To Participants in the University of Texas Law & Economics Seminar:

Thank you for taking the time to engage with our work. I'm attaching drafts of two chapters that are part of a book project with my co-author, Michael Kang. I also provide a synopsis of the book, which we're planning to title something along the lines of *Free to Judge: The Corrupting Influence of Money in State Courts*. The first chapter traces the history of judicial elections and explains why the recent proliferation of campaign finance has created a crisis for our state courts. The second chapter contains our data and empirical analysis (which is the main substance of the book), the findings from which inform the best approaches to reform.

The project is still very much ongoing and would benefit greatly from your feedback. I look forward to our discussion.

Sincerely,
Joanna Shepherd

Free to Judge:
The Corrupting Influence of Money in State Courts

By Michael Kang and Joanna Shepherd

Synopsis

Money buys things. This is a big benefit to people with money to spend in elections. They can spend money to elect and re-elect lawmakers who promote their preferences in government. And in a system like ours that elects state judges, they can spend money to elect and re-elect judges who decide cases the way they want. But this should greatly trouble those of us who believe that money should not dictate the application of justice. This book is about how and why money affects judicial decisions. And what can be done to stop it.

A growing body of literature, including several studies by us, has established a robust relationship between judicial decisions by elected judges and the campaign contributions received from a wide range of donors: business groups, political parties, left- and right-leaning interest groups, among others. Elected judges demonstrably lean toward the interests and preferences of their campaign donors across all types of cases.

More difficult to establish empirically is whether this relationship between campaign money and judicial decisions results from the selection of judges that are elected in the first place or from the outright biasing of judges. That is, judicial candidates who are already predisposed to vote in favor of particular donors' interests are likely to draw campaign funding from those donors and, by virtue of those resources, are more likely to win elections. When these candidates take the bench, their predispositions will lead them to naturally decide cases in a way that favors their donors. Alternatively, once elected, sitting judges might favor their respective donors' preferences in their judicial decisions with the next election in mind. Even judges who are not predisposed to vote in favor of a particular donor's interests might still, whether consciously or subconsciously, vote in their favor so as to curry future financial support from those donors.

We unravel this methodological puzzle by analyzing the voting of lame duck judges facing mandatory retirement. These judges raised money and were elected just like all the other judges, but once in their final term, they no longer have the possibility of re-election. We find that, for most judges, campaign money is associated with judges' voting in the direction of donors' interests. However, for lame duck judges, there is no meaningful relationship between campaign money and judges' votes. We conduct a series of robustness checks to empirically rule out several of the likeliest counter-explanations for why lame ducks defy the usual relationship between votes and money. Regardless of the way we analyze the data, lame duck judges vote differently than their non-retiring counterparts. Our results indicate that, when the possibility of re-election is removed and

judges are liberated from the pressures of campaign fundraising, they become free to judge without the bias that usually accompanies campaign money.

We argue from our findings that existing criticism of judicial elections should be aimed less at judicial elections in general, and more at the specific problem of judicial *re-election.* Re-election concerns inject bias into judicial outcomes, so the best way to eliminate the problem is to remove the re-election pressures on sitting judges. This can be accomplished either by granting permanent tenure to state supreme court justices, as three states already do, or by limiting judges to a single, lengthy term in office.

Chapter 2: Judicial Elections Then and Now

Choosing judges by election is an almost uniquely American practice. In the United States, 9 out of 10 state judges must win election to retain their seats on the bench. Virtually no other country requires judicial candidates to win votes or campaign for office. Judges are typically chosen by appointment, often with a long process of training and secure tenure. In France, for instance, judicial candidates are generally picked through an intense process that begins with competitive examinations for admission to a specialized program where as few as 5 percent of test takers are selected for admission.[1] Once admitted, judicial candidates receive training and take another set of competitive examinations to become apprentice judges. They then undergo a 31-month course of study before receiving their initial posting as what we would consider a judge. This long process of selection and training is intended to ensure the highest quality of judicial performance and insulate judges from the political process.

Although not all countries have the same system for judicial selection as France, most countries likewise shield judicial candidates and judges from electoral pressures. Only two other countries use any sort of election to select or retain judges. Switzerland uses elections to pick low-level local judges only. Japan uses a highly structured system of judicial selection similar to France's system, with competitive examinations and selection by merit-based appointment. However, Japanese Supreme Court justices must be periodically re-elected to keep their position, though retention is so routine that one scholar described the Japanese Supreme Court as "among the most autonomous constitutional or highest regular courts in the industrial world." [2]

Thus, the American system of judicial elections to select and retain judges is an international anomaly. Mitchel Lasser, a scholar of comparative judicial selection, explains that "[t]he rest of the world is stunned and amazed at what we do, and vaguely aghast. They think the idea that judges with absolutely no judge-specific educational training are running political campaigns is both insane and characteristically American."[3]

In this Chapter, we provide a brief introduction to judicial elections in the United States. First, we describe the evolution of the methods of judicial selection and retention, from the emergence of judicial elections during the nineteenth century to the wide range of partisan elections, nonpartisan elections, and variants of appointment and merit plans seen today. Second, we describe the increasing politicization of judicial campaigns in recent years and the growing importance of campaign contributions to candidates. Third, we

[1] See generally Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (2009).
[2] John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust in Law in Japan: A Turning Point* (Daniel Foote ed., 2007)
[3] See Adam Liptak, *Rendering Justice, With One Eye on Re-election,* N.Y. Times, A1 (May 25, 2008).

explain that the rapid growth in campaign spending has ignited new worry about the influence of money on judges. However, most of the criticism and calls for reform have been aimed at the specific type of judicial election, and proposed reforms would simply replace one type of election for another. In contrast, we argue that the threats to judicial impartiality may have less to do with the type of elections in which judges are selected, and more to do with the pressures facing judges that must run for re-election.

A Brief History of Judicial Elections

Today, there is significant variation in the methods that states use to select and retain their judges. However, the appointment of state judges originally resembled that of the federal judiciary. At the Founding, all state judges were initially appointed to the bench by the state legislature or governor. It was not until the 1840s, and the Jacksonian era of championing popular democracy, that concerns about political influence on the judiciary led to the adoption of judicial elections in many states. Although all states entering the Union before 1845 had an appointed judiciary, each state that entered between 1846 and 1959 adopted judicial elections.[4]

Ironically from today's perspective, state constitutional conventions of the time debating judicial selection believed that elective systems would produce more independent judges than appointive systems because only popular elections could "insulate the judiciary . . . from the branches that it was supposed to restrain."[5] They believed that elections would ensure that judges represented the voters and would preserve the public good. As a delegate to the Kentucky convention in 1849 explained, a judge "is to look somewhere for his bread, and that is to come from the people. He is to look somewhere for approbation, and that is to come from the people."[6] State after state established an elective judiciary after long, cautious debate in constitutional conventions. The convention delegates believed they were transforming judicial selection to ensure more impartial judges and improve the quality of the bench. As an Illinois convention delegate explained, "if only the federal judiciary had been made elective . . . the people 'would have chosen judges, instead of broken-down politicians.'"[7]

---

[4] Larry C. Berkson updated by Rachel Caufield, *Judicial Selection in the United States: A Special Report,* Am. Judicature Soc'y (2004), http://judicialselection.us/uploads/documents/Berkson_1196091951709.pdf

[5] See Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 205 (1993).

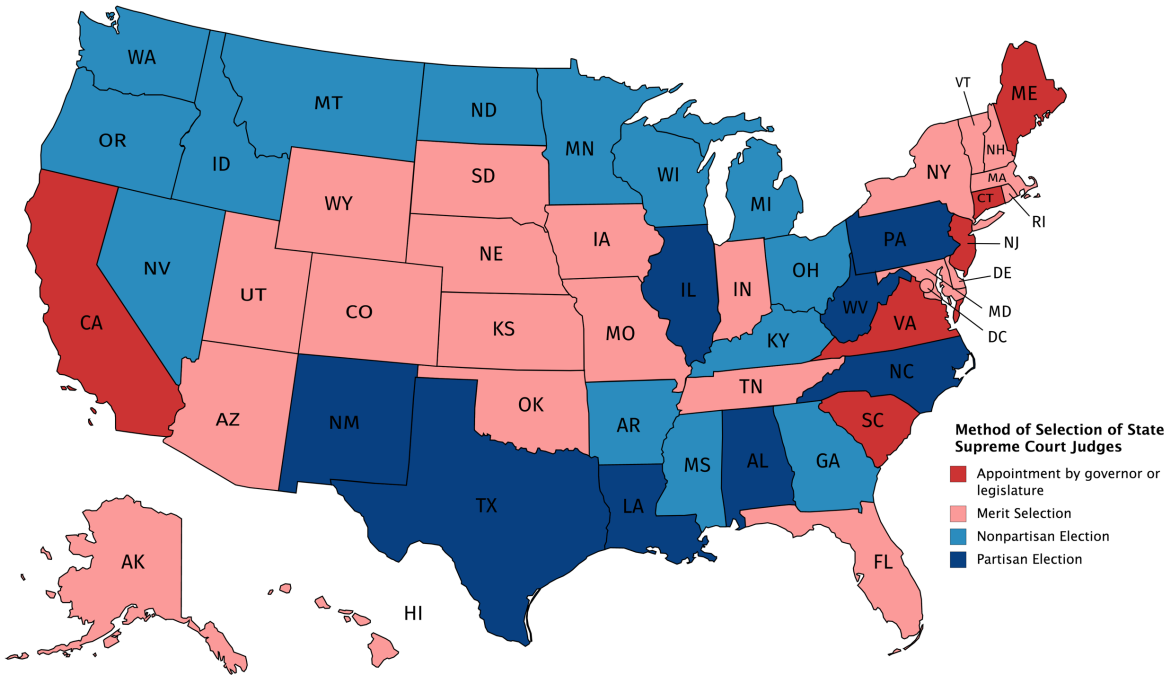
[6] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Kentucky* 273 (Frankfort, A.G. Hodges & Co. 1849) (statement of Francis M. Bristow).

[7] Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 195 (1993). (quoting constitutional debates of 1847, at 462 (Arthur Charles Cole ed., 1919 (statement of David Davis)).

Unfortunately, none of those early Jacksonian supporters of judicial elections anticipated the rise of money in elections and the corrosive effect that money would have on the bench. The same could be said of the Progressive Era reformers who condemned partisan elections in the early 1900s because of their distrust of political party involvement in judicial elections. Rather than do away with elections altogether, these reformers advocated replacing partisan elections with other types of elections in which political parties ostensibly play a smaller role. For example, by 1927, twelve states had switched from partisan elections, which reveal judges' party affiliations on the ballot, to nonpartisan elections. Other states moved to a merit selection plan under which the governor appoints judges from a list of qualified candidates prepared by a bipartisan commission, but the judges must run in unopposed retention elections to keep their seats. By 1980, twenty-one states and the District of Columbia had adopted merit selection for selecting some or all of their judges.

