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## SUPPLYING JUSTICE: UNETHICAL PRACTICES IN STATE SUPREME COURTS

*Emmanuel Morga and Clint Saylor<sup>1</sup>*

*Who are judges accountable to? Politicians? Special interest groups? The law and the Constitution? The People?*

State Supreme Court elections exist to provide the means by which a judge can be accountable to their constituents, but due to the growing involvement of special interest groups in judicial campaigns, the credibility of State Supreme Court justices has been called into question. According to the American Bar Association (ABA), judges are described as “umpires in baseball. Their role is to see that the rules of court procedures are followed ... without regard to which side is popular (no home field advantage), without regard to who is ‘favored,’ without regard for what the spectators want, and without regard to whether the judge agrees.”<sup>2</sup> This definition suggests that judges are to be free from any outside pressure,

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  - 2 American Bar Association, *How Courts Work*, AMERICANBAR, [http://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/judge\\_role.html](http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/judge_role.html) (last visited Mar. 15, 2016).

and are to “call ‘em as they see ‘em, according to the facts and law [regardless of whether] . . . the judge agrees with the law.”<sup>3</sup> However, because of the nature of judicial elections, judges are constantly divulging their personal opinions, promising reforms, and accepting alarming amounts of financial contributions from interest groups. Studying the State Supreme Court election processes of various states confirms the negative ethical and social impact that has occurred due to the politicization of the judicial branch; therefore, to maintain the virtue of State Supreme Court justices, judicial elections should be eliminated.

In order to provide the reader with a sound foundation of State Supreme Courts and judicial elections, Section I will review background information including definitions of key terms and historical context. In Section II we will discuss our proof of claim, which highlights a discussion on the ethical and social effects of judicial elections, provides examples of court cases where unethical rulings have resulted from judicial campaign financing, and sheds light on the rising politicization of the judiciary by interest groups. Section III looks to the future and presents the authors’ suggestions on where to go next. Lastly, Section IV summarizes our conclusion.

## I. BACKGROUND

### A. Definitions

To fully understand the current context of judicial elections, we first need to define various key terms. We define judicial elections as an institution; meaning the process by which a judge is elected. To define a judge’s neutrality, we reference the current ABA Model Code of Conduct, Canon 2 which states:

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge’s judicial position

to gain advantage in a civil suit involving a member of the judge's family.

....

A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.<sup>4</sup>

### *B. Historical Context*

Historically, there have been two methods of approaching judicial selection. Originally, all states that entered the Union employed a direct appointment of State Supreme Court justices.<sup>5</sup> Beginning with President Andrew Jackson, a wave of democratic populism motivated people to break the judicial power by majority control.<sup>6</sup> This did not reach full effect until 1846 when states entering the Union included a judicial election process in their State Constitutions.<sup>7</sup> Tocqueville, while observing judicial elections, warned: "Sooner or later these innovations will have dire results ... not judicial power only but the democratic republic itself has been attacked."<sup>8</sup>

By the turn of the twenty-first century, thirty states had implemented a type of State Supreme Court election, despite warnings from early Federalists like Alexander Hamilton. Hamilton argued for the appointment and retention of judges who would remain independent and free from outside influence, in order to guard "the

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4 AM. BAR ASS'N. MODEL CODE OF JUDICIAL CONDUCT § 2 (AM. BAR ASS'N. 2014).

5 Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993).

6 *Id.* at 191.

7 *Id.* at 190.

8 Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review* 123 HARV. L. REV. 1061, 1072 (2010).

Constitution and the rights of individuals from the effects of those ill humours . . . or the influence of particular conjunctures.”<sup>9</sup>

The contemporary breakdown of judicial elections and appointments is as follows:<sup>10</sup> Nine states currently have partisan elections,<sup>11</sup> meaning that a judge can run with a party affiliation on the ballot. Thirteen states have non-partisan elections where a judge is listed on a ballot without a party affiliation.<sup>12</sup> Two have legislative elections in which the justices are selected and voted on by the state legislature.<sup>13</sup> An assisted appointment process is used in twenty-four states and the District of Columbia,<sup>14</sup> in which a nominating commission is assembled to prepare a short list of names for the governor to consider, who then can only choose from among those candidates. In six of those states, sitting judges are then subject to uncontested retention elections for a judge’s second term and beyond;<sup>15</sup> voters are asked if the current judge should be retained. In two states, direct gubernatorial appointment is used to select new judges.<sup>16</sup> In total, thirty states employ some form of judicial election process.

