Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama

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Law is politics. Legal Realists advanced this proposition in the early 20th Century,[1] and it seems to have become the received wisdom today.[2] "Money is the mother's milk of politics,"[3] as election

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[1] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 169-212 (1992) (legal realism's most important legacy was its challenge to the notion that law has an autonomous role separate from politics); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 274 (1998) ("the program of unmasking law as politics [was] central to American Legal Realism"); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) ("critical legal realists" "argued that all law is politics and thereby impugned the neutrality and legitimacy of law"); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 92 (1995) (realists' indeterminacy argument implied that "law was nothing more than the naked exercise of political power."); Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. No. 2, 83, 88 (1998) ("We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decision-maker.").

[2] That "we are all realists now" is so thoroughly accepted as to be a "cliché." *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997). *Accord* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1973) ("Realism is dead; we are all realists, now."); Joseph William Singer, Book Review, *Legal Realism Now*, 76 CAL. L. REV. 467, 467 (1988) (arguing that "[American legal scholars] are all realists now"). *See also* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

> It is a commonplace that law is 'political.' Ever since the realists debunked 'formalism' in legal reasoning, the received learning has been that legal analysis cannot be neutral and determinate, that general propositions of law cannot decide particular cases. Some policy judgment or value choice necessarily intervenes. It is 'transcendental nonsense' to believe that it could be any other way.

Id. at 1152.

[3] *Now is the Time for All Good Men...*, TIME, Jan. 5, 1968, at 44 (quoting Jesse Unruh). This expression has also risen to the level of a "cliché." *See* Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 10 (1994).

campaign contributions rise to dizzying new heights.[4] If law is politics and money is the mother's milk of politics, then a simple logical step identifies the relationship between money and law: campaign contributions buy judicial decisions. Is this accurate? Do elected judges consistently move the law in the direction sought by those who fund their election campaigns? While scholars increasingly study the relationship between elected judges' votes in particular cases and the apparent desires of voters,[5] scholars write less about the relationship between elected judges' votes in particular cases and the apparent desires of campaign contributors. This article is a step toward filling that gap.

This article begins with a brief review of the scholarly literature on judicial elections in Section I. Then it turns to a case study of judicial politics in Alabama. Section II tells the recent history of the Supreme Court of Alabama and the role two interest groups (plaintiffs' lawyers and business) have had in the elections to that court. Section III presents the bulk of the original research for this article, a review of 106 decisions by the Supreme Court of Alabama from January 18, 1995 through July 9, 1999. The decisions are in the area of arbitration law and reveal the remarkably close correlation between a justice's votes on arbitration cases and his or her source of campaign funds. Finally, Section IV concludes that this data provides a striking example of contributors to judicial election campaigns buying changes in law and policy, much like contributors to other election campaigns buy changes in law and policy.

I. LAW AS POLITICS

Judicial selection has been an issue in the United States since the nation's founding. While Hamilton argued for the independence of judges appointed for life,[6] Jefferson argued for the accountability of judges with limited terms who must stand for re-election or re-

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[4] *See, e.g.*, Center for Responsive Politics' summary of the latest federal election cycle, <http://www.opensecrets.org/home/index/asp>.

[5] *See* Section I.A., *infra*.

[6] *See, e.g.*, THE FEDERALIST NO. 78 at 433 (Alexander Hamilton) (C. Rossiter, ed. 1999) ("the complete independence of the courts of justice is peculiarly essential in a limited constitution"). *See also* Paul Nejelski, *The Jefferson-Hamilton Duality: A Framework for Understanding Reforms in the Administration of Justice*, 64 JUDICATURE 450, 452 (1981).

appointment.[7] While those emphasizing independence succeeded in getting life tenure for *federal* judges,[8] those emphasizing accountability have largely had their way in the selection of *state* judges.[9] Most states' judges face election.[10] How do elected judges behave? In particular, do they decide cases in accord with the preferences and interests of those who voted for them and/or those who contributed to their election campaigns?

This question should be placed in the context of judicial behavior more generally. Many people, including many lawyers, believe that judges generally make decisions based on the sorts of things discussed in law school, such as: "(1) the language of the applicable law, (2) the intentions or motivations of those who made the law, (3) the precedents established in previously decided cases, and (4) a balancing of societal interests."[11] In contrast, the "leading school of thought in political science"[12] holds that courts "decide[] disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the [judges]."[13] Political scientists advocating this "attitudinal model" contend that it explains judicial decisions better than does the "legal model," with its focus on language, intent, precedent and societal interests.[14] As Frank Cross states:

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[7] *See* DONALD O. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF *MARBURY V. MADISON* 155-58 (1970); EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 93 (1944).

[8] U.S. CONST. art. III, § 1.

[9] *See, e.g.*, PHILIP L. DUBOIS, FROM BALLOT TO BENCH (1980).

[10] *See* SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 141-45 (1990); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 690, 725 (1995). Nearly 82 percent of state appellate judges and almost 87 percent of state trial court judges stand for election of some type. *See* REPORT AND RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, Part II, at 3 n.1 (July 1998). Appointed judges were more common than elected ones prior to the mid 1800's. *See* DANIEL R. PINELLO, THE IMPACT OF JUDICIAL SELECTION METHOD ON STATE-SUPREME COURT POLICY: INNOVATION, REACTION, AND ATROPHY 2 (1995); Croley, *supra* note 10 at 716-17.

[11] Harold J. Spaeth, *The Attitudinal Model*, *in* CONTEMPLATING COURTS 296, 296 (Lee Epstein ed., 1995).

[12] Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1994 (1996). *Accord* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252 n.4 (1997) ("The attitudinal model has achieved predominance in political science scholarship.").

[13] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 65 (1993).

[14] *See* Spaeth, *supra* note 11, at 296.

> The political science research and the attitudinal model are significant in that they could potentially obliterate the foundations of much current and past legal scholarship. The attitudinal model suggests that judges do not make their decisions based upon reasoned judgment from precedent or statute and consideration of their role in the legal system. Rather, many political scientists claim that a judge's decision depends primarily upon her individual political ideology and the identities of the parties.[15]

In a sense, then, the attitudinal model corresponds to the strong strain of Legal Realism which "contends that law is politics through and through and that judges exercise broad discretionary authority."[16]

Advocates of the attitudinal model assert that it, unlike the legal model, can be empirically tested.[17] These political scientists claim that a judge's attitude is "amenable to testing."[18] But how can this be? In this context, "attitude" refers to the judge's ideology or "policy preferences."[19] These beliefs, like any other beliefs, are concealed inside the believer's head.[20] It is, therefore, troubling as a philosophical matter to build a model around a political scientist's claimed knowledge about a judge's "attitude." Because a judge's attitude can never be known to anyone but the judge, political scientists have had to use other data as proxies for "attitude." Such data include: party affiliation, background experiences and social characteristics, prior votes, speeches, and newspaper editorials.[21]

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[15] Cross, *supra* note 12, at 253.

[16] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 25 (1990). See also Segal & Spaeth, supra note 13, at 65 ("The attitudinal model has its genesis in the legal realist movement of the 1920's.") For another application of Legal Realism to judicial elections, see Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505 (1999).

[17] *See, e.g.*, Spaeth, *supra* note 11, at 306.

[18] *Id.* at 308.

[19] Melinda Gann Hall & Paul Brace, *Toward An Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 147, 149-51 (1992).

[20] *See generally* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION 114-46 (1982); THOMAS NAGEL, OTHER MINDS: CRITICAL ESSAYS 1964-1994 (1995).

[21] *See* Hall & Brace, *supra* note 19, at 149-51. *See also* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 37-42 (1997) (providing a good summary in the context of the United

This article avoids philosophical controversies about knowing someone else's "attitude," by focusing on data that is less controversially knowable: campaign contributions.[22] This article examines the relationship between a judge's votes and the source of contributions to the judge's election campaign. Before examining that topic, however, a brief review of the literature on judicial elections is in order.

A. Correlation with Voters' Preferences

Political scientists study elected officials, and elected judges are no exception. There is debate within political science about the effects of different methods of judicial selection: partisan election, non-partisan election, appointment for life, and appointment followed by retention election.[23] The political science literature, for example, discusses whether judges selected by one method are more innovative policymakers than judges selected by another method.[24]

Some political scientists address the relationship between elected judges' votes in particular cases and the apparent desires of voters.[25] How close a correlation is there between the way a particular judge decides cases and the way those who voted for the judge want the

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States Supreme Court); Spaeth, *supra* note 11, at 307-12 (advocate of attitudinal model discussing use of prior votes).

[22] I do not doubt the value of the attitudinal model and the studies applying it. I would merely soften the conclusions from assertions about judges' votes being explained by the judges' "attitudes" to assertions of correlation between judges' votes and objectively measurable characteristics like party affiliation.

If the data on judges' votes presented in Section III of this article were compared with party affiliation, rather than campaign contributions, the correlation would not be quite as strong. That is because Justice Maddox, a Democrat whose campaign contributions come from business, votes more like other business-funded justices than like other Democrats. In other words, these judges' votes are better explained by campaign contributions than party affiliation.

[23] *See* STUART S. NAGEL, IMPROVING THE LEGAL PROCESS 202-03 (1975); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. (Special Issue) 31, 31-32 nn. 3-7 (1986) (citing authorities); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 428 (1992); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 81-90 (1985).

[24] *See* Pinello, *supra* note 10, at 2. *See also* Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 14 (1992); Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make?*, 5 JUST. SYS. J. 25, 39 (1979); Henry R. Glick, Book Review, 90 AM. POL. SCI. REV. 920, 920 (1996) (reviewing Pinello, *supra* note 10); F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 232 (1999).

[25] *See, e.g.*, Hall, *supra* note 23, at 429; Rick A. Swanson & Albert P. Melone, *The Partisan Factor and Judicial Behavior in the Illinois Supreme Court*, 19 S. ILL. U. L.J. 303, 306 (1995).

cases decided? Do most voters who vote for Judicial Candidate X want the law to move in one direction, while most voters who vote for Judicial Candidate Y want the law to move in another direction? And if X is elected, does the law actually move in the direction his voters wanted, while if Y had been elected the law would have moved in the direction her voters wanted? Do the policies preferred by a majority of voters actually get enacted by elected judges?

Lawyers, as well as political scientists, consider these questions. In recent years, voters have removed from the bench several judges after high-profile campaigns focusing on the judge's votes on a single issue, often the death penalty.[26] This has led some judges, lawyers and legal scholars to worry that good judges are losing their careers over as little as their votes in a single case.[27] These good judges may be replaced by bad judges whose only reason for ascending to the bench is their commitment to vote with the majority of the electorate on the single issue in question.[28] In other words, Judicial Candidate

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[26] *See, e.g.*, John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 470-75 (1999); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760-69 (1995). *See also* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 847-49 (1998) (Tennessee Supreme Court Justice Penny White ousted in 1996); David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 Miss. C. L. Rev. 1, 16-29 (1992) (defeat of Mississippi Supreme Court Justice Robertson); Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, pt. 1, at 1 (California Supreme Court Justices Rose Bird, Joseph Grodin, and Cruz Reynoso were ousted in 1986). *See generally* JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989).

[27] *See* note 26, *supra*.

[28] *See, e.g.*, Bright & Keenan, *supra* note 26, at 759.

