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WHITE PAPER NO. 24

INDEPENDENTS' DAY:

SEEKING DISCLOSURE IN A NEW ERA OF UNLIMITED SPECIAL INTEREST SPENDING

New Jersey Election Law Enforcement Commission
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State of New Jersey

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The Commissioners would like to thank the various staff members involved in this report, which is the 24th white paper released by the New Jersey Election Law Enforcement Commission (ELEC) over the past 26 years.

This series has received international recognition and its contents often have been cited in media reports, the political science literature and studies issued by sister agencies.

Besides serving as reference works, the reports also provide valuable background and guidance for the Governor's office, legislators and other policymakers.

Deputy Director Joseph W. Donohue is the author of White Paper No. 24, Independents' Day: Seeking Disclosure in a New Era of Unlimited Special Interest Spending.

General editors and proofreaders included Executive Director Jeffrey M. Brindle, Director of Information Technology Carol Neiman, Legal Director Carol L. Hoekje and Compliance Director Amy F. Davis.

Neiman and Kim A. Roman, Associate Director of Information Technology, helped gather some data for the project.

Assistant Elbia L. Zeppetelli formatted the final version with her usual creative flair.

A special thanks goes to former Executive Director Frederick M. Herrmann, whose library of campaign finance books was an indispensable reference for this report.

All 24 white papers are available on ELEC's website at www.elec.state.nj.us.
Revisions made 5/30/2018 in bold italics Pages 26, 41, 43, 46, 64.

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SUMMARY

- Since the landmark *Buckley v. Valeo* ruling in 1976, independent spending by special interest groups and individuals has steadily swelled into a major force in American politics. Super PACs and other independent groups not run directly by parties spent $1 billion in the 2012 federal campaigns (Page 22)- up from the equivalent of $45 million in 1980 (Page 5).
- A fast-growing amount of spending by these so-called "outside groups"- independent spenders that, by law, are supposed to operate outside the control of candidates or parties- is coming from untraceable contributions. Nearly $311 million was spent on the 2012 federal elections without revealing the names of contributors- up from $4.1 million in 2002 (Page 23 and 24).
- *Citizens United v. FEC* has been criticized for accelerating the growth of independent spending by striking down a long-time ban on corporate and union independent spending. But it also contained perhaps the strongest endorsement of disclosure by any U.S. Supreme Court majority (Pages 59 and 60).
- Under Supreme Court rulings, it is clearly constitutional to require groups to publicly detail their contributions and expenses if they explicitly urge voters to support or oppose candidates. More recent also permit full disclosure by groups that run issued-oriented advertising that can be legitimately tied to elections (Page 52).
- Independent spending has risen sharply in New Jersey even as it has mushroomed in federal elections. In 1977, only about $10,700 (unadjusted for inflation) was spent independently on state campaigns (Page 34). In 2013, nearly $39 million was spent on gubernatorial and legislative elections- the fifth largest amount of independent spending ever in any state (Pages 26 and 41).
- As early as April 2010, ELEC, on a bipartisan basis, has supported recommendations by Executive Director Jeff Brindle to expand disclosure by independent groups. Brindle has outlined legislation that requires full, timely reporting of contributions and expenditures by all groups that engage in express advocacy, and by groups that run issue ads that can be reasonably construed as election-related (Pages 63 through 65).

CHAPTER I

INDEPENDENT SPENDING MILESTONES – A NATIONAL OVERVIEW

YEAR	INDEPENDENT SPENDING MILESTONES - FEDERAL
1907	Tillman Act bans corporations from “directly or indirectly” making contributions to federal elections. Some view this as the original ban on independent corporate expenditures.
1913	Congress creates 501(c)4 non- profits to give tax break to civic groups operating exclusively for the promotion of social welfare.
1947	Overriding a veto by President Harry Truman, who called it a “dangerous intrusion on free speech,” the Labor Management Relations Act (Taft Hartley) explicitly bans independent spending by corporations and unions. Political action committees are created to try to get around this ban.
1959	IRS issues rule that allows 501(c)4 non-profits to participate in more than just social welfare activities. It opens the door for some to become involved in politics.
1974	Federal Election Campaign Act limits independent spending by individuals to $1,000 per year.
1975	Congress creates 527 non-profit groups to clarify tax status of political organizations.
1976	*Buckley v. Valeo* strikes down limits on campaign spending except for corporations and unions. Individuals and associations free to spend unlimited sums independently. Regulation limited to express advocacy, creating an early impetus for “issue ads” to flourish.
1978	*First National Bank of Boston v. Bellotti* allows unlimited corporate expenditures on state ballot questions.
1980	Federal independent spending reaches $16.2 million in federal elections- eight times more than 1976 elections.
1986	*FEC v. Massachusetts Citizens for Life* allows small, ideologically based non-profit corporations to engage in issue advocacy during federal elections.
1988	Use of infamous “Willie Horton” ad by several independent groups helps defeat Michael Dukakis in federal presidential campaign.
1988	Independent group called “Citizens United” is formed. Twenty-two years later, a lawsuit it files leads to a landmark campaign finance ruling.
1993	Independent group aligned with health insurers airs “Harry and Louise” issue ads that erode support for federal health insurance proposal.
1996	*Colorado Republican Federal Campaign Committee v. FEC* permits political parties to engage in independent spending.
1996	Independent groups spend tens of millions of dollars on issue ads during federal election considered most notorious since Watergate.
2000	Ads by independent group run by Wyly brothers helps defeat Senator John McCain during Republican presidential primary.
2000	Senator McCain pushes through federal bill requiring 527 non-profit groups to disclose their contributions and expenses in reports filed with the Internal Revenue Service.
2002	Bipartisan Campaign Reform Act, better known as McCain Feingold, includes ban on issue ads by unions and corporations 30 days before primaries and 60 days before general elections.
2004	Swift Boat Veterans and POWs for Truth runs powerful ad attacking military service record of Senator John Kerry, who loses presidential election. The term “swiftboating” becomes part of political lingo.
2004	Pro-Democratic groups like MoveOn.org PAC and America Coming Together step up efforts to use independent spending to attack President George W. Bush. Bush still wins.
2007	Issue ad spending by 501 non-profit groups, which don’t disclose contributors, explodes after *Wisconsin Right to Life v. FEC*. The ruling struck down prohibition on corporations and unions funding electioneering communications.
2010	*Citizens United v. FEC* ends 1947 ban on independent spending by corporations and unions.
2010	*SpeechNow.org v. FEC* declares that a 527 non-profit group is not subject to $5,000 federal contribution limit but must disclose its contributions and expenditures.
2010	FEC issues two advisory opinions that permit a conservative 501 non-profit group and liberal non-connected political committee to form independent expenditure only committees that are not subject to contribution limits, better known as Super PACs.
2011	*Carey v. FEC* allows political action committees to set up independent spending-only committees not subject to contribution limits.
2012	Non-party independent spending exceeds $1 billion in federal elections, an all-time record and triple the amount spent in 2008.

INDEPENDENT SPENDING – A NATIONAL OVERVIEW

The ads have become political legends.

One used the ominous glare of furloughed killer Willie Horton to wilt the prospects of Presidential candidate Michael Dukakis in 1988.

The fearful reaction of the fictitious but memorable couple "Harry and Louise" in 1993 and 1994 helped sink President Bill Clinton's proposed national health insurance plan.

More recently, an emotional 2012 commercial tried to blame the cancer death of a steel worker's wife on a business decision by Presidential candidate Mitt Romney.

These political attack advertisements have more in common than just their harsh tone and indelible content.

They also were produced by special interest groups or individuals ostensibly operating independently of the candidates or parties.

During the past 30 years, these political mercenaries have become a powerful force in campaigns, both nationally and in New Jersey.

Many attained this power by sponsoring campaign attack ads so vicious that candidates themselves might have been reluctant to air them.

Independent campaign committees weren't always a major force in politics.

In the early days of American campaigns, there was no need for independent campaign committees. Wealthy individuals, corporations, unions and others could contribute all they wanted directly to candidates.

Standard Oil gave $250,000 to President William McKinley's campaign in 1896, the equivalent of more than $6.7 million in today's dollars.[1]

Even more than a century ago, such mega-contributions stirred concerns.

[1] William T. Horner, "Ohio's Kingmaker: Mark Hanna, Man and Myth," 2010.

INDEPENDENT SPENDING – A NATIONAL OVERVIEW

As early as 1897, four states- Nebraska, Missouri, Tennessee and Florida- banned corporate contributions.[2]

During his 1904 campaign, Teddy Roosevelt also received $100,000 from Standard Oil- worth about $2.5 million today- but ordered his campaign manager to return it. "We cannot under any circumstances afford to take a contribution which can be even improperly construed as putting us under an improper obligation," he said.[3]

That didn't stop Roosevelt from taking plenty of checks from other companies. He was criticized enough that he became a champion of public financing and signed a bill banning corporate contributions to federal candidates.

His ingratitude brought this response from steel magnate Henry Clay Frick: "We bought the son of a bitch and then he didn't stay bought."[4]

Federal laws, including a ban on direct corporate contributions in 1907 and direct union contributions in 1947, were adopted to try to curtail the worst abuses.

The 1907 Tillman Act banned corporations from "directly or indirectly" making contributions in federal elections.[5] The 1947 Labor Management Relations Act (also known as Taft-Hartley) was the first law to forbid the use of corporate or union treasuries for independent expenditures to fund express advocacy.[6]

Aside from these restrictions, the laws during most of the 20th Century were weak or loosely enforced. Campaign spending was largely unregulated.

No law, for instance, stopped insurance tycoon Clement Stone and his wife from contributing $2.8 million- more than $18.4 million in today's dollars- to Richard Nixon's successful presidential campaign in 1968.[7]

[2] Bradley A. Smith, "Unfree Speech," 2001, 23.
[3] Bob Herbert, "A World of Difference," New York Times, August 19, 2008.
[4] Jeffrey Tobin, "Super PACs- Worse to Come," The New Yorker, January 24, 2012.
[5] Testimony of Fred Wertheimer, President, Democracy 21, on the Supreme Court Decision in *Citizens United v. FEC* Submitted to the House Administration Committee, February 4, 2010.
[6] Floyd Abrams and Burt Neuborne, "Debating *Citizens United*," The Nation, January 1, 2011.
[7] Smith, 30.

Watergate- A Turning Point for Campaign Finance Reform

The campaign finance climate changed sharply after Nixon ran for reelection and a series of political abuses known collectively as the Watergate scandal rocked the nation's capitol.

Campaign finance abuses were a key part of the scandal, which ultimately brought down the administration. Twenty corporations were criminally convicted for illegal campaign finance activities.[8] Some of the illegal funds were used to finance the historic break-in.

The result: the strictest campaign spending rules in American history. But even as the government tightened the noose around campaign warchests, it sowed the seeds for an eventual explosion of independent spending.

The Federal Election Campaign Act amendments of 1974 imposed limits on both contributions and spending. Independent expenditures on behalf of candidates by individuals and unincorporated associations were capped at $1,000 per year.[9]

The restrictions on spending, both by candidates and independent spenders, were quickly struck down by the landmark U.S. Supreme Court ruling, *Buckley v. Valeo* (1976).

In an opinion that foreshadowed another monumental case, *Citizens United v. FEC* (2010), the *Buckley* court drew a distinction between contributions made directly to candidates and those raised for independent expenditures.

The Court concluded that "While the independent expenditure ceiling thus fails to serve any substantial government interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression."[10]

Assuming there was no coordination between candidates and independent committees, the potential for tit-for-tat corruption was greatly diminished, the majority decided.

"[T]he independent advocacy restricted by the provision does not presently appear to pose dangers or real or apparent corruption comparable to those identified with large campaign contributions."[11]

8 Fred Wertheimer, "*Citizens United*: Watergate Redux," Politico, June 14, 2012.
9 Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter, and Frank J. Sorauf, "Campaign Finance Reform- A Sourcebook," 1997, 54.
10 *Buckley v. Valeo*, 424 U.S. (1976) at 47-48.
11 Id. at 46.

A New York Times story about *Buckley* included a comment that was eerily prescient of today's Super PAC era that enables some wealthy donors to spend tens of millions of dollars on presidential campaigns.

"With a $1,000 limit on independent political spending by an individual citizen removed from the law, a wealthy promoter like Stewart Mott, the General Motors heir, will be able to spend as much as he wants to support or oppose any federal candidates . . . ."[12]

Mott had provided contributions of more than $3.6 million (in 2013 dollars) to Democratic presidential candidates Eugene McCarthy and George McGovern before contribution limits took effect. *Buckley* did not address the separate 1947 ban on independent expenditures by corporations and unions. Not until *Citizens United* more than 30 years later was that ban struck down.

Following *Buckley's* decision, independent spending soared.

The Federal Election Commission (FEC) estimated that committees spent $16.2 million independently of federal candidates in 1980- eight times the 1976 amount. In current dollars, the spending totaled nearly $45 million. President Ronald Reagan received the lion's share of support- $10.6 million, or nearly $30 million in current dollars.[13]

Their impact quickly became apparent. "Although independent of the candidates and their respective campaigns, committee activities nonetheless often constitute 'parallel' campaigns complete with their own professional managers, fundraising staffs and media consultants. These parallel campaigns can significantly affect the results of electoral contests."[14]

While sometimes criticized, these groups brought benefits to the political system- a "better informed electorate . . . greater opportunities for effective political association. Because these committees can spend unlimited amounts of money to spread their views, they can reach more voters and give them more information about candidates and issues."[15]

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[12] Warren Weaver, Jr., "Impact This Year- Ruling Removes Bans on Spending Funds in Congress Races," NY Times, January 31, 1976.
[13] Adam Clymer, (untitled), New York Times, Nov. 29, 1981.
[14] Andrew P. Buchsbaum, "Campaign Finance Re-Reform- The Regulation of Independent Political Committees, California Law Review, March 31, 1983.
[15] Id.

One of the negatives was bluntly summarized by Terry Dolan, chairman of the National Conservative Political Action Committee, the major spender in the 1980 campaign.

"A group like ours could lie through its teeth, and the candidate it helps stays clean," he said.[16]

Ironically, while Dolan was a pioneer in the use of independent expenditures, he wasn't a fan. He acknowledged they "decrease accountability . . . I think candidates should be accountable for charges that are brought up . . . ."[17]

Indeed, critics said "short of libel, candidates have little if any protection, against any unauthorized or even inaccurate claims made by an independent PAC."[18]

"These groups are not accountable to candidates, to parties or to the voters. Instead, they are responsible only to themselves and their financial backers- and their only standard is success. As such, independent expenditure groups are a 'wild card' in the election process."[19]

While Republicans benefited most from the independent spending in 1980, Richard Richards, then-chairman of the Republican National Committee, decried the practice. The renegade committees "create all kind of mischief. If campaigns are going to be honest, the candidates have to be responsible for everything that is done."[20]

In an interesting footnote to the 1980 election, the National Right to Life Committee issued voter guides before the election that the FEC tried to block. The FEC's ban was overturned by the committee's general counsel- James Bopp, Jr. of Indiana. It was the first of scores of challenges he would wage against campaign finance law leading up to *Citizens United*, his most famous case (Bopp filed the initial lawsuit but was later replaced by a different attorney).[21] Bopp is currently a special counsel of the Republican National Committee.[22]

Bopp has made a career out of trying to legally dismantle campaign finance laws in the name of free speech. He has filed more than 150 cases so far.[23]

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16 Myra MacPherson, "The New Right Brigade; John Terry Dolan's NCPAC Targets Liberals and the Federal Election Commission," Washington Post, August 10, 1980.
17 Herbert E. Alexander and Brian Haggerty, "The Federal Election Campaign Act- After a Decade of Political Reform," 1981, 86.
18 Herbert E. Alexander, "Money and Politics: Campaign Spending Out of Control," 1983, 21.
19 Id.
20 Fred Wertheimer, "Fixing Election Law," New York Times, September 3, 1981.
21 Jeffrey Toobin, "Money Unlimited," The New Yorker, May 21, 2012.
22 Republican National Committee press release, April 8, 2013.
23 James Bennet, "The New Price of American Politics," The Atlantic, September 19, 2012.

In recent interviews, Bopp insists his mission is simply to apply the First Amendment as the Founding Fathers intended.

