THE PARTISAN PRICE OF JUSTICE: AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS

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Do campaign contributions affect judicial decisions by elected judges in favor of their contributors' interests? Although the Supreme Court's recent decision in Caperton v. A.T. Massey Coal Co. *relies on this intuition for its logic, that intuition has largely gone empirically untested. No longer. Using a dataset of every state supreme court case in all fifty states over a four-year period, we find that elected judges are more likely to decide in favor of business interests as the amount of campaign contributions received from those interests increases. In other words, every dollar of direct contributions from business groups is associated with an increase in the probability that the judge in question will vote for business litigants. Surprisingly, though, when we disaggregate partisan and nonpartisan elections, we find that a statistically significant relationship between campaign contributions and judicial decisions in favor of contributors' interests exists only for judges elected in partisan elections, and not for judges elected in nonpartisan ones. Our findings therefore suggest that political parties play an important causal role in creating this connection between campaign contributions and favorable judicial decisions. In the flurry of reform activity responding to* Caperton, *our findings support judicial reforms that propose the replacement of partisan elections with nonpartisan methods of judicial selection and retention.*

INTRODUCTION

The Supreme Court's landmark decision in *Caperton v. A.T. Massey Coal Co.*[1] gives constitutional recognition to one of the most pressing concerns of American law and democracy—the influence of campaign money on the judiciary. In *Caperton*, the Court held that the Due Process Clause required recusal in a case involving the presiding judge's major campaign contributor, who had spent more than $3 million to elect that judge into office while the case was pending. Such financial connections between the contributor and the judge raised a "serious risk of actual bias—based on objective and reasonable perceptions" that legitimately called the judge's impartiality into question.[2] This concern regarding the campaign financing of judicial elections is hardly a new one, and the Court's decision in *Caperton* follows from a larger national debate about the financing of judicial elections and its implications for the judiciary's impartiality.

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[1] 129 S. Ct. 2252 (2009).
[2] *Id*. at 2263.

However, *Caperton* itself and the larger debate over the role of money in judicial elections operate in almost complete ignorance about the degree to which the financing of judicial campaigns is actually associated with biased judicial performance. Specifically, we know surprisingly little about the empirical relationship between the financing of judicial campaigns and subsequent decisions in favor of campaign contributors made by candidates once they are on the bench. In short, the very premise of *Caperton*—that judicial judgments may be influenced by campaign fundraising—remains an almost entirely open empirical question.

Our Article answers this basic question about the relationship between campaign contributions and judicial voting in favor of those contributors. This issue is particularly salient because campaign fundraising has become increasingly important in judicial elections. Between 2000 and 2007, over $168 million was contributed to state supreme court campaigns,[3] more than twice the amount contributed throughout the 1990s.[4] The average spending per contest in partisan elections has increased to over $1.5 million.[5] The increasing cost of judicial campaigns has made it extremely difficult for candidates to win elections without substantial funding.[6] What is more, these elected judges decide the overwhelming majority of cases in our nation. More than 90% of the United States' judicial business is handled by state courts,[7] and 89% of all state court judges face the voters in some type of election.[8]

The first question we explore is a basic and fundamental one, particularly following *Caperton*: To what degree is financing for judicial campaigns associated with judicial decisions favorable to the interests of the sources of that campaign financing? To put it more bluntly, to what extent does money buy judicial decisions, at least where judges rely on campaign contributions to get elected?

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[3] We refer to the highest appellate court in a state as the "state supreme court."

[4] *The* Caperton v. Massey *Case: Not for Sale*, ECONOMIST, June 13, 2009, at 36.

[5] Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 59, 63 fig.4.1 (Matthew J. Streb ed., 2007).

[6] *See* DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002, at 15 (Bert Brandenburg ed., 2002), *available at* http://brennan.3cdn.net/3e06222f06bc229762_yom6bgubs.pdf ("With few exceptions, money means victory.").

[7] Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001); *see also* 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) (positing that state courts handle 98% of judicial business in United States).

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

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 elections. Judges who are already 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 more direct but equally plausible. Judges who are not predisposed to vote in favor of business interests might still vote in their favor so as to curry financial support from those interests for their future campaigns. We think both of these causal pathways are empirically likely and mutually reinforcing, and we explore in particular the degree to which judges are influenced by the prospective need for campaign financing in future elections.

The second question we address is equally important but has been surprisingly underexplored: To what degree do partisan elections, compared to nonpartisan elections, exaggerate any association between campaign contributions and judicial decisions? Our intuition is that partisan elections might have this effect because of the involvement of political parties. This intuition is simple and grounded in a deep literature from political science. Parties are well-organized institutions whose business is electing candidates to public office. They are skilled at directing resources, most prominently money, to candidates most likely to serve their programmatic goals once in office. In short, parties may professionalize both pathways for money's influence on judicial voting by identifying candidates who will predictably serve their contributors' interest once on the bench and by monitoring judicial performance for reward or punishment in subsequent elections. Parties may therefore serve as efficient brokers who strengthen the connection between campaign contributors and judicial candidates.

The dataset that we use to answer both of these questions includes detailed information on virtually every state supreme court case in all fifty states between 1995 and 1998.[9] It includes more than 28,000 cases, involving more than 470 judges. The data include variables that reflect case histories, case participants, legal issues, case outcomes, and individual judges' behavior. The comprehensiveness of

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[9] *See infra* note 109 and accompanying text (describing data).

these data is unique. Whereas previous studies of judicial decisions have examined specific courts or specific types of cases, our data include virtually *every* judge's vote in essentially *every* case in *every* state supreme court over a four-year period. The richness of the data allows for a more systematic and sophisticated empirical analysis than previous studies have performed.

We focus mainly on the role of contributions to judicial candidates by business groups, in large part because business groups account for almost half of all donations to judicial campaigns. In fact, they are routinely the single largest contributors in state supreme court races. For example, in the 2005–2006 election cycle, business groups directly contributed over $15 million to candidates, or 44% of the total and twice the amount contributed by the second-largest contributing interest group.[10] Business groups also dominate television advertising, which has become the major venue for supreme court campaigning. In 2006 alone, over $16 million was spent on TV ads in states with contested supreme court campaigns.[11] Business groups were responsible for more than 85% of the special interest ads and 90% of the advertising spending that year.[12]

Our findings are surprising and provocative. At first cut, we find that campaign contributions from business groups are, in fact, associated with judicial votes in favor of business interests. We find that every dollar of contributions from business groups is associated with increases in the probability that elected judges will decide for business litigants. Moreover, business groups' share of total contributions to judicial campaigns is also positively related to partisan-elected judges' voting for business litigants in many cases.

However, when we disaggregate this data and compare the relationship between campaign contributions and judicial voting under partisan elections with the same relationship under nonpartisan elections, our findings are astonishing: Campaign contributions from business groups are associated at statistically significant levels with judicial decisions for business interests *only under partisan elections*, but not under nonpartisan ones.

Earlier studies comparing partisan and nonpartisan election of judges argued that nonpartisan elections actually presented greater concerns about the role of campaign money and that, by certain measures, nonpartisan elections actually feature more campaign spending

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[10] JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 18 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake. org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf.

[11] *Id.* at 3.

[12] *Id.* at 7.

by judicial candidates.[13] These studies note that nonpartisan elections frequently include heavy involvement from the major political parties, who end up aligned with various candidates even when their labels are not technically on the ballot.[14] Furthermore, the argument goes, where voters cannot rely on the informational cue of the party label, candidates may need to raise and spend more money for advertising in order to establish their credibility with voters.[15] Our findings, however, fly in the face of such claims that "the practical differences between a technically nonpartisan election and partisan election may be more imagined or perceived than real."[16]

Instead, our results suggest that campaign contributions do not influence the votes of judges elected under nonpartisan elections. Our study thus indicates not only that the influence of money may be less in nonpartisan elections than is often claimed, but that the influence of political parties under partisan elections for judicial office is critical to understanding the significant association between campaign contributions and judicial decisions. In other words, what matters is not simply the amount of campaign money at issue, but the level of party involvement in judicial elections.

In Part I, we briefly describe the evolution of judicial elections in the American states. Although judicial elections emerged during the Jacksonian era as a response to the perceived lack of impartiality among appointed judges, recent trends have transformed judicial campaigns. Many more judicial elections are contested, with incumbents losing at much higher rates than ever before, and the amounts of money spent in judicial campaigns have increased dramatically.

In Part II, we present several empirical results that support the hypothesis that interest groups influence judicial outcomes through campaign contributions. We find that contributions from business

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[13] *See* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 132 (2009) (arguing that adoption of nonpartisan system does not minimize role of politics and money in judicial elections because nonpartisan elections involve higher levels of spending).

[14] *See, e.g.*, Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1418–20 (2001) (describing partisan activity in nonpartisan judicial elections).

[15] *See* BONNEAU & HALL, *supra* note 13, at 132.

[16] Champagne, *supra* note 14, at 1418 (quoting J. CLARK KELSO, JUDICIAL ELECTIONS: PRACTICES AND TRENDS 18 (1999)); *see also* BONNEAU & HALL, *supra* note 13, at 127 ("[S]tates with highly competitive nonpartisan elections continue to face issues with campaign activities and negative advertising even without partisan labels on the ballot."); Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L.J. 281, 322–23 (1995) (expressing similar skepticism about value of nonpartisan election systems because of persistent partisan endorsements, and urging state not to adopt nonpartisan elections).

groups are associated with increases in the probability that elected judges will rule in favor of business litigants. Moreover, judges who must run for reelection are more likely to decide in favor of a business litigant in most case types. In contrast, we find that when elected judges are serving their last term before mandatory retirement, their favoring of business litigants essentially disappears. This lame duck effect suggests that campaign fundraising affects judicial decisions on the bench; when retiring judges no longer need to curry favor with potential contributors, they no longer prefer those contributors' interests.

In Part III, we explain that we find this significant relationship between campaign money and judicial voting only in partisan elections, not nonpartisan ones. We report that judges facing partisan elections are approximately 12% more likely to decide in favor of business litigants than judges under any other appointment or retention system. In other words, for every 100 cases that judges from other systems decide against business litigants, judges facing partisan elections would decide for the business litigant in 12 of those cases. With thousands of cases involving business litigants appearing in state supreme courts each year, our results suggest that hundreds of case outcomes may be affected.

We argue that parties matter: Judges who must run for reelection under a partisan election system face even greater campaign finance pressures than judges under nonpartisan elections and other types of retention systems because the linkage of partisan politics and party involvement with judicial elections may make a critical difference in the character of judicial elections. What is more, although Joanna Shepherd found in a previous paper that, in general, Republican judges are more likely to decide for business litigants than their Democratic counterparts,[17] we find in this Article that both Republican and Democratic judges facing partisan elections are more likely to decide for business litigants than judges in other systems. Campaign contributions are predictive of judicial voting in partisan systems, regardless of the judges' party affiliations.

In Part IV, we suggest that our findings about the importance of party involvement support a surprisingly intuitive reform response to concerns inherent in *Caperton* about the influence of campaign contributions on judicial decisions—the adoption of nonpartisan elections

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[17] Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009). In this previous study, a judge's political party affiliation was defined by the political preferences of the voters or governor responsible for their retention (i.e., a judge seeking retention by Republican voters or a Republican governor was defined as a Republican judge). *Id.* at 655–56.

for judges. Although skeptics claim that nonpartisan elections are no better than, and perhaps even worse than, partisan elections on many measures, our findings indicate that nonpartisan elections for judges may be better at limiting the relationship between campaign contributions and subsequent judicial decisions. Indeed, nonpartisan elections appear no different on this score than merit plans with unopposed retention elections or appointive methods of judicial selection.

I
JUDICIAL ELECTIONS IN THE UNITED STATES

In this Part, we provide a brief introduction to judicial elections in the United States. First, we describe the evolution of the methods of judicial selection and retention, from the emergence of judicial elections during the nineteenth century to the wide range of partisan elections, nonpartisan elections, and variants of appointment and merit plans seen today. Second, we describe the rapidly increasing costs of judicial campaigns in recent years and the importance of campaign contributions, particularly from business groups, that raise the basic concerns about judicial integrity underlying *Caperton*.

A.   *Brief History of Judicial Elections*

In the United States, almost 90% of state appellate judges must regularly be reelected by voters.[18] This approach is peculiarly American.[19] Yet the use of popular elections for the state judiciary is not a product of the Founding; the appointment of state judges originally was by the executive or legislature.[20] It was only due to the Jacksonian era's championing of popular democracy that an elected judiciary developed. Although nearly all states entering the Union before 1845 had an appointed judiciary, each state that entered between 1846 and 1959 utilized judicial elections.[21]

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[18] Eighty-seven percent of state appellate court judges must be retained through either partisan elections, nonpartisan elections, or retention elections. Schotland, *supra* note 8, app. 2, at 1105. In contrast, as explained earlier, 89% of all state judges (appellate and trial) face voters at some point, either in the initial election or when seeking retention. *See supra* note 8 and accompanying text.

[19] *See, e.g.*, Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007 (2007) ("The United States is unusual . . . in the degree to which it relies on popular elections for the selection or retention of its state court judges . . . ."); Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1996 (1988) ("To the rest of the world, the American adherence to judicial elections is as incomprehensible as our rejection of the metric system.").

[20] ARTHUR T. VANDERBILT, THE CHALLENGE OF LAW REFORM 14–15 (1955).

[21] LARRY C. BERKSON & RACHEL CAUFIELD, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 1 (2004), *available at* http://www.ajs.org/selection/docs/Berkson.pdf.

The movement to elect judges fits the Jacksonian philosophy perfectly. A core value of Jacksonianism was a distrust of unrepresentative, unaccountable government officers and an affection for the mass of ordinary people.[22] Supporters believed that appointed judges were beholden to the government officials who appointed and retained them and would inevitably be influenced to shape their rulings to please governors and legislators. Conversely, popular elections could "insulate the judiciary . . . from the branches that it was supposed to restrain."[23]

Andrew Jackson and his followers preferred that any influence come directly from the people through popular elections. In the Massachusetts state constitutional convention in 1853, one delegate said of judges: "They are men, and they are influenced by the communities, the societies and the classes in which they live, and the question now is, not whether they shall be influenced at all, . . . but from what quarter that influence shall come."[24] Similarly, a delegate to the Kentucky convention in 1849 answered that the judge "is to look somewhere for approbation, and that is to come from the people."[25]

Following this pattern, state after state established an elective judiciary after long, cautious debate in constitutional conventions.[26] Ultimately, the majority of convention delegates believed that elective systems would produce more impartial judges than appointive systems. Moreover, they believed that requiring judges to face voters in reelections would give them strong incentives to preserve the public good.[27] As a leading commentator notes, "the judiciary became elective not so much to permit the people to choose honest judges as to keep judges honest once they reached the bench."[28]

Indeed, many convention delegates of the time believed that the only downside to an elective judiciary was that elected judges might

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[22] *See* Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 222–23 (1993).

[23] *Id.* at 205.

[24] 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 773 (Boston, White & Potter 1853) (statement of Edward L. Keyes).

[25] REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 1849, at 273 (Frankfort, A.G. Hodges & Co. 1849) (statement of Francis M. Bristow).

[26] *See* Nelson, *supra* note 22, at 192 (describing contentious debates in state constitutional conventions adopting elected judiciaries).

[27] *Id.* at 224.

