

## ***Citizens United* and Independent Expenditures in State Supreme Court Elections**

Following the controversial decision of the US Supreme Court in *Citizens United v. Federal Elections Commission* in 2010, concern about the impact of the decision has been considered for state supreme court elections. Many in the popular press and field of law reason state courts are adversely affected by increasing sums of independent money spent in judicial contests. Utilizing data from the National Institute on Money in Politics, this research explores patterns of outside spending. Among states that utilize partisan or nonpartisan judicial elections are fourteen that tracked independent expenditures from 2006 through 2016. Findings from this research are both descriptive and utilize regression analysis; however, variables commonly associated with campaign spending have modest, yet important effects for understanding independent expenditures. By understanding the participation of independent groups in judicial elections, we better understand perceived threats to judicial independence where states elect their judges.

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“I think judicial elections are really the untold story of *Citizens United*.... [J]udicial elections are really a national scandal that few people know about, because corporations, in particular, and labor unions, to a lesser extent, have such tremendous interest in who’s on state supreme courts and even lower state courts that that’s where they are going to place their money and energy, because they’ll get better bang for their buck there.”

- Jeffrey Toobin<sup>1</sup>

With the decision of the United State Supreme Court in *Citizens United v. Federal Election Commission*<sup>2</sup>, announced on January 21, 2010, corporations thereafter were permitted to spend unlimited sums of money to support or oppose political candidates in elections. The nation’s high court ruled that political spending by corporations was protected speech under the First Amendment of the US Constitution. While limits on direct contributions to candidates were upheld, corporate, union, or third-party spending by independent political committees cannot be restricted. In the aftermath of the Court’s decision, political pundits and scholars pondered how *Citizens United* might affect elections throughout the United States. Would congressional or presidential elections be transformed by independent or corporate interests? Alternatively, could the removal of spending limitations on corporate or labor impact other offices? Very soon, concern about the impact of *Citizens United* on state court races developed. As noted by Jeffrey Toobin above, commentators quickly realized that state supreme court elections had the potential to be politicized and overcome by non-direct contributions. With state supreme courts ranging from five to nine judges, outside spending had a very real possibility of shifting the partisan or ideological majority in each of the forty-five states that used elections to select or retain their high court judges.<sup>3</sup>

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<sup>1</sup> Moyers, Bill. 2010. Interview with Jeffrey Toobin. “Justice for Sale.” In *The Journal*. Public Broadcasting Service. February 19.

<sup>2</sup> 558 U.S. 310 (2010)

<sup>3</sup> From 2006-2016, seven states used partisan elections, fifteen states used nonpartisan elections, and twenty-three states used the merit plan to initially select their state supreme judges. Illinois, Pennsylvania, and New Mexico use partisan elections to select their judges, but retention elections to retain their judges. North Carolina and West Virginia altered their method of election in 2016 – North Carolina from nonpartisan to partisan elections and West Virginia from partisan to nonpartisan elections, yet the national balance was not changed.

This paper seeks to understand the impact of *Citizens United* in terms of independent expenditures by outside groups in judicial elections. By examining two pre-*Citizens United* elections (2006 and 2008) and four post-*Citizens United* elections (2010, 2012, 2014, and 2016), this study explores the broad patterns that emerged in response to the Supreme Court’s decision. Did the Court’s decision cause corporate or outside money to flow into judicial elections, as many feared, or were judicial elections largely unchanged? The findings of this study indicate that changes did occur, yet not evenly across types of groups and not in each of the post-*Citizens United* elections.

By examining two attributes of outside spending – (1) the total sum of independent expenditures and (2) the percent of total campaign receipts that independent expenditures comprised, we see overall growth in independent expenditures and the rise of specific sectors of outside groups as the reality of unlimited spending took shape. Specific attention is directed to political parties and party related groups to better understand how outside spending shaped the character of judicial elections, including both partisan and nonpartisan elections. Attention is also directed to the assumed beneficiaries of *Citizens United* – corporate and labor interests. Additionally, ideological, issue, and single election groups receive attention. Within the data, we see patterns of growth or decline for specific sectors, yet for several groups no obvious pattern exists. The following provides a detailed overview of independent expenditures in judicial elections and regression analysis of the broad patterns observed.

### **A Growing Literature on *Citizens United***

It comes as no surprise that many critics dismiss the purpose of judicial elections. As documented by two leading proponents of judicial elections – Melinda Gann Hall and Chris Bonneau (2017), critics of judicial elections reason judicial impartiality is threatened by requiring judges to fundraise and seek the approval of voters. Criticisms of judicial elections in the post-*Citizens United* era include Adam Liptak’s (2014) concern that independent spending creates a norm of gratitude and Jeffrey Toobin’s (2012) view that unregulated super PACS’s are “plowing” money into judicial elections causing threats to judicial independence by outside interests. Beyond the popular media, the field of law has echoed these concerns with Charles Geyh (2016) and others arguing that judicial elections do not work where judicial independence

is threatened by the flood of money. Rather, building upon their lack of performance in prior eras, judicial elections now directly place judges and candidates in a difficult place where outside money directly affects the winners and losers of these elections.

Evidence relating to the impact of *Citizens United*, however, is decidedly mixed in relation to judicial elections and state elections more generally. In their book, La Raja and Schaffner (2015) find that *Citizens United* affected state elections, but largely by transferring where money is directed. Where states apply restrictive limits on direct contributions to state campaigns, money is allocated to independent groups. Thus, while the wealthy have alternatives in where they send their money, the form of those alternatives is often political action committees and their advocacy causes. Interestingly for corporations and unions, some argue that rather than being a negative effect on society, corporations and unions are finally able to overcome decades of repression that benefited partisan interests prior to 2010 (Hubbard and Kane 2013). However, taking a critical look at *Citizens United's* effect on elections, La Raja and Schaffner and others have sought to show that the transition has been complicated. Today, non-party groups using independent expenditures can raise money without restriction (La Raja and Schaffner 2015). Not all groups, however, benefit equally. Fenton (2014) reasons that one of the great paradoxes of the post-Citizens era is that corporate interests did not fully exploit state elections, rather unions and advocacy groups filled the void. Additionally, political parties are now about as active as before among races for governor and state legislatures (Malbin et al. 2018).

