



Open Floodgates?

Independent Spending in State Supreme Court Elections After *Citizens United*¹

by Nicholas LaRowe

IN JANUARY 2010, THE UNITED STATES SUPREME COURT ruled that bans on independent expenditures by labor unions and corporations violated the First Amendment's guarantee of free expression. Given the polarizing nature of the issue, it was perhaps inevitable that the Supreme Court's ruling in *Citizens United v. Federal Election Commission*²—overruling precedent, declaring a section of the Bipartisan Campaign Reform Act unconstitutional, and removing limits on independent spending by corporations and unions—would initiate a political firestorm. The ruling had supporters among conservative and libertarian politicians, commentators, and scholars. Senate Minority Leader Mitch McConnell argued that the decision “struck a blow for the First Amendment.”³ Others expressed strong opposition. In his State of the Union address, President Obama took time to castigate members of the Court sitting just feet away. Pundit Jonathan Alter deemed it “the most serious threat to [American] democracy in a generation.”⁴ Though the ruling struck down bans on union and corporate spending, much attention focused on the potential for business

dominance. Michael Waldman, president of the Brennan Center for Justice, argued that, “Exxon or any other firm could spend Bloomberg-level sums in any congressional district in the country against, say, any congressman who supports climate change legislation, or health care, etc.”⁵

Those in the legal profession expressed a more specific worry that the ruling would undermine faith in courts because judges may now have an incentive to hew to the wishes of powerful corporations and labor unions rather than the electorate, much less act as neutral umpires.⁶ Were such fears justified?

In the 73 years (from 1936 to 2009) of state supreme court retention elections, only eight of 637 judges have failed to keep their job.⁷ But in November 2010, all three justices up for retention election in Iowa's State Supreme Court—nearly half of the seven-judge court—lost their seats as a consequence of a 2009 ruling legalizing same-sex marriage. Vast amounts of money poured into the race; conservative groups spent over \$1 million independently to oust the three justices, while supporters spent \$423,766.

In March 2011, partisan warfare over

Wisconsin Gov. Scott Walker's “budget repair bill,” which dramatically curtailed the power of public sector unions, spilled over into a nonpartisan election for chief justice on the closely divided state supreme court. Wisconsin's judicial election became a proxy war for public-sector unions and their conservative foes. Conservative incumbent David Prosser barely survived an incredibly partisan and negative campaign, fueled by the wrath of labor unions. Working America, a pro-union advocacy group, made 366 independent expenditures; 183 targeting Prosser and 183 supporting his opponent, Joanne Kloppenburg. Both Iowa and Wisconsin were among the states forced to alter their election laws after the Supreme Court's ruling and shortly after witnessed judicial elections unparalleled in rancor and expense. Is this the future of judicial elections?

Independent spending is of concern to scholars focusing on judicial elections, as the literature has chronicled the increasing expense and competitiveness of such contests. But its significance spans far beyond judicial politics; it matters for other state elections and for congressional and

“ I look at whether labor unions and businesses have taken advantage of changes in the law to spend money independently in state supreme court elections. I find that independent spending has increased significantly since 2010 and that the change is not explainable solely by the permissiveness of state laws. Surprisingly, I also discover that **while pro-union spenders have become much more active since 2010, pro-business spenders appear to have become less active.**



NICHOLAS LAROWE is an assistant professor of political science at the University of Southern

Indiana. He studies judicial elections and campaign spending as well as public perceptions of courts. He thanks Dr. Hinh Khieu for generously sharing his time to help with questions regarding methodology.

presidential elections as well. And because it implicates elections generally, the sine qua non of representative democracy, it reaches to the most fundamental questions about the reality and possibility of self-governance. Yet despite the passions it provokes and its importance as an issue, there is virtually no research on independent spending.

Drawing insight from the theoretical framework in the literature on campaign spending — that campaign spenders are strategic, rational, self-interested actors⁸ — I use data on independent expenditures collected by the National Institute on Money in State Politics (“NIMSP”) to conduct the first analysis of independent spending in judicial elections after *Citizens United*. Specifically, I look at whether labor unions and businesses have taken advantage of changes in the law to spend money independently in state supreme court elections. I find that independent spending has increased significantly since 2010 and that the change is not explainable solely by the permissiveness of state laws. Surprisingly, I also discover that while pro-union spenders have become much more active since 2010, pro-business spenders appear to have become less active. Thus this article makes several important contributions: It updates a rapidly expanding and evolving literature on judicial elections; it provides one of the first investigations of the impact of changes in independent spending regulation; it extends theoretical insights from the campaign spending literature to a new area; and it represents progress in understanding a component of electoral spending that is badly in need of attention.

