

## THE PARTISAN FOUNDATIONS OF JUDICIAL CAMPAIGN FINANCE

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INTRODUCTION

Money buys things. This operative understanding is precisely the worry about money in judicial elections. For candidates who win office, the prospective need for money to finance their re-election campaigns looms over judicial decisionmaking. This need for money tempts judges to decide cases in ways that may attract, or at worst, would not alienate their contributors and skews judges toward their interests. As the electoral competition and campaign spending in judicial elections has rapidly ramped up, there is increasing worry that judicial elections now have become “floating auctions”<sup>3</sup> in which contributors purchase favorable judicial treatment in exchange for campaign financing. Even the Supreme Court, which has hardly demonstrated great concern about campaign finance, recognized for the first time the potential for actual bias from big-money campaign spending in state judicial elections in *Caperton v. A.T. Massey Coal Co.*<sup>4</sup>

What is regularly missed in this story of modern judicial campaign finance, however, is that Republican and Democratic parties play an indispensable role in the influence of money on judicial decisionmaking. Of course, there is a very real relationship between contributions to judges and judicial decisions by those judges favorable to their contributors that we ourselves have helped document. But the intuitive understanding of judicial campaign finance as a direct exchange of money for influence between individual contributors and candidates is far too simplistic to capture the larger realities of modern judicial elections. In today’s world, the Republican and Democratic parties broker the powerful relationships between contributors and candidates, particularly in partisan elections where their involvement is greatest.

The necessary role of the major parties in cementing the relationships between contributors and judicial candidates has nonetheless been underexplored and regularly overlooked. For example, the Supreme Court in *Caperton* held that the \$3 million of campaign spending by Don Blankenship in support of a Brent Benjamin’s campaign for West Virginia Supreme Court Justice created an unconstitutional probability of actual bias in a later case where Benjamin, as a sitting justice, voted to overturn a large

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<sup>3</sup> Dennis Brady, *PACs, Donors Shaping Judicial Elections*, WASH. POST, Mar. 30, 2012, at A1 (quoting Roy Schotland).

<sup>4</sup> 556 U.S. 868 (2009).

jury verdict against Blankenship. The Court focused entirely on the relationship between the two men and money implicated in the case as if political party, in this case the Republicans, played no role, not once mentioning the Republican Party in the decision.

However, Blankenship's campaign finance support of Brent Benjamin was nested in a much larger, more complicated web of political influence where Blankenship exerted power through and with his party. What went unmentioned was the leadership role that Don Blankenship played in the state Republican Party. Blankenship, the CEO of Massey Coal Company, personally footed half the bill for the state party's new headquarters in his hometown of Charleston just two years earlier,<sup>5</sup> and during the year of Benjamin's election, he coordinated a coal industry effort with the party to raise money from Massey vendors, investors, and other contacts exclusively for Republican candidates.<sup>6</sup> The following year, Blankenship spent roughly \$1 million in opposition to Democratic Governor Joe Manchin's pension bond proposal and other Democratic initiatives.<sup>7</sup> In 2006, after vowing to spend "whatever it takes" to give Republicans control of the state House of Delegates, Blankenship spent almost \$4 million in support of Republican candidates for state and federal office in West Virginia.<sup>8</sup> The state Democratic Party chairman declared that "Don Blankenship is the Republican Party" in West Virginia.<sup>9</sup>

The Republican and Democratic Parties serve as the critical networks between campaign finance contributors and judicial candidates, efficiently matching them and cementing the ongoing bonds between them. The major parties are by definition engines of political coordination that draw together sprawling coalitions of supporters and candidates into identifiable teams, allied internally by policy goals across every level and branch of American government, including state courts. Parties have always influenced judicial lawmaking at the state level, both by affecting which

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<sup>5</sup> See Ian Urbina, *Wealthy Coal Executive Hopes to Turn Democratic West Virginia Republican*, N.Y. TIMES, Oct. 22, 2006, at 22.

<sup>6</sup> See Paul J. Nyden, *Other Coal Interests Spread Campaign Contributions*, CHARLESTON GAZETTE & DAILY MAIL, at 1; 1 Joint Appendix 331a-32a, *Caperton v. Massey*, 129 S.Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213.

<sup>7</sup> See Erik Schelzig, *Blankenship Content to Campaign, But Not Run*, CHARLESTON GAZETTE & DAILY MAIL, Nov. 27, 2005, at 1C.

<sup>8</sup> See Associated Press, *Massey Stockholder Seeks Report on Political Spending*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 16, 2008, at 4C; Paul J. Nyden, *They Are Not Friends? Dinner, Campaign Reports Show Connections Between Blankenship, Benjamin*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 15, 2009, at 1A.

<sup>9</sup> Jake Stump, *Party Chiefs Spar Over Blankenship's Effort*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 22, 2006, at 1C (quoting West Virginia Democratic Party Chairman Nick Casey). See also Urbina, *supra* note, (quoting a Republican consultant characterizing Blankenship as "really the linchpin of it all").

candidates are chosen for the bench and by swaying sitting judges toward their preferences through various means. The pivotal role of the parties in judicial elections today therefore should be quite familiar. After all, the historical evolution of methods for judicial selection, from appointment to election to new forms of merit selection today can be understood largely as state attempts to insulate judicial decisionmaking from pervasive partisan influence.<sup>10</sup> Today, the parties simply assert their influence on state judges through the newly important channels of judicial campaign finance that have emerged as critically important over the past twenty years.

In this Article, we reveal the parties' pivotal role and pervasive influence through judicial campaign finance in the first comprehensive empirical study of this scale on the subject. Analyzing an exhaustive database of all campaign contributions and state supreme court decisions over a four-year period, we provide robust empirical support for popular worries about partisan influence on state judges through campaign finance. The breadth of our data is unique and enables us to investigate the complex world of judicial campaign finance and the major parties as no study ever has.<sup>11</sup> It includes every state supreme court case across all fifty states over four years, encompassing more than 28,000 cases and more than 470 judges. The data include variables that reflect case histories, case participants, legal issues, case outcomes, and individual judges' behavior. What is more, we incorporate comprehensive campaign finance data covering all contributions to judicial candidates during our period of study, with contributors sorted by industry based on information contained in disclosure reports and research on the donor's characteristics and agendas. The combination of data on judges, their decisions, and the campaign contributions they receive from the full range of contributors allow us to detail the relationship among judges, contributors, and the major parties.

Our findings are striking and revealing. As an initial matter, we identify broad left- and right-leaning political coalitions, allied roughly with the Democratic and Republican parties, whose collective contributions exercise systematic influence on judges who receive their money. These left- and right-leaning coalitions of contributors contribute heavily, though not exclusively to their party's judicial candidates. More importantly, we find a systematic relationship between these campaign contributions and the decisions of judges who receive them in the preferred ideological direction

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<sup>10</sup> See generally JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 258 (2012) (describing this "ongoing cycle of institutional design, corruption, reform, new corruption, and new reform").

<sup>11</sup> See, e.g., Michael H. LeRoy, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, 95 IOWA L. REV. 1569 (2010) (comparing decisions by judges selected through different methods but acknowledging limitations on findings without data on campaign contributions).

of the relevant coalition. In other words, our results indicate that contributions from groups within each party coalition exercise a global influence on judicial decisionmaking by judges that goes beyond the parochial interests of the contributor's particular industry and instead is coordinated with other groups united by global ideological outlook. We find this effect even controlling for the judge's ideological preferences. That is, even for judges who are already committed ideologically to a coalition's positions, contributions from that coalition are associated with even stronger voting toward the coalition's preferences. What is more, we find this effect only for judges running for re-election, and therefore the potential need for campaign financing in the future, but not for retiring judges with no such prospective worries.

However, we find this relationship between campaign contributions and judicial decisions only for judges elected through partisan elections where the major parties play their biggest role. In partisan elections, contributions from the Democratic coalition are associated with judges voting in a liberal direction across their judicial decisionmaking, while contributions from the Republican coalition are associated with judges voting more in a conservative direction. This robust relationship between money and judicial decisions largely *disappears* for judges elected in nonpartisan elections. Although the party coalitions contribute money to judicial candidates in nonpartisan elections as well, the money appears to bear little relationship with judges' decisions when the parties play less or no role in brokering and mediating the relationships between contributors and candidates. In our data, the Republican and Democratic parties play a necessary role in money's influence through judicial campaign finance.

That said, when we disaggregate contributions from the party coalitions, we discover yet another critical new finding about judicial campaign finance: campaign finance appears to place strikingly disparate influences on Republican and Democratic judges. A major study of campaign finance concluded that "[t]he country doesn't have two major parties, it has just one: the money party."<sup>12</sup> At least for judicial campaign finance, we find this true only in the limited sense that judges of both parties appear responsive to some sort of campaign contributions, but we also establish a very clear and important partisan asymmetry in judicial campaign finance between Republicans and Democrats.

For Republican judges, our results suggest that all the pressures from campaign finance influence them in the same conservative direction. Contributions from the Republican coalition are associated with Republican judicial decisionmaking in a more conservative direction, as are

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<sup>12</sup> DAN CLAWSON, ALAN NEUSTADTL, & MARK WELLER, DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY 91 (1998).

contributions directly from the Republican Party itself. Republican judges, though, simply do not appear to be affected at all by campaign finance contributions from the Democratic coalition. Campaign finance pressures for Republican judges seem simply to reinforce partisan discipline in the party-preferred direction. By striking contrast, Democratic judges are torn in different, countervailing directions by campaign finance pressures. Yes, contributions from the Democratic coalition are associated with Democratic judicial decisionmaking in a more liberal direction, as are contributions directly from the Democratic Party. However, Democratic judicial decisionmaking *also* appears influenced by contributions from the Republican coalition. As contributions from the Republican coalition increase, Democratic judges vote in a more conservative direction. Democratic judges thus respond in *both* directions to campaign finance pressures. For Democratic judges, but not Republicans, campaign finance compromises party cohesion and discipline.

For seasoned political observers, this clear partisan difference may well resonate. As we discuss further, the Democrats have long had the reputation of being less organized and cohesive than their more disciplined Republican antagonists. But in judicial campaign finance, we find that the partisan structure of judicial campaign finance not only reflect critical differences between the parties, but it also reinforces them, and therefore helps explain them.

We further test the party loyalty of partisan elected judges in a special set of cases with salient partisan payoffs—election disputes. In these cases, the parties have much at stake, as their candidates' fortunes hang in balance, but as we will explain, these cases in our dataset hinge almost entirely on arcane, technical questions that allow judges great discretion. We find that Republican judges are more likely to favor their party's interests in these cases as a function of campaign finance support from the Republican Party, but the Democratic judges do *not* become more likely to favor their party as campaign finance support from their party increases. Campaign finance again appears to reinforce party loyalty and cohesion for Republican judges, but not for Democrats. Republicans may be better at judicial campaign finance in part because they are more organized and cohesive than Democrats, but judicial campaign finance helps reinforce and explain their superior organization and cohesiveness relative to Democrats as well.

In Part I, we introduce two major concerns about modern judicial elections—the influences of money and partisanship on judges—and explain that Republican and Democratic Parties drive both problems. In Part II, we explain how and why the major parties organize broad coalition of campaign finance contributors to support their candidates. Using our dataset of judicial decisions and campaign finance, we find that

contributions from these left-leaning and right-leaning party coalitions are highly predictive of judicial decisions in the preferred ideological direction of the contributing coalition. We find, in short, that the parties efficiently leverage money from their coalitions to influence judicial decisionmaking broadly across the range of cases toward their ideological preference.

In Part III, we turn to differences between the major parties and find that Republicans are more effective than Democrats at using judicial campaign finance to achieve their ideological aims. Republican judges are influenced by campaign finance pressures only in the conservative direction, while Democratic judges are influenced by money from both conservative and liberal directions. In Part IV, we present the more refined test of the partisan loyalty of Republican and Democratic judges in election cases. We find the overall result is that judicial campaign finance reinforces party cohesion for Republicans while undermining it for Democrats.

Finally, in Part V, we conclude from our findings that the major parties are not only critical institutions in the game of judicial campaign finance, but they have fully absorbed judicial elections and campaign finance into their regular operations. Judicial politics on this score is no different than legislative and other forms of electoral politics. As Justice Sandra Day O'Connor has warned, these partisan dynamics in judicial elections threaten judicial independence and pressure elected judges to become "just politicians in robes."<sup>13</sup> To the degree that this operative concern has motivated judicial reform for centuries and continues to do so today, our Article substantiates how judicial elections have fully integrated wholesale partisan politics back into judicial elections. Akhil Amar recently expressed anxiety that when judges decide cases, "[w]hat mattered was politics, money, party, and party loyalty."<sup>14</sup> We find that Amar's distress absolutely hits home when it comes to judicial campaign finance at the state level.

## I. AN INTRODUCTION TO JUDICIAL ELECTIONS

In this Part, we provide a brief introduction to two prominent concerns about judicial elections: (1) the influence of money on the judiciary; (2) the influence of partisan politics on the judiciary. The first concern about the influence of money dominates contemporary debates about judicial elections and judicial independence. As campaign spending in judicial elections increased dramatically in recent years, so too has a new worry

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<sup>13</sup> Editorial, *'Politicians in Robes': New Task Force on Judicial Selection Has Chance to Change Flawed System*, GRAND RAPIDS PRESS, Dec. 21, 2010, at A13 (quoting Sandra Day O'Connor).

<sup>14</sup> Ezra Klein, *Of Course the Supreme Court Is Political*, WASH. POST, Wonkblog, June 21, 2012 (quoting Akhil Reed Amar).

about the influence of money on judges looking to the next election. The second concern, about partisan politics, has taken a back seat recently to alarm about the influence of money, but it is actually much older, dating back almost to the Founding. In fact, concern about partisan politics has always motivated the long history of judicial selection reform that continues today and actually undergirds alarm about judicial campaign finance. Concerns about partisan politics and about money should be understood as tightly related in today's world of judicial elections, because the major parties are at the heart of both.

*A. The Growing Importance of Campaign Finance in Judicial Elections*

The major front in debates today over judicial elections is campaign finance. Despite Progressive-era modifications to many states' judicial elections, judicial elections until the 1980s were "low-key affairs, conducted with civility and dignity,"<sup>15</sup> with very little in terms of campaign spending and media advertising. This began to change in Los Angeles in 1978, however, in a watershed election cycle when a group of deputy district attorneys offered to support any candidate who would run against an unopposed incumbent trial judge, producing a record number of contests and defeated judges.<sup>16</sup> In the 1980s, battles over tort law in Texas that produced "unprecedentedly costly, heated races" for supreme court seats sparked an escalation of campaign spending in judicial races that spread nationally.<sup>17</sup>

Since those early developments, judicial elections have increasingly become highly politicized, more competitive contests that have created new electoral pressures for judges. In 1984, only 33 percent of nonpartisan elections were contested.<sup>18</sup> By 2000, this figure increased to 75 percent.<sup>19</sup> Along similar lines, 74 percent of partisan elections were contested in 1988.<sup>20</sup> By 2000, this number increased to 95 percent.<sup>21</sup> As elections have become more contested, incumbents have found it harder to win. In 1980,

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

<sup>16</sup> *Id.* at 1080.

<sup>17</sup> *Id.*

<sup>18</sup> See Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21 (2004); Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337 (2003).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

only 4.3 percent of incumbents were defeated in nonpartisan elections,<sup>22</sup> but in 2000, 8 percent of incumbents were defeated in these elections.<sup>23</sup> In partisan elections, 26.3 percent of incumbents were defeated in 1980,<sup>24</sup> yet by 2000, the loss rate for incumbents was a stunning 45.5 percent.<sup>25</sup> This rate of defeat is much higher than the rate at which incumbents lose in the U.S House or Senate or in state legislatures.<sup>26</sup>

With the substantial increase in the competitiveness of judicial elections, campaign spending has skyrocketed. Whereas state supreme court candidates raised less than \$6 million in the 1989-1990 election cycle,<sup>27</sup> candidates raised more than \$38 million for the 2009-2010 election cycle,<sup>28</sup> and in three of the last six election cycles, candidates raised a total of more than \$45 million.<sup>29</sup> Interest groups and political parties routinely dominate campaign finance in supreme court races. Contributions from business groups and lawyers dominated interest group contributions; business groups contributed over \$62.6 million, or 30 percent of the total contributions. Lawyers and lobbyists contributed \$59.3 million, or 28 percent of the total. Political parties contributed \$22.2 million, or 11 percent of the total during this period.<sup>30</sup>

Interest groups and political parties have similarly dominated television advertising in state supreme court races. Of the \$93.6 million spent on television advertising between 2000 and 2009, interest groups spent \$27.5 million and party organizations spent \$11.7 million; the candidates' campaigns made up the rest.<sup>31</sup> Business groups dominated the interest group spending. In 2006, business groups were responsible for over 90

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<sup>22</sup> Melinda Gann Hall, *Judging the Election Returns: Competition as Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 165, 177 (Matthew Streb ed., 2007).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 92 *AM. POL. SCI. REV.* 315 (2001); Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 *AM. J. POL. SCI. REV.* 20 (2006).

<sup>27</sup> JAMES SAMPLE, et al, *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE* at 5 (Charles Hall ed., 2010), available at [http://www.brennancenter.org/content/resource/the\\_new\\_politics\\_of\\_judicial\\_elections](http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections)

<sup>28</sup> ADAM SKAGGS, et al, *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2009-2010*: at 11 (Charles Hall ed., 2011), available at [http://brennan.3cdn.net/23b60118bc49d599bd\\_35m6yyon3.pdf](http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf)

<sup>29</sup> JAMES SAMPLE, et al, *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE* at 5 (Charles Hall ed., 2010), available at [http://www.brennancenter.org/content/resource/the\\_new\\_politics\\_of\\_judicial\\_elections](http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections)

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 25.

percent of the television advertising paid for by interest groups.<sup>32</sup> Although lawyers and lobbyists were the second largest interest group sponsor of television ads, their advertising paled in comparison to that of business groups, whose dominance of television advertising has steadily increased over time.<sup>33</sup>

The increasing cost of judicial campaigns has made it difficult for candidates to win elections without substantial funding. Indeed, the top fundraisers and candidates benefitting from the most television advertising win the overwhelming majority of elections. As a result, elected judges point to intense pressure to raise campaign money during election years.<sup>34</sup> Ohio Supreme Court Justice Paul Pfeifer told the *New York Times*, “I never felt so much like a hooker down by the bus station . . . as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote.”<sup>35</sup>

Much of the spending growth can be attributed to so-called “super spenders” who have dominated both contributions to candidates and independent television advertising; in many states, the top five super spenders account for more than 40 percent of all campaign spending.<sup>36</sup> Mirroring aggregate campaign spending, conservative groups dominate among super spenders. Of the ten largest campaign spenders nationally between 2000 and 2009, seven were business or Republican groups while three were plaintiffs’ lawyers or Democratic groups. These seven top conservative spenders spent \$26.2 million on direct candidate contributions and TV ads, while the Democratic-leaning spenders spent only \$11.9 million. As an Ohio AFL-CIO official put it, “We figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.”<sup>37</sup> Indeed, the public certainly believes that interest groups influence judges’ voting. A nationwide survey has revealed that 76 percent of voters believe

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<sup>32</sup> JAMES SAMPLE, LAUREN JONES, & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS: 2006*, at 7 (Jesse Rutledge ed., 2006), available at [http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006\\_D2A2449B77CDA.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf)

<sup>33</sup> *Id.* at 8

<sup>34</sup> *Id.* at 12

<sup>35</sup> Adam Liptak, *Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court’s Ruling*, N.Y. TIMES, Oct. 1, 2006.