This long historical evolution has led to many variations of judicial selection for the states' highest courts. Today, fourteen states choose their state supreme court justices by nonpartisan election and eight do so by partisan judicial election. In twenty-eight states, the governor or legislature appoints judges to the state supreme court, with twenty-two of those states using a form of merit selection. Figure 1 reports the methods the states currently use to select state supreme court justices.

Figure 1: Method of Selection of State Supreme Court Justices



Just as the states originally modeled their selection of supreme court justices on the federal system, they also borrowed the federal judiciary's provision of permanent tenure for high court judges. Of the twenty-three states that established a high court by 1820, only four did not originally grant their judges life tenure.[8] However, at the same time that the states considered shifting from appointments to elections for selecting judges, they also reconsidered the desirability of permanent tenure. At the state constitutional conventions, may delegates argued that requiring judges to face voters in re-elections would give them strong incentives to continue to represent the wishes of the citizens. A delegate to the Massachusetts Convention asserted that "if the judges were made elective, and they were found to yield to their private political opinions, and carry out their judgments and decisions against their duty, . . . I believe those judges would be hurled from their seats by the people more readily than if they had been guilty of a higher degree of corruption in any other direction; because, I believe the quality which the people most require in a judge is independence."[9] In the same convention, another delegate argued that "if you provide that [judges] shall come before the people for re-election, they will take care that their opinions reflect justice and right, because they cannot stand upon any other basis."[10]

Seventeen of the nineteen states that had originally granted permanent tenure to supreme court justices moved instead to limited terms in the mid- to late-1800s. Only two states, Massachusetts and New Hampshire, opted to retain permanent tenure for supreme court justices; they were joined by Rhode Island in 1842. The states enacting limited terms adopted a range of retention methods that were sometimes only tangentially related to the methods they chose to select judges. As a result, the states today display a hodgepodge of selection and retention method combinations. Five states currently use partisan elections for retention, fourteen states use nonpartisan elections, nineteen states use unopposed retention elections, and nine states rely on reappointment by the governor, legislature, or a judicial nominating commission. Figure 2 displays the current retention methods used in the states for state supreme court justices.

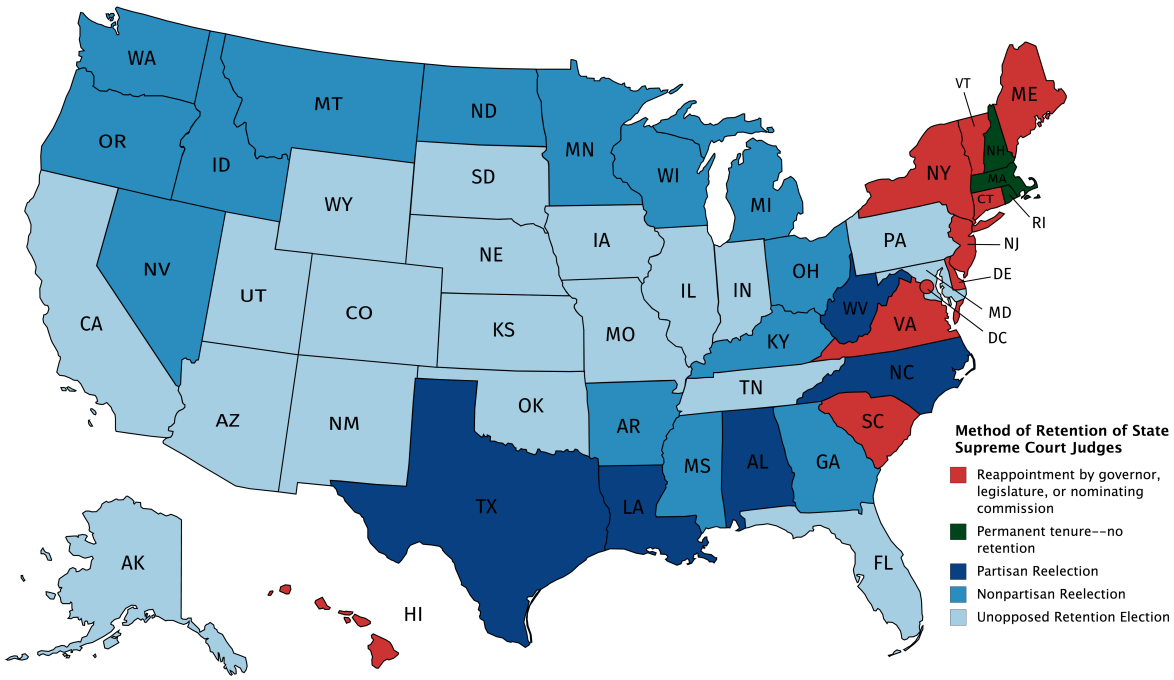
---

[8] Indiana, New Jersey, Ohio, and Pennsylvania. However, Pennsylvania switched from a 7-year term to a life term in 1790. National Center for State Courts, *History of Reform Efforts: Formal Changes since Inception* (2019), http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=

[9] 2 *Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts* 776 (Boston 1853) (remarks of Benjamin F. Hallett)

[10] *Id.* At 700 (remarks of Foster Hooper)

Figure 2: Method of Retention of State Supreme Court Justices



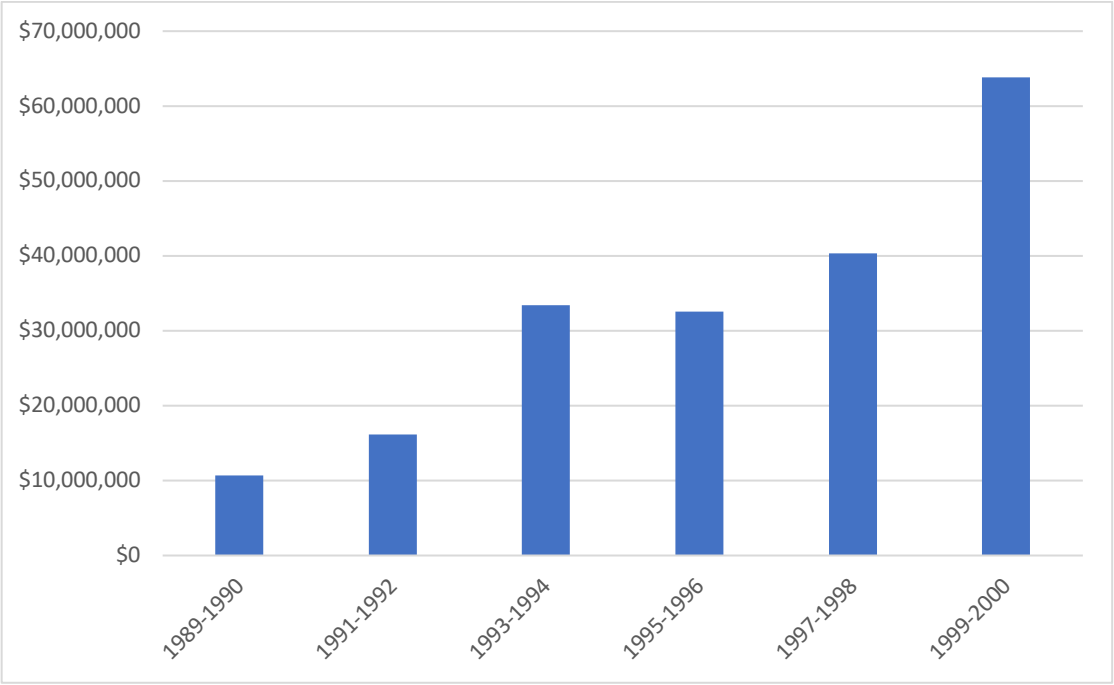
Increasing Costs and Politicization of Judicial Elections: The 1990s

As a result of this long evolution in judicial selection and retention methods, ninety percent of current state judges must face the voters in some type of election. Unfortunately, the nature of judicial elections has fundamentally changed since the original supporters of elections heralded them as shields against partiality. Those original supporters did not envision that judges would one day run for office like other politicians, raising millions of dollars from groups with a personal stake in who is on the bench.

This change in judicial campaigns is primarily a product of the last three decades. As recently as the 1980s, judicial elections were still characterized as "low key" with modest campaign spending and media advertising. But the nature of state supreme court contests changed dramatically during the 1990s as elections became increasingly politicized and campaign spending skyrocketed. At the beginning of the 1990s, state supreme court candidates across the United States raised around $10 million per election

cycle, but by the end of the decade, the total had increased more than six-fold.[11] Figure 3 reports the candidate contributions raised during each cycle of the 1990s.[12]

Figure 3: Total Contributions raised by State Supreme Court Candidates (in 2016 dollars)



So, what happened in the 1990s that caused this dramatic increase in campaign contributions to state supreme court candidates? We believe that three primary forces combined to bring about this inevitable shift. First, we believe that the stakes of state supreme court elections became higher in the last few decades of the twentieth century as the courts themselves increased in power and influence. State supreme court dockets increased as the number of cases filed in some state appellate courts doubled every ten years between the 1960s and 1980s.[13] The courts also began to hear more important cases owing both to the federal government's increasing tendency to devolve power to the states and to the sheer volume of important and divisive issues coming before the state courts. As the American Bar Association described that period: "While federal and state courts

[11] James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* 5 (2010).
[12] James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* 5 (2010). Data for 1989-2000 is not inflation-adjusted in the Decade of Change Report so we adjusted the reported nominal dollars into 2016 dollars.
[13] National Center for State Courts, *Examining the Work of the State Courts, 1999-2000: A National Perspective from the Court Statistics Project* 76 (Brian J. Ostrom, Neal B. Kauder, Robert C. LaFoundtain eds., 2001).

both witnessed an upsurge in the controversial, policy-laden cases they were called upon to decide in the latter half of the twentieth century, this trend has become especially noticeable in state court systems. . . . [S]tate courts have become a new forum of choice for litigation of constitutional rights and responsibilities, which has placed them in the political spotlight with increasing frequency."[14]

The cases that likely played the largest role in increasing the politicization of judicial elections involved disputes over tort reform. During the 1980s and 1990s, several state legislatures were confronted with what they perceived to be an insurance and liability "crisis" characterized by increasing numbers of tort cases, higher damage awards, and rising insurance premiums.[15] Many state legislatures responded by enacting tort reform legislation that curtailed the civil liability or damage awards of tort defendants such as product manufacturers and doctors. However, subsequent to the legislative enactment, many important tort reforms were challenged in the state courts, eventually appearing on the dockets of the state supreme courts.

The tort reform challenges contributed to the second force responsible for the dramatic increase in judicial campaign financing—the rise in interest group involvement in state judicial races. Between 1968 and 1988, the number of registered special interest groups in the United States doubled from 10,300 to 20,600.[16] Although the increase in interest group involvement was originally isolated to legislative and executive elections, it soon spread to judicial elections as interest groups found this a cost-effective means to influence state policy. It was cheaper and easier to affect the outcome of a judicial election than the outcome of a legislative or executive branch election, and interest groups only needed to elect four or five tort-reform-friendly judges to attain a majority in the court, while it would have taken dozens or hundreds of state legislators to form a majority. As one interest group representative explained: "[W]e figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators."[17]

The significant interest group involvement in state judicial elections began in Texas in 1988 when business interest groups decided to inject themselves into the Texas Supreme

---

[14] ABA Commission on the 21st Century Judiciary, Justice in Jeopardy 15 (2003), https://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf

[15] Explanations involve the role of the underwriting cycle, conspiracy among insurance companies, increased liability actions, and uncertainty. For an assessment of alternate explanations of the crisis, see, for example, Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio St. L.J. 399 (1987); George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521 (1987); Michael J. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 San Diego L. Rev. 929 (1987); Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 Yale J. on Reg. 455 (1988).