JUDICIAL ELECTIONS

The “new era” in judicial elections

Since approximately the last decade of the 20th century, judicial elections have come to resemble “political” campaigns — they are increasingly expensive and competitive, and since 2002, they more often involve discussion and debate of legal policy and issues.⁹ Scholars Owen G. Abbe and Paul S. Herrnson¹⁰ trace the origin of the “new era” of judicial elections to California in the late 1970s, when district attorneys advertised to recruit candidates to run against local trial judges. Soon after, elections

became more competitive, expensive, and contentious in states like Ohio,¹¹ North Carolina,¹² Pennsylvania,¹³ and Texas.¹⁴ This was due in part to the decline of Democratic dominance in the south and the increasing tendency of state courts to take on high-profile and contentious cases.¹⁵ Watchdog groups like The Brennan Center have documented, with increasing alarm, the rapid increase in campaign spending in judicial elections.¹⁶ Titled *The New Politics of Judicial Elections*, these reports focus primarily on the amount and tone of television advertising and rising spending levels generally.

Campaign Spending and Competition in Judicial Elections

Research on campaign spending in judicial races has as its basis the findings from campaign finance research in federal and state gubernatorial and legislative elections and the theory that both direct contributions and independent expenditures are made by rational actors to advance their interests.¹⁷ Direct contributors are those who give directly to a candidate or her campaign. They generally wish to acquire or maintain access to officeholders and to strengthen the political prospects of those friendly to their agenda.¹⁸ Independent spenders are those who try to influence voters by making expenditures on behalf of (or against) a candidate (or issue) without the prior knowledge or coordination of the campaign.¹⁹

These “electoral spenders,” both direct contributors and independent spenders, are strategic, adapting their spending to whatever campaign finance regime they encounter.²⁰ In states with few limits and regulations, they contribute money freely to candidates or parties.²¹ When facing regulations such as limits in direct contributions, such actors may spend their money independently of the candidate,²² or provide alternative means of support such as endorsements or soft-money donations.²³ A similar dynamic exists in judicial elections. Scholar Chris W. Bonneau finds that state supreme court elections are more expensive when there is an open seat, the race is competitive, when the court has few seats, and when terms are longer.

Citizens United and Independent Expenditures

Studies of independent spending in state elections are few, and studies of independent spending after *Citizens United* are nearly nonexistent, due to recentness and difficulties in collecting data. Two such studies are of note, however. Observing that roughly half of the states had to remove their ban on independent spending, scholars Douglas M. Spencer and Abby K. Wood²⁵ frame the Court’s ruling as an experimental treatment, dividing states into “treated” and “control” groups and use a difference-in-differences model to analyze patterns in spending. They find that treated states, or those that removed bans on independent spending, experienced a jump in spending above and beyond the trend of increasing spending in control states. They also find that much money was channeled into avenues governed by weak disclosure laws, and that smaller spenders were not crowded out by moneyed interests.

A second look by researcher Joseph V. Ross applies the traditional framework from the campaign finance literature to a novel target — independent spenders in judicial elections. He finds that the decision to make an independent expenditure is shaped in large part by campaign finance regulations. In particular, low contribution limits prompt contributors to seek alternative avenues of influence and lead to independent expenditures.²⁶

Will corporations and unions take advantage of this new avenue of influence and unleash a flood of independent spending in judicial elections? Looking to the literature on campaign spending, *the clear theoretical expectation is there will be an increase in spending, that the increase will occur in states that had previously banned such expenditures, and that labor unions and corporations will be responsible for the increase.*

Data are now available for two election cycles since the January 2010 ruling: The midterm elections of 2010 and the presidential cycle of 2012. To see whether the predictions of increased spending are correct, I collect data on independent expenditures in state supreme court races in 15 states over four election cycles: 2006, 2008, 2010, and 2012. The 2006 and 2008 elections are designated as a

pre-*Citizens United* era and the 2010 and 2012 elections as a post-*Citizens United* era. Some states were required to reform their election laws to allow for independent spending by corporations and unions, while others never banned such spending. This approach offers leverage in testing the predictions of scholars, pundits, and politicians. I test three propositions about the post-*Citizens* era: First, there will be an overall increase in independent spending, primarily in states that previously banned independent spending; second, corporations and labor unions will become more active, and thus account for a larger proportion of all expenditures; and third, labor unions and corporations will account for a larger proportion in dollars of independent spending.

DATA AND METHODS

Studying independent spenders

Undoubtedly, one reason there has been so little research on independent expenditures, as opposed to direct contributions, is a concern with the reliability of the data collected. For one thing, disclosure and reporting regimes on independent expenditures vary significantly among the states. Another problem lies in what states regulate and what they do not or legally

may not be able to regulate. Independent expenditures are typically classified as one of two types: independent spending, which clearly identifies a candidate and explicitly calls for their election or defeat; and electioneering communications, which are communications via some type of media, occurring near an election, clearly identifying a candidate, but not expressly advocating that candidate’s defeat or election. Electioneering communications are usually subjected to much less thorough regulation. Thus, a more lax regulatory regime may provide an incentive for spenders to channel their money toward electioneering communications rather than independent expenditures.

