



# Bullying Bolick

## *Attempt to remove Arizona justice fails*

by JOSHUA DUNN

**AS AN ATTORNEY, CLINT BOLICK** worked for decades to defend educational choice for families and challenge barriers to economic entrepreneurship. He co-founded the Institute for Justice, a libertarian public-interest law firm; advocated for choice in *Zelman v. Simmons-Harris*, in which the U.S. Supreme Court upheld a school voucher program in Cleveland; and served as president of the Alliance for School Choice and vice president of litigation for the Goldwater Institute. His distinguished record—in 2008 the *Legal Times* called him one of D.C.’s “greatest lawyers” of the past 30 years—led Arizona’s Republican governor Doug Ducey to appoint Bolick to the Arizona Supreme Court in 2016. But Bolick has drawn opponents, too. In November, they tried to end Bolick’s judicial career.

In Arizona, supreme court justices face a retention election two years after their initial appointment and every six years thereafter. These elections are normally pro forma, with voters retaining judges by large, comfortable margins. During his first two years, Bolick established himself as an independent jurist, with his committed textualism leading him to sometimes vote against political expectations.

But in August Bolick drew the wrath of the state teachers union when the Arizona Supreme Court voted to remove an education-funding measure from the November ballot. Proposition 207, known as the Invest in Education Act, was supported by the union—the Arizona Education Association (AEA). The measure would have provided a guaranteed funding source for teacher salary increases. It would have raised the income tax rate on individuals earning more than \$250,000 and households earning more than \$500,000 by 3.46 percentage points, to 8 percent. For individuals earning more than \$500,000 and households earning more than \$1,000,000, the rate would have spiked to 9 percent.

Opponents of the measure sued, saying that the description provided by the initiative’s sponsors was misleading and, therefore, violated state law. The first problem was that the sponsors erroneously stated that the measure would trigger increases of 3.46 and 4.46 *percent*, rather than *percentage points*. In fact, the proposed percentage-point hikes amounted to respective increases of 76 and 98 percent over the current rates.

What’s more, Arizona indexes state income taxes based on inflation. As the initiative was written, it would have eliminated that indexing and increased taxes even more. Proposition 207’s supporters said their intent was not to eliminate indexing,

but the language of the initiative would have had that effect. In Arizona, sponsors of ballot measures have the option of submitting their draft text to a legislative council that reviews the language for ambiguities and conflicts, but 207’s creators did not submit their draft.

In August 2018, the state supreme court ruled 5–2 that the description created “a significant danger of confusion or unfairness” and ordered that the measure be removed from the ballot. The court majority appeared to find the effect on indexing to be the most troubling issue, saying that if the act’s supporters had let the legislative council review the measure beforehand, “the question might never have become a judicial one and the measure might well be before the voters.”

The outcry from the measure’s supporters was swift and focused, concentrating on two justices up for a retention vote, Bolick and Justice John Pelander, who was in his eighth year on the court. The AEA and its allies immediately took to social media to launch a campaign to remove both justices from the bench, even though no one knew until weeks later how any of the justices had voted on the ballot initiative.

The union had amassed a large war chest to support 207, which it redirected to its campaign against Bolick and Pelander. The union also had support from the National Education Association. In response, many leaders of the state legal community, including Paul Bender, the former dean of Arizona State University’s law school, criticized the campaign. Even though he personally disagreed with the court’s decision, Bender praised both judges as “high-quality” jurists and specifically praised Bolick for being “thoughtful” and not “political.” Bolick himself did not run a formal campaign but did give interviews and speeches to different groups, emphasizing his strong scores from the Arizona Commission on Judicial Performance.

AEA’s campaign failed in November. Bolick was retained with 70 percent of the vote and Pelander with 71 percent. Judges on lower courts were retained with slightly larger margins of 73 to 75 percent. Bolick now has another six years to put his textualism into action. One suspects that it won’t be the parade of horrors predicted by the people who just tried to remove him.

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