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Judicial Elections After Citizens United

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JUDICIAL ELECTIONS AFTER *CITIZENS UNITED*

*Alicia Bannon**

INTRODUCTION

Everyone interested in contributing [in a judicial election] has very specific interests. . . . They mean to be buying a vote.

—Justice Paul Pfeifer, Supreme Court of Ohio[1]

Thirty-eight states use judicial elections as part of their system for choosing high court judges. But what originated as a nineteenth century reform, reflecting the view that elected judges would be more likely to check overreach by corrupt governors and legislatures,[2] is more accurately described today as part of the problem. In recent decades, judicial races have become, in the frequently-cited words of one observer, "nastier, noisier, and costlier,"[3] prompting regular calls for reform from many judges, bar associations, scholars, and task forces.[4] In 2009, the U.S. Supreme Court entered into the conversation, ruling in *Caperton v. A.T. Massey Coal Co., Inc.*[5] that a West Virginia Supreme Court justice was required, as a matter of due process, to recuse himself from hearing an appeal of a $50 million jury

* Senior Counsel, Brennan Center for Justice at NYU School of Law. The author is grateful for the insights from participants at the April 2017 Clifford Symposium on Tort Law and Social Policy at DePaul College of Law, where she presented an earlier draft of this paper, as well as for research support from Cathleen Lisk, Harleen Gambhir, and Rebecca Mears.

1. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES (Oct. 1, 2006), http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all.

2. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS 105 (2012).

3. Roy A. Schotland, Comment, 61 LAW AND CONTEMPORARY PROBLEMS 149, 150 (1998), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1096&context=lcp.

4. *See* ABA COAL. FOR JUSTICE, AM. BAR ASS'N, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 12–15 (2008), https://shop.americanbar.org/ebus/store/productdetails.aspx?productid=217453; AM. COLL. OF TRIAL LAWYERS, WHITE PAPER ON JUDICIAL ELECTIONS 4 (2011), https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/actl_white_paper_on_judicial_elections.pdf?sfvrsn=2; B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1439–41 (2001), http://digitalcommons.lmu.edu/llr/vol34/iss4/10; JUDICIAL SELECTION TASK FORCE, ASS'N OF THE BAR OF THE CITY OF N.Y., RECOMMENDATIONS ON THE SELECTION OF JUDGES AND THE IMPROVEMENT OF THE JUDICIAL SELECTION SYSTEM IN N.Y. STATE 5–32 (2006), http://www.nycbar.org/pdf/report/Judicial_Selection_TaskForceReport_Dec2006.pdf; Michigan Judicial Selection Taskforce, Report and Recommendations 1–2, 7–12 (2012), http://www.mcfn.org/uploads/documents/MIJudicialSelectionTaskForce.pdf.

5. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009).

verdict.[6] In *Caperton*, the CEO of the lead defendant spent more than $3 million in support of the justice's recent campaign for a seat on the court.[7]

It was against this backdrop that, in 2010, the Supreme Court decided *Citizens United v. Federal Election Commission*,[8] upending a century of precedent by striking down a law that barred corporations and unions from using their general treasury funds for independent expenditures in federal elections.[9] Many critics of the ruling highlighted its implications for judicial elections, which had already attracted substantial special interest attention. In his dissent, Justice John Paul Stevens, who would retire from the Court later that year, warned that "[a]t a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races."[10]

Other legal observers echoed these concerns. Justice Sandra Day O'Connor, who had been a vocal critic of judicial elections since her 2006 retirement from the Supreme Court,[11] told a conference at Georgetown University Law Center that *Citizens United* would likely create "an increasing problem for maintaining an independent judiciary."[12] She further noted that "if both [unions and corporations] unleash their campaign spending monies without restrictions, then I think mutually-assured destruction is the most likely outcome."[13] Legal commentator Jeffrey Toobin likewise observed, "I think judicial elections are really the untold story of *Citizens United*."[14] A report by the Brennan Center for Justice, a long-time observer of judicial elections, warned, "The inevitable result will be increased corporate spending in judicial elections—and increased threats to independent and impartial courts."[15]

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6. *Id.* at 886.

7. *Id.* at 886.

8. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

9. *Id.* at 365–66; *see also id.* at 394–95 (Stevens J., dissenting).

10. *Id.* at 460.

11. *See, e.g.*, John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES, Dec. 23, 2009, http://www.nytimes.com/2009/12/24/us/24judges.html.

12. Adam Liptak, *Former Justice O'Connor Sees Ill in Election Finance Ruling*, N.Y. TIMES, Jan. 27, 2010, http://www.nytimes.com/2010/01/27/us/politics/27judge.html.

13. *Id.*

14. Interview by Bill Moyers with Jeffrey Toobin, Staff Writer, the NEW YORKER, and Legal Analyst, CNN (Feb. 19, 2010), http://www.pbs.org/moyers/journal/02192010/transcript2.html.

15. ADAM SKAGGS, BRENNAN CENTER FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF *Citizens United* on Judicial Elections 2 (2010), https://www.brennancenter.org/sites/default/files/legacy/publications/BCReportBuyingJustice.pdf?nocdn=1.