There is minimal evidence to date that outside spending flooded into judicial elections (Bannon 2018). Yet, lingering concerns exist that increased money led to increasingly negative political campaigns from outside spenders, the results of which could threaten the legitimacy of state courts (Bannon 2017). While Hall (2015) disagrees that attack ads and political ads imperil state courts, a consistent theme is the environment of state court elections has forever changed as a result of *Citizens United*.<sup>4</sup> From popular press to the academic literature,

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<sup>4</sup> Brooks and Murov (2012) show attack ads in congressional elections sponsored by unknown independent groups are more effective than those directly sponsored by campaigns. A similar effect exists where by independent group sponsored attack cause less backlash than candidate sponsored ads (Dowling and Wichowsky 2015).

questions continue to linger as time passes, yet to date few exhaustive treatments have been created to understand the decision's full impact on (1) the total independent expenditures and (2) their share of total money circulating within judicial elections. The remainder of the article seeks to better understand these characteristics and how judicial elections changed as a result of *Citizen's United*.

### **Outside Spending Sectors**

A responsibility of any study on outside spending is to classify groups that participate in elections (Herrnson 2017). Fortunately, the National Institute of Money in Politics (NIMP) provides a detailed classification for groups found in their data of independent expenditures. For the fourteen states with competitive judicial elections, this paper utilizes coding by the NIMP and verification by the author to categorize the sources of independent expenditures. Within NIMP's Follow the Money dataset, each contribution is grouped into both a broad (i.e., sector) to specific category (i.e., area of business or political interest). This study relies upon the broad category.<sup>5</sup> Moreover, with each sector, I confirmed the categorization of the 404 outside groups that disclosed the use outside money during a judicial election. In some cases, the coding by the NIMP and my interpretation of the groups differed (about 5 percent of the groups), but in most cases there was a strong alignment. While many groups were difficult to code or discern their interest or objective based on their title, the large majority of groups had active websites that allowed them to be tied to one of several sector categories.

[Insert Table 1 here]

Table 1 presents the different sectors of outside groups. These sectors include political parties and party-affiliated, party-allied, ideological, issue, business, labor, and single election groups. Additionally, a category was created for "other" for less descript outside groups. Just 1 percent of groups fell into that latter category. The first group – political parties were not affected by *Citizens United v. Federal Elections Commission* due to the US Supreme Court's 1996

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<sup>5</sup> The broad spending sector category assigned groups by their connection to agriculture, construction, energy/natural resources, finance/insurance/real estate, general business, government agencies/education, health, ideology/single issue, labor, lawyers and lobbyists, political parties, and other miscellaneous groups. From those subcategories, outside spending groups where placed within the categories described in Table 1.

decision in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*.<sup>6</sup> In that prior case, the US Supreme Court ruled that political parties could make unlimited expenditures to support or oppose candidates. Within this data used in this analysis, political parties include any state or local party committee. Political parties, such as the Michigan Democratic Party, were 20 percent of the outside spenders between 2006-2016. Two party connected entities are party-affiliated and party-allied groups. Following the categories constructed by Malbin et al. (2018), party-affiliated groups are committees that are composed of party elites, whether they originate from the national, state, or local levels, though many originate from the national level. Party-affiliated groups, which include the Republican State Leadership Committee, were 3 percent of the total population of outside groups. Party-allied groups like Texas Democratic Women of Collin County (TX) are independent entities that have overlapping objectives with political parties, yet for most there is an ideological characteristic that may place them at odds with party objectives. Party-allied groups were 10 percent of the population of outside spenders.

Ideological groups like Fuse Washington were about 9 percent of outside spenders and are defined as committees with multiple ideological goals. Issue groups in contrast are motivated by a single issue or a cluster of issues that attach to one topic. Examples include reproductive health or abortion policies. Issue groups, like NARAL Pro-choice Washington State and Wisconsin Right to Life, were 20 percent of groups active in judicial elections. Business groups, including coalitions of businesses and trade associations, promote specific market interests. Business groups, such as Koch Industries, the West Virginia Chamber of Commerce, and law firms active in judicial elections, were the largest category of outside spenders with 23 percent of the population. Labor groups are composed and funded primarily by labor unions. Labor groups like the National AFL-CIO were 4 percent of the outside group population. The last category – single-election groups – represents a development following the *Citizens United* decision. While single election groups existed prior to that US Supreme Court’s decision, there was a proliferation of single election groups following the decision. Throughout the period of review, 9 percent of outside spenders were single election groups. Examples of single election

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<sup>6</sup> 518 U.S. 604 (1996)

groups include the Strong Economy PAC in Washington State in 2010 and the Just Courts for West Virginia PAC in 2016. Where groups were present for more than one election, they were assigned to an alternative category.

### **Theory: What Has Shaped Independent Expenditures in Judicial Elections?**

With unlimited contributions by outside groups following the decision of the US Supreme Court in *Citizens United v. Federal Elections Commission*, their relative impact on judicial elections is now undergoing examination by scholars. The following provides a theoretical outline for independent expenditures in the fourteen states that collect records on independent expenditures. By understanding differences that follow the *Citizens United* decision, the focus here is on the features of states institutions, elections, and state context. With a focus on how the nationwide policy affected outside group spending in elections, this analysis evaluates to attributes of judicial elections: (1) the total sum of expenditures by outside groups and (2) the share of the spending relating to total contributions to judicial campaigns.

Conventional wisdom from studies of giving and activity in state supreme court elections reasons that different attributes of elections affect their performance, as well as participation by voters and contributors. For influences on independent expenditures, I first visit state rules and structures that most likely condition incentives for outside giving. A primary determinant of state election outcomes are rules on giving. While political parties, outside groups, and super PAC's are unrestricted in the wake of *Colorado Republican Federal Campaign Committee v. FEC* and *Citizens United v. FEC*, limits on individuals and political parties in many states could affect independent expenditures. While thirteen of fourteen states use limits on direct contributions by individuals to judicial campaigns, only nine of those states limit direct contributions by political parties to judicial campaigns. Following La Raja and Schaffner's (2015) finding that limitations on contributions by political parties lead to increased independent expenditures, restrictions on political parties are expected to encourage participation from outside groups (*Limits of Party Contributions*).

