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## Recommended Citation

Michael J. Nelson, *Is There A Silver Lining? Dark Money and Support for State Courts*, 67 DePaul L. Rev. (2018)  
Available at: <https://via.library.depaul.edu/law-review/vol67/iss2/3>

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# IS THERE A SILVER LINING? DARK MONEY AND SUPPORT FOR STATE COURTS\*

*Michael J. Nelson\*\**

## INTRODUCTION

Judges and scholars alike underscore the importance of public support for the efficacy of the judicial branch.<sup>1</sup> Courts famously lack both the power of the purse and the sword, meaning they are unable to fund themselves nor use the necessary force to implement their decisions. As a result, courts depend on other actors to implement their decisions, and implementation is hastened by the legitimacy of the judicial branch. A legislative or executive branch that refuses to comply with the decision of a legitimate court will be punished in the next election by voters who perceive the judicial branch as legitimate.

Our understanding of public support for courts is complicated at the state court level by the widespread use of popular elections to select and retain judges. While elections are generally legitimacy-enhancing institutions, the trappings of judicial campaigns are fraught with peril.<sup>2</sup> Perhaps the most potent threat to the public's willingness to support their state supreme court comes from campaign contributions, a fea-

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\* I thank Jim Gibson, Keith Schnakenberg, Zachary Baumann, and Morgan Hazelton for helpful conversations and Steven Saroka for helpful research assistance.

\*\* Jeffrey L. Hyde and Sharon D. Hyde and Political Science Board of Visitors Early Career Professor in Political Science, Assistant Professor, Department of Political Science, Affiliate Law Faculty, Pennsylvania State University. [mjn15@psu.edu](mailto:mjn15@psu.edu).

1. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992); Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1138–40 (1997). While the focus in this article is on the legitimacy of the judiciaries of the United States, legitimacy is no less important outside the boundaries of the United States. See, e.g., James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 349 (1998); Amanda Driscoll & Michael J. Nelson, *Judicial Selection and the Democratization of Justice: Lessons from the Bolivian Judicial Elections* 3 J. LAW & COURTS 115, 116, 134–35 (2015). Likewise, institutions of all stripes depend on public support for their efficacy. See, e.g., JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY* 22 (1995).

2. JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* 136 (2012).

ture of campaigns that robust evidence from political science has demonstrated can harm perceptions of judicial legitimacy.<sup>3</sup>

Concerns about the campaign finance and judicial legitimacy nexus are only likely to magnify as spending in judicial races continues to grow at a high rate.<sup>4</sup> Indeed, given that campaign spending more than doubled in judicial races between 1990–1999 and 2000–2009, there is reason for concern regarding the long-term ramifications of high levels of campaign spending on public support for state supreme courts.<sup>5</sup>

Compounding these normative concerns is the growth of dark money support—campaign support which cannot be traced back to specific donors—in these elections. Unlike traditional campaign support, in which donors provide contributions directly to candidates who are typically required to disclose the source of their funds, dark money support obscures the connection between donor and recipient, leaving litigants unsure if their opponents contributed to a judge’s position on the bench and leaving them with no means to verify any suspected conflicts of interest.

While the political science research on campaign contributions and judicial legitimacy raises concerns about the relationship between campaign financing and support for courts,<sup>6</sup> an inquiry into the relationship between these two concepts is also important in light of doctrinal concerns. The Supreme Court of the United States has recognized that campaign finance reforms can be justified by the state’s interest in preventing “both the actual corruption threatened by large financial contributions and . . . the appearance of corruption” that could result from such support.<sup>7</sup>

This Article examines the consequences of campaign support on the public’s belief that their state supreme court is fair, impartial, and legitimate. Relying on a survey of 800 Americans, I demonstrate that the public penalizes courts and judges who receive support from dark money groups less than they penalize those that receive support—either direct or independent—from known litigants directly. Moreover, these effects do not dissipate with the passage of time. These results

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3. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 62 (2008).

4. JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE* 68 (2010), <https://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf>.

5. *Id.* at 1–2.

6. *See, e.g.*, Gibson, *supra* note 3, at 62.

7. *McConnell v. FEC*, 540 U.S. 93, 135 (2003).

have important implications for both the legitimacy of state supreme courts and the likelihood of reform.

## II. COURTS AND THEIR PUBLICS

### A. *The Importance of Public Support for Courts*

The U.S. Supreme Court has acknowledged the importance of its legitimacy and the relationship of that legitimacy to compliance. In perhaps the most famous statement regarding the importance of legitimacy to the Court made in recent years, Justice O'Connor wrote in *Planned Parenthood v. Casey* that:

As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands . . . .

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.<sup>8</sup>

The frequency with which the Court publicly acknowledges its legitimacy has increased over time. The Court has made seventy-one direct references to its legitimacy since deciding *Brown v. Board of Education* in 1954, but only made nine similar references before that point in time.<sup>9</sup> More recently, dissenting in *Bush v. Gore*, Justice Breyer described “the public’s confidence in the Court” as “a public treasure” that has been “built slowly over many years.”<sup>10</sup> But what, exactly, is legitimacy? Tyler provides a clear explication:

Legitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decisions and rules, following

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8. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992).

9. Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 *POLIT. RES. Q.* 206, 207 (2012).

10. *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward.<sup>11</sup>

Scholars use synonyms like “authority” and “diffuse support” as analogues for legitimacy.<sup>12</sup>

In one of the most famous statements of the concept, David Easton compared legitimacy to “a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants.”<sup>13</sup> The notion of legitimacy as a reservoir is particularly apt: a single disagreeable decision should not drain an otherwise robust reservoir of support, though a reservoir might become drained after repeated challenges, such as a series of disagreeable decisions.

Diffuse support differs from other types of support for courts.<sup>14</sup> Most notably, institutions also have specific support. In Easton’s terminology, specific support “can be closely associated with the satisfactions obtained from specific classes of output” such as the policies promulgated by an institution.<sup>15</sup> Easton notes that diffuse and specific support should not be too closely related; legitimate institutions can make unpopular decisions without losing their legitimacy. Indeed, in Gibson’s apt phrase, “legitimacy is for losers”: it only matters for institutions once an *objection precondition* is met.<sup>16</sup> When individuals agree with an institution’s decision, they comply even in the absence of legitimacy. When satisfaction is tested, legitimacy encourages compliance even in the face of dissatisfaction.<sup>17</sup> However, in the face of a

11. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANNU. REV. PSYCHOL. 375, 375 (2006). For other reviews of the academic literature on legitimacy, see James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, ANNU. REV. LAW SOC. SCI. 201, 202 (2014); JOSH T. JOST & BRENDA MAJOR, *THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS* 3 (2001).

12. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 268 (1965).

13. *Id.* at 273.

14. Diffuse and specific support are also different from *confidence* in an institution. Confidence reflects a blend of diffuse and specific support: more unyielding than strict performance satisfaction but more malleable than diffuse support. See, e.g., James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 355 (2003); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1212–13 (1986).

15. EASTON, *supra* note 13, at 268; David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435, 439 (1975).

16. James L. Gibson, *Legitimacy Is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and the Symbols of Judicial Authority*, *MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY: THE ROLE OF INSTITUTIONAL TRUST* 81–116 (Brian H. Bornstein & Alan J. Tomkins eds., vol. 62, 2015).

17. James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 188 (2005).

sustained string of dissatisfying decisions, support for an institution will decline.<sup>18</sup> The mechanism is a complicated psychological one, theorized to rely on implicit information processing and the omnipresence of judicial symbols.<sup>19</sup> The presence of such symbols can sever the relationship between disappointment and a decline in support for a court.<sup>20</sup>

The extent to which performance satisfaction harms the institutional legitimacy of courts is debated by scholars.<sup>21</sup> Studies generally show that performance satisfaction has some effect on judicial legitimacy, though that effect is not as important as other factors, such as democratic values or perceived politicization.<sup>22</sup> As a result, support for the U.S. Supreme Court is markedly stable over time.<sup>23</sup> Other studies that examine support for the Court before and after a high-profile decision, such as the Court's decisions in *Bush v. Gore*, or *National Federation of Independent Business v. Sebelius*, generally find aggregate stability in the Court's legitimacy.<sup>24</sup> In short, legitimacy

18. James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120, 1130 (1992).

19. James L. Gibson et al., *Losing, But Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC. REV. 837, 839 (2014); James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: An Analysis of the Effects of Disappointment in the Court's Rulings*, 80 PUB. OP. Q. 622, 638 (2016).

