

**THE DARK NIGHT RISES: THE GROWING ROLE OF
INDEPENDENT EXPENDITURES IN JUDICIAL ELECTIONS
AFTER *CITIZENS UNITED***

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TABLE OF CONTENTS

I. INTRODUCTION	502
II. BACKGROUND	505
A. <i>Citizens United v. FEC</i>	506
B. <i>SpeechNow.org v. FEC</i>	507
III. THE RISE IN INDEPENDENT SPENDING ON JUDICIAL ELECTIONS .	507
A. <i>Before 2000: Origins of the Growth in Judicial Election Spending</i>	507
B. <i>Spending Explodes in the 2000s, Before Citizens United</i>	508
1. Spending trends in the early 2000s	508
2. The Rise of Super-Spenders in the 2000s.....	509
C. <i>After Citizens United: What Changed?</i>	511
1. Trends in Judicial Election Spending After <i>Citizens United</i>	511
2. What Changed? Perspectives from Two States	513
a. Michigan: Outside Money Pouring in before <i>Citizens United</i>	513
b. North Carolina: the Influence of the Super PACs	514
3. Independent Spending Spills into Retention Races ...	515
IV. CONCLUSION.....	518

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I. INTRODUCTION

After *Citizens United v. FEC*,¹ fears echoed widely that the decision would lead to unprecedented sums of money flooding America's elections.² *Citizens United* held that limits on independent political expenditures by corporations and labor unions were unconstitutional.³ Two years later, the United States experienced the most expensive election in its history.⁴ At the federal, state, and local levels, the 2012 elections cost an astounding six billion dollars.⁵ Estimates indicate that independent groups accounted for more than one billion of that total, a dramatic increase from previous election cycles.⁶

Some suggested that *Citizens United* would touch all elections, including judicial campaigns.⁷ Historically, judicial elections have been low-key affairs with modest levels of spending, mostly coming from competing groups of attorneys in the state.⁸ But in the 39 states that elect at least some of their judges, the politically charged and costly character of modern judicial elections has far deeper roots than *Citizens United*.⁹ These roots stretch back as far as the 1980s and stem from the tort reform movement and "tough on crime" campaigns of that time. Since 2000, spending in judicial elections has increased considerably. Candidate fundraising in state supreme court races, for example, rose nearly 250 percent—from \$83.3 million to \$206.9 million—between the 1990s and 2000s.¹⁰

1. 558 U.S. 310 (2010).

2. See, e.g., President Barack Obama, State of the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (asserting that *Citizens United* would single-handedly "open the floodgates for special interests—including foreign corporations—to spend without limit in our elections").

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

4. Nicholas Confessore and Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES, Nov. 8, 2012, at A1.

5. *Id.*

6. *Total Outside Spending by Election Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=Y&chart=N (last visited July 9, 2013).

7. See, e.g., Matt Bai, *How Did Political Money Get This Loud?*, N.Y. TIMES, July 17, 2012, at MM14.

8. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1393–94 (2001).

9. JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE 99 (Charles Hall ed., 2010) [hereinafter NPR DECADE], available at http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

10. NPR DECADE, *supra* note 9, at 1.

Now, two full election cycles removed from *Citizens United*, trends suggest that although *Citizens United* did not single-handedly transform state judicial elections, state court races throughout the country continue to feel the impact of the decision. Many of the trends that predated *Citizens United* have continued, and spending on judicial elections remains high. In 2012, candidates raised just over \$29.8 million.¹¹ Together, independent groups and candidates spent \$29.7 million on television advertising, setting a new record and continuing the recent emphasis on television spending in judicial races.¹² Once again, a select cadre of big spenders continued to dominate state judicial races, with the top ten spenders nationwide pouring in nearly \$2 million apiece.¹³

Two important trends have emerged since *Citizens United*. First, as independent groups play an increasingly large role, money has seeped out of candidates' campaign coffers. In the 2011–12 biennium, independent groups accounted for 61 percent of spending on television advertising.¹⁴ Although independent groups accounted for 52.3 percent of spending in the 2008 election, they previously had not made up a majority of the television advertising spending in any prior two-year election cycle in the 2000s.¹⁵ In fact, in 2002 independent groups' share of television advertising spending was just

11. ALICIA BANNON ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–12: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS [hereinafter NPR 2011–12]. This issue went to press prior to the report being made available to the public. The editors of the Willamette Law Review have not had an opportunity to review this report. The report will be made available to the public in early September 2013. Readers wishing to view this report may direct questions to the authors of this article or may find the report, upon publishing, at www.newpoliticsreport.org.

12. *Id.*

13. *Id.*

14. *Id.*

15. NPR DECADE, *supra* note 9, at 29; JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS ARE FIGHTING BACK 3 (Jesse Rutledge ed., 2007) [hereinafter NPR 2006], available at http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf; DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT”—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 6–7 (Jesse Rutledge ed., 2005) [hereinafter NPR 2004], available at http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFB D7C43A3.pdf; DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS, HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002, 8 (Bert Brandenburg ed., 2004) [hereinafter NPR 2002], available at http://www.justiceatstake.org/media/cms/NewPoliticsReport2002_CDB5276C31D15.pdf.

