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Written Testimony of State Representative Carmichael
 In Opposition to HCR 5004 & HCR 5005
 House Judiciary Committee
 February 11, 2015

Chairman Barker and Members of the Committee:

I offer this written testimony in opposition to the two pending concurrent resolutions, as well as the other judicial selection resolutions now referred to the committee. Omitted from this testimony are thoughts concerning judicial retirement—a topic for another day. Also, in the interest of disclosure, I proudly confess to being a thirty-plus year member of the Kansas Bar, Kansas Federal District Court Bar, Tenth Circuit Court of Appeals Bar, and the Bar of the United States Supreme Court.

There's an old saying, "If it ain't broke, don't fix it." The wisdom of this statement clearly applies here. While our Secretary of State believes our state's judiciary is of inferior competence as compared with the federal judiciary, the facts do not support his conclusion. For example, The United States Chamber of Commerce's Institute for Legal Reform has surveyed the quality of state legal environments in all fifty states for the past 10 years. In the Chamber's most recent report, a copy of which is appended hereto, the Chamber concludes the Kansas legal system ranks fifth in the nation overall, eighth in the nation with respect to judicial impartiality and ninth in the nation in judicial competence.

Others assert change is needed because a "Federal" system improves democratic participation. The claim is that involving democratically elected senators in the selection process benefits democracy. I remind the committee that under our present merit selection process the governor, a democratically elected representative of the people, makes the final selection of judges of our Supreme and District Courts [with the exception of counties such as mine, where district court judges are selected through partisan elections]. More importantly, one need only look to the sad experience of the past 16 years in the federal judiciary where partisan bickering has delayed and or defeated the nominations of well qualified jurists to the extent that some estimate as many as 40% of federal judicial positions have remained unfilled. Equally concerning is the New Jersey example, where since 2010 only one justice has been confirmed to the State's Supreme Court and until recently, the seven member court had only four members because of a stalemate between the governor and state senate.

In my judgment the least meritorious proposal before the committee is partisan election of judges, particularly appellate judges. A recent study by Professor Joanna Shepherd of Emory University School of Law, *Justice at Risk, An Empirical Analysis of Campaign Contributions and Judicial Decisions*, is

appended for the committee's consideration. The study concludes that of the dollars spent by judicial candidates nationwide, 30% of the campaign contributions come from business related donors and 28% of the contributions come from lawyers. Not surprisingly, the study concludes, with a high degree of confidence, there is a direct relationship between campaign contributions and how judges rule. While an argument can be made that it is a legitimate expression of free speech to financially support gubernatorial and legislative candidates with whom donors agree—"Justice is Blind." Attempting to influence or successfully influencing judicial decisions with money is wrong—look only to the sad experience in our neighboring state of Oklahoma in the mid-sixties where lawyers bought their justices by bringing stacks of cash directly to the Supreme Court chambers.

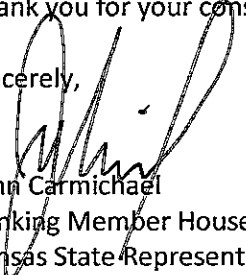
Finally, we turn to Kansas history. In 1956 amid scandal, Governor Fred Hall was defeated in the primary. Meanwhile Chief Justice William Amos Smith passed on to his eternal reward, after having announced he would resign prior to the new governor, George Docking, assuming office so Gov. Docking could not appoint his successor. After being unsuccessful in his bid to find post-gubernatorial employment in appointive federal office, Gov. Hall instead resigned his remaining term as governor and was promptly appointed by the former Lt. Gov., John McCush, to serve as Chief Justice; and thus the defeated Gov. Hall found a full time job in state government. This was all accomplished prior to the new Governor, George Docking, assuming office in January 1957, the year of my birth. The "Triple Jump" of 1956 led to the reforms which gave rise to our present Kansas merit selection process. The entire sorry story is described in Professor R. Alton Lee's outstanding and often cited article in *the Journal of the Kansas Bar Association* appended hereto.

While there may well be legitimate concern regarding the appearance of domination of the Merit Judicial Selection Commission by members of the bar, the testimony provided to the committee earlier in the session suggests the contrary. However, to the extent either public perception or an asserted lack of transparency in the selection process on it's face raise a possible need for change, this representative urges the committee not to change the method of judicial selection in the midst of a political fray. Claims of wrongly decided cases from the Secretary of State, assertions that gubernatorial candidates and even members of this committee, will excuse murderers from the most heinous crimes imaginable, claims the Supreme Court has wrongly decided cases involving school finance and calls by our Governor to "...change the way we select judges so we can get judges who will vote the way we want them to," [Topeka Capitol Journal, February 10, 2015] poison the debate. If change is necessary, now is not the time.

Absent demonstrated bias or incompetency on the part of our Supreme Court, this representative urges the committee to defer the debate to another time so the political exigencies of the moment do not dictate an outcome which may adversely affect the Kansas judiciary for generations to come.

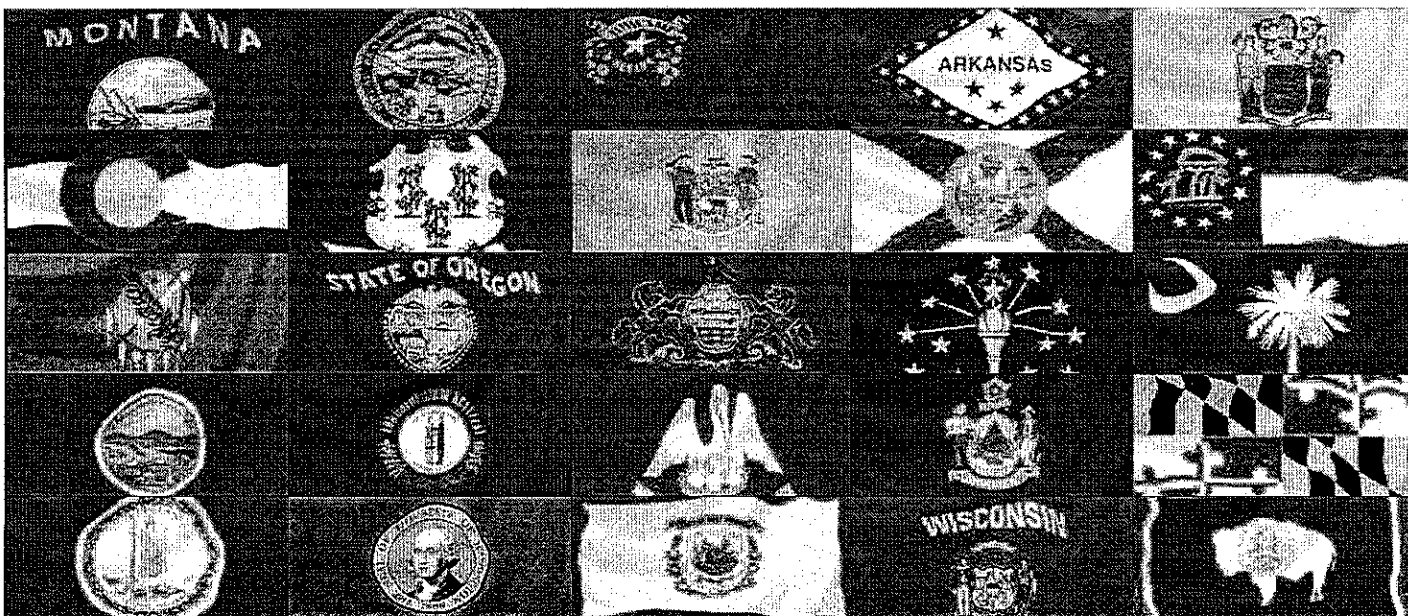
Thank you for your consideration of my thoughts.

Sincerely,



John Carmichael
Ranking Member House Judiciary Committee
Kansas State Representative
District 92

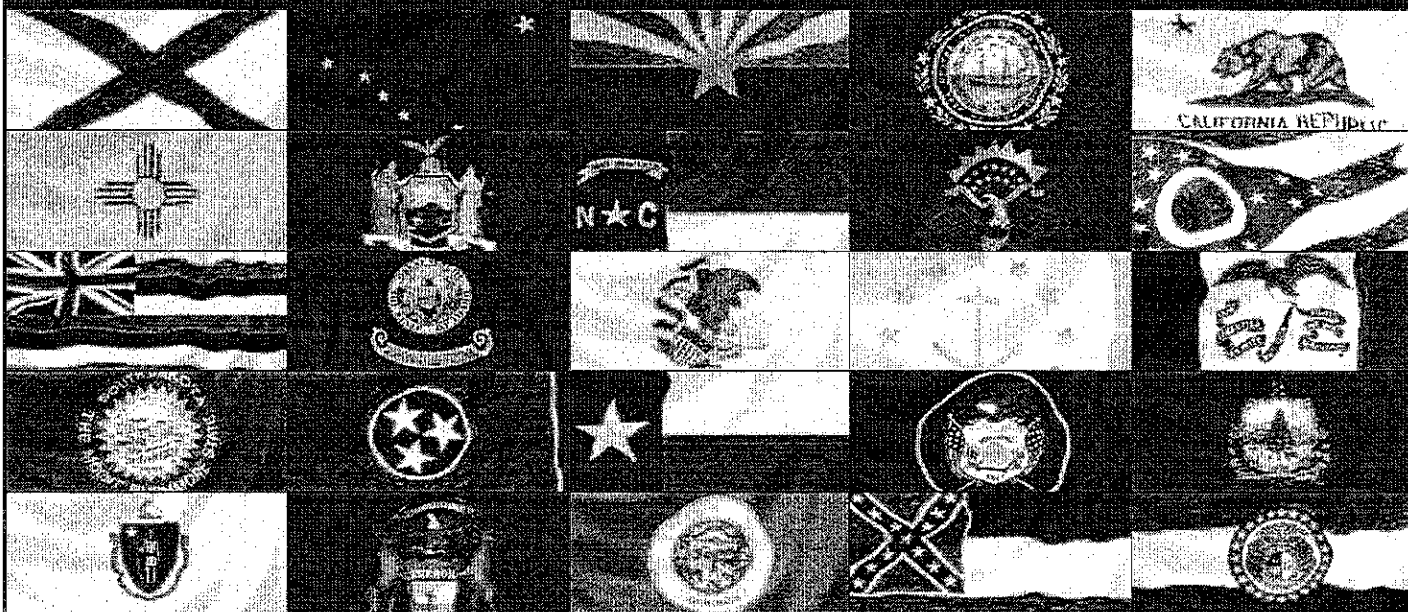
Enclosures:



2012 State Liability Systems Survey

LAWSUIT CLIMATE

Ranking the States

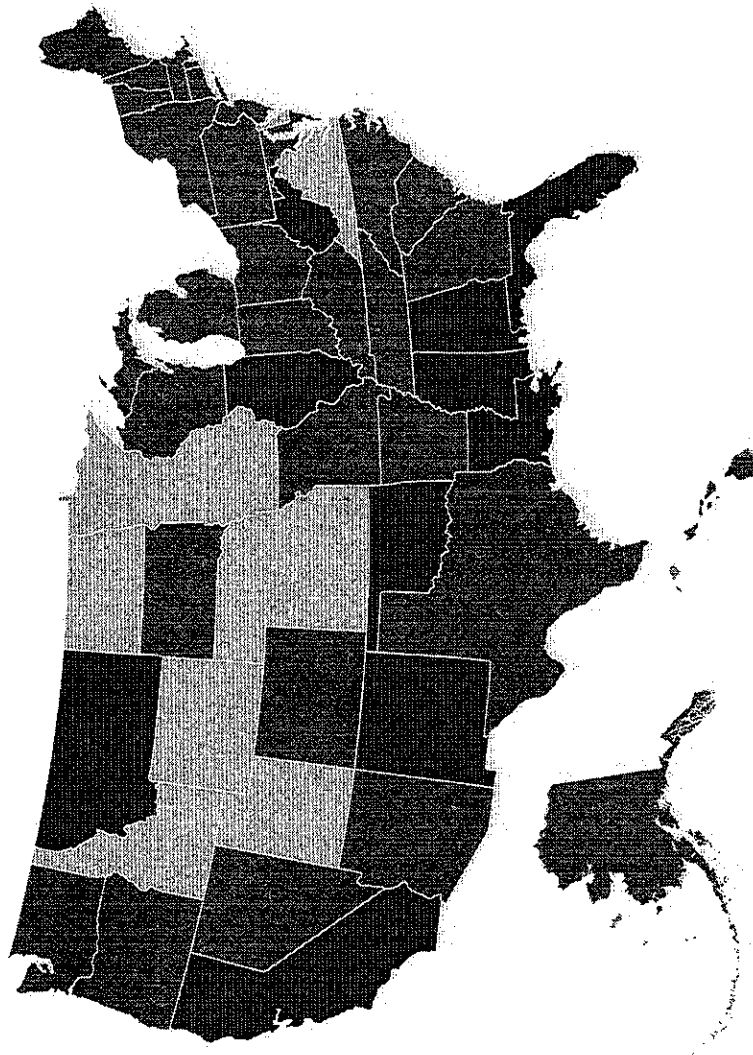


Conducted by Harris Interactive Inc. for the U.S. Chamber Institute for Legal Reform,
September 2012

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2012 Legal Climate Overall Rankings by State



1	Delaware	26	Tennessee
2	Nebraska	27	Michigan
3	Wyoming	28	Oregon
4	Minnesota	29	Hawaii
5	Kansas	30	Ohio
6	Idaho	31	Rhode Island
7	Virginia	32	New Jersey
8	North Dakota	33	Maryland
9	Utah	34	Missouri
10	Iowa	35	Arkansas
11	South Dakota	36	Texas
12	Maine	37	Nevada
13	Alaska	38	Kentucky
14	Indiana	39	South Carolina
15	Wisconsin	40	Pennsylvania
16	Vermont	41	Florida
17	Arizona	42	Oklahoma
18	New York	43	Alabama
19	Massachusetts	44	New Mexico
20	North Carolina	45	Montana
21	New Hampshire	46	Illinois
22	Washington	47	California
23	Colorado	48	Mississippi
24	Georgia	49	Louisiana
25	Connecticut	50	West Virginia

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The 2012 State Liability Systems Ranking Study was conducted for the U.S. Chamber Institute for Legal Reform to explore how fair and reasonable the states' tort liability systems are perceived to be by U.S. businesses. Participants in the survey were comprised of a national sample of 1,125 in-house general counsel, senior litigators or attorneys, and other senior executives who indicated that they are knowledgeable about litigation matters at companies with at least \$100 million in annual revenues. The 2012 ranking builds on previous years' work,¹ where in each survey year all 50 states are ranked by those familiar with the litigation environment in that state. Prior to these rankings, information regarding the attitudes of the business world toward the legal systems in each of the states had been largely anecdotal. The State Liability Systems Ranking Study aims to quantify how corporate attorneys view the state systems.

Approximately half of all senior attorneys (49%)² view the fairness and reasonableness of state court liability systems in America as excellent or pretty good, up from 44% in the 2010 survey. The remaining 51% view the systems as only fair or poor, or declined to answer (1%). **The impact of a state's litigation environment has always been and continues to be important, with more than two-thirds (70%) reporting that it is likely to impact important business decisions** at their companies, such as where to locate or do business. This is an increase from 67% in 2010 and 63% in 2008.

Respondents were first screened for their familiarity with states, and those who were very or somewhat familiar with the litigation environment in a given state were then asked to evaluate that state. It is important to remember that **courts and localities within a state may vary a great deal** in fairness and reasonableness. However, respondents had to evaluate the state as a whole. To explore the detailed nuances within each state would have required extensive questioning about each state and was beyond the scope and purpose of this study. Other studies have also demonstrated this variability within a

1 2010, 2008, 2007, 2006, 2005, 2004, 2003, and 2002.

2 Differences between this value and those on the line graph on p. 5 are due to rounding.

state. For example, several studies have documented very high litigation activity in certain county courts such as Madison County, Illinois, and Jefferson County, Texas, revealing that these counties have “magnet courts” that are extremely hospitable to plaintiffs. Thus, it is possible that some states received low grades due to the negative reputation of one or two of their counties or jurisdictions.

Overall Rankings of States

Respondents were asked to give states a grade (A through F) in each of the following areas: overall treatment of tort and contract litigation; having and enforcing meaningful venue requirements; treatment of class action suits and mass consolidation suits; damages; timeliness of summary judgment or dismissal; discovery; scientific and technical evidence; judges’ impartiality; judges’ competence; and juries’ fairness. They were also asked to give the state an overall grade for creating a fair and reasonable litigation environment. These elements were then combined to create an **overall ranking of state liability systems**.

Taken as a whole, general counsel and senior litigators perceive state courts to be doing better than average on the various elements. States received significantly more

A’s and B’s (49%) than D’s and F’s (16%) when all of the elements were averaged together, as shown in the table below.

Average Percentage Across All Elements Among 50 States

Grade	Average Percentage
A	12%
B	37%
C	28%
D	11%
F	5%
Not sure/ Decline to answer	7%

Since the inception of the survey, there has been a general increase in the overall average score (expressed numerically on a scale of 1 to 100) of state liability systems, and this trend continues with the 2012 survey. In fact, the 2012 survey results show a significant increase from the relatively level showing from 2007-2010. This year the score has increased by three percentage points.

**Average
Overall
Score
Among
50 States**

Year	Average Overall Score
2012	60.9
2010	57.9
2008	59.4
2007	58.1
2006	55.3
2005	52.8
2004	53.2
2003	50.7
2002	52.7

Most Important Issues to Focus On to Improve the Litigation Environment

The study also asked respondents to name the most important issue that policymakers who care about economic development should focus on to improve the litigation environment in their states. Limits on discovery were mentioned by 5% of respondents. Other top issues named were elimination of unnecessary lawsuits (4%), fairness and impartiality (4%), speeding up the trial process (3%), and tort reform (3%).

Worst Local Jurisdictions

In order to understand if there are any cities or counties that might impact a state's ranking, respondents were

asked which five cities or counties have the least fair and reasonable litigation environments. The worst jurisdiction was Chicago/Cook County, Illinois (17%), followed by Los Angeles, California (16%), the state of California in general (9%), San Francisco, California (9%), and Philadelphia, Pennsylvania (8%).