More than eight years after *Citizens United*, this Article considers how these predictions have played out and what the current landscape means for the fairness and integrity of state courts—where 95 percent of all cases are filed.[16] Drawing on fundraising and independent expenditure data from *The New Politics of Judicial Elections* report series,[17] as well as on television spending data gathered by the Brennan Center for the most recent 2015–16 supreme court election cycle,[18] this Article argues that judicial races in the post-*Citizens United* world have been transformed, at least at the supreme court level, but not in the way many observers predicted.

There is little evidence that supreme court elections have seen "floodgates" open with respect to total levels of spending—the pre-*Citizens United* trend of high-cost elections has continued, but there has been no dramatic uptick in overall spending. In fact, in the 2013–14 election cycle,[19] overall spending was slightly lower than in other recent non-presidential cycles. Instead, *Citizens United*'s most significant effect appears to be on the *composition* and *transparency* of spending in judicial races. Outside spending by special interest groups, many of which do not disclose their donors, has become increasingly important in supreme court elections, while direct contributions to candidates have fallen dramatically.

While not what critics predicted, this new reality presents serious risks to the fairness and integrity of elected courts by: (1) leaving the public in the dark about the interests that seek to shape state courts; (2) exacerbating pressures on judicial decision-making, as outside groups further politicize judicial campaigns' tenor and messages; and (3) creating new challenges for policies that seek to mitigate the harms from special interest influence in judicial races.

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16. Alicia Bannon, Brennan Center for Justice, Rethinking Judicial Selection in State Courts 1 (2016), https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf.

17. The New Politics of Judicial Elections (All Reports), Brennan Center for Justice (Oct. 28, 2015), http://www.brennancenter.org/analysis/new-politics-judicial-elections-all-reports. This biennial report on state supreme court elections is issued by the Brennan Center for Justice, Justice at Stake, and the National Institute on Money in State Politics. The report series covers election cycles since 2000. Final data for the 2015-16 cycle was not available at the time this Article was written.

18. Television data was provided to the Brennan Center by Kantar Media/CMAG, and is based on captured satellite data in the nation's largest media markets. Kantar Media/CMAG's calculations do not reflect ad agency commissions or the costs of producing advertisements, nor do they reflect the cost of ad buys on local cable channels. Spending estimates are available on the Brennan Center's Buying Time website. *Buying Time*, Brennan Center for Justice, https://www.brennancenter.org/analysis/buying-time (last visited Aug. 2, 2017).

19. At this time this Article was written, this was the most recent cycle for which the Brennan Center had final data.

I. The Rise of Politicized Judicial Elections

For most of the last century, state supreme court elections were generally inexpensive and sleepy. Elections were frequently uncontested and campaigning, to the extent it occurred, typically focused on candidates' professional background and qualifications. But over the past few decades, and particularly since the year 2000, judicial races, especially at the state supreme court level, have come to look increasingly like ordinary political campaigns.[20]

Most strikingly, wealthy special interest groups have increasingly turned their attention, and wallets, to judicial races. In the 2000-09 decade, 20 of the 22 states that use contested elections to select high court judges set spending records.[21] Much of this attention came from interests who regularly appear in court: from 2000-09, 59 percent of all contributions to state supreme court candidates came from lawyers, lobbyists, and business interests.[22]

Efforts to shape courts in a more "business" or "plaintiff"-friendly direction have often been key drivers of spending, with corporate interests generally supporting Republican candidates and plaintiffs' lawyers generally supporting Democratic candidates.[23] Indeed, spending has often been highest in states with closely-divided courts,[24] and since 2000, an influx of spending has corresponded with shifts in the ideological composition of at least nine state supreme courts.[25]

This spending has also created potential conflicts of interest for judges. A study of the Nevada Supreme Court, for example, found

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20. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L.J. 623, 639–40 (2009), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1386&context=dlj.

21. James Sample et al., Brennan Center for Justice, The New Politics of Judicial Elections 2000–2009, at 1 (2010), http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf.

22. *Id.* at 8.

23. Scott Greytak et al., Brennan Center for Justice, Bankrolling the Bench: The New Politics of Judicial Elections 2013–14, at 30 (2014), http://newpoliticsreport.org/app/uploads/JAS-NPJE-2013-14.pdf; *see also* Debra Erenberg & Matt Berg, *The Dark Night Rises: The Growing Role of Independent Expenditures in Judicial Elections After* Citizens United, 49 Willamette L. Rev. 501, 508 (2013), https://willamette.edu/law/resources/journals/review/pdf/Volume%2049/49-4%20ERENBERG%20%20BERG%20ME%20Format.pdf.

24. Alicia Bannon et al., Brennan Center for Justice, The New Politics of Judicial Elections 2011–12, at 5–11 (2013), http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf; Adam Skaggs, et al., Brennan Center for Justice, New Politics of Judicial Elections 2009–10, at 3–4 (2011), http://www.brennancenter.org/sites/default/files/legacy/Democracy/NewPolitics2010.pdf.