28.5 percent.¹⁶

The shift of campaign cash toward independent television advertisements is particularly troubling because these groups go to great lengths to conceal the sources of their funding¹⁷ and sponsor an alarming number of misleading attack ads that reduce public confidence in the courts.¹⁸ In 2010, for example, candidates sponsored 20,296 of 37,252 total television spots—just under 60 percent.¹⁹ But candidates paid for only a small portion of attack ads; independent groups accounted for nearly three in four attack ads in 2010, while candidates sponsored only 27 percent.²⁰

The impact of these advertisements has been particularly clear in Wisconsin. Independent spending—mostly on attack ads—has dominated the Wisconsin airwaves in recent years, totaling nearly \$3.4 million on television advertisements in 2008²¹ and \$3.6 million in 2011.²² Those attack ads have helped severely deteriorate the reputation of the Wisconsin Supreme Court; a 2011 opinion survey showed 33 percent of Wisconsin voters approved of the Wisconsin Supreme Court's work, down from 52 percent in 2008.²³ In the same 2011 survey, 88 percent said they were at least somewhat concerned that increased spending and the deteriorating tone of their state's judicial elections were compromising the fairness and impartiality of Wisconsin courts.²⁴

In the second trend post-*Citizens United*, money has begun to pour into judicial retention races as independent groups spend heavily

16. NPR 2002, *supra* note 15, at 8.

17. See ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009–2010: HOW SPECIAL INTEREST “SUPER SPENDERS” THREATENED IMPARTIAL JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ATTACKS ON AMERICA’S COURTS 12 (Charles Hall ed., 2011) [hereinafter NPR 2009–10], available at <http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf>.

18. See NPR DECADE, *supra* note 9, at 31–32.

19. NPR 2009–10, *supra* note 17, at 16.

20. NPR 2009–10, *supra* note 17, at 16.

21. NPR DECADE, *supra* note 9, at 29.

22. NPR 2011–12, *supra* note 11.

23. JUSTICE AT STAKE, 2011 20/20 INSIGHT WISCONSIN POLL (CONFIDENCE IN WI SUPREME COURT) 2 (2011), http://www.justiceatstake.org/media/cms/WI_Merit_Poll_Results_734DCFE0AA5C8.pdf (last visited July 25, 2013); JUSTICE AT STAKE, 2008 WISCONSIN PUBLIC OPINION POLL ON PUBLIC FINANCING 3 (2008), http://www.justiceatstake.org/media/cms/AmView_Wisconsin_Statewide_Toplines_4BAC7C24F248C.pdf (last visited July 25, 2013).

24. 2011 20/20 INSIGHT WISCONSIN POLL (CONFIDENCE IN WI SUPREME COURT), *supra* note 23, at 3.

to unseat justices.²⁵ The 2010 retention elections in Iowa sent shockwaves throughout the nation. Independent groups spent close to \$1 million to unseat three Iowa Supreme Court Justices for their decision in *Varnum v. Brien*,²⁶ which provided marriage rights to same-sex Iowa couples.²⁷ Remarkably, Iowa ranks as only the third most expensive retention election since *Citizens United*. In 2010, Justice Thomas Kilbride of Illinois fundraised heavily to retain his seat, and in 2012, supporters of three justices of the Florida Supreme Court needed several million dollars in independent expenditures to thwart a retention challenge.²⁸

By examining spending trends on judicial elections since 2000, this article seeks to explain how *Citizens United* exacerbated existing trends related to judicial election spending and how it has helped increase the influence of independent groups and dark money on these races. Part II of this article describes *Citizens United* and the *SpeechNow.org v. FEC*²⁹ decision that followed it. Part III looks at how judicial election spending has evolved over time. It also examines how this spending changed after *Citizens United* and how it stayed the same, focusing in particular on examples from two states: Michigan and North Carolina. Finally, Part IV examines the impact *Citizens United* may have had on judicial retention races around the country. The article concludes by offering some reform options for states seeking to protect the fairness and impartiality of their court systems.

II. BACKGROUND

Citizens United and *SpeechNow.org v. FEC*³⁰ are two critical Supreme Court decisions that have helped transform electoral politics at all levels, even though their focus was on federal law. Although state laws, by and large, were not as restrictive as federal regulations of campaign finance, *Citizens United* has certainly exacerbated spending trends in state elections. In addition to opening the door to

25. In retention races, voters cast ballots to decide whether to return an incumbent judge to the bench for another term or whether to remove the judge from office.

26. 763 N.W.2d 862 (Iowa 2009).

27. NPR 2009–10, *supra* note 17, at 8.

28. NPR 2009–10, *supra* note 17, at 8, 20; NPR 2011–12, *supra* note 11.

29. 599 F.3d 686 (D.C. Cir. 2010).