Given the difficulties in data collection, and given a flourishing body of literature on direct spending in judicial campaigns, is it worth chasing down such an elusive subject? It is, and good reasons exist for doing so. First, it does not follow that concerns about the validity of data mean that an issue is completely resistant to analysis, or that scholars should avoid the issue. Data are likely never to be perfectly valid or reliable in any area, and careful studies that are clear about their limits can add to our understanding of an issue. For example, a recent study of independent

TABLE 1: SUMMARY OF STATES INCLUDED IN ANALYSIS*

STATE	TYPE OF ELECTION	INDEPENDENT SPENDING RESTRICTIONS BEFORE <i>CITIZENS UNITED</i>
Alaska	Retention	Corporations and unions banned
Arizona	Retention	Corporations and unions banned
California	Retention	No bans
Colorado	Retention	Corporations and unions banned
Idaho	Nonpartisan	No bans
Iowa	Retention	Corporations banned
Michigan	Nonpartisan	Corporations and unions banned
Minnesota	Nonpartisan	Corporations banned
Missouri	Retention	No bans
North Carolina	Nonpartisan	Corporations and unions banned
Ohio	Nonpartisan	Corporations and unions banned
Oklahoma	Retention	Corporations and unions banned
Tennessee	Retention	Corporations banned
Texas	Partisan	Corporations and unions banned
Washington	Nonpartisan	No ban

*Data from National Institute on Money in State Politics

“... [T]here is a clear jump in activity by independent spenders in the two cycles after the ruling. But is spending by business and labor interests the predominant reason for the increase? No; most of the increase is driven by advocacy groups without business or labor ties.

expenditures in state elections post-*Citizens United* notes that while expenditures by unions and corporations did not increase, spending by 501c and 527 groups nearly doubled, leading the authors to surmise that legal changes influenced the behavior of independent spenders, if not the total amount of money given.²⁷

Furthermore, as in other fields, though initial studies may be rudimentary or beset with limitations or simple case studies, they fill a critical hole in the literature and will serve as the basis for replication, refutation, methodological advance, and increasingly sophisticated and systematic study. Indeed, there is a compelling example from within judicial politics, such as the advent of the study of judicial behavior.²⁸ More relevant still is the study of judicial elections, which evolved from state-level case studies²⁹ to more systematic analyses that leveraged state variation and rapidly proliferating datasets³⁰ in an attempt to draw general lessons from specific states.

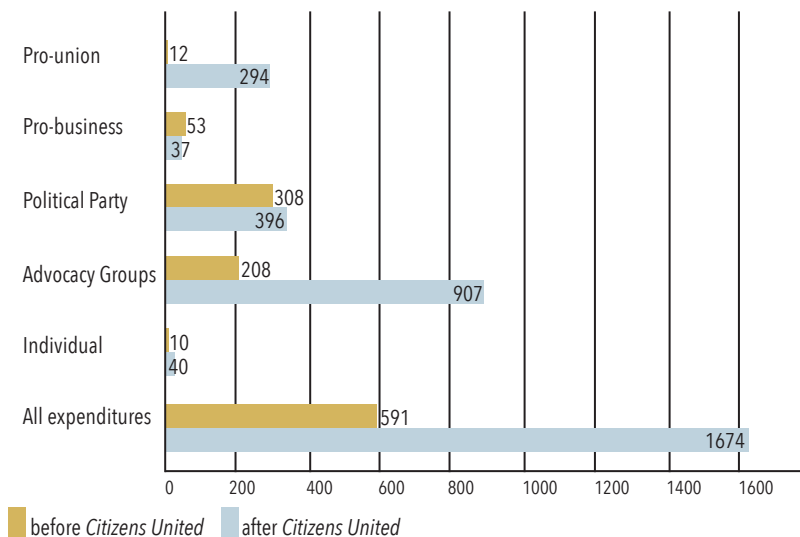
Cognizant of the challenges in data collection and analysis, I proceed cautiously in my selection of states and races. Due to differences in state law, not all 39 states with judicial elections are suitable for analysis. To reduce the problem of “dark” expenditures [that is, expenditures that are not documented analogous to unreported crimes], I use [or study or analyze] independent expenditures only in states with robust disclosure and reporting regimes, as

reported by NIMSP. To qualify for analysis, NIMSP selects only those states whose definitions of independent expenditure or electioneering communication are as or more specific than the federal definition. While this may limit the confidence with which we can generalize about judicial elections, it provides for a nice comparison with studies of federal elections, as the legal environments are highly similar. Among states that elect their judges, I look only at races for state court of last resort. These are the most prized seats within each system and receive the most attention.³¹ Therefore, they are the most likely to be targets of independent spenders and to have the most complete recordkeeping.

The list of states is compiled according to the following criteria: states holding judicial elections between 2006–2012; with independent spending regimes as or more specific than federal guidelines; that require disclosure of the target, direction, and amount of expenditure; and that have data available for the years 2006–2012. Table 1 (previous page) provides a list of the states, type of judicial election, and whether they banned corporate or union expenditures before *Citizens United*.

The states comprise a useful, if not perfectly representative sample population. In all, 15 states are included in the analysis, representing all regions of the United States except the northeast and 46 percent of the population as of the 2010 census.