20. *Id.*

21. *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 185 (2013); James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 162–63 (2015).

22. James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?* 14 J. EMPIRICAL LEGAL STUD. 592 (2017).

23. James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 516 (2007).

24. Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrupted: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 404 (2015); James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 545 (2003); Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 33, 37 (2001). Other studies have found that public attitudes toward the Court—though not necessarily legitimacy—are affected by single judicial decisions. Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter?: The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633, 651 (1998). Studies that examine those most affected by decisions do find some effect of change in support for the institution. *See, e.g.*, Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 97 (2000). To compound the issue, the Court might act strategically, deciding cases in line with public opinion in order to maintain its legitimacy. Marshall notes that only 33 percent of the Court's decisions between 1935 and 1986 were inconsistent with public opinion. THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 78 (1989).

serves a vital function for all political institutions and is especially important for courts. As a result, maintaining public support is particularly important for these institutions to be able to fulfill their role as equal partners in governance.

### B. *Judicial Campaigns and Support for Courts*

The dynamics of judicial legitimacy are different at the state level where most judges must receive the support of a plurality of voters to be elected. Because elections are legitimacy-enhancing, judicial elections theoretically provide these courts with a direct mechanism through which they can renew and enhance their legitimacy.<sup>25</sup>

With only a handful of exceptions, the United States is unique in its use of popular judicial elections to select and retain judges.<sup>26</sup> Originally adopted as a means to curb state legislatures who were leading states into fiscal peril,<sup>27</sup> judicial elections today are competitive, featuring many trappings of modern-day legislative and executive campaigns.<sup>28</sup>

What are the consequences of judicial elections on public support for courts? There is no clear-cut answer to this question. Some evidence, like the experimental evidence provided by Nownes and Glennon, suggest that the use of judicial appointment is associated with *lower* levels of judicial legitimacy,<sup>29</sup> while Nelson's observational evidence suggests a positive relationship between the use of judicial elec-

25. Gibson, *supra* note 3, at 59.

26. The two most notable exceptions are Bolivia and Japan. Bolivians adopted national non-partisan elections to select their national judges, electing the first judges in 2011. Japan uses uncontested retention elections to retain some of its judges. Amanda Driscoll & Michael J. Nelson, *The 2011 Judicial Elections in Bolivia*, 31 ELEC. STUD. 628, 628–29 (2012); Amanda Driscoll & Michael J. Nelson, *The Political Origins of Judicial Elections: Evidence from the United States and Bolivia*, 96 JUDICATURE 151, 151–52 (2013); David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1589 (2009).

27. Jed H. Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1066 (2010); JED H. SHUGERMAN, *THE PEOPLE'S COURTS* 57 (2012); F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 432, 441 (2004); Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 1984 AM. B. FOUND. RES. J. 345, 347 (1984). Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 204 (1993).

28. CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* 2 (2009); MELINDA GANN HALL, *ATTACKING JUDGES* 1 (2014); HERBERT M. KRITZER, *JUSTICES ON THE BALLOT* 238 (2015).

29. Anthony J. Nownes & Colin Glennon, *An Experimental Investigation of How Judicial Elections Affect Public Faith in the Judicial System*, 41 LAW & SOC. INQUIRY 37, 38 (2015).

tions and judicial legitimacy.<sup>30</sup> Nelson’s evidence stands in direct contradiction to the observational evidence cited by Cann and Yates, who find that the use of judicial elections is associated with lower levels of judicial legitimacy.<sup>31</sup> Likewise, Benesh finds that the use of partisan elections is associated with a decrease in confidence in the “courts in your community.”<sup>32</sup> Other studies find no relationship between the use of judicial elections and citizen perception of their state judiciaries.<sup>33</sup>

A set of studies by Gibson demonstrate that the trappings of judicial campaigns have predictable effects on public evaluations of judicial legitimacy. Indeed, contrary to concerns of many in the wake of the Supreme Court’s decision in *Republican Party of Minnesota v. White*, there is no evidence that public statements of policy positions by judges are associated with lower judgments of the legitimacy of judicial institutions.<sup>34</sup>

There is evidence that Kentuckians penalize their state supreme court in the face of attack advertising,<sup>35</sup> though that effect dissipates in a national sample. Indeed, when Gibson asked Kentuckians to rate the appropriateness of three real negative advertisements used in judicial elections in that state, respondents broadly indicated that such advertisements were appropriate.<sup>36</sup> The exception was an advertisement that strayed away from policy disagreement and suggested the targeted judge was a typical politician.<sup>37</sup> Finally, in a multi-wave panel survey, Gibson and colleagues evaluated change in support for the Pennsylvania Supreme Court over the course of an election cycle.<sup>38</sup> In this experiment, subjects *viewed* television advertisements;

30. Michael J. Nelson, *The Sky is Not Falling: Judicial Elections and Support for State Courts*, JUDICIAL ELECTIONS IN THE 21ST CENTURY 217–33 (Chris W. Bonneau & Melinda Gann Hall eds., 2016).

31. DAMON M. CANN & JEFF YATES, THESE ESTIMABLE COURTS: UNDERSTANDING PUBLIC PERCEPTIONS OF STATE JUDICIAL INSTITUTIONS AND LEGAL POLICY-MAKING 104 (2016); see also Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for State Courts*, 36 AM. POL. RES. 297, 316 (2008) (finding that judicial elections only have deleterious consequences on the legitimacy of state supreme courts among respondents with low levels of political information).

32. Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 701–02 (2006).

33. Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government*, 60 POL. RES. Q. 707, 715 (2007).

34. Gibson, *supra* note 3, at 70.

35. *Id.* at 64.

36. *Id.*

37. *Id.* at 62.

38. James L. Gibson et al., *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 POL. RES. Q. 545, 545–46 (2011).



those respondents who viewed negative advertisements had less support for the Pennsylvania Supreme Court. The authors concluded that “the message of most ads is that ‘courts are the same as other political institutions,’ a message that tarnishes support based on the presumption that the judiciary should be a nonpolitical branch of government.”<sup>39</sup> Again, the harm comes from the connection between judges and “typical” political activity.<sup>40</sup>

Campaign contributions represent a final type of campaign activity with effects on legitimacy that have been examined by scholars. Many advocates fear that campaigns harm support for state supreme courts because they make judges beholden to the litigants (or their lawyers) who eventually appear before them. Indeed, the Florida Supreme Court has recognized this possibility, writing that a ban on direct solicitations of donors by judicial campaigns was justified due to “a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public’s confidence in an impartial judiciary.”<sup>41</sup> There is broad support for the proposition that campaign contributions harm public support for courts. Gibson finds that learning a judge has accepted campaign contributions reduces support for a state supreme court.<sup>42</sup> Additionally, Cann and Yates report that citizens concerned about campaign contributions tend to ascribe lower levels of legitimacy to their state supreme court.<sup>43</sup>

In short, there is an accumulating body of evidence that campaign conduct by individual justices can contaminate their constituents’ support for the institutions in which they hope to serve. The relationships between judges and donors represents a potentially fraught issue for the legitimacy of courts. With that in mind, I now turn to a discussion of trends in campaign finance in state courts over the past two decades.

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39. *Id.* at 553.

40. Importantly, despite claims like Dahl’s famous dictate that “much of the legitimacy of the Court’s decisions rests upon the fiction that it is not a political institution but exclusively a legal one . . . .”, there is little evidence that legal realists are less supportive of courts than strict legal realists. Robert E. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. LAW. 279, 280 (1957). James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC’Y REV. 195, 197–98 (2011); Gibson et al., *supra* note 24, at 545.

41. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1664 (2015).

42. Gibson, *supra* note 3, at 62.

43. Cann & Yates, *Homegrown*, *supra* note 31, at 316.

C. *The Campaign Finance Landscape in Judicial Elections*

The notion that campaign contributions are harmful to public support for courts is particularly noteworthy when considering campaign finance changes in judicial elections over the past three decades. A report by the Brennan Center for Justice, in collaboration with the National Institute for Money in State Politics, noted that “[c]ampaign fundraising more than doubled, from \$83.3 million in 1990–1999 to \$206.9 million in 2000–2009 . . . . All but two of the twenty-two states with contestable Supreme Court elections had their costliest-ever contests in the 2000–2009 decade.”<sup>44</sup> A similar report analyzing the 2013–2014 election cycle found that over 90% of contested state supreme court elections were won by the candidate who raised the most money.<sup>45</sup>

The sources of these campaign funds are varied. Bonneau finds that the percentage of campaign spending by candidates dropped from over 90% in 2002 to less than 60% in 2012 and 2014, noting that an increase in spending by outside groups moves control away from candidates, leaving the outside groups free to dictate the issues, tone, and content of the electoral contest.<sup>46</sup> In short, outside spending in judicial elections has increased markedly in the past decade-and-a-half.