<sup>36</sup> JAMES SAMPLE, et al., *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE* at 9 (Charles Hall ed., 2010), available at [http://www.brennancenter.org/content/resource/the\\_new\\_politics\\_of\\_judicial\\_elections](http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections); see also Donald P. Judges, *Who Do They Think They Are?*, 64 ARK. L. REV. 119, 147-51 (2011) (discussing the activity of so-called super spenders).

<sup>37</sup> J. Christopher Heagarty, *The Changing Face of Judicial Elections*, N.C. ST. BAR J. 19, 20 (Winter 2002).

that campaign contributions influence judges' decisions, and only 5 percent of those surveyed believe that campaign contributions have no influence.<sup>38</sup>

The empirical literature on money in judicial elections has focused almost exclusively on the direct relationship between interest group contributions and judges. Several recent empirical studies find that judges favor campaign contributors in their decisions. In the most comprehensive study of judicial campaign contributions, we found that campaign contributions from business groups influence judicial voting in cases involving business issues.<sup>39</sup> Similarly, contributions from various interest groups are associated with increases in the probability that judges will vote for the litigants whom those interest groups favor.<sup>40</sup> Other studies examine, on a more limited basis, the relationship between contributions from individual law firms and case outcomes when those law firms appear in court. These studies find correlation between the law firms that contribute to judges' campaigns and the judges' rulings in arbitration decisions from the Alabama Supreme Court,<sup>41</sup> in tort cases before state supreme courts in Alabama, Kentucky, and Ohio,<sup>42</sup> in cases between two businesses in the Texas Supreme Court,<sup>43</sup> and in cases during the Supreme Court of Georgia's 2003 term.<sup>44</sup>

The empirical literature largely confirms public suspicion about interest group influence on judges. Almost 90 percent of voters and 80 percent of judges believe that with campaign contributions, interest groups are trying

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<sup>38</sup> GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *available at* <http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf>; GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note, at 4.

<sup>39</sup> Michael Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011).

<sup>40</sup> Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670-72 & tbls.7-8 (2009).

<sup>41</sup> Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 25 J.L. & POL. 645, 660 (1999) (examining arbitration decisions in the Alabama Supreme Court).

<sup>42</sup> Eric N. Waltenburg & Charles S. Lopeman, *2000 Tort Decisions and Campaign Dollars*, 28 SOUTHEASTERN POL. REV. 241, 248, 256 (2000) (examining tort cases before state supreme courts in Alabama, Kentucky, and Ohio).

<sup>43</sup> See Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994-1997*, 31 POL. & POL'Y 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money).

<sup>44</sup> Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making* 16 (Aug. 10, 2006) (unpublished manuscript), *available at* <http://ssrn.com/abstract=991364> (examining cases during the Supreme Court of Georgia's 2003 term).

to use the courts to shape policy.<sup>45</sup> Even worse, 46 percent of judges believe that campaign contributions have at least “a little influence” on their decisions, and 56 percent believe “judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign.”<sup>46</sup>

### *B. Partisan Politics, Judicial Independence, and Judicial Elections*

Overlooked and sometimes forgotten in the alarm about judicial campaign finance in recent years is that concerns about partisan influence on the courts have historically been the greater concern and have always loomed over debates about judicial selection and independence. The history of judicial elections, according to one historian, is “the story of the ongoing American pursuit of judicial independence.”<sup>47</sup> Across two centuries, states have experimented with different forms of judicial selection, adapting and responding to pressure from party politics and money to strike the right balance between insulation and accountability. Selection of judges has evolved first from political appointment, to popular elections, and more recently to merit selection and retention elections. At each stage, the old system of judicial selection eventually slipped into the influence of partisan influence, providing the impetus for new systems of judicial selection that further insulated judges from those pressures and re-started the cycle of reform and adaptation.

In this history of judicial elections, the political parties play a prominent role. Indeed, the original institution of judicial elections in the United States occurred in response to the perceived threat of partisan politics to judicial independence. Although today almost 90 percent of state appellate judges must regularly be reelected by voters,<sup>48</sup> no state elected any of its judges until Mississippi became the first to adopt judicial elections in 1832.

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<sup>45</sup> JAS SURVEY: VOTERS AND JUDGES, *supra* note, at 12; JAS SURVEY: JUDGES, *supra* note, at 5.

<sup>46</sup> GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *available at* <http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf>; GREENBERG QUINLAN ROSNER RESEARCH INC., *supra* note, at 4.

<sup>47</sup> JED HANDELSMAN SHUGERMAN, THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 5 (2012).

<sup>48</sup> Eighty-seven percent of state appellate court judges must be retained through either partisan elections, nonpartisan elections, or retention elections. COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2006: SUPPLEMENT TO EXAMINING THE WORK OF STATE COURTS, 2006, at 96-97 fig. G (2007). In contrast, we earlier explained that 89 percent of all state judges (appellate and trial) face the voters at some point, either in the initial election or when seeking retention. *See supra* note and accompanying text.

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.<sup>49</sup>

However, by the 1840s, concerns about political influence dominating the judiciary spurred a wave of states to adopt judicial elections. The rise of an elected judiciary occurred as part of the Jacksonian Era's championing of popular democracy. Influences on judges were inevitable.<sup>50</sup> However, the Jacksonian reformers preferred that this influence come directly from the people, through popular elections, instead of from the government officials who appointed and retained them. 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."<sup>51</sup> 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."<sup>52</sup>

Although all states joining the Union before 1845 had an appointed judiciary, every state that joined between 1846 and 1959 adopted judicial elections for selecting judges.<sup>53</sup> Ironically from today's perspective, state constitutional conventions of the time debating judicial selection believed that elective systems would produce *more* politically independent judges than appointive systems because only popular elections could "insulate the judiciary . . . from the branches that it was supposed to restrain."<sup>54</sup> An Illinois convention delegate, David Davis, argued that "if only the federal judiciary had been made elective, . . . the people 'would have chosen judges, instead of broken down politicians.'"<sup>55</sup> Moreover, the delegates believed that, in contrast to a system of life or permanent tenure, requiring

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<sup>49</sup> ARTHUR T. VANDERBILT, *THE CHALLENGE OF LAW REFORM* 14-15 (1955).

<sup>50</sup> Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *AM. J. LEGAL HIST.* 190, 222 (1993).

<sup>51</sup> *Official Report of the Debates and Proceedings in the State Convention, Assembled May 4<sup>th</sup>, 1853, to Revise and Amend the constitution of the Commonwealth of Massachusetts* 757 (Boston 1853) at 773-774 (remarks of Edward Keyes), cited in Nelson, *supra* note, at 217.

<sup>52</sup> *Report of the Debates and Proceedings of the convention for the Revision of the constitution of the State of Kentucky, 1849-50* (Frankfort 1850) at 273 (remarks of Francis Bristow), cited in Nelson, *supra* note, at 217.

<sup>53</sup> LARRY C. BERKSON UPDATED BY RACHEL CAUFIELD, *AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 1* (2004), available at <http://www.ajs.org/selection/docs/Berkson.pdf>.

<sup>54</sup> *Id.* at 205.

<sup>55</sup> *Id.* (quoting ILLINOIS CONVENTION OF 1847, *supra* note, at 462 (statement of David Davis)).

judges to face voters for re-election would give them healthy incentives once on the bench.<sup>56</sup> As a leading commentator notes, “the judiciary became elective not so much to permit the people to choose honest judges as to keep judges honest once they reached the bench.”<sup>57</sup>

By the turn of the century, however, public sentiment about partisan judicial elections had shifted. The institution of partisan judicial elections had once responded to worries about the politicization of the judiciary inherent in political appointment, but partisan elections eventually succumbed to basically the same concern. At the dawn of the Progressive Era, a new set of reformers believed that partisanship had grown to dominate the judiciary and adapted to partisan elections. Judicial candidates, after all, learned that they needed party nominations to run successfully for office and thus grew to rely heavily on party connections to obtain them. One commentator argued that “[t]he use of the Republican or Democratic insignia in city elections served as a sort of ‘smoke-screen,’ behind which municipal spoilsmen and office-brokers could hide in safety.”<sup>58</sup> Partisan elections no longer broke the link between party bosses and state judges. Instead, as one critic saw it, “[I]n too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the constitution.”<sup>59</sup>

The next evolution in the push and pull between judicial reform and partisan politics was then nonpartisan forms of judicial election. North Dakota adopted nonpartisan judicial elections in 1910, followed immediately in 1911 by Ohio. By 1927, twelve states had switched from partisan elections to nonpartisan elections.<sup>60</sup> Other states opted for yet 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.<sup>61</sup> Under merit selection plans, a bipartisan judicial nominating commission reviews applications for judgeships and then compiles a list of qualified applicants.<sup>62</sup> The governor then appoints one of

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<sup>56</sup> See Nelson, *supra* note, at 224.

<sup>57</sup> *Id.*

<sup>58</sup> Robert Cushman, *Non-Partisan Nominations and Elections*, 106 ANNALS AM. ACAD. POL. & SOC. SCI. 83 (1923).

<sup>59</sup> Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and Transformation of the Judicial Selection Debate*, 39 U. TOLEDO L. REV. 551, 564 n.82 (2008); Rachel Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249, 253 (2011).

<sup>60</sup> BERKSON & CAUFIELD, *supra* note, at 2.

<sup>61</sup> *Id.*

<sup>62</sup> Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 627-28 (2005) (citing BERKSON & CAUFIELD, *supra* note, at 2).

the candidates from the commission's list.<sup>63</sup> 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.<sup>64</sup> By 1980, twenty-one states and the District of Columbia had adopted some form for merit selection for selecting some or all of their judges.<sup>65</sup>

This continuing historical evolution has led to many variations of judicial selection and retention methods. Today, there are four different principal systems of judicial selection and retention: partisan elections, nonpartisan elections, gubernatorial appointment, and merit plans. In the selection of judges to their highest courts, nine states use partisan elections and thirteen states use nonpartisan elections.<sup>66</sup> In twenty-eight states, the governor or legislature initially appoints judges to the highest court, with twenty-one of those states using some form of merit plan.<sup>67</sup> For the retention of judges on the state's highest court, six states use partisan elections and fourteen states use nonpartisan elections. Eighteen states hold retention elections to determine whether those judges remain in office beyond their initial term. The incumbent judges run unopposed and must win majority approval for retention. Nine states rely on reappointment by the governor, legislature, or a judicial nominating committee.<sup>68</sup> Only three states grant their highest court judges permanent tenure. Table 1 shows each state's methods of selection and retention.<sup>69</sup>

TABLE 1:  
METHODS OF SELECTION AND RETENTION BY STATE<sup>70</sup>

<sup>63</sup> *Id.*

<sup>64</sup> Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 804 (2004).

<sup>65</sup> See Caufield, *Curious Logic*, *supra* note, at 255.

<sup>66</sup> Schotland, *supra* note, 95 GEO. L. J. at 1084.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* Illinois and New Mexico hold partisan elections to appoint judges initially to the bench, but they use unopposed retention elections to determine whether incumbent judges keep their positions beyond the initial term of appointment.

<sup>69</sup> Although there are other differences between the selection and retention methods of each state, they can be grouped into these primary categories.

<sup>70</sup> Table 1 reports the selection and retention methods for each state during our datasets, 1995-1998, as those methods are relevant for judicial voting during that period. AMERICAN JUDICATURE SOCIETY, *METHODS OF JUDICIAL SELECTION*, available at: [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=); DAVID B. ROTTMAN, CAROL R. FLANGO, MELISSA T. CANTRELL, RANDALL HANSEN, NEIL LAFOUNTAIN. *STATE COURT ORGANIZATION 1998*. NCJ 178932 Table 4 (2000). 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.

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	N. Hampshire <sup>71</sup>	G	--
California	G	R	New Jersey <sup>72</sup>	G	G
Colorado	M	R	New Mexico	P	P
Connecticut <sup>73</sup>	LA	LA	New York	M	G
Delaware	M	G	N. Carolina	P	P
Florida	M	R	North Dakota	N	N
Georgia	N	N	Ohio <sup>74</sup>	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 <sup>75</sup>	M	--
Iowa	M	R	S. Carolina	LE	LE
Kansas	M	R	South Dakota	M	R
Kentucky	N	N	Tennessee	M	N
Louisiana	P	P	Texas	P	P
Maine	G	G	Utah	M	R
Maryland	M	R	Vermont	M	LE
Massachusetts <sup>76</sup>	M	--	Virginia	LA	LA
Michigan <sup>77</sup>	N	N	Washington	N	N
Minnesota	N	N	West Virginia	P	P

<sup>71</sup> In New Hampshire, judges serve until age seventy. *Id.* at 28 n.18.

<sup>72</sup> In New Jersey after an initial gubernatorial reappointment, judges serve until age 70.

<sup>73</sup> In Connecticut, the Governor nominates and the legislature appoints.

<sup>74</sup> In Ohio, political parties nominate candidates to run in nonpartisan elections

<sup>75</sup> In Rhode Island, judges have life tenure. *Id.* at 28 n.27.

<sup>76</sup> In Massachusetts, judges serve until age seventy. *Id.* at 28 n.8.

<sup>77</sup> In Michigan, political parties nominate candidates to run in nonpartisan elections, but the election process is widely criticized as deeply partisan. *See, e.g.,* Jack Lessenberry, *Making the Case for Judicial Reform in Michigan*, WINDSOR STAR, Jan. 18, 2011, at A6. In fact, one quantitative study of state courts ranked the Michigan Supreme Court last in the nation on its judges' "ability to withstand partisan pressures." *See* Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *Judicial Evaluation and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1323-43 (2009).

Mississippi	N	N	Wisconsin	N	N
Missouri	M	R	Wyoming	M	R

Even states with nominally nonpartisan judicial elections feature judicial races with extensive party involvement. Michigan and Wisconsin, both of which hold nominally nonpartisan judicial elections, recently hosted the most politicized supreme court elections in the country with intense campaign spending and partisan mobilization.<sup>78</sup> One reform advocate observed that “Wisconsin now has essentially partisan elections with this (nonpartisan) fig leaf attached.”<sup>79</sup> This widespread partisanship in judicial elections has led to a renewed push for merit selection in place of judicial elections. Retired Supreme Court Justice Sandra Day O’Connor has made it her cause, since stepping down from the Court, to campaign nationally for the adoption of merit selection in place of state judicial elections,<sup>80</sup> a cause supported by many reformers and academics.<sup>81</sup> New Hampshire adopted a form of merit selection in 2000, and most recently, North Carolina in 2011 created a merit selection process for mid-term vacancies. Reform efforts to adopt merit selection are underway in several other states, including Alabama,<sup>82</sup> Illinois,<sup>83</sup> and Michigan.<sup>84</sup> In still other states, including

<sup>78</sup> See George W. Soule, *The Threats of Partisanship to Minnesota’s Judicial Elections*, 34 WM. MITCHELL L. REV. 701, 718-19 (2008); Dee J. Hall, *Judicial Races More Partisan, Expert Said the State’s High Court Elections Are Nonpartisan in Name Only*, WIS. ST. J. Nov. 18, 2008, at A1; Editorial, ‘Politicians in Robes’: New Task Force on Judicial Selection Has Chance to Change Flawed System, GRAND RAPIDS PRESS, Dec. 21, 2010, at A13; Phil Power, *Time to Appoint Justices, Regents*, DAILY TELEGRAM, June 27, 2012, at A6; Craig Gilbert, *Electorate Unusually Fired Up and Partisan in Court Race*, MILWAUKEE J. & SENTINEL, April 7, 2011, at A5.

<sup>79</sup> See Dee J. Hall, *Judicial Races More Partisan, Expert Said the State’s High Court Elections Are Nonpartisan in Name Only*, WIS. ST. J. Nov. 18, 2008, at A1 (quoting Justice at Stake spokesman Charlie Hall).

<sup>80</sup> See, e.g., Sandra Day O’Connor, *Choosing (and Recusing) Our State Court Justices Wisely*: Keynote Remarks by Justice O’Connor, 99 GEO. L.J. 151 (2010).

<sup>81</sup> See Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL’Y 67 (2009); Caufield, *Curious Logic*, *supra* note; Shira J. Goodman and Lynn A. Marks, *A View from the Ground: A Reform Group’s Perspective on the Ongoing Effort to Achieve Merit Selection of Judges*, 34 FORDHAM URB. L.J. 425 (2006); Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713 (2005); Janice D. Russell, *The Merits of Merit Selection: A Kansas Judge’s Response to Professor Ware’s Article*, 17 KAN. J.L. & PUB. POL’Y 437 (2008). See also SHUGERMAN, *supra* note, at 12 (“[E]ven if merit selection has its own politics and its own flaws, it better insulates the courts from money and partisan politics, and offers more job security than competitive elections.”).

<sup>82</sup> Peter Hardin, *Calls for Merit Selection in Alabama, North Carolina*, January 19, 2012, GavelGrab, Justice at Stake, <http://www.gavelgrab.org/?p=29665>.

<sup>83</sup> Chris Bonjean, *ISBA continues push for merit selection of judges*, ILLINOIS LAWYER NOW (October 6, 2010), available at: <http://iln.isba.org/2010/10/06/isba-continues-push-for-merit-selection-of-judges>

Nevada, New York, and Pennsylvania different forms of merit selection were vigorously debated but failed to win legislative passage.

### C. *The Parties and Judicial Campaign Finance Today*

Today, longstanding concerns about judicial selection and independence from partisan politics should be seen in historical context as inextricably connected today to judicial campaign finance. What gets underappreciated in the thick debate over judicial campaign finance is the central position of the major parties at the root of both partisanship and money. Parties once exercised influence over judges through appointment and nomination under other selection regimes, but as we plan to show, they do so today through judicial campaign finance. Partisanship on the one hand, and campaign money on the other hand, are far from separate concerns when it comes to judicial elections. In short, criticisms of judicial elections for excessive partisanship and excessive influence of money are tightly intertwined.

Of course, concerns about judicial campaign finance are the most acute in states with partisan judicial elections, where the political parties are most deeply involved in judicial campaign finance. As Justice O'Connor has argued, partisan judicial elections "are specifically *designed* to infuse politics into the law."<sup>85</sup> Campaign fundraising in judicial elections doubled from 2000 to 2009 over the preceding decade, but over the same period, campaign fundraising was three times greater in states with partisan elections, raising \$153.8 million across nine states, than in the thirteen states with nonpartisan elections.<sup>86</sup> Overall in 2010, political parties paid directly for more than a fifth of all television advertisements aired in judicial races across the country, more than all other types of interest groups combined, and second only to the candidates themselves.<sup>87</sup> What is more, parties paid for almost half of the negative attack ads in judicial races, dwarfing all other spenders in the category and suggesting intelligent

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<sup>84</sup> Suzanne Almeida, MICHIGAN JUDICIAL SELECTION TASK FORCE REPORT RECOMMENDS MERIT SELECTION (May 8, 2012), available at: <http://www.judgesonmerit.org/2012/05/08/michigan-judicial-selection-task-force-report-recommends-merit-selection/>

<sup>85</sup> Sandra Day O'Connor, *Choosing (and Recusing) Our State Court Justices Wisely*: Keynote Remarks by Justice O'Connor, 99 GEO. L.J. 151, 153 (2010).