FIGURE 1. FREQUENCY OF EXPENDITURES BY SPENDER TYPE IN STATE SUPREME COURT RACES BEFORE AND AFTER *CITIZENS UNITED*

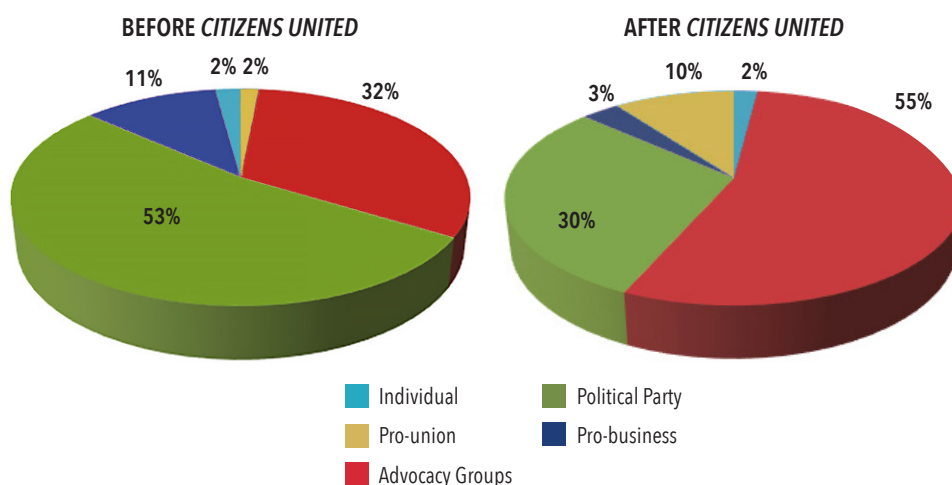


All forms of judicial election are represented; eight states use retention elections, six select judges in nonpartisan elections, and one state, Texas, uses partisan elections.³² Eleven of 15 states had in place bans on independent expenditures either by corporations, or both corporations and labor unions. States are classified as either having bans or not, and states with bans on corporate spending are designated as having a ban.

The analysis begins by looking into the composition of independent spending before and after 2010.³³ If, as the literature suggests, corporations and labor unions would take advantage of this new opportunity to influence elections via independent spending, one should see increased activity by both labor unions and corporations. Specifically, I look for such evidence in two ways: an increase in the number of expenditures by pro-business and pro-union groups [or entities] and an increase in the amount spent by corporations and unions. In both cases I conduct a difference of proportions test, first to see whether corporate and union expenditures compose a larger slice of the pie, then to see whether such expenditures constitute a larger portion of all independent spending.

NIMSP identifies and classifies independent spenders based on reports from state disclosure agencies. Hewing closely to economic industry designations of the federal government, NIMSP verifies the economic or political interest of a spender, either from disclosure reports or its own research into the group.³⁴ When this research fails to identify the spender and its interests, NIMSP simply classifies that entity as “unknown.” Fortunately, none of the spenders included in my analysis falls into the category of “unknown.” Based on that research, I place independent spenders into one of the following groups: individual, political party, pro-business, pro-union, and other advocacy groups. This categorization allows me to answer my research question: Have businesses and unions taken advantage of the *Citizens United* ruling? I separate out political parties and individuals, on the one hand, and then categorize PACs, 527, and 501c groups by whether they represent a business or labor interest as assessed by

FIGURE 2. INDEPENDENT EXPENDITURES BY AMOUNT IN STATE SUPREME COURT RACES



NIMSP. If not, they are not directly relevant to my analysis and thus are relegated to the “other advocacy groups” category. While state disclosure laws can compel the disclosure of the interest of a spender, it is not possible to identify the individuals and groups who fund these independent spenders. It would be ideal to know the identities of the contributors to such groups, but, still, a jump in pro-business and pro-union spending would serve as strong circumstantial evidence that unions and businesses are spending money to advance their interests.

In Figure 1 I use a clustered bar chart to compare the amount of activity by spender type before and after the 2010 ruling. Through four election cycles and 110 separate races, 142 different spenders made 2271 separate expenditures. In the two election cycles before 2010 there were 57 races, and 53 in 2010–12. While the number of races before and after 2010 is almost even, the frequency of independent expenditures is not. In the pre-*Citizens United* era, there were 591 expenditures; in the post-*Citizens United* era, the number of expenditures nearly triples to 1674. Overall, then, there is a clear jump in activity by independent spenders in the two cycles after the ruling. But is spending by business and labor interests the predominant reason for the increase? No; most of the increase is driven by advocacy groups without business or labor ties. Before *Citizens United*, these groups made 208 expenditures; after they