Aside from individual and independent support, a third type of campaign support has become increasingly common in judicial races. This third type of support—dark money support—refers to “untraceable political spending.”<sup>47</sup> “Dark money is money that has been routed through an opaque nonprofit—thus concealing its true source from voters and investors alike. The source of dark money could be individuals, unions, associations, nonprofits, or for-profit businesses.”<sup>48</sup> While often linked to the Supreme Court’s decision in *Citizens United*, that ruling was not the origin of dark money in U.S. elections, nor, according to Professor Ciara Torres-Spelliscy, is it the

44. James Sample et al., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE*, <https://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf>; Cf. Chris W. Bonneau, *Fundraising and Spending in State Supreme Court Elections*, *JUDICIAL ELECTIONS IN THE 21ST CENTURY* 84 (Chris W. Bonneau & Melinda Gann Hall eds., 2016) (finding “while state supreme court elections are not cheap, campaign fundraising is not changing in any kind of escalating manner. In fact, if anything, candidates are raising *less* money in recent years than they were at the beginning of the [2000] decade”).

45. SCOTT GREYTAK ET AL., *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2* (2015) (spending over this election cycle was over \$34.5 million).

46. Bonneau, *supra* note 46, at 87.

47. Ciara Torres-Spelliscy, *Dark Money, Black Hole Money, and How to Solve It*, *AM. CONST. SOC’Y* 2.2 (2015), [https://www.acslaw.org/sites/default/files/2\\_Dark\\_Money\\_Black\\_Hole\\_Money\\_and\\_How\\_to\\_Solve\\_It.pdf](https://www.acslaw.org/sites/default/files/2_Dark_Money_Black_Hole_Money_and_How_to_Solve_It.pdf).

48. *Id.*

reason for the increase in dark money seen since 2010.<sup>49</sup> Indeed, that ruling upheld—by an 8-1 vote—the constitutionality of disclosure requirements.<sup>50</sup>

Still, the involvement of dark money groups in judicial elections is not rare. Consider the 2016 primary elections in the six states that used television advertising. The Brennan Center for Justice reports that candidates were only responsible for about one-third of television advertising in these races, and dark money groups were responsible for airing 70% of non-candidate advertisements.<sup>51</sup> The 2016 figures represent a significant increase from past election cycles, suggesting that the amount of dark money in judicial races is rising.

There is reason to believe these dark money contributions could be especially harmful in judicial races because of the thinness of the information environment in these races. As Professor Heather Gerken puts it:

Judicial elections are one of the places where money is likely to have the most corrosive effect. The obvious reason, of course, is that we have a different sense of the position (hence all the objections about judicial elections generally). But I have an additional worry that stems from my experience in election law. In most instances, big money funds races between the two major parties. There, at least, voters have some background sense of the politics of the candidates, which means that money may have less of an effect. In judicial elections, however, the money may matter more because we lack a “shorthand” (such as an identification with a political party) to guide our votes.<sup>52</sup>

In other words, in judicial elections—and especially nonpartisan or retention elections—voters lack the party cue on election day that can counteract any misleading information heard from campaign advertisements. As a result, such spending may be particularly effective in these races.

The public broadly supports campaign finance reform. A 2015 Associated Press-NORC poll asked respondents how effective they felt specific forms of campaign finance reform would be at reducing the influence of money in politics. The results are fairly remarkable.

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49. *Id.*

50. *Id.* at 2.3.

51. BRENNAN CENTER FOR JUSTICE, NEW ANALYSIS: 2016 JUDICIAL ELECTIONS SEE SECRET MONEY AND HEIGHTENED OUTSIDE SPENDING, <https://www.brennancenter.org/press-release/new-analysis-2016-judicial-elections-see-secret-money-and-heightened-outside-spending> (last visited Oct. 1, 2017).

52. Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, MARQ. LAWS. 21 (2016), <https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2014-summer/2014-summer-p10.pdf>.

Only 13% of respondents felt that limiting how much an outside group can spend on a candidate's campaign would be ineffective at reducing the influence of money in politics.<sup>53</sup> Additionally, 15% of respondents felt that limits on candidate spending would be ineffective, while only 13% of respondents felt that limits on spending by political parties would be ineffective.<sup>54</sup> In that same poll, 76% of respondents expressed opposition to dark money in electoral campaigns, answering that they felt that "all groups that raise and spend unlimited money to support candidates should be required to publicly disclose their contributors."<sup>55</sup> A 2015 CBS News/New York Times poll found an almost identical result: 75% of respondents felt that "groups not affiliated with a candidate that spend money during political campaigns should be required to publicly disclose their contributors."<sup>56</sup>

This discussion suggests three conclusions. First, political science studies discussing how campaigning affects support for judicial institutions suggest that campaign contributions generally have deleterious effects on the legitimacy of state supreme courts. Second, the landscape of judicial campaigns has changed markedly since the early 1990s because campaign spending—and spending from outside groups especially—is increasing significantly. Finally, the public appears broadly supportive of campaign finance reform efforts.

### III. DARK MONEY, JUDICIAL CAMPAIGNS, AND PUBLIC SUPPORT FOR COURTS

Given public concerns about campaign finance reform, and dark money especially, it is appropriate to examine how different types of campaign support might affect public support for state supreme courts and their judges. Indeed, one might expect that the unique challenge of judging exacerbates the effect of dark money contributions on support for courts because it creates ambiguities that, in turn, call into question the fairness, impartiality, and legitimacy of state supreme courts.

Dark money contributions might affect citizens' perceptions of their state supreme courts in one of two ways. First, as Rich Robinson, the Executive Director of the Michigan Campaign Finance Network, has suggested:

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53. *Americans' Views on Money in Politics*, ASSOC. PRESS-NORC CTR. FOR PUB. AFFAIRS, RES. 8–9 (2015).

54. *Id.*

55. *Id.* at 7.

56. *Americans' Views on Money in Politics*, N.Y. TIMES (Sept. 8, 2017), [www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?mcubz=1](http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?mcubz=1).

Nobody has the motivation to spend big money in a judicial race like a litigant with a high-stakes case in the appeals pipeline. Imagine being in court opposing the person who financed the campaign of the justice who is going to decide your case. Imagine not knowing it, so you can't make a legitimate motion for recusal. Dark money undermines the whole premise of judicial impartiality.<sup>57</sup>

In other words, because the lack of disclosure requirements render vague the relationship between a litigant and the support received by a judicial candidate, it is unclear the extent to which the two are linked. Accordingly, in the wake of dark money, support for courts (especially perceptions of fairness and impartiality) might suffer because citizens judge harshly candidates who do not speak out against such support, thereby dirtying their hands in the eyes of voters.

A second possibility is implied by Professor Torres-Spelliscy who suggests that "because of the dark money problem, Americans often don't know what they don't know about money in politics."<sup>58</sup> In this sense, such contributions are "out of sight, out of mind" for the public: because they do not and cannot know whether there is a relationship between the litigant and the support, they are unlikely to penalize the court or judge when they learn of such support. In this way, just as dark money obscures the relationship between the donor and the object of the donor's support, it also shields the object of that support from public reprisal for that support.

Indeed, this second possibility seems particularly likely given the relatively low levels of awareness that most citizens have about their state supreme courts. When these institutions operate out of sight (and mind) of voters, voters are unlikely to acquire the information necessary to (1) learn about a particular case the state supreme court is hearing, (2) learn about the support the judges of that court received in their last election, and (3) combine that information to come to a judgement about their support for their state supreme court.<sup>59</sup>

As a result, the first hypothesis of this study is that *dark money contributions have less deleterious effects on support for state supreme courts than direct litigant support.*

Aside from the source of the support, the timing of the support might matter as well. The adage is that "time heals all wounds."