The manner in which State Supreme Court elections function has seen negative changes over the last twenty years. For example, the average total amount raised from 1989–1998 was nearly \$28 million<sup>17</sup> and the total average amount raised from 1998–2008 was

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9 THE FEDERALIST No. 78 (Alexander Hamilton).

10 *Assisted Appointment (Judicial Selection)*, BALLOTPEdia, [https://ballotpedia.org/Assisted\\_appointment\\_\(judicial\\_selection\)](https://ballotpedia.org/Assisted_appointment_(judicial_selection)) (last visited Jan. 21, 2017).

11 *Id.* (Ala., Ill., La., Mich., N.M., Ohio, Pa., Tex., and W. Va.).

12 *Id.* (Ark., Ga., Idaho, Ky., Minn., Miss., Mont., Nev., N.C., N.D., Or., Wash., and Wis.).

13 *Id.* (S.C. and Va.).

14 *Id.* (Alaska, Ariz., Colo., Conn., Del., D.C., Fla., Haw., Ind., Iowa, Kan., Me., Md., Mass., Mo., Neb., N.H., N.Y., Okla., R.I., S.D., Tenn., Utah, Vt., and Wyo.).

15 *Id.* (Alaska, Colo., Iowa, Neb., Utah, and Wyo.).

16 *Id.* (Cal. and N.J.).

17 Adjusted for inflation to represent amount in 2008 dollars.

\$40 million.<sup>18</sup> Data from 1998–2008 shows that the average amount spent on each State Supreme Court election was about \$1 million. Although the amount of money spent in judicial campaigns is relatively low in comparison to the hundreds of millions of dollars raised for other political offices, the fact that the number continues to rise is troubling. Furthermore, lawyers, unions, and businesses that have made large contributions to a judicial campaign later appear in front of the judges they have contributed to, leading to unethical practices.

## II. PROOF OF CLAIM: JUDICIAL CAMPAIGN FINANCING AND UNETHICAL RULINGS

The unethical behavior associated with judicial elections has become most noticeable within the last twenty years. Businesses have enjoyed the opportunity to contribute financially to judges' campaigns, thereby gaining favors in the courtroom. In fact, in 2007, Zogby International (an American public opinion pollster company) surveyed a total of 200 companies that had more than 100 employees. They found that 96% of business leaders who have contributed to judicial elections feel that their financial support has influenced court decisions in favor of their businesses.<sup>19</sup> In order to shed light on these unethical practices, we will review various court cases that show the negative influence of campaign financing on judicial ethics.

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18 See *Follow the Money*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, <https://www.followthemoney.org> (last visited Feb. 25, 2017) (The total amount presented here was found by summing the reported campaign expenditures by each judicial election, in each state, from 1989–2008. It should be noted that these figures reflect amounts reported to the IRS by law. Therefore, while likely representative of the influence of campaign finance as a whole, complete and total expenditures are unknown).

19 See Zogby International, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges*, JUSTICE AT STAKE, [http://www.justiceatstake.org/media/cms/CED\\_FINAL\\_repor\\_ons\\_14MAY07\\_BED4DF4955B01.pdf](http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf) (last visited Jan 21, 2017) (the stated 96% represents the total responses of “Strongly Agree” (93%) and “Somewhat Agree” (3%)).

*A. Maitland v. Ford Motor Company (2003)*<sup>20</sup> and *Wilson v. Brush Wellman, Inc. (2004)*<sup>21</sup>

One example of these deteriorating ethics took place in the state of Ohio in 2004. During this time, Ohio experienced a competitive State Supreme Court election. Justice O'Donnell, the conservative incumbent, was facing Democratic candidate William M. O'Neill. With Justice O'Donnell, the Ohio Supreme Court had a 4 to 3 conservative majority that had a trend of ruling in favor of businesses. During this election, Justice O'Donnell was hearing three important lawsuits. These lawsuits consisted of a toxic substance suit and two suits concerning defective cars.<sup>22</sup> The three companies involved in these suits were defendants, and decided to contribute to O'Donnell's PAC.<sup>23</sup> After gaining victory over O'Neill, Justice O'Donnell headed back to the bench and sided in favor of the companies that had contributed to his campaign. The financial contributions made to O'Donnell's campaign by the companies in question obviously affected the judge in some way, and whether he would have otherwise ruled in their favor is beside the point. It is clearly unethical that the defendants had the opportunity to financially influence the judge who was actively hearing their case. It was tantamount to bribery.

