JUDICIAL ELECTIONS IN THE WAKE OF CITIZENS UNITED: HOW INCREASED SPENDING IS DEGRADING PUBLIC CONFIDENCE IN STATE JUDICIARIES

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INTRODUCTION

For more than a century, judicial elections have spurred debate, criticism, and controversy. Much of the controversy surrounding judicial elections involves the increasing cost of judicial campaigns. Some commentators and scholars argue that campaign spending “weaken[s] the principle of fair and impartial courts” because “justice goes to the highest bidder.” One scholar has argued that the influence of money on judicial elections has resulted in an “unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve and to retain judicial office.” However, other commentators and scholars have argued that increased spending in judicial campaigns benefits the public because increased spending raises citizens’ awareness of elections and encourages citizen participation in elections. This Paper explores these divergent opinions from a variety of vantage points, and concludes that judicial elections, at least those for the highest state court offices, impose a serious and ongoing threat to the impartiality of state judiciaries. Although some states have

1 Emily Nowlin and Nick Belair are members of the Boston University School of Law class of 2013.
6 CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 46 (2009).
made efforts to curb the potential threats, including strong disclosure laws and more robust recusal procedures, these efforts have done little to stem the tide of campaign contributions that has been pouring into judicial elections in recent years.

In Part I, this Paper first considers judicial elections from an historical perspective, and traces the growth of state election systems from their modest beginnings in the first half of the nineteenth century to their near ubiquity in modern day. With the historical backdrop in mind, Part II explores the nature of judicial impartiality as it relates to the rule of law, and suggests that judicial elections pose a special threat to impartiality. Specifically, Part II argues that campaign rhetoric and financial contributions create actual and perceived biases among candidates for judicial office, and that those biases may subsequently influence an elected judge’s decision-making while on the bench. In support of these arguments, Part II considers a combination of scholarly and practical source material, including: the Model Code of Judicial Conduct, relevant Supreme Court precedent, public opinion polls, and a series of interviews with current and former judges from across the country.7

Beginning with Part III, this Paper examines trends in judicial campaign spending, specifically in high-level state court elections, which demonstrate significant growth of both candidate and special interest spending. Part IV recounts the 2010 case of Citizens United v. Federal Election Commission,8 which found state-imposed limits on campaign contributions to

7In preparation for this Paper, the authors interviewed three judges: Judge Chris Lee of the North Las Vegas District Court in Nevada, Judge Steven Plotkin of the Fourth Circuit Court of Appeal in Louisiana, and Judge Alex Sanders, former Chief Judge of the South Carolina Court of Appeals. The authors chose these judges based on their diverse backgrounds and experiences in states with highly varied judicial election and appointment systems. For example, Judge Plotkin hails from Louisiana, which is one of the few states to employ a partisan judicial election process. Judge Lee holds a position at trial level in Nevada, and his experiences shed some light on the differences between high-level and trial court elections. Judge Sanders has never participated in a judicial election because South Carolina is one of a dozen states to employ an appointment process in lieu of an election system, yet he shares many of the same concerns as his elected colleagues with respect to the importance of, and threats to, judicial impartiality.

8 558 U.S. 310 (2010).
be unconstitutional, and considers the decision’s impact on the American judiciary. In light of both the growing campaign budgets identified in Part III and *Citizens United*’s elimination of a contribution cap, Part V explores some potential solutions to mitigate public perceptions that ‘justice is for sale.’

I. THE HISTORY OF JUDICIAL ELECTIONS IN THE UNITED STATES

Though debate surrounding judicial elections has existed for years, the history of judicial elections sheds light on the current controversy. The Framers of the United States Constitution believed that judicial independence was necessary to insulate judges from the political process. Alexander Hamilton stated, “If the power of [selecting judges was committed] to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity.” Given this, at the beginning of the nation’s founding, states did not elect their judges. Instead, all thirteen states modeled their judicial selection processes on the federal government’s judicial appointment procedure. States initially preferred to appoint judges because states believed that if judges were free from the political process, judges would make

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9 Id. at 4.


independent and impartial decisions.\textsuperscript{14} This sentiment continued until 1812, when Georgia implemented the first judicial election system.\textsuperscript{15}

In 1829, Andrew Jackson’s ascension to the Presidency gave rise to Jacksonian Democracy, which in turn ushered in an era of judicial elections.\textsuperscript{16} Andrew Jackson believed in a fully representative form of government because “the majority is to govern.”\textsuperscript{17} As a result, Jackson sought to eliminate the Electoral College and to have the people directly elect U.S. Senators.\textsuperscript{18} Likewise, electing judges fit squarely within Jackson’s desire to form a truly democratic government. Jackson believed that states should elect their judges because judges should be accountable to the people and not to governors or legislatures.\textsuperscript{19} Jackson contended that the only way that the judicial branch could keep the other branches of government in check was if the judiciary was completely independent of both the executive and legislative branches of government.\textsuperscript{20} Therefore, if the people elected the judges, the judiciary would be independent and not beholden to the executive and legislative branches.\textsuperscript{21}

\textsuperscript{14} BONNEAU & HALL, supra note 6, at 5.
\textsuperscript{16} Id.; see also BONNEAU & HALL, supra note 6, at 5.
\textsuperscript{17} Shepherd, supra note 1, at 631 (citing HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 97 (1990) (quoting Andrew Jackson)).
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 632 (stating that Andrew Jackson believed that judges should be elected because “if judges were appointed . . . judges would shape their rulings to please the governors and legislators.”).
\textsuperscript{20} Id.
\textsuperscript{21} Id.
As Jackson delivered more democratic power to the people, states began implementing judicial election systems. In turn, new states that entered the union during that time tended to distrust judicial appointment systems, resulting in an influx of new states with election-based systems. The states that entered the Union during the Jacksonian era also distrusted a system of judicial appointments because they believed that appointed judges were “unrepresentative, unaccountable government officers.” Many states believed that appointed judges were unaccountable to the people, and thus were inconsistent with a democratic form of government. Electing judges became so prevalent that by the Civil War, twenty-four of the thirty-four states elected their judges. Following the Jacksonian era, the majority of states continued to adhere to the election process for selecting judges, and every state that entered the Union from 1832 to 1958 adopted a constitutional provision that allowed it to elect its judges.

Today, judicial elections remain the most popular method for selecting judges. Currently, thirty-eight states select their judges through a judicial election and only twelve states appoint their judges. In fact, 87% of all state judges are elected through some form of a judicial

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24 Id. at 631.

25 Streb, supra note 13, at 253-54.


27 Streb, supra note 13, at 254.

28 BONNEAU & HALL, supra note 6, at 6 (stating that Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Vermont, and Virginia are the only states that select state judges through an appointment process).
election, whether partisan or non-partisan.\textsuperscript{29} No other democratic nation in the world elects a comparable number of judges.\textsuperscript{30} Despite the prevalence of judicial elections in the United States, most elections tend to be relatively “sleepy events garnering little attention and involving relatively small sums of money.”\textsuperscript{31} Unlike legislative elections, early judicial elections did not involve fiery political rhetoric, and tended to be decided based on factors such as “candidates’ ethnicity, gender, or name familiarity.”\textsuperscript{32} During the twentieth century, judicial ethics rules often prohibited candidates from communicating political issues on the campaign trail or accepting campaign contributions.\textsuperscript{33} However, the style of judicial elections has radically changed since the 1970’s, and today, many judicial elections, specifically those involving high-level state courts,\textsuperscript{34} are high profile, high-stakes events.\textsuperscript{35}


\textsuperscript{31} Pozen, supra note 30, at 266, note 3 (quoting BRIAN Z. TAMANAH, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 185 (2006)).

