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## **“Who is Really Deciding Your Case?” A Path to Restore Judicial Independence and Impartiality After Citizens United, 51 J. Marshall L. Rev. 167 (2017)**

Anthony Morelli

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“WHO IS REALLY DECIDING YOUR CASE?”  
 A PATH TO RESTORE JUDICIAL  
 INDEPENDENCE AND IMPARTIALITY  
 AFTER *CITIZENS UNITED*

ANTHONY MORELLI

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I. JUSTICE IS BLIND, OR IS IT?

“Judges are not politicians, even when they come to the bench by way of the ballot.”<sup>1</sup> Although this statement may seem to be self-explanatory, Chief Justice John Roberts found the need to clarify this thought in his recent opinion regarding judicial campaign contribution restrictions. Specifically, Chief Justice Roberts explained his desire to drive money away from judicial selection

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1. *Williams-Yulee v. Florida B.*, 135 S. Ct. 1656, 1662 (2015).

methods and combat public suspicion of corruption.<sup>2</sup> Those who applaud the Chief Justice's stance that judges are not politicians are likely to be adamant supporters of a movement that has taken this nation by storm; a movement made up of citizens and political leaders alike who wish to see the Supreme Court overturn *Citizens United v. FEC*,<sup>3</sup> a landmark Supreme Court case, which held that the First Amendment bars the federal government from putting restrictions on independent political expenditures made by nonprofit corporations.<sup>4</sup>

Since that decision in 2010, corporations, unions, and individuals have now been free from limitations on campaign spending.<sup>5</sup> This decision, former-President Barack Obama has argued, "reversed a century of law to open the floodgates for special interests – including foreign corporations – to spend without limit in our elections"<sup>6</sup> in an attempt to put in place their desired candidate. Following this address, much attention has been focused on North Carolina, as it became the first state to see a Super PAC (an entity spawned by *Citizens United* that allows for unlimited campaign spending) "established to support a pro-corporate judge" in its election.<sup>7</sup>

These gross campaign contributions violate the universal notion of the justice system: justice is blind. This saying, usually accompanied by a picture of a blindfolded Lady Justice holding her scale, has been at the core of our country's legal system and has been supported by Supreme Court Justices back as early as 1803,<sup>8</sup> and as recent as 2016.<sup>9</sup> As time passes and more judicial candidates

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2. Bill Corriher, *Supreme Court: Judges Aren't Politicians, and States Can Bar Them From Soliciting Campaign Cash*, CENTER FOR AMERICAN PROGRESS (Apr. 30, 2015), [www.americanprogress.org/issues/courts/news/2015/04/30/112296/supreme-court-judges-arent-politicians-and-states-can-bar-them-from-soliciting-campaign-cash/](http://www.americanprogress.org/issues/courts/news/2015/04/30/112296/supreme-court-judges-arent-politicians-and-states-can-bar-them-from-soliciting-campaign-cash/).

3. *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010).

4. Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765, 785-86 (2013).

5. See generally *Citizens United*, 558 U.S. 310 (holding, in-part, that the Freedom of the Speech Clause of the First Amendment to the United States Constitution prohibits the government from restricting independent political expenditures by a nonprofit corporation).

6. Barack Obama, Former President of the United States, State of the Union Address (Jan. 27, 2010).

7. Bill Corriher, *Big Business Taking over State Supreme Courts How Campaign Contributions to Judges Tip the Scales Against Individuals*, CENTER FOR AMERICAN PROGRESS (Aug. 13, 2012), [www.americanprogress.org/issues/courts/report/2012/08/13/11974/big-business-taking-over-state-supreme-courts/](http://www.americanprogress.org/issues/courts/report/2012/08/13/11974/big-business-taking-over-state-supreme-courts/).

8. "It is the right of the people that their judges should be independent." *Stuart v. Laird*, 5 U.S. 299, 304 (1803).

9.

Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed

become elected officials through the use of limitless campaign contributions, the hope for public accountability, judicial independence, and legal impartiality becomes more and more far-fetched. In order to restore “judges as ... impartial administration of justice, as one of the best securities of the rights and liberties,”<sup>10</sup> there needs to be an effort to bring true meaning to the words “judges are not politicians.” To do this, judicial selection methods for state supreme court justices that do not require campaign contributions and political agendas must be explored and implemented.

This Comment will address the need for judicial selection reform, specifically for state supreme courts,<sup>11</sup> following *Citizens United v. FEC*.<sup>12</sup> To understand this need for change, one must first recognize the existing judicial selection methods employed by the states. After analyzing the pros and cons of each method, this Comment proposes that each state adopt the Missouri Plan to increase transparency in the elections of state supreme court justices.

## II. A LOOK AT *CITIZENS UNITED* AND THE VARIOUS JUDICIAL SELECTION METHODS USED BY THE STATES

As the courts of last resort for their respective states, state supreme courts are required to interpret the state’s law, the state’s constitution, and also federal laws in their proceedings.<sup>13</sup> These courts exercise a wide-range of discretion on public policy issues that affect the citizens of their states.<sup>14</sup> Because of their importance, each judicial selection method should combat corruption to ensure judicial impartiality and accountability. Before discussing the various selection methods, it is imperative to look at *Citizens United* in order to see how its result has compromised state supreme courts across the country.

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harmless.

*Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909–10 (2016).

10. *McAllister v. U.S.*, 141 U.S. 174, 194–95 (1891).

11. The scope of this comment is limited to state supreme courts because they are the highest court in their respective jurisdiction, are comprised of a small number of justices who retain their positions for long periods of time, and directly affect the lives of the citizens of their state with every ruling they hand down.

12. *Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310 (2010).

13. Paul Brace, *Comparing Courts Using the American States*, 83 JUDICATURE 250, 253 (2000).

14. *Id.*

### A. *Citizens United v. Federal Election Commission and its Impact on State Supreme Courts*

In order to understand the current role that campaign contributions play in elections for state supreme court justices, the 2010 United State Supreme Court case of *Citizens United v. Federal Election Commission* must first be addressed and understood.<sup>15</sup>

#### 1. *The Facts of the Case*

In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002 (“BCRA”),<sup>16</sup> which prohibited “corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.”<sup>17</sup> Section 203 of the BCRA amended § 441b and added “electioneering communication”<sup>18</sup> to the list of prohibited uses of corporate or union general treasury funds.<sup>19</sup> The Federal Election Commission (“FEC”) regulates “publicly distributed”<sup>20</sup> electioneering communications.<sup>21</sup> Thus, under this federal law and FEC regulation, corporations and unions are “barred from using their general treasury funds for express advocacy or electioneering communications.”<sup>22</sup> However, corporations and unions may establish “separate segregates funds,” commonly referred to as political action committees or PACs, for the purposes of expressly advocating for or against an election candidate or distributing electioneering communications.<sup>23</sup> Money received by PACs consists entirely of contributions from stockholders and employees of the corporation or union members.<sup>24</sup> Essentially, corporations can use PACs to contribute directly to candidates running for election or a political party to get around federal law and FEC regulations designed to prohibit this conduct.

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15. *Citizens United*, 558 U.S. at 310.

16. 2 U.S.C. § 441b (2000).

17. *Citizens United*, 558 U.S. at 321.

18. See 2 U.S.C. § 434(f)(3)(a) (2006) (defining “electioneering communication” as “any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office and is made within 30 days of a primary or 60 days of a general election.”).

19. 2 U.S.C. § 441b(b)(2) (2006).

20. See 11 CFR § 100.29(b)(3)(ii) (2009) (defining communications that are “publicly distributed” as communications that “[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days.”).

21. 11 CFR § 100.29(a)(2) (2009).

22. *Citizens United*, 558 U.S. at 321.

23. 2 U.S.C. § 441b(b)(2) (2006).

24. *Citizens United*, 558 U.S. at 321.

Citizens United is a nonprofit corporation that operates with an “annual budget of about \$12 million.”<sup>25</sup> According to its website, the corporation is “dedicated to restoring our government to citizens' control ... and seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security.”<sup>26</sup> Its stated goal is to “restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.”<sup>27</sup>

In January 2008, Citizens United released a ninety minute documentary about then-Senator Hillary Clinton, a Democratic Party candidate running for the 2008 Presidential election, entitled *Hillary: The Movie* (“*Hillary*”).<sup>28</sup> *Hillary* specifically identifies Senator Clinton and offers harshly critical commentary on her political career and ideology.<sup>29</sup> The documentary was originally released only in theaters and on DVD, but Citizens United, seeking greater exposure, “wanted to increase distribution by making it available through video-on-demand.”<sup>30</sup> A cable company paid \$1.2 million to make *Hillary* available to viewers free of charge on its video-on-demand channel.<sup>31</sup> To enhance promotional efforts, Citizens United created two ten second ads and one thirty second ad for *Hillary*.<sup>32</sup> The Supreme Court stated, “[e]ach ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Website address.”<sup>33</sup> Citizens United’s goal was to promote the video-on-demand offering by running advertisements on broadcast and cable television.<sup>34</sup>

Its plan was to make *Hillary* available through video-on-demand within thirty days of the 2008 primary elections, but it feared that the documentary and its ads violated §441b’s ban on “corporate-funded independent expenditures” and would subject Citizens United to civil and criminal penalties.<sup>35</sup> Trying to avoid these penalties, Citizens United sought an injunction against the FEC in federal district court, arguing that “(1) § 441b is

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25. *Id.* at 319.

