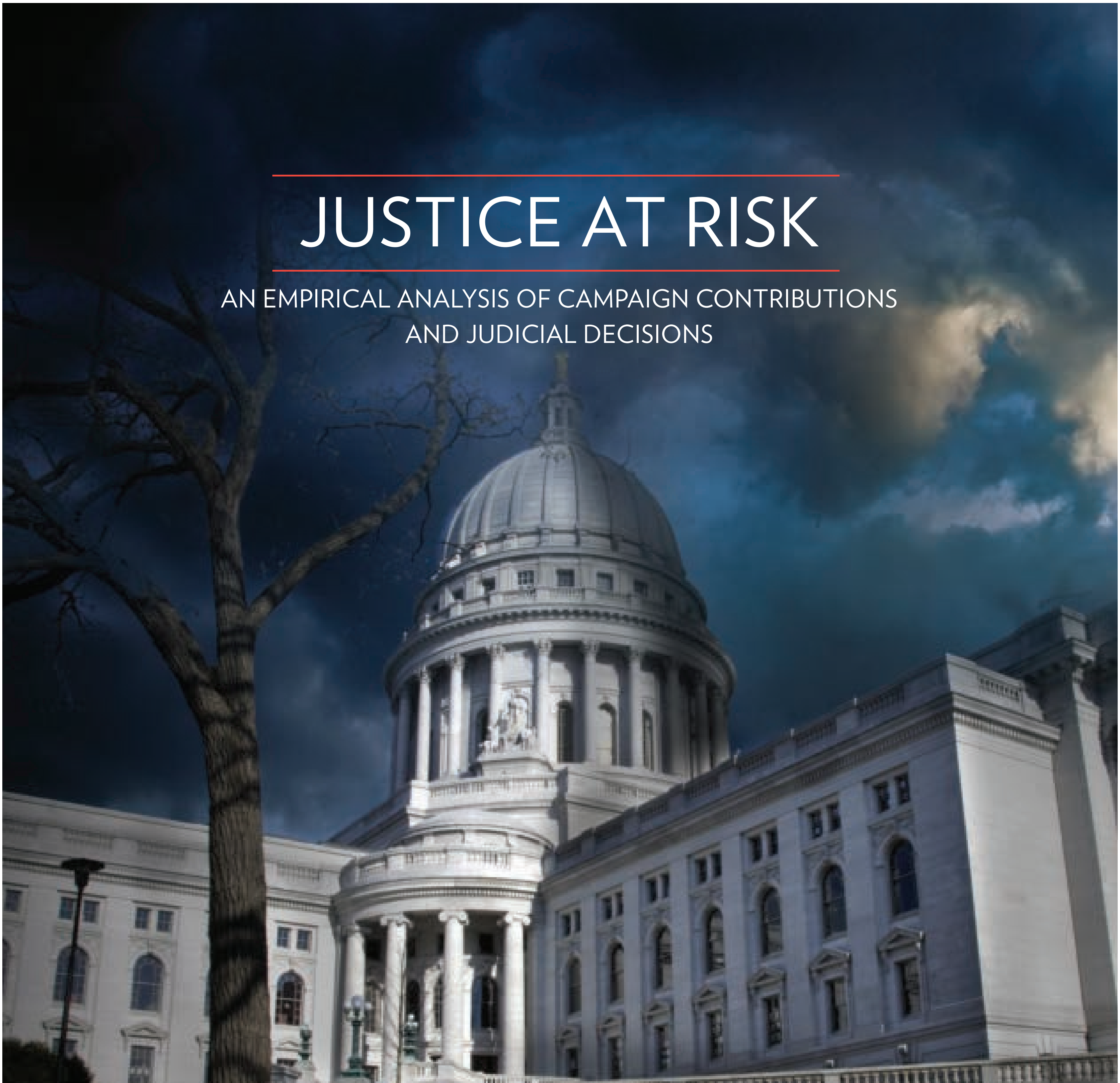
JUSTICE AT RISK

AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS



BY JOANNA SHEPHERD

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WITH AN INTRODUCTION BY THE HONORABLE SUE BELL COBB, FORMER CHIEF JUSTICE, ALABAMA SUPREME COURT

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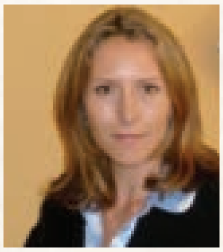
ABOUT THE AUTHOR



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ABOUT THE AMERICAN CONSTITUTION SOCIETY

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Sue Bell Cobb
Alabama Supreme Court Chief Justice (Ret.)

Having worn a judicial robe for a few months shy of thirty years, having run and won five times in partisan elections, having been involved in the most expensive appellate court race in the nation in 2006, I am sincerely concerned about judicial elections, the obscene amount of money which has flooded into campaigns, and the damage that has been done to the image of our beloved judicial system. This politicization of the courts puts justice at risk.

After 13 years on the trial court, having presided in 40 of Alabama's 67 counties, and after 12 years on the Alabama Court of Criminal appeals, I decided to run for Chief Justice of the Alabama Supreme Court. Not approving of partisan elections, but having to contend with the system in place, I proceeded to raise $2.6 million to fund a statewide campaign for Chief Justice. My opponent, the Republican incumbent, and groups supporting him raised over $7 million. Even though I was outspent about three to one, I was victorious, becoming Alabama's first female Chief Justice.

Two days after the election, a National Law Journal reporter called seeking an interview. I expected that she was going to ask what it felt like to be the first female Chief Justice in the state's history. Instead, she asked, "How does it feel to be the victor of the nation's most expensive judicial race?" and "How will you convince the people of Alabama that the campaign contributions that you sought and received will not influence how you rule?" These were valid questions, when so much money was invested, obviously to impact the outcome of an election.

Too often the answers to these important and difficult questions are obscured by heaps of rhetoric. For this reason, I welcome the publication of "Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions." I congratulate the American Constitution Society for sponsoring the research summarized by the report, and I encourage scholars to take advantage of the opportunity presented by the assembly of such a valuable collection of data to continue to grapple with the difficult – and incredibly important – questions it raises. Because it offers data, rather than merely more rhetoric, "Justice at Risk" is a valuable contribution to the debate over the implications of the current system of campaign finance for judicial elections.

In my view, the current system does indeed place justice at risk. It will be rescued only by honest, open debate, informed by facts. I hope all those who care about our system of justice will debate this report in that spirit.

Post Office Box 640175 Pike Road, Alabama 36064

WHY ELSE DO CAMPAIGN DONORS GIVE?

In all other races for public office, contributors would say that they give to campaigns to ensure that candidates are elected who will represent their interests and to give them access to that public official when issues arise. What do donors in judicial races get in return? Judges are not supposed to "represent" anyone; they are supposed to be wed to "the law." "Access" is certainly not needed because judges are forbidden to conduct "ex parte" communications about a case, which is one of the most basic tenets of our judicial code of conduct. Judges, without bias or favoritism, are expected to rule solely on the facts and the law in a particular case.

JUSTICE AT RISK

AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS

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BY JOANNA SHEPHERD[1]

EXECUTIVE SUMMARY

There is a growing suspicion of the role money and interest groups play in judicial elections. Almost 90 percent of voters and 80 percent of judges believe that by means of campaign contributions, interest groups are trying to use the courts to shape policy.[2] Even more troubling, 76 percent of voters and 46 percent of judges believe that campaign contributions have at least some influence on judges' decisions.[3]

Confirming this public suspicion, a growing body of empirical literature has found that there is a tendency — whether conscious or unconscious — for some judges to favor campaign contributors in their decisions. However, most of the studies utilize outdated data in their empirical analyses. Indeed, the dataset most often used is a collection of state supreme court cases from the period 1995-1998. Although these data are comprehensive and unique in their coverage, several recent court cases and an upsurge in the amount of money in elections have made conclusions based on this 15-year old data increasingly irrelevant. Cases such as *Citizens United v. FEC* and *Republican Party of Minnesota v. White* have dramatically changed the landscape of campaigning in judicial elections. Moreover, during this 15-year period, campaign spending has skyrocketed. Campaign fundraising has more than doubled, from $83.3 million in 1990–1999 to $206.9 million in 2000–2009.[4] In fact, three of the last six state supreme court election cycles topped $45 million.

MORE THAN 90 PERCENT OF THE UNITED STATES' JUDICIAL BUSINESS IS HANDLED BY STATE COURTS, AND 89 PERCENT OF ALL STATE COURT JUSTICES FACE THE VOTERS IN SOME TYPE OF ELECTION.

Interest groups have also come to dominate campaign finance in judicial elections over the 2000-2009 period. During this period, business groups contributed over $62.6 million, or 30 percent of the total contributions, and lawyers and lobbyists contributed $59.3 million, or 28 percent of the total.[5] Interest groups have similarly dominated television advertising in state supreme court races. Of the $93.6 million spent on television advertising between 2000 and 2009, interest groups spent $27.5 million, with business groups responsible for over 90 percent of the television advertising paid for by interest groups.[6]

Thus, the dramatic changes in both the amount of money and the legal landscape surrounding judicial elections has made new data critical for drawing timely conclusions and making important policy decisions. The American Constitution Society has responded to this need by sponsoring an objective and non-partisan empirical study to explore the effect of campaign contributions on judicial behavior. Over the past year, a team of independent researchers has collected and coded data on more than 2,345 business-related state supreme court published opinions, which includes opinions from all 50 states during the years 2010 to 2012. The dataset was merged with over 175,000 contribution records that detail every reported contribution to a sitting state supreme court justice over the same period, or dating back to the last time the justice ran for reelection. Data have also been collected on related factors such as individual justice characteristics, ideology, and data about state processes to ensure a complete and robust empirical model for testing and analysis.

The data confirm a significant relationship between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters. The more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants appearing before them in court. Notably, the analysis reveals that a justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time.

Moreover, the data demonstrate that the empirical relationship between business contributions and justices' voting for business interests exists only in partisan and nonpartisan systems. There is no statistically significant relationship between money and voting in retention election systems.

The data also show that there is a stronger relationship between business contributions and justices' voting among justices affiliated with the Democratic Party than among justices affiliated with the Republican Party. Because Republican justices tend to be more ideologically predisposed to favor business interests, additional business contributions may not have as large of an influence on them as they do on Democratic justices.

Finally, there is a stronger relationship between business contributions and justices' voting in the period from 2010-2012 compared to 1995-1998. Although several previous empirical studies have confirmed a relationship between money and voting in the 1995-1998 period, it is not surprising that the relationship would strengthen with the ever-increasing importance of money in judicial elections.