\textsuperscript{32} Id. at 267.

\textsuperscript{33} Id.; but see Republican Party of Minnesota v. White, 536 U.S. 765, 785 (2002) (suggesting that judicial candidates in partisan elections were “touting party affiliations” long before the development of the Canons of Judicial Conduct”).

\textsuperscript{34} See, Brian K. Arbour & Mark J. McKenzie, Has the “New Style” of judicial campaigning reached lower court elections?, 93 JUDICATURE 150, 160 (2010) (concluding that “Lower court campaigns remain essentially “friends and family” affairs” and that lower court candidates “[focus] only on issues such as court administration, experience, and legal qualifications.”)

II. ELECTIONS AND THE THREAT TO JUDICIAL IMPARTIALITY

Consistent with Jacksonian conceptions of democracy, judicial elections ensure to some extent that judges remain accountable to the people, as opposed to the legislative or executive branches of state government.\(^{36}\) In this way, judicial election systems help maintain an independent judiciary. Unfortunately, independence is but one aspiration of United States judges, and despite the beliefs of early proponents of judicial elections, the modern style of elections has created multiple threats to an equally important aspiration, impartiality.\(^{37}\)

Judicial impartiality is a core value of the rule of law in American society.\(^{38}\) Sitting judges and justices, scholars, and the public all agree that judicial decision-making should be based on the law, as applied to the facts of a given case, rather than based on the personal bias of the sitting judge.\(^{39}\) Canon 1 of the Model Code of Judicial Conduct reflects this attitude, stating that “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”\(^{40}\) As Canon 1 suggests, judicial impartiality is measured in both subjective and objective terms. If a judge favors one party over another based on an actual, subjective bias, then that judge violates the rule

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\(^{36}\) See discussion supra Part II (detailing Jacksonian Democracy and the rise of judicial elections).

\(^{37}\) MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2010) (“A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary”); cf. MODEL CODE OF JUDICIAL CONDUCT R.4.2(C)(1) (“A judicial candidate in a partisan public election may . . . identify himself or herself as a candidate of a political organization”).


\(^{39}\) Erwin Chemerinsky, et al., Citizens United Impact on Judicial Elections, 60 DRAKE L. REV. 685, 696 (2012);

\(^{40}\) MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010).
of law because he has, under the color of law, unjustly taken something from the losing party.\footnote{For example, in a civil case that results in damages, the judge will have misappropriated the property of the losing party. Alternatively, in a criminal case that results in imprisonment, the judge will have denied the losing party of his or her liberty. Greene, supra note 38, at 886.} On the other hand, if the public, based on objective criteria, reasonably believes a judge to be biased in favor of one party over another, then that fact alone violates the rule of law because perceived bias has the effect of degrading public confidence in the judicial system.\footnote{Id; see also Vernon Palmer, The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors 6 (unpublished manuscript) (available at http://ssrn.com/abstract=1721665) (“The most important thing for us to remember,” he stated, “is that when dealing with citizens’ attitudes toward justice, perception is reality.”” (quoting a former Chief Justice of the Louisiana Supreme Court)).} In this way, the presence of actual or perceived bias has the effect of calling judicial impartiality into question in any given case. In the context of judicial elections, the two most obvious threats to judicial impartiality stem from political rhetoric on the campaign trail and private financial contributions to candidates.

A. Campaign Rhetoric

The Model Code of Judicial Conduct recognizes that judges must make decisions “based upon the law and the facts of every case,” rather than “upon the expressed views or preferences of the electorate.”\footnote{MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 1 (2010).} In furtherance of this objective, the Model Code mandates that “judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence or political pressure.”\footnote{Id.} During much of the twentieth century, many state Supreme Courts adopted judicial ethics rules that prohibited candidates from asserting party affiliations or communicating their political agenda on the campaign trail.\footnote{See discussion supra Part II} In such states, the conduct of
judicial candidates during the election season differed greatly from that of legislative candidates. Most fundamentally, the rules prohibited candidates from making promises or pledges about how they would decide a case that implicated an important political or legal issue. In turn, the rules prevented candidates from responding to inquiries about their politics, and in some instances prohibited candidates from announcing their positions on hotly-debated political issues. The underlying purpose of these rules was to shield judges from the political pressures inherent in a campaign for public office. Rather than decide cases based on what constituents might want or expect, these rules enabled an elected judge to be free of political pressure and to decide based on the rule of law, as applied to the facts of the case.

However, the 2002 Supreme Court decision in Republican Party of Minnesota v. White significantly changed the political landscape in judicial elections. In White, the Court struck down a Minnesota Supreme Court canon of judicial conduct, holding that “[the canon] prohibiting candidates for judicial election from announcing their views on disputed legal or political issues violates the First Amendment.” Applying strict scrutiny analysis, the Court rejected the contention that “preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary” were “sufficiently compelling” state

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46 “The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices.” Model Code of Judicial Conduct R. 4.1 cmt. 11 (2010).


49 “Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence.” Model Code of Judicial Conduct R. 4.1 cmt. 3 (2010).


51 Id. at 788.
interests to pass muster. In responding to Justice Stevens’ dissent, however, Justice Scalia was careful to distinguish between campaign “announcements” and campaign “promises,” acknowledging that the latter could pose a “special threat to judicial open-mindedness.” After White, judicial candidates were free to voice their personal views about hot political or legal issues on the campaign trail, so long as they did not promise to decide any given case in a particular manner.

Despite the Supreme Court’s unequivocal rejection of judicial impartiality as a compelling state interest in the context of judicial election speech, the opinions of the American public suggest otherwise. According to a 2007 study, 75% of Americans believe that personal politics influence a judge’s opinion to a great or moderate extent, whereas only 33% of Americans thought such influences were appropriate considerations on the bench. Similarly, 73% of the public links a fear of not being reelected to a judge’s ability to rule in a fair and impartial manner. This would seem to suggest that a clear majority of the American public believes that judicial campaign speech affects the manner in which a judge rules from the bench. Many judges likewise agree with this sentiment. For example, Judge Steven Plotkin of Louisiana believes that accountability to constituents influences judicial decision-making on a routine basis. In his experience, Judge Plotkin has observed Louisiana state judges make “grandiose

52 Id. at 775.

53 Id. at 780. See also MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 13 (“Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited”).


