carolina General Assembly earnestly considers pending legislation that attempts to address these issues.

This Comment examines the implications of post-election party switching on representative democracy and argues that current remedies in North Carolina are insufficient. Part I frames the impact of post-election party

30. Shortly after Cotham's announcement, a Mecklenburg County nonprofit started a petition entitled "The People's Recall," demanding that Cotham resign; the petition had over 7,000 signatures as of June 2023. Morgan Frances, *Petition Launched for Rep. Tricia Cotham to Resign*, CBS 17 NEWS, <https://www.cbs17.com/news/north-carolina-news/petition-launched-for-rep-tricia-cotham-to-resign/> [<https://perma.cc/397J-BHGT> (staff-uploaded archive)] (last updated June 21, 2023, 7:04 AM).

31. See *infra* Section I.B for a discussion of the impacts of partisan gerrymandering on voter remedies for post-election party switching.

32. See S.B. 748, 156th Gen. Assemb., Reg. Sess. (N.C. 2023), which has been stalled before the Senate Committee on Rules and Operations since June 7, 2023. *Senate Bill 748 Bill Lookup*, N.C. GEN. ASSEMBLY, <http://www.ncleg.gov/BillLookup/2023/S748> [<https://perma.cc/38GB-5NFJ>].

33. It bears mentioning that prominent members of the North Carolina Republican Party, including Republican House Speaker Tim Moore, have admitted publicly that they encouraged Cotham to run for office before she was elected as a Democrat in 2022. Kate Kelly & David Perlmutter, *Inside the Party Switch That Blew Up North Carolina Politics*, N.Y. TIMES, <https://www.nytimes.com/2023/07/30/us/inside-the-party-switch-that-blew-up-north-carolina-politics.html> [<https://perma.cc/M5W4-SPBC> (staff-uploaded, dark archive)] (last updated July 31, 2023) (interviewing Speaker Moore).

34. See *infra* Section I.B, for a discussion of these impacts on voters.

switching on voter expectations and representation in the context of externalities including political gerrymandering. Part II identifies First Amendment freedom-of-association limitations on outright prohibition of party switching, describes hostility towards pre-election party switching, and outlines limits which prevent restriction of party switching under traditional civil and contracts principles. Part III surveys and analyzes the landscape of statutory remedies available in other states to redress post-election party switching, including resignation, expulsion, recall, and vacancy filling. Finally, Part IV recommends that the proposed “Voter Fraud Prevention Act,”³⁵ with minor changes, would be an effective mechanism for limiting the injurious effects of post-election party switching on representative democracy in North Carolina.

I. FRAMING THE ISSUE

The essential issue of post-election party switching is that it leads to betrayal of voter expectations. This assumes, of course, two component parts: (1) politicians who switch parties change their behavior, and (2) voters select candidates based on expectations about how that candidate will behave while in office. Ultimately, post-election party switching can lead to voter disenfranchisement, and a lack of accountability for elected officials.

A. *Impact of Party Switching on Politician Behavior*

Post-election party switching leads politicians to vote routinely with their new party, and they are rewarded for their switch with power and opportunity in their new party structures. It is well established that party affiliation impacts legislative voting behavior. Even after controlling for an individual politician’s ideology—politicians tend to vote along party lines, regardless of how they really feel.³⁶ Further, a survey of roll call voting behavior of congressional party switchers over fifty years reveals that, after switching, members exhibit large, statistically significant changes in their voting behavior to match the political agenda of their new party.³⁷

The voting behavior of North Carolina State Representative Tricia Cotham embodies this phenomenon and supports the conclusion that party affiliation has a strong impact on voting behavior. From 2007 to 2008 and 2010

35. S.B. 748, 156th Gen. Assemb., Reg. Sess. (N.C. 2023).

36. See Gregory L. Hager & Jeffrey C. Talbert, *Look for the Party Label: Party Influences on Voting in the U.S. House*, 25 LEGIS. STUD. Q. 75, 94 (2000) (“Our results suggest that parties do influence member behavior beyond that predicted from their individual preference structure. The real difficulty is understanding what behavior would be like in the absence of party influence.”); cf. Nolan McCarty, Keith T. Poole & Howard Rosenthal, *The Hunt for Party Discipline in Congress*, 95 AM. POL. SCI. REV. 673, 686 (2001) (stating that “[v]oting behavior changes fairly dramatically when members change parties,” and describing that party discipline may stem from internal and external factors).

37. Timothy P. Nokken, *Dynamics of Congressional Loyalty: Party Defection and Roll-Call Behavior, 1947-97*, 25 LEGIS. STUD. Q. 417, 440–41 (2000).

to 2015, Cotham consistently voted along party lines as a Democrat. As a single example, she was endorsed by Planned Parenthood, and, in 2015, she spoke on the N.C. House floor about her own abortion in opposition to proposed abortion restrictions.³⁸ This political behavior was and is consistent with Democratic Party ideology.³⁹ Her campaign platform for the 2022 election was also consistent with Democratic Party values.⁴⁰ She campaigned on an explicitly pro-choice,⁴¹ pro-LGBTQ+,⁴² and pro-voting access platform in 2022.⁴³ As a Democrat, she also co-sponsored a bill to codify abortion protections in January of 2023⁴⁴ and a bill to establish online voter registration and expand early voting hours in March of 2023, less than one month before announcing her party switch.⁴⁵ Since her party switch in April 2023, she has consistently voted along party lines with her Republican colleagues. She has voted in favor of a twelve-

38. Laura Leslie, *NC House Approves Three-Day Abortion Waiting Period*, WRAL NEWS, <https://www.wral.com/story/nc-house-approves-three-day-abortion-waiting-period/14601698/> [<https://perma.cc/JL5H-SUKW>] (last updated Apr. 23, 2015, 6:44 PM) (quoting Tricia Cotham: “This decision was up to me, my husband, my doctor and my God. It was not up to any of you in this chamber, and I didn’t take a survey.”).

39. *2012 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Sept. 3, 2012), <https://www.presidency.ucsb.edu/documents/2012-democratic-party-platform> [<https://perma.cc/9R62-HSKZ>] (“The Democratic Party strongly and unequivocally supports *Roe v. Wade* and a woman’s right to make decisions regarding her pregnancy, including a safe and legal abortion.”).

40. *2020 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Aug. 17, 2020), <https://www.presidency.ucsb.edu/documents/2020-democratic-party-platform> [<https://perma.cc/5JC9-BCWK> (staff-uploaded archive)]. The 2020 party platform states:

We believe unequivocally . . . that every woman should be able to access . . . safe and legal abortion. . . . We will work to ensure LGBTQ+ people are not discriminated against We will make voting easier and more accessible for all Americans by supporting automatic voter registration, same-day voter registration, early voting, and universal vote-from-home and vote-by-mail options.

Id.

41. Tricia Cotham (@triciacotham), X (May 3, 2022, 7:31 AM), <https://x.com/triciacotham/status/1521452477475917825> [<https://perma.cc/HV8R-9B9L>] (“Now, more than ever we need leaders who will be unwavering and unapologetic in their support of abortion rights. I’ll fight to codify Roe in the #ncga and continue my strong record of defending the right to choose.”).

42. *Meet Tricia Cotham*, TRICIA COTHAM NC HOUSE DIST. 112, <https://democrat.triciacotham.org/> [<https://perma.cc/C9YK-92YA>] (“Right now, LGBTQ+ youth are under attack by Republican state legislatures across the country. I will stand strong against discriminatory legislation and work to pass more protections at the state level.”).

43. *Id.* (“I was proud to sponsor legislation to expand access to voter registration for young people, enact same-day registration, and extend early voting to include Sunday voting when many organizations conduct ‘Souls to the Polls’. I will continue to oppose attacks on our democracy, preserve fundamental voting rights, and ensure all voices are heard.”).

44. H.B. 19, 156th Gen. Assemb., Reg. Sess. (N.C. 2023); *House Bill 19 Bill Lookup*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/BillLookup/2023/H19> [<https://perma.cc/92CH-7J63>] (listing Representative Cotham as a sponsor).

45. H.B. 293, 156th Gen. Assemb., Reg. Sess. (N.C. 2023); *House Bill 293 Bill Lookup*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/BillLookup/2023/H293> [<https://perma.cc/DD8P-WC4N>] (listing Representative Cotham as a sponsor).

week abortion ban,⁴⁶ legislation that would prevent transgender youth from accessing gender-affirming care,⁴⁷ and voting legislation that drastically shortened the mail-in ballot return window,⁴⁸ all in direct contravention of her pre-party-switch platform.

Such drastic changes in political behavior post-switch beg the question of what truly motivates legislators to vote with their new party. Scholars posit two types of partisan constraints on politician behavior: constituency-based and institutionally based constraints.⁴⁹ The distinction between the two types suggests that constituency-based constraints act to incentivize politicians to toe “the party line” or risk losing the support in primary and general elections of constituents who expect a certain behavior from politicians in their party.⁵⁰ On the other hand, institutionally based constraints are in force where party leadership incentivizes politicians in their party to cohere via tangible benefits.⁵¹ Party-line voting by party switchers demonstrates a motivation to adhere to the institutionally based expectations associated with their new party, not the expectations of the constituents who elected them (which they have likely already betrayed by switching parties).⁵²

The fact that post-election party switchers have already flouted constituency-based constraints indicates that they may be more motivated than pre-election switchers by the ability to reap nonvoter-related benefits from their new party affiliation. These benefits may include preferential committee assignments, other leadership opportunities, and the ability to leverage party clout in bids for reelection.⁵³ This phenomenon is borne out in the United States House of Representatives, where party switchers are more likely than nonswitchers to receive preferential committee assignments that violate norms

46. *Representative Tricia Ann Cotham Votes*, N.C. GEN. ASSEMB., <https://www.ncleg.gov/Members/Votes/H/817> [<https://perma.cc/F3ET-Q89Z>].

47. *Id.*

48. *Id.*

49. See Nokken, *supra* note 37, at 419 (“Partisan constraint may be exogenous (constituency based) or endogenous (institutionally based).”).

50. *Id.* at 419–20.

51. For detailed discussion of this theory, known as the “party cartel” model, see generally GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (Brian Barry, Robert H. Bates, James S. Coleman & Samuel L. Popkin eds., 1st ed., 1993); Gary W. Cox & Mathew D. McCubbins, *Bonding, Structure, and the Stability of Political Parties: Party Government in the House*, 19 *LEGIS. STUD. Q.* 215 (1994).

52. See Rickards, *supra* note 12, at 26 (“[I]t does not appear that electoral concerns fuel party switching. . . . On the other hand, legislators seemed to be very responsive to the fortunes of the opposing party.”).

53. See Nokken, *supra* note 37, at 420 (“Parties utilize bonding mechanisms that help to compel [elected officials] to support the party leadership in return for tangible benefits such as plum committee assignments, leadership positions, and the party’s collective reputation to assist them in their respective reelection bids.”).

of seniority.⁵⁴ It follows that politicians who decide to engage in post-election party switching have significant incentives to change their voting behavior to align with their new party and few reelection-related disincentives to adhere to voter expectations.

B. *Impact of Party Switching on Voter Expectations and Representation*

In our representative democracy, most state legislators are elected by a plurality of voters in their district: the candidate with the most votes gets to represent the voters.⁵⁵ As a general rule, voters who identify with a political party vote in congruence with that party when they go to the polls.⁵⁶ Political party is a shorthand for candidate values,⁵⁷ and for the totally uninformed voter, it is the single piece of information available about a candidate as they make decisions in the ballot box. As political analyst Charlie Cook described it, “It’s not the face anymore; it’s the jersey.”⁵⁸ Consequently, post-election party switching betrays constituents’ expectations because the elected official’s behavior often departs from their original party affiliation.

This result is problematic because the dominant historical and modern view of representation envisions the elected official as a representative for the *beliefs and interests of their specific constituency*, rather than as a guardian who promotes their own vision of what is best for the society.⁵⁹ The Framers shared this view, believing that representative democracy serves as “a check on government because it allow[s] citizens to unseat incompetent rulers and thereby align the interests of governmental actors with those of the

54. Antoine Yoshinaka, *House Party Switchers and Committee Assignments: Who Gets “What, When, How?”*, 30 LEGIS. STUD. Q. 391, 399 (2005).

55. Georgia and Louisiana require a state legislator to win a majority of the vote, and if one is not achieved, it triggers a run-off election between the two candidates with the highest share of the votes. See GA. CODE ANN. § 21-2-501 (2024); LA. STAT. ANN. § 42:1360 (2024).