> The spending of money is necessary to communicate. So, when you curtail the influence of money: you are saying you want to curb the influence of speech on elections. Well, of course, we can't do that. Now, the Court still recognizes the really large contributions can contain a quid pro quo, and you can limit large contributions. But I think contributions limits are too low.[24]

Paul Ryan, senior counsel of the Campaign Legal Center, which often is on the opposite side of Bopp's legal challenges, believes there are additional motives at work.

"Bopp recognizes something that few on the left recognize: that campaign finance law underlies all other substantive law. If you can deregulate money in politics, you can buy the policy outcomes you prefer."[25]

When Reagan ran for reelection in 1984, $15.8 million was spent independently on Reagan's behalf while $2.5 million was spent to help Democrat Walter Mondale- a combined total of more than $40 million in present day dollars.

The Legacy of Willie Horton

Throughout the 1980s, independent spending became an ever-larger influence in federal elections. Probably the most memorable example of the decade- and a case study about the potentially huge impact of independent ads- came in the 1988 presidential election.

In early October 1988, a group called Committee for the Presidency held a Los Angeles press conference featuring Maryland resident Cliff Barnes.[26] Barnes was beaten and his wife Angela was raped by Willie Horton, a convicted murderer allowed to leave prison under a Massachusetts furlough program. Days later, the same independent group began running ads in California suggesting that former Massachusetts Governor Michael Dukakis, Bush's Democratic opponent, was to blame for his state's lax furlough policies.[27]

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[24] Alex Roarty, "When 'No' Means 'No'- Conservative James Bopp cites the Bill of Rights in arguing that many campaign finance laws need to be overturned," National Journal, May 19, 2011.
[25] "Follow the Dark Money," Mother Jones, June 19, 2012.
[26] Keith Love, "Bush Backers Have Horton Victim's Speak," Los Angeles Times, October 8, 1988.
[27] Keith Love, "Both Campaigns Launch Ads on Prison Furlough Issue," Los Angeles Times, October 22, 1988.

Another independent group known as the National Security PAC spent millions running a similar ad nationally. Despite a 17-point lead at one point, Dukakis lost to Republican nominee George H. W. Bush, partly because of the devastating impact of the Willie Horton issue. "Dukakis figured voters would see through what he viewed as false and unfair charges. He was wrong."[28]

In an interesting historical link, Americans for Bush, which helped produce the Willie Horton ad campaign, was directed by conservative activist Floyd Brown. He created a new group in November 1988. Its name- Citizens United, the same group that brought about the 2010 Supreme Court precedent.[29]

One major impact of the *Buckley* decision was a distinction between express advocacy, meaning political communications aimed at directly promoting or opposing a candidate, and issue-oriented ads, which lack words such as "vote for" or "vote against" but still can influence an election.

"So long as persons and groups eschew expenditures that, in express terms, advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."[30]

Until the advent of McCain-Feingold in 2002, issue ads largely escaped federal disclosure rules.

They flourished in the decade preceding that law.

One of the most notable was a series of ads featuring "Harry and Louise" that aired in 1993. The ads were run by Coalition for Health Insurance Choices and financed with $10 million from the Health Insurance Association of America.[31] They were a clever broadside at President Clinton's proposed federal health insurance program. They appeared to be supporting it but actually raised fears in the viewer's mind about the ambitious scheme.

It was one of the first major issue ads- and one of the most effective.

"Rarely in the past have we seen a paid advertising campaign on a major policy issue," Darrell West, a professor of political science at Brown University, told the New York Times.[32]

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[28] David Mark, "Going Dirty- The Art of Negative Campaigning," 2006, 200.
[29] Jeffrey Toobin, "Money Unlimited," The New Yorker, May 21, 2012, 38.
[30] *Buckley v. Valeo*, 424 U.S. (1976) at 45.
[31] Margaret Carlson, "Public Eye: Harry and Louise," Time, March 3, 1994.
[32] Elizabeth Kolbert, "New Arena for Campaign Ads: Health Care," New York Times, October 21, 1993.

"Issue advertising exploits the margins between election advocacy, which can be regulated, and issue advocacy, which court rulings have said is protected from regulation by the First Amendment."[33]

Ironically, Republicans and the media coined a new term in a 1994 state election in Wisconsin- Super PAC- after several unions pooled their contributions into an independent group named Wisconsin Citizens for Responsive Government.[34] It would be 16 more years before Super PAC became a recognized federal committee.

Issue Ad Attacks Mark Historic 1996 Campaign

After simmering in previous elections, issue ads boiled over in the 1996 campaign. They became a much more dominant form of advertising in candidate elections. Eventually, they would become the weapon of choice because they could damage a candidate's reputation while hiding the identities of contributors.

One reason the trend accelerated in 1996 was a new U.S. Supreme Court ruling, *Colorado Republican Federal Campaign Committee v. FEC*. The decision issued in June 1996 declared that federal regulators could not limit independent spending by political parties. "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees" the majority opinion held.[35]

Second, parties had increasing success raising funds through so-called "soft money" accounts, which were not subject to contribution limits. The two parties combined raised more than $262 million from soft money- a 200 percent increase just between 1992 and 1996.[36]

Issue ads grew in popularity because they generally fell outside FEC rules, or, even when they did face bureaucratic scrutiny, were subject to looser regulation. "The parties were free to spend as much money as they wished- and they did."[37]

The Annenberg Public Policy Center at the University of Pennsylvania estimated that outside groups spent as much as $150 million on issue ads during the campaign ($223 million in 2013 dollars).[38]

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[33] Michael J. Malbin and Thomas L. Gais, "The Day After Reform: Sobering Campaign Finance Lessons from the American States" 1998, 11.
[34] Michael J. Malbin and Thomas L. Gais, "The Day After Reform: Sobering Campaign Finance Lessons from the American States," 1998, 89.
[35] *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. (1996) at 616.
[36] Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter, and Frank J. Sorauf , "Campaign Finance Reform- A Sourcebook," 1997, 175.
[37] Id.

> The year 1996 was a watershed in American politics. Special interest groups, individuals and political parties inundated the air waves with unregulated issue-oriented advertisements that undoubtedly had an impact on federal elections. In some U.S. House races, more money was spent on issue advocacy than was spent by the two major party candidates combined.[39]

Another outcome was the most notorious election since the Watergate era.

Sometimes described as Chinagate, since it partly involved a large illegal infusion of funds to Democrats from Asian donors, it led to 27 individuals and two corporations being charged with election-related violations by federal prosecutors.[40]

The Democratic National Committee (DNC) ended up returning $3.1 million raised by many of these contributors.[41]

An infamous quote by one contributor, Johnny Chien Chuen Chung, characterized the attitude of many benefactors- "I see the White House is like a subway: You have to put in coins to open the gates."[42]

A key strategy in this campaign was an early series of DNC issue ads promoting Democratic President Bill Clinton and demonizing Republican House Speaker Newt Gingrich and the GOP Congress. Clinton was still stinging from the impact of the "Harry and Louise" ads. "Clinton . . . had a victim's appreciation of issue ad power."[43]

So the DNC, using soft money, spent $44 million from October 1995 through August 1996 on issue ads- three times more than Clinton's primary budget.[44]

The DNC's efforts were supplemented by outside special interest groups favorable to Democrats, including a $35 million advertising campaign waged by the American Federation of Labor and Congress

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[38] John Green, "Financing the 1996 Election," 1999, 203.
[39] Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter, and Frank J. Sorauf, "Campaign Finance Reform-A Sourcebook," 1997, 238.
[40] "Ernest G. Green Pleads Guilty To Tax Violations," Department of Justice press release, December 21, 2001.
[41] Paul Gigot, "A Stolen Election," Wall Street Journal, October 17, 1997.
[42] William C. Rempel and Alan C. Miller, "First Lady's Aide Solicited Check to DNC, Donor Says; Administration Denies Account by Torrance Businessman Johnny Chung, who gave $50,000 to Hillary Clinton's Chief of Staff," Los Angeles Times, July 27, 1997.
[43] Ruth Marcus and Charles R. Babcock, "The System Cracks Under the Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion," Washington Post, February 9, 1997.
[44] Id.

of Industrial Organizations (AFL-CIO) against Republican House members. A business group responded by praising their records.[45]

> On the TV screen, the soft money, party-sponsored ads- positive or negative- are indistinguishable from regular campaign ads except that they don't explicitly tell the viewer to vote for or against someone. Most important, there are no limits whatsoever on the size of soft-money contributions, leading to a return to the bad old days when millionaires, corporations and labor unions could spend millions on politics, said one news magazine.[46]

Then-Republican National Committee chairman Haley Barbour said it quickly became evident that Democrats would have "enough money to burn a wet mule . . . They had money piled so high a show dog couldn't jump over it."[47]

While the contributions from foreign contributors drew the most attention after the 1996 election, another important trend emerged during this watershed election- the continuing emergence of non-profit groups as a force in national politics.

These groups differed significantly from candidates, parties, and PACs because, before 2000, most did not have to disclose their contributors. Non-profits played a key role in the 1996 campaign.

"The core of federal election law- full disclosure of campaign contributions and spending- was undermined by interest groups able to operate without public accountability."[48]

Non-profits that supported Democrats included AFL-CIO, Citizen Action, League of Conservation Voters and Sierra Club.

Barbour and the Republicans countered by aligning with conservative groups such as Americans for Tax Reform, National Right to Life and American Defense Institute. The Republican National Committee (RNC) provided more than $5 million directly to these groups.[49]

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[45] Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter, and Frank J. Sorauf, "Campaign Finance Reform- A Sourcebook," 1997, 227.
[46] Jonathan Alter and Michael Isikoff, "The Real Scandal is What's Legal," Newsweek, October 28, 1996.
[47] Ruth Marcus and Charles R. Babcock, "The System Cracks Under the Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion," Washington Post, February 9, 1997.
[48] Id.
[49] Ruth Marcus, "RNC Steered Funds to Outside Groups; $1 Million-Plus Was Passed from Big Donors," Washington Post, October 23, 1997.

Interestingly, defenders said one of the main pressures for outside spending was the fact that federal contribution limits to candidates were too low.

> Conservatives . . . argue that so much political action has moved to outside groups because the $1,000 limit direct contributions to candidates (currently, $2,500) has not been changed since the election law was written. 'There's a vacuum that's created because you have underfunded candidates,' said GOP election lawyer Benjamin Ginsberg.[50]

The chaotic 1996 campaign evoked comments similar to those heard today in the wake of *Citizens United* and the emergence of Super PACs. "What we saw in this election cycle was nothing less than the breakdown of the campaign finance system," said Anthony Corrado, a political scientist who is one of the foremost experts on campaign spending. "The system we created in the 1970s essentially collapsed . . . It's the Wild West out there. It's anything goes."[51]

In the wake of the election, a major call for reform would come from Senator John McCain (R-Arizona). It would take six years before he got his wish with the passage of McCain-Feingold in 2002.

Before that happened, however, McCain personally became a target of outside spenders.

When McCain challenged George W. Bush in the 2000 Republican presidential primary, he was ambushed by attack ads sponsored by a mysterious non-profit group called "Republicans for Clean Air" on the eve of the New York, Ohio and California primaries.

It turned out the "group" was Charles and Sam Wyly, two Texas millionaire brothers who were major Bush donors.[52]

McCain lost. He did get a measure of revenge when he convinced Congress to enact a law requiring 527 non-profit groups, which was the type used by the Wyly brothers, to disclose their contributions and expenses to the Internal Revenue Service (IRS). The law took effect July 1, 2000.

As a result, just since 2004, these groups, which include the Democratic and Republican Governor's Associations, have disclosed more than $2.6 billion in contributions.[53]

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[50] Ruth Marcus, "Hidden Assets; Flood of Secret Money Erodes Election Limits," Washington Post, May 15, 2000.

[51] Ruth Marcus and Charles R. Babcock, "The System Cracks Under the Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion," Washington Post, February 9, 1997.

[52] Ruth Marcus, "Hidden Assets; Flood of Secret Money Erodes Election Limits," Washington Post, May 15, 2000.

[53] Center for Responsive Politics website, "527s: Advocacy Group Spending," summary of all 527 organization receipts 2004 through 2012, data reviewed on January 23, 2014.

As is so often the case when there are new regulations, there was a major unintended consequence of the 2000 legislation that required disclosure by 527 non-profits.

Advent of 501(c) Non-Profit Groups

Before the new disclosure rules took effect, there was a rush to convert many 527 groups to another type of non-profit- 501(c) social welfare, labor and trade association groups.[54]

These have become the drone missiles of modern-day political combat.

Because politics is not supposed to be their major purpose, 501(c) non-profit groups even in 2014 do not publicly disclose their contributions although they do reveal to the IRS all contributions larger than $5,000.

There is a growing demand for disclosure because these groups have become a major- and controversial- force in campaigns.

"Nonprofit groups can organize quickly and can often blindside candidate campaigns. Because many of them are new each election cycle and the disclosure mechanisms at the IRS are not transparent, these groups often go unnoticed until they start spending large amounts of money."[55]

> Moreover, according to Politifact, the Pulitzer Prize winning fact-checking website of the St. Petersburg Times, Super PACs and other outside groups 'overwhelmingly spread exaggerations and falsehoods.' If a candidate or political party were to have such a dismal record for accuracy, voters could hold that candidate or party accountable at the ballot box. However, with such distortions attributable only to supposedly independent outside groups, voters are powerless to react as our electoral discourse is flooded with misleading and deceptive advertisements funded by undisclosed backers.[56]

> Candidates are at least somewhat inclined to avoid the extremes, and may pay a price if their ads are overly harsh and negative. Special interest groups and Super PACs are less likely to feel these constraints…candidates are 'grateful' when independent groups take on the burden of running the negative ads, because it enables them to appear to be 'above the fray.[57]

[54] Susan Schmidt, "Political Groups Change Status to Avoid Disclosure," Washington Post, September 15, 2000.
[55] P. 80, "The Last Hurrah: Soft Money and Issue Advocacy in the 2002 Congressional Elections" 2004.
[56] Monica Youn, "A Comprehensive Response to *Citizens United*," Testimony before Senate Subcommittee on Constitution, Civil Rights and Human Rights, April 12, 2011.
[57] Michael W. McConnell, "In Defense of *Citizens United*," Yale Law Journal, Vol. 123, No. 2013, March 29, 2013, 31.

McCain pursued an even broader reform law in 2002 when he teamed up with Senator Russ Feingold (D-Wisconsin). Their actions had huge implications for outside groups and campaign finance law in general that still resonate today.

The Bipartisan Campaign Reform Act, also known as McCain Feingold, imposed the first-ever federal restrictions on issue ads.

The law defined a new type of ad that was subject to regulation- the electioneering communication. It labeled these ads as broadcast, cable or satellite communications that referred to a clearly identified candidate within 60 days of a general election, or 30 days of a primary, and that were "targeted." Targeting meant the ad had to reach at least 50,000 people.

The law also banned unions and corporations from sponsoring any issue ads within 30 days of primaries and 60 days of general elections except through affiliated PACs.

Individuals and non-incorporated associations who ran electioneering ads were required to disclose their contributions and expenses. The bill also banned soft money fundraising by candidates and national parties, prohibited contributions by foreign residents, raised contribution limits (including a special provision allowing temporary increases when candidates face wealthy opponents) and made other changes.

The landmark law had an enormous impact, not all of it intentional.

One change: independent spending by special interest groups mushroomed after soft money donors were stopped from working through national parties.

> The new law stamped out soft money for good, but it also created a vacuum in political fund-raising. The parties could no longer tap an endless stream of soft money, but thanks to the advent of 527 non-profits, rich ideologues with their own agendas could write massive checks for the purpose of building what were, essentially, shadow parties- independent groups with their own turnout and advertising campaigns, limited in what they could say but accountable to no candidate or party boss . . . The unintended consequence of McCain Feingold was to begin a gradual migration of political might from inside the party structure to outside it.[58]

[58] Matt Bai, "How Much Has *Citizens United* Changed the Political Game?" New York Times, July 17, 2012.

One outside group that had a major impact after the adoption of McCain Feingold was Swift Boat Veterans and POWs for Truth, a 527 non-profit group. Its 2004 ad campaign generally is credited- or blamed- for contributing to the defeat of Senator John Kerry in the presidential campaign.