In light of these findings and the increasingly large role politics, elections and campaign contributions are playing in judicial selection, this study is of critical importance to both scholars and groups working to understand the current impact of money on judicial decision-making and articulate the case for policies conducive to fair and impartial courts. Elected judges decide the overwhelming majority of cases in our nation. More than 90 percent of the United States' judicial business is handled by state courts,[7] and 89 percent of all state court judges face the voters in some type of election.[8] Only data from the current legal and political landscapes of judicial races can yield confident conclusions about the destructive role of money in judicial elections.

KEY FINDINGS

- A significant relationship exists between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters.
- The more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants appearing before them in court.
- A justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time.
- The empirical relationship between business contributions and justices' voting for business interests exists only in partisan and nonpartisan systems; there is no statistically significant relationship between money and voting in retention election systems.
- There is a stronger relationship between business contributions and justices' voting among justices affiliated with the Democratic Party than among justices affiliated with the Republican Party.

WHY STUDY CONTRIBUTIONS AND CASES INVOLVING BUSINESS INTERESTS?

The empirical research on which this report is based was a significant undertaking, involving a team of scholars guiding the work of numerous legal research fellows. They examined over 2,345 business-related supreme court decisions from all 50 states in the years 2010 -2012 and merged this data with over 175,000 contribution records that detail every reported contribution to a sitting state supreme court justice. As a practical matter, the scholars designing the research had to devise some principled means of limiting the project's scope to match the level of available resources.

They chose to examine business contributions and cases for the following reasons.

Business interests and lawyers dominate contributions to judicial candidates, with unions playing only a small role …

As shown by Figure 3 on page 6 below, during the last decade, contributions from business groups and lawyers have dominated interest group contributions; business groups contributed over $62.6 million, or 30 percent of the total contributions. Lawyers and lobbyists (for the most part, members of the plaintiffs' bar and their agents), contributed $59.3 million, or 28 percent of the total. Unions have not, for the most part, been significant contributors to judicial candidates, and the total amount of union contributions to such candidates is a small fraction of the total contributed by either lawyers and lobbyists or business interests.

but business interests dominate the interest group spending on television advertising, the most expensive and effective form of campaign activity, and …

Although business groups and lawyer/lobbyist groups contribute approximately equal amounts to candidates' campaigns, business groups overwhelmingly dominate interest group spending on television advertising. In 2006, business groups were responsible for over 90 percent of the television advertising paid for by interest groups. Although lawyers and lobbyists were the second largest interest-group sponsor of television ads, their advertising paled in comparison to that of business groups, whose dominance of television advertising has steadily increased over time.

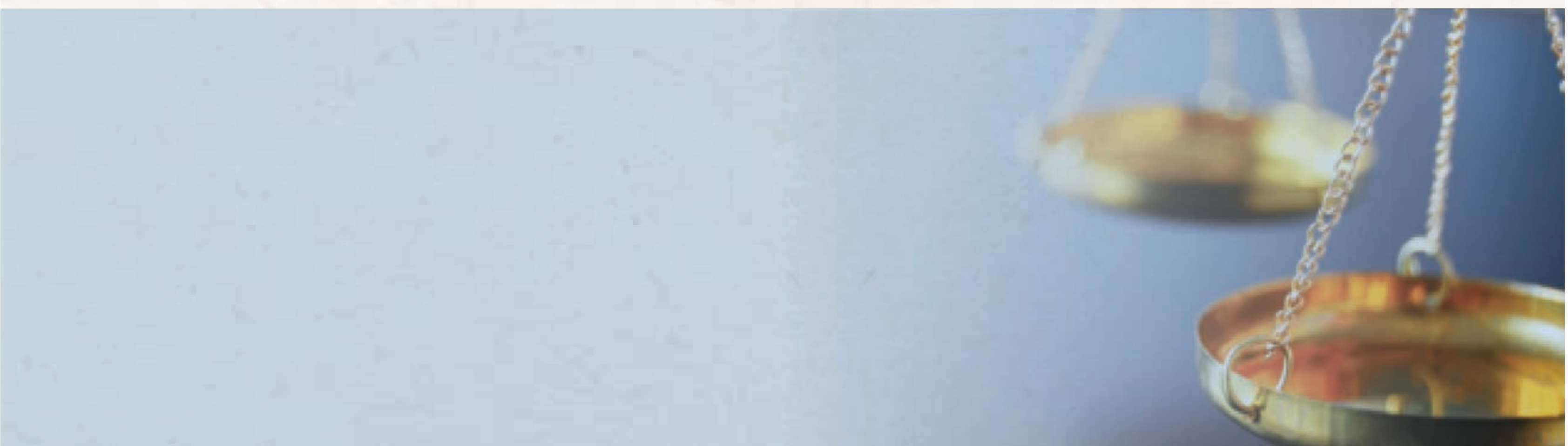
under current circumstances business groups are likely to be unique in their ability to exert influence over the judiciary …

Although any interest group that is able to marshal sufficiently large campaign contributions might exert influence over the judiciary, under current circumstances business groups are likely to be unique in their ability to do so. Even compared to other influential interest groups, business groups often have a more focused agenda and a clearer idea of the types of justices they would like to support. Business groups usually have an unambiguous agenda in most state judicial races—to help pro-business, pro-tort reform justices get elected. Indeed, tort reform has become the primary issue in most state judicial races. In contrast, the plaintiffs' bar in many states is typically much more diverse in their economic interests because they represent such a diverse range of clients.

and, in any case, those concerned with fair and impartial justice should be troubled that any group can have such influence over the judiciary.

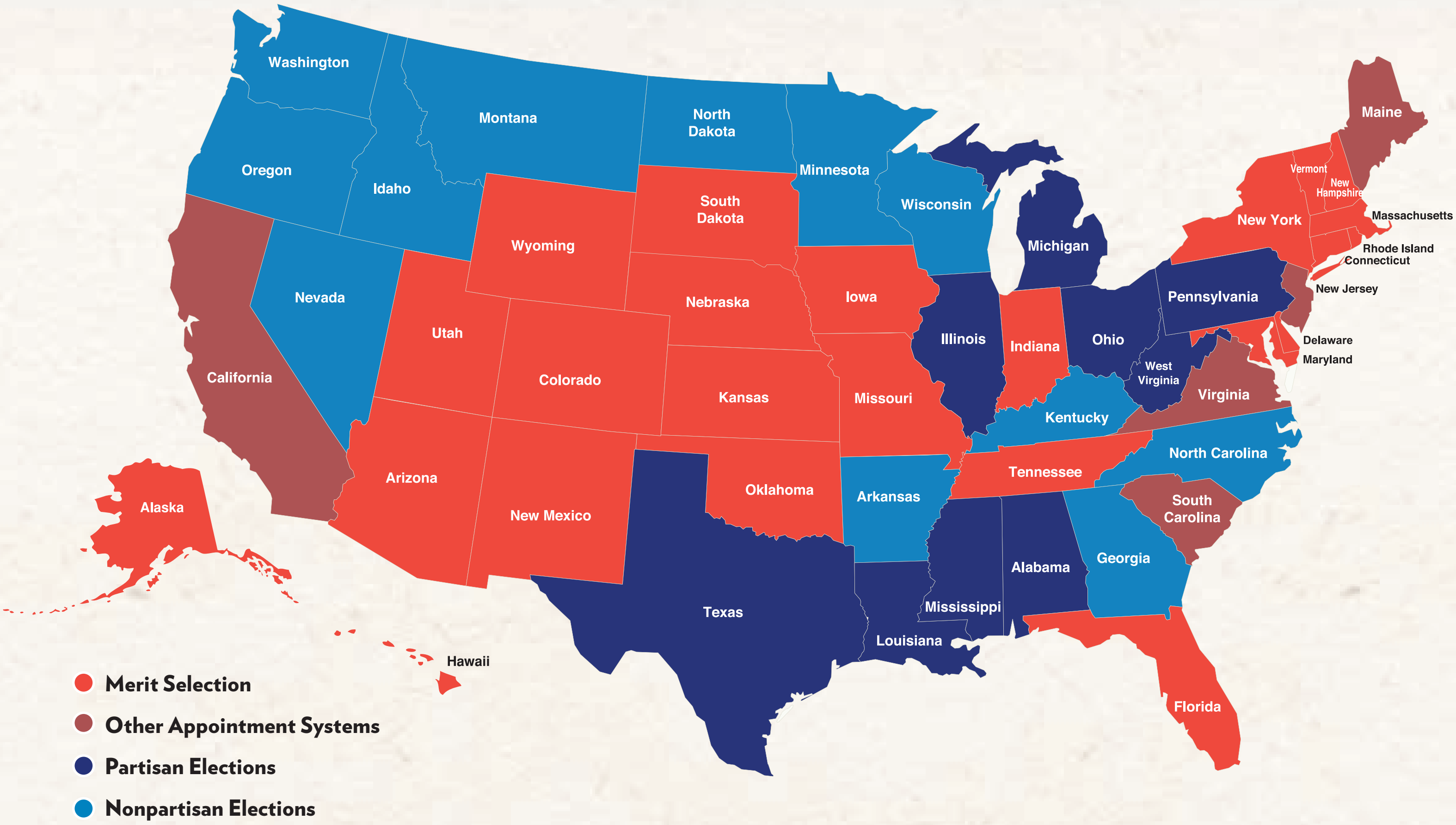
If one group can marshal resources sufficient to place justice at risk, so too can others, especially in a political and economic climate different from the present one. A fair and independent judiciary is a protection against influential groups — whatever their ideological leanings or the degree to which they are benefited by the politics of the moment — bending the justice system in their favor.

Any empirical study benefits from transparency. The data analyzed in this report is available for your review and use at www.followthemoney.org/Research/special_topics.phtml. We invite you to contribute to and expand the important conversation about fair courts.



I. AN OVERVIEW OF JUDICIAL ELECTIONS AND CAMPAIGN FINANCE

Almost 90 percent of state appellate judges must regularly be reelected by voters.[9] There is, however, dramatic variation among the states' methods of selection and retention of judges. **States have divided roughly among three different principal systems of judicial selection and retention: partisan elections, nonpartisan elections, and merit plans.** In the selection of justices to their highest courts, nine states use partisan elections and twelve states use nonpartisan elections.[10] In twenty-nine states, the governor or legislature initially appoints justices to the highest court, with twenty-four of those states using some form of merit plan.[11] For the retention of justices on the state's highest court, five states use partisan elections and fourteen states use nonpartisan elections. Eighteen states hold retention elections to determine whether those justices remain in office beyond their initial term. The incumbent justices run unopposed and must win majority approval for retention. Nine states rely on reappointment by the governor, legislature, or a judicial nominating committee.[12] Only three states grant their highest court justices permanent tenure.