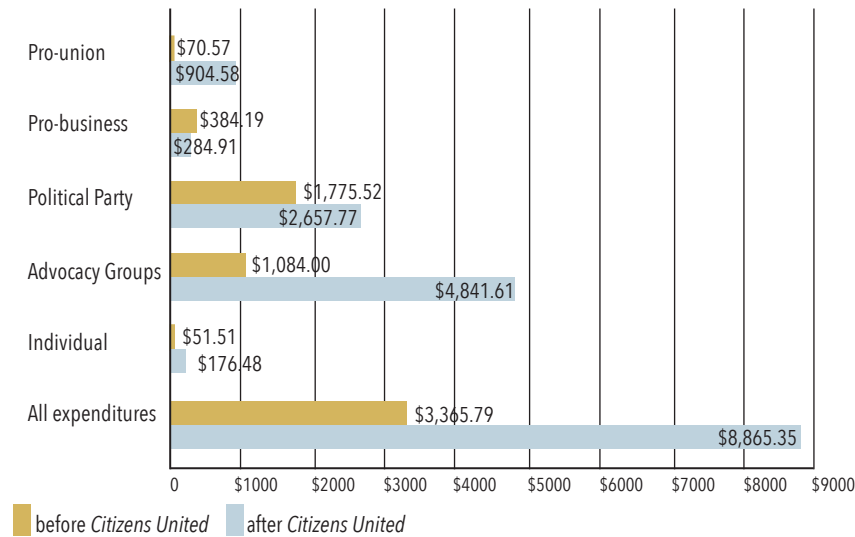
made 907, accounting for over half the increase. The second largest contributor to the increase, however, is union spending. Union independent spenders became much more active, from 12 pre-*Citizens United* expenditures to 294 post-*Citizens United*. Political parties and individuals also became more frequent independent spenders. Most striking, however, is the fact that pro-business interests not only became less active, they actually decreased their number of expenditures post-*Citizens United*. There is thus partial support for my hypothesis with a surprising twist: Union spending became more frequent, while business spending became less frequent.

In Figure 2, I present frequency of expenditures by spender type in the two periods to illustrate the distribution before and after the *Citizens United* ruling.

There is also a change in the composition of the spenders. In the pre-*Citizens United* era, political parties were the most frequent spenders, making 308 expenditures. In the post-*Citizens United* era, advocacy groups take over with 907 expenditures, significantly more than the total number of expenditures in the pre-*Citizens United* era. However, it is not as if Republicans and Democrats sat on the sidelines after 2010; the two parties were actually slightly more active, making a combined 396 expenditures.

In neither era were business or labor interests dominant, as measured by spending activity. However, there is a jump in activity by pro-business and union spend-

FIGURE 3. AMOUNT OF EXPENDITURES BY SPENDER TYPE IN STATE SUPREME COURT RACES BEFORE AND AFTER *CITIZENS UNITED*



ers, as statutory amendments in 11 states provide new opportunities to influence elections. Before 2010, pro-business groups made 53 expenditures and pro-union groups a mere 12, for 10.99 percent of total expenditures. After 2010, pro-business groups made only 37 expenditures, yet labor unions made 294 to combine for 19.5 percent of all expenditures. This nearly 8.5-percent jump is not only substantively noticeable, but statistically significant at the .001 level.

In terms of activity then, those who predicted an increased role for business and union interests were partially correct. The fact of increased activity is interesting and significant, but what is really intriguing is the relative frequency of expenditures for both groups. All things equal, one would expect corporate and union interests to participate at a roughly equal rate. If this were true, one would see more pro-union than pro-business expenditures pre-*Citizens United* (given three states in the sample banned only business expenditures) and an approximately equal number of expenditures post-*Citizens United*. What we see instead is a drop in business expenditures, to 37 from 53, and a dramatic increase in union expenditures, to 294 from 12.³⁵ Spencer and Wood document a similar phenomenon: few business expenditures but a surge in expenditures by 501c, 527, and other types of advocacy groups.³⁶ This finding is discussed in the conclusion.

I next investigate whether, after 2010, corporate and union interests account for a larger share of overall spending. While assessing changes in the number of expenditures serves as a useful indicator of activity, one cannot simply assume a one-to-one relationship between activity and spending. It may be that labor unions rely upon a traditionally strong “ground game” while business interests contribute larger amounts though less frequently. I again conduct a difference of proportions test, comparing the proportion of spending by corporations and labor unions in the pre and post-*Citizens United* eras. The clustered bar chart in Figure 3 compares spending (in logged dollars) by groups before and after the ruling.

