THE BUSINESS OF JUDICIAL ELECTIONS

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Abstract:

The ever-increasing importance of money in judicial elections has given wealthy interest groups an opportunity to shape the judiciary. The groups can influence both which judges are elected and how judges vote. Although all interest groups may exert some influence on judicial outcomes, the strongest influence likely comes from pro-business groups. These groups are routinely the single largest contributor in state Supreme Court races. Using a dataset of virtually every state Supreme Court case in all fifty states over a four-year period, I provide empirical results that support the hypothesis that pro-business groups influence judicial outcomes. I find that judges facing partisan elections are more likely to vote in favor of business litigants than judges under any other system. The results are significant; judges facing partisan elections are approximately 23 percentage points more likely to vote in favor of the business litigant in torts cases. Every dollar of direct contributions from pro-business groups is associated with increases in the probability that the judges will vote for business litigants. Moreover, both Republican and Democrat judges facing partisan elections are more likely to favor business interests, suggesting that business groups influence judicial outcomes, regardless of the judges' party affiliations. Additional analyses suggest that, in states with partisan elections, business groups influence both which judges are elected and how judges vote. Finally, I explain how recent reforms will do little to curtail the influence of interest groups on judicial outcomes. Only more dramatic changes to elective systems will safeguard judicial impartiality

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INTRODUCTION

The Supreme Court's recent landmark decision requiring judges to recuse themselves from cases involving major campaign contributors has gratified many critics of judicial elections.[2] However, although the decision may prevent future instances of judicial bias towards individual campaign contributors, it will have little effect on one of the biggest threats to impartial justice. In this article, I explain how the growing importance of money in judicial elections has given wealthy interest groups the opportunity to shape judicial outcomes. Thus, impartial justice remains in jeopardy until future reforms restrict interest groups' influence on elected judiciaries.

Money has become increasingly important in judicial elections. Between 2000 and 2008, over $200 million was contributed to state Supreme Court campaigns, more than twice the $85 million contributed throughout the 1990s.[3] The average spending in partisan elections alone has increased to over $1.5 million.[4] The increasing cost of judicial campaigns has made it extremely difficult for candidates to win elections without substantial funding.[5]

Consequently, wealthy interest groups can often dictate 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. Moreover, once elected, judges have the incentive to favor interest groups in their judicial decisions in the hopes of obtaining more campaign support in future elections. Thus, the importance of money in judicial elections allows wealthy interest groups to influence both which judges are elected and how those judges vote after they are elected.

Impartial justice among elective judiciaries could affect a considerable number of cases and litigants. Elected judges decide the overwhelming majority of cases in our nation. More than 90 percent of the United States' judicial business is handled by state courts,[6] and 89 percent of all state court

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[2] Caperton v. Massey, 556 U.S. ___ (2009).

[3] The Economist, Not For Sale (June 11, 2009)

[4] *Id.*

[5] Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections,* 5 STATE POLITICS & POLICY QUARTERLY 107 (2005); Donald W. Jackson & James W. Riddlesperger, *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991); Chris W. Bonneau & Melinda Gann Hall, Mobilizing Interest: Money, Quality, and Ballot Rolloff in State Supreme Court Elections, Presented at the Annual Meeting of the Midwest Political Science Association (April 20, 1960).

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

judges face the voters in some type of election.[7]

In its recent *Caperton v. Massey* decision, the Supreme Court, for the first time, recognized the possibility of judicial bias in cases involving major campaign contributors.[8] This case involved Don Blankenship, the CEO of Massey Coal Co., who contributed $3 million in 2004 to help elect Brent Benjamin to the West Virginia Supreme Court election. Benjamin won the election. In 2007, when Massey appealed a $50 million verdict against it to the West Virginia Supreme Court, Benjamin denied motions to recuse himself, and instead voted to reverse the verdict against Massey.

The U.S. Supreme Court reversed the decision of the West Virginia Supreme Court, ruling that the Due Process Clause requires judges to recuse themselves when there is a serious, objective risk of actual bias. Justice Kennedy, writing for the majority, concluded that

> there is a serious risk of actual bias-based on objective and reasonable perceptions-when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judges election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent on the election, and the apparent effect such contribution had on the outcome of the election.

Thus, the court determined that the size of Blankenship's contribution in comparison to the total amount raised in Benjamin's campaign, the importance of Blankenship's contribution to Benjamin's victory, and Blankenship's stake in the *Caperton v. Massey* case combined to create a serious risk of actual bias that required Benjamin's recusal in the case.[9]

Critics of judicial elections commended the Court's ruling. H. Thomas Wells, Jr., President of the American Bar Association, "applauded the decision."[10] Similarly, the Brennan Center's James Sample 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."[11]

Although the *Caperton* ruling sets a constitutional limit on the potential judicial bias resulting from an individual campaign contributor's influence, it does little to curtail interest groups' influence on judicial outcomes. Yet,

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

[8] Caperton v. Massey, 556 U.S. ___ (2009).

[9] 129 S. Ct. at 2265.

[10] Statement of H. Thomas Wells Jr., President, American Bar Association Re: Ruling of The Supreme Court of The United States in Caperton Et Al. v. A.T. Massey Coal Co., Inc., Et Al. *available at:*

http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=671

[11] Adam Liptak, Justices Tell Judges Not to Rule on Major Backers, NY Times at A1 (June 9, 2009).

as I explain in this article, wealthy interest groups also pose a significant threat to impartial justice.

In Part I, I discuss the evolution of judicial elections in the American states. Elective systems came to dominate state courts during the Jacksonian era as a careful, reasoned response to the perceived lack of impartiality among appointed judges. Proponents argued that electing judges would increase judicial independence because elections would ensure that judges would not be beholden to the government officials who appointed and retained them.[12] However, the original supporters did not foresee the threats to judicial impartiality that eventually emerged under elective systems.

As I discuss in Part II, three recent trends have transformed many judicial campaigns from sleepy boredom to bracing competition. First, many more judicial elections are being contested, with a challenger running against the incumbent.[13] Second, incumbents are losing at a much higher rate than before.[14] For example, in partisan elections in 2000, more than 45 percent of incumbents lost, a much higher loss rate than for elections in both U.S. and state legislatures.[15] Third, recent decades have seen dramatic increases in the amounts of money spent in judicial campaigns.[16] For example, spending in partisan state Supreme Court elections averaged more than $1.5 million in 2004.[17]

The increasing competitiveness and expense of judicial elections, and especially partisan elections, has given wealthy interest groups the opportunity to shape a like-minded judiciary. Although all wealthy interest groups likely exert some influence on judicial outcomes, the strongest influence likely comes from pro-business interest groups. These groups are routinely the single largest contributor in state Supreme Court races. For example, in the 2005-2006 election cycle, pro-business interest groups directly contributed over $15 million to candidates, or 44 percent of the total.[18] This was more than double the amount contributed by the second-largest contributing interest group. Pro-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, and pro-business groups were responsible for more than 90 percent of the special interest ads that year.[19]

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[12] *See infra* text accompanying notes [].

[13] *See infra* text accompanying notes [].

[14] *See infra* text accompanying notes [].

[15] *See infra* text accompanying notes [].

[16] *See infra* text accompanying notes [].

[17] *See infra* text accompanying note [].

[18] James Sample, Lauren Jones, and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS, at 18 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2006.pdf.

[19] James Sample, Lauren Jones, and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS, at 18 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2006.pdf.

Although the ever-increasing importance of money in judicial elections has given business groups an opportunity to shape a pro-business judiciary, no empirical study has shown that pro-business groups influence judicial outcomes. This paper fills that gap.

In Part III, I present several empirical results that support the hypothesis that pro-business interest groups influence judicial outcomes. My data set includes detailed information on virtually every state Supreme Court case in all fifty states between 1995 and 1998. 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. Using multivariate regression techniques, I measure the relationship between business interests, campaign funds, and judges' voting.

First, I test whether interest groups' direct campaign contributions have any relationship with judges' voting. I find that every dollar of contributions from pro-business groups is associated with increases in the probability that partisan-elected judges will vote for business litigants. Moreover business groups' share of total contributions is also positively related to partisan-elected judges' voting for business litigants in many cases.

Then, to measure the full effect of business groups' influence on judicial outcomes, I test whether judges seeking reelection routinely decide cases more favorably to business interests than other judges. My results reveal that judges facing partisan re-elections are more likely to vote in favor of business litigants than judges under any other system. The voting differences between judges facing partisan re-election and judges from other systems are especially large in torts and contracts cases. For example, my results indicate that, compared to judges under other systems, a judge facing a partisan reelection is approximately 23 percentage points more likely to vote in favor of the business litigant in torts cases.

Additional regressions reveal that both Republican and Democrat judges facing partisan re-elections are more likely to vote for business litigants than judges from the baseline categories. Although the results for Republican judges are larger in magnitude, the results suggest that business interest groups influence judicial outcomes, regardless of the judges' party affiliations.

Although business interest groups likely influence both which judges are elected and how judges vote, my data do not allow me to test interest groups' influence on election outcomes. Nevertheless, I try to distinguish the relative importance of each path of influence. First, I test whether the results are similar in states that select judges in partisan elections but use different methods to retain judges. I find that judges' voting in these states more closely resembles the voting of the other judges facing retention elections, suggesting that it is not the initial partisan election, but rather the threat of future partisan reelections that influences judges' pro-business voting.

I also examine whether partisan-elected judges continue to favor business interests when they no longer need to attract campaign funds. I

find that partisan-elected judges in their last term before mandatory retirement continue to favor business litigants more than retiring judges in the baseline categories, but the magnitudes of the difference are considerably smaller. These results support the hypothesis that both paths of influence are important. Partisan-elected judges continue to cast pro-business votes when they are retiring, suggesting that partisan elections produce more pro-business judges. However, the smaller magnitudes suggest that business groups also influence how judges vote; when partisan judges no longer need to curry favor with business groups, their favoring of business interests decreases.