[16] See G. Calvin MacKenzie, *The Revolution Nobody Wanted*, Times Literary Supplement 13 (Oct. 13, 2000).

[17] J. Christopher Heagarty, *The Changing Face of Judicial Elections*, N.C. St. Bar J. 19, 20 (Winter 2002).

Court races. The races soon became the most expensive in the state's history, with candidates raising over $10 million.[18] The effort paid off as business-friendly judges won several seats on the court. Texas appellate judge, Phil Hardberger, explained how that election remade the court and, in turn, transformed tort liability in the state: "With this new Court, previous expansions of the law were stopped, then rolled backwards. Jury verdicts became highly suspect and were frequently overturned for a variety of ever-expanding reasons. . . Damages, too, did not go unnoticed. Juries' assessments were wiped out by increasingly harsher standards. . . ."[19]

Although the expense of the Texas Supreme Court elections in the late 1980s was an anomaly for that decade, it was a harbinger of things to come. In the 1990s, many other states experienced an increase in interest group involvement in state supreme court races over tort reform issues. For example, the Alabama state legislature enacted several tort reforms in 1987 that were overturned by the Alabama Supreme Court in the early 1990s. Interest groups rallied to the cause, generating an over-seven-fold increase in Alabama Supreme Court candidate expenditures from 1986 to 1996.[20] The involvement of interest groups in state judicial elections quickly spread throughout the country. The U.S. Chamber of Commerce summarized the motivation behind many of the interest groups that were newly invested in state judicial elections: "meaningful [tort] reform is unlikely unless and until the justices elected to the [state] Supreme Court by the plaintiffs' bar are replaced by the voters."[21]

The third cause of the increasing politicization and expense of state judicial races is important legal changes that permitted judges to participate more openly and aggressively in judicial campaigns. Until 1990, a canon of judicial conduct in the ABA Model Code had prohibited judges from announcing their views on disputed legal or political issues.[22] That year, the ABA eliminated the canon because of First Amendment concerns and, soon after, twenty-five of the thirty-four states that had adopted it followed suit. In 2002, the United States Supreme Court struck down enforcement of the canon in the remaining nine states in the case *Republican Party of Minnesota v. White*.[23] Scholars have generally viewed White's loosening of the restrictions on judicial campaigning as a watershed event in escalating the politicization of judicial races.[24] However *White* was

---

[18] See generally Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 Crime, Law & Soc. Change 91 (1992)

[19] Phil Hardberger, *Juries Under Siege*, 30 St. Mary's L. J. 1, 4-5 (1998).

[20] American Judicature Society, *Alabama, Judicial Selection in the States* (2019) http://www.judicialselection.us/judicial_selection/index.cfm?state=AL

[21] Jonathan Groner, *Mississippi: Battleground for Tort Reform*, Legal Times 1 (Jan. 26, 2004).

[22] Model Code of Judicial Conduct, Canon 7(B)(1)(c) (1989).

[23] *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002);

[24] Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections, 36 (Matthew J. Streb ed., 2007)

only the first U.S. Supreme Court case to have a significant impact on state judicial elections. More were to come.

A Transformation in Judicial Campaigns: the 2000s

The 1990s saw an explosion in the amount of spending and overall politicization of state supreme court elections. In the twenty-first century, we have witnessed an equally dramatic transformation in how this money is raised and how it is spent. Increasingly, the money in judicial elections flows not to the campaigns of the candidates, but rather to outside interest groups. While these groups certainly have an interest in who wins elections, they have, or are at least supposed to have, no direct connection to the campaigns of the candidates.

The spur for this explosive growth in outside spending in state judicial races was the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission.* [25] *Citizens United* was and still is the most important and publicly controversial campaign finance case decided by the U. S. Supreme Court in nearly 40 years. The case overruled half a century's worth of federal law by striking down key prohibitions on corporate and union electioneering. This allowed donors, including corporations and unions, to contribute unlimited amounts to outside groups such as Super PACs, 501(c) and 527 organizations, who can then spend unlimited amounts advocating for the election or defeat of candidates, so long as the spending is independent of candidates or parties. This outside spending generally takes place without complete disclosure about who is funding it, preventing voters from knowing who is truly behind political messages. For example, for only 18 percent of the outside spending by interest groups in the 2015-2016 state supreme court elections could the underlying donor be identified from campaign finance filings.[26] As a result, contributions to Super PACs and other outside groups are often referred to as "dark money."

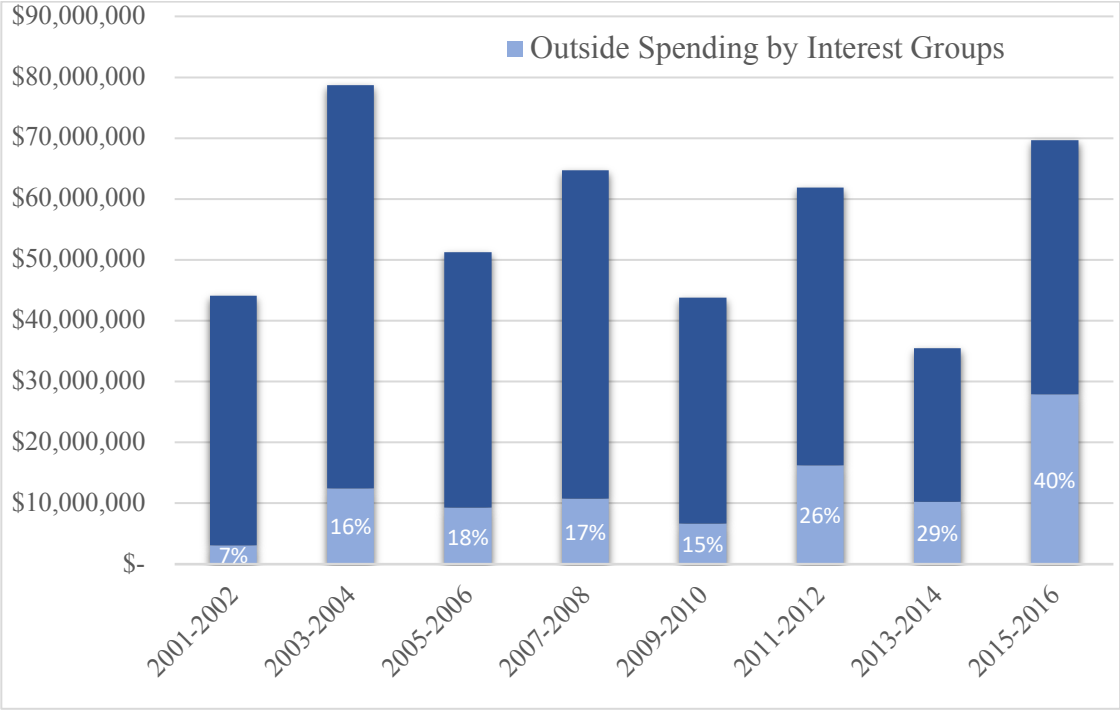
Citizens United has contributed to dramatic increases in outside spending in federal elections. According to the nonpartisan research organization Open Secrets, outside spending in federal elections was roughly $500 million in 2010, the year *Citizens United* was decided. However, by 2018, outside spending had grown to over $1.3 billion.[27] Outside money has also significantly increased relative to overall federal campaign spending. In 2010, outside spending made up about 8 percent of total federal election

[25] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[26] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 8 (2017).
[27] OpenSecrets.org, *Outside Spending by Group* (2010-2018); https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=A

spending, but just three cycles later, in 2016, outside spending comprised approximately 21 percent.[28]

But *Citizens United* has not just affected federal elections; the decision has also unleashed a flood of outside money in state supreme court elections. In every state supreme court election since *Citizens United*, outside spending as a share of total spending has grown. In the 2009-2010 election cycle, interest groups' outside spending totaled $6.6 million, accounting for approximately 15 percent of total spending on state supreme court races. However, by 2016, interest groups' outside spending had grown to almost $28 million and accounted for 40 percent of the total spending on supreme court elections.[29] Figure 4 reports the total spending on supreme court elections and the portion of that total spending made up of interest groups' outside spending.

Figure 4: Total Spending and Outside Spending by Interest Groups in State Supreme Court Elections (in 2016 dollars)



[28] OpenSecrets.org, *8 Years Later: How Citizens United Changed Campaign Finance* (2018), https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/

[29] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 8 (2017).

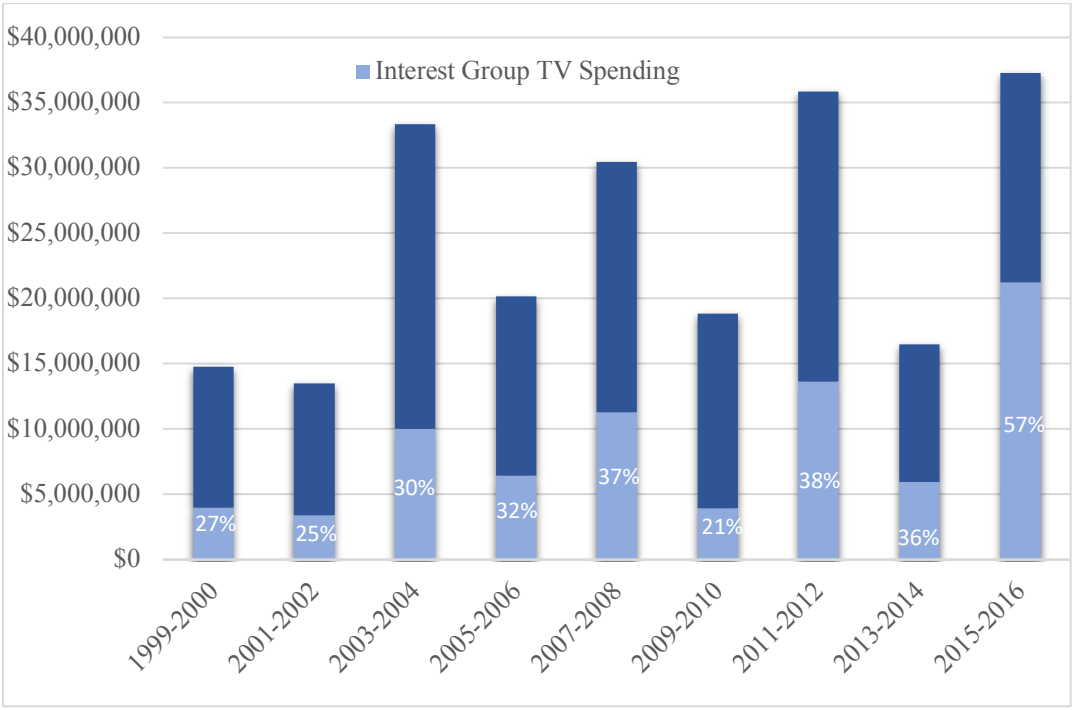
A few things are evident in Figure 4. First, total spending in supreme court races has remained more or less constant since the early 2000s. As with elections for other offices, more money is generally spent in the cycles that coincide with presidential elections because there are more voters and, thus, more spending is needed to reach those voters. However, beyond these four-year cycles there is no other clear trend in the amount of total spending. Yet, the portion of total spending made up of outside spending by interest groups has clearly trended upward, from less than 10 percent of the total at the turn of the century to 40 percent in the most recent election cycle for which data is available.