The resources devoted to state supreme courts, like those of state legislatures (Squire 1988), connect to various attributes of state court elections including voter turnout and the size of individual contributions. Among the elective states under investigation, features vary

relating to judicial salaries, staff resources, and a court's control over their agenda (Squire 2012). Attention by external groups should be more pronounced where state high court resources and control over policy is more pronounced (*SSC Professionalism*).

Features of elections should influence activity of outside group spending in state supreme court elections. First, states that hold a greater number of judicial elections should see larger sums of money expended by outside groups, as well as a larger share of money coming from independent expenditures (*Number of Elections*). Second, more competitive races should encourage activity by outside groups. In judicial elections and elsewhere (Ensley 2009; Francia et al. 2003), marginal elections are shown to increase citizen participation. Likewise, for outside groups, I expect competitive races to encourage larger sums of spending (*Competitive Race*). Third, states with competitive elections include both partisan and nonpartisan designs. While the direction of impact is unclear, it is reasonable to assume the structural design of elections could encourage or deter independent expenditures (*Partisan Elections*). Fourth, states that divide their supreme court by district should encourage more local attributes. As such, I expect diminished independent expenditures where judicial are elected by a district rather than at-large (*District Election*). Last, elections in Michigan, Pennsylvania, and West Virginia were occasionally multi-members contests. Where multiple seats are subject to the outcome of a judicial election, I expect that outside spending and the share of outside spending will increase (*Multimember District*).

Additional influences on independent expenditures may come from the environments of states. Where the total income of a state's population is greater, I expect increased attention and larger shares of outside spending in that state's judicial elections (*State Wealth*). Two additional control variables are added to the model. Where elections follow the decision of the US Supreme Court in *Citizens United v. FEC*, I expect larger sums and shares of spending by outside groups (*Post-Citizens*). Moreover, as elections advance from 2006 to 2016, spending should increase (*Trend*).

### **Data and Methodology**

To evaluate independent expenditures, this study examines the fourteen states from 2006 through 2016 that required outside groups to report their expenditure activities. While



only seven of the fourteen states were active throughout the entire period, fourteen states represent a majority of states that use competitive partisan or nonpartisan judicial elections.<sup>7</sup> I use data from the National Institute on Money in Politics' (NIMP) Follow the Money dataset, which collects information about campaign contributions and independent expenditures in state and national election campaigns. While partisan and nonpartisan elections are explored, non-competitive retention elections are not due to a lack of competition in those elections.<sup>8</sup> The dataset includes independent expenditures from all outside groups, including political parties, party-affiliated groups, party-allied groups, ideological groups, issue groups, business and labor groups, single issue groups, and miscellaneous groups. Those entities are explored together and separately both within the descriptive results and together within regression models.<sup>9</sup> In total, I explore 46 state observations with the level of analysis the state-year. Elections are grouped by election cycle rather than year, with adjacent years grouped together (e.g., 2006 and 2007 are included within the 2006 election cycle). No state with outside group activity had elections in both an even and odd year.

Given the low number of observations, I did not separately explore the seven states that were consistent throughout the period of analysis. While there are advantages to such consistency and problems relating to states entering the pool of data at a later date, an obvious advantage to being inclusive is a larger pool of data. All states with disclosure requirements are analyzed.

### **Measurement of Dependent Variables**

The dependent variables (*total sum of contributions and percentage of total contributions*) are gathered from the NIMP data. The first dependent variable - *total sum of contributions* – has nine versions and captures that total amount of independent expenditures for a state-year where independent expenditures are reported by a state. The first version is

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<sup>7</sup> Throughout the period of study, states with partisan judicial elections and requirements of disclosure of independent expenditures included Illinois, North Carolina, Pennsylvania, Texas, and West Virginia. Nonpartisan contests took place in Arkansas, Idaho, Kentucky, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, West Virginia, and Wisconsin.

<sup>8</sup> States with retention elections and requirements of disclosure of independent expenditures included Alaska, California, Colorado, Iowa, Missouri, Oklahoma, and Tennessee.

<sup>9</sup> Miscellaneous groups are not separately explored within the descriptive results.

the total sum for all groups and the other eight represent the total sum for each of the eight sectors – (1) political parties and (2) party-affiliated, (3) party-allied, (4) ideological, (5) issue, (6) business, (7) labor, and (8) single election groups.<sup>10</sup> Only the first version (total sum for all groups) is included in the regression analysis in Table 6. The second dependent variable - *percentage of total contribution* – is the relative value of independent expenditures donated by outside groups. The value is equal to the total amount of independent expenditures divided by the combined total of direct contributions to judicial election campaigns and total amount of independent expenditures. Like the first dependent variable, all groups and the eight separate sectors are explored in the descriptive results. Only the percentage of total contributions for all groups is explored in the regression in Table 7. Following the example of Malbin et al. (2018), the variable represents the share of money flowing from outside groups as a percentage of total election receipts.

### **Explanatory Variables**

Of the explanatory variables used to understand independent expenditures, limits on party contributions were coded as a dichotomous variable. Where states applied limits on how much political parties could directly give to judicial campaigns, a value of 1 was assigned. Where states did not limit party contributions, that state is assigned a 0 value. Contribution limit data was coded from the specific state campaign finance offices. To understand the impact of state supreme court professionalism, I use Squire’s (2008) measure of state supreme court professionalism with the degree of docket discretion identified. Higher values suggest a more professional court, while lower values identify a court was smaller salaries, fewer resources, and less discretion over the issues considered.

Among election features, the number of elections variable provides a count of the number of seats for election in a given year. The most seats in a given year was 5 (Kentucky in 2014), while 1 seat was the minimum. Competitive races were those contests where the winner received 55 percent or less of the vote. Where competitive, races are coded 1 or 0 where non-

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<sup>10</sup> Alternatives to the total sum of contributions measure include a natural log transformation of the variable and an adjusted value using the consumer price index. Both alternatives were used in auxiliary analyses and available upon request. The results for the three versions of the variable were nearly identical.

competitive. Partisan elections are systems where political party affiliation is identified on the ballot. States are coded 1 where partisan designs are utilized and 0 where nonpartisan elections are used. District elections exist where states use district elections with a value of 1 for states with district elections and 0 where at-large designs. Multimember districts exist where elections decide multiple offices simultaneously. Elections receive a value of 1 where a multimember election, 0 otherwise.