26. *Who We Are*, CITIZENS UNITED (Oct. 4, 2016), [www.citizensunited.org/who-we-are.aspx](http://www.citizensunited.org/who-we-are.aspx).

27. *Id.*

28. *Citizens United*, 558 U.S. at 319.

29. *Id.* at 320.

30. *Id.* Citizens United, in their argument, stated that video-on-demand “allows digital cable subscribers to select programming from various menus” so that the “viewer can watch the program at any time and can elect to rewind or pause the program.”

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 321.

unconstitutional as applied to *Hillary* because the documentary was not ‘electioneering communication’; and (2) BCRA’s disclaimer (BCRA § 201)<sup>36</sup> and disclosure requirements (BCRA § 311)<sup>37</sup> are unconstitutional as applied to *Hillary* and to the three ads for the movie.”<sup>38</sup> The district court, however, granted summary judgment in favor of the FEC.<sup>39</sup> Citizens United appealed to the U.S. Supreme Court, where the issues were defined as “whether, as applied to *Hillary*, (1) § 441b’s prohibition on corporate independent election expenditures was constitutional and (2) BCRA’s disclaimer, disclosure, and reporting requirements were constitutional.”<sup>40</sup>

## 2. The Result of the Case

The Court sided with Citizens United and struck down § 441b’s ban on corporate independent expenditures,<sup>41</sup> as well as BCRA § 203’s extension of § 441b’s restrictions on independent corporate expenditures.<sup>42</sup> Citizens United’s facial challenge to § 441b led the Court to the conclusion that the “government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>43</sup> No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”<sup>44</sup> The BCRA, the

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36. Pursuant to BCRA § 201, “[a]ny person who spends more than \$10,000 on electioneering communications during a calendar year must file a disclosure statement” with the FEC. 2 U.S.C. § 434(f)(1) (2006). The statement “must identify the person making the expenditure, the amount, the election to which the communication was directed, and the names of certain contributors.” 2 U.S.C. § 434(f)(2) (2006).

37. Pursuant to BCRA § 311, “televised electioneering communications funded by anyone other than a candidate for office must include a clear, readable disclaimer displayed on the screen for at least four seconds. The disclaimer must identify the person or organization responsible for the advertisement, that person or organization’s address or website, and a statement that the advertisement is not authorized by any candidate or candidate’s committee.” 2 U.S.C. § 441d(a)(3) (2006).

38. *Citizens United*, 558 U.S. at 321.

39. Kristin Sullivan and Terrance Adams, *Summary of Citizens United v. Federal Election Commission*, OLR RESEARCH REPORT (Mar. 2, 2010), [www.cga.ct.gov/2010/rpt/2010-R-0124.htm](http://www.cga.ct.gov/2010/rpt/2010-R-0124.htm).

40. *Id.*

41. This first ruling effectively overturned the previous case of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which held that the Michigan Campaign Finance Act prohibiting corporations from using treasury money to support or oppose candidates in elections did not violate the First or the Fourteenth Amendment.

42. This second ruling effectively overturned the previous case of *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003), which, in-part, upheld the constitutionality of most of the BCRA.

43. *See Citizens United*, 558 U.S. at 339 (concluding that because corporate expenditures paid to political campaigns are the equivalent to the corporation’s political speech, § 441b’s prohibition on corporate independent expenditures is thus a ban on speech).

44. *Citizens United*, 558 U.S. at 365.

Court found,<sup>45</sup> was unconstitutional as written.<sup>46</sup> The Court rejected the government's anti-corruption argument,<sup>47</sup> as well as its shareholder protection from compelled funding for corporate speech argument.<sup>48</sup>

### 3. *The Impact of Citizens United on State Supreme Courts*

The Court's ruling in *Citizens United* has left a lasting impact on political elections around the country. Essentially, the holding of

45. Because the BRCA burdens political speech, the Court applied the strict scrutiny standard of review; thus, requiring the government to prove that the statute served "a compelling interest and was narrowly tailored to meet that interest." *Citizens United*, 558 U.S. at 340 (quoting *Fed. Election Comm'n. v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007)). In its analysis, the Court relied on past precedent that recognized the First Amendment applied to corporations (*First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)) and the protection extended to the context of free speech (*NAACP v. Button*, 371 U.S. 415 (1963)). Kristin Sullivan and Terrance Adams, *supra* note 39.

46. The Court reasoned, "differential treatment of media corporations and other corporations cannot be squared with the First Amendment and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' free speech." *Citizens United*, 558. at 314. Continuing, the Court stated that the previous holding in *Austin* interfered "with the 'open marketplace' of ideas protected by the First Amendment." *Id.*

47. The Court ruled that independent expenditures "do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U.S. at 314. The Court reasoned that (1) although *Buckley v. Valeo*, 424 US 1 (1976) stated as follows.

[I]dentified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption; (2) this interest justifies restrictions on direct contributions to candidates, but not on independent expenditures; (3) influence over and access to elected officials does not mean that those officials are corrupt and the appearance of influence or access 'will not cause the electorate to lose faith in our democracy'; and (4) twenty six states do not ban corporate independent expenditures, and the government did not argue that the absence of a ban in these states has led to increased corruption.

Kristin Sullivan and Terrance Adams, *supra* note 39.

48. The Court reasoned that:

(1) [u]nder a shareholder protection interest, if shareholders of a media corporation disagreed with its political views, the government would have the authority to restrict the media corporation's political speech; (2) if Congress had been interested in protecting shareholders, it would not have limited the ban on corporate independent expenditures to the 30 and 60 day windows preceding an election; and (3) the ban is over inclusive because it includes corporations that only have a single shareholder.

*Id.*



*Citizens United* is grounded in the First Amendment.<sup>49</sup> In application, the Court equates political contributions (financial or otherwise) to the exercise of Freedom of Speech;<sup>50</sup> an exercise that was being infringed upon by the then existing law.<sup>51</sup> Political speech, often considered the core of First Amendment protections,<sup>52</sup> can only be regulated when a narrowly tailored law serves a compelling governmental interest.<sup>53</sup> The Court finds that federal restrictions on donations to a Super PAC are comparable to the federal government restricting one's speech during election season, which has repeatedly been held to be unconstitutional because a compelling governmental interest supporting a restriction on political speech rarely exists.<sup>54</sup> This exclusive treatment has "shifted power away from the political parties and toward the whims of the donors themselves" and has vested the power in "small groups of billionaires" and exceedingly wealthy corporations with aspirations to change, alter, or persuade candidates running for election.<sup>55</sup>

Many writers, historians, and political strategists credit Justice Kennedy's opinion for the creation of what are now commonly referred to as Super PACs.<sup>56</sup> Super PACS are legally entitled to make independent expenditures "expressly supporting

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49. See Robert Weissman, *Let the People Speak: The Case for A Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979, 984 (2011) (explaining that the principal holding of *Citizen United* expands on past cases stating that corporations are protected under the Free Speech Clause of the First Amendment, "including in the core area of election-related speech, as real, living human beings").

50. See *Citizens United*, 558 U.S. at 339 (2010) (concluding that because corporate expenditures paid to political campaigns are the equivalent to the corporation's political speech, §441b's prohibition on corporate independent expenditures is thus a ban on speech).

51. *Citizens United*, 558 U.S. at 362.

52. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 483 (1988); *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

53. *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 451 (2007).

54. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (holding an Ohio statute that prohibits anonymous political or campaign literature is unconstitutional); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (finding "announce clauses" of judicial ethics codes which prohibit judicial candidates from announcing their views on how disputed legal or political issues be decided unconstitutional); and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding parodies of public figures which could not reasonably be taken as true are protected against civil liability by the First Amendment).

55. Zachary Mider, *What Kind of Man Spends Millions to Elect Ted Cruz?*, BLOOMBERG (Jan. 20 2016), [www.bloomberg.com/politics/features/2016-01-20/what-kind-of-man-spends-millions-to-elect-ted-cruz](http://www.bloomberg.com/politics/features/2016-01-20/what-kind-of-man-spends-millions-to-elect-ted-cruz).

56. Richard L. Hasen, *Super-Soft Money: How Justice Kennedy paved the way for "SuperPACS" and the return of soft money*, SLATE (Oct. 13, 2012), [www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/10/citizens\\_unit\\_ed\\_how\\_justice\\_kennedy\\_has\\_paved\\_the\\_way\\_for\\_the\\_re.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/citizens_unit_ed_how_justice_kennedy_has_paved_the_way_for_the_re.html).

or opposing candidates for ... office, but do[] not make any contributions to ... candidates” directly.<sup>57</sup> Super PACs are exempt from following federal laws and FEC restrictions placed on regular PACs.<sup>58</sup> Both PACs and Super PACs “can engage in unlimited amounts of independent spending,” but only Super PACs can “fund that unlimited spending by collecting unlimited amounts in contributions from individuals, corporations, and unions.”<sup>59</sup>

This special treatment permits Super PACs to “raise and spend far more money than the standard PAC,” effectively changing campaign finance to allow wealthy corporations, and wealthy individuals alike, to have much more influence during election season.<sup>60</sup> Their special treatment also allows Super PACs to escape the extensive administrative burdens that bog down PACs.<sup>61</sup>

As one can imagine, the amount of money donated to political campaigns has skyrocketed since the Court handed down its opinion in *Citizens United*.<sup>62</sup> The heightened contributions have generated heated controversy.<sup>63</sup> Those supporting the Court’s decision fall in line with the constitutional argument that “[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”<sup>64</sup> Those who disagree with the Court’s outcome believe the holding “threatens to undermine the integrity of elected institutions across the Nation” and allows for the “improper use of money to influence the result” of all elections throughout the

57. Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012).