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57. Rich Robinson, *Culture of Dark Money*, DOME MAG. (Dec. 21, 2012), <http://domemagazine.com/robinson/rr122112>

58. Torres-Spelliscy, *supra* note 47, at 2.3.

59. James L. Gibson et al., *Updating Supreme Court Legitimacy: Testing the "Rule, Learn, Update" Model of Political Communication*, 54 AM. POL. RES. (forthcoming 2017); Michael J. Nelson & Patrick Tucker, *The Dynamics of U.S. Supreme Court Legitimacy*, (Working Paper, 2017).

Here, the passage of time might lead voters to conclude that the acceptance of campaign support is temporally distant enough to mitigate the deleterious consequences of accepting that campaign support. Indeed, even if citizens do learn about such support, the political science literature suggests that changes in support are likely fleeting, regenerating to equilibrium levels over time.<sup>60</sup> More practically, voters are busy people, and most do not fret (or even think) about the campaign support received by their state supreme court justices on a daily basis. If voters do not know or remember the campaign support, they are unable to penalize their state supreme court for that support.

As a result, the second hypothesis of this study is that *the effect of campaign support on support for state supreme courts dissipates with time.*

#### IV. THE SURVEY

To examine the extent to which public perceptions of courts are affected by campaign contributions, especially those made by litigants, I conducted an experiment using the Amazon Mechanical Turk platform on March 7–10, 2017. The beginning of the survey asked respondents about their demographic characteristics and their background knowledge of their state supreme court. Then, respondents were exposed to a short, fictional vignette of a ruling by their state supreme court. Finally, I asked respondents about: (a) their perceptions of fairness and impartiality, (b) their willingness to vote for the judge who received the campaign contributions, and (c) the legitimacy of their state supreme court.

##### A. *The Survey Experiment*

The survey vignette was based heavily upon one used by Gibson and Caldeira to study the extent to which recusals mitigate the deleterious consequences of campaign support by litigants in both West Virginia and in a national sample of Americans.<sup>61</sup> However, where the Gibson and Caldeira experiment manipulated a number of characteristics of the decision, I manipulate only two: (1) the identity of the donor who provided campaign support to the judge and (2) the timing of the campaign support.

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60. Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1119 (1997).

61. James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of Courts?*, 74 J. POL. 18, 33 (2012); James L. Gibson & Gregory A. Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey*, 10 J. EMPIRICAL LEGAL STUD. 76, 78–79 (2013).

Realism is always an issue with vignette experiments, so I took pains to model the dispute in the vignette after a state supreme court decision: *Avery v. State Farm Mutual Automobile Insurance Company*.<sup>62</sup> According to *The New Politics of Judicial Elections 2000-2009*:

*Avery v. State Farm Mutual Automobile Ins. Co.* involved the most expensive state judicial campaign in United States history, a 2004 contest in which Illinois Appellate Judge Gordon Maag and then-circuit Judge Lloyd Karmeier raised a total of \$9.3 million. Karmeier, who received over \$350,000 in direct contributions from employees, lawyers and others linked to State Farm Insurance, and over \$1 million more from groups of which State Farm was a member or to which it contributed, won the election.

Justice Karmeier then refused to recuse himself from *Avery*, which, as the timeline illustrates, was pending before the Illinois Supreme Court during the entire campaign. The stakes in *Avery* were hardly trivial. Justice Karmeier cast the decisive vote to reverse a verdict on breach of claims valued at over \$450 million against State Farm (57).<sup>63</sup>

I recast the dispute into one involving a fictional insurance company, Golden Eagle Insurance, and a fictional Justice Smith. I kept the size of the verdict—\$450 million—and the general issue at dispute in the appeal: whether or not the insurance company needed to reimburse plaintiffs for authorizing faulty repairs.

First, respondents were randomly presented with campaign support from one of three possible sources. In the first (“Direct Support”) condition, a litigant provided campaign support directly to the candidate, enabling the candidate to purchase television advertising. In the second (“Independent Support”) condition, the litigant provided independent campaign support, airing television advertisements on behalf of the judge, but not with the blessing of the candidate. In the third (“Dark Support”) condition, a group whose donors are unknown aired television advertisements on behalf of the candidate.

Formally, the options were:

- “the American Insurance Partnership, a group of insurance companies that includes Golden Eagle Insurance. The group gave campaign contributions which allowed Smith to pay for TV ads urging voters to elect Smith.”

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62. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100 (2005).

63. Sample et al., *supra* note 44, at 57.

- “the American Insurance Partnership, a group of insurance companies that includes Golden Eagle Insurance. The group independently paid for TV ads urging voters to elect Smith.”
- “the American Insurance Partnership, a group that does not disclose its donors. The group independently paid for TV ads urging voters to elect Smith.”

Second, the timing of the support was varied across the three conditions. Half of the respondents learned that the support was provided to the candidate for an electoral contest that took place “Last November” while the remaining respondents were told that the support was provided “About Eight Years ago.” In all versions of the vignette, respondents were told three additional pieces of information: (a) that the Court ruled in favor of the insurance company, (b) that Justice Smith cast the deciding vote on the decision, and (c) that the size of the campaign support was “quite large and therefore likely to have had some impact” on the electoral campaign. These three pieces of information raise the salience of the campaign support on the ruling and make it particularly likely that any experimental effects are high. As a result, a natural extension of this study is to vary one or more of these features to examine the extent to which the effects of campaign support are mitigated in the face of a ruling against the donor, the political cover provided by judicial unanimity, or a small amount of campaign support.<sup>64</sup>

Taken together, the design is a 3 x 2 factorial design with six different versions of the vignette. The version of the vignette hypothesized to have the greatest negative effect on court support is:

Last week, the [State] Supreme Court decided a case involving the Golden Eagle Insurance Company. Golden Eagle Insurance asked the Court to decide that it did not have to pay a group of its customers \$450 million dollars for faulty repairs it authorized. Reversing the decision of the previous court, the [State] Supreme Court decided that Golden Eagle did not have to pay \$450 million to its customers. Justice Smith cast the deciding vote on the decision. Last November, when he was first elected to the Court, Justice Smith received the support of the American Insurance Partnership, a group that does not disclose its donors. The group independently paid for TV ads urging voters to elect Smith.

The contributions provided by the American Insurance Partnership were quite large and therefore likely to have had some impact on Justice Smith’s successful electoral campaign.

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64. This is exactly the approach taken by Gibson and Caldeira, *supra* note 61, at 21–22, 25–26.



*B. The Sample: Amazon Mechanical Turk*

Respondents were recruited using Amazon’s Mechanical Turk (MTurk) platform and were compensated \$0.50 for completing the short, six to eight minute survey. The nature of the sample raises two important questions. First, to what extent does the sample have characteristics that mirror the American people (or the characteristics of other surveys)? Second, to what extent was the randomization employed in the experiment successful at ensuring balance among demographic characteristics across experimental conditions?

Mechanical Turk samples, unlike most phone or internet surveys, are convenience samples rather than nationally representative surveys of the American people. Only those respondents who choose to complete tasks (called “hits”) on the Mechanical Turk platform are among the group of individuals who could be polled. Moreover, respondents choose which surveys and tasks they want to complete, creating potential self-selection issues.

	Internet Samples			Face to Face	
	Sample	Christenson and Glick	Berinsky, Huber, Lenz	ANES-P 2008-09	ANES 2008
% Female	47.5	54.4	60.1	57.6	55
% White	82.3	79	83.5	83	79.1
% Black	7.6	7.9	4.4	8.9	12
% Hispanic	7.3	5	6.7	5	9.1
Mean Age (Yrs)	38.6	33.4	32.3	49.7	46.6
Ideology (7 pt.)	3.51	3.3	3.4	4.3	4.2
Education	53% Col Grad 32% Some Col	50% Col Grad 37% Some Col	14.9 yrs	16.2 yrs	13.5 yrs

**Table 1: Comparison of Sample Demographics.** ANES-P is the American National Election Panel Study conducted by Knowledge Networks and the ANES is the American National Election Study. Data from the ANES are weighted. Data for Christenson and Glick comes from Table A1 of their article; data for the remaining columns comes from Table 3 in Berinsky, Huber, and Lenz 2012.

Luckily, political scientists have shown that Mechanical Turk samples perform similarly to high quality internet surveys widely used by political scientists.<sup>65</sup> As a demonstration, Table 1 compares the characteristics of my sample to those used by Christenson and Glick, the Berinsky, Huber, and Lenz MTurk sample, the 2008-2009 American National Election Panel Study (a web-based panel survey), and the

65. Adam J. Berinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com’s Mechanical Turk*, 20 POL. ANALYSIS 351, 356–57 (2012); Michael Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon’s Mechanical Turk A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSP. PSY. SCI. 3 (2011).