25. Bannon, *supra* note 16, at 30 n.39 (Illinois, Michigan, Mississippi, Nevada, Ohio, Pennsylvania, Wisconsin, and West Virginia); Anne Blythe & Lynn Bonner, *Rare Big Win for Democrats Tilts Party Balance on NC Supreme Court*, Charlotte Observer, Nov. 10, 2016, http://www.charlotteobserver.com/news/politics-government/article114053308.html (North Carolina).

that in 60 percent of civil cases decided in 2008-09, at least one of the litigants, attorneys, or firms involved in the case had contributed to the campaign of at least one justice.[26] And, while causation is difficult to prove, numerous studies have shown a correlation between campaign contributions and justices' votes.[27] Even more striking, in a 2001 survey of state supreme court, appellate, and trial judges, 46 percent said they believed campaign contributions had at least some impact on judges' decisions.[28]

In addition to heightened spending, judicial campaigns have changed in other ways as well. Television has become increasingly important. In 2000, 22 percent of states with contested supreme court elections featured television ads.[29] In 2004, the number rose to 80 percent, and in 2006, it was 91 percent.[30] With greater reliance on television, attack ads have become more common,[31] and judges are regularly targeted for prior decisions on the bench.[32] Judges have also become more likely to describe themselves in overtly political terms, including highlighting their positions on contested issues like gun rights.[33] Additionally, after a 2002 Supreme Court decision that struck down a judicial conduct rule that prohibited judicial candidates from announcing their views on "disputed legal or political issues,"[34] states also have fewer tools to regulate behavior on the judicial campaign trail.[35]

Thus, even before *Citizens United*, state supreme court elections increasingly looked similar to political campaigns. Of particular note to commentators, these elections had already attracted substantial sums from special interest groups with a financial interest in the precedents state courts set, and sometimes in particular cases pending before

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26. BANNON, *supra* note 16, at 8.

27. *See, e.g.*, JAMES SAMPLE ET AL., BRENNAN CENTER FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 11 (2008), http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper_FINAL.pdf (citing studies).

28. *See State Judges Frequency Questionnaire*, JUSTICE AT STAKE 5 (2001), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

29. SAMPLE, ET AL., *supra* note 21, at 24.

30. *Id.*

31. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 934 (2016), http://repository.law.umich.edu/mlr/vol114/iss6/6.

32. *See, e.g.*, SAMPLE, ET AL., *supra* note 21, at 32.

33. BANNON, *supra* note 16, at 10–11.

34. Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002).

35. More recently, the U.S. Supreme Court rejected a First Amendment challenge to a Florida rule barring the direct solicitation of campaign contributions by judicial candidates. Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015). *Williams-Yulee* makes clear that states do retain the ability to regulate judicial election conduct in ways that would be impermissible for non-judicial races, placing important limits on *White*'s reach.

those courts. At the same time, a growing chorus of sitting and retired judges were acknowledging that election pressures had the potential to undermine the promise of equal justice. As Richard Neely, a retired chief justice of the West Virginia Supreme Court of Appeals, observed in a 2006 interview with *The New York Times*, "It's pretty hard in big-money races not to take care of your friends. It's very hard not to dance with the one who brung you."[36]

II. *CITIZENS UNITED* AND ITS PROGENY

It was against this backdrop that *Citizens United* changed the legal landscape for campaign finance regulation, which had direct implications for judicial elections.[37]

It was, to put it mildly, a controversial decision. *Citizens United* is the rare Supreme Court decision that many non-lawyers know by name. Days after the opinion was issued, President Barack Obama criticized the ruling during his State of the Union address as six justices sat in the audience.[38] During the 2016 presidential election, both Hillary Clinton and Bernie Sanders campaigned on overruling it.[39] Hundreds of municipalities have passed resolutions or ordinances supporting a constitutional amendment to overturn the decision, as have at least thirteen states.[40] While *Citizens United* has in part functioned as a short-hand for broader objections to the role of money in politics, it was indeed a sea change in the law.

The immediate holding in *Citizens United* was to strike down a federal ban on corporate (and union) independent expenditures.[41] However, the ruling has cast such a long shadow over election law, and U.S. democracy, because of its reasoning, which dramatically narrowed the kind of "corruption" that could justify campaign finance regulations. Reasoning that the "fact that speakers may have influ-

36. Liptak & Roberts, *supra* note 1.

37. This section draws on analysis of *Citizens United* and its implications by Daniel I. Weiner. *See* DANIEL I. WEINER, *Citizens United* Five Years Later, Brennan Center for Justice (2015), http://www.brennancenter.org/sites/default/files/analysis/Citzens_United_%20Five_Years_Later.pdf.

38. Adam Liptak, *Supreme Court Gets a Rare Rebuke, In Front of a Nation*, N.Y. TIMES, Jan. 28, 2010, at A12, http://www.nytimes.com/2010/01/29/us/politics/29scotus.html.

39. *See* Jacob Pramuk, *Hillary Clinton: Here's What I Want in the Supreme Court*, CNBC, Oct. 19, 2016, https://www.cnbc.com/2016/10/19/hillary-clinton-heres-what-i-want-in-the-supreme-court.html; Eric Bradner, *Bernie Sanders Has a Supreme Court Litmus Test*, CNN, May 10, 2015, http://www.cnn.com/2015/05/10/politics/bernie-sanders-supreme-court-litmus-test-election-2016/index.html.

40. *See* Move to Amend, *Resolutions & Ordinances*, https://movetoamend.org/resolutions-map (last visited July 31, 2017).