[28] *Id.*

occasionally feel excessive pressure from excited voters.[29] To prevent this, they carefully structured the election process to reduce any dangers of overbearing popular influence. In most states, judges would have long terms.[30] To assure that all judges could not be thrown out together in a fit of popular excitement, terms would be staggered, and elections would be by district instead of at large.[31] Finally, judges would not be permitted to run for other elected offices during their terms.[32]

Supporters were initially delighted with the judges elected under the new systems. An Illinois convention delegate and eventual Supreme Court Justice, David Davis, later claimed that "[i]f only the federal judiciary had been made elective, . . . the people 'would have chosen judges, instead of broken down politicians.'"[33] The number of states with elected judges continued to grow.[34]

The turn of the century, however, brought a growing distrust of elected judges, and a number of states modified their judicial elections during the Progressive Era. By 1927, 12 states had switched from partisan elections, which revealed judges' party affiliations, to nonpartisan elections.[35] Other states moved to another election variation, the so-called "merit plan," also commonly known as the "Missouri Plan" after Missouri became the first state to adopt it in 1940.[36] Under a merit plan, a bipartisan judicial nominating commission reviews applications for judgeships and compiles a list of qualified applicants from which the governor appoints.[37] Once appointed, the judge regularly faces unopposed, nonpartisan retention elections. The ballot question poses only whether the judge should be retained, without mention of the judge's party affiliation.[38]

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[29] *See* Schotland, *supra* note 8, at 1094 (noting that constitutional devices were adopted "to limit the potentially disruptive consequences of popular election"); *cf.* Nelson, *supra* note 22, at 218 (recognizing that some delegates were concerned about overly excited voters but noting that even those delegates were more concerned about unchecked government officials).

[30] Schotland, *supra* note 8, at 1094.

[31] Nelson, *supra* note 22, at 218.

[32] Schotland, *supra* note 8, at 1094.

[33] Nelson, *supra* note 22, at 196 (quoting 2 THE CONSTITUTIONAL DEBATES OF 1847, at 462 (Arthur Charles Cole ed., 1919) (statement of David Davis)).

[34] *See* Schotland, *supra* note 8, at 1093 (noting increasing adoption of elected judiciaries).

[35] BERKSON & CAUFIELD, *supra* note 21, at 2.

[36] *Id.*

[37] Rachel Paine Caufield, *In the Wake of* White*: How States Are Responding to* Republican Party of Minnesota v. White *and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 627–28 (2005).

[38] Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 804 (2004).

This long historical evolution has led to several variations of judicial selection and retention methods across states. Today, states are divided roughly among three different principal systems: partisan elections, nonpartisan elections, and merit plans. In the initial selection of judges to their highest courts, 9 states use partisan elections and 13 states use nonpartisan elections.[39] In the remaining 28 states, the governor or legislature initially appoints judges to the highest court, with 21 of those states using some form of merit plan.[40] For the retention of judges on the state's highest court, 6 states use partisan elections, and 14 states use nonpartisan elections.[41] Eighteen states hold retention elections in which incumbent judges run unopposed and must win majority approval for retention.[42] Nine states rely on reappointment by the governor, legislature, or a judicial nominating committee.[43] Only 3 states grant their highest court judges permanent tenure.[44]

Judicial elections are even more common in the selection of judges to trial courts and lower appellate courts. Twenty-one states use partisan elections to fill judicial positions at some level, even if they do not use them to elect their highest court.[45] Another 20 states use nonpartisan elections for at least some judicial positions.[46] Table 1 provides a sense of the variation across states today and lists systems of selection and retention for the highest court in each state.[47]

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[39] Schotland, *supra* note 8, at 1085 (summarizing judicial selection methods nationwide).

[40] DAVID B. ROTTMAN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NO. NCJ 178932, STATE COURT ORGANIZATION 1998, at 21 tbl.4 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sco98.pdf.

[41] Am. Judicature Soc'y, *Methods of Judicial Selection*, JUD. SELECTION STS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Feb. 17, 2010).

[42] ROTTMAN ET AL., *supra* note 40, at 21 tbl.4. Illinois, New Mexico, and Pennsylvania 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. Am. Judicature Soc'y, *supra* note 41.

[43] ROTTMAN ET AL., *supra* note 40, at 21 tbl.4.

[44] Judges in Massachusetts and New Hampshire are appointed for permanent tenure to age seventy, and Rhode Island grants its judges life tenure. *Id.* at 26 tbl.5.

[45] *Id.* at 34 tbl.7.

[46] *Id.*

[47] Although there are other differences between the selection and retention methods of each state, they can be grouped into these primary categories.

TABLE 1

METHODS OF SELECTION AND RETENTION FOR
HIGHEST COURT BY STATE[48]

State	*Selection Method for Full Term*	*Retention Method*	*State*	*Selection Method for Full Term*	*Retention Method*
Alabama	P	P	Montana	N	N
Alaska	M	R	Nebraska	M	R
Arizona	M	R	Nevada	N	N
Arkansas	P	P	New Hampshire[49]	G	-
California	G	R	New Jersey[50]	G	G
Colorado	M	R	New Mexico	P	R
Connecticut[51]	LA	LA	New York	M	G
Delaware	M	G	North Carolina	P	P
Florida	M	R	North Dakota	N	N
Georgia	N	N	Ohio[52]	N	N
Hawaii	M	J	Oklahoma	M	R
Idaho	N	N	Oregon	N	N
Illinois	P	R	Pennsylvania	P	R
Indiana	M	R	Rhode Island[53]	M	-
Iowa	M	R	South Carolina	LE	LE
Kansas	M	R	South Dakota	M	R
Kentucky	N	N	Tennessee	M	N
Louisiana[54]	P	P	Texas	P	P

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[48] The data in this table were collected from ROTTMAN ET AL., *supra* note 40, at 21 tbl.4, and the American Judicature Society, *supra* note 41. G = gubernatorial appointment or reappointment, P = partisan election or reelection, N = nonpartisan election or reelection, LA = legislative appointment or reappointment, LE = legislative election or reelection, M = merit plan, R = retention election, and J = reappointment by a judicial nominating commission.

[49] In New Hampshire, judges serve until age seventy. ROTTMAN ET AL., *supra* note 40, at 28 tbl.4.

[50] In New Jersey, after an initial gubernatorial reappointment, judges serve until age seventy. N.J. CONST. art. VI, § 6, ¶ 3.

[51] In Connecticut, the governor nominates, and the legislature appoints. ROTTMAN ET AL., *supra* note 40, at 21 tbl.4, 25 n.2.

[52] In Ohio, political parties nominate candidates to run in nonpartisan elections. Am. Judicature Soc'y, *supra* note 41.

[53] In Rhode Island, judges have life tenure. ROTTMAN ET AL., *supra* note 40, at 28 tbl.5.

[54] In Louisiana, candidates compete in a blanket primary with party labels on the ballot. The top two primary candidates go on to the general election. Am. Judicature Soc'y, *supra* note 41.

TABLE 1 CONTINUED

State	Selection Method for Full Term	Retention Method	State	Selection Method for Full Term	Retention Method
Maine	G	G	Utah	M	R
Maryland	M	R	Vermont	M	LE
Massachusetts[55]	M	-	Virginia	LE	LE
Michigan[56]	N	N	Washington	N	N
Minnesota	N	N	West Virginia	P	P
Mississippi	N	N	Wisconsin	N	N
Missouri	M	R	Wyoming	M	R

B.   *Increasing Costs and Politicization of Judicial Elections*

The debate over the proper method of judicial selection and retention across the states has intensified more recently in the context of dramatic increases in campaign costs and politicization of judicial elections. As recently as the 1960s, judicial elections were generally "low-key affairs, conducted with civility and dignity,"[57] which were "as exciting as a game of checkers . . . [p]layed by mail."[58] This began to change in Los Angeles in 1978, when a group of deputy district attorneys offered to support any candidate who would run against any unopposed incumbent trial judge, producing a record number of contests and defeated judges.[59] Similarly, throughout the 1980s, battles over tort law in Texas produced "unprecedentedly costly, heated races" for its supreme court.[60] Since then, judicial elections have become increasingly politicized, more competitive, and have created new electoral pressures for judges. By 2000, 75% of nonpartisan elections were contested, up from 44% in 1990.[61] Similarly, a staggering 95% of partisan elections were contested in 2000, up from 68% in 1990.[62]

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[55] In Massachusetts, judges serve until age seventy. ROTTMAN ET AL., *supra* note 40, at 27 tbl.5.

[56] In Michigan, political parties nominate candidates to run in nonpartisan elections. Am. Judicature Soc'y, *supra* note 41.

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

[58] Schotland, *supra* note 8, at 1079 (alteration in original) (quoting William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Justice Race*, COM. APPEAL (Memphis), Oct. 29, 2000, at DS.1).

[59] *Id.* at 1080.

[60] *Id.*

[61] Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 27 tbl.6 (2004).

[62] *Id.*

As elections have become increasingly competitive, incumbents have found it harder to win reelection. In 1980, roughly 4% of incumbents were defeated in nonpartisan elections, but in 2000, the loss rate for incumbents seeking reelection had doubled to 8%.[63] In partisan elections, only a quarter of incumbents were defeated in 1980, but in 2000, this loss rate had also doubled to nearly 50%.[64] By comparison, the loss rate for incumbent judges is *higher* than the average rate at which incumbents lose reelection bids for state legislatures, the U.S. Senate, and the House of Representatives.[65]

With the substantial increase in the competitiveness of judicial elections came similarly dramatic increases in campaign spending. Between 1990 and 2004, average campaign spending in nonpartisan elections doubled, increasing from approximately $300,000 to $600,000.[66] Average spending in partisan elections increased from approximately $425,000 to $1.5 million, an increase of over 250%, during this same period.[67]

Indeed, spending has become more predictive of victory, and it is now difficult for candidates to win elections without substantial funding.[68] In 1997 and 1998, the top campaign fundraiser prevailed in approximately 75% of contested state supreme court races, and in 2001 and 2002, the top fundraiser won in 80% of elections.[69] Since 1993, winners in these races have outraised losers by a margin of $91 million to $53 million.[70] The pressure to raise funds is truly more intense than ever.

Judges are also now permitted to engage in greater fundraising thanks to changes in the canons of judicial conduct in the American Bar Association's Model Code. The Code had prohibited judges from

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[63] Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 177 (Matthew J. Streb ed., 2007) [hereinafter RUNNING FOR JUDGE].

[64] *Id.*

[65] From 1990 to 2000, the average reelection rates for state legislators, U.S. Senators, and U.S. Representatives were 85.1%, 89.3%, and 94.1%, respectively, while state supreme court justices were reelected at a lower average rate of 84.1%. Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 AM. J. POL. SCI. 20, 21 (2006); *see also* Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 & tbl.5 (2001) (finding that incumbent state supreme court judges have failed to be reelected at rates equivalent to, or greater than, members of U.S. House of Representatives).

[66] Bonneau, *supra* note 5, at 63 fig.4.1.

[67] *Id.*

[68] *See* GOLDBERG & SANCHEZ, *supra* note 6, at 15 ("With few exceptions, money means victory.").

[69] *Id.*

[70] *Id.*

announcing their views on disputed legal or political issues until 1990,[71] when the ABA repealed the canon because of First Amendment concerns.[72] Soon afterward, 25 of the 34 states that had adopted the canon eliminated it.[73] In 2002, the Supreme Court in *Republican Party of Minnesota v. White* struck down enforcement of the canon in the remaining 9 states.[74] Other appellate courts have gone further and struck down additional limits on judges' personal fundraising, partisan conduct, and making pledges and commitments.[75]

While the costs of state supreme court election campaigns are universally high because of these developments, costs nevertheless vary greatly across states based on the election system used. Table 2 presents the average spending on state supreme court races between 1994 and 2000 for each state that uses either partisan or nonpartisan elections to select judges to its highest court. As shown, the states with the most expensive campaigns are those that elect judges in partisan elections. Moreover, the most expensive nonpartisan states, Ohio and Michigan, are states that nominate candidates in partisan primaries but use nonpartisan general elections.[76]

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[71] MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1989); *see also, e.g.*, MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1996) (retaining prohibition on announcement of disputed legal or political views).

[72] MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) annot. at 355–58 (2004) (prohibiting judges only from *committing* themselves on issues likely to come before court).

[73] Schotland, *supra* note 8, at 1095 n.77.

[74] 536 U.S. 765 (2002).

[75] *E.g.*, Republican Party of Minn. v. White, 416 F.3d 738, 754, 765–66 (8th Cir. 2005) (en banc) (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 canon prohibiting personal solicitation by judges). *But cf.* Schotland, *supra* note 8, at 1095–97 (discussing limited impact of *White*'s permissiveness on judicial campaign behavior).

[76] For a thorough explanation of the differences in campaign spending among the states, see Bonneau, *supra* note 5, at 66–68.

TABLE 2

AVERAGE SPENDING PER SUPREME COURT CAMPAIGN
BY STATE, 1990–2004[77]

State	Average Spending per Campaign	Selection Method
Pennsylvania	$2,250,773	P
Alabama	$1,450,673	P
Illinois	$1,371,590	P
Ohio	$1,193,205	N
Texas Supreme Court[78]	$1,155,125	P
Louisiana	$1,080,113	P
Michigan	$927,019	N
West Virginia	$887,218	P
Mississippi	$599,251	N
Nevada	$593,816	N
Wisconsin	$559,505	N
Kentucky	$422,063	N
North Carolina	$366,742	P
Montana	$359,974	N
Georgia	$289,865	N
New Mexico	$273,398	P
Arkansas	$264,320	P
Washington	$205,601	N
Oregon	$183,107	N
Idaho	$124,579	N
Texas Court of Criminal Appeals[79]	$116,841	P
Minnesota	$108,185	N

C. Business Influence on the Judiciary

The increasing competitiveness and expense of judicial elections offers interest groups the opportunity to influence judges and their decisions through at least two separate avenues. First, as judicial campaigns have become costlier, wealthy interest groups can influence the outcomes of judicial elections by contributing substantial campaign funds in support of favored candidates. Second, once elected, judges

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[77] The information in this table can be found in *id.* at 67 tbl.4.2.

[78] Note that Texas has two courts of last resort: one for criminal trials and one for civil trials.

[79] Because of issues like tort reform and the accompanying interest group involvement, Texas Supreme Court elections are significantly more expensive than elections to the Texas Court of Criminal Appeals. *Id.* at 67.

are incentivized to favor wealthy interest groups in their decisions so as to obtain more campaign support in future elections. Thus, the newly central role of money in judicial elections may permit wealthy interest groups to influence both which judges are elected and how those judges vote after they are elected.

Although any interest group might exert influence over the judiciary, business groups may be unique in their ability to do so. In contrast to most others, business groups often have substantial resources collected from the wealthy businesses that they represent. Furthermore, even compared to other relatively wealthy interest groups, business groups often have a more focused agenda and a clearer idea of the types of judges they would like to support: pro-business, pro-tort reform judges. Indeed, tort reform has become business groups' primary focus in state judicial races.[80] By contrast, the plaintiffs' bar in many states is typically much more diverse in their economic interests because they represent a diverse range of clients. Similarly, insurance groups insure both plaintiffs and defendants, resulting in a significantly less focused judicial agenda compared to business groups.

In addition, business groups typically have a great deal at stake in their support of judicial candidates, as a significant portion of state supreme court cases involve business litigants. According to our data, between 1995 and 1998, almost one-third of cases before the state supreme courts involved business litigants. Compared even to attorneys or insurers, businesses have much to lose if their cases are to be heard by unsympathetic judges.

As one might expect, then, business groups do spend more on state supreme court elections than any other interest group. In the 2005–2006 election cycle, for example, 32 states held supreme court elections.[81] Candidates in these elections raised a combined total of over $34 million, and business groups directly contributed over $15 million, or 44% of the total.[82] In fact, their contributions more than doubled the amount contributed by the second-largest contributing interest group.[83]

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[80] *See* Anthony Champagne, *Tort Reform and Judicial Selection*, 38 Loy. L.A. L. Rev. 1483, 1488 (2005) ("It is state judge selection that produces the major battles between economic interests that are concerned with a state's tort law.").

[81] Sample et al., *supra* note 10, at 16 fig.9.

[82] *Id.* at 18.