Source: Justice at Stake

Judicial elections are even more common in the selection of judges to trial courts and lower appellate courts. Nineteen states use partisan elections to fill judicial positions at some level, even if they do not use them to elect their highest court.[13] Another twenty-one states use nonpartisan elections for at least some judicial positions.[14]

IMPORTANT BACKGROUND

- More than 90 percent of the United States' judicial business is handled by state courts, and 89 percent of all state court judges face the voters in some type of election.
- States have divided roughly among three different principal systems of judicial selection and retention: partisan elections, nonpartisan elections and merit plans.
- Judicial elections have become increasingly politicized in recent years.

Without justice we have no rights, no peace, and no prosperity. Judicial independence is the cornerstone of justice. This means that judges, who are empowered to ensure that justice always reigns supreme, must never be beholden to any particular political party or special interest group. Nor should they have favored financial backers. Their only "constituency" must be the law and the law alone. You need only open your daily newspaper to the international section to read about countries where judicial independence doesn't exist to see how bad things can become.

Former Justice Leah Ward Sears, Georgia Supreme Court

A. THE GROWING IMPORTANCE OF MONEY IN JUDICIAL ELECTIONS

Despite various reforms aimed at protecting fair and impartial courts, judicial elections have become increasingly politicized in recent years. Until the 1980s, judicial elections were "low-key affairs, conducted with civility and dignity,"[15] with very little in terms of campaign spending and media advertising. Judicial elections since then have, however, become more competitive and more expensive. In 1980, only 4.3 percent of incumbents were defeated in nonpartisan elections, but in 2000, 8 percent of incumbents were defeated in these elections.[16] In partisan elections, 26.3 percent of incumbents were defeated in 1980, but by 2000, the loss rate for incumbents was 45.5 percent.[17] This loss rate for judges is much higher than the loss rate for congressional and state legislative incumbents over the same period of time.[18]

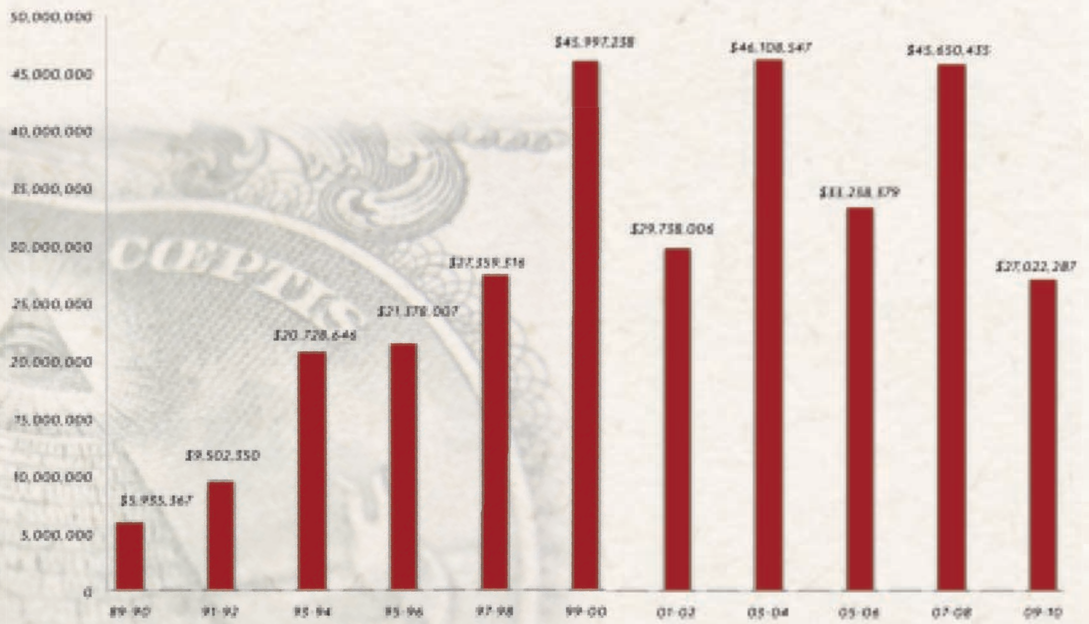
With the increase in competitiveness of judicial elections, campaign spending has skyrocketed. State supreme court candidates raised less than $6 million in the 1989-1990 election cycle.[19] For the 2009-2010 election cycle, the most recent cycle for which aggregate data has been compiled, candidates raised more than $38 million, approximately $11.5 million of which was independent in nature.[20] In three of the last six election cycles, candidates raised a total of more than $45 million.[21]

Indeed, **throughout the 1990s, only $83.3 million was contributed to state supreme court candidates; in contrast, candidates raised $206.9 million between 2000-2009.**[22] Figure 1 shows trends in candidate fundraising from 1989 to 2010.

During the last decade, **the flow of campaign contributions has been especially powerful in partisan races.** Between 2000-2009, campaign fundraising was three times greater in states with partisan elections; candidates in these races raised $153.8 million across nine states, compared to $50.9 million raised in the thirteen states with nonpartisan elections.[23]

Mirroring the increases in direct campaign contributions, the last decade has also seen a dramatic increase in spending on television advertising in judicial races. Candidates and interest groups have realized that television advertising is effective in increasing name recognition and support for favored candidates, or alternatively, attacking their opponents. In the 2009-10 election cycle, $16.8 million was spent on television advertising, making it the costliest nonpresidential election cycle for TV spending in judicial elections. Figure 2 shows the increasing trend in the number of TV ad airings in state supreme court elections.

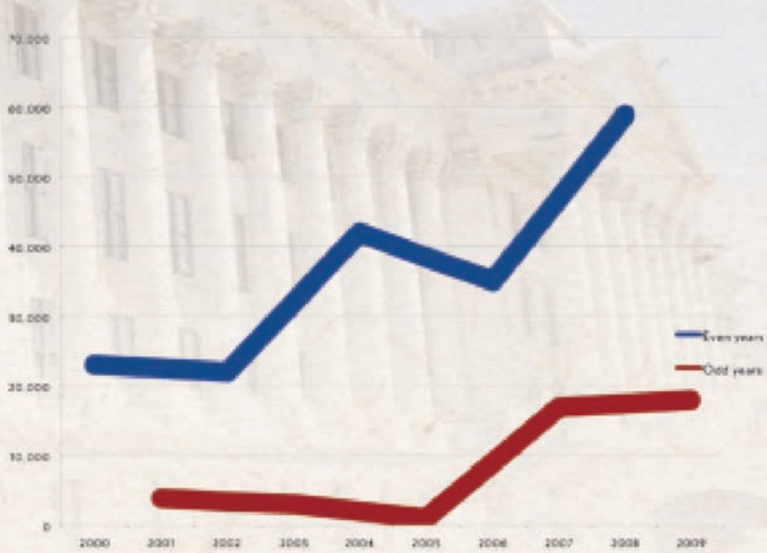
Figure 1 TRENDS IN STATE SUPREME COURT FUNDRAISING



Source: Adam Skaggs et al., *The New Politics of Judicial Elections 2009-10*

Interest groups and political parties routinely dominate campaign finance in supreme court races. During the last decade, contributions from business groups and lawyers have dominated interest group contributions; business groups contributed over $62.6 million, or 30 percent of the total contributions. Lawyers and lobbyists (for the most part, members of the plaintiffs' bar and their agents), contributed $59.3 million, or 28 percent of the total.[25] Political parties contributed $22.2 million, or 11 percent of the total during this period.[26] Figure 3 shows the direct contributions to state supreme court candidates by interest group sector over the period 2000-2009. And, although unions have made significant contributions to gubernatorial and legislative candidates, they have not, for the most part, been significant contributors to judicial candidates, and the total amount of union contributions to such candidates is a small fraction of the total contributed by either lawyers and lobbyists or business interests.

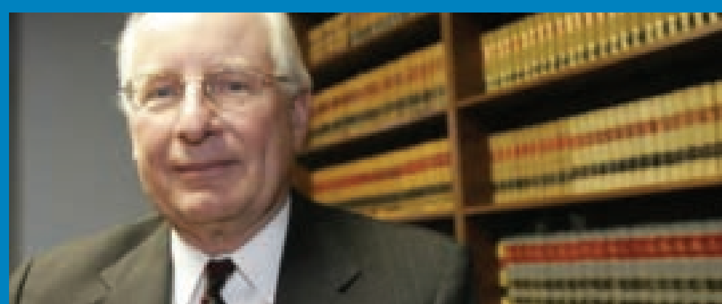
Figure 2 TRENDS IN THE NUMBER OF TV AD AIRINGS IN STATE SUPREME COURT RACES[24]



Interest groups and political parties have similarly spent heavily on outside expenditures such as television advertising. Of the $93.6 million spent on television advertising between 2000 and 2009, interest groups spent $27.5 million and party organizations spent $11.7 million; the candidates' campaigns made up the rest.[27] Although business groups and lawyer/lobbyist groups contribute approximately equal amounts to candidates' campaigns, business groups overwhelmingly dominate interest group spending on television advertising. In 2006, business groups were responsible for over 90 percent of the television advertising paid for by interest groups.[28] Although lawyers and lobbyists were the second largest interest-group sponsor of television ads, their advertising paled in comparison to that of business groups, whose dominance of television advertising has steadily increased over time.[29] In fact, many business groups spend more on television advertising than they do on candidates' campaigns. Of the top interest group contributors during the last decade, business groups spent $1.68 on television advertising for every $1.00 contributed to candidate campaigns. In contrast, for every $1.00 lawyers and lobbyists contributed to candidate campaigns, they spent only $.26 on television advertising.[30]

The increasing cost of judicial campaigns has made it difficult for candidates to win elections without substantial funding. Indeed, the top fundraisers and candidates benefitting from the most television advertising win the overwhelming majority of elections.[31]

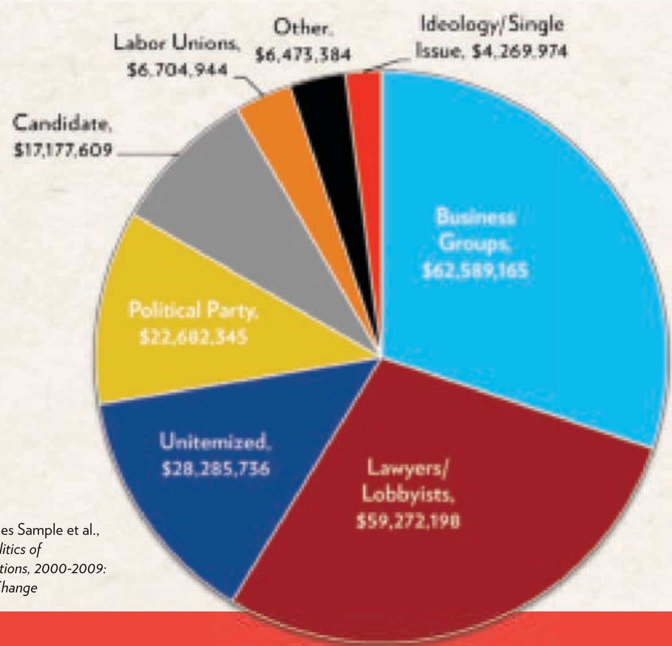
As judicial elections have become increasingly difficult to win without substantial funding, the financial support of wealthy interest groups can be decisive and may give those groups great influence with judicial candidates. Indeed, elected judges point to the intense pressure to raise campaign funds and the concerning relationship between money and judging.