30. Because their impact on campaign finance issues discussed in this article are intertwined, *Citizens United* and *SpeechNow.org* are referred to collectively as “*Citizens United*” throughout this article.

increased spending in federal elections, *Citizens United* significantly transformed the role and spending power of independent groups throughout the political system, notably in judicial elections.

A. *Citizens United v. FEC*

Citizens United held that the First Amendment bars limits on corporate independent expenditures for engaging in express political advocacy.³¹ *Citizens United*, a nonprofit corporation, sought to release a 90-minute documentary that criticized Democratic presidential candidate Hilary Clinton.³² The corporation wanted to make the documentary available through video-on-demand and wished to avoid restrictions on using its general treasury funds to pay for advertising and distribution.³³ Because the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b, placed limits on corporate independent expenditures, *Citizens United* sought declaratory relief.³⁴

The Court sided with *Citizens United*, ruling that “[t]he [g]overnment may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”³⁵ The Court reasoned that BCRA’s restrictions on corporate independent expenditures were subject to strict scrutiny, which required the government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”³⁶ The government advanced several interests in support of the restriction: (1) it reduced the distorting influence of deep-pocketed corporations;³⁷ (2) it prevented corruption and the appearance of corruption;³⁸ and (3) it prevented dissenting shareholders from being compelled to speak.³⁹ The Court disagreed with all three of these arguments, rejecting the anti-distortion and shareholder protection rationales and concluding that independent expenditures “do not give rise to corruption or the appearance of corruption.”⁴⁰ The Court

31. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

32. *Id.* at 319.

33. *Id.* at 320–21.

34. *Id.* at 321.

35. *Id.* at 319.

36. *Id.* at 340.

37. *Id.* at 348.

38. *Id.* at 356.

39. *Id.* at 361.

40. *Id.* at 357, 361–62.

therefore held that restrictions on independent expenditures failed to survive strict scrutiny.⁴¹

B. SpeechNow.org v. FEC

While *Citizens United* opened the door to unlimited corporate and union independent expenditures, it was not until *SpeechNow.org v. FEC* that individuals could engage in unlimited independent expenditures. SpeechNow, an unincorporated nonprofit association, promoted free speech rights and provided support to like-minded candidates.⁴² It sought to receive unlimited individual contributions for the purposes of making electioneering communications, in spite of §441a of the BCRA's limits on such contributions.⁴³ SpeechNow challenged these limits under the Supreme Court's ruling and rationale in *Citizens United*.⁴⁴

The D.C. Circuit Court of Appeals found in favor of SpeechNow. The court concluded that individual contributions to political committees for the purposes of sponsoring independent expenditures cannot be limited.⁴⁵ The court reasoned that because independent expenditures do not give rise to corruption or its appearance, contributions to groups for this purpose also "cannot corrupt or create the appearance of corruption."⁴⁶ Taken together with *Citizens United*, *Speechnow.org* is credited with the creation of the Super PAC.⁴⁷

III. THE RISE IN INDEPENDENT SPENDING ON JUDICIAL ELECTIONS

A. Before 2000: Origins of the Growth in Judicial Election Spending

Spending on judicial elections began to rise long before *Citizens United*. In fact, several observers have noted that the 1980s inaugurated the contentious and costly judicial elections of today.⁴⁸

41. *Id.* at 365.

42. *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010).

43. *Id.*

44. *Id.* at 692–93.

45. *Id.* at 694–95.

46. *Id.* at 694.

47. See FEC ADVISORY OP. (2010), available at http://www.fec.gov/members/walther/statements/STW_AO_2010-09_Club_for_Growth_and_AO_2010-11_Commonsense_Ten.pdf.

48. See generally Champagne, *supra* note 8; Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011) (internal citation omitted).

Tort reform became a hot-button issue, particularly in Texas, and the issue transformed Texas's judicial campaigns into "unprecedentedly costly, heated races."⁴⁹ Trial lawyers began spending heavily on Texas Supreme Court races, and money from civil defense interests soon followed.⁵⁰ Judicial candidates began to take specific stands on tort liability issues, attracting contributions from pro-business groups and other advocates in favor of changing tort liability standards.⁵¹ Texas's early experience, it turned out, would become the national norm rather than the exception.⁵²

B. Spending Explodes in the 2000s, Before Citizens United

1. Spending trends in the early 2000s

Battles between interest groups led to the explosion of judicial campaign spending in the 2000s. Between 1990 and 1999, candidates for state supreme court seats raised \$83.3 million.⁵³ In the next decade, that number ballooned to \$206.9 million.⁵⁴ By the 1999–2000 biennium, candidate fundraising rose to nearly \$46 million.⁵⁵ Fundraising stayed near that level in 2003–04 and 2007–08, with \$46.1 million and \$45.6 million raised, respectively. Fundraising also rose during nonpresidential election cycles—which consistently have lower fundraising totals than presidential cycles⁵⁶—with \$29.7 million raised in 2001–02 and \$33.2 million raised in 2005–06.⁵⁷ By contrast, interest groups raised only \$5.9 million in 1989–90 and \$9.5 million in 1991–92.⁵⁸