The increase in both direct-to-candidate contributions beginning in the 1990s and outside spending in the 2000s has transformed the way judicial campaigns are conducted. Campaigns increasingly rely on TV ads to promote a preferred candidate or attack an opposing candidate. Whereas TV advertising in judicial campaigns was essentially nonexistent in the early 1990s, by the 1999-2000 election cycle more than $10.6 million was spent on 22,000 airings.[30] Yet, even with this spending, TV advertising was still relatively rare; TV ads appeared in only 4 states out of the 33 states with state supreme court elections in 2000. TV advertising soon intensified and expanded across the country. By the 2015-2015 cycle, more than $37 million was spent on over 71,000 airings and TV ads appeared in 16 of the 33 states with state supreme court elections.[31]

Outside interest groups, as distinct from the candidates' campaigns, have become the biggest players in TV advertising. As outside spending has increased during the 2000s, so has the groups' focus on TV ads. In the 1999-2000 cycle, outside interest groups spent approximately $3.9 million on TV advertising, constituting just over one-quarter of all dollars spent on TV ads during the two-year period.[32] However, in 2015-2016, outside groups spent a record $21.2 million on TV ads, accounting for 57 percent of all money spent on TV ads.[33] Figure 5 reports the total spending on TV ads and outside groups' share of that spending.

[30] Deborah Goldberg, Craig Holman, & Samantha Sanchez, *The New Politics of Judicial Elections, 2000: How 2000 was a Watershed Year for Big Money, Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns* 14 (2002).
[31] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 32-34 (2017).
[32] Deborah Goldberg et al., *The New Politics of Judicial Elections, 2004: How Special Interest Pressure on Our Courts has Reached a "Tipping Point"—and How to Keep our Courts Fair and Impartial* vii (2004).
[33] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 32 (2017)

Figure 5: Spending on TV Advertising in State Supreme Court Elections and Interest Groups' Share of Spending (in 2016 dollars)



Although funders of TV advertising sometimes euphemistically refer to the ads as "voter education" efforts,[34] the ads typically provide very little informational value. Indeed, as early as 2004, a report reviewing the TV ads in that year's supreme court races concluded that "[t]he judicial campaign ads of 2004 confirm that the days when judicial advertising focused primarily on candidate qualifications are gone, replaced by advertising that signals how candidates might decide cases and sometimes explicitly states their opinions on controversial issues that demand impartial adjudication in the courtroom."[35] Ads run by interest groups are especially likely to attack judges for their votes in a particular case, without providing any details or nuance to explain why the judge voted how they did.[36] In the 1999-2000 cycle, 62 percent of such TV attack ads were financed by special interest groups, but by the 2013-2014 supreme court races, 100 percent of attack

[34] U.S. Chamber, Institute for Legal Reform, *U.S. Chamber Enters Political Debate for Next White House* (Aug. 23, 2004).
[35] Deborah Goldberg et al., *The New Politics of Judicial Elections, 2004: How Special Interest Pressure on Our Courts has Reached a "Tipping Point"—and How to Keep our Courts Fair and Impartial* 9 (2004).
[36] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 35-39 (2017).

ads were purchased by interest groups.[37] Candidates, and even parties, have realized that they can maintain an image of "judicial temperament" by not running attack ads, instead relying on outside groups to do so.

These attack ads often focus on a judge's vote in a criminal case, even when paid for by interest groups with no connection to criminal justice. The groups are well aware of the power of attack advertisements that portray judges as "soft on crime." For example, during a 2004 West Virginia Supreme Court election, an outside group called "And for the Sake of the Kids," which was funded by Massey Coal Company CEO Don Blankenship, ran a TV ad alleging that an incumbent justice voted to release a "child rapist" and then "agreed to let this convicted child rapist work as a janitor in a West Virginia school." Similarly, a series of ads in a 2016 Kansas Supreme Court race claimed that candidates "overturned [a] death sentence on a technicality," "ha[ve] done enough to these victims' families", and "repeatedly pervert the law to side with murderers and rapists." Criminal justice is generally the most common theme of state supreme court election ads, making up between one-third to over one-half of all TV ads aired during supreme court races.[38] These fear-provoking advertisements, funded by outside groups without public accountability, can easily create a distorted profile of a judge and swing an election.

So, who are these donors spending tens of millions of dollars in judicial races? Since at least 2000, business groups, lawyers and lobbyists have been the largest donors of contributions directly to supreme court candidates' campaigns. These donors generally account for approximately half of judicial candidates' direct fundraising, with lawyers and lobbyists usually contributing slightly more than business groups. However, in recent years, direct candidate fundraising has accounted for less than 60 percent of total spending in state supreme court races, while outside spending by interest groups has made up the other 40 percent. This outside spending is overwhelmingly dominated by business groups; in some cycles business groups have been responsible for more than 90 percent of the interest group spending on TV ads.[39] Although each state and election are different, business groups are typically the largest overall spenders in state supreme court races, accounting for around 25 percent of direct contributions to candidates (which makes up 60 percent of total spending) and making up the majority of outside spending (which accounts for the other 40 percent of total spending).[40]

---

[37] Scott Greytak et al., *The New Politics of Judicial Elections, 2013-2014: Bankrolling the Bench* 54 (2015)

[38] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 36 (2017)

[39] James Sample, Lauren Jones, & Rachel Weiss, The New Politics of Judicial Elections 2006, 7 (2006).

[40] The Brennan Center estimates sources of outside spending by identifying sources of TV ad buys. Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 25 (2017)

The Growing Alarm about Judicial Elections

The picture of judicial campaign finance that emerges from our work is simple but striking. Campaign contributions have transformed judicial races so that they now, more-or-less, resemble competitive elections for other political offices. In fact, spending in most state supreme court races has surpassed spending for state legislative seats. In the 2015-2016 cycle, 27 judges in 13 states were elected in races in which at least $1 million dollars was spent.[41] In many states, spending was even higher. For example, over $21.4 million was spent on just three open supreme court seats in Pennsylvania.[42] In contrast, the average raised by candidates for state legislative seats in 2015-2016 was over $1 million in only two states—California and Illinois.[43]

As a result, state supreme court justices face many of the same pressures as elected officials for other political offices. They worry about how voters and other politicians will respond to their judicial decisions, with an eye toward the next election. They need to raise campaign money and curry favor with donors to win or keep office. In fact, over 90 percent of supreme court judicial races are won by the candidate that raised the most money.[44] In short, if an elected judge wants to keep the job, then re-election looms over even the best, most principled judges in the country. As a California Supreme Court justice once put it, the next election is like a crocodile in your bathtub when you go into the bathroom: "You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[45]

Indeed, empirical studies have found evidence that these retention pressures affect judges. We discuss this literature in great detail in Chapter 3, including several studies that we have authored, but the studies almost uniformly conclude that judges decide cases in a way that reflects these pressures. For example, Shepherd finds that the judicial decisions of elected judges conform to the preferences of whoever will decide if those particular judges retain their jobs for another term, whether that decision maker is the governor, legislature, or voters.[46] Several studies have also found empirical evidence that judges' voting does, in fact, favor certain campaign contributors. In a previous study, Shepherd finds that contributions from various interest groups are associated with increases in the

---

[41] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 2 (2017)
[42] *Id.*
[43] J.T. Stepleton, FollowtheMoney.org, *Monetary Competitiveness in State Legislative Races, 2015 and 2016* (2017), https://www.followthemoney.org/research/institute-reports/monetary-competitiveness-in-2015-and-2016-state-legislative-races
[44] Scott Greytak et al., *The New Politics of Judicial Elections, 2013-2014: Bankrolling the Bench,* v (2015).
[45] Gerald F. Uelmen, *Crocodile in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 Notre Dame L. Rev. 1133, 1133 (1997).
[46] Joanna Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. Legal Stud. 169 (2009)

probability that judges will vote for the litigants whom those interest groups favor.[47] In an earlier study, we together analyzed contributions from business groups in the 1990s and find that campaign contributions from these groups are associated with state supreme court justices favoring business litigants across a range of cases. [48] In a different study, we find that contributions from left- and right-leaning political coalitions—including both political parties and interest groups—are significantly associated with judicial votes in the preferred ideological direction of the relevant political coalition.[49] Separately, we find that judges that receive significant contributions from their political parties are more likely to exhibit partisan loyalty in election law cases like *Bush v. Gore*.[50]

Other studies examine, on a more limited basis, the relationship between contributions from lawyers and case outcomes when those lawyers' interests appear before the courts. These studies find a correlation between the campaign contributions from the plaintiff and defense bars and favorable rulings in arbitration decisions by the Alabama Supreme Court,[51] in tort cases before state supreme courts in Alabama, Kentucky, and Ohio,[52] in cases between businesses in the Texas Supreme Court,[53] in cases before the Supreme Court of Georgia, [54] in civil cases before the Michigan Supreme Court, [55] and in cases before a sample of 16 state supreme courts when the judges face closely contested elections.[56]

---

[47] Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L. J. 623, 670–72 & tbls. 7–8 (2009).

[48] Michael Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions,* 86 N.Y.U. L. Rev. 69, 128–29 (2011).

[49] Michael Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. Cal. L. Rev. 1239 (2013)

[50] Michael Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 Stan. L. Rev. 1411 (2016).

[51] Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J. L. & Pol. 645, 660 (1999) (examining arbitration decisions in the Alabama Supreme Court).

[52] Eric N. Waltenburg & Charles S. Lopeman, *2000 Tort Decisions and Campaign Dollars*, 28 Southeastern Pol. Rev. 241, 248, 256 (2000) (examining tort cases before state supreme courts in Alabama, Kentucky, and Ohio).

[53] Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 Pol. & Pol'y 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money). Madhavi McCall & Michael McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court: Assessing the Appearance of Impropriety*, 90 Judicature 214 (2007).

[54] Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making*, 7 State Polit. Policy 281 (2007) (examining cases during the Supreme Court of Georgia's 2003 term)

[55] Aman McLeod, *Bidding For Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 Univ. Detroit Mercy L. Rev. 385 (2008).

[56] Ryan Rebe, *Analyzing the Link Between Dollars and Decisions: A Multi-State Study of Campaign Contributions and Judicial Decisionsmaking* , 35 Am. Rev. of Pol. 65 (2016).