[83] *Id.* Researchers from the National Institute on Money in State Politics categorize donors into interest groups. The categorization of major labor and industry groups into interest groups is straightforward; the researchers use information on individuals' occupation, employer, or from professional directories to code contributions from individuals. *About Our Data*, Nat'l Inst. on Money St. Pol., http://www.followthemoney.org/ Institute/about_data.phtml (last visited Feb. 17, 2010). There have been a few election

In addition to their direct campaign contributions to judicial candidates, business groups routinely spend substantial amounts on independent expenditures and issue advocacy, particularly in the form of television campaign advertising. Independent campaign advertising is effective in increasing name recognition and support for favored candidates, or alternatively, in attacking their opponents.

To disguise their campaign support, business groups regularly channel their funds through nonprofit groups with inspirational but completely opaque names. For example, 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.[84] Similarly, the Ohio Chamber of Commerce created "Citizens for a Strong Ohio," which received most of its funding from the U.S. Chamber of Commerce.[85] 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 judge with his pro-business candidate, Brent Benjamin.[86] What is more, independent expenditures and issue advocacy are not always subject to the disclosure requirements under state campaign finance laws or the ethical constraints imposed by the states' codes of judicial conduct applicable to judicial candidates' campaign committees.[87]

Much of this business spending pays for television advertising, which has become increasingly prominent in state supreme court elections.[88] Television ads ran in 91% of states with contested supreme court campaigns in 2006, costing over $16 million.[89] Business groups dominated this advertising—they were responsible for more than 90%

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years where lawyers' groups donated more direct campaign funds than business groups, but business groups routinely dominate independent expenditures. SAMPLE ET AL., *supra* note 10, at 19 fig.12.

[84] RACHEL WEISS, INST. ON MONEY IN STATE POLITICS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES 13 (Aug. 25, 2005), *available at* http://www.followthemoney.org/press/Reports/200508251.pdf.

[85] *Id.* at 14.

[86] *Id.* at 18.

[87] *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 10.4-4.4(g) (2010) (noting that only campaign contributions, and not independent expenditures, are regulated by Model Code of Judicial Conduct); Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 322 (2005) (describing how business groups avoid disclosure requirements under state campaign finance law).

[88] *See* Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 670 (2002).

[89] SAMPLE ET AL., *supra* note 10, at 1, 3.

of all special interest television advertisements for judicial candidates in 2006.[90] Moreover, television advertising appears quite important in determining the outcomes of state supreme court elections. Between 2002 and 2006, there were 66 state supreme court races that featured television ads. In 52 of these, or 79%, the candidate with the most television advertising support won the election.[91]

The financial support of wealthy business groups can be decisive for judicial elections. Between 2000 and 2004, voters elected 36 of the 40 judges supported by the U.S. Chamber of Commerce,[92] due in no small part to the estimated $100 million that the Chamber spent on campaigns.[93] As noted above, this money buys more than one-time electoral victories. Indeed, the need to raise substantial sums for reelection campaigns also gives judges incentives to consider how their decisions will affect contributions. Although this influence is difficult to gauge with any precision, 46% of judges believe that campaign contributions have at least "a little influence" on judicial decisions, and as a result, 56% of them believe that "[j]udges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign."[94] Along these lines, Justice Kennedy expressed concerns in *New York State Board of Elections v. Lopez Torres* about whether "elections [that] require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties . . . [are] consistent with the perception and the reality of judicial independence and judicial excellence."[95] The public shares this concern: One national survey finds that nearly 9 out of 10 voters believe that campaign contributions influence judges' decisions, while only 5% of

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[90] *Id.* at 7.

[91] Deborah Goldberg et al., The New Politics of Judicial Elections 2004, at 1 (Jesse Rutledge ed., 2005), *available at* http://www.justiceatstake.org/media/cms/New PoliticsReport2004_83BBFBD7C43A3.pdf (presenting data for 2004 elections); Goldberg & Sanchez, *supra* note 6, at 9 (presenting data for 2002 elections); Sample et al., *supra* note 10, at 11 (presenting data for 2004 and 2006 elections).

[92] Between 2000 and 2003, 21 of the 24 pro-business judges that the Chamber of Commerce supported were elected. Champagne, *supra* note 80, at 1502–03. In 2004, 15 of the 16 pro-business judges that the Chamber supported were elected. Press Release, Inst. for Legal Reform, Chamber Highlights Successful Pro-Business Election Effort (Nov. 3, 2004), *available at* http://www.instituteforlegalreform.com/component/ilr_media/30/press release/2004/283.html.

[93] Champagne, *supra* note 80, at 1502.

[94] Greenberg Quinlan Rosner Research Inc., Justice at Stake—State Judges Frequency Questionnaire 5, 11 (2002), *available at* http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

[95] 552 U.S. 196, 212 (2008) (Kennedy, J., concurring in judgment).

those surveyed believe that campaign contributions have no influence on judges' decisions.[96]

Although this Article is the first systematic analysis of the relationship between business groups, judicial elections, and judicial outcomes, a few recent studies have found empirical evidence that judges do, in fact, favor certain campaign contributors. For example, in a previous study, Shepherd found that contributions from various interest groups are associated with increases in the probability that judges will vote for the litigants whom those interest groups favor.[97] Other studies examine, on a more limited basis, the relationship between contributions from lawyers and case outcomes when those lawyers' interests appear before the courts. These studies find a correlation between the campaign contributions from the plaintiff and defense bars and favorable rulings in arbitration decisions by the Alabama Supreme Court,[98] in tort cases before state supreme courts in Alabama, Kentucky, and Ohio,[99] in cases between businesses in the Texas Supreme Court,[100] and in cases during the Georgia Supreme Court's 2003 term.[101]

In its recent decision *Caperton v. A.T. Massey Coal Co.*, the U.S. Supreme Court recognized for the first time a due process concern

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[96] GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE: FREQUENCY QUESTIONNAIRE 4 (2001), *available at* http://www.justiceatstake.org/media/cms/ JASNationalSurveyResults_6F537F99272D4.pdf.

[97] Shepherd, *supra* note 17, at 669–72 & tbls.7 & 8. In that article, Shepherd reported results suggesting that elected judges' decisions, especially in partisan systems, were influenced by the political preferences of both voters and campaign contributors. *Id.* at 684. That article primarily focused on the relationship between the political party of the majority of voters—Republican or Democrat—and judges' votes for litigants that were typically aligned with the interests of each political party. It included one estimation that showed, when controlling for the political party of the majority of voters, that judges in partisan systems who received campaign contributions from business groups were more likely to favor the business litigant in cases between a business and an individual person. That article emphasized the importance of political parties to judicial voting, while this article investigates whether, regardless of political preferences, the *type of election* has a significant influence on the relationship between campaign contributions and judicial voting.

[98] Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 661 (1999).

[99] Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 SOUTHEASTERN POL. REV. 241, 256 (2000).

[100] 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, 315, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor litigant that contributed more money).

[101] Damon M. Cann, Justice for Sale? Campaign Contributions and Judicial Decision Making 11, 16 (Aug. 10, 2006) (unpublished manuscript), *available at* http://ssrn.com/ abstract=991364.

arising out of the possibility of judicial bias in favor of a major finan-
cial supporter of a judge's campaign.[102] Justice Kennedy, writing for
the majority, held that judges must recuse themselves when there is a
serious, objective risk of bias. Such a risk exists "when a person with a
personal stake in a particular case had a significant and dispropor-
tionate influence in placing the judge on the case by raising funds or
directing the judge's election campaign."[103] He explained that the risk
of actual bias depends on factors like the amount of the supporter's
spending on behalf of the judge, the total amount spent on the elec-
tion, and the apparent effect of the supporter's spending on the out-
come of the election.[104]

This particular case centered on Don Blankenship, the CEO of
Massey Coal Company, who had spent $3 million in 2004 to help elect
Brent Benjamin to the West Virginia Supreme Court. Benjamin won
the election, and when Massey appealed a $50 million verdict to the
West Virginia Supreme Court, Justice Benjamin denied motions to
recuse himself and ultimately voted to reverse the verdict against
Massey.[105] In finding a risk of bias warranting recusal in *Caperton*,
Justice Kennedy emphasized the fact that the case was pending at the
time of Massey's campaign spending to promote Benjamin's election,
the relatively large amount of Blankenship's campaign spending, and
Blankenship's large financial stake in the case.[106]

Caperton thus sets a constitutional upperbound on an individual
campaign sponsor's potential influence on a particular judge by
requiring recusal when the risk of bias is sufficiently severe. H.
Thomas Wells Jr., President of the American Bar Association,
"applaud[ed] the Supreme Court's ruling,"[107] and James Sample of
the Brennan Center for Justice hailed the decision as "a huge victory
for one of the most basic aspects of the rule of law: the right to a fair
hearing."[108] Yet the notion of bias underlying *Caperton* and its sup-
porters' praise remains untested. In the next Part, we assess the intui-
tion at the core of *Caperton* regarding the risk of judicial bias from

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[102] 129 S. Ct. 2252 (2009).

[103] *Id.* at 2263–64.

[104] *Id.* at 2264.

[105] *Id.* at 2257–58.

[106] *Id.* at 2264–65.

[107] H. Thomas Wells Jr., President, Am. Bar Ass'n, Statement Regarding the Ruling of
the Supreme Court of the United States in *Caperton et al. v. A.T. Massey Coal Co., Inc., et
al.* (June 8, 2009), *available at* http://www.abanet.org/abanet/media/statement/statement.
cfm?releaseid=671.

[108] Adam Liptak, *Justices Issue a Rule of Recusal in Cases of Judges' Big Donors*, N.Y.
Times, June 9, 2009, at A1.

campaign money by testing empirically whether campaign contributions correlate with favorable judicial decisions.

II
DO BUSINESS GROUPS BUY JUDICIAL DECISIONS THROUGH CAMPAIGN CONTRIBUTIONS?

We now examine empirically whether campaign contributions actually influence judicial decisions in states with judicial elections. To test the influence of business contributions on elected judges' voting, we use data from the State Supreme Court Data Project. The data include almost the entire universe of state supreme court cases in all fifty states from 1995 to 1998—more than 21,000 cases involving more than 400 individual state supreme court justices.[109] The data also include variables that reflect case histories, case participants, legal issues, case outcomes, and individual justices' behavior. We supplement these data with institutional variables that describe aspects of the judicial system of each state, and with detailed information about each judge's background and career. The sample of cases that we analyze includes all cases between a business litigant and a non-business litigant.

The comprehensiveness of our study is unique. Although Shepherd has used the data in a previous study regarding the importance of political parties on judicial voting,[110] most previous studies of the influence of campaign contributions have examined specific courts and specific types of cases.[111] In contrast, our data include *every* judge's vote in essentially *every* case in *every* state supreme court over our four-year period. The richness of the data allows for a more systematic empirical analysis than previous studies were able to undertake.

Unfortunately, full data are only available for the years 1995 through 1998, a period that precedes what some commentators characterize as a change in tone of judicial elections following the Court's decision in *Republican Party of Minnesota v. White*.[112] However, if anything, academic and anecdotal accounts describe a dramatic

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[109] Paul Brace & Melinda Gann Hall, *Project Overview*, ST. SUPREME CT. DATA PROJECT, http://www.ruf.rice.edu/~pbrace/statecourt/index.html (last visited Feb. 17, 2010). In the rare instance when state dockets exceed 200 cases in a single year, the researchers select a random sample of 200 cases.

[110] *See* Shepherd, *supra* note 17, at 652.

[111] *See supra* notes 98–101 and accompanying text.

[112] 536 U.S. 765 (2002); *see supra* text accompanying note 74.

increase in the influence of money and politics after that decision, which would only fortify the effects we describe in this Part.[113]

A.   *Estimation Models*

We employ two multivariate regression models to isolate business groups' influence on elected judges' decisions. Both models measure how individual judges' rulings are related to the influence of business groups as well as to other characteristics of the state, the judge, and the case. Our first model tests the relationship between judges' voting and direct campaign contributions from business groups. The estimation equation for this model is:

(1) $\text{Prob}(BusVote=1 \mid x) = \phi\ (\beta_0 + \beta_1{*}Contributions + \beta_2{*}Judge + \beta_3{*}Case + \beta_4{*}State)$

Our second multivariate regression model estimates the direct relationship between the type of judicial election and pro-business voting. Although the first model measures the relationship between direct campaign contributions and pro-business votes, it does not capture all the ways that interest groups influence judicial outcomes. For example, our campaign contribution data do not include campaign spending on independent expenditures and issue advocacy by business groups or other outside groups formally independent from the candidate's campaign apparatus.[114] This type of spending by business groups can fund campaign advertising in support of a judicial candidate and is likely to be appreciated by that candidate, even though the funds do not go directly to the candidate's campaign. Along the same lines, judicial candidates are likely to fear campaign spending by business groups on independent expenditures and issue advocacy in opposition to their election. Indeed, business groups routinely spend on independent expenditures and issue advocacy aimed at unseating incumbent judges who have made judicial decisions with which they disagree.[115] The analysis of campaign contribution data under our first model also does not capture the effect of campaign spending in support of the candidate's opponents. Business groups may often support opposing candidates in elections solely to prevent the victory of a

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[113] *See, e.g.*, Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of* White, *in* RUNNING FOR JUDGE, *supra* note 63, at 36 (observing increased campaign spending and overtly political tenor of judicial campaigns since *White*).

[114] *See, e.g.*, Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1404–05 (2001) (describing independent expenditures and issue advocacy by interest groups for judicial elections).

[115] Champagne, *supra* note 80, at 1483–86 (providing examples of campaign spending and issue advocacy regarding tort reform in state judicial campaigns).

judge who would cast unfavorable votes.[116] However, our spending data cannot measure the relationship between these other types of campaign spending and judges' decisions under model (1) because the data include neither independent expenditures and issue advocacy by business groups nor their contributions to opposing judicial candidates.

Therefore, to more fully measure business groups' influence on elected judges, our second model estimates the direct relationship between systems of judicial elections and pro-business voting. A significant difference in pro-business votes among judges seeking reelection and judges under other systems would support the hypothesis that business groups' involvement in judicial elections has been successful in shaping a pro-business judiciary. The estimation equation for this model is:

$$(2) \ \text{Prob}(BusVote=1 \mid x) = \phi \ (\beta_0 + \beta_1 {*} Election + \beta_2 {*} Judge + \beta_3 {*} Case + \beta_4 {*} State)$$

1. Dependent Variable

Our estimations will separate the influence of each independent variable (the variables on the right side of the equation) on the dependent variable (the variable on the left side of the equation). In both models, the dependent variable is the probability that a given judge votes for the business litigant in a given case. A judge is coded as voting for a litigant in the State Supreme Court Data Project archive if the judge voted to make the litigant any better off, regardless of whether the judge voted to reverse a lower court or to change the damage award.

Certainly the outcomes of many individual cases in our analysis have little, if any, impact on the welfare of most businesses as a general matter. What is more, not every vote for a business litigant is necessarily an instance of pro-business bias. However, this large sample of cases allows us to measure whether elected judges generally favor business litigants over the wide range of cases and, if they do, whether the aggregate impact over the range of decisions is likely to be meaningful for business interests.

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[116] In *Caperton*, Blankenship supported then-attorney Benjamin in his campaign to unseat Justice McGraw. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

2. *Variables Testing Our Hypothesis*

The primary variable of interest in model (1) is *Contributions*, the direct campaign contributions to judges facing partisan and non-partisan elections.[117] The data on campaign contributions are collected by the National Institute on Money in State Politics, a "nonpartisan, nonprofit organization dedicated to accurate, comprehensive and unbiased documentation and research on campaign finance at the state level."[118] The Institute receives its data in either electronic or paper files from the state disclosure agencies with which candidates file campaign finance reports. It then compiles the information for all state-level candidates in the primary and general elections and assigns the donors an economic interest code based on information contained in the disclosure reports and on deeper research into the donors' characteristics and agendas.[119] To devise a total figure for contributions from business groups, we aggregate the campaign contributions from four economic interest codes that are the primary supporters of pro-tort reform and pro-business judges: general business, financial/real estate business, insurance companies, and medical groups.[120] Our estimations include one of two measures of campaign contributions in judges' most recent elections: either the total dollar amount of campaign contributions from business groups or the percentage of each judge's total contributions that come from business groups.