The value for state wealth was collected from the US Bureau of Economic Analysis. The continuous measure represents the total amount of income for a specific state and year. Of the control variables, a dichotomous value for whether an election occurred before or after the *Citizens United* decision. Where after, elections are coded 1 and 0 otherwise. The trend variable is a continuous variable that ranges from 1 to 6, representing the six election cycles between 2006 and 2016.

### **Modeling Approach**

With dependent variables being continuous measures of total sum and percentage of total contributions, ordinary least squares (OLS) designs are used to estimate both regression models. Robust standard errors are used to obtain unbiased standard errors within the OLS specification. This method is particularly useful where the potential for unequal variance exists.

## **Results**

### **Descriptive Patterns of Independent Expenditures**

The following section explores patterns of independent expenditures in state supreme court elections from 2006 through 2016. Spending by outside groups is explored using two approaches. The first approach evaluates the total sum of expenditures by outside groups. That sum is measured in increments of \$1,000's, rather than million-dollar increments, reflecting that judicial races saw smaller levels of spending than most federal and some state races. The second approach considers the percentage of dollars contributed by outside groups. Stated differently, independent expenditures are divided by the total sum of independent expenditures and direct contributions to judicial campaigns to present a comparable measure over the years of the analysis. Both measures – total sum of expenditures and independent expenditures as a percentage of funds – are evaluated across all methods of elections and

separately by election method. Together, we better understand how independent expenditures increases, decreased or remained static during the pre and post-phase of *Citizens United v. Federal Election Commission*.

[Insert Table 2 here]

Table 2 presents these results by year for each year that collected records on independent expenditures. Seven states (Idaho, Michigan, Minnesota, North Carolina, Ohio, Texas, and Washington) collected records for independent expenditures affecting judicial elections throughout the entire period of the analysis (2006-2016). Another seven states (Wisconsin in 2010; Arkansas, Illinois, Kentucky, Montana, and West Virginia in 2012; Pennsylvania in 2016) entered into the pool of data at various points during the eleven-year period. Following Malbin et al. (2018), contributions by political parties (state or local) are not included among the data reported in Table 2 since the *Citizens United* decision had no direct effect on their patterns of giving. Political parties – since *Colorado Republican Federal Campaign Committee v. Federal Elections Commission* – have been permitted to make unlimited independent expenditures, including contributions to support or oppose candidates running for state supreme courts.

Table 2 evaluates independent expenditures in three different ways. At the top, elective state supreme courts are collectively evaluated regardless of their method of election. The middle tier of the table separately examines courts selected by partisan elections. From 2006 through 2016, five states used partisan elections at some point with West Virginia shifting away from partisan to nonpartisan elections in 2016 and North Carolina transitioning away from nonpartisan to partisan elections that same year. Sectors of giving are similarly examined to explore trends in giving in elections that allow formal party designation on election ballots. The lower third of the table identifies states with nonpartisan elections. Eleven states used nonpartisan elections at some point during the period of review.

Table 2 demonstrates that among all elections, total expenditures by outside groups increased substantially from 2006 through 2016. While spending was robust in 2006, in the pre-*Citizens* election of 2008, spending was not substantive with just \$15,000 spent by external groups. During the post-*Citizens* elections of 2010, 2012, 2014, and 2016, however, that

pattern changed with outside spending growing rapidly. In 2010, IE's exceeded \$952,000 and continued to increase to \$4.4 million in 2014, \$7.7 million in 2014, and \$12.9 million in 2016. Spending by IE's increased by almost 250 percent from 2006-2016 or 86,000 percent from 2008-2016 – a staggering transition.

When exploring IE's as a percentage of total contributions, a similar observation can be made. During the pre-*Citizens* elections (2006 and 2008), 2006 again shows strong, yet limited activity among IE's where we consider IE funds as a percentage of total judicial election funds. In 2006, IE funds exceeded 21 percent of total fundraising. That value fell in 2008 to 0.03 percent when judicial elections during that election cycle coincided with the presidential election. Beginning in the first post-*Citizens* election, IE funds began to increase with a value of 4.2 percent in 2010, 11.5 percent in 2012, 17.4 percent in 2014, and then a considerable increase to 32.9 percent in 2016.

Among partisan elections of the pre and post-*Citizens* era, similar patterns develop with the exception of 2006 where spending was slight to non-existent. In both 2006 and 2008, total funds expended by IE's was \$50 in 2006 and \$7,000 in 2008. Thereafter, total spending increased from \$30,000 in 2010 to \$5.3 million in 2016. Table 2 shows that IE's also increased as a share of contributions. While IE's in 2006 were small, roughly a third of funds in 2016 originated from IE's rather than direct contributions to judicial campaigns.

With nonpartisan elections, the patterns echo the aggregate sums. In 2006, the total sum of contributions in nonpartisan election states represented almost all expenditures. During the following election, the total sum dropped to \$816,000, but then increased each year following the *Citizens* decision, except 2014. By 2016, IE's spent more than \$8 million. IE's a percent campaign receipts reflect these patterns. While IE's in nonpartisan elections states were active in 2006 contributing 21 percent of the money expended that year, by the following cycle their percentage was just .05 percent. During the post-*Citizens* phase, the IE percentage of funds increased from 7 percent in 2010 to almost 33 percent in 2016.

[Insert Table 3 here]

Table 3 shows that among all judicial elections, there was a notable shift among group sectors. Among political parties, they were quite active in 2008, 2010 and to a lesser degree in

2012. In each election, political parties spent almost \$1 million. In the other years – 2006, 2014, and 2016, parties were less active participants. While this study evaluates expenditures throughout the entire election season, the growth of party-affiliated groups is evident. While party-affiliated groups were not active prior to *Citizens*, they became active in 2012. By 2014 and 2016, party-affiliated groups gave \$2.6 million and \$3.5 million, respectively. The pattern for party-allied coalitions is less clear, yet those groups gave in excess of \$1 million in 2016. Among ideological and single-election groups we see clear growth. With both, IE's from 2012-2016 increased rapidly and surpassed \$1 million by 2012 and \$2 million by 2016. The activities of issue and labor groups are less clear with strong spending for both in 2006, but declining values thereafter. With labor expenditures, recent years have seen an increase in spending.