Financed largely by wealthy supporters of President George W. Bush, including $20,000 from the Wyly brothers, the ads made a case that Democrat Kerry was "unfit to serve" as president based on his performance in Vietnam. The group spent more than $18.6 million on media buys, according to 527 committee reports for 2004 on file with the IRS. The ads were so successful that the term "swiftboating" has become part of the political vernacular- and one of the legacies of outside spending.

Some Democratic outside groups also went for the jugular but missed. MoveOn.org sponsored one video ad showing a tuxedo-clad Bush at a media dinner in Washington D.C. making jokes about the search for Iraqi weapons of mass destruction. It then switched to a Missouri woman lamenting that her brother died in pursuit of those weapons.[59]

MoveOn.org briefly featured on its website a suggested ad submitted by a supporter that directly compared Bush to Adolph Hitler. But the ad was pulled after widespread criticism and never aired on television.[60]

While the success of several Republican Super PACs in collecting multi-million dollar checks from wealthy donors has been chronicled in the 2012 campaign, few remember that independent Democratic groups like MoveOn.org pioneered the concept in the 2004 election.

Mega-Donors Assert themselves through Outside Spending

The most successful was America Coming Together, which along with its sister group, Media Fund, raised and spent about $200 million. Billionaire George Soros gave $20 million just to America Coming Together.[61]

Soros's total known contributions to outside groups in 2004 were a then-record $27.5 million.[62]

Other leading liberal donors included Peter Lewis ($22.5 million) and Stephen Bing ($13.9 million).[63]

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59 David Mark, "Going Dirty- The Art of Negative Campaigning," 2006, 157.
60 Beth Fouhy, "MoveOn.org Winnows Hundreds of Anti-Bush Ads to 15," Associated Press, January 6, 2004.
61 Byron York, "America Coming Together Comes Apart- The Democrats' Great Hope Goes Away," National Review, August 3, 2005.
62 "Billionaire Adelson Sets New U.S. Political Donation Record: Report," Reuters, September 25, 2012.

The 2004 advent of liberal plutocrats was a sneak preview of the massive contributions by dozens of individuals in the 2008 and 2012 elections, mostly to outside groups.

Most notable has been Republican supporter and billionaire Sheldon Adelson.

In 2008, Adelson provided about $30 million to Freedom's Watch, a non-profit group established to serve as a Republican counter-weight to MoveOn.org and similar Democratic-leaning groups.[64]

Adelson, who pledged to spend up to $100 million to defeat President Obama and help elect Republican Congressional candidates in 2012, ended up spending an estimated $150 million.[65] His generosity made him the biggest single contributor in American history so far.

In essence, many of the same individuals and groups who used to write big soft money checks to the national parties- or still might if such checks were allowed today- now are redirecting them to outside groups. Only now, many are writing even bigger checks.

The 2004 campaign was notable in another respect- the FEC eventually slammed several of the major outside groups with some of its heftiest fines ever. They included American Coming Together, $775,000; Club for Growth, $350,000; Swiftboat Veterans and POWs for Truth, $299,500; and MoveOn.org, $150,000.[66]

The migration of "soft money" contributions to outside groups was a trend that became evident well before Citizens United.

Supporters of McCain Feingold insist the law was never intended to stop campaign spending, it was only intended to provide more disclosure. "No speech is muzzled by the new law- not a single ad nor any word or combination of words would be muzzled."[67]

The same commentator pointed out that individuals could spend unlimited funds but have to disclose spending on electioneering communications. Corporations and unions could not use their

63 Michael J. Malbin, "The Election After Reform," 2006, 94.
64 "Great Expectations for a Conservative Group Seem All but Dashed," *The New York Times*, April 12, 2008.
65 Ryan Grim, "Sheldon Adelson Spent Far More on Campaign Than Previously Known," Huffington Post, December 3, 2012.
66 Federal Election Commission press releases dated August 29, 2007, December 13, 2006, and September 5, 2007.
67 Thomas E. Mann and Norman J. Ornstein, "Myths and Realities About The BiPartisan Campaign Reform Act of 2002," May 7, 2002.

treasury funds to finance such ads. But they could use their political action committees to do so. Or give to advocacy groups.

But the U.S. Supreme Court, mostly under Chief Justice John Roberts, has issued a recent series of rulings that have whittled away at the 10-year-old law.

In a prelude to *Citizens United*, which is viewed as the most significant of the decisions, a majority decided in 2007 that Wisconsin Right to Life had the right to air issue ads without reporting its activities to the FEC under federal electioneering disclosure rules.

At the same time, the court struck down the prohibition on corporations and unions funding electioneering communications.

The judges drew an important new distinction between "sham issue ads," which were subject to detailed disclosure requirements, and legitimate issue-only ads, which were not. "A court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[68]

Real issue ads, the justices said, focus on a legislative issue, take a position, urge the public to support that position and urge them to contact public officials. They do not mention elections, candidates, political parties or challengers. Legitimate issue ads, they continued, also take no position on a candidate's character, qualifications or fitness for office.[69]

After this ruling, even more section 501(c) non-profit groups began arriving on the national political scene, and their issue ad spending rose sharply.

Before the Wisconsin Right to Life ruling, nearly 100 percent of groups that reported electioneering ads disclosed their donors. "In the 2010 election cycle, nearly two-thirds of groups reporting electioneering communications failed to disclose their donors. Today . . . organizations that fund electioneering communications are disclosing less information about their donors than ever before."[70]

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68 *Wisconsin Right to Life v. FEC*, 551 U.S. (2007) at 469-470.
69 Id.
70 Federal Election Commission, "Statement of FEC Vice Chair Ellen L. Weintraub on the Proposal to Commence a Rulemaking to Address Electioneering Communications Disclosure Rules," October 4, 2012.

Citizens United v. FEC Accelerates Outside Spending

In Citizens United, a 5-4 ruling decided January 21, 2010, the majority reaffirmed that it was constitutional to require disclosure by groups running such ads.

But the judges also declared that it was unconstitutional for McCain Feingold to ban direct corporate or union spending 30 days before primaries, and 60 days before general elections.

They also struck down Taft-Hartley restrictions from 1947 that forbid direct corporate or union independent spending.

"[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[71]

Do Independent Expenditures Corrupt?

While the Roberts majority in *Citizens United* concluded this question with a resounding no, it hasn't ended the debate.

The court felt so strongly about its conclusion that it overrode a major precedent in *Austin v. Michigan Chamber of Commerce* that upheld a Michigan ban on the use of corporate treasuries for independent expenditures.

The *Austin* majority noted: "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."[72]

The Roberts court also flatly rejected a subsequent challenge by Montana's Attorney General that asked the majority to reconsider its *Citizens United* finding that independent spending is uncorrupting. Montana officials wanted a state ban on such spending to continue.[73]

In a bipartisan amicus brief written on behalf of Montana by U.S. Senators John McCain, R-Arizona, and Sheldon Whitehouse, D-Rhode Island, the lawmakers said *Citizens United* has created massive potential for new corruption.[74]

[71] *Citizens United v. FEC*, 558 U.S. (2010) at 357.
[72] *Austin v. Michigan Chamber of Commerce*, 494 U.S. (1990) at 660.
[73] *American Tradition Partnership v. Bullock*, 132 S. CT. 2490 (2012).

> The ability to make and to credibly threaten large expenditures gives outside groups the opportunity to exert improper leverage over politicians running for office. Through backchannel communications, or simply a quiet phone call, candidates can be warned, for example, that failure to take the 'right' position will be punished with a large expenditure against them . . . Alternatively, interest groups can gain improper influence by promising to support a political candidate with a large expenditure if the need arises. Before Citizens United, a threat of attack or pledge of support would mean a maximum $5,000 PAC contribution, or perhaps hosting a fundraiser for a legislator, with all contributions disclosed. Today, this could mean an unlimited independent expenditure, including an anonymous one, that could elect or defeat a candidate. If the threat is successful, or if the pledge of support turns out to be unnecessary, there will be no record of quid pro quo; no public advertising, no disclosure, no trail of receipts, and no account statements for regulators, prosecutors and media outlets to track. The lack of disclosure thus makes ferreting out this quid pro quo corruption extremely difficult.

Interestingly, the Roberts court (though with a slightly different majority) in 2009 concluded that a $3 million independent expenditure on behalf of a Supreme Court candidate in West Virginia potentially compromised the judge, who was overseeing a case involving a mining company that made the expenditure.[75]

Justice Andrew Kennedy, who wrote the majority opinion in Citizens United, concluded the independent group's influence was extreme enough in the so-called *Caperton* case that it demanded the judge's recusal.

Writing in *Citizens United*, Kennedy saw no contradiction between the two decisions. "*Caperton's* holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."[76]

Judges in an earlier court ruling, *First National Bank of Boston v. Bellotti*,[77] observed that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." But Kennedy dismissed this statement as being based on a misinterpretation of *Buckley*.

[74] *American Tradition Partnership v. Bullock* , (2011) U.S. Briefs 1179 at 7 and 8.
[75] *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868 (2009).
[76] *Citizens United*, 558 U.S. (2010) at 360.
[77] *First National Bank of Boston v. Bellotti*, 435 U.S. (1978) at 788, footnote 26.

Other critics of *Citizens United* insist the Roberts majority was too quick to dismiss the risk of corruption.

"If anyone truly believes that independent expenditures cannot corrupt, they are simply not paying attention," said Paul Ryan, Senior Counsel of the Campaign Legal Center, in response to the ruling involving Montana.[78]

Monica Youn, Senior Counsel, Brennan Center for Justice, took a similar view in testimony before Senate Judiciary Subcommittee on Constitution, Civil Rights and Human Rights.

> Independent political spending, of the type that has been unleashed by Citizens United, can also create substantial risks of corruption. Indeed, independent campaign ads or even the threat of unleashing such an ad may be a more direct route than lobbying for special interests to pressure election officials. Such campaign ads allow outside spenders to threaten politicians' ability to remain in office. For example, in 1998, a Native American tribe offered to undertake a substantial independent spending campaign on behalf of a Kansas Congressman in an extremely close race, if the Congressman would switch his position on and subsequently support legislation that would allow the tribe to build a casino.[79]

Michael McConnell, a Stanford Law School professor, recently wrote a paper entitled "In Defense of *Citizens United*." He said the *Citizens United* majority appeared "naïve, or obtuse" in embracing *Buckley's* assertion that independent expenditures lacked the power to corrupt.

> That was a dubious claim at the time of Buckley, and is even harder to believe today. The district court in *Citizens United* heard powerful testimony from participants in campaigns to the effect that independent expenditures are well known to the candidates and have much the same impact on them as direct contributions.[80]

Erwin Chemerinsky, Dean and Professor at the Irvine School of Law, University of California, echoed this sentiment. "Elected officials can be influenced by who spends money on their behalf, just as they can be influenced by who directly contributes to them. The perception of corruption might be generated by large expenditures for a candidate, just as it can be caused by large contributions."[81]

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[78] Paul Ryan, "Montana Reversal Unfortunate but Predictable- Emphasizes Need for New FEC Commissioners and Legislative Solutions," Campaign Legal Center press release, June 25, 2012.
[79] Monica Youn, "A Comprehensive Response to Citizens United," Testimony before the Senate Subcommittee on Constitution, Civil Rights and Human Rights, April 12, 2011.
[80] Michael W. McConnell, "In Defense of *Citizens United*," Yale Law Journal Vol. 123, No. 2013, March 29, 2013, 33.
[81] Erwin Chemerinsky, "Symposium: The Distinction Between Contribution Limits and Expenditure Limits," www.scotusblog.com, August 12, 2013.

Others remain unconvinced that any contributions, either independent or direct, pose a serious threat of corruption. In the view of Stephen Simpson, Senior Attorney for the Institute of Justice:

> Corporations can no more buy elections with political advertising than they can buy market share with commercial advertising. If they could, we would all be driving American cars and drinking new Coke; Michael Huffington would have long since been elected Senator and Ross Perot would be president . . . In fact, the evidence that even direct contributions to candidates cause corruption of the political process is weak at best. Evidence from the political science literature suggests that campaign contributions made directly to candidates have very little to no discernible impact on public policy, let alone any undue or corrupt influence.[82]

While the debate over the corrupting influence of political spending will drag on, the emphatic conclusion in *Citizens United* that independent expenditures do not corrupt will have a profound impact, some observers say.

> [N]arrowing the government's interest in preventing corruption has consequences that extend well beyond the regulations struck down in Citizens United because virtually all campaign finance regulation depends on this anti-corruption rationale for its constitutionality. Taken to its logical extreme, Justice Kennedy's view of corruption may limit campaign finance restrictions to not much beyond the regulation of contributions to candidates and officeholders.[83]

In testimony before Congress, Robert Lenhard, a Covington and Burling attorney with two decades of experience in campaign finance law and a former FEC chairman, summarized the major impact of the *Citizens United* ruling.

> *Citizens United* has shifted the balance of power in political contests away from candidates running for office and towards corporations and unions seeking to advance their policy agendas. Candidates are now far more vulnerable to unexpected negative ad campaigns, funded by corporations and unions either directly or through non-profit groups.[84]

[82] Steven M. Simpson, Testimony before the House Administration Committee during hearing on "Defining the Future of Campaign Finance in an Age of Supreme Court Activism," February 3, 2010.
[83] Michael S. Kang, "After *Citizens United*," Indiana Law Review, Volume 44, No. 1, 2010.
[84] Robert D. Lenhard, Testimony before the House Administration Committee during hearing on "Defining the Future of Campaign Finance in an Age of Supreme Court Activism," February 3, 2010.

Citizens United was quickly followed by other cases and an FEC advisory opinion that further loosened restrictions on independent fundraising and spending, and led to the creation of federal Super PACs. Super PACs are offshoots of regular PACs that are not subject to contribution limits.

In *SpeechNow.org v. FEC*, the U.S. Court of Appeals for the District of Columbia unanimously ruled in March 2010 that the FEC could not limit contributions to political committees that spend money independently to support or defeat candidates. The ruling eliminated the $5,000 contribution limit that applied to 527 political non-profits, which included SpeechNow.org. At the same time, it kept a requirement to disclose contributions and expenditures.

In July, 2010, the FEC issued two advisory opinions- one to a conservative group, Club for Growth, one to a liberal group, Commonsense Ten- that enabled them to set up the first two independent expenditures-only committees, aka Super PACs.[85]

In June 2011, a judge from District of Columbia circuit went further by declaring in *Carey v. FEC* that political action committees that contributed to candidates and made independent expenditures could simply set up separate accounts to do the independent expenditures. They weren't required to create an entirely separate committee.[86] These became known as "Super Duper PACs."[87]

Contribution limits still would apply to PAC accounts used to give money to candidates. But there would be no contribution or spending limits on the independent spending accounts.

Unlike many non-profit groups that engage in political spending, Super PACs do disclose their contributors. The presidential election has shown that many are closely aligned with candidates even though they are supposedly independent.

"Super PACs have become sidecars to each campaign's motorcycle: ostensibly separate entities, but comprising one vehicle."[88]

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[85] Federal Election Commission, Advisory Opinion 2009-09 and Advisory Opinion 2010-11 (July 22, 2010).
[86] *Carey v. FEC*, 791 F. Supp. 2d 121 (2011).
[87] "Former FEC Chair Smith Joins Litigation Team to Create "Super-Duper" PACs," The Republican Lawyer Blog, April 27, 2011.
[88] Douglas M. Spencer and Abby K. Wood, "*Citizens United*, States Divided: Evidence of Elasticity in Independent Expenditures" By Doug Spencer and Abby Wood, September 20, 2012, 19.

INDEPENDENT SPENDING – A NATIONAL OVERVIEW

The advent of Super PACs and the continued growth in non-profit spending caused non-party independent spending to swell to $1 billion in 2012, according to the Center for Responsive Politics.[89] That is more than triple the $305 million in non-party outside spending in 2010.[90]

A large share of the funds went to political advertising. For the first time ever, more than one million presidential campaign ads were run during the general election, up 39.1 percent from 2008.[91]

Not only was the spending unprecedented, but it also was unrelentingly negative.