55 Id.

56 Interview with Judge Steven Plotkin, Louisiana Fourth Circuit Court of Appeal (Apr. 29, 2013) [hereinafter Plotkin Interview].
statements” to political or quasi-political community groups concerning, for example, municipal zoning laws.\footnote{Id.} In subsequent litigation implicating the relevant zoning laws, the judge will tend to rule in favor of the corresponding community group.\footnote{Id.} Similarly, Judge Plotkin suggests that judges who run “hard on crime” campaigns tend to maintain an extreme negative view of criminal defendants, both at the trial level and on appeal.\footnote{Id.}

One explanation for Judge Plotkin’s observations is simply that campaign speech often stems from the personal opinions of the judicial candidate, and it is these opinions that affect the judge’s decision-making while on the bench. Judge Chris Lee of Nevada supports this view, and suggests that not only do a judge’s personal views influence his or her decision-making, but that such influence is entirely appropriate.\footnote{Interview with Judge Chris Lee, North Las Vegas District Court, Department 3 (Apr. 12, 2013) [hereinafter Lee Interview].} In \textit{White}, Justice Scalia makes note of this reality, stating that “[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice,” and that “it is virtually impossible to find a judge who does not have preconceptions about the law.”\footnote{Republican Party of Minnesota v. White, 536 U.S. 765, 777 (2002).} With this in mind, it makes sense expect an elected judge to rule in accordance with statements made on the campaign trail, especially in light of the fact that the voting public elects judges for the very purpose of furthering their own conceptions of justice. Despite this reality, judges must recognize the fine line between announcing a particular political or legal view, which the \textit{White} Court found to be

\footnote{\textit{Id.}}

\footnote{\textit{Id.}}

\footnote{\textit{Id.}}

\footnote{Interview with Judge Chris Lee, North Las Vegas District Court, Department 3 (Apr. 12, 2013) [hereinafter Lee Interview].}

\footnote{Republican Party of Minnesota v. White, 536 U.S. 765, 777 (2002).}
protectable expression, and promising to decide specific cases in accordance with those views, which the *White* Court recognized as a threat to judicial impartiality.

**B. Campaign Contributions**

As described above, campaign rhetoric has the potential to threaten judicial impartiality because an elected judge may feel obligated to rule a certain way in an effort to remain accountable to his or her constituents. Financial contributions to a judicial candidate’s campaign, on the other hand, are a more direct threat to judicial impartiality, because they can give rise to both actual and potential bias in favor of a specific contributor. It is simple to imagine a situation in which a judge accepts a series of donations from an attorney, law firm, or corporate litigant during his or her campaign, and later feels obligated to vote in that party’s favor during subsequent litigation. In this way, financial contributions to judicial campaigns are ripe with potential conflict.

In an effort to separate judicial candidates from the political influence inherent in campaign contributions, the Model Code of Judicial Conduct mandates that candidates accept contributions exclusively through campaign committees formed for the purpose of organizing and running the campaign.62 Although such committees help to shield candidates from direct influence, they do little to mitigate public concerns about judicial impartiality when a contributor appears before the elected judge in court. Public opinion polls from the past two decades reveal that, on a consistent basis, greater than 75% of Americans believe that campaign contributions influence an elected judge’s decision-making on the bench.63 One scholar suggests that “the

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incidence of contributors appearing in the courtroom has . . . become almost institutionalized,”64 while another scholar warns that “. . . as long as campaign contributors continue to appear with frequency before the judges they helped elect, the perception will persist.”65 Although judges tend to have a more optimistic view of their colleagues’ ability to remain impartial on the bench, a 2002 survey found that 35% of judges believed that campaign contributions had “some” or “a great deal” of influence on judicial decision-making.66

For Judge Steven Plotkin, the correlation between campaign contributions and judicial impartiality is self-evident. When asked whether campaign contributions influence or have influenced his colleagues’ decisions, Judge Plotkin responded with an emphatic “yes.”67 He went on to explain that, in his experience, campaign contributions “frequently and regularly” influence Louisiana judges, and that the level of influence is directly tied to the significance, that is the amount, of the campaign contribution.68 Although Judge Plotkin considers campaign contributions to be a considerable threat to judicial impartiality, he notes that under most circumstances, judges are unlikely to recuse themselves in cases involving one of their contributors.69 Instead, those judges would simply proclaim that the contribution does not influence their judicial philosophy.70

64 Palmer, supra note 42, at 3.
65 Goodman, supra note 63, at 823.
67 Plotkin Interview.
68 Id.
69 Id.
70 Id.; see also Goodman, supra note 63, at 823. (“. . . denying that campaign contributions affect judicial decision making is the strategy perceived to be the most aligned with perpetuating the ideal of the rule of law.”).
Based on a recent study of Louisiana Supreme Court Justices, Judge Plotkin’s sentiment appears to be grounded in reality. 71 Vernon Palmer studied fourteen years of Louisiana Supreme Court decision-making and employed statistical methods to determine whether there is a risk of actual bias in cases in which the parties had previously donated to the deciding judges’ campaigns. 72 Utilizing public records, Palmer identified thousands of individual contributions, amounting to $1.8 million in total contributions from litigants in 177 different cases, resulting in 425 instances in which a judge decided for or against a campaign contributor. 73 Depending on the justice, rulings in favor of contributors ranged from 39% to 100%, with only two of the seven justices studied having a ruling percentage lower than 50%. 74 Focusing in on tort cases, the study found that for every $1000 in net contributions, the odds of a favorable decision increased by more than 10%. 75

Palmer’s analysis of individual justice voting patterns showed that each justice’s voting pattern in cases for which no contributions were made essentially tracks the pattern in cases for which the plaintiff was the net contributor. 76 However, four justices show inverted voting patterns in cases for which the defendant was the net contributor. 77 Only one of the seven justices had a voting pattern that remained consistent, regardless of the parties’ relative contributions. 78

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71 Palmer, supra note 42.
72 Id.
73 Id. at 6-9.
74 Id. at 7.
75 Id. at 9. “Net contributions” refers to the difference between plaintiff and defendant contributions in cases in which each litigant, or the litigant’s attorneys, contributed to the justice’s campaign.
76 Id. at 17 (Table 3b)
77 Id.
78 Id.
Even more striking is the fact that Palmer did not find a single judicial recusal in any of the 177 cases studied, despite some individual contributions as high as $40,000.\textsuperscript{79} Although Palmer notes that an “appearance of impropriety” does not necessarily justify the conclusion that contributions “actually or even probably influenced” any given justice, his analysis demonstrates that justices have, at a minimum, “carelessly foster[ed] the impression that they have been influenced.”\textsuperscript{80}

In 2006, the New York Times released the results of a similar study of Ohio Supreme Court Justices.\textsuperscript{81} The study, which looked at 215 cases over a 12 year span, found that on average, the justices “voted in favor of contributors 70 percent of the time.” As in Palmer’s study of Louisiana justices, the New York Times study found very few recusals, noting that the “justices recused themselves just 9 times” in 215 cases with direct conflicts.\textsuperscript{82} In the same year that the New York Times published its study, the Los Angeles Times released an article detailing the apparent influence of campaign contributions among Nevada District Judges.\textsuperscript{83} The article recounts several instances of Nevada judges accepting contributions from litigants just before or during the pendency of litigation, as well as two judges who collected a combined $200,000 in campaign contributions while running unopposed in 2002.\textsuperscript{84} In fact, of the 17 incumbent judges running for reelection in 2002, 13 ran unopposed, yet collected just shy of $1 million in

\textsuperscript{79} Id. at 5
\textsuperscript{80} Id. at 6
\textsuperscript{82} Id.
\textsuperscript{83} Michael J. Goodman & William C. Rampel, \textit{In Las Vegas, They’re Playing With a Stacked Judicial Deck}, \textit{Los Angeles Times} (Jun. 8, 2006).
\textsuperscript{84} Id.
campaign contributions anyway. Some attorneys interviewed for the article suggested that law firm contributions to judicial campaigns were a form of currency in a “pay-to-play” system where “juice” with a judge could mean a more favorable outcome in the courtroom. In an interview conducted for purposes of this paper, Judge Chris Lee of the North Las Vegas District Court stated that he “[does] not think campaign donations affect [his] colleagues’ decisions.” Judge Lee noted that “there are a lot of things that affect judges’ decisions,” most notably a judge’s personal background. However, when asked whether a merit selection system would better serve the public’s interest in judicial impartiality, Judge Lee suggested that while it might be a better process, an “appointment system is certainly susceptible to as much political pressure” as an elected system.

The facts underlying the 2009 Supreme Court case of Caperton v. A.T. Massey Coal are perhaps the most striking example of the potential for campaign contributions to affect judicial impartiality. Caperton involved the refusal of West Virginia Supreme Court of Appeals Justice Brent Benjamin to recuse himself shortly after receiving $3 million in campaign contributions from Don Blankenship, CEO of Massey Coal. Caperton’s attorneys challenged Justice Benjamin’s refusal all the way to the Supreme Court. Justice Kennedy, writing for the Court, resolved the case on due process grounds, finding that on the extreme facts of the case, “the

85 Id.
86 Id.
87 Id.
88 Id.
90 Id. at 873.
91 Id. at 876.
probability of actual bias rises to an unconstitutional level.”

Justice Kennedy noted that the majority ruling established the outer bounds of the due process requirement, stating that “codes of [judicial] conduct serve to maintain the integrity of the judiciary and the rule of law,” and that states could choose to “adopt recusal standards more rigorous than due process requires.” In dissent, Chief Justice Roberts listed forty questions that he believed the majority opinion left open, most of which revolved around the issue of what Justice Kennedy meant by “probability of actual bias” and what amount of contributions would trigger a constitutional violation. Recent increases in judicial campaign spending have shined a bright light on the limits of the majority holding in Caperton, and breathed new life into the Chief Justice’s concerns about the slippery slope of judicial recusal under the due process clause.

III. JUDICIAL CAMPAIGN SPENDING 1990-2010

The cost of judicial elections has dramatically increased over the last twenty years. The increase in the costs has been so substantial that some scholars have described the trend with terms such as “runaway spending” and an “explosion of money.” These costs, coupled with the increasing influence of special interest groups on judicial campaign spending, has led many

92 Id. at 887. Justice Kennedy found the “temporal relationship between campaign contributions, the justice’s election, and the pendency of the case” to be critical facts in determining the case. Id. at 886.

93 Id. at 889 (internal quotations omitted).

94 Id. at 893-898 (Roberts, J., dissenting).


96 SKAGGS, supra note 4, at 1.

to speculate about money’s effect on the independence of the judiciary. Retired Justice Sandra Day O’Connor has warned, “In too many states, judicial elections are becoming political prizefights where partisan and special interests seek to install judges who will answer to them instead of the law and the Constitution.” While contributions and independent expenditures have increased in judicial elections, the majority of the data detailing this increase is only available for state Supreme Court races. Therefore, this section focuses on the increase in candidate fundraising and independent expenditures in state Supreme Court elections.

A. State Supreme Court Candidate Fundraising Between 1990-2010

In 1990, state Supreme Court candidates raised approximately $6 million. By the mid-1990s, candidates for state Supreme Court races were raising almost five times that amount. Overall, state Supreme Court candidates raised $83.3 million between 1990 and 1999. While fundraising increased through the 1990s, judicial candidate fundraising reached a record high in the 2000 election cycle. Many scholars consider the 1999-2000 election cycle to be a “watershed year” for judicial elections because fundraising, spending, and campaign advertising in judicial elections increased considerably.

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98 See, e.g., SAMPLE ET AL., supra note 95, at 5 (stating that, “The money explosion is not just a threat to impartial courts. It has left a sour taste for a majority of Americans, who believe that campaign cash is tilting the scales of justice.”).


100 The Study of Judicial Elections, supra note 22, at 5.

101 Id.

102 SAMPLE ET AL., supra note 95, at 1.

During the 2000 election cycle, state Supreme Court candidates raised $45.9 million dollars, which was a 61% increase from the previous election cycle. The spike in spending in the 2000 election set the tone for the remainder of the decade. Between 2000 and 2010, state Supreme Court candidates raised over $239 million, which is more than double the amount of money that state Supreme Court candidates raised in the previous decade. To put this in perspective, in the 2004 Illinois state Supreme Court election, the two judicial candidates spent approximately $10 million, which was more expensive than nineteen of the thirty-four U.S. Senate races that year. Figure 1 details the amount of money state Supreme Court candidates

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104 SAMPLE ET AL., supra note 95, at 5; Chemerinsky et al., supra note 39 (stating that judicial candidates spent approximately $39 million in 2010).

105 SAMPLE ET AL., supra note 95, at 5.

106 Id. at 1.

107 Streb, supra note 13, at 256.
raised in each election cycle between 1990 and 2010. Importantly, however, the figure does not include the amount of money special interest groups independently spent on judicial elections.

B. Special Interest Groups’ Contributions in State Supreme Court Elections

While judicial candidates have increased their campaign war chests, special interests groups have also spent millions of dollars on judicial elections.108 Many special interests groups donate money directly to the judicial candidates and additionally spend substantial sums of money independently in order to influence the results of the election.109 Business interests, trial lawyers, and labor unions are the largest special interest group contributors.110 Each of these groups often is a stakeholder in litigation, and as a result, each group seeks to elect the judicial candidate that is most likely to support their position.111

Special interest groups have become increasingly involved in judicial elections because of tort reform, and the bulk of state judicial campaign contributions and expenditures come from special interest groups who hope to alter tort law.112 Tort reform is a divisive issue between business groups and trial lawyers because both groups have vested and competing interests over jury awards and product liability standards.113 Trial lawyers generally support judicial candidates that are considered friendly to plaintiffs, and business groups generally back judicial candidates

108 SAMPLE ET AL., supra note 95, at 8.
109 Streb, supra note 13, at 259.
110 SAMPLE ET AL., supra note 95, at 9.
111 Id.
113 SAMPLE ET AL., supra note 95, at 38 (stating that, “In America’s tort wars, both sides feel perpetually aggrieved, pointing to rulings they believe to be abusive and courts they believe are convinced are biased, and vowing to out organize and outspend the other side.”).
that support business interests.\textsuperscript{114} U.S. Chamber of Commerce President Thomas Donohue explained that due to the “billions of dollars in fees from tobacco and asbestos litigation,” the Chamber of Commerce was going to challenge the “unscrupulous trial lawyers every time they poke their head out of the ground.”\textsuperscript{115} Donohue further explained that the U.S. Chamber of Commerce’s strategy was to “get involved in key state Supreme Court and attorney general races as part of [its] effort to elect pro-legal reform judicial candidates.”\textsuperscript{116} Other issues such as environmental protection, political apportionment, the rights of criminal defendants, and abortion have also caused special interests groups to increase the amount of money they spend on judicial elections.\textsuperscript{117} Given this, many special interest groups spend significant sums of money on judicial elections because they view judicial elections as a strategic investment. As an AFL-CIO representative explained, “It’s easier to elect seven judges than to elect 132 representatives.”\textsuperscript{118}