> After a decision by [Texas'] highest criminal court, the Court of Criminal Appeals, reversing the conviction in a particularly notorious capital case, a former chairman of the state Republican Party called for Republicans to take over the court in the 1994 election. The voters responded to the call. Republicans won every position they sought on the court.
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> One of the Republicans elected to the court was Stephen W. Mansfield, who had been a member of the Texas bar only two years, but campaigned for the court on promises of the death penalty for killers, greater use of the harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases." Even before the election it came to light that Mansfield had misrepresented his prior background, experience, and record, that he had been fined for practicing law without a license in Florida, and that – contrary to his assertions that he had experience in criminal cases and had "written extensively on criminal and civil justice issues" – he had virtually no experience in criminal law and his writing in the area of criminal law consisted of a guest column in a local newspaper criticizing the same

X *is* getting elected and the law *is* moving in the direction his voters wanted.[29] This bothers commentators who do not share the policy preferences held by the majority of voters. These commentators might be described as present-day Hamiltonians because they would prefer a system with less judicial accountability and more judicial independence.

But even present-day Jeffersonians, who emphasize accountability to voters, are bothered by single-issue elections. These commentators like the idea of the law moving in the direction desired by the majority of voters, but in single-issue elections it is only the law on a narrow, high-profile issue that moves in the direction desired by a majority of voters. All other areas of the law may move in a direction opposite to that desired by a majority of voters.[30]

This worry seems serious because voters cannot be expected to know about the day-to-day work of judges. Unless the judge makes a controversial decision that generates media attention, it is unlikely that the judge will make any impression in the minds of ordinary voters.[31] "Probably the only jurists in America with substantial name recognition are Judge Wapner, Judge Judy, and Judge Ito."[32] It is not realistic to expect voters to be informed about the direction a judge moves the law in any of the areas the judge may affect, whether that be divorce, commercial or environmental law. To put it another way, voters' ignorance of judges is rational because the gains to an individual voter of becoming knowledgeable about judges are less

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decision that prompted the former Republican chairman to call for a takeover of the court. Nevertheless, Mansfield defeated the incumbent judge.

Id. at 761-62.

[29] "Empirical evidence demonstrates that elected judges tend to follow majority voter preferences in deciding high-salience cases." Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1322 (1997).

[30] *See id.* at 1365 ("Suppose in the California case that a majority of voters disagreed with Justice Bird's position on the death penalty but agreed with her pro-consumer, pro-tenant decisions. Does a majority vote against Bird in a race that focused only on the death penalty issue and not on the other issues signify an accountable judiciary or one subject to the influence of small groups?").

[31] *See* MATHIAS, *supra* note 10, at 17-18; Anthony Champagne, *The Selection of Judges in Texas*, 40 SW. L. J. (Special Issue) 53, 93 (1986). Judicial elections tend to be "low salience" elections. *See* Hasen, *supra* note 29, at 1315-26. *See also* Lawrence Baum, *Electing Judges*, *in* CONTEMPLATING COURTS 18, 18-43 (Lee Epstein ed. 1995). For an example of a high salience judicial election, see Lawrence Baum, *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L. J. 645 (1988).

[32] Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 543 (1999).

than the costs of doing so.[33] Voters' ignorance of judges is exacerbated by ethics codes that deter judicial candidates from communicating useful information to voters. The codes "prohibit[] candidates from making pledges or promises of future performance in office or from stating views on disputed legal or political issues."[34] For a number of reasons then, it is unrealistic to expect knowledgeable voting in judicial elections. Perhaps the most knowledgeable voting for judges that can routinely be expected is party-line voting in which the judge's party affiliation (Republican or Democrat) serves as a proxy for the judge's general philosophy and orientation.[35]

B. Correlation with Campaign Contributors' Preferences

Having just considered the relationship between elected judges' votes in particular cases and the apparent desires of the voters, we can now turn to the relationship between elected judges' votes and the apparent desires of those who contribute to judicial election campaigns. This topic encompasses two somewhat distinct activities by campaign contributors: (1) buying justice in individual cases involving the contributor, and (2) buying legal policy that affects a range of cases not involving the contributor.

1. Buying Justice

Suppose a judge's election campaign received a large sum from a single contributor. If the judge decides a case involving that contributor and decides it in favor of the contributor, some will

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[33] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 573-74 (5th ed. 1998) ("Since the benefit of voting to the individual is negligible in any practical sense - vanishingly close to zero, in fact, in any but the most local election - it doesn't pay the average voter to invest much in learning about the different candidates or the policies they espouse."). Voters' ignorance of judges is just what public choice theory predicts. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 205-06 (1989). *See also* Gregory Sisk, Michael Heise, and Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1391-92 (1998) ("public choice theory suggests examining legislators' votes and campaign contributions from special interest groups."). Although Sisk, Morriss & Heise say that this approach is not applicable to judges, they are referring to appointed federal judges with life tenure. *Id.* "Judges who run for reelection are best analogized to vote-maximizing politicians, particularly to those politicians running for low-salience office." Hasen, *supra* note 29, at 1313.

[34] Case, *supra* note 26, at 13-14. *See also* Dubois, *supra* note 23, at 37.

[35] *See* Champagne, *The Selection of Judges in Texas*, supra note 31, at 95-96; Dubois, *supra* note 23, at 44-45; Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184, 189 (1991); Swanson & Melone, *supra* note 25, at 305.

suspect that "justice is for sale,"[36] *i.e.*, the judge is "owned" by the contributor. As Paul Carrington explains:

> Judicial candidates receive money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits. A fundamental difference exists between judicial and legislative offices in this respect because judges decide the rights and duties of individuals even when they are making policy; hence any connection between a judge and a person appearing in his or her court is a potential source of mistrust. . . . There have been celebrated occasions . . . when very large contributions were made by lawyers or parties who thereafter secured large favorable judgments or remunerative appointments such as receiverships.[37]

Such cases plainly reveal insufficient judicial independence or, to put it another way, excessive accountability to campaign contributors. Arguably, judges should recuse themselves from such cases,[38] and the failure to do so may even violate the Due Process right to a fair and impartial forum.[39]

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[36] MATHIAS, *supra* note 10, at 47-48.

[37] Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. No. 3 79, 91-92 (1998). For examples of these "celebrated occasions," see *id.* at 92 n.86; WINTHROP E. JOHNSON, COURTING VOTES IN ALABAMA: WHEN LAWYERS TAKE OVER A STATE'S POLITICS 43 (1999); MATHIAS, *supra* note 10, at 76 n.199; TEXANS FOR PUBLIC JUSTICE, PAYOLA JUSTICE: HOW TEXAS SUPREME COURT JUSTICES RAISE MONEY FROM COURT LITIGANTS (1998); Schotland, *supra* note 23, at 61-63; Stuart Banner, Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 453 n.25 (1988); Sheila Kaplan, *Justice for Sale*, COMMON CAUSE MAG., May/June 1987, at 29; Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, THE NATION, Jan. 26, 1998, at 11.

[38] *See* Schotland, *supra* note 23, at 124-25; Banner, *supra* note 37, at 452. *Cf.* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1380 (1994) (law should prohibit "elected judges [from] solicit[ing] campaign contributions from the parties to a case before her."); David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 146 (1995) ("No one . . . believes that a judge's decision in a case . . . should be responsive to payments of any kind.").

[39] *See* Mark Andrew Grannis, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 385-86 (1987).

2. Buying Policy

The appropriate tradeoff between independence and accountability is not so plain, however, when the campaign contributor is not a single lawyer or litigant, but rather a large group of people who band together to advance their political philosophy. A single contributor may seek only victories in cases in which the contributor appears as a party or lawyer. In contrast, an interest group may have a broad policy agenda, such as protecting the environment or deregulating the economy. Such an interest group may contribute to the campaigns of judges who share its political philosophy, just as it may contribute to the campaigns of like-minded candidates for other public offices. If such an interest group succeeds, it affects the results in many cases in which the winning parties and lawyers are not members of the interest group.[40] In short, the interest group succeeds, not by buying justice in individual cases, but by buying policy that influences a range of cases.[41]

Buying justice in individual cases violates the principle that courts should apply legal rules without regard to the identities of the parties and lawyers who happen to be involved in a particular case. This principle of treating like cases alike is crucial to many widely-shared conceptions of justice.[42] While buying justice violates the principle of treating like cases alike, buying policy does not. Buying policy changes legal rules, but changes them for everybody. Contributors who buy policy must still live under the same rules as everybody else. For this reason, buying judge-made policy through judicial campaign contributions is not as bad as buying justice in particular cases through judicial campaign contributions. In fact, buying policy through judicial campaign contributions may not be bad at all. It is not easy to condemn contributors who buy policy through judicial

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[40] *Cf.* Banner, *supra* note 37, at 461-62 (comparing liberals opposed to the death penalty even though they will never face it with anesthesiologists who have a personal stake in the outcome of certain tort cases) & 480-81 (distinguishing between those who contribute to judicial compaigns because they agree with a judge's qualifications or policy beliefs, and those who contribute because they wish to "curry favor" with the judge).

[41] Of course, the distinction between buying justice and buying policy is merely quantitative, rather than qualitative. Is it buying policy, rather than justice, when the contributor expects to be a party or lawyer in 90 percent of the cases affected by the policy change? 50 percent? 10 percent? Alternatively, how many contributors, with how broad an agenda, does it take before they can be said to be buying "policy" rather than "justice"?

[42] *See, e.g.*, ARISTOTLE, ETHICA NICOMACHEA bk. V, S 3 (W.D. Ross ed., 1942); H.L.A. HART, THE CONCEPT OF LAW 155 (1961). "The rule of law also implies the precept that similar cases be treated similarly." JOHN RAWLS, A THEORY OF JUSTICE 237 (1971).

campaign contributions without endorsing the myth that courts are apolitical and do not make policy. The Legal Realists exploded that myth and showed that judges do make policy.[43] This is especially true of judges on states' highest courts. Should not interest groups be as free to buy judge-made policy through campaign contributions as they are to buy governor-made and legislator-made policy through campaign contributions?[44]

Interest groups in some states seem to be buying judge-made policy with increasing vigor.

> [P]olitical interest groups and parties began about 1980 to take a heightened interest in judicial elections. In some states, tort and insurance law moved to the top of the political agenda for judicial elections. By 1980, local groups of personal injury lawyers were organized to secure the election of judges favoring their clients. For a time, they seemed to control elections to the Supreme Court of Texas. Their success, however, evoked a response from insurance companies and others whose financial interests were threatened by a "plaintiffs' court," and in recent years, "habitual defendants" have been more successful in securing election of judges thought to favor their interests.[45]

In Texas, the battle lines in judicial elections are clearly drawn: plaintiffs' lawyers versus "habitual defendants", *i.e.*, business.[46]

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[43] *See* text accompanying notes 1-22, *supra*.

[44] "[T]he implicit exchange of campaign contributions for legislators' votes or other government action" is often called "corruption" but it "may be inherent in the democratic process itself rather than any system of campaign finance." David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, *supra* note 38, at 1369-70. *See also* Gerald F. Uelmen, Commentary, *Are We Reprising a Finale or an Overture?* 61 S. CAL. L. REV. 2069, 2072 (1988) ("As Jesse Unruh put it, money is the mother's milk of politics, and we live in a world where lots of the sucklings will be wearing black robes.").