Considering judicial elections by their partisan and nonpartisan election format, we see additional patterns. In states with partisan elections, political parties, party-affiliated groups, and party-allied coalitions have been fairly limited. Only in one year did any group's spending exceed \$400,000 when party-allied groups spent \$1.9 million in 2014 – a strong year for Republicans nationally. Elsewhere, ideological groups were inactive until 2016 when then spent \$2.2 million. No group throughout the post-*Citizens* era has spent more than single-election groups. In 2014, single-election groups spent more than \$2 million and in 2016 they spent an additional \$1.1 million. Among nonpartisan election states, parties were frequent participants. Among other partisan groups, party-affiliated groups spent \$3.5 million in 2016 – more than any other group in a single year. Single-election groups were also active participants, spending \$1.3 million and \$1.9 million in 2012 and 2016, respectively. Other groups, including ideological, issue, and labor groups participated, but less inconsistently.

[Insert Table 4 here]

Table 4 evaluates group sectors by their relatively share of election funds. Patterns are roughly similar to the total sums expended by outside groups. Amount political parties or connected groups, only among party-affiliated groups is there a clear pattern. Their share of total funds directed to judicial elections was zero, yet from 2012 through 2016 their involvement increased considerably with 11 percent of total money attached to these non-official party entities. Similar growth is observed among ideological, business, and single

election groups. Ideological group spending increased from zero percent in 2008 to almost 8 percent in 2016. Business groups followed a similar pattern, increasing from zero percent in 2008 to approximately 7 percent in 2016. Consistent with the total sum patterns, single election group activity was insignificant prior to the *Citizens* decisions, yet between 2010 and 2016 their proportion of candidate receipts increased from 1.1 percent to almost 10 percent. A nine-fold increase.

Among partisan elections, political parties and party connected groups – somewhat interestingly – were not very involved. With all but party-affiliated groups in 2014, those groups contributed less than 2 percent in each election - pre or post-*Citizens United*. Likewise, labor and issue groups were not active. Ideological, business, and single election groups, however, followed the general pattern among all judicial elections. Their share of total receipts grew after *Citizens United* and by 2016 each gave at least 6.7 percent of total receipts. In nonpartisan elections, party-affiliated groups grew most with 15 percent of money in nonpartisan elections. Political parties were also active yet their share dropped after 2012. Otherwise, few consistent patterns emerge for outside groups in nonpartisan elections, though single-election groups were generally active after *Citizens United*. Their share of total money in nonpartisan elections increased from 0 percent in 2008 to more than 8 percent in 2016 – though they were not active in 2014.

[Insert Table 5 here]

Table 5 reports the proportion of independent expenditures by outside groups. For all election methods, the first noticeable characteristic is the change in involvement by political parties. While political parties were responsible for 98.7 percent of all independent expenditures in 2008 and almost 60 percent in 2010, their share decreased to 3.6 percent in 2016. Party-affiliated and party-allied groups appear to have replaced part of the role of political parties. While neither group was engaged before *Citizens*, by 2016 party-affiliated groups were responsible for more than a quarter of independent expenditures and party-allied groups another 8.4 percent. Ideological and single election groups engaged throughout the post-*Citizens* era though not evenly. Ideological groups surged to more than a quarter of independent expenditures in 2012 and remained active in 2014 and 2016 with 17 and 19

percent, respectively, for those years. Single elections grew to a share of 13 percent in 2010 and remained consistent during the last three election cycles with 24, 28, and 23 percent. In 2006, issue and business groups were the most active groups. While business groups held steady, issue group participation became a smaller share of independent expenditures after 2006.

Separating partisan and nonpartisan elections, political parties were not active in partisan elections except 2008. Similarly, party-affiliated and party-allied groups were not major participants in partisan election states. Among independent expenditures, issue groups maintained an important role in 2006, 2010, and 2012, but saw their share of independent expenditures decrease thereafter. By 2016, ideological, business, and single election groups were responsible for the largest shares of independent expenditures. In nonpartisan election states, political parties were responsible for a majority of independent expenditures in 2008 and 2010 and about a fifth of independent expenditures in 2012. By 2014 and 2016, their share decreased to 1 and 6 percent, respectively. Following the general pattern, party spending was partially replaced by party-affiliated and party-allied groups with 44 percent and 13 percent of independent expenditures in 2016. Otherwise, few consistent patterns are evident other than a general level of involvement by business groups and increased activity by single election groups.

Placing the descriptive results together, political parties saw their once prominent role in using independent expenditures decline not long after the *Citizens United* decision. In the election cycles following *Citizens United*, political parties were active participants across the states and in nonpartisan election states specifically. Their position, however, was replaced by party-affiliated groups. By 2016, their contributions were more than eight times the amount of formal state and local party organizations. Among states with partisan elections, political parties nor their partisan allies were consistently engaged. Political parties filled a greater portion of spending in judicial elections where states restricted partisan information. While issue and business groups saw fits of activity, ideological, labor, and single election groups were important contributors in the post-*Citizens* years. Ideological groups have become generous over time with their independent expenditures in partisan election states, though they have



been more consistent in nonpartisan election states. Labor, however, has increased in activity as outside groups, yet their resources have mainly been distributed in nonpartisan election states. Single election groups present the most interesting development with changes in the total money expended. With unlimited contributions after *Citizens United*, groups designed to affect the outcome of a single election have become increasingly active in determining the winners and losers of judicial elections.

### **Regression Results**

Table 6 and 7 show the results for the OLS models used to explain independent expenditures in state supreme court elections. Table 6 illustrates the total sum of contributions for all independent expenditures and by sector and their determinants. First, I should acknowledge that few of the explanatory variables have a strong effect across the nine models. With the first model (All IE's), however, several variables have discernably strong relationships with total independent expenditures and the r-squared goodness of fit measure is .262. Variables that are either conventionally or marginally significant include state supreme court professionalism, competitive races, and district election designs. State supreme court professionalism has the largest substantive effect with an additional \$1.6 million in independent expenditures in the most professionalized courts, compared to the least. District elections likewise affect independent expenditures, yet in a negative way. Where states use district elections, almost \$1 million fewer independent expenditures dollars are spent compared to at-large districts. While just marginally significant, competitive races also encourage larger sums of independent expenditures with \$566,000 additional dollars spent by outside groups where elections are marginal.