56. In the 2022 midterm elections, 96% of Democratic voters voted for Democratic candidates, and 94% of Republican voters voted for Republican candidates. HANNAH HARTIG, ANDREW DANILLER, SCOTT KEETER & TED VAN GREEN, PEW RSCH. CTR., *REPUBLICAN GAINS IN 2022 MIDTERMS DRIVEN MOSTLY BY TURNOUT ADVANTAGE 25* (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/07/PP_2023.07.12_validated-voters_REPORT.pdf [<https://perma.cc/8HZJ-V6P2>]. Independents split their votes between the two parties, with 49% and 47% respectively. *Id.* There was also a strong correlation between political ideology and preference, with conservative Republicans voting with their party 98% of the time, and liberal Democrats with theirs 99% of the time. *Id.*

57. See generally Paul Goren, *Party Identification and Core Political Values*, 49 AM. J. POL. SCI. 881 (2005) (concluding that party identification shapes core political values because party identification systematically constrains beliefs and finding that “[c]itizens rely heavily on partisanship and core principles to construct their policy preferences, to guide their evaluations of public officials, and to inform their votes”).

58. Charlie Cook, *For More Voters than Ever, It’s the Party, Not the Person*, COOK POL. REP. (Sept. 18, 2020), <https://www.cookpolitical.com/analysis/national/national-politics/more-voters-ever-its-party-not-person> [<https://perma.cc/V8KT-MD2S>].

59. Jonathan Macey, *Representative Democracy*, 16 HARV. J.L. & PUB. POL’Y 49, 49–50 (1993).

electorate.”⁶⁰ Post-election party switching therefore represents a breakdown in the expected and intended outcomes of free and fair elections in a representative democracy.

The effects of this breakdown are threefold. First, if a majority of voters vote for the Republican candidate, and after the election, the elected official transforms into a Democrat, the impact of the additional Republican votes, which allowed them to win in the first place, have effectively been nullified—as if those individuals never cast a ballot at all. This means that the politician’s switch nullified the voting power of some constituents and, in effect, reversed the outcome of the election. Further, this newly minted Democrat now represents the ideology of the minority, not the majority, of their constituents.

Second, switching creates a lack of accountability for elected officials because they can evade traditional intraparty pressures by simply moving to a seat across the aisle. The ability to switch parties post-election frees the politician of pressures that would cause them to toe the party line in their old party.⁶¹ Using the same example, this means that our new Democrat, who has switched parties to become a Democrat in name, has no reason not to become a Democrat in values as well and will reap rewards from her new party for doing so. This effect removes the voter accountability mechanisms that traditionally curtail politician behavior.⁶²

60. *Id.* at 51; *see also* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 170–71* (2017). Bailyn describes contemporary colonial sentiment towards direct representation as follows:

The [colonial] debate broadened into a general consideration of the nature and function of representation The virtues of binding representatives by instructions were now explicitly explored. . . . [T]he dominant voices were direct and decisive. The right to instruct representatives, Arthur Lee declared in the fourth of his “Monitor” papers, has been denied only “since the system of corruption which is now arrived to so dangerous a height began first to predominate in [the English] constitution.” . . . Elected representatives, he stated, “*are trustees for their constituents* to transact for them the business of government . . . and for this *service* they, like all other agents, were paid by their constituents, till they found it more advantageous to sell their voices in Parliament, and then . . . wished to become independent of the people.” . . . [T]he right of freemen not merely to choose representatives but to bind them with instructions “must have begun with the constitution,” and was “an ancient and unalienable right in the people.”

Id. at 170–71 (fourth and fifth ellipses in original).

61. *See supra* Section I.A.

62. *See* Thad Dunning, Guy Grossman, Macartan Humphreys, Susan D. Hyde, Craig McIntosh, Gareth Nellis, Claire L. Adida, Eric Arias, Clara Bicalho, Taylor C. Boas, Mark T. Buntaine, Simon Chauchard, Anirvan Chowdhury, Jessica Gottlieb, F. Daniel Hidalgo, Marcus Holmlund, Ryan Jablonski, Eric Kramon, Horacio Larreguy, Malte Lierl, John Marshall, Gwyneth McClendon, Marcus A. Melo, Daniel L. Nielson, Paula M. Pickering, Melina R. Platas, Pablo Querubín, Pia Raffler & Neelanjana Sircar, *Voter Information Campaigns and Political Accountability: Cumulative Findings from a Preregistered Meta-Analysis of Coordinated Trials*, 5 *SCI. ADVANCES* 1, 1 (2019) (“According to many accounts, officials whose actions are shielded from public scrutiny are less responsive to constituents’ concerns and more likely to engage in corruption.”).

Third, switching can lead to a feeling of futility and disenfranchisement among voters, ultimately reducing turnout and faith in our system of governance. When voters show up to the polls and successfully place their preferred candidate in office, they feel vindicated that their government heard their voices.⁶³ When their elected official then disavows these voters and the message they send with their vote, it can lead to a feeling of profound futility—resentment that they even bothered to participate.⁶⁴ At a time when faith in the fairness of our elections and our democracy is already trending down,⁶⁵ this type of seemingly backward outcome poses an imminent danger to the respect for and integrity of our electoral system.⁶⁶

In North Carolina, voters must endure these effects throughout an official's term of office, as they currently lack a means to redress their concerns before the end of the term. Still, as is the case with any elected official who fails to meet voter expectations, the traditional remedy would be to express displeasure at the polls in the next election by voting them out of office.⁶⁷ However, the impacts of political gerrymandering compound the deleterious effect of post-election party switching on representative democracy, making it impossible for North Carolina voters to exercise even this most basic power of political expression effectively.

Recently, both political parties have widely employed political gerrymandering to redraw electoral districts and create outcomes favorable to

63. *Contra* Stephen C. Craig, Michael D. Martinez, Jason Gainous & James G. Kane, *Winners, Losers, and Election Context: Voter Responses to the 2000 Presidential Election*, 59 POL. RSCH. Q. 579, 589 (2006) (“[Voters for election losers] tend to be less trustful, less certain of the responsiveness of government to popular concerns, less satisfied with the way democracy is working . . . [and] less inclined to extend legitimacy to the victorious candidate [than winners].”).

64. Hundreds of X (formerly Twitter) users who opposed Tricia Cotham's post-election switch expressed this sentiment in comments on her post thanking State Representative Scott Stone for his support of her switch. *See, e.g.*, @JVrontakis, X (Apr. 7, 2023, 8:19 PM), <https://twitter.com/JVrontakis/status/1644495259450355712> [<https://perma.cc/AKX9-EM4C>] (“I'm sorry someone hurt your feelings but your responsibility is to the constituents that voted for you. If you fail them you have failed.”); @possumdearie1, X (Apr. 7, 2023, 6:48 PM), <https://twitter.com/possumdearie1/status/1644472195396296704> [<https://perma.cc/W39N-U8EG>] (“Tricia Cotham deceived and betrayed the people who put her in office.”); @hellojalapeno, X (Apr. 8, 2023, 11:28 AM), <https://twitter.com/hellojalapeno/status/1644723787038859266> [<https://perma.cc/L5XT-9MPN>] (“You suck. How is this ‘representing Mecklenburg and CLT well’ when you are switching to a platform that is completely different than the one you were voted in on? Resign.”).

65. Charles Stewart, *Trust in Elections*, 151 DAEDALUS 234, 241 (2022) (depicting the downward trend in voter confidence in the accuracy of the vote count from 2000 to 2020).

66. *Id.* at 234 (“Election officials must continue to try to overcome attacks on trust in the system, but it is unclear how long they can sustain the legal system guaranteeing free and fair elections without broad-based public trust in how we administer elections.”).

67. *See* Thomas B. Edsall, *What Motivates Voters More Than Loyalty? Loathing*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/opinion/negative-partisanship-democrats-republicans.html> [<https://perma.cc/FC5D-RBVX>] (staff-uploaded, dark archive)] (describing how voters are highly motivated to vote in elections by anger and disdain for candidates).

them in states across the country.⁶⁸ In North Carolina, the Republican Party has held the legislative majority and has drawn maps that are more likely to result in election of Republican candidates.⁶⁹ The ability to wield this power removes the foundational recourse of voting a party switcher out of office from constituents in North Carolina.

Taking Representative Cotham's recent switch as an example, since Cotham joined the Republican Party and gave them the supermajority superpower, the state legislature released new redistricting maps.⁷⁰ These maps drew Cotham out of the majority-Democratic District 112 and instead placed her for the 2024 election in District 105, which was drawn to give an edge to Republican candidates.⁷¹ Cotham was narrowly reelected as the Republican incumbent in District 105 in November 2024.⁷² Should Cotham one day choose to seek federal office, the recently enacted United States House of Representatives map also includes a district that would be favorable to her as a Republican.⁷³ In effect, Cotham's Democratic constituents, who elected her as

68. State courts have struck down maps drawn by Democrat- and Republican-controlled state legislatures for extreme partisan gerrymandering in recent years. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018) (invalidating Republican-drawn maps); *In re 2021 Redistricting Cases*, 528 P.3d 40, 94 (Alaska 2023) (invalidating Republican-drawn maps); *see also, e.g.*, *In re Legis. Dist. of State*, 282 A.3d 147, 211 (Md. 2022), *rev'd*, 282 A.3d 147 (Md. 2022) (invalidating Democratic-drawn maps); *In re Hoffmann v. New York State Indep. Redistricting Comm'n*, 41 N.Y.3d 341 (N.Y. App. Div. 2023) (invalidating Democratic-drawn maps).

69. *See Daniela Altimari, NC Court Reverses Decision on Partisan Gerrymandering, Allows GOP To Draw New Maps*, ROLL CALL (April 28, 2023, 4:03 PM), <https://rollcall.com/2023/04/28/nc-court-reverses-decision-on-partisan-gerrymandering-allows-gop-to-draw-new-maps/> [<https://perma.cc/ZXY9-HLV6>] (“The 5-2 decision by . . . the court will allow the Republican-controlled legislature to redraw district boundaries for both Congress and the General Assembly to favor GOP candidates.”); *see also Moore v. Harper*, 143 S. Ct. 2065, 2075 (2023) (holding that partisan gerrymandering is a political question beyond the scope of judicial review in the federal courts).

70. An Act to Realign the North Carolina Congressional Districts, ch. 145, § 1(a), 2023 N.C. Sess. Laws __, __ (codified at N.C. GEN. STAT. § 163-201); An Act to Realign the North Carolina House of Representatives' Districts, ch. 149, § 1(a), 2023 N.C. Sess. Laws __, __ (codified at N.C. GEN. STAT. § 120-2(a)); An Act to Realign the North Carolina Senate Districts, ch. 146, § 1(a), 2023 N.C. Sess. Laws __, __ (codified at N.C. GEN. STAT. § 120-1(a)).

71. This new district was drawn approximately 53% to 45% in favor of Republicans. Dawn Baumgartner Vaughan, *NC Rep. Tricia Cotham Switched Parties. Here Are 2 Possible Routes for Her Political Future*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/article280698270.html> [<https://perma.cc/6MTL-J94U> (staff-uploaded, dark archive)] (last updated Dec. 6, 2023, 9:54 AM).

72. Tricia Cotham (@triciacotham), X (Dec. 7, 2023, 10:24 AM), <https://x.com/triciacotham/status/1732783092463477046> [<https://perma.cc/83A6-E8NG>] (“I filed for NC House 105! Exciting times ahead! @meckgop #ncpol”); *Official General Election Results – Mecklenburg*, N.C. ST. BD. ELECTIONS (Nov. 5, 2024), https://er.ncsbe.gov/?election_dt=11/05/2024&county_id=60&office=NCH&contest=1285 [<https://perma.cc/8ESP-T58Z> (staff-uploaded archive)].

73. This favorable district includes areas formerly represented by Republican Dan Bishop, who did not run for reelection to the U.S. House of Representatives in 2024, and instead ran for state attorney general, but lost to Democrat Jeff Jackson. Vaughan, *supra* note 71; *Official General Election*

a Democrat in 2022, will not have the opportunity to vote her out of office in the 2024 election, because the new gerrymandered maps have purposely drawn many of them out of her district. This can leave those former constituents disenfranchised, with absolutely no way to redress their valid discontentment with her decision to switch parties.⁷⁴

Ultimately, to rise to their duty to support the Constitution, and therefore our representative democracy, state legislators must create accountability for voters for post-election party switching. Whether the switch was pre-meditated, reflects a genuine change of heart for the elected official, or is a second chance at wielding power in a shifting district, the issues for representative democracy remain the same.⁷⁵ Instead of an outright prohibition on party switching, there should be a system which disincentivizes the behavior by creating undesirable outcomes for those who engage in party switching, thereby reducing the likelihood that politicians will engage in this harmful behavior. Although there are several possible avenues to treat the problem, many fall short of true redress, although the Voter Fraud Prevention Act remains a promising remedy.