41. *See Citizens United*, 558 U.S. at 365–66.

ence over or access to elected officials does not mean that these officials are corrupt," the Court limited the state's "corruption" interest to "quid pro quo" deals (i.e., money for votes) or the appearance thereof.[42] The Court also concluded (without any supportive facts in the record), that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[43] Based on this reasoning, in *SpeechNow.org v. Federal Election Commission*,[44] the D.C. Circuit invalidated all federal limits on outside spending and limits on contributions to groups that only make independent expenditures.[45] With this ruling, so-called Super PACs were born. *Citizens United* and *SpeechNow* likewise freed outside spenders to engage in "express advocacy" without restrictions, and made it easier for shadowy groups to engage in election spending.[46]

At the state level, the impact of *Citizens United* is even more complex. The immediate impact of *Citizens United* varied depending on the laws on the books, which were in many states already weaker than federal laws. Prior to the ruling, twenty-three states had bans on independent expenditures by corporations, including nineteen states that utilized judicial elections.[47] *Citizens United* effectively invalidated these prohibitions, along with state bans on union expenditures.[48] *Citizens United*, coupled with *SpeechNow*, likewise served as the death knell for state law limits on contributions to independent expenditure-only committees (i.e., state Super PACs),[49] as well as for regulations on the kind of advocacy outside groups could undertake during an

42. *Id.* at 359.

43. *Id.* at 357.

44. 599 F.3d 686 (D.C. Cir. 2010) (en banc).

45. *Id.* at 695–96.

46. *See* WEINER, *supra* note 37, at 7, 15 n.17.

47. *See* JOANNA SHEPHERD & MICHAEL S. KANG, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, SKEWED JUSTICE, (2014), http://skewedjustice.org/.

48. Moreover, a study that compared spending trends post-*Citizens United* in states that did and did not have corporate independent expenditure bans prior to the ruling found evidence that *Citizens United* bore a causal relationship with increases in outside spending in subsequent elections. The authors found:

> [W]hile independent expenditures increased in both treated and control states between 2006 and 2010, the increase was more than twice as large in the treated states, and nearly all of the new money was funneled through nonprofit organizations and political committees where weak disclosure laws and practices protected the anonymity of the spenders.

DOUGLAS M. SPENCER & ABBY K. WOOD, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315 (2014).

49. *See* Gen. Majority Pac v. Aichele, No. 1:14-CV-332, 2014 WL 3955079, at *2–5 (M.D. Pa. Aug. 13, 2014) (invalidating Pennsylvania's contributions limits with respect to independent expenditure-only groups, and citing other cases).

election.[50] Thus, as James Sample has observed, *Citizens United* functioned as a "one-way ratchet" for states and the regulation of money in judicial elections.[51] It eliminated campaign finance restrictions where they existed and maintained the legal status quo in states where they did not, along with foreclosing any future reforms.

Beyond its immediate impact on state law, the changes *Citizens United* brought to federal elections may also have had other spillover effects in the states. For example, *Citizens United* incentivized new groups to focus on election spending at the federal level. However, once these groups were created, they were free to spend in state elections as well. For judicial election observers, this new legal landscape seemed poised to transform already politicized races for state high courts.

III. Spending Patterns in Supreme Court Elections After *Citizens United*

So, at least with respect to judicial elections, did *Citizens United* live up to expectations? Spending patterns in state supreme court elections since *Citizens United* suggest that the ruling did dramatically change judicial campaigns, but not by opening the spending "floodgates" in the way that commentators at the time predicted. Rather, the new openings the decision created for outside spending, including dark money, have been far more transformative: while total spending in supreme court elections has been roughly constant since *Citizens United*, much of that spending has shifted to outside groups, many of which are not transparent about their donors. Collectively, these changes pose substantial new challenges to judicial integrity.

A. The Shift to Outside Spending

During the last two election cycles for which, at the time this Article was written, complete data existed (2011–12 and 2013–14), supreme court races did not experience a dramatic infusion of new money. Total spending in 2011–12 was $57.7 million, virtually indistinguishable from the $57 million that was spent in the 2007-08 presidential election cycle.[52] In 2013–14, total spending was $34.5 million, slightly *lower* than previous cycles; $38.1 million was spent in 2009–10.[53]

50. *See* Weiner, *supra* note 37, at 14 n.16.

51. James Sample, *Retention Elections 2010*, 46 Univ. S. Fla. L. Rev. 383, 393 (2011), http://scholarlycommons.law.hofstra.edu/faculty_scholarship/1045.

52. Greytak et al., *supra* note 23, at 12.

53. *Id*.

Rather, the most notable change in recent election cycles has been in the composition of spending—groups, spending separately from candidates, have become increasingly important players. In 2011–12, outside groups made up a record 27 percent of total election spending, and the amount spent by groups ($15.4 million) was more than 50 percent greater than the previous outside spending record ($9.8 million in 2003–04).[54] In the 2013–14 cycle, outside groups set another new record, making up 29 percent of total spending.[55] Major players have included several conservative or libertarian groups supporting Republican candidates, most notably the Republican State Leadership Committee, which put nearly $3.4 million into five state and local judicial races in 2014 as part of a new "Judicial Fairness Initiative."[56] Democratic candidates have received backing principally from state-based groups with ties to plaintiffs' trial lawyers.[57] In Montana, for example, Montanans for Liberty and Justice spent nearly $520,000 in support of the incumbent justice during Montana's 2014 supreme court election.[58]

While complete data for 2015–16 was not available at the time this Article was written, television spending estimates suggest that the trend of heightened outside spending is not only continuing, but accelerating. Interest groups spent nearly 50 percent more on television ads than in the previous presidential election cycle—over $20 million compared with the previous high of $13.5 million in 2012.[59] Moreover, for the first time, television spending by groups exceeded candidates' own television expenditures, making up 55 percent of television spending, compared with 38 percent in the last presidential election cycle. At the same time, political parties essentially disappeared from state supreme court races, making up less than one percent of total television spending, as compared to 24 percent in the last presidential cycle.[60]