The primary variables of interest in model (2) are reflected in *Election*, a series of indicator variables reflecting whether and how judges face reelection. We include two different election indicator variables: one indicator for whether judges face either partisan or nonpartisan elections and a second indicator for whether judges face unopposed retention elections.

We separate retention elections from partisan and nonpartisan elections based on their differences in competitiveness, fundraising, and retention rate; we expect these factors will be relevant to the degree of business influence on the judiciary. As we have already discussed, partisan and nonpartisan elections are typically contested;[121] in contrast, judges run unopposed in retention elections and are sub-

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[117] The variable *Contributions* is coded as 0 for judges that received no money from business groups.

[118] *Mission & History*, NAT'L INST. ON MONEY ST. POL., http://www.followthemoney.org/Institute/index.phtml (last visited Feb. 17, 2010).

[119] *About Our Data*, *supra* note 83.

[120] *See* WEISS, *supra* note 84, at 4 (discussing primary actors in tort reform debate).

[121] *See supra* notes 61–62 and accompanying text.

ject only to a yes-or-no vote for retention.[122] Similarly, judges in partisan and nonpartisan elections face higher loss rates,[123] while judges facing retention elections are retained by significant margins.[124] Finally, judges in partisan and nonpartisan elections depend on substantial campaign contributions to finance their elections,[125] whereas judges facing retention elections are typically forbidden from campaigning because they are unopposed.[126]

Indeed, several empirical studies have found that the significant differences in competitiveness and spending across election types produce different voting behaviors among judges. For example, studies have shown that judges subject to nonpartisan and partisan reelection are more likely to avoid unpopular voting on politically salient issues[127] and impose the death penalty.[128]

Thus, we include separate indicators for judges facing either partisan or nonpartisan reelection and judges facing retention elections because we expect the differences between these elections will determine the degree of business influence on the judiciary. The base category in the estimations, where both of the indicator variables are zero, consists of votes by judges facing gubernatorial reappointment, legislative reappointment, and those with permanent tenure. Therefore, the results for the indicator variables will reveal the differences in voting between judges in the base category and judges facing each type of reelection.

3. Control Variables

Our estimations of the two models will separate the impact of each factor that is included, isolating the business groups' influence from other influences on judges' voting. Thus, to determine whether

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[122] *See supra* note 38 and accompanying text.

[123] *See supra* notes 63–65 and accompanying text.

[124] *Cf.* William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Taught Us,* 70 JUDICATURE 340, 343 (1987) (noting that, between 1964 and 1984, judges facing retention elections were retained over 98% of the time).

[125] *See supra* notes 66–67 and accompanying text.

[126] James J. Alfini & Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671, 684–85 (1989) (discussing ethical codes prohibiting campaigning until opposition forms).

[127] *See* Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992) (demonstrating that judges facing reelection will not distinguish themselves by voicing disagreement with perceived popular opinion through dissents); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117 (1987) (indicating same through case study).

[128] *See* Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States,* 48 POL. RES. Q. 5, 24 (1995) ("[W]here judges must face voters to retain their positions, state partisan competition exerts a positive influence on support for the death penalty.").

campaign contributions affect judicial decision-making by elected judges, it is important to control for as many other factors as possible to ensure that the results are not caused by something other than retention politics.[129]

The control variables we include fall into three categories: judge-level variables, case-level variables, and state-level variables. All of these may be related to how the judge votes in a given case. That is, a judge's vote may be partly determined by his own characteristics, such as his fundamental ideology, partly determined by case characteristics, such as the type of litigants, and partly determined by state characteristics, such as the conservatism of the state's laws. Unfortunately, one of the most important influences on a judge's voting—the guilt or liability of the parties—is unquantifiable and, therefore, not included as a control variable. Nevertheless, the variables that we do include will pick up the marginal influence of these other factors on judges' voting.

The variables reflected in *Judge* control for judge-specific characteristics that may be related to judges' voting. First, it includes a measure of the ideological preferences of each judge to control for the relationship between policy preferences and voting for business litigants. For this proxy, we use each judge's party-adjusted surrogate judge ideology measure, or "PAJID" score.[130] This is the most common measure of a judge's ideology currently used in political science studies, and it is based on the assumption that judges' ideologies can be best proxied by both their "partisan affiliations and the ideology of their states at the time of their initial accession to office."[131] Including the PAJID scores allows us to separate the influence of the judges' own ideology from the influence of the retention method.

The judge-level variables also include a variable indicating the length of time in years that the individual judge has served on the court and a variable indicating the length of time in years until the judge's next retention event.[132] These variables control for voting changes throughout a judge's career and term.

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[129] That is, if a third, omitted variable has significant influence on voting, and that omitted variable is strongly correlated with retention politics, our analysis may erroneously attribute to the retention agent variable the relationship between voting and the omitted third variable.

[130] *See generally* Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387 (2000) (developing PAJID score).

[131] *Id.* at 388; *see also id.* at 400–04 (showing validity of PAJID scoring and fact that it outperforms other scoring mechanisms).

[132] This variable is actually the reverse of the years to retention. As the longest number of years to retention during our sample is 12, the inverse years to retention is 13 minus the years to retention.

The variables in *Case* control for case-level factors that may be related to judges' voting. First, we include indicator variables for whether the opposing litigant (that is, the litigant opposing the business litigant) is a person or a government branch or representative. We also include indicator variables for the general issue in the case (labor dispute, contract, tort, or government regulation) and for the general industry of the business litigant (agriculture, construction, financial services, manufacturing, mining, service, trade, transportation, or utilities). Finally, we include an indicator variable for whether the individual judge's vote is a dissenting vote. As dissenting votes may be a way of ostensibly favoring business litigants without changing actual case outcomes, dissents may be related to support for business interests.

The variables in *State* control for state-level characteristics that may be related to case outcomes. First, we include the percentage of years since 1960 that each state's legislature had a Republican majority. We use this variable as a proxy for the conservatism of each state's laws. Because states with conservative laws may also be more likely to have conservative judges, this control allows us to isolate the influence of the retention method from the effect of judges simply applying pro-business laws in conservative states.

We also include variables that indicate whether a state's supreme court has discretionary control over its docket (that is, whether it has a lower appellate court) and whether judges may sit en banc.[133] Both of these variables may be relevant to a judge's voting by affecting the types of cases that a supreme court hears; when it has discretion to grant review, the litigants do not alone control which appeals are heard. Instead, judges may choose to hear cases that give them specific opportunities to exercise their ideological preferences.[134]

Whether a supreme court sits en banc may also influence the types of cases it hears. The supreme courts of Alabama, Connecticut, Delaware, Massachusetts, Mississippi, Montana, Nebraska, Nevada,

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[133] Thirty-nine states have intermediate appellate courts, and those states' supreme courts have discretionary review. COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2006: SUPPLEMENT TO EXAMINING THE WORK OF STATE COURTS 16–67 (2007), *available at* http://www.ncsconline.org/D_Research/csp/2006_files/StateCourtCaseloadStatistics2006.pdf.

[134] Conceivably, litigants could decide to settle after review of their case has been granted; the granting of review may be a signal that the court plans to vote ideologically. However, in a study of civil appeals in 46 counties between 2001 and 2005, no litigants withdrew their cases after the courts of last resort granted review, so litigants do not appear to anticipate an ideological outcome. *See* THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 212979, APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005, at 9 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/agctlc05.pdf.

Virginia, and Washington may hear cases either en banc or in panels.[135] By contrast, the supreme courts of all of the other states always sit en banc except when a judge must recuse herself.[136] If the ideologies of the judges on a specific court differ, and the litigants do not know which judges will hear their case because the court does not sit en banc, then the litigants cannot fully consider the court's ideology when making settlement decisions. Thus, we may see more ideological voting in these cases because litigants do not know the judges' identities in advance, so they cannot consider the judges' ideologies in their settlement decisions. In contrast, in states where litigants know the identity of the judges, they should choose to settle cases where the ideological bent of the judges is clear and outcomes are predictable.

Finally, we include an indicator for southern states to control for the fact that many of the states employing partisan judicial elections are in the South. Because southern states may also be more likely to have conservative judges, this control allows us to isolate the influence of the retention method from judges simply applying pro-business laws in southern states.

As is standard and appropriate in such analyses, the models also include a set of year indicator variables that capture national trends and influences that affect all judges but vary over time.[137] The variables correct for the possibility that a change in voting may be due, not to business groups' influence, but to factors that affect all judges, such as trends in conservatism or changes in national laws.[138]

4. Methodology

The dependent variable is modeled as a dichotomous choice; each vote for a business litigant is coded as a positive outcome and each failure to vote for a business litigant is a null outcome. Given the dichotomous nature of the outcomes, we estimate this model with a maximum likelihood probit model.[139] However, because the raw probit results are difficult to interpret in terms of the probability of a judge's particular vote, we present the marginal effects of the variables on the probability of voting for the business litigant. Thus, the

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[135] COURT STATISTICS PROJECT, *supra* note 133, at 16–67. In Connecticut, the court sits en banc only by order of the chief justice. *Id.* at 22. The District of Columbia's highest court also sits in panels and en banc. *Id.* at 24.

[136] *Id.* at 16–67.

[137] *See, e.g.*, WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 116–18 (5th ed. 2003) (explaining use of dummy variables in regression analysis).

[138] We are unable to include state-level and judge-level fixed effects because most are perfectly collinear with the retention variables, many of which do not change during the four-year sample period.

[139] For a general discussion of the probit model, see GREENE, *supra* note 137, at 814–15.

results tables for model (1) report the increase in the probability of a judge voting for the business litigant for each $1000 increase in campaign contributions from business groups, holding the cases' other characteristics constant. Similarly, the results tables for model (2) report the increase in the probability that a judge facing reelection as opposed to a judge in the base categories will vote for the business litigant, holding the cases' other characteristics constant.[140]

In addition, the *t*-statistics are computed from standard errors clustered by retention method to correct for possible clustering effects. Clustering refers to the fact that observations may be independent across groups (such as retention methods), but not necessarily within groups.[141] Thus, the standard errors from observations within the same retention method may be relatively small when compared to standard errors from observations from other retention methods, and would thus artificially inflate our *t*-statistics and produce results that incorrectly appear to be statistically significant. By controlling for possible clustering effects, we prevent these problems.

B. *Empirical Results*

Tables 3 through 6 reveal the results of our probit estimations. In each results table, the top number in each cell is the regression coefficient, which indicates the magnitude and direction of the relationship between each variable and judges' votes. A negative coefficient indicates that a variable reduces the probability that a judge will vote for the business litigant; a positive coefficient indicates that a variable increases the probability that a judge will vote for the business litigant.

In addition, the table reports the *t*-statistic for each coefficient. In each cell, the *t*-statistic is the bottom number, in parentheses. Coefficients with *t*-statistics equal to or greater than 1.645 are considered statistically significant at the 10% level, meaning that there is 90% certainty that the coefficient is different from zero. *T*-statistics equal to or greater than 1.96 indicate statistical significance at the more-certain 5% level, and *t*-statistics equal to or greater than 2.576 indicate statistical significance at the most-certain 1% level. Empiricists typically require *t*-statistics of at least 1.645 to conclude that one variable

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[140] We also estimate a series of mixed-effects (hierarchical) logit models that can account for nested errors. The mixed-effects logit models account for two levels of nested groups; the case-specific random effects are nested within state-specific random effects. Although we do not report the results in the interest of brevity, they are consistent with the probit results, confirming that our results are robust to alternative specifications.

[141] *See generally* JEFFREY M. WOOLDRIDGE, ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA 405–07 (2002).

affects another in the direction indicated by the coefficient.[142] In the table, "*," "+," and "ᵃ" indicate significance at the 1%, 5%, and 10% levels, respectively.

1. *Direct Campaign Contributions and Pro-Business Votes*

First, we estimate model (1) to explore the relationship between direct campaign contributions from business groups and elected judges' votes for business litigants. Our estimations include one of two measures of campaign contributions in the judges' most recent elections: either the total dollar amount of campaign contributions from business groups or the percentage of each judge's total contributions that come from business groups.

Table 3 reports the probit results for four different categories of case types: labor, tort, contract, and an aggregated category that includes all case types. The other control variables in model (1) are included in the analyses, but are not reported in the interest of brevity. The results show that there is a statistically significant, positive relationship between the level of campaign contributions from business groups and elected judges' voting for business litigants in all case types. The magnitudes of the coefficients in the level estimations show the average percentage point increase in the probability of a judge voting for a business litigant for each $1000 contribution from a business group. For example, a $1000 contribution would increase the average probability that a judge would vote for a business litigant in any case by 0.03%, and a $1,000,000 contribution would increase the average probability that a judge would vote for a business litigant in any case by 30%. With millions of dollars contributed by business groups,[143] our results suggest that direct campaign contributions have the potential to affect hundreds of case outcomes each year.

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[142] For each regression, the table also reports the log likelihood that is used to perform a likelihood ratio test. This test determines whether the difference between the log likelihoods of two models is statistically significant; if it is, then the less restrictive model (the one with more variables) is said to fit the data significantly better than the more restrictive model. For more on likelihood ratio tests, see GREENE, *supra* note 137, at 151–53.

[143] *See* SAMPLE ET AL., *supra* note 10, at 18.

TABLE 3
CAMPAIGN CONTRIBUTIONS AND VOTING FOR
BUSINESS LITIGANTS[144]

	Increased Probability of Vote for Business Litigant by Case Type			
	All Cases	*Labor Cases*	*Tort Cases*	*Contract Cases*
$1000 Contribution from Business Group	0.0003[a] (1.69)	0.0004[+] (2.27)	0.0005[a] (1.69)	0.0002[+] (2.02)
Log Likelihood	-8509	-1301	-4043	-2798
Business Groups' Share of Total Contributions	0.003* (2.55)	0.006* (2.88)	0.005* (2.57)	0.004* (2.90)
Log Likelihood	-8497	-1295	-4032	-2790

Moreover, business groups' share of total contributions is positively related to elected judges' voting for business litigants in all case types. The magnitudes of the coefficients show the increase in the likelihood of a judge voting for the business litigant for a one-percentage-point increase in business groups' share of total campaign contributions to an elected judge. Thus, a one-percentage-point increase would increase the probability that an elected judge would vote for the business litigant in tort cases by 0.5%.

These results reveal that there is a significant relationship between direct campaign contributions from business groups and elected judges' voting. However, the estimation of model (1) does not capture all of the ways that interest groups influence judicial outcomes. As discussed above, the campaign contribution data do not include the millions of dollars spent by business groups on media campaigns, nor do they capture how the threat of both attack campaigns and support for opposing candidates can influence judicial outcomes.[145] The true effect may therefore be even stronger.

2. Retention Method and Pro-Business Votes

Next, because the direct campaign contribution data do not capture the entire influence of business groups on judicial decisions by elected judges, we use model (2) to measure the full effect. In this estimation, we test whether judges seeking reelection routinely decide

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[144] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. All control variables are included in the estimation but are not reported in the interest of brevity. *T*-statistics computed from standard errors clustered by retention method are reported underneath each marginal effect. The symbols "*," "+," and "a" represent significance at the 1%, 5%, and 10% levels, respectively.