I never felt so much like a hooker down by the bus station... as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote.[32]

Ohio Supreme Court Senior Associate Justice Paul Pfeifer

Figure 3 DIRECT CONTRIBUTIONS TO STATE SUPREME COURT CANDIDATES BY SECTOR: 2000-2009



Source: James Sample et al., *The New Politics of Judicial Elections, 2000-2009: Decade of Change*

II. THREATS TO IMPARTIAL JUSTICE

Despite growing concerns about the importance of money in judicial elections, there has always been a fundamental debate about the appropriate amount of influence that the public should have on judges' decision-making. On one side, many academics, elite lawyers, and federal judges have advocated for the "independence" model. It is an assumed truth among these groups that judges should be protected completely from public influence; in their view, public pressure on judges to rule a certain way is a menace.[33] Justices of the U.S. Supreme Court recently expressed this perspective in a case in which the Court reluctantly upheld on First Amendment grounds New York's system for electing judges.[34] But in their concurrence, **Justices Stevens and Souter noted the "broader proposition that the very practice of electing judges is unwise."**[35] They regretfully concluded, "The Constitution does not prohibit legislatures from enacting stupid laws."[36]

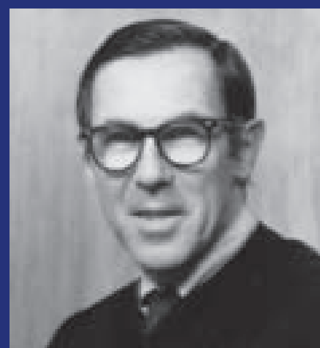
According to polling data, a majority of the American public has, however, generally supported the "accountability" model for the judiciary. Under this model, judges are accountable to their constituents because they may not be reelected if they make rulings with which voters disagree. As a result, judges are induced to vote in ways that are consistent with the preferences of their voting constituency. Surveys reveal that over 75 percent of the U.S. public prefers elections over appointments for selecting judges.[37]

Yet despite the public's overwhelming support for judicial elections, most agree that the increasing importance of money in judicial campaigns is putting pressure on judges to decide cases strategically. Indeed, **76 percent of voters believe that campaign contributions have at least some influence on judges' decisions and almost 90 percent of voters believe that with campaign contributions, interest groups are trying to use the courts to shape policy.**[38]

The truth is that Michigan's nonpartisan Supreme Court elections have taken on a highly partisan cast and have become increasingly politicized over the past fifteen years. Moreover, money from undisclosed sources matters more and more.

Former Justice Marilyn Kelly,
Michigan Supreme Court

Even worse, judges generally agree that money matters in judicial decision-making. Forty-six percent of judges believe that campaign contributions have at least "a little influence" on their decisions, and 56 percent believe "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign."[39] Moreover, 80 percent of judges believe that with campaign contributions, interest groups are trying to use the courts to shape policy.[40]



To this day, I don't know to what extent I was subliminally motivated by the thing you could not forget — that it might do you some good politically to vote one way or the other.[41]

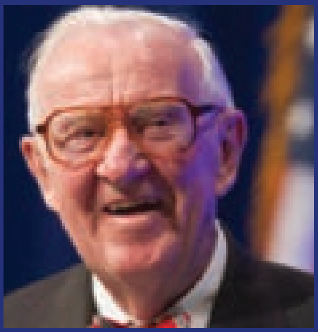
Former Justice Otto M. Kaus,
California Supreme Court

Similarly, in a series of interviews with the members of Louisiana's high court, a liberal justice acknowledged that his "perception of his constituents was that they clearly preferred the death penalty as a punishment for murder and that they would retaliate against him at election time if the justice did not reflect constituent preferences in this set of judicial decisions....[and] he does not dissent in death penalty cases against an opinion of the court to affirm a defendant's conviction and sentence, expressly because of a perceived voter sanction, in spite of his deeply felt personal preferences to the contrary."[42]

A. PREVIOUS EMPIRICAL FINDINGS

The empirical literature largely confirms the public's growing suspicion that campaign contributions can influence judicial decision-making. Several recent empirical studies find that judges tend to favor campaign contributors in their decisions. For example, one recent study has found that contributions from various interest groups are associated with increases in the probability that state supreme court justices will vote for the litigants whom those interest groups favor.[43] Another study specifically analyzed contributions from business groups and found evidence that campaign contributions from these groups are associated with state supreme court justices favoring business litigants across a range of cases.[44] Similarly, a recent study of political parties' contributions found a systematic relationship between these contributions and justices' voting in the preferred ideological direction of the relevant party coalition.[45] Other empirical studies examine, on a more limited basis, the relationship between contributions from individual law firms and case outcomes when those law firms appear in court.[46]

Despite the previous studies' strong evidence showing that campaign contributions can influence judicial decision-making, they all used relatively outdated data. Most of the comprehensive national studies use a dataset of all state supreme court decisions from 1995-1998. Several recent court cases have, however, dramatically changed the landscape of judicial elections. As a result, new analyses using current data are critical to establish the current relationship between money and judicial decisions.



At a time when concerns about the conduct of judicial elections have reached a fever pitch... the Court today unleashes the floodgates of corporate and union general treasury spending in these races.

U.S. Supreme Court Justice John Paul Stevens dissenting in *Citizens United*

B. RECENT COURT CASES

One recent decision that is reshaping the rules around judicial elections is the 2002 Supreme Court ruling in *Republican Party of Minnesota v. White*, which held that the First Amendment prohibits rules barring judicial candidates from announcing their positions on legal and policy issues.[47] Although courts have divided on what judicial campaign speech regulations conform with the First Amendment since *White*, the ruling has clearly led to more judicial campaigning and campaign spending in judicial races. Other appellate courts have similarly struck down limits on judges' fundraising, partisan conduct, and making pledges and commitments.[48]

We are in the midst of a "perfect storm" of campaign money, favorable judicial rulings to satisfy this money, partisanship and a media attracted to typical politics that is now threatening to destroy judicial independence and impartiality.

Former Justice James Nelson, Montana Supreme Court

The 2009 Supreme Court ruling in *Caperton v. Massey* has also changed the playing field in judicial elections by holding that large campaign contributions can, in some cases, threaten the proper functioning of elected state courts by creating an unacceptable potential for bias favoring a campaign benefactor.[49] While some states have responded by enacting a variety of recusal reforms in cases involving campaign contributors, other states have made no changes in the rules governing judicial recusal.

The most recent case, *Citizens United v. Federal Election Commission*, may have the biggest impact of any of these cases.[50] In this 2010 case, the Supreme Court struck down the long-standing federal ban on corporate independent expenditures in elections. The resulting unrestricted corporate and union spending in judicial elections could dramatically change the importance of money in judicial campaigns. Writing for the dissent, Justice Stevens articulated the concerns of many: "At a time when concerns about the conduct of judicial elections have reached a fever pitch... the Court today unleashes the floodgates of corporate and union general treasury spending in these races."[51]

C. BUSINESS INFLUENCE IN JUDICIAL ELECTIONS

The increasing competitiveness and expense of judicial elections offers interest groups the opportunity to influence judicial outcomes. **Although any interest group that is able to marshal sufficiently large campaign contributions might exert influence over the judiciary, under current circumstances business groups are likely to be unique in their ability to do so.** In contrast to most other interest groups, business groups often have substantial resources collected from the businesses that they represent. Furthermore, even compared to other influential interest groups, business groups often have a more focused agenda and a clearer idea of the types of judges they would like to support. Business groups usually have an unambiguous agenda in most state judicial races—to help pro-business, pro-tort reform judges get elected. Indeed, tort reform has become the primary issue in most state judicial races.[52] In contrast, the plaintiffs' bar in many states is typically much more diverse in their economic interests because they represent such a diverse range of clients. Similarly, insurance groups insure both plaintiffs and defendants in different cases, resulting in a significantly less focused agenda. Likewise, business groups typically have a great deal at stake in their support of judicial candidates. A significant portion—about one-third—of state supreme court cases involve business litigants.[53] As businesses are litigants in these cases, instead of attorneys or insurers, they usually have much more to lose if their case is heard by an unsympathetic judge.

IT IS ESTIMATED THAT THE PRO-BUSINESS U.S. CHAMBER OF COMMERCE SPENT $100 MILLION BETWEEN 2000 AND 2003 ON JUDICIAL CAMPAIGNS.

As one might expect, business groups therefore spend more on state supreme court elections than any other interest group. In addition to their direct campaign contributions to judicial candidates, business groups routinely fund independent expenditures in the form of television advertising for favored candidates. Independent expenditures are sometimes subject to looser disclosure requirements, which make it difficult to identify the sources of support for individual judicial candidates.

