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By Scott W. Gaylord

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*Scott W. Gaylord**

This November, North Carolinians will have the opportunity to select one person to serve an eight year term as a Justice on the North Carolina Supreme Court. Justice Paul Newby, the incumbent, is being challenged by Judge Sam Ervin IV, who currently serves on the North Carolina Court of Appeals. Although North Carolina's judicial elections are nonpartisan (*i.e.*, no political affiliation is listed for the candidates on the ballots), local news reports describe Justice Newby as a Republican and Judge Ervin as a Democrat. It is widely believed that the North Carolina Supreme Court is narrowly divided along ideological lines, with conservative justices holding a 4-3 majority that includes Justice Newby. Thus, the outcome of the upcoming election could alter the ideological balance of the Court.

North Carolina Supreme Court elections typically do not garner much statewide, let alone national, attention. This year is an exception, in part because of the type of cases the Court is expected to decide in the near future. As local news reports have explained, the Court is soon expected to review the redistricting plan that the Republican-controlled North Carolina General Assembly passed in 2011. The race has garnered additional media coverage relating to the formation of an organization called the North Carolina Judicial Coalition. This organization, a special type of political action committee known as a "super PAC," was formed by a group of North Carolinians to support Justice Newby's reelection. Some contend that the creation of such "super PACs" threatens the independence and impartiality of the North Carolina judiciary. In one of its two editorials on this subject, *The New York Times* claimed that the organization served as "another example of the devastating harm caused by *Citizens United*."[1] Similarly, the *News & Observer* warned that super PACs would undermine the "impartial independence of the North Carolina courts."[2]

The purpose of this paper is to inform the debate over such organizations by analyzing (i) the historical development of super PACs and their recent use in North Carolina's judicial elections, (ii) the claim by critics that increased spending by super PACs undermines public confidence in and the independence of North Carolina's judiciary, and (iii) the responses typically given in defense of independent campaign spending by super PACs in judicial elections.

I. An Overview of Super PACs and their Role in North Carolina's Upcoming Judicial Elections.

Super PACs are relatively new, coming into existence in July 2010 following two federal court decisions: the Supreme Court's *Citizens United v. Federal Election Commission*[3] *opinion* and the D.C. Circuit's decision in *SpeechNow.org v. Federal Election Commission*.[4] Taken together, these cases hold that limits on independent expenditures by individuals, corporations, unions, and super PACs violate their First Amendment speech rights. That is, in the wake of these federal cases, the First Amendment protects the right of the North Carolina Judicial Coalition and any other super PAC to raise and spend unlimited amounts of money from corporations, unions, and individuals to advocate for or against particular candidates for office. Yet despite the significant impact these organizations might have on judicial elections, many people do not

**Scott W. Gaylord is a Professor at Elon University School of Law. He previously practiced law with the Charlotte, N.C. firm of Robinson, Bradshaw & Hinson, handling complex civil and commercial litigation involving breach of contract, unfair trade practice, bankruptcy, and appellate work in both state and federal courts.*

1 *North Carolina, Meet Citizens United*, N.Y. Times, June 5, 2012, *available at* http://www.nytimes.com/2012/06/06/opinion/north-carolina-meet-citizens-united.html?_r=2.

2 *Tilted Bench?*, News & Observer, June 10, 2012, *available at* http://www.newsobserver.com/2012/06/10/2123177/tilted-bench.html.

3 Citizens United v. FEC, 130 S. Ct. 876 (2010).

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

know what super PACs are or how they might affect the independence of the North Carolina judiciary.

While super PACs have been around for only a short time, there has been a long-standing concern, dating back to at least 1907, that well-funded and well-organized groups of individuals might exert an improper influence on elections or candidates. That year, Congress passed the Tillman Act, which precluded corporations from making contributions directly to political campaigns. Almost forty years later, Congress passed the Smith-Connally Act, extending this prohibition to labor unions. And in 1947, Congress enacted the Taft-Hartley Act, which precluded corporations and labor unions from spending money "to influence federal elections," whether that money was given directly to a candidate or used for independent advertising.