The 2000s also saw a new emphasis on television advertising in judicial races. Candidates and independent groups spent \$8.4 million on television advertising in 2002.⁵⁹ By 2006, that number nearly doubled to \$16.1 million.⁶⁰ Presidential election cycles also saw a

49. Kang & Shepherd, *supra* note 48, at 70, 81.

50. *Id.*

51. *Id.*

52. Champagne, *supra* note 8, at 1395.

53. NPR DECADE, *supra* note 9, at 1.

54. *Id.*

55. *Id.* at 5.

56. NPR 2009–10, *supra* note 17, at 3.

57. NPR DECADE, *supra* note 9, at 5.

58. *Id.*

59. NPR 2002, *supra* note 15, at 8.

60. NPR 2006, *supra* note 15, at 3.

huge increase on television advertising expenditures. In 2004, \$24.4 million was spent on television advertising,⁶¹ and in the 2007–08 biennium, that number rose slightly to \$26.6 million.⁶²

At first, candidates funded over half of the total spent on television advertising, ranging from 71.5 percent in 2002⁶³ to 50.9 percent in 2004.⁶⁴ By 2008, however, a shift emerged and independent spenders began to dominate the airwaves. Independent groups spent an unprecedented \$10.4 million on television advertising in 2008.⁶⁵ Candidates, meanwhile, spent only \$9.5 million.⁶⁶ In total, 52.3 percent of television advertisements in 2008 came in the form of independent expenditures.

2. The Rise of Super-Spenders in the 2000s

Prior to *Citizens United*, a select cadre of elite spenders—deemed “super-spenders”⁶⁷—and interest groups came to dominate judicial campaign spending. The U.S. Chamber and other national business interests poured money into judicial elections to unseat candidates deemed “unsympathetic” to business and promote “pro-legal reform judicial candidates.”⁶⁸ Plaintiffs’ lawyers responded in turn and spent more on their favored judicial candidates, leading to an even more elevated arms race of spending in judicial elections.⁶⁹ Businesses accounted for \$62.5 million of the \$206.9 million contributed to candidates from 2000 to 2009, while lawyers and lobbyists accounted for \$59.3 million.⁷⁰ Together these warring factions accounted for over half of the contributions to state supreme court candidates, while no other interest group spent over \$25 million.⁷¹

The emergence of these “super-spenders” marked four elections in particular during the early 2000s. The U.S. Chamber of Commerce

61. NPR 2004, *supra* note 15, at 6–7.

62. NPR DECADE, *supra* note 9, at 24.

63. NPR 2002, *supra* note 15, at 8.

64. NPR 2004, *supra* note 15, at 6–7.

65. NPR DECADE, *supra* note 9, at 26.

66. *Id.*

67. *Id.* at 9.

68. *Id.* at 41 (quoting 2002 speech from Thomas Donohue, president of the U.S. Chamber of Commerce).

69. *Id.*

70. *Id.* at 8.

71. *Id.*

and its Ohio affiliates spent \$4.4 million in Ohio in 2000. The Alabama Democratic Party, with the backing of plaintiffs' lawyers, spent \$2.4 million in 2000. In 2004, the Illinois Democratic Party, also with plaintiffs' lawyers' support, spent \$2.8 million battling the Illinois Republican Party, who, in turn, spent \$1.9 million. Don Blankenship infamously spent \$3 million of his own money in 2004 to win one seat on the West Virginia Supreme Court. His spending laid the groundwork for the eventual Supreme Court decision in *Caperton v. Massey*,⁷² which ruled that Blankenship's high spending was so extreme that it created a right to recusal under the Due Process Clause of the U.S. Constitution.⁷³

Super-spenders exerted their influence on 29 elections from 2000 to 2009, with the top five spenders in each of those races—145 in all—spending \$68.7 million.⁷⁴ In contrast, the other 116,600 donors in those same 29 races spent a total of \$99.2 million.⁷⁵ The average super-spender spent \$473,679, while the average donation from a nonsuper-spender was \$850.⁷⁶

The 2000 Ohio Supreme Court election exemplifies the high level of spending by independent groups that emerged in the 2000s. David Goldberger described the Ohio race as:

[T]he first judicial campaign where a well-funded interest group operating completely independently, spent millions of dollars more than all of the candidates combined, and inundated the entire judicial election campaign with messages supporting or opposing specific candidates.⁷⁷

The interest group that Goldberger referred to was the U.S. Chamber, which along with its partners, spent at least \$5 million (an unprecedented amount for a single judicial race) on TV ad campaigns in order to unseat incumbent Justice Alice Robie Resnick.⁷⁸ Justice Resnick had authored opinions and cast crucial votes in a series of

72. 556 U.S. 868 (2009).