> Every presidential campaign in the last 20 years had been touted as the 'most negative' on record. By all appearances, the 2012 presidential campaign will be the most negative since the advent of television. By one count, nine out of 10 presidential campaign ads aired in recent weeks were negative.[92]

Few drew more fire than a nasty Super PAC commercial that cynically implied Republican presidential candidate Mitt Romney bore responsibility for a woman's cancer death due to his actions at a former firm. The ad was produced by Priorities USA Action, a pro-President Obama Super PAC. It featured ex-steel worker Joe Soptic lamenting the loss of his wife Ranae due to the closure of his former plan. Romney's former firm, Bain Capital, owned the plant at the time of its closing.

Independent FactCheck.org concluded it was "misleading on several counts" and "strains the facts to the breaking point to imply that this tragic death is Romney's doing."[93]

It pointed out that Mrs. Soptic died five years after the plant closed, she had her own health insurance from another employer for at least a year afterward, and Romney was running the 2002 winter Olympics at the time the plant went dark.

Another consequence of the growing use of independent spending committees, particularly 501(c)-non-profit groups, is less disclosure. In the 2012 federal campaigns, $311 million was spent without disclosure of contributors.[94]

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89 Center for Responsive Politics summary of outside spending activity based on website check September 20, 2013.
90 Id.
91 "Presidential Ad War Tops 1M Airings," Wesleyan Media Project, November 2, 2012.
92 John G. Geer and Doug Rivers, "Democratizing the Political Ad Watch," Politico, August 17, 2012.
93 Robert Farley, "Is Romney to Blame for Cancer Death," www.factcheck.org, August 8, 2012.
94 "Outside Spending by Disclosure, Excluding Party Committees," Center for Responsive Politics, website checked on January 6, 2014.

Table 1
Total Estimated Undisclosed Outside Spending in Federal Campaigns Excluding Party Groups (In Millions)

YEAR	TOTAL	% FULLY DISCLOSURE
2000	$ 11,196,067	78%
2002	$ 4,161,611	85%
2004	$ 5,881,016	97%
2006	$ 5,245,304	87%
2008	$ 69,187,001	65%
2010	$130,730,419	49%
2012	$310,818,577	41%
Source: Center for Responsive Politics		

According to the Center for Responsive Politics data, nearly 97 percent of outside spending groups fully disclosed their contributions and expenditures in the 2004 federal elections. That total sank to 41 percent in 2012.

Not everyone is overly distressed by this trend.

Former FEC Chairman Bradley A. Smith, who prefers limited regulation of political fundraising, made this observation at a Congressional hearing in 2013:

> [C]oncerns about 'undisclosed' spending must be placed in context. The current disclosure regime is the most extensive in U.S. history. Only a bit more than five percent of spending in 2012 came from groups that do not disclose donors, and even that overstates the issue, since many of these groups, their missions, their general source of support, and often specific supporters are well known from other sources. By contrast, prior to the 1970s virtually no campaign donations or expenditures by candidates or political parties were publicly reported. Yet, no one then complained about dysfunctional government, legislative gridlock, or the imminent end of democracy.[95]

Citing Center for Responsive Politics data, Smith also noted that the percentage of groups providing no disclosure actually fell after the creation of Super PACs, from 42.9 percent to about 29 percent.[96]

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95 Statement of Bradley A. Smith, Chairman of the Center for Competitive Politics, Before Senate Judiciary Subcommittee on Crime and Terrorism for forum on "Current Issues in Campaign Finance Law Enforcement," April 9, 2013.

96 Id.

What this disregards is that overall independent spending is growing rapidly. The amount of undisclosed independent spending in total dollars doubled between 2010 and 2012. Also, independent spending tends to be used to target races in swing districts. That means more undisclosed money is being used to elect or defeat candidates in the districts that matter most.

Independent Spending has Soared in State and Local Campaigns

Outside spending has become so prevalent that it is becoming a major factor in state and even local races.

One analysis found that at least $384 million was spent in elections in just 20 states between 2006 and 2010.[97]

Table 2
Total Independent Spending in
Select States by Year

ELECTION CYCLE	TOTAL INDEPENDENT SPENDING ON CANDIDATES
2006	$115,565,187
2008	$ 83,015,747
2010	$185,043,753
Total	**$383,624,687**

"Currently, independent expenditures are the largest loophole contributors use to circumvent state limits on direct campaign contributions."[98]

Perhaps no state has seen more of an increase than California, the nation's largest state.

Not including ballot issues, all state candidates running in the 2010 campaigns in the Golden State drew more than $83 million in independent spending while the 2006 campaign drew $62 million.[99]

In other states, independent spending also topped $48 million in the 2010 Florida gubernatorial race,[100] and $41 million in the 2012 Wisconsin recall elections.[101] Independent spending in New Jersey's 2013 gubernatorial and legislative campaigns reached nearly $39 million (for more details, see Table 9).

97 Kevin McNellis and Robin Parkinson, "Independent Spending's Role in State Elections 2006-2010," National Institute on Money in State Politics, August 13, 2012.
98 Linda King, "Indecent Disclosure: Public Access to Independent Expenditure Information at the State Level," National Institute on Money in State Politics, August 1, 2007.
99 Linda Casey, "Independent Spending in California, 2005-2010," National Institute on Money in State Politics, September 20, 2011.

Table 3
Independent Spending on State Gubernatorial and Legislative Elections. (Excludes Ballot Initiatives Except Where Noted)

RANK	STATE	YEAR	TOTAL
1	California	2010	$63,076,079
2	California	2006	$49,954,502
3	Florida*	2010	$48,218,708
4	Wisconsin	2012	$41,170,583
5	**New Jersey**	**2013**	***$38,828,738***
6	Wisconsin	2011	$34,600,131
7	Florida*	2006	$31,538,738
8	Washington	2012	$26,327,170
9	California	2012	$23,000,000
10	Washington*	2008	$21,398,042
Sources: ELEC, National Institute on Money in State Politics, Wisconsin Democracy Project, California Fair Political Practices Commission, Washington Public Disclosure Commission.			

*Includes Ballot Initiatives

Even small states are seeing an influx of independent spending. Independent groups spent $3.6 million on Maine legislative elections in 2012- a 574 percent increase from 2008.[102]

In the 38 states with judicial elections in 2011 and 2012 (judges are not elected in New Jersey), total spending topped $56.4 million.[103] Independent spending by parties and special interests accounted for $24 million, or 43 percent of that total, compared to $12.8 million, or 22 percent, in 2007-2008.[104]

Concerned by this trend, the State Bar of Michigan petitioned Secretary of State Ruth Johnson to require full disclosure in judicial elections. In an interview, Bar President Bruce Courtade said the secretive contributing "undermines public confidence in the legal system. It can also threaten judicial

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100 Kevin McNellis, "Independent Spending in Florida, 2006-2010," National Institute on Money in State Politics, November 16, 2011.
101 "Recall Race for Governor Cost $81 Million," Wisconsin Democracy Campaign, January 31, 2013.
102 Andrew Bossie, John Brautigam, Ann Luther, BJ McCollister and Alison Smith, "Money in Politics Project- Report 11, How Independent Expenditures have Invaded Maine since *Citizens United*," Maine Citizens for Clean Elections, December 9, 2013.
103 Alicia Bannon, Eric Velasco, Linda Casey, and Lianna Reagan, "The New Politics of Judicial Elections- 2011-2012: How New Waves of Special Interest Spending Raised the Stakes for Fair Courts," Brennan Center for Justice, Justice at Stake and National Institute on Money in State Politics, October, 2013.
104 Id.

independence and it can place judges in the awkward position of not knowing when they should recuse themselves from handling a case."[105]

What happened next shows that while the nation's top courts have signaled the green light for disclosure, it doesn't automatically mean all legislatures are following that cue.

On November 14, 2013, Johnson, a Republican, proposed new rules requiring broader disclosure for sponsors of political ads. The rules would require disclosure for ads within 30 days of primary elections or 60 days of general election that try to persuade voters about the worthiness or unworthiness of candidates even if they do not explicitly urge them to vote for or vote against the candidate. It applies to ads that appear on TV, online, radio and in print.[106]

Subsequently, the Republican-controlled Michigan legislature approved a bill that blocked Johnson's proposal from taking effect while doubling the amount candidates can receive from individuals or independent groups. Opponents of Johnson's proposal, including House Speaker Jase Bolger, said they see no need for more disclosure.

"Even though I've been the subject of many of those attacks, I don't think it's necessary I know who in particular funded them," Bolger said. "If I'm attacked by the MEA (teachers union), I don't think I need a list of all the teachers' home addresses who funded that attack."[107]

Michigan Governor Rick Snyder signed the legislation on December 27. He said the bill expands transparency by making sponsors of automated phone calls (robocalls) identify themselves.[108]

But Rich Robinson, director of the Michigan Campaign Finance Network, dismissed that as a minor concession. "The core of the new law pitted citizens' right to know who is funding political campaigns against funders' privilege to do so anonymously. Citizens lost. Funders won."[109]

Independent expenditures also are playing a growing role in local campaigns.

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[105] David Ashenfelter, "Bridge Magazine: "Why 'Dark Money' Matters When You Stand Before a Michigan Judge," September 18, 2013.
[106] "Ruth Johnson Proposes Tough New Disclosure Rules for Campaign Attack Ads," Department of State press release, November 14, 2013.
[107] Chad Livengood, "Fast-Tracked Michigan Election Funding Bill May Aid Incumbents," Detroit News, December 2, 2013.
[108] "Campaign Funding Law Hikes Limits, Keeps 'Issue' Donors' Identity Secret," Detroit News, December 27, 2013.
[109] "Rich Robinson: Governor Snyder's Support of Dark Money Taints His Legacy," Detroit Free Press, December 30, 2013.

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When San Francisco Mayor Ed Lee won reelection in 2011, he benefited from nearly $950,000 in outside spending. Independent opponents spent nearly $420,000 against him. There was less than $30,000 in outside spending in 2007.[110]

Local races in 2013 in Los Angeles, including the campaign for mayor, drew a total of $20.5 million in independent spending.[111]

New York City campaigns in 2013 attracted $15.4 million in independent spending.[112]

According to Matt Sollars, a spokesman for the New York City Campaign Finance Board, "It's pretty clear that this is unprecedented. We have never seen groups spending like that."[113]

Meanwhile, in Boston, the mayor's race won by Martin Walsh drew nearly $4 million in independent spending but didn't have to disclose until after the election. That has prompted legislation to require real time disclosure before the vote.[114] Coincidentally, one of the independent groups involved in the race, One Boston, received $480,000 from One New Jersey, which in turn received the funds from the American Federation of Teachers.[115]

One New Jersey, which is a 501(c) non-profit that does not disclose its contributors, claimed it spent $2.8 million running issue ads against Governor Chris Christie in the 2013 primary campaign.[116]

Given these national and local trends, it was inevitable that independent spending also would become a major factor in New Jersey. The next section discusses the growing trend in the Garden State.

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110 Disclosure filings, San Francisco Ethics Commission.
111 Disclosure Filings, 2013 Elections, Regular Election totals- Los Angeles Ethics Commission on September 16, 2013.
112 Brian Paul and Susan Lerner, "Analysis of Independent Expenditures in the 2013 New York City Elections," Common Cause New York, November, 2013.
113 "Surge in Independent Spending is Reshaping City's Elections," New York Times, September 13, 2013.
114 Michael Levenson, "Campaign Bill Would Order Fast Disclosure of Donor; Secret Gifts Cited in Mayoral Race," Boston Globe, November 12, 2013.
115 Wesley Lowery, "Teachers Union Funded Walsh Ad; National Leaders Donated $480,000 Through New Jersey Group," Boston Globe, December 28, 2013.
116 Geoff Mulvihill, "Outside Money Looms Large in NJ Governor's Race," Associated Press, May 31, 2013.

INDEPENDENT SPENDING MILESTONE – A NEW JERSEY PERSPECTIVE

YEAR	INDEPENDENT SPENDING MILESTONES- NEW JERSEY
1976	Ballot question allowing casinos in Atlantic City becomes most expensive referendum in history- $5.6 million in 2013 dollars.
1977	Coalition of American Public Employees spends $10,700 independently supporting Governor Brendan Byrne.
1988	Jeff Brindle, current ELEC executive director and previous deputy executive director, predicts in research report that independent spending will lead to nastier, less accountable campaigns.
1998	Americans for Job Security spends $2 million on television advertising critical of Republican Frank Pallone (D-6th).
2000	Several secretive non-profit groups participate in New Jersey congressional campaigns.
2001	Candidates for governor spend $4.9 million using non-profit groups before election; independent groups spend another $1.9 million during the election year.
2006	Independent spending totals $13 million in U.S. Senate campaign.
2009	Independent spending tops $14 million in New Jersey gubernatorial campaign.
2011	First significant independent spending in New Jersey legislative elections tops $1.8 million.
2012	Federal elections attract first Super PAC spending in New Jersey, including first Super PAC spending in a local campaign.
2013	Independent spending in New Jersey state elections tops an estimated $42 million, including ballot question spending. Spending on just gubernatorial and legislative elections is nearly $39 million- the fifth largest amount for any state ever.
2013	Better Education for New Jersey's Kids Inc. spends $251,629 supporting the candidacy of Jersey City Mayor Steven Fulop. It is believed to be the largest independent expenditure in a local campaign.

A New Breed of Secretive Non-Profits Invade Congressional Races in 2000

In the spring of 2000, a brochure circulated in the 7th Congressional District that displayed four faces- former Boston Celtic Larry Bird, then-Senator Edward Kennedy, the head of a Revolutionary War "Minuteman" statue- and Tom Kean Jr.

Kean, the son of former Republican New Jersey Governor Tom Kean, was engaged in his first-ever political campaign. It was a primary challenge against Republican Michael Ferguson.

The brochure was "Paid for by the Accountability Project of CRG." It portrayed Kean as a carpetbagger because he lived in Massachusetts before moving back to New Jersey to mount the Congressional bid.[117]

Kean (R-Union), who now serves as leader of the Republican State Senate Minority, lost to Ferguson 10,748 to 7,358.

He became one of the first New Jersey candidates to feel the sting of an independent campaign waged by what were then generally derided as "Stealth PACs."

His race drew national attention. Senator John McCain (R-Arizona) called CRG- eventually identified as the Council for Responsible Government of Burke, Va.- as "the latest poster child in the battle for real and meaningful campaign finance reform."[118]

Kean filed a complaint with the Federal Election Commission. It was dismissed after the commission deadlocked. He then filed a lawsuit that prompted a second look by the FEC, insisting that CRG went beyond mere issue-oriented ads into a deliberate attempt to influence the election.

FEC eventually issued a $5,500 fine against the respondents for failing to disclose an $11,169 direct mail expenditure for what it decided was a clear attempt to defeat Kean.[119] The expenditure was made on CRG's behalf by an affiliate, U.S. Term Limits Inc.

117 Federal Election Commission Conciliation Agreement MUR 5024R in the matter of Council for Responsible Government Inc. and its Accountability Project, and Gary Glenn and William "Bill" Wilson, as corporate officers, November 16, 2005, 6.

118 Josh Margolin, "Seventh District Sullied by Ton of Dirt," The Star-Ledger, June 1, 2000.

119 Federal Election Commission conciliation Agreement MUR 5024R in the matter of Council for Responsible Government Inc. and its Accountability Project, and Gary Glenn and William "Bill" Wilson, as corporate officers, November 16, 2005, 8.

At the time, neither group was required to disclose contributions since they were non-profits that reported only to the IRS.

CRG was a 527 committee, and it had to begin disclosing its contributions to the IRS only after McCain pushed through a federal law that took effect July 1, 2000.

U.S. Term Limits Inc. was a 501(c)4 social welfare group based in Glenview, Illinois. These types of non-profits still do not have to publicly disclose their contributors except in states that require such disclosure.

Kean Jr. wasn't the only New Jersey primary candidate ambushed or aided by an independent group in 2000. In fact, several congressional races that year were targets of a new breed of shadowy campaign committees that today are widespread.