Finally, in the only study examining the relationship between TV advertising and judicial decisions, we find that the more TV ads aired in state supreme court judicial elections—ads that typically criticize the judges for being soft-on-crime—the less likely judges are to vote in favor of criminal defendants.[57]

It is not only academics that have recognized the worrisome incentives created by judicial campaign finance. Polls find that the public also believes judges are influenced by their campaign contributions and need to satisfy donors. For instance, one poll reported that 60 percent of surveyed Americans reported that they believed campaign contributions had "a great deal of influence" on judicial decisions, with a total of 90 percent agreeing that campaign contribution had at least "some" influence on judges.[58] Likewise, 70 percent of Americans felt it was a "very serious problem" that an elected judge may have received contributions from litigants with a pending case before the judge, with only 6 percent believing that it is "not that serious a problem or no problem at all."[59]

More troubling is that even judges seem to agree that campaign fundraising influences judicial decisionmaking. A famous survey of state judges found that roughly 60 percent of state supreme court justices felt a "great deal" of pressure to raise money for campaigning during election years.[60] Eighty-five percent of state judges felt that interest groups are trying to use their campaign contributions to affect public policy.[61] And almost half of state supreme court justices felt that campaign contributions to judges had at least a little influence on decisions, with more than a third agreeing money had some or a great deal of influence on decisions.[62] As a former chief justice for the Tennessee Supreme Court put it: "[w]hether subtle or unintentional or not, there may be a tendency in the future for appellate judges to have one eye looking over their shoulder."[63]

The legal community has similarly expressed widespread consternation about judicial elections. Justice Sandra Day O'Connor, who has championed judicial-election reform since her retirement from the Supreme Court, warns that "there are many who think of judges as politicians in robes" and agrees "[i]n many states, that's what they are."[64] Similarly, she has explained that because "elected judges in many states are compelled to solicit money for their election campaigns. . . . [t]he crisis of confidence in the impartiality

---

[57] Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 Mich. L. Rev. 929 (2016).
[58] Justice at Stake/Brennan Center, *National Poll, 2013*, https://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf.
[59] *Id.*
[60] Greenberg Quinlan Rosner Research Inc., *Justice At Stake—State Judges Frequency Questionnaire* 3-4 (2002).
[61] *Id.* at 9.
[62] *Id.* at 5.
[63] Christie Thompson, *Trial by Cash*, Atlantic (Dec. 11, 2014((quoting Gary R. Wade).
[64] Annemarie Mannion, *Retired Justice Warns Against "Politicians in Robes"*, Chi. Trib. (May 30, 2013) (quoting Justice Sandra Day O'Connor).

of the judiciary is real and growing."[65] The American Bar Association has also endorsed the elimination of judicial elections in favor of merit selection plans and retention elections, arguing that "[j]udges have a responsibility to know and impartially apply the law to the facts of the case at hand. In important ways, today's judicial elections often undermine judges' ability to perform this essential role."[66]

Sitting justices on the U.S. Supreme Court have also articulated this perspective. For example, in *N.Y. State Board of Elections v. Lopez Torres*, the Court reluctantly upheld on First Amendment grounds New York's system for electing judges.[67] However, in their concurrence, Justices Kennedy and Breyer noted:

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.[68]

They concluded:

> The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.[69]

In a separate concurrence, Justices Stevens and Souter agreed with "the broader proposition that the very practice of electing judges is unwise."[70] But, they regretfully concluded, "The Constitution does not prohibit legislatures from enacting stupid laws."[71]

Most of the criticism has been aimed at the specific type of election used to select judges, and proposed reforms generally call for replacing one type of election with another. In fact, of the only five states that have reformed their judicial selection methods since 1990, four simply traded in one type of election for another. Arkansas (2000), Mississippi (1994), and North Carolina (2002), simply switched from partisan to nonpartisan elections,

---

[65] James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change*, at Foreword (2010).
[66] See Am. Bar Ass'n Coal. For Justice, *Judicial Selection* 2,8 (2008). See also Am. Bar Ass'n Comm'n on the 21st Century Judiciary, *Justice in Jeopardy* 1–2 (2003), https://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf .
[67] *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 801 (2008).
[68] *Id.* at 803 (Kennedy & Breyer, JJ., concurring).
[69] *Id.*
[70] *Id.* at 801 (Stevens & Souter, JJ., concurring).
[71] *Id.* (quoting Justice Thurgood Marshall).

though North Carolina switched back to partisan elections in 2016.[72] Tennessee (1994) switched from partisan elections to a merit selection system under which the governor appoints judges from a list of nominees identified by a judicial nominating commission. However, for retention, the Tennessee judges must run in retention elections to keep their seats.

Thus, both past and present critics of judicial races are generally focused on altering the specific type of election used to select judges. Most reformers do not call for an end to judicial elections altogether. Even proposals to adopt a merit selection system would require judges to face voters in retention elections to keep their seats on the bench.

In contrast, we argue that the best way to reform judicial races depends on how you think the elections and the money raised in elections are affecting judicial outcomes. As we explain in detail in Chapter 4, one possibility is that elections lead to the selection of judges that are already predisposed to favor campaign contributors' interests and, as a result, judicial outcomes reflect those predispositions. If you think that this selection effect is the root of the problem, then the best approach is likely to adopt other non-elective methods of selecting judges. However, another possibility is that pressure on sitting judges to ingratiate themselves with potential campaign donors for their future re-elections causes judges to adjust their decisions in favor of the donors' interests. If you think that the need to raise future campaign money biases judicial outcomes, then the best way to eliminate the problem is to remove the re-election pressures on sitting judges.

[72] National Center for State Courts, *History of Reform Efforts: Formal Changes Since Inception* (2019), http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=. The other state to reform judicial selection, Rhode Island (1994) replaced a system under which the state legislature selected judges with a merit selection system, but maintained permanent tenure for state supreme court justices.

Chapter 4: Why Money Matters

As described in the previous chapter, an expanding literature has found a significant relationship between the money spent in judicial elections and the way that judges decide cases. Money matters. The more money that interest groups donate to judges, the more predictably those judges decide cases in favor of those groups' interests and preferences. The more money that political parties donate to judges, the more predictably those judges vote in favor of their side in election cases. The more campaign ads and specifically attack ads that run in a state's supreme court elections, the more that judges cover their flanks by voting more predictably against criminal defendants, regardless of their party affiliation or ideological predispositions.

What is somewhat less clear, at least so far, is *why* the money matters. There are at least two causal pathways by which campaign finance might be associated with judicial decisions in favor of contributors' interests. The first pathway is a selection bias among the set of judges who win elections. Wealthy contributors, whether interest groups, political parties, companies, or individuals, can often influence the outcomes of judicial elections by contributing substantial campaign funds to favored candidates. Judges who are already predisposed to vote in favor of a particular contributor's interests are likely to draw campaign financing from that contributor and, by virtue of those resources, are more likely to be elected. Campaign finance support from those contributors would then be correlated with decisions in favor of their preferences because the contributors directed the necessary campaign financing to judges they anticipated were ideologically likely to vote in their favor in the first place.

The second pathway by which campaign finance may influence judicial decisions is what we call a biasing effect. Once elected, judges need to get re-elected to keep their jobs. To get re-elected, judges need campaign money. In nine out of ten races for state supreme courts, the candidate with the most money wins.[73] As a result, judges have an incentive to favor contributors' preferences in their judicial decisions in the hopes of obtaining more campaign support from those contributors in future elections. Even judges who are not predisposed to favor of a particular contributor's interests might still, whether consciously or subconsciously, vote in their favor so as to attract future financial support from those contributors or at least head off opposition or attacks funded by those contributors in future campaigns. As a California Supreme Court Justice explained "[t]o this day, I don't know to what extent I was subliminally motivated by the thing you could not forget—that it might do you some good politically to vote one way or the other."[74]

---

[73] Scott Greytak et al., *The New Politics of Judicial Elections, 2013-2014: Bankrolling the Bench,* v (2015).

[74] Philip Hager, *Kaus Urges Re-election of Embattled Court Justices*, L.A. Times 3 (Sept. 28, 1986) (quoting Justice Otto M. Kaus, Cal. Supreme Court).

Both biasing and selection effects are empirically plausible and likely explanations for the relationship between campaign contributions and judicial decisions. It is not only likely that both occur, but that they reinforce each other. Moreover, through either causal pathway, money affects judicial decisions. Campaign donors buy their preferred outcomes whether by installing the right judges into office or by biasing judges into doing what they want. However, as worrisome as the effects of selection may be, we are especially troubled if campaign finance is biasing judges.

If selection effects are solely responsible for the relationship between money and votes, then judges are deciding cases as they believe is correct under the law, and it just happens to match up with what their contributors want. The judges themselves, in this account, are not changing their views based on campaign finance or re-election considerations. There is simply favorable selection of judges from the perspective of their contributors.

In contrast, if biasing effects are responsible for the relationship between money and votes, then sitting judges change how they decide cases with campaign finance and re-election considerations in mind. Judges know how they think their cases should be decided but nonetheless change or otherwise adjust their decisions to ingratiate themselves with campaign donors. This is a serious problem for the rule of law. Judges should decide cases correctly rather than bending the law to curry favor with contributors.

Moreover, if biasing is an important part of why campaign money has an influence on judicial outcomes, it indicates a different set of fixes to remedy the problem. If selection is the root of the problem, then it suggests that the basic idea of electing judges doesn't work well. Money buys the candidates it wants from the start, and that's why the money lines up with later judicial decisions by those candidates once in office. However, if the problem is less about selection and more about biasing, then the problem is not simply judicial elections as a general matter. If campaign money matters because judges are too concerned about re-election, then a single-term limitation for elected judges would remove the re-election bias and allow judges to decide freely under the law without worrying about campaign fundraising for the next election. The problem isn't that judicial elections choose bad judges or compromise them as a categorical matter. Instead, judges are affected by campaign money only prospectively when they worry about the need to win re-election in the future. So, taking re-election off the table, by either granting permanent tenure or limiting judges to a single term in office, would free judges from this biasing effect that is responsible for the link between campaign money and decisions.

In this chapter, we focus on identifying whether campaign finance biases judges and their decisions, rather than influencing decisions entirely through selection. Unfortunately, it's difficult to untangle the selection and biasing effects of campaign money on elected judges. A close relationship between a judge's campaign finance support and the judge's voting could exist because the judge's predisposition to voting in certain directions helped the judge attract the campaign funds needed to win an election. The

campaign money therefore would match the later decisions when the judge votes in ways that are consistent with this predisposition. Alternatively, or in addition, the close relationship may exist because the judge hopes to draw future fundraising and therefore votes in ways favored by potential future contributors. The money therefore matches because the judge is deciding in favor of contributors' interests on an ongoing basis to continue receiving contributions in the future. The influence of money could be selection or biasing (or both), but the close relationship between money and decisions would look the same either way.