[45] Carrington, *supra* note 37, at 105-06.

[46] *See* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 158 (1988); Champagne, *The Selection of Judges in Texas*, *supra* note 31, at 90; Jackson & Riddlesperger, *supra* note 35, at 184; Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525, 551 (1992); Schotland, *supra* note 23, at 61n.15; Mary Flood, *Justice Still for Sale?* WALL ST. J., June 24, 1998, at T1; Sean Reilly, *Doin' the Bench Shuffle: Tort Reform Republicans Now Sit on Ala. High Court*, A.B.A. J., Nov. 1999, at 26.

Although commentators have written extensively about this situation in Texas, there is a dearth of similar analysis on other states.[47] The published literature simply does not reveal whether Texas is typical. Other states' judicial elections may be as stark a battle between plaintiffs' lawyers and business, a more complicated battle among many interest groups, or something else entirely. This article argues, in the following section, that Alabama's judicial elections are, like those in Texas, very much a battle between plaintiffs' lawyers and business.[48]

II. ALABAMA'S JUDICIAL POLITICS

Alabama is a battleground between businesses and those who sue them.[49] Punitive damages and tort reform have long been the high-profile battles.[50] Countless newspaper and magazine stories refer to Alabama's reputation as a jurisdiction in which proliferating tort suits yield astronomical punitive damages awards.[51] Alabama business

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[47] The little available commentary includes Shirley S. Abrahamson, *Remarks Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 69 (1996); Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out With the Bathwater?*, 44 WAYNE L. REV. 367 (1998); Hasen, *supra* note 29 (1986 California Supreme Court elections); Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031 (1997); Kaplan, *Justice for Sale*, *supra* note 37; Frances Kahn Zemens, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625 (1999).

[48] *See* Sections II-III, *infra*. *See also* Glenn C. Noe, *Alabama Judicial Election Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215 (1998); Reilly, *supra* note 46, at 26; *Federalist Society White Paper: The Case for Judicial Appointment*, <http://www.fed-soc.org/judicialappointments.htm>; *Federalist Society White Paper: The Case for Partisan Judicial Elections*, <http://www.fed-soc.org/judicialelections.html>.

[49] *See* David White, *Campaign Cash Ready to Flow: Siegelman Has a Jump on James*, BIRMINGHAM NEWS, May 31, 1997, at 1A ("Business groups and trial lawyers have struggled for years to get their allies on the court, which plays a big role in deciding whether punitive damages awarded by juries to injured people are fair or excessive."); Buster Kantrow, *Business Groups Worry Over Alabama Court Race*, WALL ST. J., Mar. 8, 2000, at S1.

[50] *See* text accompanying notes 51-55, *infra*. *See also* Tom Gordon, *Shores Won't Seek Re-Election*, BIRMINGHAM NEWS, Mar. 26, 1998, at 1B ("A big issue in recent Supreme Court races has been whether the state needs to limit punitive damages in lawsuits. Business groups say yes; plaintiff's lawyers say no."); Anne Permaloff & Carl Grafton, *Tort Reform Debate Suffers Significant Weaknesses*, BIRMINGHAM NEWS, Apr. 12, 1998, at 3C; White, *supra* note 49, at 1A.

[51] *See, e.g.*, JOHNSON, *supra* note 37, at 22 (quoting Forbes); Max Boot, *In the Land of Lawsuits*, WALL ST. J., Oct. 30, 1996, at A22; Gregory Jaynes, *Where the Torts Blossom: While Washington Debates Rules About Litigation, Down in Alabama, the Lawsuits Grow Thick and Wild*, TIME, Mar. 20, 1995, at 38; Reilly, *supra* note 46, at 26 ("to tort reformers, Alabama perhaps represented Ground Zero. This, after all, is the state where a jury famously socked BMW with a $4 million punitive damages award for repainting a car without telling the customer."); Dale

groups cite the reputation as evidence that the state must enact tort reform and limits on punitive damages awards,[52] while Alabama plaintiffs' lawyers vigorously deny that the reputation is deserved or, alternatively, that it harms the state's economy.[53] The Alabama battle between businesses and those who sue them is often fought in elections for the Supreme Court of Alabama.

In 1993, the Supreme Court of Alabama declared unconstitutional a significant package of tort-reform legislation in *Henderson v. Alabama Power Co.*[54] The ramifications of the *Henderson* decision were felt in the court's 1994 elections in which five of the court's nine seats or "places" were up for election. These ramifications appeared first in the Democratic Party's primaries because, even as late as 1994, not a single justice of the Supreme Court of Alabama was a Republican.[55]

Three Justices dissented from *Henderson,* thus voting for tort reform. One of these three justices, Justice Maddox, was up for re-election in 1994. Maddox received "unexpected"[56] opposition in the Democratic primary and publicly accused plaintiffs' lawyers of targeting him for defeat because of his votes in *Henderson* and other tort cases.[57] Maddox's reelection campaign was funded by business (including lawyers who represent business),[58] while his opponent's

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Russakoff, *Legal War Conquers State's Politics; In Tort Reform Fight, Alabama Court Race Cost $5 Million*, WASH. POST, Dec. 1, 1996, at A1.

[52] *See, e.g.*, Stan Bailey & Justin Fox, *High Court Delivers Blow to Tort Reform*, BIRMINGHAM NEWS, June 26, 1993, at A1 ("Business Council of Alabama spokeswoman Renee Lemaire said the Supreme Court's decision 'makes Alabama an even more frightening place to do business. Their decision today will have a severe negative impact on industrial recruitment, needed jobs for the people of Alabama, and the image of the state.'").

[53] *See* Permaloff & Grafton, *supra* note 50; *Key Players Spent Over $11 Million in Tort Fight*, BIRMINGHAM NEWS, Jan. 2, 1997, at 1A.

[54] 627 So.2d 878, 884-92 (Ala. 1993).

[55] "The Republican Party had not won a seat on a state appellate court in Alabama for over 100 years." JOHNSON, *supra* note 37, at 8. Like the rest of the Deep South, Alabama was overwhelmingly Democrat for roughly a century between the Reconstruction of the 1860's and the Second Reconstruction (Civil Rights Movement) of the 1960's. *See, e.g.*, WILLIAM WARREN ROGERS, ET AL., ALABAMA: THE HISTORY OF A DEEP SOUTH STATE 241-76, 578-580 (1994). The Republican Party has enjoyed significant growth in Alabama since the 1960's. *See id.* at 578-80, 600-04.

[56] *See* Tom Gordon, *High Court's Maddox Puts Limits on Own Funds in Re-Election Bid*, BIRMINGHAM NEWS, Apr. 8, 1994, at 4A.

[57] *See* JOHNSON, *supra* note 37, at 39.

[58] *See* Gordon, *High Court's Maddox Puts Limits on Own Funds in Re-Election Bid, supra* note 56, at 4A.

campaign was funded by plaintiffs' lawyers.[59] Maddox won the primary election, but the Democratic primaries for all four of the other places produced winners whose campaigns were all funded by plaintiffs' lawyers.[60]

The 1994 general election was a Republican landslide nationwide and in Alabama. It produced a Republican Chief Justice of the Supreme Court of Alabama, Perry Hooper.[61] This was a major victory for business, which had funded Hooper's campaign,[62] but it was not a victory easily earned. The result of the election was in doubt until federal litigation eventually resolved a dispute concerning 2000 absentee ballots and finally unseated the incumbent chief justice,[63] a former president of the Alabama Trial Lawyers Association ("ATLA").[64]

The rancor surrounding the 1994 judicial election seemed unsurpassable until it was surpassed in 1996, which the *Birmingham News* dubbed the "Year of the Skunk."[65]

> The symbol for the year comes from the Alabama Supreme Court race between Republican Harold See and Democrat Kenneth Ingram. It was a race which saw millions thrown in by trial lawyers supporting Ingram and business interests supporting See. It was a race for the highest court in the state which was so lacking in decorum, at least on Ingram's part, that it delved into such personal matters as See's divorce and

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[59] *See id*; Bob Blalock & Tom Gordon, *Lawyers Give Most to High Court Candidates*, BIRMINGHAM NEWS, Mar. 6, 1994, at 21A; Stan Bailey, *High Court Spot May Be Reclaimed by Business*, BIRMINGHAM NEWS, July 24, 1994, at 17A.

[60] These four were Chief Justice Hornsby and Justices Butts, Cook and Kennedy. *See* Blalock & Gordon, *supra* note 59 at 21A. *See also* Bailey, *High Court Spot May Be Reclaimed by Business*, *supra* note 59, at 17A ("plaintiff trial lawyers . . . gave the bulk of hundreds of thousands of dollars in recent election campaigns for justices who struck down the 1987 tort reform laws.").

[61] This election is the subject of a book written by the victor's deputy campaign manager, WINTHROP E. JOHNSON, COURTING VOTES IN ALABAMA: WHEN LAWYERS TAKE OVER A STATE'S POLITICS, *supra* note 37.

[62] *See id.* at 37-46; Bailey, *High Court Spot May Be Reclaimed by Business*, *supra* note 59, at 17A.

[63] *See* JOHNSON, *supra* note 37, at 75-252.

[64] *See id.* at 18; *Magazine Says Alabama Judiciary Becoming Increasingly Politicized*, ASSOCIATED PRESS POLITICAL SERVICE, May 18, 1997 (available at 1997 WL 2526497).

[65] Editorial, *Year of the Skunk: It's Hard to Recall the Year Just Passed Without Thinking of Big Money and Politics*, BIRMINGHAM NEWS, Jan. 1, 1997, at 1A.

> alluded to See again and again in commercials picturing a skunk.[66]

Plaintiffs' lawyers, specifically ATLA, helped pay for those controversial ads.[67] An Alabama newspaper, the *Anniston Star*, analyzed campaign finance reports from the 1994 and 1996 elections and found that ATLA's political action committee was "the most generous donor in Alabama politics" over those two election cycles.[68] "The trial lawyers focused on the Supreme Court and the state Senate."[69] The Business Council of Alabama and individual businesses contributed comparably large dollar amounts.[70] As the Associated Press put it, "The money flowing into campaigns has turned the once low-key races for the Alabama Supreme Court into expensive mud-wrestling contests."[71]

See won the 1996 race, adding another business-funded Justice to the Supreme Court of Alabama.[72] Combined with Chief Justice Hooper, and the two remaining dissenters from *Henderson* (Justices Maddox and Houston),[73] the business-funded Justices had four votes on the nine-member court. The correlation between interest-group support and party identification grew as Justice Houston switched from Democrat to Republican.[74] This left Justice Maddox as the only remaining Democrat among the business-funded Justices, while all five of the plaintiffs'-lawyer-funded Justices were Democrats (Almon, Butts, Cook, Kennedy, Shores).[75]

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[66] *Id.* *See also* Reilly, *supra* note 46.

[67] *See* Michael Sznajderman, *"Truth-in-Advertising" Among Campaign Reforms Proposed*, BIRMINGHAM NEWS, Jan. 17, 1997, at 4B.

[68] *Key Players Spent Over $11 Million in Tort Fight*, *supra* note 53, at 1A.

[69] *Id.*

[70] *See id.*

[71] *Id.* "In Alabama, the cost of running for Supreme Court seat rose 776 percent from 1986 to 1996." Sheila Kaplan, *The Very Best Judges That Money Can Buy*, U.S. NEWS & WORLD REPORT, Nov. 29, 1999, at 35.