Then-Assemblyman Joel Weingarten (R-Union), who also unsuccessfully challenged Ferguson, was criticized for his "tax and spend" record through other CRG leaflets. CRG officials told the Star-Ledger that they expected to spend at least $100,000 in the district, although the exact amount was never made public.[120]

"These 527s often put forth information that is patently false and there's no sense of accountability. Under the cloak of darkness, people feel they have the ability to besmirch others, and that's just wrong," Weingarten noted.[121]

Republican Mike Pappas (R-12th) lost the primary to Dick Zimmer after a group called Citizens for Tax Reform ran radio ads linking Pappas's employer, a Franklin Township church, to the Ku Klux Klan.[122] The church had been founded by a woman who wrote several books supporting the Klan in the 1920s.[123] Pappas also was supported by an independent group, 60-Plus Association, a national conservative senior citizens group.[124]

Independent groups also were active in the hotly contested 5th Congressional district primary between Republican Marge Roukema (R-5th) and then-Assemblyman Scott Garrett (R-Sussex). The Club for Growth reportedly spent more than $100,000 to support Garrett, while Republican Leadership Council

120 Josh Margolin, "Conservative Group Rallying Behind Ferguson," The Star-Ledger, May 24, 2000.
121 Joe Donohue, "Disclosure Law Nips at Heels of 2 at GOP's Top- Experts: PAC Donors Must Now Be Revealed," Star-Ledger, July 11, 2000.
122 Susan K. Livio, "Democrats File Charges Against Zimmer Over Radio Ad Campaign," The Star-Ledger, June 9, 2000.
123 Matthew Reilly, "Church Dealing With Fallout of Attack Ad," The Star-Ledger, June 11, 2000.
124 Susan K. Livio, "Twelfth District Foes Locked in Struggle to Find an Issue," The Star-Ledger, June 4, 2000.

spent roughly the same amount backing Roukema.[125] Roukema narrowly won, though Garrett became Congressman two years later.

Democratic candidates also suffered attacks. For instance, Republican Rush Holt (D-12th) was accused of threatening Social Security by a shadow group named Americans for Economic Growth.

"It was outrageous," Holt recalls. "Here I was, being attacked on one of my strongest issues, Social Security, and it was impossible to figure out who paid for the attack."[126]

When former Senator Bill Bradley ran unsuccessfully for the Democratic nomination for president during the same year, the non-profit Hands Across New Jersey ran ads bankrolled by undisclosed contributors that slammed him as a puppet of "special interests."[127]

The nastiness of the 2000 primaries prompted a public hearing at which former Governor Kean was highly critical of the secret spenders. He likened them to "termites getting at the roots of democracy."[128]

"I don't believe there's a place in democracy for people who hide in the dark . . . If someone wants to attack you, if someone wants to attack me, that's fine. Sign your name," he said.[129]

While the involvement of anonymously financed issue advocacy groups didn't become a major issue in New Jersey until 2000, there had been notable appearances even in earlier Congressional campaigns.

In 1998, Americans for Job Security- suspected of being mostly large insurance companies opposed to managed care reform- spent an estimated $2 million on attack ads trying without success to oust Republican Frank Pallone (D-6th).[130]

When Senator Robert Torricelli ran for reelection in 1996, groups such as Sierra Club, AFL-CIO and Citizens Action spent about $1 million to provide independent support. Americans for Tax Reform shelled out $500,000 to support his opponent, Republican Dick Zimmer (R-12th).[131]

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125 Steve Chambers, "Roukema Survives, Zimmer's Comeback Quest Continues," The Star-Ledger, June 7, 2000.
126 John Hassell, "Stealth PACs Score Hit on US Politics- Smears are Anonymous, Donations Unregulated," The Star-Ledger, May 9, 2000.
127 John Mintz, "NJ Republicans Funding TV Ads Against Bradley; Sponsor Won't Disclose Donors," Washington Post, January 31, 2000.
128 Laura Mansnerus, "After Some Very Ugly Races, Campaign Reform Has Allure," New York Times, July 16, 2000.
129 Joe Donohue, "Kean Calls for Exposing Secret Donors," The Star-Ledger, July 13, 2000.
130 Romesh Ratnesar, "The New Money Game," Time, November 2, 1998.

The largest known infusion of outside spending in a New Jersey federal race came in 2006, when Republican Robert Menendez defeated state Senator Tom Kean Jr. (R-Union) for the U.S. Senate seat. More than $13 million was independently spent during that campaign, mostly by party-controlled committees.[132]

Congressional campaigns in New Jersey drew $3.3 million in outside spending in 2012, with $1.4 million going to the U.S. Senate race alone.[133]

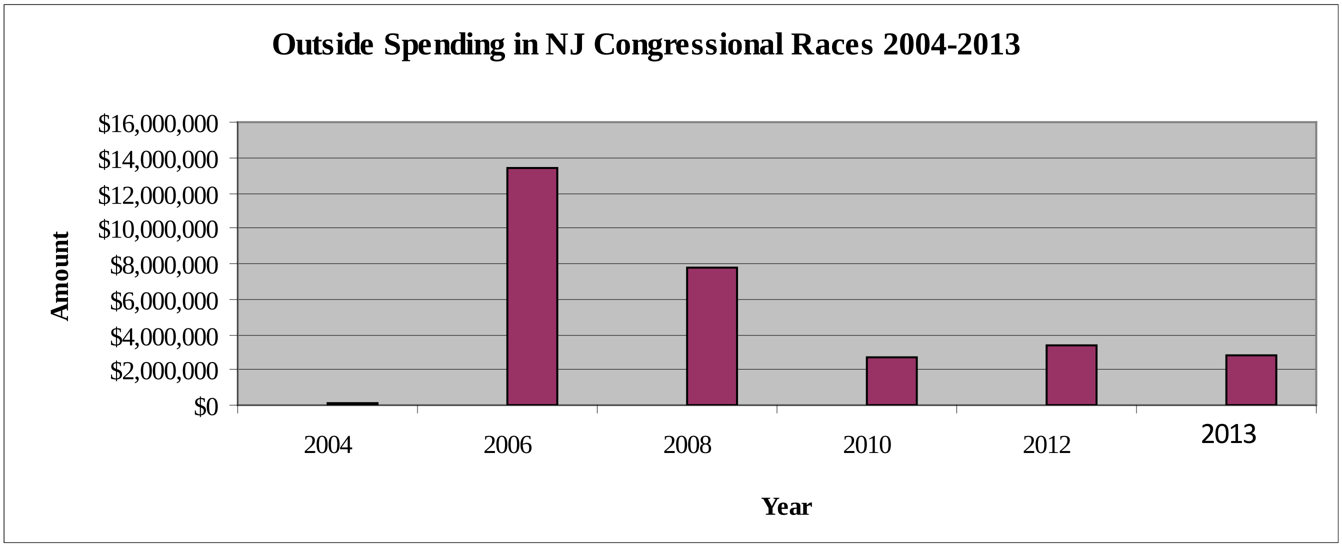
One of the more notable expenditures was the $918,789 spent by Patriot Prosperity PAC on behalf of Shmuley Boteach, a rabbi who unsuccessfully challenged Republican William Pascrell (D-9th).[134]

The PAC spent another $480,000 to support Republican state Senator Joe Kyrillos in his attempt to unseat Democratic incumbent U.S. Senator Robert Menendez.[135] Patriot Prosperity PAC is the national Super PAC set up by mega-donor and casino executive Shelden Adelson.

Outside spending topped $2.8 million in the special U.S. Senate election in 2013 against Democrat Cory Booker and Republican Steve Lonegan.[136]

131 Christopher Luna, "Campaign Finance Reform," 2001, 116-117.
132 Center for Responsive Politics website, query on outside spending by state on November 16, 2012.
133 Center for Responsive Politics website, query on outside spending in New Jersey congressional races, September 20, 2013.
134 Id.
135 Id.
136 Id. query done on January 6, 2014.

Table 4
Independent Spending in New Jersey
Congressional Races Since 2004



In Non-Federal Races, Gubernatorial Elections Historically have Attracted the Most Independent Activity in New Jersey

While independent spending rarely has been a major factor in state and local campaigns in New Jersey until recently, it has long been evident in gubernatorial campaigns, which are the most high profile- and expensive- elections in the state.

In the 1977 campaign, the Coalition of American Public Employees spent $10,700 on behalf of Governor Brendan Byrne's candidacy.[137]

During the 1981 election for governor, several groups made 18 independent expenditures on behalf of candidates, no single one more than $14,600.[138] The expenditures were made by League of Conservation Voters, Tom Kean Open Golf Day, Jersey City Democratic Committee, Environmental Campaign 81 Fund, and Hudson County Dinner Committee.

Even as early as 1988, the Commission foresaw some of the problems with independent expenditures that are commonplace today.

[137] "Public Financing in New Jersey- the 1977 General Election for Governor," August, 1978, 25.
[138] "New Jersey Public Financing, 1981 Gubernatorial Elections," June 1982, 20.

In ELEC's first white paper, "Contribution Limits and Prohibited Contributions," Jeff Brindle, now the agency's Executive Director, raised prophetic questions about the practice.

> The concern with independent expenditures is that they result in less accountability in the electoral process . . . there is not the same degree of disclosure. Moreover, there is considerable concern that independent expenditures, because of the accountability issue, lead to campaign tactics that are offensive, in particular negative advertising. Most would agree that spending by the campaigns themselves is preferable to spending by independent committees.[139]

Independent sums spent during gubernatorial campaigns have steadily grown ever since.

When Democrat Jim Florio ran a successful campaign for governor in 1989, the National Abortion Rights Action League spent $200,000 promoting him.[140] Spending by opponents pushed total independent spending in the race to $287,000.[141]

Independent spending became an issue during the 1993 campaign when Florio was upset by Republican Christie Whitman.

Florio was unpopular because he enacted major tax increases during his term.

He also had made a major enemy in Washington, D.C. due to his gun control initiatives.

During his first several months in office in 1990, Florio pushed through a ban on assault-style weapons through the then-Democratically controlled Legislature. The National Rifle Association didn't forget.

Its PAC spent $229,371 on the 1993 elections, most of it ($174,571) on independent expenditures either aimed at Florio or promoting Republican legislators who opposed his ban.[142] Florio and other Democrats complained about the spending, and the group subsequently was fined $7,000 by ELEC for failing to meet its disclosure requirements for the independent expenditures.[143]

139 Jeff Brindle, "White Paper Number 1- Contribution Limits and Prohibited Contributions," October 1988, 16-17.
140 "2007 Fair and Clean Elections Report," March 28, 2008, 39.
141 Jeff Brindle, "New Jersey Gubernatorial Public Financing Revised: 1989 and Beyond," March 1992, 49.
142 January 18, 1994 R-3 report for the NRA Political Victory Fund.
143 "NJ ELEC v. NRA Political Victory Fund and Mary Rose Jennison, Treasurer, Consent Settlement and Final Decision for Failure to File 48-Hour Notices and Late Filing of Certifications of Independence of Expenditures," January 6, 1995.

Along with its direct involvement in New Jersey, the NRA also gave $275,000 to the Republican National State Election Committee, which also participated in the race.[144]

2001 Governor's Race Draws Major Flurry of Outside Spending

Two 527 non-profit groups and three 501(c)4 social welfare non-profit groups that operated in 2000, and in some cases, years earlier, set the stage for the governor's race. Initially, none of these groups identified their contributors, though all three eventually disclosed their funding.

Before the governor's race officially began, three potential Republican candidates for governor used these five non-profit groups to help pave the way for their possible candidacies. While the committees were controlled by potential candidates, they operated outside the state's traditional political system.

During 2000, Senate President Donald DiFrancesco (R-Union) spent nearly $1.6 million through "Solutions for a New Century."[145] Then-Acting Governor DiFrancesco became a candidate but withdrew in April 2001.

Also in the months leading up to the election, Assembly Speaker Jack Collins (R-Salem), who never became a candidate, raised $226,000 through "Leadership for New Jersey's Future."[146]

The groups created by DiFrancesco and Collins both were 527 non-profit groups.

In the years leading up to his gubernatorial run, Jersey City Mayor Bret Schundler took a different direction. He appears to be the first candidate in the state to use 501(c)4 social welfare groups to generate favorable publicity.

He created three groups: "Empower the People," "Jersey City Scholarship Fund," and "National Children's Scholarship Fund." Between the three groups, Schundler, the eventual Republican primary winner, spent more than $2.5 million.[147]

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[144] Joe Donohue, "Major Parties Report Spending $10.4 Million on 1993 Campaigns," The Star-Ledger, January 25, 1994.
[145] Issue Advocacy Organization Reports of Contributions and Expenditures filed with ELEC on March 12 and March 26, 2001.
[146] Joe Donohue, "GOP Leaders Raise Thousands Through Lightly Regulated PACs," The Star-Ledger, October 17, 2000.
[147] Issue Advocacy Organization Reports of Contributions and Expenditures filed with ELEC on May 15, 2001, May 31, 2001, June 11, 2001, and August 27, 2001.

In the wake of these fund-raising activities, the Legislature enacted a law that requires that any gubernatorial candidate who participates in an issue advocacy organization during the four years prior to becoming a candidate file disclosure reports with ELEC or be deemed ineligible for public funds.

Democrat Jim McGreevey, who ultimately won the 2001 election, also used a special fundraising committee to help lay the groundwork for a gubernatorial campaign.

He took a different path than the Republicans, creating a federal political action committee, Committee for Working Families. That committee raised and spent about $530,000 before McGreevey declared his candidacy, according to reports filed with the Federal Election Commission.

Looking only at the independent expenditures directly related to the gubernatorial campaign, the 2001 race is unusual because there was more spending by outside groups in the years leading up to it than during the actual campaign.

The six fundraising committees used by the candidates before 2001 spent a total of about $4.9 million.

During the campaign, the total was about $1.9 million. The Republican National State Elections Committee spent the most- nearly $1.2 million on Schundler's behalf. NJEA PAC spent $408,920 to support McGreevey.

Table 5
Independent Spending Related to
2001 New Jersey Gubernatorial Election

NON-PROFIT EXPENDITURES BY POSSIBLE GUBERNATORIAL CANDIDATES BEFORE 2001 CAMPAIGN	SPENT	BENEFICIARY
Empower the People, Jersey City Scholarship Fund and National Children's Scholarship Fund	$ 2,585,498	Bret Schundler
Solutions for the New Century	$ 1,558,624	Don DiFrancesco
Committee on Working Families	$ 529,069	Jim McGreevey
Leadership for New Jersey's Future	$ 226,000	Jack Collins
Subtotal- Pre Campaign	**$ 4,899,191**	
OFFICIAL INDEPENDENT SPENDING DURING GUBERNATORIAL CAMPAIGN		
Republican National State Elections Committee	$ 1,167,000	Bret Schundler
NJEA PAC	$ 408,920	Jim McGreevey
Club for Growth	$ 250,000	Bret Schundler
Ceasefire	$ 22,000	Jim McGreevey
National Jewish Democratic Council	$ 18,173	Jim McGreevey
NJ Right to Life PAC	$ 9,460	Bret Schundler
Democratic National Committee Non Federal General 2001	$ 4,811	Jim McGreevey
Parents in Control PAC	$ 2,000	Bret Schundler
Subtotal- During Campaign	**$ 1,883,928**	
Total Gubernatorial	**$ 6,783,119**	

Indy Groups Quiet in the 2005 Gubernatorial Election

Independent spending was relatively modest in the 2005 gubernatorial race perhaps for an obvious reason- the major candidates didn’t need the help.

Reports filed with ELEC show Republican Doug Forrester and Democrat Jon Corzine spent a combined $76 million on their campaigns, nearly all from their personal bank accounts.

There was some participation in the race by national groups, including the two parties and governor’s associations. But they mostly provided direct contributions rather than independent expenditures.

The largest known independent outlay was a $253,382 expenditure by the Republican National Committee on behalf of Forrester. A New Orleans group called Communities Voting Together spent $120,000. Total independent spending on the gubernatorial campaign by six groups was $407,748, according to independent expenditure reports submitted to ELEC.

Independent Spending Soars in 2009 Governor's Race

A potent combination set the stage for the second largest infusion of independent cash ever in the 2009 gubernatorial campaign.

The race pitted Democrat Governor Jon Corzine, an incumbent weakened by the national economic collapse, and Republican Chris Christie, a popular ex-U.S. attorney running as a challenger. It also featured a spirited primary fight between ex-Bogota Mayor Steven Lonegan and Christie, and a credible independent candidate, Chris Daggett, running in the general.