<sup>86</sup> JAMES SAMPLE, et al, THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE at 14 (Charles Hall ed., 2010), available at

[http://www.brennancenter.org/content/resource/the\\_new\\_politics\\_of\\_judicial\\_elections](http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections).

The same pattern held in the 2010 election cycle, with more than \$9 million spent in partisan supreme court elections compared to \$3 million in nonpartisan ones. See ADAM SKAGGS, et al., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2009-2010: at 14 (Charles Hall ed., 2011), available at [http://brennan.3cdn.net/23b60118bc49d599bd\\_35m6yyon3.pdf](http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf)

<sup>87</sup> See id. at 16.

coordination with their candidates (who ran about half as many negative ads against their opponents).<sup>88</sup>

The level of party spending helps illustrate how the parties have become the critical players in judicial campaign finance. In Michigan, for example, the political parties spent more than \$1.5 million on campaign advertising, roughly 40 percent of all campaign spending that year in the state, for a hotly contested state supreme court election.<sup>89</sup> The Michigan Democratic Party itself spent more than \$1 million on campaign advertising to defeat the Republican incumbent up for re-election and ran more than 2,800 television ads, greater than any other single group in the election cycle.<sup>90</sup> In the following 2010 election cycle, the Republican Party responded by significantly outspending the Democrats by burning through more than \$4 million on two state supreme court races, compared to only \$1.5 million by the Democrats.<sup>91</sup> Along similar lines, the Illinois Democratic Party contributed half the \$2.8 million raised by incumbent state supreme court justice Thomas Kilbride in 2010, funneling roughly the same amount contributed to the party from plaintiffs' lawyers, and the Pennsylvania Republican Party likewise contributed \$1.4 million into the 2009 campaign of Joan Orié Melvin. The Michigan Republican and Democratic Parties, Illinois Democratic Party, and Pennsylvania Republican Party, ended up as the four of the five biggest campaign spenders among all contributors and sponsors of independent expenditures on judicial elections nationwide during the 2009-10 cycle.<sup>92</sup>

However, there has been virtually no systematic study of the parties' campaign finance activity in judicial elections. What is more, almost all studies of judicial campaign finance ignore the important role of the parties on contributors and judges. The literature proceeds from the assumption that campaign contributors act independently of each other, and more importantly, act independently of coordination by the political parties. As we describe further in the rest of the Article, parties not only contribute large amounts of money to their candidates, but they also play a central role in coordinating the campaign finance activity of allied interest groups for

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<sup>88</sup> *See id.*

<sup>89</sup> JAMES SAMPLE, et al., *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE* at 30 (Charles Hall ed., 2010), available at [http://www.brennancenter.org/content/resource/the\\_new\\_politics\\_of\\_judicial\\_elections](http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections).

As discussed above, *see supra* note, judges run for office in Michigan without listed party affiliation on the ballot but typically, at least in recent years, run as partisan candidates in all but name.

<sup>90</sup> *See id.*

<sup>91</sup> ADAM SKAGGS, et al., *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2009-2010*: at 12 (Charles Hall ed., 2011), available at [http://brennan.3cdn.net/23b60118bc49d599bd\\_35m6yyon3.pdf](http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf).

<sup>92</sup> *See id.* at 6.

partisan ends.

This Article is the first comprehensive study of the major parties' central role in judicial campaign finance.<sup>93</sup> In this Article, we shift the focus from campaign contributors as independent operators to the major parties themselves. We explore how well the major parties coordinate the campaign finance activity of the range of allied contributors under the party coalition and identify the payoff that the major parties can achieve by playing this role. We explain how party campaign finance plays out in presenting differing incentives to Republican and Democratic judges, and as we describe in detail, we find dramatic differences in how well the major parties coordinate their party campaign finance activity. These differences between the major parties in judicial campaign finance produce a similarly dramatic effect on judicial decisionmaking by Republican and Democratic

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<sup>93</sup> Although only a handful of studies have explored the influence on judicial decisionmaking of campaign contributions, there has been more work examining these influences on legislators. 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. 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. See, e.g., John P. Frendreis & Richard W. Waterman, *PAC Contributions and Legislative Behavior: Senate Voting on Trucking Deregulation*, 66 SOC. SCI. Q. 401 (1986); Woodrow Jones, Jr. & K. Robert Keiser, *Issue Visibility and the Effects of PAC Money*, 68 SOC. SCI. Q. 170 (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 (1990); John McArthur & Stephen V. Marks, *Constituent Interest vs. Legislator Ideology: The Role of Political Opportunity Cost*, 26 ECON. INQUIRY 461 (1988); Thomas Stratmann, *Campaign Contributions and Congressional Voting: Does the Timing of Contributions Matter?*, 77 REV. ECON. & STATS. 127 (1995); Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J.L. & ECON. 345 (2002); Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, 57 S. ECON. J. 606 (1991).

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. Thus, the interest groups influence congressional voting not by giving money to legislators to change their votes, but by increasing the probability of election for legislators whose past voting records show that they share the interest group's preferences. The contributions cull the interest group's enemies, leaving only friendly legislators. See, e.g., 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, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1272 (1994); Note, *The Ass Atop the Castle: Competing Strategies for Using Campaign Donations to Influence Lawmaking*, 116 HARV. L. REV. 2610 (2003).

elected judges.

## II. THE PARTISAN INFLUENCE OF INTEREST GROUP MONEY ON JUDICIAL DECISIONMAKING

In this Part, we explain how the major parties help organize coalitions of interest groups that contribute money in judicial elections as part of broader partisan efforts to influence judicial decisions. The Democrats and their allied interest groups direct campaign financing to judicial candidates in hopes of producing more liberal policy outcomes, while Republicans and their allied interest groups do the same for conservative purposes. We analyze campaign contributions and judicial voting data from a four-year period and find that both party coalitions enjoy success in influencing judicial decisions by judges they supported financially in their preferred ideological direction.

### A. *The Partisan Organization of Judicial Campaign Finance*

The major parties are pervasively involved in American electoral politics. They run candidates for every federal and state office and together dominate federal, state, and local elections in every state. The major parties not only run candidates, but support them with a permanent apparatus of professional expertise, labor, and financial support. Parties coordinate policy and electoral activity as a long coalition of similarly minded political actors who work together to advance shared policy goals across virtually all branches and levels of government.

The major parties maintain continuing and defining investments in their reputations on public policy. Their reputations, embodied by their party label, express a public commitment to a broad policy agenda of the party across important issues. The party's candidates, who carry the party label, rely upon the party reputation for credibility with voters, and the party's supporters rely on the party label as a critical voting cue that signals which candidates adhere to the party's policy commitments. Based on the party label, voters can reasonably infer that "a Democratic candidate is more liberal and a Republican more conservative unless there is evidence otherwise."<sup>94</sup> The party reputation is "largely defined by what its candidates say and do" and needs to be jealously protected from candidates who deviate from the party agenda and detract from the party's credibility.<sup>95</sup>

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<sup>94</sup> JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 166 (1994).

<sup>95</sup> *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 469 (2001) (Thomas, J., dissenting).

Through their party reputations, the major parties certify certain candidates as credibly committed to the party's political orientation and present themselves as identifiable teams in which supporters with matching orientations can invest.

Parties selectively recruit, support, and monitor their candidates with the goal of building party cohesion and discipline that reinforces their policy reputations. Parties involve themselves in careful recruitment to identify attractive candidates who share their commitments on policy issues and will reliably advance the party's agenda once in office. What is more, parties actively support their favored candidates by providing their credibility, resources, and expertise to promote those candidates' campaign prospects.<sup>96</sup> Parties offer candidates this permanent, well-established support system, including broad networks of campaign finance donors willing to contribute. And then, parties continually monitor the performance and party loyalty of their candidates elected to office. Parties dangle the promise of future support to officeholders who vote loyally for the party line once in office, while disciplining wayward officeholders by threatening, explicitly or otherwise, to withhold such support and other benefits. Parties, as one political scientist puts it, must "persuade, cajole, or coerce fellow party members to vote consistently with the designated party position."<sup>97</sup> The parties thus not only match up candidates with supporters and party resources under their party label, but provide institutionalized incentives for their candidates to toe the party line.

Campaign finance is a critical practice that the major parties have mastered in support of their candidates.<sup>98</sup> The parties cultivate and maintain networks of necessary infrastructure for modern campaign finance, such as professional fundraisers and lawyers, but most importantly, a cadre of wealthy supporters with financial means and willingness to contribute money.<sup>99</sup> These campaign financiers regularly supply money to advance the campaigns of their party's candidates, or at least certain party

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<sup>96</sup> See, e.g., PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 149-50 (1980) (describing how parties seek out judicial candidates, offer them endorsements, and supply them with campaign expertise, personnel, and finances required for a winning campaign).

<sup>97</sup> KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 197 (1998).

<sup>98</sup> See generally Paul S. Herrnson & Stephanie Perry Curtis, *Financing the 2008 Congressional Elections*, in *FINANCING THE 2008 ELECTION* 166, 170-78 (David B. Magleby & Anthony Corrado eds., 2011) (describing the major parties' congressional fundraising).

<sup>99</sup> See generally PETER L. FRANCA, JOHN C. GREEN, PAUL S. HERRN SON, LYNDA W. POWELL, & CLYDE WILCOX, *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES* (2003) (describing the parties' campaign finance infrastructure); PAUL S. HERRN SON, *CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON* (2008) (same).

candidates. The fundraising capacity of the major parties is an important element of what parties offer their candidates and how parties advance their agendas in competitive elections.

In previous work, we highlighted the central function of the major parties in the campaign financing of judicial candidates. We previously found that campaign contributions from business groups reliably predicted the judicial decisions of elected judges in favor of business groups.<sup>100</sup> However, we found this empirical pattern only for judges elected under partisan elections, but not in nonpartisan elections or other forms of retention elections.<sup>101</sup> Only in partisan elections is the party label actually listed on the ballot, putting the parties' reputations on the line publicly. Given the greater stakes for parties in partisan elections, parties invest more heavily and become more involved in partisan elections compared to nonpartisan ones,<sup>102</sup> and we argued that the major parties in partisan systems played a more influential brokering role in connecting campaign contributors to their partisan candidates.<sup>103</sup> This brokering role helped facilitate more careful matching between contributors and judicial candidates on the front end, as well as more careful monitoring of the performance of judges on the bench that helped contributors reward judges who decided cases favorably for their interests and punish those who did not.

However, Republican and Democratic judges are far from identical ideologically and claim different base constituencies of their own. Each respective base constituency comprises disparate groups that share overlapping preferences over public policy and therefore see common interest in jointly supporting candidates willing to promote those preferences in office. Each base constituency maintains and supports its respective party because it has concluded it can "get more from government by funneling their resources through a party coalition to nominate and elect officeholders friendly to their interests than buying policies one at a time from independent officeholders."<sup>104</sup> The competing slates of candidates from two major parties thus offer distinct agendas, captured by the party

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<sup>100</sup> Kang & Shepherd, *supra* note at 98-106.

<sup>101</sup> *Id.* at 112-19.

<sup>102</sup> *See, e.g.,* Kang & Shepherd, *supra* note at 125-26 (discussing greater campaign contributions from the parties in partisan elections); Matthew J. Streb, *Partisan Involvement in Partisan and Nonpartisan Trial Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 102-09 (Matthew J. Streb ed., 2007)

<sup>103</sup> Kang & Shepherd, *supra* note at 125.

<sup>104</sup> MARTY COHEN ET AL., *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* 34 (2008).

label, that produce a simplified, coherent choice over public policy.<sup>105</sup> Indeed, the fact that the major parties represent different constituencies and support competing policymaking agendas through their candidates is built into the very logic of partisan elections.

As a consequence, Republican and Democratic judicial candidates draw campaign finance support from perhaps overlapping but distinct sets of sources, particularly as it relates to their very different core constituencies. One important way that the base constituencies of the major parties support their candidates is through campaign finance. The parties' base constituencies include networks of campaign finance donors willing to bankroll their respective parties' nominees on an ongoing basis.<sup>106</sup> Given that the parties have different base constituencies and promote different policy agendas, it is not surprising that Republican and Democratic candidates usually have different bases of campaign finance donors as well.

When we dig deeper to look at particular groups that spend in judicial elections, it is easy to identify certain categories of contributors as part of one party's base constituency and not the other's. To start, the major parties each have formal party committees at the state and local level that collect campaign financing and contribute it to their candidates for office. In addition, each party has a set of closely affiliated and ideologically-minded political action committees, such as Emily's List and the American Legislative Exchange Council, that raise and contribute money overwhelmingly on behalf of one major party over the other.

Beyond these explicitly political groups, certain industry groups also traditionally and regularly lean toward one major party over the other in politics and campaign finance.<sup>107</sup> Left-leaning groups whose members typically vote Democratic can be expected to favor the Democratic Party in campaign finance support. For example, the plaintiff's bar through the Association of Trial Lawyers of America<sup>108</sup> historically supports Democratic candidates at a far greater rate than Republican candidates for

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<sup>105</sup> For the classic statement of this proposition for judicial candidates, see Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961).

<sup>106</sup> See SETH MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 43-53 (2009); COHEN ET AL., at 3-7; Gregory Koger, Seth E. Masket, & Hans Noel, *Partisan Webs: Information Exchange and Party Networks*, 39 BRITISH J. POL. SCI. 633 (2009); Gregory Koger, Seth Masket, & Hans Noel, *Cooperative Party Factions in American Politics*, 38 AM. POL. RES. 33 (2008).

<sup>107</sup> See generally Thomas L. Brunell, *The Relationship Between Political Parties and Interest Groups: Explaining Patterns of PAC Contributions to Candidates for Congress*, 58 POL. RES. Q. 681 (2005).

<sup>108</sup> The Association of Trial Lawyers of America is now known as the American Association of Justice. See Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665, 1667 (2009).

various public offices.<sup>109</sup> Conversely, right-leaning groups whose members typically vote Republican can be expected to lean toward the Republican Party in campaign finance support. For example, physicians through the American Medical Association have traditionally supported the Republican Party and regularly contribute financially to Republican candidates to a greater degree than Democratic candidates.<sup>110</sup>

In this Part, we analyze how well the major parties mobilize campaign financing from their competing coalitions to influence judicial decisionmaking in their party-preferred direction. The Democratic Party and its coalition of allied interest groups generally seek to produce more liberal decisions. At the same time, the Republican Party and its coalition of allied interest groups generally seek to produce more conservative ones. To test the influence of their respective campaign contributions on judicial decisions, we collected data on contributions from both interest groups and political parties. The data on campaign contributions are collected by the National Institute on Money in State Politics, a nonpartisan, nonprofit charitable organization dedicated to accurate, comprehensive and unbiased documentation and research on campaign finance at the state level.<sup>111</sup> The Institute receives its data in either electronic or paper files from the state disclosure agencies with which candidates must file their campaign finance reports. The Institute compiles the information for all state-level candidates in the primary and general elections, and then assigns the donors an economic interest code based on both information contained in the disclosure reports and deeper research into the donor's characteristics and agendas.

We also collected data on campaign contributions to all candidates in both partisan and nonpartisan state supreme court races from 1989 to 2010. The data include interest group and political party contributions to 100 Democratic candidates in partisan elections, 99 Republican candidates in partisan elections, and 373 candidates in nonpartisan elections. We aggregate the campaign contributions from various interest groups to create a measure of contributions from conservative interest groups and

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<sup>109</sup> See, e.g., David Ingram, *Trial Lawyers Sticking with Democratic Party*, NAT'L L.J., Oct. 19, 2010; Thomas B. Edsall, *GOP Using 'Tort Reform' as Powerful Political Club*, SEATTLE TIMES, Aug. 10, 2003, at A10 (reporting that the Democratic Party received more than \$49 million from trial lawyers from 1991 to 2003, compared to \$1 million to the Republican Party); Kimberley A. Strassel, *Tort Tribute*, WALL ST. J., Apr. 27, 2007, at A16 (reporting that trial lawyers gave almost half a billion dollars to Democratic candidates between 1994 and 2007).

<sup>110</sup> See Robert Pear, *Doctors' Group Opposes Public Health Insurance Plan*, N.Y. TIMES, June 11, 2009, at A19 (reporting that the American Medical Association contributed more to Republicans than to Democrats in four of the five elections from 2000 to 2008).

<sup>111</sup> THE NAT'L INST. ON MONEY IN STATE POLITICS, MISSION & HISTORY, available at: <http://www.followthemoney.org/Institute/index.phtml> (last visited Sept. 19, 2009).

contributions from liberal interest groups. The interest groups we define as “conservative” are general business groups, financial/real estate business groups, insurance companies, medical groups, and conservative single-issue groups.<sup>112</sup> These interest groups tend to be the primary supporters of judges with relatively conservative ideologies.<sup>113</sup> The interest groups we define as “liberal” are labor unions, lawyers, and liberal single-issue groups.<sup>114</sup> These interest groups tend to be the primary supporters of judges with more liberal ideologies.<sup>115</sup> Table 2 reports the average contribution of interest groups and political parties to state Supreme Court candidates in partisan and nonpartisan elections from 1989 to 2010. The average is computed only for candidates receiving contributions from each group, and the number in parentheses in each cell reports the number of candidates receiving contributions from each group.

TABLE 2:  
INTEREST GROUP CONTRIBUTIONS IN STATE SUPREME COURT ELECTIONS

	Contributions to Republican Candidates in Partisan Elections	Contributions to Democratic Candidates in Partisan Elections	Contributions to Candidates in Nonpartisan Elections
Total Contributions	\$921,863 (99)	\$707,476 (100)	\$303,989 (373)
Contributions of Republican Party Committee	\$99,392 (86)	0	\$37,728 (84)
Contributions of Democratic Party Committee	\$5,667 (3)	\$190,158 (72)	\$47,801 (71)
Contributions from Conservative Interest	\$335,744 (96)	\$50,438 (94)	\$65,504 (326)

<sup>112</sup> The conservative single-issue groups include groups associated with the following issues: abortion policy, pro-life, anti-gun control, Christian Coalition, religious right, foreign and defense policy, limited government, school choice advocates, and Republican Party-based groups that are not official party committees.

<sup>113</sup> RACHEL WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES, THE INSTITUTE ON MONEY IN STATE POLITICS at 4 (August 25, 2005), *available at*: <http://www.followthemoney.org/press/Reports/200508251.pdf>

<sup>114</sup> The liberal single-issue groups include groups associated with the following issues: abortion policy, pro-choice, animal rights, elderly/Social Security, gay/lesbian rights and issues, minority and ethnic groups, pro-environmental policy, public school advocates, women’s issues, and Democratic Party-based groups that are not official party committees.

<sup>115</sup> RACHEL WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES, THE INSTITUTE ON MONEY IN STATE POLITICS at 4 (August 25, 2005), *available at*: <http://www.followthemoney.org/press/Reports/200508251.pdf>.