73. NPR DECADE, *supra* note 9, at 10.

74. *Id.*

75. *Id.*

76. *Id.*

77. David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN. L. REV. 1, 4 (2003).

78. *Id.* at 6.

decisions that the Chamber disagreed with, including decisions that invalidated a comprehensive tort reform statute and that expanded personal liability for supervisors in employment discrimination cases.⁷⁹

Because the U.S. Chamber's electioneering communications were not subject to Ohio's campaign finance regulations, its spending rocketed. The Chamber successfully persuaded the Ohio Election Commission (OEC) that its issues ads were merely "abstract issue advocacy" that did not tell the public how to vote; therefore, restrictions on independent political spending from corporate treasuries did not apply.⁸⁰ With the spending restrictions lifted, the Chamber continued to pour money into the race. One tactic included forming a nonprofit organization through which to run negative ads targeting Justice Resnick.⁸¹ The Chamber funded a nonprofit organization called Citizens for a Strong Ohio during the election, which was nominally independent of political advocacy.⁸² Taking advantage of the OEC ruling, the Chamber spent \$4.4 million on unregulated issue advertisements through Citizens for a Strong Ohio.⁸³ To viewers, those ads resembled political attacks ads more than anything else.⁸⁴

C. After Citizens United: What Changed?

1. Trends in Judicial Election Spending After *Citizens United*

Many of the spending trends that emerged before *Citizens United* remained after the decision: overall spending totals remained high, judicial election campaigns spent heavily on television advertising, and super-spenders loomed large. In 2009–10, candidate fundraising and independent television spending totaled \$38.5 million, compared with just over \$39 million four years earlier.⁸⁵

79. *Id.*

80. *Id.* at 10.

81. Kara Baker, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159, 160 (2001).

82. THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES 2000–2008, 10 (Jesse Rutledge ed., Justice at Stake Campaign 2008) [hereinafter NPR GREAT LAKES STATES].

83. NPR DECADE, *supra* note 9, at 41.

84. NPR GREAT LAKE STATES, *supra* note 82, at 10.

85. NPR 2009–10, *supra* note 17, at 5, 15; NPR 2006, *supra* note 15, at 3, 5.

Television spending rose just slightly, from \$16.1 million in 2006 to \$16.8 million in 2009–10.⁸⁶ The top ten spenders in 2009–10 averaged \$1.49 million in candidate contributions and independent expenditures.⁸⁷

Little changed in the 2011–12 biennium. Candidate fundraising and independent television spending combined were \$51.9 million, compared with \$58.2 million in 2007–08.⁸⁸ Television spending rose from a total of \$26.6 million in 2007–08 to \$33.7 million in 2011–12.⁸⁹ Television spending in 2011–12 actually set a new two-year record.⁹⁰ Yet again, the top ten spenders in 2011–12 spent an average of \$1.95 million each.⁹¹

Perhaps unsurprisingly, one important aspect of judicial campaign spending did change after *Citizens United*—money began to shift hands from candidates to independent groups. In 2009–10, candidate fundraising fell to just over \$27 million.⁹² This number is well below the \$33.2 million candidates raised four years earlier.⁹³ Meanwhile, independent television spending rose to \$11.5 million,⁹⁴ up from just \$5.8 million in 2006.⁹⁵ Of the total spent on television in 2009–10—\$16.8 million—over two-thirds were independent expenditures.⁹⁶ Independent groups spent \$11.5 million on television advertising in 2009–10—over 68 percent of the total for the biennium.⁹⁷

These trends continued in 2011–12. Candidate fundraising fell to just under \$32 million,⁹⁸ far below the \$45.7 million candidates had raised four years earlier.⁹⁹ Meanwhile, independent television spending jumped to \$20.7 million,¹⁰⁰ up from just \$12.6 million in 2007–08. As in the previous two-year cycle, in 2011–12 more than

86. NPR 2009–10, *supra* note 17, at 15; NPR 2006, *supra* note 15, at 3.

87. NPR 2009–10, *supra* note 17, at 6.

88. NPR 2011–12, *supra* note 11; NPR DECADE, *supra* note 9, at 5, 29, 36.

89. NPR 2011–12, *supra* note 11; NPR DECADE, *supra* note 9, at 24.

90. NPR 2011–12, *supra* note 11.

91. *Id.*

92. NPR 2009–10, *supra* note 17, at 5.

93. NPR DECADE, *supra* note 9, at 5.

94. NPR 2009–10, *supra* note 17, at 3.

95. NPR 2006, *supra* note 15, at 3.

96. NPR 2009–10, *supra* note 17, at 3, 15.

97. *Id.*

98. NPR 2011–12, *supra* note 11.

99. NPR DECADE, *supra* note 9, at 5.

100. NPR 2011–12, *supra* note 11.

60 percent of television spending came in the form of independent expenditures.¹⁰¹ Independent groups spent \$20.7 million of the total \$33.7 million in television advertising in 2011–12—over 61 percent of the total for that biennium.¹⁰²