2008 American National Election Study, a well-known face-to-face survey.

Overall, my sample is fairly representative. Its average age is markedly older than the other Mechanical Turk samples and has a higher amount of Latino representation than any of the internet samples. A common critique of Mechanical Turk convenience samples is their liberal bent. This is still true in this sample; however, it is closer to the average ideology (measured on a seven-point scale) of the nationally representative surveys than either of the other Mechanical Turk samples. Overall, the demographic comparison underscores the conclusion that Berinsky, Huber, and Lenz reached about Mechanical Turk samples:

the MTurk sample does not perfectly match the demographic and attitudinal characteristics of the U.S. population but does not present a wildly distorted view of the U.S. population either. Statistically significant differences exist between the MTurk sample and the benchmark surveys, but these differences are substantively small. MTurk samples will often be more diverse than convenience samples and will always be more diverse than student samples.<sup>66</sup>

Or, as Christensen and Glick put it,

the MTurk sample deviates from the gold standard surveys in important ways and should never be considered a valid substitute for making population estimates. On the other hand . . . many deviations are relatively minor and that on some important metrics the MTurk sample is more similar to the ANES than the ANES panel.<sup>67</sup>

	Direct Support	Independent Support	Dark Support	p-value
% Female	45.90%	52.42%	44.11%	0.13
% White	83.96%	80.51%	82.58%	0.57
% Black	7.84%	8.46%	6.44%	0.67
% Hispanic	7.09%	6.62%	8.33%	0.74
Age (Years)	38.25	39.40	38.00	0.40
Ideology (mean 7 pt.)	3.51	3.49	3.55	0.94
Education (mean 8 pt.)	6.11	6.02	5.93	0.40
N	268	272	264	

**Table 2:** Balance By Support Condition. The p-values for the first four rows are from Chi<sup>2</sup> tests. The p-values from the remaining rows are from one-way ANOVA models.

The second consideration concerns the extent to which the randomization was effective at balancing assignment to condition across various demographic characteristics. Table 2 compares the balance of assignment to condition across the three donation treatments.

66. *Id.* at 361.

67. Christenson & Glick, *supra* note 24, at 403.

Overall, the randomization was very successful; no demographic characteristic shows statistically significant evidence of imbalance.

However, the randomization was less successful for the temporal manipulation. Here, a higher percentage of men (57.61%) than women (42.39%) received vignettes where the campaign support came in the last year (p-value: 0.004). Likewise, the group of respondents assigned to learn about campaign support in the last election was significantly younger (mean: 37.24 years) than the group who learned about campaign support eight years ago (mean: 39.88). There were no statistically significant differences across the two conditions on any other covariate.

### C. *The Outcome Variables*

I analyze three separate outcome variables in this study: (a) perceptions of fairness and impartiality, (b) a citizen's willingness to support the judge in an upcoming election, and (c) the legitimacy of state supreme courts.

I used the three-question battery employed by Gibson and Caldeira to measure perceptions of fairness and impartiality.<sup>68</sup> The questions, and their response sets, are:

Which best describes your view of Justice Smith's ability as a judge?

- I strongly believe that Justice Smith can be fair and impartial.
- I somewhat believe that Justice Smith can be fair and impartial.
- I somewhat believe that Justice Smith cannot be fair and impartial.
- I strongly believe that Justice Smith cannot be fair and impartial.

Assume for the moment that all judges on the [State Supreme Court] were selected in the same circumstances as Justice Smith. Would you consider the state supreme court:

- A very legitimate institution
- A somewhat legitimate institution
- Not a very legitimate institution
- Not legitimate at all

How likely are you to accept decisions made by Justice Smith as impartial and fair?

- Very Likely
- Somewhat Likely

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68. Gibson & Caldeira, *supra* note 61, at 25.

- Not Too Likely
- Not at all Likely

The items scale well together. The average interitem covariance is 0.51 and the Cronbach's alpha for the scale is 0.87.<sup>69</sup> The three items load onto a single factor with loadings of 0.77 or higher.<sup>70</sup> The factor analysis combines the respondents' scores into a single number between zero and one. Higher values mean more legitimacy. The variable has a mean of 0.33 and a standard deviation of 0.25.

To measure vote choice, I examined responses on a 4-point scale to the following question: "How likely would you be to vote for Justice Smith in the next judicial election?" Most respondents were not likely to vote for Justice Smith again with a slight majority (51%) of respondents falling at the lower endpoint of the scale. The mean of the variable is 1.69 with a standard deviation of 0.82.

Following the work of Gibson and Caldeira,<sup>71</sup> I measured the legitimacy of state supreme courts using the following three questions:

- If the [State Supreme Court] started making a lot of decisions that most people disagree with, it might be better to do away with the supreme court altogether.
- The [State Supreme Court] gets too mixed up in politics.
- The [State Supreme Court] ought to be made less independent so that it listens a lot more to what the people want.

The three items scale together moderately well. The scale is fairly reliable, with a Cronbach's alpha of 0.63 and an average interitem covariance of 0.44. When the three items are loaded onto a single factor, the loadings are 0.59, 0.45, and 0.62, slightly lower than one would hope. The variable has a mean of 0.52 and a standard deviation of 0.21.

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69. Covariance is a statistical measure that assesses the relationship between two variables; larger covariances indicate that two variables are more strongly related to one another. ALAN AGRESTI & BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 425 (4th ed. 2009). According to Braumoeller, "Cronbach's alpha is a worthwhile measure of intercoder reliability, with values below 0.60 considered clearly problematic, those in the 0.60–0.69 range borderline (acceptable by some scholars but not others), 0.70–0.79 acceptable, and 0.80 and above very strong." Bear F. Braumoeller, *Systemic Politics and the Origins of Great Power Conflict*, 102 AM. POL. SCI. REV. 77, 90 (2008).

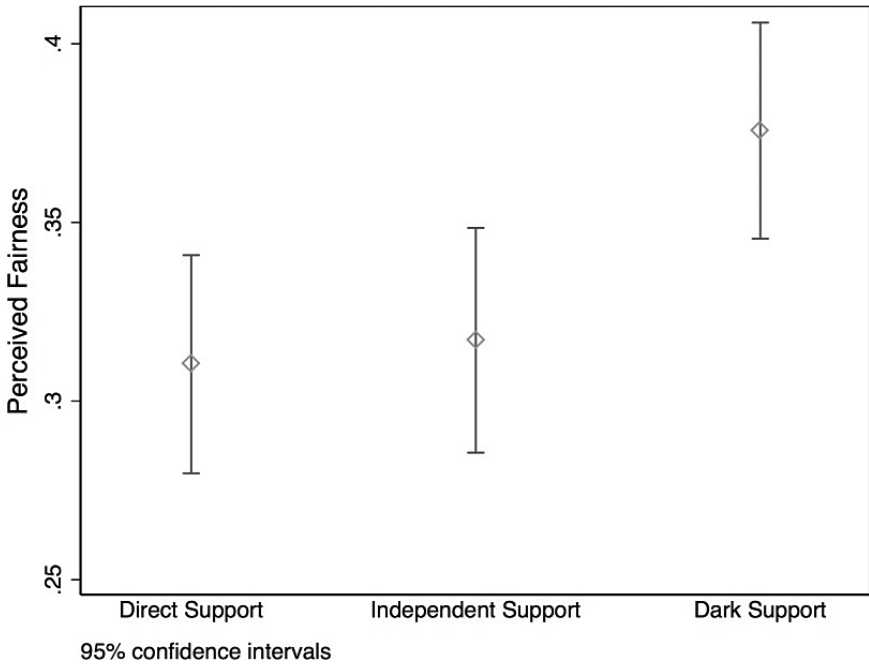
70. According to an introductory statistics textbook, factor analysis is "a multivariate statistical method used for a wide variety of purposes" including "Reducing a large number of factors to a smaller number of statistically uncorrelated variables, the *factors* of factor analysis." AGRESTI & FINLAY, *supra* note 71, at 533. A factor loading is "The correlation of a variable with a factor." Higher factor loadings therefore indicate better item fit. *Id.*

71. Gibson & Caldeira, *supra* note 61, at 23, 25, 31.

V. RESULTS

We examine the results of the experiment in three steps. First, we analyze the support manipulation, analyzing whether support for courts decreases in the presence of campaign support from dark money groups. Second, we analyze the time manipulation, looking for evidence that the deleterious effects of campaign support dissipate with time. Finally, we analyze the two manipulations jointly to determine whether the effect of a particular type of campaign support varies with the timing of that support.