Groups			
Contributions from Liberal Interest Groups	\$200,786 (95)	\$349,718 (98)	\$109,626 (351)
Contributions from Pro-Business Groups	\$219,288 (91)	\$25,140 (79)	\$24,129 (277)
Contributions from Finance/Insurance Groups	\$72,451 (90)	\$20,384 (88)	\$28,646 (307)
Contributions from Medical Groups	\$30,918 (91)	\$9,120 (89)	\$19,373 (287)
Contributions from Labor Unions	\$12,000 (37)	\$47,560 (84)	\$28,914 (192)
Contributions from Lawyers	\$197,431 (94)	\$304,673 (96)	\$95,362 (343)
Contributions from Conservative Single-Issue Groups	\$42,637 (69)	\$16,603 (9)	\$6,314 (50)
Contributions from Liberal Single-Issue Groups	\$3132 (23)	\$15,825 (65)	\$2,245 (97)

*B. Measuring the Partisan Influence of Campaign Contributions*

We now quantitatively examine whether campaign contributions from interest groups and political parties influence judicial decisions. We obtain data on judicial decisions from the State Supreme Court Data Archive. The data include an almost universal sample of state supreme court cases in all fifty states from 1995 to 1998. The data include more than 28,000 cases involving more than 470 individual state supreme court justices.<sup>116</sup> The data include variables that reflect case histories, case participants, legal issues, case outcomes, and individual justices' behavior. We supplemented these data with institutional variables that describe aspects of the judicial system of each state, and with detailed information about each judge's background and career.

The comprehensiveness of our data is unique; it includes every judge's vote in essentially every case in every state supreme court over our four-year period. Although we have used the data in a previous study of the importance of campaign contributions from business groups on judicial

<sup>116</sup> State dockets exceeding 200 cases in a single year are selected from a random sample of 200 cases. Typically, case quantities are unaffected due to the limited size of many state supreme court dockets.

voting,<sup>117</sup> most previous studies of the influence of campaign contributions have examined specific courts and specific types of cases. In contrast, the richness of our data allows for a more systematic empirical analysis than previous studies were able to undertake. Admittedly, full data are only available for the years 1995 through 1998, a period that precedes what some commentators characterize as a change in tone of judicial elections following the Court's decision in *Republican Party of Minnesota v. White*.<sup>118</sup> However, if anything, all these anecdotal accounts describe a dramatic increase in the influence of money and parties that would only fortify the effects we describe.

### 1. Estimation Model

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

$$(1) \text{ Prob}(\text{ConservativeVote}=1/x) = \phi (\beta_0 + \beta_1 * \text{IGContributions} + \beta_2 * \text{Judge} + \beta_3 * \text{Case} + \beta_4 * \text{State})$$

Our second multivariate regression model estimates the relationship between judges' voting and direct campaign contributions from political parties. The estimation equation for this model is:

$$(2) \text{ Prob}(\text{PartyVote}=1/x) = \phi (\beta_0 + \beta_1 * \text{PartyContributions} + \beta_2 * \text{Judge} + \beta_3 * \text{Case} + \beta_4 * \text{State})$$

We estimate these multivariate regression models in five different types of cases that are likely to reveal differences between conservative and liberal judges: cases involving a business and an individual, labor cases, products liability cases, medical malpractice cases, and an aggregated

<sup>117</sup> See Kang & Shepherd, *supra* note.

<sup>118</sup> 536 U.S. 765 (2002). See generally Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* (Matthew Streb ed., 2007).

category of all torts cases.

## 2. Dependent Variables

Our estimations will separate the influence on the dependent variable (the variable on the left-side of the equations) of each independent variable (the variables on the right-side of the equation). In Model 1, the dependent variable is the probability that the judge casts a conservative vote in each case type that we examine. We code a conservative vote as a vote for the business litigant in cases between a business and an individual, a vote for the employer in labor cases, a vote for the business defendant in products liability cases, a vote for the doctor or hospital in medical malpractice cases, and a vote for the original defendant in torts cases.<sup>119</sup>

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

In Model 2, the dependent variable is the probability that the judge casts a vote in favor of the litigant generally preferred by the judges' political party. Hence a Republican judge voting in favor of a business litigant or a Democratic judge voting against a business litigant would both be considered votes for the party-preferred litigant. In contrast, a Republican judge voting against a business litigant or a Democratic judge voting for a business litigant would both be considered votes against the party-preferred litigant. For each case type, we define the party-preferred litigants in the following way:

TABLE 3.  
DEFINITION OF PARTY-PREFERRED LITIGANTS

Case Type	Judges' Political Party	Party-Preferred Litigant
Business versus Individual	Republican	Business
Business versus Individual	Democrat	Individual

<sup>119</sup> A decision favoring a torts plaintiff is commonly viewed as a liberal outcome while 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 (1992); Jeff Yates, Holley Tankersley, & Paul Brace, *Do Institutions Really Matter? Assessing the Impact of State Judicial Structures on Citizen Litigiousness*, Presented at the Annual Meeting of the American Political Science Association (2005).

Labor Case	Republican	Employer
Labor Case	Democrat	Employee
Products Liability	Republican	Business
Products Liability	Democrat	Consumer
Medical Malpractice	Republican	Doctor/Hospital Defendant
Medical Malpractice	Democrat	Plaintiff
Torts Case	Republican	Original Defendant
Torts Case	Democrat	Original Plaintiff

Once again, the facts of some of the cases under each category should produce no distinction between Republican and Democratic preferences. What is more, not every vote for a party-preferred litigant is necessarily an instance of bias. However, this large sample of cases allows us to measure whether judges generally favor party-preferred litigants over the wide range of cases, and if they do, the aggregate impact over the range of decisions is likely to be meaningful for party interests.

A judge is coded as voting for a litigant in the State Supreme Court Data Project archive if the judge voted to make the litigant any better off, regardless of whether the judge voted to reverse a lower court or to change the damage award.

### 3. Variables Testing Our Hypothesis

The primary variable of interest in our models is *Contributions*, the direct campaign contributions to judges facing partisan and nonpartisan elections.<sup>120</sup> In Model 1, *IGContributions* represents two variables: one that measures the percentage of each judge's total contributions that come from conservative interest groups and one that measures the percentage of each judge's total contributions that come from liberal interest groups. As previously discussed, the interest groups we define as "conservative" are general business groups, financial/real estate business groups, insurance companies, medical groups, and conservative single-issue groups. The interest groups we define as "liberal" are labor unions, lawyers, and liberal single-issue groups.

<sup>120</sup> The variable *Contributions* is coded as 0 for judges that received no money from interest groups or political parties.

In Model 2, *PartyContributions* is the percentage of each judge's total contributions that come from the judges' political party committees. Thus, for judges affiliated with the Republican Party, this variable measures the percentage of the judge's contributions from the formal Republican Party organizations. Similarly, for judges affiliated with the Democratic Party, this variable measures the percentage of the judge's contributions from the formal Democratic Party organizations.

#### 4. Control Variables

Our estimations of the two models will separate the influence of each factor, isolating the interest group and political party influence on voting from other influences. Thus, to determine whether campaign contributions affect judicial decisions, it is important to control for as many other factors as possible to ensure the results are not caused by something other than contributions.<sup>121</sup> Ideally, we would 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 we 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, a judge's vote in a particular case may be partly determined by his or her own characteristics, such as fundamental ideology, partly determined by case characteristics, such as the type of litigants, and partly determined by state characteristics, such as the conservatism of the state's laws. Unfortunately, one of the most important influences on a judge's voting, the liability of the parties, is unquantifiable and, therefore, not included as a control variable. Nevertheless, the variables we 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 ideological preferences of each judge to control for the relationship between policy preferences and voting. For this proxy, we use each judge's party-adjusted surrogate judge ideology measure, or PAJID score.<sup>122</sup> This is the most common measure of judge's ideology currently used in political science studies, and is based on the assumption that judges' ideologies can be best proxied by both their partisan affiliation and the ideology of their

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<sup>121</sup> That is, if a third, omitted variable has significant influence on voting, and that omitted variable is strongly correlated with contributions, our analysis may erroneously attribute to the contributions variable the relationship between voting and the omitted third variable.

<sup>122</sup> See Paul Brace, Laura Langer, & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 400–04 (2000).

states at the time of their initial accession to office. Including the PAJID scores allows us to separate the influence of the judges' own ideology from the influence of the campaign contributions. The judge-level variables also include a variable indicating the length of time in years that the individual judge has served on the court. This variable controls for voting changes throughout a judge's career.

The variables in *Case* control for case-level factors that may be related to judges' voting. First, we include indicator variables for the general issue in the case (labor dispute, contracts, torts, or government regulation). Moreover, in estimations that involve a business litigant we include a series of indicator variables signifying the general industry of the business litigant (agriculture, construction, financial services, manufacturing, mining, service, trade, transportation, or utilities). Finally, we include an indicator variable for whether the individual judge's vote is a dissenting vote. As dissenting votes may be a way of ostensibly favoring a specific litigant without changing actual case outcomes, dissents may be related to support for party or group interests.

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

Second, we 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 hear 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.<sup>123</sup> In these courts, the judges may choose to hear cases that give them opportunities to exercise their ideological preferences.<sup>124</sup>

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<sup>123</sup> COURT STATISTICS PROJECT, *supra* note, at 12–67.

<sup>124</sup> 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>.

Whether the supreme courts sit en banc may also influence the types of cases the courts hear. The supreme courts of Alabama, Connecticut, Delaware, the District of Columbia, Massachusetts, Mississippi, Montana, Nebraska, Nevada, Virginia, and Washington often do not sit en banc; instead, various subsets of the judges hear each case.<sup>125</sup> 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,<sup>126</sup> the models also include a set of year indicator variables that capture national trends and influences that affect all judges but vary over time. The variables correct for the possibility that a change in voting may be due, not to party or interest groups' influence, but to factors that affect all judges, such as trends in conservatism or changes in national laws.<sup>127</sup>

## 5. Methodology

In each model, the dependent variable is modeled as a dichotomous choice; each vote for a conservative or party-preferred litigant is coded a positive outcome and each failure to vote for these litigants is a null outcome. Given the dichotomous nature of the outcomes, we estimate this model with a maximum likelihood probit model.<sup>128</sup> However, because the raw probit results are difficult to interpret in terms of the probability of a judge's particular vote, we present the marginal effects of the variables on the probability of voting for the relevant litigant. Thus, the results tables for Model 1 report the increase in the probability of a judge voting for a conservative litigant for each one percentage point increase in campaign contributions from conservative and liberal interest groups, holding the cases' other characteristics constant. Similarly, the results tables for Model 2 report the increase in the probability of a judge voting for a party-preferred litigant for each one percentage point increase in campaign

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<sup>125</sup> COURT STATISTICS PROJECT, *supra* note, at 16–67.

<sup>126</sup> See, e.g., WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 116–18 (5th ed. 2003) (explaining the use of dummy variables in regression analysis).

<sup>127</sup> We are unable to include state-level and judge-level fixed effects because most are perfectly collinear with the retention variables, many of which do not change during the four-year sample period.

<sup>128</sup> For a general discussion of the probit model, see WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 846 (4th ed. 2002).

contributions from the judges' political party.

In addition, the t-statistics are computed from standard errors clustered by state 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.<sup>129</sup> Thus, the standard errors from observations from within the same state may be relatively small when compared to standard errors from observations from other states, artificially inflating our t-statistics and producing results that incorrectly appear to be statistically significant. By controlling for possible clustering effects, we prevent these problems.

### *C. Empirical Results: The Relationship Between Coalition Contributions and Judicial Voting*

Tables 4 through 9 reveal the results of our probit estimations. In each results table, the top number in each cell is the regression coefficient, which indicates the magnitude and direction of each variable's relationship with judges' votes. A negative coefficient indicates that a variable reduces the probability that a judge will vote for a conservative or party-preferred litigant. In contrast, a positive coefficient indicates that a variable increases the probability that a judge will vote for these litigants.

In addition, the table reports the t-statistic for each coefficient. In each cell, it 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 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. Empiricists typically require t-statistics of at least 1.645 to conclude that one variable affects another in the direction indicated by the coefficient.<sup>130</sup> In the table, "\*" and "+" indicate significance at the 5 percent and 10 percent levels, respectively.

First, we estimate Model 1 to explore the relationship between direct campaign contributions from interest groups and judges' voting for conservative litigants. Table 4 reports the probit results for five different categories of case types: cases between a business and individual, labor cases, products liability cases, medical malpractice cases, and torts cases.

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<sup>129</sup> HALL WHITE, ASYMPTOTIC THEORY FOR ECONOMETRICIANS 135-36 (1984).

<sup>130</sup> For each regression, the table also reports the log likelihood that is used to perform a likelihood ratio test. This test determines whether the difference between the log likelihoods of two models is statistically significant; if it is, then the less restrictive model (the one with more variables) is said to fit the data significantly better than the more restrictive model. For more on likelihood ratio tests, see GREENE, *supra* note, at 559

The other control variables in Model 1 are included in the analysis, but not reported for brevity.

The results show that there is a strong relationship between the level of campaign contributions and judicial voting. Specifically, in all five case types, contributions from conservative interest groups have a positive and statistically significant relationship with judges' voting for conservative litigants. In four of the five case types, contributions from liberal interest groups have a negative and statistically significant relationship with voting for conservative litigants. The magnitudes of the coefficients show the increase in the likelihood of a judge voting for the conservative litigant for a one percentage point increase in each interest groups' share of total contributions. Thus, a one percentage point increase in conservative interest groups' share of total contributions would *increase* the probability that a judge would vote for the conservative litigant in torts cases by 0.7 percent. Similarly, a one percentage point increase in liberal interest groups' share of total contributions would *decrease* the probability that a judge would vote for the conservative litigant in torts cases by 0.1 percent.

TABLE 4:  
INTEREST GROUP CONTRIBUTIONS IN CIVIL CASES<sup>131</sup>

	Vote for Conservative Litigant				
	Business vote in Business v Person	Employer vote in Labor Dispute	Doctor/ Hospital in Medmal Case	Business vote in Products Liability Case	Original Defendan t in Torts Case
% of Contributions from Conservative Interest Groups	0.006* (3.69)	0.007* (3.64)	0.007* (2.10)	0.006* (2.10)	0.007* (3.44)
% of Contributions from Liberal Interest Groups	-0.001* (2.18)	-0.001+ (1.85)	-0.002+ (1.65)	-0.001 (1.31)	-0.001* (2.56)

<sup>131</sup> The table reports the marginal effects of all variables on the probability of a judge voting for the conservative litigant, based on probit estimates. All control variables are included in the estimation, but are not reported for brevity. T-statistics computed from standard errors clustered by state are reported underneath each marginal effect. “\*” and “+” represent significance at the 5 percent and 10 percent levels, respectively.

# of Observations	19566	4105	1706	1539	17638
Log Likelihood	-13352	-2784	-1152	-923	-12031

Second, we estimate Model 2 to explore the relationship between direct campaign contributions from political parties and judges' voting for party-preferred litigants. Table 5 reports the probit results for five different categories of case types: cases between a business and individual, labor cases, products liability cases, medical malpractice cases, and torts cases. The other control variables in Model 2 are included in the analyses but not reported for brevity. The results reveal that in all case types, contributions from political parties have a statistically significant relationship with voting for party-preferred litigants. That is, contributions from the Republican Party are associated with voting for litigants generally favored by the Republican Party (businesses, employers, doctors/hospitals, and torts defendants), and contributions from the Democratic Party are associated with voting for litigants generally favored by the Democratic Party (individuals, consumers, employees, and plaintiffs in medical malpractice and torts cases). The magnitude of the coefficients reveal that, for every one percentage point increase in a political party's share of total contributions, the probability that the judge will vote for a party-preferred candidate in medical malpractice cases increases by 0.3 percent.

TABLE 5:  
PARTY CONTRIBUTIONS IN CIVIL CASES<sup>132</sup>

	Vote for Party-Preferred Litigant				
	Business v Person	Labor Dispute	Medmal Case	Products Liability Case	Torts Case
% of Contributions from Political Party	0.002* (2.55)	0.003* (3.65)	0.003+ (1.74)	0.001+ (1.65)	0.001+ (1.85)

<sup>132</sup> The table reports the marginal effects of all variables on the probability of a judge voting for the party-preferred litigant, based on probit estimates. All control variables are included in the estimation, but are not reported for brevity. T-statistics computed from standard errors clustered by state are reported underneath each marginal effect. The control variables are not reported for brevity. “\*” and “+” represent significance at the 5 percent and 10 percent levels, respectively.

# of Observations	16418	3555	1425	1329	14850
Log-Likelihood	-11302	-2422	-971	-887	-10203

Third, we test Models 1 and 2 separately for judges facing partisan and nonpartisan elections. In previous work, we showed that contributions from pro-business interest groups increased the probability that partisan judges would vote for business litigants. However, the results suggested a weaker relationship between business contributions and voting for nonpartisan judges. If we similarly find that judicial decisionmaking under partisan elections displays a stronger association with campaign contributions from party coalitions, then we believe that the greater investment of parties in partisan elections is likely to be an explanation, as we will develop later. Here we test whether the stronger results for partisan judges still hold when looking at several different case types and aggregate categories of interest group and party contributions.

Table 6 reports the results of separate estimations of Model 1 for partisan and nonpartisan judges. The results confirm that there is a stronger association between campaign contributions and voting for partisan judges than for nonpartisan judges. Not only are more of the campaign contribution variables statistically significant for partisan judges, the magnitudes of most of the coefficients are also substantially larger in the partisan estimations.

TABLE 6:  
CAMPAIGN CONTRIBUTIONS AND VOTING AMONG PARTISAN AND  
NONPARTISAN JUDGES<sup>133</sup>

Vote for Conservative Litigant					
	Business vote in Business v Person	Employer vote in Labor Dispute	Doctor/ Hospital in Medmal Case	Business vote in Liability Case	Original Defendan t in Torts Case
Judges Facing Partisan Elections					

<sup>133</sup> The table reports the marginal effects of all variables on the probability of a judge voting for the conservative litigant, based on probit estimates. All control variables are included in the estimation, but are not reported for brevity. T-statistics computed from standard errors clustered by state are reported underneath each marginal effect. “\*” and “+” represent significance at the 5 percent and 10 percent levels, respectively.

% of Contributions from Conservative Interest Groups	0.007* (3.78)	0.008* (3.34)	0.009* (2.42)	0.009* (3.04)	0.008* (3.46)
% of Contributions from Liberal Interest Groups	-0.001* (1.78)	-0.001+ (1.75)	-0.001 (0.96)	-0.002+ (1.89)	-0.001 (0.90)
# of Observations	17160	3426	1706	1293	15308
Log Likelihood	-11695	-2325	-1152	-744	-10415
Judges Facing Nonpartisan Elections					
% of Contributions from Conservative Interest Groups	0.003* (2.15)	0.007* (2.57)	0.001 (0.51)	0.001 (0.36)	0.003* (2.59)
% of Contributions from Liberal Interest Groups	-0.006 (1.15)	-0.0007 (1.03)	-0.004* (2.61)	-0.001 (0.94)	-0.001* (2.20)
# of Observations	16596	3669	1435	1232	15053
Log Likelihood	-11380	-2491	-960	-719	-10316

Similarly, Table 7 reports the results of separate estimations of Model 2 for partisan and nonpartisan judges. Again, the results confirm that the relationship between party contributions and the voting of partisan judges is stronger than the relationship between party contributions and the voting of nonpartisan judges. Although the coefficients on party contributions to partisan judges are positive and statistically significant in all case types, the coefficients on party contributions to nonpartisan judges are insignificant in three of the five case types. Moreover, in one of the case types, the results even suggest a negative relationship between party contributions and voting for the party-favored litigant.