Business groups regularly disguise their campaign support by channeling their funds through nonprofit groups with inspirational but completely opaque names.[54] For example, in the 2004 judicial elections in Mississippi, the Business and Industry Political Education Committee, which received most of its funding from the American Tort Reform Association, created the "Improve Mississippi" PAC to support pro-business judges.[55] That same year, the Ohio Chamber of Commerce created "Citizens for a Strong Ohio" that received most of its funding from the U.S. Chamber of Commerce.[56] And in *Caperton* itself, a group called "And For the Sake of Kids" received over two-thirds of its funding from Don Blankenship, the CEO of Massey Energy (the original defendant in *Caperton*), as he sought to replace the incumbent justice with his favored, pro-business candidate.[57]

As judicial elections have become increasingly difficult to win without substantial funding, the financial support of business groups can be decisive and may give those groups great influence with judicial candidates. It is estimated that the pro-business U.S. Chamber of Commerce spent $100 million between 2000 and 2003 on judicial campaigns. Most of these efforts were successful. Between 2000 and 2004, 36 of the 40 judges whom the Chamber supported were elected.[58]

The next section presents results from empirical tests of the relationship between campaign contributions from business groups and the voting of judges that receive those contributions. There are at least two causal pathways by which campaign financing might be associated with judicial decisions in favor of campaign contributors' interests. The first pathway is a selection bias among the set of judges who win election. Judges who are already ideologically or otherwise predisposed to vote in favor of business interests are likely to draw campaign financing from business groups and, by virtue of those resources, are more likely to be elected. Campaign finance support from business groups would then be correlated with pro-business decisions on the bench, at least in part, because business groups directed the necessary campaign financing to judges they anticipated were ideologically likely to vote in their favor in the first place. A second pathway by which campaign financing may influence judicial decisions is less subtle but equally plausible. Judges who are not ideologically or otherwise predisposed to vote in favor of business interests might, whether intentionally — or, to use Justice Kaus' term, subliminally — cast votes in cases either to obtain financial support from those business interests for their future campaigns, or at least to reduce incentives for opposition or attacks funded by business interests. The empirical literature has established that both of these two causal pathways play an important role in the relationship between campaign contributions and judicial decision-making.[59] Most importantly, regardless of the pathway, **the data demonstrate that interest group money *is* affecting judicial outcomes.** Whether the campaign contributions determine which judges are on the bench or they influence how the judges on the bench decide cases — or both — the rising tide of campaign contributions from interest groups is placing fair and impartial justice at risk.

III. IS JUSTICE AT RISK?: EMPIRICAL ANALYSIS

This study will now examine empirically whether campaign contributions from business groups are associated with judges voting in favor of business interests. After describing the data sources and summaries, it will discuss the results of various empirical analyses.

THE DATA ANALYZED IN THIS REPORT IS AVAILABLE FOR YOUR REVIEW AND USE AT WWW.FOLLOWTHEMONEY.ORG/RESEARCH/SPECIAL_TOPICS.PHTML. WE ENCOURAGE YOU TO CONTRIBUTE TO AND EXPAND THE IMPORTANT CONVERSATION ABOUT FAIR COURTS.

A. DATA

Data from several different sources were compiled to analyze the contemporary relationship between money and judicial decision-making. The first dataset consists of the decisions of 439 state supreme court justices in 2,345 business-related cases decided between 2010 and 2012 across all 50 states.[60]

The second dataset includes data on campaign contributions in each elected justice's most recent election. It consists of over 175,000 contribution records that detail every reported contribution to a sitting state supreme court justice between 2010 and 2012, or dating back to the last time the justice ran for reelection. The data are collected by the National Institute on Money in State Politics, a nonpartisan, nonprofit charitable organization dedicated to accurate, comprehensive and unbiased documentation and research on campaign finance at the state level.[61] The Institute receives its data in either electronic or paper files from the state disclosure agencies with which candidates must file their campaign finance reports. The Institute compiles the information for all state-level candidates in the primary and general elections, and then assigns donors an economic interest code based on both information contained in the disclosure reports and deeper research into the donor's characteristics and agenda.

Two additional datasets — one capturing data on the individual justices' party affiliation and one recording retention method and other state-specific data — were then combined with the judicial decisions and contributions data. In the final dataset, each record contains information about a single justice's vote in a single case along with all the contextual information (about the justice, contributions, case, court, and state) relevant to that vote.

B. KEY VARIABLES

This analysis tests whether justices who receive more campaign contributions from business interests are more likely to cast pro-business votes. Two different measures are used to capture business contributions. The first is simply the sum of contributions in a justice's most recent election from the following sectors: agriculture, communications, construction, defense, energy, finance, real estate and insurance, health care, transportation and a general business category. In the sample, the average justice received $62,400 from business groups, with total business contributions ranging from $0 to $2,286,801.[62]

The second measure of business contributions in our analysis is the percentage of each justice's total contributions that come from business groups. This is likely a more accurate measure of business influence because the impact of a contribution likely depends on its importance relative to other contributions. That is, a $50,000 contribution from a business group to a justice might have a stronger influence on a justice's voting if, for example, his or her total contributions are $100,000 instead of $750,000.

As shown in Table 1, judicial candidates in partisan elections receive the most campaign contributions, both in total and from business groups. Judicial candidates in nonpartisan elections receive substantially less. In fact, justices in partisan elections receive more than 4 times the average amount contributed to justices in nonpartisan elections. Very little is contributed to justices in retention elections, by business interests or others.

Table 1 BUSINESS CONTRIBUTIONS BY SELECTION METHOD

	AVERAGE CONTRIBUTIONS		AVERAGE PERCENTAGE FROM BUSINESS
JUSTICES SUBJECT TO:	BUSINESS	TOTAL	
Appointment	**0**	**0**	**0**
Retention Election	**$6,411**	**$40,820**	**2.9%**
Nonpartisan Election	**$65,692**	**$251,526**	**16.9%**
Partisan Election	**$289,025**	**$841,360**	**25.1%**

Moreover, as shown in Table 2, regardless of the selection method, justices affiliated with the Republican Party receive significantly more business contributions than justices affiliated with the Democratic Party. Republican justices receive over three times as much in business contributions in partisan systems, over five times as much in contributions in nonpartisan systems, and over nine times as much in contributions in retention election systems. Similarly, across all selection methods, a much larger percentage of Republican-affiliated justices' total contributions come from business groups.

Table 2 BUSINESS CONTRIBUTIONS BY JUDICIAL PARTISAN AFFILIATION

	AVERAGE CONTRIBUTIONS FROM BUSINESS		AVERAGE PERCENTAGE FROM BUSINESS	
JUSTICES SUBJECT TO:	Republican	Democratic	Republican	Democratic
Retention Election	**$9,017**	**$736**	**4.0%**	**1.0%**
Nonpartisan Election	**$89,886**	**$16,050**	**18.8%**	**9.5%**
Partisan Election	**$351,926**	**$101,341**	**29.3%**	**12.0%**

To identify pro-business votes, coders determined which litigant the court's decision in a given case made better off compared to immediately before the Court's decision. Cases where no identifiable business appeared, or where both litigants were businesses, were omitted since they did not allow for the identification of a pro-business outcome. Of the 10,104 judicial votes included for analysis, 49% were pro-business votes. Nevertheless, individual justices vary in their propensity to favor business interests; the percentage of pro-business votes effectively ranges from a low of 15 percent to a high of 85 percent.

As shown in Table 3, judicial decision-making in business cases varies across judicial retention method. Incumbent justices facing partisan elections are the most likely to vote in favor of business, doing so in 59 percent of cases. Justices across all other systems are significantly less likely to vote for business interests. In fact, justices facing partisan elections are more than 10 percentage points more likely to vote for business interests than justices under any other system.

Table 3 VOTES FOR BUSINESS LITIGANT BY RETENTION METHOD

	Percentage of Votes for Business Litigant in Sample Data
JUSTICES SUBJECT TO:	
Appointment	**46.3%**
Retention Election	**47.9%**
Nonpartisan Election	**48.8%**
Partisan Election	**59.4%**

Table 4 VOTES FOR BUSINESS LITIGANT BY JUDICIAL PARTISAN AFFILIATION

	Percentage of Votes for Business Litigant in Sample Data	
JUSTICES SUBJECT TO:	Republican	Democratic
Appointment	**49.5%**	**43.4%**
Retention Election	**51.5%**	**45.1%**
Nonpartisan Election	**53.1%**	**43.1%**
Partisan Election	**65.2%**	**50.9%**

Moreover, across each judicial retention method, Republican-affiliated justices cast more pro-business votes than Democratic-affiliated justices. Indeed, for justices facing nonpartisan elections, Republican justices are 10 percentage points more likely to vote for the business litigant than Democratic justices in the same system. For justices facing partisan elections, Republican justices are 15 percentage points more likely to vote for business litigants than Democratic justices.

C. EMPIRICAL ANALYSIS

The study employs regression analysis to test the relationship between campaign contributions from business groups and judicial decisions in business cases. The empirical methodology is explained in more detail in the Appendix. The dependent variable in the analysis is whether a justice voted for or against the business litigant. The chief explanatory variable in one set of analyses is the total dollar contributions from business; in the other set of analyses it is the percentage of a justice's contributions that came from business interests.[63]

All analyses include the following control variables:

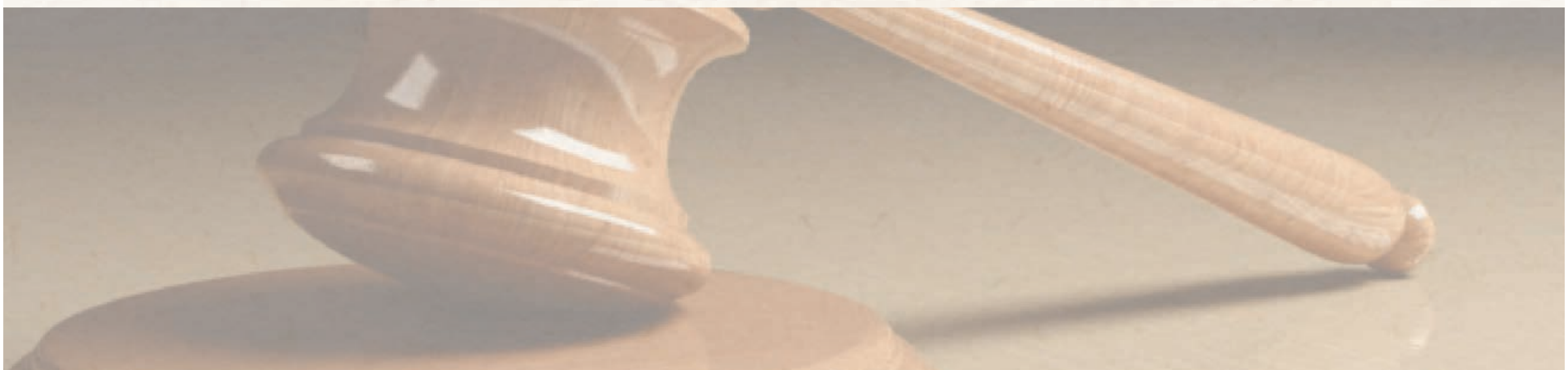
OTHER CONTRIBUTIONS. For analyses incorporating business contributions as a percentage of all contributions, the study controls for the total dollars received by the justice. This measure serves as a control for the different sums being contributed across states and individual justices — 40 percent from business may have a very different effect when it is 40 percent of $10,000 than when it is 40 percent of $250,000. For analyses of total dollar contributions from businesses, the study controls for the total dollars coming from all other contributors. Again this serves as a control for the different sums being contributed across states. It also provides a measure of potential influence from interests and sectors opposed to (or unrelated to) business interests.[64] Similar to the primary contribution variables, the study uses the natural logs of these totals.