II. LIMITS AND BOUNDARIES OF LEGAL REMEDIES

The practical implications of party switching on voter representation paint a bleak picture. Nonetheless, countervailing factors caution against and prevent the total elimination of party switching. The constitutionally protected freedom of association creates a wall beyond which party affiliation cannot be curtailed. Still, at other times, state laws tend to show hostility towards party switching. This indicates the general discomfort felt by state courts and legislatures towards our current system of liberal party realignment but does nothing to address post-election party switching. Private causes of action under civil and contracts theories are also ineffective, leaving few alternatives to legislative self-regulation as a mechanism for addressing post-election party switching in North Carolina.

A. *Constitutional Boundaries*

In North Carolina, the current system of allowing politicians to freely switch parties leads to an erosion of representation, losses in politician

Results – Statewide, N.C. ST. BD. ELECTIONS (Nov. 5, 2024), https://er.ncsbe.gov/?election_dt=11/05/2024&county_id=0&office=COS&contest=1005 [<https://perma.cc/FR38-X3CB> (staff-uploaded archive)]; *see also* An Act to Realign the North Carolina Congressional Districts § 1(a).

74. It is crucial to note that both parties engage in this type of political gerrymandering. *See supra* note 68 and accompanying text. It follows that there is nothing to prevent a future Democrat-controlled state legislature from doing the same thing in North Carolina to shore up the chances of reelection for party switchers in their favor and eliminate the ability of Republican constituents to exercise their basic electoral powers.

75. For a discussion of politician motivations for party switching, *see supra* Introduction.

accountability to voters, a departure from voter expectations, and in the long term, even loss of faith in the electoral system.⁷⁶ Nonetheless, the ability for politicians to switch parties just as all private citizens may do, even after election, is critical and fundamental in our system of government.⁷⁷ The First Amendment to the United States Constitution endows Americans with the freedom of association, which the United States Supreme Court has repeatedly interpreted to protect the ability of individuals to form and associate in political parties,⁷⁸ and the explicit right to choose one's party association.⁷⁹ As such, this right of "expressive association"⁸⁰ is a right distinct from, but closely associated with, the freedoms of speech and assembly.⁸¹

This right is multifaceted, including both a freedom *to* associate and *not to* associate. The Court has held that overly burdensome restrictions on expressive association and compelled association can violate the First Amendment.⁸²

76. For a discussion of these effects, see *supra* Section I.B.

77. *Freedom of Expression, Association and Peaceful Assembly*, COMMONWEALTH F. NAT'L HUM. RTS. INSTS., <https://cfnhri.org/human-rights-topics/freedom-of-expression-association-and-peaceful-assembly/> [<https://perma.cc/6HNV-2KRZ>] ("Freedom of association is crucial to the functioning of a democracy . . . It protects the right to form and be part of democratic institutions such as political parties, trade unions, NGOs, religious organizations and other associations.").

78. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association . . . enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations.").

79. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy . . . is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself. Consistent with this tradition, the Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs' . . . a corollary of the right to associate is the right not to associate.") (citations omitted) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–15 (1986)).

80. The U.S. Supreme Court has described the right as follows:

Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).

81. *Id.* at 622 ("[The Court has] long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.").

82. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 665–69 (2000) (holding that requiring admission of an LGBTQ+ activist to the Boy Scouts was unconstitutional compelled association); *Coates v. City of Cincinnati*, 402 U.S. 611, 615–16 (1971) (holding that an ordinance prohibiting gathering on sidewalks violated the positive freedom to associate).

Applied to the political party context, this protects both the right to belong to as well as the right to dissociate from any party you choose. Nonetheless, the freedom of expressive association is not absolute, and lawmakers may curtail the right where the government's interests in regulation outweigh the correlated burden on expressive association.⁸³ However, in the context of post-election party switching, Court precedent suggests that this exception is unlikely to apply.⁸⁴

In addition to the immovable bar that this constitutional right presents, the fact that the Court has routinely protected this right in the context of political party association also cautions against employing means to prevent post-election party switching which would infringe on this freedom. For both private citizens and politicians, our democratic system demands that we allow the will of the people to govern, and where that will is too strongly curtailed such that individuals are not at liberty to change their association, that curtailment may undermine the true will of the people. In this way, the benefits of free association for democracy caution against, and likely eliminate the possibility of, banning party switching altogether, pre- or post-election.

B. *State Law Hostility*

Despite firm constitutional boundaries, many state legislatures have nonetheless attempted to limit a candidate's ability to switch party association, especially around the time of elections. "Sore loser laws" comprise a significant category of such restrictions, with all but three states having some version as of 2023.⁸⁵ These laws prohibit the loser of a primary election from running as a

83. The *Anderson-Burdick* test is used to determine whether legislative infringements are constitutional. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against the 'precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))). Good faith arguments can be made that, in the context of the freedom of association, the injury associated with an outright ban on post-election party switching is relatively limited, and the interest in protecting the integrity of our representative democracy is significant, such that it justifies the associated burden on the rights of elected officials to change their party affiliation while in office. Still, the freedom of political association is jealously guarded, and courts are generally reluctant to curtail it. See *infra* note 84 and accompanying text (holdings protecting freedom of association).

84. The Court applies a strict standard to upholding limits on association, and generally only upholds restrictions on association related to political parties and elections which apply well in advance of the election. See, e.g., *Rosario v. Rockefeller*, 410 U.S. 752, 761–62 (1973) (upholding the requirement to enroll in a party eleven months before a primary election). *But cf.* *Kusper v. Pontikes*, 414 U.S. 51, 60–61 (1973) (striking down the requirement to abstain from one election before changing parties).

85. Connecticut, New York, and Iowa lack sore loser laws. Barry C. Burden, Bradley M. Jones & Michael S. Kang, *Sore Loser Laws and Congressional Polarization*, 39 LEGIS. STUD. Q. 299, 304–05

candidate for another party in the general election, thus preventing “sore losers” of primaries from simply abandoning their party for a second chance at elected office.⁸⁶

Sore loser laws come in two main varieties: explicit prohibitions and procedural prohibitions.⁸⁷ In the first variety are laws like the original sore loser law,⁸⁸ the modern version of which explicitly prohibits political parties from nominating a candidate who already ran and lost in a different party’s primary for the same open seat in the same year.⁸⁹ In contrast, procedural prohibitions are more subtle, but still prevent primary losers from running in the general election. Some procedural prohibitions forbid cross-filing in multiple-party primaries and require independent candidates in general elections to be unaffiliated for a period of time before filing.⁹⁰ Others allow cross-filing in multiple primaries but prohibit candidates who lose partisan primaries from running in the general election as independents.⁹¹ The North Carolina sore loser law is a procedural prohibition which falls into the second category.⁹²

Critics of sore loser laws argue that their existence contributes to political polarization by excluding moderate candidates, because moderates may be unable to win partisan primaries where voters at the extremes of the political spectrum control, resulting in the more radical candidates reaching the general election.⁹³ Nonetheless, sore loser laws have garnered significant support, especially among partisans who view them as integral to preventing voter confusion and disenfranchisement.⁹⁴

(2014). A sore loser law was proposed in Iowa in 2019, but it never became law. Adam Sullivan, *Iowa’s Proposed ‘Incumbent Protection Act’ Halted for Now*, GAZETTE (Apr. 2, 2019, 11:26 AM), <https://www.thegazette.com/staff-columnists/iowas-proposed-incumbent-protection-act-halted-for-now/> [https://perma.cc/5V4H-L48F].

86. See Burden et al., *supra* note 85, at 299.

87. See *id.* at 304 (“These sore loser laws take various forms, ranging from express prohibitions to arrangements of relevant filing deadlines and requirements that make sore loser candidacies practically unfeasible.”).

88. *Id.* at 305.

89. N.J. STAT. ANN. § 19:13-8.1 (2024).

90. See, e.g., MASS. GEN. LAWS ANN. ch. 53, §§ 6, 48 (2024) (prescribing that candidates must be enrolled as a member of the party from which they seek nomination beginning at least ninety days prior to the date for filing nomination papers to appear on the ballot of the state primary).

91. See, e.g., DEL. CODE ANN. tit. 15, § 3002(b) (2024) (forbidding independent candidates from appearing on the general election ballot if they were affiliated with any political party in the ninety days before filing their declaration of candidacy).

92. N.C. GEN. STAT. §§ 163-106, -106.1, -106.6 (2024).

93. See generally Burden et al., *supra* note 85 (“Ideologically extreme candidates are advantaged, while moderate candidates less aligned with their respective party base’s preferences must become more ideologically extreme to remain competitive.”).

94. See, e.g., Amended Brief Filed on Behalf of Appellants at 14–16, *Patriot Party v. Allegheny City Dep’t. of Elections*, 95 F.3d 253, 265 (3d Cir. 1996) (No. 96-3677) (arguing the challenged sore loser law was necessary to prevent voter confusion); Brief of Intervenor Defendant-Appellee

These laws routinely withstand challenges in federal courts where they are upheld as constitutional under article I, section 4 of the United States Constitution,⁹⁵ which allows states to promulgate their own ballot access requirements.⁹⁶ The Constitutional Research Service found that the federal courts often view sore loser laws as requirements that “help states maintain the integrity of the nominating and election process by preventing ‘interparty raiding,’ carrying ‘intraparty feuds’ into the general election, ‘unrestrained factionalism,’ ballot clutter, and voter confusion.”⁹⁷

For example, in *Libertarian Party of Michigan v. Johnson*,⁹⁸ the district court upheld the state sore loser law, finding it did not place a severe, unconstitutional burden on the plaintiff’s associational rights.⁹⁹ Such a result is possible because these laws do not directly restrict the politician’s freedom of political association (just their ability to run in the election as a member of said party), which falls under the purview of article I, section 4.¹⁰⁰ Sore loser laws regulate the conduct of political candidates within the context of an election cycle, and can therefore be justified under the power of state legislatures to determine how elections will be administered, and the eligibility of particular individuals for public office. On the contrary, outright prohibition of post-election party switching would not fit neatly within the powers granted to states to control elections, as the behavior does not occur within the confines of an election. Instead, it would enter the realm of legislating to curtail the constitutional right of a (supposedly) duly elected official. In essence, sore loser laws don’t say, “you can’t be a member of X political party,” but rather, “you can’t run for office as a member of X political party in this election.” This distinction allows sore loser laws to avoid running afoul of constitutional norms, while an outright prohibition on post-election party switching may not.

Apart from sore loser laws, states have attempted to impose other limitations on party switching and party association, with differing results. In

Republican Party of Michigan at 32–35, *Libertarian Party of Michigan v. Johnson*, 714 F.3d 929 (6th Cir. 2013) (No. 12-2153) (arguing the challenged sore loser law was necessary to prevent disenfranchisement of absentee voters).

95. See, e.g., *Storer v. Brown*, 415 U.S. 724, 736 (1974) (upholding as constitutional California statutes which required candidates to be politically disaffiliated for at least one year prior to the primary election because they served a sufficiently important state interest).

96. See JACK MASKELL, CONG. RSCH. SERV., RL33678, SUBSTITUTION OF NOMINEES ON THE BALLOT FOR CONGRESSIONAL OFFICE, “SORE LOSER” LAWS, AND OTHER “BALLOT ACCESS” ISSUES 10 (2006).

97. *Id.* (first quoting *Storer*, 415 U.S. at 731, 735, 736; and then quoting *Patriot Party*, 95 F.3d at 265).

98. 905 F. Supp. 2d 751 (E.D. Mich. 2012), *aff’d*, 714 F.3d 929 (6th Cir. 2013).

99. See *id.* at 727 (holding that the Michigan sore loser statute prevented the plaintiff from running as a Libertarian in the general election after losing the Republican primary and specifically that the statute was not unconstitutional as applied to state elections or presidential elections).