To bypass these limits, labor unions created separate committees that were funded by union members. The money collected from union members then could be spent on elections for specific offices. In 1974, following Watergate and various investigations into possible corruption in the election process, Congress amended the Federal Election Campaign Act (FECA) to establish rules for the operation of PACs. Under FECA, an organization is a PAC if it campaigns for or against a political candidate and spends or receives more than $1,000 to influence a federal election.[5] The most common form of PAC is known as a "connected PAC," *i.e.*, a political action committee that can raise money from a "restricted class" of individuals who are connected to the organization. Thus, corporations may solicit contributions for connected PACs from their executives and shareholders, while unions can solicit contributions from their members. But neither corporations nor labor unions can contribute directly to PACs. Moreover, individuals can contribute at most $5,000 per year to a traditional PAC ($2,500 in a primary and $2,500 in a general election). Thus, taken collectively, these provisions restrict the amount of money PACs can collect and spend on elections in order to prevent such organizations from unduly influencing a candidate or, at a minimum, creating the appearance of corruption in the election process.

5 *See* Federal Election Campaign Act, 2 U.S.C. § 431(4).

In *Buckley v. Valeo*,[6] the Supreme Court considered a 1976 challenge to the FECA amendments and distinguished direct contributions to a political campaign from expenditures made independently of a campaign. While Congress could limit the former, the Court held that the First Amendment prevented Congress's limiting the amount individuals spent in connection with an election but without any consultation with or direction from a candidate's campaign.[7] Because these expenditures are "independent" of the campaign, they do not implicate what *Buckley* took to be the central threat of large direct contributions to a particular campaign—*quid pro quo* corruption:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate….[8]

In *Citizens United*, the Court extended *Buckley*'s First Amendment protection of independent expenditures to corporations and labor unions. Specifically, the Court held that laws prohibiting corporations and unions from making independent expenditures from their general treasury funds to influence elections violated the First Amendment speech rights of such organizations and, therefore, were unconstitutional. Given the importance of protecting political speech and the lack of coordination between campaigns and the independent spending of third parties, the Court held that "independent expenditures, including those made by corporations, do not give rise to corruption

6 424 U.S. 1 (1976).

7 FECA defines independent expenditures as "expenditures that expressly advocate the election or defeat of a clearly identified federal candidate and are not made in concert or cooperation with, or at the request or suggestion of such candidate, the candidate's authorized committee or their agents or a political party committee or its agents." 2 U.S.C. § 431(17).

8 Buckley v. Valeo, 424 U.S. 1, 46 (1976).

or the appearance of corruption."[9]

After the Supreme Court's decision in *Citizens United*, other groups challenged the limits on the amounts corporations and individuals could give to independent groups that sought to influence elections by advocating for the election or defeat of particular candidates. In 2010, a unanimous panel of the D.C. Circuit held in *SpeechNow.org v. Fed. Election Comm'n* that a certain type of PAC could accept unlimited amounts from corporations, unions, and individuals for the purpose of making independent expenditures related to elections provided that such PAC did not contribute directly to candidates, political parties, or other PACs. Following *Citizens United*, the D.C. Circuit confirmed that "corporations may not be prohibited from spending money for express political advocacy when those expenditures are independent from candidates and uncoordinated with their campaigns."[10] Thus, the contribution limits at issue in *SpeechNow.org* "violate the First Amendment by preventing [individuals] from donating to SpeechNow in excess of the limits."[11]

These "independent-expenditure only committees" came to be known as "super PACs." Super PACs differ from traditional candidate committees in virtue of who can donate to them and the amount they can receive from such donors. Whereas candidates and their committees can accept only $5,000 from individual donors in an election year[12] and cannot receive moneys from corporations, unions, or associations, super PACs can accept money from any type of donor (corporation, union, or private individual) without any limit on the amount donated and can spend that money without limit to promote the election or defeat of specific candidates. Thus, super PACs are able to advocate for the election or defeat of candidates for elected office through various means, including television, radio, and print advertising as well as other forms of media. Like traditional PACs, however, super PACs must disclose to the Federal Election Commission the identities of any person or organization donating more than $200 per year.