JUSTICE'S PARTY AFFILIATION. Because they tend to follow a more conservative judicial ideology, Republican justices should be more inclined to vote for the business litigant. Party affiliation was determined from The American Bench—a directory with biographical information on over 18,000 judges[65] —and reputable online sources. Where no party information was available but the justice was initially appointed to the high court by a governor, the party of the justice was inferred to be the same as that of the appointing governor. The group of justices with inferred party affiliations includes some from elected systems, where justices were appointed to complete the term of a justice who left the bench before the end of a term.

STATE TORT CLIMATE. In states where existing law favors business interests, one should expect justices to vote more often in favor of business interests regardless of contributions. Thus, the study includes a control capturing the legal climate to ensure that the analyses isolate the influence of business contributions from the underlying state law. It uses the Pacific Research Institute's U.S. Tort Liability Index, which evaluates the tort litigation risks and liability costs across states, as its measure of the state law's underlying partiality to business interests.[66]

CITIZEN AND GOVERNMENT IDEOLOGY. Justices' voting might also be influenced by the attitudes of the public and of other governmental officials in the state. Justices may fear negative consequences from displeasing the public or government, or they may think it is appropriate to consider others' preferences in their voting. The study employs well known measures to capture the liberalism of citizens in the state and the liberalism of the state government.[67]

CASE STRENGTH. The final control variable measures the underlying strength of the case. This control variable is important because some cases are so strong (or weak) that justices will vote for (or against) business interests regardless of their ideological predisposition or the influence of campaign contributions. To create a measure of case strength, the study first estimates the model without the case strength variable. The results of this estimation allow a prediction of the most likely number of pro-business votes from the other justices on the court. The difference between this predicted vote and the actual vote provides the measure of case strength. That is, suppose that the model predicts that, based on the justices' ideological predisposition, campaign contributions, the state tort climate, and the citizen and government ideology, four of the six other justices would support the business position. In reality, if five of the other justices supported the business position, this variable would indicate a stronger than average case. In contrast, if only one other justice voted in favor of business instead of the predicted four, the variable would indicate that the case was very weak.



D. RESULTS

I. PRIMARY MODEL

The results from the study's primary model indicate that **there is a statistically significant relationship between campaign contributions from business groups and justices' voting in favor of business interests.** Both the level of business contributions and the percentage of total contributions from business groups have a statistically significant, positive relationship with justices' voting for the business litigant. The full results from the regression models are shown in Appendix Table A1. To illustrate the results in an intuitive way, Figure 4 shows the relationship between the percentage of contributions from business interests and the predicted probability of pro-business votes, with all other variables held constant.

Figure 4
PREDICTED PROBABILITY OF A PRO-BUSINESS VOTE BY PERCENTAGE OF CONTRIBUTIONS FROM BUSINESS

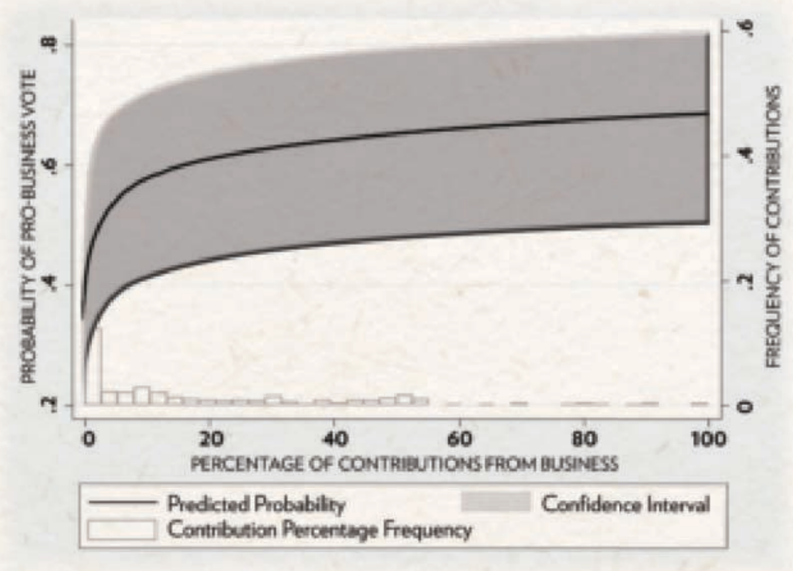


Table 5 translates the results of the model into hypothetical scenarios to help illustrate the size of the effects. For instance, all else equal, while an elected justice who receives a mere 1 percent of contributions from the business sector votes in favor of business about 46.2 percent of the time, on average, an elected justice who receives a quarter of his or her contributions from business votes in favor of business in 62.1 percent of cases. Notably, **a justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time.**

Table 5 CHANGES IN PREDICTED PROBABILITY OF A PRO-BUSINESS VOTE FOR SELECT INCREASE IN BUSINESS CONTRIBUTIONS

Change in Percentage Contribution from Business	Predicted Probability of a Pro-Business Vote
1%	**46.2**
10%	**57.9**
25%	**62.1**
50%	**65.4**
100%	**68.5**

2. COMPARISON ACROSS RETENTION METHODS

The study also analyzes the relationship between campaign contributions from business groups and judicial voting across different retention methods. It would not be surprising for contributions' relationship with voting to differ across methods; campaign contributions vary significantly across methods. Justices in partisan elections receive more than four times the average amount contributed to justices in nonpartisan elections and more than 40 times the amount contributed to justices in retention elections. The full results of this analysis are shown in Appendix Table A2. **In general, the results reveal a positive relationship between business contributions and justices' voting for business interests in partisan and nonpartisan systems, but no relationship in retention election systems.**

Specifically, the results show a statistically significant positive relationship between the percentage of total contributions from business groups and justices' voting in both partisan and nonpartisan systems. The larger coefficient in the partisan estimations indicates that the relationship between the percentage of contributions from business groups and justices' voting is larger in magnitude in partisan systems than nonpartisan systems.

However, the estimations using the simple level of contributions suggest that each dollar spent by business groups has a larger impact in nonpartisan elections (likely because each dollar spent is a larger percentage of the total in nonpartisan systems than in partisan systems). In fact, the simple level of contributions is only marginally significant (p=.164) in the partisan election estimations.

Importantly, both the level of contributions and the percentage of contributions from business groups have no statistically significant relationship with justices' voting in retention election systems. Estimations produce statistically insignificant coefficients when there is no systematic relationship between two variables; here, they suggest no systematic relationship between business contributions and justices' voting in retention election systems. However, the statistically insignificant results could also be explained by a small number of observations in the sample; because businesses contribute relatively infrequently in retention elections, we have fewer observations for justices in these systems. Nevertheless, the small coefficients suggest that, even with more data, it is unlikely that one would find a large statistically significant relationship between business contributions and judicial decision-making in retention election systems. Moreover, previous empirical studies using large national datasets find no statistically significant relationship between campaign contributions and decisions in retention election systems.

3. COMPARISON AMONG REPUBLICAN- AND DEMOCRATIC-AFFILIATED JUSTICES

The study next analyzes whether business contributions' relationship with voting differs between justices affiliated with the Republican and Democratic parties. As reported in Table 2, Republican justices receive over three times as much in business contributions in partisan systems, over five times as much in contributions in nonpartisan systems, and over nine times as much in contributions in retention election systems. The full results from our estimation are shown in Appendix Table A3. **In general, the results reveal a stronger relationship between business contributions and justices' voting among Democratic justices than among Republican justices.**

Specifically, the level of business contributions has a statistically significant positive relationship with justices' voting for business interests for both Republican- and Democratic-affiliated justices. The larger coefficient in the estimations for Democratic justices do, however, indicate a relationship between contributions and voting that is larger in magnitude compared to Republican justices. Similarly, in the estimations measuring the relationship between the percent of total contributions from business groups and justices' voting, the coefficient on the contribution variable is larger in magnitude for Democratic-affiliated justices. Again, this result indicates a stronger relationship between contributions and voting among Democratic justices. In addition, the percentage of contributions is only marginally significant (p=.138) in the estimations of Republican justices.

The stronger relationship between contributions and voting among Democratic justices could be explained by the already-high baseline of voting for business interests by Republican justices. Because Republican justices typically already favor business interests more than Democratic justices, additional business contributions may have a smaller effect on Republican justices' voting. This study's results indicating a stronger relationship between business contributions and voting among Democratic justices is consistent with previous empirical studies.[68]

4. COMPARISON BETWEEN 2010-2012 AND 1995-1998

The final analyses compare the relationship between business contributions and justices' voting for business interests in two time periods: 2010-2012 and 1995-1998. **As judicial elections have become increasingly politicized and expensive, it should not be surprising for the relationship between money and judicial decisions to have grown stronger.** The full results from this estimation are shown in Appendix Table A4. In general, the results reveal a stronger relationship between business contributions and justices' voting in the period from 2010-2012 compared to 1995-1998.

Specifically, in both the 2010-2012 data and the 1995-1998 data, both the level and the percent of business contributions have a statistically significant positive relationship with justices' voting for business interests.[69] Indeed, previous empirical studies have found such a statistically significant relationship using 1995-1998 data. However, the larger coefficients for both the level and the percent of business contributions in the 2010-2012 data indicate a stronger relationship between money and votes in the latter period.

IV. CONCLUSION

Campaign spending in state supreme court elections has surged in the past decade, with powerful interest groups responsible for an ever-increasing amount of the spending in these judicial races. Moreover, judicial campaigning has changed dramatically in the wake of recent cases such as *Citizens United v. FEC* and *Republican Party of Minnesota v. White*. The growing importance of money in judicial elections gives interest groups the opportunity to shape the judiciary. Although any interest group that is able to marshal sufficiently large campaign contributions might exert influence over the judiciary, under current circumstances, business groups are likely to be unique in their ability to do so because of a focused agenda and considerable resources at their disposal.

Using a new dataset from the 2010-2012 period, this study's empirical analyses confirm a statistically significant, positive relationship between campaign contributions from business groups and justices' voting in favor of business interests. The more campaign contributions from business interests the justices receive, the more likely they are to vote for business litigants when they appear before them in court. Notably, the analysis reveals that a justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time.