100. U.S. CONST. art. I, § 4.

Utah, for example, the state code provides that when there is a vacancy in a congressional seat, the Lieutenant (“Lt.”) Governor establishes procedures for the special election to fill the vacancy.¹⁰¹ However, after a direct challenge in *United Utah Party v. Cox*,¹⁰² the district court limited the Lt. Governor’s discretion to establish these procedures on the grounds that his requirements did not provide for new party participation in special elections, in violation of their First Amendment freedom of association rights.¹⁰³ In other cases, courts have upheld state regulations which limit party switching. In Maryland, for instance, state law prohibits a person from filing as a candidate of a political party with which they are not affiliated as a registered voter.¹⁰⁴ In *Cabrera v. Penate*,¹⁰⁵ Maryland’s highest court upheld this restriction, disqualifying a gubernatorial candidate from the Democratic primary ballot because she was a registered Republican voter at the time she filed her candidacy.¹⁰⁶

Regardless, none of these categories of legislation sufficiently address post-election party switching, and some fail to even pass constitutional muster. What they do provide, though, is a glimpse at the uneasiness surrounding party switching, and attempts by legislators to restrict switching where possible. In general, these state law measures paint a picture of willingness to restrict laissez-faire party association in advance of elections, especially when doing so protects incumbents. It would be logical, then, for legislators to express the same sentiment after the election, when their constituents have already made their party preference known.

C. *Ineffective Civil and Contract Remedies*

Without effective statutory remedies, and mindful of constitutional boundaries, it is reasonable to explore common law causes of action as a means for voters to redress the harms done by post-election party switching. Options such as breach of contract, fraud or misrepresentation, or unjust enrichment seem workable at first glance, but none are viable.

Proving damages is crucial for any of these potential claims,¹⁰⁷ yet scholars conclude that voters in these situations “have not suffered any clearly

101. UTAH CODE ANN. § 20A-1-502 (2024).

102. 268 F. Supp. 3d 1227 (D. Utah 2017).

103. When a U.S. House Representative resigned leaving a vacancy and triggering a special election, the Lt. Governor’s procedural requirements left insufficient time for the United Utah Party, a new party which had never held a primary, to qualify for the special election. The court invalidated the procedure under the First Amendment. *Id.* at 1231–60.

104. MD. CODE ANN., ELEC. LAW § 5-203(a)(2) (2024).

105. 94 A.3d 50 (Md. 2014).

106. *Id.* at 59–61.

107. See *Wrona & Cissna*, *supra* note 9, at 739 (“Many jurisdictions require persons seeking recovery for fraud or misrepresentation to prove actual damages.”); *id.* at 746 (“A party seeking to recover in contract must prove damages.”).

quantifiable pecuniary loss.”¹⁰⁸ James S. Wrona and L. Francis Cissna explain that a politician’s decision to change their political affiliation does not injure any legally cognizable interest in voters and cite a United States Supreme Court decision which clearly indicates that voters are not entitled to rely on a candidate’s party affiliation when casting their vote.¹⁰⁹ Further, even if a plaintiff-voter could prove actual damages, the likely remedy would be monetary damages. It is highly unlikely that a court would be empowered to issue an injunction or order specific performance forcing the switcher to revert to their original party or step down from their position as a legislator.¹¹⁰ Monetary damages provide little redress for the disenfranchisement experienced by affected voters and the broader systemic harms to faith in our elections and democracy at large.¹¹¹

To sustain a claim of fraud or misrepresentation, a plaintiff-voter must prove that the politician made a material “misrepresentation of a definite *past or existing fact*.”¹¹² A voter challenging a post-election party switcher would be hard-pressed to make this proof, as it is unlikely the politician would have made any concrete statements misrepresenting the existing fact of their affiliation. Even explicit promises to not change their affiliation post-election would not provide proof because promises to do future acts generally do not constitute the basis of a valid fraud claim.¹¹³

Further, campaign statements cannot be considered a valid offer for contract formation purposes; rather, they are rightly considered merely “precatory” and do not create a power of acceptance in the voter.¹¹⁴ Courts have held that it is not reasonable for a voter to understand campaign promises as a binding offer, thus there can be no mutual assent and no resulting contract.¹¹⁵ By the same token, the politician’s precatory promises cannot constitute valid consideration to support formation of a binding contract. Even if a campaign promise was deemed to be a valid offer, and sufficient consideration was

108. *Id.* at 739.

109. *Id.* at 740–41 (“Courts, moreover, have recognized the infirmity in the argument that society should protect individuals who cast their votes strictly along party lines. . . . Justice Marshall . . . [explained] that the Court’s decisions ‘reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.’” (quoting *Tashjian v. Republican Party*, 479 U.S. 208, 229 (1986)) (citing *Republican Party v. Tashjian*, 770 F.2d 265, 286 (2d Cir. 1985))).

110. Courts usually reserve grants of specific performance for unique situations where other remedies are wholly insufficient, such as in contracts for the sale of real property. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 357–69 (AM. L. INST. 1981).

111. *See supra* Section I.B.

112. Wrona & Cissna, *supra* note 9, at 739.

113. *See, e.g.*, *Mellon Bank Corp. v. First Union Real Est. Equity & Mortg. Invs.*, 951 F.2d 1399, 1409 (3d Cir. 1991) (“[P]romises to do future acts do not constitute a valid fraud claim.”).

114. Wrona & Cissna, *supra* note 9, at 744.

115. *Russell v. D.C.*, 747 F. Supp. 72, 80 (D.D.C. 1990), *aff’d*, 984 F.2d 1255 (D.C. Cir. 1993) (“The statement . . . was in the nature of a campaign promise, which would not have been interpreted by most listeners as creating a legally binding contract.”).

provided,¹¹⁶ the resulting contract would likely be deemed unenforceable due to illegality,¹¹⁷ as well as against public policy.¹¹⁸

A claim for unjust enrichment, though plausible, is similarly flawed. Before an election, politicians receive and benefit from donations of time, labor, services, and money from voters and organizations. Contributors, who in part donated based on the candidate's political party association, may be justified in feeling that the candidate who switches parties after being elected was "unjustly enriched at their expense."¹¹⁹ However, by design, campaign contributions are made to political campaign committees which are separate legal entities from the candidate themselves.¹²⁰ This may prevent voters from holding a candidate personally liable for benefitting from their contributions, and then walking across the aisle.¹²¹

The desire for voters to seek reimbursement of campaign contributions when a candidate switches parties is understandable and not uncommon. In the case of Representative Cotham, after she announced her switch, many of her former supporters became outraged and demanded that their campaign donations be returned to them.¹²² As of June 2023, Cotham's candidate committee had refunded \$8,350 to donors.¹²³ Still, some former Cotham

116. Setting aside issues of offer and acceptance, a direct campaign donation in exchange for a specific promise to a voter to vote for a certain policy could theoretically be deemed valid consideration.

117. Wrong & Cissna, *supra* note 9, at 745 ("[Federal law] forbids a candidate for public office from promising employment 'or other benefit[s]' as consideration for political support." (quoting 18 U.S.C. § 600)).

118. *Id.* at 746.

119. *Id.* at 747.

120. In North Carolina, candidates for office are required to form a candidate committee. *Candidate Committees*, N.C. ST. BD. ELECTIONS, <https://www.ncsbe.gov/campaign-finance/candidate-committees> [<https://perma.cc/3BR9-2BLE>].

121. Wrona and Cissna describe two cases where courts held candidates were not liable for contracts entered into on behalf of, or unjust enrichment ascribed to, their campaign committees, showing that courts legally distinguish between the committee and the candidate. Wrona & Cissna, *supra* note 9, at 747–48 (first citing *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1291 (5th Cir. 1994) (holding that for a political candidate to be held liable for contracts entered into by his political committee the evidence must show that he authorized, assented to, or ratified that agreement); then citing *Duquesne Litho, Inc. v. Roberts & Jaworski, Inc.*, 661 A.2d 9 (Pa. Super. Ct. 1995) (holding that a candidate had taken the appropriate steps to protect himself from personal liability for the debts of his committee)).

122. *Campaign Refunds? NYT Reports Rep. Tricia Cotham Refunded Democratic Activist*, QUEEN CITY NEWS, <https://www.qcnews.com/news/politics/campaign-refunds-nyt-reports-rep-tricia-cotham-refunded-democratic-activist/> [<https://perma.cc/X3PG-N25E> (staff-uploaded archive)] (last updated Aug. 1, 2023, 7:51 PM) [hereinafter *Campaign Refunds?*].

123. Danielle Battaglia, *Rep. Jeff Jackson Asked NC's Tricia Cotham for Refund Because She 'Misrepresented Herself'*, CHARLOTTE OBSERVER, <https://www.charlotteobserver.com/news/politics-government/election/article277890598.html> [<https://perma.cc/26VK-DU9P> (staff-uploaded, dark archive)] (last updated Aug. 2, 2023, 8:18 PM). The State House Caucus Director Stephen Wiley informed reporters that these refunds were processed by Cotham's former campaign treasurer, who resigned following her switch, calling the treasurer a "disgruntled employee." *Id.* It is also important to note that from April 2023 when she switched to June 2023, Cotham had raised over \$27,000. *Id.*

supporters highlight the inadequacy of this remedy to redress the greater harms to our democracy, even if it is available, explaining, “I don’t care about the money. I care about her vote. And no, it doesn’t matter to me. It matters to me that she’s not voting the way that I want her to.”¹²⁴ Ultimately, common law remedies are mostly inapplicable to situations of post-election party switching, and even where they may apply, they do nothing to remediate the damage this practice does to voters and to our representative democracy.

III. SOLUTIONS IN OTHER STATES

Despite constitutional constraints and common law limitations, there are still viable remedies available to treat the ill of post-election party switching. One option, although unlikely, is the voluntary resignation of a politician facing backlash after party switching. Barring this extraordinary occurrence, state legislatures may engage in prospective self-regulation by passing election laws that create mechanisms for voter accountability, which could include expulsion, recall, and filling a “vacancy” via appointment or special election. The use of each as a check on politician behavior varies among the states, and each comes with its own benefits and drawbacks due to logistical, pragmatic, and theoretical variables.

A. *Expulsion*

1. State Law

Expulsion is a process through which a state legislature may vote to remove one of its members. Unlike impeachment, which is a bicameral process,¹²⁵ expulsion occurs intra-chamber. Most states explicitly grant the power of expulsion to their legislature in their state constitution.¹²⁶ In other states, the power is created via legislation,¹²⁷ while in Massachusetts, the state supreme court held that the power is implied.¹²⁸ Regardless of the state, expulsion requires a two-thirds majority vote of the relevant chamber.¹²⁹

124. See *Campaign Refunds?*, *supra* note 122 (quoting Beth Sibley, former Cotham campaign donor).

125. Impeachment proceedings in many states mirror the federal impeachment mechanism, involving the filing of articles of impeachment in the House and a trial in the Senate. See, e.g., N.C. GEN. STAT. § 123-1 to 123-11 (2024); WIS. CONST. art. VII, § 1.

126. See *infra* Table 1.

127. New Hampshire, New York, North Carolina, and South Dakota lack explicit constitutional provisions granting expulsion power. *Id.*

128. *Hiss v. Bartlett*, 69 Mass. 468, 475 (1855) (“[T]he power to commit and to expel its members . . . was regarded as inherent, incidental and necessary . . . our legislative houses have the power to protect themselves, by the punishment and expulsion of a member.”).

129. This requirement mirrors the two-thirds requirement for expulsion from Congress. U.S. CONST. art. I, § 5.

However, the procedures for initiating an expulsion vote vary widely among states, and the relevant law is housed in various places. Nonetheless, many states require that complaints about legislator behavior be routed through an internal ethics or disciplinary body, which engages in fact-finding and investigation, and ultimately makes a recommendation to the whole chamber on whether expulsion is warranted.¹³⁰ In North Carolina, for instance, complaints are submitted to the Legislative Ethics Committee, responsible for investigating, holding hearings, and resolving matters through various methods, including recommending censure or expulsion to the appropriate chamber.¹³¹ While the committee is bound by its own rules to recommend expulsion only for specific behaviors,¹³² the chamber may choose to disregard the recommendation and proceed with a vote on expulsion.¹³³ Although there have been several prominent and controversial examples in recent memory,¹³⁴ expulsion of members from state legislatures is relatively infrequent.¹³⁵

130. See, e.g., N.C. GEN. STAT. § 120-103.1. In other states, absent legislation establishing process requirements, legislators can be expelled if a colleague sponsors an expulsion motion and it carries the required two-thirds majority without any formal investigation or right to be heard. N.D. LEGIS. COUNCIL, DUE PROCESS CONSIDERATIONS FOR EXPELLING MEMBERS OF THE LEGISLATIVE ASSEMBLY 1 (2021) (describing that there are no constitutional due process rights associated with holding political office, therefore in the absence of statutory requirements, the basic requirements under the N.D. Constitution are sufficient to expel a legislator).

131. N.C. GEN. STAT. § 120-103.1.

132. For example, the North Carolina Legislative Ethics Committee may only investigate allegations that a lawmaker has violated the State Government Ethics Act or committed a crime. *Id.*

133. N.C. GEN. STAT. § 120-103.1(m) (“Any action or lack of action by the Committee under this section shall not limit the right of each house of the General Assembly to discipline or to expel its members.”).