Among the different sectors, few explanatory variables have an effect on independent expenditures with the exception of district elections in the party-affiliated groups model. With party-affiliated groups associated with elite interests of a party, district elections have a negative effect on independent expenditures. Where looking at the smaller pool of money by party-affiliated groups, about \$270,000 fewer dollars are spent where district rather than at-large designs are used.

Independent expenditures by single election groups have a relationship with four determinants. Of those variables, state supreme court professionalism has a positive relationship with independent expenditures with an additional \$700,000 spent in the most professionalized courts compared to the least. District elections and multimember districts both register a negative effect with about \$294,000 fewer dollars spent in district elections and \$631,000 less in multimember elections. With state wealth, about \$600,000 less was spent by single election groups in the wealthiest states compared to the poorest states. In total, the general performance of the models suggests few factors explain spending by outside groups. With the general category for independent expenditures, however, we see strong relationships between spending and several variables. Those variables are generally repeated in the model for single election groups.

Table 7 includes the results for the percentage of total contributions by outside groups. In terms of the performance of the models, the results are similar to those for the sum of independent expenditures. Beginning with the model for All IE's, the model explains about 23 percent of the total variance. Moreover, just two variables – district elections and multimember districts – have a conventionally or marginally discernable impact on the percentage of contributions from outside groups. With district elections, about 26 percent fewer dollars come from outside groups where states use district elections. More tentatively, there is a 28 percent reduction of outside contributions when states decide the outcome of multiple seats in one election.

Among the different group sectors than are not single-election, only the trend variable in the party-affiliated sector model is statistically significant. In the single election group model, however, four variables are either conventionally or marginally significant. State supreme court professionalism registers a substantively important effect with the share of single election group expenditures increasing by almost 19 percent when contrasting the most professionalized courts to the least professionalized. District elections impact the percentage of judicial election receipts with 7.7 percent smaller single election group contributions in district elections than in at-large contests. Multimember elections have a negative, yet marginal effect with 17 percent smaller shares than in single member districts. Last among the

variables affecting single election group shares is state wealth. The share of single election group expenditures decreases by almost 12 percent when comparing the wealthiest state to the poorest.

In both Table 6 and 7, the commonalities relate to the distinct effects of state supreme court professionalism and district elections. Both variables affect the performance of total sums spent and the share of outside spending in judicial elections. Moreover, the failure of most variables to affect the results of the various sectors suggest unseen political and social forces at play for the forty-six state-year combinations examined.

### **Conclusion**

Have independent expenditures changed the dynamics of judicial elections? The answer is an unqualified “yes”. In the post-*Citizens* period, independent expenditures have continued to increase in each new election cycle. Further, the rise in independent expenditures does not appear to be slowing, rather millions of additional dollars are spent for each new cycle. That new reality is reflected by the total share of judicial election dollars that now run through outside groups rather than judicial campaigns. For judicial campaigns, the result appears to be external voices speaking on behalf or against campaigns.

The advent of spending by single election groups is noticeable for temporary groups formed to alter the outcome of a single election. For political parties, however, the results provide an interesting quandary, as to why they benefited initially but then slowed. The answer seems to suggest an evolution in partisan spending. While political parties remain active participants, party-affiliated groups that are not the political parties now spend about eight times that spent by political parties. One obvious result for these party-affiliated groups is greater latitude to offset the more ideological components of the major two parties. With Republican-connected, yet more conservative Tea Party factions and Democratic-connected, yet more liberal progressive factions, party-aligned groups may allow for a centrist actor to distribute money to support judicial candidates.

Emerging from *Citizens United* was the belief that corporate interests won, as well as labor to a lesser extent. Looking at both the total sum spent by outside groups and their share of total campaign receipts, the evidence does not provide witness to that expectation. Business

interests have largely remained quiet. Among labor connected groups, we see much more activity. While their total expenditures pale in comparison to party-affiliated and single election groups, labor was the fourth highest spending sector, falling just behind ideological groups.

Comparing partisan and nonpartisan election systems, it should be noted the considerable disparity in spending. Nonpartisan systems are far more inundated with independent expenditures than partisan systems. While this paper does not answer why such a disparity, party-affiliated group spending suggests party-connected groups find ways around formal barriers, which is long suggested in the academic literature (see Streb 2007).

As we look forward to developing this project, advancements must be made to the regression analysis. Important findings were uncovered for the determinants of independent expenditures and the percentage of independent expenditures as a share of money in judicial elections, yet the results are limited. For most groups, the results are not conclusive. Where approaches are considered for the next stage of analysis, a deeper investigation into the incentives and disincentives for specific group activity is a logical next step. With 404 total groups donations between 2006 and 2016, there is an opportunity to see why different groups promote or oppose judicial candidates. A logical consideration would be the partisan or ideological balance of the courts. With this study, however, we see important variation by era (pre and post-*Citizens*), year, and sector of giving.

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**Table 1: Group/Sector Classification<sup>11</sup>**

<b>Group/Sector Type</b>	<b>Description</b>	<b>Percent</b>
Political Party	Official state or local party committees	20%
Party-Affiliated Group	Dominated by elected or political party officials. A substantial portion of their money comes from the formal party apparatus	3%
Party-Allied Group	Non-party entities though composed of party connected actors. Groups exist for more than one election	10%
Ideological	Multi-issue groups that have strong ideological leanings	9%
Issue	Single issue or issue cluster organizations	20%
Business	Pro-business interests, including business groups and trade associations	23%
Labor	Pro-labor interests, including labor unions and coalitions of labor interests	4%
Single Election	Groups formed to affect the outcome of a single election	9%
Other	Miscellaneous	1%

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<sup>11</sup> The classification scheme was used prior by Malbin et al. (2018).