[145] *See* SAMPLE ET AL., *supra* note 10, at 3, 8–9 (describing business groups' spending on television advertising and attack ads).

cases more favorably to business interests than other judges. If there is a significant difference in pro-business votes among judges seeking reelection and judges under other systems, this would support the hypothesis that business groups' broad involvement in judicial elections—in the form of contributions, media campaigns, and threatened opposition—has been successful in shaping a pro-business judiciary.

The full results for all variables in the aggregated estimation are reported in Table 11 in the Appendix; Table 4 summarizes the coefficients and t-statistics for the election variables and reports the probit results for the four different categories of case types. The magnitudes of the coefficients reveal the increase in the probability of a judge casting a vote for the business litigant under a given retention method, assuming all of the other variables are equal to the average variables in the sample.

TABLE 4
RETENTION METHOD AND VOTING FOR
BUSINESS LITIGANTS[146]

Retention Method	Increased Probability of Vote for Business Litigant by Case Type			
	All Cases	Labor Cases	Tort Cases	Contract Cases
Partisan or Nonpartisan Reelection	0.03[a]	-0.005	0.018	0.06[+]
	(1.66)	(.10)	(.53)	(2.52)
Retention Election	0.02[a]	0.003	0.002	-0.009
	(1.68)	(0.08)	(0.10)	(0.39)
Number of Observations	19,026	2952	9348	6029
Log Likelihood	-13,051	-2006	-6407	-4115

The results indicate that, compared to the baseline categories, judges facing either partisan or nonpartisan reelection are more likely to vote in favor of a business litigant in contract cases and the aggregate category of all case types. The magnitudes of the marginal effects are substantial but plausible. In the aggregate category of all case types, the results suggest that a judge facing either a partisan or nonpartisan reelection is approximately 3% more likely to vote in favor of a business litigant than a judge from the baseline categories. This implies that for every 100 cases in which judges from other systems vote against business litigants, judges facing partisan elections vote for

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[146] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. All control variables are included in the estimation but are not reported in the interest of brevity. T-statistics computed from standard errors clustered by retention method are reported underneath each marginal effect. The symbols "*," "+," and "a" represent significance at the 1%, 5%, and 10% levels, respectively.

the business litigants in 3 more of those cases. With over 2000 cases involving business litigants appearing in state supreme courts each year, our results suggest that judicial elections likely produce different outcomes in dozens of cases.

In contrast, most of the coefficients for the retention election variable are insignificant, indicating that judges facing retention elections do not systematically vote differently from judges facing gubernatorial or legislative reappointment and judges with permanent tenure. Because there is little campaign fundraising in retention elections, our results reveal that there is little opportunity for wealthy interest groups to affect judicial outcomes. However, the statistically significant results for judges facing either partisan or nonpartisan elections support the hypothesis that, when campaign fundraising is important, contributions, and the threat of losing future contributions, influence voting outcomes.

3. *Retention Concerns and Pro-Business Votes*

There are at least two causal pathways by which campaign financing might be associated with judicial voting in favor of campaign contributors' interests. The first pathway is a selection bias among the set of judges who win elections. Wealthy business groups can often influence the outcomes of judicial elections by contributing substantial campaign funds to favored candidates. Hence, judges that are sympathetic to the views of interest groups are more likely to win elections. Campaign finance support from business groups would then be correlated with pro-business votes on the bench at least in part because business groups directed the necessary campaign financing to judges they correctly anticipated were ideologically likely to vote in their favor.

A second pathway by which campaign financing may affect judicial outcomes is more direct but equally plausible. Once elected, any judge may have the incentive to favor business interests in their judicial decisions in the hopes of obtaining more campaign support from business groups in future elections. Thus, judges who are not ideologically or otherwise predisposed to vote in favor of business interests might vote to curry financial support from those business interests.

These two causal pathways are both empirically likely and mutually reinforcing, but we attempt to measure the independent importance of each pathway of influence. First, we test whether the results are similar in states that select judges in partisan elections but use different methods to retain judges. In the period covered by the data, three states—Illinois, New Mexico, and Pennsylvania—employed partisan elections to select judges but used unopposed retention elections

to retain judges. If judges in these three states were also more likely to cast pro-business votes, this would suggest a selection bias among the set of judges who win elections because wealthy business groups are able to influence the original election outcomes. In contrast, if judges' voting in these three states more closely resembles the voting of judges facing reappointment or retention elections—that is, they are no more likely to favor business litigants—then the results would suggest that it is not the selection bias, but rather the need to raise future campaign funds from wealthy interest groups, that causes pro-business judicial outcomes.

Table 5 reports the results from estimations that include an additional indicator variable for the three states that employ partisan elections to select judges but use unopposed retention elections to retain judges. The table shows the coefficients and *t*-statistic for the new indicator variable; the other control variables are included in the analyses but are not reported in the interest of brevity. The results indicate that judges in states that employ partisan elections only to select judges are no more likely to cast pro-business votes than judges in the baseline categories. This supports the hypothesis that it is not a selection bias, but rather the need to obtain campaign support from business groups in future partisan reelections that induces judges to favor business interests.

TABLE 5
PARTISAN SELECTION AND VOTING FOR
BUSINESS LITIGANTS[147]

| | *Increased Probability of Vote for Business Litigant by Case Type* | | | |
	All Cases	*Labor Cases*	*Tort Cases*	*Contract Cases*
Partisan Election for Selection Only	0.011 (0.41)	0.091 (0.96)	0.058 (1.41)	0.042 (0.81)
Log Likelihood	-12,998	-1998	-6338	-4102

Second, we test whether elected judges vote differently in their last term before retirement than they do when facing retention. Thirty-seven states have mandatory retirement laws that compel judges to retire sometime between age seventy and seventy-five. By examining the voting of judges in their last term before mandatory

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[147] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. All control variables are included in the estimation but are not reported in the interest of brevity. *T*-statistics computed from standard errors clustered by state are reported underneath each marginal effect. The symbols "*," "+," and "a" represent significance at the 1%, 5%, and 10% levels, respectively.

retirement, we can test whether elected judges continue to favor business interests when they no longer need to attract campaign funds or advertising support. If retiring elected judges continue to favor business litigants, this would suggest that selection bias is largely responsible for the pro-business voting. In other words, it would indicate that elections produce more pro-business judges who remain pro-business even when they are retiring. In contrast, if elected judges vote differently as their retirement approaches, this would support the hypothesis that it is the need to raise future campaign funds that drives elected judges' pro-business voting.

Table 6 reports the results for the retention method indicators; the other control variables are included in the analyses but are not reported in the interest of brevity. The statistically insignificant results suggest that, in the last term before mandatory retirement, the favoritism toward business litigants by judges facing partisan and non-partisan elections essentially disappears. Compared to the baseline category, these judges are no more likely to favor the business litigant in any category. These results support the hypothesis that it is the need to obtain future campaign support that influences how elected judges vote; when these judges no longer need to gain and maintain the support of wealthy business groups, they are less likely to favor business interests.

TABLE 6
RETIRING JUDGES AND VOTING FOR
BUSINESS LITIGANTS[148]

Election Method	Increased Probability of Vote for Business Litigant by Case Type			
	All Cases	Labor Cases	Tort Cases	Contract Cases
Partisan or Nonpartisan Reelection	-0.009 (0.76)	-0.008 (0.50)	0.006 (1.22)	0.016 (0.69)
Retention Election	0.024[a] (1.69)	0.064[a] (1.89)	0.057* (2.61)	-0.051* (4.07)
Log Likelihood	-2879	-377	-1263	-997

Thus, although both causal pathways are likely responsible for some of the pro-business judicial outcomes in states with judicial elections, our results suggest that the prospect of future elections is

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[148] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. All control variables are included in the estimation but are not reported in the interest of brevity. *T*-statistics computed from standard errors clustered by retention method are reported underneath each marginal effect. The symbols "*," "+," and "a" represent significance at the 1%, 5%, and 10% levels, respectively.

causing some of the pro-business votes. If elected judiciaries were more pro-business only because elections produced more pro-business judges, then judges in the states that employ partisan elections to select judges but other methods to retain judges should cast as many pro-business votes as their brethren who are retained through partisan elections, and should do so with even frequency throughout their tenures. Because our results illustrate that neither of these is the case, we reject the selection bias explanation in favor of one that relies on judges' need to raise money for future campaigns.

C.   *Buying Judicial Decisions*

In short, our findings indicate that the growing concerns about the influence of campaign contributions in judicial elections have an empirical foundation. We find that elected judges who have previously received campaign contributions from business groups are more likely to vote in favor of business interests across all types of cases. To provide a rough guide to the magnitude of the relationship, we find that a $1000 contribution increases the average probability that a judge would vote for a business litigant by 0.03%, while a $1,000,000 contribution increases the average probability that a judge would vote for a business litigant in any case by 30%. In an informal sense, the millions of dollars in campaign contributions spent on judicial elections appear to have "bought" the judicial decisions that business groups want.

Of course, the causal explanation for the relationship between campaign contributions and judicial decisions in favor of campaign contributors is likely complex. We do not claim that specific judges are trading their votes on the bench for campaign contributions in any explicit quid pro quo exchange. We believe instead that the relationship between contributions and judicial decisions is likely explained, at least in part, by two familiar causal pathways. First, contributors direct their donations to judicial candidates who are most likely to support their interests once on the bench. Campaign money therefore flows to candidates already aligned with contributors' interests on ideological or other grounds who need less financial persuasion to decide cases as their contributors want. This selection effect requires no assumption about the financial motivations of the judges themselves. Second, judges worry prospectively about receiving future reelection campaign contributions from their past contributors (or perhaps from new ones with similar interests). As a result, judges may be inclined to maintain themselves as attractive candidates to their campaign contributors by deciding cases in ways that would benefit the contributors' interests. Here, we assume that judges are only human and may

be induced by political incentives to vote in ways that facilitate their reelection. Our results for judges facing mandatory retirement provide evidence of this causal pathway.

Our study does not claim to definitively tease apart which of these causal explanations is most responsible for the relationship we find. Our methods, and the methods of social science as a general matter, cannot entirely unravel the underlying endogeneity in this and other studies of campaign finance.[149] Instead, we believe that both causal explanations are likely to be correct to varying degrees, and for our purposes, the causes are only secondarily important. Under either causal explanation, we find that campaign contributions are highly effective in electing judges who are more likely to decide cases in favor of contributors' interests by a statistically significant margin. However, we should underscore that we find evidence for both explanations and argue that judges appear biased at least in part by the prospective need for campaign contributions in future elections. Judges decide cases involving contributors' interests differently when they may need future support than when they do not. Specifically, we find that retiring judges who no longer need to curry favor with wealthy business groups are less likely to favor business interests than sitting judges who still do.

In the rest of the Article, we explore how the structure of judicial elections contributes to or minimizes the relationship between campaign contributions and judicial decisions. In this Part, we aggregated data across all types of elections—partisan, nonpartisan, and retention elections. In the next Part, by contrast, we disaggregate the data and examine whether the same relationship between contributions and favorable decisions persists across different systems of judicial elections or whether it occurs only in partisan elections. Along these lines, we consider what special role political parties might play in the process of linking campaign money and judges.

III
DOES THE ELECTION SYSTEM MATTER? PARTISAN V. NONPARTISAN JUDICIAL ELECTIONS

Roughly nine out of ten state judges must win retention through some form of reelection,[150] but judges who must run for reelection under a partisan election system may face greater political pressure

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[149] *Cf.* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 798 (1990) (noting that empirical work has been unable to show that campaign contributions directly influence legislators to vote differently than they otherwise would have).

[150] Schotland, *supra* note 8, at 1105.

than judges under nonpartisan elections and other types of retention systems. The linkage of partisan politics to judicial elections may make a critical difference in the character of judicial elections because of the involvement of political parties.

In this Part, we first explore the basic nature of political parties and then test whether the influence of campaign fundraising on judicial decisions is different among judges facing partisan, as opposed to nonpartisan, elections. When we distinguish partisan-elected judges' decisions from nonpartisan-elected judges' decisions, we find that the influence of campaign contributions on judicial decisions is limited almost exclusively to judges facing partisan elections.

A. The Role of Political Parties and Judicial Elections

Political parties are by definition institutions that coordinate political activity among myriad actors across every branch and level of government. Though constitutional separation of powers effectuates a horizontal segregation of policymaking authority that may shield the judiciary somewhat from other branches of government,[151] political parties bridge that formal separation of power with informal political cooperation.[152] Parties are natural bundling agents that coordinate sprawling political coalitions across all types of policy domains and venues.[153] To the extent that they become involved with judicial elections, they help connect judges and judicial candidates to the larger activity of the party, for better or worse.[154]

Political parties therefore may increase the political stakes of judicial elections in partisan systems relative to nonpartisan systems. Of course, parties desire and support judges whose decisions will be consistent with their respective policy goals irrespective of the system of judicial selection and retention. Parties are, in large part, coalitions that have at their core some commitment to certain policy interests and therefore should promote judicial candidates who advance those

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[151] *Cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2365 (2006) (observing that separation of powers ensures that "when there is no legislative-executive consensus on policy, judicial review *can* be significantly countermajoritarian").

[152] *See id.* at 2329 ("Intraparty cooperation . . . smoothes over branch boundaries and suppresses the central dynamic assumed in the Madisonian model.").

[153] *See generally* John H. Aldrich, Why Parties? The Origin and Transformation of Political Parties in America (1995) (arguing that vast modern political parties are necessary to solve fundamental problems of democracy); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 Iowa L. Rev. 131 (2005) (defining parties as bundles of political relationships, best understood in political, supralegal terms).

[154] *See, e.g.*, Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, 39 Willamette L. Rev. 1357, 1362 (2003) (describing heavy party involvement in partisan judicial elections).

interests under nonpartisan elections as well as partisan elections.[155] Compared to nonpartisan elections and other types of retention systems, however, the opportunities and incentives for coordination between judicial candidates and political parties are greater in states with partisan elections.

One reason for such coordination is that, by running for election with a partisan affiliation, a judicial candidate finds her fortunes tied to those of a party, and vice versa. The judicial candidate expresses some public commitment to the broader policy agenda of the party, putting the party label into play and raising the stakes for both. Justice Thomas once explained, "A party nominates its candidate; a candidate often is identified by party affiliation throughout the election and on the ballot; and a party's public image is largely defined by what its candidates say and do."[156] Each partisan candidate therefore affects the credibility and attractiveness of the party label, and the party has great incentive to monitor judicial elections and the performance of party candidates.[157] Bad candidates will harm the party's reputation by association while good candidates have the potential to enhance the party's reputation. To protect their brands, parties may therefore invest more heavily in partisan judicial elections than in nonpartisan elections and other retention systems and press for greater coordination between themselves and their judicial candidates.

Parties can act on their interest in judicial candidates through several mechanisms. First, they can play a larger role in recruiting attractive candidates in states with partisan judicial elections. Because the party label will be associated with judicial candidates, parties care to a greater degree about recruitment of candidates with stronger qualifications and electoral marketability. Indeed, studies suggest that judges chosen by partisan election may be stronger candidates from the standpoint of certain objective criteria for productivity than judges chosen by nonpartisan election and other selection methods.[158] Parties also can be expected to be careful to recruit candidates who will be

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[155] *Cf.* Champagne, *supra* note 14, at 1421 ("Political parties jockeying for power in the selection of state court judges is an ancient political rite.").

[156] Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 469 (2001) (Thomas, J., dissenting).

[157] *See generally* ALDRICH, *supra* note 153, at 290 (explaining that parties cultivate and protect their "brand name," which connects candidates with voters); GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 2 (1993) (arguing that parties are "legislative cartel[s]" that monitor and seek to advance their own public image by monitoring and disciplining candidates).