The result: independent spending on just the governor's race topped $14 million.

During the primary, Freedom's Defense Fund, a conservative group based in Washington, spent more than $189,459 assailing Christie and promoting Lonegan, ELEC reports show.

Nearly 80 percent of the total independent spending was done by the Republican and Democratic Governors Associations. The Republican Governors Association spent an estimated $7.5 million, largely on political commercials assailing Corzine.[148]

The Democratic Governors Association expended just under $2 million on issue ads attacking Christie, and another $1.3 million on "party building" and get-out-the-vote efforts.[149]

Like many Democrats, Corzine received huge support from unions. They contributed at least $3.7 million to independent spending initiatives intended to benefit his candidacy.

148 Jenna Portnoy, "Once Shunned by Powerful GOP Group, Christie Now Among Its Leaders," The Star-Ledger, May 12, 2012.
149 Annual Reports of Communication with the General Public for New Jersey Progress (filed with ELEC March 4, 2010) and Mid-Atlantic Leadership Fund (filed with ELEC February 24, 2010), and Claire Heininger, "Dems Gave Millions to Groups Attacking Christie, Reports Say," The Star-Ledger, March 11, 2010.

Table 6
Estimated Independent Spending in
2009 New Jersey Gubernatorial Election

GROUP	RAISED	SPENT
Republican Governors Association		$ 7,500,000
MidAtlantic Leadership Fund Raised $2,350,000 From:		$ 1,634,091
AFSCME	$ 400,000	
Democratic Governors Association	$ 250,000	
Democratic Governors Association	$1,200,000	
Laborers Political League	$ 500,000	
NJ Progress Raised $2,695,000 From:		$ 2,151,864
AFSCME	$1,350,000	
Ben Barnes	$ 50,000	
DCN NJ Ironworkers PAC Fund	$ 50,000	
Democratic Governors Association	$ 500,000	
MidAtlantic Leadership Fund	$ 400,000	
MidAtlantic Leadership Fund	$ 45,000	
Service Employees International Union	$ 200,000	
Working For Working Americans	$ 100,000	
Democratic Governors Association		$ 1,350,000
Service Employees International Union Cope		$ 512,640
NJEA (Independent Expenditures Made Through PAC)		$ 522,313
Freedom's Defense Fund		$ 189,459
AFSCME (Independent Expenditures Made Through PAC)		$ 143,266
Planned Parenthood Action Fund Inc		$ 65,923
International Union Of Painters And Allied Trades PAC		$ 9,612
Archetto Construction Inc		$ 1,000
NJ Faith And Freedom Coalition		NA
Total		**$14,080,168**

Table 7
Known Union Independent Spending in the 2009
New Jersey Governor's Race

UNION	AMOUNT
AFSCME	$ 1,893,266
SEIU	$ 712,640
Laborers Political League	$ 500,000
NJEA	$ 522,313
DCN NJ Ironworkers Pac Fund	$ 50,000
International Union of Painters and Allied Trades PAC	$ 9,612
Total	**$ 3,687,831**

A Record Gusher of Independent Spending Erupts in 2013

While the spending was significant in 2009, it ended up a minor prelude to record-breaking outlays in 2013.

Nearly $39 million was spent by outside groups on gubernatorial and legislative races in 2013.[150] About ***$21.3*** million was spent on the gubernatorial campaign, ***$16*** million spent on legislative races, and ***$1.4*** million spent on both types of elections or could not be determined, according to an ELEC analysis.

Table 8
Estimated Total Independent Spending in New Jersey Elections, Including Breakdown for Gubernatorial Races

YEAR	GUBERNATORIAL	TOTALS INCLUDING LEGISLATIVE
1977	$ 10,700	$ 10,700
1981*	$ 14,600	$ 14,600
1985		
1989	$ 287,000	$ 287,000
1993	$ 326,000	$ 326,000
1999		$ 113,255
2001	$ 6,783,119	$ 6,783,119
2003		$ 4,857
2005	$ 407,748	$ 411,224
2007		$ 165,000
2009	$ 14,080,168	$ 14,096,167
2011		$ 1,835,500
2012		$ 299,049
2013	***$ 21,350,619***	***$ 38,828,738***
TOTALS	***$ 43,259,954***	***$ 63,175,209***

*Largest of several small expenditures

Probably because Governor Chris Christie was widely presumed to be a possible presidential candidate in 2016, the state elections drew heavy interest from several groups with national ties.

Christie benefited from a wave of early expenditures by a 501(c)4 non-profit group called Committee for Our Children's Future.

The governor was an early supporter of 2012 Republican Presidential nominee Mitt Romney. The Committee for Our Children's Future was staffed by partners of Carl Forti, who was Romney's national political director in 2008 and who supported Romney in 2012 through Restore Our Future PAC.[151]

150 ELEC press release analyzing spending in 2013 election, December 5, 2013.
151 Hunter Walker, "The Connection Between Mitt Romney's Super PAC 'Money Man' and the Pro-Chris Christie PAC," www.politicker.com, March 8, 2012.

Starting in September 2011 and continuing through 2012, the group spent an estimated $7.8 million on issue-oriented ads promoting the governor.[152]

Many initially believed the governor's race would be the primary focus of independent spending. But it quickly became clear from polls that Christie had a large lead that would be hard to overcome even with a heavy dose of independent spending.

Instead, Democrat leaning groups shifted huge sums into trying to protect the Democratic majority in the Legislature.

In the end, the biggest spender was Garden State Forward, a 527 non-profit group set up by the New Jersey Education Association. It spent about $14.6 million, including millions of dollars to support Democratic state Senator Barbara Buono in her unsuccessful bid to unseat Christie (most spending on the gubernatorial campaign was not explicitly identified), and $5.5 million to another Democratic group that spent heavily in key legislative districts. Garden State Forward's treasurer was Shelly Moskwa, who also served as treasurer for the 2008 primary campaign of Hillary Clinton.[153]

The group that spearheaded efforts to protect the legislative majority was Fund for Jobs, Growth and Security, a political committee established for the sole purpose of promoting Democratic legislative candidates.

Its strategy worked after the group spent more than $8 million. Democrats kept their majority intact despite the Republican governor's huge victory. While they lost one seat, they picked up another seat. Jonathan Levy, the committee's executive director, said after the election: "We made sure that the governor had no coattails."[154]

Fund for Jobs, Growth and Security also had national connections. Levy is a partner of Susan McCue, a long-time confidante of Senate Majority Leader Harry Reid.[155]

The committee's entry into the race not only had an impact on the election but it led to a major change in ELEC rules.

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152 Salvador Rizzo, "Advocacy Group Spent $1.8M On Christie Television Ad in Weeks Before Election," Star-Ledger, November 13, 2012.
153 Jim McElhatton, "Clinton Campaign Continued After Backing Obama," Washington Times, November 24, 2008.
154 Byron Tau, "Democrats, Unions Celebrate New Jersey Statehouse Wins," Politico, November 6, 2013.
155 Id.

Prior to its creation, the group's organizers had to sue ELEC because they wanted to file as a political committee but didn't believe it was constitutional to limit its contributions following *Citizens United v. FEC*.

ELEC agreed to a permanent injunction approved July 11, 2013 that permits unrestricted fundraising by a political committee that plans to make only independent campaign expenditures in the state.[156] Funds for Jobs, Growth and Security has since been renamed General Majority PAC and it is planning involvement in other state elections this year, including Pennsylvania.[157]

Table 9
Estimated Special Interest Independent Spending in 2013
New Jersey Gubernatorial and Legislative Campaigns

GROUP	SPENT	GENERAL/ PRIMARY/BOTH?	ELECTION
Garden State Forward (New Jersey Education Association)	$14,598,194[(1)]	Both	Gubernatorial and Legislative
Fund for Jobs, Growth and Security	$ 8,017,190	Both	Legislative
Committee for Our Children's Future ***(pre-primary)***	$ 7,800,000	P	Gubernatorial
One New Jersey	$ 2,800,000	P	Gubernatorial
Republican Governors Association	$ 1,725,000	P	Gubernatorial
NJ Workers' Voices (NJ AFL-CIO)	***$ 1,288,167***	Both	Gubernatorial and Legislative
National Association of Realtors	$ 1,022,056	Both	Gubernatorial and Legislative
Republican State Leadership Committee	$ 446,166	G	Legislative
Americans for Prosperity	$ 400,000	G	Legislative
Latino Consumer Group Inc.	$ 365,095	G	Gubernatorial
NJ For the People	$ 140,350	G	Gubernatorial
Working Families Organization	$ 110,257	G	Gubernatorial
Planned Parenthood Action Fund of NJ	$ 64,936	G	Gubernatorial and Legislative
NJ League of Conservation Voters for a Clean Environment	$ 44,603	G	Legislative
New Jersey Family First	$ 6,724	G	Legislative
Total-Gubernatorial and Legislative Elections	***$38,828,738***		

(1) Figure compiled based on figures taken from 527 report filed with IRS, reported Garden State Forward contributions to Fund for Jobs, Growth and Security, and independent expenditure reports filed with ELEC.

Nationally, outside money increasingly is a major factor in gubernatorial and legislative races.

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156 Fund for Jobs, Growth & Security v. New Jersey Election Law Enforcement Commission et al, (2013), Civil Action No. 3:13-CV-02177-MAS-LHG.

157 "Super PAC Sues to Change Election Law, Plans to Help Elect Democrats to Pennsylvania Legislature," Peter Jackson, Associated Press, March 10, 2014.

The 2010 California contest between Democrat Jerry Brown and Republican Meg Whitman drew $45.4 million even though Whitman spent $142 million of her own money.[158] [159] The $83 million spent on all California campaigns that year (excluding ballot initiatives) appears to be a record for any state.

Turning to 2012 campaigns, the Washington State gubernatorial contest was a cliffhanger between Democrat Jay Inslee and Republican Robert McKenna. Inslee narrowly won. Outside groups spent $10.8 million on McKenna and $10.1 million on Inslee.[160] The nearly $21 million is only $5 million less than the candidates themselves spent.

In tiny New Hampshire, outside groups spent an estimated $10 million.[161] Democrat Maggie Hassan became the second woman governor, defeating Republican Ovide Lamontagne.

Republican Pat McCrory prevailed in a contest against Democrat Walter Dalton to become North Carolina's new governor. He also was the main beneficiary of nearly $8 million just for the governor's contest.[162] Total outside spending in North Carolina topped $14 million including judicial and legislative races.[163]

Independent Spending Steadily Grows in New Jersey Legislative Races

While there was relatively little independent spending in legislative races during the 1990s, it became a bigger factor in the past decade.

One of the first notable independent expenditures involving legislative races occurred in 1993, when the NRA spent $50,800 to oppose Governor Jim Florio, and $174,571 to support legislators opposed to his assault weapons ban.[164]

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[158] Linda Casey, "Independent Spending in California, 2005-2010," National Institute on Money in State Politics, September 20, 2011.
[159] Anne Bauer, "Candidate Self-Financing: More Barrier Than Stepping Stone," National Institute on Money in State Politics, November 16, 2010.
[160] Public Disclosure Commission records on November 15, 2012.
[161] Kevin Landrigan, "Hassan Defeats Lamontagne in Race for New Hampshire Governor," Nashua Telegraph, November 7, 2012.
[162] Chris Komm, "Big Money Plays Big Role in North Carolina Elections," Institute for Southern Studies, November 14, 2012.
[163] Id.
[164] January 18, 1994 R-3 report for the NRA Political Victory Fund.

In 1999, when future Governor Jon Corzine was gearing up for his successful U.S. Senate campaign, he invested $113,255 in independent radio ads that promoted both his federal candidacy and Assembly candidates running that year.[165]

The next three legislative races attracted little outside spending.

But in 2007, an attack by a tax-exempt nonprofit group on a 14th legislative District incumbent became a preview of today's elections.

A conservative group called Common Sense America financed radio ads and robo-calls targeting then-Assemblywoman Linda Greenstein (D-14th). Common Sense America was a 501(c)4 group that reported only to the IRS and did not reveal its contributors.[166] Common Sense America's chairman was Brian Brown, who at the time also was executive director of the National Organization for Marriage (NOM) (he now is president). NOM's political action committee also criticized Greenstein's position on gay marriage.[167]

In 2007, Greenstein's legislative district was part of a pilot program, since discontinued, that provided public funds to legislative candidates. Greenstein was able to obtain an extra $100,000 in public funds after she convinced ELEC officials that Greenstein's opponents had spent $165,000 independently on a "robocall/push poll" and radio ads.[168]

While there was little independent spending on legislative races during the 2009 campaign, nearly $1.8 million was spent during the 2011 campaigns.[169] It was almost eleven times the total for 2007, the previous year when all 120 legislative seats were in contention. The number probably is low because some tax-exempt groups that participated in the race did not disclose their spending.

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165 Independent spending report filed Oct. 22, 1999 by Corzine for Senate.
166 Paul Mulshine, "Reform May Trip Up a Reformer," Star-Ledger, November 4, 2007.
167 Id.
168 October 17, 2007 letter from Amy Davis, Director of Special Programs, to Assemblywoman Linda Greenstein.
169 "White Paper 23- Legislative General Elections 2011, Rise of the Independents," July 18, 2013, 18.

Table 10
Estimated Special Interest Independent Spending in
2011 New Jersey Legislative General Election

GROUP	DISTRICTS	SPENT
Americans for Prosperity*	2,3,14,27,28	$ 500,000
Better Education for NJ Kids Inc.	4,7,38	$ 483,138
New Jersey Education Association	14,16,38,40	$ 414,259
Republican State Leadership Committee	2	$ 300,000
American's Families First	38	$ 65,000
Local 32BJ SEIU American Dream Fund	38	$ 40,000
Planned Parenthood Action Fund Inc	NA	$ 20,209
Environment NJ	15,27,38	$ 7,940
NJ Family First	NA	$ 4,953
Strong New Jersey	14	NA
	Total	**$1,835,500**

*Estimate. Group reported total of $571,458 spent on New Jersey issues and campaigns in 2011

Interestingly, of the $1.2 million in independent spending that ELEC was able to categorize by district, $1.1 million, or 92 percent, went to the top ten battleground districts.[170]

In 2013, independent spending on legislative campaigns soared again. An estimated ***$16*** million went into legislative races- a number that is probably low due to disclosure limitations.

Table 11
Estimated Special Interest Independent Spending in
2013 New Jersey Legislative Election

GROUP	TOTAL SPENDING IN LEGISLATIVE RACES
Fund for Jobs, Growth and Security	$ ***8,017,190***
Garden State Forward	***$ 5,552,500***
Realtors PAC	***$ 754,056***
NJ Workers Voices	***$ 739,839***
Republican State Leadership Committee	***$ 446,166***
Americans for Prosperity	$ 400,000
Planned Parenthood Action Fund of NJ	$ 64,616
NJ League of Conservation Voters PAC	$ 44,603
NJ Family First	$ 6,724
Total	***$ 16,025,694***

170 Id. at 19.

Super PACs now Participating in Local Elections

Many local campaigns also have attracted independent expenditures. But with a few exceptions, such as the large spending on behalf of local parties and candidates in 2001 by national parties, the amounts tend to be small, usually ranging from a few hundred to a few thousand dollars.

One of the largest also is historic.

In 2012, Nevada-based Patriot Prosperity Committee, formed and largely underwritten by Sheldon Adelson, made a $111,619 independent expenditure against Democratic candidates for freeholder in Burlington County.[171]

It is the first known Super PAC involvement in a local New Jersey campaign.

Another significant local independent expenditure- believed to be the largest ever- occurred in the 2013 Jersey City Mayoral race. Better Education for New Jersey's Kids Inc. spent $251,629 supporting the candidacy of eventual winner Steven Fulop.[172]

In 2013, Committee for Economic Growth and Social Justice, a Super PAC established by state Senator Raymond Lesniak (D-20th), spent $176,116 on the Elizabeth school board race.[173]

Ballot Question Committees- The Original Super PACs

Political committees set up to promote or oppose ballot questions are a special form of independent spending. Unlike other political committees, they focus strictly on issues.