58. Federal law limits an individual’s contribution to a PAC to \$5,000 per year (2 U.S.C. § 441a(a)(1)(C) (2006)); it also prohibits corporations and unions from donating treasury funds to a PAC (2 U.S.C. § 441b (2006)).

59. Briffault, *supra* note 57.

60. Molly J. Walker Wilson, *Financing Elections and “Appearance of Corruption”: Citizen Attitudes and Behavior in 2012*, 63 CATH. U. L. REV. 953, 973 (2014).

61. “For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.” *Citizens United v. Fed. Election Comm’n.*, 558 U.S. 330, 337–38.

62. Wilson, *supra* note 60.

63. Gabrielle Levy, *How Citizens United has Changed Politics in 5 Years*, U.S. NEWS (Jan. 21, 2015), [www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics](http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics); Richard L. Hasen, *The Numbers Don’t Lie: If you aren’t sure Citizens United gave rise to the super PACs, just follow the money*, SLATE (Mar. 9, 2012), [www.slate.com/articles/news\\_and\\_politics/politics/2012/03/the\\_supreme\\_court\\_s\\_citizens\\_united\\_decision\\_has\\_led\\_to\\_an\\_explosion\\_of\\_campaign\\_spending\\_.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html); David Coles, *The Supreme Court’s Billion-Dollar Mistake*, THE NEW YORK REVIEW OF BOOKS (Jan. 19, 2015), [www.nybooks.com/daily/2015/01/19/citizen-united-billion-dollar-mistake/](http://www.nybooks.com/daily/2015/01/19/citizen-united-billion-dollar-mistake/).

64. *Citizens United*, 558 U.S. at 349.

country, from the Presidential election to the election of trial court judges.<sup>65</sup>

### *B. An Introduction to the Five Different Judicial Selection Methods*

Currently, there are five different selection methods used by states to determine the members of their respective supreme courts.<sup>66</sup> The five methods, which will be discussed in turn, are partisan elections, nonpartisan elections, gubernatorial appointment (with the consent of one or both of the state's legislative bodies), direct election by the state legislature, and merit based selection commonly referred to as the Missouri Plan.<sup>67</sup> Because each state's constitution describes the selection method it employs for its supreme court, a change of the selection method generally requires a constitutional amendment approved by the voting public.<sup>68</sup>

#### *1. Partisan Elections and Nonpartisan Elections*

Currently, there are seven states in the country that select their supreme court justices by way of partisan elections.<sup>69</sup> In partisan elections, candidates appear on ballots with an indicator that reveals the political party of which he or she is a member.<sup>70</sup> On the other hand, fifteen states currently use nonpartisan elections to select their supreme court justices.<sup>71</sup> In a nonpartisan election, the only information revealed about the candidates on the ballot is their name.<sup>72</sup> Nonpartisan elections of state judges became popular by

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65. *Id.* at 396 (Stevens, J., concurring in part and dissenting in part).

66. See Jonathan D. Nase, *The Governor's Impact on an Elected Judiciary: The Lessons from Pennsylvania*, 69 TEMP. L. REV. 1137 (1996) (classifying the five types of state supreme court judicial selection methods).

67. Shauna Reilly and Carol Walker, *State Judicial Elections' Impact on Participation in Direct Democracy*, 31 JUSTICE SYSTEM JOURNAL 225, 235 (2013).

68. Anthony Champagne, *Parties, Interest Groups, and Systemic Change*, 74 MO. L. REV. 555, 556 (2009).

69. The seven states that elect their supreme court justices through partisan elections are Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia. *Methods of Judicial Selection*, NATIONAL CENTER FOR STATE COURTS, [www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state) (last visited Feb. 14, 2018).

70. Rebecca D. Gill, *Beyond High Hopes and Unmet Expectations: Judicial Selection Reforms in the States*, 96 JUDICATURE 278, 279 (2013).

71. The fifteen states that elect their supreme court justices through nonpartisan elections are Arkansas, Georgia, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin. NATIONAL CENTER FOR STATE COURTS, *supra* note 69.

72. Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK.

1927 because they were thought to minimize political party corruption.<sup>73</sup>

In total, nearly half of the states in this country (twenty-two of fifty states) select supreme court justices through an election process of some sort. The reason states prefer an election for their judicial selection method is because “populism defines our essential view of democracy.”<sup>74</sup> Because justices are considered political leaders of our states, “judicial elections exist to assure accountability in our pluralist democracy by putting choices to the voters.”<sup>75</sup> Our nation’s rich history of using democratic elections to select the leaders of our society resonates with constituents and provides persuasive support for this method.<sup>76</sup> Popular sovereignty tends to be the most favored selection choice by those who value democratic principles in their government.

## 2. *Gubernatorial Appointment*

In states that use a gubernatorial appointment as their selection method for their supreme court, the governor chooses the candidate he or she wants to fill the vacancy.<sup>77</sup> Presently, ten states use this method,<sup>78</sup> but some states add slight variants.<sup>79</sup> The majority of states using gubernatorial appointment require the justice selected to gain approval from either their state legislature or state senate and win a retention election after a certain amount of time in office.<sup>80</sup>

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L. REV. 249, 253 (2011).

73. *Id.*

74. Wendell Griffen, *Judicial Elections, Campaigning, and the First Amendment: Looking Past the Hype and Hysteria to Democracy*, 64 ARK. L. REV. 77, 79 (2011).

75. Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neeley*, 86 DENV. U. L. REV. 233, 249 (2008).

76. See generally Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges As Politicians*, 21 YALE L. & POLICY REV. 301, 306-13 (2003) (describing in-depth the history of judicial elections and judicial independence while providing the criticisms for and against judicial elections as they relate to that history).

77. See generally Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL’Y 343, 347-49 (2008) (providing an explanation of history and multiple types of judicial appointment).

78. The ten states that use gubernatorial appointment as the selection method for their supreme court are Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, and South Dakota. NATIONAL CENTER FOR STATE COURTS, *supra* note 69.

79. *Id.*

80. *Id.*

For example, Massachusetts and New Hampshire both employ a system in which an elected body known as the Governor's Council must approve of the governor's appointment.<sup>81</sup> In both states, the Governor's Council is a constitutionally created body whose members are selected by the governor that advises and assists the governor in the discharge of his or her duties.<sup>82</sup> Although seemingly useful, the Governor's Council approval method has been under attack in Massachusetts since the early 1990s, and many citizens are calling for its abolition.<sup>83</sup>

### 3. *Direct Election by State Legislature*

There are only two states, Virginia and South Carolina, that select their state supreme court justices by an election held within the state legislatures.<sup>84</sup> When a vacancy arises in the Supreme Court of Virginia or South Carolina, the General Assembly of the respective state elects a candidate by a majority vote to fill the vacant seat.<sup>85</sup> The only qualifications in Virginia are that the candidate must be a resident of Virginia and a member of Virginia Bar Association for at least five years.<sup>86</sup> In South Carolina, restrictions are covered in the Judicial Merit section of the state constitution.<sup>87</sup>

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81.

All judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council . . . "); *see also* NH Const. p. II art. 46 (stating: All judicial officers, the attorney general, and all officers of the navy, and general and field officers of the militia, shall be nominated and appointed by the governor and council).

*See* MASS. CONST. pt. II, ch. II, § I, art. IX

82. Mark C. Miller, *A Legislative Perspective on the Ohio, Massachusetts, and Federal Courts*, 56 OHIO ST. L.J. 235, 242 (1995).

83. *See* Robert L. Turner, *A Council whose Time has Passed*, THE BOSTON GLOBE (Feb. 27, 1992), [www.highbeam.com/doc/1P2-8731625.html](http://www.highbeam.com/doc/1P2-8731625.html) (citing reasons for why the citizens of Massachusetts would vote to remove the approval of the Governor's Council for state supreme court appointment).

84. National Center for State Courts, *supra* note 69.

85. VA CONST. Art. 6, § 7; S.C. CONST. Art. V, § 3.

86. *See* VA CONST. Art. 6, § 7 (stating "all justices of the Supreme Court . . . shall be residents of the Commonwealth and shall, at least five years prior to their appointment or election, have been admitted to the bar of the Commonwealth.").

87. This seems to mirror the Missouri Plan, and it was most likely selected to combat criticisms from South Carolina citizens about their judicial selection method. *See generally* Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. Rev. 1217, 1224-44 (1998) (describing the history of South Carolina's judicial selection method while providing reasons why the method as changed over time).