To understand why respondents feel negatively about particular jurisdictions, a follow-up question was asked to those who cited a jurisdiction. A third (33%) of respondents mentioned that the reason why a city or county has the least fair and reasonable litigation environment is because of biased or partial juries/judges. Similar to 2010, this is the number one reason by a large margin. The next tier includes corrupt/unfair system (9%), a slow process (9%), anti-

business/anti-corporate environment (8%), unreasonable rulings/verdicts (6%), incompetent juries/judges (5%), and excessive damages awards (5%).

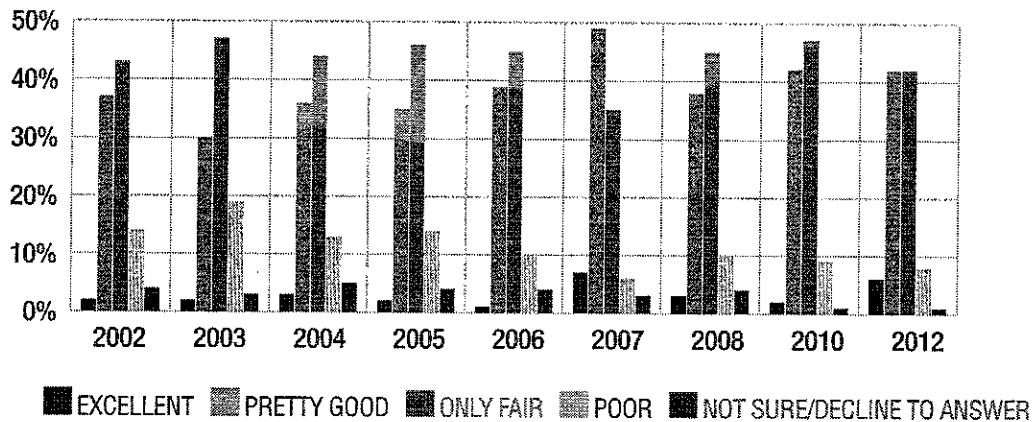
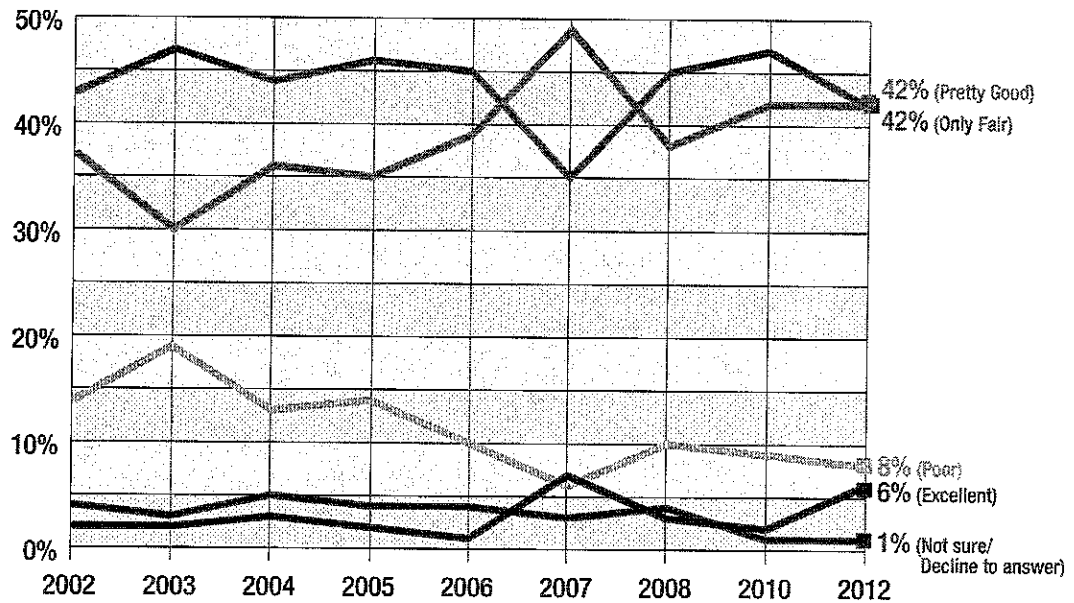
Conclusion

Several organizations³ have conducted surveys among various constituencies of state courts to determine and understand how the state courts are perceived by these audiences. Until the annual **State Liability Systems Survey** was initiated in 2002, there was no data on one important constituency: senior lawyers in large companies. This, the ninth **State Liability Systems Survey**, finds that while the overall average scores of the states are increasing, senior lawyers in large corporations still have mixed perceptions about the fairness and reasonableness of state liability systems *overall*.

An examination of individual state evaluations, however, reveals wide disparity among those states that are doing the best job and those states that are doing the worst job, with the highest performing state (Delaware) scoring 76 out of a possible 100 and the poorest performing state (West Virginia) scoring 45 out of 100. However, the poorest performing state score does reflect a 10 percentage point improvement over the 2010 survey results. Clearly, corporate counsel see specific areas needing improvement in the individual states, and the perceptions of senior lawyers and executives in large companies matter. This survey reveals that the litigation environment in a state is likely to impact important business decisions, which could have economic consequences for the states. The challenge for the states is to focus on areas where they received the lowest score and then make improvements where they are needed.

³ This includes the *Public Perceptions of the State Courts: A Primer*, National Center for State Courts (2000); *Perceptions of the U.S. Justice System*, American Bar Association (1998); *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, National Center for State Courts and University of Nebraska (1999); and *Level of Public Trust and Confidence: Utah State Courts*, State Justice Institute (2000).

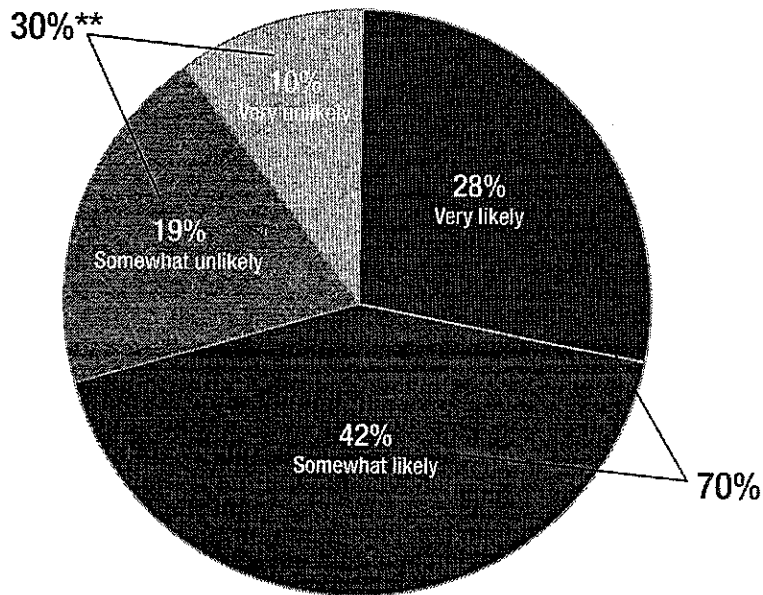
Overall Rating of State Court Liability Systems*



* Results given are for a base of 1,125 general counsel/senior litigators who were asked, "Overall, how would you describe the fairness and reasonableness of state court liability systems in America – excellent, pretty good, only fair, or poor?"

**Impact of Litigation
Environment on Important
Business Decisions
Such as Where to Locate or
Do Business***

OVERVIEW



■ VERY LIKELY ■ SOMEWHAT LIKELY ■ SOMEWHAT UNLIKELY ■ VERY UNLIKELY

* Results given are for a base of 1,125 general counsel/senior litigators who were asked, "How likely would you say it is that the litigation environment in a state could affect an important business decision at your company such as where to locate or do business? Would you say very likely, somewhat likely, somewhat unlikely, or very unlikely?"

** Note: Differences between pie chart values and nets are due to rounding.

2012 STATE LIABILITY SYSTEMS SURVEY ■ OVERVIEW

**Overall
Rankings
of State
Liability
Systems
2002-2012***

STATE	'12 SCORE	'12	'10	'08	'07	'06	'05	'04	'03	'02
Delaware	75.8	1	1	1	1	1	1	1	1	1
Nebraska	74.1	2	3	2	3	2	2	2	2	6
Wyoming	72.6	3	15	23	22	16	9	15	25	20
Minnesota	71.4	4	11	11	2	14	7	8	9	19
Kansas	70.6	5	14	10	13	15	16	9	15	4
Idaho	70.5	6	18	26	30	18	10	5	13	14
Virginia	70.2	7	6	6	12	3	4	3	8	2
North Dakota	69.8	8	2	13	20	12	3	16	6	25
Utah	69.7	9	7	5	9	17	14	6	7	8
Iowa	69.5	10	5	7	4	4	5	4	3	5
South Dakota	69.5	11	10	12	11	7	8	17	4	9
Maine	69.2	12	12	3	5	9	11	12	16	18
Alaska	69.1	13	33	20	43	36	33	33	32	37
Indiana	69	14	4	4	8	11	6	11	5	12
Wisconsin	68.4	15	22	24	10	23	17	10	11	15
Vermont	67.1	16	25	8	27	24	21	20	19	21
Arizona	66.8	17	13	15	15	13	19	14	18	11
New York	66.4	18	23	25	19	21	27	22	27	27
Massachusetts	66.3	19	9	18	18	32	31	28	22	36
North Carolina	65.8	20	17	21	16	10	20	19	20	16
New Hampshire	65.7	21	16	16	6	6	12	7	10	17
Washington	65.4	22	26	27	25	28	15	24	21	3
Colorado	64.2	23	8	9	21	8	13	13	12	7
Georgia	64	24	27	28	31	27	28	29	39	23
Connecticut	63.8	25	24	19	14	5	18	18	17	10
Tennessee	63.7	26	19	22	7	29	22	25	26	24
Michigan	63	27	30	33	23	22	24	23	29	28
Oregon	62.6	28	21	14	17	30	25	27	14	13
Hawaii	62.5	29	35	45	42	46	41	39	43	40
Ohio	62.1	30	29	32	24	19	26	32	24	26
Rhode Island	60.9	31	38	39	35	26	35	36	37	35
New Jersey	60.1	32	32	35	26	25	30	26	30	32
Maryland	58.3	33	20	30	29	20	23	21	23	22
Missouri	57.8	34	37	31	34	35	40	41	33	29
Arkansas	57.2	35	44	34	41	41	43	42	45	44
Texas	57.2	36	36	41	44	43	44	45	46	46
Nevada	57	37	28	40	28	37	29	34	34	30
Kentucky	56.8	38	40	29	33	34	36	35	35	38
South Carolina	56.3	39	39	43	37	42	39	40	42	42
Pennsylvania	56.3	40	34	36	32	31	34	30	31	31
Florida	55.3	41	42	42	36	38	42	38	40	33
Oklahoma	55	42	31	17	38	33	32	31	36	41
Alabama	52.8	43	47	47	47	47	48	48	48	48
New Mexico	52.7	44	41	37	39	40	38	37	41	39
Montana	52.2	45	43	38	40	39	37	43	28	43
Illinois	51.3	46	45	46	46	45	46	44	38	34
California	50.6	47	46	44	45	44	45	46	44	45
Mississippi	46.6	48	48	48	49	48	50	50	50	50
Louisiana	46.5	49	49	49	48	49	47	47	47	47
West Virginia	44.8	50	50	50	50	50	49	49	49	49

* Scores displayed in this table have been rounded to one decimal point. However, when developing the ranking, scores were evaluated based on two decimal points. Therefore, states that appear tied based upon the scores in this table were not tied when two decimal points were taken into consideration. See details on p. 27.

**Most Important
Issues for State
Policymakers***

Limits on discovery	5%
Eliminate unnecessary lawsuits	4%
Fairness and impartiality	4%
Speeding up the trial process	3%
Tort reform issues	3%
Punitive damages	2%
Lack of timely decisions	2%
Cap/Limits on settlements/Damages	2%
Electronic discovery	2%

SPOTLIGHT

* The responses displayed in this table were volunteered by respondents. Mentions by 2% or more are given above. Results given are for a base of 1,125 general counsel/senior litigators who were asked, "What do you think is the single worst aspect of the litigation environment that state policymakers should focus on to improve the business climate in their states?"

**Cities or
Counties with
the Least
Fair and
Reasonable
Litigation
Environment***

Chicago/Cook County, Illinois	17%
Los Angeles, California	16%
California (unspecified**)	9%
San Francisco, California	9%
Philadelphia, Pennsylvania	8%
Madison County, Illinois	7%
Texas (unspecified)	7%
New York (unspecified)	7%
Miami/Dade County, Florida	6%
New Orleans/Orleans Parish, Louisiana	5%
Mississippi (unspecified)	5%
Louisiana (unspecified)	4%
East Texas	3%
Alabama (unspecified)	3%
California (other mentions**)	2%
Illinois (unspecified)	2%
Houston, Texas	2%
Beaumont, Texas	2%
Dallas/Fort Worth, Texas	2%
Texas (other mentions)	2%
New York (other mentions)	2%
West Virginia (unspecified)	2%
St Louis, Missouri	2%
Detroit, Michigan	2%
Washington, DC	2%

* Responses displayed above were volunteered by respondents. Mentions by at least 2% given above. Results given are for a base who were asked, "Thinking about the entire country, what do you think are the five worst city or county courts? That is, which city or county courts have the least fair and reasonable litigation environment for both defendants and plaintiffs?"

** Each "unspecified" parenthetical denotes a response of the state name; no specific city or county within the state was mentioned. The "other mentions" parenthetical denotes miscellaneous cities and counties in that particular state that were mentioned by 1% of respondents or fewer.

**Worst
Specific City
or County
Courts
by State***

CALIFORNIA (all mentions)	30%	FLORIDA (all mentions)	10%
Los Angeles, California	16%	Miami/Dade County, Florida	6%
California (unspecified)	9%	Florida (unspecified)	1%
San Francisco, California	9%	Broward, Florida	1%
San Diego, California	1%	South Florida	1%
Oakland, California	1%	Other jurisdictions mentioned	1%
Sacramento, California	1%	LOUISIANA (all mentions)	9%
Other jurisdictions mentioned	2%	New Orleans/Orleans Parish, Louisiana	5%
ILLINOIS (all mentions)	25%	Louisiana (unspecified)	4%
Chicago/Cook County, Illinois	17%	Other jurisdictions mentioned	1%
Madison County, Illinois	7%	PENNSYLVANIA (all mentions)	9%
East St. Louis, Illinois	1%	Philadelphia, Pennsylvania	8%
St. Clair, Illinois	1%	Other jurisdictions mentioned	1%
Other jurisdictions mentioned	2%	MISSISSIPPI (all mentions)	7%
TEXAS (all mentions)	23%	Mississippi (unspecified)	5%
Texas (unspecified)	7%	Jackson, Mississippi	1%
East Texas	3%	Other jurisdictions mentioned	1%
Houston, Texas	2%	ALABAMA (all mentions)	6%
Beaumont, Texas	2%	Alabama (unspecified)	3%
Dallas/Fort Worth, Texas	2%	Birmingham, Alabama	1%
Harris County, Texas	1%	Other jurisdictions mentioned	1%
South Texas	1%	WEST VIRGINIA (all mentions)	5%
Brownsville, Texas	1%	West Virginia (unspecified)	2%
Jefferson County, Texas	1%	Charleston, West Virginia	1%
Marshall County, Texas	1%	Other jurisdictions mentioned	1%
Hidalgo County, Texas	1%	NEW JERSEY (all mentions)	3%
Other jurisdictions mentioned	2%	New Jersey (unspecified)	1%
NEW YORK (all mentions)	10%	Newark, New Jersey	1%
New York (unspecified)	7%	Other jurisdictions mentioned	1%
Bronx County, New York	1%	MISSOURI (all mentions)	3%
Brooklyn, New York	1%	St Louis, Missouri	2%
Other jurisdictions mentioned	2%	Other jurisdictions mentioned	1%

* The responses displayed above were volunteered by respondents. Mentions by at least 3% for an entire state are given above. Results given are for a base who were asked, "Thinking about the entire country what do you think are the five worst city or county courts? That is, which city or county courts have the least fair and reasonable litigation environment for both defendants and plaintiff?"

**Top Issues
Mentioned as
Creating the
Least Fair and
Reasonable
Litigation
Environment***

Biased/Partial judgment	33%
Corrupt/Unfair system	9%
Slow process/Delays	9%
Anti-business/Anti-corporate environment	8%
Unreasonable rulings/Verdicts	6%
Incompetent juries/Judges	5%
Other negative jury/Judge mentions	5%
Personal experience	5%
Excessive damage awards	5%
Heavily influenced by politics	4%
Poor quality of juries/Judges	4%
Composition of jury pool	4%
Good old boy system/Depends on who you know	3%
Other corruption mentions	3%
Overburdened with cases/Too many cases	3%
Discovery issues	3%
Other attorney mentions	3%
Other issues mentioned	3%
Does not adhere to laws/Rules	3%
Liberal jury/judges/System	2%
Election of judges	2%
Unpredictable juries/Judges	2%
Refusal to consider summary judgment	2%
Bad reputation	2%
Out of control system/Verdicts/Jury	2%
Frivolous litigation	2%
Other court system mentions	2%
Too easy to file cases there	2%
Difficult to get cases dismissed	2%
Expensive/High court costs	2%
Inconsistent application of the law	2%

* The responses displayed in this table were volunteered by respondents. Mentions by at least 2% are given above. Results are given for a base of who were asked, "Why do you say [Insert Name of City or County] has the LEAST fair and reasonable litigation environment for both defendants and plaintiffs?"