Otherwise, they operate identically to the much newer Super PACs. While they can raise and spend unlimited amounts of money, they also must detail their contributions and expenses.

Decades before Super PACs arrived on the campaign finance scene, the U.S. Supreme Court decided that there was little potential for these types of committees to cause corruption. So the judges struck down contribution limits in states that had them (New Jersey was not one).

171 Independent Expenditure reports filed with ELEC on October 26, November 1 and November 5, 2012.
172 Independent Expenditure reports filed with ELEC on October 24, November 7, and November 26, 2012.
173 FEC Form 3X, Report of Receipts and Disbursements for Other than an Authorized Committee, filed January 31, 2014.

The landmark case, spurred by contribution limits imposed in Massachusetts, was *First National Bank of Boston v. Bellotti* (1978). In that ruling, the nation's high court found that "The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."[174]

Interestingly, even without contribution limits, ballot question elections in the Garden State historically have not attracted large outlays like those commonly seen in states like California and Washington.

For instance, a 2013 proposal to raise the minimum wage, which passed, drew about $3.2 million in spending. In inflation adjusted dollars, it is the second largest amount ever spent on New Jersey ballot question.

However, Californian Molly Munger in 2012 alone spent $44 million on Proposal 38, which would have boosted educational revenues in the Golden State had it passed.[175] That's more than the estimated $30.4 million spent on ALL ballot question spending in New Jersey since 1974, according to an ELEC analysis. Munger's brother Charles invested another $34.7 million on other ballot proposals.[176]

Using inflation adjusted dollars, the most expensive New Jersey ballot question was the 1976 Constitutional Amendment to permit casino gambling in Atlantic City. Resorts International, which became the operator of the state's first casino, and others spent a combined $1.3 million- the equivalent of almost $5.6 million in today's dollars.[177]

174 *First National Bank of Boston v. Bellotti*, 435 U.S. (1978) at 790.
175 "Californian Spends $44 Million, Loses Ballot Initiative Fight," Center for Public Integrity, November 14, 2012.
176 www.followthemoney.org under Explore\California 2012 Top 20 Contributors.
177 "Fourth Annual Report of the New Jersey Election Law Enforcement Commission," 1977, 10.

Table 12
Five Most Expensive Ballot Questions by Spending

COMMITTEE	REFERENDUM	OUTCOME	YEAR	UNADJUSTED FOR INFLATION	ADJUSTED FOR INFLATION
Committee to Rebuild Atlantic City and its opposition	Allow casinos in Atlantic City	Passed	1976	$ 1,351,865	$ 5,563,230
Multiple committees for and against	Increase state minimum wage	Passed	2013	$ 3,167,928	$ 3,167,928
Pro- and anti-casino interests	Allow casinos in four New Jersey locations	Failed	1974	$ 612,500	$ 2,902,844
New Jersey Committee for Simulcasting	Allow simulcasting at state race tracks	Passed	1985	$ 1,006,918	$ 2,188,952
Building Our Future	Higher education bond issue	Passed	2012	$ 2,019,690	$ 2,019,690

More recently, a ballot proposal enacted in Maryland to allow a casino not far from the nation's capitol saw opponents and supports spend $90 million.[178]

Another unsuccessful proposal to require labels on food with genetically altered ingredients drew $27 million in Washington State.[179]

178 Reid Wilson, "Ballot Issues Draw $1 Billion in 18 Months," Washington Post, November 10, 2013.
179 Id.

CHAPTER III

INDEPENDENT SPENDING – THE CASE FOR DISCLOSURE

Issue Ads- A Long-Time Quandary for Judges and Regulators

Almost since the modern era of campaign finance began in the early 1970s, there has been intense debate about what types of political advertising warrant regulation.

Ever since the monumental *Buckley v. Valeo* ruling in 1976, it has been clear that campaign ads with direct statements urging voters to elect or defeat candidates are subject to disclosure rules.

Yet it soon became evident after *Buckley* that another type of political advertisement- ads geared around issues rather than candidates- also had the potential to influence elections. The trick was deciding which ones were strictly about issues, and which ones really were trying to tilt campaigns.

Between the 1976 *Buckley* ruling and passage of a federal law in 2000 that required section 527 non-profit groups to disclose their contributions and expenses to the IRS, there was virtually no disclosure requirements for groups running issue-oriented ads at the federal level.

Corporations or unions that, until 2010, were prohibited from using their treasuries to directly finance independent campaign spending could simply avoid "express advocacy" and slam or support the positions of candidates during an election- and thereby sway voter perceptions.

This type of advertising exploded in the mid-1990s through the use of tax-exempt groups set up under IRS rules that they didn't have to tell anyone how they raised or spent their money

"By the 1990s, the 'express advocacy' requirement had become an easy escape hatch for many electorally active groups. Political parties, interest groups and campaign specialists had little difficulty producing ads that effectively promoted or opposed federal candidates while eschewing the magic words of express advocacy."[180]

The political tolerance for these election-time issue ads began to change, however, after some prominent elected officials, including Senator John McCain (R-Arizona), became targets of anonymous smear campaigns.

[180] Richard Briffault, "Updating Disclosure for the New Era of Independent Spending," Columbia Law School, April 16, 2012.

McCain first pushed through the 2000 law requiring non-profit groups to disclose their campaign activity to the IRS. Then he teamed with Senator Russ Feingold (D-Wisconsin) to enact in the Bipartisan Campaign Reform Act of 2002- best known as McCain Feingold- that, for the first time, imposed restrictions on issue-oriented ads called "electioneering" communications during federal elections.

The reform law was quickly challenged by Senator Mitch McConnell (R-Kentucky), who currently is Senate Republican Leader.

The U.S. Supreme Court in 2003 upheld the regulation of electioneering ads.

The majority noted that it was not persuaded:

> [T]hat the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad . . . Indeed, the unmistakable lesson from the record in this litigation . . . is that *Buckley*'s magic-word requirement is functionally meaningless.[181]

The majority further stated:

> Not only can advertisers easily evade the (Buckley bright) line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. Buckley's express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.[182]

The case contained a intriguing footnote that mentioned testimony by political consultant Douglas Bailey. He said the most powerful political ads often are those that DON'T contain magic words.

Bailey said it is "rarely advisable to use such clumsy words as 'vote for' or 'vote against.' . . . All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat."[183]

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[181] *McConnell v. FEC*, 540 U.S. (2003) at 193.
[182] Id. at 193 and 194.
[183] Id. at 194, footnote 77.

In a second footnote, the judges cited an example of how issue ads containing none of the "magic words" clearly can have an impact on campaigns. The group sponsoring the ad did so anonymously.

> One striking example is an ad that a group called Citizens for Reform sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated: 'Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But her nose was not broken. He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values'. . . The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.[184]

Buckley's decision to limit regulation only to ads containing express advocacy ultimately created a major loophole that caused these vaguer but no less influential ads to flourish during campaigns.

"These 'magic words' protected free speech, to be sure, but they also failed to capture much spending clearly intended to benefit or harm particular candidates."[185]

In the wake of *Citizens United*, courts have declared that issue ads are fair game if disclosure rules are carefully drawn.

"Recounting the series of Supreme Court cases that had upheld disclosure requirements while simultaneously striking down other regulations on campaign speech, the Court (in *Citizens United*) affirmed and reiterated the importance of disclosure requirements- even requirements that apply to issue advocacy- to the government's interest in informing the electorate."[186]

"Given the Court's analysis . . . and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."[187]

While many believe the U.S. Supreme Court has given the go-ahead to requiring disclosure by issue ad sponsors, a major loophole will remain in New Jersey until state law authorizes such disclosure.

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184 Id. at 194, footnote 78.
185 Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter, "The New Campaign Finance Sourcebook" 2005, 95.
186 *Human Life of Washington Inc. v. Brumsickle*, 624 F. 3rd U.S. (2010) at 1013.
187 Id. at 1016.

Current State of Law in New Jersey

The chief law governing ELEC, the "New Jersey Campaign Contributions and Expenditures Reporting Act," requires little disclosure by independent groups that engage in issue-oriented political advertising during campaigns.

Independent groups that directly call for a candidate's defeat, or urge support, must only file reports that list their expenditures. They are not required to detail their contributions.

An amendment to state lobbying laws in 2004 requiring lobbying groups that communicate directly with the public on issues to file disclosure reports with ELEC has promoted some additional disclosure.[188] It also exposes the fuzzy line between "straight" issue ads and those targeting candidates.

Some groups that have engaged in what is essentially electioneering advertising have filed reports under this regulation.

For instance, Mid-Atlantic Leadership Fund and New Jersey Progress, two Democratic Washington, D.C. groups that ran issue-oriented attack ads against Republican Chris Christie during the 2009 Governor's race, filed grassroots lobbying disclosure reports in February 2010.[189] The $3.8 million spent on those issue ads clearly were campaign-related. The groups disclosed a list of their contributions and their expenditures.

Likewise, Americans for Prosperity, a conservative group based on Arlington, Va., did lobbying in New Jersey in 2011 but also spent funds criticizing the records of five Democratic legislators during the 2011 campaign. It also filed a grassroots lobbying report in February, 2012 that indicated it spent a total of $571,458 on all activities. It did not disclose any specific contributions, and did not report how much it spent on lobbying and on the legislative campaign.[190]

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188 The Commission's regulations state in part: "Any person other than a governmental affairs agent or lobbyist who receives contributions or makes expenditures for the purpose of communication with the general public shall be required to file and certify the correctness of an annual report of such contributions or expenditures in the same manner as governmental affairs agents if the contributions or expenditures made, incurred or authorized by the person for the purpose of communication with the general public exceed in the aggregate $2,500 in any year," Commission Unofficial Regulation Text, last updated February 1, 2013, 219.

189 Annual Reports of Communication with the General Public filed with ELEC on February 18, February 24, and March 4 2010.

190 Annual Reports of Communication with the General Public filed with ELEC on February 15 and 17, 2012.

While the use of issue ads in political campaigns is on the rise, so is spending on issue-oriented lobbying campaigns. Budgets for television ads have sharply increased during the past decade as special interest groups adopt the same mass-media techniques used for decades by commercial advertisers and political campaigns.

For instance, Verizon and cable companies spent nearly $10 million in 2006, mostly on broadcast advertising, for and against legislation that allowed Verizon to compete with cable companies in providing television service.[191] This was a clear example of an apolitical issue ad.

Sometimes groups truly are taking positions on issues but, at the same time, they might want to settle a political score.

New Jersey Education Association (NJEA) shattered all lobbying records by spending $6.6 million in 2010 and $10.9 million in 2011 on communications.[192]

The funding promoted the state teachers union while also criticizing certain policy initiatives of Governor Chris Christie that it strongly opposed.

The governor also had his defenders. A group of supporters formed a 501(c)4 non-profit called Reform New Jersey now that spent $402,932 urging support of the governor in 2010. It filed a grassroots lobbying report that disclosed its contributions and expenses.[193]

In 2012, an off year for state elections, grassroots lobbying fell to $2.2 million.

But in 2013, it jumped again to $6.7 million- again with NJEA leading all spenders at $3.3 million. Americans for Prosperity, which lobbied on issues and participated in legislative elections, reported its largest spending ever in New Jersey- $951,233.

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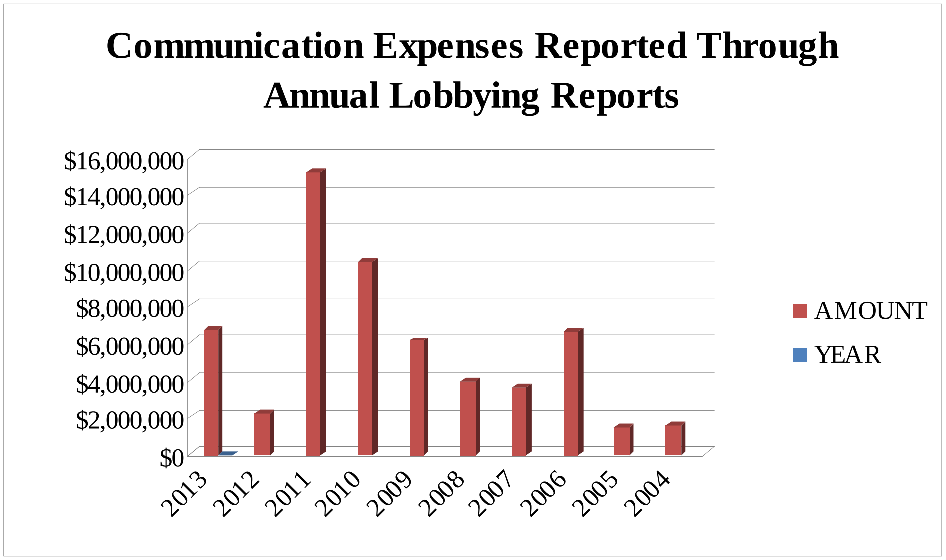
[191] Joe Donohue and Dunstan McNichol, "Verizon Changes Channels After Big-Money Battle," The Star-Ledger, February 28, 2007.

[192] Annual Reports of Represented Entity Submitted February 15, 2011 and February 15, 2012, respectively.

[193] Annual Report of Communication with the General Public filed with ELEC on February 14, 2011.

Table 13
Issue Ad Spending in New Jersey
by Lobbying Groups



While some groups that fund election-related issue ads may occasionally feel compelled to file reports under the grassroots lobbying provision, complete disclosure is unlikely unless the Legislature adopts a law that imposes a more direct responsibility on advertisers.

One such legislative option is discussed in a subsequent section.

Independent Spending is Soaring but State Disclosure is Inadequate Nationally

States have a fundamental reason to do a better job identifying the source of independent spending- it is a fast-growing share of campaign expenditures.

"States need to grapple with the fact that political spending may not continue to go through political committees. Therefore, a reporting regime that only captures PAC spending may miss the lion's share of political spending."[194]

For instance, Coalition for an Open Democracy in New Hampshire found that of the $3.5 million in reported independent expenditures in 2010 state campaigns, only $60,000 was reported to the state.[195]

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194 Ciara Torres-Spelliscy, "Transparent Elections After *Citizens United*," 2011, 6.
195 Ted Siefer, "New Hampshire Campaign Finance Bill Targets Nonprofits," Union Leader, May 9, 2012.

Presently, 43 states have laws that require some level of disclosure for independent expenditures.[196]

Only 25 states have opted to regulate electioneering communications.[197]

Some states have gone beyond the federal electioneering definition.

For instance, of the states that have their own definitions, most impose disclosure requirements on more than just broadcast media, including direct mail, internet, phone banks and even billboards.[198]

Connecticut requires disclosure of nearly all independent expenditures at any time that identifies a candidate.[199]

The Los Angeles City Ethics Commission has one simple definition for independent expenditures: "a political communication that expressly advocates the election or defeat of a clearly identified city candidate or ballot measure, or, taken as a whole, unambiguously urges a particular result in a city election."[200]

Some states are trying to address the issue sometimes called the "Russian Doll" syndrome- using multiple sources to conceal the original donor.

Others simply call it money laundering.

> [O]ne of the problems with how current election laws capture disclosure is they often allow one entity to hide its identity by spending through a second entity- especially if the second entity is a trade association or another type of nonprofit. But this result is not inevitable. States can adjust disclosure laws to require more transparency of underlying donors.[201]

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196 Kevin McNellis, "Hide and Seek: The Dismal State of Transparency Around Independent Spending in State Elections," National Institute on Money in State Politics, March 15, 2012.

197 Alaska, Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Maryland, Massachusetts, Maine, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, and West Virginia- "States Expand Definition of Electioneering Communications to Guard Against Corruption," Brennan Center for Justice, February 7, 2013.

198 Id.

199 Julius Chen, "Connecticut Governor Signs Campaign Finance Bill," June 21, 2013, www.insidepoliticallaw.com.

200 "2013 Election-Independent Expenditures," ethics.lacity.org.

201 Ciara Torres-Spelliscy, "Transparent Elections After *Citizens United*," Brennan Center for Justice, 2011, 21.

Traditional campaign finance laws in New Jersey and elsewhere have provisions that forbid these types of money-laundering transactions. But such maneuvers are notoriously hard to prove.

As a result, more states are moving to explicitly require that candidates or political committees disclose the original source of a contribution.