#### 4. *The Missouri Plan*

The Missouri Plan is a judicial selection method that was created in 1940 as an innovative alternative to the other selection methods that the Missouri legislature deemed unfit.<sup>88</sup> Currently, sixteen states use this method, or a variation of it, to select their supreme court justices.<sup>89</sup> The Missouri Plan is a nonpartisan method that establishes an independent judicial commission in the state that will send a short list of the most qualified candidates to the governor for his or her selection.<sup>90</sup> The governor has up to sixty days to make a selection or the commission makes the selection in his or her place.<sup>91</sup> After an allotted time period that varies according to the constitution of each specific state, the appointed justice must face a retention election in which the voting public can chose to have the justice removed from office if they are displeased with the selection.<sup>92</sup> The commission varies from states to state, but it always includes at least three lawyers elected from the bar association of that state, at least three citizens, and the state's chief justice.<sup>93</sup> The factors that each state commission considers also vary state to state.<sup>94</sup>

The states that employ the Missouri Plan do so because of the consensus that it “balances the competing interests of public accountability and judicial independence and, at the same time, fosters public confidence in the judiciary by selecting the best qualified candidates on the basis of merit and ability.”<sup>95</sup> In addition,

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88. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 724 (1995).

89. The sixteen states that use the Missouri Plan, or some variation of it, as their judicial selection method are Alaska, Arizona, California, Colorado, Hawaii, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, Rhode Island, Tennessee, Utah, Vermont, and Wyoming. National Center for State Courts, *supra* note 69.

90. Marsha Puro, Peter J. Bergerson and Steven Puro, *An Analysis of Judicial Diffusion: Adoption of the Missouri Plan in the American States*, 15.4 PUBLIUS 85, 86 (1985).

91. *Id.*

92. *Id.*

93. *Id.* at 87.

94. Most committees rate the judges according “to judicial performance standards, including whether they administer justice impartially and uniformly; make decisions based on competent legal analysis and proper application of the law; issue rulings and decisions that can be understood clearly; effectively and efficiently manage their courtrooms and the administrative duties of their office; and act ethically and with dignity, integrity and patience.” Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 746 (2009).

95. Theodore McMillian, *Selection of State Court Judges*, 40 SW. L.J. 9, 11 (1986).

the Missouri Plan “encourages well-qualified lawyers to consider a judicial career by providing for independence and long tenure.”<sup>96</sup> Others are more critical and opine that this merit selection is undemocratic, allows for the selection of judges by small elite groups, is a secretive process, and does not accurately reflect the interest of citizens.<sup>97</sup>

### III. JUDICIAL SELECTION METHODS: WHAT WORKS AND WHAT DOESN'T

This section compares and contrasts the different judicial selection methods employed by state supreme courts. In doing so, the pros and cons of each method will be brought to the forefront and examined critically. Because the U.S. Supreme Court's 2010 *Citizens United* decision heavily implicates judicial elections,<sup>98</sup> and because the majority of state supreme courts choose their bench via elections,<sup>99</sup> judicial elections will receive the most attention. Following the analysis of judicial elections, the other selection methods will be dissected.

It is important to keep two factors in mind when thinking about the various judicial selection methods. First, most state supreme court justices “have no choice but to take into account “The Will of the People”<sup>100</sup> because they face a future reelection campaign or a retention election. Moreover, unfavorable decisions that they hand down run the risk of being overturned with a constitutional amendment proposed by either the citizens or state legislature.<sup>101</sup> Second, high court justices' attention to public opinion (accountability) is constantly balanced against judicial independence (impartiality), which are arguably the two most important characteristics that make up any bench.<sup>102</sup> This fine-line balance plays into every case a court hears, and justices must

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96. *Id.*

97. Honorable Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or A Survivor in A Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 319 (1997).

98. *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010).

99. Nearly half of the states (twenty-two of fifty) elected their state supreme court justices. NATIONAL CENTER FOR STATE COURTS, *supra* note 69.

100. Neal Devins and Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455 (2010).

101. See Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1639-53 (2010) (examining the various aspects of state constitutions and state courts that prompts a greater awareness of public opinion).

102. See Phillip L. Dubois, *Accountability, Independence and the Selection of State Judges: the Role of Popular Judicial Elections*, 40 SW.L.J. 31, 38-40 (1986) (concluding that when selecting the state's highest judges, it is particularly appropriate to strike the accountability/independence balance on the side of accountability).

constantly remember that they may be charged with violating ethical standards,<sup>103</sup> should they deviate from these considerations.<sup>104</sup> The various judicial selection methods implicate judicial accountability and impartiality in different ways.

### A. *The Election Process: How Financial Contributions Alter the Outcome*

Whether or not Chief Justice Roberts is willing to admit it, when a state supreme court employs elections to select their judges, it is a political exercise.<sup>105</sup> Without question, partisan elections open the door to political favoritism and strict party line voting.<sup>106</sup> These tendencies have led most states that favor judicial elections to use a nonpartisan election format rather than a partisan election.<sup>107</sup> But, the question is remains: does this distinction make a difference when it comes to judicial accountability and impartiality?

#### 1. *Problems Presented as Money Enters Elections*

Those who subscribe to the idea that popular elections (partisan or otherwise) generate the most accountability between the candidate and the constituents may need to look a little deeper into the election process.<sup>108</sup> The use of money presents the largest challenge to judicial independence in today's society,<sup>109</sup> and

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103. "A judge shall uphold the integrity and independence of the judiciary." MODEL CODE OF JUD. CONDUCT, Canon 1 (2010); A judge must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." MODEL CODE OF JUD. CONDUCT, Canon 2A (2010).

104. See William G. Ross, *Presidential Ambitions of U.S. Supreme Court Justices: A History and an Ethical Warning*, 38 N. KY. L. REV. 115, 162 (2011) (stating "any justice who would allow political ambition to influence his or her work on the Court also might violate Canon 1 of the American Bar Association's Model Code of Judicial Conduct, which provides that a judge shall uphold the independence, integrity, and impartiality of the judiciary.").

105. Griffen, *supra* note 74.

106. See John H. Aldrich, *Political Parties and Democracy*, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 3–28, (1995) (explaining the concepts of collective action and party identification as a "simple but effective cure" to the uninformed voter).

107. Nonpartisan election advocates "hoped that more qualified jurists would be elected to the bench and that voters would make judgments based on the objective qualifications of the candidates instead of partisan tides." CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 8 (Routledge, 2009).

108. See generally Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 550 (2006) (listing the inherent flaws that stem from campaign contributions made to judges in states that employ partisan elections as their judicial selection method).

109. Candidates "spend huge campaigns and large sums of money" which,



selecting justices through elections opens more avenues for special interest groups and wealthy corporations to sway elections, especially after the advent of Super PACs.<sup>110</sup> Because state supreme court cases often deal with political issues and public policy, special interest groups and political parties have turned to campaign contributions hoping to persuade election outcomes and affect decisions of the court.<sup>111</sup> Even more startling is the fact that lawyers and law firms often contribute large amounts of money through campaign funds for judges they know may one day be assigned to their case.<sup>112</sup>

With this influx of money, it is easy to start seeing how *Citizens United* may have compromised the integrity of judicial elections entirely. Many political scholars believe that the “emergence of Super PACs ... as potent fundraising machines makes it exceedingly difficult for candidates to compete successfully by relying solely on contributions subject to FECA's caps.”<sup>113</sup> This becomes considerably more dangerous when the candidates running for election are high court justices during the most legalized and litigious society at any point in this country's history.<sup>114</sup>

This is not to say all campaign contributions are given with intent to curry a favor. After all, only contributions that cause “a judge to apply a legal rule differently to the contributor than the judge would to another otherwise similarly situated party ... violate judicial impartiality.”<sup>115</sup> Looking at the big picture, if judicial campaign contributions “cause a significant number of judges to

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in turn, “bases the appointment of judges on how much money they have put into a campaign, regardless of how competent the candidate is. Not utilizing judicial independence causes corrupt elections.” Dorothy Osterhout, *The Importance of an Independent Judiciary and A Free Press*, 22 DEL. LAW. 26, 28 (2004).

110. See Fred Wertheimer, *Super PACs Wreak Havoc*, POLITICO (Jan. 18, 2012), [www.politico.com/news/stories/0112/71603.html](http://www.politico.com/news/stories/0112/71603.html) (discussing how Super PACs enable donors to give large amounts of money to their desired candidate while, limiting the effectiveness of individual donor contributions made directly to candidates).

111. Souders, *supra* note 108.

112. As former Supreme Court Justice Sandra Day O'Connor explains: “You hear horror stories of lawyers going to trial in Texas . . . , and the first thing they do is to find out how much the lawyers on the other side have already given to the judge. If they can find that out, then they have to match it or exceed it, or they don't go to trial.” Sandra D. O'Connor, Linda Greenhouse, Judith Resnik, Bert Brandenburg, and Viet D. Dinh. *Judicial Independence*, 62.2 BULLETIN OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES 1, 47 (2015).

113. Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super Pacs*, 60 DRAKE L. REV. 755, 762 (2012).

114. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 274 (2008).

115. Stephen J. Ware, *Judicial Elections, Judicial Impartiality and Legitimate Judicial Lawmaking: Williams-Yulee v. The Florida Bar*, 68 VAND. L. REV. 59, 69 (2015).

apply legal rules differently to their contributors than to otherwise similarly situated parties, then that judicial election system violates judicial impartiality.”<sup>116</sup> Assessing how these contributions actually alter a judge’s ruling is, as most would imagine, nearly impossible to track, but political analysts believe that “potential for corruption increases as more money is used by corporations and PACs to influence the outcome of elections.”<sup>117</sup>

In *Citizens United*, the Court found there was “no risk of quid pro quo corruption in corporate independent expenditures.”<sup>118</sup> It concluded that independent expenditures “do not give rise to corruption or the appearance of corruption.”<sup>119</sup> However, this runs contrary to the practical effects and expert opinions.