2. What Changed? Perspectives from Two States

North Carolina and Michigan are two states that illustrate how *Citizens United* both did and did not change spending trends in judicial elections. In Michigan’s case, *Citizens United* accelerated an already high rate of spending by independent groups within the state. At the same time, in North Carolina independent spenders quickly reemerged as dominant factors in judicial races.

a. Michigan: Outside Money Pouring in before *Citizens United*

Michigan exemplifies how *Citizens United* accelerated the movement of independent money into judicial races. In 2000, outside money began to flow into Michigan’s Supreme Court elections. From 1984 to 1998, candidates were responsible for nearly all of the spending: they raised and spent \$12.5 million across 18 races—an average of about \$768,000 per seat.¹⁰³ During the same period, independent groups spent \$1.3 million on state supreme court elections, less than ten percent of the total.¹⁰⁴ In 2000, six major candidates fought for three seats on the supreme court and spending exploded.¹⁰⁵ Candidates raised \$6.8 million, while independent groups spent \$9.1 million,¹⁰⁶ a 57 percent increase.¹⁰⁷ Independent spending then hovered around \$1 million to \$2 million per election until 2008 when it suddenly jumped to \$4.8 million.¹⁰⁸

Citizens United seems to have reopened the floodgates in Michigan. In 2010, independent groups spent close to \$8.8 million, which was 78 percent of the total spent on state supreme court races that year and was the highest amount of the 2000s.¹⁰⁹ In 2012,

101. *Id.*

102. *Id.*

103. MICH. CAMPAIGN FINANCE NETWORK, \$70 MILLION HIDDEN IN PLAIN VIEW 4 (2011), available at http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf.

104. *Id.* at 4.

105. *Id.* at 4–5.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

Michigan had its most expensive state supreme court race ever,¹¹⁰ with spending reaching a total of \$18.6 million.¹¹¹ Candidates spent a mere \$3.4 million in 2012 while independent groups spent \$15.1 million.¹¹² The share of independent spending rose to an all-time high of 81 percent, a sharp contrast to the small role that independent groups played in the 1990s.¹¹³

b. North Carolina: the Influence of the Super PACs

North Carolina experienced its first multi-million dollar state supreme court race in 2002.¹¹⁴ After that election, the state established a public financing program for its state appellate elections.¹¹⁵ From 2004 to 2008, 31 of the 40 eligible candidates participated in the program.¹¹⁶ In 2006, only five of eight candidates took part in the public financing program, and independent groups spent \$272,715 on television advertising.¹¹⁷ Otherwise, between when the state adopted the program and 2012, not a single dollar of independent money went into the North Carolina Supreme Court elections.¹¹⁸

In 2012, for the first time, every candidate for an appellate court seat in North Carolina participated in the state's public financing program.¹¹⁹ Nevertheless, independent groups dominated the airwaves in the state supreme court race between incumbent Justice Paul Newby and his challenger, Judge Sam Ervin IV. Although both candidates participated in the state's public financing program, a Super PAC called the North Carolina Judicial Coalition played a substantial role in the 2012 race.¹²⁰ The North Carolina Judicial

110. *2012 Supreme Court Race Was State's Most Expensive, Least Transparent Ever*, MICH. CAMPAIGN FINANCE NETWORK (Feb. 21, 2013), <http://www.mcfn.org/press.php?prId=173>.

111. *Id.*

112. *Id.*

113. *Id.*

114. NPR DECADE, *supra* note 9, at 82.

115. *Id.*

116. *Id.* at 69.

117. *See* NPR 2006, *supra* note 15, at 3.

118. *Id.*

119. *LOD: Candidates Rewarded for Good*, DEMOCRACY N. CAROLINA (May 24, 2012), <http://www.democracy-nc.org/2012/05/24/lod-candidates-rewarded-for-good>.

120. Craig Jarvis, *Super Pac Funds Pour Into Newby's Campaign for N.C. Supreme Court*, THE CHARLOTTE OBSERVER (Oct. 26, 2012), <http://www.charlotteobserver.com/2012/10/26/3622735/super-pac-funds-pour-into-newbys.html>.

Coalition alone spent nearly \$2.9 million in support of Justice Newby's reelection.¹²¹ In total, independent groups drove television spending in North Carolina to over \$3.5 million.¹²² This \$3.1 million significantly outpaced the \$480,200 that the state's public financing program gave to the candidates.¹²³

The prominence of just one Super PAC in the state's supreme court race indicated a significant development in judicial elections. Before *Citizens United*, there were already concerns that judges would decide cases in favor of their large campaign donors. For instance, a 2011 survey of North Carolinians found that 83 percent felt that campaign contributions were at least somewhat likely to influence a judge's decisions.¹²⁴ After *Citizens United*, independent groups and Super PACs have found new avenues to pressure judges and sap public confidence in their impartiality. Justice Newby's campaign against Judge Ervin may be an example of this tactic.