Summary of Top/Bottom 5 States by Key Elements

**Overall
Treatment
of Tort and
Contract
Litigation**

BEST	WORST
Wyoming	West Virginia
Nebraska	Louisiana
Delaware	Mississippi
Idaho	California
Iowa	Montana

**Having and
Enforcing
Meaningful
Venue
Requirements**

BEST	WORST
Delaware	West Virginia
Indiana	Illinois
Virginia	Mississippi
New York	Louisiana
Minnesota	Alabama

**Treatment of
Class Action
Suits and
Mass
Consolidation
Suits**

BEST	WORST
Indiana	California
Delaware	Louisiana
Virginia	Mississippi
Idaho	Illinois
Alaska	West Virginia

Damages**BEST**

Nebraska
Wyoming
Delaware
North Dakota
Kansas

WORST

West Virginia
California
Louisiana
Illinois
Alabama

**Timeliness
of Summary
Judgment or
Dismissal****BEST**

Nebraska
Wyoming
Delaware
Alaska
South Dakota

WORST

Louisiana
West Virginia
Mississippi
Illinois
California

**Overall
Treatment
of Tort and
Contract
Litigation**

1. Wyoming
2. Nebraska
3. Delaware
4. Idaho
5. Iowa
6. Kansas
7. Indiana
8. North Dakota
9. Virginia
10. South Dakota
11. Minnesota
12. Maine
13. Utah
14. Vermont
15. Arizona
16. Wisconsin
17. New York
18. Washington
19. Alaska
20. North Carolina
21. Massachusetts
22. Georgia
23. Colorado
24. Tennessee
25. Connecticut
26. New Hampshire
27. Michigan
28. Hawaii
29. Ohio
30. Oregon
31. Texas
32. Rhode Island
33. Kentucky
34. Nevada
35. New Jersey
36. Maryland
37. South Carolina
38. Missouri
39. Arkansas
40. Pennsylvania
41. Florida
42. Alabama
43. Oklahoma
44. New Mexico
45. Illinois
46. Montana
47. California
48. Mississippi
49. Louisiana
50. West Virginia

**Having and
Enforcing
Meaningful
Venue
Requirements**

- | | |
|--------------------|--------------------|
| 1. Delaware | 26. New Jersey |
| 2. Indiana | 27. Missouri |
| 3. Virginia | 28. North Dakota |
| 4. New York | 29. Kentucky |
| 5. Minnesota | 30. Washington |
| 6. Nebraska | 31. Georgia |
| 7. Wyoming | 32. Rhode Island |
| 8. Utah | 33. Nevada |
| 9. South Dakota | 34. Colorado |
| 10. Alaska | 35. Ohio |
| 11. Idaho | 36. Maryland |
| 12. Kansas | 37. Arkansas |
| 13. Wisconsin | 38. South Carolina |
| 14. Michigan | 39. Florida |
| 15. Iowa | 40. New Mexico |
| 16. New Hampshire | 41. Oklahoma |
| 17. Hawaii | 42. Montana |
| 18. Maine | 43. Pennsylvania |
| 19. Vermont | 44. California |
| 20. Oregon | 45. Texas |
| 21. Massachusetts | 46. Alabama |
| 22. Tennessee | 47. Louisiana |
| 23. North Carolina | 48. Mississippi |
| 24. Connecticut | 49. Illinois |
| 25. Arizona | 50. West Virginia |

**Treatment
of Class
Action Suits
and Mass
Consolidation
Suits**

- | | |
|--------------------|--------------------|
| 1. Indiana | 26. Iowa |
| 2. Delaware | 27. Colorado |
| 3. Virginia | 28. Connecticut |
| 4. Idaho | 29. North Dakota |
| 5. Alaska | 30. Ohio |
| 6. Nebraska | 31. Texas |
| 7. Hawaii | 32. Montana |
| 8. Utah | 33. New Jersey |
| 9. Wisconsin | 34. Missouri |
| 10. Wyoming | 35. Oregon |
| 11. Kansas | 36. Kentucky |
| 12. Maine | 37. Maryland |
| 13. New Hampshire | 38. South Carolina |
| 14. Minnesota | 39. Pennsylvania |
| 15. Massachusetts | 40. Oklahoma |
| 16. Tennessee | 41. Arkansas |
| 17. South Dakota | 42. Florida |
| 18. Georgia | 43. Alabama |
| 19. North Carolina | 44. Nevada |
| 20. Vermont | 45. New Mexico |
| 21. New York | 46. West Virginia |
| 22. Michigan | 47. Illinois |
| 23. Rhode Island | 48. Mississippi |
| 24. Washington | 49. Louisiana |
| 25. Arizona | 50. California |

Damages

- | | |
|--------------------|--------------------|
| 1. Nebraska | 26. Hawaii |
| 2. Wyoming | 27. Ohio |
| 3. Delaware | 28. Tennessee |
| 4. North Dakota | 29. Michigan |
| 5. Kansas | 30. Oregon |
| 6. Utah | 31. Rhode Island |
| 7. Iowa | 32. Maryland |
| 8. Indiana | 33. South Carolina |
| 9. Idaho | 34. Texas |
| 10. Minnesota | 35. New Jersey |
| 11. Alaska | 36. Arkansas |
| 12. Virginia | 37. Missouri |
| 13. Maine | 38. Pennsylvania |
| 14. Vermont | 39. Kentucky |
| 15. Arizona | 40. Nevada |
| 16. Colorado | 41. Florida |
| 17. Wisconsin | 42. Montana |
| 18. South Dakota | 43. Oklahoma |
| 19. New York | 44. New Mexico |
| 20. North Carolina | 45. Mississippi |
| 21. New Hampshire | 46. Alabama |
| 22. Connecticut | 47. Illinois |
| 23. Washington | 48. Louisiana |
| 24. Georgia | 49. California |
| 25. Massachusetts | 50. West Virginia |

**Timeliness
of Summary
Judgment/
Dismissal**

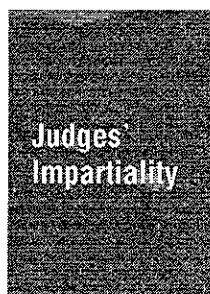
- | | |
|--------------------|--------------------|
| 1. Nebraska | 26. Michigan |
| 2. Wyoming | 27. New York |
| 3. Delaware | 28. Oregon |
| 4. Alaska | 29. Georgia |
| 5. South Dakota | 30. Nevada |
| 6. North Dakota | 31. Oklahoma |
| 7. Idaho | 32. Arkansas |
| 8. Minnesota | 33. Tennessee |
| 9. Maine | 34. Maryland |
| 10. Virginia | 35. Missouri |
| 11. Utah | 36. New Jersey |
| 12. Kansas | 37. Texas |
| 13. Wisconsin | 38. Ohio |
| 14. Vermont | 39. New Mexico |
| 15. Iowa | 40. Montana |
| 16. Washington | 41. South Carolina |
| 17. Arizona | 42. Alabama |
| 18. Indiana | 43. Florida |
| 19. North Carolina | 44. Kentucky |
| 20. Rhode Island | 45. Pennsylvania |
| 21. New Hampshire | 46. California |
| 22. Massachusetts | 47. Illinois |
| 23. Hawaii | 48. Mississippi |
| 24. Colorado | 49. West Virginia |
| 25. Connecticut | 50. Louisiana |

Discovery

1. Alaska
2. Delaware
3. Wyoming
4. Nebraska
5. Minnesota
6. Vermont
7. Kansas
8. Virginia
9. North Dakota
10. Wisconsin
11. South Dakota
12. Maine
13. Iowa
14. Utah
15. Indiana
16. North Carolina
17. Idaho
18. Arizona
19. Washington
20. New Hampshire
21. Tennessee
22. New York
23. Hawaii
24. Michigan
25. Massachusetts
26. Oregon
27. Georgia
28. Ohio
29. Arkansas
30. Colorado
31. New Jersey
32. Connecticut
33. Rhode Island
34. Nevada
35. Pennsylvania
36. Texas
37. Kentucky
38. South Carolina
39. Oklahoma
40. Missouri
41. Maryland
42. Florida
43. Alabama
44. Illinois
45. New Mexico
46. Louisiana
47. California
48. West Virginia
49. Mississippi
50. Montana

**Scientific
and
Technical
Evidence**

- | | |
|-------------------|--------------------|
| 1. Delaware | 26. North Carolina |
| 2. Wyoming | 27. Missouri |
| 3. Minnesota | 28. Oregon |
| 4. Virginia | 29. Colorado |
| 5. Nebraska | 30. Rhode Island |
| 6. South Dakota | 31. Georgia |
| 7. New York | 32. Ohio |
| 8. Massachusetts | 33. New Jersey |
| 9. North Dakota | 34. Maryland |
| 10. Kansas | 35. Kentucky |
| 11. Alaska | 36. Arkansas |
| 12. Maine | 37. Texas |
| 13. Iowa | 38. Illinois |
| 14. Washington | 39. California |
| 15. Wisconsin | 40. Pennsylvania |
| 16. Vermont | 41. Oklahoma |
| 17. Arizona | 42. Florida |
| 18. Hawaii | 43. Alabama |
| 19. New Hampshire | 44. Nevada |
| 20. Utah | 45. New Mexico |
| 21. Indiana | 46. Montana |
| 22. Connecticut | 47. South Carolina |
| 23. Idaho | 48. Mississippi |
| 24. Tennessee | 49. Louisiana |
| 25. Michigan | 50. West Virginia |



- | | |
|--------------------|--------------------|
| 1. Delaware | 26. Colorado |
| 2. North Dakota | 27. Oregon |
| 3. Nebraska | 28. Tennessee |
| 4. Minnesota | 29. Ohio |
| 5. Idaho | 30. New Jersey |
| 6. Wyoming | 31. Hawaii |
| 7. Maine | 32. Rhode Island |
| 8. Kansas | 33. Maryland |
| 9. Massachusetts | 34. Florida |
| 10. Iowa | 35. Pennsylvania |
| 11. Utah | 36. Missouri |
| 12. Wisconsin | 37. Kentucky |
| 13. Arizona | 38. Nevada |
| 14. Indiana | 39. Oklahoma |
| 15. New York | 40. California |
| 16. New Hampshire | 41. South Carolina |
| 17. South Dakota | 42. Texas |
| 18. Virginia | 43. Arkansas |
| 19. Washington | 44. New Mexico |
| 20. Alaska | 45. Illinois |
| 21. Vermont | 46. Montana |
| 22. Connecticut | 47. Alabama |
| 23. North Carolina | 48. Louisiana |
| 24. Georgia | 49. Mississippi |
| 25. Michigan | 50. West Virginia |



- | | |
|--------------------|--------------------|
| 1. Delaware | 26. Georgia |
| 2. Minnesota | 27. New Jersey |
| 3. Virginia | 28. Ohio |
| 4. Utah | 29. Michigan |
| 5. Maine | 30. Hawaii |
| 6. North Dakota | 31. Tennessee |
| 7. Nebraska | 32. Rhode Island |
| 8. Massachusetts | 33. Maryland |
| 9. Kansas | 34. South Carolina |
| 10. Wyoming | 35. Nevada |
| 11. New York | 36. Pennsylvania |
| 12. Idaho | 37. Texas |
| 13. South Dakota | 38. California |
| 14. Wisconsin | 39. Florida |
| 15. Iowa | 40. Kentucky |
| 16. Vermont | 41. Missouri |
| 17. Arizona | 42. Arkansas |
| 18. Alaska | 43. Illinois |
| 19. New Hampshire | 44. Alabama |
| 20. Indiana | 45. Oklahoma |
| 21. Washington | 46. Montana |
| 22. North Carolina | 47. New Mexico |
| 23. Colorado | 48. Louisiana |
| 24. Oregon | 49. West Virginia |
| 25. Connecticut | 50. Mississippi |

**Juries'
Fairness**

- | | |
|--------------------|--------------------|
| 1. Nebraska | 26. Washington |
| 2. Minnesota | 27. Georgia |
| 3. Idaho | 28. Rhode Island |
| 4. Delaware | 29. Oregon |
| 5. Utah | 30. New Jersey |
| 6. Kansas | 31. Hawaii |
| 7. Alaska | 32. Michigan |
| 8. Iowa | 33. Maryland |
| 9. South Dakota | 34. Pennsylvania |
| 10. Indiana | 35. Arkansas |
| 11. North Dakota | 36. Missouri |
| 12. Wisconsin | 37. Texas |
| 13. Wyoming | 38. Kentucky |
| 14. Maine | 39. Florida |
| 15. Virginia | 40. South Carolina |
| 16. Vermont | 41. Nevada |
| 17. Colorado | 42. Alabama |
| 18. New Hampshire | 43. Oklahoma |
| 19. Massachusetts | 44. Montana |
| 20. Arizona | 45. New Mexico |
| 21. Tennessee | 46. Illinois |
| 22. Ohio | 47. California |
| 23. Connecticut | 48. Louisiana |
| 24. North Carolina | 49. West Virginia |
| 25. New York | 50. Mississippi |

The 2012 State Liability Systems Ranking Study was conducted for the U.S. Chamber Institute for Legal Reform by Harris Interactive. The final results are based on interviews with a nationally representative sample of 1,125 in-house general counsel, senior litigators or attorneys, and other senior executives who are knowledgeable about litigation matters at public and private companies with annual revenues of at least \$100 million. Phone interviews averaging 19 minutes in length were conducted with a total of 551 respondents and took place between March 19, 2012 and June 25, 2012. Online interviews using the same questionnaire and averaging 16 minutes in length were conducted with a total of 574 respondents that took place between March 13, 2012 and June 25, 2012. The previous research was conducted from October to January in the years 2002–2010.

Sample Design

For the telephone sample, a comprehensive list of general counsel at companies with annual revenues of at least \$100 million was compiled using idExec, Dun & Bradstreet (Hoovers), AMI, and ALM. An alert letter was sent to the general counsel at each company. This letter provided general information about the study, notified them of the option to take the survey online or by phone, and told them that an interviewer from Harris Interactive would be contacting them to request their participation if they chose not to take

the survey online. The letter included an 800 number for respondents to call and schedule a survey appointment, and it also alerted the general counsel to a \$100 charitable incentive or check in exchange for qualified participation in the study.

For the online sample, a representative sample of general counsel and other senior attorneys was drawn from Hoovers ConnectMail, the Association of Corporate Counsel, and LinkedIn. Respondents from Hoovers ConnectMail

and the ACC received an electronic version of the alert letter, which included a password-protected link to take the survey. LinkedIn respondents received a public link. All were screened to ensure that they worked for companies with more than \$100 million in annual revenues.

Sample Characteristics

A vast majority (83%) of respondents were general counsel, corporate counsel, associate or assistant counsel, or some other senior litigator or attorney. The remaining respondents were senior executives knowledgeable about or responsible for litigation at their companies. Respondents had an average of 21 years of relevant legal experience, including their current position, and had been involved in or familiar with litigation at their current companies for an average of 10 years. Most respondents (81%) were familiar with or had litigated in the states they rated within the past three years. The most common industry sector represented was manufacturing, followed by services.

Telephone Interviewing Procedures

The telephone interviews utilized a computer-assisted telephone interviewing (CATI) system, whereby trained interviewers call and immediately input responses into the computer. This system greatly enhances reporting reliability. It reduces clerical error by eliminating the need for keypunching, since interviewers enter respondent answers directly into a computer terminal during the interview itself. This data entry program does not permit interviewers to inadvertently skip questions, since each question must be answered before the computer moves on to the next question. The data entry program also ensures that all skip patterns are correctly followed. The online data editing system refuses to accept punches that are out-of-range, it demands confirmation of responses that exceed expected ranges, and asks for explanations for inconsistencies between certain key responses.

To achieve high participation, in addition to the alert letters, numerous telephone callbacks were made to reach respondents and conduct the interviews at a convenient time. Interviewers also offered to send respondents an e-mail invitation so that respondents could take the survey online on their own time.

Online Interviewing Procedures

All online interviews were hosted on Harris Interactive's server and were conducted using a self-administered, online questionnaire via proprietary Web-assisted interviewing software. The mail version of the alert letter directed respondents to a URL and provided participants with a unique ID and password that they were required to enter on the landing page of the survey. Those who received an e-mail version of the alert letter accessed the survey by clicking on the password-protected URL included in the e-mail. Due to password protection, it was not possible for a respondent to answer the survey more than once. Respondents for whom we had e-mail addresses received an initial invitation as well as one to two reminder e-mails.

Interviewing Protocol

After determining that respondents were qualified to participate in the survey, interviewers identified the state liability systems with which the respondents were familiar. Then the respondents were asked to identify the last time they litigated in or were familiar with the states' liability systems. From there, respondents were given the opportunity to evaluate the

states' liability systems, prioritized by most recent litigation experience. On average, respondents evaluated four states via telephone and five states online.

Rating and Scoring of States

States were given a grade (A through F) by respondents for each of the key elements of their liability systems, providing a rating of the states by these grades, the percentage of respondents giving each grade, and the mean grade for each element. The mean grade was calculated by converting the letter grade using a 5.0 scale where A = 5.0, B = 4.0, C = 3.0, D = 2.0, and F = 1.0. Therefore, the mean score displayed can also be interpreted as a letter grade. For example, a mean score of 2.8 is roughly a C- grade.

The Overall Ranking of State Liability Systems table was developed by creating an index using the grades given on each of the key elements plus the overall performance grade. All of the key elements were highly correlated with one another and with overall performance. The differences in the relationship between each element and overall performance were trivial, so it was determined that each element should contribute equally to the index score. To



create the index, each grade across the elements plus the overall performance grade were rescaled from 0 to 100 (A = 100, B = 75, C = 50, D = 25, and F = 0). Then, any evaluation that contained 6 or more “not sure” or “decline to answer” responses per state was removed. A total of 7.1% of state evaluations were unusable. From the usable evaluations, the scores on the elements were then averaged together to create the index score from 0 to 100.

The scores displayed in this report have been rounded to one decimal point. However, when developing the ranking, scores were evaluated based on two decimal points. Therefore, states that appear tied based upon the scores in this report were not tied when two decimal points were taken into consideration. The scores for states that appear tied based on one decimal place are Iowa (69.49) and South Dakota (69.48), Arkansas (57.23) and Texas (57.15), and South Carolina (56.34) and Pennsylvania (56.29).

For the Ranking on Key Elements tables, a score was calculated per element for each state based on the 0–100 rescaled performance grades. The states were then ranked by their mean scores on that element.

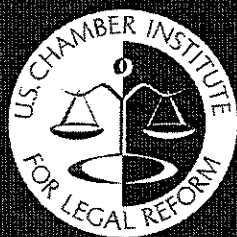
Reliability of Survey Percentages

The results from any sample survey are subject to sampling variation.