A few previous studies have tried to empirically distinguish selection and biasing. Some studies tried to control for judges' predispositions in order to isolate the direct influence of campaign funding from selection effects. For example, using an instrumental variable approach to control for judges' ideology, Damon Cann found evidence that campaign contributions have a biasing effect on judicial voting in the Georgia Supreme Court.[75] Other studies have made use of the judges' ideology in their tests for causality by examining whether campaign funding from a source opposite a judge's ideology can cause him or her to deviate from their usual tendency. For example, Damon Cann, Chris Bonneau, and Brent Boyea employ a matching research design to identify judges with the same ideological predispositions but differing campaign contributions to see if they have different voting patterns as a result of different campaign financing. Their study found statistically significant differences in voting and therefore significant evidence of contributions' biasing influence on judicial voting, at least in the Michigan Supreme Court.[76] Similarly, Madhavi McCall found that judges in the Texas Supreme Court that were ideologically predisposed to vote in favor of defendants were significantly more likely to support the plaintiff if they had received contributions from the plaintiffs' side.[77]

Our solution to the methodological challenges of proving bias is to look at lame duck judges in their final term. Lame duck judges are retiring judges who are legally required to retire when they reach a certain age. They are, as a consequence, not eligible for re-election once they reach their final term. Figure 1 shows the thirty-two states that have mandatory retirement laws that compel judges to retire sometime between age seventy and ninety.

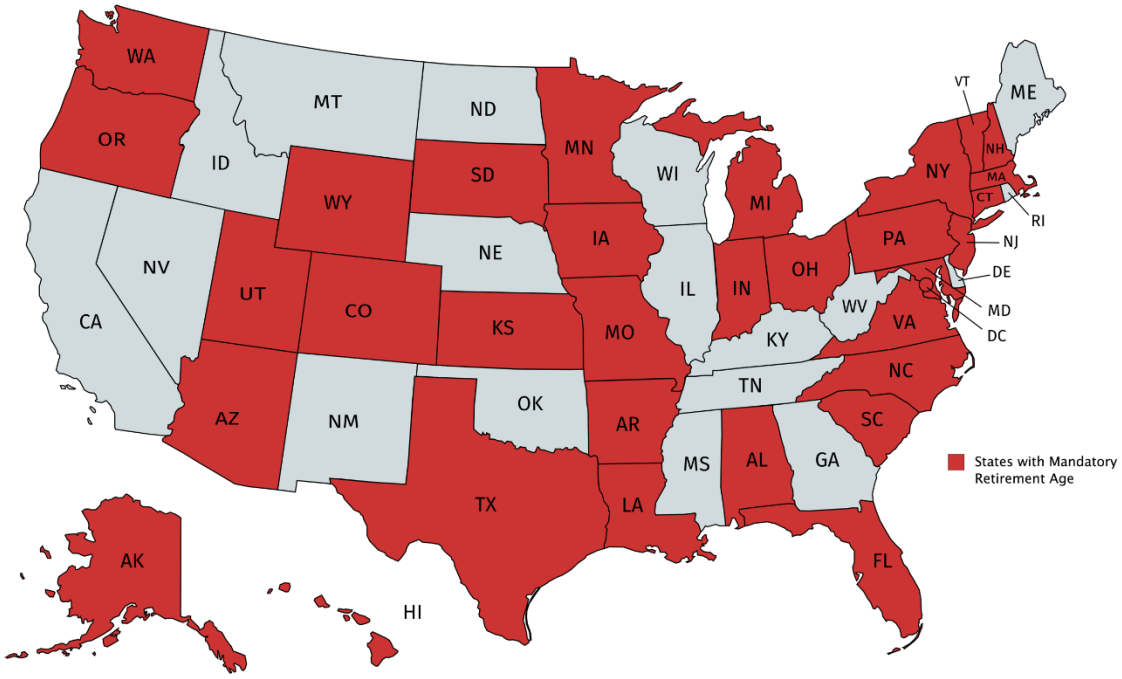
---

[75] Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making*, 7 State Polit. Policy 281 (2007).

[76] Damon Cann, Chris Bonneau, & Brent Boyea, *Campaign Contributions and Judicial Decisions in Partisan and Nonpartisan Elections*, New Directions in Judicial Politics 38 (KT McGuire, ed., 2012).

[77] Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 Pol. & Pol'y 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money).

Figure 1: States with Mandatory Retirement



By examining the voting of judges in their last term before mandatory retirement, we can test whether judges continue to favor their contributors' interests when they no longer need to attract campaign funds. If lame duck judges continue to favor their contributors' interests, it would suggest that selection bias is largely responsible for their voting. In other words, it would indicate that elections produce judges that are predisposed to favor their contributors' interests, and those judges continue to vote in that way even when they are retiring. In contrast, if lame duck judges no longer favor contributors' interests as their mandatory retirement approaches, it would support the biasing theory that it is the need to raise future campaign funds that drives judges' voting in favor of contributors' interests.

This Chapter sets out our deepest study on lame duck judges and the biasing effect of campaign contributions. We use the latest data on judges' votes in business-related cases form 2010-2012, which updates our earlier studies. This time period is important because it occurs after *Citizens United v. FEC* was decided and therefore reflects current campaign finance law and practices that elected judges face today. We find that campaign finance is generally associated with judges' voting in the direction of contributors' interests. However, for lame duck judges in their final term, without any chance of re-election, there is no meaningful relationship between campaign money and judges' votes. We conduct additional analyses, called robustness checks, to empirically rule out several

of the likeliest counter-explanations for why lame ducks defy the usual relationship between votes and money. Regardless of the way we analyze the data, lame duck judges vote differently than their non-retiring counterparts. This sudden shift in a judge's final term suggests that it's re-election and the need to raise campaign funds that induces judges to vote in favor of their contributors' interests earlier in their careers.

Empirical Analysis: Data and Methodology

To explore the degree to which judges are influenced by the prospective need for campaign financing in future elections we compiled a new dataset of judicial decisions and judge characteristics. Our dataset of judicial decisions consists of the decisions of over 650 state supreme court justices in over 3,000 business-related cases decided between 2010 and 2012 across all 50 states.[78] We supplemented these data with both institutional variables that describe aspects of the judicial system of each state and with detailed information about each judge's background and career.

The sample of cases that we analyze includes cases between a business litigant and a non-business litigant. Our analyses focus on business cases for several reasons. The first reason is simply one of data availability: business cases make up almost one-third of the cases before the state supreme courts. Second, an analysis of judges' votes in business cases and contributions from business groups to those judges is likely one of the best ways to study the relationship between campaign finance and judicial decisions. Compared to many other interest groups, business groups typically have more substantial resources to devote to judicial campaigns. Indeed, over the past two decades, business groups have been among the largest direct contributors to judicial campaigns and have dominated interest group spending on television campaign advertising. In addition, business groups typically have a more focused agenda and clearer preferences than do other interest groups. Business groups generally favor pro-business, pro-tort reform judges and decisions. By contrast, the plaintiffs' bar in many states is typically much more diverse in their economic interests because they represent an assorted range of clients. The magnitude of contributions from business groups and clarity of business groups' preferences provides an ideal case study to empirically isolate the influence of money on votes.

However, despite our empirical focus on business cases and business contributions, our results have important implications for all wealthy campaign donors. Any contributor that is able to marshal sufficiently large campaign contributions likely exerts similar influence over the judiciary.

[78] Business cases were identified by a key search in WestLaw. Once all business cases were identified within a given state and year, 25 cases were randomly selected for the sample. If there were 25 or fewer cases in a given state and year, all available cases were coded.

In all of our empirical tests, we use regression analyses to measure the relationship between campaign contributions from business groups and judicial decisions in business cases.[79] A regression analysis isolates the relationship between the dependent variable (in our case, judges' pro-business votes) and each of the explanatory variables that we describe below. In this way, our analyses can separate the influence of money on judges' voting from, say, the judges' ideology or the underlying state law.

Dependent variable

The dependent variable in our analyses is whether a judge voted for or against the business litigant in a given case. A judge is coded as voting for a litigant if the judge voted to make the litigant any better off, regardless of whether the judge voted to reverse a lower court or to change the damage award.

Our large sample of cases allows us to measure whether there is any relationship between contributions from business groups and judges' voting for business litigants over a wide range of cases. However, the outcomes of many individual cases in our analysis have little, if any, impact on the welfare of most businesses as a general matter. Also, not every vote for a business litigant is necessarily an instance of pro-business bias. These less salient cases create empirical noise that makes it more difficult for our analysis to detect a relationship between contributions and votes in the cases that do matter to business groups. However, if, despite the noise, we do find an empirical relationship in the data, the actual relationship between contributions and votes in the salient cases is likely much larger than our analysis can detect.

Explanatory Variables

To measure the impact of money on votes, the explanatory variable in which we are most interested is the dollar value of campaign contributions from business groups in each judge's most recent election.[80] Our measure of business group contributions aggregates the contributions from several different sectors that are generally supporters of pro-tort reform and pro-business judges: agriculture, communications, construction,

[79] In most analyses, we estimate a multilevel-logit model. Our multilevel model controls for dependence across both individual judges' decisions and specific state supreme courts' decisions. That is, an individual judge's decisions across cases are likely not independent because there is some relationship between how the judge decides one case and how he or she decides another case. Similarly, the decisions of judges on the same court are likely not independent because the judges share not only the court in common, but also the state, its laws, and other environmental influences. Our model accommodates this dependence so we can precisely isolate the influence of business contributions on judicial votes

[80] The data on campaign contributions are collected by the National Institute on Money in State Politics, a nonpartisan, nonprofit charitable organization dedicated to accurate, comprehensive and unbiased documentation and research on campaign finance at the state level.

defense, energy, finance, real estate and insurance, health care, transportation and a general business category.

Our regression analyses separate the influence of each included explanatory variable in order to isolate the relationship between business contributions and judges' voting. Because the explanatory variables control for other factors that might influence judicial voting, their inclusion minimizes the chance that the results are caused by something other than campaign finance. The control variables we include fall into three categories: judge-level variables, state-level variables, and case-level variables. All of these variables may influence how a judge votes in a given case. That is, a judge's vote may be partly determined by his own characteristics, such as his ideology, partly determined by state characteristics, such as the conservatism of the state's laws, and partly determined by case characteristics, such as which litigant appealed to the state supreme court.

Our judge-level control variables include non-business campaign contributions, party affiliation, and the type of retention election. First, we include the dollar value of campaign contributions from non-business groups in each judge's most recent election. [81] This variable provides a measure of the potential influence from interests and sectors opposed to (or unrelated to) business interests. It also controls for the total amount of money raised by different judges—$200,000 in business contributions should have a different impact when the total amount raised is $300,000 than when $2 million is raised in total.

Next, we include each judge's party affiliation.[82] Because Republican judges generally adhere to a more conservative judicial ideology, we expect they would be more inclined to vote for business litigants regardless of campaign finance. Thus, including party affiliation as an explanatory variable allows us to separate the relationships between, on the one hand, ideology and voting, and on the other, campaign finance and voting.

We also include the type of election that the judges in each state face for retention—partisan, nonpartisan, or an unopposed retention election. Different types of elections have different degrees of competitiveness and require the candidates to raise different magnitudes of money. Thus, including the type of retention election as an explanatory variable will control for different judges' need to attract future campaign funds.