Of course, one might wonder why the formation of a single super PAC supporting a particular candidate for a seat on the North Carolina Supreme Court has captured the attention of national newspapers like the *New York Times*. I believe there are at least three reasons. First, since super PACs did not spring into existence until July 2010, this election cycle provides the first significant opportunity for such entities to weigh in on national and statewide elections for executive, legislative, and judicial offices. As a result, there is a general curiosity about the impact super PACs might have on the elections. Second, critics of judicial elections are concerned that super PACs threaten the independence of the judiciary, which plays a unique role in our system of government, by making judicial candidates dependent on large expenditures from third parties who might eventually end up in court before the newly elected judge. As *The New York Times* said in its June 10, 2012 editorial, "[even those] intent on upholding the integrity of the state's judiciary recognized that having judicial candidates rely on private fundraising—typically from attorneys who might wind up presenting cases before judges whom they'd helped to elect—was asking for trouble." Third, a federal district court in North Carolina recently struck down a provision of North Carolina's public financing system for judicial elections, which permitted judicial candidates who opted into the public financing system to receive additional funds if their non-publically funded opponents raised more than a statutorily prescribed amount. The loss of these so-called "matching funds," it is argued, makes judicial candidates all the more dependent on super PACs and their money, thereby increasing the threat—or at least the appearance—of corruption in the judicial selection process.

Are these concerns justified? Do super PACs present real or only imagined threats to the integrity and independence of the North Carolina judiciary? Answering these questions requires a closer look at the arguments made by critics and supporters of super PACs, and judicial elections in general.

9 Citizens United v. FEC, 130 S. Ct. 876, 909 (2010).

10 *SpeechNow.org*, 599 F.3d at 693; *see also Citizens United*, 130 S. Ct. at 909 (stating that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

11 *SpeechNow.org*, 599 F.3d at 696.

12 $2,500 in the primary and $2,500 in the general election.

II. Super PACs and the Alleged Threat toJudicial Independence

Critics of super PACs assert that they pose a direct threat to judicial independence because of the corrupting influence that large expenditures made on behalf of, even if not done in consultation with, a judicial candidate have on judicial candidates.[13] To secure election or reelection, judges must raise ever-increasing sums of money. According to a 2010 report by the Justice at Stake Campaign, "[c]ampaign fundraising more than doubled, from $83.3 million in 1990-1999 to $206.9 million in 2000-2009.[14] Three of the last five Supreme Court election cycles topped $45 million." With the advent of super PACs, critics contend that these numbers will continue to increase. Moreover, many of those contributing to super PACS—individuals, businesses, unions, and other professional associations—are apt to subsequently appear in the courtrooms of elected judges. Thus, the integrity of the judiciary may be suffering because super PACS will spend money to support a particular judge with the expectation that the judge will favorably consider the donors' interests if they have a future case before that judge. And the more money spent in judicial campaigns, the greater the risk of actual or perceived influence. As Justice O'Connor, who has become a leading critic of contested judicial elections since retiring from the Supreme Court, states, "[l]eft unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold."[15]

Under this view, judges, unlike members of the legislative and executive branches, are not supposed to be "political." Given the special role of the judiciary in our system of checks and balances, judges are supposed to neutrally apply the law to the specific facts of a case without regard for the political repercussions of their decisions. This is the position Judge Ervin advanced in response to the formation of the North Carolina Judicial Coalition, emphasizing the need to "avoid having judges be beholden to big money and instead ensure judges decided cases on the basis of the facts and the law."[16] But, judicial elections, it is argued, require elected judges to do just that—decide cases knowing that their jobs depend on how the public and their donors react to their opinions: "Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."[17] Thus, the use of super PACs is thought to increase the ever-increasing amount of money needed to secure a judicial position, which further compromises the integrity and impartiality of members of the judicial system in the eyes of the electorate.