A. The Support Manipulation



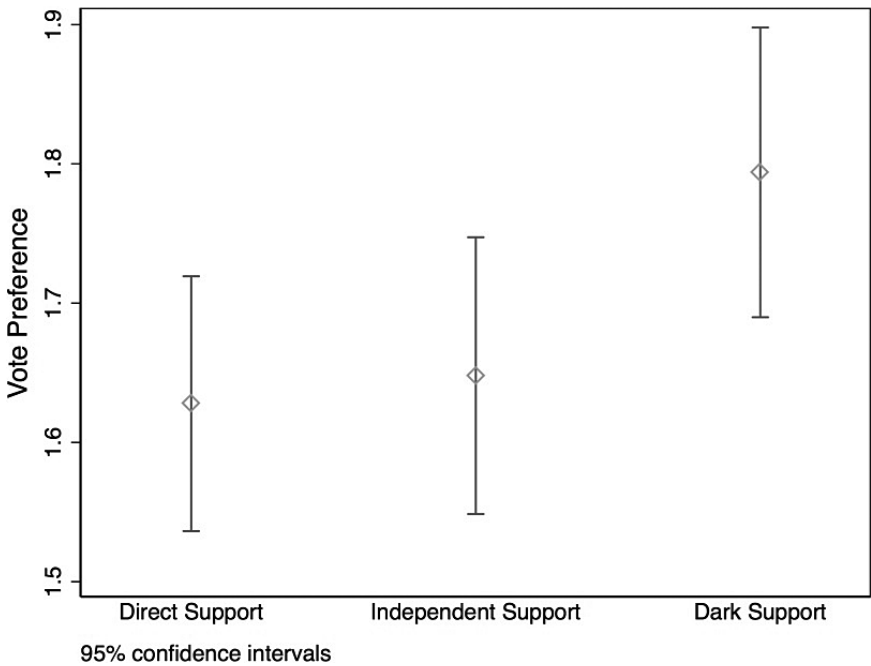
**Figure 1.** Average Perceived Fairness by Support Condition. The bars represent 95% confidence intervals. Higher values on the y-axis indicate higher levels of perceived fairness.

We begin our analysis of the data by examining differences in perceived fairness across the three different support conditions. Overall, there is strong evidence that support varies across the three conditions. A one-way ANOVA analysis provides clear support to reject the hypothesis that average levels of perceived fairness are the same across the three conditions ( $p < 0.01$ ).<sup>72</sup>

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72. An ANOVA (analysis of variance) is an “inferential method for comparing several means.” AGRESTI & FINLAY, *supra* note 69, at 369.

The ANOVA analysis only tells us that there are differences between the three conditions, but it does not tell us what those differences are. To this end, Figure 1 plots mean levels of perceived fairness for each condition. The overwhelming conclusion from the graph is that perceived fairness is *higher* in the presence of dark money support than for either type of direct litigant support. Moreover, while there are statistically significant differences between the Dark Support and Direct Support ( $p < 0.01$ ) and Independent Support ( $p < 0.01$ ) conditions, respondents in the Direct and Independent Support conditions held views that were indistinguishable from one another ( $p = 0.76$ ). This result differs from that reported by the Gibson and Caldeira samples; those samples were more likely to report lower levels of perceived fairness in the face of direct support than independent support.<sup>73</sup>



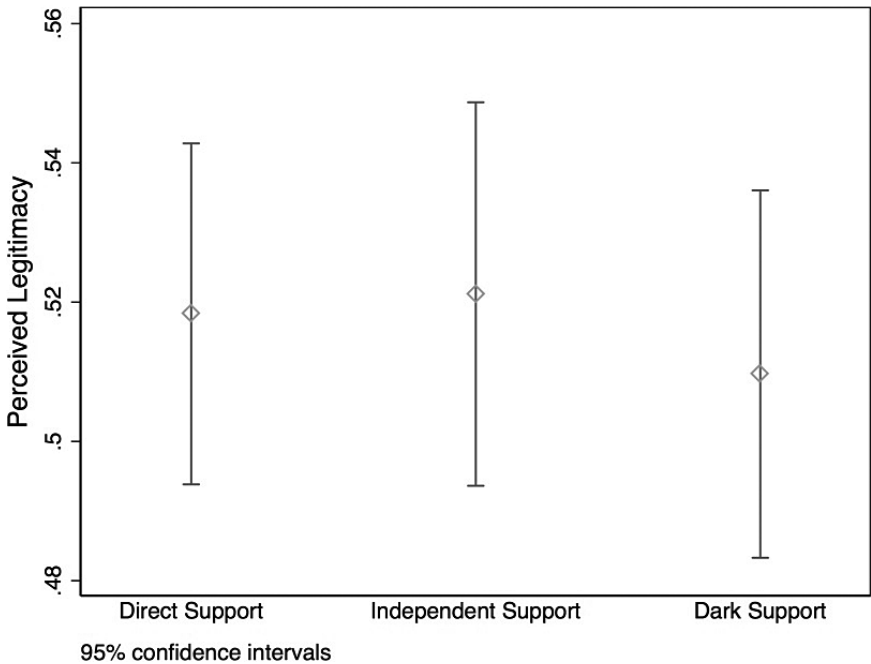
**Figure 2.** Average Vote Intention by Support Condition. The bars represent 95% confidence intervals. Higher values on the y-axis indicate higher willingness to vote for Justice Smith in the next election.

Second, recall that respondents were also asked about the likelihood that they would support Justice Smith in the next election. Respondents provided their responses on a four-point scale and a one-

73. Gibson & Caldeira, *supra* note 61, at 32.

way ANOVA analysis indicates statistically significant differences across conditions ( $p=0.04$ ).

Again, it is easiest to look to a figure to examine the differences across conditions. Figure 2 plots the average responses to this question across the three conditions. The same pattern holds. There are statistically significant differences between the Dark Support condition and the other two conditions ( $p=0.02$  and  $p=0.05$  respectively) but no differences between the two conditions in which respondents were directly informed that the litigant in the case supported Justice Smith ( $p=0.77$ ).



**Figure 3.** Average Legitimacy by Support Condition. The bars represent 95% confidence intervals. Higher values on the y-axis indicate higher levels of perceived legitimacy.

Finally, respondents provided assessments of their state supreme court’s legitimacy in light of the decision. The one-way ANOVA analysis indicates no statistically significant differences across conditions ( $p=0.82$ ). Moreover, as Figure 3 shows, there are no statistically significant differences between the conditions. In short, there is no evidence that the type of campaign support received by the judge has differentially deleterious consequences on the institution’s legitimacy.

Taken together, the results of the support manipulation provide clear evidence that respondents viewed support by a dark money

group as very different than direct support from the litigant. Respondents were more likely to perceive decisions made by a judge who had received dark money as fairer than those in which a judge received direct support from the litigant. However, respondents did not differentiate among the manner in which the litigant provided support: regardless of whether the contribution was given directly to the judicial candidate or used independently, respondents were indistinguishably disdainful of the judge.<sup>74</sup>

There is an important contextual note to make about these results. In all three conditions in the experiment, the judge received campaign support from an industry-related group. Gibson has shown in a variety of works that the receipt of campaign contributions generally *does* harm perceptions of judicial legitimacy.<sup>75</sup> On the whole, the public is tolerant of judicial campaigns: in this sample, roughly half (48.4%) of respondents thought that a “good state supreme court justice” should air television advertisements during campaigns to inform the public of their views. However, more than three-quarters (77.3%) of respondents felt that a good state supreme court justice should refuse to accept any campaign contributions from anyone while about half of respondents (45.9%) felt that good justices should publicly condemn television advertisements made by groups who do not disclose their donors. Thus, while this experiment is unable to determine this fact definitively, it is likely that support from dark money groups mitigates the harm caused by campaign contributions. It is almost certainly not the case that support from dark money groups actually *increases* support for a decision.