[158] *See* Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010) (finding that while appointed judges write higher quality opinions, elected judges write more opinions, focusing on service to voters).

more certain to remain loyal to and reliably support the party's policy interests once in office.[159] Along the same lines, parties can be expected to deter unattractive candidates from running as their candidates.[160]

Second, parties might support their favored candidates with campaign funding. Parties are distinct from other types of interest groups in that their overriding purpose is to elect preferred candidates to public office. For this reason, they continually develop, adapt, and maintain an institutional apparatus of campaign resources that can be efficiently deployed to support party candidates in electoral competition.[161] Part of that apparatus is expertise and endorsements from experienced and well-known political professionals who can help candidates of all types, including candidates for judicial office. More obviously, parties are skilled at campaign fundraising from a ready number of sources. Indeed, in a larger sense, a political party is a diffuse political coalition that includes a regular group of campaign donors who willingly contribute money.[162] The support of political parties can thus help judicial candidates raise money more efficiently, and, when necessary, in greater amounts.

Third, parties may protect their past and ongoing investments in judicial candidates, and assess future ones, by monitoring the performance of judges once in office. Judges in office in partisan-elected states know the importance of political parties and understand that parties and party success have a central role in putting and keeping them in

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[159] *See* Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 646 (1996) (Thomas, J., concurring in judgment and dissenting in part) ("The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes.").

[160] Although the process by which judicial candidates are selected by parties to run in partisan elections differs from state to state, a lack of party leadership support can be effectively fatal to one's judicial candidacy. *See* Ellen D. Katz, *Barack Obama, Margarita Lopez Torres, and the Path to Nomination*, 8 ELECTION L.J. 369, 371, 374–76 (2009) (illustrating point with case study from New York's judicial nomination process).

[161] *See* SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 43–53 (2009) (describing cooperation among party activists and networks of campaign donors to control party nominations); Paul S. Herrnson, *The Importance of Party Campaigning*, 20 POLITY 714, 717 (1988) (describing, among other things, parties' "brokerage function" between candidates and campaign professionals and fundraisers); Gregory Koger, Seth Masket & Hans Noel, *Cooperative Party Factions in American Politics*, 38 AM. POL. RES. 33, 35 (2010) (describing modern parties as expansive social networks that include campaign consultants and donors).

[162] *See* MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 3–7 (2008) (describing party-based networks of campaign donors and interest groups that regularly support party candidates).

office.[163] One of their goals on the bench may therefore be to ensure that their respective parties continue to provide that critical support for their reelection. Judges facing partisan reelection thus may be more reluctant than other judges to cross their respective parties and decide cases contrary to that party's interests. Indeed, because partisan judicial elections feature greater voter turnout and more predictably partisan voting patterns on judicial candidates than nonpartisan elections, party support is more critical for electoral success.[164] Even if parties do not issue quid pro quo threats, parties might be expected to discipline judges in partisan systems and discourage them from straying too far from the party line.[165] One aspect of such unwanted deviation could be deciding cases against the interests of the party's financial supporters.

Finally, the very use of partisan elections in certain states is likely to attract a different type of judicial candidate in the first place. As we have just described, a judicial candidate facing a partisan election may need to behave and conform to party preferences much like candidates for legislative and executive office. Not every prospective judge may be comfortable with the raw politics of partisan elections, and, as a result, many potential candidates may opt not to run at all for judicial office in partisan states.[166] In other words, the use of partisan elections to appoint and retain judges may exert a significant selection effect: It is likely to encourage candidates who are already predisposed toward party politics and toward coordination with partisan actors outside the judicial branch. Consistent with all the foregoing, one meta-study of partisan judicial elections concludes that "party is a dependable measure of ideology in modern American courts."[167]

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[163] *See* Cheek & Champagne, *supra* note 154, at 1379–80 (illustrating parties' significant role by finding that affiliation with party that wins in other races is strongest predictor of electoral success in partisan judicial elections); L. Douglas Kiel, Carole Funk & Anthony Champagne, *Two-Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290, 292 (1994) (finding similarly that fortunes of partisan judicial candidates were closely tied to their party's success at top of ticket).

[164] BONNEAU & HALL, *supra* note 13, at 41–45 (noting less "ballot roll-off"—greater voter participation—in partisan judicial elections than in nonpartisan judicial elections); Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147 (2007) (same).

[165] *See* MASKET, *supra* note 161, at 53 ("[Parties] maintain leverage over officeholders by threatening to withhold . . . resources or to channel them toward a more faithful candidate.").

[166] *See* George W. Soule, *The Threats of Partisanship to Minnesota's Judicial Elections*, 34 WM. MITCHELL L. REV. 701, 723 (2008) ("Many lawyers who would be good judges have little political background and are wary of running a high-profile election campaign.").

[167] Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999).

In short, we expect that judges elected under partisan elections will behave differently than judges elected under nonpartisan elections when it comes to campaign financing because of the greater role that political parties can be expected to play in partisan elections. Indeed, when we disaggregate our results between judges elected under partisan elections and judges elected under nonpartisan elections, we reach very different findings. We find surprisingly that, while campaign money is important in influencing judicial decisions in general, there is a statistically significant relationship between money and decisions only in partisan elections, and not in nonpartisan ones.

B. *Comparing Partisan and Nonpartisan Elections: Empirical Analysis*

To test whether business groups' influence differs among judges facing partisan and nonpartisan elections, we empirically isolate the influence on partisan-elected judges' voting from the influence on nonpartisan-elected judges' voting. We first re-estimate model (1) to test the relationship between judges' voting and direct campaign contributions from business groups. Although we use similar data, models, and techniques as the previous analysis, our new estimation, now called model (3), includes separate variables for direct campaign contributions to judges facing partisan elections and direct campaign contributions for judges facing nonpartisan elections. The equation for this model is:

$$(3) \ \text{Prob}(\textit{BusVote=1} \,|\, x) = \phi \ (\beta_0 + \beta_1 * \textit{Contributions}_p + \beta_2 * \textit{Contributions}_{np} + \beta_3 * \textit{Judge} + \beta_4 * \textit{Case} + \beta_5 * \textit{State})$$

where *Contributions*$_p$ is the direct campaign contributions to judges facing partisan elections, and *Contributions*$_{np}$ is the direct campaign contributions to judges facing nonpartisan elections.

Next, we re-estimate model (2) to measure the full effect of business groups' influence on partisan-elected and nonpartisan-elected judges. Our new estimation, now called model (4), includes separate indicator variables for judges facing partisan elections, judges facing nonpartisan elections, and judges facing retention elections. Thus, in contrast to model (2), which aggregated the influence of business groups on judges in both partisan and nonpartisan systems, model (4) isolates business groups' influence on judges facing partisan reelection from business groups' influence on judges facing nonpartisan reelection or a retention election. The estimation equation for this model is:

(4) $\text{Prob}(BusVote=1 \mid x) = \phi \, (\beta_0 + \beta_1 * Partisan \; Election +$
                              $\beta_2 * Nonpartisan \; Election +$
                              $\beta_3 * Retention \; Election +$
                              $\beta_4 * Judge + \beta_5 * Case + \beta_6 * State)$

where *Partisan Election* is an indicator variable for judges facing par-
tisan elections, *Nonpartisan Election* is an indicator variable for judges
facing nonpartisan elections, and *Retention Election* is an indicator
variable for judges facing unopposed retention elections.

All of the other variables remain unchanged.[168] The dependent
variable in both model (3) and model (4) is the probability that the
judge votes for the business litigant in each case. The variables in
Judge include the PAJID ideology measure, the length of time in
years that the individual judge has served on the court, and the length
of time in years until the judge's next retention event. *Case* includes
indicator variables for whether the opposing litigant is a person or a
government branch or representative, the general issue in the case,
the general industry of the business litigant, and whether the indi-
vidual judge's vote is a dissenting vote. *State* includes variables that
indicate the percentage of years since 1960 that each state's legislature
had a Republican majority, whether the state's supreme court has dis-
cretion to grant review, and whether the judges sit en banc, as well as
an indicator for southern states. Both models also include a set of year
indicator variables, and the *t*-statistics are computed from standard
errors clustered by retention method to correct for possible clustering
effects.

1. Direct Campaign Contributions to Partisan-Elected and Nonpartisan-Elected Judges

First, we report the estimation results for model (3), illustrating
the relationship between direct campaign contributions from business
groups and the votes of judges facing partisan and nonpartisan elec-
tions. Table 7 reports the probit results for the four different catego-
ries of case types. The other control variables in model (3) are
included in the analyses but are not reported in the interest of brevity.
We find a statistically significant, positive relationship between the
level of campaign contributions from business groups and partisan-
elected judges' votes in favor of business litigants in all case types. The
magnitudes of the coefficients show the average percentage point
increase in the probability of a partisan-elected judge voting for a bus-
iness litigant for each $1000 contribution from a business group. For

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[168] *See supra* Part II.A.3.

example, a $1000 contribution would increase the average probability that a partisan judge would vote for a business litigant in a torts case by 0.06%. Hence, a $1,000,000 contribution would increase the average probability that a partisan judge would vote for a business litigant in a tort case by an astounding 60%.

TABLE 7

CAMPAIGN CONTRIBUTIONS AND VOTING FOR
BUSINESS LITIGANTS[169]

Case Type	*Increased Probability of Vote for Business Litigant by Case Type*			
Judges Facing Partisan Election	*All Cases*	*Labor Cases*	*Tort Cases*	*Contract Cases*
$1000 Contribution from Business Group	0.0003[a] (1.65)	0.0004[+] (2.16)	0.0006[a] (1.67)	0.0002[+] (2.19)
Log Likelihood	-11,435	-1778	-5511	-3616
Percentage of Contributions from Business Groups	0.006* (3.04)	0.006[a] (1.94)	0.009* (3.69)	0.006* (2.90)
Log Likelihood	-11,408	-1778	-5490	-3608
Judges Facing Nonpartisan Election	*All Cases*	*Labor Cases*	*Tort Cases*	*Contract Cases*
$1000 Contribution from Business Group	0.0004 (0.35)	0.0007* (5.51)	0.0002 (0.85)	0.0002 (0.08)
Log Likelihood	-10,187	-1535	-4957	-3326
Percentage of Contributions from Business Groups	0.001 (1.25)	0.006[+] (2.32)	0.002 (1.16)	0.002[a] (1.74)
Log Likelihood	-10,185	-1536	-4955	-3324

Moreover, business groups' share of total contributions is positively related to partisan-elected judges' votes in favor of business litigants in all case types. The magnitudes of the coefficients show the increase in the likelihood of a judge voting for the business litigant given a one-percentage-point increase in business groups' share of total contributions. Thus, a one-percentage-point increase would increase the probability that a partisan judge would vote for the business litigant in tort cases by 0.9%.

In contrast to the results for partisan-elected judges, the results suggest that campaign contributions only influence nonpartisan-elected judges' votes in labor cases. The results for the other case

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[169] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. All control variables are included in the estimation but are not reported in the interest of brevity. *T*-statistics computed from standard errors clustered by retention method are reported underneath each marginal effect. The symbols "*," "+," and "a" represent significance at the 1%, 5%, and 10% levels, respectively.

types are not statistically significant, indicating that money has no systematic influence on nonpartisan-elected judges' voting in these cases. Put simply, there is a major difference between partisan and nonpartisan elections when it comes to the association of campaign contributions with judicial outcomes favorable to those contributors.

Of course, our data, while comprehensive, are limited to the years 1995 through 1998. This time period precedes an increase in campaign spending following the Court's decision in *Republican Party of Minnesota v. White*.[170] Nonetheless, our findings are, at minimum, quite suggestive about the influence of money in judicial elections today as well, though we acknowledge that the recent increases in spending for judicial campaigning may mean that campaign contributions exert a greater influence on judicial voting, not only in partisan elections, as we find, but in nonpartisan elections as well.

2. Retention Method and Pro-Business Votes

The results from the direct campaign contribution data suggest that money influences judicial voting in partisan systems significantly more than in nonpartisan systems. Yet, because model (3) does not include financing of media campaigns, attack campaigns, or support for opposing candidates, we employ model (4) to more fully measure the relationship between campaign fundraising and judicial outcomes. This estimation tests whether judges facing partisan reelections, nonpartisan reelections, and retention elections routinely decide cases more favorably to business interests than other judges.

Table 8 reports the probit results for the four different categories of case types. The coefficients reveal the increase in the probability of a judge casting a vote for the business litigant under the particular retention method, assuming all of the other variables are equal to the average variables in the sample. The results indicate that judges who need to win a partisan election to keep their seat are substantially more likely to vote in favor of a business litigant in all case types than are judges who do not face partisan reelection. The magnitudes of the marginal effects are considerable and highly statistically significant; the probit results suggest that a judge facing a partisan election is approximately 12% more likely to vote in favor of a business litigant than judges from the baseline categories. This implies that for every 100 cases in which judges from other systems vote against business litigants, judges facing partisan reelections vote for the business litigant in 12. With over 2000 cases involving business litigants appearing

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[170] 536 U.S. 765 (2002).

in state supreme courts each year, our results suggest that partisan systems produce different judicial outcomes in hundreds of cases.

TABLE 8
RETENTION METHOD AND VOTING FOR
BUSINESS LITIGANTS[171]

Election Method	Increased Probability of Vote for Business Litigant by Case Type			
	All Cases	Labor Cases	Tort Cases	Contract Cases
Partisan Reelection	0.12* (11.37)	0.08* (2.47)	0.16* (7.50)	0.14* (3.39)
Nonpartisan Reelection	-0.01 (0.44)	-0.04 (0.68)	-0.05 (1.37)	0.03 (0.97)
Retention Election	0.02 (0.78)	-0.009 (0.20)	0.014 (0.38)	-0.009 (0.33)
Number of Observations	19,026	2952	9348	6029
Log Likelihood	-12,998	-1999	-6339	-4102

In contrast, the statistically insignificant results for judges facing nonpartisan and retention elections indicate that these judges are no more likely to favor business litigants than the baseline judges. Once again, our results support the hypothesis that the influence of money in judicial elections is almost entirely confined to partisan systems.

3. *Retention Concerns in Partisan and Nonpartisan Elections*

Next we explore whether elected judges become more likely to vote for business litigants as their retention event approaches. Because interest groups may remember that, even though a judge is casting pro-business votes today, she had cast anti-business votes at the beginning of her term, it is not clear that judges have a real incentive to vote in favor of interest groups only as their next election approaches. However, prior studies have suggested that the behavior of elected judges does in fact change in response to an impending retention event; judges deviate from earlier voting patterns, impose longer criminal sentences, and side with the majority in death penalty cases.[172]

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[171] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. All control variables are included in the estimation but are not reported in the interest of brevity. *T*-statistics computed from standard errors clustered by retention method are reported underneath each marginal effect. The symbols "*," "+," and "ᵃ" represent significance at the 1%, 5%, and 10% levels, respectively.

[172] *See supra* notes 127–28 (collecting sources).

To test the influence of an approaching retention event on judges' votes in favor of business litigants, we re-estimate model (4) with an interaction term between the retention method indicators and the number of years left until the next retention.[173] Table 9 reports the coefficients and *t*-statistics of the interaction variables; the other control variables are included in the analyses but are not reported in the interest of brevity. The coefficients on the interaction terms reveal the marginal increase in the probability that a judge from each retention method votes for the business litigant as the judge gets one year closer to retention.