TABLE 7:

PARTY CONTRIBUTIONS IN CIVIL CASES AMONG PARTISAN AND  
NONPARTISAN JUDGES<sup>134</sup>

Vote for Party-Preferred Litigant					
	Business v Person	Labor Dispute	Medmal Case	Products Liability Case	Torts Case
Judges Facing Partisan Elections					
% of Contributions from Political Party	0.002* (2.48)	0.003* (4.09)	0.004* (3.16)	0.002+ (1.65)	0.001+ (1.90)
# of Observations	14666	3031	1313	1147	13140
Log-Likelihood	-10101	-2068	-894	-765	-9029
Judges facing Nonpartisan Elections					
% of Contributions from Political Party	0.002* (3.03)	0.003+ (1.67)	-0.001 (1.08)	0.001 (1.21)	0.0001 (0.36)
# of Observations	13448	3119	1154	1027	12265
Log-Likelihood	-9294	-2125	-790	-689	-8454

Fourth, we test whether elected judges vote differently in their last term before retirement than they do when facing retention. Thirty-seven states have mandatory retirement laws that compel judges to retire sometime between age seventy and seventy-five. By examining the voting of judges in their last term before mandatory retirement, we can test whether elected judges continue to cast votes for party-favored or group-favored litigants when they no longer need to attract campaign funds or advertising support. If elected judges vote differently as their retirement approaches, this would support the hypothesis that the need to raise future campaign funds drives elected judges' partisan voting.

We estimate Model 1 again, this time with an interaction term between the group contribution variables and an indicator variable for whether it is

<sup>134</sup> The table reports the marginal effects of all variables on the probability of a judge voting for the party-preferred litigant, based on probit estimates. All control variables are included in the estimation, but are not reported for brevity. T-statistics computed from standard errors clustered by state are reported underneath each marginal effect. “\*” and “+” represent significance at the 5 percent and 10 percent levels, respectively.

the judge's last term before mandatory retirement. Table 8 reports the coefficients for the contribution variables and interaction terms; the other control variables in Model 1 are included in the analysis but not reported for brevity. The interaction term reveals how the relationship between group contributions and voting changes for retiring judges. The negative coefficients on the interactions between contributions from conservative groups and retiring judges indicate that the positive relationship between conservative contributions and voting for conservative litigants *decreases* for retiring judges. Similarly, the positive coefficients on the interactions between liberal contributions and retiring judges indicate that the negative relationship between liberal contributions and voting for conservative litigants reverses, or becomes more positive, for retiring judges. Although the interaction terms are statistically insignificant, their signs show that groups contributions have a weaker influence on retiring judges' voting for conservative litigants.

TABLE 8:  
INTEREST GROUP CONTRIBUTIONS IN CIVIL CASES: RETIRING JUDGES<sup>135</sup>

	Vote for Conservative Litigant				
	Business vote in Business v Person	Employer vote in Labor Dispute	Doctor/ Hospital in Medmal Case	Business vote in Products Liability Case	Original Defendan t in Torts Case
% of Contributions from Conservative Interest Groups	0.006* (2.59)	0.007* (2.71)	0.008+ (1.79)	0.005+ (1.63)	0.006* (2.25)
% of Contributions from Conservative Interest Groups*Retiring	-0.0008 (0.30)	-0.0009 (0.26)	-0.003 (0.59)	-0.004 (1.14)	-0.0008 (0.22)
% of Contributions from Liberal Interest	-0.001* (0.30)	-0.001 (0.26)	-0.001 (0.59)	-0.001* (1.14)	-0.001* (0.22)

<sup>135</sup> The table reports the marginal effects of all variables on the probability of a judge voting for the conservative litigant, based on probit estimates. All control variables are included in the estimation, but are not reported for brevity. T-statistics computed from standard errors clustered by state are reported underneath each marginal effect. “\*” and “+” represent significance at the 5 percent and 10 percent levels, respectively.

Groups	(2.57)	(1.19)	(1.12)	(2.15)	(2.73)
% of Contributions from Liberal Interest	0.0005	0.00007	0.0007	0.002	0.0001
Groups*Retiring	(0.47)	(0.08)	(0.52)	(1.34)	(0.06)
# of Observations	20094	4211	1792	1578	18149
Log Likelihood	-13738	-2874	-1225	-956	-12413

Table 9 reports the results from our estimation of Model 2 with an additional interaction between party contributions and retiring judges. Again, the negative coefficients on the interaction terms in all cases show that the positive relationship between party contributions and voting for party-favored litigants *decreases* for retiring judges. The results in Tables 8 and 9 support the hypothesis that the need to obtain future campaign support influences how elected judges vote; when these judges no longer need to curry favor with wealthy interest groups, they are less likely to favor group interests.

TABLE 9:  
PARTY CONTRIBUTIONS IN CIVIL CASES: RETIRING JUDGES<sup>136</sup>

	Vote for Party-Preferred Litigant				
	Business v Person	Labor Dispute	Medmal Case	Products Liability Case	Torts Case
% of Contributions from Political Party	0.003* (6.36)	0.005* (3.54)	0.003+ (1.75)	0.004+ (1.89)	0.002* (2.47)
% of Contributions from Political Party * Retiring	-0.0004* (2.78)	-0.001 (1.48)	-0.002 (0.85)	-0.002 (0.90)	-0.0002 (0.42)

<sup>136</sup> The table reports the marginal effects of all variables on the probability of a judge voting for the party-preferred litigant, based on probit estimates. All control variables are included in the estimation, but are not reported for brevity. T-statistics computed from standard errors clustered by state are reported underneath each marginal effect. “\*” and “+” represent significance at the 5 percent and 10 percent levels, respectively.

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# of Observations	16747	3617	1476	1356	15168
Log-Likelihood	-11556	-2477	-1012	-922	-10444

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In sum, the results of our estimations show that contributions from both groups and political parties are associated with judicial votes in favor of the interests of those contributors. Specifically, contributions from Republican sources—conservative interest groups and the Republican Party itself—are associated with judicial votes in favor of conservative-preferred litigants. Correspondingly, contributions from Democratic sources—liberal groups and the Democratic Party itself—are associated with judicial votes in favor of liberal-preferred litigants. These relationships extend beyond cases with issues or litigants with industry-specific importance to the contributors; instead the relationships hold across the range of cases. The data suggest that contributions from groups within each party coalition exercise a global influence on judicial decisionmaking coordinated with other groups united by a common ideological outlook.

Moreover, the relationship between coalition contributions and voting for coalition interests decreases during judges' last terms before mandatory retirement. These results confirm that the need to obtain future campaign support is an important influence on elected judges; when judges no longer need to curry favor with coalition groups, they are less likely to favor coalition interests.

However, the relationship between coalition contributions and judicial voting in favor of coalition interests is much stronger, in both magnitude and statistical significance, for judges in partisan systems compared to judges in nonpartisan systems. These results suggest that parties play an important role in brokering and mediating the relationships between contributors and candidates.

#### *D. Buying Judicial Decisions: The Marriage of Party and Money*

We have shown that partisan elected judges decide cases in predictable directions based the sources and amounts of their campaign finance support from the major party coalitions. This is predictably true, not just so for contributions from business groups and decisions in business cases as we already have shown, but more generally for the contributions of a wide array of groups and the political parties. To provide a rough guide to the magnitude of the finding, Table 6 reports that as the percentage of contributions from Republican interest groups increases by 1 percentage point (for example, from 49 percent to 50 percent of total contributions),

judges facing partisan elections are, on average, 0.7 percent more likely to vote for business litigants in business-versus-person cases, 0.8 percent more likely to vote for employers in labor disputes, 0.9 percent more likely to vote for the doctor or hospital in medical malpractice cases, 0.9 percent more likely to vote for businesses in products liability cases, and 0.8 percent more likely to vote for the original defendants in tort cases. Thus, as the percentage of total contributions from Republican interest groups increases by 10 percentage points (for example, from 40 percent to 50 percent of the total), judges are, on average, 7 to 9 percent more likely to vote for these conservative-preferred litigants.

In contrast, the contributions from Democratic interest groups have the expected reverse effect on judicial decisionmaking, though the relationship is smaller in magnitude. The coefficients in Table 6 reveal that as the percentage of contributions from Democratic interest groups increases by 1 percentage point, judges facing partisan elections are, on average, 0.1 percent *less* likely to vote for business litigants in business-versus-person cases, 0.1 percent less likely to vote for employers in labor disputes, and 0.2 percent less likely to vote for businesses in products liability cases.

*Caperton v. Massey* put the focus on the influence of money in judicial elections and decisionmaking.<sup>137</sup> In *Caperton*, the Supreme Court for the first time found a violation of due process in a state supreme court justice's failure to recuse himself from a case involving an interested party who previously spent more than \$3 million on election campaigning to elect that justice. The Court concluded that the \$3 million in campaign spending created "a serious risk of actual bias" given the large amount of money spent and the apparent effect the money had on the outcome of the election.<sup>138</sup> The fact that Blankenship contributed more money than the total support spent by all other supporters and thrice exceeded Benjamin's own campaign committee's spending automatically attracted doubts about Benjamin's objectivity in a case involving Blankenship's company with such a large verdict in the balance.

However, *Caperton* may not have presented the right question about the influence of campaign finance money on judicial decisions. *Caperton* focused on the most glaring, obvious case where campaign finance money might be expected to influence a judicial decision. The facts were, in Justice Kennedy's words, "extreme by any measure."<sup>139</sup> The Court, in fact, took pains to underscore the exceptionality of the case and emphasized the constitutional recusal remedy required in *Caperton* as "confined to rare

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<sup>137</sup> *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

<sup>138</sup> *Id.* at 884.

<sup>139</sup> *Id.* at 887.

instances.”<sup>140</sup> The Court dismissed the notion that *Caperton* would create adverse consequences, ranging from “a flood of recusal motions to unnecessary interference with judicial elections,” because there were no other instances involving “a potential for bias comparable to the circumstances in this case.”<sup>141</sup> But it is precisely because of the extremeness of the facts in *Caperton* that suspicion is well supported and public scrutiny is most likely, to the degree that the Court was willing to apply the extraordinary remedy of constitutionally required recusal. The Court applied a constitutional remedy only in the most egregious case, where the risk of bias was greatest and most obvious, and confined that remedy only to comparably egregious cases.

Our findings suggest a different, more pervasive concern about the influence of money than the type presented in *Caperton*. In our study, we do not focus on only the most extreme cases but look across all cases, big and small. Indeed, we would argue that the aggregate influence of money in small- and medium-size cases is more worrisome than in the most extreme cases like *Caperton* where suspicion is most obvious and likely. *Caperton* involved a large verdict effectively against a critical campaign donor who stood to benefit directly, but the suspicion is that campaign donors contribute to judicial candidates not necessarily because they foresee a particular case arising before that judge and hope to curry favor with that prospect in mind. Instead, campaign donors foresee a whole range of cases that implicate their interests, even if those particular donors are not individually involved in the case.<sup>142</sup> These donors should benefit from all types of decisions from sympathetic judges that do not involve them directly as a party but touch upon the law of their business affairs in important ways.

The subtle influence of money at the margin of every individual decision would be almost certainly more important in aggregate effect on the collective interests of the various parties than any single decision, however large. What is more, the influence of money in the wider gamut of cases is much more difficult to detect and credibly allege where extreme facts like those in *Caperton* are absent. It is precisely in these cases where the constitutional remedy from *Caperton* is unavailable and favorable

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<sup>140</sup> Id. at 890.

<sup>141</sup> Id. at 887.

<sup>142</sup> To give a concrete example from congressional campaign finance, ExxonMobil long distributed its PAC campaign contributions according to a quantitative “key vote system” that aggregated congresspeople’s votes on certain key votes for the company’s business interests. The closer to the ideal position on these key votes that a congressperson took, the more money that ExxonMobil was willing to contribute to his or her campaigns going forward. See Steve Coll, *Gusher: The Power of ExxonMobil*, NEW YORKER, Apr. 9, 2012, at 28, 29.

decisions for a judge's campaign contributors are likely to be chalked up to general ideology rather than the influence of money. Indeed, in all the national commentary about *Caperton*, there is virtually no mention of the extensive partisan campaign finance activity of Don Blankenship, the major donor in the case, not only for Brent Benjamin, but for many Republican candidates.<sup>143</sup>

When we look across the full range of cases, we find that campaign finance contributions to partisan elected judges systematically predict their decisions over the four-year period we studied. Eric Fingerhut, former congressman from Ohio, explained once about campaign finance that “[t]he public will often look for the big example; they want to find the grand-slam example of influence in these interests [b]ut rarely will you find it. But you can find a million singles.”<sup>144</sup> Here, we help identify those million singles. We find that campaign finance money predicts judicial decisions not necessarily in every case, and not only in the most extreme cases, but systematically across the whole set of judicial decisions by all partisan elected state supreme court justices. We therefore find support for the view that campaign contributions to judicial candidates may be “the single best investment in American politics.”<sup>145</sup>

From our data, we conclude that the Republican and Democratic Parties are a crucial catalyst for this relationship between contributions and judicial decisions by the judges who receive them. This correlation between contributions and decisions exists clearly and unequivocally for partisan elected judges across the range of cases they decide, but strikingly, this correlation *largely disappears* when we look at judges elected under nonpartisan elections. Nonpartisan elections entail less investment and involvement by the Republican and Democratic Parties, though not their complete withdrawal. Where their party label is not at stake, the major parties have less reason to mobilize their fundraising base, facilitate relationships between contributors and candidates, and monitor judges' ideological fidelity once elected. This lesser level of involvement by the major parties appears to make a critical difference in how well contributions

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<sup>143</sup> See *supra*. The plaintiffs recounted Blankenship's partisan fundraising in their filings. See, e.g., 1 Joint Appendix 331a-32a, *Caperton v. Massey*, 129 S.Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213 (suggesting that Benjamin's media advisor and Blankenship had met at a state party conference and citing news commentary reporting that Blankenship “worked through the party to put candidates in touch with a huge number of Massey vendors, investors and other contacts who could contribute and raise money”).

<sup>144</sup> DAN CLAWSON, ALAN NEUSTADTL, & MARK WELLER, *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* 67 (1998) (quoting Eric Fingerhut).

<sup>145</sup> Dennis Brady, *PACs, Donors Shaping Judicial Elections*, WASH. POST, Mar. 30, 2012, at A1 (quoting Charles Hall, spokesman for Justice at Stake).

to judges dictate later judicial decisions by those judges. Money seems not to matter, at least not nearly as much, when the parties do not play their central role in coordinating judicial campaign finance.

Of course, we also find that the political parties exert a large and systematic influence on judicial decisionmaking in partisan elections through their direct campaign contributions. Table 7 reports that as the percentage of contributions from the judges' own party coalition increases by 1 percentage point (for example, from 49 percent to 50 percent of total contributions), judges are, on average, 0.2 percent more likely to vote for the party-preferred litigant in business-versus-person cases, 0.3 percent more likely to vote for the party-preferred litigant in labor disputes, 0.4 percent more likely to vote for the party-preferred litigant in medical malpractice cases, 0.2 percent more likely to vote for the party-preferred litigant in products liability cases, and 0.1 percent more likely to vote for the party-preferred litigant in tort cases. Thus, as the percentage of total contributions from the judges' own party coalition increases by 10 percentage points (for example, from 40 percent to 50 percent of the total), judges are, on average, 1 to 4 percent more likely to vote for the party-preferred litigant litigants.

However, by comparison, the essential role that the major parties play in connecting their core contributors and judicial candidates has a much bigger impact in translating money into judicial decisions. The parties appear to be indispensable institutions for matching contributors with roughly likeminded candidates willing to invest in the party agenda and be disciplined by campaign finance pressures. Without the parties to play this role, as well as to provide ongoing monitoring of candidates, the influence of campaign finance contributions on elected judges who receive them disappears in our data. Under nonpartisan judicial elections, contributors appear simply unable to translate their campaign finance support into influence as effectively without the parties to broker the necessary coordination and incentives.

Our findings raise an obvious question—if the major parties play the pivotal role in coordinating judicial campaign finance, which one does it better and why? We might expect that Republicans and Democratic Parties differ quite a bit in judicial campaign finance because of their basic differences over ideology. The partisan divide tracks ideological disagreements and therefore very different base constituencies willing to provide campaign financing to the parties and their candidates. What is more, we might expect that partisan judges are more sensitive to contributions from their party base than other sources of money, or at least otherwise differentiate among sources of money that push for different

types of decisions. In the next Part, we investigate this intuition about partisan differentiation and report our results.

### III. PARTISAN DIFFERENCES: HOW JUDICIAL CAMPAIGN FINANCE REINFORCES PARTY DISCIPLINE FOR REPUBLICANS AND UNDERCUTS IT FOR DEMOCRATS

Party matters in judicial campaign finance. We have shown that the Republican and Democratic Parties play an indispensable role in connecting their party contributors to their judges on an ongoing basis. As important as this finding is to understanding how money influences judicial decisionmaking, it describes only one part of what the major parties do in judicial campaign finance. The parties not only must strengthen the relationships between their own contributors and their judges, but they also must try to ensure that their judges resist the influence of contributions received from outside the party coalition. Judicial candidates receive money from many contributors, including groups in the opposing party's coalition, all presenting some form of ideological influence.

In this Part, we explain how Republican and Democratic judges respond very differently to these competing campaign finance pressures. The partisan differences here are dramatic. Republican judges are consistently responsive to contributions from Republican sources and become more conservative in their decisionmaking as contributions from Republican sources increase. Republican judges, though, are unresponsive to contributions from Democratic sources. Democratic judges, by contrast, are responsive to contributions from *both* Democratic and Republican sources. They become more liberal as contributions from Democratic sources increase, but they become more conservative as contributions from Republican sources increase. Unlike Republicans, Democratic judges are cross pressured by campaign finance pressures and become less loyal partisans as a consequence.

#### A. *Why Republican and Democratic Campaign Finance Might Be Different*

In *Dollars and Votes*, their comprehensive study of money in politics, Dan Clawson and his colleagues argue that the notion that “political party matters” is a myth when it comes to money in politics. As they put it, “[T]here is only one party when it comes to the question, ‘Are you willing to take money from business and in exchange help create loopholes that will

undermine the stated purpose of the law?”<sup>146</sup> Virtually all candidates from both parties, in their view, accept contributions from business groups and participate in what Clawson and his colleagues call the “access process,” notwithstanding ideological differences between the major parties. At least when comes to campaign finance in Congress, “The country doesn’t have two major parties, it has just one: the money party.”<sup>147</sup>

Indeed, judicial candidates from both major parties have great incentive to pay attention to their campaign finance contributors. Campaign financing is an important element of electoral success, and judicial candidates seeking re-election are wise to consider where their campaign financing will come for the next election. We have already found that judges tend to be more likely to cast votes on the bench in the preferred ideological direction of party-affiliated campaign contributors. In earlier work, we found along similar lines that judges who received contributions from business groups were more likely to vote in favor business litigants. We found that a \$1,000 contribution from business increased the average probability that a judge would vote for a business litigant by 0.03 percent, while \$1,000,000 in contributions from business increased the average probability that a judge would vote for a business litigant in a case by 30 percent.<sup>148</sup>

For their part, campaign contributors therefore have reason to contribute money to judicial candidates from both major parties, regardless of their own partisan affiliation. To the degree that campaign finance contributions influence judicial decisions, a contributor may not want to write off an entire party’s slate of candidates and instead may hope to work both sides of the aisle. For this reason, we find that business groups in particular contributed money to both parties’ candidates. As Table 2 describes, business groups contribute a significant amount to both parties, for an average of \$220,000 to Republican candidates and \$25,000 to Democratic candidates in partisan judicial elections. Although business contributions have a greater effect on Republican decisions than Democratic ones, we found that business groups influence judicial decisions by judges appointed through partisan elections regardless of their individual partisan affiliation.<sup>149</sup>

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<sup>146</sup> DAN CLAWSON, ALAN NEUSTADTL, & MARK WELLER, *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* 93 (1998).