## 2. *How Campaign Contributions Affect Elections and Disrupt Judicial Impartiality*

One justice’s 2010 election to the Illinois Supreme Court provides an example of large campaign contributions at work. That justice accepted a little over \$1.4 million dollars in campaign contributions.<sup>120</sup> This was approximately \$500,000 more than that justice’s opponent in the general election.<sup>121</sup> Aggravating this issue, nearly \$800,000 of the \$1.4 million raised by the justice was donated by “lawyers and lobbyists.”<sup>122</sup> Of course, this is just one example of the winner being the candidate that raises the most campaign funds, but further investigation reveals that this is less of a coincidental trend and more of an alarming development. In fact, the only seats awarded to justices that raised fewer campaign funds than their opponents, post-*Citizens United*, took place in states where one political party had a strong control on the politics.<sup>123</sup> One example where this is a common occurrence is in Texas, a state that has historically been dominated by the Republican Party.<sup>124</sup> Democratic justices in this state tend to raise more campaign finances than Republican justices in elections but have not won a

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116. *Id.*

117. Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections As People?*, 39 W. ST. U.L. REV. 203, 210 (2012).

118. *Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310, 361 (2010).

119. *Id.* at 358. However, this runs counter to the practical effects and expert opinions.

120. NATIONAL CENTER FOR STATE COURTS, *supra* note 69.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Overview and History*, REPUBLICAN PARTY OF TEXAS (Apr. 22, 2011), [www.texasgop.org/inner .asp?z=3web.archive.org/ web/20110422201308/](http://www.texasgop.org/inner.asp?z=3web.archive.org/web/20110422201308/).

general election since 1990.<sup>125</sup> Nevertheless, this is an outlier and cannot be enough to disrupt the established trend.

Moreover, a study published in 2008 successfully linked the correlation between campaign finances raised in judicial elections with the winners of those elections.<sup>126</sup> The study showed that over the seven-year span from 1999-2006, state supreme court candidates raised nearly \$157 million.<sup>127</sup> For skeptics that believe justices can remain independent despite receiving large campaign contributions, perhaps it helps to dissect the source of this money. Of the \$157 million raised in that seven-year span, more than a third of the money contributed came from businesses and business groups; a little over a quarter was donated by attorneys and law firms from states holding elections; and the remaining percentage was comprised of campaign contributions from “independent donors,” political parties, and candidates themselves.<sup>128</sup> Because this astronomical amount of money was spent in a short period, now is the time to seriously question the integrity of these donations.

A 2006 review of the Ohio Supreme Court performed by the *New York Times* revealed that the supreme court justices of Ohio “routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs.”<sup>129</sup> On average, these same justices ruled in favor of contributors seventy percent of the time.<sup>130</sup> In the twelve years that were studied, 215 cases were categorized as having a potential direct conflict of interest for at least one member of the bench, but justices only recused themselves nine times.<sup>131</sup> These justices almost never disqualified themselves from hearing cases from campaign contributors, a requirement by law in Ohio.<sup>132</sup> This has led Ohio Supreme Court Justices themselves to question their election system and the role campaign contributions play.<sup>133</sup>

The ethical mishaps apparent in Ohio are not confined to that state. A study analyzing all civil cases heard by the Supreme Court of Pennsylvania in the years of 2008 and 2009 found that in sixty percent of the cases heard, at least one of the parties, attorneys, or firms involved had contributed to the most recent campaign of at

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125. NATIONAL CENTER FOR STATE COURTS, *supra* note 69.

126. Bert Bradenburg and Roy A. Schotland, *Keeping Courts Impartial Amid Changing Judicial Elections*, 137 DAEDALUS 102, 103 (2008).

127. *Id.* at 104.

128. *Id.*

129. Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES (Sept. 2006).

130. *Id.*

131. *Id.*

132. *Id.*

133. Justice Paul E. Pfeifer, a Republican member of the Ohio Supreme Court, stated, “I never felt so much like a hooker down by the bus station in any race I’ve ever been in as I did in a judicial race.” *Id.*

least one justice on the bench.<sup>134</sup> In addition, forty-two percent of the cases heard had at least one litigant, attorney, or firm involved in the case that had contributed campaign funds to a majority of the justices deciding said case.<sup>135</sup> These figures have been proven through intense review of all the cases heard before these justices. These examples demonstrate how judicial elections allow for corruption in a state supreme court bench and support a finding by the Seventh Circuit of Appeals that the “unfortunate reality of judicial elections [is] that judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins.”<sup>136</sup>

The undisputed fact is campaign spending in judicial races has increased exponentially in recent years.<sup>137</sup> “Average campaign spending in contested supreme court races has increased from \$364,348 in 1990, to \$892,755 in 2004. In 2000, judicial candidates in supreme court races raised a total of \$45 million; in 2002, they raised \$29 million; and in 2004, they raised \$42 million.”<sup>138</sup> In 2004, Illinois saw the most expensive contested state supreme court election in American history,<sup>139</sup> in which candidates raised \$9.3 million in total.<sup>140</sup> The amount of money may be eye-opening, but the reasons behind these astronomical donations paint a frightening picture of the reality behind campaign contributions and corruption.

Most campaign contributors are not a “single lawyer or litigant, but rather a large group of people who band together to advance their political philosophy.”<sup>141</sup> While “a single contributor may seek only victories in cases in which the contributor appears as a party or lawyer[,] ... an interest group may have a broad policy agenda, such as protecting the environment or deregulating the

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134. Shira J. Goodman et. al., *What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence*, 48 DUQ. L. REV. 859, 865 (2010).

135. *Id.*

136. *Siefert v. Alexander*, 608 F.3d 974, 990 (7th Cir. 2010).

137. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEG. ETHICS 1259, 1265 (2008).

138. *Id.* (citing Chris Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 204, 205-06 (Matthew J. Streb ed. 2007); Am. Judicature Society, *Judges Under Attack: Ethically Appropriate Activity in Retention Elections*, 2 (2005); and Press Release, *Justice at Stake Campaign, 2004 State Supreme Court Election Overview* (2005)).

139. James Sample et al., *Justice at Stake*, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009 1 (2010), [www.justiceatstake.org/resources/new\\_politics\\_of\\_judicial\\_elections\\_20002009](http://www.justiceatstake.org/resources/new_politics_of_judicial_elections_20002009).

140. *Id.*

141. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 654 (1999).

economy.”<sup>142</sup> With this strategy, interest groups succeed, “not by buying justice in individual cases, but by buying policy that influences a range of cases.”<sup>143</sup> Small victories by lobbyists may result in widespread policy change overtime.<sup>144</sup>

Some of these figures and concepts must have caught the attention of the U.S. Supreme Court because recently, in *Williams-Yulee v. Florida Bar*,<sup>145</sup> the Court held that a state may limit a judicial candidate’s right to personally solicit campaign funds.<sup>146</sup> The Court reasoned that this restriction on judges meets the strict scrutiny standard of review and is constitutional.<sup>147</sup> However, this has done nothing to stop the enormous contributions made without solicitation, and thus, the problem of Super PACs remain an issue. Campaign contributions do not have an impact on the remaining selection methods. The flaws inherent in the other systems manifested themselves in a subtler way. The more interesting issues reside with gubernatorial appointment.

### *B. Gubernatorial Appointment and the Political Pressures that Follow*

With judicial appointment, there is an “underlying (if unspoken) assumption has been that the ... process offers an alternative to judicial elections that does not raise the same problems as judicial elections do.”<sup>148</sup> Notwithstanding this assertion, this process still presents conflicts with judicial accountability and impartiality.<sup>149</sup> These issues are less likely to be found through empirical evidence and more so through political agendas. For example, a governor may feel compelled to appoint a justice of a racial minority group in order to ease political pressures.<sup>150</sup> Diversifying a state’s supreme court bench will likely

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142. *Id.*

143. *Id.*

144. “Tort reform” has been, perhaps, the biggest policy battle between campaign contributors to date. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEG. ETHICS 1259, 1266 (2008).

145. *Williams-Yulee v. Florida B.*, 135 S. Ct. 1656 (2015).

146. *Id.* at 1673.

147. The Court found a compelling governmental interest in preserving public confidence in the integrity of its judiciary and understood this limitation to be the least restrictive means available. *Id.*

148. Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2169 (2006).

149. Judges who wish to be reappointed “routinely rule more favorably for government litigants” because “retention concerns or political loyalty are strong influences on these judges.” Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1609 (2009).

150. See Greg Goelzhauser, *Diversifying State Supreme Courts*, 45 L. & SOC. REV. 761 (2011) (providing an analysis of the factors that may persuade state governors to appoint minority justices).

help the governor gain approval from that minority class of voters.<sup>151</sup> These motives and underlying agendas have left many experts skeptical about the effectiveness of gubernatorial appointments.<sup>152</sup>

Although hard to prove empirically, there is anecdotal evidence that supports this theory. In 2009, a seat on Georgia's Supreme Court became vacant.<sup>153</sup> A news outlet leaked a letter in which the author stated, "Gov. Sonny Perdue must appoint someone to fill the Supreme Court seat soon to be vacated by Chief Justice Leah Ward Sears. Perhaps a Hispanic will make the governor's short list,"<sup>154</sup> implying that this appointment will help his popularity amongst Hispanic voters.