**Table 2: Independent Expenditures (IE's) in Judicial Elections, 2006-2016**

	<b>2006</b>	<b>2008</b>	<b>2010</b>	<b>2012</b>	<b>2014</b>	<b>2016</b>
<b>All Election Methods</b>						
Total Sum of IE's (\$1,000's)	5215	15	952	4461	7756	12900
IE as Percentage of Contributions	10.3	.03	4.2	11.5	17.4	32.9
<b>Partisan Elections</b>						
Total Sum of IE's (\$1,000's)	.05	7	30	197	4665	5328
IE as Percentage of Contributions	.0002	.03	.3	1.1	18.3	33.3
<b>Non-Partisan Elections</b>						
Total Sum of IE's (\$1,000's)	5503	816	2323	5210	3104	8067
IE as Percentage of Contributions	21.3	.05	7.5	23.0	17.4	32.8



**Table 3: Independent Expenditures (IE's) in Judicial Elections, 2006-2016, By Sector, Total Sum (\$1000's)**

	2006	2008	2010	2012	2014	2016
<b>All Election Methods</b>						
Party	288	1207	1402	946	13	480
Party-Affiliated	0	0	0	31	2607	3558
Party-Allied	7	.1	57	15	.7	1128
Ideological	.5	0	30	1419	1306	2472
Issue	2459	15	58	790	460	533
Labor	2585	0	456	790	1111	2117
Business	12	0	49	94	124	24
Single Election	152	0	301	1319	2149	3083
Other	0	0	0	2	0	0
TOTAL	5503	1222	2353	5408	7769	13400
<b>Partisan Elections</b>						
Party	0	400	0	0	0	0
Party-Affiliated	0	0	0	0	1930	0
Party-Allied	0	0	3	0	.1	105
Ideological	0	0	0	0	102	2230
Issue	.05	7	27	197	402	328
Labor	0	0	0	.02	18	1494
Business	0	0	0	0	124	3
Single Election	0	0	0	0	2089	1168
Other	0	0	0	0	0	0
TOTAL	.05	406	30	197	4665	5328
<b>Non-Partisan Elections</b>						
Party	288	807	1402	946	13	480
Party-Affiliated	0	0	0	31	677	3558
Party-Allied	7	.1	54	15	.6	242
Ideological	.5	0	30	1419	1203	242
Issue	2459	9	31	592	58	205
Labor	2585	0	456	790	1093	623
Business	12	0	49	94	0	21
Single Election	152	0	301	1319	60	1915
Other	0	0	0	2	0	0
TOTAL	5503	816	2323	5211	3105	8067

**Table 4: Independent Expenditures (IE's) in Judicial Elections, 2006-2016, By Sector, Percentage of Total Contributions**

	2006	2008	2010	2012	2014	2016
<b>All Election Methods</b>						
Party	.6	2.6	5.2	2.4	.03	1.5
Party-Affiliated	0	0	0	.07	6.2	11.2
Party-Allied	.01	.0002	.2	.04	.002	3.5
Ideological	.001	0	.1	4.0	3.4	7.8
Issue	4.8	.03	.2	2.0	1.2	1.7
Labor	.02	0	.2	.2	.3	.07
Business	5.0	0	1.7	2.0	2.9	6.7
Single Election	.3	0	1.1	3.3	5.5	9.7
Other	0	0	0	.006	0	0
TOTAL	10.7	2.6	8.7	13.6	17.5	42.1
<b>Partisan Elections</b>						
Party	0	1.7	0	0	0	0
Party-Affiliated	0	0	0	0	7.5	0
Party-Allied	0	0	.03	0	.0004	.7
Ideological	0	0	0	0	.4	13.9
Issue	.0002	.03	.3	1.1	1.6	2.0
Labor	0	0	0	0	.5	.02
Business	0	0	0	.0001	.07	9.3
Single Election	0	0	0	0	8.2	7.3
Other	0	0	0	0	0	0
TOTAL	.0002	1.7	.3	1.1	18.2	33.2
<b>Non-Partisan Elections</b>						
Party	1.2	4.5	10.3	4.9	.07	2.0
Party-Affiliated	0	0	0	.2	3.8	15.1
Party-Allied	.03	.0005	.4	.1	.004	4.3
Ideological	.002	0	.2	7.3	6.8	1.0
Issue	10.0	.05	.2	3.0	.3	.9
Labor	.05	0	.4	.5	0	.09
Business	10.5	0	3.3	4.0	6.1	2.6
Single Election	.6	0	2.2	6.8	.3	8.1
Other	0	0	0	.01	0	0
TOTAL	22.3	4.6	17.1	26.7	17.4	34.2

**Table 5: Independent Expenditures (IE's) in Judicial Elections, 2006-2016, By Sector as Percentage of Total IE's**

	2006	2008	2010	2012	2014	2016
<b>All Election Methods</b>						
Party	5.2	98.7	59.6	17.5	.2	3.6
Party-Affiliated	0	0	0	.6	33.6	26.6
Party-Allied	.1	0	2.4	.3	0	8.4
Ideological	0	0	1.3	26.2	16.8	18.5
Issue	44.7	1.2	2.5	14.6	5.9	4.0
Labor	.2	0	2.1	1.7	1.6	.2
Business	47.0	0	19.4	14.6	14.2	15.8
Single Election	2.8	0	12.8	24.4	27.7	23.0
Other	0	0	0	0	0	0
TOTAL	100	100	100	100	100	100
<b>Partisan Elections</b>						
Party	0	98.4	0	0	0	0
Party-Affiliated	0	0	0	0	41.4	0
Party-Allied	0	0	11.3	0	0	2.0
Ideological	0	0	0	0	2.2	41.9
Issue	100	1.6	88.7	100	8.6	6.2
Labor	0	0	0	0	2.7	0
Business	0	0	0	0	.4	28.0
Single Election	0	0	0	0	44.8	21.9
Other	0	0	0	0	0	0
TOTAL	100	100	100	100	100	100
<b>Non-Partisan Elections</b>						
Party	5.2	98.9	60.3	18.2	.4	5.9
Party-Affiliated	0	0	0	.6	21.8	44.1
Party-Allied	.1	0	2.3	.3	0	12.7
Ideological	0	0	1.2	27.2	38.8	3.0
Issue	44.7	1.1	1.4	11.4	1.9	2.5
Labor	.2	0	2.1	1.8	0	0.3
Business	47.0	0	19.6	15.2	35.2	7.7
Single Election	2.8	0	12.9	25.3	1.9	23.7
Other	0	0	0	0	0	0
TOTAL	100	100	100	100	100	100

**Table 6: OLS Model of Independent Expenditures with Robust Standard Errors, 2006-2016, Dependent Variable = Total Sum of Contributions by Sector**