My results also suggest that judges facing partisan reelections become slightly more likely to vote for business litigants as retention approaches. These results also suggest that business groups influence how judges vote; judges' favoring of business interests increases when interest group support becomes more important to winning reelection.

Thus, all of the results support the hypothesis that interest groups' influence judicial outcomes in partisan systems. I discuss various reasons why interest group money has more impact in partisan-elections systems compared to other election systems.

Finally, in Part IV, I discuss recent reform proposals after *Caperton*. Unfortunately, most of these reforms will do little to curtail the influence of interest groups on judicial outcomes. Instead, I explain how only more dramatic changes to elective systems will safeguard judicial impartiality.

I conclude in part V.

I. HISTORICAL DEVELOPMENTS OF JUDICIAL ELECTIONS

Almost 90 percent of state appellate judges must regularly be reelected by voters.[20] However, this approach to the judiciary is unique to the U.S. states; judges in most other countries have permanent tenure, serving for life or until retirement. Moreover, the states have not always employed elections to select and retain their judges. The appointment of state judges originally resembled that of the federal judiciary; in all of the original thirteen states, judges were appointed either by the executive or legislature.[21]

Yet the Jacksonian era's championing of popular democracy led to the rise of an elected judiciary. Although all states entering the union before 1845 had an appointed judiciary, each state that entered between 1846 and

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

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

1959, had judicial elections.[22]

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.[23]   Supporters believed that appointed judges were beholden to the government officials who appointed and retained them. Thus, they would inevitably be influenced to shape their rulings to please the governors and legislators. The convention delegates supporting an elected judiciary argued that only popular elections could "insulate the judiciary . . . from the branches that it was supposed to restrain."[24]

Jackson and his followers preferred that any influence come directly from the people, through popular elections. In the Massachusetts convention, 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."[25] In the Kentucky convention, another delegate answered that the judge "is to look somewhere for his bread, and that is to come from the people. He is to look somewhere for approbation, and that is to come from the people."[26]

State after state established an elective judiciary only after long, cautious debate in constitutional conventions.[27] 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 heed the public good.[28] 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."[29]

Indeed, many convention delegates believed that the only notable threat to the impartiality of an elective judiciary was that elected judges might occasionally feel excessive pressure from excited voter majorities.[30]   To prevent this, they carefully structured the election process to reduce any

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[22] LARRY C. BERKSON UPDATED BY 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.

[23] *See* Nelson, *supra* note [] at 222.

[24] *Id.* at 205.

[25] 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) [hereinafter MASSACHUSETTS CONVENTION OF 1853] (statement of Edward Keyes).

[26] 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) [hereinafter KENTUCKY CONVENTION OF 1849] (statement of Francis Bristow).

[27] Nelson, *supra* note[], at 222–24.

[28] *See* Nelson, *supra* note [], at 224.

[29] *Id.*

[30] *Id.* at 218; Schotland, *supra* note[], at 1094.

dangers of excessive popular influence.[31] For example, in most states, judges would have long terms.[32] The terms would be staggered; this would assure that all judges could not be thrown out together in a fit of popular excitement.[33] Judges would not be permitted to run for other elected offices during their terms.[34] Finally, elections would be by district, rather than at large.[35] This would again reduce the possibility that an excited state-wide majority could remove large numbers of judges.

Supporters were initially delighted with the judges elected under the new systems. An Illinois convention delegate, David Davis, later claimed that "if only the federal judiciary had been made elective, . . . the people 'would have chosen judges, instead of broken down politicians.'"[36] The number of states with elected judges continued to grow.[37]

The turn of the century, however, brought a growing distrust of electorates, and during the Progressive Era, several states modified their judicial elections. By 1927, twelve states had switched from partisan elections, which revealed judges' party affiliations, to nonpartisan elections.[38] Other states moved to another election variation, the so-called "merit selection plan," also commonly known as the "Missouri Plan" after Missouri became the first state to adopt it in 1940.[39] Under merit selection plans, a bipartisan judicial nominating commission reviews applications for judgeships and then compiles a list of qualified applicants.[40] The governor then appoints one of the candidates from the commission's list.[41] Once appointed, the judge regularly faces unopposed nonpartisan retention elections; the ballot asks only whether the judge should be retained, and does not mention party affiliation.[42]

This long historical evolution has led to many variations of judicial selection and retention methods. Table 1 shows each state's methods of selection and retention.[43]

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[31] Schotland, *supra* note [], at 1094.

[32] *Id.*

[33] Nelson, *supra* note [], at 218.

[34] Schotland, *supra* note [], at 1094.

[35] Nelson, *supra* note[], at 218.

[36] *Id.* (quoting ILLINOIS CONVENTION OF 1847, *supra* note[], at 462 (statement of David Davis)).

[37] *Id.* at 1093.

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

[39] *Id.*

[40] 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) (citing BERKSON & CAUFIELD, *supra* note [], at 2).

[41] *Id.*

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

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

II. INCREASING POLITICIZATION OF JUDICIAL ELECTIONS

Despite some early skepticism of judicial elections, most were "low-key affairs, conducted with civility and dignity,"[44] which were "as exciting as a game of checkers. . . . [p]layed by mail."[45] This began to change in Los Angeles in 1978, however, when a group of deputy district attorneys offered to support any candidate who would run against an unopposed incumbent trial judge, producing a record number of contests and defeated judges.[46] Then, in the 1980s, battles over tort law in Texas produced "unprecedentedly costly, heated races" for its supreme court.[47]

Since then, elections have become highly politicized contests that have created pressure for justices to behave and rule strategically. In this section, I first describe the increasing politicization of state Supreme Court races. Then, I discuss the likely consequences of this politicization on impartial justice.

A. TRENDS IN POLITICIZATION

In the late twentieth century, elections have become substantially more contested and competitive. In 1984, only 33 percent of nonpartisan elections were contested. [48] By 2000, this number had increased to 75 percent.[49] Likewise, 74 percent of partisan elections were contested in 1988.[50] By 2000, this number had grown to 95 percent. [51]

As elections have become more contested, incumbents have found it harder to win. In 1980, only 4.3 percent of incumbents were defeated in nonpartisan elections,[52] but in 2000, 8 percent of incumbents were defeated in these elections.[53] In partisan elections, 26.3 percent of incumbents were defeated in 1980,[54] yet by 2000, the loss rate for incumbents was a

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

[45] Schotland, *supra* note [], 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 DS1).

[46] *Id.* at 1080.

[47] *Id.*

[48] Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21 (2004); Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337 (2003).

[49] *Id.*

[50] *Id.*

[51] *Id.*

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

[53] *Id.*

[54] *Id.*

stunning 45.5 percent.[55] This rate of defeat is much higher than the rate at which incumbents lose in the U.S House or Senate or in state legislatures.[56]

Following the substantial increase in the competitiveness of judicial elections, campaign spending on these elections has increased dramatically. Between 1990 and 2004, average campaign spending in nonpartisan elections increased by approximately 100 percent, from approximately $300,000 to $600,000.[57] Average spending in partisan elections during this period increased from approximately $425,000 to $1.5 million, an increase of over 250 percent.[58]

The increasing cost of judicial campaigns has made it extremely difficult for candidates to win elections without substantial funding.[59]   In 1997-1998, the top campaign fundraiser prevailed in approximately 75% of contested state Supreme Court races, and in 2001-2002, the top fundraiser won in 80% of the elections. Since 1993, winners have outraised losers by a margin of $ 91 million to $ 53 million.[60]

The expense of state Supreme Court races varies greatly among the states. Table 2 presents the average spending on state Supreme Court races between 1994 and 2000, by state. The states with the most expensive campaigns are states 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.[61]

Moreover, changes in the law permitting judges to participate more openly and aggressively in judicial campaigns has contributed to the increasing competitiveness of judicial elections. Until 1990, a canon of judicial conduct in the ABA Model Code had prohibited judges from

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[55] *Id.*

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

[57] 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 63 FIG. 4.1.(Matthew Streb ed., 2007).

[58] *Id.*

[59] Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections,* 5 STATE POLITICS & POLICY QUARTERLY 107 (2005); Donald W. Jackson & James W. Riddlesperger, *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991); Chris W. Bonneau & Melinda Gann Hall, Mobilizing Interest: Money, Quality, and Ballot Rolloff in State Supreme Court Elections, Presented at the Annual Meeting of the Midwest Political Science Association (April 20, 1960).

[60] Deborah Goldberg & Samantha Sanchez, The New Politics of Judicial Elections 15 (Bert Brandenburg, ed. 2002), http://www.brennancenter.org/programs/downloads/New%2520Politics%2520of %Judicia%23274.pdf.

[61] For a thorough explanation of differences in campaign spending among the states, see *id.* at 63–68.

announcing their views on disputed legal or political issues.[62] That year, the ABA eliminated the canon because of First Amendment concerns.[63] Soon, twenty-five of the thirty-four states that had adopted it eliminated it.[64] In 2002, the Supreme Court struck down enforcement of the canon in the remaining nine states.[65] Other appellate courts have struck down limits on judges' fundraising, partisan conduct, and making pledges and commitments.[66]

B. BUSINESS INFLUENCE ON THE JUDICIARY

The increasing competitiveness and expense of judicial elections has given interest groups an opportunity to influence judicial outcomes through two separate avenues. First, as elections have become increasingly expensive to win, wealthy interest groups can often dictate 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. Second, once elected, judges have the incentive to favor interest groups in their judicial decisions in the hopes of obtaining more campaign support in future elections. Thus, the importance of money in judicial elections allows wealthy interest groups to influence both which judges are elected and how those judges vote after they are elected.