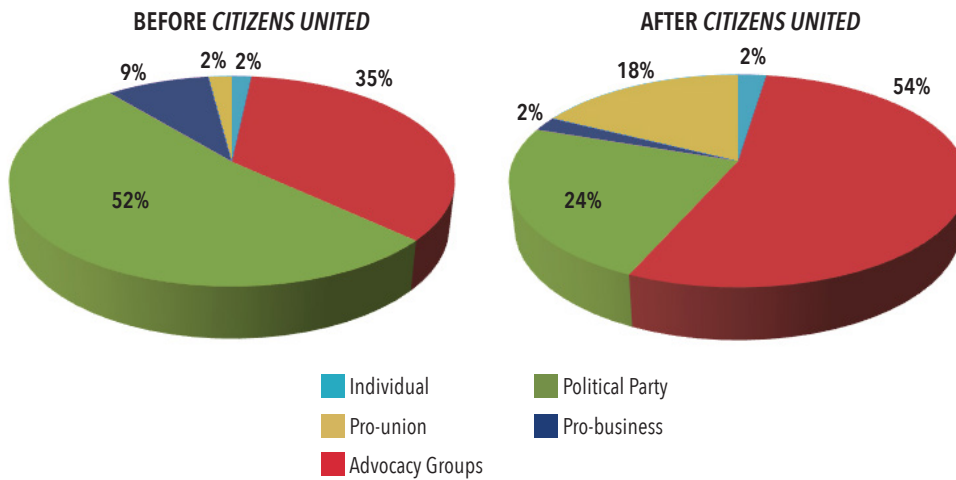
Whether measured by frequency or amount, there is a dramatic increase from pre- to post-*Citizens United* elections. The total amount of spending in 2006 and 2008 was \$3,365.79 logged dollars; in 2010 and 2012 the number jumps to \$8,865.35. The pattern that emerges is strikingly similar to the pre and post comparison of spender frequency discussed in Figure 1: Advocacy groups nearly quintuple the amount of money spent (to \$4,841.61 from \$1,084) and union spenders become much more active. Again, also, we see the strange decline in activity by business groups. Just as they became less frequent spenders after the ruling, they have also simply spent less money.

Figure 4 depicts the proportion of total spending by each type of spender both before and after 2010. Before 2010, political parties accounted for over half of all independent expenditures; after 2010, advocacy groups became the single largest group of spenders, despite an increase in party spending. Also similar is the dramatic increase in pro-union spending coupled with a decrease in pro-business spending. Pro-union spending rose to 10.2 percent of total spending from 2 percent, while pro-business spending declined to 3.2 percent from 11.4 percent. What is different, in this case, is despite a more than tenfold increase in pro-union spending, the combined proportion of money spent by pro-business and union groups is nearly equal in the two eras; in other words, the spending increase predicted post-*Citizens United* did not occur. Despite spending \$1,189.49 logged dollars post-*Citizens United*, over 2.6 times than they spent before 2010, pro-business and union groups together account for the same proportion, 13.5 percent, in both eras. In this case, the marked increase in pro-union spending was offset by sizable increases by political parties and advocacy groups as well.

So far, the analysis presents an interesting depiction of change in judicial elections after 2010. The amount of independent spending has increased consistently and may be fueled by states that repealed bans on independent spending after *Citizens United*. The data also show that, while pro-business and pro-union interests each have become more frequent spenders, their share of all spending has not increased. In fact, measured by both the number of expenditures and amount, 501c, 527 groups, and PACs have become the dominant players. Finally, while pro-union groups have become more active, pro-business groups have become less active.

I now return to the initial hypothesis, that the amount of independent spending in the 2010–12 cycles will be significantly higher in the 2006–08 elections and that states with bans would be the primary drivers of this increase. A retest of the first hypothesis is conducted, this time using regression analysis to predict independent spending in logged dollars with states as unit of analysis. The model includes the variables Number of Candidates, Partisan

FIGURE 4. INDEPENDENT EXPENDITURES BY SPENDER TYPE IN STATE SUPREME COURT RACES



Competitiveness, Both Banned, and Corporations Banned. The unit of analysis is state-years (e.g. Minnesota 2006, Tennessee 2010, etc.) As the sample size is small (N=54) few variables are included, so as not to saturate the model.

Of primary theoretical interest are the two dummy variables (Both Banned and Corporations Banned) representing states forced to repeal their bans. Because the analysis above has indicated real differences in pro-business and pro-union groups, I create a separate variable for states that banned only corporate expenditures and those that banned both corporate and union expenditures. I expect that both classes of states will exhibit significant increases in spending after 2010. Next, as the number of candidates in an election increases, so does the number of targets for independent spenders to endorse or condemn, thus, the more candidates running in a particular election, the more independent spending one expects to see. Third, prior research has found that judicial elections in states in which the major parties are of roughly equal strength are more expensive than states where one party predominates. To capture this dynamic I use Ranney's four-year folded index of partisan competitiveness.³⁷ Values range from 0.5 to 1, with higher values indicating greater competitiveness. Partisan competitiveness is expected to lead to increased independent spending. The results are presented in Table 2.

Overall, the model is significant and

does a satisfactory job of predicting variations in independent spending, explaining about one-fifth of the observed variance. All of the coefficients are in the predicted direction, with Both Banned significant at the .10 level and Number of Candidates significant beyond the .05 level. Overall the primary hypothesis is supported: States with bans on both corporate and union expenditures did experience a significant increase in independent spending after 2010, and states with bans on corporate expenditures alone saw an increase as well, though the change was not significant.³⁸

It is also worth remarking that Number of Candidates was the single most-powerful variable in the model, in terms of both significance and substance. For all of the talk about how changes in campaign finance regulation is remaking the electoral landscape, what matters most is how many candidates have entered the race. This result provides a causal puzzle for scholars: Are races becoming more expensive mainly because there are more candidates and more contested races, or is the increasingly high-stakes nature of races

drawing more candidates in?³⁹ Alternately, there may be a reciprocal dynamic to this phenomenon.