Our state-level control variables include the state tort climate, the ideology of the state's citizens, and the ideology of the state government. We include a variable capturing

[81] We follow the common practice of transforming each contribution measure because of the non-linearity observed in bivariate analysis; we use log base 2 for a more straightforward interpretation of the coefficients than the natural log.

[82] Party affiliation was compiled from The American Bench, a directory with biographical information on over 18,000 judges. In situations in which no party information was available for a judge, but the judge was initially appointed to the high court by a governor, the party of the judge was inferred to be the same as that of the appointing governor

the tort liability climate to isolate the influence of business contributions on pro-business votes from the underlying state law.[83] In states with existing law that favors business interests, we would expect judges to vote in favor of business interests regardless of contributions.

We also include variables that measure the liberalism of citizens in the state and the liberalism of the state government.[84] Judges' voting may be influenced by the attitudes of the public and of other governmental officials in the state if they fear that displeasing these groups could negatively impact them. Thus, controlling for citizen and government ideology allows us to isolate the influence of campaign finance from the influence of the political climate in which each judge serves.

Finally, we include two case-specific explanatory variables that capture the likelihood of the business litigant winning the case without regard to a judge's pro-business bias. First, we include a variable indicating whether the business litigant is the petitioner filing the appeal in each case. Because petitioners are more likely to win on appeal, this variable captures the judge's natural propensity to vote for the petitioner.[85]

We also include a measure of the underlying strength of the case. This control variable is important because some cases are so strong (or weak) that judges will vote for (or against) business interests regardless of their ideological predisposition or the influence of campaign contributions. To create a measure of case strength, the study first estimates the model without the case strength variable. The results of this estimation allow us to predict how many of the other judges will vote for the business litigant in each case. The difference between this predicted number and the actual number of the other judges voting for the business litigant provides our measure of case strength. That is, suppose that the model predicts that, based on the judges' ideological predisposition, retention election, campaign contributions, the state tort climate, the citizen and government ideology, and the litigation petitioning the court, four of the six other judges would support the business position. In reality, if five of the other judges supported the business position, the case strength variable would indicate a stronger than average case. In contrast, if only one other justice voted in favor of business instead of the predicted four, the case strength variable would indicate that the case was very weak.

Table 1 provides descriptive statistics for each of the variables we include in our analysis.

---

[83] We use the Pacific Research Institute's U.S. Tort Liability Index, which evaluates the tort litigation risks and liability costs across states, as its measure of the state law's underlying partiality to business interests.

[84] We use the Berry measure of citizen and government ideology. William D. Berry et al., *Measuring Citizen and Government Ideology in the American States*, 1960-93, 42 Am. J. of Pol. Sci. 327 (1998).

[85] Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source,* 89 Boston Univ. L. Rev. 1451, 1470-1472 (2009).

Table 1: Descriptive Statistics of Variables in Regression Analysis

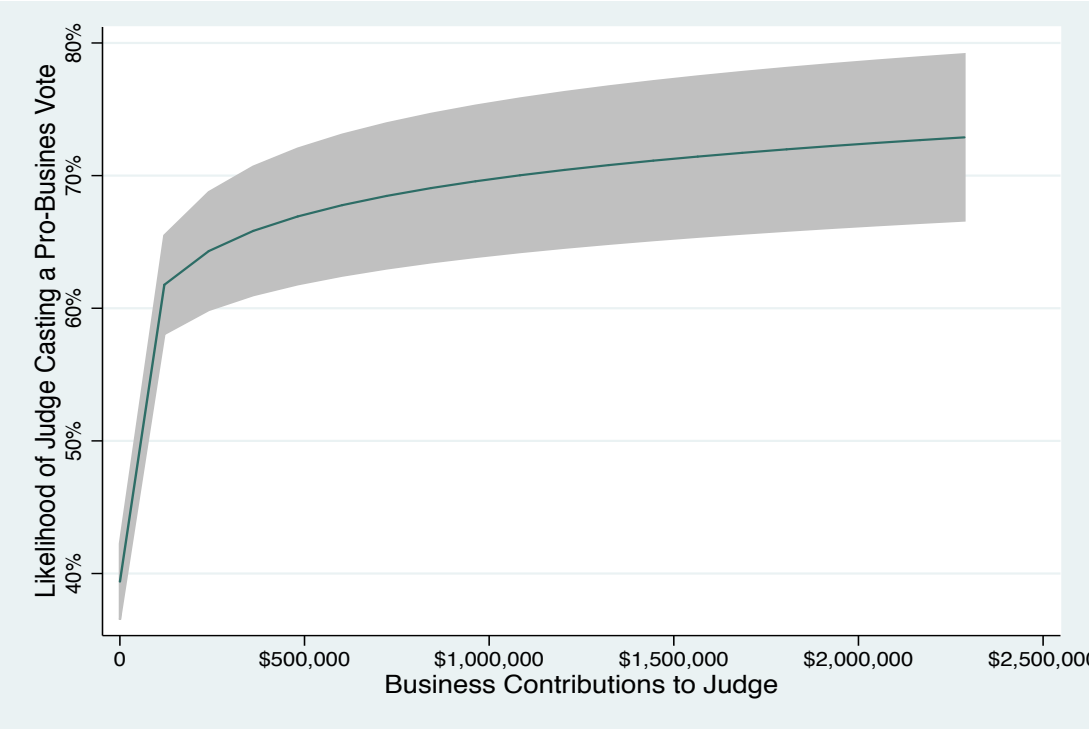
Variable	Mean	Standard Deviation
Pro-Business Vote	0.49	0.49
Business Contributions	$84,790	$234,855
Non-Business Contributions	$196,443	$397,244
Retention Election Indicator	0.31	0.46
Nonpartisan Re-election Indicator	0.32	0.47
Partisan Re-election Indicator	0.14	0.35
Democratic Judge Indicator	0.41	0.49
Republican Judge Indicator	0.43	0.50
State Tort Climate	-0.043	0.46
Citizen Ideology	60.9	17.1
Government Ideology	51.9	14.1
Business Petitioner Indicator	0.48	0.50
Case Strength	-0.02	44.0

Empirical Analysis: Results

We perform several different analyses to determine how judges are influenced by the prospective need for campaign funds. First, we explore the baseline relationship between contributions from business groups and judges' voting in business-related cases. Figure 1 reports the marginal effect of business contributions on the likelihood of a judge casting a pro-business vote, holding all other explanatory variables equal.[86] The figure shows that increasing business contributions are associated with an increase in the likelihood of judges casting pro-business votes.

[86] The margins are computed from a logit regression of pro-business votes on all explanatory variables discussed above. The results from a multi-level logit model are presented in the Appendix.

Figure 1: Relationship between Business Contributions and Pro-Business Votes



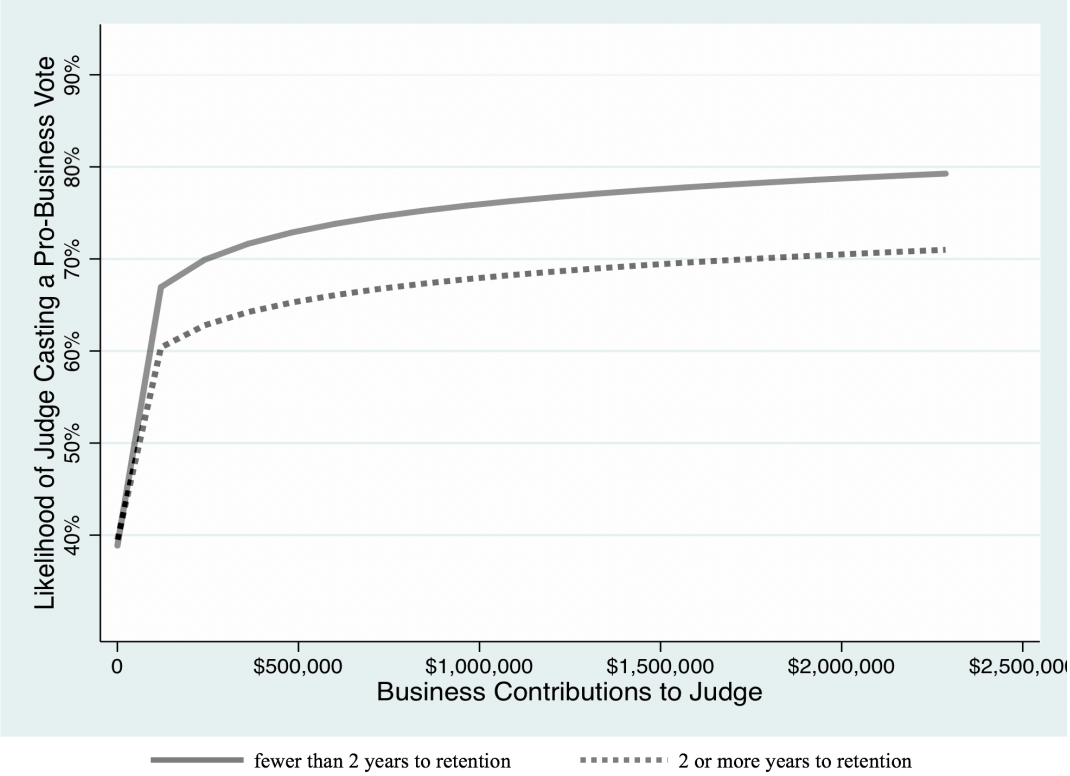
However, the relationship in Figure 1 can be explained by either the selection effects or biasing effects of campaign funding. As we previously discussed, it's possible that greater contributions are related to pro-business votes because business groups fund judges that are more likely to vote in favor of their interests. Alternatively, the relationship could be explained by judges voting in favor of business interests in order to attract future business contributions.

We first examine the impact of future retention concerns and the prospective need for campaign financing by exploring whether judges become more likely to vote for business litigants as their retention event approaches. Because business groups may remember that, even though a judge is casting pro-business votes today, she had cast anti-business votes at the beginning of her term, it is not clear that judges have a real incentive to vote in favor of business interests only as their next election approaches. However, prior studies have suggested that the behavior of elected judges does in fact change in response to an impending retention event; judges deviate from earlier voting patterns, impose longer criminal sentences, and side with the majority in death penalty cases.[87]

[87] See Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. Pol. 427 (1992); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and*

Figure 2 reports the difference in the marginal effects of business contributions on the likelihood of a judge casting a pro-business vote for judges with fewer than two years until their retention versus judges with two or more years until retention.[88] The figure shows that, although there is a relationship between business contributions and pro-business votes throughout a judge's term, contributions are associated with a greater increase in the likelihood of pro-business votes in the two years prior to a judge's retention.

Figure 2: Business Contributions and Pro-Business Votes as Retention Approaches



To further explore the degree to which judges are influenced by the prospective need for campaign financing in future elections, we next examine judges that cannot run for re-election and, as a result, are liberated from campaign finance concerns. Table 2 presents the results of estimations measuring the relationship between business campaign contributions and pro-business votes for judges who are in their mandatory last term and those who are not.[89] We report only the results of the contribution variables for brevity; the full results are reported in the Appendix. We present the results in odds ratios for ease of

a Case Study, 49 J. Pol. 1117 (1987); Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 Pol. Res. Q. 5, 24 (1995)

[88] The margins are computed from a logit regression of pro-business votes on all explanatory variables discussed above. The results from a multi-level logit model are presented in the Appendix.