The sampling variation (or error) that applies to the results for this survey of 1,125 respondents is plus or minus 2.9 percentage points. That is, the chances are 95 in 100 that a survey result does not vary, plus or minus, by more than 2.9 percentage points from the result that would have been obtained if interviews were conducted with all persons in the universe represented by the sample. Note that survey results based on subgroups of smaller sizes can be subject to larger sampling error.

Sampling error of the type so far discussed is only one type of error. Survey research is also susceptible to other types of error, such as refusals to be interviewed (nonresponse error), question wording and question order, interviewer error, and weighting by demographic control data. Although it is difficult or impossible to quantify these types of error, the procedures followed by Harris Interactive keep errors of these types to a minimum.

A full copy of the report, including
grades for each state on each of the
key elements, is available at
www.InstituteForLegalReform.com



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JUSTICE AT RISK

AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS
AND JUDICIAL DECISIONS



BY JOANNA SHEPHERD

ASSOCIATE PROFESSOR OF LAW, EMORY UNIVERSITY SCHOOL OF LAW

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

ACS
AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

JUNE 2013

ABOUT THE AUTHOR



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ACKNOWLEDGEMENTS

The author and ACS wish to thank a number of individuals for their contributions to this report. Dr. Greg Rabidoux, J.D., Ph.D., directed the research phase of this project; Drs. David Klein and Michele Claibourn of the University of Virginia assisted in the methodological design and analysis; and the legal research fellows below assisted in the collection and coding of the data: Nicholas Harper, Joseph Syverson, Kristen Reek, Brittany Smith, McKillop Erlandson, Jaclyn O'Connor, Nicole Sinder, Kathy Chambers, Dayne Poshusta and Dave Bartholomew.

ABOUT THE AMERICAN CONSTITUTION SOCIETY

The American Constitution Society for Law & Policy (ACS), founded in 2001 and one of the nation's leading progressive legal organizations, is a rapidly growing network of lawyers, law students, scholars, judges, policymakers and other concerned individuals. ACS embraces the progress our nation has made toward full embodiment of the Constitution's core values and believes that law can and should be a force for improving the lives of all people. ACS is revitalizing and transforming legal and policy debates in classrooms, courtrooms, legislatures and the media, and we are building a diverse and dynamic network of progressives committed to justice. By bringing together powerful, relevant ideas and passionate, talented people, ACS makes a difference in the constitutional, legal and public policy debates that shape our democracy. For more information about the organization or to locate one of the more than 200 lawyer and law student chapters in 48 states, please visit www.acslaw.org. All expressions of opinion in this report are those of the author. ACS takes no position on specific legal or policy initiatives.



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

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

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

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

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

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



WHY ELSE DO CAMPAIGN DONORS GIVE?

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

JUSTICE AT RISK

AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS

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JUSTICE AT RISK

AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS

BY JOANNA SHEPHERD¹

EXECUTIVE SUMMARY

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

Confirming this public suspicion, a growing body of empirical literature has found that there is a tendency — whether conscious or unconscious — for some judges to favor campaign contributors in their decisions. However, most of the studies utilize outdated data in their empirical analyses. Indeed, the dataset most often used is a collection of state supreme court cases from the period 1995-1998. Although these data are comprehensive and unique in their coverage, several recent court cases and an upsurge in the amount of money in elections have made conclusions based on this 15-year old data increasingly irrelevant. Cases such as *Citizens United v. FEC* and *Republican Party of Minnesota v. White* have dramatically changed the landscape of campaigning in judicial elections. Moreover, during this 15-year period, campaign spending has skyrocketed. Campaign fundraising has more than doubled, from \$83.3 million in 1990-1999 to \$206.9 million in 2000-2009.⁴ In fact, three of the last six state supreme court election cycles topped \$45 million.

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

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

Thus, the dramatic changes in both the amount of money and the legal landscape surrounding judicial elections has made new data critical for drawing timely conclusions and making important policy decisions. The American Constitution Society has responded to this need by sponsoring an objective and non-partisan empirical study to explore the effect of campaign contributions on judicial

behavior. Over the past year, a team of independent researchers has collected and coded data on more than 2,345 business-related state supreme court published opinions, which includes opinions from all 50 states during the years 2010 to 2012. The dataset was merged with over 175,000 contribution records that detail every reported contribution to a sitting state supreme court justice

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

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

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

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

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

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

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

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

KEY FINDINGS

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

WHY STUDY CONTRIBUTIONS AND CASES INVOLVING BUSINESS INTERESTS?

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

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

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

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

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

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

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

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

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

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

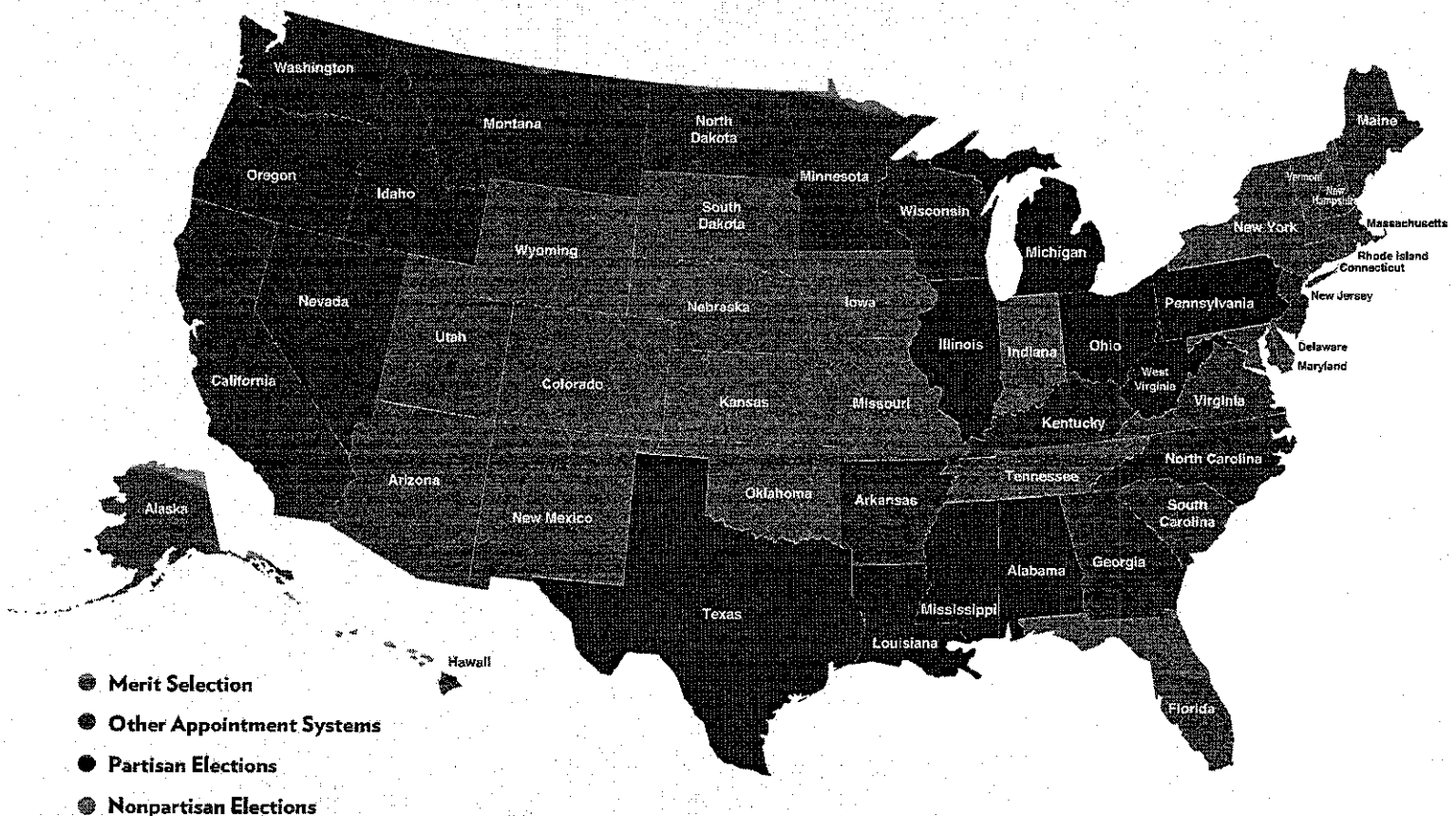
If one group can marshal resources sufficient to place justice at risk, so too can others, especially in a political and economic climate different from the present one. A fair and independent judiciary is a protection against influential groups — whatever their ideological leanings or the degree to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

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

I. AN OVERVIEW OF JUDICIAL ELECTIONS AND CAMPAIGN FINANCE

Almost 90 percent of state appellate judges must regularly be reelected by voters.⁹ There is, however, dramatic variation among the states' methods of selection and retention of judges. States have divided roughly among three different principal systems of judicial selection and retention: partisan elections, nonpartisan elections, and merit plans. In the selection of justices to their highest courts, nine states use partisan elections and twelve states use nonpartisan elections.¹⁰ In twenty-nine states, the governor or legislature initially appoints justices

to the highest court, with twenty-four of those states using some form of merit plan.¹¹ For the retention of justices on the state's highest court, five states use partisan elections and fourteen states use nonpartisan elections. Eighteen states hold retention elections to determine whether those justices remain in office beyond their initial term. The incumbent justices run unopposed and must win majority approval for retention. Nine states rely on reappointment by the governor, legislature, or a judicial nominating committee.¹² Only three states grant their highest court justices permanent tenure.

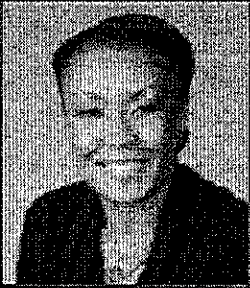


Source: Justice at Stake

Judicial elections are even more common in the selection of judges to trial courts and lower appellate courts. Nineteen states use partisan elections to fill judicial positions at some level, even if they do not use them to elect their highest court.¹³ Another twenty-one states use nonpartisan elections for at least some judicial positions.¹⁴

IMPORTANT BACKGROUND

- ✦ More than 90 percent of the United States' judicial business is handled by state courts, and 89 percent of all state court judges face the voters in some type of election.
- ✦ States have divided roughly among three different principal systems of judicial selection and retention: partisan elections, nonpartisan elections and merit plans.
- ✦ Judicial elections have become increasingly politicized in recent years.



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

Former Justice Leah Ward Sears, Georgia Supreme Court

A. THE GROWING IMPORTANCE OF MONEY IN JUDICIAL ELECTIONS

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

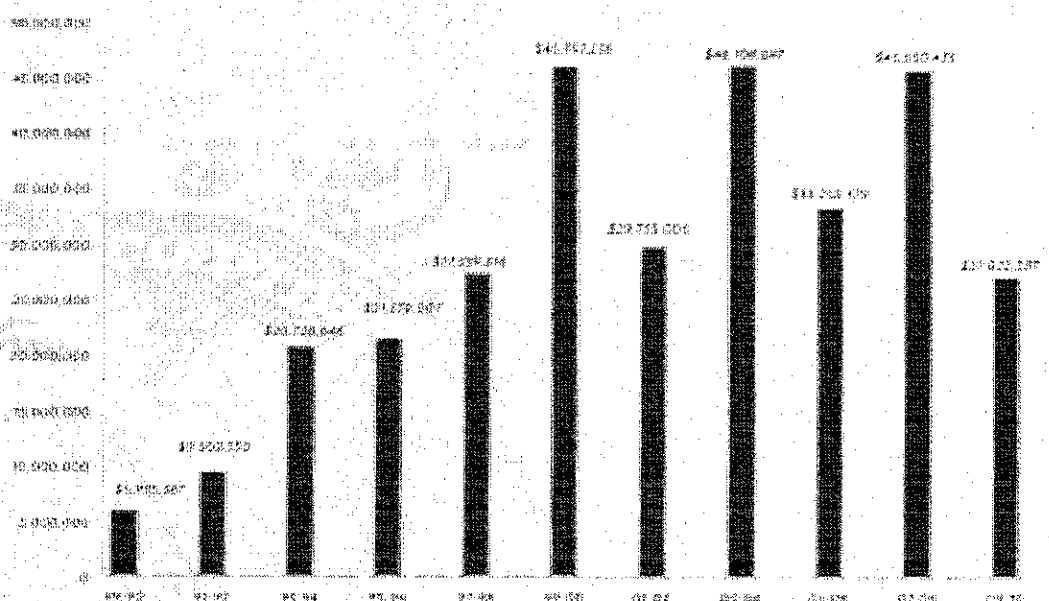
With the increase in competitiveness of judicial elections, campaign spending has skyrocketed. State supreme court candidates raised less than \$6 million in the 1989-1990 election cycle.¹⁹ For the 2009-2010 election cycle, the most recent cycle for which aggregate data has been compiled, candidates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

Indeed, throughout the 1990s, only \$83.3 million was contributed to state supreme court candidates; in contrast, candidates raised \$206.9 million between 2000-2009.²² Figure 1 shows trends in candidate fundraising from 1989 to 2010.

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

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

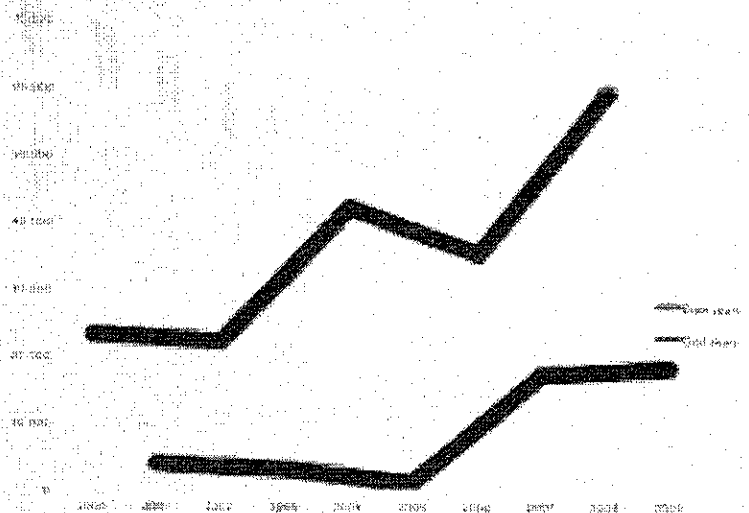
Figure 1 TRENDS IN STATE SUPREME COURT FUNDRAISING



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

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

Figure 2 TRENDS IN THE NUMBER OF TV AD AIRINGS IN STATE SUPREME COURT RACES²⁴



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

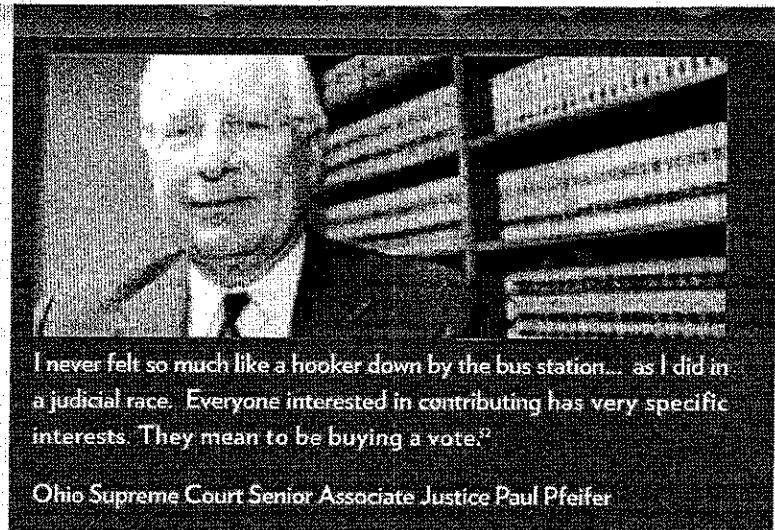
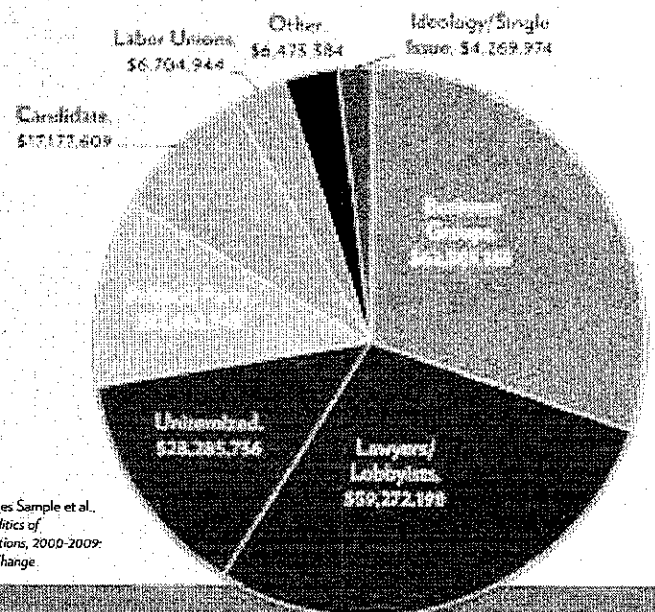


Figure 3 DIRECT CONTRIBUTIONS TO STATE SUPREME COURT CANDIDATES BY SECTOR: 2000-2009



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

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.³¹

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

II. THREATS TO IMPARTIAL JUSTICE

Despite growing concerns about the importance of money in judicial elections, there has always been a fundamental debate about the appropriate amount of influence that the public should have on judges' decision-making. On one side, many academics, elite lawyers, and federal judges have advocated for the "independence" model. It is an assumed truth among these groups that judges should be protected completely from public influence: in their view, public pressure on judges to rule a certain way is a menace.³³ Justices of the U.S. Supreme Court recently expressed this perspective in a case in which the Court reluctantly upheld on First Amendment grounds New York's system for electing judges.³⁴ But in their concurrence, Justices Stevens and Souter noted the "broader proposition that the very practice of electing judges is unwise."³⁵ They regretfully concluded, "The Constitution does not prohibit legislatures from enacting stupid laws."³⁶

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

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



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

Former Justice Marilyn Kelly,
Michigan Supreme Court

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



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

Former Justice Otto M. Kaus,
California Supreme Court

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

A. PREVIOUS EMPIRICAL FINDINGS

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

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



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

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

B. RECENT COURT CASES

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

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

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



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

Former Justice James Nelson,
Montana Supreme Court

C. BUSINESS INFLUENCE IN JUDICIAL ELECTIONS

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

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

Business groups regularly disguise their campaign support by channeling their funds through nonprofit groups with inspirational but completely opaque names.⁵⁴ For example, in the 2004 judicial elections in Mississippi, the Business and Industry Political Education Committee, which received most of its funding from the American Tort Reform Association, created the "Improve Mississippi" PAC to support pro-business judges.⁵⁵ That same year, the Ohio Chamber of Commerce created "Citizens for a Strong Ohio" that received most of its funding from the U.S. Chamber of Commerce.⁵⁶ And in *Caperton* itself, a group called

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

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

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

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

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

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

III. IS JUSTICE AT RISK?: EMPIRICAL ANALYSIS

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

A. DATA

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

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

THE DATA ANALYZED IN THIS REPORT IS AVAILABLE FOR YOUR REVIEW AND USE AT WWW.FOLLOWTHEMONEY.ORG/RESEARCH/SPECIAL_TOPICS.PHTML. WE ENCOURAGE YOU TO CONTRIBUTE TO AND EXPAND THE IMPORTANT CONVERSATION ABOUT FAIR COURTS.