134. In April of 2023, the Tennessee state legislature expelled two Democratic lawmakers for their involvement in a citizen protest of the body’s lack of action on gun control. Kimberlee Kruesi & Johnathan Mattise, *Tennessee’s House Expels 2 of 3 Democrats Over Guns Protest*, ASSOCIATED PRESS (Apr. 7, 2023, 6:44 AM), <https://apnews.com/article/tennessee-lawmakers-expulsion-d3f40559c56a051eec49e416a7b5dade> [<https://perma.cc/AWR9-HUPJ>]. Republican House leadership blocked three Democratic lawmakers—Representatives Pearson, Jones, and Johnson—from making statements in favor of gun reforms. Robyn Sanders & Andrew Garber, *The Unconstitutional Expulsion of Legislators*, BRENNAN CTR. FOR JUST. (May 25, 2023), <https://www.brennancenter.org/our-work/research-reports/unconstitutional-expulsion-legislators> [<https://perma.cc/28XJ-H99Q>]. In response to being silenced, the Representatives led chants on the House floor. *Id.* House leadership called an expulsion vote, and the two Black legislators—State Representatives Pearson and Jones—were promptly expelled, while the white legislator—State Representative Johnson—narrowly kept her seat. *Id.* GOP leaders justified the expulsions as example setting, to avoid the precedent that legislators could “disrupt proceedings” through protests. Kruesi & Mattise, *supra*. The expulsions triggered a special election to fill the vacancies, and Representatives Pearson and Jones easily won back their seats. Kimberlee Kruesi, *Both Expelled Members of ‘Tennessee Three’ Win Back Their State House Seats*, ASSOCIATED PRESS, <https://apnews.com/article/tennessee-three-election-lawmakers-expelled-1ae19a1bd5f042624568e94b30c8fc1b> [<https://perma.cc/TLY5-4YMX>] (last updated Aug. 4, 2023, 6:03 AM).

135. In one survey, Ballotpedia identified only seventy-nine instances of expulsion from state legislatures between 1813 and 2023. *Elected Officials Expelled from State Legislatures*, BALLOTPEDIA,

2. Benefits

Expulsion could deter and potentially prevent politicians from switching parties, although it is not the most obvious choice. First, if state legislative bodies regularly pursued the expulsion of party switchers, it would serve as a deterrent for any elected official considering making that leap. Even if the elected official felt strongly that their constituents were better aligned with the other party, the threat of expulsion would incentivize them to postpone until the next election. This approach, driven by fellow legislators, would demonstrate respect and solidarity to the party switcher's constituents, mitigating losses in faith in officials and our system of governance caused by the switch itself.¹³⁶

Additionally, expulsion does not require the political will and investment of time and effort by constituents. If the goal is to preserve constituents' rights to representative democracy, this is preferable because constituents do not have to "earn" their right to have an elected official who represents the will of the people, when the expulsion process is initiated by legislators.¹³⁷ Finally, while expulsions traditionally followed only the most severe misconduct, recent trends include cases related to speech or political behavior.¹³⁸ This departure from tradition opens the door for legislators to make novel use of the expulsion mechanism in other ways, including as a means to punish post-election party switchers.

3. Drawbacks

Expulsion faces practical challenges, particularly in cases of party switching. The act triggering expulsion must be widely unpopular among fellow legislators, yet incentives for party switching often align with the majority party.¹³⁹ And because legislators are unlikely to oust a member who just defected to join their party, it is highly unlikely a motion to expel a party switcher could garner the necessary two-thirds vote, as most of those votes would need to come from members of the party that benefitted from the switch. These mechanics nullify the benefits of expulsion being legislator-led because a motion to expel a party switcher will fail. Moreover, because expulsion is legislator-led, it does

https://ballotpedia.org/Elected_officials_expelled_from_state_legislatures [https://perma.cc/Y287-LLL6].

136. See *supra* Section I.B, for further discussion.

137. See *infra* Section III.B.3, for further discussion of the impacts of constituent initiation of methods of redress on rights fulfillment.

138. Sanders & Garber, *supra* note 134 (surveying the 122 instances of state legislators being banned from office since 1788, and noting that, before 2023, only six legislators had ever been removed for their views, one in 1875 for his atheism and five during the Red Scare for Socialist Party membership).

139. See *supra* Section I.A, for discussion of incentives.

not directly address the impact on the constituents, leaving them disempowered and at the mercy of other elected officials.

Further, expulsion has the most significant potential for abuse. Recent departures from restraint in seeking expulsion open the door for its use in cases of party switching, but unfortunately also for political or ideological reasons and as cover for invidious discrimination.¹⁴⁰ Such abuse would do further damage to our system of representative democracy, by stifling candid representation, as members may fear expulsion for advocating zealously for their constituents.¹⁴¹ Finally, an expulsion would leave impacted constituents without representation in the relevant chamber until an appointment or special election could be held, further hindering representation.

B. Recall

1. State Law

Recall is a process allowing voters to revoke their elected representative's term before completion and choose a replacement. State legislative recall is available in only eighteen states and is currently unavailable in North Carolina.¹⁴² Like expulsion, most states that allow legislative recall empower voters to do so in their constitutions.¹⁴³ The process begins with circulation of a recall petition, requiring signatures from ten to forty percent of eligible voters to trigger a recall, depending on state law.¹⁴⁴ Grounds for a recall also vary, with many states not specifying any particular rationale, and others requiring petitioners to allege specific infractions to qualify.¹⁴⁵

Once constituents qualify, the state board of elections will schedule a recall election in seventeen of the eighteen states.¹⁴⁶ In some states, constituents vote on a single ballot on: (1) whether to recall the current officeholder, and (2) with whom to replace the official if recalled.¹⁴⁷ In these simultaneous elections, the politician who is up for recall may or may not be permitted to appear among the candidates for election in the event of their recall.¹⁴⁸ Other states place a

140. Sanders & Garber, *supra* note 134 (exploring the recent trend in expulsions for purportedly ideological reasons, and examining potential First, Fourteenth, and Fifteenth Amendment violations).

141. *Id.*

142. *See infra* Table 2.

143. Montana does not provide for recall in its constitution, but the state code does create a recall mechanism. MONT. CODE ANN. §§ 2-16-601 to -635 (2023).

144. *See infra* Table 2.

145. *See, e.g.,* ALASKA STAT. § 15.45.510 (2024) (“The grounds for recall are (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption.”). *But see* OR. REV. STAT. §§ 249.865 to .877 (2024) (describing the process of expulsion in detail but not defining any particular grounds for recall).

146. Legislative recalls in Virginia take the form of recall trials before the circuit court. VA. CODE ANN. §§ 24.2-233 to -238 (2024).

147. *See infra* Table 2.

148. *Id.*

single question on the ballot: whether to recall. If the recall is successful, a second election is held to fill the vacancy, or in five states, a replacement is appointed.¹⁴⁹

2. Benefits

The greatest benefit of a recall election is that, in the states where it exists, this recourse is already available in practice to constituents of post-election party switchers. The lack of specificity in grounds for recall in many states implies that party switching may be sufficient grounds to circulate a recall petition. Given the public outrage that typically occurs after a post-election party switch, it is conceivable that constituents could gather the signatures needed to initiate a recall. Using Representative Cotham as an example, the petition for her resignation gathered over 7,000 signatures in two months.¹⁵⁰ Although North Carolina does not have a recall mechanism, assuming the typical requirement of twenty-five percent of votes cast for the office in the last election, the 7,000 signatures would have surpassed that threshold.¹⁵¹ In states with simultaneous recall and replacement elections, there would also be no issue of a temporary vacancy in the official's seat, ensuring continuous representation for constituents.

3. Drawbacks

Recall mechanisms vary significantly between states. While simultaneous recalls prevent vacancies, a succession of recall and replacement will create one. Further, in successive recalls, if the recalled legislator is replaced by appointment, then the right of the constituents to choose their elected official has still not been satisfied.¹⁵² States lacking recall laws face a major barrier, as it is typically empowered by the difficult-to-amend state constitution.¹⁵³ If a state wanted to create a recall mechanism without amending its constitution, it could do so by statute, but this would involve the creation of a significant new legislative scheme. It also seems unlikely that legislators would have incentive

149. Arizona, California, Colorado, Georgia, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, and Wisconsin hold an election to fill a recall-created vacancy, while Alaska, Idaho, Oregon, Kansas, and Washington use appointment to fill recalled positions. *Id.*

150. *Petition Launched for Rep. Tricia Cotham Resignation*, QUEEN CITY NEWS, <https://www.qcnews.com/news/u-s/north-carolina/mecklenburg-county/petition-launched-for-rep-tricia-cotham-resignation/> [<https://perma.cc/JVR3-QR3F>] (last updated June 21, 2023, 9:09 PM).

151. See *infra* Table 2. 25,986 votes were cast in the election that Cotham won, and thus the 7,000 petition signatures represent 26.94% of votes cast. *NC House of Representatives District 112*, N.C. ST. BD. ELECTIONS, https://er.ncsbe.gov/?election_dt=11/08/2022&county_id=0&office=NCH&contest=1273 [<https://perma.cc/YAZ5-D4GU>] (last updated Nov. 28, 2022, 8:46 PM).

152. For more discussion of appointment procedures, see *infra* Section III.C.1.

153. See *infra* Table 2.

to invent a method of recall that would apply to themselves where one does not already exist.¹⁵⁴

Redressing post-election party switching by recall demands constituents' political will. Although anecdotal evidence suggests this will exists, requiring citizen-voters to expend the additional time and effort to determine when recall is needed, educate themselves on the recall mechanism, file a recall petition, and circulate it to gather signatures is itself an affront to representative democracy. Asking citizens to take extra steps to secure their right to vote, beyond simply going to the polls and voting, implies that voting is a privilege that must be earned in order to merit representation, contradicting the foundational and inalienable nature of that right.¹⁵⁵ Other legal scholars argue that initiating a recall election with the help of modern technology, such as access to virtual voter rolls, is too easy and allows the inappropriate entrée of influential—and economically powerful—national special interest groups into state politics, forcing officials into a “permanent campaign.”¹⁵⁶

C. *Vacancy Filling*

1. State Law

Another approach to tackle post-election party switching is more unconventional, involving the recognition of a “vacancy” in the office of the

154. Legislatures are not known to readily engage in significant self-regulation. For example, despite relatively high public support for enacting term limits on state legislators, only sixteen states currently have them. *The Term-Limited States*, NAT'L CONF. ST. LEGISLATURES, <https://www.ncsl.org/about-state-legislatures/the-term-limited-states> [https://perma.cc/7HDC-92Y5] (last updated Aug. 3, 2023). Some of the enacting measures passed with as little as 52% of the vote. *Id.* Further, the legislatures of two states, Idaho and Utah, repealed term limits that had been in place for almost a decade, while legislators in four other states, Massachusetts, Oregon, Washington, and Wyoming, have successfully challenged term limits in state courts, where they were struck down as unconstitutional as enacted. *Id.*

155. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”); U.S. CONST. amends. XIV, § 2, XV, § 1, XIX, XXVI, § 1 (describing voting as a “right”). Although the U.S. Constitution and the U.S. Supreme Court clearly classify voting as a “right,” there is significant partisan disagreement over whether voting is “a fundamental right for every adult U.S. citizen and should not be restricted in any way” or “a privilege that comes with responsibilities and can be limited if adult U.S. citizens don’t meet some requirements.” Vianney Gómez & Carroll Doherty, *Wide Partisan Divide on Whether Voting Is a Fundamental Right or a Privilege with Responsibilities*, PEW RSCH. CTR. (July 22, 2021), <https://www.pewresearch.org/short-reads/2021/07/22/wide-partisan-divide-on-whether-voting-is-a-fundamental-right-or-a-privilege-with-responsibilities/> [http://perma.cc/3QGW-NENR]. Overall, 57% of Americans view voting as a right rather than a privilege, including 78% of Democrats but only 32% of Republicans. *Id.*

156. See generally Zachary J. Siegel, Comment, *Recall Me Maybe? The Corrosive Effect of Recall Elections on State Legislative Politics*, 86 U. COLO. L. REV. 307, 307 (2015) (“[T]his Comment argues that increased use of [recall elections] . . . will shake the foundation of state legislative politics.” (emphasis omitted)).

party switcher. This vacancy can be filled through a special election or appointment, resembling the second step of the successive recall mechanism without the initial recall vote.¹⁵⁷ Which events or situations create a “vacancy” in a legislative seat vary among the states, but most acknowledge death, resignation, and removal as creating a vacancy, while nineteen states do not explicitly define the term.¹⁵⁸

Every state already has some mechanism for filling state legislative vacancies. Twenty-six states use special elections, twenty-four use appointments.¹⁵⁹ In special elections states, the governor or the presiding officer of the chamber with the vacant seat calls the election.¹⁶⁰ Appointment states have more variation. The governor makes the appointment in twelve states, the local board of county commissioners in seven states, the political party of the previous seat holder appoints in five states, and in Ohio, members of the same house and party as the last incumbent make the appointment.¹⁶¹

Where the members of the same political party that held the seat before the vacancy make the appointments, the seat stays with that party because they are politically incentivized to appoint members of their own party.¹⁶² Among the nineteen states where the governor or board of county commissioners makes appointments, only four allow appointments not constrained by political party.¹⁶³ In the remaining fifteen states, the appointee must be from the same party as the vacated seat holder, or the empowered body selects from a list provided by the party of the previous seat holder.¹⁶⁴

157. *See supra* Section III.B.1.