TABLE 9
VOTING FOR BUSINESS LITIGANTS AS
RETENTION APPROACHES[174]

Retention Method Interacted with Years to Retention	*Increased Probability of Vote for Business Litigant by Case Type*			
	All Cases	*Labor Cases*	*Tort Cases*	*Contract Cases*
Partisan Reelection * Years to Retention	0.009* (20.74)	0.013* (3.19)	0.008* (7.49)	0.007* (4.29)
Nonpartisan Reelection * Years to Retention	-0.007* (3.69)	-0.006* (22.68)	-0.01* (5.29)	-0.007* (2.74)
Retention Election * Years to Retention	-0.002* (2.55)	-0.002 (0.73)	-0.002* (13.29)	-0.001 (0.54)
Number of Observations	19,026	2942	9348	6029
Log Likelihood	-12,993	-1991	-6321	-4094

The results indicate that judges facing partisan elections become slightly more likely to vote for business litigants in all case types as the next retention event approaches. For example, the probability that a judge facing a partisan election votes for the business litigant increases by 0.9% for each year closer to the next election. In contrast, most of the coefficients on the interaction variables for judges facing nonpartisan elections are negative, which indicates that judges facing non-

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[173] The variables are actually the interaction between each retention method and the inverse of the years to retention. Because the longest number of years to retention during our sample is 12, the inverse of the years to retention is 13 minus the years to retention. Moreover, the sample is limited to judges that do not have life tenure, so as to compare the impact of approaching retention on judges under different retention methods.

[174] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. All control variables are included in the estimation but are not reported in the interest of brevity. *T*-statistics computed from standard errors clustered by retention method are reported underneath each marginal effect. The symbols "*," "+," and "a" represent significance at the 1%, 5%, and 10% levels, respectively.

partisan elections actually become *less* likely to favor business litigants as the next election approaches. Nonpartisan-elected judges, who are, relative to partisan-elected judges, not predisposed to favor business interests, may actually see electoral advantage in deciding cases in favor of government or individual litigants and *against* businesses as the election draws nearer.

4.   *Political Parties and Pro-Business Votes*

Finally, we explore the relationship between political party, retention method, and judicial voting. In a previous empirical study, Shepherd found that, regardless of the method of judicial selection, Republican judges are more likely than Democratic judges to decide for business litigants.[175] Our analysis here tests whether this distinction between Republican and Democratic judges exists more specifically among judges facing partisan elections. Differences in voting patterns among Republican and Democratic judges could be caused simply by different ideological backgrounds or by the fact that judges from different parties expect to obtain campaign support from different interest groups. While business groups donate to approximately the same number of Democratic and Republican judges in partisan elections, the average total contribution to Republican judges is about twice that to Democratic judges.[176] Thus, Republican judges may feel increased pressure to favor business interests.

To test these theories, we re-estimate model (4) with an interaction term between the judges' party affiliation and the retention method indicators. Table 10 reports results from the probit model that includes the interaction variables. The table shows the coefficients and *t*-statistics for the retention method indicators and the interaction terms; the other control variables are included in the analyses but are not reported in the interest of brevity. The coefficient on each retention method variable indicates the increase in the probability that a *Democratic* judge facing that retention method will vote for the business litigant, compared to the baseline categories. The coefficient on the interaction variables indicates the additional increase in the probability, compared to the Democratic judges, that a *Republican* judge facing that retention method will favor the business litigant.

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[175] *See* Shepherd, *supra* note 17.

[176] According to the data in our sample, the average contribution to Republican judges in partisan elections is $90,000, and the average contribution to Democratic judges in partisan elections is $40,000.

TABLE 10
PARTY AFFILIATION AND VOTING FOR
BUSINESS LITIGANTS[177]

Election Method and Party Affiliation	Increased Probability of Vote for Business Litigant by Case Type			
	All Cases	Labor Cases	Tort Cases	Contract Cases
Partisan Reelection	0.03[a] (1.93)	0.01 (0.42)	0.02 (1.17)	0.13* (3.43)
Republican and Partisan Reelection	0.19* (14.51)	0.20* (9.69)	0.21* (8.51)	0.14* (15.12)
Nonpartisan Reelection	-0.04 (1.51)	-0.07 (1.19)	-0.12* (3.55)	0.04 (1.15)
Republican and Nonpartisan Reelection	0.08* (54.33)	0.13* (21.96)	0.15* (50.84)	0.05* (6.80)
Retention Election	0.01 (0.43)	0.007 (0.19)	-0.04 (0.99)	0.03 (1.01)
Republican and Retention Election	0.02+ (2.07)	0.008 (0.30)	0.02* (3.50)	-0.002 (0.23)
Number of Observations	16,212	2564	8062	5077
Log Likelihood	-11,013	-1721	-5398	-3435

The positive coefficients on the partisan election variable indicate that, in contract cases and in the aggregated category, even Democratic judges facing partisan elections are more likely to vote for business litigants than judges from the baseline categories.[178] The magnitudes of the coefficients reveal that Democratic judges facing partisan elections are, on average, 3% more likely to favor business litigants than judges facing gubernatorial reappointment, legislative reappointment, or with permanent tenure. These results suggest that business groups influence partisan-elected judges' voting regardless of a judge's party affiliation.

The statistically significant coefficients on the interaction variables, however, indicate that Republican judges facing partisan reelections are *even more likely* to favor business interests than their Democratic counterparts. The magnitudes of the probit coefficients

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[177] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. All control variables are included in the estimation but are not reported in the interest of brevity. *T*-statistics computed from standard errors clustered by retention method are reported underneath each marginal effect. The symbols "*," "+," and "a" represent significance at the 1%, 5%, and 10% levels, respectively.

[178] The total effect of the partisan reelection indicator on pro-business voting is the coefficient on the partisan reelection indicator plus the coefficient on the interaction variable multiplied by the mean percentage of Republican judges.

suggest that, among judges facing partisan reelection, Republican judges are 19% more likely to favor business interests than Democratic judges. In short, while partisan reelections change the behavior of both Democratic and Republican judges, they have a greater impact on Republican judges.

In contrast to the results for partisan-elected judges, most of the coefficients on the indicators for nonpartisan reelection and retention election are insignificant. These results indicate that Democratic judges in these systems are no more likely to favor business litigants than judges in the baseline categories. However, Republican judges facing nonpartisan reelections are still more likely to favor business litigants than their Democratic counterparts.

Thus, Republican judges under all elective systems are more likely to favor business litigants. However, only in partisan systems do campaign contributions from business groups also influence judicial decisions by Democratic judges.

IV

THE TENTATIVE CASE FOR NONPARTISAN
ELECTION OF JUDGES

Our results suggest that there is a basic difference between partisan and nonpartisan election systems that allows business groups to have more influence over judicial outcomes in the former. Party support is critical to judges seeking reelection. Parties help candidates raise money, finance advertising campaigns, formulate campaign strategy, and mobilize supportive voters.[179] Parties' goals are also very broad and long term; they want to assist all party candidates for elected offices in obtaining campaign funds from wealthy interest groups both now and in the future. Thus, parties may pressure any of their members in elected office to make decisions that favor wealthy interest groups. That is, because judges are dependent on party support in partisan elections, and because those parties want to curry favor with wealthy interest groups, parties may pressure judges to cast pro-business votes.

Following *Caperton*, many states have proposed various recusal reforms to ensure judicial impartiality in response to concerns about the influence of campaign contributions. Justice Kennedy noted in *Caperton* that states would be wise to "adopt recusal standards more

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[179] *See* Matthew J. Streb, *Partisan Involvement in Partisan and Nonpartisan Trial Court Elections*, *in* RUNNING FOR JUDGE, *supra* note 63, at 96, 104–10 (describing support provided by political parties to judicial campaigns).

rigorous than due process requires,"[180] and, taking his lead, the Michigan Supreme Court has proposed requiring court-wide review when a judge denies a motion for his or her disqualification.[181] The Michigan Supreme Court has also proposed requiring judges to publish their reasons for ruling on a party's motion for disqualification.[182] Similarly, West Virginia legislators have proposed the creation of a judicial recusal commission, an independent body composed of former judges that would review and rule on all disqualification motions.[183] Other states, including California, Montana, Nevada, Texas, Washington, and Wisconsin, have proposed mandatory disqualification of any judge who has accepted a campaign contribution over a predetermined threshold amount.[184] The threshold levels range from $250 in Montana to $50,000 in Nevada.[185]

Our findings, however, suggest that a simpler, though more fundamental, reform—the replacement of partisan elections with nonpartisan elections or merit plans—holds more promise than academic skeptics believe.[186] We find that campaign contributions are associated with judicial decisions in favor of campaign contributors' interests only under partisan elections. To the degree that *Caperton* and

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[180] Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267 (2009) (quoting Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002)).

[181] Brennan Ctr. for Justice, Recusal Reform in the States: 2009 Trends and Initiatives (July 28, 2009), *available at* http://www.brennancenter.org/page/-/2009DISQUALIFICATIONREFORMINSTATES-3.doc.

[182] *Id.*

[183] James Sample & Michael Young, *Invigorating Judicial Disqualification: Ten Potential Reforms*, 92 Judicature 26, 31 (2008).

[184] Brennan Ctr. for Justice, *supra* note 181.

[185] *Id.*

[186] Skeptics challenge the virtues of nonpartisan judicial elections on various grounds. *See, e.g.*, Bonneau & Hall, *supra* note 13, at 135–37 (arguing that nonpartisan elections do not produce better quality judges than partisan elections and that partisan elections may actually produce better judges); Averill, *supra* note 16, at 322 (listing undesirable features of nonpartisan elections, including likelihood of corruption, ability to be politically influenced, and low and uninformed voter turnout); Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 Wis. L. Rev. 21, 64 (concluding that judges are more responsive to public opinion in nonpartisan elections than in partisan elections because of absence of identifying party label); Melinda Gann Hall, *Voluntary Retirements from State Supreme Courts: Assessing Democratic Pressures To Relinquish the Bench*, 63 J. Pol. 1112 (2001) (finding that electoral considerations do not influence voluntary retirements in nonpartisan elections, indicating failure of democratic accountability mechanism); Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 Judicature 184, 189 (1991) (concluding that nonpartisan elections offer no advantages over partisan elections and remove useful cues for voters). For skepticism about the very problem of judicial bias, see Eric A. Posner, *Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal Reform*, 75 U. Chi. L. Rev. 853, 853–58 (2008), which explains that judicial bias is not harmful in a broad range of circumstances and that reforms may in fact impose costs on other values.

reform efforts are motivated by a concern about the biasing effect of campaign fundraising considerations, we do not find such an effect for judges elected under nonpartisan elections. This empirical finding underscores the fundamental unreliability of scattershot anecdotal claims about the equivalence between partisan and nonpartisan elections for judges. Our analysis of comprehensive quantitative data across all fifty states indicates that the type of election system matters.

Our findings are obviously relevant to ongoing debates in many states, given new salience by *Caperton*, about the relative advisability of partisan and nonpartisan judicial elections. In fact, many states that use partisan elections have recently begun considering whether to adopt nonpartisan elections for judicial office, in part as a response to what are seen as excessively expensive and politicized campaigns. Some states have already done so,[187] and other states are currently considering changes.[188] Even in states that have replaced partisan elections for judges with nonpartisan ones, a public debate continues regarding whether the change has been a good one and whether it ought to be reversed.[189] What is more, although only nine states use partisan elections to select their supreme court justices, many states hold partisan elections to elect judges to their lower courts and may still have to consider whether or not to adopt nonpartisan elections for these positions.[190] Our findings are instructive to all these policy debates and suggest that nonpartisan elections would limit the influence of money more effectively than skeptics predict if adopted by states that currently use partisan elections, such as West Virginia, whose judicial election system was the focus in *Caperton*.

However, critics argue that nonpartisan judicial elections combine only the appearance of nonpartisanship with the ugly reality of partisan elections. They claim that, even when judicial elections are nominally nonpartisan, and even when party labels do not appear on the ballot, political parties generally remain free under the First

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[187] Arkansas, Georgia, Kentucky, Mississippi, and North Carolina have adopted nonpartisan elections for at least some judicial positions. BONNEAU & HALL, *supra* note 13, at 3.

[188] For instance, Pennsylvania has long considered proposals to adopt nonpartisan elections or merit selection in place of partisan elections for judicial positions. *See* Webster, *supra* note 57, at 22–24 (detailing longstanding consideration of issue in Pennsylvania and Texas).

[189] *See* Schotland, *supra* note 8, at 1082–83 (describing judicial reforms under consideration, including returning to partisan elections, in variety of states).

[190] *See supra* note 39 and accompanying text. Trial court judges are elected through partisan elections in 22% of jurisdictions, and trial court judges face partisan elections for retention in 14% of jurisdictions. ROTTMAN ET AL., *supra* note 40, at 34 tbl.7. Twenty-one states used partisan elections for at least some judgeships compared to twenty states that use nonpartisan elections for at least some judgeships. *Id.*

Amendment to endorse and campaign for judicial candidates in these nonpartisan races.[191] As a result, Lawrence Averill observes that "a nonpartisan election system may be the worst of all selection methods" because "nonpartisan elections are often so in name only [and] parties still support certain candidates over others on a formal endorsement or informal endorsement basis."[192] Critics of non-partisan elections cite some of the worst examples of "noisier, nastier, and costlier" judicial races in states "that claim nonpartisan status but actually have heavy political party involvement, such as Michigan and Ohio."[193]

Another nonpartisan state, Georgia, was home to one of the most frequently cited examples of a noisy, nasty, and costly judicial race: the Georgia Supreme Court race between Leah Ward Sears and Grant Brantley in 2004. In what was ostensibly a nonpartisan election, both candidates enjoyed the endorsements and heavy campaign support of a major party. Each candidate was later sanctioned by the Georgia Committee for Ethical Judicial Campaigns, a nonpartisan public interest group focused on judicial ethics, which declared that "Democratic and Republican party involvement in Georgia judicial campaigns . . . threatened the state constitution's mandate for nonpartisan judicial elections."[194] Brantley was recruited by the Republican Party, whose spokesman described him as "someone whose record reflects the values of Georgia,"[195] and he was censured for receiving undisclosed in-kind Republican support. Sears received the benefit of more than $150,000 in television commercials bought by the Democratic Party of Georgia, including a joint television advertisement that may have clinched her victory during the closing days of the campaign.[196] In the wake of the race, one state judge commented that there had been "more partisan input than we've seen since judicial

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[191] *See, e.g.*, Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1416 (2003) (explaining that state provisions barring candidate endorsement by political parties are surely unconstitutional and citing cases); *cf.* Republican Party of Minn. v. White, 536 U.S. 765 (2002) (recognizing that First Amendment permits judicial candidates to announce views on how cases should be decided). *See generally* Kathleen M. Sullivan, Republican Party of Minnesota v. White*: What Are the Alternatives?*, 21 GEO. J. LEGAL ETHICS 1327, 1328–33 (2008) (discussing *White*).

[192] Averill, *supra* note 16, at 322.

[193] Cheek & Champagne, *supra* note 154, at 1362 (quoting Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, at 74).

[194] Jonathan Ringel, *Nonpartisan Voting Put in Jeopardy, Panel Reports*, FULTON COUNTY DAILY REP. (Atlanta), Dec. 20, 2004, at 1.

[195] Jonathan Ringel, *Republicans Recruiting for Sears Opponent*, FULTON COUNTY DAILY REP. (Atlanta), Apr. 21, 2004, at 1.

[196] Camille M. Tribble, Comment, *Awakening a Slumbering Giant: Georgia's Judicial Selection System After* White *and* Weaver, 56 MERCER L. REV. 1035, 1068–69 (2005).

races became nonpartisan in Georgia."[197] As a result of this experience, Georgia is one state that is considering a switch back to partisan judicial elections.[198]

Along similar lines, Chris Bonneau and Melinda Gann Hall argue empirically that campaign spending in nonpartisan elections for judicial office is actually *higher* on average than in partisan elections. They claim that, "[r]ather than reducing demands on judges to solicit campaign contributions and generate large campaign war chests, nonpartisan elections do the opposite."[199] The reason for greater campaign fundraising and spending in nonpartisan elections may be the greater need for publicity and advertising in the absence of the party label to provide information about the candidates to voters. Under any circumstance, judicial elections tend to be low-information affairs in which voters are not likely to be very familiar with most candidates or their qualifications. In partisan elections, judicial candidates can at least rely on the party label to gain campaign and voting support from affiliated segments of citizens.[200] However, in nonpartisan elections, judicial candidates must advertise to an even greater degree to attract public attention and identify themselves ideologically to potential supporters. As a result, the "increased spending that characterizes nonpartisan elections serves to intensify the efforts that candidates must make to elicit funds and exacerbates the problems of the seeming impropriety of doing so."[201] For this reason, critics argue that instituting nonpartisan elections for judges will have either no effect, or even a counterproductive one.[202] In fact, based on the experience in states such as Georgia already running nonpartisan elections for judges, they argue that instituting nonpartisan elections is likely to lead to higher levels of campaign spending, and therefore greater pressures on fundraising.