DISCUSSION AND CONCLUSION

It seems, then, that those forecasting an influx of independent expenditures were correct. To the extent that the 15 states in the sample represent the nation at large, it looks like *Citizens United* did in fact usher in a new era in independent spending. While the literature predicted an uptick in both business and union activity, much of the prognostication focused on the potential for businesses to dominate. What I found was surprising: Pro-union groups took full advantage of the new legal climate, while pro-business groups appeared to take a step back. Pro-union groups not only made more expenditures after *Citizens United*, but spent a great deal more as well. However, in terms of dollars spent, increased pro-union activity only meant keeping up with an onslaught of spending by political parties and other advocacy groups.

What is puzzling and potentially frustrating to analysts is the decrease in activity by pro-business groups. It seems inconceivable that such groups would unilaterally surrender in an arms race

TABLE 2. RESULTS OF REGRESSION ANALYSIS PREDICTING INDEPENDENT SPENDING FOR STATE SUPREME COURT ELECTIONS

INDEPENDENT VARIABLE	COEFFICIENT (S.E.)	BETA
Number of candidates	53.81** (22.28)	.32
Partisan competitiveness	11.61 (10.38)	.15
Post-Citizens corporations and unions banned	306.38* (178.44)	.23
Post-Citizens corporations banned	314.12 (270.70)	.15
Constant	-1131.36 (927.20)	
F	2.97**	
R ²	.195	
Adjusted R ²	.129	
N	54	

Notes: Unit of analysis is state-years. Six state-years were eliminated from the sample because no candidates were up for election. Dependent variable is the natural log of dollars spent. N=54 *p < .10; **p < .05; ***p < .01

among independent spenders. Perhaps they desire subtlety or anonymity, to avoid alienating voters, and funneled their resources to groups or allies who are not explicitly pro-business. If a candidate is both socially conservative and business friendly, it matters little if get-out-the-vote efforts are funded by right-to-life groups instead of the chamber of commerce. So, should Michael Waldman [of the Brennan Center] fear not General Electric, but the International Union of Electrical Workers? The correct response is probably not to

believe (naively?) that businesses have unilaterally disarmed, but to probe further into this relatively unexplored territory. Future studies should work toward a reliable integration of data from institutions like NIMSP and also CMAG to piece together a more complete picture of independent spending.

Last, the normative dimension should not be ignored. Do expensive judicial elections breed corruption or favoritism or the appearance thereof? In a system heavily dependent on an image of impar-

tiality, perception is as important as reality. Though some good work has been done in these areas,⁴⁰ scholars have yet to investigate the effects of a new campaign finance environment. Do the people of Iowa and other states trust and respect their judges less now? Will increased independent spending damage confidence in courts, or are we in for yet another counterintuitive result?⁴¹ When it comes to judicial elections, independent spending is a new area in a new era, and there is a pressing need to answer questions and test predictions.

¹ Data used in this manuscript may be accessed by visiting the National Institute on Money in State Politics at www.followthemoney.org. Data are also available from the author upon request.

² 558 U.S. 310 (2010).

³ Greg Stohr, *Corporate Campaign Spending Backed by U.S. High Court (Update4)*, BLOOMBERG (Jan. 21, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6YsdbRSDKIA>.

⁴ Newsweek Staff, *Alter: The Roberts Court Radicals*, NEWSWEEK (Jan. 22, 2010, 2:09 PM), <http://www.newsweek.com/alter-roberts-court-radicals-71047>.

⁵ Michael Waldman, *Bigger Than Bush v. Gore*, Comment to *How Corporate Money Will Reshape Politics*, N.Y. TIMES BLOG (Jan. 21, 2010, 12:45 PM), http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/?_r=0.

⁶ Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010, 12:58 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_grubbers.html.

⁷ Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremors Through the Judicial Retention System*, ABA J. (Jan. 1, 2011, 6:59 AM), http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/.

⁸ Graham P. Ramsden, *State Legislative Campaign Finance Research: A Review Essay*, 2 SCI. POL. & POL'Y Q. 176 (2002).

⁹ G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012).

¹⁰ Owen G. Abbe & Paul S. Herrnsen, *Public Financing for Judicial Elections? A Judicious Perspective on the ABA's Proposal for Campaign Finance Reform*, 35 POLITY 535 (2003).

¹¹ Laurence Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas* 66 JUDICATURE 420 (1983).

¹² Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court 1965-2010*, 89 N.C. L. REV. 1965 (2011).

¹³ James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 JUDICATURE 10 (2000).

¹⁴ Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991).

¹⁵ Abbe & Herrnsen, *supra* note 10, at 535.

¹⁶ ALICIA BANNON ET AL., JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2011-12 (Laurie Kinney & Peter Hardin eds., 2012), <http://newpoliticsreport.org/media/JAS-NewPolitics2012-Online.pdf>; DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS (Jesse Rutledge ed., 2004), http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BB-FBD7C43A3.pdf; JAMES SAMPLE ET AL., JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009 (Charles Hall ed., 2010), http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD-3FEB83E3.pdf.