158. *See infra* Table 3.

159. *Id.*

160. *Id.* One state departs from this pattern; the secretary of state calls special elections in Rhode Island. R.I. GEN. LAWS § 17-3-6 (2024).

161. *See infra* Table 3.

162. *See id.*

163. *Id.*

164. *Id.* There is, however, one interesting exception: in Arizona, the board of county commissioners appoints the official from a list compiled by the “appropriate political party.” State law stipulates that

“appropriate political party” means the same political party of which the person who was elected to or appointed to the office was a member immediately before the vacancy occurred except that if the person vacating the office changed political party affiliation after taking office, the person who is appointed to fill the vacancy shall be of the same political party that the vacating officeholder was when the vacating officeholder was elected or appointed to that office.

ARIZ. REV. STAT. ANN. § 41-1202 (2024).

2. Benefits

First, assuming a party switch is deemed to create a vacancy,¹⁶⁵ the prospect of an automatically triggered special election or appointment is a significant disincentive for politicians contemplating party switching, as this method would be akin to a forced resignation. If the vacancy triggered a special election, it would also eliminate potential benefits to the switcher's new party, because the resulting special election likely would not favor their party. For example, if the switch transformed a Democrat into a Republican, the special election would pit the newly minted Republican—now viewed as a traitor to the constituents who elected them—against a Democrat in a district that was most recently won by a Democrat. If the new Republican cannot hold their seat under these long odds, their utility to their Republican colleagues is eliminated, creating fewer incentives to switch in the first place.

A special election that is automatically triggered by a vacancy would also ameliorate the issues posed by placing the onus on constituents and requiring political will to undertake the method of recourse. Unlike a recall, if the special election was automatically triggered, constituents would not have to undertake extra efforts to *earn* their right to representation of their interests in our democratic system. This mechanism would also essentially give the party switcher's constituents a "do-over" of the initial election, but with all the relevant information about the official's actual party affiliation to be able to make a truly informed choice, and hopefully achieve genuine representation of the majority's interests.

3. Drawbacks

The first drawback is that a legislator switching parties may not clearly create a vacancy according to language in existing state schemes.¹⁶⁶ In order to make vacancy filling a viable path to redress party switching, states would need to draft and pass legislation which explicitly defines a vacancy to include one triggered by a post-election party switch. It is also somewhat unclear how this would work practically. In the case of the traditional events triggering vacancy such as death, resignation, and removal, the elected official is immediately unwilling or unable to fulfill their duties, and the office is therefore vacant. In the case of a party switch, the vacancy would be purely symbolic, because the party switcher would still be willing and able to serve out the remainder of the term. This raises questions about whether the switcher would stay until a new official is appointed or elected, risking a representation gap for constituents.

165. See *infra* Section III.C.3, for an explanation of situations where a party switch may not create a "vacancy" per state law definitions.

166. See *infra* Table 3.

Another notable drawback arises when a vacancy leads to an appointment, as the appointment process is typically constrained by political affiliation. If the switcher's new party retains control of the seat, the impacts of party switching persist, and constituents will remain misrepresented in the legislature. And even if state law mandates that the appointee must be from the switcher's original party, the appointment process still technically deprives the constituents of their right to choose their own elected official by removing their ability to exercise their voice via the voting process.

In the event of a vacancy triggering a special election, there are serious questions about whether the results of special elections will be consistent with the desires of the electorate, which could itself lead to misrepresentation.¹⁶⁷ Special elections scheduled incongruently with the general election may impact voter turnout, and lead to unexpected results.¹⁶⁸ It is possible that a special election, decided by only the most engaged and available voters, might favor the party that lost in the last general election, again resulting in misrepresentation, but without the safety valve of a post-election party switch remedy.¹⁶⁹

IV. PROPOSING A REMEDY FOR NORTH CAROLINA

In response to Representative Cotham's party switching,¹⁷⁰ and recognizing its impact on representative democracy,¹⁷¹ Democrats in the N.C. Senate introduced the Voter Fraud Prevention Act ("the Act") in June 2023.¹⁷² Although transparently politically motivated, this proposed legislation aims to address the issue of post-election party switching and provide redress for North Carolinians. The Act suffers some shortcomings but could be improved significantly by replacing special elections with politically constrained appointments. Although the bill stalled in committee soon after it was

167. Tyler Yeargain, *Maryland's Legislative Appointment Process: Keep It and Reform It*, 51 U. BALT. L.F. 1, 10 (2020) [hereinafter Yeargain, *Maryland's Process*].

168. *Id.* at 11–12.

169. *Id.* at 11–13 ("Low-turnout elections are likely to be decided by the most intensely interested voters, who may not always reflect the electorate as a whole. When that's the case . . . the most interested voters achieve a result that wouldn't have been possible at the most recently scheduled general election.")

170. S.B. 748, 156th Gen. Assemb., Reg. Sess. (N.C. 2023) ("Whereas, 25,986 votes were cast in the 2022 general election for or against a North Carolina legislator who chose to switch political party affiliation less than six months after being sworn into office . . .").

171. *Id.* ("Whereas, nothing is more important to the functioning of an open and free democracy than voter confidence in elections; and Whereas, members of the General Assembly are duty-bound to faithfully pursue the interests and issues for which they were elected; and Whereas, political party affiliation switches by seated legislators may have profound consequences for those legislators' constituents and all residents of North Carolina . . .").

172. *Id.*

introduced,¹⁷³ the Act represents an opportunity for North Carolina legislators to demonstrate commitment to preserving representative democracy in North Carolina for their constituents.

A. *The Voter Fraud Prevention Act*

The Act is quite simple. Section 1—just nine lines long—provides the proposed remedy¹⁷⁴:

§ 163-3.5. Special election; change in party affiliation.

Notwithstanding any provision of law to the contrary, if an elected or appointed member of the General Assembly changes party affiliation during the member's term of office with more than six months remaining on the member's term, that member's office shall be deemed vacated and the vacancy shall automatically trigger a special election which shall be held within 90 days from the date the member changed party affiliation. The State Board of Elections shall develop the guidelines and procedures to be used in conducting the special election required by this section, including reimbursement to the county board of elections for the actual cost involved in administering the special election.¹⁷⁵

Essentially, this legislation would create a mandatory special election, automatically triggered in the case of a post-election party switch. The Act circumvents the issue of needing a vacancy to hold a special election by simply declaring that a post-election party switch creates a vacancy as a matter of law. Finally, for practical reasons, this scheme only creates a vacancy where the switch occurs with more than six months remaining in the term of office.¹⁷⁶ Without this provision, it would be difficult to hold a special election and seat the party switcher's replacement with any meaningful time left for them to govern. Although the proposed legislation represents a valiant first effort, mindful of the benefits and drawbacks of each method of redressing post-election party switching, there remain several areas for improvement.

B. *A Better Solution*

1. Practical Implications

The accountability mechanism proposed by the Act lacks needed specificity: it demands a special election but leaves finalization of the details to

173. The bill has been stalled before the Senate Committee on Rules and Operations since June 7, 2023. *Senate Bill 748 Bill Lookup*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/BillLookup/2023/S748> [https://perma.cc/38GB-5NFJ].

174. Section 2 requires party switchers to return campaign contributions on request. S.B. 748.

175. *Id.*

176. *Id.*

the North Carolina State Board of Elections, while constraining the time between the party switch and the special election to ninety days.¹⁷⁷ This relatively short period of time makes it difficult to organize an election and even harder to hold primaries to determine who will appear on the ballot. A party primary, or some other method of choosing a candidate, will always be necessary; either the switcher's former party will be without a clear successor, having lost their frontrunner in the switch, or the switcher's new party may prefer to run a different candidate. Given the practical need for at least one party to hold a primary, ninety days may not be enough time to implement this plan.

Further, implementing the Act would require many other changes to North Carolina's statutes. For instance, currently, the General Statutes of North Carolina neither defines vacancies to include those created by party switchers, nor does it fill vacancies in the state legislature by special election.¹⁷⁸ However, North Carolina does use special elections to fill vacancies in United States congressional offices,¹⁷⁹ so implementing the Act would likely involve explicitly redefining vacancy and creating a carveout in the standard vacancy filling mechanism for state legislators while substituting the existing congressional vacancy filling protocol.

2. Implementation Concerns

Additionally, the special election mechanism raises cost concerns, as demonstrated by the 2016 special primary election in Wake County which cost taxpayers at the time \$599,000,¹⁸⁰ the equivalent of \$780,816 in 2024 dollars.¹⁸¹ The Act attempts to account for this significant drain on local resources by promising to reimburse county boards for these costs,¹⁸² but the potential long-term expenses outweigh cost-effective (free) methods such as appointment.

The special election mechanism also risks a lack of representation, or misrepresentation, for constituents. If the party switcher must immediately step down upon creation of the vacancy, their district inevitably loses representation

177. *Id.*

178. N.C. CONST. art. II, § 10; N.C. GEN. STAT. § 163-11 (2024).

179. N.C. GEN. STAT. §§ 163-12 to -13.

180. See *What the Special Election Cost Taxpayers in NC*, ABC 11 RALEIGH-DURHAM (June 23, 2016), <https://abc11.com/special-election-nc-primary-counties-cost-to-taxpayers/1399090/> [<https://perma.cc/6EZU-E4NE>]. As of the latest certified county population estimates, Wake County is the largest county in the state; for other less populous counties, the cost would likely be less. See *2022 Certified County Population Estimates*, N.C. OFF. ST. BUDGET & MGMT., <https://www.osbm.nc.gov/facts-figures/population-demographics/state-demographer/county-population-estimates/certified-county-population-estimates> [<https://perma.cc/E625-WDZT>].

181. See *CPI Inflation Calculator*, U.S. BUREAU LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/KA56-FT8W> (staff-uploaded archive)] (estimating the equivalent cost of the June 2016 special primary election in Wake County in June 2024 dollars).

182. S.B. 748, 156th Gen. Assemb., Reg. Sess. (N.C. 2023).

in the ninety days until the special election.¹⁸³ A special election also risks creating misrepresentation if the special election suffers from poor turnout.¹⁸⁴ In North Carolina, we must also consider the confounding effects of voter suppression and disenfranchisement of communities of color and other marginalized groups.¹⁸⁵ Special elections may exacerbate existing disparities in poll access due to a lack of advanced notice and advertising that traditionally accompanies a general election. The benefits of advanced warning allow citizens to overcome barriers such as a lack of required ID, voter roll purging, and the need for alternative methods of voting such as mail-in ballots.¹⁸⁶

Finally, the decision to deem a legislative seat vacated when a legislator switched parties could implicate constitutional concerns. Traditionally, vacancies are created when a legislator is unwilling or unable to serve or has stopped performing their duties.¹⁸⁷ It is a legislative innovation to deem a seat vacated where there remains a living legislator willing to perform their duties who has not been the subject of some official process such as a removal, recall, or a hearing on their competence. Nevertheless, with innovation comes risk; it is conceivable but unlikely that a court could find that the compelling state interest in protecting representative democracy outweighs the corresponding burden on the party switcher's First Amendment rights under this scheme.¹⁸⁸

3. Proposed Amendments

Given the absence of constitutional recall authority and the impracticality of party switch-motivated expulsion, the vacancy filling method is the optimal choice for North Carolina. However, appointing a replacement for a party switcher's vacancy is preferable to a special election. This proposed change streamlines legislative changes by keeping the current legislative vacancy-filling

183. Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & POL'Y 564, 619 (2020) ("Policymakers also justified moving to legislative appointments on the grounds that special elections deprive voters of effective representation. Because special elections can't happen *immediately* upon a vacancy occurring, an interim period, in which the district is without representation, is largely inevitable.").