Although any interest group can exert influence over the judiciary, pro-business groups may be unique in their ability to do so. In contrast to most other interest groups, pro-business groups often have substantial resources collected from the wealthy businesses that they represent. Money is essential to influence over judicial elections or judges' voting.

Furthermore, even compared to other relatively wealthy interest groups, pro-business groups often have a more focused agenda and a clearer idea of the types of judges they would like to support. Pro-business groups usually have an unambiguous agenda in most state judicial races—to help pro-business, pro-tort reform judges get elected. Indeed, tort reform has become the primary issue in most state judicial races.[67] In contrast, the plaintiff's bar in many states is typically much more diverse in their goals because they represent such a broad range of clients. Similarly, insurance

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[62] MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1989); *see also, e.g.*, MINN. CODE OF JUDICIAL CONDUCT CANON 5(A)(3)(d)(i) (YEAR).

[63] ABA ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 355–58 (Arthur Garwin ed., 2004).

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

[65] Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002); Schotland, *supra* note [], at 1095 n.77.

[66] *E.g.*, Republican Party of Minn. v. White, 416 F.3d 738, 754, 765–66 (8th Cir. 2005) (striking down limits on judges' partisan conduct and personal solicitation of campaign *contributions*); Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (striking down a solicitation clause, which failed strict scrutiny); *see also* Schotland, *supra* note [], at 1095–97 (discussing *White*).

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

groups insure both plaintiffs and defendants in different cases, resulting in a significantly less-focused agenda.

Likewise, pro-business groups typically have more at stake in their support of judicial candidates. A significant portion of state Supreme Court trials involve business litigants; between 1995 and 1998, almost one-third of cases before the state Supreme Courts involved business litigants. As businesses are litigants in these cases, instead of attorneys or insurers, they usually have much more to lose if their case is heard by an unsympathetic judge.

Indeed, pro-business groups are more involved in state Supreme Court races than any other interest group. They contribute a significant amount of direct campaign funds. For example, in the 2005-2006 election cycle, candidates for state Supreme Court seats combined to raise over $34 million. [68]   Pro-business interest groups directly contributed over $15 million to candidates, or 44 percent of the total.[69]   This was more than double the amount contributed by the second-largest contributing interest group.[70]

In addition to these direct campaign contributions to favored candidates, pro-business groups routinely finance independent television advertising campaigns. These advertising campaigns are effective in increasing name recognition and support for favored-candidates, or, alternatively, attacking opponents' rulings and positions.   They are generally not subject to campaign finance disclosure laws, making it difficult to identify the sources of support for individual judicial candidates. Moreover, these independent campaigns are not subject to the ethical constraints imposed by the states' codes of judicial conduct that apply to judicial candidates' campaigns.

Television has become the major venue for Supreme Court campaigns[71] and is prominent in most races for state Supreme Court seats. TV ads ran in 91 percent of states with contested Supreme Court campaigns in 2006, costing over $16 million. [72] Pro-business groups dominate this advertising; these groups were responsible for more than 90 percent of all spending on special interest television advertisements in 2006. [73]

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[68] James Sample, Lauren Jones, and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS, at 18 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2006.pdf.

[69] *Id.*

[70] There have been a few election years where lawyers groups donated more direct campaign funds than business groups, but business groups routinely dominate independent expenditures. *See, e.g.* James Sample, Lauren Jones, and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS, at 19 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2006.pdf.

[71] Anthony Champagne, Television Ads in Judicial Campaigns, 35 Ind. L. Rev. 669, 670 (2001)

[72] James Sample, Lauren Jones, and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS, at 18 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2006.pdf.

[73] *Id.*

Moreover, television advertising is decisive in many state Supreme Court elections. These advertising campaigns are effective in increasing name recognition and support for favored-candidates, or, alternatively, attacking opponents' rulings and positions. Between 2002 and 2006, 79 percent of state Supreme Court races that featured TV ads were won by the candidate with the most TV advertising support.[74]

Presumably, interest groups make both the direct campaign contributions and the independent expenditures on media campaigns in order to shape the judiciary; "contributors would not give money unless they reasonably believed they could gain an advantage thereby."[75] Interest groups' lobbying of judges certainly creates an impression of impropriety. Aproximately 90 percent[76] of voters and 80 percent of judges believe that with campaign contributions, interest groups are trying to use the courts to shape policy.[77]

The importance of money in judicial elections permits pro-business groups to influence both which judges are elected and how judges vote. As judicial elections have become increasingly difficult to win without substantial funding,[78] wealthy pro-business groups routinely dictate the outcomes of judicial elections by contributing substantial campaign funds to favored candidates. For example, it is estimated that the pro-business U.S. Chamber of Commerce spent $100 million between 2000 and 2003 on judicial campaigns. Most of these campaigns were successful.[79] Between 2000 and 2004, 36 of the 40 pro-business judges that the Chamber supported were elected.[80]

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[74] DEBORAH GOLDBERG AND SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002, at 9 (Bert Brandenburg ed., 2002), *available at* http://faircourts.org/files/NewPoliticsReport2002.pdf.; DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 20 (Jesse Rutledge ed., 2005), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf.; James Sample, Lauren Jones, and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS, at 18 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2006.pdf.

[75] James Michael Scheppele, *Are We Turning Judges into Politicians?* 38 Loy. L.A. L. Rev. 1517, 1528 (2005).

[76] GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note [], at 9.

[77] GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note[], at 9.

[78] Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections,* 5 STATE POLITICS & POLICY QUARTERLY 107 (2005); Donald W. Jackson & James W. Riddlesperger, *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991); Chris W. Bonneau & Melinda Gann Hall, Mobilizing Interest: Money, Quality, and Ballot Rolloff in State Supreme Court Elections, Presented at the Annual Meeting of the Midwest Political Science Association (April 20, 1960).

[79] Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1502 (2005).

[80] In 2000-2003, 21 of the 24 pro-business judges that the Chamber supported were elected. *Id*. at 1503. In 2004, 15 of the 16 pro-business judges that the Chamber supported were elected. U.S. CHAMBER OF COMMERCE, CHAMBER HIGHLIGHTS SUCCESSFUL PRO-BUSINESS ELECTION EFFORT -- BUSINESS GOTV BEHIND MID-TERM ELECTION VICTORIES

Interestingly, even though tort reform and business interests are the primary concern for the pro-business groups, many of the groups' campaigns focus on separate issues. Often the groups choose to advertise an issue that resonates better with voters than does the tort reform issue.[81] Typically, this more salient theme is crime control. For example, one study found that all of the Chamber of Commerce sponsored television ads in the 2000 Mississippi Supreme Court elections stressed crime control, but none stressed tort reform or business issues.[82]

Similarly, pro-business groups often disguise the true objective of their support by forming nonprofit groups with inspirational but completely opaque names. For example, in the 2004 judicial elections in Mississippi, the Business and Industry Political Education Committee, which received most of its funding from the American Tort Reform Association, created the *Improve Mississippi* PAC to support pro-business judges.[83] That same year, the Ohio Chamber of Commerce created *Citizens for a Strong Ohio* that received most of its funding from the U.S. Chamber of Commerce.[84] Perhaps the most disguised nonprofit group in the 2004 Supreme Court races was created in West Virginia. The 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 v. Massey), as he sought to replace the incumbent judge with a pro-business judge, Brent Benjamin.[85]

In addition to helping favored judges win elections, pro-business groups may also influence how judges vote. The need to raise substantial amounts of money to finance future election campaigns gives judges the incentive to decide cases based on who contributed to their last campaign, and in turn, who will contribute to their next campaign. Thus, elected judges may alter their rulings to favor business interests in order to obtain future campaign funds from those groups.

Indeed, the public certainly believes that interest groups influence judges' voting. A nationwide survey has revealed that 76 percent of voters believe that campaign contributions influence judges' decisions, and only 5% of those surveyed believe that campaign contributions have no influence.[86]

(November 6, 2002) *available at: http://www.uschamber.com/NR/exeres/B1A02926-F9DF-4986-89B4-197149A7BC36.htm*

[81] Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1489 (2005).

[82] Anthony Champagne, Television Ads in Judicial Campaigns, 35 Ind. L. Rev. 669, 688-89 (2002).

[83] RACHEL WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES, The Institute on Money in State Politics at 13 (August 25, 2005), *available at: http://www.followthemoney.org/press/Reports/200508251.pdf*

[84] *Id.* at 14.

[85] *Id.* at 18.

[86] GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *available at*

Even worse, 46 percent of judges believe that campaign contributions have at least "a little influence" on their decisions, and 56 percent believe "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign."[87] Even Justices of the U.S. Supreme Court have expressed this perspective. After the Court reluctantly upheld on First Amendment grounds New York's system for electing judges, Justices Kennedy and Breyer noted in their concurrence:

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.[88]

Although mine is the first analysis to examine the relationship between pro-business groups, judicial elections, and judicial outcomes, a few recent studies have found empirical evidence that judges favor certain campaign contributors. For example, in an earlier study, I found that contributions from various interest groups are associated with increases in the probability that judges will vote for the litigants those interest groups favor.[89] Similarly, other recent studies have examined the relationship between contributions from individual law firms and case outcomes when those law firms appear in court. They have found a correlation between the law firms that contribute to judges' campaigns and the judges' rulings in arbitration decisions from the Alabama Supreme Court,[90] in tort cases before state supreme courts in Alabama, Kentucky, and Ohio, [91] in cases between two businesses in the Texas Supreme Court, [92] and in cases during the Supreme

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http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf; GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note [] at 4.

[87] GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *available at*
http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf; GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note [] at 4.