Though special interest groups have spent large amounts of money on judicial elections, it is difficult to determine the exact amount because of the campaign finance disclosure loopholes.\textsuperscript{119} However, according to the Brennan Center for Justice, between 2009 and 2010, a mere ten special interest groups accounted for approximately 40% of all money spent on state

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\item[	extsuperscript{114}] Champagne, supra note 5, at 1487.
\item[	extsuperscript{115}] \textsc{Sample et al.}, supra note 32, at 40 (quoting U.S. Chamber of Commerce President Thomas Donohue).
\item[	extsuperscript{116}] \textit{Id.}
\item[	extsuperscript{117}] Shepherd, supra note 1, at 643; \textit{see e.g.}, Christine E. Barnstad, David L. Phillips & Nathan A. Olson, \textit{A Coin on the Tracks: Can Big Money and Politics Derail Judicial Impartiality through Election Spending?}, 60 \textsc{Drake L. Rev.} 715, 734-742 (recounting the 2010 Iowa Supreme Court retention elections, which saw unprecedented campaign and special interest spending in an effort to remove three incumbent justices who had ruled in favor of same sex marriage earlier in the term)
\item[	extsuperscript{118}] \textsc{Sample et al.}, supra note 95, at 9 (quoting an unnamed AFL-CIO representative).
\item[	extsuperscript{119}] \textit{Id.}
\end{enumerate}
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Supreme Court elections. In some cases, special interest groups spent more on the judicial election than the candidate’s campaign spent on the election. For example, the 2008 Wisconsin Supreme Court race cost approximately $5.96 million, and special interest groups accounted for $4.8 million of the total amount spent on the race. Though special interests groups have played a critical role in judicial elections over the last decade, many have speculated that special interest groups’ spending and influence would further increase due to the Supreme Court’s ruling in *Citizens United v. Federal Election Commission*.

**IV. *Citizens United* and Its Impact on the Judiciary**

**A. *Citizens United*: The Decision**

Prior to *Citizens United*, corporations and special interest groups were limited in the amounts of money that they could donate to campaigns and independently spend on elections. Corporations and unions were also barred from using their general treasury funds for express advocacy or electioneering communications. However, corporations and unions could use voluntary contributions to form Political Action Committees (PACs) to make limited donations to candidates. In *Citizens United*, the Supreme Court struck down the federal ban on corporate independent expenditures, which changed the landscape of campaign financing in judicial elections. As a result of *Citizens United*, corporations, unions, and individuals may now raise and

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120 SKAGGS, supra note 4, at 3.
123 Moenius, supra note 12, at 1123.
124 *Citizens United*, 558 U.S. at 320-21 (citing 2 U.S.C. § 441(b)(2)).
125 Id.
spend unlimited amounts of money to influence judicial elections so long as the corporate
communications are not coordinated with the campaign or candidate.\textsuperscript{126}

The issue before the Supreme Court in \textit{Citizens United} was whether § 441b, as amended
by § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) was constitutional.\textsuperscript{127} Section
441b prohibited unions and corporations from using their general treasury funds to make
independent expenditures for speech that is defined as an “electioneering communication”\textsuperscript{128} or
speech that expressly advocates for the election or defeat of a candidate.\textsuperscript{129} The Court struck
down § 441b, which prohibited corporate independent expenditures.\textsuperscript{130} The Court reasoned that §
441b was subject to strict scrutiny analysis because “[t]he First Amendment has its fullest and
most urgent application to speech uttered during a campaign for political office.”\textsuperscript{131} The Court
further held that the First Amendment protection extends to corporations because “the First
Amendment does not allow political speech restrictions based on a speaker’s corporate
identity.”\textsuperscript{132} Ultimately, the Court found that § 441b did not pass strict scrutiny analysis because
the Government did not have a compelling interest in regulating this speech since “independent
expenditures . . . do not give rise to corruption or the appearance of corruption.”\textsuperscript{133}

\textsuperscript{126} \textit{Id.} at 364.
\textsuperscript{127} \textit{Id.} at 316.
\textsuperscript{128} Pursuant to 2 U.S.C. § 434(f)(3)(a), an electioneering communication is “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.
\textsuperscript{129} \textit{Citizens United}, 558 U.S. at 310 (citing 2 U.S.C. § 441b (2006)).
\textsuperscript{130} \textit{Id.} at 364.
\textsuperscript{131} \textit{Id.} at 339.
\textsuperscript{132} \textit{Id.} at 347.
\textsuperscript{133} \textit{Id.} at 358.
It is important to note that the Court did not distinguish between executive, legislative, or judicial elections, and consequently, *Citizens United* applies to all elections. Though *Citizens United* applies to all types of elections, Justice Stevens raised concerns about *Citizens United*’s effect on judicial elections. In the dissent, Justice Stevens reasoned that *Citizens United* “unleashes the floodgates of corporate and union general treasury spending in [judicial] races.” Justice Stevens further warned that because of *Citizens United*, states “may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.” Following *Citizens United*, many commentators, scholars, and even Justice O’Connor expressed concern about *Citizens United*’s impact on the judiciary.

**B. Citizens United: As Applied to Judicial Elections**

Speaking at a conference at Georgetown University Law Center, Justice O’Connor criticized *Citizens United* because Justice O’Connor believed that the ruling would create “an increasing problem for maintaining an independent judiciary.” Justice O’Connor further speculated that because of *Citizens United*, “the problem of campaign contributions in judicial

134 Moenius, *supra* note 12, at 1123.

135 *Citizens United*, 558 U.S. at 968 (Stevens, J., dissenting).


elections might get considerably worse and quite soon.” Legal scholars have expressed similar concerns about *Citizens United’s* effect on judicial elections and the independence of the judiciary. Scholars have reasoned that *Citizens United* will “fundamentally change the election process” because *Citizens United* “equips corporations with excessively more power to influence judicial elections.” Therefore, some scholars have argued that *Citizens United* “exacerbates the threat to judicial impartiality,” and “increase[s] pressures on judges who seek to remain independent and impartial.”

At this point, *Citizens United’s* effect on the election process and the independence of the judiciary is not entirely clear because comprehensive judicial election expenditure data for the 2012 election cycle is not yet available. Furthermore, loopholes in donor disclosure laws prevent scholars from clearly identifying the total amount of money that special interest groups spent on judicial campaigns in the 2012 election cycle. However, the limited data that is currently available indicates that *Citizens United* significantly impacted the outcomes of judicial elections in 2012 because independent expenditures from special interest groups increased.

In 2012, judicial campaigns and special interests groups spent a record $29.7 million on television advertising alone. According to Justice at Stake and the Brennan Center for Justice, special interest groups accounted for over half of the money spent on judicial advertising in

138 Id.
139 SAMPLE ET AL., supra note 95, at 9.
140 Moenius, supra note 12, at 1131.
141 Greene, supra note 38, at 916.
142 SKAGGS, supra note 4, at 1.
2012, whereas special interest groups only accounted for 30% of television advertising in 2010. Though television advertising expenditures do not tell the complete story of Citizens United’s impact, the data is a meaningful indicator of special interest groups’ growing influence on judicial elections. In addition to examining television advertising expenditures to determine Citizens United’s impact, it is also worth examining two of the most closely watched and most competitive Supreme Court elections in 2012.