As an initial matter, we disagree with Bonneau and Hall that the best interpretation of the spending data is any conclusion that nonpartisan elections feature more spending than partisan ones. It is absolutely clear that aggregate spending in partisan judicial elections is

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[197] Greg Bluestein, *State Bar May Back Campaign Reform Bill*, FULTON COUNTY DAILY REP. (Atlanta), Dec. 13, 2004, at 1 (quoting Judge Benjamin W. Studdard III).

[198] *See* Schotland, *supra* note 8, at 1082 (noting Georgia's proposed change).

[199] BONNEAU & HALL, *supra* note 13, at 132.

[200] *See* HARRY P. STUMPF & JOHN H. CULVER, THE POLITICS OF STATE COURTS 46 (1992) ("In partisan races, the political party label may give most voters all the information they seek.").

[201] BONNEAU & HALL, *supra* note 13, at 132.

[202] *See id.* ("Through the lens of campaign spending, nonpartisan elections are not the best choice among elections for minimizing the politics of big money in state supreme court contests.").

higher on average than in nonpartisan judicial elections by every available measure.[203] Bonneau himself acknowledges elsewhere that average campaign spending was higher in partisan judicial elections than in nonpartisan ones from 1990 to 2004.[204]

Bonneau and Hall conclude that campaign spending is higher in nonpartisan elections only when several other differences between partisan and nonpartisan systems are held constant. That is, if factors such as whether an election is contested, the incumbent's electoral vulnerability, the attractiveness of the seat, the political and institutional context, and the candidate pool were the same among partisan and nonpartisan systems, then their regressions report that campaign spending would be higher in nonpartisan systems.[205] However, these are the critical differences between partisan and nonpartisan systems such that Bonneau and Hall effectively control away virtually all substantive differences between partisan and nonpartisan elections. In other words, we argue that partisan elections differ materially from nonpartisan ones in all these substantive ways largely because of heavier party involvement in partisan elections. Whether partisan elections directly result in higher spending, or whether they cause differences in competitiveness, seat attractiveness, and candidate pool, which then result in higher spending, the bottom line is that campaign spending has always been higher in partisan elections.

However, even if we were to stipulate that nonpartisan elections increase aggregate campaign spending, we find here that the spending in nonpartisan elections appears to matter less where it counts—judicial decisions on the bench. It is easy to assume that higher levels of spending might lead ineluctably to greater pressure to raise campaign money and in turn to more predictably biased voting by judges in favor of campaign contributors, but our findings suggest otherwise. Levels of spending in nonpartisan elections are simply not associated with a statistically significant pattern of judicial decisions in favor of campaign contributors' interests.[206] Put simply, even if more money is spent in nonpartisan elections, it has had no predictable effect on judicial decisions over our period of study. What is more, judicial deci-

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[203] *See National Overview*, Nat'l Inst. on Money St. Pol., http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2010&abbr=0 (last visited Feb. 17, 2010) (showing total campaign expenditures for high court candidates across states); *supra* Table 2 (identifying states with partisan elections as highest spending). For example, in 2010, spending was greatest in Texas, Ohio, Alabama, and Arkansas, all four of which have either partisan elections or elections in which parties choose the nominees.

[204] Bonneau, *supra* note 5, at 63–64 ("In every election from 1990 to 2004, partisan elections were more expensive, on average, than nonpartisan elections.").

[205] Bonneau & Hall, *supra* note 13, at 131–32.

[206] *See supra* Table 7.

sions are certainly much less favorable toward contributors' interests under nonpartisan systems than in states with partisan elections.

We can infer the causal role of parties only cautiously based on our data, but the intuitive implications of our findings are reasonably clear. Under partisan elections, parties may selectively choose candidates and provide their critical support only to candidates already committed ideologically to favorable positions. Furthermore, the importance of political parties in partisan elections encourages them to monitor and allows them to discipline judges on the bench to a greater degree than in nonpartisan elections. Thus, judicial candidates in partisan elections are more predictably favorable toward their campaign contributors' interests at least in part because of the mediating role of the party in candidate selection and monitoring.

Indeed, political parties appear to be involved to a significantly greater degree with judicial elections, in almost every respect, when they are partisan than when they are nonpartisan. The actual involvement of political parties in the practical matters of campaigning in judicial elections has not been well studied. However, Matthew Streb's terrific study of party involvement with trial court elections, based on a survey of county party chairs in twenty-five states with varying methods of judicial selection, suggests that parties are substantially more involved in partisan elections than nonpartisan ones.[207] Streb finds that more than 70% of county party chairs report endorsing judicial candidates in partisan races, compared to just more than half who report party endorsements in nonpartisan races.[208] Along the same lines, about three out of four county chairs report coordinating campaigns with judicial candidates, conducting get-out-the-vote efforts with them, and organizing campaign events in partisan judicial races, but only about half of county chairs report doing the same for nonpartisan races.[209] Two-thirds of county party chairs report organizing fundraising events for and contributing money to judicial candidates in partisan races, compared to just more than 40% reporting the same in nonpartisan races.[210] In short, parties are significantly more involved in judicial campaigns when the race is partisan, and when their party label is on the ballot, than in nonpartisan races.

Our data suggest the greater involvement of parties in partisan elections as well. Both major parties spend more in partisan judicial elections than in nonpartisan judicial elections. On average, the major parties combined for a total contribution of $8444 per judicial candi-

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[207] *See* Streb, *supra* note 179, at 102.
[208] *Id*. at 109 tbl.6.5.
[209] *Id.* at 109 tbl.6.6.
[210] *Id.* at 105 tbl.6.2.

date in nonpartisan states, compared to a total contribution of $38,093 per judicial candidate in partisan states.[211] For the Republicans, the increase in partisan states was striking, from an average contribution of $4974 per candidate in nonpartisan elections to an average contribution of $30,189 in partisan elections. For the Democrats, the increase in partisan states was less dramatic but still significant, up from an average contribution per candidate of $2419 in nonpartisan elections to an average contribution of $7904 in partisan elections.

Of course, partisan elections are more competitive on average than nonpartisan elections and therefore are associated with greater fundraising pressures. Indeed, the competitiveness of partisan elections itself is a function of the political professionalization that parties bring to judicial elections. Both parties recruit stronger candidates, help raise campaign resources, and leverage their party labels behind their nominees in what become more prominent and salient contests.[212] It is the significant involvement and brand names of the major parties in partisan elections that produce both greater candidate discipline and greater competitiveness.

Our empirical findings and analysis of the role of political parties suggest the unreliability inherent in anecdotal dismissals of any substantive difference between partisan and nonpartisan elections. True, there are particular races in nonpartisan systems that are among the most controversial and that feature intense party involvement, such as the Sears-Brantley race in Georgia. However, in the aggregate, our findings suggest that the conclusions often drawn from these vivid anecdotes are not substantiated empirically over the broader run of cases. In our study, nonpartisan and partisan elections simply do not produce the same association between campaign contributions and judicial decisions that might be characterized as biased toward the sources of those contributions. Parties appear on average to be less involved with judicial races when those races are nonpartisan. This lesser involvement by the parties may be responsible for the lack of a statistically significant relationship between campaign contributions and judicial decisions that benefit contributors.

In short, reformers who argue against partisan elections for judges and advocate instead for nonpartisan elections turn out to be

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[211] These figures represent the average contribution to candidates across all judicial races, including many noncompetitive races. When we exclude candidates who received no party contributions at all, the average combined contribution of the major parties per candidate was $120,386 in partisan states, compared to $46,337 in nonpartisan states.

[212] *See* CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 69–85 (1997) (describing party recruitment of judicial candidates for partisan elections).

correct in our tentative view.[213] The classic case for nonpartisan elections over partisan ones is based on the worry that a partisan election "increasingly turns on [judicial candidates] currying favor with contributors, interest groups and voters by signaling in advance how they are likely to rule."[214] Our findings suggest that, regardless whether there is any explicit signaling, partisan elections feature a more predictable connection between campaign contributions and subsequent judicial decisions consistent with the contributors' interests.

Finally, our findings are relevant to debates over the relative advisability of merit selection plans as well. Merit plans are another type of retention system, under which bipartisan judicial nominating commissions review applications for judgeships, compile a list of qualified applicants, and submit the list to the governor for the final selection.[215] Once appointed, these judges regularly face unopposed retention elections in which they appear on a ballot that asks voters only whether they should be retained in office.

Merit plans involve retention elections that entail campaign fundraising, but retention elections are nonpartisan, feature no opponent, and are deliberately designed to be less political in many respects.[216] Merit plans thus permit citizens to vote on the retention of sitting judges, which is important because most citizens favor electoral accountability and are reluctant to "give up their vote."[217] However, retention elections typically are less competitive affairs and accordingly feature less campaign spending and pressure to collect campaign contributions.[218] Nevada, for instance, recently considered a proposal

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[213] We do not take a position here, based on our findings, about the advisability of public financing of judicial elections, whether they are partisan or nonpartisan, but we also do not think our findings cut against public financing at all. Of course, public financing of campaigns limits the need for private financing and therefore has the potential, depending on the design, to limit the influence of campaign contributions as well. However, there are many reasons to choose between nonpartisan and partisan elections on other grounds. Our study concludes only that the uncomfortably tight relationship between campaign money and judicial decisions applies mainly to partisan elections and that nonpartisan elections present fewer concerns on this score.

[214] Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1272 (2008).

[215] Caufield, *supra* note 37, at 627–28.

[216] *See generally* Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711 (2009) (describing and advocating for merit selection).

[217] Schotland, *supra* note 8, at 1082.

[218] *See* Hall & Aspin, *supra* note 124, at 343 (noting that, between 1964 and 1984, judges facing retention elections were retained over 98% of the time).

to replace nonpartisan judicial elections with a merit plan system for precisely these reasons.[219]

However, our findings suggest that merit plans enjoy no advantages over nonpartisan elections when it comes to limiting the influence of campaign contributions on judicial decisions. Earlier research has already debunked the notion that merit plans produce better qualified judges than nonpartisan (or partisan) elections.[220] Our work finds that judges elected under nonpartisan elections are no more predictably predisposed toward their contributors' interests than judges reelected under retention elections as part of a merit plan. We conclude that the real difference when it comes to the influence of campaign contributions on decisions on the bench is basically between partisan elections and all other systems, not between nonpartisan elections and merit plans. Of course, we cannot compare the influence of campaign contributions in other systems of appointment and retention that do not involve elections at all, or that require public financing of judicial elections, because there are no campaign contributors or contributions to study in the first place. And there may be other reasons besides concerns about the effect of campaign finance on judicial decisions to adopt a merit plan instead of nonpartisan elections for judicial appointment and retention. However, we do not find that the choice between nonpartisan elections and merit plans matters significantly with respect to the relationship between campaign contributions and judicial decisions that involve the contributors' interests.

Conclusion

This Article is the first to demonstrate a statistically significant relationship, on a comprehensive dataset that covers all fifty states, between campaign contributions and judicial decisions in favor of contributors' interests. Although *Caperton v. A.T. Massey Coal Co.* recognizes the potential for judicial bias in cases involving major campaign contributors, there has been no systematic empirical work documenting the underlying intuition, at least until now.

However, our Article goes beyond this basic, important finding to identify a surprising complication: Campaign contributions are con-

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[219] *See Nevada Voters Reject Judicial Ballot Measures*, Las Vegas Sun, Nov. 3, 2010, *available at* http://www.lasvegassun.com/news/2010/nov/03/nv-nevada-measures-2nd-ld-writethru/ (noting that supporters promoted proposal as way to reduce role of campaign contributions in judicial elections).

[220] *See* Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 Judicature 229, 235 (1987) (finding no evidence that objective credentials of judges selected by merit plan differ significantly from those of elected judges).

nected to judicial decisions in favor of contributors' interests only in states with partisan judicial elections, but not in states with non-partisan elections or other appointment methods. This finding is sur-prising because judges who run in nonpartisan elections need campaign money much like judges who run in partisan elections. We suggest that campaign money has a stronger connection to judicial decisions in states with partisan judicial elections because of the spe-cial brokering role that parties play in those states' judicial elections. Parties exercise discretion in candidate selection, connect judicial can-didates with campaign contributors, and apply discipline to judicial candidates to a greater degree in states with partisan elections. Par-ties, we argue, make a difference.

As a result, our Article has clear implications that demand fur-ther attention. Money is important in judicial elections when we pay attention to what ultimately matters most—its connection to judicial decisions once the candidates are on the bench. But our findings sug-gest a possible direction for reform. Nonpartisan elections do not pro-duce the same relationship between campaign contributions and judicial decisions as partisan elections. Despite a great deal of skepti-cism in the literature and among practitioners about whether non-partisan elections differ materially from partisan elections, we argue that moving from partisan elections to nonpartisan elections for judges, or other similarly nonpartisan forms of judicial selection and retention, reduces the role that parties play in the process and there-fore offers a promising way of ultimately reducing the influence of money in judicial elections.

APPENDIX

TABLE 11

RETENTION METHOD AND VOTING FOR BUSINESS
LITIGANTS: DIFFERENT CASE TYPES[221]

Indicators	Increased Probability of Vote for Business Litigant by Case Type			
	All Cases	Labor Cases	Tort Cases	Contract Cases
Partisan or Nonpartisan Reelection	0.03[a] (1.66)	-0.005 (0.10)	0.018 (0.53)	0.062[+] (2.5)
Retention Election	0.02[a] (1.68)	0.003 (0.08)	0.002 (0.10)	-0.009 (0.039)
Years on Court	-0.0005 (0.27)	-0.003 (1.14)	-0.0009 (0.41)	0.0007 (0.25)
Years to Retention (Reverse)	-0.002 (0.88)	0.0004 (0.13)	-0.003 (1.40)	-0.003 (1.0)
Judge's PAJID Score	-0.0007 (1.09)	-0.001 (1.35)	-0.0009 (0.98)	-0.0003 (0.49)
Southern Indicator	0.008 (0.024)	0.034 (1.58)	0.036 (0.66)	0.39 (0.64)
Lower Appellate Court Indicator	-0.024 (0.56)	-0.009 (0.17)	-0.015 (0.19)	-0.041* (4.48)
En Banc Indicator	-0.0001 (0.01)	-0.035[+] (2.21)	-0.004 (0.12)	0.007 (0.45)
Percent of Years with Republican Legislature	0.0001 (0.17)	0.002[+] (2.55)	0.0006 (0.55)	0.0002 (0.25)
Opposing Litigant Is Person	0.062* (4.72)	-0.021 (0.12)	0.126* (4.15)	-0.042 (1.16)
Opposing Litigant Is Government	0.027 (1.38)	0.11 (1.52)	0.049[+] (2.07)	-0.036 (0.60)
Dissenting Vote	0.004 (0.33)	0.0007 (0.006)	-0.05* (9.20)	0.043 (0.97)
Number of Observations	19,026	2952	9348	6029
Log Likelihood	-13,051	-2006	-6407	-4115

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[221] The table reports the marginal effects of all variables on the probability of a judge voting for the business litigant, based on probit estimates. Standard errors clustered by state are reported underneath each marginal effect. The issue indicators and industry indicators are not reported in the interest of brevity. The symbols "*," "+," and "a" represent significance at the 1%, 5%, and 10% levels, respectively.