[72] *See Key Players Spent Over $11 Million in Tort Fight*, *supra* note 53.

[73] The third dissenter, Justice Steagall, retired in 1994.

[74] *See* Stan Bailey, *Judge Added $213,361 to War Chest Last Year*, BIRMINGHAM NEWS, Jan. 22, 1998, at 2B. *See also* Stan Bailey, *GOP Court Candidates Lead Opponents in Fund Raising*, BIRMINGHAM NEWS, Nov. 1, 1998, at 24A (indicating Houston's business funding).

[75] *See* Stan Bailey, *Another Nasty Supreme Court Race Predicted*, BIRMINGHAM NEWS, June 29, 1997, at 15A (Almon and Shores "who won their posts in 1992 with strong financial backing from the state's trial lawyers . . . aroused the ire of the state's business community in 1993 when they voted to strike down as unconstitutional a $250,000 cap on punitive damages awards in

In early 1998, word spread that Justice Butts might leave the court to run for another office.[76] Plaintiffs' lawyers and business interests lobbied Governor Fob James on the issue of whom the Governor would appoint as Butts' replacement.[77] Governor James selected Republican Champ Lyons. This gave a majority to the court's four Republicans and their ally Justice Maddox. The date Justice Lyons joined the court, March 23, 1998, marked a major turning point. Cases that plaintiffs had previously won five-votes-to-four now turned into defendant victories by the same margin.[78]

In the 1998 elections, business picked up an additional seat on the Supreme Court of Alabama. Two plaintiffs'-lawyer-funded justices (Almon and Shores) were replaced by one justice whose campaign was funded by plaintiffs' lawyers (Justice Johnstone) and one whose campaign was funded by business (Justice Brown).[79] This raised the number of business-funded justices to six and lowered the number of plaintiffs'-lawyer-funded justices to three. That six-to-three split continued as 1999 ended.[80]

This short history of recent elections to the Supreme Court of Alabama identifies the participants in the battle between plaintiffs' lawyers and business interests for control of that court. All the plaintiffs'-lawyer-funded Justices are Democrats. They dominated the court in the early 1990's. The business-funded Justices are, except for Justice Maddox, Republicans. The business-funded Justices won brutal, costly, and degrading elections in 1994 and 1996. They then received their crucial fifth vote when Governor James appointed Justice Lyons to fill a vacancy on March 23, 1998. Finally, the November 1998 election strengthened their majority, by adding one

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personal injury cases."); Robin DeMonia, *Butts Plans to Quit Post on High Court*, BIRMINGHAM NEWS, Mar. 7, 1998, at 1A (describing Butts as "heavily backed by trial lawyers," Cook "who has received backing from both sides," and Kennedy "usually an ally of the trial lawyers.").

[76] *See* DeMonia, *Butts Plans to Quit Post on High Court*, *supra* note 75; Robin DeMonia, *Butts' Possible Campaign Spurs Replacement Talk*, BIRMINGHAM NEWS, Feb. 11, 1998, at 3C.

[77] *See* DeMonia, *Butts' Possible Campaign Spurs Replacement Talk*, *supra* note 76.

[78] *See* Section III, *infra*. Justice Lyons has candidly acknowledged that, as a newly appointed justice, he was often asked to cast the deciding vote. *Ex parte* Dan Tucker Auto Sales, Inc., 718 So.2d 33, 41 (Ala. 1998) (concurring).

[79] *See* Bailey, *GOP Candidates Lead Opponents in Fund Raising*, *supra* note 74.

[80] In 1999, plaintiffs'-lawyer-funded Justice Kennedy left the court and was replaced by Justice England. Justice England is a Democrat, so if he follows the pattern of all the other Democrats on the court since 1994 (aside from Justice Maddox), he will also find his support with the plaintiffs' lawyers, so there will be no change in the number of justices whose campaigns are funded by each group.

more business-funded justice.

III. ARBITRATION LAW IN ALABAMA

A. Correlation, Not Causation

The previous section of this article summarized the battle for the Supreme Court of Alabama between plaintiffs' lawyers and business interests. This section turns to the consequences of that battle for the law, arbitration law in particular. The data presented below indicate that, in arbitration cases, the Supreme Court of Alabama often splits along predictable lines. Justices whose election campaigns are funded by plaintiffs' lawyers oppose arbitration, whereas justices whose campaigns are funded by business favor arbitration.[81] There is a strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases.

While the data showing this correlation are presented below, it is worth pausing to emphasize that correlation does not prove causation. Knowing that there is a strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases does nothing to explain *why* this occurs. It might occur because judicial candidates have firmly established views and interest groups know each candidate's views well enough to predict with great accuracy how that candidate will vote in various cases. The interest group then contributes to the candidate whose predicted votes are closest to the interest group's policy preferences. Alternatively, the correlation might occur because judicial candidates lack firmly established views and are willing to tailor their views to match the interest group's policy preferences. Which of these theories is more accurate is not a topic addressed in this article.[82] This article does not try to explain what causes the strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases. It merely shows that the strong correlation exists.

The correlation between a justice's source of campaign funds and how that justice votes in arbitration cases might be expected in "big"

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[81] The one partial exception is Justice Houston, a business-funded justice who often opposes arbitration. *See* Section IV, *infra*.

[82] *See, e.g.*, Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things They Do?*, 40 J. L. & ECON. 317 (1997).

or "controversial" cases. But the correlation goes deeper than that, much deeper. It pervades the entire area of law. It pervades ordinary, run-of-the-mill, routine cases over issues like contract interpretation and waiver. The entire body of arbitration law seems to be shaped by the campaign finance battle between plaintiffs' lawyers and business. Assessing these claims, and the data presented below, requires a brief primer on arbitration law.

B. Arbitration Law Background

The Federal Arbitration Act ("FAA")[83] governs virtually all arbitration agreements.[84] The FAA requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."[85] In essence, the FAA makes arbitration law a branch of contract law: arbitration agreements are enforceable when, and only when, contract law says so.[86] In contrast, Alabama arbitration law is thoroughly anti-contract. An Alabama statute prohibits courts from enforcing arbitration agreements.[87] This anti-arbitration statute makes Alabama quite unusual, one of perhaps three states to deny enforcement to arbitration agreements.[88] The vast majority of states have arbitration

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[83] 9 U.S.C.A. §§ 1-16 (West 1999).

[84] *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-81 (1995).

[85] 9 U.S.C.A. § 2.

[86] *See, e.g.*, Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996); Stephen J. Ware, *Arbitration and Unconscionability after* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1008-13 (1996); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law*, 29 MCGEORGE L. REV. 195, 197 (1998).

[87] *See* ALA. CODE. § 8-1-41 (1975). To be precise, this provision does not state that arbitration agreements are unenforceable, only that they cannot be enforced by the remedy of specific enforcement. In other words, the Alabama Code does not rule out money damages as a remedy for breach of an arbitration agreement. But the ineffectiveness of money damages as a remedy for breach of arbitration agreements is the very reason for the enactment of the FAA and other "modern" arbitration statutes starting in the 1920s. Courts could not calculate damages for breach of an arbitration agreement so they awarded only nominal damages. *See, e.g.*, Munson v. Straits of Dover S. S. Co., 102 F. 926, 928 (2d Cir. 1900) (holding that plaintiff, who sought damages in the form of lawyer's fees and costs incurred in defending a lawsuit for breach of agreement to arbitrate, was entitled to nominal damages only); IAN R. MACNEIL, et al., AMERICAN ARBITRATION LAW 20 (1992) (damages remedy was "largely ineffective"). Modern arbitration statutes were enacted to provide a meaningful remedy for breach, specific performance, which takes the form of court orders staying litigation and compelling arbitration. *See, e.g.*, 9 U.S.C.A. §§ 3-4. *See generally* IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 4.1.1 (1999).

[88] *See* Henry C. Strickland et al., *Modern Arbitration for Alabama: A Concept Whose Time Has Come*, 25 CUMB. L. REV. 59, 60 n.4 (1994)(other than Alabama, only Nebraska and, perhaps,

law quite similar to the FAA.[89]

FAA preemption of Alabama's anti-arbitration statute was the subject of a 1995 United States Supreme Court case, *Allied-Bruce Terminix Cos. v. Dobson*.[90] The case involved a contract obligating Terminix to provide home termite protection. The contract contained an arbitration clause. When the homeowners sued Terminix in state court, Terminix moved to stay the litigation and compel arbitration of the homeowners' claims. The trial court denied the stay and the Supreme Court of Alabama affirmed, relying on the aforementioned Alabama anti-arbitration statute.[91] Reversing, the United States Supreme Court reaffirmed its holding that the FAA applies in state, as well as federal, courts and preempts any state law inconsistent with it.[92] In short, *Terminix* emphatically directed Alabama courts to enforce arbitration agreements.

With this background, one can assess Alabama arbitration decisions since *Terminix*. What follows, in Section III.C., is a discussion of the 106 published arbitration decisions by the Supreme Court of Alabama between January 18, 1995 (the date of *Terminix*) and July 9, 1999.[93] The cases discussed are the 69 with at least one

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West Virginia deny enforcement to arbitration agreements.). Nebraska has since enacted a statute to enforce arbitration agreements. *See* Neb. Rev. St. 25-2602.01.

[89] *See* 7 U.L.A. § 1 (1997) (table of jurisdictions adopting the act).

[90] 513 U.S. 265 (1995).

[91] *See id.* at 269.

[92] *See id.* at 272-73.

[93] The following Westlaw search revealed 125 opinions in the AL-CS database: ARBITRATION & DA (AFT 1/17/1995 & BEF 7/10/1999). Only 106 of these are opinions by the Supreme Court of Alabama in arbitration law cases. Of the remaining, 7 are opinions by other courts and 12 are opinions that use the word "arbitration" but do not address any arbitration law issues. The opinions by other courts are: *Valley Fin., Inc. v. Owens*, 733 So.2d 439 (Ala. Civ. App. 1999); *Crown Pontiac, Inc. v. Savage*, 723 So.2d 1274 (Ala. Civ. App. 1998); *Crown Pontiac, Inc. v. Charley*, 710 So.2d 435 (Ala. Civ. App. 1997); *Tounzen v. Southern United Fire Ins. Co.*, 701 So.2d 1148 (Ala. Civ. App. 1997); *Nichols v. Colvin*, 674 So.2d 576 (Ala. Civ. App. 1995); *Perry v. Beneficial Nat. Bank USA*, No. CIV. A. CV97-218, 1998 WL 279174 (Ala. Cir. Ct. May 15, 1998); *Williams v. Direct Cable TV*, Civ. A. CV-97-009, 1997 WL 579156 (Ala. Cir. Ct. Aug 13, 1997). The opinions that merely use the word "arbitration" but do not address any arbitration issues are: *Johnson v. Bd. of Control*, 740 So.2d 999, 1012 (Ala. 1999); Ex parte *Green Tree Fin. Corp.*, 723 So.2d 6, 10 (Ala. 1998); Ex parte *Atmore Community Hosp.*, 719 So.2d 1190, 1193 (Ala. 1998); *General Motors Corp. v. Bell*, 714 So.2d 268, 282 (Ala. 1996); Ex parte *Brown*, 686 So.2d 409, 415 (Ala. 1996); Ex parte *Smith*, 683 So.2d 431, 434 (Ala. 1996); Ex parte *Birmingham Airport Auth.*, 678 So.2d 757, 758 (Ala. 1996); *Lipham v. General Motors Corp.*, 665 So.2d 190, 192 (Ala. 1995); *Smith v. Dunlop Tire Corp.*, 663 So.2d 914, 916 (Ala. 1995); Ex parte *Parsons & Whittemore Ala. Pine Constr. Corp.*, 658 So.2d 414, 415 (Ala. 1995); *Hosea O. Weaver & Sons, Inc. v. Towner*, 663 So.2d 892, 897 (Ala. 1995); *Brown v. State*, 686 So.2d 385, 391 (Ala. Crim. App. 1995).