1. 2012 Michigan Supreme Court Election

The Michigan Supreme Court election was one of the most competitive elections in 2012 because both political parties were competing for control of the Michigan Supreme Court. Though Michigan Supreme Court elections are nonpartisan, the judicial election process in Michigan is inherently political because the political parties nominate their chosen candidate at each parties’ state conventions. Due to their roles in the nominating process, political parties often spend substantial amounts of money during Michigan Supreme Court elections.

In 2012, three of the seven justices on the Michigan Supreme Court faced re-election, and at the time of the election, Republicans controlled the Michigan Supreme Court with a 4-3 majority. Democrats hoped to regain control of the Michigan Supreme Court for the first time.

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144 BILL CORRIHER, CAMPAIGN FINANCE LAWS FAIL AS CORPORATE MONEY FLOODS JUDICIAL RACES 1 (2013) [hereinafter CAMPAIGN FINANCE LAWS FAIL].

145 Judicial Elections, Unhinged, supra note 3.


147 Id.

148 Id.

since 1999 because two of the justices that were up for re-election were Republicans and the other seat was an open seat to replace a retiring justice.\textsuperscript{150} Judicial candidates, political parties, and outside special interest groups spent more money in Michigan than in any other state in the 2012 election.\textsuperscript{151} Additionally, judicial candidate expenditures and outside interest group expenditures increased from Michigan’s 2010 judicial elections.

Candidates, political parties, and outside special interest groups spent approximately $15 million on the Michigan Supreme Court elections.\textsuperscript{152} Michigan Supreme Court candidates raised $3.2 million in 2012\textsuperscript{153} compared to the $2.26 million that judicial candidates raised in 2010.\textsuperscript{154} Though the candidates raised a record amount of money, political parties and outside special interest groups significantly outraised and outspent the judicial candidates.\textsuperscript{155} Political parties and PACs reported independent expenditures from identifiable donors of $679,000.\textsuperscript{156} However, due to the loopholes in election disclosure laws, unidentifiable special interest group donors spent approximately $11 million on television advertising alone.\textsuperscript{157} In fact, one special interest

\footnotesize{\textsuperscript{150} Id.}


\textsuperscript{153} \textit{Judicial Elections, Unhinged}, \textit{supra} note 3.

\textsuperscript{154} Light, \textit{supra} note 151.

\textsuperscript{155} \textit{Judicial Elections, Unhinged}, \textit{supra} note 3.

\textsuperscript{156} Robinson, \textit{supra} note 152.

\textsuperscript{157} Id.
group from Washington, D.C. spent $1 million against Michigan Supreme Court Justice Bridget McCormack in the last week of the election alone.¹⁵⁸

The state political parties also spent vast sums of money on the elections. The state Republican Party spent $4.5 million on television advertising for their nominees but did not disclose the source of that money, and the Democratic Party spent approximately $5 million in undisclosed spending supporting their nominees.¹⁵⁹ Overall, identifiable donors only accounted for 25% of the expenditures, and unidentifiable donors accounted for the remaining 75% of the expenditures.¹⁶⁰ This exceeded the 2010 Michigan Supreme Court election where unidentifiable donors accounted for 50% of total expenditures.¹⁶¹ Ultimately, Republican incumbent Justices Stephen Markman and Brian Zahra won re-election and Democratic nominee Bridget McCormack replaced retiring Justice Marilyn Kelly.¹⁶²

The 2012 Michigan Supreme Court elections differed from past Supreme Court elections because the cost of the elections increased, outside special interest group spending increased, and the amount of unidentifiable donors from special interests groups increased. The spike in election expenditure and unidentifiable special interest group expenditures in Michigan’s Supreme Court elections is directly attributable to *Citizens United*.¹⁶³ While it is clear that *Citizens United*

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¹⁵⁹ CAMPAIGN FINANCE LAWS FAIL, supra note 144, at 4

¹⁶⁰ Robinson, supra note 152.

¹⁶¹ Judicial Elections, Unhinged, supra note 3.


¹⁶³ See CAMPAIGN FINANCE LAWS FAIL, supra note 144, at 1 (arguing that, “[T]he 2012 elections saw spending records shattered as the unlimited campaign cash unleashed by *Citizens United* and other federal court cases funded billions of dollars in independent expenditures.”); see also Robinson, supra note 91 (arguing that the 2012 Michigan
altered the Michigan Supreme Court campaign process, it is unclear whether the increasing influence of outside special interest group spending will ultimately hinder a judge’s impartiality. With that said, given the increasing presence of special interest group spending, the Michigan Supreme Court elections indicate that at a minimum, there is potential for the groups to threaten the judge’s impartiality.\footnote{Chemerinsky, et al., supra note 39, at 687.}

2. 2012 North Carolina Supreme Court Elections

The 2012 North Carolina Supreme Court election also presented an interesting electoral climate to determine \textit{Citizen United}’s effect on judicial elections. North Carolina’s judicial election system differs from other states’ judicial election systems because judicial elections are nonpartisan and judicial candidates’ campaigns are publicly financed.\footnote{Craig Jarvis, \textit{New Super PAC Gets Involved in Supreme Court Race to Back Newby}, NEWSOBSERVER.COM, June 2, 2012, http://www.newsobserver.com/2012/06/02/2105910/new-super-pac-formed-to-help-re.html#storylink=cpy. (explaining that to qualify for public financing, judicial candidates must collect up to $82,000 from 350 North Carolina voters who donate between $10 to $500 each. The candidates are then eligible for $240,100 public matching funds).} Though judicial elections are nonpartisan, partisan politics play a significant role in judicial elections because judicial candidates may identify themselves as a member of a political party, make contributions to a political party, and may speak at political party events.\footnote{Judicial Selection in North Carolina, \textsc{The North Carolina Bar Association}, http://www.ncbar.org/about/communications/judicial-selection (last visited Apr. 12, 2013).} North Carolina adopted nonpartisan elections and public financing in order to limit the amount of money in judicial elections and to limit money’s influence on the judiciary.\footnote{SAMPLE ET AL., supra note 95, at 62 (stating that North Carolina adopted a public finance system for judicial candidates in order to “reduc[e] pressure on judicial candidates to raise money from those appearing in court.”).}