[88] N.Y. State Bd. of Elections v. Torres, 128 S. Ct. 791, 803 (2008) (Kennedy, J., joined by Breyer, J., concurring in the judgment).

[89] Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670–72 & tbls.7 & 8 (2009).

[90] Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 25 J.L. & POL. 645, 660 (1999) (examining arbitration decisions in the Alabama Supreme Court).

[91] Eric N. Waltenburg & Charles S. Lopeman. *2000 Tort Decisions and Campaign Dollars*, 28 SOUTHEASTERN POL. REV. 241, 248, 256 (2000) (examining tort cases before state supreme courts in Alabama, Kentucky, and Ohio).

[92] *See* Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 POL. & POL'Y 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money).

Court of Georgia's 2003 term. [93]

In the next section, I test whether the empirical evidence supports the hypothesis that pro-business interest groups influence judicial outcomes.

III. EMPIRICAL ANALYSIS OF BUSINESS GROUPS' INFLUENCE ON JUDICIAL OUTCOMES

I now examine empirically whether money from pro-business groups shapes judicial outcomes in states with judicial elections. First, I test the relationship between judges' voting and direct campaign contributions from pro-business interest groups. Then, to measure the full effect of business groups' influence on judicial outcomes, I test whether judges seeking reelection routinely decide 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' involvement in judicial elections has been successful in shaping a pro-business judiciary.

A. DATA

I use data from the State Supreme Court Data Archive. This data includes an almost universal sample of state Supreme Court cases in all fifty states from 1995 to 1998. The data include more than 28,000 decisions involving more than 470 individual state Supreme Court justices. [94] The data include variables that reflect case histories, case participants, legal issues, case outcomes, and individual justices' behavior. I supplemented 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 I analyze includes all cases between a business litigant and a non-business litigant.

B. MODEL

I estimate a series of both ordinary probit models and 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. [95]

In all models, the dependent variable is the probability that the judge votes for the business litigant in each case. A judge is coded as voting for a litigant in the State Supreme Court Data Project archive if the judge voted

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[93] Damon M. Cann, Justice for Sale? Campaign Contributions and Judicial Decision Making 16 (Aug. 10, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=991364 (examining cases during the Supreme Court of Georgia's 2003 term).

[94] State dockets exceeding 200 cases in a single year are selected from a random sample of 200 cases. Typically, case quantities are unaffected due to the limited size of many state supreme court dockets.

[95] STATA's *xtmelogit* command is used to estimate these models.

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 some of the cases that I include in my analysis have little, if any, impact on general business interests. That is, not every vote for a business litigant is necessarily a pro-business vote. However, this sample of cases does allow me to measure whether elected judges generally favor business litigants. Moreover, the over-inclusiveness of my data only biases the results against a finding of business influence over judicial outcomes; if elected judges cast pro-business votes in one category of cases, but not in another, then the results from the aggregated data will underestimate the pro-business voting that exists in the appropriate category.

Many of the estimations include indicator variables for three different retention methods: partisan reelections, nonpartisan reelections, and unopposed retention elections. Thus, the base category in the estimations, when all three of these indicator variables are zero, consists of votes by judges facing gubernatorial reappointment, legislative reappointment, or with permanent tenure. As I have discussed,[96] judicial elections have seen a dramatic increase in competitiveness and expense. Thus, if the money from wealthy business groups influences judicial outcomes, elected judges should be more likely to favor business litigants.

Some of the estimations also include data on direct campaign contributions to judges facing partisan and nonpartisan elections. The data on campaign contributions is collected by The National Institute on Money in State Politics, a nonpartisan, nonprofit charitable organization dedicated to accurate, comprehensive and unbiased documentation and research on campaign finance at the state level.[97] The Institute receives its data in either electronic or paper files from the state disclosure agencies with which candidates must file their campaign finance reports. The Institute compiles the information for all state-level candidates in the primary and general elections, and then assigns the donors an economic interest code based on both information contained in the disclosure reports and deeper research into the donor's characteristics and agendas. I aggregate the campaign contributions from four economic interest codes—general business, financial/real estate business, insurance companies, and medical groups—that are the primary supporters of pro-tort reform and pro-business judges.[98]

In addition, the estimations include a series of judge-level, case-level, and state-level variables that might be related to judges' propensity to vote for business litigants. The judge-level variables include 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, I use

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[96] *See supra* Part II.B.

[97] The Nat'l Inst. on Money in State Politics, Mission & History, http://www.followthemoney.org/Institute/index.phtml (last visited Sept. 19, 2008).

[98] RACHEL WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES, The Institute on Money in State Politics at 4 (August 25, 2005), *available at: http://www.followthemoney.org/press/Reports/200508251.pdf*

each judge's party-adjusted surrogate judge ideology measure, or PAJID score. [99] This is the most common measure of judge's ideology currently used in political science studies, and is based on the assumption that judges' ideologies can be best proxied by both their partisan affiliation and the ideology of their states at the time of their initial accession to office. Including the PAJID scores allows me 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. [100] These variables control for voting changes throughout a judge's career and term.   In later estimations, I include interactions between the retention method and the time until retention.

In addition, all estimations include various case-level variables that may be related to judicial voting.   First, I 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. I also include indicator variables for the general issue in the case (labor dispute, criminal appeal, contracts, torts, or government regulation). Moreover, I include a series of indicator variables signifying the general industry of the business litigant (agriculture, construction, financial services, manufacturing, mining, service, trade, transportation, or utilities). Finally, I 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.

Next, I include various state-level characteristics that have been found to be related to judicial voting. First, I include the percentage of years since 1960 that each state's legislature had a Republican majority. I use this variable as a proxy for the conservatism of the states' laws. Because states with conservative laws may also be more likely to have conservative judges, this control allows me to isolate the influence of the retention method from judges simply applying pro-business laws in conservative states.

I also include variables that indicate whether the states' supreme courts have discretion to grant review (that is, whether they have a lower appellate court) and whether the judges sit en banc. Both of these variables may be relevant to the types of cases that supreme courts here and, in turn, to the judges' voting. When supreme courts have discretion to grant review, the litigants do not alone control which appeals are heard. Thirty-nine states have lower appellate courts, and those states' supreme courts have

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[99] *See* Paul Brace, Laura Langer, & Melinda Gann Hall*, Measuring the Preferences of State Supreme Court Judges,* 62 J. POL. 387, 400–04 (2000).
[100] This variable is actually the reverse of the years to retention (as the longest number of years to retention during my sample is twelve, the inverse years to retention is thirteen minus the years to retention).

discretionary review.[101] In these courts, the judges may choose to hear cases that give them opportunities to exercise their ideological preferences.[102]

Whether the supreme courts sit en banc may also influence the types of cases the courts hear. The supreme courts of Alabama, Connecticut, Delaware, the District of Columbia, Massachusetts, Mississippi, Montana, Nebraska, Nevada, Virginia, and Washington often do not sit en banc; instead, various subsets of the judges hear each case.[103] The supreme courts of other states may periodically not sit en banc, if, for example, there is a conflict with a particular judge. 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, when making settlement decisions, fully consider the court's ideology. In some cases, litigants may not settle cases that they would have settled had they known in advance their judges' identities.

Finally, I include an indicator for southern states to control for the fact that many of the states employing partisan judicial elections are in the South.

As is standard and appropriate in such analysis,[104] the models also include a set of year indicator variables that capture national trends and influences that affect all judges but vary over time. 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.[105]

In the probit estimations, the t-statistics are computed from standard errors clustered by state. In the mixed-effects nested logit models, cases are nested within states.

C. RESULTS

I present the results of several estimations that test whether business groups influence judicial outcomes in states with judicial elections. Tables 3-9 present the results. Because the raw probit results are difficult to interpret in terms of the probability of a judge's particular vote, I present the

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[101] COURT STATISTICS PROJECT, *supra* note[], at 12–67.

[102] 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 forty-six large counties between 2001 and 2005, no litigants withdrew their cases after the courts of last resort granted review. THOMAS H. COHEN, APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005, at 9 (Bureau of Justice Statistics, Bulletin No. NCJ 212979, 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/agctlc05.pdf.]

[103] COURT STATISTICS PROJECT, *supra* note[], at 16–67.

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

[105] I am 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.

marginal effects of the variables on the probability of voting for the business litigant.

1. Direct Campaign Contributions and Pro-Business Votes

First, I explore the relationship between direct campaign contributions from pro-business groups and elected judges' voting for business litigants. Because large fundraising occurs only under systems using partisan and nonpartisan elections, I limit my sample to judges that were elected under these systems. My estimations include one of two measures of campaign contributions in the judges' most recent elections: either the total dollar amount of campaign contributions from pro-business groups or the percentage of each judge's total contributions that come from pro-business groups.

Table 3 reports the probit results for 5 different categories of case types: all case types, labor cases, torts cases, contracts cases, and government regulation cases; the other control variables are included in the analyses, but not reported for brevity [106]   The results show that there is a statistically significant, positive relationship between the level of campaign contributions from pro-business groups and partisan-elected judges' voting for business litigants in both torts cases and in the aggregated category that includes 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 $1,000 contribution from a pro-business interest group. For example, a $1,000 contribution would increase the average probability that a judge would vote for a business litigant in a torts case by .6 percentage points.

Moreover business groups' share of total contributions is positively related to partisan-elected judges' voting for business litigants in the aggregate category, labor cases, torts cases, and contracts cases. 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 contributions. Thus, a one-percentage-point increase would increase the probability that a partisan judge would vote for the business litigant in torts cases by .8 percentage points

2. Retention Method and Pro-Business Votes

Although the previous estimations measured the relationship between direct campaign contributions and pro-business votes, it did not capture all of the ways that interest groups influence judicial outcomes. For example, the campaign contribution data does not include indirect expenditures on media campaigns.   With tens of millions of dollars spent on TV advertisements during state Supreme Court races,[107] media campaigns

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[106] The results for mixed-effects logit models are not reported for brevity, but they are similar to the probit results.