dissenting vote, *i.e.*, cases in which the court split.[94] The 37 unanimous cases are not discussed.[95]

C. The Data: Reported Decisions From 1995 Through 1999

1. Formation: Mutual Manifestations of Assent

Formation of a contract requires manifestation of assent by each party. Assent is typically manifested by signing a document or saying certain words, but can be accomplished in other ways as well. Mutual manifestation of assent is required to form an arbitration agreement, just as it is required to form any contract. [96]

In eight cases from January 18, 1995, through July 9, 1999, the Supreme Court of Alabama split on the issue of whether parties had manifested assent to arbitration. In three of these cases, the document containing the arbitration clause was never signed by all of the parties and the issue was whether the parties manifested assent to

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[94] These include cases in which the court granted or denied writs of mandamus to trial courts on arbitration issues. For a discussion of that procedure, see Jerome Hoffman, *Alabama Appellate Courts: Jurisdiction in Civil Cases*, 46 ALA. L. REV. 834, 891-98 (1995).

[95] Kenworth of Dothan, Inc. v. Bruner-Wells Trucking, Inc., 745 So.2d 271 (Ala. 1999); Southern Energy Homes, Inc. v. Parmer, 742 So.2d 159 (Ala. 1999); American Bankers Life Assurance Co. v. Rice Acceptance Co. 739 So.2d 1082 (Ala. 1999); Chazen v. Parton, 739 So.2d 1104 (Ala. 1999); Jim Burke Automotive, Inc. v. Murphy, 739 So.2d 1084 (Ala. 1999); TranSouth Fin. Corp. v. Bell, 739 So.2d 1110 (Ala. 1999); Colonial Sales-Lease-Rental, Inc. v. Target Auction & Land Co., Inc., 735 So.2d 1161 (Ala. 1999); Patrick Home Ctr., Inc. v. Karr, 730 So.2d 1171 (Ala. 1999); Quality Truck and Auto Sales, Inc. v. Yassine, 730 So.2d 1164 (Ala. 1999); *Ex parte* Parker, 730 So.2d 168 (Ala. 1999); Value Auto Credit, Inc. v. Talley, 727 So.2d 61 (Ala. 1999); Anderson Bros. Chrysler Plymouth Dodge, Inc. v. Hadley, 720 So.2d 895 (Ala. 1998); *Ex parte* Warren, 718 So.2d 45 (Ala. 1998); Merrill Lynch, Inc. v. Cobb, 717 So.2d 355 (Ala. 1998); *Ex parte* Conference America, Inc., 713 So.2d 953 (Ala. 1998); Robert Frank McAlpine Architecture, Inc. v. Heilpern, 712 So.2d 738 (Ala. 1998); Morrison Restaurants, Inc. v. Homestead Village of Fairhope, Ltd., 710 So.2d 905 (Ala. 1998); *Ex parte* Indus. Techs., Inc., 707 So.2d 234 (Ala. 1997); Nissan Motor Acceptance Corp. v. Ross, 703 So.2d 324 (Ala. 1997); Northcom, Ltd. v. James, 694 So.2d 1329 (Ala. 1997); Crown Pontiac, Inc. v. McCarrell, 695 So.2d 615 (Ala. 1997); Coastal Ford, Inc. v. Kidder, 694 So.2d 1285 (Ala. 1997); Hobson v. American Cast Iron Pipe Co., 690 So.2d 341 (Ala. 1997); Palm Harbor Homes, Inc. v. Crawford, 689 So.2d 3 (Ala. 1997) (unanimous on arbitration issues); Koullas v. Ramsey, 683 So.2d 415 (Ala. 1996); *Ex parte* Gray, 686 So.2d 250 (Ala. 1996); Reynolds and Reynolds Co., Inc. v. King Autos., Inc., 689 So.2d 1 (Ala. 1996); Med Center Cars, Inc. v. Smith, 682 So.2d 382 (Ala. 1996); Money Tree, Inc. v. Moore, 677 So.2d 1170 (Ala. 1996); *Ex parte* Gates, 675 So.2d 371 (Ala. 1996); *Ex parte* Phelps, 672 So.2d 790 (Ala. 1995); Companion Life Ins. Co. v. Whitesell Mfg., Inc., 670 So.2d 897 (Ala. 1995); Lopez v. Home Buyers Warranty Corp., 670 So.2d 35 (Ala. 1995); *Ex parte* Lorance, 669 So.2d 890 (Ala. 1995); Terminix Intern. Co. Ltd. Partnership v. Jackson, 669 So.2d 893 (Ala. 1995); Allied-Bruce Terminix Cos. v. Dobson, 684 So.2d 102 (Ala. 1995); *Ex parte* Stallings & Sons, Inc., 670 So.2d 861 (Ala. 1995).

[96] *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 3 (3d ed. 1999).

arbitration by performing the contract.[97] In two of these cases, the parties signed a document that did not contain an arbitration clause, and the issue was whether that document effectively incorporated by reference a different document that did contain an arbitration clause.[98] In two cases, the document containing the arbitration clause was signed but also contained language arguably stating that it was not a legally-binding contract.[99] In the final of these cases, the issue was whether the clause initialed by the parties was, in fact, an arbitration clause.[100]

The voting pattern in these eight cases is striking. Business-funded justices cast 71 percent of their votes for the holding that an arbitration agreement was formed,[101] while plaintiffs'-lawyer-funded justices cast only 9 percent of their votes for that holding.[102]

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[97] *Ex parte* Shelton, 738 So.2d 864, 870 (Ala. 1999); *Ex parte* Rush, 730 So.2d 1175, 1177 (Ala. 1999); Med Center Cars, Inc. v. Smith, 727 So.2d 9, 14 (Ala. 1998).

[98] *Ex parte* Hopper, 736 So.2d 529, 531 (Ala. 1999); *Ex parte* Bentford, 719 So.2d 778, 780 (Ala. 1998).

[99] *Ex parte* Beasley, 712 So.2d 338, 340 (Ala. 1998); *Ex parte* Grant, 711 So.2d 464, 465 (Ala. 1997).

[100] *Ex parte* Pointer, 714 So.2d 971, 972 (Ala. 1997).

[101] *See* Table 1.

[102] *See* Table 2.

Table 1

Business-Funded Justice	**Votes for Formation of Arbitration Agreement**	**Votes Against Formation of Arbitration Agreement**
Brown	*Shelton, Rush*	
Hooper	*Shelton, Rush, Hopper, Med Center, Bentford, Beasley, Pointer, Grant*	
Houston	*Shelton, Rush*	*Hopper, Med Center, Bentford, Beasley, Pointer, Grant*
Lyons	*Rush, Med Center,*	*Hopper, Bentford*
Maddox	*Shelton, Rush, Med Center, Hopper, Grant,*	*Beasley, Pointer*
See	*Shelton, Rush, Hopper, Med Center, Bentford, Pointer Grant*	*Beasley*
Total	**26 votes**	**11 votes**

Table 2

Plaintiffs'-Lawyer-Funded Justice	**Votes for Formation of Arbitration Agreement**	**Votes Against Formation of Arbitration Agreement**
Almon		*Hopper, Med Center, Bentford, Beasley, Pointer, Grant*
Butts		*Beasley, Pointer, Grant*
Cook	*Shelton, Rush*	*Hopper, Med Center, Bentford, Beasley, Pointer, Grant*
Johnstone	*Rush*	*Shelton*
Kennedy		*Shelton, Rush, Hopper, Med Center, Bentford, Beasley, Pointer, Grant*
Shores		*Hopper, Med Center, Bentford, Beasley, Pointer, Grant*
Total	**3 votes**	**30 votes**

2. *Interpretation: Contractual Arbitrability*

a. Two Parties

Even if an arbitration agreement is formed, that agreement may not cover a particular claim by one party against the other. Some arbitration agreements are written broadly to cover any and all disputes "arising out of or relating to" the parties' transaction.[103] Other arbitration agreements are written more narrowly to require arbitration of only certain disputes, leaving other disputes to litigation. Like any contract, arbitration agreements must be interpreted. One interpretive problem is determining whether or not an arbitration agreement requires a particular claim to be resolved in arbitration, rather than litigation. This is the issue of "contractual arbitrability."

Disagreements in cases of this sort are inevitable. The language of arbitration clauses, like the language of other contract terms, is not always crystal clear. Interpretation of that language in close cases is not an exact science. Reasonable people, including reasonable judges, can disagree about the better interpretation of certain contract terms. Issues of contractual arbitrability are no different in this regard from other issues of contract interpretation.

What is noteworthy, however, is when a judge's interpretations of contracts can be predicted from the judge's source of campaign funds. That seems to be true when the judges are on the Supreme Court of Alabama and the contracts contain arbitration clauses. The court was divided on the interpretation of an arbitration clause in thirteen cases from January 18, 1995 through July 9, 1999. In all of the nine cases prior to March 23, 1998, the period when plaintiffs'-lawyer-funded justices held a majority on the court, a majority of the Justices found that the arbitration clause did not cover the claim in question.[104] In all four cases after business-funded justices gained a

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[103] AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES 2 (1996) (quoted language is from a model arbitration clause).

[104] *Ex parte* Hagan, 721 So.2d 167, 174 (Ala. 1998); Terminix Int'l Co. v. Jackson, 723 So.2d 555, 558 (Ala. 1998); *Ex parte* Discount Foods, Inc., 711 So.2d 992, 994 (Ala. 1998); American Bankers Life Assurance Co. v. Rice Acceptance Co., 709 So.2d 1188, 1191 (Ala. 1998); *Ex parte* Pope, 706 So.2d 1156, 1159 (Ala. 1997); Fidelity Nat'l Title Ins. Co., v. Jericho Management, Inc., No. 1950828, 1997 WL 564473 (Ala. Sep. 12, 1997) (Fidelity I), *op. withdrawn and rev'd*, 722 So.2d 740 (Ala. 1998); Carl Gregory Chrysler-Plymouth, Inc. v. Barnes, 700 So.2d 1358, 1361

majority on the court, by contrast, a majority of the justices found that the arbitration clause did cover the dispute in question.[105] In the thirteen cases, business-funded justices cast 91 percent of their votes for a broad interpretation of the arbitration agreement, *i.e.*, one that would cover the claim in question.[106] In contrast, plaintiffs'-lawyer-funded justices cast only 4 percent of their votes for a broad interpretation.[107]

Table 3

Business-Funded Justice	**Votes for Broad Interpretation of Arbitration Agreement**	**Votes for Narrow Interpretation of Arbitration Agreement**
Brown	*Selma, Southtrust, Waites*	
Hooper	*Selma, Southtrust, Waites, Merrill Lynch, Terminix, Discount Foods, American Bankers, Pope, Fidelity I, Carl Gregory , Capital Investment, Ryan*	*Hagan*
Houston	*Selma, Southtrust, Waites, Merrill Lynch, Terminix, Discount Foods, Pope, Carl Gregory*	*American Bankers, Fidelity I, Capital Investment, Ryan*
Lyons	*Selma, Southtrust, Waites, Merrill Lynch*	
Maddox	*Selma, Southtrust, Waites, Merrill Lynch, Terminix, Hagan, Discount Foods, American Bankers, Pope, Fidelity I, Carl Gregory, Capital Investment, Ryan*	
See	*Selma, Southtrust, Waites, Merrill Lynch, Terminix, Discount Foods, American Bankers, Pope, Fidelity I, Carl Gregory*	
Total	**50 votes**	**5 votes**

(Ala. 1997); Capital Inv. Group, Inc. v. Woodson, 694 So.2d 1268, 1270 (Ala. 1997); Ryan Warranty Serv., Inc. v. Welch, 694 So.2d 1271, 1273 (Ala. 1997).