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\textsuperscript{164}Chemerinsky, et al., \textit{ supra} note 39, at 687.
\textsuperscript{165}Craig Jarvis, \textit{New Super PAC Gets Involved in Supreme Court Race to Back Newby}, NEWSOBSERVER.COM, June 2, 2012, http://www.newsobserver.com/2012/06/02/2105910/new-super-pac-formed-to-help-re.html#storylink=cpy. (explaining that to qualify for public financing, judicial candidates must collect up to $82,000 from 350 North Carolina voters who donate between $10 to $500 each. The candidates are then eligible for $240,100 public matching funds).
\textsuperscript{166}Judicial Selection in North Carolina, \textsc{The North Carolina Bar Association}, http://www.ncbar.org/about/communications/judicial-selection (last visited Apr. 12, 2013).
\textsuperscript{167}SAMPLE ET AL., supra note 95, at 62 (stating that North Carolina adopted a public finance system for judicial candidates in order to “reduc[e] pressure on judicial candidates to raise money from those appearing in court.”).
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the public financing system, the 2012 North Carolina Supreme Court election was one of the most competitive and expensive judicial races in the country.\footnote{Josh Israel, Super PAC Trying to Buy N Supreme Court Re-Election for Pro-Corporate Conservative Justice, THINK PROGRESS.ORG, June 4, 2012, http://thinkprogress.org/justice/2012/06/04/494284/super-pac-trying-to-buy-nc-supreme-court-re-election-for-pro-corporate-conservative-justice/} The North Carolina Supreme Court election was a high-stakes and highly publicized election because both political parties were competing for control of the North Carolina Supreme Court, the Court was expected to hear several controversial issues in 2013 and 2014,\footnote{Becky Gray, Supreme Court Election is Key, CAROLINA JOURNAL ONLINE, Sept. 20, 2012, http://www.carolinajournal.com/exclusives/display_exclusive.html?id=9507 (stating that the North Carolina Supreme Court was expected to hear cases in 2013 and 2014 on several controversial issues, including medical malpractice reform, workers’ compensation, and most importantly, a challenge to the 2011 political redistricting map).} and \textit{Citizens United} led to significant interest groups expenditures. At the time of the election, Republicans held a 4-3 majority in the North Carolina Supreme Court.\footnote{Jarvis, supra note 165.} As a result, the Republicans hoped to maintain control while the Democrats hoped to gain control of the North Carolina Supreme Court.\footnote{\textit{Id.}} Democrats and liberal interest groups supported Appeals Court Justice Sam Ervin IV, and Republicans and conservative interest groups supported incumbent Justice Paul Newby.\footnote{\textit{Id.}} Given this, political parties and outside special interest groups spent a significant amount of money on the North Carolina Supreme Court election to elect their preferred candidate.

Special interest group expenditures increased from previous years because \textit{Citizens United} allowed special interest groups to form “super PACs” to influence the outcome of the election.\footnote{\textit{Id.}}
North Carolina Supreme Court election. Unlike traditional PACs, super PACs can accept unlimited amounts of money from a union, corporation or private individual, and can spend unlimited amounts of money to elect or defeat a candidate. Ultimately, super PACs led to increased interest group spending, which undermined the public financing system. Due to the “gush of outside money from super PACs” the usually quiet North Carolina Supreme Court race generated “unprecedented news coverage of what is usually a low-profile campaign.” Though both candidates received support from independent expenditures and super PACs, Paul Newby received the most support from independent interest groups. The North Carolina Judicial Coalition, which was a Super PAC established to re-elect Justice Paul Newby, spent $2.5 million on television advertising. Additionally, Americans for Prosperity spent $225,000 on direct mail for Paul Newby, and Justice for All, which the Republic State Leadership Committee funded, spent an additional $865,000 on Paul Newby’s race. Paul Newby’s campaign also spent approximately $200,000 on television advertising. Overall, special interest groups spent approximately $3.59 million to re-elect Paul Newby. Sam Ervin also received support from special interest groups, but Sam Ervin did not receive as much financial

173 CORRIHER supra, note 97, at 2.
175 CORRIHER supra, note 97, at 2.
176 Id.
177 Jarvis, supra note 165.
179 Id.
180 Id.
support as Paul Newby. For instance, the super PAC, North Carolina Citizens for Protecting Our Schools, spent approximately $263,000 on direct mail for Sam Ervin.\textsuperscript{181} Ultimately, the conservative interest groups’ efforts were successful, and Paul Newby defeated Sam Ervin by winning 52% of the vote.\textsuperscript{182}

\textbf{V. Reining in Judicial Campaign Spending}

In \textit{Citizens United}, the Court stated as a matter of law, that unlimited corporate independent expenditures do not give rise to an inference of corruption.\textsuperscript{183} The 2012 Michigan and North Carolina Supreme Court races suggest that \textit{Citizens United} could enable exorbitant campaign contributions to become the norm in high-level state judicial elections. If this hypothesis plays out, then state courts could be confronted with an ever-increasing influx of judicial recusal motions, because, in light of \textit{Caperton}, such contributions could continue to test the outer bounds of constitutional due process. Indeed, Judge Steven Plotkin perceives increased campaign spending in the wake of \textit{Citizens United} as an enhanced threat to judicial impartiality.\textsuperscript{184} Although Judge Chirs Lee generally agrees, he has not observed an increase in campaign spending at the trial judge level, which leads him to conclude that the impact of \textit{Citizens United}’s will likely be limited to the highest state courts.\textsuperscript{185} Regardless, \textit{Citizens United}, as applied to judicial elections, is a serious cause for concern.\textsuperscript{186} The following sections discuss a

\textsuperscript{181} Id.


\textsuperscript{183} \textit{Citizens United}, 558 U.S. 310 (2010).

\textsuperscript{184} Plotkin Interview.

\textsuperscript{185} Lee Interview.

\textsuperscript{186} See Greene, supra note 38, at 916 (noting that \textit{Citizens United} “exacerbates the threat to judicial impartiality already recognized in \textit{Caperton} through judicial elections”).

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series of potential solutions to reign in judicial campaign spending and re-instill public confidence in an independent and impartial judiciary.

A. Implement Stronger Disclosure Rules Coupled with More Robust Judicial Recusal Procedures

In light of *Citizens United*, “we are living in a world of unlimited money . . . .”\(^{187}\) Unfortunately, in the case of judicial campaign spending, significant portions of that spending remain hidden from public scrutiny.\(^ {188}\) Congressional failures and loopholes in FEC disclosure guidelines have resulted in a system whereby private parties, often law firms or corporate litigants, can support judicial candidates through political action committees without having to reveal themselves to the public.\(^ {189}\) One obvious solution to this problem would be to revamp and restructure FEC disclosure rules such that the public, and more importantly, elected judges, are aware of the extent to which private parties or corporations have influenced judicial campaigns. In this way, judges would be in a position to more effectively rule on recusal motions.

Although a 2002 study showed that 90% of state judges believed that states should have strong campaign disclosure rules,\(^ {190}\) some judges question whether disclosure is a meaningful solution. For example, when asked whether stronger disclosure rules might mitigate public perceptions, Judge Sanders noted that disclosure rules are “a nod in the direction of reform,” but that such proposals would not likely be effective.\(^ {191}\) Judge Plotkin agreed that stronger disclosure

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\(^{187}\) Chemerinsky et al., *supra* note 39, at 695 (comments of Professor Richard Hasen)

\(^{188}\) *Id.; see also* discussion *supra* Part III.

\(^{189}\) *Id.*


\(^{191}\) Interview with Judge Alex Sanders, former Chief Judge of the South Carolina Court of Appeals (Apr. 29, 2013) [hereinafter *Sanders Interview*].
rules would not necessarily mitigate public concerns, but suggested that if the public were aware
that some contribution levels were so outrageous, then perhaps the public would react to force
legislators to reform existing reporting guidelines. Har
More fundamentally however, Judge
Plotkin believes that despite Citizens United, state legislatures should place limits on private
campaign contributions, or simply ban them altogether in favor of public financing systems. He acknowledged that public financing is not a practical solution because state legislatures
would not be inclined to adopt such proposals, but suggested that, at a minimum, state
legislatures should cap campaign expenses on a greater scale, and require full disclosure of all
contributions, whether direct or indirect.