<sup>147</sup> *Id.* at 91

<sup>148</sup> Kang & Shepherd, *supra* note, at 105.

<sup>149</sup> *See id.* at 118-19. *See also* John R. Wright, *Interest Groups, Congressional Reform, and Party Government in the United States*, 25 LEGIS. STUD. Q. 217, 230-31(2000); Gary Jacobson, *Money in the 1980s Elections*, in *MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980S* (Michael Malbin ed., 1984); DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 48-63 (1991).

However, we nonetheless suspect that a judge's individual partisanship should matter in judicial campaign finance. As a fundamental point, parties organize in important part for common ideological purposes that bring together diverse players under the party label as an ongoing electoral and legislative coalition. As such, the major parties adopt different policy commitments and attract different sets of candidates, voters, and campaign contributors. The major parties must maintain their policy reputations to keep together their respective party coalitions. To do so, the major parties must produce a measure of ideological coherence in the right direction from their candidates, who sometimes have competing individual incentives to stray from the party line. The Republican Party therefore may deploy its campaign finance resources, including money from Republican-leaning groups, to encourage Republican officeholders to toe the Republican party line in office. If the party is effective in this objective, Republican judges should react differently to money from groups within the Republican coalition than money outside of it. The same should hold for Democratic judges, as the Democratic Party tries to ensure that Democratic judges toe their party line and please their own party coalition.

Partisan candidates, even once selected and certified by their party, cannot easily afford to alienate their parties even after reaching office. In partisan systems, parties “coordinate on a preferred set of candidates and channel[] vital resources—money, endorsements, expertise—to those candidates to help them prevail.”<sup>150</sup> Party support is important to partisan candidates' election fortunes, particularly with an opposing party organizing against them through competing candidates.<sup>151</sup> Parties can exercise leverage over their candidates by threatening, implicitly and sometimes explicitly, to withhold resources from judges who do not hew to the party's preferences in judicial decisions.<sup>152</sup> Along these lines, we suspect that the parties in partisan judicial elections try to ensure their candidates are responsive foremost to loyal contributors in the party's base constituency. As a result, if parties do their job well in selecting, monitoring, and disciplining candidates, we expect to see the greatest congruence between partisan judges' decisions and their party-affiliated contributions.

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<sup>150</sup> SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES* 53 (2009).

<sup>151</sup> *See, e.g.*, PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 152 (1980) (“Judges selected through an essentially partisan process have a prospective incentive to demonstrate their loyalty and allegiance to the party while on the bench in order to secure a future renomination and re-election.”).

<sup>152</sup> *See, e.g.*, MASKET, *supra* note, at 53 (“[Parties] maintain leverage over officeholders by threatening to withhold [party] resources or to channel them toward a more faithful candidate.”).

Republican and Democratic judges should be expected to respond more strongly to money from their party coalition than other sources of money if the major parties successfully do their jobs. Put another way, the decisions of partisan judges should be better predicted by contributions from groups within their respective party bases than from other groups. Republican judges should be more responsive to money from Republicans, and Democrats should be more responsive to money from Democrats, than to money from outside their respective parties.

To test how judges respond to contributions from their base constituencies, we empirically isolate the influence of contributions from conservative groups and liberal groups on Republican and Democratic judges. We re-estimate Model 1 again to test the relationship between judges' voting and contributions from their base constituencies. Although we use similar data, models, and techniques as the previous analysis, this new estimation of Model 1 includes separate *IGContribution* variables for Republican and Democratic judges. The equation for this model is expressed as Model 3 below:

$$(3) \text{Prob}(\text{ConservativeVote}=1/x) = \phi (\beta_0 + \beta_1 * \text{IGContributions}_{Rep} + \beta_2 * \text{IGContributions}_{Dem} + \beta_3 * \text{Judge} + \beta_4 * \text{Case} + \beta_5 * \text{State})$$

*IGContributions* continues to represent two variables: one that measures the percentage of each judge's total contributions that come from conservative interest groups and one that measures the percentage of each judge's total contributions that come from liberal interest groups. As previously discussed, the interest groups we define as "conservative" are general business groups, financial/real estate business groups, insurance companies, medical groups, and conservative single-issue groups. The interest groups we define as "liberal" are labor unions, lawyers, and liberal single-issue groups. Model 3 thereby isolates the influence of conservative and liberal group contributions on Republican and Democratic judges by including separate *IGContributions* variables for judges from each party.

Table 10 reports the results. The results indicate that, whereas contributions from conservative interest groups increase the probability that Republican judges will vote for conservative litigants, contributions from liberal interest groups have no influence on Republican judges voting. In contrast, Democratic judges are influenced by contributions from both conservative and liberal interest groups; conservative contributions increase the probability that Democratic judges will vote for conservative litigants, but liberal contributions decrease the probability that Democratic judges will vote for conservative litigants.

TABLE 10:  
INTEREST GROUP CONTRIBUTIONS IN CIVIL CASES<sup>153</sup>

	Vote for Conservative Litigant				
	Business vote in Business v Person	Employer vote in Labor Dispute	Doctor/ Hospital in Medmal Case	Business vote in Products Liability Case	Original Defendan t in Torts Case
Republican	0.006 (0.31)	-0.018 (0.55)	0.042 (0.65)	-0.003 (0.07)	0.032 (1.27)
% of Contributions from Conservative Interest Groups to Republican Judges	0.004* (2.52)	0.005* (1.96)	0.003 (1.01)	0.003+ (1.91)	0.003+ (1.76)
% of Contributions from Liberal Interest Groups to Republican Judges	0.0006 (0.43)	0.001 (0.71)	0.002 (0.69)	-0.001 (0.96)	0.001 (0.46)
Democrat	-0.019 (1.08)	0.008 (0.20)	-0.008 (0.15)	-0.074 (1.55)	-0.020 (1.00)
% of Contributions from Conservative Interest Groups to Democratic Judges	0.006* (4.48)	0.008* (4.14)	0.009* (2.15)	0.007* (3.06)	0.008* (5.07)
% of Contributions from Liberal Interest Groups to Democratic Judges	-0.001* (3.53)	-0.002* (2.81)	-0.001 (1.15)	-0.002* (2.36)	-0.001* (2.64)

<sup>153</sup> The table reports the marginal effects of all variables on the probability of a judge voting for the conservative litigant, based on probit estimates. All control variables are included in the estimation, but are not reported for brevity. T-statistics computed from standard errors clustered by state are reported underneath each marginal effect. “\*” and “+” represent significance at the 5 percent and 10 percent levels, respectively.

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# of Observations	20094	4211	1792	1578	18149
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The magnitude of the coefficients reveals the additional influence of contributions above the baseline Republican and Democratic judges' voting—Republican and Democratic judges receiving no contributions from the relevant interest groups. For example, as the total share of contributions from conservative interest groups increases by 1 percentage point (for example, from 49 percent to 50 percent of total contributions), Republican judges are 0.4 percent more likely to vote for the business litigant in business-versus-person cases than baseline Republicans, and Democratic judges are 0.6 percent more likely to vote for the business litigant in these cases than baseline Democrats. Similarly, as the total share of contributions from liberal interest groups increases by 1 percentage point, Democratic judges are 0.1 percent less likely to vote for the business litigant in business-versus-person cases than baseline Democrats. However, there is no statistically significant difference between Republican judges receiving contributions from liberal interest groups and baseline Republican judges in these cases.

These findings thus point to a dramatic difference in the way that money from their base constituencies influences Republican and Democratic judges. Whereas Republican judges appear to be responsive only to contributions from groups within the Republican party coalition, Democratic judges are responsive to contributions from both inside and outside the Democratic party coalition. Remarkably, this is true even though Republican judges receive significantly larger outside contributions than Democratic judges; Republican judges receive, on average, \$200,786 from liberal interest groups but Democratic judges only receive an average of \$50,438 from conservative interest groups. Yet despite the significant contributions from liberal groups, Republican judges maintain a high degree of ideological consistency by responding only to contributions from Republican constituencies. In contrast, Democratic judges often stray from the party line and respond to contributions from outside the Democratic coalition.

### B. *Two Different Money Parties, Not One*

In *Dollars and Votes*, Clawson and his colleagues argued the country “doesn’t have two major parties, it has just one: the money party.”<sup>154</sup> But when we separate Republican and Democratic judges in our analysis, we

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<sup>154</sup> DAN CLAWSON, ALAN NEUSTADTL, & MARK WELLER, *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* 91 (1998).

find strikingly different patterns in the relationships between the campaign contributions they receive and their judicial decisionmaking. There is not just one money party when it comes to campaign finance in state supreme court.

Republican judges who receive money from Republican sources are more likely to vote more conservatively, even controlling for the judges' ideology. Money from conservative groups in the Republican coalition, as well as from the party itself, is associated with more conservative judicial decisionmaking by Republican judges. However, Republican judges are not similarly responsive to money from Democratic sources. They are *not* more likely to vote more liberally when they receive money from a liberal group in the Democratic coalition. Money from liberal groups has no statistically significant effect on Republican judges' decisionmaking. Only money from the conservative side seems to matter for Republican judges.

By contrast, Democratic judicial decisionmaking appears responsive to money from *both* sides. Democratic judges who receive money from Democratic sources are more likely vote more liberally, even controlling for the judges' ideology. Money from liberal groups in the Democratic coalition and from the Democratic Party itself is associated with more liberal decisionmaking from Democratic judges. However, Democratic judges' judicial decisionmaking is also influenced in the opposite direction by money from Republican sources. Money from conservative groups in the Republican coalition pulls Democratic judges in a conservative direction, contrary to their party's ideological preferences. Democratic judges are thus pulled in competing directions by liberal and conservative forces, while Republicans are affected only by conservative ones.

Republicans may simply be better at disciplining their coalition and candidates in campaign finance than the Democrats are. The notion that the Democratic Party is less organized and disciplined than the Republican Party is very familiar to students of American politics. Will Rogers famously quipped "I am not a member of any organized party—I am a Democrat."<sup>155</sup> We find that this longstanding punchline about the differences between the major parties contains truth when it comes to the partisan cohesion of Republican and Democratic judges. We think the differences have important foundations here in campaign finance.

For one thing, the Republican Party is much more successful in coordinating the campaign finance activity of its coalition in our data. The conservative Republican groups in our database focus their campaign finance contributions more squarely on Republican judicial candidates and

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<sup>155</sup> P.J. O'BRIEN, WILL ROGERS: AMBASSADOR OF GOOD WILL, PRINCE OF WIT AND WISDOM 162 (1935) (quoting Will Rogers).

withhold contributions from Democratic candidates. As Table 2 reports, Republican groups contribute, on average, \$336,000 to Republican candidates and just \$50,000 to Democratic candidates in partisan elections.

The Democratic Party, though, struggles to constrain liberal groups in its coalition from giving to Republican candidates. Democratic groups in our dataset contribute more money on average to Democratic candidates than to Republican candidates, but they nonetheless contribute significant amounts to Republican candidates as well. As Table 2 shows, Democratic groups contribute, on average, \$201,000 to Republican candidates and \$350,000 to Democratic candidates in partisan elections. What is more, even the Democratic Party committees themselves have occasionally contributed money to Republican judicial candidates; in three elections, the Democratic Party contributed an average of \$5,667 to Republican candidates! Republican Party committees in our database contributed not a single dollar to any Democratic judicial candidate during the four years studied.

Republican party discipline extends to judicial candidates as well. Republican candidates on average received roughly four times as much money from Democratic sources than Democratic candidates on average received from Republican sources. Republican candidates received, on average, \$201,000 from Democratic groups, while Democratic candidates received, on average, \$50,000 from Republican groups. But Republican judges were uninfluenced in our study by this significant flow of money from the Democratic side, while Democratic judges were influenced in a conservative direction by a smaller amount of money on average from the Republican side.

In short, Republicans were more cohesive and disciplined than Democrats in judicial campaign finance among both contributors and candidates. Although judges from both parties were influenced by campaign finance, Republican campaign finance was more effective at influencing judicial decisions in a conservative direction than Democratic campaign finance managed to achieve in a liberal direction. Party mattered for both Republican and Democratic judges, but in very different ways for each.

#### IV. PUTTING PARTISAN LOYALTY TO THE TEST: THE SPECIAL CATEGORY OF ELECTION CASES

In this Part, we study more closely at the institutional effectiveness of the major parties in inducing their judges to decide cases to their ideological preference. In the previous Part, we looked at how campaign financing from the major parties, and the interest groups allied with them, influences

judicial decisionmaking by partisan judges in a party-preferred ideological direction across the entire run of cases. Here we look at the relationship between these direct contributions from the formal party organizations and judges' decisions in a special category of cases that are almost entirely about partisan loyalty—partisan election disputes. We focus only on campaign contributions to judicial candidates by the formal party organizations themselves. We thereby hope to isolate the parties' effectiveness in selecting loyal candidates and maintaining discipline over judges once in office through the tool of campaign finance.

#### A. *Party Contributions and Partisan Loyalty*

Parties not only coordinate their candidates and contributors, but the parties themselves contribute money directly to candidates as well. Parties once served mainly as vehicles of mass mobilization, relying heavily on manpower rather than financial capital or technology. However, when American politics shifted during the television era to candidate-centered campaigning, parties too shifted their approach to politics. As John Aldrich describes, parties increasingly became focused on technology and campaign finance in service to their candidates.<sup>156</sup> They developed expertise in the mass media campaigning necessary to win modern elections, and in the campaign fundraising necessary to pay for expensive television advertising. As part of their evolution, the parties found efficient ways to raise money for the party coffers and then deploy that money strategically to serve the party's goals.<sup>157</sup>

Parties can be expected to contribute their money to maximize their electoral success. Parties are in the business of winning offices, and campaign finance money is another means for advancing their nominees' electoral prospects. Until recently, political science theory on parties tended to conceive of parties as almost purely Downsian institutions that seek to maximize their control of public offices with little ideological purpose independent of that central goal. Under this view, as one political scientist put it, parties “would enact whatever policies voters wanted—or at least give verbal support to whatever voters wanted—in order to win election.”<sup>158</sup> Just so, empirical research in political science finds that the major parties indeed tend to allocate greater funding on what they see as the most

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<sup>156</sup> See ALDRICH, *supra* note, at 241-74.

<sup>157</sup> See Gary C. Jacobson, *A Collective Dilemma Solved: The Distribution of Party Campaign Resources in the 2006 Congressional Elections*, 9 ELECTION L.J. 381, 383-88 (2010) (outlining this history).

<sup>158</sup> COHEN ET AL., *supra* note, at 21.

competitive elections.<sup>159</sup> Parties seek bang for their buck in deciding whom to support across their candidates running for election and rationally distribute money where party contributions are most likely to provide a determinative edge.

That said, parties are themselves ideological enterprises with independent interests they wish to advance through their candidates. More recent work in political science approaches parties not simply as institutions blindly in service to candidates' election prospects, but instead as coalitions driven by intense policy demanders with their own ideological agency.<sup>160</sup> These policy demanders engage in party politics to achieve policy-oriented goals and use their resources to favor party candidates who support those goals and occasionally resist party candidates who are less supportive. As a consequence, a party's collective goals are sometimes in tension with what party candidates want, and the party can apply pressure on candidates nonetheless to toe the line.

Parties have an array of carrots and sticks to reward and discipline their candidates, but one important tool for exercising pressure on candidates is direct contributions from the party itself.<sup>161</sup> Candidates who have received party money in the past, valued its assistance, and hope to receive more in the future could reasonably be loath to cross the party leadership too many times on important matters, at least to the degree that doing so is not critical for re-election. The research suggests that, in fact, parties tend to weight the competitiveness of the race most heavily in deciding whether to contribute money to a candidate.<sup>162</sup> However, this is not an obvious fact of life that candidates can assume. Indeed, empirical work finds legislative candidates who receive money from the party, or party-affiliated sources, display greater loyalty in subsequent legislative voting.<sup>163</sup> That is, even if parties

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<sup>159</sup> See Jacobson, *supra* note, at 388-97; Timothy P. Nokken, *Ideological Congruence Versus Electoral Success: Distribution of Party Organization Contributions in Senate Elections, 1990-2000*, 31 AM. POL. RES. 3 (2003); Jeffrey M. Stonecash & Sara E. Keith, *Maintaining a Political Party: Providing and Withdrawing Party Campaign Funds*, 2 PARTY POL. 313 (1996); David F. Damore & Thomas G. Hansford, *The Allocation of Party Controlled Campaign Resources in the House of Representatives, 1989-1996*, 52 POL. RES. Q. 371 (1999); Jeffrey M. Stonecash, *Working at the Margins: Campaign Finance and Party Strategy in New York Assembly Elections*, 13 LEGIS. STUD. Q. 477 (1988).

<sup>160</sup> See generally *id.*; MASKET, *supra* note.

<sup>161</sup> See Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598 (2000).

<sup>162</sup> See note *supra*.

<sup>163</sup> See, e.g., David M. Cantor & Paul S. Herrnson, *Party Campaign Activity and Party Unity in the U.S. House of Representatives*, 22 LEGIS. STUD. Q. 393 (1997); Kevin M. Leyden & Stephen A. Borrelli, *Party Contributions and Party Unity: Can Loyalty Be Bought?*, 43 W. POL. Q. 343 (1990); Richard Clucas, *Party Contributions and the Influence of Campaign Committee Chairs on Roll-Call Voting*, 22 LEGIS. STUD. Q. 179 (1997). *But*

do not always reward party loyalty when they decide how to contribute money across candidates, candidates nevertheless may respond to past contributions from the party by prospectively becoming more loyal to the party.

In just this way, previous research on elected judges finds that they adapt their judicial decisionmaking predictably in response to retention incentives. For example, in earlier work one of us found that the judicial decisions of partisan judges conform to the preferences of whoever will decide whether those particular judges retain their jobs for another term, whether that decisionmaker is the governor, legislature, or the voters.<sup>164</sup> By contrast, judges with permanent tenure and “lame duck” judges retiring before the next election—neither of whom face significant worries about retention—do not similarly conform their decisions toward voter preferences. Judges, just like other elected officials, respond predictably and rationally to retention incentives.

Along exactly these lines, we explore in this Part whether elected judges who receive campaign finance support from their party are more likely to cater to their party in their decisions. We look at the cleanest measure of party support in campaign finance—contributions directly from the party to a candidate. With contributions straight from the party, there is no question about to whom the candidate’s loyalty is owed. The party controls the money and chooses to allocate it in support of a particular judicial candidate up for election.