*B. Caperton v. Massey (2008–13)*<sup>24</sup>

The *Maitland* and *Wilson* cases were not anomalous outliers, and the appearance of *quid pro quo* is also seen in the State Supreme Court of West Virginia. In *Caperton v. Massey*, Harman

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20 *Maitland v. Ford Motor Co.*, 153 Ohio App.3d 161, (2003).

21 *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, (2004).

22 *Wilson v. Brush* concerned the toxic substance suit, while *Maitland v. Ford Motor Co.* involved the two suits concerning defective cars.

23 *Or* "Political Action Committee." These are groups created to raise and pool money from their members for use in or against specific campaigns.

24 *Hugh M. Caperton et al. v. A.T. Massey Coal Co., Inc., et al.*, 223 W. Va. 624 (2008), *abrogated by* *Caperton et al. v. A. T. Massey Coal Co., Inc., et al.*, 555 U.S. 1028 (2008).

Mining Company filed a lawsuit against A.T. Massey Coal Company. Harman said that Massey had illegally canceled a contract which ultimately left Harman bankrupt. In August 2002, a West Virginia jury found that Massey Company had acted wrongfully and awarded Harman \$50 million in damages. Upset with the results, the Massey Company filed for an appeal.

While awaiting appeal, CEO and president of Massey, Don Blankenship, donated to a non-profit corporation that ran TV ads, during the ongoing judicial election, against the incumbent Democratic candidate, Justice Warren McGraw.<sup>25</sup> The television ads portrayed McGraw as a radical liberal, a friend of trial lawyers, and a justice who protected sex offenders. Blankenship spent \$3 million on this campaign in hopes that the Republican challenger, lawyer Brent Benjamin, would be elected to the State Supreme Court.<sup>26</sup>

Brent Benjamin won the State Supreme Court race against Warren McGraw. When *Caperton v. Massey* was presented before the West Virginia Supreme Court, Harman, concerned that Blankenship's significant financial contributions to the judge's campaign would sway Benjamin in Massey's favor, motioned to disqualify Judge Benjamin from the Court on the grounds of conflict of interest. Judge Benjamin refused to recuse himself and denied the motion. In April 2008, the West Virginia Supreme court ruled 3–2 in favor of Massey—and Judge Benjamin was part of the majority. It is evident that under the Constitution a state judge is prohibited from hearing a case when a financial interest exists.<sup>27</sup> This case made it to the U.S. Supreme Court, where a 5–4 ruling reversed West Virginia's opinion and told West Virginia to try the case again, this time without Justice Benjamin. Although this ruling was reversed, the

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25 Matthew Mosk, et al., *The Downfall of Coal King Don Blankenship*, ABC NEWS, <http://abcnews.go.com/US/downfall-king-coal/story?id=26902484> (last visited Jan. 21, 2017).

26 Matthew Mosk, *Massey's Don Blankenship Shoveling Out Campaign Cash Again*, ABC NEWS, <http://abcnews.go.com/Blotter/masseys-don-blankenship-shoveling-campaign-cash/story?id=11260272> (last visited Jan. 21, 2017).

27 CODE OF JUDICIAL CONDUCT § 3C.1 (2015).



unethical practice of allowing interest groups, lawyers, and business to fund judicial campaigns continues.

### C. Forcing Politics into the Judiciary

Interest groups have also found creative ways to influence elected judges. After two specific U.S. Supreme Court rulings, tactics such as surveys, television ads, and voter cards forced politics into the judiciary and lead to an uninformed public. The following court cases demonstrate the rising opportunities for political influence to affect judicial elections—stemming mostly from interest groups.