[105] Selma Med. Ctr., Inc. v. Manayan, 733 So.2d 382, 385-86 (Ala. 1999); SouthTrust Secs., Inc. v. McClellan, 730 So.2d 620, 622 (Ala. 1999); *Ex parte* Waites, 736 So.2d 550, 552 (Ala. 1999); Merrill Lynch, Inc., v. Kirton, 719 So.2d 201, 203-04 (Ala. 1998).

[106] *See* Table 3.

[107] *See* Table 4.

Table 4

Plaintiffs'-Lawyer-Funded Justice	**Votes for Broad Interpretation of Arbitration Agreement**	**Votes for Narrow Interpretation of Arbitration Agreement**
Almon		*Merrill Lynch, Terminix, Hagan, Discount Foods, American Bankers, Pope, Fidelity I, Carl Gregory, Capital Investment, Ryan*
Butts		*Terminix, Hagan, Discount Foods, American Bankers, Pope, Fidelity I, Carl Gregory, Capital Investment, Ryan*
Cook	*Selma, Merrill Lynch*	*Waites, Terminix, Hagan, Discount Foods, American Bankers, Pope, Fidelity I, Carl Gregory, Capital Investment, Ryan*
Johnstone		*Selma, Southtrust*
Kennedy		*Southtrust, Merrill Lynch, Terminix, Hagan, Discount Foods, American Bankers, Pope, Carl Gregory, Capital Investment, Ryan*
Shores		*Merrill Lynch, Terminix, Hagan, Discount Foods, American Bankers, Pope, Fidelity I, Carl Gregory, Capital Investment, Ryan*
Total	**2 votes**	**51 votes**

b. Multiple Parties

A frequent fact pattern in reported Alabama cases is an arbitration clause in a contract between Buyer and Seller for the sale of goods, often an automobile or mobile home. If Buyer sues Seller, Seller will be able to obtain a stay of the litigation and an order compelling Buyer to arbitrate.[108] But what if Buyer sues someone other than Seller, such as the manufacturer of the goods, the lender who financed the sale, an insurance company involved in the transaction, or the individual salesperson who acted as Seller's agent in making the sale? Must Buyer arbitrate its claims against those defendants who did not sign the arbitration agreement?

As arbitration is a creature of a contract, the question of whether Buyer must arbitrate against these "nonsignatory defendants" is best

[108] This is the result of the United States Supreme Court requiring Alabama courts to apply the FAA. *See* 9 U.S.C.A. § 3; *Allied-Bruce Terminix*, 513 U.S. at 273.

understood in the context of contract law, particularly the law of third-party beneficiaries.[109] Contracts, of course, confer rights on those who sign or otherwise manifest assent to them. Contracts also often confer rights on parties who have not signed them. These parties are known as third-party beneficiaries or, in the current jargon, "intended beneficiaries."[110] To qualify as an intended beneficiary, one must show that "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties."[111]

With regard to third-party beneficiaries, there is no reason why arbitration agreements should be analyzed differently from other contracts.[112] In determining who may enforce a promise to arbitrate, the proper analysis considers, not just who signed the arbitration agreement, but also who is covered by it. That issue, like all issues of contract interpretation, is inherently fact-specific. It turns on the language of the agreement in question and the context in which the agreement was formed.

The issue of whether a particular arbitration agreement covered claims against a particular non-signatory defendant split the Supreme Court of Alabama eleven times between January 18, 1995, and July 9, 1999.[113] In these eleven cases, business-funded justices cast 67 percent of their votes for a broad interpretation of the arbitration agreement, *i.e.*, one that would cover the claim in question.[114] In contrast, plaintiffs'-lawyer-funded justices cast zero votes for a broad interpretation.[115]

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[109] Agency law will also be relevant. *See* MACNEIL ET AL., FEDERAL ARBITRATION LAW, *supra* note 87, at § 18.3.2.3.

[110] *See generally* FARNSWORTH, *supra* note 96, at ch.10.

[111] RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1981).

[112] *See* MACNEIL ET AL., FEDERAL ARBITRATION LAW, *supra* note 87, at § 18.7.2.1.

[113] McDougle v. Silvernell, 738 So.2d 806 (Ala. 1999); Nissan Motor Acceptance Corp. v. Jackson, 738 So.2d 812 (Ala. 1999); First Family Fin. Servs., Inc. v. Rogers, 736 So.2d 553 (Ala. 1999); Universal Underwriters Life Ins. Co. v. Dutton, 736 So.2d 564 (Ala. 1999); *Ex parte* Herron, No. 1971256, 1999 WL 6949 (Ala. Jan. 8 1999); Stewart Title of Mobile, Inc. v. Montalvo, 709 So.2d 1194 (Ala. 1998); Ford Motor Co. v. Hall, 709 So.2d 1198 (Ala. 1998); *Ex parte* Isbell, 708 So.2d 571 (Ala. 1997); *Ex parte* Stripling, 694 So.2d 1281 (Ala. 1997); *Ex parte* Martin, 703 So.2d 883, 887 (Ala. 1996); *Ex parte* Jones, 686 So.2d 1166, 1167 (Ala. 1996). *See generally*, Jeff DeArman, Comment, *Resolving Arbitration's Nonsignatory Issue: A Critical Analysis of the Application of Equitable Estoppel in Alabama Courts*, 29 CUMB. L. REV. 645 (1998-1999).

[114] *See* Table 5.

[115] *See* Table 6.

Table 5

Business-Funded Justice	**Votes to Compel Arbitration of Claims Against Non-signatory**	**Votes to Allow Litigation of Claims Against Non-signatory**
Brown	*McDougle*	*Nissan, First, Universal*
Hooper	*McDougle, First, Universal, Herron, Montalvo, Hall, Isbell, Stripling, Martin, Jones*	*Nissan*
Houston	*McDougle, Hall, Isbell*	*Nissan, First, Universal, Herron, Stripling, Martin*
Lyons	*McDougle, Herron*	*Nissan, First, Universal*
Maddox	*McDougle, Nissan, Universal, Herron, Montalvo, Hall, Isbell, Stripling, Martin, Jones*	*First*
See	*McDougle, Universal, Herron, Montalvo, Isbell, Hall, Stripling*	*Nissan, First*
Total	**33 votes**	**16 votes**

Table 6

Plaintiffs'-Lawyer-Funded Justice	**Votes to Compel Arbitration of Claims Against Non-signatory**	**Votes to Allow Litigation of Claims Against Non-signatory**
Almon		*Herron, Isbell, Montalvo, Hall, Stripling, Martin, Jones*
Butts		*Isbell, Montalvo, Hall, Stripling, Martin, Jones*
Cook		*McDougle, Nissan, First, Universal, Herron, Montalvo, Hall, Isbell, Stripling, Martin, Jones*
Ingram		*Jones*
Johnstone		*McDougle, Nissan*
Kennedy		*McDougle, Nissan, Universal, Herron, Montalvo, Hall, Isbell, Stripling, Martin, Jones*
Shores		*Herron, Montalvo, Hall, Isbell, Stripling, Martin, Jones*
Total	**0 votes**	**44 votes**

The converse issue is whether an arbitration agreement signed by the defendant covers certain claims asserted by plaintiffs who did not sign the agreement. This issue split the Supreme Court of Alabama four times between January 18, 1995, and July 9, 1999.[116] In the four cases, business-funded justices cast 72 percent of their votes for a broad interpretation of the arbitration agreement, *i.e.*, one that would cover the claim in question.[117] In contrast, plaintiffs'-lawyer-funded justices cast only 6 percent of their votes for a broad interpretation.[118]

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[116] Infiniti of Mobile, Inc. v. Office, 727 So.2d 42 (Ala. 1999); Tom Williams Motors, Inc. v. Thompson, 726 So.2d 607 (Ala. 1998); *Ex parte* Dickinson, 711 So.2d 984 (Ala. 1998); Prudential Sec., Inc. v. Micro-Fab, Inc., 689 So.2d 829 (Ala. 1997).

[117] *See* Table 7.

[118] *See* Table 8.

Table 7

Business-Funded Justice	**Votes to Compel Arbitration of Claims by Non-signatory**	**Votes to Allow Litigation of Claims by Non-signatory**
Hooper	*Infiniti, Tom Williams, Dickinson, Prudential*	
Houston	*Infiniti, Dickinson*	*Tom Williams, Prudential*
Lyons	*Infiniti*	*Tom Williams*
Maddox	*Infiniti, Tom Williams, Dickinson*	*Prudential*
See	*Infiniti, Tom Williams, Dickinson*	*Prudential*
Total	**13 votes**	**5 votes**

Table 8

Plaintiffs'-Lawyer-Funded Justice	**Votes to Compel Arbitration of Claims by Non-signatory**	**Votes to Allow Litigation of Claims by Non-signatory**
Almon		*Tom Williams, Dickinson*
Butts		*Dickinson, Prudential*
Cook	*Infiniti*	*Tom Williams, Dickinson, Prudential*
Kennedy		*Infiniti, Tom Williams, Dickinson, Prudential*
Shores		*Infiniti, Tom Williams, Dickinson, Prudential*
Total	**1 vote**	**15 votes**

3. Waiver

Even if an arbitration agreement is formed, and even if that agreement is interpreted to cover the claim in question, the agreement will not be enforced to compel arbitration if the party seeking enforcement has waived its right to do so. The waiver issue typically arises when a plaintiff sues and the defendant participates, to some degree, in litigation before asking the court to compel arbitration.

> Whether a party's participation in an action amounts to an enforceable waiver of its right to arbitrate depends on whether the participation bespeaks an intention to abandon the right in favor of the judicial process and, if so, whether the opposing party would be prejudiced by a subsequent order requiring it to submit to arbitration.[119]

From January 18, 1995, through July 9, 1999, waiver issues split the Supreme Court of Alabama nine times.[120] In four of the six cases prior to March 23, 1998, the period when plaintiffs'-lawyer-funded justices held a majority on the court, a majority of the justices found waiver of the right to compel arbitration.[121] In all three cases after business-funded justices gained a majority on the court, by contrast, a majority of the justices found no waiver.[122] In these nine cases, business-funded justices cast 92 percent of their votes for the conclusion that the right to compel arbitration had not been waived.[123] In contrast, plaintiffs'-lawyer-funded justices cast only 18 percent of their votes for the no-waiver conclusion.[124]

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[119] Mutual Assurance, Inc. v. Wilson, 716 So.2d 1160, 1163 (Ala. 1998) (quoting Companion Life Ins. Co. v. Whitesell Mfg., Inc., 670 So.2d 897, 899 (Ala. 1995)).