According to one state filing report, the North Carolina Judicial Coalition accepted a \$100,000 contribution from R.J. Reynolds Tobacco Company on October 16, 2012. The Super PAC had run ads expressly supporting Justice Paul Newby's reelection bid.¹²⁵ R.J. Reynolds likely felt a debt of gratitude toward Justice Newby, who had authored the majority opinion in a decision that sided with R.J. Reynolds in a dispute over settlement payments to tobacco growers.¹²⁶ Meanwhile, this significant outside expenditure to support Justice Newby's successful reelection effort raises troubling questions about the debt Justice Newby may feel he now owes to R.J. Reynolds.

3. Independent Spending Spills into Retention Races

Aside from two notable exceptions,¹²⁷ judicial retention elections

121. NPR 2011–12, *supra* note 11.

122. *Id.*

123. *Id.*

124. JUSTICE AT STAKE, 2011 20/20 INSIGHT NORTH CAROLINA POLL 2 (2011), http://www.justiceatstake.org/media/cms/q165__freq_limited_release_9E72F4684EB8B.pdf (last visited July 25, 2013).

125. N. CAROLINA DISCLOSURE FILING REPORT 7 (October 29, 2012), *available at* http://www.app.sboe.state.nc.us/webapps/cf_rpt_search_org/cf_report_image.aspx?DID=156681.

126. Chris Kromm, *Justice For Sale?*, INST. FOR S. STUDIES (Oct. 30, 2012), <http://www.southernstudies.org/2012/10/justice-for-sale-backers-of-shadow-groups-pushing-money-into-nc-judicial-election-may-have-h>.

127. In California in 1986, voters ousted three justices: Joseph R. Grodin, Cruz

before 2010 were sleepy affairs, immune to big-money politics.¹²⁸ Then, the 2010 contest in Iowa sent shockwaves throughout the nation. Voters removed three justices, including the Chief Justice, from the Iowa Supreme Court.¹²⁹ Special interest groups targeted these justices for their decision in *Varnum v. Brien*, which ruled that Iowa's Defense of Marriage Act was unconstitutional under the Equal Protection Clause of the Iowa Constitution.¹³⁰ Their opponents spent close to \$1 million to unseat these justices—all in the form of independent expenditures—with groups from outside Iowa spending more than \$900,000.¹³¹ Largest among these groups was the National Organization for Marriage, which spent \$635,000, placing it among the top ten super-spenders for the 2009–10 election cycle.¹³² The three justices of the Iowa Supreme Court did not raise money to campaign for their seats.¹³³

While more well known, Iowa was not the most expensive retention race in 2010; that distinction went to Justice Thomas Kilbride's race in Illinois.¹³⁴ Kilbride was the target of the nation's costliest anti-retention campaign since the campaign that unseated California Chief Justice Rose Bird and her colleagues in 1986.¹³⁵ The Illinois Civil Justice League—a group funded by three historic super-spenders: the U.S. Chamber, the American Tort Reform Association, and the American Justice Partnership—spent \$688,000 to unseat Kilbride.¹³⁶ Kilbride responded aggressively and raised \$2.8 million to campaign for his seat.¹³⁷ Most of Kilbride's cash came from major plaintiffs' firms, who routed their donations through the Illinois Democratic Party.¹³⁸ Like the National Organization for Marriage, the Illinois Civil Justice League and the Illinois Democratic Party

Reynoso, and Rose Bird. A multi-million dollar campaign targeted these justices for being soft on crime and for failing to uphold the death penalty. In 1996 in Tennessee, voters ousted Justice Penny White after conservative activists aimed at her for being soft on crime. See generally James Sample, *Retention Elections 2.010*, 46 U.S.F. L. Rev. 383 (2011).

128. NPR 2009–10, *supra* note 17, at 7.

129. *Id.* at 7–9.

130. *Id.* at 8.

131. *Id.*

132. *Id.* at 6, 8.

133. *Id.* at 8.

134. *Id.*

135. *Id.*

136. *Id.* at 8, 20.

137. *Id.*

138. *Id.*

ended the 2009–10 cycle among the top ten super-spenders.¹³⁹

Whether the events in Iowa and Illinois in 2010 portended a new reality or were a flash in the pan is not immediately clear.¹⁴⁰ The 2012 retention race in Florida suggests the former. In 2010, a tea-party group called Restore Justice unsuccessfully urged their supporters to vote no in an attempt to unseat two of the four justices on the ballot. The group returned in 2012 and, in a series of web videos, criticized all three justices on the ballot—R. Fred Lewis, Peggy Quince, and Barbara Pariente—for so-called “judicial activism.”¹⁴¹ Americans for Prosperity, a national group, joined the Restore Justice effort, spending \$155,000 on television advertising and other advocacy urging voters to unseat the justices.¹⁴² The state Republican Party also endorsed a no vote.¹⁴³

Having observed the efforts of Restore Justice in 2010, supporters of three justices on the 2012 ballot began to organize well in advance.¹⁴⁴ Unlike the Iowa justices in 2010, all three campaigned and raised money.¹⁴⁵ Each raised approximately \$500,000, a collective total to \$1.5 million.¹⁴⁶ Their supporters also formed a group called Defend Justice from Politics, which spent heavily on television advertising in support of the justices.¹⁴⁷ They raised and spent \$3.1 million on independent expenditures on behalf of the justices.¹⁴⁸ For the first time, an independent group supporting retention of a sitting judge was among the top ten super-spenders in a two-year election cycle.¹⁴⁹

139. *Id.* at 6.