For critics of judicial elections generally and super PACs in particular, the Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.* vividly demonstrates the way in which large campaign contributions undermine judicial independence. As the Supreme Court repeatedly noted, the facts of *Caperton* were "extreme." The lower court had entered a $50 million verdict against the coal company. While that verdict was on appeal, the CEO of the company made $3 million in independent personal expenditures, most of which were directed against the incumbent running

13 Nat'l Ctr. for State Courts, Call to Action: Statement of the National Summit on Improving Judicial Selection 7 (2002), *available at* http://www.ncsconline.org/d_research/CallToActionCommentary.pdf ("Judicial election campaigns pose a substantial threat to judicial independence . . . and undermine public trust in the judicial system.".

14 *See* James Sample, et al., Brennan Ctr. for Justice, Nat'l Inst. of Money in Politics, Justice at Stake Campaign, The New Politics of Judicial Elections 2000-2009: Decade of Change 1 (2010), *available at* http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

15 Sandra Day O'Connor, *Foreword to* Sample, et al., *supra* note 14; *see also White*, 536 U.S. at 789–90 (O'Connor, J., concurring) ("Moreover, contested elections generally entail campaigning . . . .Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups.").

16 John Frank, *Sam Ervin IV blasts super PAC supporting opponent Paul Newby*, News & Observer.com, June 16, 2012, *available at* http://projects.newsobserver.com/node/24914.

17 Republican Party of Minn. V. White, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring).

for a seat on the West Virginia Supreme Court.[18] The candidate who benefited from the independent expenditures won the election and ultimately cast the deciding vote overturning the $50 million verdict against the coal company.[19] The Court held that large expenditures made in support of a successful judicial candidate can create a "probability of bias" that violates the due process rights of litigants appearing before the judges who benefitted from campaign spending by one or more of the parties.[20] Thus, *Caperton* is used to illustrate the argument that campaign spending can undermine the integrity and independence of the judiciary by making—or at least appearing to make—a judge beholden to financial supporters.

Critics of judicial elections believe two recent Supreme Court decisions exacerbate the problem, creating what one commentator described as a "national crisis."[21] In *Citizens United*, the Court held that limits on independent expenditures by corporations and unions violated the First Amendment. In particular, the Court emphasized that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'"[22] As a result, those who oppose large spending on judicial races contend that *Citizens United* ensures that corporations can—and will—spend freely from their corporate treasuries to support judicial candidates. They believe this influx of money into judicial races will, in turn, increase the likelihood of judicial bias. Because corporations now are permitted to use their corporate treasuries to advertise for or against particular judicial candidates, corporations and labor unions can drown out other voices in the political arena. Furthermore, as *Caperton* demonstrates, corporations are apt to spend heavily when important litigation is at stake to curry favor with—even if not trying to buy the vote of—a specific judicial candidate. Even if a candidate who is elected judge remains completely impartial, critics argue that *Citizens United* creates the appearance of corruption, which is sufficient to undermine the integrity of the judicial system.

Moreover, opponents of judicial elections contend that the Court made things worse in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* by striking down the matching funds provision of Arizona's public financing scheme. Under Arizona's law, which was similar to North Carolina's matching funds provision, candidates who opted into the public financing system received an initial amount of public money to run their campaigns. If the opponent or her supporters spent more than a statutorily prescribed amount, the publicly financed candidate would receive another payment from the government to help balance the amount of money being spent by the candidates. In this way, the matching funds provision was meant to insulate elected judges from the corrupting influence of private expenditures and to encourage candidates to opt into the public financing system. Absent a matching funds provision, though, critics contend that States lack a way to entice candidates to rely on public money instead of having to solicit contributions from parties who might eventually appear in their courts. As Justice Kagan stated in her dissent in *Arizona Free Enterprise*, without a matching funds provision, states using judicial elections will "remain[] afflicted with corruption."[23] In light of *Arizona Free Enterprise* and *Citizens United*, when wealthy individuals who are willing to contribute to a super PAC that supports a particular judicial candidate, the other candidates will be forced to rely on other wealthy individuals who are willing to make their own independent expenditures. As *The New York Times* stated in one of its editorials about the North Carolina super PAC, "because the state is prohibited from reducing the spending gap