Similarly, Judge Chris Lee suggested that increasing the accessibility of campaign
finance reports, as well as increasing the rate at which such reports are released to the public,
might be the better solution. In his estimation, strong public disclosure rules would put judges
in a similar position as other elected officials, and subject them to a greater degree of public
scrutiny.

What is clear is that disclosure, standing alone, is likely not a meaningful solution.
Rather, disclosure must be coupled with more robust recusal procedures if we hope to change
public perceptions about judicial impartiality. Although a 2002 study showed that 55% of judges
believed that other judges should be prohibited from presiding over cases in which one of the

192 Plotkin Interview.
193 Id.
194 Plotkin Interview.
195 Lee Interview.
196 Id.
parties has contributed to the judge’s campaign,\(^\text{197}\) one scholar suggests that “non-recusal is routine and fully entrenched in judicial culture.”\(^\text{198}\) In many states, efficiency demands that a sitting judge hear recusal motions in his own cases. This was the procedure in West Virginia prior to *Caperton v. A.T. Massey Coal*, at which time Justice Benjamin denied Caperton’s request that the Justice recuse himself from the case.\(^\text{199}\) In Louisiana, Judge Steven Plotkin was instrumental in pushing for reform of state judicial recusal procedures.\(^\text{200}\) After those reforms, Louisiana judges are no longer authorized to hear motions for their own recusal.\(^\text{201}\) In addition to eliminating deference to the target judge on recusal motions, scholars have suggested that *de novo* review of recusal decisions is a necessary corollary, as opposed to the current “abuse of discretion” standard.\(^\text{202}\)

Although the reforms noted above might help mitigate public concerns, Judges Sanders and Lee suggest that implementing stronger recusal rules is a slippery slope.\(^\text{203}\) Like Chief Justice Roberts in his *Caperton* dissent, Judges Sanders and Lee wonder where to draw the line. Judge Lee suggested that one solution might be for a judge to keep a list of any attorney who has ever given money to his campaign, and if any of those attorneys appear before him, then he


\(^{198}\) Palmer, *supra* note 42, at 5.


\(^{200}\) Plotkin Interview.

\(^{201}\) *Id.*

\(^{202}\) *See* Greene, *supra* note 38, at 905 (discussing the applicable standards of review of recusal motions, as detailed in the Model Code of Judicial Conduct).

\(^{203}\) Lee Interview; Sanders Interview.
could ask the opposing side whether they would prefer recusal.\textsuperscript{204} Although this might sound like a reasonable solution, Judge Lee wonders if it would mean that a judge might have to recuse himself if he ever sat down for lunch with the attorney.\textsuperscript{205} As Justice Kennedy did in \textit{Caperton}, Judge Plotkin would suggest that the best solution would be to allow the states to establish their own thresholds for recusal, which could be laid out in the state’s code of judicial ethics.

\textbf{B. Adopt Alternative Selection Systems}

Regardless of whether disclosure and recusal reforms are meaningful solutions to combat public perceptions that ‘justice is for sale,’ the fact remains that such proposals do little to combat campaign spending in the first instance. Alternative reforms may be necessary to stem the tide of campaign contributions in judicial elections, and thus eliminate the threat to judicial impartiality at its source.\textsuperscript{206} Not only would this eliminate \textit{ex post} perceptions of judicial bias, but it would eliminate \textit{ex ante} barriers to entry for would-be judicial candidates.\textsuperscript{207} Appointment or merit-based selection systems would accomplish the task of removing money from judicial elections.\textsuperscript{208} Unfortunately, implementing such systems would require states to amend their constitutions, which is no simple hurdle to overcome. Alternatively, Congress could reverse

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\textsuperscript{204} \textit{Lee Interview}.
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\textsuperscript{205} \textit{Id}.
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\textsuperscript{206} \textit{See} Greene, \textit{supra} note 38, at 941 (“As of now, voluntary restraint (by corporations and others) stands in the way of increased spending on independent expenditures in judicial elections as a result of \textit{Citizens United}, and the risks of such spending are enhanced. . . . Whether curative activity, either legislative or constitutional, is possible is up to the political process and ultimately, American citizens and their representatives.”)
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\textsuperscript{207} Chemerinsky \textit{et al}., \textit{supra} note 39, at 692 (“. . . if you’ve got a hundred thousand dollar war chest, it creates a substantial barrier to entry for competitors who know, \textit{ex ante}, that they would have to compete with that war chest”) (comments of Professor Richard Hasen)
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\textsuperscript{208} \textit{See} Goodman, \textit{supra} note 63, at 824 (“. . . while there are no perfect judicial selection systems and no systems that remove politics entirely from the process, merit selection does solve the money problem”); \textit{see also} Greene, \textit{supra} note 38, at 933 (noting that the “struggle to obtain appointment systems within the states in ongoing and well-known, but eliminating judicial elections would obviously eliminate the effect of \textit{Citizens United} on those elections by removing money from the process of selecting judges”)
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Citizens United, but again, that would require an amendment to the federal constitution, which is especially unlikely given the fact that Congressional campaigns benefit from Citizens United.209

CONCLUSION

Controversy surrounding elected judges has existed since President Andrew Jackson first encouraged states to elect their judges in order to ensure that judges are accountable to the will of the people. Though Andrew Jackson intended for judicial elections to increase judges’ independence and accountability to the people, recent changes in judicial elections directly contradict the original purpose for electing judges. In recent years, changes in judicial elections have increased the controversy surrounding elected judges, have threatened judges’ impartiality, and have caused some to question whether “justice is for sale.”210

Political rhetoric on the campaign trail, private financial contributions, and special interest groups’ influence on judicial elections have directly impacted elected judges’ impartiality. The presence of political rhetoric on the campaign trail and private financial contributions impact a judge’s impartiality because both threaten a judge’s ability to be free from political influence and political pressure. Private financial contributions more directly jeopardize an elected judge’s independence because elected judges often hear cases that involve contributors to their campaign. Additionally, Citizen United threatens a judge’s impartiality because the judge may be more influenced by special interest groups than by the pursuit of justice. Although it is currently unclear whether justice actually is for sale, the state Supreme Court elections in 2012 suggest that Citizens United certainly exacerbated special interest groups’ influence over judicial elections. The recent changes in judicial elections align with

209 See Greene, supra note 38, at 929.

210 Goldberg, supra note 5, at 95.
Justice O’Connor’s belief that “the very practice of electing judges undermines” an elected judge’s ability to remain impartial. However, meaningful solutions and reforms may help mitigate this belief. A combination of stronger disclosure rules and more robust judicial recusal procedures provides the necessary first step to mitigate public concerns related to judicial impartiality. Such proposals offer *ex post* solutions to shield judges from potential bias, yet they do little to reign in potential campaign spending, whether direct donations to a candidate’s campaign or independent expenditures. If campaign spending is in the fact the real concern, then state legislatures must look to more generalized campaign finance reform, or alternatively, must look to eliminate judicial election systems altogether. Regardless of whether such efforts prove successful, judicial elections will continue to be an impetus for scholarly debate, and increased campaign spending will ensure the prevalence of public perceptions that “justice is for sale” in America’s state courts.

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211 Republican Party of Minnesota v. White, 536 U.S. at 788 (O’Connor, J., concurring).