140. *Compare* Sample, *supra* note 127, at 423–24 (suggesting future retention races would see spending similar to Iowa and Illinois in 2010), *with* Grant Schulte, *Remaining Four Justices Could Face Ouster Efforts*, DES MOINES REGISTER, Nov. 6, 2010, at A1 (“Election-watchers say the three [unseated justices] fell victim to a perfect storm.”).

141. *See, e.g.*, Mary Ellen Klas, *Restore Justice 2012 Says Its Launching TV Ad Aimed at Opposing Justices*, TAMPA BAY TIMES (Oct. 1, 2012), <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/restore-justice-2012-says-its-launching-tv-ad-aimed-opposing-justices>.

142. NPR 2011–12, *supra* note 11.

143. *See* Chris McGreal, *Florida Republicans Wage Campaign to Oust Judges from State Supreme Court*, THE GUARDIAN (Oct. 29, 2012), <http://www.theguardian.com/world/2012/oct/29/florida-gop-state-supreme-court-campaign>.

144. *See* NPR 2009–10, *supra* note 17, at 8.

145. NPR 2011–12, *supra* note 11.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

IV. CONCLUSION

The trajectory of spending in judicial elections suggests that independent expenditures may routinely outstrip candidate spending in the future as partisans and special interests seek to exert their influence over American courts. A rise in independent spending will subsequently increase efforts to hide its sources. Additionally, because independent spenders have proven more likely to engage in the practice, misleading attack advertisements will grow in frequency, making it more difficult for voters in judicial elections to separate truth from fiction. Recent cycles suggest that this tactic can be expected for contested judicial elections and retention elections alike.

Advocates for fair and impartial courts have presented several imperfect options as they seek to protect courts from the negative influence of independent election spending by special interests and partisan independent election spending:

MERIT SELECTION. When a judicial vacancy arises in a merit selection state, a citizen nominating commission made up of lawyers and nonlawyers screens candidates and submits a short list of qualified nominees to the governor, who then appoints one. In many—but not all—merit selection systems, sitting judges then face periodic retention elections. These systems gained national popularity in the 1960s and 1970s,¹⁵⁰ but in the last three decades, voters have rejected moving from elections to appointive systems when given the option.¹⁵¹ Additionally, recent spending on retention races raises real questions about their continued wisdom.

IMPROVED DISCLOSURE LAWS. Financial disclosure laws give the public information about who is spending money in elections. Ideally, independent spending would be disclosed quickly and in searchable online databases. But even though the Court ruled 8-1 in *Citizens United* that disclosure laws are constitutional, many state legislatures have been indifferent—and at times, openly hostile—to improving disclosure requirements.¹⁵²

VOTER INFORMATION GUIDES. Most Americans are not engaged in the judicial system, and this lack of engagement can lead to low voter participation in judicial races. This lack of engagement provides special interests an opportunity to gain the upper hand with a

150. NPR DECADE, *supra* note 9, at 70.

151. Sample, *supra* note 127, at 424.

152. NPR DECADE, *supra* note 9, at 69–70.

relatively small number of votes, using misleading advertisements to energize and turn out their supporters. Voter guides can help fill the information void and expand the base of ordinary voters. Voters have expressed a desire for more information, and, in a 2004 survey, 67 percent said reliable, nonpartisan guides would make them more likely to vote in judicial elections.¹⁵³ One limitation, however, is that while voters express a desire for more information, the information voters really want is how judges will rule in specific cases that could come before them.

JUDICIAL PERFORMANCE EVALUATIONS (JPEs). Similar to voter guides, judicial performance evaluations provide objective feedback about judges' performance that helps voters decide whether they are fit for office.¹⁵⁴ Nine states currently conduct government-run JPE programs that provide feedback to judges from lawyers, witnesses, jurors, and others who come into contact with them.¹⁵⁵

None of these options can completely eliminate the negative influences of independent spending in judicial races. Only a complete cultural shift in the way political campaigns are conducted, the elimination of judicial elections altogether, or a reversal of *Citizens United* can accomplish that. But each of these options can help ensure that voters and other deciders choose judges in a way that makes courts more fair and impartial.

153. *Id.* at 70.

154. *Id.*

155. *Id.*