[89] The average contributions raised from business groups in the most recent election was $119,000 for judges in their mandatory last term and $173,000 for judges not facing mandatory retirement.

interpretation and we also report the p-value associated with each logit coefficient.[90] For simplicity we include a "*" to indicate statistical significance at the .05 level and a "+" to indicate statistical significance at the .10 level. If a coefficient is statistically insignificant, that means that there is not a statistically reliable relationship between the explanatory variable and the dependent variable in the data.

The odds ratios can be used to interpret the magnitude of the relationship between each explanatory variable and the dependent variable. An odds ratio greater than one indicates a positive relationship between the explanatory and dependent variable and an odds ratio less than one indicates a negative relationship. Given the log transformation of our contribution variables, the precise interpretation of each odds ratio for the contribution variables is the percentage increase (or decrease) in the odds of a pro-business vote for a doubling of the business contributions, with all other variable held constant. That is, Table 2 reports that, for judges not in their mandatory last term, a doubling of business contributions is associated with, on average, a 24 percent increase in the likelihood of casting a pro-business vote. However, a doubling of non-business contributions is associated with an average 18 percent decrease (1 – 0.82) in the odds of casting a pro-business vote. In contrast, the statistically insignificant odds ratios for the lame duck judges indicate that our analysis cannot discern a meaningful relationship between the voting of lame duck judges and either business contributions or non-business contributions.

Table 2: Business Contributions and Votes: Impact of Mandatory Retirement

	Judges not facing Mandatory Retirement	Lame Duck Judges
Business Contributions	1.24* (0.000)	1.12 (0.130)
Non-Business Contributions	0.82* (0.000)	0.98 (0.725)
# of observations	7,620	2,310
Chi2	1949.3	644.9

These results support the biasing theory; the need to obtain future campaign support influences how judges vote. When these judges are liberated from future

[90] The p-value for each variable indicates whether there is sufficient evidence in the data to conclude that the variable has a relationship with judges' voting. A small p-value indicates that there is strong evidence that the variable does have a relationship. Researchers generally use a p-value cutoff of 0.05 (or, to a lesser extent, 0.10) as the demarcation between a statistically significant and statically insignificant result. A p-value less than 0.05 indicates that there is strong evidence of a meaningful relationship between the variable and judges' voting; a p-value greater than 0.05 indicates that the evidence is not strong enough to conclude that there is a meaningful relationship between the variable and judges' voting.

campaign fundraising concerns, the money they have raised has no meaningful impact on how they vote. Judges become free to judge when the possibility of re-election is removed.

Robustness Check: Age

We next perform a series of robustness checks to ensure that our interpretation of the results is correct. These checks are aimed at eliminating other possible explanations for the contrasting results between lame duck judges and non-retiring judges. By eliminating counter-explanations, we are left with only one logical explanation for the difference between lame duck and non-retiring judges—when judges no longer need to raise campaign funds or run for re-election, campaign finance ceases to influence how they vote.

Our first robustness checks focus on the influence of the judges' age on the relationship between business contributions and pro-business votes. Because lame duck judges are generally older than other judges, it is possible that age is explaining the different results for lame duck and non-retiring judges. Perhaps, as judges age, either their ideological preferences shift away from business interests or they become less concerned with attracting or maintaining future campaign funds.

Initially we include each judge's age as a control variable to isolate the influence of age from the influence of the mandatory retirement. Table 3 reports the results of the contribution variables; the full results are reported in the Appendix. The insignificant odds ratios on the contribution variables for judges in their mandatory last term indicate that, even controlling for age, contributions have a different effect on lame duck judges than on non-retiring judges.

Table 3: Business Contributions and Votes: Judge's Age as a Control

	Judges not facing Mandatory Retirement	Lame Duck Judges
Business Contributions	1.23* (0.000)	1.11 (0.160)
Non-Business Contributions	0.83* (0.000)	0.98 (0.743)
# of observations	7,341	2,310
Chi2	1874.2	644.6

Our next robustness check involving age takes advantage of the fact that 18 states do not have mandatory retirement ages. Thus, in 18 states, older judges that do not face mandatory retirement are approximately the same age as older judges that do face

mandatory retirement in 32 other states. Because they are the same age, the only variable that differs between these two sets of judges is whether they will need to attract future campaign funds.

As different states have different mandatory retirement ages and different term lengths, judges in their last term can be very different ages. In our data, judges in their mandatory last term range in age from 56 to 79, and judges not in their last term range in age from 37 to 89. To restrict our robustness check to judges of similar age, we include in our sample only judges over age 60. Table 4 reports the results for judges over 60 facing mandatory retirement versus those that are not. We report only the results of the contribution variables for brevity; the full results are reported in the Appendix. The results show that, even when we restrict our estimation to judges over 60, lame duck judges are different from other judges. Older judges that do not face mandatory retirement still respond to business contributions by casting more pro-business votes. However, judges of the same age that cannot run for retention do not respond to business contributions in any meaningful way.

Table 4: Business Contributions and Votes: Judges Over Age 60

	Judges over 60 not facing Mandatory Retirement	Lame Duck Judges over 60
Business Contributions	1.24* (0.002)	1.13 (0.113)
Non-Business Contributions	0.83* (0.002)	0.97 (0.692)
# of observations	4,332	2,106
Chi2	1086.1	588

Robustness Check: States with Mandatory Retirement

Next, we perform a robustness check to ensure that there is nothing particular about the states with mandatory last terms that explains the relationship between contributions and votes. These checks ensure that it is the mandatory last term that affects judges' pro-business voting and not factors, such as business friendly laws, that are present in the state in which the last term judges happen to be located. As shown in Figure 1, states with mandatory retirement ages are not concentrated in a particular region but are spread across the country. However, Table 5 reports that states utilizing mandatory retirement are more likely to use merit selection to select judges and retention elections to retain judges. Similarly, states without a mandatory retirement age are more likely to use nonpartisan elections and re-elections. Our robustness check will ensure that it is not differences between these selection and retention methods, or any other state-specific factors, that are

responsible for the different pro-business votes among lame duck judges and non-retiring judges.

Table 5: Number of States with Different Selection and Retention Methods

	States with Mandatory Retirement Age	States without Mandatory Retirement Age
Method of Selection		
Gubernatorial/ Legislative Appointment	5	2
Merit Selection	16	5
Nonpartisan Election	5	8
Partisan Election	6	3
Method of Retention		
Gubernatorial/Legislative Reappointment	6	2
Retention Election	15	4
Nonpartisan Re-election	6	7
Partisan Re-election	5	2
Permanent Tenure	2	1

Table 6 reports the results of regression analyses that restrict the sample to only the 32 states with mandatory retirement ages. The table presents only the results of the contribution variables; full results are reported in the Appendix. The results remain effectively the same as the estimation results from all fifty states: business contributions are associated with pro-business votes among judges not in their mandatory last term, but this relationship disappears among lame duck judges. Thus, the relationship between contributions and votes cannot be explained by differences among states with mandatory last terms and those without.

Table 6: Business Contributions and Votes: States with Mandatory Last Terms

	Judges not facing Mandatory Retirement	Lame Duck Judges
Business Contributions	1.28* (0.000)	1.12 (0.130)
Non-Business Contributions	0.76* (0.000)	0.98 (0.725)
# of observations	3,939	2,310
Chi2	1013.6	644.9

Robustness Check: Last Term Judges

Our next robustness check isolates the impact of mandatory retirement from other reasons that judges leave the bench. Judges may leave their position because they are appointed to another job, because of an illness or death, because of a voluntary retirement, or because they are not reappointed or lose a re-election. While all of these events result in a judge serving his or her last term before the event, they are different from mandatory retirement. Only when judges face mandatory retirement do they know they will no longer need to attract campaign funds. In contrast, the other events that could also cause a judge to be in the last term are either complete surprises or at least not guaranteed to happen. Thus, we would expect for business contributions to continue to influence pro-business votes for judges that are in their last term for any reason other than mandatory retirement.

Table 7 reports the results of estimations for three sets of judges: true lame duck judges in their last term because of mandatory retirement; judges in their last term because of voluntary retirement, death or illness, appointment to another job, or a failed retention; and judges in their last term because of voluntary retirement only. The table presents only the results of the contribution variables; full results are reported in the Appendix. Despite the similar sample size among these three groups, the contribution variables for lame duck judges remain statistically insignificant while the variables for the other sets of judges reveal a significant positive relationship between business contributions and pro-business votes. These results indicate that, when judges know they will not seek retention nor need to attract campaign funds, contributions have no meaningful relationship with votes. However, even when judges are in their last term, if they are uncertain about whether they'll seek retention or raise money, then past business contributions are associated with more pro-business votes. Thus, it is mandatory retirement that severs the relationship between contributions and votes.

Table 7: Business Contributions and Votes: Other Last Term Judges

	Lame Duck Judges	Judges in Last Term because of Voluntary Retirement, Death or Illness, Appointment to Another Job, or Failed Retention	Judges in Last Term because of Voluntary Retirement
Business Contributions	1.12 (0.130)	1.31* (0.002)	1.36* (0.001)
Non-Business Contributions	0.98 (0.725)	0.77* (0.002)	0.74* (0.001)
# of observations	2,310	2,772	2,250
Chi2	644.9	750.5	597.4

Robustness Check: Initial Selection

Finally, our last robustness checks confirm that the results for lame duck judges cannot be explained by the circumstances of the judges' initial rise to office. That is, if our sample of lame duck judges consists of more judges that are *not* predisposed to favor business interests in the first place, compared to the non-retiring judges, then our lame duck results may simply reflect these predispositions. If this was the case, then the insignificant results for lame duck judges could reflect a selection effect—lame duck judges were somehow selected differently in the first place. This counter-explanation seems unlikely as the lame duck judges in our sample serve in 26 different states that have various methods of selection and retention. Nevertheless, we conduct robustness checks to ensure that the judges' original selection method does not explain the contrasting results between non-retiring and lame duck judges.

Our previous analyses have examined judges that are similar in almost every way except for their retention possibilities—some judges are in their mandatory last term and others are not. By holding other variables constant except for the possibility of retention, these analyses allow us to isolate the impact of retention pressures on the way judges vote. Now, we hold retention pressures constant and, instead, explore judges that vary in the way they were originally selected to the bench. These analyses will allow us to isolate the impact of the judges' original selection on their subsequent votes.

To do this, we examine judges that were originally appointed in elective systems. In many states, if a sitting judge retires, dies, or is otherwise removed from office, the governor or a judicial nominating committee appoints an interim judge to fill the vacancy. These judges will eventually have to win an election to be retained in their position, but

they enter that subsequent election with the substantial advantages that typically accompany incumbents. Our data includes 74 judges in 21 states whom were originally appointed to fill vacancies in systems that otherwise require judges to win elections before taking the bench. Although these judges will later have to attract campaign funds to win re-election, they were originally appointed without raising any money. