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Money, Politics, and Impartial Justice

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MONEY, POLITICS, AND IMPARTIAL JUSTICE

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ABSTRACT

A centuries-old controversy asks whether judicial elections are inconsistent with impartial justice. The debate is especially important because more than 90 percent of the United States' judicial business is handled by state courts, and approximately nine in ten of all state court judges face the voters in some type of election. Using a stunning new data set of virtually all state supreme court decisions from 1995 to 1998, this paper provides empirical evidence that elected state supreme court judges routinely adjust their rulings to attract votes and campaign money. I find that judges who must be reelected by Republican voters, especially in partisan elections, tend to decide cases in accord with standard Republican policy: they are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases and tort cases generally, and against criminals in criminal appeals. Judicial behavior is correspondingly liberal for judges facing reelection by Democrats. Moreover, I find evidence that judges change their rulings when the political preferences of the voters change.

In addition, my analysis finds a strong relationship between campaign contributions and judges' rulings. Contributions from pro-business groups, pro-labor groups, doctor groups, insurance

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companies, and lawyer groups increase the probability that judges will vote for the litigants favored by those interest groups. The results suggest that recent trends in judicial elections—elections becoming more contested, competitive, and expensive—may have upset the delicate balance between judicial independence and accountability. I discuss various policy solutions for reforming states' systems.

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INTRODUCTION

A centuries-old debate asks whether judicial elections are inconsistent with impartial justice. The debate is especially important because more than 90 percent of the United States' judicial business is handled by state courts,[1] and approximately nine in ten of all state court judges face the voters in some type of election.[2] Using a stunning new data set of virtually all state supreme court decisions from 1995 to 1998, this Article provides empirical evidence that elected state supreme court judges routinely adjust their rulings to attract votes and campaign money. The results suggest that recent trends in judicial elections—elections becoming more contested, competitive, and expensive—may have upset the delicate balance between judicial independence and accountability.

For many academics, elite lawyers, and federal judges, it is an assumed truth that judges should be protected completely from public influence.[3] Public pressure on judges to rule a certain way is a menace. Safety from the menace is found only in providing strict judicial independence. From this perspective, judicial heroes are southern federal judges with life tenure resisting racist threats and public hatred to integrate public schools. Tragedies are the stories of justices like Rose Bird, whom California voters threw off the state supreme court in 1986 because she refused to uphold death sentences.[4]

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1. 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).

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

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

4. *See* Robert Lindsey, *Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. TIMES, Nov. 6, 1986, at A30. For an account of the opposition to Bird, see JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 167–79 (1989).

Justices of the U.S. Supreme Court recently expressed this perspective. The Court reluctantly upheld on First Amendment grounds New York's system for electing judges.[5] But in their concurrence, Justices Kennedy and Breyer noted:

> 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.[6]

They concluded:

> The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.[7]

Likewise, Justices Stevens and Souter agreed with "the broader proposition that the very practice of electing judges is unwise."[8] They regretfully concluded, "The Constitution does not prohibit legislatures from enacting stupid laws."[9]

But this independence model for the judiciary is not the only model that reasonable minds accept. Indeed, the public has overwhelmingly chosen a different model for the judiciary: the accountability model. Under this model, judges are accountable to their constituents because they may not be reelected if they make rulings with which voters disagree. The federal judges who are the main examples of the independence model take care of only a sliver of the country's litigation. Instead, more than 90 percent of cases in the United States are litigated in state courts,[10] and 89 percent of all state court judges face the voters in some type of election.[11] Moreover,

5. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 801 (2008).
6. *Id.* at 803 (Kennedy & Breyer, JJ., concurring).
7. *Id.*
8. *Id.* at 801 (Stevens & Souter, JJ., concurring).
9. *Id.* (quoting Justice Thurgood Marshall).
10. Abrahamson, *supra* note 1, at 976; Schotland, *supra* note 1, at 77.
11. Schotland, *supra* note 2, app. 2 at 1105.

surveys reveal that over 75 percent of the U.S. public prefers elections over appointments for selecting judges.[12]

In Part I, I discuss how judicial elections are almost as old as the country itself. The accountability model came to dominate state courts during the Jacksonian era as a careful, reasoned response to the perceived lack of accountability of appointed judges. Moreover, proponents argued, electing judges increased judicial independence rather than reduced it.[13] Elections ensured that judges would be responsive to the citizens rather than to the officials who appointed and retained the judges.

Controversy about judicial elections is likewise as old as the elections. For more than a century, leading academics and lawyers have called them "mobocracy," "disgraceful," "shocking," and accused them of "destroy[ing] the traditional respect for the bench."[14] Likewise, many state judges dislike elections. According to former Justice Otto Kaus of the California Supreme Court, the pressure of facing the voters for reelection is like "hav[ing] a crocodile in your bathtub . . . . You keep wondering whether you're letting yourself be influenced, and you do not know. You do not know yourself that well."[15]

Despite two centuries of controversy about judicial elections, however, no empirical study has yet addressed one of the central issues in the controversy: the degree to which the political preferences of both voters and campaign contributors influence judges' decisions. Proponents of the independence model believe that elections and retention politics affect judges' rulings a lot.[16] In contrast, supporters of the accountability model believe that any influence is modest.[17] Both groups' beliefs, however, are based only on anecdote.

The absence of information on this fundamental issue is especially important because of recent developments in judicial elections. As I discuss in Parts II and III, three recent trends have

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12. *See, e.g.*, GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE: FREQUENCY QUESTIONNAIRE 7 (2001), *available at* http://faircourts.org/files/JASNational SurveyResults.pdf.

13. *See infra* text accompanying notes 31–32.

14. *See infra* text accompanying notes 26, 71–72.

15. Dan Morain, *Kaus to Retire from State Supreme Court; Deplores Strident Attacks on Justices in Anti-Bird Effort*, L.A. TIMES, July 2, 1985, at A1 (quoting Justice Otto M. Kaus, Cal. Supreme Court).

16. *See infra* text accompanying notes 71–72.

17. *See infra* text accompanying notes 32–47.

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.[18] Second, incumbents are losing at a much higher rate than before.[19] 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.[20] Third, recent decades have seen dramatic increases in the amounts of money spent in judicial campaigns.[21] For example, spending in partisan state supreme court elections averaged more than $1.5 million in 2004.[22] No study has yet addressed whether, under this newly heated competition for votes and money, judges will shape their rulings to get them.

This paper fills that gap. I exploit a stunning new data set that 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 impact on judges' rulings of politics and money: the degree to which individual judges' rulings are related to the political preferences both of the people who will decide whether the judge will be retained and of those who contribute money to the judge's campaign.

I explore two distinct routes through which the politics of elections and campaign contributions from interest groups can influence judges' voting. First, the need to attract both votes and interest groups' campaign contributions could persuade judges to vote in certain ways. Second, voters and interest groups may be more likely to both contribute to the campaigns and vote for the judges whose votes are consistent with their own preferences. Under both of these possibilities, elections and interest group contributions influence state supreme court rulings. In the first case, the influence is direct, influencing judges to change their votes. In the second the influence is indirect, increasing the probability that a judge whose

18. *See infra* text accompanying notes 90–94.
19. *See infra* text accompanying notes 95–98.
20. *See infra* text accompanying notes 98–99.
21. *See infra* text accompanying notes 99–100.
22. *See infra* text accompanying note 103.

votes favor an interest group or group of voters will be reelected. But the first question is whether there is any influence at all.

In Part IV, I present several empirical results that suggest that retention politics are associated with judges' rulings. That is, I find that under some retention methods, judges' voting is associated with the political preferences of those who will decide whether the judges keep their jobs. For example, the results indicate that when judges face Republican retention agents in partisan reelections, they are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases, for original defendants in tort cases, and against criminals in criminal appeals. The magnitudes of the marginal effects are substantial but reasonable. For example, a judge facing a partisan reelection when voters are Republican rather than Democrat is approximately 36 percentage points more likely to vote in favor of businesses over individuals.

The results also suggest that, unlike judges facing retention decisions, judges who do not need to appeal to voters shape their rulings to voters' preferences less. For example, voters' politics has little effect on the rulings of judges with permanent tenure or who plan to retire before the next election.

Furthermore, when the preferences of those who will reappoint a judge change, so too do the judge's rulings. The results show that when a Republican governor replaces a Democratic governor, judges are more likely to vote in favor of the business in a business-versus-person case, in favor of the employer in a labor dispute, and in favor of defendants in general in tort cases. This is strong evidence for the hypothesis that retention politics directly influence judges; their rulings change after a change in retention agents' preferences, as proxied by the governor's party affiliation.

Next, in Part V, I discuss my empirical analysis of the relationship between interest groups' campaign contributions and judges' voting. The results support the hypothesis that money can buy justice. That is, I find that contributions from interest groups are associated with increases in the probability that judges will vote for the litigants favored by those interest groups. Contributions from pro-business groups are associated with increases in the probability that a judge will vote for the business litigant in a business-versus-individual case, in a products liability case, and in tort cases generally. Contributions from pro-labor groups are associated with reductions in the probability that judges vote for the employers in labor disputes.

Contributions from doctor and hospital groups are associated with increases in the probability that judges vote for the original defendants (who are often doctors and hospitals) in tort cases. Contributions from insurance companies are associated with increases in the probability that judges will vote for those that that the companies typically insure: businesses in business-versus-person cases, businesses in products liability cases, and original defendants in tort cases. In contrast, contributions from lawyers' groups, whose members are mainly plaintiffs' lawyers, are associated with reductions in the probability that judges will vote for those same litigants that are typically defendants.

Taken together, the results suggest that the accountability model may be under stress. If elections ever maintained the delicate balance between independence and accountability that the original supporters believed they would, my results suggest that this balance may be at risk. With increasingly competitive elections and the inflow of campaign money, some judges may frequently adjust their rulings to attract votes and dollars.

In Part VI, I discuss various possible policy solutions for reforming states' judicial election systems. I first explore the possibility of granting permanent tenure to state judges, and I discuss the judicial selection systems in several other countries that have permanent tenure. Then I discuss other reforms such as eliminating partisan elections, moving to a system of public financing of judicial elections, voluntary spending limits on campaign spending, and stricter recusal rules for judges.

I. THE HISTORICAL TENSION BETWEEN JUDICIAL ACCOUNTABILITY AND INDEPENDENCE

The modern tension between judicial accountability and judicial independence is almost as old as the United States itself. 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.[23] But, in 1812, Georgia became the first state to amend its Constitution to provide for popular elections for all trial judges.[24] In 1832, Mississippi became the first

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

24. LARRY C. BERKSON AS 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.

state to elect all of its judges, including those on courts of appeals.[25] Some were aghast. One former member of Mississippi's supreme court complained at the time, "Our constitution is the subject of ridicule in all the States where it is known. It is referred to as a full definition of mobocracy."[26]

Yet election of judges was an idea whose time had come. "Every state that entered the union before 1845 did so with an appointed judiciary."[27] In contrast, each state that entered between 1846 and 1959, more than a century later, had judicial elections.[28] By 1865, 24 of the 34 states elected their judges.[29]

The rise of an elected judiciary occurred as part of the Jacksonian era's championing of popular democracy. A core value of Jacksonianism was a distrust of unrepresentative, unaccountable government officers, and an affection for the mass of ordinary people.[30] Jackson described his core value: "the first principle of our system—that the majority is to govern."[31] Civic virtue would prevent the majority from mistreating minorities.

Jackson and his followers worked diligently to steer government away from promoting narrow interests and special privileges. Jackson sought to have U.S. senators and representatives elected directly, and to eliminate the electoral college.[32] Similarly, an attempt to eliminate another unelected elite opened wide the doors to the professions. For example, requirements for becoming a lawyer were almost completely eliminated. In almost every state, one could now qualify to practice law without attending law school and by submitting to only a brief, easy-to-pass oral exam.[33] The new openness permitted a poor boy

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25. *Id.*

26. EDWIN ARTHUR MILES, JACKSONIAN DEMOCRACY IN MISSISSIPPI 42 (1960) (quoting NATCHEZ (Miss.), Nov. 9, 1832); *see also* Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993) (commenting on Mississippi's submission of the appellate court to the electorate, "[a]lthough Indiana and Georgia had been electing trial judges for years, the election of appellate judges seemed beyond the pale").

27. Nelson, *supra* note 26, at 190.

28. *See* BERKSON & CAUFIELD, *supra* note 24, at 1.

29. *Id.*

30. *See* Nelson, *supra* note 26, at 222.

31. HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 97 (1990) (quoting Andrew Jackson).

32. Nelson, *supra* note 26, at 222–23.

33. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2115, 2123 (1998).

from a backwoods cabin to become a leading Illinois lawyer and president.

The movement to elect judges fit the Jacksonian philosophy perfectly. State after state established an elective judiciary only after long, cautious debate in constitutional conventions.[34] Supporters came to believe that appointing judges did not ensure judicial independence.[35] Influences on judges were inevitable.[36] If judges were appointed, then this influence would come from the officials who appointed and retained them;[37] that is, judges would shape their rulings to please the governors and legislators. It was preferable instead that this 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."[38] 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."[39]

Moreover, the judiciary could function as a check and balance on the other governmental branches only if it truly were independent of them. A judge who was appointed by the executive or legislature, and so beholden to them, could not be truly independent of them. The only means to a truly independent judiciary was election by the people. As noted in the Illinois debates, because "one object of the judiciary was to protect the people from the other branches of the

34. Nelson, *supra* note 26, at 222–24.

35. *Id.*

36. *Id.* at 217.

37. *Id.*

38. 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).

39. 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).

government,"[40] it was necessary that the judiciary was "above the control of the legislative or executive departments."[41]

In addition, supporters believed that voters, not politicians, would select the best judges.[42] The appointment process too often led to the selection of party hacks, with the judiciary often serving as pleasant pasture for failed but loyal politicians who had lost elections.[43]

Finally, supporters argued that elections would ensure a judiciary that had the optimal combination of independence and contact with the people's will. They believed that elections would not pervasively bias judges' decisions; the judges' consciences would assure that. Instead, the elections would offer a modest disciplining force that would induce judges not to stray dramatically from the people's preferences. A delegate to the Massachusetts convention explained the harms of excessive independence: "I like to have independent and upright men in all public stations, but I do not like the idea of having any public officers entirely independent of the people. I think they should be so dependent at least, as to have an eye to the power they serve."[44] Similarly, an Indiana delegate explained how elections might help to create the proper relationship between judge and people, the right balance of independence and accountability: "I do not say that he should be so much under their influence as to be awed into decisions, but merely that he should understand their will."[45]

The convention delegates strove to create a system that gave judges strong incentives to heed the public good.[46] As a leading commentator notes, "the judiciary became elective not so much to

40. CONSTITUTIONAL DEBATES OF 1847, at 466 (Arthur Charles Cole ed., 1919) [hereinafter ILLINOIS CONVENTION OF 1847] (statement of Archibald Williams).

41. *Id.*

42. *See* Kermit L. Hall, *The 'Route to Hell' Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832–1920*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229, 230 (David J. Bodenhamer & James W. Ely, Jr. eds., 1983); Nelson, *supra* note 26, at 200.

43. *Id.*

44. MASSACHUSETTS CONVENTION OF 1853, *supra* note 38, at 785 (statement of Rodney French).

45. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1662 (Indianapolis, A.H. Brown 1850) [hereinafter INDIANA CONVENTION OF 1850] (statement of Henry Thornton).

46. *See* Nelson, *supra* note 26, at 224.

permit the people to choose honest judges as to keep judges honest once they reached the bench."[47]

Nevertheless, the supporters of an elected judiciary recognized that elected judges might occasionally feel excessive pressure from excited voter majorities.[48] The supporters felt, however, that this danger was less than the dangers of an appointive system. In an appointive system, the officials who appointed and retained the judges would exert even greater influence and pressure on them.[49] Even a judge who was appointed for life would be forever beholden to the official who had appointed him. Moreover, appointed judges, especially those with life tenure, were examples of what Jacksonians feared most: unelected government officials with unchecked power.[50] Because a judge with life tenure is unaccountable to the people, the judge is, in effect, in the same position as a dictator.

Careful structuring of the election process could reduce any dangers of excessive popular influence.[51] For example, in most states, judges would have long terms.[52] The terms would be staggered; this would assure that all judges could not be thrown out together in a fit of popular excitement.[53] Judges would not be permitted to run for other elected offices during their terms.[54] Finally, elections would be by district, rather than at large.[55] This would again reduce the possibility that an excited state-wide majority could remove large numbers of judges.

This accountability model—judicial independence tempered by modest popular influence through a carefully structured election system—continued to flourish even after its initial success in the mid-1800s.[56] The number of states with elected judges continued to grow.[57]

Contemporary examples suggest the accountability model has had some success in achieving its historical proponents' goals. First, it

47. *Id.*

48. *Id.* at 218; Schotland, *supra* note 2, at 1094.

49. *See, e.g.*, KENTUCKY CONVENTION OF 1849, *supra* note 39, at 270 (statement of James Guthrie); *id.* at 225 (statement of Squire Turner).

50. *See* Nelson, *supra* note 26, at 222.

51. Schotland, *supra* note 2, at 1094.

52. *Id.*

53. Nelson, *supra* note 26, at 218.

54. Schotland, *supra* note 2, at 1094.

55. Nelson, *supra* note 26, at 218.

56. Schotland, *supra* note 2, at 1093–94.

57. *Id.* at 1093.

promotes selection of judges whose values reflect those of the public. Alan Page's 1992 election to the Minnesota Supreme Court is one example.[58] Page is an African-American former professional football star who had become a successful lawyer.[59] He was unable for years to convince politicians to appoint him to any judgeship in Minnesota, trial or appellate.[60] His lack of success may have been due to stereotypes about the intelligence of football players, especially African-American ones, that he saw arising during his later campaign.[61] Unable to gain appointment, he filed to be a candidate in an election for the supreme court. He was elected in a landslide, with 61 percent of the vote.[62] Although opinions may differ about whether other appointed candidates would have been better judges than Page, the election results indicate that his appointment represented the people's will.

Second, the accountability model has succeeded in removing judges who stray substantially from voters' preferences. A recent example is Jack Hampton, a Texas district court judge, who imposed an unusually light sentence on a defendant who had been convicted of killing two gay men.[63] He explained:

> These homosexuals, by running around on weekends picking up teen-age boys, they're asking for trouble . . . . I don't care much for queers cruising the streets picking up teen-age boys.
>
> . . . I put prostitutes and gays at about the same level. And I'd be hard put to give somebody life for killing a prostitute.[64]

Although the State Commission on Judicial Conduct censured Hampton for his remarks, it did not remove him from office.[65] When he ran for a seat on the Texas court of appeals, however, he was defeated.[66] His opponent received approximately 20 percent of her

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58. *Id.* at 1091.

59. *Id.*

60. *Id.* (quoting Alan C. Page, Justice, Address at the Summit on Improving Judicial Selection (Dec. 8–9, 2000)).

61. *Id.*

62. *Id.*

63. Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1047 (2007).

64. Lisa Belkin, *Report Clears Judge of Bias in Remarks About Homosexuals*, N.Y. TIMES, Nov. 2, 1989, at A25 (quoting Jack Hampton, Judge, Dallas County Criminal Dist. Court).

65. Karlan, *supra* note 63, at 1047–48.

66. *Gay Rights Groups Hail Defeat of Judge in Texas*, N.Y. TIMES, Dec. 4, 1992, at B20.

campaign contributions from gay and lesbian groups.[67] Hampton's remarks and decision in the case were major issues in the campaign.[68]

Judge Hampton's ruling may have been sincere and based on his conscience. Proponents of the accountability model, however, believe that the judge's conscience should not necessarily triumph over the consciences of the voters.[69] As Professor Karlan notes, "once we move away from decisions in particular cases and toward the pronouncement of general legal rules, it is even less clear that individuals ought to be selected or retained without regard for their viewpoints. . . . To some extent, then, judges *should* pay attention to popular views."[70] According to this approach, judges do not prostitute themselves by responding to a modest extent to voters' views any more than any elected representatives do.

Despite both the successes and the public support for judicial elections, angry criticisms of the elected judiciary continued on after its inception. Periodically, ardent supporters of the independence model, often elite academics and bar leaders, have lashed out at the pervasive policy of electing judges. One such period was as the beginning of the twentieth century. Ex-President William Howard Taft blustered in 1913 that judicial elections were "disgraceful" and "so shocking . . . that we ought to condemn [them]."[71] Likewise, Professor Roscoe Pound stated: "Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[72]

Yet the dominance of the accountability model endures and is increasing. It has prevailed in all except federal courts and a sliver of state courts. When President Taft and Professor Pound raged a century ago, eight in ten state court judges were subject to election.[73] As of 2004, approximately nine in ten were.[74]

Nevertheless, some states have modified aspects of their judicial elections. For example, by 1927, twelve states had switched from

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67. *Id.*

68. *Id.*

69. *See, e.g.*, Karlan, *supra* note 63, at 1048.

70. *Id.*

71. WILLIAM HOWARD TAFT, POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS 194–95 (1913).

72. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906).

73. *Guilty, Your Honour?*, ECONOMIST, July 24, 2004, at 28, 29.

74. *Id.*

partisan elections, which revealed judges' party affiliations, to nonpartisan elections.[75] 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.[76] Under merit selection plans, a bipartisan judicial nominating commission reviews applications for judgeships and then compiles a list of qualified applicants.[77] The governor then appoints one of the candidates from the commission's list.[78] 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.[79]

This long historical evolution has led to variations of the accountability model. The modern selection methods are partisan elections, nonpartisan elections, gubernatorial appointment, legislative elections, legislative appointments, and merit plans. Although in many states the methods of selection and retention are the same, in other states they are different. The following are the combinations that states have chosen:

1. Judges selected through gubernatorial appointment and merit plans are retained through gubernatorial reappointment, legislative elections, unopposed retention elections, or reappointment by a judicial nominating commission.
2. Judges selected through legislative appointments are retained through legislative reappointments.
3. Judges that are originally elected in partisan elections are retained through partisan elections or unopposed retention elections.
4. Judges originally elected in nonpartisan elections are retained only through nonpartisan elections.

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75. BERKSON & CAUFIELD, *supra* note 24, at 2.

76. *Id.*

77. 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 24, at 2).

78. *Id.*

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

Table 1 shows each state's methods of selection and retention for the study period, 1995 to 1998.[80]

Table 1. Methods of Selection and Retention by State[81]

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[82]	G	—
California	G	R	New Jersey	G	G
Colorado	M	R	New Mexico	P	P
Connecticut[83]	LA	LA	New York	M	G
Delaware	M	G	North. Carolina	P	P
Florida	M	R	North Dakota	N	N
Georgia	N	N	Ohio[84]	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[85]	M	—
Iowa	M	R	South Carolina	LE	LE
Kansas	M	R	South Dakota	M	R

80. Although there are other differences between the selection and retention methods of each state, they are generally grouped into these primary categories. *See* BERKSON & CAUFIELD, *supra* note 24, at 2.

81. 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?state= (last visited Nov. 3, 2008). 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.

82. In New Hampshire, judges serve until age seventy. ROTTMAN ET AL., *supra* note 81, at 28 n.18.

83. In Connecticut, the Governor nominates candidates from a merit-commission list, and the legislature appoints. *Id.* at 25 tbl.4.

84. In Ohio, political parties nominate candidates that are then chosen in nonpartisan elections. *Id.* at 28 n.24.

85. In Rhode Island, judges have life tenure. *Id.* at 28 n.27.

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[86]	M	—	Virginia	LA	LA
Michigan[87]	N	N	Washington	N	N
Minnesota	N	N	West Virginia	P	P
Mississippi	N	N	Wisconsin	N	N
Missouri	M	R	Wyoming	M	R

The states' judicial selection and retention methods continue to provoke hot controversy. The states face the same concerns they faced two hundred years ago: which methods achieve the best balance of judicial independence and accountability. With almost 90 percent of all state judges facing voters in some way, however, and almost 90 percent of all state appellate judges being subject to a retention decision by either voters or other politicians,[88] a critical issue is the degree to which election pressures influence judges' decisions.

II. THE THREAT FROM STATE COURTS' INCREASED POLITICIZATION

As those who implemented it first indicated, the accountability model functions properly only if judicial elections' impact on judges' decisions is modest and in the background. The model's success depends on elections creating an appropriate balance between independence and accountability, with judges mindful of the public will but not slaves to it. If, instead, judicial elections profoundly and pervasively influence how judges decide cases, then judicial impartiality is lost and the accountability model fails.

Three trends in the late twentieth and early twenty-first century have created threats to this delicate balance.[89] The trends have increased politicization of state supreme courts and elections, and they have created pressure for justices to behave and rule politically.

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86. In Massachusetts, judges serve until age seventy. *Id.* at 28 n.8.

87. In Michigan, political parties nominate candidates that are then chosen in nonpartisan elections. *Id.* at 28 n.12.

88. NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 12 (2002), *available at* http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf.

89. *See, e.g.*, Nathan Richard Wilderman, Casenote, *Bought Elections:* Republican Party of Minnesota v. White, 11 GEO. MASON L. REV. 765, 769–72 (2003).

First, the fraction of contested elections, in which a new candidate challenges the incumbent, has increased. The fraction has always been higher in partisan systems than in nonpartisan systems.[90] Both partisan and nonpartisan systems, however, have recently experienced increases in the number of contested elections.[91] In 1984, only 33 percent of nonpartisan elections were contested.[92] By 2000, this number had increased to 75 percent.[93] Likewise, 75 percent of partisan elections were contested in 1988.[94] By 2000, this number had grown to 95 percent.[95]

Second, as elections have become more contested, incumbents in partisan elections have found it harder to win. Mirroring the differences in the percentage of contested races for nonpartisan and partisan elections, incumbents in nonpartisan elections are much more likely to be reelected than those in partisan elections.[96] Whereas approximately 7 percent of incumbents were defeated in nonpartisan elections between 1980–2000, approximately 23 percent of incumbents were defeated in partisan elections.[97] Moreover, the loss rate for incumbents has increased dramatically in partisan elections over this period. In 1980, 26.3 percent of incumbents were defeated in 1980, but in 2000, the loss rate for incumbents was a stunning 45.5 percent,[98] much higher than the rate at which incumbents lose in the U.S. House or Senate or in state legislatures.[99]

The third trend is the dramatic increase in spending on judicial campaigns from the 1990s to the early twenty-first century. The average contested state supreme court race in 1990, including both

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90. Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 27 tbl.6 (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, 343 tbl.2 (2003).

91. Bonneau, *supra* note 90, at 27 tbl.6.

92. Bonneau & Hall, *supra* note 90, at 343 tbl.2.

93. Bonneau, *supra* note 90, at 27 tbl.6.

94. Bonneau & Hall, *supra* note 90, at 343 tbl.2.

95. Bonneau, *supra* note 90, at 27 tbl.6.

96. Melinda Gann Hall, *Judging the Election Returns: Competition as Accountability in State Supreme Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 178 tbl.9.5 (Matthew Streb ed., 2007).

97. *Id.* at 177 tbl.9.4.

98. *Id.*

99. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 (2001); Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 AM. J. POL. SCI. 20, 21 (2006).

partisan and nonpartisan contests, involved $364,348 in campaign spending.[100] A similar race in 2004 cost $892,755.[101]

Spending in partisan elections has increased substantially more than spending in nonpartisan elections. Between 1990 and 2004, average campaign spending in nonpartisan elections increased by approximately 100 percent, from approximately $300,000 to $600,000.[102] In contrast, average spending in partisan elections during this period increased from approximately $425,000 to $1.5 million, an increase of over 250 percent.[103]

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.[104]

Table 2. Average Spending per Supreme Court Campaign, by State, 1990–2004[105]

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

100. 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, *supra* note 96, at 59, 63.

101. *Id.*

102. *Id.* at 63 fig.4.1.

103. *Id.*

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

105. The information in this table can be found in Bonneau's article. *Id.* at 67 tbl.4.2.

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[106]	116,841
Minnesota	108,185

The cost of supreme court campaigns, especially in partisan elections, has risen so dramatically that it is often difficult, if not impossible, for candidates to win elections without substantial funding.[107] In 1997–1998, the top campaign fundraiser prevailed in approximately 75 percent of contested state supreme court races, and in 2001–2002, the top fundraiser won in 80 percent of the elections.[108] Thus, with few exceptions, more money is a prelude to victory.

Four forces have contributed to the growth in competitiveness and expense of judicial elections. The forces are not all independent; many cause or reinforce each other. First, in the mid-1970s, people discovered that vigorously contesting a judicial election could be effective. Until then, judicial elections were "low-key affairs, conducted with civility and dignity,"[109] which were "as exciting as a game of checkers. Played by mail."[110] Then in Los Angeles in 1978, a group of deputy district attorneys offered to support any candidate who would run against an unopposed incumbent trial judge.[111] This

106. 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.

107. Bonneau, *supra* note 90, at 32 & tbl.11; Wilderman, *supra* note 89, at 769–80.

108. It is possible that more money does not cause victory; instead, pending victory may create the inflow of money. Donors may be generous with the candidate that they expect to win, even if the candidate would win without the money.

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

110. William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Justice Race*, COM. APPEAL (Memphis), Oct. 29, 2000, at DS1.

111. Schotland, *supra* note 2, at 1080.

led to "an unprecedented number of contests and defeated judges."[112] Others recognized the possibilities of this technical innovation, and copied it.[113]

Second, campaigns may be more competitive and expensive because the stakes may be higher. State supreme courts may have increased in power and influence during recent decades. For example, case filings have increased dramatically, with the number of cases filed in some state appellate courts doubling every ten years between the 1960s and 1980s.[114] The second half of the twentieth century has also brought an increase in controversial cases in state courts, such as environmental protection, the rights of criminal defendants, abortion, political apportionment, and industry-wide liability for toxic torts.[115] In addition, the new judicial federalism following the federal government's increasing tendency to devolve power to the states has enhanced the power of the states' supreme courts.[116]

Third, interest groups, many from outside the state, have become powerfully active in judicial elections,[117] thrusting large amounts of money into them. Between 1968 and 1988, the number of registered special interest groups in the United States doubled from 10,300 to 20,600.[118] Similarly, during the 1940s, there were only five hundred registered lobbyists in Washington; as of 2000 there were over 25,000.[119] The increase in interest group involvement was originally isolated to legislative and executive elections.[120] It soon spread to judicial elections, however, as interest groups found this a cost-effective means to influence state policy; it was cheaper and easier to

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112. *Id.*

113. *Id.*

114. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS, 1999–2000: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 76 (Brian J. Ostrom, Neal B. Kauder, Robert C. LaFoundtain eds., 2001).

115. ABA COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 14 (2003).

116. *See id.* at 15 ("While federal and state courts both witnessed an upsurge in the controversial, policy-laden cases they were called upon to decide in the latter half of the twentieth century, this trend has become especially noticeable in state court systems. . . . [S]tate courts have become a new forum of choice for litigation of constitutional rights and responsibilities, which has placed them in the political spotlight with increasing frequency.").

117. *See id.* at 8–9, 18.

118. *See* G. Calvin MacKenzie, *The Revolution Nobody Wanted*, TIMES LITERARY SUPPLEMENT (London), Oct. 13, 2000, at 13.

119. *Id.*

120. *See* David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN. L. REV. 1, 2, 4–5 (2003).

affect the outcome of a judicial election than the outcome of a legislative or executive branch election.[121]

The significant interest group involvement in state judicial elections began in Texas in the 1980s when business interests and trial-lawyers' groups fought over tort reform.[122] In most states, the majority of the contributions to state judicial campaigns comes from groups hoping to shape tort law.[123] The major opponents are trial lawyers and unions, on one side, who tend to promote the candidacies of judges who favor tort plaintiffs. Against them are business interests and professional groups, such as physicians, who tend to promote the candidacies of defendant-friendly judges.

Criminal justice is also an important issue for interests groups. During the 1980s and 1990s, three high-profile incumbent losses in state supreme courts involved criminal justice issues. In 1986, three California Supreme Court Justices, including Rose Bird, were defeated in an expensive retention-election battle.[124] Commentators attribute their defeats to the substantial funds raised by interest groups that opposed the justices' anti-death penalty rulings.[125] Similarly, Tennessee Supreme Court Justice Penny White lost a retention election in 1996, largely because of interest group opposition to her anti-death penalty rulings.[126] In that same year, Judge David Lanphier was the target of a well-funded interest group campaign opposing his reelection to the Nebraska Supreme Court because he had vacated several murder convictions during his previous term.[127]

Fourth, 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 announcing their views on disputed legal or political issues.[128] That

121. *Id.*

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

123. *Id.*

124. Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1420 (2001); Lindsey, *supra* note 4.

125. *See* Champagne, *supra* note 124, at 1420.

126. *Id*.

127. Traciel V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White*, *in* RESEARCH ON JUDICIAL SELECTION 1999 41, 52–54 (2000).

128. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1989).

year, the ABA eliminated the canon because of First Amendment concerns.[129] Soon, twenty-five of the thirty-four states that had adopted it eliminated it.[130] In 2002, the Supreme Court struck down enforcement of the canon in the remaining nine states.[131] Other appellate courts have struck down limits on judges' fundraising, partisan conduct, and making pledges and commitments.[132]

I now examine theoretical predictions about the impact that more competitiveness and money will have on judges' independence and accountability.

III. PREDICTED EFFECTS OF INCREASING POLITICIZATION ON JUDGES' DECISIONS

The increasing politicization of both state supreme courts and elections to them may affect judges' levels of independence and accountability. If the influence of election pressures on judges' judicial decisions is nonexistent or modest, then this would support arguments of proponents of the accountability model. They argue that judicial elections will operate at most as a moderate constraint on judges, but without warping their decisions. In contrast, if elections influence judges' decisions strongly, then this would support the independence model. It would suggest that, unless judges are freed completely from election pressures, their decisions will be fundamentally biased.

I now discuss the potential impacts on judges' decisions of the increasing competitiveness of state supreme court elections and the increasing importance of campaign contributions.

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

130. Schotland, *supra* note 2, at 1095 n.77.

131. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002); Schotland, *supra* note 2, at 1095 n.77.

132. *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 2, at 1095–97 (discussing *White*).

A. The Increasing Need to Appeal to Constituents

As of 2006, 87 percent of state appellate judges must regularly face the voters to keep their jobs.[133] These judges may have an incentive to rule strategically if doing so helps them get reelected. The hypothesis that reelection concerns influence judges' voting is an extension of the electoral-incentive theory,[134] which is the central principle in theories about legislative politics and empirical analyses of it. This theory, which was a new way of thinking about the behavior and incentives of legislators when it was introduced in the 1970s, asserts that a candidate's primary goal is to be reelected.[135] Because candidates cannot achieve any other goals if they are not elected, election is their overriding goal. Extending this theory to state supreme courts, judges without life tenure have the incentive to decide cases in ways that benefit the litigants favored by the people responsible for retaining judges (the retention agents). This is true whether the retention agent is a politician who decides whether to reappoint the judge or the voters in a retention election. For example, if a judge expects to face reelection by conservative, pro-business voters, she may have an incentive to favor business litigants.

Although all nontenured judges have the incentive to rule strategically if they believe it will help them gain reelection,[136] the increasing competitiveness of elections has increased the pressures on

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133. Eighty-seven percent of state appellate court judges must be retained through either partisan elections, nonpartisan elections, or retention elections. SHAUNA M. STRICKLAND, CHANTAL G. BROMAGE & WILLIAM E. RAFTERY, 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), *available at* http://www.ncsconline.org/D_Research/csp/2006_files/IntroductiontoSCCS06.pdf. 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 11 and accompanying text.

134. *See* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 11–78 (1974) (describing the electoral-incentive theory).

135. *Id.* at 13.

136. *See* Lawrence Baum, *State Supreme Courts: Activism and Accountability*, *in* THE STATE OF THE STATES 103, 126 (Carl E. Van Horn ed., 1989) ("Increasingly, judges who wish to maintain their positions will take into account the possibility of opposition from interest groups and from the electorate as a whole."); PHILIP DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 30 (1980) ("By exercising their control over the selection and tenure of public officials, voters can set effective limits upon the policy initiatives of the government."); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUPREME CT. ECON. REV. 1, 41 (1993) ("[M]y analysis predicts that judges elected for a term . . . are more responsive to the current balance of political power, hence less 'independent.'").

judges. The increasing rates at which incumbents are defeated, especially in partisan elections, should heighten the pressure on judges to rule in a way that will help them be reelected. The political pressure on judges who face reelection may be even stronger than the pressure that legislators confront. Incumbent state supreme court justices in judicial elections are more likely to be defeated than incumbents in the U.S. House of Representatives and Senate and state legislatures.[137] From 1990 through 2000, reelection rates were approximately 94.1 percent in the U.S. House of Representatives, 89.3 percent in the U.S. Senate, 85.1 percent in state houses, and 84.1 percent in state supreme courts.[138]

Like Chief Justice Rose Bird in California and Justice Penny White in Tennessee, many examples exist of judges that have been unseated over decisions that were unpopular with the retention agents.[139] Campaigns have been mounted to unseat incumbent judges in Mississippi, Nebraska, Tennessee, Wisconsin, Illinois, California, Georgia, Idaho, Alabama, Michigan, Pennsylvania, and Texas based on their unpopular judicial decisions in areas including crime control, victims' rights, abortion, homosexual rights, water rights, school funding, and tort reform.[140]

Many judges have admitted that reelection concerns may influence their judicial rulings. For example, former California Supreme Court Justice Otto M. Kaus commented: "[T]o 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."[141] Justice Kaus, who also likened election pressure to having a crocodile in the bathtub,[142] then changed animals. "When you're eating dinner with a gorilla, it's hard to make small talk, even when he's using the right knife and fork."[143]

Similarly, when participating in a series of interviews with the members of Louisiana's high court, a liberal justice acknowledged that:

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137. *See supra* notes 98–99 and accompanying text.

138. Hall & Bonneau, *supra* note 99, at 21.

139. *See supra* text accompanying notes 124–27.

140. *See* Charles G. Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 49–50 (2003).

141. Philip Hager, *Kaus Urges Reelection of Embattled Court Justices*, L.A. TIMES, Sept. 28, 1986, at 3 (quoting Justice Otto M. Kaus, Cal. Supreme Court).

142. *See supra* note 15 and accompanying text.

143. Hager, *supra* note 141 (quoting Justice Otto M. Kaus, Cal. Supreme Court).

> 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.[144]

Despite these anecdotes, no prior empirical paper has shown that the retention agents' political preferences influence judicial voting. Some recent empirical studies have found other relationships between elections and judicial behavior. Some studies have shown that litigation patterns vary under different judicial selection systems. For example, litigation rates are lower in states where judges are elected, suggesting that elected judges' political voting reduces uncertainty about court decisions so that more cases settle.[145] Similarly, plaintiffs file more antidiscrimination claims in states that elect judges than in states that appoint judges; elected judges may have stronger pro-employee preferences, inducing more employees to file claims.[146]

Other studies have shown that the behavior of elected judges changes as reelection approaches. The judges deviate from earlier voting patterns,[147] impose longer criminal sentences,[148] and side with the majority in death penalty cases.[149]

Still other studies find that judges' behavior varies under different selection methods, especially under systems with partisan elections. For example, judges who face partisan elections are less

144. Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1120 (1987).

145. F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 210 (1999).

146. Timothy Besley & A. Abigail Payne, Implementation of Anti-Discrimination Policy: Does Judicial Discretion Matter?, 1, 18 (London Sch. of Econ. & Political Sci., Research Paper No. PEPP04, 2005), *available at* http://ssrn.com/abstract=1158326.

147. *See* Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 442 (1992).

148. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004).

149. Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5, 24 (1995); Hall, *supra* note 147, at 442.

likely to dissent on politically controversial issues,[150] less likely to rule for challengers to a regulatory status quo,[151] and more likely to redistribute wealth in tort cases from out-of-state businesses to in-state plaintiffs.[152] Not all studies find such results, however; one of the most recent papers finds almost no evidence of elected judges responding to political pressure.[153]

No other paper, however, has addressed the bottom-line issue of whether judges bend their rulings to appeal to those who will be deciding whether they keep their jobs.

B. The Increasing Need to Raise Campaign Funds

Because the cost of winning a judicial election has increased dramatically,[154] judges feel pressure to rule in ways that will help them to obtain campaign funds. Although mine is the first analysis to examine the relationship between interest group contributions and judges' voting, the public certainly believes that judges are influenced by interest groups. A nationwide survey has revealed that 76 percent of voters and 26 percent of judges believe that campaign contributions have at least some influence on judges' decisions.[155]

By appealing to special interest groups, judges can increase their chances of receiving future campaign contributions from those groups. Money from interest groups may influence judges' voting in two ways. First, the influence may be direct: judges may bend their rulings in a way that will help them obtain future campaign funds from interest groups.

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150. *See* Hall, *supra* note 147, at 442 ("District-based elections . . . influence liberal justices to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky.").

151. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. ECON. & ORG. 534, 567–68 (2000).

152. Eric Helland & Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. ECON. REV. 341, 345–46 (2002); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 158 (1999).

153. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 19–22 (Univ. of Chi. Law & Econ., Olin Working Paper No. 357, 2007), *available at* http://ssrn.com/abstract=1008989.

154. *See supra* notes 100–07 and accompanying text.

155. GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note 12, at 4; GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *available at* http://www.justiceatstake.org/files/JASJudgesSurvey Results.pdf.

Second, the influence may be indirect. Interest groups may give campaign contributions to judges who happen to rule in the way that the interest groups prefer, increasing the judges' chances of reelection. Although under this theory the contributions do not cause any individual judge to rule differently; rather the contributions indirectly influence case outcomes by increasing the probability that judges who share the interest groups' preferences are elected.

Although no study has yet explored these influences in judicial elections, several studies have addressed congressional contests. Analyses of the determinants of congressional voting have identified both direct and indirect influences from interest groups' campaign contributions. Empirical studies of the U.S. Congress show that contributions from political action committees directly influence congressional voting.[156] The studies suggest that the possibility of raising future campaign funds provides an incentive for legislators to vote in the way that interest groups prefer.[157]

In addition, other studies have shown that interest groups have an additional indirect influence on congressional voting. They use their wealth to increase the probability that the people elected will share their political ideologies.[158] Thus, the interest groups influence congressional voting not by giving money to legislators to change

156. *See, e.g.*, John P. Frendreis & Richard W. Waterman, *PAC Contributions and Legislative Behavior: Senate Voting on Trucking Deregulation*, 66 SOC. SCI. Q. 401, 407–09 (1986); Woodrow Jones, Jr. & K. Robert Keiser, *Issue Visibility and the Effects of PAC Money*, 68 SOC. SCI. Q. 170, 175 (1987); Laura I. Langbein & Mark Lotwis, *The Political Efficacy of Lobbying and Money: Gun Control in the U.S. House, 1986*, 15 LEGIS. STUD. Q. 413, 433–34 (1990); John McArthur & Stephen V. Marks, *Constituent Interest vs. Legislator Ideology: The Role of Political Opportunity Cost*, 26 ECON. INQUIRY 461, 467 (1988); Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, 77 REV. ECON. & STAT. 127, 132–35 (1995); Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J.L. & ECON. 345, 368 (2002); Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, 57 S. ECON. J. 606, 615–17 (1991).

157. For a criticism of the studies that show that interest-group money buys votes, see John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 605 (2005).

158. Professor Lowenstein has referred to these different strategies as "legislative strategies" (vote-buying) and "electoral strategies" (affecting who is elected). Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 308 (1989); *see also* Lillian R. BeVier, Essay, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1272 (1994) (distinguishing between electoral and legislative strategies); Note, *The Ass atop the Castle: Competing Strategies for Using Campaign Donations to Influence Lawmaking*, 116 HARV. L. REV. 2610, 2610–11 (2003) (discussing legislative and electoral strategies in the context of campaign finance laws).

their votes but by increasing the probability of election for legislators whose past voting records show that that they share the interest group's preferences. The contributions cull the interest group's enemies, leaving only friendly legislators.

Thus, regardless of whether judges vote to obtain funds or interest groups award funds to judges based on their past votes, it is possible that interest groups may affect case outcomes. Approximately 90 percent[159] of voters and 80 percent of judges are concerned that with campaign contributions, interest groups are trying to use the courts to shape policy.[160]

Three groups are the most active contributors to judicial campaigns. In 2004 state supreme court elections, over 60 percent of contributions came from interest groups that were business groups, labor groups, or lawyers' organizations.[161] The single largest interest group contributors were pro-business groups, which contributed 34 percent of the total campaign funds raised by candidates.[162]

Although mine is the first analysis to examine the relationship between interest group contributions and judges' voting, some recent studies have examined the relationship between contributions from individual law firms and case outcomes when those law firms appear in court. Scholars have found a correlation between the sources of a judge's funding and the judge's rulings in arbitration decisions from the Alabama Supreme Court,[163] in tort cases before state supreme courts in Alabama, Kentucky, and Ohio,[164] in cases between two businesses in the Texas Supreme Court,[165] and in cases during the Supreme Court of Georgia's 2003 term.[166] Although it might seem

159. GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note 12, at 9.

160. GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note 155, at 9.

161. DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 20 (Jesse Rutledge ed., 2005), *available at* http://www.justiceatstake.org/files/NewPoliticsReport 2004.pdf.

162. *Id.*

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

164. Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 SOUTHEASTERN POL. REV. 241, 255 (2000).

165. 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, 326, 330 (2003).

166. Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making*, 7 ST. POL. & POL'Y Q. 281, 287–89 (2007).

shocking that a judge would be permitted to rule in a case in which one of the litigants is a campaign contributor, many states allow this.[167]

IV. EMPIRICAL ANALYSIS OF THE IMPACT OF RETENTION POLITICS ON JUDGES' VOTING

I now examine empirically the relationship between money, politics, and impartial justice. If judges routinely adjust their rulings to attract votes and campaign dollars, my results suggest that the delicate balance between judicial independence and accountability has been upset. In this Part, I explore whether judges' voting is strongly associated with the preferences of the retention agents. In Part V, I test the relationship between judges' voting and campaign contributions.

To test the influence of fundamental ideology and retention politics on judges' voting in state supreme courts, I use data from the State Supreme Court Data Project.[168] The data include more than 21,000 decisions involving more than four hundred individual state supreme court justices.[169] These data include almost all state supreme court cases in all fifty states from 1995 to 1998.[170] The data include variables that reflect case histories, case participants, legal issues, case outcomes, and individual justices' behavior.[171] I supplemented these data in several ways: with institutional variables that describe aspects of the judicial system of each state, with variables that describe the political affiliations of various groups and people in each state, and with detailed information about each judge's career.

I estimate a multivariate regression equation that measures how individual judges' rulings are related both to the political preferences

167. Aman McLeod, *If at First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 520 (2005).

168. Paul Brace & Melinda Gann Hall, State Supreme Court Data Project, http://www.ruf.rice.edu/~pbrace/statecourt/index.html (last visited Nov. 3, 2008).

169. *Id.*

170. State dockets exceeding two hundred cases in a single year are selected from a random sample of two hundred cases. Typically, case quantities are unaffected due to the limited size of many state supreme court dockets. Paul Brace & Melinda Gann Hall, State Judicial Database Coding Rules (Feb. 1, 1999), http://www.ruf.rice.edu/~pbrace/statecourt/CodingRules.html.

171. *Id.*

of the people responsible for their retention and to other characteristics of the state, the judge, and the case.[172]

A. The Model's Technical Structure

I first introduce the model in symbols, and I provide a brief outline of the variables. In Section B, I explain the model more fully. The model is:

$$(1)\quad \Pr ob(FavLitVote_i = 1|x) = \Phi(\beta_0 + \beta_1 \,\mathrm{Re}\, tentAgent + \beta_2 Judge + \beta_3 Case + \beta_4 State)$$

FavLitVote	The probability that the relevant litigant wins in case *i*
RetentAgent	Includes four indicator variables for whether a vote is given by a judge facing Republican retention agents in: a partisan reelection, a nonpartisan reelection, an unopposed retention election, or a gubernatorial reappointment.
Judge	Includes three judge-level variables: the PAJID measure of judicial ideology, the number of years the judge has been on the court, the number of years until the next retention.
Case	Includes several case-level variables: in business cases, an indicator variable for the general industry of the business litigant when relevant, in civil cases, an indicator variable for the general issue in the case,

172. A similar analysis with more detailed econometric explanations can be found in Joanna Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. (forthcoming 2009), *available at* http://ssrn.com/abstract=997491. In this article, I developed

> three hypotheses about the relationship between ideology or political influences, on the one hand, and judges' voting, on the other hand: judges' voting could reflect the judges' fundamental ideological beliefs, judges' voting could reflect the preferences of the groups responsible for judges' retention, or selection effects could completely eliminate political or ideological voting; if potential litigants bargain in the shadow of politics, then only cases without a clear political or ideological slant would go to trial.

Id. (manuscript at 2). I then tested the hypotheses empirically. *Id.* Although I found that the voting of state supreme court judges is strongly associated with the stereotypical preferences of the retention agents, *id.* (manuscript at 16), this previous article did not discuss or examine any relationship between campaign contributions and judges' voting.

	and, in criminal appeals, indicator variables for whether the criminal was represented by a public defender and whether the case was a murder trial.
State	Includes several state-level variables: the percentage of years since 1960 that each state's legislature was majority Republican, an indicator variable for whether the state has a lower appellate court, and an indicator variable for whether the judges sit en banc.

B. Details of the Model

Equation (1) measures the relationship between judges' voting and the political preferences of retention agents, while controlling for many other factors that might also affect voting.

1. *Dependent Variable.* The dependent variable is the probability that the relevant litigant wins in any given case. I examine six categories of cases that seem especially likely to reveal divisions between Republican and Democratic judges: cases between a business and a person, cases involving labor disputes, medical malpractice cases, products liability cases, tort cases,[173] and criminal appeals.

Certainly the facts of some of the cases under each category should produce no distinction between Republican and Democratic preferences. However, the categories do allow me to measure whether judges' voting conforms to general stereotypes about Republican and Democratic preferences.

The State Supreme Court Data Project coded judges in civil cases as voting for a litigant if they voted to make the litigant any better off, regardless of whether they voted to reverse a lower court

173. A decision favoring a tort plaintiff is commonly viewed as a liberal outcome whereas one favoring the defendant is considered a conservative outcome. *See, e.g.*, Reginald S. Sheehan, William Mishler & Donald Songer, *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 464 (1992); Jeff Yates, Holley Tankersley & Paul Brace, *Do Institutions Really Matter? Assessing the Impact of State Judicial Structures on Citizen Litigiousness* 7–8 (Searle Ctr. on Law, Regulation, & Econ. Growth, Working Paper No. 11, 2007), *available at* http://www.law.northwestern.edu/searlecenter/papers/Brace-Yates_Northwestern_conf.pdf.

or to change the damage award. The Project coded judges in criminal cases as voting for the criminal if they voted to overturn all or some convictions.

2. *Retention-Politics Variable.* *RetentAgent* includes the four primary variables of interest: a variable that indicates if a vote is given by a judge facing Republican retention agents in a partisan reelection, a variable that indicates if a judge is facing Republican retention agents in a nonpartisan reelection, a variable that indicates if a judge is facing Republican retention agents in an unopposed retention election, and a variable that indicates if a judge must be reappointed by a Republican governor.

For some retention methods, the political affiliation of the retention agents is clear. If judges are subject to reappointment by the governor, then the political affiliation of the reappointing governor should influence the voting of judges facing reappointment. Similarly, the majority party in the legislature should influence the voting of judges facing legislative reappointment or legislative reelection.

For other methods, however, the political affiliation of the retention agents is more ambiguous or difficult to determine. For judges facing reelection, the ideological preferences of the citizens voting in the reelections should influence how judges vote before the elections. Because there is no exact measure of the future voters' preferences, however, I use the political affiliation of the states' governors as a proxy for the voters' ideological preferences.

The governors' party affiliation is the best measure available to proxy the preferences of voters in judicial elections because the same pool of voters usually vote for judges as for governors. In the majority of states, judges are elected in statewide elections,[174] as are governors. In contrast, state legislators are typically elected by district.[175] In addition, voter turnout (in both the number and the type of citizens) for judicial elections would be more similar to voter turnout in gubernatorial elections than voter turnout in presidential elections. Finally, although certain indexes of citizen ideology, such as the Berry measure,[176] are good measures of overall citizen preferences, they may

174. ROTTMAN ET AL., *supra* note 81, at 25–28 tbl.4.

175. Nat'l Conference of State Legislatures, State Profile Summary, http://www.senate.mn/departments/scr/redist/redprof/profiles.htm (last visited Nov. 3, 2008).

176. *See generally* William Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960–93*, 42 AM. J. POL. SCI. 327, 329 (1998).

be weaker proxies for the preferences of voters in judicial elections. These indexes are composed of several different measures, including interest group ratings of the members of Congress, election returns for congressional races, the party composition of state legislatures, and the party affiliation of state governors.[177] Thus, most of the included measures have little relationship with the preferences of the voters in judicial elections. Nevertheless, I also check the robustness of my findings against other proxies for the preferences of voters in judicial elections.[178]

For each judge, the best prediction of the future retention agent's party affiliation depends on when the judge will face retention. For judges that face retention during the current governor's term, the best predictor of the party affiliation of the retention agents is the governor's current party affiliation. For example, for a judge seeking retention in 1996 in a state where the governor's term lasts from 1994–1998, the party affiliation of the governor elected in 1994 is the best proxy for the political preferences of the people that will reelect the judge in 1996.

In contrast, for a judge who faces retention after the current governor's term, the judge's prediction is based not only on the current governor's party, but also on recent governors' party affiliations. That is, the best predictor of the party affiliation of the future retention agents is the likelihood that the future retention agents will belong to a given party. For example, for a judge seeking retention in 2000 in a state where the current governor's term ends in 1998 and has had two Republican governors out of the last five governors, the judge's expected probability of a future Republican governor—and in turn, future Republican retention agents—is 40 percent.

3. *Control Variables.* My estimation of Equation (1) will separate the influence of each factor that is included, allowing me to distinguish the retention agents' influence on voting from other influences. Thus, to determine whether retention politics really influences voting, it is important to control for as many other factors

177. *E.g.*, *id.* at 329

178. Moreover, many scholars assert that under partisan elections, judicial selection is essentially vested with political party leaders and a judge's nomination by the dominant party almost always leads to victory. *See, e.g.*, Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713, 718 (2005) (basing the conclusions on numerous exit surveys and observations from New York City judicial elections).

as possible to ensure that the results are not caused by something other than retention politics.[179] Ideally, one could quantify and include any factor related to voting. In practice, researchers include as many variables as is technically possible given data constraints.

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

The variables in *Judge* control for judge-specific characteristics that may be related to judges' voting. First, it includes a measure of the fundamental ideology of each judge. For this proxy, I use each judge's party-adjusted surrogate judge ideology measure, or PAJID score. This is the most common measure of judges' ideology 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.[180] Including the PAJID scores allows me to separate the influence of the judges' own ideology from the influence of retention agents. I also include both 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. These variables control for voting changes throughout a judge's career and term.[181]

The variables in *Case* control for case-level factors that may be related to judges' voting. I include a series of dummy variables

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

180. Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 393–94 (2000).

181. Interactions that include the time until retention are generally insignificant, most likely because the short period of my sample permits little variation in the time until retention for each year.

indicating the general industry of the business litigant (agriculture, construction, financial services, manufacturing, mining, service, trade, transportation, or utilities) in the estimations of cases between a business and an individual, employer litigants in labor disputes, business litigants in products liability cases, and litigants who were the original defendants in tort cases. In addition, all of the estimations for civil cases include a series of indicator variables signifying the general issue in the case (domestic relations, estates, contracts, or torts). The estimations based on criminal appeals include an indicator variable for whether the criminal was represented by a public defender and a variable indicating whether the case was a murder trial.

The variables in *State* control for state-level characteristics that may be related to case outcomes. First, *State* includes 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 Republican retention agents, this control allows me to isolate the influence of Republican retention agents from judges simply applying conservative laws in conservative states.

In *State* 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 discretionary review.[182] In these courts, the judges may choose to hear cases that give them opportunities to exercise their ideological preferences.[183]

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

182. STRICKLAND ET AL., *supra* note 133, at 12–67.

183. 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.

each case.[184] 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.

As is standard and appropriate in such analysis,[185] the equation also includes a set of time dummy variables[186] 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 retention politics, but to factors that affect all judges, such as trends in conservatism or changes in national laws.[187]

4. *Estimation Method.* Equation (1) is estimated with a maximum likelihood probit model. I present the marginal effects of each retention method–political party variable on the probability of a judge voting for the relevant litigant. The results tables report the increase in the probability of a judge voting for the relevant litigant under the particular retention method–political party combination, holding the case's other characteristics constant.

The base category in all estimations, when all four retention agent variables are zero, consists of votes by judges facing Democratic retention agents in any retention method and votes by judges with permanent tenure.[188] Thus, because of the small number of judges with permanent tenure, every result for judges facing Republican retention agents is almost the mirror image of the findings for judges facing Democratic retention agents. That is, if I find that judges facing Republican retention agents are 20 percent more likely to vote for a particular litigant, then one can infer that judges facing Democratic

184. STRICKLAND ET AL., *supra* note 133, at 16–67.

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

186. A dummy variable is a yes-no indicator with only two possible values, 0 and 1.

187. 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.

188. For the four states with retention by legislative election or appointment, the retention agents are Democratic throughout my sample.

retention agents are approximately 20 percent less likely to vote for the same litigant.

In addition, the t-statistics are computed from standard errors clustered by case to correct for possible clustering effects. Clustering effects refers to the fact that observations may be independent across groups (clusters), but not necessarily within groups.[189] Thus, the standard errors from observations from within the same case may be relatively small when compared to standard errors from observations from other cases. Not controlling for possible clustering effects could artificially inflate my t-statistics, producing results that incorrectly appear to be statistically significant.

C. Primary Empirical Results

The results support the hypothesis that, under some retention methods, judges' voting is influenced by the political preferences of retention agents. The table in the Appendix reports the full results for all variables. The table indicates the relationship between judges' voting, on one hand, and the retention agent variables and control variables, on the other. In the table, the top number in each cell is the regression coefficient, which indicates for each variable the magnitude and direction of the relationship with judges' votes. A negative coefficient indicates that a variable reduces the probability that a judge will vote for the Republican-favored litigant. In contrast, a positive coefficient indicates that a variable increases the probability that a judge will vote for the Republican-favored litigant.

In addition, the table reports the t-statistic for each coefficient. In each cell, the t-statistic is the bottom number in parentheses. Coefficients with t-statistics equal to or greater than 1.645 are considered statistically significant at the 10 percent level, meaning that there is 90 percent certainty that the coefficient is different from zero. T-statistics equal to or greater than 1.96 indicate statistical significance at the more-certain 5 percent level, and t-statistics equal to or greater than 2.576 indicate statistical significance at the most-certain 1 percent level. Empiricists typically require t-statistics of at least 1.645 to conclude that one variable affects another in the direction indicated by the coefficient.[190] In the table, "*" and "+"

189. HALBERT WHITE, ASYMPTOTIC THEORY FOR ECONOMETRICIANS 135–36 (1984).

190. For each regression, the table also reports R-squared statistics. In contrast to the t-statistics, which measure the reliability of each individual coefficient, the R-squared measures the regression's overall goodness of fit. GREENE, *supra* note 185, at 33–36. That is, the

indicate significance at the 5 percent and 10 percent levels, respectively.

Table 3 reproduces from the Appendix the coefficients and t-statistics for the retention agent variables. The results indicate that when judges face Republican retention agents in partisan reelections, they are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases, for original defendants in tort cases, and against criminals in criminal appeals.[191] The magnitudes of the marginal effects are substantial but reasonable. For example, the results suggest that a judge facing a partisan reelection during the current term of a Republican governor, compared to the base categories, is approximately 36 percentage points more likely to vote in favor of businesses over individuals.[192]

Table 3. Political Influences on Judicial Voting under Different Retention Methods[193]

Litigant	Republican/ Partisan	Republican/ Nonpartisan	Republican/ Retention Election	Republican/ Reappoint
Business Vote in	0.364*	0.05+	.035	0.041
Business v. Person	(7.89)	(1.65)	(1.39)	(0.58)
Employer Vote in	0.359*	0.042	0.030	-0.204
Labor Dispute	(2.91)	(0.69)	(0.57)	(1.32)

R-squared measures how much of the overall variation in the dependent variable, here the probability of voting for the Republican-favored litigant, is explained by the explanatory variables. *Id.* at 33. Thus, the R-squared of a regression will vary between 0 and 1. *Id.* An R-squared of 0 means that the explanatory variables explain none of the dependant variable's variation. *Id.* An R-squared of 1 means that the explanatory variables explain all of the variation. *Id.* The closer the R-squared is to 1, the better the regression explains the data. *Id.*

191. My unreported estimations confirm that the near mirror image applies for judges facing Democratic retention agents.

192. For brevity, I do not report the coefficients for all of the control variables, most of which are statistically insignificant. The coefficients on both the years to retention and the percentage of years since 1960 that each state's legislature was majority Republican are positive and significant for most of the cases.

193. The table reports the marginal effects of each retention method/political party variable on the probability of a judge voting for the relevant litigants, based on probit estimates. The other control variables are not reported for brevity. T-statistics are reported in parentheses. "*" and "+" represent significance at the 5 percent, and 10 percent levels, respectively.

Doctor/Hospital	0.308*	-0.021	0.10	-0.251
Vote in Medmal Case	(2.57)	(0.22)	(1.16)	(0.95)
Business Vote in	0.444*	0.077	0.004	0.607+
Products Liability Case	(3.09)	(0.78)	(0.04)	(1.76)
Original Defendant	0.418*	0.048	0.067*	0.096
Vote in Tort Case	(8.90)	(1.59)	(2.70)	(0.94)
Vote to Overturn	-0.076+	0.002	0.026	-0.03
Criminal Conviction	(1.90)	(0.10)	(1.41)	(0.39)

The results are much weaker for the other retention methods. Judges facing Republican retention agents in nonpartisan reelections are more likely to favor the Republican-favored litigant only in cases between businesses and individuals. Judges facing Republican retention agents in unopposed retention elections are more likely to favor the Republican-favored litigant only in tort cases. Finally, judges facing reappointment by a Republican governor are more likely to vote for businesses only in products liability cases.

The stronger results in both significance and magnitude for judges facing partisan elections are consistent with recent trends in these elections; partisan elections are much more likely to be contested and incumbents are significantly more likely to lose in the reelections. It appears that, to keep their jobs, judges in partisan election systems must appeal more to their retention agents than judges under other systems.

D. Influences on Judges Not Facing Retention

Next, I test whether the same political ideologies that are shown to influence judicial voting when judges face retention also influence the behavior of judges that do not face retention. If they do, then this would suggest that judges generally respond to public sentiment; that is, the results would suggest that all judges, whether subject to retention or not, attempt to conform their own judicial approach to public preferences. In contrast, if there is a difference between judges that do and do not face retention, then this would suggest that retention politics are an important influence on judges facing retention.

First, I test whether the party affiliations of the groups found to influence nontenured judges—governors and legislatures—also influence judges with permanent tenure. The results, which are

reported in Table 4, show that tenured judges respond less to the electorate's will than do nontenured ones. Indeed, tenured judges in states with Republican legislatures and Republican governors are not any more likely to vote in favor of Republican-favored litigants. In fact, tenured judges in states with Republican legislatures are more likely to vote to overturn a criminal conviction on appeal, the opposite of their untenured counterparts.

Table 4. The Impact of Gubernatorial and Legislative Party Affiliations on Judges with Permanent Tenure[194]

Litigant	**Majority Republican Legislature**	**Republican Governor**	**# of Observ-ations**
Business Vote in Business v. Person	-0.08 (1.04)	0.065 (0.51)	2164
Employer Vote in Labor Dispute	0.005 (0.03)	-0.28 (0.95)	382
Doctor/Hospital Vote in Medmal Case	0.163 (0.59)		146
Business Vote in Products Liability Case	0.03 (0.10)	-0.072 (0.14)	152
Original Defendant Vote in Tort Case	-0.040 (0.46)	-0.140 (0.98)	1719
Vote to Overturn Criminal Conviction	0.173* (2.51)	-0.099 (1.04)	3512

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

194. The table reports the marginal effects of each retention method/political party variable on the probability of the relevant litigants' receiving a vote, based on probit estimates. The estimation is limited to the sample of states where judges are given life tenure or serve until age 70: Massachusetts, New Hampshire, New Jersey, Rhode Island. *See* table accompanying note 81. In Rhode Island, judges have life tenure, *see supra* note 85; in Massachusetts and New Hampshire, judges serve until age 70, *see supra* notes 82, 86; in New Jersey, after an initial gubernatorial reappointment, judges serve until age 70, N.J. CONST. art. VI, § 6, ¶ 6 (all of the New Jersey judges were already reappointed) The other control variables are not reported for brevity. T-statistics are reported in parentheses. "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

sometime between age seventy and seventy-five. By examining the voting of judges in their last term before mandatory retirement, I can test whether the same differences in voting that exist between judges facing Republican and Democratic retention agents also exist when judges are immune from retention politics.

Table 5 reports the results. It appears that judges in their last term before mandatory retirement respond less to political forces than other judges. The results suggest that, for most categories of cases, there is no significant difference in voting between retiring judges that would have faced Republican retention agents (if they had not retired) and retiring judges that would have faced Democratic retention agents. Only in tort cases in states with partisan reelections and retention elections do judges that would have faced Republican retention agents vote for the Republican-favored litigant. In contrast, judges that would have faced Republican retention agents in states with partisan reelections are more likely, not less likely, to vote to overturn a criminal conviction.

Table 5. Influences on Judges in the Last Term before Mandatory Retirement[195]

Litigant	Republican/ Partisan	Republican/ Nonpartisan	Republican/ Retention Election	Republican/ Reappoint	# of Observ-ations
Business Vote in	0.175	-0.089	.044	0.071	3018
Business v. Person	(1.57)	(1.52)	(0.86)	(1.02)	
Employer Vote	0.153	-0.099	0.167	-0.022	610
in Labor Dispute	(0.59)	(0.78)	(1.62)	(0.12)	
Doctor/Hosp Vote	0.324	-0.078	0.159	-0.613	268
in Medmal Case	(0.94)	(0.31)	(0.83)	(1.25)	
Business vote in	0.321	-0.098	0.160	1.14	189
Prod. Liab. Case	(0.84)	(0.44)	(0.78)	(1.32)	

195. The table reports the marginal effects of each retention method/political party variable on the probability of a judge voting for the relevant litigants, based on probit estimates. The estimation is limited to the sample of judges in their last term of office before mandatory retirement. The other control variables are not reported for brevity. T-statistics are reported in parentheses. "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

Orig. Defendant	0.284*	0.010	0.111*	0.066	2615
Vote in Tort Case	(2.69)	(0.16)	(2.13)	(0.75)	
Vote to Overturn	0.23*	-0.052	0.008	-0.047	5027
Crim. Conviction	(5.34)	(1.17)	(0.23)	(1.19)	

The results from Tables 4 and 5 suggest that the political preferences of retention agents have little influence on judges that do not face pressure from retention politics because they either have life tenure or are in their last term in office. These results suggest that, in contrast to judges not facing retention, public sentiment is an important influence on judges facing retention.

E. Effect of Changes in Retention Agents' Preferences

As a further test of the importance of political pressure on judges, I examine if judges' voting changes when a new governor from a different political party is elected. If the political affiliation of the current governor is an indicator of the preferences of retention agents, judges may take the election of a new governor from a different political party as a signal that the political preferences of retention agents have changed. During my sample, the governors changed parties in three states where judges face retention: Arkansas,[196] Louisiana,[197] and West Virginia.[198] Judges in these three states must be retained in partisan elections.[199] I examine the votes of only judges that were present both before and after the change of governors to ensure that the results are not just capturing the voting of new judges that were selected for the supreme court after the regime change.

Table 6 reports the results. The results show that when a Republican governor replaces a Democratic governor, judges are more likely to vote in favor of the business in a business-versus-person case, in favor of the employer in a labor dispute, and in favor of the original defendant in a tort case. This evidence provides

196. *See* Frank Wolfe & Elizabeth Caldwell, *Mansion Ready? Huckabee on Doorstep*, ARK. DEMOCRAT-GAZETTE, July 15, 1996, at A1.

197. *See* Jack Wardlaw, *Changing of the Guard*, TIMES-PICAYUNE (New Orleans), Jan. 9, 1996, at A1.

198. *See* Fanny Seller, *House Ready to Take Lead*, CHARLESTON GAZETTE, Jan. 9, 1997, at A1.

199. STRICKLAND ET AL., *supra* note 133, at 19, 34, 65.

support for the hypothesis that judges have their fingers to the wind; their voting appears to change immediately following a change in retention agents' preferences, as proxied by the governor's party affiliation.

Table 6: Impact of Changes in Political Influences on Judicial Voting[200]

Litigant	Republican Retention Agent	# of Observa-tions
Business Vote in Business v. Person	0.10+ (1.77)	918
Employer Vote in Labor Dispute	0.284* (2.13)	186
Doctor/Hospital Vote in Medmal Case	-0.26 (1.31)	105
Business Vote in Prod. Liability Case	-0.407 (1.58)	48
Original Defendant Vote in Tort Case	0.135+ (1.88)	825
Vote to Overturn Criminal Conviction	-0.010 (0.24)	1484

V. EMPIRICAL ANALYSIS OF THE IMPACT OF CAMPAIGN CONTRIBUTIONS ON JUDGES' VOTING

In this Part, I examine the relationship between campaign money and impartial justice. That is, I explore whether judges adjust their rulings to attract campaign contributions from interest groups.

200. The table reports the marginal effects of a variable indicating a Republican party affiliation in states where the party affiliation of the people responsible for retention changes. Thus, the marginal effects show the change in the likelihood of a judge voting for the relevant litigants when the party affiliation of the retention agent changes from Democrat to Republican. T-statistics are reported in parentheses. "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

A. Empirical Model

I estimate a model similar to the model in Part IV:

$$(2)\ \text{Prob}(FavLitVote_i = 1|x) = \Phi(\beta_0 + \beta_1 RetentAgent + \beta_2 Judge + \beta_3 Case + \beta_4 State + \beta_5 IGContrib)$$

All of the variables in *Judge*, *Case*, and *State* are the same as in Equation (1). Because large fundraising occurs only under systems using partisan and nonpartisan elections, I limit my sample to judges elected under these systems. Thus, the variable *RetentAgent* now includes only two variables: a variable that indicates if a vote is given by a judge facing Republican retention agents in a partisan reelection, and a variable that indicates if a judge is facing Republican retention agents in a nonpartisan reelection. By including these variables, I can separate the influence of campaign contributions on voting from the influence of retention politics more generally. That is, although I demonstrated in Part IV that judges facing Republican retention agents in partisan elections are more likely to vote for the Republican-favored litigant, I can now explore whether campaign contributions have an additional, yet separate, effect on judges' voting.

The new variable *IGContrib* includes the total dollar amount of campaign contributions from various interest groups in the judges' most recent elections.[201] I explore the relationship between judges' voting and campaign contributions from five categories of interest groups that might have a stake in the particular type of case before the supreme court. First, I explore the relationship between the campaign contributions from pro-business groups and judges' voting for the business appellant in business-versus-person cases, for the business in products liability cases, and for the original defendant in tort cases (original defendants are often businesses). If judges' rulings favor pro-business interest groups that contributed to their previous campaigns, then one would expect to see a positive relationship

201. The data on campaign contributions comes from Nat'l Inst. on Money in State Politics, Follow the Money, http://www.followthemoney.org/index.phtml (last visited Nov. 3, 2008). The nonpartisan, nonprofit charitable organization is dedicated to accurate, comprehensive, and unbiased documentation and research on campaign finance at the state level. Nat'l Inst. on Money in State Politics, Mission & History, http://www.followthemoney.org/Institute/index.phtml (last visited Nov. 3, 2008). "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 collects the information for all state-level candidates in the primary and general elections and then puts it into a database." Nat'l Inst. on Money in State Politics, About Our Data, http://www.followthemoney.org/Institute/about_data.phtml (last visited Nov. 3, 2008).

between previous pro-business campaign contributions and the likelihood that judges vote for the business litigant.

Second, I explore the relationship between the campaign contributions from pro-labor groups and judges' voting for the employer in labor disputes. If campaign contributions make judges more sympathetic to pro-labor groups, then one would expect a negative relationship between pro-labor contributions and the likelihood that judges would vote for employers in labor disputes.

Third, I estimate the relationship between the campaign contributions from doctor and hospital groups and judges' voting for the doctor or hospital in medical malpractice cases or general tort cases. One would expect a positive relationship between these contributions and the likelihood of judges' voting for doctors or hospitals if campaign contributions have an effect.

Fourth, I estimate the relationship between campaign contributions from insurance companies and judges' voting for litigants that were originally defendants; I assume that a relatively high proportion of litigants that were originally defendants are insured. I test the relationship between insurance contributions and judges' voting for the business in business-versus-person cases, for the doctor or hospital in medical malpractice cases, for the business in products liability cases, and for the original defendant in tort cases. If campaign contributions from insurance companies influence judges' voting, one would expect them to vote more favorably for the insured litigants.

Finally, I estimate the relationship between judges' voting and campaign contributions from lawyer groups. The majority of the lawyer groups are pro-plaintiff groups.[202] Thus, one might expect these contributions to have the opposite influence from the insurance contributions. That is, one expects that lawyer contributions will negatively influence the likelihood that judges will vote for the business in business-versus-person cases, for the doctor or hospital in medical malpractice cases, for the business in products liability cases, and for the original defendant in tort cases.

Again, I include a set of time dummy variables that capture national trends that might influence judges' voting, such as trends in conservatism or changes in national legislation.

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202. *See, e.g.*, GOLDBERG ET AL., *supra* note 161, at 23 (discussing battles between pro-business groups and lawyer groups, and the resulting campaign contributions).

Like the previous retention estimations, I estimate Equation (2) with a maximum likelihood probit model. I present the marginal effects of each interest group's campaign contributions on the probability that a judge will vote for the relevant litigant. The results report the increase in the probability that a judge will vote for the relevant litigant for a $1,000 increase in each interest groups' campaign contribution, holding the case's other characteristics constant.

As before, the t-statistics are computed from standard errors clustered by case to correct for any possible clustering effect.

B. Primary Empirical Results

The results show that there is a strong relationship between campaign contributions and judges' voting. Table 7 shows that for judges elected in partisan elections, contributions from various interest groups have a statistically significant relationship with the probability that judges vote for litigants that the interest groups favor.

The results show that contributions from pro-business groups increase the probability that judges will vote for the business litigant in a business-versus-person case, for the business litigant in a products liability case, and for the original defendant (which is often a business) in tort cases.

Contributions from pro-labor groups reduce the probability that judges vote for the employers in labor disputes. Contributions from doctor and hospital groups increase the probability that judges vote for original defendants (which are often doctors and hospitals) in tort cases.

Contributions from insurance companies increase the probability that judges will vote for parties that typically carry insurance: businesses in business-versus-person cases, businesses in products liability cases, and original defendants in tort cases.

In contrast, contributions from lawyers, most of which are plaintiffs' lawyers, reduce the probability that judges will vote for litigants that are typically defendants: businesses in business-versus-person cases, businesses in products liability cases, and original defendants in tort cases.

Table 7. Influence of Campaign Contributions in Partisan-Election Systems[203]

	Contributions from Interest Groups				
Litigant	**Pro-Business Groups**	**Pro-Labor Groups**	**Doctors & Hosp-itals**	**Insurance Companies**	**Lawyer Groups**
Business Vote in Business v. Person	0.024* (2.59)			0.40* (6.83)	-0.02* (4.10)
Employer Vote in Labor Dispute		-1.23* (2.37)			
Doctor/Hosp. Vote in Medmal Case			0.17 (1.55)	0.34 (1.41)	-0.02 (1.63)
Business Vote in Prod. Liability Case	0.18* (3.25)			0.69* (3.14)	-0.05* (3.23)
Original Defendant Vote in Tort Case	0.021+ (1.89)		0.14* (5.37)	0.35* (5.59)	-0.02* (3.79)

The magnitudes of the coefficients show the average percentage increase in the probability of a judge voting for a relevant litigant for each $1,000 contribution from a special interest group. The magnitudes are significant, but reasonable. For example, the results suggest that for every $1,000 contribution from insurance companies, judges are, on average, 0.4 percent more likely to vote for business litigants in business-versus-person cases, 0.69 percent more likely to vote for businesses in products liability cases, and 0.35 percent more likely to vote for the original defendants in tort cases.

The results show that the impact of large contributions can be important. For example, a $100,000 contribution would increase the average probability that a judge would vote for a business in a products liability case by 69 percent. These results comport with

203. The table reports the marginal effects of each groups' campaign contributions on the probability of a judge voting for the relevant litigants, based on probit estimates. The magnitudes of the coefficients show the average percentage increase in the probability of a judge voting for a relevant litigant for each $1,000 contribution from a special interest group. The other control variables are not reported for brevity. T-statistics are reported in parentheses. "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

earlier findings that judges' votes favor specific litigants who earlier made contributions to the judges.[204]

Table 8 reports the results for judges elected in nonpartisan systems. Some of the results are statistically insignificant, indicating that campaign contributions have a weaker relationship with judges' voting in nonpartisan systems. Yet there are still several significant relationships.

Contributions from pro-business groups increase the probability that a judge will vote for the original defendant in tort cases. Contributions from pro-labor groups decrease the probability that judges will vote for employers in labor disputes. Contributions from doctor and hospital groups increase the probability that judges vote for doctors or hospitals in medical malpractice cases and for original defendants (which are often doctors and hospitals) in tort cases. Contributions from insurance companies increase the probability that judges will vote for businesses in business-versus-person cases and original defendants in tort cases. In contrast, contributions from lawyers reduce the probability that judges will vote for businesses in business-versus-person cases and original defendants in tort cases.

Table 8. Influence of Campaign Contributions in Nonpartisan-Election Systems[205]

	Contributions from Interest Groups				
Litigant	**Pro-Business Groups**	**Pro-Labor Groups**	**Doctors & Hosp-itals**	**Insurance Companies**	**Lawyer Groups**
Business Vote in Business v. Person	0.17 (1.23)			1.13* (3.85)	-0.16* (5.83)
Employer Vote in Labor Dispute		-0.33* (4.45)			

204. *See supra* note 163 and accompanying text.

205. The table reports the marginal effects of each groups' campaign contributions on the probability of a judge voting for the relevant litigants, based on probit estimates. The magnitudes of the coefficients show the average percentage increase in the probability of a judge voting for a relevant litigant for each $1,000 contribution from a special interest group. The other control variables are not reported for brevity. T-statistics are reported in parentheses. "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

Doctor/Hospitals Vote in Medmal Case		1.42+ (1.76)	1.02 (0.94)	-0.06 (0.58)
Business Vote in Prod. Liability Case	0.63 (1.14)		1.29 (1.06)	-0.14 (1.48)
Original Defendant Vote in Tort Case	0.26* (2.04)	0.71* (4.90)	0.868* (2.81)	-0.16* (5.12)

Thus, Tables 7 and 8 show that there is a strong relationship between interest group campaign contribution and judges' voting. The relationships are generally stronger for judges elected in partisan elections. Campaign contributions from many interest groups influence judges' voting under both systems, however.

C. Results for Judges Not Facing Reelection

Although the results from Tables 7 and 8 reveal a strong relationship between interest group campaign contributions and judges' voting, they do not reveal which way the causality runs. That is, they do not show whether campaign contributions persuade judges to vote in certain ways or whether interest groups contribute to the campaigns of those judges whose votes are consistent with the interest groups' preferences. Under both of these possibilities, interest contributions influence state supreme court rulings. The influence can be direct, by influencing judges to change their votes. Or the influence on case outcomes can be indirect, by increasing the probability that a judge whose votes favor an interest group will be elected.

However, as an additional test of the degree to which campaign contributions persuade judges to vote in certain ways, I estimate the relationship between contributions and voting for retiring judges. I examine the voting of judges in their last term before mandatory retirement to test whether contributions have the same relationship with voting on judges who will not be seeking reelection, and thus will not solicit campaign contributions in the future. If contributions have a weaker relationship with the voting of retiring judges, then this suggests that some of the relationship between contributions and voting can be explained by judges' voting in a way that will likely increase the future contributions from interest groups at the time of their next reelection campaign. That is, a weaker relationship for retiring than nonretiring judges would suggest that an interest group's campaign contributions can convince judges to change their rulings,

rather than just increasing the probability of election of judges whose rulings happen to favor the interest group.

I reestimate Equation (2), but this time I include an interaction variable that shows the interaction between interest group contributions and an indicator for whether a judge is retiring. By including this variable, I am able to measure separately the relationship between contributions and voting for nonretiring judges and retiring judges. The results for judges elected in partisan elections are reported in Table 9; the top panel reports the results for judges that are not retiring, and the bottom panel shows the results for judges that are retiring. The results show that fewer of the contribution variables have a statistically significant relationship with the voting of retiring judges. Although this could be caused by a smaller number of observations for retiring judges, it does show that most interest group contributions have no systematic relationship with the voting of retiring judges.

Table 9. Differences in the Influence of Campaign Contributions on Nonretiring Judges versus Retiring Judges[206]

Litigant	**Pro-Business Groups**	**Pro-Labor Groups**	**Doctors & Hospitals**	**Insurance Companies**	**Lawyer Groups**
	Nonretiring Judges				
Business Vote in Business v. Person	0.027* (2.97)			0.49* (7.05)	-0.04* (5.48)
Employer Vote in Labor Dispute		-1.0+ (1.67)			
Doctor/Hospitals Vote in Medmal Case			0.18 (1.41)	0.59+ (1.82)	-0.01 (0.61)

206. The table reports the marginal effects of each groups' campaign contributions on the probability of a judge voting for the relevant litigants, based on probit estimates. The magnitudes of the coefficients show the average percentage increase in the probability of a judge voting for a relevant litigant for each $1,000 contribution from a special interest group. The estimations reported in the top panel are limited to the sample of judges not in their last term before mandatory retirement; the estimations reported in the bottom panel are limited to the sample of judges in their last term of office before mandatory retirement. The other control variables are not reported for brevity. T-statistics are reported in parentheses. "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

Business Vote in Product Liability Case	0.24+ (1.88)			1.27* (3.63)	-0.08* (2.51)
Original Defendant Vote in Tort Case	0.023* (2.20)		0.14* (5.32)	0.51* (6.41)	-0.03* (3.83)
Retiring Judges					
Business Vote in Business v. Person	0.35 (1.94)+			-4.8* (2.55)	-0.6* (4.37)
Employer Vote in Labor Dispute		-4.6 (0.77)			
Doctor/Hospitals Vote in Medmal Case			-0.08 (0.01)	-7.5 (0.98)	-0.5 (0.95)
Business Vote in Product Liability Case	-0.50 (0.62)			-22.2* (2.74)	-1.1+ (1.90)
Original Defendant Vote in Tort Case	0.24 (1.21)		-0.13 (0.39)	-6.7* (3.31)	-0.5* (3.12)

The negative and statistically significant coefficients on contributions from insurance companies and lawyer groups indicate that retiring judges that received contributions from these groups in the most recent election are even less likely to vote for certain Republican-favored litigants than they would have been if they were not retiring. For brevity, I do not report the results for judges elected in nonpartisan elections, but they show almost no systematic relationship between any interest group's contributions and judges' voting.

These results suggest that the strong relationship shown in Part V between campaign contributions and how nonretiring judges vote is due, at least in part, to campaign contributions causing the judges to change their votes. That is, if the relationship was due merely to the campaign contributions permitting the election of a higher proportion of judges who naturally already vote the way that the interest groups prefer, then campaign contributions should have the same relationship with the voting of all judges, whether retiring or not.

VI. PROPOSALS FOR REFORM

Supporters of the independence model, adopted in federal courts, view almost complete independence as optimal. In contrast,

supporters of the accountability model have suggested that modest pressure from judicial elections is beneficial. Increasingly contentious elections and high campaign spending in some states may have placed judges under such strong political pressure that the important balance between judicial accountability and independence may be at risk. The following changes might help to maintain balance in the accountability model.

A. Permanent Tenure and Maintaining Accountability

The most extreme reform that would increase judicial independence in state supreme courts would be to grant permanent tenure to state judges. Like federal judges, state judges would not have to seek retention and they could serve for life or until some mandatory retirement age.

Systems with permanent tenure would not completely sacrifice accountability for independence. Indeed, an extensive literature on federal judges argues that these judges are accountable to the degree that they are concerned with improving their reputation, being cited by their peers, being promoted, minimizing future reversals, and reducing the possibility of political retribution.[207] Similarly, foreign court systems that give permanent tenure to their judges maintain judicial accountability through various methods. Examples are the powers that governments sometimes wield to control judges' promotions, the ability to grant permanent appointments after probationary appointments, the power over judicial transfers, the power over judicial salaries and budgets, and the ability of the legislature or executive to fire disfavored judges. Although many sources of pressure exist, I limit my discussion to the major sources: those that threaten a substantial influence on a judge's career.

207. For surveys of the literature on motivations of judicial behavior, see generally RICHARD A. POSNER, HOW JUDGES THINK (2008); Gilat Levy, *Careerist Judges*, 36 RAND J. ECON. 275 (2005); Hugo Mialon, Paul Rubin & Joel Schrag, *Judicial Hierarchies and the Rule-Individual Tradeoff* (Emory Law & Economics Research Paper No. 05-5, 2004), *available at* http://ssrn.com/abstract=637564.

a. Promotion Procedures. The agents responsible for deciding whether a judge is promoted—the promotion agents—may exert pressure. If judges are promoted to higher courts based on their records, then they may decide to create records consistent with a promotion agent's ideology.

For example, the appointments and promotion process in Germany, and formerly in Britain, creates incentives for both judges and those who seek appointment to the bench to shape their records to the promoting agent's political orientation.

Until 2005, top-level judges in England were, in effect, appointed and promoted by the lord chancellor, a political appointee and cabinet member: although judges were, technically, appointed by either the queen (high court judges) or the prime minister (court of appeal judges and house of lords judges), the queen and prime minister in practice followed the lord chancellor's advice.[208] Because of the lord chancellor's effective power, critics argued that judges were often selected based on political patronage instead of merit.[209] An empirical study of decisions by Court of Appeal judges from 1951 to 1986, however, found no evidence that judges' records were a factor in their promotion to the House of Lords.[210]

Nevertheless, in response to these and other criticisms, the Constitutional Reform Act of 2005[211] removed the lord chancellor's unfettered appointment and promotion powers and vested many of them in a new Judicial Appointments Commission (JAC).[212] Following this reform, British judges are selected and promoted by this independent body of fifteen commissioners drawn from the judiciary, the legal professions, tribunals, the lay magistracy, and the lay public.[213] The Reform Act requires the commission to select

208. *See* Kate Malleson, *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 39, 40–42 (Kate Malleson & Peter H. Russell eds., 2006); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349, 353–54 (1993).

209. *See* Malleson *supra* note 208, at 41 (indicating that it was "increasingly difficult to sustain" the idea that judges were selected "on the basis of merit rather than political patronage").

210. Salzberger, *supra* note 208, at 354–56.

211. Constitutional Reform Act, 2005, c. 4 (Eng.).

212. *Id.* c. 4, § 61 (creating JAC); *id.* c. 4, §§ 63–107 (detailing the role of JAC for different levels of courts); *see also* Malleson, *supra* note 208, at 39–41 (indicating that the creation of the JAC "significantly reduced the role of the executive in the selection process").

213. Malleson, *supra* note 208, at 48.

candidates solely on merit and to then make recommendations to the lord chancellor, who can reject the recommendations only after providing reasons.[214]

In Germany, two of the highest courts, the Federal Constitutional Court (Bundesverfassungsgericht) and the Federal Court of Justice (Bundesgerichtshof), have a process for appointments and promotions that is substantially political.[215] Judges on the Constitutional Court are "selected by a . . . small group of leading members of political parties . . . [in] the Bundestag and . . . the second chamber of the Bundesrat."[216] Although commentators suggest that judges are more likely to be promoted when their records "mirror . . . the political orientation of the . . . government[al body] choosing them,"[217] there is a high degree of continuity on the court; political parties typically retain "their" chair in the court.[218]

Similarly, the judges of the Federal Court of Justice are selected by the Committee for the Selection of Judges and appointed by the President of the Federal Republic of Germany.[219] The Committee is composed of the ministers of justice of the sixteen federal states and sixteen additional members who are selected by the German Federal Parliament.[220] Although the Committee typically seeks proportional representation of the political parties in the court,[221] scholars agree that the process of selecting judges is a political process in which judges are selected based at least in part on their judicial decisions' political orientation.[222]

Similar promotion procedures may create political pressure on lower court judges in other countries. In Australia, the

214. Judicial Appointments Comm'n, Step-by-Step Guide to Processes, http://www.judicialappointments.gov.uk/select/step.htm (last visited Nov. 3, 2008).

215. Christine Landfried, *The Selection Process of Constitutional Court Judges in Germany*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 208, at 196, 197, 202.

216. *Id.* at 197.

217. *See, e.g.*, *id.*

218. *Id.* at 202.

219. Russell A. Miller & Peer C. Zumbansen, *Judicial Selection Controversy at the Federal Court of Justice*, 2 GERMAN L.J. art. 8, ¶ 15 (2001), http://www.germanlawjournal.com/article.php?id=69.

220. *Id.* ¶ 4.

221. *Id.* ¶ 17.

222. *See id.* ¶ 22 ("[O]ne can do nothing to prevent the parties charged with selecting judges from bringing their . . . political . . . values to bear on the selection . . . .").

Commonwealth attorney general appoints judges to the High Court[223] and is criticized for making selections based on political patronage rather than merit.[224] Likewise, in South Africa, where judges were appointed by the president at the advice of the minister of justice, the process received criticism for pushing through judicial appointees that were loyal to the current government's views.[225] Finally, because American federal judges are promoted by the President, an incentive exists for them to shape their decisions to curry favor with the current administration.

b. Probationary Appointments. Probationary appointments provide another source of political pressure on judges. For example, in Russia, federal judges are granted life tenure, but only after an initial probationary three-year appointment.[226] After three years, the president chooses whether the judge will be reappointed.[227] Commentators suggest that judges who make decisions consistent with the president's ideology are more likely to be reappointed.[228] For example, Lubov Osipkina was not reappointed after she spoke out against government corruption.[229]

Although this political pressure may not be permanent, it may dictate judges' decisions for a few years.

c. Judicial Transfers. Another source of political pressure on judges results from the ability of the executive to transfer judges to undesirable courts. If a political appointee determines whether judges will maintain or improve their geographic location, judges have an incentive to render decisions that are consistent with the political appointee's ideology.

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223. Elizabeth Handsley, '*The Judicial Whisper Goes Around': Appointment of Judicial Officers in Australia*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 208, at 122, 123–24.

224. *See id.* at 126 (describing the controversial High Court appointment of a cabinet minister who lacked the legal experience typical of other High Court appointees).

225. François du Bois, *Judicial Selection in Post-Apartheid South Africa*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 208, at 280, 283–84.

226. Int'l Comm'n of Jurists, The Russian Federation 9 (Aug. 27, 2002), http://www.icj.org/IMG/pdf/Russia_chapter-final_Copy_.pdf.

227. *See id.* at 14.

228. *See, e.g.*, *id.* at 9 ("[J]udges who were compliant with the executive were said to stand the best chance of receiving a life appointment . . . .").

229. *Id.* at 14.

For example, judges in Japan face strong political pressure from the dominant Liberal Democratic Party (LDP) through the lever of judicial transfers.[230] The LDP uses the appointment power of the cabinet to ensure a politically compliant Supreme Court and Secretariat.[231] The Secretariat, in turn, decides which judges obtain the best postings.[232] Empirical analyses suggest that when judges render decisions contrary to the interest of the LDP, the Secretariat punishes them with transfers to unattractive posts in obscure courts.[233] As a result, most judges are deterred from ruling against the interests of the LDP.

Similarly, in India, the president has employed the power of transfer to exert pressure on judges.[234] The president has transferred several High Court judges that delivered judgments against the government's interests to unpopular regions of the country, where the judges suffer lower living standards and language barriers.[235] The transfer power may motivate at least some judges to issue rulings that are favorable to the government.

The same thing can happen in Mexico. A ruling against the interest of the government can result in a federal judge being transferred to another region.[236]

d. Judicial Salaries and Budgets. Government control over judicial salaries and court budgets is another way that political parties can pressure judges. For example, the judicial branch of Venezuela lacks financial autonomy; it has to submit an annual budget to the executive branch, which may reduce or amend the budget.[237] Some commentators argue that executive control over the courts' budget is

230. J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 10–12, 57 (2003).

231. *Id.* at 126.

232. *Id.* at 60–61.

233. *Id.* at 48–61.

234. Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, *in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 590, 608 (Shimon Shetreet & Jules Deschenes eds., 1985).

235. *See id.*

236. *See* Jon Mills, *Principles for Constitutions and Institutions in Promoting the Rule of Law*, 16 FLA. J. INT'L L. 115, 126 n.31 (2004).

237. Josefina Calcaño de Temeltas, *Commentary*, 40 ST. LOUIS U. L.J. 997, 998 (1996).

one of the primary means by which the executive branch pressures the courts, and thus it is a main obstacle to judicial independence.[238]

Similarly, judges in Japan,[239] India,[240] and Nigeria[241] have reason to fear cuts in compensation if they rule against the government.

Thus, many systems with permanent tenure for judges, including both the U.S. federal court system and many foreign court systems, do achieve a degree of judicial accountability. Nevertheless, research shows that most citizens do not want to "give up their vote" when it comes to reelecting state court judges.[242] Because people generally prefer to reelect their state court judges, judicial elections will need to be altered, rather than eliminated.

B. Reforming Judicial Elections

Instead of abolishing judicial retention completely, contested elections could be abolished and replaced with merit plans, which 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."[243] The commission submits this list to the governor, who appoints one of the candidates from the list of recommendations.[244] "Once appointed, the judges regularly face . . . [unopposed] retention elections," in which incumbent judges appear on a ballot asking voters only "whether . . . the judge should [be retained] in office."[245]

This reform ensures that citizens still have a voice through retention elections and can hold judges accountable. Moreover,

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238. *See, e.g.*, MARK UNGAR, ELUSIVE REFORM: DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA 153 (2002) (describing the negative effects on the justice system due to a politicized judicial budget).

239. *See* RAMSEYER & RASMUSEN, *supra* note 230, at 21–22, 37–38, 59–60 (using data analysis to demonstrate that the Japanese government slows judges' salary advancements following unfavorable rulings).

240. *See* Shetreet, *supra* note 234, at 608.

241. *See* Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT'L L. 9, 37–38 (2005) ("'One of the whips used by civil servants to force Judges to 'behave' is in the allocation of residential quarters . . . .' It is therefore not surprising that some judges go out of their way to demonstrate their fealty to the executive." (quoting P.O.E. BASSEY, THE NIGERIAN JUDICIARY: THE DEPARTING GLORY 20 (2000))).

242. Schotland, *supra* note 2, at 1082.

243. Caufield, *supra* note 77, at 627–28.

244. *Id.* at 628.

245. *Id.*

because elections would be uncontested, candidates would no longer have to raise as many campaign contributions. Thus, judges would no longer have to vote in a way that would help them obtain contributions. In addition, because the retention rate of incumbents in retention elections is much higher than that in contested election systems,[246] judges would not have to appeal so relentlessly to constituents. Indeed, my empirical results show that retention politics have almost no influence on the voting of judges under merit plan systems.[247]

Merit plans are imperfect, however. For example, the selection commissions that compile the lists of candidates for the governor are typically partisan in both their composition and deliberations.[248] Thus, judges may still be selected based on their political preferences. In contrast to systems with contested reelections, however, once they are on the bench, there will be much less pressure on the judges to vote with the political preferences of the retention agents. Although there have been some instances in which judges were not retained in retention elections following heated political campaigns against them,[249] incumbents are very rarely defeated in retention elections.[250]

C. Reforming Campaign Finance

As with the excessive influence from retention politics, the sure way to eliminate money's influence on judges' decisions is to eliminate judicial elections. Because of the accountability model's popularity, however, this is probably politically infeasible. The following is a brief outline of several proposals that attempt to reduce money's influence, without eliminating elections.[251]

246. Hall, *supra* note 96, at 177 (presenting data indicating that incumbents lose 1.8 percent of sampled retention elections compared with 7.4 percent in sampled nonpartisan elections and 22.9 percent in sampled partisan elections).

247. *See supra* table accompanying note 193.

248. McLeod, *supra* note 167, at 513.

249. For details of these campaigns, see Reid, *supra* note 127, at 49–59; Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2036–42 (1988).

250. Hall, *supra* note 96, at 177.

251. For a more detailed discussion of these and other proposals, see McLeod, *supra* note 167, at 515–21.

Although the government cannot constitutionally impose spending limits on political campaigns,[252] some states have experimented with voluntary spending limits as a way to reduce judges' dependence on contributions.[253] There is little incentive, however, for judges to comply with the voluntary limits; voters do not appear to punish judges that refuse to comply.[254]

Other states have experimented with publicly funding judicial races.[255] 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.[256] Although publicly financing elections reduces judges' dependence on campaign contributions, it would not necessarily make judges more independent. Because independent special interest groups would not be similarly limited in their spending to oppose candidates, judges would still face pressure to vote in ways that do not provoke opposition.[257]

Finally, states could consider tightening their recusal rules. Although state ethics codes generally require judges to recuse themselves in cases in which they have a conflict,[258] the codes have generally not been interpreted to require recusal merely because a case involves a campaign contributor.[259]

Requiring recusal when a case involves a campaign contributor, however, would create at least two difficulties. First, although stronger recusal rules may eliminate any bias in judges' voting toward specific attorneys or litigants that individually contributed to their

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252. *See* Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 139–42 (1998) (citing Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)).

253. For example, Texas and New York have tried this approach. TEX. ELEC. CODE ANN. § 253.164(a) (Vernon 2003) (requiring either voluntary compliance with spending limits or a declaration of intent to exceed limits); SARA MATHIAS, AM. JUDICATURE SOC'Y, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 45 (1990) (describing a judicial election in Rochester, New York).

254. *See* MATHIAS, *supra* note 253, at 45 (describing an election in which seven of eight judicial candidates pledged to limit their spending to $25,000, whereas the eighth candidate spent $100,000 and won the election).

255. For example, North Carolina fully funds all candidates for appellate courts and Wisconsin provides partial funding for its supreme court candidates. Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107, 116 (2003).

256. *Id.* at 118.

257. McLeod, *supra* note 167, at 519.

258. MATHIAS, *supra* note 253, at 52.

259. McLeod, *supra* note 167, at 520.

campaign, it would not eliminate all or even most bias. It would still permit judges to participate in cases in which the contributor was not a litigant or an attorney, but in which the contributor had an interest. For example, stricter recusal rules would not prevent a judge who had received contributions from a medical-association tort-reform group from ruling in medical malpractice tort cases.

Second, as a practical matter, if campaign contributions are permitted, then stricter recusal rules would be impossible in many communities. In communities with small numbers of lawyers and small numbers of judges, strict recusal rules might require judges to recuse themselves in almost every case. In these communities, the only way to prevent these wholesale recusals would be to prohibit lawyers from contributing to campaigns. But this would probably be unconstitutional.

Perhaps campaign contributions are simply inconsistent with maintaining the judiciary's legitimacy. Reasonable minds can differ about whether it is appropriate under the accountability model for a judge to face modest pressure from the citizens of the judge's own jurisdiction. It seems much worse for campaign contributions to allow wealthy groups and individuals, many of whom are not even from the judge's jurisdiction, to generate great pressure on judges.

And yet it is far from clear that campaign spending in judicial elections has purely negative consequences. For example, when candidates spend money on their campaigns, they provide information to allow voters to make more informed decisions. With campaign contributions, voters must rely on a contest of biased information. Without contributions, voters have next to no information. Moreover, the more money that is spent in judicial elections, the higher the levels of voter participation.[260] A vigorous campaign stimulates voter interest and fewer voters are disenfranchised by ignorance.

CONCLUSION

My empirical results suggest that recent trends may threaten the necessary balance between judicial independence and accountability. The results about the increasingly contentious retention politics

260. Melinda Gann Hall & Chris W. Bonneau, Mobilizing Interest: The Effect of Money on Ballot Roll-Off in State Supreme Court Elections 17, 28 tbl.5 (Apr. 2006) (unpublished manuscript, on file with the *Duke Law Journal*).

suggest that in states with certain retention systems, retention politics strongly affect many case outcomes. The results suggest that judges may frequently shape their rulings on many different subject matters to appeal to retention agents. The subject matters range widely, from all cases in which an individual faces a business, to labor disputes, to medical malpractice cases, to other tort cases, to products liability cases, to criminal appeals.[261] And the magnitude of politics' influence on judges' rulings is substantial, often making it much more likely that a judge will vote to favor the retention agent's preferences.

Like the impact of retention politics, the recent flow of campaign money into judicial elections has also affected judges' rulings across a wide range of subjects. Also like the effect of retention politics, the impact of the new campaign money is large, often making it substantially more likely that a judge's rulings will favor campaign contributors.

Together, competitive judicial politics and campaign money may influence judges' decisions so profoundly that the important balance between judicial accountability and independence is threatened. Reforms must eliminate the intense pressure on judges to vote in a way that attracts votes and campaign contributions. There is no sign that the politicization of state supreme courts and elections to them is lessening. Until reforms are enacted, the application of impartial justice is at risk.

261. *See supra* text accompanying note 191.

APPENDIX: FULL SET OF PRIMARY RESULTS[262]

	Business Vote in Business v. Person	Employer Vote in Labor Dispute	Doctor / Hospital Vote in Medmal Case	Business Vote in Products Liability Case	Original Defendant Vote in Tort Case	Vote to Overturn Criminal Conviction
Republican / Partisan Reelection	0.364*	0.359*	0.308*	0.444*	0.418*	-0.076+
	(7.89)	(2.91)	(2.57)	(3.09)	(8.90)	(1.90)
Republican / Nonpartisan Reelection	0.049	0.042	-0.021	0.077	0.048	0.002
	(1.65)+	(0.69)	(0.22)	(0.78)	(1.59)	(0.10)
Republican / Retention Election	0.035	0.030	0.10	0.004	0.067	0.026
	(1.39)	(0.57)	(1.16)	(0.04)	(2.70)*	(1.41)
Republican / Reappointed	0.04	-0.204	-0.251	0.607+	0.006	-0.03
	(0.58)	(1.32)	(0.95)	(1.76)	(0.94)	(0.39)
Judges' PAJID score	-0.0002	-0.0005	-0.001	0.0018	-0.0004	0.001*
	(0.41)	(0.62)	(0.83)	(1.25)	(0.91)	(4.93)
% Years with Republican Legislature	0.0006*	0.0016*	0.0004	-0.0001	0.0013*	-0.0008*
	(2.03)	(2.57)	(0.37)	(0.12)	(4.04)	(3.51)
Years on Court	0.00004	-0.0005	0.003	-0.002	-0.0017*	0.001*
	(0.05)	(0.30)	(0.89)	(0.55)	(1.96)	(2.04)
Year to Retention	0.006*	0.008	0.011	0.021*	0.006*	-0.0004
	(3.10)	(1.63)	(1.50)	(2.82)	(2.90)	(0.28)
Lower Appellate Court Indicator	-0.013	-0.0189	0.007	0.002	0.007	0.078*
	(0.61)	(0.39)	(1.20)	(0.02)	(0.32)	(4.58)
Enbanc Indicator	-0.017	-0.035	0.051	-0.065	-0.021	-0.013
	(0.93)	(0.92)	(0.83)	(0.96)	(1.11)	(0.96)
Public Defender Indicator						0.024*
						(2.01)
Murder Case Indicator						-0.125*
						(10.94)
# of observations	14015	2976	1241	1077	12602	22893
Log-Likelihood	-9536.7	-2014.0	-831.8	-651.3	-8533.2	-13406.7

262. The table reports the marginal effects of each variable on the probability of a judge voting for the relevant litigants, based on probit estimates. The indicator variables for years, general issue in the case, and general industry of the business litigant are not reported for brevity. T-statistics are reported in parentheses. "*" and "+" represent significance at the 5 percent, and 10 percent levels, respectively.