B. Secret Money, Secret Interests

As interests have increasingly moved from making direct contributions to candidates to spending via outside groups, much of that

54. BANNON ET AL., *supra* note 24, at 1.
55. GREYTAK ET AL., *supra* note 23, at 2.
56. *Id*. at 30.
57. *Id*.
58. *Id.* at 15, 37, 46.
59. Spending estimates were provided to the Brennan Center by Kantar Media/CMAG.
60. *Spending By Outside Groups in Judicial Races Hits Record High, Secret Money Dominates*, BRENNAN CENTER FOR JUSTICE (Nov. 15, 2016), https://www.brennancenter.org/press-release/spending-outside-groups-judicial-races-hits-record-high-secret-money-dominates.

spending has been non-transparent. This is likely another by-product of *Citizens United*, which made it easier for interest groups to influence elections via shell organizations or nonprofit groups that do not disclose their donors.[61]

Television data from the 2015–16 election cycle shows the extent to which secret money has permeated state supreme court races: nearly all of the outside spending in these races came from groups that are not fully transparent about their donors. Only three of the twenty groups that spent money on television ads during that cycle were fully transparent about their donors. The rest, either did not disclose their donors at all, or their donor lists included PACs or other groups, making it difficult, and sometimes impossible, to discern the underlying interests.[62] In Kansas, for example, a high-profile retention election for five sitting justices attracted more than $2 million in television spending, all from groups that did not disclose their donors.[63] The prevalence of secret money in these judicial races is also consistent with broader trends in state elections. A recent Brennan Center study found unprecedented levels of secret spending in state ballot measures in 2016,[64] while research into state and local elections in six states found that fully transparent spending had declined from 76 percent in 2006 to just 29 percent in 2014.[65]

A second challenge to transparency is weak state laws governing the reporting of independent expenditures, which allow groups to avoid reporting their campaign spending altogether. According to a 2014 study, twenty-four states either limit the reporting of independent expenditures to instances where groups explicitly call for the election or defeat of a candidate (creating an easy loophole for groups that avoid those "magic words") or do not require outside spending to be re-

61. *See* WEINER, *supra* note 37, at 7; Center for Responsive Politics, *Outside Spending*, https://www.opensecrets.org/outsidespending/ (last visited Aug. 2, 2017). This lack of transparency includes so-called "dark money" – spending by groups that do not disclose their donors – as well as "gray money" – spending by groups whose donors are made of other groups, thus making it impossible to discern underlying interests without sifting through multiple layers of disclosure. CHISUN LEE AT AL., BRENNAN CENTER FOR JUSTICE, SECRET SPENDING IN THE STATES 5 (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf (defining dark and gray money).

62. *Spending by Outside Groups in Judicial Races Hits Record High, Secret Money Dominates*, *supra* note 60.

63. *Buying Time 2016 – Kansas*, BRENNAN CENTER FOR JUSTICE, https://www.brennancenter.org/analysis/buying-time-2016-kansas (last visited Aug. 2, 2017).

64. Iris Zhang & Chisun Lee, *Anonymous Donors Spent Record Amounts on 2016 State Ballot Questions,* BRENNAN CENTER FOR JUSTICE (Jan. 12, 2017), https://www.brennancenter.org/blog/anonymous-donors-spent-record-amounts-2016-state-ballot-questions.

65. LEE ET AL., *supra* note 61, at 2.

ported at all.[66] In Michigan, for example, $4.6 million in television spending on the 2014 Michigan Supreme Court election was never reported to the state's campaign finance authority, according to a study that compared Michigan campaign finance filings with records of ad buys from state broadcasters and cable companies.[67]

What does this lack of transparency mean in practice? One recent example from Montana highlights some of the concerns. In 2012, a new and little-known group called the Montana Growth Network spent hundreds of thousands of dollars on Montana's 2012 Supreme Court election, attacking one candidate, Ed Sheehy, for his efforts as a public defender to avoid the death penalty for his client. "It was a slap in the face for victims' families and justice," said the group's radio spot and mailers, which warned that Sheehy "wants to take his activist values to the Montana Supreme Court."[68] The group spent more than the candidates combined, and Sheehy ultimately lost his race to Judge Laurie McKinnon.[69]

The Montana Growth Network, which was structured as a social welfare organization under the tax code, did not disclose who was behind its spending at the time. However, three years later, its donors were made public after an investigation by the state's election authority determined that it had violated state campaign finance and disclosure laws.[70] It thus provides an unusual glimpse into the interests behind secret money.

Who was behind the attacks on Sheehy? One major set of contributors were oil and gas companies that operated in the state.[71] These companies regularly appear in state court, but have little apparent interest in the criminal justice issues highlighted in the group's ads and mailers. Another contributor was the U.S. Chamber of Commerce, a group whose own donors are undisclosed.[72] Most striking, however,

66. Pete Quist, National Institute on Money in State Politics, Scorecard: Essential Disclosure Requirements for Independent Spending, 2014 (2014), https://www.followthemoney.org/research/institute-reports/scorecard-essential-disclosure-requirements-for-independent-spending-2014/.

67. Michigan Campaign Finance Network, Campaign Finance Summary, Michigan Supreme Court Campaign 2/1/2014-11/24/2014 (2015), http://mcfn.org/uploads/documents/2014Supremes_campaign_postgen_rev.pdf.

68. Paul Blumenthal, *Two of America's Richest Men Secretly Tried to Sway Montana's Judicial Elections*, HuffPost Politics (May 10, 2016), http://www.huffingtonpost.com/entry/montana-dark-money-judicial-race_us_572b9f4ce4b016f378951c8f.

69. *Id.*

70. Hamlett v. Montana Growth Network, COPP-2012-CFP-053 (Mont. Comm'r Political Practices 2015), http://politicalpractices.mt.gov/Portals/144/2recentdecisions/HamlettvMontanaGrowthNetworkDecision.pdf.

71. *Id.*

72. *Id.*

was the $300,000 the group received from two out-of-state billionaires, Charles Schwab, the founder of the eponymous discount brokerage firm, and James Cox Kennedy, the chair of the media group Cox Enterprises.[73] Both men owned estates in Montana, and both had been previously involved in lawsuits challenging Montana's liberal public access laws for streams and other waterways.[74] At the time of the 2012 supreme court election, Kennedy had filed a new lawsuit challenging the constitutionality of the state's entire stream access law.[75] The state Supreme Court ultimately heard the case and upheld the law by a 5-2 vote. One of the two justices who sided with Kennedy? Justice McKinnon.[76]

Ironically, Montana is a state with relatively strong disclosure laws, which is why the Montana Growth Network's donors were ultimately revealed three years later. Indeed, the state's experience illustrates some of the challenges in giving teeth to disclosure in the face of ballooning outside spending: the Montana Growth Network was a small and little-known group that made a big splash in an important state election. It flouted state election laws, but its underlying interests were revealed only years later, long after the time it would be relevant to voters. Importantly, unlike political parties with long-term reputational interests, it is easy to disband and create a new group for the next election.

Montana's experience also illustrates why the rise of secret money groups, most of which will never have their donors revealed publicly, raises particular concerns in the judicial election context. First, secret money can obscure the identity of powerful interests seeking to shape courts' ideological composition, interests which may have a strong economic interest in how state courts rule on important legal issues, or even a direct stake in pending litigation. They can thereby have an outsized impact on judicial races, which are often low on information to begin with, without giving the public sufficient information to assess their motives or credibility. This is particularly so when, as was the case in Montana, there was a disconnect between the group's "tough on crime" message and the actual interests of its funders.

The situation in Montana also shows how secret spending can obscure conflicts of interest in court cases. This has the potential to undermine public confidence in the integrity of state courts and deny

73. *Id.*

74. *Id.*

75. *Id.*

76. Pub. Lands Access Ass'n v. Bd. of Cty. Comm'rs of Madison Cty., 321 P.3d 38 (Mont. Sup. Ct. 2014).

litigants the information needed to call for recusal in the appropriate circumstance. There is no evidence that Justice McKinnon was aware of who was spending on her behalf. But even when judges are unaware of the identity of donors to dark-money groups, secret spending can corrode public confidence by creating the appearance of unseemly connections and conflicts.[77] This is particularly so because, as discussed below, most states lack clear guidance on when and how a judge would need to inform the parties or recuse herself in the event she was aware of such conflicts.[78]

C. Shifting Tones and Heightened Pressure on Judges

The growing prominence of outside groups in supreme court elections may also increase the likelihood that judges will be attacked for decisions on the bench, as outside groups have historically been more willing to go on the attack than the candidates themselves. Such a move toward greater negativity has the potential to not only alter the tenor of supreme court races, but also may heighten pressures on judicial decision-making itself.

Outside groups tend to put out different messages than judicial candidates. In 2013–14, for example, more than 90 percent of "traditional" television ads in supreme court races (i.e., ads that focus on a candidate's background and experience) came from candidates themselves.[79] In contrast, more than 85 percent of negative ads were sponsored by outside groups, including several criminal justice themed ads that, among other things, described judges as "liberal on crime," or "not tough on child molesters."[80] Outside groups were responsible for half of all criminal justice-themed ad spots, and 78 percent of all ads criticizing a judge's decision on the bench, despite sponsoring only a third of ad spots overall.[81]

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77. *Cf.* JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 6–8 (2012) (survey data suggesting that conflicts of interest stemming from judicial campaign spending impacts public confidence in the courts).

78. *See infra* Part IV.

79. This calculation was made by the author based on the statistics provided on the following website: *TV Ad Archive, State Supreme Court Elections*, The Politics of Judicial Elections, https://judicialpolitics.org/election-cycle/2015-16/ (last visited Feb. 2, 2018).

80. GREYTAK ET AL., *supra* note 23, at 54, 64. Interestingly, during this cycle candidates' ads were unusually positive, which meant that in the aggregate campaign ads were more positive than in other recent cycles, even though many outside groups went on the attack. It is too early to tell if this will be a long-term pattern, but it raises the possibility that candidates, knowing that outside groups will likely be spending on their behalf, and are likely willing to go negative, will change their own behavior in response. At the same time, in the long-term, outside groups may come to so dominate the airwaves that even with a "substitution" effect by candidates, races become more negative overall.

81. *Id.* at TV Ad Archive.