Moreover, the empirical relationship between business contributions and justices' voting for business interests exists only in partisan and nonpartisan systems. There is no statistically significant relationship between money and voting in retention election systems.

We also find a stronger relationship between business contributions and justices' voting among justices affiliated with the Democratic Party than among those affiliated with the Republican Party. Because many Republican justices are more ideologically predisposed to favor business interests, additional business contributions may not have as large of an influence on Republicans as they do on Democratic justices.

Finally, we find a stronger relationship between business contributions and justices' voting in the period from 2010-2012 compared to 1995-1998. Although several previous empirical studies have confirmed a relationship between money and voting in the 1995-1998 period, it is not surprising that the relationship would strengthen with the ever-increasing importance of money in judicial elections.

There is no sign that the politicization of state supreme courts elections is lessening. Until reforms are enacted, powerful interest groups' influence on judicial outcomes will only intensify.

APPENDIX: EMPIRICAL METHODOLOGY

In all empirical analyses, we use logistic regression, or logit, which is designed for models where the variable to be explained (here a judge's vote) can take only two values (here either pro-business or anti-business). More specifically, we estimate a multilevel-logit model. Because judges cast decisions in multiple cases, an individual judge's decisions across cases are not likely to be independent of each other; that is, there is likely to be a relationship between what a judge does in one case and what that same judge does in another case, even after we have controlled for observable judge-specific characteristics. Similarly, because the judges on any given court share not only the court in common, but also the state, its laws, and other environmental influences, it would be surprising if the decisions of judges on the same court were entirely independent of each other. Here, we accommodate the dependence across decisions by the same justice and across decisions by different justices from the same state by estimating a multilevel model with a random intercept across justices and across states.[70]

The following tables present the full results of all estimations. In each results table, the top number in each cell is the regression coefficient, which indicates the magnitude and direction of the relationship with justices' votes of each variable. A negative coefficient indicates that a variable reduces the probability that a justice will vote for the business litigant. In contrast, a positive coefficient indicates that a variable increases the probability that a justice will vote for the business litigant.

In addition, the table reports the p-value for each coefficient. In each cell, it is the bottom number, in parentheses. The p-value indicates the probability that one could find a relationship as strong as the one observed simply by chance if no real relationship existed. Coefficients with p-values equal to or less than .10 are considered statistically significant at the 10 percent level, meaning that there less than a 10 percent chance that the reported relationship would occur by chance in the sample data. P-values equal to or less than .05 indicate statistical significance at the more-certain 5 percent level, and p-values equal to or less than .01 indicate statistical significance at the most-certain 1 percent level. Empiricists typically require p-values of at less than .10 to conclude that one variable affects another in the direction indicated by the coefficient.

Table A1 THE RELATIONSHIP BETWEEN BUSINESS CONTRIBUTIONS AND JUDICIAL VOTING

	Business Contributions (10k)	Percentage of Business Contributions
Measure of Business Contributions	**0.269** (0.000)	**0.206** (0.002)
Non Business Contributions ($10K), logged	**-0.218** (0.000)	**-0.116** (0.011)
Nonpartisan Election	**0.005** (0.988)	**-0.214** (0.533)
Partisan Election	**0.824** (0.024)	**0.875** (0.020)
Democrat	**-0.524** (0.067)	**-0.655** (0.026)
Republican	**0.272** (0.315)	**0.248** (0.378)
State Tort Climate	**-0.672** (0.002)	**-0.807** (0.000)
State Citizen Ideology	**0.009** (0.317)	**0.004** (0.673)
State Elite Ideology	**-0.015** (0.120)	**-0.011** (0.295)
Business was Petitioner	**-0.455** (0.000)	**-0.461** (0.000)
Case Strength	**0.072** (0.000)	**0.072** (0.000)
Intercept	**0.602** (0.278)	**0.440** (0.447)
VARIANCE TERM		
State Level	**0.000**	**0.000**
Justice Level	**0.922**	**0.970**
N	**7,112**	**7,112**
Chi^2	**1942.83**	**1937.11**

Note: p-values in parentheses

Table A2 THE RELATIONSHIP BETWEEN BUSINESS CONTRIBUTIONS AND JUDICIAL VOTING: COMPARISON OF JUDICIAL RETENTION METHOD

	Business Contributions (10k)			Percentage of Business Contributions		
	Partisan	Non-Partisan	Retention	Partisan	Non-Partisan	Retention
Business Contributions	**0.225** (0.164)	**0.416** (0.000)	**0.091** (0.761)	**0.267** (0.069)	**0.203** (0.010)	**0.080** (0.810)
Total Contributions ($10K), logged	**-0.207** (0.147)	**-0.290** (0.000)	**-0.244** (0.285)	**-0.170** (0.069)	**-0.082** (0.145)	**-0.230** (0.298)
Republican	**na***	**-0.505** (0.109)	**na***	**na***	**0.329** (0.296)	**na***
Democrat	**-0.849** (0.022)	**0.368** (0.210)	**-0.641** (0.426)	**-0.849** (0.014)	**-0.667** (0.046)	**-0.648** (0.422)
State Tort Climate	**-1.160** (0.011)	**-0.385** (0.197)	**-1.425** (0.337)	**-1.186** (0.009)	**-0.652** (0.038)	**-1.415** (0.340)
State Citizen Ideology	**-0.015** (0.411)	**0.017** (0.149)	**0.125** (0.365)	**-0.009** (0.616)	**0.009** (0.443)	**0.126** (0.350)
State Elite Ideology	**0.015** (0.629)	**-0.021** (0.062)	**na****	**0.012** (0.696)	**-0.016** (0.190)	**na****
Business was Petitioner	**-0.339** (0.072)	**-0.538** (0.000)	**-0.106** (0.766)	**-0.346** (0.067)	**-0.539** (0.000)	**-0.110** (0.759)
Case Strength	**0.067** (0.000)	**0.073** (0.000)	**0.084** (0.000)	**0.067** (0.000)	**0.073** (0.000)	**0.084** (0.000)
Intercept	**1.579** (0.094)	**0.731** (0.216)	**-8.410** (0.344)	**1.081** (0.266)	**0.182** (0.777)	**-8.692** (0.330)
VARIANCE TERM						
State level	**0.000**	**0.000**	**0.000**	**0.000**	**0.000**	**0.000**
Justice level	**0.644**	**0.943**	**1.081**	**0.637**	**1.040**	**1.081**
N	**1,974**	**4,431**	**707**	**1,974**	**4,431**	**707**
Chi2	**556.38**	**1206.52**	**153.43**	**556.56**	**1201.64**	**153.42**

Note: p-values in parentheses.

*The party affiliation of many justices is unknown in states with non-partisan elections. In these states, the coefficients gauge the probability of a pro-business vote of Democrats and Republicans relative to justices with unknown party affiliation. In partisan and retention election systems, where judicial partisanship is known, the coefficients measure the effect of being a Democrat relative to a Republican.

**In retention states, state elite ideology was nearly perfectly collinear with state citizen ideology, so was omitted from the model.

Table A3 THE RELATIONSHIP BETWEEN BUSINESS CONTRIBUTIONS AND JUDICIAL VOTING: COMPARISON OF POLITICAL AFFILIATION

	Business Contributions (10k)		Percentage of Business Contributions	
	Republicans	Democrats	Republicans	Democrats
Measure of Business Contributions	**0.295** (0.004)	**0.326** (0.002)	**0.166** (0.138)	**0.260** (0.008)
Non Business Contributions ($10K), logged	**-0.252** (0.009)	**-0.234** (0.004)	**-0.096** (0.224)	**-0.138** (0.031)
Retention Election	**-0.561** (0.262)	**0.801** (0.094)	**-0.606** (0.266)	**0.633** (0.189)
Nonpartisan Election	**0.040** (0.928)	**-0.003** (0.994)	**-0.291** (0.520)	**-0.273** (0.457)
Partisan Election	**0.923** (0.072)	**0.615** (0.191)	**0.918** (0.091)	**0.720** (0.134)
State Tort Climate	**-0.813** (0.003)	**-0.478** (0.244)	**-0.924** (0.002)	**-0.648** (0.128)
State Citizen Ideology	**0.021** (0.083)	**-0.004** (0.753)	**0.015** (0.234)	**-0.001** (0.906)
State Elite Ideology	**-0.027** (0.049)	**0.006** (0.561)	**-0.022** (0.137)	**0.005** (0.623)
Business was Petitioner	**-0.657** (0.000)	**-0.386** (0.005)	**-0.666** (0.000)	**-0.382** (0.005)
Case Strength	**0.078** (0.000)	**0.072** (0.000)	**0.078** (0.000)	**0.072** (0.000)
Intercept	**0.958** (0.315)	**-0.246** (0.772)	**0.866** (0.406)	**-0.799** (0.358)
VARIANCE TERM				
State Level	**0.000**	**0.000**	**0.000**	**0.000**
Justice Level	**1.021**	**0.787**	**1.059**	**0.824**
N	**4,618**	**3,675**	**4,618**	**3,675**
Chi2	**1159.26**	**1016.33**	**1142.25**	**1013.09**

Note: p-values in parentheses.

Table A4 THE RELATIONSHIP BETWEEN BUSINESS CONTRIBUTIONS AND JUDICIAL VOTING: COMPARISON BETWEEN 2010-2012 AND 1995-1998

	Business Contributions (10k)		Percentage of Business Contributions	
	2010-2012	1995-1998	2010-2012	1995-1998
Measure of Business Contributions	**0.233** (0.000)	**0.097** (0.000)	**0.131** (0.024)	**0.115** (0.000)
Total Contributions ($10K), logged	**-0.177** (0.001)	**-0.061** (0.000)	**-0.060** (0.113)	**-0.028** (0.402)
Retention Election	**0.145** (0.630)	**0.009** (0.937)	**0.044** (0.886)	**0.015** (0.903)
Nonpartisan Election	**0.057** (0.804)	**0.019** (0.907)	**-0.144** (0.537)	**-0.218** (0.422)
Partisan Election	**0.000** (1.000)	**0.191** (0.358)	**-0.027** (0.927)	**-0.002** (0.996)
Democrat	**-0.388** (0.081)	**-0.084** (0.004)	**-0.473** (0.035)	**-0.067** (0.021)
Republican	**0.303** (0.160)	***na** (0.158)	**0.310**	***na**
Case Strength	**0.075** (0.000)	**0.030** (0.000)	**0.075** (0.000)	**0.029** (0.000)
Intercept	**-3.495** (0.000)	**-1.562** (0.000)	**-3.698** (0.000)	**-1.566** (0.000)
VARIANCE TERM				
State Level	**0.000**	**0.312**	**0.000**	**0.316**
Justice Level	**0.894**	**0.069**	**0.921**	**0.000**
N	**10,105**	**31,245**	**10,105**	**26,571**
Chi2	**2614.41**	**369.66**	**2614.62**	**312.46**

Note: p-values in parentheses.