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

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

B. KEY VARIABLES

This analysis tests whether justices who receive more campaign contributions from business interests are more likely to cast pro-business votes. Two different measures are used to capture business contributions. The first is simply the sum of contributions in a justice's most recent election from the following sectors: agriculture, communications, construction, defense, energy, finance, real estate and insurance, health care, transportation and a general business category. In the sample, the average justice received \$62,400 from business groups, with total business contributions ranging from \$0 to \$2,286,801.⁶²

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

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

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

Table 1 BUSINESS CONTRIBUTIONS
BY SELECTION METHOD

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

Moreover, as shown in Table 2, regardless of the selection method, justices affiliated with the Republican Party receive significantly more business contributions than justices affiliated with the Democratic Party. Republican justices receive over three times as much in business contributions in partisan systems, over five times as much in contributions in nonpartisan systems, and over nine times as much in contributions in retention election systems. Similarly, across all selection methods, a much larger percentage of Republican-affiliated justices' total contributions come from business groups.

Table 2 BUSINESS CONTRIBUTIONS BY JUDICIAL PARTISAN AFFILIATION

JUSTICES SUBJECT TO:	AVERAGE CONTRIBUTIONS FROM BUSINESS		AVERAGE PERCENTAGE FROM BUSINESS	
	Republican	Democratic	Republican	Democratic
Retention Election	\$9,017	\$736	4.0%	1.0%
Nonpartisan Election	\$89,886	\$16,050	18.8%	9.5%
Partisan Election	\$351,926	\$101,341	29.3%	12.0%

To identify pro-business votes, coders determined which litigant the court's decision in a given case made better off compared to immediately before the Court's decision. Cases where no identifiable business appeared, or where both litigants were businesses, were omitted since they did not allow for the identification of a pro-business outcome. Of the 10,104 judicial votes included for analysis, 49% were pro-business votes. Nevertheless, individual justices vary in their propensity to favor business interests; the percentage of pro-business votes effectively ranges from a low of 15 percent to a high of 85 percent.

As shown in Table 3, judicial decision-making in business cases varies across judicial retention method. Incumbent justices facing partisan elections are the most likely to vote in favor of business, doing so in 59 percent of cases. Justices across all other systems are significantly less likely to vote for business interests. In fact, justices facing partisan elections are more than 10 percentage points more likely to vote for business interests than justices under any other system.

Table 3 VOTES FOR BUSINESS LITIGANT BY RETENTION METHOD

JUSTICES SUBJECT TO:	Percentage of Votes for Business Litigant in Sample Data
Appointment	46.3%
Retention Election	47.9%
Nonpartisan Election	48.8%
Partisan Election	59.4%

Table 4 VOTES FOR BUSINESS LITIGANT BY JUDICIAL PARTISAN AFFILIATION

JUSTICES SUBJECT TO:	Percentage of Votes for Business Litigant in Sample Data	
	Republican	Democratic
Appointment	49.5%	43.4%
Retention Election	51.5%	45.1%
Nonpartisan Election	53.1%	43.1%
Partisan Election	65.2%	50.9%

Moreover, across each judicial retention method, Republican-affiliated justices cast more pro-business votes than Democratic-affiliated justices. Indeed, for justices facing nonpartisan elections, Republican justices are 10 percentage points more likely to vote for the business litigant than Democratic justices in the same system. For justices facing partisan elections, Republican justices are 15 percentage points more likely to vote for business litigants than Democratic justices.

C. EMPIRICAL ANALYSIS

The study employs regression analysis to test the relationship between campaign contributions from business groups and judicial decisions in business cases. The empirical methodology is explained in more detail in the Appendix. The dependent variable in the analysis is whether a justice voted for or against the business litigant. The chief explanatory variable in one set of analyses is the total dollar contributions from business; in the other set of analyses it is the percentage of a justice's contributions that came from business interests.⁶⁵

All analyses include the following control variables:

OTHER CONTRIBUTIONS. For analyses incorporating business contributions as a percentage of all contributions, the study controls for the total dollars received by the justice. This measure serves as a control for the different sums being contributed across states and individual justices — 40 percent from business may have a very different effect when it is 40 percent of \$10,000 than when it is 40 percent of \$250,000. For analyses of total dollar contributions from businesses, the study controls for the total dollars coming from all other contributors. Again this serves as a control for the different sums being contributed across states. It also provides a measure of potential influence from interests and sectors opposed to (or unrelated to) business interests.⁶⁶ Similar to the primary contribution variables, the study uses the natural logs of these totals.

JUSTICE'S PARTY AFFILIATION. Because they tend to follow a more conservative judicial ideology, Republican justices should be more inclined to vote for the business litigant. Party affiliation was determined from *The American Bench*—a directory with biographical information on over 18,000 judges⁶⁷—and reputable online sources. Where no party information was available but the justice was initially appointed to the high court by a governor, the party of the justice was inferred to be the same as that of the appointing governor. The group of justices with inferred party affiliations includes some from elected systems, where justices were appointed to complete the term of a justice who left the bench before the end of a term.

STATE TORT CLIMATE. In states where existing law favors business interests, one should expect justices to vote more often in favor of business interests regardless of contributions. Thus, the study includes a control capturing the legal climate to ensure that the analyses isolate the influence of business contributions from the underlying state law. It uses the Pacific Research Institute's U.S. Tort Liability Index, which evaluates the tort litigation risks and liability costs across states, as its measure of the state law's underlying partiality to business interests.⁶⁸

CITIZEN AND GOVERNMENT IDEOLOGY. Justices' voting might also be influenced by the attitudes of the public and of other governmental officials in the state. Justices may fear negative consequences from displeasing the public or government, or they may think it is appropriate to consider others' preferences in their voting. The study employs well known measures to capture the liberalism of citizens in the state and the liberalism of the state government.⁶⁹

CASE STRENGTH. The final control variable measures the underlying strength of the case. This control variable is important because some cases are so strong (or weak) that justices will vote for (or against) business interests regardless of their ideological predisposition or the influence of campaign contributions. To create a measure of case strength, the study first estimates the model without the case strength variable. The results of this estimation allow a prediction of the most likely number of pro-business votes from the other justices on the court. The difference between this predicted vote and the actual vote provides the measure of case strength. That is, suppose that the model predicts that, based on the justices' ideological predisposition, campaign contributions, the state tort climate, and the citizen and government ideology, four of the six other justices would support the business position. In reality, if five of the other justices supported the business position, this variable would indicate a stronger than average case. In contrast, if only one other justice voted in favor of business instead of the predicted four, the variable would indicate that the case was very weak.

D. RESULTS

I. PRIMARY MODEL

The results from the study's primary model indicate that there is a statistically significant relationship between campaign contributions from business groups and justices' voting in favor of business interests. Both the level of business contributions and the percentage of total contributions from business groups have a statistically significant, positive relationship with justices' voting for the business litigant. The full results from the regression models are shown in Appendix Table A1. To illustrate the results in an intuitive way, Figure 4 shows the relationship between the percentage of contributions from business interests and the predicted probability of pro-business votes, with all other variables held constant.

Figure 4
PREDICTED PROBABILITY
OF A PRO-BUSINESS VOTE
BY PERCENTAGE OF
CONTRIBUTIONS FROM
BUSINESS

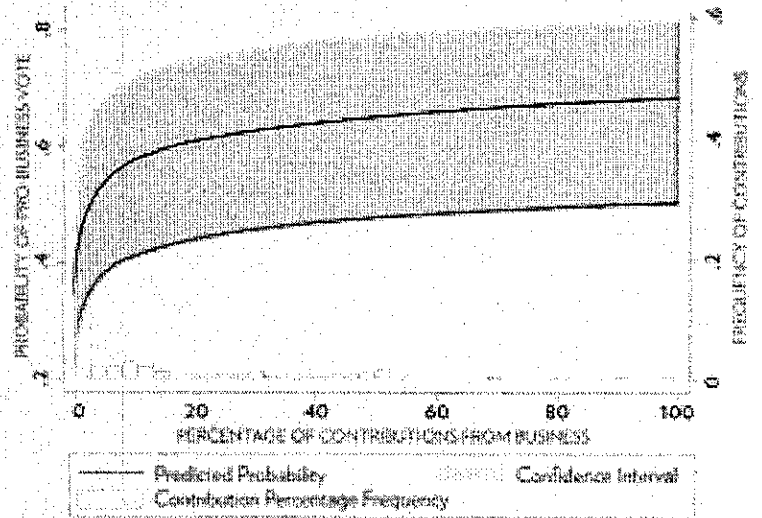


Table 5 translates the results of the model into hypothetical scenarios to help illustrate the size of the effects. For instance, all else equal, while an elected justice who receives a mere 1 percent of contributions from the business sector votes in favor of business about 46.2 percent of the time, on average, an elected justice who receives a quarter of his or her contributions from business votes in favor of business in 62.1 percent of cases. Notably, a justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time.

Table 5 CHANGES IN PREDICTED PROBABILITY
OF A PRO-BUSINESS VOTE FOR SELECT INCREASE
IN BUSINESS CONTRIBUTIONS

Change in Percentage Contribution from Business	Predicted Probability of a Pro-Business Vote
1%	46.2
10%	57.9
25%	62.1
50%	65.4
100%	68.5

2. COMPARISON ACROSS RETENTION METHODS

The study also analyzes the relationship between campaign contributions from business groups and judicial voting across different retention methods. It would not be surprising for contributions' relationship with voting to differ across methods; campaign contributions vary significantly across methods. Justices in partisan elections receive more than four times the average amount contributed to justices in nonpartisan elections and more than 40 times the amount contributed to justices in retention elections. The full results of this analysis are shown in Appendix Table A2. In general, the results reveal a positive relationship between business contributions and justices' voting for business interests in partisan and nonpartisan systems, but no relationship in retention election systems.

Specifically, the results show a statistically significant positive relationship between the percentage of total contributions from business groups and justices' voting in both partisan and nonpartisan systems. The larger coefficient in the partisan estimations indicates that the relationship between the percentage of contributions from business groups and justices' voting is larger in magnitude in partisan systems than nonpartisan systems.

However, the estimations using the simple level of contributions suggest that each dollar spent by business groups has a larger impact in nonpartisan elections (likely because each dollar spent is a larger percentage of the total in nonpartisan systems than in partisan systems). In fact, the simple level of contributions is only marginally significant ($p=.164$) in the partisan election estimations.

Importantly, both the level of contributions and the percentage of contributions from business groups have no statistically significant relationship with justices' voting in retention election systems. Estimations produce statistically insignificant coefficients when there is no systematic relationship between two variables;

here, they suggest no systematic relationship between business contributions and justices' voting in retention election systems. However, the statistically insignificant results could also be explained by a small number of observations in the sample; because businesses contribute relatively infrequently in retention elections, we have fewer observations for justices in these systems. Nevertheless, the small coefficients suggest that, even with more data, it is unlikely that one would find a large statistically significant relationship between business contributions and judicial decision-making in retention election systems. Moreover, previous empirical studies using large national datasets find no statistically significant relationship between campaign contributions and decisions in retention election systems.

3. COMPARISON AMONG REPUBLICAN- AND DEMOCRATIC-AFFILIATED JUSTICES

The study next analyzes whether business contributions' relationship with voting differs between justices affiliated with the Republican and Democratic parties. As reported in Table 2, Republican justices receive over three times as much in business contributions in partisan systems; over five times as much in contributions in nonpartisan systems, and over nine times as much in contributions in retention election systems. The full results from our estimation are shown in Appendix Table A3. In general, the results reveal a stronger relationship between business contributions and justices' voting among Democratic justices than among Republican justices.

Specifically, the level of business contributions has a statistically significant positive relationship with justices' voting for business interests for both Republican- and Democratic-affiliated justices. The larger coefficient in the estimations for Democratic justices do, however, indicate a relationship between contributions and voting that is larger in magnitude compared to Republican

justices. Similarly, in the estimations measuring the relationship between the percent of total contributions from business groups and justices' voting, the coefficient on the contribution variable is larger in magnitude for Democratic-affiliated justices. Again, this result indicates a stronger relationship between contributions and voting among Democratic justices. In addition, the percentage of contributions is only marginally significant ($p=.138$) in the estimations of Republican justices.

The stronger relationship between contributions and voting among Democratic justices could be explained by the already-high baseline of voting for business interests by Republican justices. Because Republican justices typically already favor business interests more than Democratic justices, additional business contributions may have a smaller effect on Republican justices' voting. This study's results indicating a stronger relationship between business contributions and voting among Democratic justices is consistent with previous empirical studies.⁶⁸

4. COMPARISON BETWEEN 2010-2012 AND 1995-1998

The final analyses compare the relationship between business contributions and justices' voting for business interests in two time periods: 2010-2012 and 1995-1998. As judicial elections have become increasingly politicized and expensive, it should not be surprising for the relationship between money and judicial decisions to have grown stronger. The full results from this estimation are shown in Appendix Table A4. In general, the results reveal a stronger relationship between business contributions and justices' voting in the period from 2010-2012 compared to 1995-1998.

Specifically, in both the 2010-2012 data and the 1995-1998 data, both the level and the percent of business contributions have a statistically significant positive relationship with justices' voting for business interests.⁶⁹ Indeed, previous empirical studies have found such a statistically significant relationship using 1995-1998 data. However, the larger coefficients for both the level and the percent of business contributions in the 2010-2012 data indicate a stronger relationship between money and votes in the latter period.

IV. CONCLUSION

Campaign spending in state supreme court elections has surged in the past decade, with powerful interest groups responsible for an ever-increasing amount of the spending in these judicial races. Moreover, judicial campaigning has changed dramatically in the wake of recent cases such as *Citizens United v. FEC* and *Republican Party of Minnesota v. White*. The growing importance of money in judicial elections gives interest groups the opportunity to shape the judiciary. Although any interest group that is able to marshal sufficiently large campaign contributions might exert influence over the judiciary, under current circumstances, business groups are likely to be unique in their ability to do so because of a focused agenda and considerable resources at their disposal.

Using a new dataset from the 2010-2012 period, this study's empirical analyses confirm a statistically significant, positive relationship between campaign contributions from business groups and justices' voting in favor of business interests. The more campaign contributions from business interests the justices receive, the more likely they are to vote for business litigants when they appear before them in court. Notably, the analysis reveals that a justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time.

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

We also find a stronger relationship between business contributions and justices' voting among justices affiliated with the Democratic Party than among those affiliated with the Republican Party. Because many Republican justices are more ideologically predisposed to favor business interests, additional business contributions may not have as large of an influence on Republicans as they do on Democratic justices.

Finally, we find a stronger relationship between business contributions and justices' voting in the period from 2010-2012 compared to 1995-1998. Although several previous empirical studies have confirmed a relationship between money and voting in the 1995-1998 period, it is not surprising that the relationship would strengthen with the ever-increasing importance of money in judicial elections.

There is no sign that the politicization of state supreme courts elections is lessening. Until reforms are enacted, powerful interest groups' influence on judicial outcomes will only intensify.

APPENDIX: EMPIRICAL METHODOLOGY

In all empirical analyses, we use logistic regression, or logit, which is designed for models where the variable to be explained (here a judge's vote) can take only two values (here either pro-business or anti-business). More specifically, we estimate a multilevel-logit model. Because judges cast decisions in multiple cases, an individual judge's decisions across cases are not likely to be independent of each other; that is, there is likely to be a relationship between what a judge does in one case and what that same judge does in another case, even after we have controlled for observable judge-specific characteristics. Similarly, because the judges on any given court share not only the court in common, but also the state, its laws, and other environmental influences, it would be surprising if the decisions of judges on the same court were entirely independent of each other. Here, we accommodate the dependence across decisions by the same justice and across decisions by different justices from the same state by estimating a multilevel model with a random intercept across justices and across states.⁷⁰

The following tables present the full results of all estimations. In each results table, the top number in each cell is the regression

coefficient, which indicates the magnitude and direction of the relationship with justices' votes of each variable. A negative coefficient indicates that a variable reduces the probability that a justice will vote for the business litigant. In contrast, a positive coefficient indicates that a variable increases the probability that a justice will vote for the business litigant.

In addition, the table reports the p-value for each coefficient. In each cell, it is the bottom number, in parentheses. The p-value indicates the probability that one could find a relationship as strong as the one observed simply by chance if no real relationship existed. Coefficients with p-values equal to or less than .10 are considered statistically significant at the 10 percent level, meaning that there is less than a 10 percent chance that the reported relationship would occur by chance in the sample data. P-values equal to or less than .05 indicate statistical significance at the more-certain 5 percent level, and p-values equal to or less than .01 indicate statistical significance at the most-certain 1 percent level. Empiricists typically require p-values of at less than .10 to conclude that one variable affects another in the direction indicated by the coefficient.