One such bill (SB 1265) has been proposed in Arizona, where heavy spending by outside groups led to the defeat of two ballot questions in 2012, including one that would create a nonpartisan primary system. The bill would require an individual or organization making a contribution to disclose the original source of the funds even if they passed through several intermediaries. "People have a right to play in the political arena . . . They don't have the right to hide who they are," said sponsoring Senator Steve Farley, D-Tuscon.[202]

California Law Forces Showdown Over Funds Used to Lobby on Ballot Questions

California's Political Reform Act requires disclosure of the true source of campaign contributions. "This information is required in most cases before the election, when it matters. The Act requires those who serve as intermediaries, or middlemen, for contributions to disclose their true source to the recipient of the contribution."[203]

It is aimed at solving the so-called "Russian Doll" problem- using multiple layers of fundraising committees to make it hard or impossible to identify the original contribution source.

The California law got a major test after a group called Americans for Responsible Leadership, an Arizona non-profit group, made an $11 million contribution in 2012 to a California campaign committee, Small Business Action Committee.

Small Business Action Committee used the funds to promote two ballot questions seeking to prohibit unions from raising political funds through payroll deductions, and to oppose a second that sought a major tax increase. Voters rejected the first ballot question and backed the second.

After the election, the California Fair Political Practices Commission demanded that the Arizona-based non-profit disclose how it raised the $11 million. The group refused, the case went to court, and the

202 Sean Peick, "Tucson Lawmaker Targets Dark Money in Campaigns With Disclosure Bill," Cronkite News, January 31, 2013.

203 "Americans for Responsible Leadership Admits Campaign Money Laundering, Discloses $11 Million Donor," California Fair Political Practices Commission press release, November 6, 2012.

California Supreme Court ordered the group to comply. The group later asked the U.S. Supreme Court Justice Andrew Kennedy to take up the case, but it withdrew that petition when it reached a settlement with the state agency.[204]

Americans for Responsible Leadership subsequently disclosed that it received the $11 million from another nonprofit, Center to Protect Patients' Care in Arizona. That group, in turn, revealed it received the same amount from Americans for Job Security based in Virginia.

On October 24, the California Fair Political Practices Commission and the Attorney General announced that those two groups agreed to pay a record $1 million civil fine for initially refusing to disclose the source of the funds.[205]

It also was revealed that Center to Protect Patients Rights also passed $4.1 million to American Future Fund, which passed the money to California Future Fund- also to lobby on the ballot questions. As a result, the two California recipients of the $15 million in allegedly illicit contributions have been ordered to pay an equivalent amount to the state of California.

Americans for Responsible Leadership and Center to Protect Patients Rights are part of a national network of committees used by billionaires Charles and David Koch to exert their influence over political issues and campaigns.[206]

The investigation and subsequent newspapers stories disclosed some of the contributors that gave to funds to Americans for Job Security that financed the fundraising maneuver.

The American Council of Engineering Companies-California gave the group $400,000 in 2012.[207]

Another major donor was the Fisher family, owner of Gap Inc. It gave $9 million. San Francisco investor Charles Schwab gave $6.4 million while Los Angeles philanthropist Eli Broad sent $1 million.[208]

204 Chris Megerian, "Controversial Arizona Nonprofit Releases Name of Contributors- More Nonprofits," Los Angeles Times, November 5, 2012.
205 "FPPC Announces Record Settlement in $11 Million Arizona Contribution Case," FPPC press release, October 24, 2013.
206 Nicholas Confessore, "Koch-Linked Group Admits Spending Violations," New York Times, October 25, 2013.
207 Dan Morain, "California FPPC Pulls Thread on Laundered Money," Sacramento Bee, February 6, 2013.
208 Chris Megerian and Anthony York, "California Probe of Campaign Donations Sheds Light on 'Dark Money,'" Los Angeles Times, November 3, 2013.

Rich Hasen, a professor at the University of California-Irvine Law School who specializes in election law, said the case shows the level of regulatory muscle that is sometimes needed in the post-*Citizens United* era to ensure full disclosure.

"California is doing what reformers have been urging the federal government to do, which is not to pay lip service to disclosure, but to actually ensure that disclosure is effective," he said.[209]

In "Transparent Elections After *Citizens United*," the Brennan Center for Justice concluded that "states have wide latitude to require disclosures not only from classic political committees, but also any entity funding independent expenditures or electioneering communications in future state elections."[210]

It later continues: "the Supreme Court indicated that current federal rules are only a floor, and not a ceiling, on what could potentially be regulated." As the Supreme Court noted, "Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[211]

For decades, candidates and parties have been required to disclose their campaign finances in detail. It seems only fair that the same rules should apply to independent groups.

Disclosure won't stop the often stinging political advertisements run by special interest shadow groups. But at least it will help the public judge their credibility.

Disclosure is Constitutional and Popular

A New York Times poll found that 92 percent of the public agreed "it is important for campaigns to be required by law to disclose how much money they have raised, where the money came from, and how it was used. There was little difference in the opinions of each party's voters on this question."[212]

While the U.S. Supreme Court in *Citizens United* firmly declared that corporations and unions can spend freely if they do so independently, eight of nine justices also gave strong backing to disclosure.

In the words of the majority, "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This

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209 Andy Kroll, "California's Dark Money Investigation is Making Conservatives Sweat," Mother Jones, April 15, 2013.
210 Ciara Torres-Spelliscy, "Transparent Elections After *Citizens United*," 2011, 2.
211 Id., page 5, citing *Williamson v. Lee Optical Co of Oklahoma*, 348 U.S. (1955) at 489.
212 Megan Thee-Brenan, "Americans Want Disclosure and Limits on Campaign Spending," New York Times, October 28, 2010.

transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[213]

The justices also pointed to prior precedent:[214] "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' . . . [215] and do not 'prevent anyone from speaking.'"[216]

Even as early as *Buckley v. Valeo* in 1976, the high court recognized the critical need for disclosure. "A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."[217]

The court further said disclosure was necessary to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity"[218] and because it is an "essential means of gathering data necessary to detect violations" of campaign finance laws.[219]

Former FEC Chairman Trevor Potter, a Republican, said the nation is returning to "the era of the Watergate scandals when huge amounts of secret money were spent on federal elections. Secret money in American politics is dangerous money . . . Secret money creates the opportunity for influence-buying that is unknown and unaccountable to the American people."[220]

Potter says the Supreme Court's endorsement of disclosure has never been stronger.

"The Supreme Court has been unusually clear in saying that the sources of funding of political advertising and other spending can constitutionally be required to be disclosed. This applies not only to the Super PACs but to c4s, c6s and other groups running campaign ads."[221]

In fact, the majority declared that the mandate for disclosure is broad. "We reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."[222]

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213 *Citizens United v. FEC*, 558 U.S. (2010) at 371.
214 *Citizens United v. FEC*, 558 U.S. (2010) at 366.
215 *Buckley v. Valeo*, 424 U.S. (1976) at 64.
216 *McConnell v. FEC*, 540 U.S. 93 (2003) at 201(internal quotation marks and brackets omitted).
217 *Buckley v. Valeo*, 424 U.S. (1976) at 67.
218 Id.
219 Id. at 67 and 68.
220 Trevor Potter, Testimony before Senate Rules Committee on DISCLOSE Act of 2012, March 29, 2012.
221 Trevor Potter, "Super PACs: How We Got Here, Where We Need to Go," December 2, 2011.

In a recent summary of major campaign finance litigation pending nationally, the Campaign Legal Center said lower courts clearly have gotten the message from the high court.

"[P]olitical disclosure laws remain a target but have largely withstood attack. The First, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits have all upheld strong disclosure laws applicable to independent spending following Citizens United."[223]

In "Updating Disclosure for the New Era of Independent Spending," Richard Briffault of Columbia Law School argues that any independent committee that "promotes, attacks, supports or opposes" (PASO) a candidate should be subject to full disclosure. He noted that the Supreme Court in *McConnell v. FEC* upheld this standard in evaluating ads by political parties.

The standard not only is clear but it avoids being overly broad.

> Rather, it reflects the common sense judgment that 'any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating.' . . . Using the PASO test for disclosure builds on *Citizens United*'s recognition that the public has an interest in knowing who is promoting or attacking candidates.[224]

Briffault says applying the standard is fair because today's independent committees "are now far more clearly electoral than in the past . . . They are, in effect, shadow parties or campaign committees politically linked to the ballot-line parties or candidates even if they are legally independent."[225]

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[222] *Citizens United v. FEC*, 558 U.S. (2010) at 369.
[223] "New Litigation Summary from CLC Describes Continuing Flood of Challenges to Campaign Finance Laws and Growing List of Voting Rights Cases," Campaign Legal Center, September 13, 2013.
[224] Richard Briffault, "Updating Disclosure for the New Era of Independent Spending," Columbia Law School, April 16, 2012.
[225] Id.

ELEC HAS MADE SOME PROGRESS

ELEC has begun trying to better track the flow of independent spending in New Jersey and is considering other steps to improve disclosure.

(A) A December 5, 2011 press release for the first time summarized spending by independent groups on legislative campaigns.

(B) During the 2013 election, the agency, for the first time, distributed press releases before and after primary and general elections that estimated total independent spending on gubernatorial and legislative elections.

(C) ELEC has created a search page to enable the public to more easily search independent spending reports. www.elec.state.nj.us/ELECReport/IndependentExpenditureSearch.aspx

(D) The agency revised Schedule E of R-3 forms filed by continuing political committees, political party committees and legislative leadership committees to allow them to indicate when expenditures made and incurred on behalf of candidates/committees are independent expenditures.

(E) On July 18, 2013, ELEC released "White Paper 23- Legislative General Elections 2011- Rise of the Independents." It includes the first ever analysis of independent spending by targeted legislative districts. www.elec.state.nj.us/pdffiles/whitepapers/white23.pdf

(F) This white paper, the first ever to focus exclusively on independent spending in New Jersey, is part of the effort to improve public awareness of the issue and guidance for policy-makers.

ELEC Plan Needs Legislative Approval to Improve Disclosure by Independent Groups

In a March, 2012 comparison of disclosure requirements for independent groups, New Jersey was graded poorly by the National Institute on Money in State Politics, scoring only 25 out of 100 points.[226]

State disclosure reports, the Institute says, fail to clearly identify and disclose electioneering communications, an independent expenditure's target, or the position of the group making the expenditure.

The average score for all states- 61 points. Nine states scored 100- Alaska, California, Colorado, Illinois, Maryland, North Carolina, Ohio, Oklahoma, and Washington.

ELEC has put forth recommendations that would strengthen New Jersey in terms of disclosure of independent spending.

With the adoption of the 2010 Annual Report in April 2010, the Election Law Enforcement Commission, in a unanimous, bipartisan action, agreed to urge the Legislature to expand disclosure requirements for independent groups.

At the time, Super PACs didn't even exist.

In 2012, Executive Director Jeff Brindle outlined key elements of reform legislation and presented it to members of both political parties. He also has written several columns to try to build support for the legislative changes.

Currently, groups or individuals that independently spend more than $1,400 in New Jersey to explicitly urge voters to elect or defeat candidates must report only expenses to ELEC.

Spending in the 2013 campaign betrayed the inadequacy of current laws. Nearly $11 million was spent by groups promoting both parties with no disclosure except for total spending. About $3.7 million disclosed expenses only. So about 38 percent of the spending came with either zero or limited disclosure.

[226] "Scorecard: Essential Disclosure Requirements for Independent Spending," National Institute on Money in State Politics, March 15, 2012.

Table 14
Amount of Disclosure by Independent Groups in 2013 New Jersey State Campaigns

EXTENT OF DISCLOSURE	TOTAL	PERCENT
Contributions/Expenses	***$ 24,088,504***	62%
Expenses Only	$ 3,740,234	10%
None Except Total Spending	$ 11,000,000	28%
Grand Total	***$ 38,828,738***	**100%**

Under Brindle's proposal, independent expenditure only committees similar in makeup to federal Super PACs would file full reports listing expenses and contributions 29 days and 11 days before elections, and 20 days afterward- just like candidates and political committees. In essence, all independent spending-only groups would file the same way groups lobbying in support of or against ballot questions have been doing for decades.

A good model from last year's campaign would be Fund for Jobs, Growth and Security, which detailed more than $8 million in contributions and independent expenses.

Brindle has further suggested that the Legislature expand the definition of independent expenditures to include electioneering-type ads in addition to express advocacy advertising.

Electioneering communications would be defined as all communications made beginning January 1 of a calendar year of a primary, general, May municipal, run-off, school board, or fire district election.

Disclosure requirements would apply to any communication that is:

> The functional equivalent of express advocacy because it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party or a challenger to a candidate, or takes a position on a candidate's character, qualifications or fitness for office.

The intent would be to require all 527 or 501(c) non-profit groups and all Super PACs, to disclose to voters their major spending related to state, county or local campaigns in New Jersey, and how they raised the funds for that spending.

There would be no contribution or spending limits on the committees spending independently. But they would have to divulge all contributions larger than $5,000. The contribution disclosure threshold would be set considerably higher than the $300 threshold for candidates and committees to try to minimize the reporting burden on membership groups such as the Sierra Club or the Chamber of Commerce.

Table 15
Current Disclosure Requirements for
Independent Spending Groups Versus Proposed Requirements

CURRENT	PROPOSED
Independent Spenders that Spend More than $1,400 Must Disclose Expenditures Before the Election If They Explicitly Urge a Candidate's Election or Defeat	Independent Spenders that Spend More than $1,400 Must Disclose Contributions and Expenditures Before the Election If They Explicitly Urge a Candidate's Election or Defeat
Independent Spenders Who Run Issue-Style Communications, also called Electioneering Ads, About Candidates Do Not Have to Disclose Before the Election*	Independent Spenders Who Run Issue-Style Communications About Candidates Would Have to Disclose Before the Election their Contributions and Expenditures for Ads Run After January 1. Applies to Communications by Network Or Cable Television, Radio, Internet, Direct Mail, Other Printed Literature, Telephone and Billboards.
No Contribution Disclosure by Independent Spenders Unless They Register as a Political Committee or Continuing Political Committee.	Contributions of $5,000 or More Must be Disclosed by Independent Spenders

*Some disclosure has been done through grassroots lobbying reports filed in February after the election.

PREVIOUS WHITE PAPERS

Number One:	Contribution Limits and Prohibited Contributions (1988)
Number Two:	Trends in Legislative Campaign Financing: 1977-1987 (1989)
Number Three:	Legislative Public Financing (1989)
Number Four:	Ideas for an Alternate Funding Source (1989)
Number Five:	Lobbying Reform (1990)
Number Six:	Autonomy and Jurisdiction (1991)
Number Seven:	Is There a PAC Plague in New Jersey? (1991)
Number Eight:	Technology in The Future: Strengthening Disclosure (1992)
Number Nine:	Legislative Candidates: How They Spend their Money (1994)
Number Ten:	Nonconnected, Ideological PACs in the Garden State (1995)
Number Eleven:	State Parties And Legislative Leadership Committees: An Analysis 1994-1995 (1996)
Number Twelve:	Repartyization: The Rebirth of County Organizations (1997)
Number Thirteen:	Trends in Legislative Campaign Financing: 1987-1997 2nd Volume (1999)
Number Fourteen:	Local Campaign Financing (2000)
Number Fifteen:	School Board Campaign Financing (2002)
Number Sixteen:	A Resurgent Party System: Repartyization Takes Hold (2003)
Number Seventeen:	Legislative Election 2003: The Rise of Party-Oriented Campaigning (2004)
Number Eighteen:	Local Campaign Financing: An Analysis of Trends in Communities Large and Small (2005)
Number Nineteen:	The 2005 Assembly Election: New Trends On The Horizon? (2006)
Number Twenty:	Legislative General Elections 2007: An Analysis Of Trends In State Senate And Assembly Elections (2009)
Number Twenty-One:	School Elections Campaign Financing: An Update (2010)
Number Twenty-Two:	Trends in Legislative Campaign Financing: Fundraising in the Era of Pay-to-Play Reform, Self-Funders and Recession • 1999-2009 3rd Volume (2011)
Number Twenty-Three:	Legislative General Elections 2011 - Rise of the Independents (2013)