### B. *The Time Manipulation*

Having addressed the effects of the support manipulation, we now consider the second manipulation—time. Recall that half of respondents were randomly assigned to read about campaign support that happened in “Last November’s Election.” The other half of respon-

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74. Of course, not all states elect their judges, and 18% of the respondents reported living in a state that does not use judicial elections to retain their judges. This may raise issues of cognitive dissonance for those respondents who know that their state supreme court does not use judicial elections. Indeed, when asked whether their state supreme court stands for election, 39.3% of respondents gave an incorrect response; this is similar to the result in Nelson, *supra* note 30, at 10–11, which reports that a slight majority of a National Center for State Courts-funded survey did not know whether their state supreme court stands for election. When the sample is subset to only those respondents who live in states that elect their judges, the results for fairness and legitimacy hold while the p-value for the ANOVA test of vote intention rises above the 0.05 threshold.

75. Gibson et al., *supra* note 3, at 1.

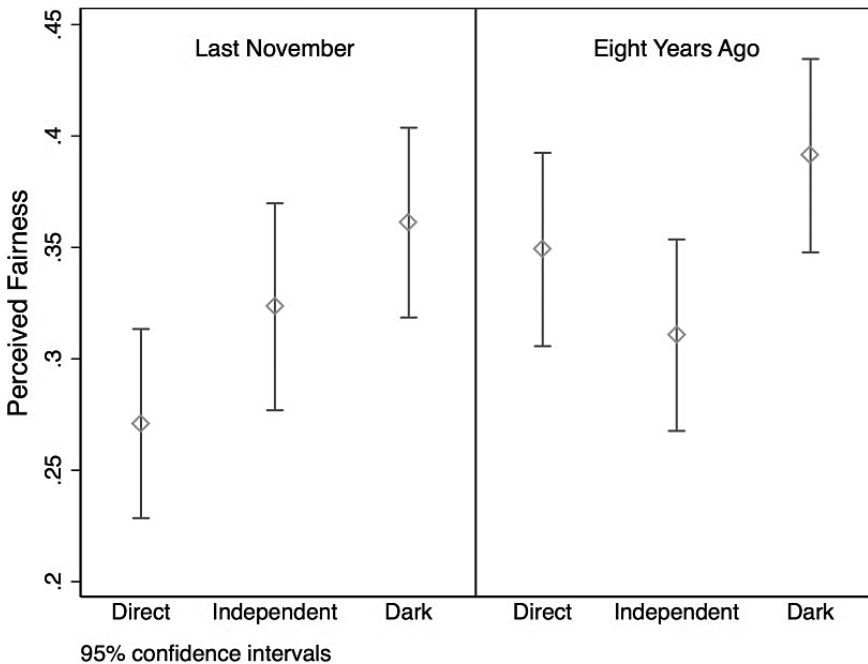


dents learned of campaign support that was provided “About 8 Years Ago.” I predicted that respondents would be more tolerant of past campaign support than recent campaign support.

That does not appear to be the case. Overall, there was no statistically significant difference in perceived fairness ( $p=0.09$ ), vote intention ( $p=0.49$ ), or perceived legitimacy ( $p=0.995$ ) based on the time manipulation to which respondents were assigned. Moreover, the lack of a statistically significant difference is not due to a lack of precision in the estimates. For example, the mean level of legitimacy for those in the “Last November” condition was 0.561 while the analogous value for those in the “Eight Years Ago” condition was 0.561. The two values are *identical*.

In other words, across none of the three dependent variables is there statistically significant evidence that the passage of time mitigates issues with campaign support. Indeed, respondents are equally punitive in their assessments of Justice Smith regardless of when he received support from the insurance industry.

C. *The Interaction of Donation and Time*



**Figure 4.** Average Perceived Fairness by Condition. The bars represent 95% confidence intervals. Higher values on the y-axis indicate higher levels of perceived fairness.

The next stage of the analysis is to analyze whether the support conditions have different effects on respondents' perceptions of Justice Smith based on the timing of the support. Figure 4 plots average values of fairness across each of the six experimental treatments. The left-hand portion of the plot provides the values for each support condition when the support occurred "Last November," while the right-hand lines display the means for the "Eight Years Ago" conditions.

"Last November" condition respondents who learned that Justice Smith received *direct* contributions from the industry have perceptions of fairness that are lower at a statistically significant level than the perceptions of those respondents who learned of *dark money* support ( $p < 0.01$ ). However, accounting for the time treatment removes the statistically significant difference between the perceptions of respondents in the Independent Support and Dark Support conditions, though the plot shows that average levels of fairness generally increase as the type of support that Justice Smith received becomes less directly tied to the litigant in the case.

Interestingly, that linear relationship does not hold in the "Eight Years Ago" treatment. Here, there is a statistically significant difference between the perceptions of respondents in the Independent Support and Dark Support conditions ( $p < 0.01$ ), but no difference between the perceptions of fairness between these respondents and those respondents in the Direct Support category. The fact that perceptions of fairness are particularly low among respondents in the "Direct Support-Last November" and "Independent Support-Eight Years Ago" treatments is particularly puzzling, but it is a pattern that shows up in the vote intention outcome (not provided here) as well. Indeed, respondents seemed somewhat likely to penalize those judges who received the independent support "Eight Years Ago," though the difference is not statistically significant.

Importantly, however, one should exercise caution before reading too much into these interactive results. A two-way ANOVA analysis indicates that there is no statistically significant interactive effect between the two manipulations in the perceived fairness outcome ( $p = 0.12$ ), the vote intention outcome ( $p = 0.06$ ), and the legitimacy outcome ( $p = 0.32$ ). Indeed, it seems that the effects (or lack thereof) of the two manipulations are independent.

#### *D. Multivariate Analysis*

The analysis to this point has suggested three major conclusions. First, respondents punish incumbent judges less for dark money support than for direct or indirect support from a litigant's industry. Sec-

ond, forgiveness is hard. The passage of time does not ameliorate respondents' misgivings about campaign support and there is no difference in their perceptions of fairness, legitimacy, or vote intention based on the timing of the campaign support. Finally, the irrelevance of time holds even when one examines the interactive effect of the type of support and the timing of the support; for no outcome was there a statistically significant interaction between the two manipulations.

However, there may be treatment heterogeneity in the effect of the variables based upon respondents' perceptions of their state supreme court or their expectations for a good state supreme court justice. To this end, the final step in the analysis is to conduct a multivariate regression analysis.

The regression analysis includes a number of control variables. First, modifying the scale used by Gibson and Nelson,<sup>76</sup> I examine the extent to which perceptions of the politicization of the judiciary confound the analysis. The measure of perceived politicization is based upon respondents' answers to the following three statements:

- State supreme court judges are little more than politicians in robes.
- State supreme court justices can be trusted to tell us why they actually decide the way they do, rather than hiding some ulterior motives for their decisions.
- State supreme court justices may say their decisions are based on law and the Constitution, but in many cases, judges make decisions because they think voters will like them.

The three items scale relatively well, with a Cronbach's alpha of 0.65, an average interitem covariance of 0.43, and factor loadings above 0.50.

The respondents answered a standard battery of demographic questions, yielding data about their gender, age, ethnicity, race, social class (home ownership), education (on an 8-point scale), partisanship, and ideology (on a 7-point scale, higher values indicate more conservatism). I measured knowledge of the state judiciary with three questions, modified from those used by Gibson:

- Some judges in the American states must run for reelection to remain in office; others do not. Do you happen to know if the justices of the [State Supreme Court] must run for reelection to remain in office?

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76. Gibson & Nelson, *supra* note 22, at 25.

- Some judges in the American states serve for a set number of years; others serve automatically until retirement. Do you know if the justices of the [State Supreme Court] serve for a set number of years or whether they serve until retirement?
- When there is a conflict over the meaning of your state’s Constitution, do you know who has the last say—is it the state supreme court, the state legislature, or the governor?

I used an additive scale of correct answers to the questions to construct a measure of court knowledge. 2.6% of respondents answered no knowledge questions correctly, 32.2% of respondents answered one question correctly, 30.4% of respondents answered two questions correctly, and 34.8% of respondents answered all three questions correctly.<sup>77</sup>

Finally, to mirror the model specification used by Gibson and Nelson, I include in the legitimacy models the standard job performance and “about right” measures of specific support as well as two indicators of democratic values. About one-third of respondents are dissatisfied with the performance of their state supreme court, while 48.1% of respondents indicated that the policies of their state supreme court were “about right” rather than “too liberal” or “too conservative.” The two democratic values measures were responses on a 5-point scale to two questions: “It is not necessary to obey a law you consider unjust” (20.4% disagree) and “It is better to live in an orderly society than to allow people so much freedom that they can become disruptive” (36.3% disagree).

The most important, and most obvious, conclusion from the multivariate linear regression models displayed in Table 3 is the statistically significant effect of the Dark Support treatment on perceptions of fairness and vote intention. This provides additional support for the first conclusion discussed above: even in a multivariate analysis, perceptions of fairness and vote intention are higher in the face of support from a dark money group than when the support is from the litigant either directly or independently.

Second, after controlling numerous characteristics, there is evidence of a statistically significant effect between the timing of the support and perceptions of fairness. The direction of the effect fits with theoretical expectations: when the support is more recent, perceptions of fairness decline.

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77. James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 434 (2009).

	(1) Fairness	(2) Vote Intention	(3) Legitimacy
Independent Support	0.01 (0.02)	0.01 (0.02)	0.00 (0.02)
Dark Support	0.06* (0.02)	0.05* (0.02)	0.00 (0.02)
Last November	-0.04* (0.02)	-0.02 (0.02)	0.00 (0.01)
Politicization	-0.31* (0.04)	-0.21* (0.05)	-0.30* (0.04)
Female	-0.01 (0.02)	0.00 (0.02)	-0.04* (0.01)
Hispanic	0.05 (0.03)	0.10* (0.04)	0.01 (0.03)
Black	0.04 (0.03)	0.10* (0.04)	-0.02 (0.03)
Own Home	0.02 (0.02)	0.01 (0.02)	0.01 (0.01)
Court Knowledge	-0.02 (0.01)	-0.02 (0.01)	0.01 (0.01)
Education	0.00 (0.01)	0.00 (0.01)	0.03* (0.00)
Democrat	0.02 (0.02)	0.03 (0.02)	-0.02 (0.02)
Republican	0.02 (0.03)	0.03 (0.03)	0.00 (0.02)
Ideology	0.03* (0.01)	0.03* (0.01)	-0.00 (0.01)
Age	-0.00* (0.00)	-0.00* (0.00)	0.00* (0.00)
Specific Support: Job Performance			0.02 (0.01)
Specific Support: "About Right"			0.05* (0.02)
Support for Rule Of Law			0.01* (0.01)
Order vs. Liberty			0.03* (0.01)
Intercept	0.50* (0.06)	0.36* (0.07)	0.23* (0.07)
R <sup>2</sup>	0.12	0.10	0.27
Adjusted R <sup>2</sup>	0.11	0.08	0.25
N	778	786	777

**Table 3. Multivariate linear regression models.** \* indicates statistical significance at p<0.05. To assist with comparability, all three outcome variables are scaled from 0 to 1.

Third, extending the findings of Gibson and Nelson to state supreme courts and to perceptions of fairness and vote intention, Table 3 suggests a statistically significant and substantively important role for perceptions of politicization in affecting respondents' perceptions of courts and judges. Indeed, the substantive effect of perceived politicization dwarfs that of any other predictor in the table, making it both statistically and substantively important.

The important role that perceptions of politicization play in shaping all three outcomes illustrates the grave threat that perceived politicization poses to the legitimacy of state supreme courts. Indeed, recall that the three outcome variables range from 0 to 1. The 0.06 coefficient for Dark Support in Model 1 indicates that respondents in the Dark Support condition have a predicted value of fairness that is 0.06 higher than respondents in the Direct Support condition. In other words, the effect of Dark Support is minor, accounting for 6% of the possible range of perceived fairness. Perceived politicization, on the other hand, accounts for a change of *one-third of the entire range of fairness, vote choice, and legitimacy* as perceptions of perceived politicization move from minimum to maximum values.

Finally, there is a stunning lack of treatment heterogeneity between the three support conditions and respondents' perceptions of courts. Indeed, across all three outcome variables, there is no statistically significant multiplicative interaction between any of the support conditions and:

- The timing of the support
- Perceived politicization
- Respondents' beliefs that "a good state supreme court justice" should "air television advertisements during their campaigns to inform the public about their views"
- Respondents' beliefs that "a good state supreme court justice" should "refuse to accept any campaign contributions from anyone"
- Respondents' beliefs that "a good state supreme court justice" should "publicly condemn television advertisements made by groups who do not disclose their donors"

There is no evidence that the effect of any of the types of campaign support on any of the outcome variables—fairness, vote intention, *or* legitimacy—is different based on respondents' normative or retrospective views of their state supreme court. In other words, the effects are the same among those who tolerate campaign contributions and those who dislike them; among those who believe judges should condemn dark money groups and those who support such groups; and

among those who believe judges act like legislators and those who view judges as divorced from politics.

## VI. CONCLUSION

The overriding conclusion of this study is that voters penalize courts and judges less for support by dark money groups than for direct or independent support by litigants. On the one hand, this result seems surprising: we might expect voters to be more likely to penalize judges for failing to denounce such contributions, doing their best to rely instead on the support of contributors whose identities are known. At the same time, perhaps the result for dark money is a rational response to not knowing whether the litigant donated. This issue highlights the key problem with dark money contributions: from the text of the vignette, respondents do not know whether the litigant was involved in the dark money contribution, so they “punish” the court less than if the contribution was obvious. The issue with dark money is that there is no way for them to find out and therefore to appropriately sanction the court for the contribution if such a penalty is warranted.

The same is true in the real world: *litigants* do not know whether the opposing litigant donated money to the judge and there is no way for them to find out. This lack of available information has important downstream consequences: the media is unable to report on potential conflicts of interest, litigants are unable to support motions for recusal when they are deemed necessary, and the public generally has no opportunity to judge the potential ethical violations of their judges.

At the same time, this “out of sight, out of mind” finding also points to a practical difficulty with campaign finance reform efforts. If citizens do not *see* the conflict of interest, they are unlikely to see the problem. Such conflicts of interest are relatively difficult issues for most people to understand. This, coupled with the fact that people generally pay little attention to politics at the state level, suggests that reformers face an uphill battle as they seek to remedy the deleterious effects of dark money contributions.

There are three major weaknesses of the survey. First, and most obviously, the data upon which the analysis relies comes from a convenience sample of Amazon Mechanical Turk workers. Though I have presented evidence that the sample’s composition is not unique, such convenience samples are not ideal. Second, the vignette simply informed respondents that ads were aired, without any flavor for the tone or content of the ads. As Gibson and his colleagues have shown, the content of television advertisements can have significant effects on

support for courts.<sup>78</sup> Accordingly, it might be that if dark money groups aired particular types of negative advertisements while candidates aired positive advertisements, citizens would judge the effect of these types of campaign support differently. Finally, and most importantly, all of the effects discussed in the experiment are conditional on the judge receiving support. Gibson and Caldeira showed that a refusal to accept campaign support can nullify the deleterious consequences of receiving that support; as a result, it is important to remember that these findings lack a true baseline condition of no support.

Overall, these results suggest that we need to expand our understanding of how citizens judge conflicts of interest, both to understand their effect on courts but also to understand how to best mobilize the public around reform efforts. After all, recusal is often motivated by “appearance[s] of impropriety,” but we know little about what appears improper to the public. Indeed, given survey results that demonstrate the public has widely different understandings and expectations of law and courts,<sup>79</sup> it may well be that what reformers *believe* is improper differs markedly from what appears improper to the public.

The other major implication of this study<sup>80</sup> concerns the relationship between perceived politicization and campaign activity. There is a burgeoning political science literature that suggests that perceived politicization is particularly harmful for courts,<sup>81</sup> and that politicization affects how individuals learn about and accept judicial decisions.<sup>82</sup> This is a large contradiction: perceived politicization is harmful for courts, but many of the trappings of politicized campaigns—like policy talk, television advertisements, and dark money support—appear to minimally affect citizens’ support for courts. How can this be? Future research should endeavor to answer this question.

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78. Gibson et al., *supra* note 1, at 9–10.

79. Gibson, *supra* note 3, at 34.

80. For more on the normative implications of empirical legal studies, see Brandon L. Bartels & Chris W. Bonneau, *MAKING LAW AND COURTS RESEARCH RELEVANT: THE NORMATIVE IMPLICATIONS OF EMPIRICAL RESEARCH* (2014).

81. Gibson & Nelson, *supra* note 23, at 25; JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS* 4 (2009).

82. Benjamin Woodson, *Politicization and the Two Modes of Evaluating Judicial Decisions*, 3 *J. LAW & COURTS* 193, 195 (2015).