18 *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

19 *Id.* at 2257–58.

20 *Id*. at 2263 (2009).

21 Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. Rev.1965, 1966 (2011) ("In recent years, the problem of selecting judges to sit on the highest state courts has become a national crisis . . . .[L]largely as a result of decisions of the Supreme Court of the United States extending the meaning and application of the First Amendment to the Constitution of the United States far beyond the expectations of those who wrote or ratified it, or many who have since proclaimed its virtue and importance.").

22 Citizens United v. FEC, 130 S. Ct. 876, 904 (2010).

23 131 S. Ct. 2806, 2829 (2011) (Kagan, J., dissenting).

with public funds, Judge Ervin's supporters may have to form a super PAC of their own to keep up with the unlimited spending of the conservative super PAC."[24] This dramatic increase in spending, though, causes all judicial candidates to become indebted to, and therefore dependent on, third parties.[25]

To critics of judicial elections, then, *Arizona Free Enterprise* and *Citizens United* eviscerate the States' most effective means of curbing the corrosive influence of increased campaign spending by doing away with matching funds. Stated differently, public financing is an attractive option to candidates only if they can receive matching funds to keep pace with their privately funded rivals: "candidates will participate [in public funding] only if they know that they will receive sufficient funding to run competitive races."[26] Under *Arizona Free Enterprise*, however, the amount of public funding cannot be adjusted after a candidate opts into the system. As a result, the viability of public financing hinges on a state's ability to guess at the outset the amount that will ensure that publicly funded candidates can run a competitive campaign. Given that corporations and labor unions can contribute unlimited amounts of money to super PACs, if the initial public grant is too low, either no candidates will agree to the campaign restrictions or a publicly funded candidate will be unable to mount a competitive campaign. If, on the other hand, the specified amount is too high, "it may impose an unsustainable burden on the public fisc."[27] And given the current budget shortfalls that many states are facing, legislators have a built-in incentive to peg the initial amount low.

Consequently, by prohibiting states from using matching funds and allowing corporations to spend without limit from their general treasury funds, critics alleged that *Arizona Free Enterprise* greatly diminishes the likelihood that candidates will opt into the public financing system, which means that candidates must continue to rely on contributions and expenditures by third parties, including independent expenditures by super PACs. Therefore, *Citizens United* and *Arizona Free Enterprise* ensure that the perceived threat to judicial independence created by third party expenditures will increase, further undermining the public's trust and confidence in the judiciary. As Justice Kagan starkly summarized this position in her dissent in *Arizona Free Enterprise*, the Court's recent cases force states to adopt a system in which election officials, including judges, "ignore the public interest, sound public policy languishes, and the citizens lose confidence in their government."[28]

III. Responses to the critics of super PACs and independent spending in judicial elections

Some commentators have begun to challenge the view that expensive campaigns jeopardize the independence of and public confidence in the judiciary. In particular, supporters of judicial elections contend there is no empirical evidence judicial elections have undermined the actual or perceived independence of judges in North Carolina or the 21 other states that have used elections for decades to select their judges. For example, Professors Chris W. Bonneau and Melinda Gann Hall, whose research has focused on the impact of judicial elections on the independence and integrity of the judiciary, argue that there is no empirical evidence supporting the critics' claims that judges must be viewed as being removed from politics and campaigning to preserve the integrity of the judiciary in the eyes of the public. According to these political scientists:

> [G]iven the notable absence of any identifiable crises of legitimacy in the states that have hosted competitive judicial elections for decades, we wonder if the real crisis is not the unrelenting assaults on the democratic process by judicial reform advocates and their never-ending cries that elections are poisoning the well of judicial independence and legitimacy.[29]

Hall and Bonneau's research suggests that, rather than alienating voters, increased spending in

24 *North Carolina, Meet Citizens United*, *supra* note 1.