Table A1 THE RELATIONSHIP BETWEEN BUSINESS CONTRIBUTIONS AND JUDICIAL VOTING

	Business Contributions (10k)	Percentage of Business Contributions
Measure of Business Contributions	0.269 (0.000)	0.206 (0.002)
Non Business Contributions (\$10K), logged	-0.218 (0.000)	-0.116 (0.011)
Nonpartisan Election	0.005 (0.988)	-0.214 (0.533)
Partisan Election	0.824 (0.024)	0.875 (0.020)
Democrat	-0.524 (0.067)	-0.655 (0.026)
Republican	0.272 (0.315)	0.248 (0.378)
State Tort Climate	-0.672 (0.002)	-0.807 (0.000)
State Citizen Ideology	0.009 (0.317)	0.004 (0.673)
State Elite Ideology	-0.015 (0.120)	-0.011 (0.295)
Business was Petitioner	-0.455 (0.000)	-0.461 (0.000)
Case Strength	0.072 (0.000)	0.072 (0.000)
Intercept	0.602 (0.278)	0.440 (0.447)
VARIANCE TERM		
State Level	0.000	0.000
Justice Level	0.922	0.970
N	7,112	7,112
Chi²	1942.83	1937.11

Note: p-values in parentheses

Table A2 THE RELATIONSHIP BETWEEN BUSINESS CONTRIBUTIONS AND JUDICIAL VOTING:
COMPARISON OF JUDICIAL RETENTION METHOD

	Business Contributions (10k)			Percentage of Business Contributions		
	Partisan	Non-Partisan	Retention	Partisan	Non-Partisan	Retention
Business Contributions	0.225 (0.164)	0.416 (0.000)	0.091 (0.761)	0.267 (0.069)	0.203 (0.010)	0.080 (0.810)
Total Contributions (\$10K), logged	-0.207 (0.147)	-0.290 (0.000)	-0.244 (0.285)	-0.170 (0.069)	-0.082 (0.145)	-0.230 (0.298)
Republican	na*	-0.505 (0.109)	na*	na*	0.329 (0.296)	na*
Democrat	-0.849 (0.022)	0.368 (0.210)	-0.641 (0.426)	-0.849 (0.014)	-0.667 (0.046)	-0.648 (0.422)
State Tort Climate	-1.160 (0.011)	-0.385 (0.197)	-1.425 (0.337)	-1.186 (0.009)	-0.652 (0.038)	-1.415 (0.340)
State Citizen Ideology	-0.015 (0.411)	0.017 (0.149)	0.125 (0.365)	-0.009 (0.616)	0.009 (0.443)	0.126 (0.350)
State Elite Ideology	0.015 (0.629)	-0.021 (0.062)	na**	0.012 (0.696)	-0.016 (0.190)	na**
Business was Petitioner	-0.339 (0.072)	-0.538 (0.000)	-0.106 (0.766)	-0.346 (0.067)	-0.539 (0.000)	-0.110 (0.759)
Case Strength	0.067 (0.000)	0.073 (0.000)	0.084 (0.000)	0.067 (0.000)	0.073 (0.000)	0.084 (0.000)
Intercept	1.579 (0.094)	0.731 (0.216)	-8.410 (0.344)	1.081 (0.266)	0.182 (0.777)	-8.692 (0.330)
VARIANCE TERM						
State level	0.000	0.000	0.000	0.000	0.000	0.000
Justice level	0.644	0.943	1.081	0.637	1.040	1.081
N	1,974	4,431	707	1,974	4,431	707
Chi2	556.38	1206.52	153.43	556.56	1201.64	153.42

Note: p-values in parentheses.

*The party affiliation of many justices is unknown in states with non-partisan elections. In these states, the coefficients gauge the probability of a pro-business vote of Democrats and Republicans relative to justices with unknown party affiliation. In partisan and retention election systems, where judicial partisanship is known, the coefficients measure the effect of being a Democrat relative to a Republican.

**In retention states, state elite ideology was nearly perfectly collinear with state citizen ideology, so was omitted from the model.

Table A3 THE RELATIONSHIP BETWEEN BUSINESS CONTRIBUTIONS AND JUDICIAL VOTING:
COMPARISON OF POLITICAL AFFILIATION

	Business Contributions (10k)		Percentage of Business Contributions	
	Republicans	Democrats	Republicans	Democrats
Measure of Business Contributions	0.295 (0.004)	0.326 (0.002)	0.166 (0.138)	0.260 (0.008)
Non Business Contributions (\$10K), logged	-0.252 (0.009)	-0.234 (0.004)	-0.096 (0.224)	-0.138 (0.031)
Retention Election	-0.561 (0.262)	0.801 (0.094)	-0.606 (0.266)	0.633 (0.189)
Nonpartisan Election	0.040 (0.928)	-0.003 (0.994)	-0.291 (0.520)	-0.273 (0.457)
Partisan Election	0.923 (0.072)	0.615 (0.191)	0.918 (0.091)	0.720 (0.134)
State Tort Climate	-0.813 (0.003)	-0.478 (0.244)	-0.924 (0.002)	-0.648 (0.128)
State Citizen Ideology	0.021 (0.083)	-0.004 (0.753)	0.015 (0.234)	-0.001 (0.906)
State Elite Ideology	-0.027 (0.049)	0.006 (0.561)	-0.022 (0.137)	0.005 (0.623)
Business was Petitioner	-0.657 (0.000)	-0.386 (0.005)	-0.666 (0.000)	-0.382 (0.005)
Case Strength	0.078 (0.000)	0.072 (0.000)	0.078 (0.000)	0.072 (0.000)
Intercept	0.958 (0.315)	-0.246 (0.772)	0.866 (0.406)	-0.799 (0.358)
VARIANCE TERM				
State Level	0.000	0.000	0.000	0.000
Justice Level	1.021	0.787	1.059	0.824
N	4,618	3,675	4,618	3,675
Chi2	1159.26	1016.33	1142.25	1013.09

Note: p-values in parentheses.

Table A4 THE RELATIONSHIP BETWEEN BUSINESS CONTRIBUTIONS AND JUDICIAL VOTING:
COMPARISON BETWEEN 2010-2012 AND 1995-1998

	Business Contributions (10k)		Percentage of Business Contributions	
	2010-2012	1995-1998	2010-2012	1995-1998
Measure of Business Contributions	0.233 (0.000)	0.097 (0.000)	0.131 (0.024)	0.115 (0.000)
Total Contributions (\$10K), logged	-0.177 (0.001)	-0.061 (0.000)	-0.060 (0.113)	-0.028 (0.402)
Retention Election	0.145 (0.630)	0.009 (0.937)	0.044 (0.886)	0.015 (0.903)
Nonpartisan Election	0.057 (0.804)	0.019 (0.907)	-0.144 (0.537)	-0.218 (0.422)
Partisan Election	0.000 (1.000)	0.191 (0.358)	-0.027 (0.927)	-0.002 (0.996)
Democrat	-0.388 (0.081)	-0.084 (0.004)	-0.473 (0.035)	-0.067 (0.021)
Republican	0.303 (0.160)	*na (0.158)	0.310	*na
Case Strength	0.075 (0.000)	0.030 (0.000)	0.075 (0.000)	0.029 (0.000)
Intercept	-3.495 (0.000)	-1.562 (0.000)	-3.698 (0.000)	-1.566 (0.000)
VARIANCE TERM				
State Level	0.000	0.312	0.000	0.316
Justice Level	0.894	0.069	0.921	0.000
N	10,105	31,245	10,105	26,571
Chi2	2614.41	369.66	2614.62	312.46

Note: p-values in parentheses.

*Judicial partisanship is identified for all cases in 1995-1998 data, coefficient for Democrat represents the difference between Democrats and Republicans.

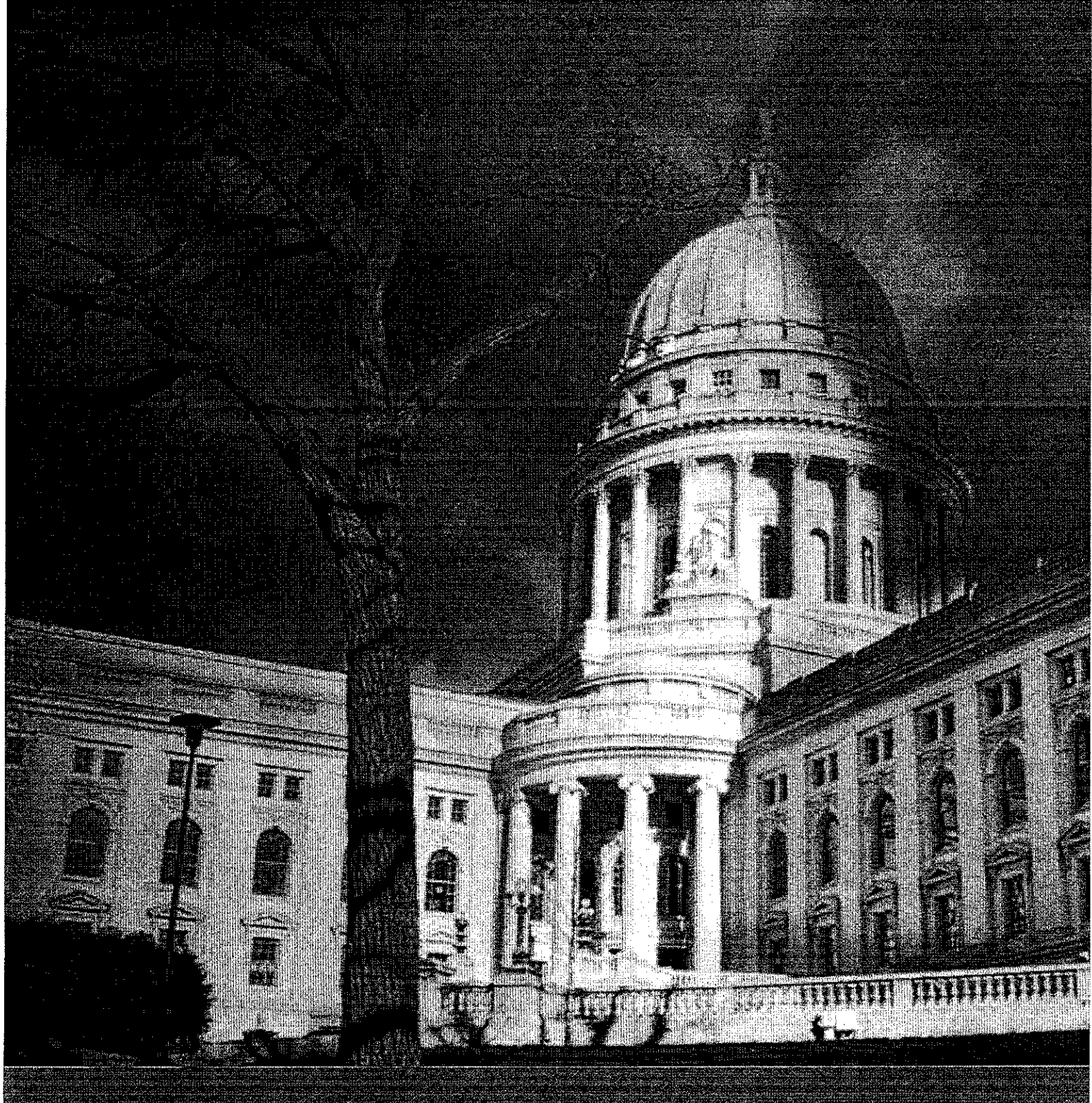
ENDNOTES

- 1 Joanna Shepherd is an Associate Professor of Law, Emory University School of Law. Dr. Greg Rabidoux, J.D., Ph.D., directed the research phase of this project. Drs. David Klein and Michele Claibourn of the University of Virginia assisted in the methodological design and analysis, and the legal research fellows below assisted in the collection and coding of the data: Nicholas Harper, Joseph Syverson, Kristen Reek, Brittany Smith, McKillop Erlandson, Jaclyn O'Connor, Nicole Sinder, Kathy Chambers, Dayne Poshusta, and Dave Bartholomew.
- 2 GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 7 (2001), available at <http://justiceatstake.org/files/JASNationalSurveyResults.pdf>; GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), available at <http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf>.
- 3 *Id.*
- 4 ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: 2009-2010 1 (Charles Hall ed., 2011), available at http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf.
- 5 *Id.*
- 6 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.
- 7 See Shirley S. Abrahamson, Chief Justice, Wis. Supreme Court, *The Ballot and the Bench, Address at the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice* (Mar. 15, 2000), in 76 N.Y.U. L. REV. 973, 976 (2001); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 77 (1985).
- 8 Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1105 app. 2 (2007).
- 9 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 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 8 and accompanying text.
- 10 Justice at Stake, "Your State National Map," <http://www.justiceatstake.org/state/index.cfm> (last visited Jun. 10, 2013); see also Schotland, *supra* note 8, at 1084.
- 11 *Id.*
- 12 *Id.*; see also National Center for State Courts, Selection of Appellate Court Judges, <http://cdm16501.contentdm.oclc.org/cdm/printview/collection/appellate/id/160/type/singleitem> (last visited Jun. 10, 2013). 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.
- 13 DAVID B. ROTTMAN ET AL., U.S. DEPT OF JUSTICE, STATE COURT ORGANIZATION 1998, 21-25 tbl. 4 (Bureau of Justice Statistics, Bulletin No. NCJ 178932, 2000), available at <http://bjs.gov/content/pub/pdf/sco98.pdf>.
- 14 *Id.*
- 15 Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995).
- 16 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).
- 17 *Id.*
- 18 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).
- 19 JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE 5 (Charles Hall ed., 2010), available at http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections.
- 20 SKAGGS ET AL., *supra* note 4, at 11.
- 21 *Id.* at 5.
- 22 *Id.* at 8.
- 23 *Id.* at 14. 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.
- 24 Replicated from SAMPLE ET AL., *supra* note 19, at 25.
- 25 This group has been found to contribute significant amounts to Democratic candidates and the groups' contributions are associated with judges voting for "liberal" outcomes. Michael Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. (forthcoming 2014).
- 26 *Id.*
- 27 *Id.* at 25.
- 28 SAMPLE ET AL., *supra* note 6, at 7.
- 29 *Id.*, at 8.
- 30 *Id.* at 13.
- 31 See generally Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections*, 5 ST. POL. & POL'Y Q. 107 (2005); Donald W. Jackson & James W. Riddlesperger, *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991); Chris W. Bonneau & Melinda Gann Hall, *Mobilizing Interest: Money, Quality, and Ballot Roll-off in State Supreme Court Elections*, Presented at the Annual Meeting of the Midwest Political Science Association (Apr. 20, 2006).
- 32 Adam Liptak, *Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court's Ruling*, N.Y. TIMES, Oct. 1, 2006.
- 33 See, e.g., Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 3, 4-5 (Nat'l Legal Ctr. for the Pub. Interest ed., 1990); Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POLY 273, 277-82 (2002); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995); Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 420-22 (1981); Ben F. Overton, *Trial Judges and Political Elections: A Time for Re-Examination*, 2 U. FLA. J.L. & PUB. POLY 9, 15-17 (1988-89); Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1559-63 (1988).

- 34 N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 208 (2008).
- 35 *Id.* at 209 (Stevens & Souter, JJ., concurring).
- 36 *Id.* (quoting Justice Thurgood Marshall).
- 37 See, e.g., GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 7 (2001), *supra* note 2.
- 38 *Id.*; GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *supra* note 2.
- 39 *Id.*
- 40 *Id.*
- 41 Philip Hager, *Kaus Urges Reelection of Embattled Court Justices*, L.A. TIMES, Sept. 28, 1986, at 3 (discussing the influence of elections on judges).
- 42 Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1119 (1987).
- 43 Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670-72 tbls. 7-8 (2009).
- 44 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).
- 45 Kang & Shepherd, *supra* note 25.
- 46 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 SE. POL. REV. 241, 248, 256 (2000) (examining tort cases before state supreme courts in Alabama, Kentucky, and Ohio); 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. & POLY 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); 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).
- 47 Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).
- 48 E.g., Republican Party of Minn. v. White, 416 F.3d 738, 754, 765-66 (8th Cir. 2005) (striking down limits on judges' partisan conduct and personal solicitation of campaign contributions); Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (striking down a solicitation clause, which failed strict scrutiny).
- 49 Caperton v. Massey, 556 U.S. 868, 886 (2009).
- 50 Citizens United v. Fed. Election Comm'n 558 U.S. 310 (2010).
- 51 *Id.* at 968 (Stevens, J., dissenting).
- 52 See Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1487 (2005).
- 53 Kang & Shepherd, *supra* note 44, at 85.
- 54 See generally Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005) (describing how business groups avoid disclosure requirements under campaign finance law).
- 55 RACHEL WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES, THE INSTITUTE ON MONEY IN STATE POLITICS 13 (2005), available at <http://www.followthemoney.org/press/Reports/200508251.pdf>.
- 56 *Id.* at 14.
- 57 *Id.* at 18.
- 58 In 2000-2003, 21 of the 24 pro-business judges that the Chamber supported were elected. Anthony Champagne, *supra* note 52, at 1503. In 2004, 15 of the 16 pro-business judges that the Chamber supported were elected. Press Release, U.S. Chamber of Commerce, Chamber Highlights Successful Pro-Business Election Effort—Business GOTV Behind Mid-Term Election Victories (Nov. 6, 2002) (available at <http://www.uschamber.com/press/releases/2002/november/chamber-highlights-successful-pro-business-election-effort>).
- 59 See, e.g., Kang & Shepherd, *supra* note 44.
- 60 Business cases were identified by a key search in WestLaw. Once all business cases were identified within a given state and year, 25 cases were randomly selected for the sample. If there were 25 or fewer cases in a given state and year, all available cases were coded.
- 61 The National Institute on Money in State Policy, Mission & History, <http://www.followthemoney.org/Institute/index.phtml> (last visited May 15, 2013).
- 62 We coded justices with no recorded contributions as receiving zero contributions if they lived in a state where a judicial colleague received contributions (under the assumption that the contribution records within a state were complete) or in a state where they were not subject to re-election (and, thus, could not receive campaign contributions). If they lived in states with no other reported contributions, they were excluded from the analysis, as we were not certain if these were true zeros or a result of incomplete records. The results do not change in any important way with the inclusion or exclusion of these justices.
- 63 Because of the non-linearity observed in bivariate analyses, this study follows the practice, common in studies involving the effects of money, of transforming each contribution measure by taking its natural logarithm. This transformation better captures decreasing marginal effects, because the logs of numbers increase more slowly than the underlying numbers (for instance, the natural logs of 10, 20, 100 are 2.3, 3.0, and 4.6).
- 64 Self-financing and funds from party committees are included in these totals. While the totals include at least some contributions from interests often opposed to businesses, the available data do not permit an estimate of their share of the totals.
- 65 MARIE T. FINN ET AL., THE AMERICAN BENCH (2013).
- 66 LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX: 2010 REPORT, PACIFIC RESEARCH INSTITUTE (2010).
- 67 William D. Berry, Evan J. Ringquist, Richard C. Fording & Russell L. Hanson, *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. OF POL. SCI. 327 (1998).
- 68 Kang & Shepherd, *supra* note 25.
- 69 The 2010-2012 results here do not match the results presented in Appendix Table A1 because, in order to compare across the two time periods, the study had to define business contributions more narrowly (including only finance, real estate, general business, and health sectors) and exclude a small number of control variables that were not available for the earlier time period.
- 70 There was no evidence that the effect of money varied randomly across states or justices.