Likewise, in 2014, Tennessee's Republican Governor, Bill Haslam, had the unusual opportunity of appointing two state supreme court justices in the same year.<sup>155</sup> Instead of "stacking the bench" by appointing two conservative justices, Governor Haslam chose the more cooperative strategy of appointing one conservative justice and one liberal justice.<sup>156</sup> Although this decision not to stack the bench with conservatives raised some eyebrows amongst Tennessee republicans, those close to the situation hypothesized that the appointment of the liberal Justice Kirby was done to gain democratic support on a pending tax reform policy.<sup>157</sup> These recent appointments demonstrate how gubernatorial appointment of state

151. *Id.* at 776.

152. Take, for example, Seventh Circuit Court of Appeals Justice Richard A. Posner opinion regarding the motives he has observed during a judicial appointment: "[T]he politicians figure, well, we're appointing this person because he or she is of a particular race, or comes from a special part of the country, or this or that, or is liberal or is conservative. And this person is not particularly bright and doesn't have much experience—never been in a trial courtroom, for example—but, there are all these brilliant law clerks working, so their opinions will be all right, because the law clerks will write them . . . That's a very serious deficiency in our system, and there are zillions more." Debra Cassens Weiss, *Posner says Supreme Court is 'awful,' top two justices are OK but not great*, ABA JOURNAL (Oct. 25, 2016), [www.abajournal.com/news/article/posner\\_says\\_supreme\\_court\\_is\\_awful\\_top\\_two\\_justices\\_are\\_okay\\_but\\_not\\_great/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/posner_says_supreme_court_is_awful_top_two_justices_are_okay_but_not_great/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email).

153. Charles William Ginn, *Leah Ward Sears*, GOVERNMENT & POLITICS (Oct. 15, 2016) [www.georgiaencyclopedia.org/articles/government-politics/leah-ward-sears-b-1955](http://www.georgiaencyclopedia.org/articles/government-politics/leah-ward-sears-b-1955).

154. Greg Goelzhauser, *Diversifying State Supreme Courts*, 45 L. & SOC'Y. REV. 761, 767 (2011).

155. NATIONAL CENTER FOR STATE COURTS, *supra* note 69.

156. *Haslam Appoints Bivins to Tennessee Supreme Court*, OFFICE OF THE GOVERNOR (Oct. 9, 2016), [www.tn.gov/governor/news/35678](http://www.tn.gov/governor/news/35678); *Haslam Appoints Kirby to Tennessee Supreme Court*, OFFICE OF THE GOVERNOR (Oct. 9, 2016), [www.tn.gov/governor/news/35264](http://www.tn.gov/governor/news/35264).

157. NATIONAL CENTER FOR STATE COURTS, *supra* note 69.

supreme courts justices can be used as a bargaining tool in political schemes.

### *C. Direct Election by State Legislatures and the Parody Problem*

The direct election by state legislatures system used by Virginia and South Carolina also leads to a tainted judiciary.<sup>158</sup> First off, these elections do not function well when the legislature is drastically divided.<sup>159</sup> This is a major problem for both states, but specifically for Virginia because its General Assembly has been polarized in recent years and has been unable to compromise on most contested issues before it.<sup>160</sup> The reason for this lack of compromise is mostly a result of hardline voting by diametrically opposed political cultures within the state.<sup>161</sup> Because the General Assembly is in charge of filling vacant state supreme court seats, this recent turmoil has made it nearly impossible for legislatures to agree on candidates to fill vacancies when they arise,<sup>162</sup> which leaves the bench incomplete.

As large as the issues in Virginia are, the more disturbing trend emerged from South Carolina in the 1990s. During this period, two defects in judicial selection via state legislatures became rampant: the “dearth of objective criteria with which legislators could evaluate a candidate, and the public perception that the General Assembly simply elected those whom it knew best, i.e., former or sitting legislators.”<sup>163</sup> Without any safeguards in place, all

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158. See generally Carl W. Tobias, *Reconsidering Virginia Judicial Selection*, 43 U. RICH. L. REV. 37 (2008) (providing a historical analysis and chronology of Virginia’s Supreme Court makeup and how its judicial selection method was developed and implemented).

159. See Jeff E. Schapiro, *Kaine To Fill Judgeships Amid Lawmaker Gridlock*, RICH. TIMES-DISPATCH, at A5 (July 11, 2008) (reporting on the sharp division between the Democratic Senate and the Republican House of Delegates the inability to come to a consensus about which candidate to elect while Republicans in both chambers could not agree with each other).

160. Roger Chesley, *Legislative Disagreement Inevitable and Sometimes Necessary*, PILOT ONLINE (Jan. 12, 2016), [www.pilotonline.com/news/local/columnist/roger-chesley/roger-chesley-legislative-disagreement-inevitable-and-sometimes-necessary/article\\_45b51b59-3127-5200-bba9-d94f757fc3d7.html](http://www.pilotonline.com/news/local/columnist/roger-chesley/roger-chesley-legislative-disagreement-inevitable-and-sometimes-necessary/article_45b51b59-3127-5200-bba9-d94f757fc3d7.html).

161. See Lauren Stroyeck, *Is Virginia’s Judicial System Too Elitist? Political Culture, Judicial Appointment, and Reform Measures*, 29 REGENT U.L. REV. 133, 135 (2017) (summarizing the history of Virginia’s political culture and how the stark difference in political ideologies prevent political action).

162. “Over the last dozen years, relations between Virginia Democrats and Republicans in the General Assembly have been contentious, a phenomenon witnessed most relevantly in the gradual deterioration of the judicial selection process. For example, in 1996, the Assembly failed to fill thirty percent of the openings because of partisan infighting.” J. Amy Dillard, *Separate and Obedient: The Judicial Qualification Missing from the Job Description*, 38 CUMB. L. REV. 1 (2007).

163. Constance A. Anastopoulo & Daniel J. Crooks III, *Race and Gender on*

five supreme court justices elected in the 1990s were previous members of the South Carolina legislature.<sup>164</sup> Although safeguards have since been installed in an attempt to try to mitigate this phenomena,<sup>165</sup> now known as “political inbreeding,”<sup>166</sup> there is not enough evidence at this time to conclude if these efforts will be successful.

#### *D. The Missouri Plan’s Departure from Historic American Principles*

The Missouri Plan is not without its critics, either. Although this judicial selection method is relatively young in comparison to the other methods,<sup>167</sup> which have been around since the inception of state courts, it too has faced harsh accusations of being unconstitutional and purely undemocratic.

Since the Missouri Plan was introduced as an alternative to the historical judicial selection methods, it has faced a barrage of constitutional challenges.<sup>168</sup> For example, in *Kirk v. Carpeneti*,<sup>169</sup> a group of individuals in Alaska sought to enjoin the use of the Missouri Plan because they felt that as public officials, judges should either be elected by the people or appointed an elected official.<sup>170</sup> In a similar case preceding *Kirk*, minority voters in Indiana challenged the Missouri Plan on the grounds that the selection method violated their equal rights, privileges, and immunities guaranteed by the Fifth and Fourteenth Amendment through the Civil Rights Act by allowing only attorneys to select those attorneys present on the Nominating Commission.<sup>171</sup> Although in both cases, as well as others not examined here, the

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*the Bench: How Best to Achieve Diversity in Judicial Selection*, 8 NW. J. L. & SOC. POLICY 174, 182 (2013).

164. NATIONAL CENTER FOR STATE COURTS, *supra* note 69.

165. One new law requires legislators to be out of the General Assembly for one year prior to seeking judicial office. S.C. Code Ann. § 2-19-70(A). The other law it vests an exclusive nomination power in the new Judicial Merit Selection Commission, making it more similar to the Missouri Plan. S.C. Code Ann. § 2-19-80(B).

166. Martin Scott Driggers, Jr., *South Carolina’s Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1228 (1998).

167. Croley, *supra* note 88 (explaining that the Missouri Plan was implemented in 1940 in a response to the downfalls inherent in the other judicial selection methods).

168. *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010); *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996); *African-American Voting Rights Legal Def. Fund v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997); *Carlson v. Wiggins*, 760 F. Supp. 2d 811 (S.D. Iowa 2011).

169. *Kirk*, 623 F.3d 889.

170. *Id.* at 892.

171. *Bradley*, 916 F. Supp. at 1451.



courts have routinely held the Missouri Plan to be consistent with the Constitution,<sup>172</sup> it would be unwise to assume that the constitutional challenges will end because of the criticisms that have continued to plague this method.

Objectors to the Missouri Plan often proffer two main faults of the Missouri Plan. First, they argue that the Missouri Plan fosters political strife via retention elections.<sup>173</sup> Second, objectors believe it promotes an elitist agenda by not allowing a popular vote.<sup>174</sup> While these arguments appear to be meritorious on their face, in reality, the Missouri Plan is the only judicial selection method that combats each of these arguments when looked at objectively.