These differences are not surprising. Judicial candidates may have reputational reasons for avoiding mudslinging, and they are bound by codes of conduct that limit how they can speak about themselves or their opponents. When outside groups put out ads, however, candidates have less control over and are less closely associated with the resulting campaign messages.[82] As political scientists Joanna Shepherd and Michael Kang have pointed out, such dynamics are likely to be particularly important with respect to attacks on judges for their decisions in criminal cases:

> Candidates for judicial office are frequently concerned about appearing aggressively negative, wishing instead to convey an image of "judicial temperament" in their campaigns. Thus, the best means of paying for a sensationalist attack advertisement involving a violent, bloody fact pattern may be an independent expenditure by an outside group not directly connected to the benefitting candidate.[83]

Importantly, increased attacks on judicial decisions can matter far beyond election day. The late California Supreme Court Justice Otto Kaus famously observed that deciding controversial cases when a judge knows he or she will be facing an election is like "finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[84] This intuition, that judges respond to election pressures when deciding hot-button cases, is borne out by numerous studies, which have found, for example, that judges sentence more harshly in election years.[85] In particular, a recent study by Shepherd and Kang found that as more television ads aired during state supreme court elections, justices became less likely to vote in favor of criminal defendants.[86] Likewise, justices in states whose bans on corporate and union independent expenditures were struck down by *Citizens United* were less likely to vote in favor of criminal defendants than they were before the ruling.[87] The authors theorized that because "the availability of such [independent expenditures] can dra-

82. States vary in the extent to which their laws aggressively bar coordination between candidates and outside groups. *See* LEE ET AL., *supra* note 61, at 18–21 (categorizing the strength of coordination regulations in 15 states, and describing 10 as strong or moderate).

83. SHEPHERD & KANG, *supra* note 47.

84. Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

85. *See, e.g.*, KATE BERRY, BRENNAN CENTER FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 7–11 (2015), https://www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases; Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 665–66 (2009), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1386&context=dlj.

86. SHEPHERD & KANG, *supra* note 47.

87. *Id.*

matically increase the possibility of future TV attack ads," it may incentivize judges to rule against criminal defendants.[88]

Politicized judicial races are not new. But the growing involvement of outside groups raises the worrying prospect that judicial elections will increasingly become referenda on controversial or hot-button cases and that judges, whether consciously or unconsciously, may take such pressures into account on the bench.

IV. New Challenges for Policy Measures to Insulate Elected Judges

These new trends make it even more important for states to adopt policies that can help insulate elected judges from political and special interest pressure and mitigate the influence of special interest money. Reforms may include strengthening recusal rules and adopting public financing for judicial races. But here, too, the rise of outside spending raises new challenges.

Judicial recusal is one crucial area where the rules have not kept up with the realities of modern judicial elections, despite troubling evidence that campaign cash has an impact on judicial decision-making.[89] While virtually all states require judges to step aside from hearing cases in instances where "the judge's impartiality might reasonably be questioned,"[90] few states have any provisions that specifically address spending in judicial campaigns, and those that do focus on direct campaign contributions.[91] Only six states have rules addressing when independent expenditures warrant recusal and even fewer address how to treat the underlying donors to such groups.[92] On this issue, recusal standards are far out of line with public perceptions of what is required for fair adjudication. For example, a 2013 poll by the Brennan Center for Justice and Justice at Stake found that more than 90 percent of voters believe judges should step aside from cases involving major campaign supporters, regardless of whether they contributed directly to judicial campaigns or made independent expenditures.[93]

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88. *Id.*

89. *See supra* notes 24–5.

90. Model Code of Judicial Conduct r. 2.11(A) (Am. Bar Ass'n 2011).

91. Adam Skaggs & Andrew Silver, Brennan Center for Justice, Promoting Fair and Impartial Courts through Recusal Reform 1 (2011), http://www.brennancenter.org/sites/default/files/legacy/Democracy/Promoting_Fair_Courts_8.7.2011.pdf.

92. Bannon, *supra* note 16, at 16. Indeed, Wisconsin has gone to the other extreme, adopting a recusal rule in 2010 providing that a judge "shall not be required" to recuse herself based solely on campaign spending. Wis. SCR 60.04(7).

93. *New Poll: Vast Majority of Voters Fear Campaign Cash Skews Judges' Decisions*, Brennan Center for Justice (Oct. 29, 2013), http://www.brennancenter.org/press-release/new-poll-vast-majority-voters-fear-campaign-cash-skews-judges-decisions.

Secret money poses further challenges for state recusal regimes because undisclosed donors, or donors hidden behind multiple layers of shell groups, can obscure conflicts of interest that would otherwise warrant judicial recusal. Litigants, of course, cannot seek recusal if they do not know that a conflict exists. Judges may likewise lack sufficient information to make an informed recusal determination or may only be able to do so after a burdensome review. Secret money is not an issue unique to judicial elections, to be sure, and stronger disclosure regimes are needed across the board.[94] But states also lack narrower provisions targeting the unique threats secret money poses to judicial integrity, such as a requirement that litigants and lawyers notify courts about any contributions to groups that supported or opposed the campaigns of judges hearing their suits.[95]

Outside spending also poses challenges to the efficacy of the codes of conduct that restrain the behavior of judges and judicial candidates. Most obviously, while these codes generally prohibit judicial candidates from "engag[ing] in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary,"[96] they leave outside groups free to engage in such activities. Nor do these codes provide guidance to judges and judicial candidates regarding how to interact with outside groups, including the kind of "fundraising" activities that may be permissible as it applies to these groups. For example, the ABA Model Code of Judicial Conduct includes a provision barring candidates from "personally solciti[ing] or accept[ing] campaign contributions other than through a campaign committee,"[97] but is silent as to how judges can interact with outside groups that may be spending independently or with the donors of an outside group. Can they appear at an event? Discuss campaign strategy? Among other things, these gaps raise the possibility that in some instances judges may know the identity of donors to secretive groups, and may even be involved in soliciting their support, while litigants and the public are left in the dark.