To learn more about this report – particularly the data that it draws from – visit the special reports and collaborations page of the National Institute for Money in State Politics (www.followthemoney.org/Research/special_topics.html). We strongly encourage interested parties to review the data, study the issue further, and contribute to and expand the important conversation about fair courts. NIMSP is the only nonpartisan, nonprofit organization revealing the influence of campaign money on state-level elections and public policy in all 50 states. The organization encourages transparency and promotes “independent investigation of state-level campaign contributions by journalists, academic researchers, public-interest groups, government agencies, policymakers, students and the public at large.”

The report is also available for viewing on the American Constitution Society website at www.americanconstitution.org.





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Kansas Bar Journals

Volume 73.

73 J. Kan. Bar Assn. 1, 28-37 (2004). The Triple Switch: How the Missouri Plan Came to Kansas

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The Triple Switch: How the Missouri Plan Came to Kansas

By R. Alton Ice

I. Introduction

For almost a century, Kansans chose their judges through the process of popular election, despite evidence that other states had modernized their selection procedures in the 20th century. The *dramatis personae* of this episode included Gov. Fred Hall, the controversial leader of the "modern" wing of the Kansas Republican Party; William A. Smith, an active and unabashed partisan Republican chief justice of the Kansas Supreme Court; and John Berridge McCuish, an amiable small town newspaper editor who served as Gov. Hall's lieutenant governor. Then in the 1950s, a bizarre political episode caused the state to adopt a more democratic method of judicial selection that surrounding states already had experimented with successfully.

The story begins in late 1956 when William Amos Smith, chief justice of the Kansas Supreme Court, became seriously ill. The normally hale and hearty 68-year-old shrugged off his symptoms until that December when he collapsed and was hospitalized with a high fever and abdominal pain. Doctors diagnosed uremic poisoning caused by a kidney stone, and they operated immediately. In this stricken condition, Smith made the important decision to retire from the bench, precipitating the "Triple Switch of 1957," which involved the sudden resignations of three state officials.

Had Smith been operated on earlier, he might have recovered sufficiently by Christmas 1956 and been able to complete his term in office through 1958. Had his surgery been a week later, there would have been no time to plan the switch. The timing was crucial because, either way, it would have precluded the "Triple Jump."^(fn1)

During this period Kansas judges ran for office on a partisan ticket, and some judges continued their partisan political activity while on the bench. In fact, the system encouraged this intrigue in many ways. Justice Smith was notorious for his extensive actions in politics and was disliked by many party regulars. Among other incursions into politics, he supported his friend C. Wesley Roberts,

Republican national chairman, when Roberts received an \$11,000 commission for facilitating the sale of the Ancient Order of United Workers (AOUW) hospital at Norton. The hospital had been built on state property and soon would have reverted to the state without cost. A legislative committee exposed the episode, resulting in serious embarrassment for Republicans, statewide and nationally, and especially for Gov. Edward Arn's conservative faction of the party. President Eisenhower, who had just campaigned for office on the slogan to "clean up the mess in Washington," accepted Roberts' resignation as Republican national chairman. Former governor and elder statesman Alf Landon, an opponent of Roberts, decried the arrangement as "peddling his political influence in a raid on the public treasury of Kansas," adding that Roberts' explanation of his role "does not satisfy the people of Kansas by a long shot."^(fn2)

The Roberts episode, and other issues regarding the entrenched officials in the Republican Party in Kansas, led young Republican Frederick Lee Hall to press for cleaning up the "mess in Topeka." Hall would later be elected governor, and his controversial term further exacerbated this split in party ranks. Yet Smith, whose son Don was a member of Hall's law firm, supported the liberal Hall in his battles with the party and the Legislature, primarily because Smith liked winners. On March 1, 1956, seniority allowed Smith to replace W.W. Harvey as chief justice when Harvey retired. Smith planned to serve out the remaining two years of his term before mandatory retirement; however, kidney stones altered his plans.^(fn3)

Hall, the second protagonist, had a tempestuous political career. Born July 24, 1916, in Dodge City, Hall received his education in that city's public schools. His ability as a high school debater won him a scholarship to the University of Southern California, where he received an undergraduate degree in 1938 and a law degree in 1941. He returned to Dodge City to practice but was unknown in Kansas politics, except for prior work in the Young Republicans organization. He ran for lieutenant governor in 1950, one of nine candidates, and won the election. This splitting of the Republican vote allowed Hall, the candidate "west of 81," to win because he was strong in western Kansas.^(fn4)

Arn was a conservative who resigned as attorney general to accept a seat on the Supreme Court. He soon vacated that position to run for governor and won. He and Lt. Gov. Hall immediately began squabbling. Arn was part of the Old Guard faction in Kansas, and *Pageant* magazine described him as one of the five "worst" governors at the time. Gov. Arn and the liberal Hall proved to be incompatible from the start. Hall had a law degree from outside Kansas and had worked in Washington for the War Production Board during World War II. Hall had no

military experience, however, because of a minor physical problem, and many believed he had a disagreeable personality, which were fatal flaws for success in the Republican Party in the period immediately after the war. In addition, Hall was aggressive and pugnacious and, as a result, Arn supporters determined to purge him from party politics. They ran Wayne Ryan, a veteran state senator and close personal friend of the governor, against Hall in the 1952 primary. The maverick Hall campaigned on the issue that the party leadership was trying to "purge" him. Hall's narrow victory earned him a statewide following among young, liberal Republicans because he was fighting the "machine," always a popular cause for youthful voters. During this term, the Arn faction could only curtail Hall's powers in presiding over the Senate, or as the *Topeka Daily Capital* expressed it, they "dehorned" him. (fn5)

Despite this "dehorning," Hall continued his crusade against the Old Guard. Their opposition to the "outsider" lieutenant governor won him additional support that year from the younger Republicans, especially in the legislative chamber. Hall played a key role in the exposure of the Roberts episode, which also increased the number of his enemies. He was continually at odds with Paul Wunsch, president of the Senate and the most powerful figure in the Legislature. Because of Hall's continual criticism of "government by crony" and the "mess in Topeka," the party leaders - Arn, Kansas City businessman and National Committeeman Harry Darby, U.S. senators Frank Carlson and Andrew Schoepel, and Congressman Ed Reese (known as the "Arn, Darby, Carlson faction") - were determined to eliminate Hall from Kansas politics.

When Hall announced in January 1954 that he would run for governor, the Old Guard supported George Templar, who resigned as U.S. Attorney to run in the primary. Hall, campaigning on the issue of "the restoration of faith and dignity in Topeka," narrowly won with 52 percent of the vote. His theme in the general election was "Let's Clean Up Topeka as President Eisenhower Cleaned Up Washington." He easily dispatched democratic newcomer George Docking of Lawrence with a 40,000 vote majority, "the biggest majority that Kansas had ever given a state candidate." He thus replaced the dominant faction in control of the state government and, as he bragged to the people in his inaugural speech, "I am under obligation to no one but you. I have no master but you." (fn6)

Hall's strong support in the House of Representatives permitted his candidate to defeat the Republican leadership's "anointed" candidate for speaker, Warren Shaw, in a party caucus. The governor went on to press for extensive state aid to high schools and an increase in the state budget, issues that the conservative faction opposed. His veto of a "Right-to-Work" bill won him praise from Eisenhower's secretary of labor, James P. Mitchell, but this action, plus his attempts to clean out the

Statehouse in Topeka, cemented his fate with the Old Guard. Although Republican state chairman Lloyd H. Ruppenthal was a Hall supporter and, in fact, had been his campaign manager in the recent election, he broke with Hall, especially over the firing of Purchasing Director Eugene W. Hiatt and over financing for Republican candidates. Ruppenthal believed that, as party chairman, he was not the governor's agent and should allocate party finances on the basis of the good of the party, not to promote Hall. In addition, Hall wanted state patronage to go to county workers who supported him while Ruppenthal supported the tradition that the county party chairmen controlled this patronage.

Hall needed friends in the party machinery. To gain support, Hall asked Old Guard stalwart Wilbur G. Leonard to head the Revenue and Tax Commission. The patronage post became available when the incumbent, Ruppenthal, found he could not devote full time to his state job and also hold the position of executive secretary of the Republican Party, a newly created post to which he had been named. Leonard had experience with the Alcoholic Beverage Commission, and the governor hoped he could use this expertise to straighten out the administrative problems in the Tax Commission and to serve as a foil to Ruppenthal and the conservatives who controlled the state party machinery. Leonard soon joined forces with Ruppenthal, however, when Hall demanded Leonard purge the Tax Commission of old time employees as part of his "clean out the Statehouse" campaign. (fn7)

On the other hand, Hall won widespread praise in this campaign. The national press gave him rave reviews. President Eisenhower, who had won office by stressing the issue of cleaning up "the mess in Washington," lauded Hall as "the kind of forward-looking young man the GOP must develop." In 1956, his second year in office, national columnists extolled Hall's virtues when he sought to "prune the deadwood in the state house." He persuaded the Legislature to increase state aid to high schools, he increased worker's compensation payments, and his Right-to-Work veto prompted *Time* magazine to describe him as "a man on the rise." In Kansas GOP circles, though, the governor was rapidly becoming anathema. When he called recalcitrant legislators "SOBs" to their faces, they formed the "SOB Club" and, as a result, "Kansas did a belly laugh and thin-skinned Hall was the victim." One of Hall's former supporters described his problem as wanting "to play every instrument in the band and lead it too." (fn8)

The Kansas governor visited President Eisenhower. On his return to Topeka, a political opponent wrote the president's press secretary that Hall utilized this friendly meeting "for all he is worth, which is not much. ... I sincerely hope that no one back there feels that there is any need to play footsie with him. He is losing ground here every day." Hall later received a letter from

Eisenhower that read, in part,

Aside from the personal endorsement [of Republican governors at their annual convention], your action is indicative of the teamwork that is so necessary to the existence of a dynamic Republican organization. Together we have already accomplished much. I am confident we shall work together to an even greater record in the future.(fn9)

Resolved to demonstrate his control over the state party machinery, Hall decided to select the slate of delegates to the Republican National Convention, which would meet in San Francisco in late summer 1956 to renominate Eisenhower and Nixon. Hall's office announced that the governor would seek a replacement for Darby as Republican national committeeman. This solidified the determination of the anti-Hall forces to crush him. When the district and state conventions met, they constituted a test of strength that defeated Hall. A majority of Old Guard delegates was chosen, along with Darby as national committeeman and his veteran cohort, Mrs. C.Y. Semple, as national committeewoman. The pair was elected to his fifth four-year term and her second. When the state convention also chose Ruppenthal and Leonard as delegates, Hall demanded they resign their party positions. They declined to do so, and the party apparatus sustained their decision. The unanimous election of Darby and Semple broke tradition as this action of selecting national committeemen was usually taken after the delegation arrived at the convention site.(fn10)

In the Republican primary of 1956, the Old Guard ran Shaw against Hall. Shaw was bitter over his loss of the speakership the previous year and eager to confront the governor and his liberal forces. His major plank was unconditional support of Right-to-Work, a popular issue in a state where organized labor was particularly weak and farmers strongly opposed unions. In a precedent-shattering television debate in 1956, Shaw portrayed Hall as the labor candidate. Hall challenged Shaw on the question, but the debate altered few votes as Kansans had already made up their minds on the issue. The governor, in turn, alleged that Shaw had received a 1-cent kickback from wholesalers who sold gasoline to the state, and Shaw correctly responded that this was a routine form of political contributions. This money, however, went into the ruling party's campaign chest and party leaders did not distribute any of it to Hall. He had to raise his own campaign funds, which further provoked his anger at the party leadership.(fn11)

Hall printed his letter from the highly popular President Eisenhower in political advertisements under the banner of "leadership and teamwork." Former Gov. Arn informed Eisenhower's chief of staff, Sherman Adams, that this had made the Old Guard faction's primary fight against Hall "difficult by using the personal letter he received from the president. He has showed it on TV, read it in his speeches and published it in political ads as

per the enclosed." Assistant staff member Howard Pyle penciled a note to Adams at the bottom of the missive, "this letter becomes increasingly familiar." Despite this advantage, Arn predicted success 'in our Kansas project' at tomorrow's primary ... keep your fingers crossed." His assessment was correct as Shaw won the contest by 33,000 votes. George Docking narrowly defeated Harry Woodring, former governor and secretary of war during the New Deal, in the Democratic primary by less than 900 votes. Shaw lost the general election to Docking, however, by a large margin of more than 100,000 votes. Hall blamed the loss on the Kansas Republican Party because: (1) it failed to follow the lead of Eisenhower on the national level; (2) the Old Guard destroyed the unity of the party, opening the way for a Democratic victory; and (3) Republican newspapers repeated the "irresponsible charges of the primary." Other observers maintained that the issues raised in the Republican primary demonstrated to large numbers of voters that neither Hall nor Shaw deserved to be governor. Hall had his greatest percentage of loss in western Kansas and rural and small town areas. The party split and the Right-to-Work issue were disastrous to Hall and, eventually, to Kansas Republicans.(fn12)

The key issues in the primary were so vitriolic that Gov. Hall wrote the Kansas attorney general afterward, charging that

Shaw and certain members of the Legislature and others have made and caused to be printed, written, and other wise charged that I sold pardons and paroles, that certain boards and commissions of the State Government have entered into illegal contracts. Literature has been circulated attacking my patriotism and character - all of which were intended to expose me to public hatred, ridicule and deprive me of public confidence. These charges have been made without evidence of any kind. In fact, you have requested evidence on such charges but it has not been produced. I doubt if any governor in the history of the state of Kansas has been charged with selling pardons and paroles in such a manner.

As governor, Hall planned an investigation and, when completed, he would ask the attorney general to "institute prosecution." "You know," he added, "that this direction from me [to prosecute] is mandatory." (fn13) This action prompted much speculation over Hall's doubtful political future.

Hall began a search for a new vocation immediately after his primary defeat and quickly explored possibilities in the Eisenhower administration. In December 1956, he sent Henry Cabot Lodge Jr., U.S. representative to the United Nations, a biography with a request for a position with that organization. Lodge responded that he would "find out what the prospects are for an appointment for a man of your caliber and will get in touch with you again." Lodge appeared to be in no hurry, however, as it was not until the following May that he reported that Andrew W.

Cordier of the United Nations had notified him that because there were 21 new U.N. members, all open positions must go to these nations.

In January 1957, Hall visited New York City to see William L. White, son of Emporia editor William Allen White, to exploit this political contact. At the same time, he contacted the Giessen and Boomer Columbia Lecture Bureau to arrange to go on the lecture circuit. The president, Edna Giessen, responded that the bureau would "do everything in our power to promote your interests in every way, not only financially but from the standpoint of your prestige and reputation," adding that she thought "young Republicans should get around the country more and I should like to be in a position to help as much as I can." The bureau arranged some speaking engagements for him before certain groups and with topics appropriate to his political interests.(fn14)

Hall also visited with Eisenhower officials, investigating employment possibilities in Washington, D.C. He particularly expressed an interest in a foreign assignment. Federal patronage in Kansas was controlled by senators Schoeppel and Carlson and National Committeeman Harry Darby. The Republican party machinery in Kansas appeared more willing to accommodate Hall than were administration officials. An aide to Sherman Adams wrote his boss that "Carlson will see Harry Darby ... on Friday. While Carlson has no objection he feels that Schoeppel must be consulted before Hall is offered any specific job." Schoeppel was on an extended trip to Latin America at the time, but a note at the bottom of the page instructed "please find out exactly the attitude of Darby and Semple on this" and another noted that "Harry Darby Oks Hall for a post." Like Lodge, the administration in Washington appeared to be in no hurry to place Hall. The secretary of the Kansas Electric Cooperatives, with Old Guard maverick Lawrence Blythe as its president, endorsed Hall for undersecretary of interior in December 1956. Another Adams aide, Robert Gray, happily notified the coops in mid-January that "you will be interested in knowing, if you haven't already learned, that Governor Hall has recently been appointed to the Supreme Court of the State of Kansas." Ten days before this exchange, Gray sent a memo to his boss, observing that "I know that you will be pleased to learn that Hall was appointed to the Supreme Court in Kansas."(fn15) This solved the administration dilemma of finding a position for the maverick Republican.