The argument that the Missouri Plan is inherently more political than the other methods stems from the existence of retention elections.<sup>175</sup> The argument is rather weak though because retention elections, as a whole, operates much differently from popular elections that select a candidate. Historically, successful retention elections require almost no campaigning and “hardly any campaign contributions,”<sup>176</sup> two elements that typically cause the biggest issues present in judicial elections. Further, retention elections used in the Missouri Plan are inherently less political than conventional elections because voters are not selecting potential judges based on political influence, and voters can focus “on his or her qualifications, not on the ability to make deals with legislators or rake in campaign contributions.”<sup>177</sup> The bottom line is the very

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Alaska's founders, when considering the selection of the members of the Judicial Council at the Constitutional Convention, discussed these tensions and resolved the debate in favor of the expertise that attorneys could bring to the process. The Equal Protection Clause, as long interpreted by the federal courts, does not preclude Alaska from making that choice.

*Kirk*, 623 F.3d at 900;

With respect to the Voters' claims that the method . . . violates the Fourteenth and Fifteenth Amendments of the Constitution, those claims must also fail. No fundamental rights are implicated nor suspect classes created by the current system, and the state's decision to let only attorneys vote for the attorney Commission members is rationally related to a legitimate purpose.

*Bradley*, 916 F. Supp. at 1474, *aff'd*, 154 F.3d 704 (7th Cir. 1998).

173. Scott W. Gaylord, *Unconventional Wisdom: The Roberts Court's Proper Support of Judicial Elections*, 2011 MICH. ST. L. REV. 1521, 1559 (2011).

174. James E. Lozier, *The Missouri Plan a/k/a Merit Selection Is the Best Solution for Selecting Michigan's Judges*, 75 MICH. B.J. 918 (Sept. 1996).

175. *Id.* at 180.

176. Billy Corriher, *Merit Selection and Retention Elections Keep Judges Out of Politics*, CENTER FOR AMERICAN PROGRESS (Nov. 1, 2012), [www.americanprogressaction.org/issues/courts/reports/2012/11/01/43505/merit-selection-and-retention-elections-keep-judges-out-of-politics/](http://www.americanprogressaction.org/issues/courts/reports/2012/11/01/43505/merit-selection-and-retention-elections-keep-judges-out-of-politics/).

177. *Id.*

criticism advanced against retention elections not only exist in partisan and nonpartisan election but are exacerbated by the long campaigns present in them.<sup>178</sup> Because of the important role that retention elections play, this argument must naturally fail.<sup>179</sup>

Moreover, the argument that most opponents of the Missouri Plan consider to be stronger is the idea that the method is undemocratic because of its manifestation of power in the state bar association and lawyers.<sup>180</sup> Keeping with the theme of retention elections, opponents allege that retention elections result in a *de facto* lifetime appointment for the committee's nominee without the meaningful consent of the citizens within the state.<sup>181</sup> One study found that from 1980 through 2000 incumbents in retention elections were retained 98.2% of the time.<sup>182</sup> Essentially the claim is that retention elections deviously “give voters the illusion of electoral participation,”<sup>183</sup> while retaining all of the power in the nominating commission.<sup>184</sup> This method, they argue, removes public accountability that is present in conventional elections and “function[s] as a way of blessing the appointed judge with a false aura of electoral legitimacy.”<sup>185</sup> For opponents, retention elections do nothing to make the process democratic and instead “can only be explained as a concession to the entrenched political necessity of preserving judicial elections in some form, so that merit selection proponents have an answer for detractors who oppose plans ‘that take away our right to vote.’”<sup>186</sup>

The other “undemocratic” problem with the Missouri Plan is that the process of selecting candidates is usually done by a small group of elites, like attorneys.<sup>187</sup> In an editorial by the Wall Street Journal, the editors opined that judicial nominating committees “hand[] disproportionate power to trial lawyers and state bar

178. See Lozier, *supra* note 174.

179. Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 717 (2009) (indicating that in judicial retention elections foster accountability and independence).

180. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 765 (2009); Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to A Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 146 (2007).

181. Gaylord, *supra* note 173, at 1563.

182. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS. 8 (Routledge, 2009).

183. Gaylord, *supra* note 173.

184. *Id.* at 1564.

185. Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 811 (2004).

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

187. Daugherty, *supra* note 97.

associations” in order to “insulate the backroom-dealing from public scrutiny while stocking state courts with liberal judges.”<sup>188</sup> This opinion appears to have legs because in 2009 “sixteen of the twenty-five states that used nominating commissions mandated that at least half of the members had to be lawyers or judges.”<sup>189</sup> In ten of these states, bar associations select all of the lawyer members.<sup>190</sup> This results in half of the nominating board being comprised of unelected committee members who often share the political interests and ideological views of the legal groups that put them there.<sup>191</sup>

While credence can be given to these arguments, it would be incredibly foolish to mistaken these slanted views as reality. First, the 98.2% retention rate present in retention elections can be explained because voters have no idea who the replacement will be if the incumbent judge is not retained.<sup>192</sup> “Thus, voters may follow the old proverb and determine ‘better the Devil you know than the Devil you don’t.’”<sup>193</sup> And while the numbers overwhelmingly prove that incumbent judges are retained, that is not to say that retention elections are pointless because that simply is not true.<sup>194</sup> The inflated retention rate may also be a result of the electorate deferring to trusted leadership of attorneys who possess first-hand knowledge and well-formed opinions about the candidates the nominated.<sup>195</sup> This thought has been upheld in federal court.<sup>196</sup>

This also explains the purpose of an attorney led judicial nominating commission. While it may be seen as undemocratic, the nominating commission lessens the amount of voter awareness and education needed to vote for a judge in a conventional election.<sup>197</sup>

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188. Editorial, *Missouri Compromised: Judicial Selection the Trial Lawyer Way*, THE WALL STREET JOURNAL (Sept. 15, 2011), [www.wsj.com/articles/SB10001424053111904265504576568563680800914](http://www.wsj.com/articles/SB10001424053111904265504576568563680800914).

189. See Gaylord, *supra* note 173 (analyzing data presented in Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 679 (2009)).

190. *Id.*

191. Gaylord, *supra* note 173.

192. *Id.* at n. 240.

193. *Id.*

194. “Retention elections are not always toothless. On rare occasions, a judge loses one. So retention elections do provide some (however small) measure of democratic legitimacy.” Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 771 (2009).

195. Practically speaking, the average voter will have no idea which judge is more qualified, independent, and impartial than attorneys that work with them on a daily basis.

196. “Attorneys are better equipped than non-attorneys to evaluate the temperament and legal acumen of judicial candidates and more likely to base their votes on factors other than party affiliation.” *Dool v. Burke*, 497 Fed. Appx. 782, 792 (10th Cir. 2012).

197. “[W]hen voters are not subjected to the charges of opposing candidates and unreliable information circulated by partisans, they are then able to decide based on more reliable information.” G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 619 (2009).

This is needed because “voters all too often cannot even identify by name the judicial candidates for whom they cast their ballot . . . , nor are the majority of voters even able to identify those individuals currently occupying judicial posts, or even the number of judges composing a state’s highest court.”<sup>198</sup> Instead of focusing on a magnitude of factors that play into conventional elections, voters in retention elections can simply decide on whether the incumbent should retain his position.<sup>199</sup> In this sense, retention elections provide a political safeguard to a process that allows for the most qualified judges to remain on the bench.

Because the “powers of the Commission are not of the type typically exercised by a popularly elected body,” the Tenth Circuit of the U.S. Court of Appeals held that the principle of democratic legitimacy allegedly at issue here is in fact nonexistent.<sup>200</sup> This is a fact established by preexisting Supreme Court precedent,<sup>201</sup> because the legitimacy of the Commission’s work is simply “not contingent on the popular election of its members.”<sup>202</sup>

#### IV. THE UNIVERSAL ADOPTION OF THE MISSOURI PLAN AND IMPLEMENTATION OF AN INTERVIEW PROCESS TO ENSURE MAXIMUM TRANSPARENCY

As laid out above, every judicial selection method is marred by its own defects. Whether it is campaign contributions, political agendas, an “undemocratic process,” or other ulterior motives polluting state supreme courts, these methods are seriously implicating judicial accountability and impartiality. Most dangerously, following the ruling in *Citizens United*,<sup>203</sup> one can expect campaign contributions for judges to continue to rise, further distorting judicial accountability and impartiality. That is why this Comment is proposing that every state supreme court adopt the Missouri Plan as its judicial selection method because this method best ensures an independent, impartial, and qualified bench. As an added safeguard, this Comment also proposes that each state adopt an interview process, discussed below, to ensure maximum

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198. See Lozier, *supra* not 174.

199. In some instances, the simple question that appears on the ballot is, “Should Judge X be retained in office, Yes or No?” B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1442 (2001).

200. *Dool*, 497 Fed. Appx. at 790.

201. *Id.* “Limiting the franchise to attorneys will neither ‘strike at the heart of representative government,’ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), nor deprive qualified voters of their ‘inalienable right to full and effective participation in the political process.’ *Id.* at 565.” *Id.*

202. *Dool*, 497 Fed. Appx. at 790-91.

203. *Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310 (2010).

transparency and increase voter awareness of the retention elections.