¹⁷ GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980); CHRIS W. BONNEAU & DAMON M. CANN, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections*, 73 J. POL. 1267 (2011); Damon M. Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 72 JUDICATURE 226 (2007); Peter L. Francia & Paul S. Herrnsen, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, 31 AM. POL. RES. 520 (2003); Gierzynski and Breaux, *Legislative Elections and the Role of Money*, 21 LEG. ST. Q. 1 (1996).

¹⁸ Ramsden, *supra* note 8, at 176.

¹⁹ Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, 55 POL. RES. Q. 885 (2002); Thomas Stratmann, *Some Talk: Money in Politics*. A

(*Partial Review of the Literature*, 124 PUB. CHOICE 135 (2005).

²⁰ Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1998).

²¹ Joseph V. Ross, *Independent Expenditures in Judicial Elections* (2011) (unpublished Ph.D. dissertation, University of Arizona).

²² Douglas M. Spencer & Abby K. Wood, Citizens United, *States Divided: Evidence of Elasticity in Independent Expenditures*, 89 IND. L.J. 315 (2014).

²³ D. E. Apollonio & Raymond J. La Raja, *Who Gave Soft Money? The Effect of Interest Group Resources on Political Contributions*, 66 J. POL. 1134 (2004); Robert E. Hogan, *State Campaign Finance Laws and Interest Group Electioneering* 67 J. POL. 887 (2005).

²⁴ Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections*, 33 AM. POL. RES. 818 (2005).

²⁵ Spencer & Wood, *supra* note 29, at 315.

²⁶ Ross, *supra* note 28, at 1.

²⁷ Spencer & Wood, *supra* note 29, at 315.

²⁸ C. Herman Pritchett, *Public Law and Judicial Behavior* 30 J. POL. 480 (1968).

²⁹ Anthony Champagne, *Judicial Reform in Texas: A Look Back After Two Decades*, 43 CT. REV. 68 (2006); Philip L. DuBois, *Penny for Your Thoughts? Campaign Spending in California Trial Court Elections, 1976-1982*, 39 WESTERN POL. Q. 265 (1986); Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 L. & SOC. REV. 395 (1984); Jackson & Riddlesperger, *supra* note 14, at 184.

³⁰ Bonneau & Cann, *supra* note 19, at 1267; Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, POL. BEHAV. 43 (2015); Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337 (2003); Chris W. Bonneau, Melinda Gann Hall & Matthew J. Streb, *White Noise: The Unrealized*

Effects of Republican Party of Minnesota v. White on Judicial Elections, 32 JUST. SYS. J. 247 (2011).

³¹ Bonneau, *supra* note 32, at 818; Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21 (2004).

³² Both Michigan and Ohio have partisan primaries and non-partisan general elections, giving rise to a debate over how they should be classified. Because judicial elections are generally low profile, it is most likely that nearly all attention paid by the public and electoral spenders comes during the general election. Thus I classify them as nonpartisan.

³³ An ideal method for study would be a difference-in-differences test. Using the natural log of dollars, this was conducted, and while states with bans experienced larger increases the difference was not significant. This was likely due to a small sample size and wide variations in expenditures. Yet the fact that states with bans experienced a larger jump is suggestive.

³⁴ *About Our Data*, NAT'L INST. ON MONEY IN ST. POL., http://classic.followthemoney.org/Institute/about_data.phtml?l=8#8.

³⁵ Ideally, I would break the sample into “control and treated” states and conduct a difference of proportions test on each group. However, the sample from states with no pre-2010 ban does not contain enough contributions from labor and corporations (1 total in post-CU era) to meet minimum requirements for difference of proportions testing.

³⁶ Spencer & Wood, *supra* note 29, at 315.

³⁷ At the time of this writing, scores were only available through 2010 so I have used 2010 scores for elections in 2012.

³⁸ As a robustness check, models were estimated where retention, nonpartisan, and partisan (MI, OH coded as partisan) elections served as dummy variables. In all cases, the model overall was significant, the direction of the variables was the same and the magnitude was comparable.

³⁹ To test a competing explanation, that the permissiveness of state laws, not the *Citizens* ruling, really explains the increase I estimated a model replacing the *Citizens* dummy variables with a variable classifying the states by the permissiveness of their campaign finance laws. Overall, this model explains less of the variance

and the permissiveness variable does not reach significance.

⁴⁰ Damon M. Cann, *Campaign Contributions and Judicial Behavior*, 23 AM. REV. POL. 261 (2002); Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 54 POL. RES. Q. 1 (2010).

⁴¹ CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009); Bonneau, Hall & Streb, *supra* note 42, at 247.

Dechert is pleased to sponsor Judicature

Dechert is a global specialist law firm with more than 900 lawyers in 27 offices throughout the United States, Europe, the Middle East and Asia. dechert.com

Dechert
LLP

Gold
Sponsor