184. *Id.* at 622 ("[I]n a low-turnout election scheduled on a seemingly random day, anything can happen, including the seat flipping parties. This could serve as a reflection of a shift in voter preferences—but it may be just as likely a reflection of asymmetric voter enthusiasm."); Yeargain, *Maryland's Process*, *supra* note 167, at 10.

185. See DEMOCRACY NC, A BRIEF HISTORY OF VOTER SUPPRESSION IN NORTH CAROLINA 9 (2021), <https://democracync.org/wp-content/uploads/2021/12/A-Brief-History-of-Voter-Suppression-in-NC-2.pdf> [<https://perma.cc/2QBS-9WAG>] (chronicling disproportionate impacts of voter suppression tactics since the 1800s).

186. Alexander Keyssar, *Barriers to Voting in the Twenty-First Century*, in REPRESENTATION: ELECTIONS AND BEYOND 39, 43–55 (Jack H. Nagel & Rogers M. Smith eds., 2013) (describing modern barriers to the polls).

187. See column entitled "Vacancy Defined" *infra* Table 3.

188. See *supra* Section II.A.

method intact.¹⁸⁹ Under the current scheme, the governor is already constrained politically to appoint a replacement recommended by “the political party with which the vacating member was affiliated when elected.”¹⁹⁰ This language already ensures that the switcher’s new party does not get to keep the seat after the appointment. Thus, the only necessary change to the General Statutes of North Carolina would be to add the language from the Act that defines a vacancy to include one created by post-election party switching.¹⁹¹

Although seemingly counterintuitive, politically constrained appointments may result in more and better representation than special elections.¹⁹² Scholars have argued that, given the prevalence of party-line voting,¹⁹³ voters select two things in any election: the person and the party.¹⁹⁴ A special election may create a mismatch in both, where the individual person and their party affiliation may not match majority preferences.¹⁹⁵ A politically constrained appointment ensures that, even if constituents do not get to choose the specific candidate, majority preferences are satisfied with regard to at least one variable—party affiliation.¹⁹⁶

Consequently, a politically constrained appointment also addresses the issue of temporary non-representation during the ninety-day window before the election. The current gubernatorial appointment scheme in North Carolina requires the governor to make the appointment within seven days of the vacancy occurring, substantially limiting the time affected constituents are without representation in the relevant chamber.¹⁹⁷ Substituting an appointment for the current special election method would also ameliorate cost concerns, and therefore both improve upon and simplify the Act.

189. See N.C. GEN. STAT. § 163-11 (2024).

190. *Id.*

191. In other words, the entirety of section 1 of the Act could read: “Notwithstanding any provision of law to the contrary, if an elected or appointed member of the General Assembly changes party affiliation during the member’s term of office with more than six months remaining on the member’s term, that member’s office shall be deemed vacated.” See S.B. 748, 156th Gen. Assemb., Reg. Sess. (N.C. 2023).

192. Tyler Yeagain, *Same-Party Legislative Appointments and the Problem of Party-Switching*, 8 TEX. A&M L. REV. 163, 192–93 (2020) [hereinafter Yeagain, *Same-Party*].

193. For further discussion of this phenomenon, see *supra* Section I.B.

194. See Yeagain, *Same-Party*, *supra* note 192, at 192–93.

195. If the confounding effects of an irregularly scheduled special election change the demographics of voters who turn out to the polls, the special election could result in a different person and a different party winning the special election. *Id.*

196. *Id.*

197. N.C. GEN. STAT. § 163-11(a) (2024). If the Governor fails to make an appointment within seven days, the candidate recommended by the political party is automatically seated. *Id.*

CONCLUSION—A CALL TO ACTION

Post-election party switching is a bipartisan issue, which has impacted Democratic and Republican voters and politicians alike throughout North Carolina's history. In our two-party system, instances of post-election party switching represent a betrayal of voter expectations and erode democratic principles and faith in our elections. The motivations of the party switcher are irrelevant when the harms they cause to constituents remain the same. It is imperative that North Carolina seek a remedy for this blight.

Outright prohibition of post-election party switching would be unconstitutional, and common law causes of action do not treat the unique damages caused by this issue. Yet, state legislators have shown discomfort with party switching, especially when it might impact elections and incumbents' positions. Among the options for legislative self-regulation, recall, and expulsion do not adequately meet the needs of constituents in myriad ways. By proposing the Voter Fraud Prevention Act and deeming the seats of party switchers vacated, North Carolina legislators have already identified the optimal solution to the problem of post-election party switching in the state. By substituting a politically constrained appointment mechanism for the proposed special elections, the Act would better limit issues of cost, and mis- or non-representation, while maximizing efficiency and practical impact.

Adoption of an amended version of the Voter Fraud Prevention Act by the North Carolina General Assembly is not mere snake oil. It is a chance for legislators to earn the respect and trust of their constituents, and an act—in their own self-interest—to prevent the opposing party from benefitting unfairly from a post-election party switch. Furthermore, it is an opportunity to demonstrate a commitment to the enduring strength of representative democracy in the state, and to safeguard its protections for their constituents—and themselves—for generations to come.

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APPENDIX

The tables that follow are a compilation of research findings from a fifty-state survey of state law avenues for an elected official who switches parties to be removed from office before their elected term of office expires.

Table 1 includes citations to the sources of law that empower legislators to expel their colleagues in all fifty states. In all but six states, the state constitution creates the mechanism. In New Hampshire, North Carolina, South Dakota, and Vermont, the power to expel comes from a combination of constitutional provisions and state statutes. In Massachusetts, the state supreme court and, in New York, the state statutes empower legislative expulsion. In every state, a two-thirds vote in favor is required to expel. In many states, the empowering language states that a legislator may not be expelled “a second time for the same cause.”

Table 2 includes citations to the sources of law that empower voters to recall state legislators. Only eighteen states have recall mechanisms for state legislators. Of these states, ten do not specify any grounds for recall. Most require twenty-five percent of voters from the last election sign the recall petition. Seven states simultaneously recall and fill the vacancy, ten do so successively, and in Virginia, the recall is achieved through a trial.

Table 3 includes citations to the sources of law that create mechanisms for filling state legislative vacancies in all fifty states. These mechanisms are created in state constitutions, sometimes with supplementary provisions in state statutes. Nineteen states do not explicitly define the conditions that create a vacancy. Approximately half of states fill vacancies via special election; the other half with an appointment by the governor, the board of county commissioners, a political party, or members of the legislature. In most states, the appointment is politically constrained.

Table 1: Expulsion

State	Governing Law
Alabama	ALA. CONST. art. IV, § 53.
Alaska	ALASKA CONST. art. II, § 12.
Arizona	ARIZ. CONST. art. IV, pt. 2, § 11.
Arkansas	ARK. CONST. art. V, § 12.
California	CAL. CONST. art. IV, § 5(a)(1).
Colorado	COLO. CONST. art. V, § 12.
Connecticut	CONN. CONST. art. III, § 13.
Delaware	DEL. CONST. art. II, § 9.

Florida	FLA. CONST. art. III, § 4(d).
Georgia	GA. CONST. art. III, § 4, ¶ 7.
Hawaii	HAW. CONST. art. III, § 12.
Idaho	IDAHO CONST. art. III, § 11.
Illinois	ILL. CONST. art. IV, § 6(d).
Indiana	IND. CONST. art. IV, § 14.
Iowa	IOWA CONST. art. III, § 9.
Kansas	KAN. CONST. art. II, § 8.
Kentucky	KY. CONST. § 39.
Louisiana	LA. CONST. art. III, § 7.
Maine	ME. CONST. art. IV, pt. 3, § 4.
Maryland	MD. CONST. art. III, § 19.
Massachusetts	MASS. CONST. pt. 2, ch. I, § II, art. IV; <i>id.</i> pt. 2, ch. I, § III, art. X; <i>Hiss v. Bartlett</i> , 69 Mass. 468, 475 (1855).
Michigan	MICH. CONST. art. IV, § 16.
Minnesota	MINN. CONST. art. IV, § 7.
Mississippi	MISS. CONST. art. IV, § 55.
Missouri	MO. CONST. art. III, § 18.
Montana	MONT. CONST. art. V, § 10.
Nebraska	NEB. CONST. art. III, § 10.
Nevada	NEV. CONST. art. IV, § 6.
New Hampshire	N.H. CONST. pt. II, art. 22; <i>id.</i> pt. II, art. 35; N.H. REV. STAT. ANN. § 14-B:4 (2024).
New Jersey	N.J. CONST. art. IV, § 4, para. 3.
New Mexico	N.M. CONST. art. IV, § 11.
New York	N.Y. LEGIS. LAW § 3.
North Carolina	N.C. CONST. art. II, § 20; N.C. GEN. STAT. § 120-103.1(j), (m) (2024).
North Dakota	N.D. CONST. art. IV, § 12.
Ohio	OHIO CONST. art. II, § 6.
Oklahoma	OKLA. CONST. art. V, § 30.
Oregon	OR. CONST. art IV, § 15.

Pennsylvania	PA. CONST. art. II, § 11.
Rhode Island	R.I. CONST. art. VI, § 7.
South Carolina	S.C. CONST. art. III, § 12.
South Dakota	S.D. CONST. art. III, § 9; S. RULES 8-1 to 8-8, 99th Sess., at 77–81 (S.D. 2024); H. RULES 6-1 to 6-8, 99th Sess., at 91–94 (S.D. 2024).
Tennessee	TENN. CONST. art. II, § 12.
Texas	TEX. CONST. art. III, § 11.
Utah	UTAH CONST. art. VI, § 10(1).
Vermont	VT. CONST. ch. II, §§ 14, 19.
Virginia	VA. CONST. art. IV, § 7.
Washington	WASH. CONST. art. II, § 9.
West Virginia	W. VA. CONST. art. VI, § 25.
Wisconsin	WIS. CONST. art. IV, § 8.
Wyoming	WYO. CONST. art. III, § 12.

Table 2: Recall

State	Governing Law	Grounds	Signature Requirement*	Recall Mechanism***
Alaska	ALASKA CONST. art. VI, § 8; ALASKA STAT. §§ 29.26.240 to .350, 15.45.470 to .710, 15.80.010 (2024).	Lack of fitness; incompetence; neglect of duties; corruption ¹⁹⁸	25% of votes cast	Successive (Appointed)
Arizona	ARIZ. CONST. art. VIII, pt. 1, §§ 1–6; ARIZ. REV. STAT. ANN. §§ 19-201 to 19-234 (2024).	None specified	25% of votes cast	Simultaneous (Eligible)
California	CAL. CONST. art. II, §§ 13–19; CAL. ELEC. CODE	None specified	20% of votes cast	Simultaneous (Ineligible)

198. ALASKA STAT. § 15.45.510 (2024).

	§§ 11000 to 11386 (2024).			
Colorado	COLO. CONST. art. XXI, §§ 1-4; COLO. REV. STAT. §§ 1-12-101 to -123, 31-4-501 to -505, 32-1-906 to -915 (2024).	None specified	25% of votes cast	Simultaneous (Ineligible)
Georgia	GA. CONST. art. II, § II, para. IV; GA. CODE ANN. §§ 21-4-1 to -21 (2024).	Acts of malfeasance; violation of oath; acts of misconduct; failure to perform duties prescribed by law; or willful misuse, conversion, or misappropriation, of public property or public funds entrusted to or associated with the elective office ¹⁹⁹	30% of registered voters	Successive (Elected)
Idaho	IDAHO CONST. art. VI, § 6; IDAHO CODE §§ 34-1701 to -1715 (2024).	None specified	20% of registered voters	Successive (Appointed)
Kansas	KAN. CONST. art. IV, § 3; KAN. STAT. ANN. §§ 25-4301 to -4331 (2024).	Conviction of a felony; misconduct (a violation of law by the officer that impacts the officer's ability to perform the official duties of the office); failure to perform duties prescribed by law. No recall submitted to the voters shall be held void because of the insufficiency of the grounds, application, or petition by which the	40% of votes cast	Successive (Appointed)