The Missouri Plan is a unique judicial selection method that was created with the specific purpose of combatting the existing problems inherent in the other selection methods.<sup>204</sup> Most legal scholars follow the logic that the Missouri Plan creates a “delicate balance necessary between judicial independence and accountability,”<sup>205</sup> which is the optimal legal setting for a state’s high court and its users. The judges are independent from the selection process because they have no need to actively campaign or raise funds. Judicial accountability is retained via retention elections because the populous ultimately holds the final say.<sup>206</sup>

At this point, it is easy to understand why the Missouri Plan has been widely accepted since its emergence in the 1940. Simply speaking, it combines the best parts of the preexisting judicial selection methods and mitigates the pockets that breed corruption. For example, retention elections allow the citizens to participate in the process by providing the final vote in favor or against a nominated judge. Thus, the popular vote is ultimately determinative, while ridding the process of excess campaign funds, smear politics, and future conflicts of interest. And because the voters would only be dealing with retention elections, they will not be asked to preform substantial research about the candidates participating or the legal system in general.

Doing away with conventional elections will also do away with court systems that systematically uphold majoritarian values while disregarding minority values.<sup>207</sup> This is especially important in state supreme courts where justices are asked to consider fundamental, constitutional rights. When the “outcomes of judicial elections are dependent on majoritarian attitudes concerning individual or minority constitutional rights, these rights may be compromised.”<sup>208</sup> Ensuring independence between the majoritarian public and the judicial candidate through a nominating committee will actively fight for the minority rights that are often lost in popular elections.

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204. See Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 979 n.21 (2001) (stating that “[b]y the early twentieth century, elective judiciaries in some states were viewed as plagued by incompetence and corruption,” so a “compromise between judicial appointment and election, between judicial independence and accountability, - dubbed the Missouri plan - was adopted by several states).

205. James Andrew Wynn, Jr., *Judging the Judges*, 86 MARQ. L. REV. 753, 765 (2003).

206. See Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 744 (2009) (noting “the reason for the retention election is to make it clear that, in the last instance, the people are in charge.”).

207. Croley, *supra* note 88, at 694.

208. *Id.* at 727.

The Missouri Plan also incorporates gubernatorial appointment without the threat of underlying political agendas compromising the integrity of the pick.<sup>209</sup> This is because trusted officers of the court are put in charge to make sure that only the most qualified judges are considered.<sup>210</sup> Attorneys accused of nominating judges in bad faith can be punished easily with ethical violations by their state bar association. This punitive measure would further safeguard the process from political corruption. The nominating commission will also insulate judicial candidates from implicit biases that may plague a governor's perception of a candidate. For example, the nominating committee can combat a governor's prejudice against a certain race, gender, religion, etc. by nominating candidates that possess these characteristics or have historically upheld the rights of the members of these classes.

Perhaps the most supported argument against the Missouri Plan is that it is undemocratic because of the inherent elitism in allowing on a special commission to select the candidates.<sup>211</sup> Those who oppose the Missouri Plan also argue that corruption still exists because of the presence of attorneys on the selection committee.<sup>212</sup> In reality, however, a study has shown that this selection method has actually bred diversity on supreme court benches.<sup>213</sup> Also, because the lawyers are merely selecting judges to appear on the list of candidates available for the governor's selection, campaign contribution are never donated. The influence of money is thus removed from the picture, as is the corruption that follows it. As previously explained, the democratic principles are retained by the retention elections themselves.

Some critics continue to rest their argument against the Missouri Plan on the idea that the nominating commission is secretive and cannot be trusted.<sup>214</sup> There is a simple solution to the problem, though. To combat any alleged secrecy, an added interview process used to screen each candidate will "increase[] transparency and participation in the judicial selection process."<sup>215</sup> To begin, the nominating commission will select candidates and invite them to

209. "[T]he Commission is designed to ensure the conduct of the executive branch does not threaten the integrity of the judicial branch." 497 Fed. Appx. 782, 791 (10th Cir. 2012).

210. "By giving lawyers a controlling vote on the Commission, [states] cabin the governor's appointment power while still protecting the judiciary from the corrosive force of popular politics." *Id.* at 792.

211. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 50 (1994).

212. *Id.* at 53.

213. *See generally id.* at 50 (explaining the findings of the study).

214. Daugherty, *supra* note 97.

215. Cort A. Vanostran, *Justice Not for Sale: A Constitutional Defense of the Missouri Plan for Judicial Selection*, 44 WASH. U. J.L. & POLICY 159, 177 (2014).

participate in an interview.<sup>216</sup> The public can attend the interviews, but nonetheless, the interviews will be made available in their entirety through the commission's website. After reviewing the interviews, constituents are encouraged "to comment on the potential appointees by directly contacting members of the nominating commission."<sup>217</sup> This added step, which is not a part of the baseline Missouri Plan, has already been implemented in Missouri to contest the secrecy objections made in recent years.<sup>218</sup>

With this additional safeguard in place, the Missouri Plan works to provide a judicial selection method that ensures judicial independence, impartiality, and accountability,<sup>219</sup> qualities that have historically been regarded as a court's most essential characteristics.<sup>220</sup> Alexander Hamilton, in the Federalist Papers, argued to colonial Americans that judicial independence was essential in protecting against infringements on individual rights.<sup>221</sup> Today, however, the holding in *Citizens United* has put the characteristics of independence and impartiality in peril. The loud and unrelenting cries to overturn this disastrous decision have come from both major political parties,<sup>222</sup> but more importantly, the overwhelming majority of Americans support overturning the holding as well. One study shows that nearly eighty percent of the U.S. population would vote to overturn the Supreme Court's ruling, while only seventeen percent of the population thinks the ruling was a good decision.<sup>223</sup>

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216. *Id.*

217. *Id.*

218. *Missouri Nonpartisan Court Plan*, YOUR MO. CTS., (Nov. 15, 2016), [www.courts.mo.gov/page.jsp?id=297](http://www.courts.mo.gov/page.jsp?id=297).

219. Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 719 (2009).

220. *Id.* at 717.

221. Alexander Hamilton, *The Federalist No. 78* (1788).

222. Vermont Senator Bernie Sanders has been one of the loudest critics on the democratic side of the aisle and made it a focal point of his 2016 presidential candidacy. On his website, Senator Sanders tells his supporters that the "need for real campaign finance reform" is neither a progressive issue nor a conservative, but rather "it is an American issue." *Getting Big Money Out of Politics and Restoring Democracy*, BERNIE 2016 (Nov. 18, 2016), [www.bernieanders.com/issues/money-in-politics/](http://www.bernieanders.com/issues/money-in-politics/). He also urges supporters to sign a petition to amend the constitution and overturn *Citizens United*. *Id.*

Although the majority of the Republicans would vote to uphold *Citizens United*, campaign finance reform was a major topic of conversation for President-Elect Donald Trump throughout the entirety of his campaign. In the middle of a debate during the primaries, President-Elect Trump explained how the other Republican candidates on the stage took campaign contributions from large corporate donors, accusing them of being puppets, before saying "[t]hat's a broken system." Marge Back, *Trump is Wrong about Basically Everything – Except this*, MSNBC (Aug. 16, 2015), [www.msnbc.com/msnbc/trump-wrong-about-basically-everything-except](http://www.msnbc.com/msnbc/trump-wrong-about-basically-everything-except).

223. Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG POLITICS (Sept. 28, 2015),

Reasonable minds will continue to differ on the subject of campaign finance laws, but the trend seems to be heading in the directions that most Americans prefer. As discussed briefly, the holding in *Williams-Yulee v. Florida B.*<sup>224</sup> stated that “a State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.”<sup>225</sup> And more specifically, the Court ruled that States may “prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees and to otherwise communicate their electoral messages in practically any way.”<sup>226</sup> The Court further explained that “a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.”<sup>227</sup>

While the ruling in *Williams-Yulee v. Florida B.* seems to significantly cut against the holding in *Citizens United*, it is important to note that the Court went out of its way to make it clear that only narrowly tailored restrictions will satisfy constitutional scrutiny.<sup>228</sup> This is the strictest standard that the Court can apply, which often leads to inconsistent rulings creating unclear precedent, especially in realm of First Amendment protections.

This unpredictability means only one thing: states cannot wait for the Supreme Court to act. It has been nearly eight years since *Citizens United* was decided, and the Court has done little to stop the vast amounts of money from pouring into the pockets of state supreme court justices and end the corruption that accompanies it. Instead, states should seek to employ the Missouri Plan to in order to insulate their supreme court from political corruption, provide an independent and impartial bench to protect all of its citizens, and increase judicial transparency and accountability.

## V. WHERE TO GO FROM HERE

There is no perfect judicial selection method, but there is one that effectively safeguards against all of the evils that have plagued past selection methods: the Missouri Plan. This selection method, which empowers a nominating committee to comprise a list of judicial candidates for the state’s chief executive appointment which is later ratified with a popular vote, incorporates the most useful parts of judicial elections and appointments while

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[www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot](http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot).

224. *Williams-Yulee v. Florida B.*, 135 S. Ct. 1656, 1662 (2015).

225. *Id.* at 1665.

226. *Id.* at 1672.

227. *Id.*

228. *Id.* at 1673.



simultaneously scrapping the avenues that breed corruption. All that is left is a judicial selection method that fosters a state supreme court that is independent from unlimited campaign funds upheld by *Citizens United* and the mass amounts of impartial decisions that have been affected by those funds. The Missouri Plan, although not perfect, is undoubtedly the best judicial selection method that a state can use to determine the justices that will make up its most powerful legal decision-maker in its state.