[107] James Sample, Lauren Jones, and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS, at 18 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2006.pdf.

likely play a significant role in shaping the judiciary.

Moreover, the campaign contribution data does not capture how the threat of both attack campaigns and support for opposing candidates can influence judicial outcomes. Interest groups routinely mount attack campaigns to unseat incumbent judges that make unpopular judicial decisions.[108] Additionally, the groups will often support opposing candidates in elections, solely to prevent the victory of a judge that casts unfavorable votes. However, my data cannot measure the relationship between this opposition and judges' decisions; the data does not include independent expenditures on attack campaigns and direct contributions to support opposing judges are not linked to the rival judge that interest groups are trying to unseat.

Therefore, to measure the full effect of business groups' influence on judicial outcomes, I test whether judges seeking reelection routinely decide cases more favorably to business interests than other judges. My estimations include all control variables and the three retention method variables. 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' involvement in judicial elections has been successful in shaping a pro-business judiciary.

Table 4 reports both the coefficients and standard errors from the probit model and from the mixed-effects logit model. The probit results report 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 facing partisan re-elections are more likely to vote in favor of a business litigant. The magnitudes of the marginal effects are substantial but reasonable; the probit results suggest that a judge facing a partisan reelection is approximately 11 percentage points more likely to vote in favor of a business litigant than judges from the baseline categories. This implies that for every 100 cases that judges from other systems vote against business litigants, judges facing partisan elections would vote for the business litigant in 11 of those cases. With over 2000 cases involving business litigants appearing in state Supreme Courts each year, my results suggest that partisan systems would produce different judicial outcomes in numerous cases.

In contrast, the insignificant results for judges facing nonpartisan and retention re-elections indicate that these judges are no more likely to favor businesses than are judges facing gubernatorial reappointment, legislative reappointment, or permanent tenure.

3. Pro-Business Voting by Case Type

Next, I test whether elected judges' voting for business litigants differs based on the case type. I analyze judges' voting in four different case types: labor cases, contracts cases, torts cases, and cases involving

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[108] Charles Geyh, *Why Judicial Elections Stink,* 64 OHIO STATE L J 43 (2003).

government regulation. If the major concern of pro-business groups is tort reform, then elected judges trying to attract campaign contributions may especially favor business litigants in torts cases.

Table 5 presents the estimation results of probit models for four different case types.[109] I find that, compared to the base categories, elected judges are more likely to vote in favor of business litigants in only torts cases and contracts. The magnitudes of the marginal effects suggest that a judge facing a partisan reelection is approximately 23 percentage points more likely to vote in favor of the business litigant in torts cases. This implies that for every 100 torts cases that judges from other systems vote against the business litigant, judges facing partisan elections would vote for the business litigant in almost one quarter of those cases.

The results are significant, but smaller in magnitude for contracts cases; compared to the baseline categories, judges facing partisan reelections are only 14 percentage points more likely to vote in favor of the business litigant in contracts cases. The insignificant results for both labor cases and cases involving government regulation may suggest that other factors are influencing elected judges' voting in these cases. For example, perhaps outcomes in labor cases are also influenced by labor unions' campaign support. Similarly, previous scholars have argued that support by political party leaders is essential to a judge's victory in many partisan elections;[110] hence, partisan-elected judges may sometimes vote to win the support of the governor in their next reelection. Thus, in many cases, it may be unclear where partisan-elected judges' preferences will lie.

4. Pro-Business Voting and Political Parties

Next, I explore the relationship between political party, retention method, and judges' voting for business litigants. This analysis tests whether, among judges facing partisan reelections, Republican judges are even more likely to favor business interests than Democratic judges. Differences in voting patterns among Republican and Democratic judges could be caused by different ideological backgrounds or because judges from different parties expect to obtain campaign support from different interest groups. Business groups routinely donate to both Republican and Democrat judges in partisan elections. However, although business groups donate to approximately the same number of Democratic and Republican judges in partisan elections, the average contribution to Republican judges is about twice the size of the average contribution to Democratic judges.[111] Thus, Republican judges may feel increased pressure to favor business

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[109] The results for mixed-effects logit models are not reported for brevity, but they are similar to the probit results.

[110] *See, e.g.*, Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection,* 68 ALB. L. REV. 713, 717–18 (2005) (looking to New York City as a typical example of how lack of voter interest "vests judicial selection with political party leaders").

[111] According to the data in my 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.

interests.

To test these theories, I estimate the primary models with an interaction term between the judges' party affiliation and the retention method indicators. Table 6 reports results from both the probit model and from the mixed-effects logit model that include the interaction variable. The table shows the coefficients and standard errors for the retention method indicators, the party-affiliation indicator, and the interaction terms; the other control variables are included in the analyses, but not reported for brevity.

The positive coefficients on the partisan re-election indicator indicates that, regardless of political party, judges facing partisan re-elections are more likely to vote for business litigants than judges from the baseline categories.[112] These results suggest that business groups influence partisan elected judges' voting, regardless of their party affiliation.

However, the statistically significant coefficients on the interaction variables suggest that Republican judges facing any type of reelection are even more likely to favor business interests than their Democratic counterparts. The magnitude of the probit coefficients suggest that, among judges facing partisan reelections, Republican judges are 22.5 percentage points more likely to favor business interests than Democrat judges.

5. Retention Concerns and Pro-Business Voting

Pro-business groups can influence judicial outcomes in elective systems through two different avenues. First, wealthy pro-business interest 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. Second, once elected, judges have the incentive to favor business interests in their judicial decisions in the hopes of obtaining more campaign support from pro-business groups in future elections.

Although both paths of influence can result in a more pro-business judiciary, the latter should be more troubling to legal scholars. Judges are supposed to be impartial interpreters of the law. They are meant to make decisions based on the merits of the case, rather than on who contributed to their last campaign or who might contribute to future campaigns.

Although both effects are likely responsible for some of the relationship between partisan judicial elections and voting for business litigants, my data do not allow me to test interest groups' influence on election outcomes. Nevertheless, I try to distinguish the relative importance of each path of influence. First, I test whether the results are similar in states that select judges in partisan elections but use different methods to retain judges. Three states—Illinois, New Mexico, and Pennsylvania—employ partisan elections to select judges, but use unopposed retention elections to retain judges. If judges in these three states are also more likely to cast pro-

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[112] The total effect of the partisan re-election indicator on pro-business voting is the coefficient on the partisan re-election indicator + the coefficient on the interaction variable*the mean percentage of Republican judges.

business votes, this would suggest that partisan elections produce more pro-business judges. In contrast, if judges' voting in these three states more closely resembles the voting of the other judges facing retention elections, then the results would suggest that it is not the initial partisan election, but rather the threat of future partisan reelections that influences judges' pro-business voting.

Table 7 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 standard errors for the new indicator variable; the other control variables are included in the analyses, but not reported for 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.

Next, I test whether 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 retirement, I 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 partisan elections produce more pro-business judges, and these judges remain pro-business even when they are retiring.

Table 8 reports the results for the retention method indicators from both the probit model and the mixed-effects logit model; the other control variables are included in the analyses, but are not reported for brevity. It appears that, compared to the baseline categories, partisan elected judges in their last term before mandatory retirement are slightly more likely to vote for business litigants in at least torts cases. The probit estimations also report that, compared to the baseline category, retiring judges are also more likely to vote for the business litigant in the aggregated category. However the coefficients are much smaller in magnitude than the coefficients for the non-retiring judges. For example, compared to the baseline categories, non-retiring judges facing partisan elections are 23 percentage points more likely to favor the business litigant in torts cases, but retiring judges under partisan systems are only 9 percentage points more likely to favor business litigants.

These results support the hypothesis that business groups influence judicial outcomes in two ways: they influence both which judges are elected and how judges vote. The statistically significant coefficients in torts cases indicate that partisan-elected judges continue to cast pro-business votes in torts cases when they have no need to attract campaign funds, suggesting that partisan elections produce more pro-business judges. However, the smaller coefficients for retiring judges support the hypothesis that business groups have some influence on how elected judges vote; when partisan judges no longer need to curry favor with business groups, their favoring of business interests decreases.

Finally, I explore whether elected judges are even more likely to vote for business litigants as their retention approaches. Because interest groups have long memories, it is not clear whether judges have the incentive to vote more favorably to interest groups as their reelection approaches. Certainly an interest group can remember that, even though a judge is casting pro-business votes today, they cast anti-business votes at the beginning of their term. However, some strategies that do not make rational sense may make political sense. Indeed, prior studies have shown that the behavior of elected judges changes as reelection approaches; the judges are more likely to deviate from earlier voting patterns,[113] impose longer criminal sentences,[114] and side with the majority in death penalty cases.[115]

To test the influence of an approaching retention on judges' voting for business litigants, I estimate the primary models with an interaction term between the retention method indicators and the years to retention.[116] Table 9 reports the coefficients and standard errors of the interaction variables; the other control variables are included in the analyses, but not reported for brevity

The results suggest that judges facing partisan reelections become slightly more likely to vote for business litigants as retention approaches. The coefficients in the probit model indicate 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. For example, the probability that a judge facing a partisan reelection votes for the business litigant increases by .8 percentage points for each year the judge gets closer to retention.

Thus, all of the results suggest that business groups exert some influence on how judges vote. If, instead, elective 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 also cast more pro-business votes. Moreover, judges' likelihood of voting for business litigants should not increase as retention drew near, and it should not lessen in judges' last term before retirement.

