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# JUSTICE AT RISK

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AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS  
AND JUDICIAL DECISIONS



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



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## ABOUT THE AUTHOR



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## ABOUT THE AMERICAN CONSTITUTION SOCIETY

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SUE BELL COBB  
ALABAMA SUPREME COURT CHIEF JUSTICE (RET.)

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

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

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

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

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



## WHY ELSE DO CAMPAIGN DONORS GIVE?

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

# JUSTICE AT RISK

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# JUSTICE AT RISK

## AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS

BY JOANNA SHEPHERD<sup>1</sup>

### EXECUTIVE SUMMARY

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

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

Interest groups have also come to dominate campaign finance in judicial elections over the 2000-2009 period. During this period, business groups contributed over \$62.6 million, or 30 percent of the total contributions, and lawyers and lobbyists contributed \$59.3 million, or 28 percent of the total.<sup>5</sup> Interest groups have similarly dominated television advertising in state supreme court races. Of the \$93.6 million spent on television advertising between 2000

and 2009, interest groups spent \$27.5 million, with business groups responsible for over 90 percent of the television advertising paid for by interest groups.<sup>6</sup>

Thus, the dramatic changes in both the amount of money and the legal landscape surrounding judicial elections has made new data critical for drawing timely conclusions and making important policy decisions. The American Constitution Society has responded to this need by sponsoring an objective and non-partisan empirical study to explore the effect of campaign contributions on judicial behavior. Over the past year, a team of independent researchers has collected and coded data on more than 2,345 business-related state supreme court published opinions, which includes opinions from all 50 states during the years 2010 to 2012. The dataset was merged with over 175,000 contribution records that detail every reported contribution to a sitting state supreme court justice

over the same period, or dating back to the last time the justice ran for reelection. Data have also been collected on related factors such as individual justice characteristics, ideology, and data about state processes to ensure a complete and robust empirical model for testing and analysis.

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

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



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

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

Finally, there is a stronger relationship between business contributions and justices' voting in the period from 2010-2012 compared to 1995-1998. Although several previous empirical

studies have confirmed a relationship between money and voting in the 1995-1998 period, it is not surprising that the relationship would strengthen with the ever-increasing importance of money in judicial elections.

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

## KEY FINDINGS

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





## WHY STUDY CONTRIBUTIONS AND CASES INVOLVING BUSINESS INTERESTS?

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

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

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

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

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

Although business groups and lawyer/lobbyist groups contribute approximately equal amounts to candidates' campaigns, business groups overwhelmingly dominate interest group spending on television advertising. In 2006, business groups were responsible for over 90 percent of the television advertising paid for by interest groups. Although lawyers and lobbyists were the second largest

interest-group sponsor of television ads, their advertising paled in comparison to that of business groups, whose dominance of television advertising has steadily increased over time.

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

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

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

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

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









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

Former Justice Leah Ward Sears, Georgia Supreme Court

## A. THE GROWING IMPORTANCE OF MONEY IN JUDICIAL ELECTIONS

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

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

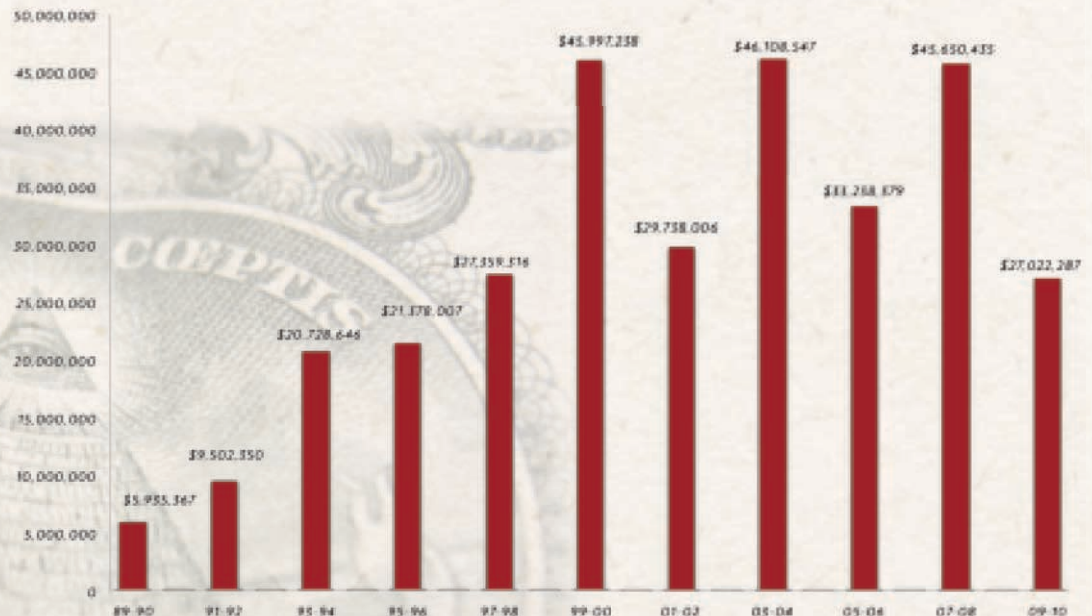
Indeed, throughout the 1990s, only \$83.3 million was contributed to state supreme court candidates; in contrast, candidates raised \$206.9 million between 2000-2009.<sup>22</sup>

Figure 1 shows trends in candidate fundraising from 1989 to 2010.

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

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

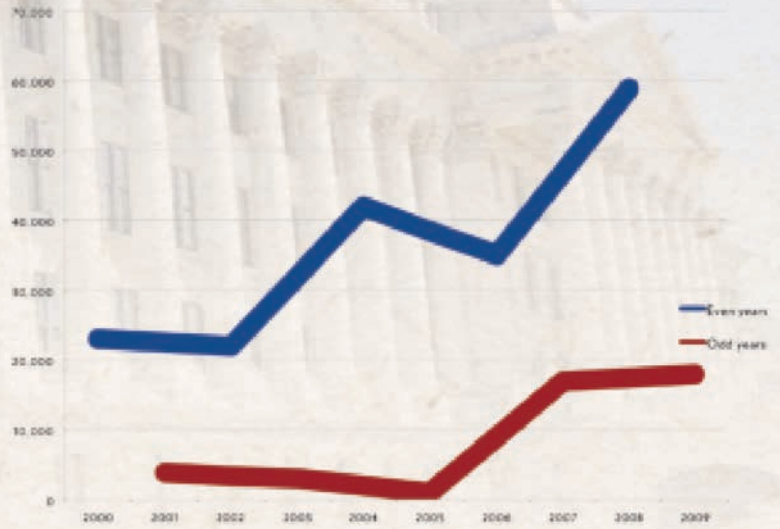
Figure 1 TRENDS IN STATE SUPREME COURT FUNDRAISING



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

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

Figure 2 TRENDS IN THE NUMBER OF TV AD AIRINGS IN STATE SUPREME COURT RACES<sup>24</sup>



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

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

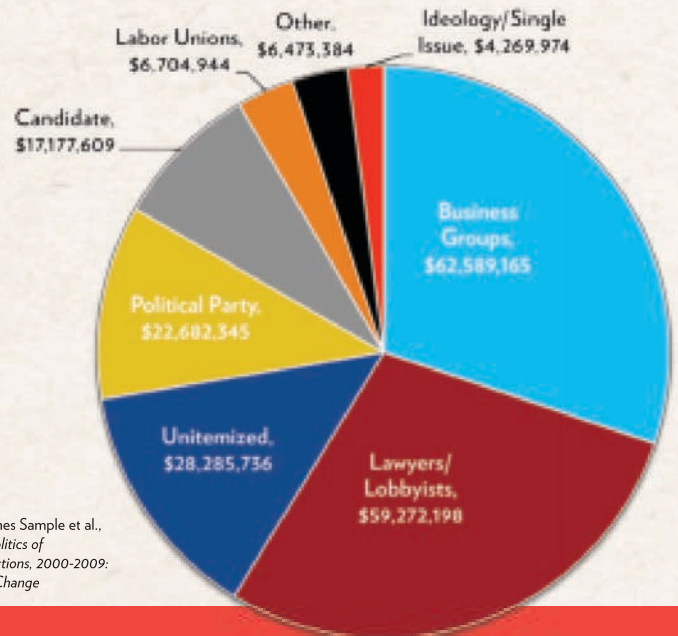
As judicial elections have become increasingly difficult to win without substantial funding, the financial support of wealthy interest groups can be decisive and may give those groups great influence with judicial candidates. Indeed, elected judges point to the intense pressure to raise campaign funds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



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

Ohio Supreme Court Senior Associate Justice Paul Pfeifer

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



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



## II. THREATS TO IMPARTIAL JUSTICE

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

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

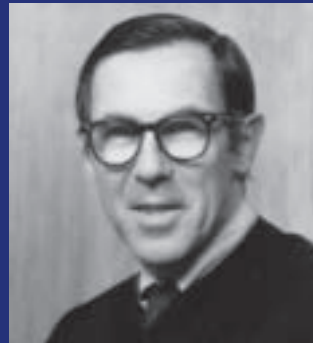
Yet despite the public's overwhelming support for judicial elections, most agree that the increasing importance of money in judicial campaigns is putting pressure on judges to decide cases strategically. Indeed, **76 percent of voters believe that campaign contributions have at least some influence on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



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

Former Justice Marilyn Kelly,  
Michigan Supreme Court

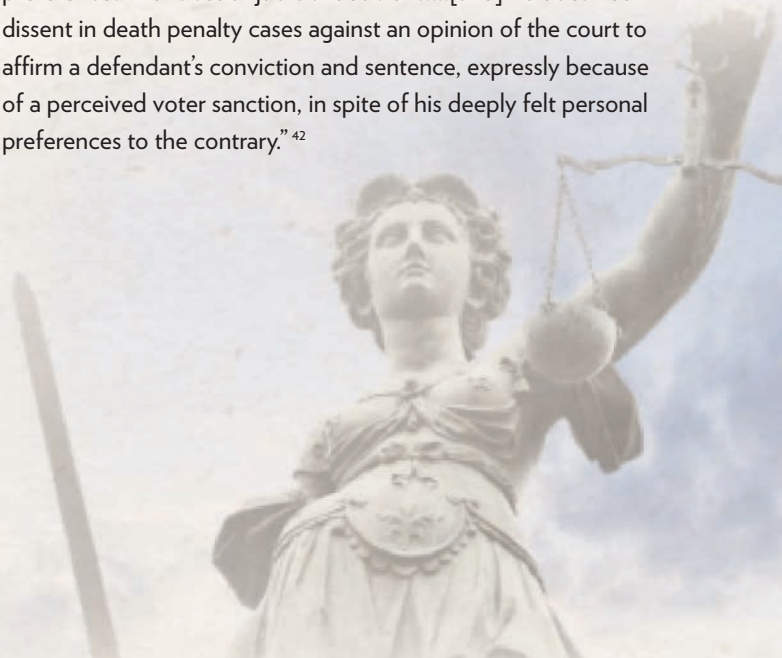
Even worse, judges generally agree that money matters in judicial decision-making. Forty-six percent of judges believe that campaign contributions have at least "a little influence" on their decisions, and 56 percent believe "judges should be prohibited from presiding over and ruling in cases when one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



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

Former Justice Otto M. Kaus,  
California Supreme Court

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



## A. PREVIOUS EMPIRICAL FINDINGS

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

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



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

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

## B. RECENT COURT CASES

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

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

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



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

**Former Justice James Nelson, Montana Supreme Court**





## C. BUSINESS INFLUENCE IN JUDICIAL ELECTIONS

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

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

Business groups regularly disguise their campaign support by channeling their funds through nonprofit groups with inspirational but completely opaque names.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> And in *Caperton* itself, a group called

"And For the Sake of Kids" received over two-thirds of its funding from Don Blankenship, the CEO of Massey Energy (the original defendant in *Caperton*), as he sought to replace the incumbent justice with his favored, pro-business candidate.<sup>57</sup>

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

Between 2000 and 2004, 36 of the 40 judges whom the Chamber supported were elected.<sup>58</sup>

The next section presents results from empirical tests of the relationship between campaign contributions from business groups and the voting of judges that receive those contributions. There are at

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

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

### III. IS JUSTICE AT RISK?: EMPIRICAL ANALYSIS

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

#### A. DATA

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

The second dataset includes data on campaign contributions in each elected justice’s most recent election. It consists of over 175,000 contribution records that detail every reported contribution to a sitting state supreme court justice between 2010 and 2012, or dating back to the last time the justice ran for reelection. The data are collected by the National Institute on Money in State Politics, a nonpartisan, nonprofit charitable organization dedicated to accurate, comprehensive and unbiased documentation and research on campaign finance at the state level.<sup>61</sup> The Institute receives its data in either electronic or paper

THE DATA ANALYZED IN THIS REPORT IS AVAILABLE FOR YOUR REVIEW AND USE AT [WWW.FOLLOWTHEMONEY.ORG/RESEARCH/SPECIAL\\_TOPICS.PHTML](http://WWW.FOLLOWTHEMONEY.ORG/RESEARCH/SPECIAL_TOPICS.PHTML). WE ENCOURAGE YOU TO CONTRIBUTE TO AND EXPAND THE IMPORTANT CONVERSATION ABOUT FAIR COURTS.

files from the state disclosure agencies with which candidates must file their campaign finance reports. The Institute compiles the information for all state-level candidates in the primary and general elections, and then assigns donors an economic interest code based on both information contained in the disclosure reports and deeper research into the donor’s characteristics and agenda.

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

#### B. KEY VARIABLES

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

The second measure of business contributions in our analysis is the percentage of each justice’s total contributions that come from business groups. This is likely a more accurate measure of business

influence because the impact of a contribution likely depends on its importance relative to other contributions. That is, a \$50,000 contribution from a business group to a justice might have a stronger influence on a justice’s voting if, for example, his or her total contributions are \$100,000 instead of \$750,000.

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

Table 1 BUSINESS CONTRIBUTIONS BY SELECTION METHOD

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