199. GA. CODE ANN. § 21-4-3(7)(B) (2024).

		submission was procured. ²⁰⁰		
Louisiana	LA. CONST. art. X, § 26; LA. STAT. ANN. §§ 18:1300.1 to .17 (2024).	None specified	<1,000 electors: 40% 1,000–25,000 electors: 33.3% 25,000–100,000 electors: 25% >100,000 electors: 20%	Successive (Elected)
Michigan	MICH. CONST. art. II, § 8; MICH. COMP. LAWS §§ 168.951 to .977 (2024).	None specified—each reason given must be stated factually and clearly ²⁰¹	25% of votes cast**	Simultaneous (Eligible)
Minnesota	MINN. CONST. art. VIII, § 6; MINN. STAT. §§ 211C.01 to .09 (2024).	Serious malfeasance or nonfeasance during the term of office in the performance of duties; conviction during the term of office of a serious crime ²⁰²	25% of votes cast	Successive (Elected)
Montana	MONT. CODE ANN. §§ 2-16-601 to -635 (2023).	Physical or mental lack of fitness; incompetence; violation of the oath; official misconduct; conviction of certain felony offenses ²⁰³	15% of registered voters	Successive (Elected)
Nevada	NEV. CONST. art. II, § 9; NEV. REV. STAT. §§ 294A.006, 306.005 to .210, 539.163 to .185 (2023).	None specified	25% of votes cast	Simultaneous (Eligible)

200. KAN. STAT. ANN. § 25-4302 (2024).

201. MICH. COMP. LAWS § 168.95a(c) (2024).

202. MINN. CONST. ART. VIII, § 6.

203. MONT. CODE ANN. § 2-16-603(3) (2023).

New Jersey	N.J. CONST. art. I, § 2, para. b; N.J. STAT. ANN. §§ 19:27A-1 to -18 (2024).	None specified	25% of registered voters	Successive (Elected)
North Dakota	N.D. CONST. art. III, §§ 1, 10; N.D. CENT. CODE §§ 16.1-01-09.1, 44-08-21 (2023).	None specified	25% of votes cast	Simultaneous (Eligible)
Oregon	OR. CONST. art. II, § 18; OR. REV. STAT. §§ 249.865 to .877 (2024).	None specified	15% of votes cast**	Successive (Appointed)
Virginia	VA. CODE ANN. §§ 24.2-233 to -238 (2024).	Neglect of duties; misuse of office; incompetence; conviction of certain misdemeanors involving controlled substances; conviction of a hate crime; conviction of certain sex crimes ²⁰⁴	10% of votes cast	Recall Trial
Washington	WASH. CONST. art. I, §§ 33 to 34; WASH. REV. CODE §§ 29A.56.110 to .270 (2024).	Commission of acts of malfeasance or misfeasance while in office; violation of oath ²⁰⁵	35% of votes cast	Successive (Appointed)
Wisconsin	WIS. CONST. art. XIII, § 12; WIS. STAT. § 9.10 (2023).	None specified	25% of votes cast**	Simultaneous (Eligible)

* All requirements are assessed at the time of the last election for the office held by the elected official subject to recall.

** Refers to votes cast for the office of governor.

*** Recall elections and the election to fill the resulting vacancy may appear at the same time on a single ballot (simultaneous) or filling the vacancy may occur after the recall election (successive). In the event of simultaneous elections, the elected official subject to recall may be eligible or ineligible to appear on the

204. VA. CODE ANN. § 24.2-233 (2024).

205. WASH. CONST. art. I, § 33.

ballot to fill a vacancy created by their recall. In the event of successive events, the vacant seat of a recalled official may be filled by a second election, or by appointment.

Table 3: Filling a Vacancy

State	Governing Law	Vacancy Defined	Filling Mechanism	Empowered Body*
Alabama	ALA. CONST. art. IV, § 46; ALA. CODE §§ 17-15-1 to -7 (2024).	Not defined	Special Election	Governor
Alaska	ALASKA CONST. art. II, § 4; ALASKA STAT. § 15.40.320 (2024).	Not defined	Appointment	Governor**
Arizona	ARIZ. REV. STAT. ANN. §§ 38-291, 41-1202 (2024).	Death; adjudicated insane; resignation; removal; ineligibility; extended absence or dereliction of duties; conviction of certain felonies; failure to take oath; voided election; failure to fill office; seeking/holding other office	Appointment	Board of County Commissioners**
Arkansas	ARK. CONST. art. V, § 6; ARK. CODE ANN. §§ 7-11-103, 10-2-118 to -119 (2024).	Resignation; death; expulsion; “or otherwise”	Special Election	Governor
California	CAL. CONST. art. IV, § 2; CAL. ELEC. CODE §§ 10700 to 10707.	Not defined	Special Election	Governor

Colorado	COLO. CONST. art. V, § 2(3); COLO. REV. STAT. § 1-12- 203 (2024).	Death; resignation; failure to take oath; “or otherwise”	Appointment	Political Party**
Connecticut	CONN. GEN. STAT. § 9-215 (2024).	Death; resignation	Special Election	Governor
Delaware	DEL. CODE ANN. tit. 15, §§ 7101 to 7112 (2024).	Failure to elect; ineligibility; death; resignation; “or otherwise”	Special Election	Presiding Officer of the House / Governor
Florida	FLA. STAT. §§ 100.101 to .141 (2024).	Not defined	Special Election	Governor
Georgia	GA. CODE ANN. § 21-2-544 (2024).	Not defined	Special Election	Governor
Hawaii	HAW. CONST. art. III, § 5; HAW. REV. STAT. §§ 17-3 to -4 (2024).	Not defined	Appointment	Governor**
Idaho	IDAHO CODE §§ 59-901, -904A (2024).	Resignation; death; removal; incapacity; extended absence; ineligibility; failure to fill office; forfeiture; conviction of felony; seeking/holding other office	Appointment	Governor**
Illinois	ILL. CONST. art. IV, § 2(d); 10 ILL. COMP. STAT. ANN. 5/25-2, -6 (2024).	Death; resignation; adjudicated incompetent; ineligibility; conviction of some crimes; removal; failure to take oath; voided election	Appointment	Political Party**
Indiana	IND. CODE § 3- 13-5-0.1 (2024).	Not defined	Appointment	Political Party***

Iowa	IOWA CODE §§ 69.2, 69.14 (2024).	Failure to elect; disqualification; resignation; death; removal; conviction of a felony; extended absence; seeking/holding other office	Special Election	Governor
Kansas	KAN. CONST. art. II, § 9; KAN. STAT. ANN. §§ 25-3902 to -3903 (2024).	Not defined	Appointment	Governor***
Kentucky	KY. REV. STAT. ANN. § 118.730 (2024).	Not defined	Special Election	Presiding Officer of the House / Governor
Louisiana	LA. STAT. ANN. §§ 18:581, :601 (2024).	Death; retirement; resignation; removal; failure to take office; ineligibility; creation of new office; disqualification	Special Election	Presiding Officer of the House
Maine	ME. STAT. ANN. tit. 21-A, §§ 361, 366, 381, 382 (2023).	Death; resignation; disqualification; ineligibility	Special Election	Governor
Maryland	MD. CONST. art. III, § 13.	Death; disqualification; resignation; refusal to act; expulsion; removal	Appointment	Governor**
Massachusetts	MASS. CONST. AMEND. art. 24; MASS. GEN. LAWS ANN. ch. 54, § 141 (2024).	Not defined	Special Election	Senate / Speaker of the House
Michigan	MICH. CONST. art. V, § 13; MICH. COMP. LAWS	Death; resignation; removal; ineligibility; voided election; failure to take oath	Special Election	Governor

	§§ 168.634, .176, .178 (2024).			
Minnesota	MINN. CONST. art. IV, § 4; MINN. STAT. §§ 204B.13, 204D.17 to .27 (2024).	Death; withdrawal; ineligibility	Special Election	Governor
Mississippi	MISS. CODE ANN. §§ 23-15- 831, -851 (2024).	Death; resignation; “or otherwise”	Special Election	Governor
Missouri	MO. CONST. art. III, § 14; MO. ANN. STAT. § 21.090 (2024).	Death; resignation; expulsion; “or otherwise”	Special Election	Governor
Montana	MONT. CONST. art. V, § 7; MONT. CODE ANN. §§ 2-16- 501, 5-2-402 to -403, 5-2-406 (2023).	Death; adjudicated insane; resignation; removal; ineligibility; extended absence; dereliction; conviction of certain felonies; failure to take oath; voided election	Appointment	Board of County Commissioners***
Nebraska	NEB. REV. STAT. § 32-560, -566 (2024).	Death; resignation; expulsion; judicial order; lack of residency; failure to elect; ineligibility; forfeiture; conviction of certain felonies; assumption of another office	Appointment	Governor
Nevada	NEV. CONST. art. IV, § 12; NEV. REV. STAT. § 218A.260 (2023).	Death; resignation; “any other reason”	Appointment	Board of County Commissioners***
New Hampshire	N.H. CONST. pt. II, arts. 16,	Death; resignation; lack of domicile;	Special Election	Governor and Executive Council

	34; N.H. REV. STAT. ANN. §§ 652:12, 661:8 (2024).	adjudicated insane; conviction of certain crimes; failure to take oath; judicial order; military service		
New Jersey	N.J. CONST. art. IV, § 4, para. 1.	"[O]ccasioned otherwise than by expiration of term"	Appointment	Political Party***
New Mexico	N.M. CONST. art. IV, § 4.	"For any reason"	Appointment	Board of County Commissioners
New York	N.Y. PUB. OFF. LAW §§ 30, 42 (2024).	Death; resignation; removal; ineligibility; conviction of some crimes; adjudicated incompetent; voided election; failure to take oath; creation of new office; dereliction; disqualification	Special Election	Governor
North Carolina	N.C. CONST. art. II, § 10; N.C. GEN. STAT. § 163-11 (2024).	Death; resignation; "otherwise than by expiration of term"	Appointment	Governor***
North Dakota	N.D. CENT. CODE §§ 44-02-01, -03.1 (2024).	Death; adjudicated incompetent; resignation; removal; dereliction; failure to take oath; lack of residency; conviction of certain crimes; disqualification; voided election	Appointment	Political Party***
Ohio	OHIO CONST. art. II, § 11.	"[F]or any cause"	Appointment	Members of Same House and Party as Last Incumbent***
Oklahoma	OKLA. STAT. ANN. tit. 26, § 12-106 (2024).	Not defined	Special Election	Governor

Oregon	OR. REV. STAT. § 171.051 to .060 (2024).	Death; recall; resignation; disqualification	Appointment	County Courts or Board of County Commissioners***
Pennsylvania	PA. CONST. art. II, § 2; 46 PA. CONS. STAT. § 42.146 (2024).	Death; resignation; "otherwise"	Special Election	Presiding Officer of the House
Rhode Island	17 R.I. GEN. LAWS § 17-3-6 (2024).	"From any cause"	Special Election	Secretary of State
South Carolina	S.C. CONST. art. III, § 25; S.C. CODE ANN. § 7-13-190 (2024).	Failure to fill office; disqualification; resignation; death; extended absence; seeking/holding other office before end of term	Special Election	Presiding Officer of the House or the Senate
South Dakota	S.D. CONST. art. III, § 10.	Not defined	Appointment	Governor
Tennessee	TENN. CODE ANN. §§ 2-14- 201 to -204 (2024).	Not defined	Special Election	Governor
Texas	TEX. ELEC. CODE ANN. §§ 201.021 to .030, 203.001 to 0.12 (2023).	Death; resignation; removal; acceptance of another office; declaration of ineligibility; new office; declining office; recall	Special Election	Governor
Utah	UTAH CONST. art. VI, § 13; UTAH CODE ANN. § 20A-1- 503 (2024).	"For any reason"	Appointment	Governor***
Vermont	VT. CONST. ch. II, art. 45; VT. STAT. ANN. tit. 2, §§ 4, 9 (2024).	Not defined	Appointment	Governor

Virginia	VA. CODE ANN. § 24.2-216 (2024).	Not defined	Special Election	Presiding Officer of the House or Senate / Governor
Washington	WASH. CONST. art. II, § 15, <i>amended by</i> WASH. CONST. amend. 52.	Not defined	Appointment	Board of County Commissioners**
West Virginia	W. VA. CONST. art. IV, § 7; W. VA. CODE § 3- 10-5 (2024).	Not defined	Appointment	Governor***
Wisconsin	WIS. CONS. art. IV, § 14; WIS. STAT. § 8.50 (2023).	Not defined	Special Election	Governor
Wyoming	WYO. CONST. art. III, § 51; WYO. STAT. ANN. §§ 22-18- 101, -111(a)(iii) (2024).	Death; resignation; adjudicated incompetent; disqualification; conviction of felony; failure to take oath; election voided; failure to elect	Appointment	Board of County Commissioners***

*Individual or body empowered to call a special election or make an appointment to fill a vacancy.

**Appointee required to be of same political party as person whose seat was vacated.

***Individual or body empowered to make appointments chooses from candidates offered by the political party of the person whose seat was vacated.