D. DISCUSSION OF RESULTS

The results show that judges facing partisan elections cast more pro-

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[113] Hall, *Constituent Influence*, *supra* note 96; Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992) [hereinafter Hall, *Electoral Politics*].

[114] Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004).

[115] Hall, *Electoral Politics, supra* note 99; Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States,* 48 POL. RES. Q. 5 (1995).

[116] The variables are actually the interaction between each retention method and the inverse of the years to retention (as the longest number of years to retention during my sample is twelve, the inverse years to retention is thirteen minus the years to retention). Moreover, the sample is limited to judges that don't have life tenure to compare the impact of approaching retention on judges under different retention methods.

business votes than judges in other systems. This is consistent with the hypothesis that pro-business interest groups influence judicial outcomes in elected states.

In this section, I discuss weaknesses with this analysis and other explanations for the results. Then I discuss puzzling findings and give possible explanations for those findings.

My estimation model tried to control for many alternative causes of partisan-elected judges casting more pro-business votes. For example, including an indicator for southern states controls for the possibility that it is the geography of the partisan states, and not the retention method, that causes the judges to be more pro-business. Including a measure of the judges' ideology controls for the possibility that partisan elections produce more conservative judges, and the ideology of the judges, instead of the retention method, is responsible for the pro-business voting.[117] Likewise, including a proxy for the conservatism of the states' laws controls for the possibility that partisan judges are only applying more conservative laws that result in pro-business outcomes.

However, there could be other problems of selection bias that explain the results. That is, there could be significant differences in the types of cases that are appealed to the state Supreme Courts among different retention methods. However, it is unlikely that selection bias could fully explain my results; there is no reason to believe that partisan-elected state Supreme Courts hear more cases where the business litigant is the "true" winner. For this to be the case, lower courts in partisan systems would have to incorrectly decide against the business litigant more than lower courts in other systems. Because partisan judges in lower courts often need the financial support of business groups in their own elections,[118] they should be more likely, not less likely, to favor the business litigant.

An additional weakness with this analysis is that the data cannot differentiate between cases where business groups have a large stake in the outcome of the case versus no stake; only a much more detailed case analysis could provide this information. Nevertheless, the over-inclusiveness of my data only biases the results against a finding of business influence over judicial outcomes; if elected judges cast pro-business votes in one category of cases, but not in another, then the results from the aggregated data will underestimate the pro-business voting that exists in the appropriate category.

Furthermore, it is possible that pro-business outcomes in partisan states

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[117] In fact, the raw data also suggest that this confounding variable problem is unlikely; partisan elections produce fewer Republican judges than any other method. During my sample period, only 28.1% of judges facing partisan reelection states were Republican, compared to 35.4% in nonpartisan reelection states, 41.3% in retention election states, 39.6% in gubernatorial or legislative reappointment states, and 75.4% in permanent tenure states.

[118] James Sample, Lauren Jones, and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS, at 18 (Jesse Rutledge ed., 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsReport2006.pdf

are unrelated to the influence of business groups. Instead, perhaps voters in partisan states honestly prefer pro-business judges, and in turn, pro-business judges are more likely to win elections. However, presumably voter preferences are influenced by the large media campaigns financed by pro-business groups. Thus, it is difficult to untangle innate voter preferences from the media-influenced voter preferences.

Moreover, it is puzzling why judges facing partisan elections have significant differences in voting for pro-business judges, but judges facing nonpartisan and retention elections appear to vote no differently than judges in the baseline categories. Although we would expect wealthy interest group money to be more influential in partisan systems because partisan elections are considerably more competitive and expensive than other retention methods, it is improbable that business groups should have no influence on judges' voting in other elective systems. Although cheaper than campaigns in partisan elections, nonpartisan elections still cost money; in 2004, the average partisan campaign raised $1.5 million and the average nonpartisan campaign raised $600,000.[119] Moreover, business groups have mounted campaigns to unseat unpopular incumbent judges in states with nonpartisan elections and retention elections.[120] Thus, business groups should have had some success in shaping a pro-business judiciary under any elective system.

Nevertheless, my results suggest that there is some inherent difference between partisan elections and other elective systems that allow business groups to have more influence over judicial outcomes. Perhaps the importance of parties in partisan states explains the difference. Party support is critical to judges seeking reelection; parties help candidates raise money, finance advertising campaigns, formulate campaign strategy, and mobilize supportive voters.[121] The party organization's 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, party organizations 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, then the parties can pressure the judges to cast pro-business votes.

Alternatively, perhaps judges in nonpartisan systems are more concerned with casting votes that would anger the public than partisan judges. In partisan elections, the party affiliation of the candidate is the

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[119] 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 63 FIG. 4.1.(Matthew Streb ed., 2007).

[120] Charles Geyh, *Why Judicial Elections Stink,* 64 OHIO STATE L J 43 (2003).

[121] Matthew J. Streb, *Partisan Involvement in Partisan and Nonpartisan Trial Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 96, 105-110.(Matthew Streb ed., 2007).

most significant determinant of how people vote.[122] In contrast, in nonpartisan elections, voters' decisions depend more on whether judges issue decisions that comport with their preferences.[123] Thus, judges facing nonpartisan elections may feel more pressure to not issue decisions that are unpopular with the public—such as pro-business decisions.

Unfortunately, my data does not allow me to fully examine all of the differences between partisan elections and other elective systems, or to test why business groups appear to only influence judicial outcomes in partisan states.

IV. PROPOSALS FOR REFORM

The results from my empirical analysis suggest that partisan elections produce more pro-business judicial outcomes. Business interest groups likely influence judicial outcomes in two different ways; business interest groups may influence both which judges get elected and how those judges vote after they are elected. Either avenue results in more pro-business rulings in partisan states.

Although interest groups routinely influence legislatures' decision-making, legal scholars are typically more troubled by the possibility of interest groups influencing the courts. Judges are expected be impartial interpreters of the law. While it is possible that judges in partisan systems have been honestly convinced by policy considerations that the law should change to produce more pro-business outcomes, many of my results suggest that the pro-business voting is not so innocent. It is clear, for example, that retention concerns are one of the motivations behind partisan elected judges' pro-business voting.

Moreover, concluding that pro-business voting in states with partisan elections is normatively undesirable also assumes that judicial outcomes were accurate and fair before interest groups began to influence the judiciary. Perhaps judges were too pro-consumer before, and business groups' influence has merely leveled the playing field. Regardless, business influence over judicial outcomes will only intensify as money becomes increasingly important in state Supreme Court races.

The need for reforms discussed in this section assumes that business groups' influence on the judiciary is incompatible with impartial justice. Although scholars, courts, and legislatures are beginning to realize the corrupting effect of money in judicial elections, recent reforms have not fully addressed the money's influence on judicial outcomes. For example, recent reforms after *Caperton* only address the second avenue of influence;

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[122] Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 24-25 (2003)

[123] *See, e.g.* Brandice Canes-Wrone & Tom S. Clark, Judicial Independence and Nonpartisan Elections, WISC L. REV. (forthcoming 2009); Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 148, 151-155 (Stephen B. Burbank & Barry Friedman eds., 2002)

they attempt to constrain how judges vote, but they do nothing to curtail business groups' power over which judges are elected. In this section, I discuss existing proposals to improve recusal laws and additional reforms that may better safeguard impartial justice.

A. *REFORMING RECUSAL LAWS*

Forty-seven states have incorporated Rule 2.11(A) of the ABA's 2007 Model Code into their own judicial conduct codes. This rules states that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[124] Moreover, most of the states have also included Rule 2.11(A)'s specific rules on recusal: a judge should always recuse herself (or be disqualified) when she is biased against one of the parties,[125] previously served as a lawyer in the matter in controversy,[126] has an economic interest in the subject matter of greater than de minimis value,[127] is related to a party or lawyer in the proceeding within the third degree of kinship,[128] has personal knowledge of disputed evidentiary facts,[129] or has made improper *ex parte* communications during the course of the proceeding.[130]

Despite the Model Code, disqualification standards are inadequate in cases involving campaign contributors. First, the Model Code's specific rules do not include any mention of campaign contributors. Since 1999, the ABA has recommended that states adopt an additional provision requiring mandatory disqualification when a litigant or the litigant's attorney has made contributions above a pre-determined threshold, but no state has adopted this provision.   Thus, current recusal doctrine makes it extremely difficult to disqualify a judge for having received contributions from ether a litigant or attorney.[131]

Even if a state interprets the existing Model Code's rule as requiring judges to recuse themselves from cases involving campaign contributors, disqualification procedures rarely ensure that judges will do so. In most states, individual judges are given the discretion to rule on their own

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[124] ABA Model Code of Judicial Conduct Canon 2, R. 2.11 (2007) [hereinafter ABA Model Code]. The three states whose codes of judicial conduct lack the ABA clause are Michigan, Montana, and Texas

[125] ABA Model Code, *supra* note [], Canon 2, R. 2.11(A)(1).

[126] *Id.* Canon 2, R. 2.11(A)(6)(a).

[127] *Id.* Canon 2, Rule 2.11(A)(3).

[128] *Id.* Canon 2, R. 2.11(A)(2).

[129] *See generally* Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges § 6.4.1, at ch. 12 (1996).

[130] ABA Model Code, *supra* note [], Canon 2, R. 2.9(A).