*Judicial partisanship is identified for all cases in 1995-1998 data, coefficient for Democrat represents the difference between Democrats and Republicans.

ENDNOTES

1 Joanna Shepherd is an Associate Professor of Law, Emory University School of Law. Dr. Greg Rabidoux, J.D., Ph.D., directed the research phase of this project, Drs. David Klein and Michele Claibourn of the University of Virginia assisted in the methodological design and analysis, and the legal research fellows below assisted in the collection and coding of the data: Nicholas Harper, Joseph Syverson, Kristen Reek, Brittany Smith, McKillop Erlandson, Jaclyn O'Connor, Nicole Sinder, Kathy Chambers, Dayne Poshusta, and Dave Barthen.

2 GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 7 (2001), available at http://justiceatstake.org/files/JASNationalSurveyResults.pdf; GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *available at* http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf.

3 *Id.*

4 ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: 2009-2010 1 (Charles Hall ed., 2011), *available at* http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf.

5 *Id.*

6 JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS: 2006, at 7 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf.

7 *See* Shirley S. Abrahamson, Chief Justice, Wis. Supreme Court, *The Ballot and the Bench, Address at the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice* (Mar. 15, 2000), in 76 N.Y.U. L. REV. 973, 976 (2001); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 77 (1985).

8 Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1105 app. 2 (2007).

9 Eighty-seven percent of state appellate court judges must be retained through either partisan elections, nonpartisan elections, or retention elections. COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2006: SUPPLEMENT TO EXAMINING THE WORK OF STATE COURTS, 2006 96-97 fig. G (2007). In contrast, we earlier explained that 89 percent of all state judges (appellate and trial) face the voters at some point, either in the initial election or when seeking retention. See *supra* note 8 and accompanying text.

10 Justice at Stake. "Your State National Map," http://www.justiceatstake.org/state/index.cfm (last visited Jun. 10, 2013); see also Schotland, *supra* note 8, at 1084.

11 *Id.*

12 *Id; see also National Center for State Courts, Selection of Appellate Court Judges, http://cdm16501.contentdm.oclc.org/cdm/printview/collection/appellate/id/160/type/singleitem (last visited Jun. 10, 2013).* Illinois and New Mexico hold partisan elections to appoint judges initially to the bench, but they use unopposed retention elections to determine whether incumbent judges keep their positions beyond the initial term of appointment.

13 DAVID B. ROTTMAN ET AL., U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, 21–25 tbl. 4 (Bureau of Justice Statistics, Bulletin No. NCJ 178932, 2000), *available at* http://bjs.gov/content/pub/pdf/sco98.pdf.

14 *Id.*

15 Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995).

16 Melinda Gann Hall, *Judging the Election Returns: Competition as Accountability in State Supreme Court Elections*, in RUNNING FOR JUDGE: THE POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 177 (Matthew Streb ed., 2007).

17 *Id.*

18 Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 92 AM. POL. SCI. REV. 315 (2001); Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 AM. J. POL. SCI. REV. 20 (2006).

19 JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE 5 (Charles Hall ed., 2010), *available at* http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections.

20 SKAGGS ET AL., *supra* note 4, at 11.

21 *Id.* at 5.

22 *Id.* at 8.

23 *Id.* at 14. The same pattern held in the 2010 election cycle, with more than $9 million spent in partisan supreme court elections compared to $3 million in nonpartisan ones.

24 Replicated from SAMPLE ET AL., *supra* note 19, at 25.

25 This group has been found to contribute significant amounts to Democratic candidates and the groups' contributions are associated with judges voting for "liberal" outcomes. Michael Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. (forthcoming 2014).

26 *Id.*

27 *Id.* at 25.

28 SAMPLE ET AL., *supra* note 6, at 7.

29 *Id.*, at 8.

30 *Id.* at 13.

31 *See generally* Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections*, 5 ST. POL. & POL'Y Q. 107 (2005); Donald W. Jackson & James W. Riddlesperger, *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991); Chris W. Bonneau & Melinda Gann Hall, *Mobilizing Interest: Money, Quality, and Ballot Rolloff in State Supreme Court Elections*, Presented at the Annual Meeting of the Midwest Political Science Association (Apr. 20, 2006).

32 Adam Liptak. *Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court's Ruling*, N.Y. TIMES, Oct. 1, 2006.

33 *See, e.g.*, Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 3, 4–5 (Nat'l Legal Ctr. for the Pub. Interest ed., 1990); Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 277–82 (2002); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995); Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 420–22 (1981); Ben F. Overton, *Trial Judges and Political Elections: A Time for Re-Examination*, 2 U. FLA. J.L. & PUB. POL'Y 9, 15–17 (1988–89); Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1559–63 (1988).

34 N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 208 (2008).

35 *Id.* at 209 (Stevens & Souter, JJ., concurring).

36 *Id.* (quoting Justice Thurgood Marshall).

37 *See, e.g.,* GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 7 (2001), *supra* note 2.

38 *Id.;* GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *supra* note 2.

39 *Id.*

40 *Id.*

41 Philip Hager, *Kaus Urges Reelection of Embattled Court Justices*, L.A. TIMES, Sept. 28, 1986, at 3 (discussing the influence of elections on judges).

42 Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1119 (1987).

43 Joanna M. *Shepherd, Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670-72 tbls. 7-8 (2009).

44 Michael Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011).

45 Kang & Shepherd, *supra* note 25.

46 Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 25 J.L. & POL. 645, 660 (1999) (examining arbitration decisions in the Alabama Supreme Court); Eric N. Waltenburg & Charles S. Lopeman, *2000 Tort Decisions and Campaign Dollars*, 28 SE. POL. REV. 241, 248, 256 (2000) (examining tort cases before state supreme courts in Alabama, Kentucky, and Ohio); see Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices*, 1994-1997, 31 POL. & POL'Y 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money); Damon M. Cann, Justice for Sale? Campaign Contributions and Judicial Decision Making 16 (Aug. 10, 2006) (unpublished manuscript, *available at* http://ssrn.com/abstract=991364) (examining cases during the Supreme Court of Georgia's 2003 term).

47 Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

48 *E.g.,* Republican Party of Minn. v. White, 416 F.3d 738, 754, 765–66 (8th Cir. 2005) (striking down limits on judges' partisan conduct and personal solicitation of campaign contributions); Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (striking down a solicitation clause, which failed strict scrutiny).

49 Caperton v. Massey, 556 U.S. 868, 886 (2009).

50 Citizens United v. Fed. Election Comm'n 558 U.S. 310 (2010).

51 *Id.* at 968 (Stevens, J., dissenting).

52 See Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1487 (2005).

53 Kang & Shepherd, *supra* note 44, at 85.

54 *See generally* Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005) (describing how business groups avoid disclosure requirements under campaign finance law).

55 RACHEL WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES, THE INSTITUTE ON MONEY IN STATE POLITICS 13 (2005), *available at*, http://www.followthemoney.org/press/Reports/200508251.pdf.

56 *Id.* at 14.

57 *Id.* at 18.

58 In 2000-2003, 21 of the 24 pro-business judges that the Chamber supported were elected. Anthony Champagne, *supra* note 52, at 1503. In 2004, 15 of the 16 pro-business judges that the Chamber supported were elected. Press Release, U.S. Chamber of Commerce, Chamber Highlights Successful Pro-Business Election Effort—Business GOTV Behind Mid-Term Election Victories (Nov. 6, 2002) (available *at* http://www.uschamber.com/press/releases/2002/november/chamber-highlights-successful-pro-business-election-effort).

59 *See, e.g.*, Kang & Shepherd, *supra* note 44.

60 Business cases were identified by a key search in WestLaw. Once all business cases were identified within a given state and year, 25 cases were randomly selected for the sample. If there were 25 or fewer cases in a given state and year, all available cases were coded.

61 The National Institute on Money in State Policy, Mission & History, http://www.followthemoney.org/Institute/index.phtml (last visited May 15, 2013).

62 We coded justices with no recorded contributions as receiving zero contributions if they lived in a state where a judicial colleague received contributions (under the assumption that the contribution records within a state were complete) or in a state where they were not subject to re-election (and, thus, could not receive campaign contributions). If they lived in states with no other reported contributions, they were excluded from the analysis, as we were not certain if these were true zeros or a result of incomplete records. The results do not change in any important way with the inclusion or exclusion of these justices.

63 Because of the non-linearity observed in bivariate analyses, this study follows the practice, common in studies involving the effects of money, of transforming each contribution measure by taking its natural logarithm. This transformation better captures decreasing marginal effects, because the logs of numbers increase more slowly than the underlying numbers (for instance, the natural logs of 10, 20, 100 are 2.3, 3.0, and 4.6).

64 Self-financing and funds from party committees are included in these totals. While the totals include at least some contributions from interests often opposed to businesses, the available data do not permit an estimate of their share of the totals.

65 MARIE T. FINN ET AL., THE AMERICAN BENCH (2013).

66 LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX: 2010 REPORT, PACIFIC RESEARCH INSTITUTE (2010).

67 William D. Berry, Evan J. Ringquist, Richard C. Fording & Russell L. Hanson, *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. OF POL. SCI. 327 (1998).

68 Kang & Shepherd, *supra* note 25.

69 The 2010-2012 results here do not match the results presented in Appendix Table A1 because, in order to compare across the two time periods, the study had to define business contributions more narrowly (including only finance, real estate, general business, and health sectors) and exclude a small number of control variables that were not available for the earlier time period.

70 There was no evidence that the effect of money varied randomly across states or justices.

To learn more about this report – particularly the data that it draws from – visit the special reports and collaborations page of the National Institute for Money in State Politics (www.followthemoney.org/Research/special_topics.phtml). We strongly encourage interested parties to review the data, study the issue further, and contribute to and expand the important conversation about fair courts. NIMSP is the only nonpartisan, nonprofit organization revealing the influence of campaign money on state-level elections and public policy in all 50 states. The organization encourages transparency and promotes "independent investigation of state-level campaign contributions by journalists, academic researchers, public-interest groups, government agencies, policymakers, students and the public at large."

The report is also available for viewing on the American Constitution Society website at www.acslaw.org/state-courts/justice-at-risk.

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