Finally, the growing role of outside spending is also problematic for some policy goals associated with another key reform—public financing of judicial elections. Currently, two states, West Virginia and New Mexico, provide for public financing of high court races.[98] Two other

94. For examples of potential policy reforms to encourage the disclosure of secret money, *see* LEE ET AL., *supra* note 61, at 23–28.

95. For an example of what such a proposal could look like, *see* SKAGGS & SILVER, *supra* note 77, at 15–16.

96. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (AM. BAR ASS'N 2011).

97. MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(8) (AM. BAR ASS'N 2011).

98. BANNON, *supra* note 16, at 16.

states, North Carolina and Wisconsin, previously had systems that were eliminated.[99] Public financing serves numerous purposes, including insulating judges from the special interest pressures associated with fundraising and creating new pathways to the bench for diverse candidates.[100] However, in three of the last five publicly financed supreme court elections, outside groups were major players, far outspending the candidates themselves.[101] The growing prominence of outside groups provides an alternative pathway for money to exert influence and risks undermining at least some of public financing's benefits. It also places greater financial pressure on the system, which, in order to be viable, must be sufficiently funded so that candidates can run competitive races even in the face of substantial outside spending.[102]

V. Conclusion

Citizens United transformed elections in the United States and judicial elections are no exception. The growing importance of outside group spending post-*Citizens United* is not unique to judicial elections,[103] but judicial elections pose unique policy challenges because of the role of courts as an institution. Courts are constitutionally obligated to "hold the balance nice, clear, and true."[104] Political and special interest pressure, if not adequately checked, threatens this basic promise of equal justice, undermining both the appearance and reality of fairness in state court systems. However, just as judicial elections raise unique policy concerns, they may also lend themselves to unique policy responses.

Some responses are legally straight-forward, even if challenging to implement. It seems obvious, for example, that states would benefit

99. *Id.*

100. *See, e.g.*, Brennan Center for Justice, Breaking Down Barriers: The Faces of Small Donor Public Financing 9, 11 (DeNora Getachew & Ava Mehta, eds., 2016), https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf.

101. *See* Bannon et al., *supra* note 24, at 6; *Buying Time 2016 – West Virginia*, Brennan Center for Justice, https://www.brennancenter.org/analysis/buying-time-2016-west-virginia (last visited Aug. 2, 2017); *Buying Time 2016 – New Mexico*, Brennan Center for Justice, https://www.brennancenter.org/analysis/buying-time-2016-new-mexico (last visited Aug. 2, 2017).

102. A 2011 Supreme Court decision heightened these financial pressures, by barring so-called trigger matching provisions, which provide for additional infusions of public funds in response to outside spending. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011). Although *Arizona Free Enterprise Club* did not address judicial races, lower courts have applied it to bar trigger matching provisions in judicial elections as well. *See, e.g.*, State ex rel. Loughry v. Tennant, 229 W. Va. 630 (2012).

103. *See, e.g.*, Weiner, *supra* note 34, at 4. *Outside Spending*, Center for Responsive Politics, https://www.opensecrets.org/outsidespending/ (last visited Aug. 2, 2017).

104. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

from recusal rules and judicial canons that respond to the realities of modern judicial campaigns, including provisions that address spending by outside groups. States might also consider broader applications of a 2015 Supreme Court decision, *Williams-Yulee v. Florida Bar*, which upheld Florida's prohibition on the direct solicitation of campaign contributions by judicial candidates. *Williams-Yulee* recognized that states have a compelling state interest in "judicial integrity,"[105] which justifies restrictions on campaign speech and conduct that would not be permissible in the context of elections for political office. As Chief Justice John Roberts explained, "Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."[106] *Williams-Yulee* raises intriguing questions about how far "judicial integrity" might take states in justifying campaign finance and other regulations that would be barred under existing jurisprudence with respect to political campaigns.

Finally, states are long past due in taking a hard look at how they structure their judicial selection systems in light of modern election realities. For example, with judges regularly subject to attacks for their decisions on the bench, states should take seriously the substantial evidence that reelection pressures are impacting how judges are ruling in cases[107] and consider eliminating such pressures by adopting a lengthy single term for judges. States should also consider whether a switch to gubernatorial appointments, with input from a nominating commission with diverse membership, may better preserve key values such as judicial independence. Moreover, states may want to consider whether robust judicial conduct rules and disciplinary procedures may be preferable to elections as an accountability mechanism for judges.

Even before *Citizens United*, state supreme court elections had become increasingly costly and politicized. The growing role of outside groups post-*Citizens United* sharpens and exacerbates many of these challenges. To date, states have done remarkably little to stem the tide of special interest money. Absent reform, state courts around the country may increasingly face questions as to whether they are capable of meeting basic principles of justice.

105. Williams-Yulee v. Florida Bar, 135 S. Ct. at 1659 (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

106. *Id.* at 1662.

107. BANNON, *supra* note 16, at 5.