[131] *See* John Copeland Nagle, *The Recusal Alternativeto Campaign Finance Legislation*, 37 HARV. J. ON
LEGIS. 69, 87 (2003); Brief of Amicus Curiae Public Citizen in Support of Reversal 1, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521) (describing Public Citizen's unsuccessful challenge to Texas's system, "which allows large campaign contributions by lawyers and others with interests before the courts but does not require recusal of judges when contributors appear before them").

disqualification motions.[132] That is, not only do judges decide whether to voluntarily recuse themselves, most judges also have discretion in deciding the disqualification motions filed by litigants. Moreover, most states do not even require challenged judges to hold evidentiary hearings,[133] or to articulate an explanation when they decline to recuse themselves.[134] Furthermore, appellate courts rarely overturn a lower court's recusal decision, doing so only for an "abuse of discretion."[135]

In *Caperton v. Massey*, the Supreme Court finally recognized the inadequacy of judicial disqualification standards in cases involving major campaign contributors.[136] Moreover, in *Caperton*, Justice Kennedy noted that states would be wise to "adopt recusal standards more rigorous than due process requires."[137] Thus, many states have proposed various recusal reforms that go beyond the ruling in *Caperton* to ensure the appearance, and reality, of fair and impartial justice.

For example, Michigan has proposed requiring court-wide review when a judge denies a motion for his or her disqualification.[138] Similarly, West Virginia, 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. [139]

Michigan has also proposed requiring judges to publish his or her reasons for ruling on a party's motion for disqualification. [140] Other states, including California, Montana, Nevada, Texas, Washington, and Wisconsin, have proposed mandatory disqualification of any judge that has accepted a campaign contribution over a pre-determined threshold amount.[141] The threshold levels range from $250 in Montana to $50,000 in Nevada.[142]

Although many of the states' proposals should remedy some of the problems with current judicial disqualification standards, most would do little to curtail interest groups' influence on judicial outcomes. Most importantly, none of the reforms are aimed at restricting business groups'

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[132] JAMES SAMPLE, DAVID POZEN, AND MICHAEL YOUNG, BRENNAN CENTER FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 20 (20008)

[133] *See* Flamm, *supra* note [], § 17.6, at 523-35;

[134] PATRICK M. MCFADDEN, AM. JUDICATURE SOC'Y, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 19 (1990)

[135] *See* Flamm, *supra* note [], § 32.1, at 592 (Supp. 2005)

[136] Caperton v. Massey, 556 U.S. ___ (2009).

[137] *Id.* At 2267.

[138] BRENNAN CENTER FOR JUSTICE, RECUSAL REFORM IN THE STATES: 2009 TRENDS AND INITIATIVES (JULY 28, 2009) *available at: http://www.brennancenter.org/page/-/2009DISQUALIFICATIONREFORMINSTATES-3.doc*

[139] James Sample and Michael Young, *Invigorating Judicial Disqualification: Ten Potential Reforms*, 92 JUDICATURE 26, 32 (2008).

[140] BRENNAN CENTER FOR JUSTICE, RECUSAL REFORM IN THE STATES: 2009 TRENDS AND INITIATIVES, *supra* note []

[141] BRENNAN CENTER FOR JUSTICE, RECUSAL REFORM IN THE STATES: 2009 TRENDS AND INITIATIVES, *supra* note []

[142] BRENNAN CENTER FOR JUSTICE, RECUSAL REFORM IN THE STATES: 2009 TRENDS AND INITIATIVES, *supra* note []

power over which judges are elected.

Moreover, even the reforms that try to constrain bias in judicial voting may be ineffective in limiting business groups' influence over judges' voting. Because pro-business groups' influence on judges facing partisan elections is pervasive, it would create an enormous administrative burden to recuse potentially biased judges from each case. A significant portion of state trials involve business litigants; between 1995 and 1998, almost one-third of cases before the state Supreme Courts involved business litigants. Moreover, the influence of pro-business groups likely extends to numerous judges on each court; any judge seeking reelection in a partisan system has the incentive to vote in a way that will help them obtain future campaign funds and avoid future attack campaigns. Thus, it would be prohibitively costly to recuse numerous judges from so many cases.

Instead, the only way to protect impartial justice is to completely transform elective systems.

B. REFORMING JUDICIAL ELECTIONS

Only significant changes to judicial elections can ensure that interest groups do not influence judicial outcomes. Two areas of reform may reduce the growing importance and influence of money in judicial races. The first involves eliminating partisan elections, and the second involves reforming campaign finance under existing systems.

First, partisan elections could be abolished and replaced with nonpartisan elections or merit plans. Merit plans combine merit selection with retention elections. Under these plans, a bipartisan judicial nominating commission reviews applications for judgeships and then compiles a list of qualified applicants.[143] This list is submitted to the governor, who appoints one of the candidates from the commission's list of recommendations. Once appointed, the judges regularly face unopposed retention elections, where incumbent judges appear on a ballot asking voters only whether the judge should be retained in office.

This reform would still allow for citizens to be involved in the process of retaining judges through retention elections; research shows that most citizens do not want to "give up their vote."[144] However, according to my empirical results, interest groups would have considerably less influence on judicial outcomes.

North Carolina is currently considering a proposal to replace partisan judicial elections with the merit plan system.[145] However, for other states,

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[143] Caufield, 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, 628 (2005).

[144] Roy A. Schotland, *Fair and Independent Courts: A Conference on the State of the Judiciary: New Challenges to States' Judicial Selection*, 95 Geo. L. J. 1077, 1082 (2007).

[145] BRENNAN CENTER FOR JUSTICE, JUDICIAL SELECTION REFORM IN THE STATES: 2009 TRENDS AND INITIATIVES (JULY 28, 2009) *available at:*
http://www.brennancenter.org/page/-/2009SELECTIONREFORMINSTATES-3.doc

such a drastic change may be politically infeasible. These states may prefer other reforms that would reduce money's influence, without eliminating elections.[146]

For example, states could consider adopting voluntary spending limits in judicial campaigns. Although the government's imposing spending limits in political campaigns is unconstitutional,[147] some states have experimented with voluntary spending limits as a way to reduce judges' dependence on contributions.[148]

Other states have experimented with publicly funding judicial races.[149] The states provide direct cash payments to candidates in judicial races, and in return, the candidates who accept public funding agree to spend only the publicly-provided funds.

Because these reforms eliminate the need for substantial campaign funds, they should reduce the pressure on judges to favor potential contributors in their judicial decisions. Unfortunately, however, because special interest groups would not be similarly limited in their spending, they could still finance independent media campaigns that strongly influence which judges get elected.

V. CONCLUSION

The results from my empirical analysis suggest that partisan elections produce more pro-business judicial outcomes. These results are consistent with the hypothesis that the ever-increasing importance of money in judicial elections gives wealthy interest groups the opportunity to shape the judiciary.

Pro-business groups can influence judicial outcomes in two ways. First, wealthy interest groups can often dictate the outcomes of judicial elections by contributing substantial campaign funds to favored candidates, thereby increasing the chances that like-minded judges are elected. Second, once elected, judges have the incentive to favor interest groups in their judicial decisions in the hopes of obtaining more campaign support in future elections. My results suggest that business groups are influencing the judiciary through both of these paths.

Assuming pro-business outcomes are inconsistent with impartial justice,

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[146] For a more detailed discussion of these and other proposals, see Aman McLeod, *If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA L. REV. 499, 515-521 (2005).

[147] See Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 139-41 (1998).

[148] For example, Texas and New York. Tex. Elec. Code Ann. 253.164 (requiring either voluntary compliance with spending limits or a declaration of intent to exceed limits). SARA MATHIAS, AMERICAN JUDICATURE SOCIETY, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 45 (1990).

[149] For example, North Carolina and Wisconsin. *See* Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L. J. 107, 116 (2003).

I discuss how only dramatic changes to judicial elections or campaign finance will decrease interest groups' influence on the judiciary. There is no sign that the politicization of state Supreme Courts elections is lessening. Until reforms are enacted, wealthy interest groups' influence on judicial outcomes will only intensify.

TABLE 1:
METHODS OF SELECTION AND RETENTION BY STATE[150]

State	Selection Method for Full Term	Method of Retention	State	Selection Method for Full Term	Method of Retention
Alabama	P	P	Montana	N	N
Alaska	M	R	Nebraska	M	R
Arizona	M	R	Nevada	N	N
Arkansas	P	P	New Hampshire[151]	G	-
California	G	R	New Jersey[152]	G	G
Colorado	M	R	New Mexico	P	R
Connecticut[153]	LA	LA	New York	M	G
Delaware	M	G	North Carolina	P	P
Florida	M	R	North Dakota	N	N
Georgia	N	N	Ohio[154]	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[155]	M	-
Iowa	M	R	South Carolina	LE	LE
Kansas	M	R	South Dakota	M	R
Kentucky	N	N	Tennessee	M	N
Louisiana	P	P	Texas	P	P
Maine	G	G	Utah	M	R
Maryland	M	R	Vermont	M	LE
Massachusetts[156]	M	-	Virginia	LE	LE
Michigan[157]	N	N	Washington	N	N
Minnesota	N	N	West Virginia	P	P
Mississippi	N	N	Wisconsin	N	N
Missouri	M	R	Wyoming	M	R

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[150] DAVID B. ROTTMAN ET AL., U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 1998, at 21–25 tbl.4 (Bureau of Justice Statistics, Bulletin No. NCJ 178932, 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf; Am. Judicature Soc'y, Methods of Judicial Selection, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Feb. 15, 2009). 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.

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

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

[153] In Connecticut, the governor nominates and the legislature appoints. ROTTMAN ET AL., *supra* note []150, at 21 tbl.4, 25 n.2.

[154] In Ohio, political parties nominate candidates to run in nonpartisan elections. Am. Judicature Soc'y, *supra* note 150.

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

[156] In Massachusetts, judges serve until age seventy. *Id.* at 28 n.8.

[157] In Michigan, political parties nominate candidates to run in nonpartisan elections. Am. Judicature Soc'y, *supra* note 150.

TABLE 2:
AVERAGE SPENDING PER SUPREME COURT CAMPAIGN, BY STATE,
1990-2004[158]

State	Average Spending per Campaign
Pennsylvania	2,250,773
Alabama	1,450,673
Illinois	1,371,590
Ohio	1,193,205
Texas Supreme Court	1,155,125
Louisiana	1,080,113
Michigan	927,019
West Virginia	887,218
Mississippi	599,251
Nevada	593,816
Wisconsin	559,505
Kentucky	422,063
North Carolina	366,742
Montana	359,974
Georgia	289,865
New Mexico	273,398
Arkansas	264,320
Washington	205,601
Oregon	183,107
Idaho	124,579
Texas Court of Criminal Appeals[159]	116,841
Minnesota	108,185

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[158] The information in this table can be found in Bonneau, *Dynamics, supra* note [] at 67.

[159] 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.

TABLE 3:
CAMPAIGN CONTRIBUTIONS AND VOTING FOR BUSINESS LITIGANTS[160]

| Case Type | Vote for Business Litigant | | | | |
	All Cases	Labor Cases	Torts Cases	Contracts Cases	Govt. Reg. Cases
Judges Facing Partisan Election					
$1000 Contribution from a Pro-Business Group.	.002+ (.0011)	.001 (.0008)	.006* (.0014)	.003 (.005)	-.006 (.004)
Log-Likelihood	-489	-44	-279	-134	-31
	.				
Percentage of Contributions from Pro-Business Groups	.6* (.3)	.2* (.06)	.8* (.03)	.1* (.04)	.006 (.01)
Log-Likelihood	-487	-44	-279	-134	-32
Judges Facing Nonpartisan Election					
$1000 Contribution from a Pro-Business Group.	.004 (.01)	.001 (.005)	.03 (.027)	.001 (.003)	-.003 (.002)
Log-Likelihood	-1329	-178	-655	-367	-290
	.				
Percentage of Contributions from Pro-Business Groups	.06 (.1)	.01 (.008)	.3 (.3)	-.04 (.1)	-.3* (.1)
Log-Likelihood	-1329	-185	-655	-368	-290

[160] 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 control variables are not reported for brevity. "*" and "+" represent significance at the 5% and 10% levels, respectively.

TABLE 4:
RETENTION METHOD AND VOTING FOR BUSINESS LITIGANTS[161]

Variable	Vote for Business Litigant	
	Probit Model	Mixed Effects Logit Model
Partisan Reelection	0.11* (0.49)	1.39* (0.59)
Nonpartisan Reelection	-0.003 (.028)	0.022 (.51)
Retention Election	0.018 (0.23)	0.294 (0.52)
Years on Court	-0.0004 (.001)	-0.013* (.005)
Years to Retention (reverse)	-0.002 (.002)	-0.041* (.015)
Judge's PAJID Score	-0.0005 (.0005)	-0.006* (.003)
Lower Appellate Court Indicator	-0.014 (.032)	-0.203 (.455)
En banc Indicator	-0.0006 (.02)	-0.196 (.282)
Southern State Indicator	-0.039 (.025)	-.461 (.32)
% Years with Republican Legislature	0.0005 (.0004)	0.009 (.006)
Opposing Litigant is Person	0.062* (.03)	2.22* (.457)
Opposing Litigant is Government	0.033 (.024)	1.08* (.417)
Number of Observations	19026	19026
Log-Likelihood	-13000	-8227

[161] The first column 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 second column reports results from mixed-effects logit models where the dependent variable is the probability of a judge voting for the business litigant. . The issue indicators and industry indicators are not reported for brevity. "*" and "+" represent significance at the 5% and 10% levels, respectively.

TABLE 5:
RETENTION METHOD AND VOTING FOR BUSINESS LITIGANTS: DIFFERENT CASE TYPES[162]

Variable	Vote for Business Litigant			
	Labor Cases	Torts Cases	Contracts Cases	Govt. Regulation Cases
Partisan Reelection	0.062 (.077)	0.233* (.06)	0.140* (.047)	-0.06 (.065)
Nonpartisan Reelection	-0.042 (.052)	-0.044 (.0545)	0.029 (.04)	0.037 (.044)
Retention Election	-0.0018 (.056)	-0.011 (.04)	-0.009 (.032)	0.124* (.054)
Years on Court	-0.0027 (.002)	-0.0008 (.002)	0.001 (.001)	0.0008 (.002)
Years to Retention (reverse)	0.0006 (.006)	-0.004 (.003)	-0.003 (.003)	0.002 (.004)
Judge's PAJID Score	-0.001 (.0008)	-0.0006 (.0007)	-0.0003 (.0006)	-0.001 (.0009)
Lower Appellate Court Indicator	0.005 (.044)	0.0001 (.05)	-0.035 (.036)	-0.065 (.047)
Enbanc Indicator	-0.028 (.038)	-0.004 (.031)	0.013 (.040)	0.043 (.040)
Southern State Indicator	-0.007 (.048)	-0.00002 (.036)	-0.046 (.04)	-0.013 (.05)
% Years with Republican Legislature	0.0017* (.0006)	0.0009 (.0006)	0.0002 (.0004)	-0.0013* (.0006)
Opposing Litigant is Person	-0.021 (.12)	0.135* (.04)	-0.046 (.06)	0.118* (.05)
Opposing Litigant is Government	0.12+ (.069)	0.066+ (.04)	-0.043 (.042)	0.008 (.07)
Number of Observations	2952	9348	6029	3489
Log-Likelihood	-2001	-6347	-4104	-2315

[162] 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 for brevity. "*" and "+" represent significance at the 5% and 10% levels, respectively.

TABLE 6:
PARTY AFFILIATION AND VOTING FOR BUSINESS LITIGANTS[163]

Variable	Vote for Business Litigant	
	Probit Model	Mixed Effects Logit Model
Partisan Reelection	0.05* (0.003)	0.91+ (0.54)
Nonpartisan Reelection	-0.058+ (.03)	-0.66 (.47)
Retention Election	-0.012 (.027)	-0.91 (0.48)
Republican Party Affiliation	-0.047 (.034)	-0.318 (.27)
Interaction between Partisan Reelection and Republican Party Affiliation	0.225* (.05)	1.09* (.39)
Interaction between Nonpartisan Reelection and Republican Party Affiliation	0.133* (.04)	1.31* (.299)
Interaction between Retention Election and Republican Party Affiliation	0.071+ (.04)	0.768* (.31)
Observations	16,212	16,212
Log-Likelihood	-11011	-7489

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[163] The first column 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 second column reports results from mixed-effects logit models where the dependent variable is the probability of a judge voting for the business litigant. . Control variables are not reported for brevity. "*" and "+" represent significance at the 5% and 10% levels, respectively.

TABLE 7:
PARTISAN SELECTION AND VOTING FOR BUSINESS LITIGANTS:[164]

Case Type	Vote for Business Litigant				
	All Cases	Labor Cases	Torts Cases	Contracts Cases	Govt. Reg. Cases
Probit Model					
Partisan Election for Selection Only	-.007 (.035)	0.074 (.099)	0.031 (.054)	0.005 (.056)	-0.094 (.058)
Log-Likelihood	-13001	-1999	-6346	-4103	-2313
Mixed Effects Logit Model	.				
Partisan Election for Selection Only	0.08 (.36)	0.112 (.35)	0.14 (.64)	0.04 (.13)	-.14 (.28)
Log-Likelihood	-7645	-3210	-4356	-3002	-1920

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[164] The first row 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 third row reports results from mixed-effects logit models where the dependent variable is the probability of a judge voting for the business litigant. The control variables are not reported for brevity.   "*" and "+" represent significance at the 5% and 10% levels, respectively.

TABLE 8:
RETIRING JUDGES AND VOTING FOR BUSINESS LITIGANTS[165]

Case Type	Vote for Business Litigant				
	All Cases	Labor Cases	Torts Cases	Contracts Cases	Govt. Reg. Cases
Probit Model					
Partisan Reelection	0.05* (.016)	0.11 (.082)	0.09* (.031)	.038 (.031)	-.051+ (.028)
Nonpartisan Reelection	-0.07 (.048)	-0.12 (.082)	-0.07 (.04)	-0.069 (.074)	-0.055 (.056)
Retention Election	0.029 (.025)	0.037 (.065)	0.053 (.033)	-0.032 (.049)	0.07 (.04)
Log-Likelihood	-2870	-375	-1257	-993	-543
Mixed Effects Logit Model	.				
Partisan Reelection	0.33 (.59)	.23 (.85)	.73* (.34)	.45 (.36)	.013 (.18)
Nonpartisan Reelection	-0.388 (.53)	0.11 (.27)	0.26 (.74)	-0.28 (.36)	0.13 (.18)
Retention Election	0.064 (.43)	0.008 (.10)	0.043 (.78)	0.012 (.22)	0.030 (.09)
Log-Likelihood	-2134	-190	-660	-364	-290

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[165] The first row 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 third row reports results from mixed-effects logit models where the dependent variable is the probability of a judge voting for the business litigant. The control variables are not reported for brevity.   "*" and "+" represent significance at the 5% and 10% levels, respectively.

TABLE 9:
JUDGES' VOTING AS RETENTION APPROACHES[166]

Variable	Vote for Business Litigant	
	Probit Model	Mixed Effects Logit Model
Partisan Reelection*Years to Retention	0.008* (0.004)	0.106* (.038)
Nonpartisan Reelection*Years to Retention	-0.006+ (.0037)	-0.06* (.02)
Retention Election*Years to Retention	-0.004 (.003)	-0.015 (.026)
Observations	19,026	19,026
Log-Likelihood	-10256	-6978

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[166] The first column 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 second column reports results from mixed-effects logit models where the dependent variable is the probability of a judge voting for the business litigant. . The issue indicators and industry indicators are not reported for brevity. "*" and "+" represent significance at the 5% and 10% levels, respectively.