As a measure of partisan loyalty, we look at election cases decided by state supreme courts in our database. Election cases are defined in our dataset as arising from a dispute in a particular election, and almost all involved either the counting of ballots or the technical eligibility of a candidate in a particular election. Two cases addressed analogous questions regarding the appointment of a replacement to a vacated office.<sup>165</sup> Another case addressed the lawfulness of a series of election tactics under state law<sup>166</sup> and the assignment of attorneys’ fees in the litigation that followed.<sup>167</sup> As we describe further below, each case involved partisan stakes, but almost all the cases hinged on a technical question about election procedure or compliance with candidacy rules.

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see David L. Schechter & David M. Hedge, *Dancing with the One who Brought You: The Allocation and Impact of Party Giving to State Legislators*, 26 LEGIS. STUD. Q. 437 (2001).

<sup>164</sup> Shepherd, *supra* note, both Duke L.J.

<sup>165</sup> State ex rel. Herman v. Klopfleisch, 651 N.E.2d 995 (Ohio 1995); Nesbitt v. Apple, 891 P.2d 1235 (Okla. 1995).

<sup>166</sup> Dansereau v. Ulmer, 903 P.2d 555 (Alaska 1995).

<sup>167</sup> Dansereau v. Ulmer, 955 P.2d 916 (Alaska 1998).

These election cases are better tests of partisan loyalty for judges than other types of politically salient cases that simply present an ideological valence. Although there is a deep literature regarding the influence of partisanship on judicial behavior, almost all the empirical studies struggle with the close relationship between partisanship and judicial ideology. Given that parties organize at least in part on ideological lines, partisan affiliation of a judge on one hand, and his or her judicial ideology on the other hand, will be closely linked and difficult to disentangle from one another. Democratic judges tend to decide cases differently than Republican judges, but given the different ideological philosophies of the major parties, the partisan split between judges may simply be a legitimate ideological disagreement, rather than one motivated by partisan loyalty. Even studies on election law cases, which often place partisan advantage in the balance, confront this basic conflation of partisanship and ideology.<sup>168</sup>

Take, for instance, Adam Cox and Thomas Miles's study of federal appellate decisions on Section 2 liability under the Voting Rights Act.<sup>169</sup> Under Section 2, federal judges decide whether a particular jurisdiction has engaged in discriminatory vote dilution on the basis of race. A finding of vote dilution requires the dismantling of the dilutive voting qualification, standard, practice, or procedure in a way that typically increases racial minority political participation, which in turn is typically thought to benefit Democratic candidates.<sup>170</sup> With this background, Cox and Miles find the likelihood that a federal judge will vote for the plaintiff in a Section 2 case is highly correlated with the partisanship of the President who nominated the judge—Democratic judges are significantly more likely than Republican judges to vote for the plaintiff.<sup>171</sup>

However, Cox and Miles cannot determine why Democratic judges are more sympathetic to Section 2 plaintiffs. They admit that one possibility is simply ideological, that Democrats are more liberal on voting rights issues than Republicans. But Cox and Miles also speculate that “Democratic and Republican appointees may be inclined to cast votes that favor the electoral prospects of their own political party.”<sup>172</sup> This notion of bare partisan

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<sup>168</sup> We distinguish between election cases, as defined above as dealing with a specific dispute related to a particular election, and election law cases, which decided issues of election law that apply more generally to all elections. In this sense, election cases are subspecies of election law cases to the degree that the decision has precedential or other binding effect on later elections, but they are so narrowly focused that they often do not.

<sup>169</sup> Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

<sup>170</sup> See generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

<sup>171</sup> Cox & Miles, *supra* note, at 3.

<sup>172</sup> *Id.* at 22.

loyalty, independent from ideology, cannot be isolated in Cox and Miles's analysis. Indeed, even in reference to the correlation between partisan affiliation and judicial decisions on Section 2, Cox and Miles toggle throughout their discussion among the terms judicial ideology,<sup>173</sup> political ideology,<sup>174</sup> partisanship,<sup>175</sup> and party loyalty,<sup>176</sup> all of which arguably have different substantive meanings. In most categories of cases, decisions that politically benefit a judge's party often can be alternately be explained as a matter of ideology instead of raw partisanship.

Election cases, though, are different. Election cases are relatively rare and arcane. In our dataset, common issues that arose in election cases were whether a candidate could be legally regarded as a resident of particular jurisdiction as required for eligibility for office<sup>177</sup>; whether certain ballots that were not completely filled out could nonetheless be counted as valid votes<sup>178</sup>; whether a candidate was eligible to appear on the ballot notwithstanding certain technical defects in the application of candidacy.<sup>179</sup> These are all plausibly interesting, important questions to which judges may apply their usual philosophical predispositions and judicial methodologies. However, as far as we can tell, no consistent resolution of these types of cases one way or the other lends itself to favoritism toward one major party rather than the other over time and across jurisdictional settings. That is, if Democratic judges consistently favor Democratic candidates in these types of cases, it is unlikely to be the result of a consistent ideological position on these types of questions that happens also to favor Democrats. Instead, it is more likely that Democratic judges who consistently favor Democratic candidates in election cases (and just so for Republican judges with Republican candidates) are doing so because they are influenced, consciously or subconsciously, by a desire to help their party.

It is precisely this risk of partisan bias in election administration that worries election law scholars. Of course, the Supreme Court's decision in *Bush v. Gore* is only the most prominent example of a case where the judges' politics allegedly trumped any fidelity to judicial philosophy on arcane issues of election administration with limited generalizability. As

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<sup>173</sup> Id. at 3.

<sup>174</sup> Id. at 3.

<sup>175</sup> Id. at 19.

<sup>176</sup> Id. at 51.

<sup>177</sup> See, e.g., *Harris v. McKenzie*, 703 So.2d 309 (Ala. 1997); *Burkhart v. Sine*, 489 S.E.2d 485 (W. Va. 1997).

<sup>178</sup> See, e.g., *Pelagatti v. Bd. of Supervisors of Elections for Calvert Cty.*, 682 A.2d 237 (Md. 1995); *Roe v. Mobile Cty. Appointment Bd.*, 676 So.2d 1206 (Ala. 1995); *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996).

<sup>179</sup> See, e.g., *Jones v. Johnston Cty. Election Bd.*, 933 P.2d 872 (Okla. 1996); *Geer v. Kadera*, 671 N.E.2d 692 (Ill. 1996); *Curry v. Hosley*, 657 N.E.2d 1311 (N.Y. 1995); *Pierce v. Breen*, 657 N.E.2d 1304 (N.Y. 1995).

Ned Foley notes, “The conventional rules that most states use for adjudicating disputes over the counting of ballots are sufficiently malleable that judges prone to partisanship easily manipulate those rules to support a decision for their favored candidate.”<sup>180</sup>

This risk of partisan politics as the main judicial motivation during the heat of an undecided election, where the partisan ramifications are clear, has persuaded election law scholars to argue that judges ought to be bound by rules set *ex ante*, when the partisan stakes are uncertain. Because there is no obvious partisan advantage in any particular calibration of most matters in election administration beyond fairly concrete circumstances, Elizabeth Garrett, for instance, argues that *ex ante* rule-setting would require “state institutions to act behind a partial veil of ignorance and thus avoid the temptation to advance the cause of particular candidates.”<sup>181</sup> Along the same lines, Josh Douglas urges states to adopt clear statutory rules and guidelines to bind adjudicators of election disputes.<sup>182</sup> But this obvious potentiality for partisan bias in election cases makes this category of cases a useful test of judges’ partisan loyalty for our analysis that follows in the next section.

#### B. Empirical Results: Partisan Loyalty in Election Cases

To explore whether elected judges who receive campaign finance contributions from their party are more likely to cater to their party’s interests, we explore the relationship between party money and partisan loyalty in election cases. As these cases lack a consistent ideological position, our analysis allows us to isolate the influence of partisan bias from ideological philosophy. We re-estimate Model 2 once more to test the relationship between judges voting and party contributions. Although we use similar data, models, and techniques as the previous analysis, our new estimation is confined to election cases. The equation for this model is expressed below as Model 4:

$$(4) \text{ Prob}(\textit{PartyVote}=1/x) = \phi (\beta_0 + \beta_1*\textit{PartyContributions} + \beta_2*\textit{Judge} + \beta_3*\textit{Case} + \beta_4*\textit{State})$$

In this estimation, we define *PartyVote* differently depending on the litigants’ party and judges’ party. In cases involving a litigant/contested election candidate from the same party as the judge, a *PartyVote* is a vote for the candidate from the same party. In cases not involving a

<sup>180</sup> Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 417, 477 (2010).

<sup>181</sup> Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975 (2001).

<sup>182</sup> Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. (2012).

litigant/contested election candidate from the same party but involving a litigant/contested election candidate from the opposing party (i.e. a Democratic contested election candidate when the judge is Republican), a *PartyVote* is a vote against the opposing-party candidate. For example, in a case involving a Democratic candidate contesting the election results, claiming the absentee ballots are invalid, a Republican judge voting to affirm the election results (voting against the Democratic candidate) is defined as a *PartyVote*.

Table 11 reports the results. The results reveal that, whereas Republican Party money is associated with increases in the probability that Republican judges will vote for party interests, Democratic Party money has no statistically significant relationship with the probability that Democratic judges will vote for party interests.

TABLE 11:  
PARTY CONTRIBUTIONS AND JUDICIAL VOTING IN ELECTION CASES<sup>183</sup>

	Vote for Party- Preferred Litigant
Republican	0.03 (0.15)
Percent of Contributions from Republican Party	0.01* (2.19)
Democratic	0.01 (0.63)
Percent of Contributions from Democratic Party	0.02 (1.41)
# of Observations	85

The magnitudes of the coefficients indicate the average relationship between party money and voting for the party-preferred litigant. The results suggest that, as the percentage of total contributions from the Republican Party increases by 1 percentage point (for example, from 49 percent to 50

<sup>183</sup> The table reports the marginal effects of each variable on the probability of a judge voting for the party-preferred litigant, based on probit estimates. Standard errors clustered by state are reported underneath each marginal effect. “\*” and “+” represent significance at the 5 percent and 10 percent levels, respectively.

percent of total contributions), judges are 1 percent more likely to vote either for the Republican candidate/litigant or against the Democratic candidate/litigant. Whereas the results suggest that contributions from the Democratic Party have a similar relationship with Democratic judges' voting, the coefficient is statistically insignificant. This insignificance could be either the result of insufficient observations (n=85) to pick up a statistically meaningful relationship or a weak relationship between Democratic Party contributions and Democratic judges' voting in election cases.

Although Republican judges consistently favor Republican candidates in election cases, there is no statistically significant evidence that Democratic judges also favor Democratic candidates. These results suggest an important difference between Republican and Democratic judges' party loyalty. Because resolution of election cases has no consistent ideological position, they represent a rare opportunity to separate the influence of partisan loyalty from ideology. Although a large empirical literature has shown that judges from both parties vote ideologically, our results show that only Republican judges display partisan loyalty through their voting in election cases. Oddly, Republican judges display greater partisan loyalty even though Democratic judges receive larger party contributions; whereas Republican judges received \$99,392 from the Republican Party, Democratic judges received \$190,158 from the Democratic Party.

Our results confirm the fears of election law scholars. Partisan bias does affect voting in election cases for Republican judges. As the rules for adjudicating many election cases are not definite enough to prevent manipulation and creative interpretation, this partisan bias could have profound impacts on the outcomes of elections. Moreover, although it is difficult to disentangle partisanship and judicial ideology in other types of cases our results suggest that party loyalty is an important influence on judges' voting in these other cases as well. Indeed, there is no reason to believe that partisanship only influences judges in election cases. Thus, it is likely that judges, and especially Republican judges, are influenced, consciously or not, by a desire to help their party in many different types of cases.

#### V. THE PARTISAN CAPTURE OF JUDICIAL CAMPAIGN FINANCE: JUDGES AS POLITICIANS IN ROBES

The picture of judicial campaign finance that emerges from our work is simple but striking: Campaign contributions to judges are coordinated by broad party-based coalitions that influence judicial decisionmaking in party-preferred ideological directions not only on a contributor- or industry-

specific basis, but across the range of issues judges decide. Former Justice Sandra Day O'Connor warned that judicial elections threatened to force judges to become "just politicians in robes."<sup>184</sup> The worry is well substantiated by our data. Elected judges, like other elected officeholders, are sensitive to campaign finance considerations, and their decisionmaking appears to respond predictably to partisan incentives.

These dynamics of judicial campaign finance flow from partisan foundations. The major parties play an indispensable role in the translation of campaign finance money into judicial decisions by organizing the political landscape such that incentives are clear for contributors and officeholders alike. Officeholders invest in the support system of their party, depend on it, and commit to a particular agenda. Contributors understand those dynamics, contribute to candidates of the party closest to their interests, and rely on the party to monitor and discipline those candidates. The parties perform their regular role in connecting judicial candidates with partisan supporters willing to invest in the party's agenda. It is, quite simply, just parties doing what parties do.

We therefore argue that the pervasive influence of money on judicial decisionmaking is more bound up with, and ultimately more dependent on, the major parties than has been understood. Monied interests do not buy their way through brute force unless parties help coordinate candidates and match them with contributors in a systematic fashion under a common party flag. This coordination function of parties explains why there is such congruence in partisan elections but not necessarily in nonpartisan elections and other retention systems. Parties have a greater stake in partisan judicial elections where the party label, and therefore their reputation, is on the ballot. To protect their reputations, parties invest more heavily in partisan judicial elections and press for greater coordination between their candidates and their base constituencies that commit money to those candidates in furtherance of the party agenda.

For these reasons, we believe that the difference between partisan and nonpartisan judicial elections is much more meaningful than anecdotally assumed when it comes to the influence of money on judges. The commentary on judicial elections is full of casual claims that "nonpartisan elections . . . possess all of the vices of partisan elections and none of the virtues,"<sup>185</sup> or that "a nonpartisan election system may be the worst of all selection methods" because "nonpartisan elections are often so in name

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<sup>184</sup> Editorial, *'Politicians in Robes': New Task Force on Judicial Selection Has Chance to Change Flawed System*, GRAND RAPIDS PRESS, Dec. 21, 2010, at A13 (quoting Sandra Day O'Connor).

<sup>185</sup> Peter D. Webster, *Selection and Retention of Judges; Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 26 (1995).

only.”<sup>186</sup> However, our data show a clear, important difference in the character of politics between partisan and nonpartisan elections. Judges elected under nonpartisan elections simply do not appear to be influenced by campaign contributions in the profound way that judges elected under partisan elections appear to be influenced. It is empirically incorrect to say that “there is little meaningful difference between the partisan and nonpartisan versions [of judicial elections], except for less helpful ballot and more ignorant voting in the nonpartisan races.”<sup>187</sup> We find striking differences between partisan and nonpartisan judicial elections for the relationship between campaign contributions and decisions.

What is more, to the degree that there is an influence of money in nonpartisan elections that we have not found in our data, we suspect that parties are at the root of the problem there as well. For instance, Michigan is widely criticized as a state that holds nonpartisan judicial elections that are nonetheless highly politicized.<sup>188</sup> Michigan does not list judicial candidates’ party affiliation on the ballot and runs what are classified as nonpartisan elections as a result. However, the parties in Michigan still nominate judicial candidates and are therefore more invested and involved in judicial races than in states with truly nonpartisan elections where parties do not nominate candidates.<sup>189</sup> We would infer from our data that problems with the influence of money in nonpartisan states such as Michigan are likely to be related to the involvement of parties there as well. Parties, not elections, seem the key to money’s influence on judges.

That said, when we disaggregate contributors and judges by party, we separately discover another important finding of a powerful partisan asymmetry in judicial campaign finance. Republican cohesion in a conservative direction, paired with Democratic vacillation in response to competing ideological influences, contributes to a distinctly conservative flavor to the landscape of judicial decisions. On the PAJID index for

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<sup>186</sup> Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L.J. 281, 322 (1995). See also G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445 (2003) (considering the “convergence in judicial selection systems”); Leslie Southwick, *The Least of Evils for Judicial Selection*, 21 MISS. COLLEGE L. REV. 209, 222 (2002) (arguing that the “artificiality of nonpartisan judicial elections, which are as political as any campaigns in Mississippi, serves no demonstrable purpose”); Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184, 189 (1991) (arguing that “nonpartisan elections offer no evident advantage over either partisan elections or “merit selection”).

<sup>187</sup> SHUGERMAN, *supra* note, at 267.

<sup>188</sup> See *supra*.

<sup>189</sup> See Anthony Champagne, *Judicial Selection from a Political Science Perspective*, 64 ARK. L. REV. 221, 226 (2011).

judicial ideology—the most common measure of judicial ideology, based on both judges’ partisan affiliation and the ideology of their states at the time of their initial accession to office<sup>190</sup>—Republican judges average a score of 39 on a scale from 0 (most conservative) to 100 (most liberal). However, Democratic judges are not much more liberal than Republican judges, with an average PAJID score of only 42 on the scale of 0 to 100. Whatever the influence of money in these aggregate figures, our analysis shows that the influence of campaign finance helps reinforce Republican conservatism and destabilize Democratic liberalism in judicial decisionmaking, netting out in a conservative direction between the two parties. In short, the Republican Party operates campaign finance in a way that perfects coordination between its judges and the party’s larger political agenda, while the Democratic Party lags behind on this score.

The major parties thus are far from one “money party” and instead present distinct normative challenges when it comes to campaign finance. The Republican judges, for their part, are more partisan on the bench in the sense that their responsiveness to campaign finance money is filtered almost entirely through partisanship. To the degree that Republican judges cater to campaign finance considerations, they do so by playing to a unified set of contributors defined by common partisanship. The Republican cohesion on campaign finance raises time-worn worries about the domination of judicial independence by partisan politics.

The Democratic experience with judicial campaign finance raises a very different concern. Democratic judges do not cater to one set of contributors defined by party and maintain a greater measure of flexibility to decide against their party’s preference. Rather than serving a single master, however, Democratic judges appear more susceptible to being pulled in any particular ideological direction based on campaign finance. If Republicans can be caricatured as slaves to partisanship, Democrats are more vulnerable to the charge of catering to the highest bidder independent of ideological commitment.

Why are Republicans more effective at leveraging campaign finance for partisan discipline? There is no literature we can find that systematically analyzes critical differences between Republicans and Democrats in judicial campaign finance. Indeed, there is very limited work on partisan differences in campaign finance of any sort, such that we think our work here breaks new ground. However, there is work from the political science more generally on the major parties that help us identify two possible explanations for Republican superiority in judicial campaign finance: (1) party organization; and (2) party homogeneity. We think that these

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<sup>190</sup> Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 393–94 (2000).

explanations also reflect the degree to which the partisan politics that dominate legislative elections have come to dominate judicial elections as well, and therefore reflect the same dynamics between the parties.