Dependent Variable	All IE's	Parties	Party-Affiliated	Party-Allied	Ideological	Issue	Business	Labor	Single Election
<b>State Rules/ Structures</b>									
Limits on Party Contributions	.309 (.320)	.080 (.066)	.102 (.109)	.001 (.032)	.024 (.121)	-.003 (.083)	.171 (.245)	-.022* (.013)	-.014 (.124)
SSC Professionalism	3.518** (1.735)	.275 (.401)	1.411 (1.053)	-.321 (.341)	.472 (.594)	.590 (.648)	.001 (.572)	.051 (.035)	1.481** (.713)
<b>Election Features</b>									
Number of Elections	-.099 (.135)	-.016 (.032)	-.016 (.034)	.025 (.028)	-.010 (.042)	.019 (.044)	-.080 (.088)	-.003 (.003)	-.024 (.052)
Competitive Race	.566* (.327)	.053 (.048)	.183 (.126)	.027 (.042)	.171 (.138)	-.158 (.159)	.243 (.155)	-.005 (.007)	.156 (.111)
Partisan Election	.796 (1.044)	-.202 (.167)	.242 (.260)	.031 (.047)	.329 (.454)	.089 (.132)	.109 (.326)	.004 (.016)	.261 (.231)
District Election	-.954** (.410)	.027 (.070)	-.270* (.148)	-.070 (.070)	-.251 (.180)	-.057 (.093)	-.084 (.144)	-.007 (.011)	-.294** (.127)
Multimember District	-1.243 (.773)	.252 (.314)	-.430 (.382)	.069 (.085)	-.383 (.316)	-.160 (.178)	-.139 (.286)	.010 (.013)	-.631** (.250)
<b>State Environment</b>									
State Wealth	-1.02e-06 (1.22e-06)	2.87e-13 (2.08e-13)	-4.14e-13 (3.83e-13)	-9.79e-14 (1.19e-13)	-2.99e-13 (5.25e-13)	-1.30e-13 (2.58e-13)	2.80e-14 (4.65e-13)	-2.02e-14 (1.72e-14)	-5.11e-13* (2.60e-13)
<b>Control Variables</b>									
Post-Citizens	-.236 (.476)	.028 (.164)	-.100 (.111)	-.086 (.087)	.066 (.161)	-.101 (.184)	-.109 (.185)	.001 (.009)	.068 (.158)
Trend	.084 (.068)	-.013 (.017)	.052* (.023)	.017 (.015)	.021 (.025)	-.014 (.019)	-.0003 (.029)	.0006 (.002)	.025 (.026)
Constant	-170.020 (137.156)	25.692 (35.115)	-107.032* (47.778)	-34.499 (31.178)	-43.487 (50.414)	28.418 (38.101)	.817 (58.501)	-1.353 (3.061)	-51.977 (53.496)
N	46	46	46	46	46	46	46	46	46
R-Squared	.262	.294	.362	.179	.174	.116	.121	.022	.299

\*  $p < .1$ , \*\*  $p < .05$ , \*\*\*  $p < .01$ , two-tailed test of significance.

**Table 7: OLS Model of Independent Expenditures with Robust Standard Errors, 2006-2016, Dependent Variable = Percentage of Total Contributions by Sector**

Dependent Variable	All IE's	Parties	Party-Affiliated	Party-Allied	Ideological	Issue	Business	Labor	Single Election
<b>State Rules/ Structures</b>									
Limits on Party Contributions	.093 (.081)	.020 (.018)	.049 (.031)	-.002 (.017)	.005 (.026)	-.002 (.022)	.042 (.047)	-.010 (.008)	-.003 (.040)
SSC Professionalism	.444 (.402)	.131 (.115)	.119 (.254)	-.169 (.174)	.086 (.113)	.123 (.148)	-.158 (.138)	.004 (.005)	.399** (.190)
<b>Election Features</b>									
Number of Elections	.017 (.032)	-.004 (.008)	.002 (.010)	.013 (.015)	-.002 (.008)	.002 (.011)	-.021 (.015)	-.001 (.001)	-.003 (.018)
Competitive Race	.120 (.078)	.009 (.013)	.056 (.037)	-.016 (.021)	.030 (.027)	-.035 (.036)	.045 (.031)	-.003 (.005)	.044 (.035)
Partisan Election	.098 (.183)	-.048 (.037)	.047 (.054)	.015 (.024)	.043 (.079)	.014 (.031)	.014 (.056)	-.005 (.005)	.030 (.053)
District Election	-.258** (.097)	-.0006 (.017)	-.068 (.042)	-.035 (.036)	-.048 (.031)	-.011 (.022)	-.025 (.028)	-.002 (.004)	-.077** (.036)
Multimember District	-.279* (.140)	.036 (.076)	-.100 (.075)	.039 (.043)	-.072 (.058)	-.038 (.040)	-.005 (.054)	.001 (.003)	-.174* (.061)
<b>State Environment</b>									
State Wealth	-2.32e-13 (2.18e-13)	6.16e-14 (4.95e-14)	-9.12e-14 (8.03e-14)	-5.63e-14 (5.94e-14)	-3.63e-14 (9.72e-14)	-2.74e-14 (5.79e-14)	-8.10e-16 (8.23e-14)	-5.02e-15 (4.10e-15)	-1.05e-13* (5.05e-14)
<b>Control Variables</b>									
Post-Citizens	-.027 (.121)	-.003 (.041)	-.022 (.030)	-.042 (.045)	.020 (.031)	-.020 (.043)	-.019 (.038)	.005 (.004)	.056 (.059)
Trend	.021 (.016)	-.001 (.004)	.012** (.006)	.008 (.008)	.003 (.005)	-.003 (.004)	.002 (.006)	-.0004 (.0006)	.002 (.009)
Constant	-44.212 (33.932)	3.203 (9.092)	-24.955** (11.357)	-16.466 (15.967)	-7.481 (9.426)	7.085 (9.115)	-3.770 (11.427)	.857 (1.110)	-5.417 (18.412)
N	46	46	46	46	46	46	46	46	46
R-Squared	.233	.064	.086	.075	.077	.092	.090	.011	.110

\*  $p < .1$ , \*\*  $p < .05$ , \*\*\*  $p < .01$ , two-tailed test of significance.