In the midst of this search for employment, Gov. Hall's political ally, William Smith, notified him of his intention to resign from the Supreme Court. While in the hospital recovering from surgery, Smith discussed this decision with his family and, given his physical condition, they strongly urged him to retire. If he waited until January 14, 1957, to retire, he believed Gov. Docking would replace him with A. Lewis Oswald, the Democrat who ran against Smith for his court seat in 1952. Smith considered this an intolerable situation and the justice

was quoted as saying "if I resign, you can rest assured I won't let George Docking name my successor." He wanted a liberal as a replacement, so he discussed the dilemma with his son Don, a member of Hall's law firm. Don Smith had a conference with the governor about whom he would want to nominate to replace his father if he should retire before Hall's term of office expired. Hall's immediate response was "how about me?" Smith, of course, had no objections, but Lt. Gov. John McCuish would have to be consulted about this unusual move.(fn16)

The third party to the switch, McCuish, was experienced in politics and, with his amiable disposition and connections, appeared on the threshold of a bright future in the Republican Party. He attended the public schools in Newton and enrolled at Washburn University, although he never received a degree. He bought the *Evening Star* in Hillsboro in 1931, and then sold it and purchased the *Harvey County News* in Newton the following year. McCuish discovered an interest in politics and became Republican County chairman. In this position he actively worked for Alf Landon, then later for the election of Payne Rafter to the governorship. The latter appointed him to the newly-established Department of Taxation and Revenue. He was chosen its chair, and Supreme Court Justice William Smith helped him operate "a smooth running machine" for the governor by serving as his "brains," another political intrusion by Smith that many Kansans resented.

McCuish compiled a good military record in Italy in World War II, and the Army sent him to Japan in 1950 to help re-establish that country's newspapers. The veteran returned to Newton in 1952 to direct the Kansas presidential campaign for Eisenhower. He was a Hall man, but proper future actions could blot out this black mark with the party regulars.(fn17)

At this point McCuish also was hospitalized and treated for high blood pressure in the Axtel Clinic in Newton. Hall had received Smith's resignation on the last day of December but refused to confirm this to the press. He telephoned the lieutenant governor's doctor on Tuesday, January 1, 1957, to determine the patient's condition, then called Mrs. Cora "Sis" McCuish to explain the plot. She discussed it thoroughly with her husband, and on Wednesday they agreed to participate.

This was too good a secret to keep. Some party regulars got wind of the agreement, and Wednesday night Sis and the doctor "answered a battering of telephone calls." On Thursday morning, McCuish was dismissed from the hospital. The head of the highway patrol drove the couple to Topeka in a patrol car. The Halls and McCuishes visited Smith in Stormont-Vail Hospital, and at noon they were driven to the Capitol. A *Journal* reporter described Mrs. Hall as "smiling and charming, natty in a black suit and fur coat." She was dressed to celebrate her birthday. Hall immediately announced Smith's decision, tendered

his own resignation as governor, and McCuish was sworn in to replace him. His first official act was to appoint Hall to the Supreme Court vacancy, and Supreme Court Justice Jay S. Parker administered the oaths of office. All this took place in a matter of minutes. McCuish was then saluted by a hastily-assembled National Guard unit with the traditional 21-gun salute. Most Republican politicians boycotted the festivities. The *Kansas City Star* observed that "events moved with bewildering speed" and was "the culmination of a deal in deepest secrecy." (fn18)

While there was nothing illegal about this "triple switch," Kansans reacted immediately and bitterly over what many considered an "immoral" betrayal. It was useless for Sen. John Potucek, a Democrat from Wellington, to call attention to the fact that Frank Carlson had resigned as governor under similar circumstances in 1950. When U.S. Senator Clyde Reed died in office in 1949, Gov. Carlson appointed Harry Darby to complete the remainder of the term, provided the national committeeman promised not to run for the seat in the next election. Carlson was elected to the Senate position in 1950 and immediately resigned as governor. The new chief executive, former Lt. Gov. Frank Hageman, appointed him to fill out the term that Darby conveniently resigned. This sequence of events was accomplished in order for Carlson to gain a few days seniority over the other U.S. senators elected that fall. In addition, Arn had some convenient political resignations on his record, as noted earlier. Most Kansas Republicans agreed with Democratic state chairman Frank Theis who commented on the triple switch: "I thought I was a pretty good title attorney, but this is the greatest shift of titles I have ever seen in such a short time." He called it "the sucker shift - the thing Notre Dame used in football." Many politicians, such as former Gov. Woodring and Republican Party secretary Wilbur Leonard, had "no comment." Alf Landon thought it "fortunate for Fred. I think he will make a good justice," but noted that the chain of events was "a complete surprise to me." (fn19)

The *Kansas City Times* was less generous, finding the "sorry episode an inglorious end to an inglorious administration." The editor said "Hall's stormy career was wrecked on political manipulations. He gave Kansas the most violently and personally-partisan administration the state had ever seen. 'This inglorious end' signified a 'callous disregard for the political decencies that are honored in Kansas.'" He considered Hall to be "wholly without judicial temperament." (fn20) Emporia editor William A. White agreed with *Kansas City Times* correspondent Alvin McCoy that this was "a brazen, raw deal for Kansas justice" and that Kansans "would be shocked by the brazen maneuver." Editor Clyde Reed Jr., of the *Parsons Sun* and soon to be a gubernatorial candidate, carefully observed that there was "seldom a dull moment" in Kansas political history. The *Salina Journal* labeled it the "Topeka Taffy Pull" and predicted:

Hall is a bright enough lawyer to make a good justice if

he wants to be. But this cozy little party confirms the suspicion that he is a bum politician. The Kansas reaction to this taffy pull will be such that Fred Hall will be permanently benched - and not in the sense of [Thursday's] seating.

The *Wichita Eagle* described the scenario as "a march of the lame ducks," adding "whether these deals to high public office without voter sanction will react on the principals in future elections is to be seen. The Kansas Democrats made lucrative political capital out of Republican miscues in the recent campaign and may do so again." The *Lawrence Journal World* was convinced that voters would not approve of this "funny business" and Hall "today does not appear as a great, unselfish friend of the people," as he had once appeared to be. The editor continued,

The Old Guard which the Hall followers have been screaming about for many months, looks pretty good today. The Old Guard apparently includes all Republicans who haven't approved of Hall. Whoever they are and whatever they are, the State of Kansas could use a few more of them to good advantage right now.

The *Pratt Tribune* agreed that Kansas needed to remove its Supreme Court vacancies from politics and "name top jurists ... not defeated, retired, 'deserving' politicians." The *Ottawa Herald* believed the governor "should create a far better feeling for himself and for the party to remain aloof from any such political arrangements which are likely to strike a hot chord of antagonism from the voters of Kansas." (fn21)

On the other hand, the *Hutchinson News Herald* observed that "slick a trick as it is, however, no political realist can cry shame. It is a tradition in our government to take care of the lame ducks and here the lame ducks only took care of themselves." The *Hays Daily News* correctly reminded its readers that "Gov. Hall isn't doing anything opponents in his own party wouldn't do if they were in the driver's seat. They brought about his defeat for renomination. This time it is Hall's turn to tag them." More importantly many editors agreed that the episode made even more obvious the need to reform the process of selecting judges.

"Public reaction, as polled by those close to politics over the state," the *Kansas City Times* editorialized, "has been universally bad to Hall's maneuver to put himself, a defeated governor, on the Supreme Court. Some of his opponents have almost blown gaskets." There would be two results from the "jump," the editor claimed: (1) the senate would give "careful scrutiny" to Hall appointees (he had just nominated 51 people to office for the next Senate to confirm and some were unhappy that one of the two he had named to the civil service board was one of the biggest liquor dealers in the state); and (2) there would be a renewed effort to enact a constitutional amendment to take the state courts out of politics. The

Wichita Eagle noted that the Kansas bar, as a whole, had opposed Hall politically and now there were "some bitter comments expressed" about him, with lawyers wanting "to change the selection of judges." The *Pratt Tribune* also pointed out that this "shocker" came just as "the bar association was considering a plan to appoint district and Supreme Court justices from recommended attorneys instead of electing them." Alvin McCoy of the *Kansas City Times* hoped "the sorry events could result in constitutional changes that will take the Supreme Court out of politics, and prevent such schemes forever." (fn22)

In 1940 Missouri pioneered in the so-called Merit Plan for selecting judges in a nonpartisan manner, but by 1971 only 11 states had followed suit. Voters often were reluctant to relinquish their right to choose justices through the traditional ballot box.

The Kansas Bar Association (KBA) had been working on a method similar to the Missouri idea. The Triple Switch made their approach more acceptable to Kansans and also accelerated their efforts to develop a feasible plan of reform. After the exchange of offices, 30 senators endorsed the reform proposal. On March 1, 1957, the upper chamber voted 33 to four to support the Senate concurrent resolution to present the voters with a referendum. At the end of March, the lower house added a few minor changes and endorsed it 88 to 34, just barely the two-thirds necessary to propose a constitutional amendment to the voters.

The plan established a nonpartisan committee, with the KBA electing one delegate from each of the state's congressional districts and the governor choosing one nonlawyer from each district. The lawyers across the state would elect one of their own as chairman. The committee would send three names to the governor to select one within 90 days, or the chief justice would make the selection. After serving at least 12 months in office, giving time for the voters to become familiar with the candidate's voting record, (assuming they would educate themselves on this question), the justice would stand for election on a nonpartisan ballot in the next general election. The system would apply to the Supreme Court and all other state appellate judges. (fn23)

There seemed to be no overwhelming enthusiasm for the proposal. No one doubted Hall's qualifications for the Supreme Court, but there was widespread disgust over the manner of his appointment. As a former member of the state Supreme Court and current chairman of the judiciary committee of the governor's commission on constitutional revision expressed it, this resulted from the "blitz" change in governors "a little more than a year ago." The KBA endorsed the proposal five to one because it conformed to its code of judicial ethics in removing justices from the realm of partisan politics. (fn24)

Sen. Potucek, voted for the proposal, but cautioned that

he "reserved the right to advise people to vote against the measure." He and fellow partisans claimed the system would "bar election of Democrats to the Supreme Court." Potucek was joined by Fayette Rowe, Republican of Columbus, who railed against the proposal for 25 minutes on the Senate floor. He insisted that this would remove the people's "God-given right to elect their own judges" and support for the plan was not justified merely because "Justice Hall slipped onto the bench." He further warned that, under the Missouri Plan, "[Boss Tom] Pendergast named the judges in Kansas City."

Both Potucek and Rowe, in cross-examining Sen. Wilfred Wiegler of Emporia, one of the plan's sponsors, forced him to admit that under the current partisan system about 70 percent "of Kansas judges today get their seat by appointment." The *Wichita Eagle* noted that many observers believed the voters would not accept the proposal in the election of 1958, except for the fact that the Triple Switch was still on their minds. (fn25)

Meanwhile, the Republican Party had not denied renomination to one of its governors since Clyde Reed in 1930. This convinced Hall he should seek vindication for his record as governor by running in the Republican primary in 1958. On April 1, after a bare 14 months on the bench, he tendered his resignation from the court to Gov. Docking. Rumors were rife that this would occur and the Democratic governor had already offered the position to Frank Theis. Democrat Theis was his party's state chairman and national committeeman and, not wishing to relinquish these posts, he declined the honor. Docking immediately turned to Schuyler Jackson, then dean of the Washburn School of Law, who accepted and became the first Democrat to sit on the high court since 1943. The *Topeka Daily Capital* noted that the switch from Hall to Jackson was "handled with a planned dispatch highly reminiscent of the now famous 'triple play.'" In naming Jackson, Docking reminded Hall that "this is one of our moves to take the court out of politics and administer the law (which had not yet been approved) as the people desire." Not exactly: Jackson was an important Democrat and certainly the original selection of Theis was politically motivated. Despite Bill Smith's efforts and fervent desire, his seat was taken by a Democrat. (fn26)

Clyde Reed Jr., publisher of the *Parsons Sun* since his father's death, was Hall's principal opponent in the primary. During the campaign both Reed and Hall carefully refrained from attacking each other in an effort to avoid further damage to the party. Reed maintained the "high road" throughout the campaign process. Both he and Hall devoted most of their time to attacking the Docking administration. Hall particularly claimed that the Democrat had brought Kansas state, city, and county governments "to the brink of financial disaster." Hall, however, could not shake his negative image in the minds of Republicans. Reed swamped him in the August primary with a five-to-one majority. In his loss to Shaw

although the fracas produced a significant judicial reform.

About the Author

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He is currently researching Kansas history, and his most recent publication is "The Bizarre Careers of John R. Brinkley" (2002).

ENDNOTES

1. Brian J. Moline, *Bill Smith: The Jurist as Politician*, 58 JKBA, Nov/Dec 1985, at 34, calls this the "Triple Play"; Homer Socolofsky, *Governors of Kansas*, University Press of Kansas, 1990, at 202, 204, labels it the "Triple Jump," as do many other authors. It was a "triple jump" only if one thinks of Smith "jumping" into retirement, which is not entirely a correct term for his decision to retire at that time.
2. Donald R. McCoy, *Landon of Kansas* (University of Nebraska Press, 1966): 552.
3. *Id.* fn 1 at 31-34; *Id.* fn. 2 at 552-53.
4. *Sketches of Governors* Topeka Daily Capital, Feb. 26, 1976. The "west of 81" term refers to Highway 81 that runs north and south, dividing the rural western two-thirds of the state from the more densely populated eastern part. Hall won this area solidly. See Photen A. Smith and Clarence J. Hein, *Republican Primary Fight: A Study in Factionalism*, Case Studies in Practical Politics (New York, 1958) at 2.
5. Pageant "worst" quote in Topeka Daily Capital, *Sketches of Governors*, Feb. 26, 1976. In an interview on December 11, 2001, Republican State Party Secretary Wilbur G. Leonard itemized Hall's political weaknesses, as he saw them.
6. Smith and Hein *Id.* at 3-6; Robert Sobel and John Raimo (eds.), *Biographical Directory of the Governors of the United States, 1789-1978* (Westport, Ct, 1978); Wichita Eagle, Jan. 11, 1954; Topeka Daily Capital (Feb. 15, March 28, 1953, Feb. 26, 1976); "biggest majority" quote from *Newsweek*, 46, Nov. 28, 1955, at 35. In its enthusiasm over Hall, however, the magazine overlooked the election two years previously when Ed Arn defeated his Democratic opponent, Charles Rooney, by more than 125,000 votes.
7. *Id.* fn. 5 State Right-to-Work laws in effect prohibited the closed shop. Leonard did not believe Right-to-Work was a great issue between Hall and party leaders because many of them were business people who had no problems with their unorganized employees and thus were not proponents of Right-to-Work.
8. The first two quotes are from *Newsweek*, 46, Nov. 28, 1955, at 35 and the last two are from *Time*, 68, Aug. 20, 1956, at 16.
9. "Footsie" quotes are from Stewart Newlin to James Hagerty, May 11, 1955, OF 109-A- 2-Kansas I; Dwight D. Eisenhower to Fred Hall, July 12, 1956, OF 109-A-2 Kansas, box 502, Dwight D. Eisenhower Library, hereafter cited as DDEL.
10. Kansas City Times, June 12, 1956.
11. Smith and Hein, fn. 3 at 13-15; Topeka Daily Capital, August 4, 1956, fn. 4, *Id.*
12. Smith and Hein, note 3 at 13-15; "personal letter" quote from Edward F. Arn to Sherman Adams, August 6, 1956, OF 109-A-2, box 502, DDEL; "irresponsible charges" quote from Topeka Daily Capital, Aug. 4, 1956; Docking primary victory vote from *Time*, 68, Aug. 20, 1956, at 16.
13. Fred Hall to John Anderson Jr., n.d., Frederick L. Hall, Correspondence and Papers, 1956 folder, Kansas State Historical Society.
14. Frederick L. Hall, Correspondence and Papers, Hall to Lodge, December 19, 1956; Lodge to Hall, May 8, 1957; "everything in our power" quote from Edna Giessen to Fred Hall, (Nov. 7, 1956), Coll. 38, 1957-1962 and 1964 folder, 1956 folder, Kansas State Historical Society.
15. Quotes are from Robert Gray, memo to Governor Adams (Nov. 28, 1956), GF 121, box 476; Kansas Electric Coops to Dwight D. Eisenhower (Dec. 20, 1956); Robert Gray to Kansas Electric Coops, January 17, 1957, OF 138, box 692, DDEL. The Kansas City Star, on the other hand, erroneously reported on January 6, 1957 that endorsements from Schoepfel, Carlson, and Darby were not "forthcoming."
16. "How about me" quote from Kansas City Star, January 6, 1957; "name my successor" quote from Moline fn. 1 at 34.
17. *Id.* fn 4; "brains" quote from Richard Walker, John B.

McCuish: *Kansas' Unknown Governor*, (senior paper: Bethel College, 1970) at 10-13, 19-20.

18. "Deepest secrecy" quote from Kansas City Star, Jan. 3, 6, 1957; "battering" quote from Wichita Eagle, Jan. 4, 1957; Topeka Journal, Jan. 3, 1957.

19. "Sucker shift" quote from Topeka Daily Capital, Jan. 4, 1957; Landon quote from Kansas City Star, Jan. 3, 4, 1957.

20. Kansas City Times, Jan. 4, 1957.

21. These and editorial opinions in the following paragraph are summarized in the Emporia Gazette, Jan. 5, 1957 and Topeka Daily Capital, Jan. 7, 1957.

22. "Reaction" quote from Kansas City Times, Jan. 5, 1957; "bitter comments" quote from Wichita Eagle, Jan. 4, 1957; McCoy and Pratt editor are cited in Emporia Gazette, Jan. 5, 1957)

23. Senate Journal, 1957, p. 16; House Journal, 1957, p. 367. This was later changed to allow districts to choose their method in selecting their judges.

24. Hugo T. Wedell, *Non-Partisan Selection of Justices*, jkba, 26, May 1958, at 359.

25. Pendergast quote from Topeka Daily Capital, March 1, 1957; Potucek quote from Topeka State Journal, March 1, 1957; Rowe quote from Wichita Eagle, Nov. 6, 1958.

26. Wichita Beacon, April 7, 1958; Topeka State Journal, April 7, 1958; Kansas City Star, April 7, 1958; "triple play" quote from Topeka Daily Capital, April 8, 1958.

27. Topeka State Journal, April 7, 1958; Topeka Daily Capital, April 8, Aug. 5, 1958; Landon quote *Id* April 8.

28. Kansas City Times, Nov. 5, 1958.

29. *Id.*; Topeka Daily Capital, Nov. 5, 1958.

30. Newton Kansan, Jan. 4, 1957; Walker, fn. 17 at 31.