First, party organization matters for partisan effectiveness, including campaign finance. The major parties, as we have discussed above, each provide resources, expertise, and coordination in support of their candidates, but they do so with varying levels of effectiveness. Effective parties provide more useful assistance to candidates and are managed smartly and efficiently with the party's overarching goals at the forefront. Although political scientists decried a decline of party organization during the 1970s into the 1980s,<sup>191</sup> the parties responded by building up new infrastructure, media expertise, and fundraising capacity during the 1980s to suit the new media politics of the times.<sup>192</sup>

What is clear is that the Republicans built up stronger party organizational capacity that helps reinforce their ability to coordinate party campaign finance. Beginning in the late 1970s, the Republican National Committee embarked on a well-funded party-building initiative not only to support Republican candidates for federal office, but to tighten coordination between the national party and its state and local counterparts.<sup>193</sup> This effort helped build up Republican Party organizational capacity to far surpass Democratic capacity early in the 1980s. For instance, Republican Party committees had larger budgets, employed more complex organizational structure, and provided more media services, campaign finance and campaign management expertise, and larger amount of direct party contributions to its candidates than Democratic committees provided to their candidates.<sup>194</sup> Republicans were more active in candidate recruitment, and "Republican party organizations at all levels . . . provide

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<sup>191</sup> See generally WILLIAM J. CROTTY & GARY C. JACOBSON, *AMERICAN PARTIES IN DECLINE* (1980); Gary R. Orren, *The Changing Styles of American Party Politics*, in *THE FUTURE OF AMERICAN POLITICAL PARTIES* (Joel L. Fleishman ed., 1982).

<sup>192</sup> See generally JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1994) (describing the major parties' adaptation from mass mobilization to candidate-centered, media politics).

<sup>193</sup> See, e.g., M. Margaret Conway, *Republican Political Party Nationalization, Campaign Activities, and Their Implications for the Party System*, 13 *PUBLIUS* 1 (1983) (detailing this history).

<sup>194</sup> See Paul S. Herrnson, *Do Parties Make a Difference? The Role of Party Organizations in Congressional Elections*, 48 *J. POL.* 589, 592-610 (1986); James L. Gibson, Cornelius P. Cotter, John Bibby, & Robert J. Huckshorn, *Assessing Party Organizational Strength*, 27 *AM. J. POL. SCI.* 193, 198-209 (1983); James L. Gibson, John P. Frendreis, & Laura L. Vertz, *Party Dynamics in the 1980s: Change in County Party Organizational Strength, 1980-84*, 33 *AM. J. POL. SCI.* 67, 72-86 (1989); Gary C. Jacobson, *Party Organization and Distribution of Campaign Resources: Republicans and Democrats in 1982*, 100 *POL. SCI. Q.* 603, 609-13 (1985).

their candidates with significantly more services than do their Democratic rivals.”<sup>195</sup> Republican Party organizations were more active in integrating national and state activity and were so advanced at the state level that one study observed that “only a few [Democratic] state parties have approached the level of the Republican state parties.”<sup>196</sup> Democratic candidates, unsurprisingly, evaluated their party organizations less highly than Republican candidates and relied more heavily on campaign assistance from outside groups, such as labor unions.<sup>197</sup> What is more, this Republican advantage is less studied now but appears to persist today<sup>198</sup> and is even more important for less salient elected offices, such as state judge, where public awareness is low.<sup>199</sup>

Republican advantages in party organization translate naturally into stronger party discipline as a function of party campaign finance. Republican candidates receive more support of all types from their party and therefore have more to lose from crossing the party on party-line decisions and other tests of loyalty. The Republican Party controls more resources to pass along to, or withhold from, its candidates, and has greater organizational capacity to monitor and react to apostates among its candidates. Party discipline may be a function of party organizational strength, and in short, it makes sense that a better organized, more capable Republican Party does a better job of managing its party campaign finance to discipline its candidates.

Second, party homogeneity should matter for party discipline, and again Republicans appear to have an advantage over Democrats. Political science has long observed greater ideological homogeneity among Republicans than among Democrats.<sup>200</sup> Put simply, Republicans agree among themselves to a greater degree about politics and are more solidly conservative than

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<sup>195</sup> Herrnson, *supra* note, at 611.

<sup>196</sup> Robert J. Huckshorn, James L. Gibson, Cornelius P. Cotter, & John Bibby, *Party Integration and Party Organizational Strength*, 48 J. POL. 976, 988 (1986).

<sup>197</sup> See Herrnson, *supra* note, at 607-09; Gibson, Frendreis, & Vertz, *supra* note, at 82-83.

<sup>198</sup> See, e.g., Sidney M. Milkis & Jesse H. Rhodes, *George W. Bush, the Republican Party, and the “New” American Party System*, 5 PERSPECTIVES POL. 461 (2007); Anthony Paik, John P. Heinz, & Ann Southworth, *Political Lawyers: The Structure of a National Network*, 36 L. & SOC. INQUIRY 892 (2011).

<sup>199</sup> See Timothy B. Krebs, *The Determinants of Candidates’ Vote Share and the Advantages of Incumbency in City Council Elections*, 42 AM. J. POL. SCI. 921 (1998) (studying the value of party support in city council elections); John P. Frendreis, James L. Gibson, & Laura L. Vertz, *The Electoral Relevance of Local Party Organizations*, 84 AM. POL. SCI. REV. 225 (1990) (examining county party organizations).

<sup>200</sup> See D. Jason Berggren, *Two Parties, Two Types of Nominees, Two Paths to Winning a Presidential Nomination, 1972-2004*, 37 PRES. STUD. Q. 203, 211 (2007) (“In terms of ideology and demographics, the literature on American parties has long noted the greater homogeneity among Democrats than among Republicans.”).

Democrats agree among themselves and are solidly liberal. This greater homogeneity holds throughout the different levels of both parties, among party activists,<sup>201</sup> voters,<sup>202</sup> and politicians.<sup>203</sup> We see this greater homogeneity in terms of the profile of conservative-leaning interest groups.

We find in our data that the distribution of contributors is more homogeneous for Republican judicial candidates than for Democratic candidates as measured by the Herfindahl-Hirschman Index (HHI). The HHI is a commonly accepted measure of market concentration in industrial organization economics that considers the size of firms in relation to the industry as a whole by squaring the market share of each firm competing in the market and then summing the results.<sup>204</sup> An HHI near zero, for instance, indicates a large number of firms with equal market share. When we calculated the HHI for contributors to Republican candidates and for contributors to Democratic candidates, and adjust for lawyers' groups,<sup>205</sup> we

<sup>201</sup> See Christopher Bruzios, *Democratic & Republican Party Activists & Followers: Inter- & Intra-Part Differences*, 22 *POLITY* 581 (1990); John S. Jackson, Barbara L. Brown, & David Bositis, *Herbert McClosky and Friends Revisited*, 10 *AM. POL. Q.* 158 (1982).

<sup>202</sup> See Barbara Norrander, *The Best Laid Plans . . . : Super Tuesday 1988*, in *NOMINATING THE PRESIDENT 72* (Emmett H. Buell & Lee Sigelman eds., 1991); Barbara Norrander, *Nomination Choices: Caucus and Primary Outcomes, 1976-1988*, 37 *AM. J. POL. SCI.* 343 (1993); J. David Gopoian, *Issue Preferences and Candidate Choice in Presidential Primaries*, 26 *AM. J. POL. SCI.* 523 (1982); James I. Lingle, Diana Owen, & Molly W. Sonner, *Divisive Nominating Mechanisms and Democratic Party Electoral Prospects*, 57 *J. POL.* 370 (1995); .

<sup>203</sup> See JAMES A. REICHLEY, *THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES* (2000); WILLIAM G. MAYER, *THE DIVIDED DEMOCRATS* (1996).

<sup>204</sup> U.S. Department of Justice, Herfindahl-Hirschman Index (last visited June 27, 2002) available at: <http://www.justice.gov/atr/public/guidelines/hhi.html>

<sup>205</sup> We find this effect after discounting contributions from lawyers' groups to both sides. Lawyers' groups are the largest industry sector among contributors to Democratic candidates, but given their pervasive professional interaction with judges from both sides, lawyers' groups' motivations for contributing are more complicated than other industries. Lawyers contribute to judicial campaigns not necessarily to support a particular judge that shares their ideological views, but often, even usually, to increase their individual chance of winning cases to be heard by those judges when they appear professionally before them.

Empirical work finding a correlation between lawyer contributions and subsequent judges' rulings in favor of the clients represented by those lawyers suggests that this may be a smart, sometimes even necessary approach. See Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 25 *J.L. & POL.* 645, 660 (1999) (examining arbitration decisions in the Alabama Supreme Court); Eric N. Waltenburg & Charles S. Lopeman, *2000 Tort Decisions and Campaign Dollars*, 28 *SOUTHEASTERN POL. REV.* 241, 248, 256 (2000) (examining tort cases before state supreme courts in Alabama, Kentucky, and Ohio); Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994-1997*, 31 *POL. & POL'Y* 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money).

find that contributions to Republican candidates are considerably more concentrated than contributions to Democratic candidates (1086 versus 897).<sup>206</sup>

The resulting Republican advantage in terms of homogeneity interacts with and multiplies the Republican advantage in party organization. As political science work on parties has shown, party organization is more effective and easier when the party constituents are more homogeneous, there is less internal disagreement to mediate, and party goals are more widely and clearly shared.<sup>207</sup> It is intrinsic to the logic of collective action that concentrated, homogeneous interests enjoy comparative advantages in coordination and mobilization.<sup>208</sup>

Our findings on judicial campaign finance resonate with Thomas Edsall's classic depiction of the major parties' development over the past thirty years. On the one hand, Edsall characterizes the Republican Party as a "juggernaut—a loosely connected but highly coordinated network of

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Lawyers therefore prefer to give directly to candidates' campaigns so that future judges might remember who supported their election campaigns when the lawyers appear in their courtroom. Empirical work further establishes that even liberal lawyers regularly give to both Republican and Democratic judges. See Madhavi McCall & Michael McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court: Assessing the Appearance of Impropriety*, 90 JUDICATURE 214, 218 (2007). While lawyers and business groups contribute directly to judicial candidates at approximately the same rate, business groups spend significantly more on television advertising than lawyers. See JAMES SAMPLE, LAUREN JONES, & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS*: 2006 8, 19 (Jesse Rutledge ed., 2006), available at [http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006\\_D2A2449B77CDA.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf). Because lawyers' campaign finance motivations are so much more multifaceted and less ideological and partisan in purpose, we chose to discount contributions from lawyers' groups in calculating HHI scores.

<sup>206</sup> Without discounting of lawyers' groups, there would be greater concentration in the contributions to Democratic candidates than the contributions to Republican candidates. Contributions from lawyer groups make up 43 percent of total contributions in the average Democratic candidate's campaign while contributions from business groups are only 24 percent of contributions in the average Republican candidate's campaign. The resulting HHI for contributions to Democratic candidates is almost twice the HHI for contributions to Republican candidates (3,104 versus 1,887). As adjusted without lawyers' contributions, the HHI for Democratic contributions is 71 percent lower while the new HHI for Republican contributions is 42 percent lower than the unadjusted figure.

<sup>207</sup> See generally DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991); GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN* (1991); William R. Lowry & Charles R. Shipan, *Party Differentiation in Congress*, 27 LEGIS. STUD. Q. 33 (2002); David W. Brady, Richard Brody, & David Epstein, *Heterogeneous Parties and Political Organization: The U.S. Senate, 1880-1920*, 14 LEGIS. STUD. Q. 205 (1989); Joseph Cooper & David W. Brady, *Institutional Context and Leadership Style: The House from Cannon to Rayburn*, 75 AM. POL. SCI. REV. 411 (1981).

<sup>208</sup> MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 5-65 (1971).

individuals and organizations—with a shared stake in a strong, centralized political machine.”<sup>209</sup> As he describes it, the Republican Party during the second half of the twentieth century became more ideologically homogeneous as an increasingly stronger alliance among the right-wing policy community, business community, and traditional Republicans. This conservative convergence, in Edsall’s view, “provided ideological coherence to what had previously been a disparate, and often conflicting, set of forces, and has provided financial backing for a shift in the balance of power in American politics.”<sup>210</sup>

For Republicans, campaign finance helped reinforce this cohesion. With the party and campaign finance supporters all rowing in the same direction, the financial support of conservative-leaning interests “function[ed] to encourage the development of a politically coherent conservative stance on matters of both economic and social policy.”<sup>211</sup> The consolidated support of the party and conservative-leaning interests “developed a base of campaign financing that, rather than encouraging internal conflict, works with the development by the part of a set of consistent economic policies beneficial to the affluent plurality of its own constituency.”<sup>212</sup> Campaign finance built on the Republican Party’s internal cohesion and added a layer of coordination and incentives to the party’s organizational efforts.

By contrast, Thomas Edsall portrays the Democratic Party as the “party in conflict.”<sup>213</sup> He characterizes the Democratic Party as split between conflicting factions. “[T]here are now two major factions within the Democratic coalition: the largely white, well-educated, professional class, and much of the bottom third of the socioeconomic ladder made up of lowest-income whites, blacks, and Hispanics.”<sup>214</sup> Edsall explains that the Democratic Party’s lack of homogeneity and policy cohesion compared to the Republican Party demanded a stronger organization to generate and enforce party discipline, but “Democrats have, over the past forty years, had problems sustaining institutions and have lacked continuous investment in party-building enterprises.”<sup>215</sup>

What is more, Democratic campaign finance “encourages, indeed guarantees, ideological conflict.”<sup>216</sup> Edsall points out that contributions to

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<sup>209</sup> THOMAS B. EDSALL, *BUILDING RED AMERICA: THE NEW CONSERVATIVE COALITION AND THE DRIVE FOR PERMANENT POWER* 5 (2006).

<sup>210</sup> THOMAS BYRNE EDSALL, *THE NEW POLITICS OF INEQUALITY* 72-73 (1984).

<sup>211</sup> THOMAS BYRNE EDSALL, *THE NEW POLITICS OF INEQUALITY* 86 (1984).

<sup>212</sup> EDSALL, *NEW POLITICS*, *supra* note, at 200.

<sup>213</sup> EDSALL, *NEW POLITICS*, *supra* note, at 23.

<sup>214</sup> EDSALL, *BUILDING RED AMERICA*, *supra* note, at 234-35.

<sup>215</sup> EDSALL, *BUILDING RED AMERICA*, *supra* note, at 227.

<sup>216</sup> EDSALL, *NEW POLITICS*, *supra* note, at 87.

congressional Democrats were typically split between conservative and liberal-leaning contributors, such that “the party [was] to some extent immobilized by the dependence of incumbent Democrats in the House and in the Senate on nearly equal amounts of campaign support from labor, business, and special-interest sources, constituencies with often directly conflicting legislative objectives.”<sup>217</sup> Campaign finance, when coupled with the parties’ respective internal composition and organization, helped to consolidate the Republican Party while encouraging the Democratic Party to become “economically and ideologically bifurcated.”<sup>218</sup>

In our view, party campaign finance for judicial elections and its effect on judicial decisionmaking echoes Edsall’s account of party campaign finance in Congress. Republican judicial decisionmaking thus is more cohesive as a function of campaign finance support, while Democratic judicial decisionmaking appears pulled in competing directions by campaign finance. In other words, in both congressional and state judicial elections, Republicans leverage campaign finance to coordinate and extend their ideological agenda more powerfully, and with greater organization and discipline than Democrats. Campaign finance drives judicial decisionmaking for both parties in some sense, but is much more successful in reinforcing and serving partisan ends for Republicans. Republicans derive a much higher payoff in terms of generating preferred judicial decisions as a function of their campaign finance investments than the Democrats.

In sum, our findings on state judicial elections suggest that partisan politics have effectively captured judicial elections through basically the same dynamics that characterize legislative elections and politics. The major parties have extended their campaign finance activity through their party coalitions from legislative politics to judicial elections. It is difficult to read Edsall’s account and not conclude that similar dynamics may be occurring in the way that the parties approach state judicial elections, at least the partisan ones where their party label is most at stake. The history of judicial selection, and the resulting evolution from judicial appointment to the current system of judicial elections, thus again has arrived at the same point, where partisan politics threatens to absorb the judiciary. We express no view here about the appropriate reform of judicial selection, whether it is merit selection, public financing, or some other institutional response, but if one worries about the influence of parties and money on the state judiciary, our findings substantiate the worry quite dramatically and identify partisan foundations for the problem.

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<sup>217</sup> EDSALL, *NEW POLITICS*, *supra* note, at 200.

<sup>218</sup> EDSALL, *BUILDING RED AMERICA*, *supra* note, at 227.

## CONCLUSION

Using a dataset that covers all fifty states over a four-year period, the Article demonstrates that contributions from both groups and political parties are associated with judicial votes in favor of the interests of those contributors. However, the influence of money works in strikingly different ways for Republican and Democratic judges. Although Republican judges do not appear to be influenced by campaign finance contributions from the Democratic coalition, Democratic judges are influenced by campaign support from the Republican coalition and thus cross pressured from opposite directions. There is little work in the large literature on political parties that runs along these lines or explores these dynamics for campaign finance in other domains, such as Congress and state executive and legislative offices. We suspect that future empirical work would find the same dynamics in other arenas as well, both in terms of the centrality of parties in money's influence and the partisan asymmetry we find in judicial campaign finance.

To end on a provocative note, we think that our findings also offer interesting insight into the partisan psychology about campaign finance reform between Republicans and Democrats. For Republican judicial candidates, campaign finance poses few complications in terms of competing loyalties and instead seems to encourage them to be ever more responsive to Republican preferences over policy. Democratic judicial candidates, by contrast, appear to experience more fraught choices when it comes to campaign finance. Democratic judicial candidates weigh countervailing loyalties along campaign finance lines from contributors whose preferences are not cohesive. In certain cases, Democratic candidates may feel pressure to pick between conflicting loyalties in a process that may resemble competitive bidding more than they would like. As one Democratic state justice saw it, “until we sever the link between big money and the administration of justice . . . elections for the Supreme Court are likely to become outright auctions going to the highest bidder.”<sup>219</sup> Democratic judges, understood from this perspective, may experience psychological conflict between campaign finance pressures and ideological principle more acutely and frequently than their Republican counterparts.

Democratic judges therefore could be more sensitive to what could be characterized as the risk of corruption from campaign finance because,

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<sup>219</sup> Bert Brandenburg & Janine Geske, *State Needs Reform to Keep Courts Fair and Impartial*, WISC. CAPITAL TIMES, June 20, 2007, at A8 (quoting former Wisconsin Chief Justice Nathan Heffernan). See also Michael Scherer, *State Judges for Sale: In the 39 States that Elect Appellate Judges, Politicization of the Bench Is Growing*, THE NATION, Sept. 2, 2002, at 20 (quoting Democratic judge Jim Parsons concluding “I’m afraid that justice is still for sale in Texas and other states”).

through no fault of their own, they feel more subject to it than their Republican counterparts. Democratic judges may, in turn, also identify a greater interest in regulatory measures to guard against this type of campaign finance pressure, through campaign finance reform, than Republican judges who feel far less such pressure as an individual matter.<sup>220</sup> For Republican judges, by contrast, any correspondence between campaign contributions and decisions in favor of the contributors can be more easily understood in good faith by them as happy convergence of principle and contributor support, rather than evidence of corruption. As Justice Kennedy addressed the point matter-of-factly in *McConnell v. FEC*, “It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.”<sup>221</sup>

The point is not that Republican and Democratic judges’ views on campaign finance simply reflect their personal self-interest or are otherwise largely unprincipled. However, we assume that their views are tempered and shaped by their experience and knowledge about how the world works. For judges, their experience of the campaign finance politics that surround partisan elections differs significantly depending on their party, and those individual experiences tend to reinforce their party’s traditional philosophy on campaign finance reform.

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<sup>220</sup> See, e.g., Kevin Murphy, *Recent State Supreme Court Races Have Turned ‘Elections into Auctions,’ Panel Says*, WISC. CAPITAL TIMES, Nov. 19, 2008.

<sup>221</sup> *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy J., dissenting).