25 Arizona Free Enter. Club's Freedom Club PAC v. Bennet, 131 S. Ct. 2806, 2830 (2011).

26 *Id.* at 2829 (Kagan, J., dissenting).

27 *Id*. at 2831.

28 *Id.*

29 Chris W. Bonneau & Melinda Gann Hall, In Defense of Judicial Elections 128 (2009)..

state supreme court races appears to increase voter participation and may actually strengthen the public's confidence in the judicial branch:

> [Our] study documents that increased spending in elections to state supreme courts has the effect of substantially enhancing citizen participation in these races. . . . [And] it is reasonable to postulate that by stimulating mass participation and giving voters greater ownership in the outcomes of these races, expensive campaigns significantly strengthen the critical linkage between citizens and courts and enhance the quality of democracy.[30]

By "tap[ping] the energy and the legitimizing power of the democratic process,"[31] voters have a direct connection to the judicial branch that supports rather than undermines the integrity of the judiciary. As the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey* noted, the "Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[32] According to super PAC supporters, super PACs help inform the public about judicial candidates so that voters can cast informed votes. As a result, the people are better able to accept judicial decisions—even controversial or unpopular ones—because they are directly involved with and responsible for the selection of those who serve as judges. If, as the Court suggests in *Casey*, legitimacy derives from the public's perception that courts have the authority to decide important and difficult issues, then super PACs help advance this important goal.

On this view, greater spending on elections actually strengthens the public's confidence in the judiciary by increasing voter education and participation in the selection process. Without sufficient money to get their message out, candidates—especially challengers—cannot adequately educate voters about the central issues or even the candidates' credentials and accomplishments. According to Professor John J. Coleman, a political scientist at the University of Wisconsin, the empirical studies of campaign spending at the federal level demonstrate that such spending "enhances the quality of democracy and leads to a vibrant political community. Spending does not diminish trust, efficacy, and involvement, contrary to critics' charges."[33] In fact, Professor Coleman's research indicates that "low levels of campaign spending are not likely to increase public trust, involvement, or attention, but they will tend to diminish public knowledge."[34] Thus, Professor Coleman concludes that "[g]etting more money into campaigns should, on the whole, be beneficial to American democracy."[35]

Supporters of judicial elections maintain that this is especially true in North Carolina where, as the *News & Observer* stated in its recent editorial, public funding "arguably isn't enough to reach voters in all 100 counties." To qualify for the $240,000 in public funding for supreme court races, judicial candidates first must collect a certain amount of money from a minimum number of contributors. Justice Newby and Judge Ervin qualified for public funding with roughly $82,000 apiece, giving them a little more than $321,000 to run a state-wide campaign for the highest judicial office in the State. This amount is similar to the 2008 campaign for the North Carolina Supreme Court in which the two candidates received $671,467 combined to run their campaigns. In that election, 3,092,764 North Carolinians voted for the two Supreme Court candidates, which means that the candidates spent less than $.22 per voter. If all registered voters in the 2008 election are included, the per voter amount drops to roughly $.11. That is, in 2008 the candidates could spend less than one-fourth the cost of a postage stamp per voter to try to educate each registered voter in North Carolina.

Super PAC proponents contend that these numbers demonstrate the *News & Observer*'s point—public

30 Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 Am. J. of Pol. Sci. 457, 468 (2008).