[120] Thompson v. Skipper Real Estate Co., 729 So.2d 287 (Ala. 1999); Georgia Power Co. v. Partin, 727 So.2d 2 (Ala. 1998); Mutual Assurance, Inc. v. Wilson, 716 So.2d 1160 (Ala. 1998); *Ex parte* Hood, 712 So.2d 341 (Ala. 1998); *Ex parte* Rager, 712 So.2d 333 (Ala. 1998); *Ex parte* Dyess, 709 So.2d 447 (Ala. 1997); *Ex parte* Smith, 706 So.2d 704 (Ala. 1997); Eastern Dredging & Constr., Inc., v. Parliament House, L.L.C., 698 So.2d 102 (Ala. 1997); *Ex parte* Prendergast, 678 So.2d 778 (Ala. 1996). The dissenting votes in *Rager* have no opinion so it is possible that the court split on the issue of formation, rather than waiver.

[121] *Hood*, 712 So.2d at 345; *Smith*, 706 So.2d at 705; *Eastern Dredging & Constr.*, 698 So.2d at 104; *Prendergast*, 678 So.2d at 781.

[122] *Partin*, 727 So.2d at 7; *Wilson*, 716 So.2d at 1164; *Thompson*, 729 So. 2d at 292.

[123] *See* Table 9.

[124] *See* Table 10.

Table 9

Business-Funded Justice	**Votes against Waiver of Arbitration**	**Votes for Waiver of Arbitration**
Hooper	*Thompson, Partin, Wilson, Hood, Rager, Dyess, Smith, Prendergast*	*Eastern*
Houston	*Thompson, Partin, Wilson, Rager, Dyess, Smith, Prendergast*	*Eastern*
Lyons	*Thompson, Partin, Wilson*	
Maddox	*Thompson, Partin, Wilson, Hood, Rager, Dyess, Smith, Eastern, Prendergast*	
See	*Thompson, Partin, Wilson, Hood, Rager, Dyess, Smith*	*Eastern*
Total	**34 votes**	**3 votes**

Table 10

Plaintiffs'-Lawyer-Funded Justice	**Votes against Waiver of Arbitration**	**Votes for Waiver of Arbitration**
Almon		*Partin, Wilson, Hood, Rager, Smith, Prendergast*
Butts		*Hood, Rager, Dyess, Smith, Eastern, Prendergast*
Cook	*Wilson, Rager, Dyess*	*Thompson, Partin, Hood, Smith, Eastern, Prendergast*
Ingram		*Prendergast*
Kennedy	*Rager, Dyess*	*Thompson, Partin, Wilson, Hood, Smith, Prendergast*
Shores	*Wilson, Dyess*	*Thompson, Partin, Hood, Smith, Eastern, Prendergast*
Total	**7 votes**	**31 votes**

4. Separability

Defenses to the enforcement of any contract (such as misrepresentation, mistake and duress) are defenses to the

enforcement of arbitration agreements.[125] Although these contract law defenses do apply to arbitration agreements, the United States Supreme Court held in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[126] that the arbitrator, not the court, must decide whether such a defense is present in a given case. The *Prima Paint* Court stated that:

> arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.[127]

The separability doctrine of *Prima Paint* has been applied beyond misrepresentation to other contract defenses.[128] On the other hand, there are "a wide range of cases where *Prima Paint* issues were in fact present, but where the courts have refused to apply them or simply ignored their presence."[129]

The separability doctrine split the Supreme Court of Alabama six times from January 18, 1995, through July 9, 1999. In the two cases decided prior to March 23, 1998, the period when plaintiffs'-lawyer-funded justices held a majority on the court, the court failed to apply the separability doctrine, either by ignoring the doctrine,[130] or by unsuccessfully attempting to distinguish it.[131] A third opinion, later withdrawn, argued that the separability doctrine had been overruled by a recent United States Supreme Court case.[132] In all four of the

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[125] *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[126] 388 U.S. 395 (1967).

[127] *Id.* at 402.

[128] *See, e.g.*, Merrill Lynch, Inc. *v.* Haydu, 637 F.2d 391, 398 (5th Cir. 1981) (duress and undue influence); WMX Techs., Inc. v. Jackson, 932 F. Supp. 1372, 1374 (M.D. Ala. 1996) (mutuality).

[129] MACNEIL ET AL., FEDERAL ARBITRATION LAW, *supra* note 87, at § 15.3.2.

[130] *Ex parte* Williams, 686 So.2d 1110, 1112 (Ala. 1996).

[131] Allstar Homes, Inc. v. Waters, 711 So.2d 924, 927 (Ala. 1997).

[132] Investment Management & Research, Inc. v. Hamilton, No. 1960138, 1998 WL 122737, at * 6 (Ala. Mar. 20, 1998). This opinion was withdrawn, and superceded on rehearing, after Justice Lyons joined the court and provided a majority of justices in favor of separability. Investment Management & Research, Inc. v. Hamilton, 727 So.2d 71, 78 (Ala. 1999).

cases after business-funded justices gained a majority on the court, by contrast, a majority of the justices applied the separability doctrine,[133] and all dissenting justices were plaintiffs'-lawyer-funded. In the six cases, business-funded justices cast 93 percent of their votes for the separability doctrine,[134] while plaintiffs'-lawyer-funded justices cast only 14 percent of their votes for it.[135]

Table 11

Business-Funded Justice	**Votes for Separability**	**Votes against Separability**
Brown	*Nationsbanc, Selma*	
Hooper	*Nationsbanc, Selma, Investment, Anniston, Allstar Homes*	*Williams*
Houston	*Nationsbanc, Selma, Investment, Anniston, Allstar Homes*	*Williams*
Lyons	*Nationsbanc, Selma, Investment, Anniston*	
Maddox	*Nationsbanc, Selma, Investment, Anniston, Williams, Allstar Homes*	
See	*Nationsbanc, Selma, Investment, Anniston, Allstar Homes*	
Total	**27 votes**	**2 votes**

[133] Nationsbanc Inv., Inc. v. Paramore, 736 So.2d 589, 592 (Ala. 1999); Selma Med. Ctr. v. Manayan, 733 So.2d 382, 386 (Ala. 1999); Investment Management & Research, Inc. v. Hamilton, 727 So.2d 71, 78 (Ala. 1999); Anniston Lincoln Mercury Dodge v. Conner, 720 So.2d 898, 902 (Ala. 1998).

[134] *See* Table 11.

[135] *See* Table 12.

Table 12

Plaintiffs'-Lawyer-Funded Justice	**Votes for Separability**	**Votes against Separability**
Almon		*Investment, Anniston, Williams, Allstar Homes*
Butts		*Williams, Allstar Homes*
Cook	*Nationsbanc, Selma, Investment*	*Anniston, Williams, Allstar Homes*
Ingram		*Williams*
Johnstone		*Nationsbanc, Selma*
Kennedy		*Nationsbanc, Anniston, Williams, Allstar Homes*
Shores		*Anniston, Williams, Allstar Homes*
Total	**3 votes**	**19 votes**

5. Unconscionability

Even when applying *Prima Paint*'s separability doctrine, courts retain the duty to hear challenges directed toward the arbitration clause itself.[136] Such challenges go under many names, but usually rest on the assertion that the arbitration clause is unconscionable.[137] Unconscionability challenges to arbitration agreements have fared poorly in the Supreme Court of Alabama since March 23, 1998, when business-funded justices gained a majority on the court. Since then, unconscionability has split the court seven times and each time the majority has rejected the unconscionability argument.[138] All twenty-one dissenting votes in these seven cases were cast by plaintiffs'-lawyer-funded justices.[139]

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[136] *Prima Paint*, 388 U.S. at 402-04.

[137] *See, e.g.*, Northcom Ltd. v. R.E. James, 694 So.2d 1329, 1331-39 (Ala. 1997) (challenge phrased in terms of "mutuality" rather than unconscionability).

[138] *Ex Parte* Smith, 736 So.2d 604, 612 (Ala. 1999); Green Tree Fin. Corp. v. Davis, 729 So.2d 329, 329 (Ala. 1999); American General Fin., Inc. v. Manley, 729 So.2d 260, 261 (Ala. 1998); *Ex Parte* Napier, 723 So.2d 49, 52-53 (Ala. 1998); *Ex Parte* McNaughton, 728 So.2d 592, 597 (Ala. 1998); *Ex Parte* Dan Tucker Auto Sales, Inc., 718 So.2d 33, 37 (Ala. 1998); Green Tree Agency, Inc. v. White, 719 So.2d 1179, 1180 (Ala. 1998).

[139] *See* Tables 13-14.

Table 13

Business-Funded Justice	**Votes Not Finding Unconscionability**	**Votes Finding Unconscionability**
Brown	*Smith*	
Hooper	*Smith, Davis, Manley, Napier, McNaughton, Dan Tucker, White*	
Houston	*Smith, Davis, Manley, Napier, McNaughton, Dan Tucker, White*	
Lyons	*Smith, Davis, Manley, Napier, McNaughton, Dan Tucker, White*	
Maddox	*Smith, Davis, Manley, Napier, McNaughton, Dan Tucker, White*	
See	*Smith, Davis, Manley, Napier, McNaughton, Dan Tucker, White*	
Total	**36 votes**	**0 votes**

Table 14

Plaintiffs'-Lawyer-Funded Justice	**Votes Not Finding Unconscionability**	**Votes Finding Unconscionability**
Almon		*Davis, Manley, Napier, McNaughton, Dan Tucker, White*
Butts		
Cook	*Smith, Davis, Manley, Napier, Dan Tucker*	*McNaughton, White*
Ingram		
Johnstone		*Smith,*
Kennedy	*Manley*	*Smith, Davis, Napier, McNaughton, Dan Tucker White*
Shores		*Davis, Manley, Napier, McNaughton, Dan Tucker, White*
Total	**6 votes**	**21 votes**

6. Statutory Arbitrability

In Section III.C.2, this Article discussed cases under the heading of "Contractual Arbitrability." Those are cases in which an arbitration agreement must be interpreted to determine whether it

covers a particular claim or dispute. The issues in contractual arbitrability cases are basically the issues of contract interpretation generally. In contrast, "statutory arbitrability" cases raise issues beyond the scope of contract law. Courts sometimes hold that a particular claim is not arbitrable even if, as a matter of contract interpretation, it is clear that the parties' agreement requires arbitration of the claim in question.[140] For example, the Supreme Court of Alabama held that claims under the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act,[141] are not arbitrable.[142] All four dissenters were business-funded justices,[143] while the majority consisted of four plaintiffs'-lawyer-funded justices and one business-funded justice, Justice Houston.[144]

7. Employment Agreements

While the FAA preempts Alabama's anti-arbitration statute, it does this only in cases to which it applies. The FAA expressly states that it does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[145] While the Ninth Circuit interprets this language to exclude all employees from FAA coverage,[146] other courts hold that it excludes only seamen, railroad employees and

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[140] These holdings are much rarer now than they were prior to the 1980's when the U.S. Supreme Court revolutionized arbitration law. *See generally* MACNEIL ET AL, FEDERAL ARBITRATION LAW, *supra* note 87, at ch. 16. The Court now holds that the FAA:

> mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the [FAA]'s mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be "deducible from [the statute's] text or legislative history,". . . or from an inherent conflict between arbitration and the statute's underlying purposes.

Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226-27 (1987) (citations omitted) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985)).

[141] 15 U.S.C.A. § 2301 et seq. (West 1998).

[142] Southern Energy Homes, Inc. v. Lee, 732 So.2d 994, 999-1000 (Ala. 1999).

[143] *Id.*

[144] *Id.*

[145] 9 U.S.C.A. § 1.

[146] Craft v. Campbell Soup Co., 161 F.3d 1199, 1206 (9th Cir. 1998).

those in similar occupations.[147] In other words, the FAA applies to all employment contracts except for those of employees directly involved in transporting goods across state lines. The Supreme Court of Alabama takes this latter view,[148] which requires a case-by-case determination of whether a particular employee is covered by the FAA. The Supreme Court of Alabama split on that determination in one case with a majority, consisting entirely of business-funded justices,[149] finding that the employee was covered by the FAA.[150] The dissenting votes came from all three plaintiffs'-lawyer-funded justices,[151] plus one business-funded justice, Justice Houston.

8. Insurance

While the FAA governs virtually all arbitration agreements outside the employment context, there is an exception for certain cases involving insurance policies containing arbitration clauses. FAA preemption of state law in the insurance context is complicated by the McCarran-Ferguson Act.[152] The pertinent McCarran-Ferguson provision states:

> (a) State Regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal Regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating

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147 *See, e.g.*, Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 365 (7th Cir. 1999); McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997); Cole v. Burns Int'l Security Serv., 105 F.3d 1465, 1470-72 (D.C. Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 747-48 (5th Cir. 1996); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 596-601 (6th Cir. 1995); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. DuPont, 443 F.2d 783, 785 (1st Cir. 1971); Tenney Eng'g, Inc. v. United Elec. Workers, Local 437, 207 F.2d 450, 452-53 (3d Cir. 1953).

148 *See* Robert Frank McAlpine Architecture, Inc. v. Heilpern, 712 So.2d 738, 749 (Ala. 1998).

149 Gold Kist, Inc. v. Baker, 730 So.2d 614 (Ala. 1999) (Opinion by Maddox; Hooper, See, Lyons, and Brown concurring).

150 *Id.* at 616.

151 Cook, Johnstone and Kennedy.

152 15 U.S.C.A. § 1011 et seq. (West 1997).

> the business of insurance, . . . unless such Act specifically relates to the business of insurance.[153]

In a recent case, plaintiffs seeking to avoid enforcement of arbitration clauses in insurance policies argued that McCarran-Ferguson protected Alabama's anti-arbitration statute from FAA preemption.[154] The Supreme Court of Alabama rejected this argument.[155] The majority rejecting it consisted entirely of business-funded justices,[156] while the dissenters consisted entirely of plaintiffs'-lawyer-funded justices,[157] plus one business-funded justice, Justice Houston.[158]

9. Miscellaneous

From 1995 through 1999, the Supreme Court of Alabama split seven times over arbitration issues not discussed above.[159] In these seven miscellaneous cases, business-funded justices cast 88 percent of their votes for a pro-arbitration result,[160] while plaintiffs'-lawyer-funded justices cast only 11 percent of their votes for a pro-arbitration result.[161]

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[153] 15 U.S.C.A. § 1012.

[154] American Bankers Ins. Co. of Fl. v. Crawford, # 1972246, 1999 WL 553725, at * 6 (Ala., July 30, 1999). This case was decided just after the time period studied throughout this article (January 18, 1995 through July 9, 1999), but seems important enough to mention.

[155] *Id.* at * 9-11.

[156] *Id.* at * 13.

[157] *Id.*

[158] The same voting pattern occurred in a similar insurance arbitration case, *Woodmen of the World Life Insurance Society v. Harris*, 740 So.2d 362 (Ala. 1999), except that Houston took the pro-arbitration position.

[159] Crimson Indus., Inc. v. Kirkland, 736 So.2d 597 (Ala. 1999); Ryan's Family Steak Houses, Inc. v. Regelin, 735 So.2d 454 (Ala. 1999); Southern United Fire Ins. Co. v. Knight, 736 So.2d 582 (Ala. 1999); Brilliant Homes, Ltd. v. Lind, 722 So.2d 753 (Ala. 1998); Delta Constr. Corp. v. Gooden, 714 So.2d 975 (Ala. 1998); Hurst v. Tony Moore Imports, Inc., 699 So.2d 1249 (Ala. 1997); Jim Burke Automotive, Inc. v. Beavers, 674 So.2d 1260 (Ala. 1995).

[160] *See* Table 15.

[161] *See* Table 16.

Table 15

Business-Funded Justice	**Votes for Arbitration**	**Votes Against Arbitration**
Brown	*Crimson, Ryan's*	*Knight*
Hooper	*Crimson, Ryan's, Knight, Brilliant, Delta, Hurst, Beavers*	
Houston	*Crimson, Ryan's, Brilliant, Delta, Hurst, Beavers*	
Lyons	*Ryan's, Brilliant, Delta*	*Crimson, Knight*
Maddox	*Crimson, Ryan's, Knight, Brilliant, Delta, Hurst, Beavers*	
See	*Crimson, Ryan's, Brilliant, Delta, Hurst*	*Knight*
Total	**30 votes**	**4 votes**

Table 16

Plaintiffs'-Lawyer-Funded Justice	**Votes for Arbitration**	**Votes against Arbitration**
Almon		*Brilliant, Delta, Hurst, Beavers*
Butts		*Hurst, Beavers*
Cook	*Crimson, Delta, Hurst*	*Ryan's, Knight, Brilliant, Beavers*
Ingram		
Johnstone		*Crimson, Ryan's, Knight*
Kennedy		*Crimson, Ryan's, Knight, Brilliant, Delta, Hurst, Beavers*
Shores		*Brilliant, Delta, Hurst, Beavers*
Total	**3 votes**	**24 votes**

IV. CONCLUSION

Alabama's most notorious citizen, Governor George Wallace, once asserted that "there ain't a dime's worth of difference" between

Democrats and Republicans.[162] If that once was true, it is no longer true on the Supreme Court of Alabama, if arbitration cases are any indication. The arbitration cases indicate that the court often splits along predictable, and highly partisan, lines.[163] Justices whose campaigns are funded by plaintiffs' lawyers are all Democrats and oppose arbitration, while justices whose campaigns are funded by business are nearly all Republicans and favor arbitration. There is a strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases.

To reiterate, correlation does not prove causation.[164] Knowing that there is a strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases does nothing to explain *why* this occurs. This article does not try to explain what causes the strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases. It merely shows that the strong correlation exists.

The one significant exception to the correlation is Justice Houston. He was the only business-funded justice to vote against arbitration on the issues of Magnuson-Moss arbitrability,[165] the FAA's employment exclusion,[166] and FAA preemption in the context of insurance.[167] He also voted against arbitration in a higher percentage of cases than any other business-funded justice on the issues of formation,[168] and contractual arbitration (both two parties[169] and multiple parties[170]).[171]

With the exception of Justice Houston, Supreme Court of Alabama justices whose campaigns are funded by plaintiffs' lawyers

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[162] *See* JOHN H. ALDRICH, WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 11 (1995).

[163] *See* Section III.C. *supra.*

[164] *See* text accompanying notes 81-82, *supra.*

[165] *See* text accompanying notes 141-43, *supra.*

[166] *See* text accompanying notes 148-50, *supra.*

[167] *See* text accompanying notes 153-57, *supra.*

[168] *See* text accompanying note 100, *supra.*

[169] *See* text accompanying note 103, *supra.*

[170] *See* text accompanying note 113, *supra.*

[171] Justice Houston has publicly declared his disagreement with the *Terminix* case in which the United States Supreme Court ordered Alabama courts to apply the FAA. Ex Parte Dan Tucker Auto Sales, Inc, 718 So.2d 33, 38 (Ala. 1998) (concurring). There, he reiterated his "oppos[ition to] the judicial enforcement of predispute arbitration agreements," *id.*, and said, "I will continue my opposition to the extent I am allowed to do so by the Constitution of the United States as interpreted by the Supreme Court of the United States." *Id.*

oppose arbitration, while justices whose campaigns are funded by business favor arbitration. This correlation holds not just in "big" or "controversial" cases, but pervades the entire area of law. It pervades ordinary, run-of-the-mill, routine cases.

As arbitration law is basically contract law,[172] arbitration cases raise lots of contract law issues. Some arbitration cases implicate contract law's ideologically-charged doctrines, like unconscionability.[173] It is not so surprising to see judges' votes on such issues correlate with a judges' source of interest-group support.[174] What does surprise this contracts teacher, however, is seeing the correlation hold with regard to judges' votes on issues of contract formation, interpretation and waiver.[175] I had thought these areas of contract law to be sufficiently "neutral", *i.e.*, sufficiently drained of ideological content, that judges' votes would not fall into easily recognized patterns. I was wrong. Even seemingly bland questions of contract formation, interpretation and waiver are apparently battlegrounds between the interest groups. Arbitration law in Alabama seems to have no doctrine at all that is purely legal, as opposed to political. In other words, arbitration law in Alabama seems to have no doctrinal integrity that survives the vicissitudes of the interest group battle. This law is indeed politics, in a very real and direct sense. This law provides evidence for the strong strain of Legal Realism which "contends that law is politics through and through and that judges exercise broad discretionary authority."[176]

Only further research will determine whether this assessment can be generalized to non-arbitration cases of the Supreme Court of Alabama, let alone to cases in other states' highest courts. It is certainly possible that arbitration cases cause the Alabama court to behave differently than it ordinarily does.[177] And even if the source of campaign contributions strongly correlates with votes by justices on the Supreme Court of Alabama in all cases, the source of

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[172] *See* text accompanying note 87, *supra.*

[173] *See* text accompanying notes 136-37, *supra.*

[174] *See* text accompanying notes 52-53, *supra.*

[175] *See* text accompanying notes 100-01, 105-06, 113-14, *supra.*

[176] POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 16, at 25.

[177] Arbitration seems to have become an especially controversial issue. One of Alabama's leading plaintiffs' lawyers, former Lieutenant Governor Jere Beasley, declared that "The spread of binding arbitration in consumer transactions is absolutely the worst possible attack on all Alabamians that I have experienced in recent years. Our political leaders have a moral duty to right this wrong." Jere Beasley, THE JERE BEASLEY CONSUMER REPORT, Sept. 1, 1999, at 1.s

campaign contributions may not be a strong predictor of votes on other states' highest courts. From the data presented in this article, however, it appears that contributing to a judicial campaign can be a sound investment. The money invested yields consistent returns, *i.e.*, judicial candidates who, if elected, vote the contributor's way, day-in, day-out. Those who believe that law, especially law made by elected judges, is nothing more than interest-group politics can find confirmation of their belief in these cases.