### D. *Buckley v. Valeo* (1976)<sup>28</sup>

The first case in question has resulted in a public that is ultimately deprived of enough impartial information to elect their judges directly. In *Buckley v. Valeo*, the U.S. Supreme Court held that campaign finance laws did not violate First Amendment free speech protections. The Court confirmed that contribution limits should be placed on individuals, PACs, and interest groups. However, a group not formally coordinated with a specific candidate or campaign may spend unlimited amounts on expenditures. As long as a group does not express support or campaign for the defeat of a clearly identified candidate, no spending limits can be imposed. A footnote in *Buckley v. Valeo* suggests that as long as a group does not use the words “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or “reject,” it is not advocating support for any candidate—also known as the magic words.<sup>29</sup>

Due to *Buckley v. Valeo*’s ruling, about 99% of interest groups involved in State Supreme Court elections avoid disclosure by not using the magic words.<sup>30</sup> This is alarming because interest groups,

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28 *Buckley v. Valeo*, 424 U.S. 75 (1976).

29 *Id.* at 44.

30 Deborah Goldberg & Samantha Sanchez, *The New Politics of Judicial Elections*, JUSTICE AT STAKE, [http://www.justiceatstake.org/media/cms/JAS-MoneyReport\\_E7C1343619C9F.pdf](http://www.justiceatstake.org/media/cms/JAS-MoneyReport_E7C1343619C9F.pdf) (last visited Feb. 10, 2016).

lawyers, businesses, and single-issue groups are influencing campaigns with negative ads—either by portraying false information or by publicizing misleading sound bites—without making their financial influence on judges apparent. Constituents naturally rely on information from ads when making voting decisions. This results in an ill-informed constituency that is unable to make ethical decisions in judicial elections.

*E. Republican Party of Minnesota v. White (2002)*<sup>31</sup>

Aside from a public that is denied the substantial, unbiased information required to ethically participate in electing their judges, the judiciary has been further politicized by laws requiring judges to make their political and ideological stance a matter of public record. *Republican Party of Minnesota v. White* is a U.S. Supreme Court case that has ultimately forced judges to divulge their political standings, even though it directly violates the mode of ethics created by the American Bar Association. Shortly after the ruling, interest groups capitalized on this decision and began pressuring judicial candidates to make known their stance on debated issues.

For example, Indiana Right to Life sent out questionnaires to *all* judicial candidates asking them to state their opinion on abortion rights, assisted suicide, and in vitro fertilization.<sup>32</sup> Indiana Right to Life warned that if the candidates did not respond they would be identified as “Refused to Respond.” According to Bert Brandenburg, the executive director at Justice at Stake, being labeled as “Refused to Respond” by an interest group is the kiss of death for an elected official.<sup>33</sup> Disappointed with the way similar questionnaires were framed, Judge Peter Webster wrote, “Questionnaires create the impression in the minds of voters that judges are no different from

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31 *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

32 Bert Brandenburg *How Election-by-questionnaire Is Threatening Independent Judges*, SLATE, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2005/10/promissory\\_notes.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2005/10/promissory_notes.html) (last visited Feb. 10, 2016).

33 *Id.*

politicians—that they decide cases based on their personal biases and prejudices. Of course, nothing could be further from the truth.”<sup>34</sup>

The Supreme Court ruling, along with the resulting questionnaires, show how interest groups have used judicial elections as a method of persuading the public to vote for judges that ideologically lean either to the left or right. Unfortunately, this has politicized the judicial branch and encouraged the public to think of their elected judges as politicians. This has compromised the neutral standing expected of judges, who are required to do nothing that creates the impression that if chosen, they will administer the office with bias.<sup>35</sup>

#### *F. Judges as Representatives*

In his book *Defense of Judicial Elections*, Chris Bonneau argues that judicial elections are an *efficacious* form of democratizing the judicial branch, creating a connection between the citizens and the bench.<sup>36</sup> Bonneau suggests that allowing judges to participate in competitive judicial campaigns and allowing them to disclose their positions would make constituents more educated.<sup>37</sup> He would consider a judge to be a representative of the citizenry.

However, the late Roy A. Schotland, a well-respected law professor at Georgetown, highlights the different characteristics of a judge compared to an executive or legislator. Unlike politicians, judges are not allowed to discuss case matters with any individual, regardless of party. Politicians, on the other hand, are expected to discuss and have party unity. This allows a candidate running for the legislative

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34 James Sample & Lauren Jones, *The New Politics of Judicial Elections*, JUSTICE AT STAKE, [http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006\\_D2A2449B77CDA.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf) (last visited Feb. 10, 2016).

35 See *Code of Conduct for United States Judges*, UNITED STATES COURTS (2015), <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> (last visited Feb. 25, 2017) (Cannon 3 details various impartiality duties required of U.S. federal judges).

36 CHRIS W. BONNEAU & MELINDA HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) (digital Kindle location 17).

37 *Id.* at 1323

or executive branch to make promises they can keep. Judges however, should solely make decisions based on formal proceedings, statutes, and precedents. It would be unethical for a judge to promise constituents that they will rule a certain way, regardless of what the law states, to support an ideological claim.<sup>38</sup> Schotland conveys that judges are not advocates; judges do not change laws purposefully. He would argue that judges are representatives of the law itself. Unfortunately, through campaign media, State Supreme Court judges are acting as advocates for policies like being “tough on crime,” or, for example, tough on property managers.<sup>39</sup> Each court case is different with distinct variables. Under the Sixth Amendment, each person in court should face a fair trial with a fair, neutral judge—basing every decision on evidence, facts, laws, and precedent.<sup>40</sup> There is nothing fair about a property owner taking a case before a judge who publicly announces their stance on property owners. It contradicts the purpose of the court. Regardless of how a judge feels towards a situation, they should rule based on the facts, not ideologies. Although the idea of politicizing the judicial system promises more democracy, it goes contrary to the purpose of the court. Allowing the judicial branch to remain free from any interaction with interest groups, politicians, and the media effectively secures a virtuous administration of the law. The judiciary is the only institution that protects the rich and the poor equally, and that promotes free and fair trials. It is the only branch of government that is not meant for political debate or legislation, rather its sole purpose is to interpret and enforce the law as it stands.

### III. FUTURE ACTION

Furthermore, it is vital that changes be made to the State Supreme Court selection process: Various states have employed different

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38 Roy A. Schotland, *Campaign Finance in Judicial Elections National Summit on Improving Judicial Selection*, 34 *LOY. L.A. L. REV.* 1489, 1489 (2001).

39 *Id.* at 1491.

40 U.S. CONST. amend. VI.

methodologies to balance the influence of constituents, elected officials, and interest groups on their judiciary. The conclusion that the public should have limited participation in the appointment process is not absolute—it does not attempt to remove their oversight of the judiciary all together. State Supreme Court justices should be appointed by the governor, approved by both houses in State legislature, have an impeachment process in place whereby they are accountable to the public, and serve on the bench under term limits.<sup>41</sup> This ensures that the pitfalls of judicial campaigning and elections are avoided, while still giving a democratic oversight and a voice to the public.

#### IV. CONCLUSION

The ethics of State Supreme Courts in the United States have been drastically damaged by the institution of judicial elections. Due to certain U.S. Supreme Court rulings, interest groups have managed to politicize State Supreme Court elections and rulings. This has led to unethical situations in which State Supreme Court justices have

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41 The authors propose the following judicial appointment process, drawing from the combined methods of various states: The governor may choose from a pool of current judges within the state—a judge must be a practicing judge within the state he or she is chosen to represent. Once the governor chooses a judge, the judge’s name will be voted on by both houses in the state legislature. For a judge’s appointment to be confirmed he or she must receive a majority vote in both houses. To maintain the democratic process, it is assumed that citizens within the state will encourage their senators to vote for a specific judge. Once their appointment is approved, each State Supreme Court justice is then subject to being impeached by the citizens of their state. In order for citizens to call for an impeachment vote for a specific State Supreme Court justice, they must gather signatures from 3% of the eligible voting population of that state. Once the 3% threshold is reached, the governor is to hold a statewide vote concerning the impeachment of the justice. If the election results in a majority (>50%) of the voting citizens calling for the judge to be impeached, the governor must grant the citizens’ request and remove the judge from office. Once the judge is removed from the bench, the governor begins the appointment process again. Term limits, set at the discretion of the legislature and voting public, will be established by an amendment to the state constitution.

ruled on cases that involve their campaign donors. In order to regain the virtue of the judicial branch, it is imperative that any appearance of *quid pro quo* between judges and interest groups be eliminated. Moreover, the continued politicization of the judicial branch must finally be put to rest so that justices can fairly assess a diverse caseload, rather than stockpile their campaign fund. Limiting the masses, including any special interest groups, from directly appointing their judges would allow for the ethical practices of the judicial branch to be reestablished.