31 Republican Party of Minn. V. White, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring).

32 Planned Parenthood of Se. Pa., v. Casey, 505 U.S. 833, 865 (1992).

33 John C. Coleman, The Benefits of Campaign Spending, 84 Cato Institute Briefing Papers 8 (2003).

34 *Id.*

35 *Id.* at 1.

financing alone is insufficient for judicial candidates to run an effective campaign. The *lack* of money in statewide judicial campaigns explains why many North Carolina voters do not know who the candidates are for judicial office. Thus, because North Carolina is the tenth most populated State, judicial election advocates maintain that additional spending by super PACs on statewide judicial races is needed so that voters can learn about the candidates and cast informed votes.

Moreover, because advertising in modern media is expensive and the public financing amount is modest, supporters of super PACs contend that increased spending on judicial elections, especially close, hard fought elections, is not unreasonable:

> Opponents of judicial elections now have the $206.9 million figure as their latest weapon in this debate. But this number reflects an aggregate, national number over a 10-year period. In the last election cycle (2007-08), Supreme Court elections across the country generated $45 million in campaign spending. This was spread out over 40 elections in 21 states—for an average of about $1 million per Supreme Court election.
>
> Is this too much money to spend on judicial elections? After all, these are important positions in state government—arguably comparable to a congressional seat or a Senate seat. One million dollars spent over a two-year period to explain to the voters of an entire state about who you are, what kind of judge you will be and how you differ from your opponent is not an extraordinary amount of money. The average Senate election in 2007-08 cost over $12 million, and the average House election cost over $1.6 million. During that same period, McDonald's averaged $34 million per state on advertising to persuade us to buy its hamburgers.[36]

In addition, although the Justice at Stake Campaign's $206.9 million number may suggest an uncontrolled increase in campaign spending, those defending judicial elections note that a closer examination shows that the increase in spending is not as dramatic as the critics suggest. While the total amount of money spent on judicial elections has increased from the 1990s to the 2000s, the Justice at Stake Campaign's report does not adjust the amounts spent in each decade for inflation. As Professor Simmons explains:

> In fact, the amount of money spent in real terms has been falling substantially since the beginning of the decade. Using 2008 dollars, the amount of money spent in the 1999-00 election-year cycle was $57 million; in 2003-04, it was $52 million; and by 2007-08, it had dropped to $45 million, a 21 percent drop from eight years before.[37]

Although judicial campaigns can be expensive, these commentators argue that there is no indication that elected state court judges are viewed as illegitimate by their citizens. In fact, given the prevalence of judicial elections in judicial selection systems, supporters of judicial elections claim there is prima facie evidence that just the opposite is true—judicial elections actually reinforce the legitimacy of state courts.

Furthermore, other commentators have questioned whether the available evidence even anecdotally suggests that judicial candidates are for sale. While critics of super PACs frequently invoke *Caperton* as an example of the corrosive effect of large contributions on judicial elections, a recent report from the West Virginia Supreme Court of Appeals states that the judge who benefited from the CEO's independent expenditures actually voted against the coal company or its subsidiaries 81.6 percent of the time, which "cost" the coal company $317 million. In contrast, including the *Caperton* decision, the company only "benefited" to the tune of $53.5 million in the other 18.4 percent of the cases decided by the same judge.

Those in favor of judicial elections take the West Virginia report to show that justice was not "for sale" in judicial races. For instance, Justice Newby, they point out, has a record and judicial philosophy that predate the North Carolina Judicial Coalition, and that the

36 Ric Simmons, Editorial, *Cost No Reason to Shun Judicial Elections*, Columbus Dispatch, Oct. 16, 2010, *available at* http://www.dispatch.com/content/stories/editorials/2010/10/16/cost_judicial_elections.html.

37 *Id.*

organization supports him because of that existing judicial philosophy and voting record. Supporters of super PACs say this is no different from the confirmation hearings for federal judges, where judicial nominees (like their elected state court counterparts) frequently have highly developed views regarding the judicial role, the nature of the Constitution, federalism, and a host of other topics—all of which bear directly on the way in which they carry out the judicial function. In fact, presidents pick nominees in large part because they believe these individuals have particular views on issues that are important to the president and will bring those to bear when deciding cases, including judicial philosophy. Super PACs, in the view of their backers, can play an important role in informing the public about the candidates' views on "political" issues related to the judiciary:

> [T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[38]

Judicial election advocates contend that the history in states that have permitted unlimited corporate expenditures demonstrates that the rise of super PACs does not mark the end of judicial independence: "26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States."[39] While super PACs have played an important role in the 2012 presidential and congressional races, the evidence indicates that the vast majority of the money given to super PACs has come from wealthy individuals, not corporations or unions. According to the Center for Responsive Politics, the top 100 individual super PAC donors in the 2011-12 election cycle contributed 80% of the money raised but made up only 3.7% of the contributors to such super PACs.[40] With respect to "the most active super PACs," corporations donated less than 0.5% of the money donated.[41]

Disclosure requirements enable citizens to know who is involved in each super PAC. For instance, the various news reports regarding the North Carolina Judicial Coalition make it clear who formed the super PAC and the leading contributors to that PAC. As the *News & Observer* noted, the North Carolina Judicial Coalition "is comprised of Republican heavy hitters." The *News & Observer* and *The New York Times* did not mention that Justice Newby has the endorsement of four of the five living chief justices of the State Supreme Court, that two of these former Chief Justices are democrats, and that one of these two, Burley Mitchell, is a leader of the Coalition. Chief Justice Mitchell, while not a supporter of judicial elections in general, stated in defense of the group: "It's far better for independent groups who are supportive of justices and judges to raise money . . . than for the justices themselves having their hat out to ask for money."[42]

Defenders of judicial elections note that, although *The New York Times* and *News & Observer* express concern over the ability of super PACs to make unlimited independent expenditures in judicial races, these media corporations use their corporate structures and general funds to weigh in on—and possibly influence—the North Carolina Supreme Court race. For example, supporters of judicial elections highlight the fact that *The New York Times* used its editorial to inform the public that Justice Newby is a conservative and that he "opposed adoptions by same-sex couples and disallowed a lawsuit challenging alleged predatory lending." These advocates wonder how much a *New York Times* editorial or the *News & Observer*'s characterization of Justice Newby as "so far to the right" is worth to Judge Ervin

38 Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) (quoted in *White*, 536 U.S. at 788).

39 Citizens United v. FEC, 130 S. Ct. 876, 908–09 (2010).

40 Charles Riley, *Can 46 rich dudes buy an election?*, CNN.com, March 26, 2012, *available at* http://money.cnn.com/2012/03/26/news/economy/super-pac-donors/index.htm.

41 Anna Palmer and Abby Phillip, *Corporations don't pony up for super PACs*, Politico, March 8, 2012, *available at* http://www.politico.com/news/stories/0312/73804.html.

42 Gary D. Robertson, *Big money could arrive for NC Supreme Court race*, RealClearPolitics.com, July 29, 2012, *available at* http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/big_money_could_arrive_for_nc_supreme_court_race.html.

or any other candidate for elected office. On this view, super PACs give private citizens the same opportunity to express and disseminate their views on the judicial candidates consistent with the First Amendment and the need to inform voters across North Carolina about the candidates running for judicial office.

IV. Conclusion

As Chief Justice Marshall famously stated in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[43] Given that the North Carolina Supreme Court is responsible for saying what the law is in North Carolina—by interpreting and applying the North Carolina Constitution and statutes—North Carolina voters should learn more about their judicial candidates, not less. But the debate no doubt will continue over what sources of information are prudent and whether the value of more voter information should be offset by other stated concerns relating to independence.

43 Marbury v. Madison, 1 Cranch 137, 177 (1803).

The Federalist Society for Law & Public Policy Studies
1015 18th Street, N.W., Suite 425 • Washington, D.C. 20036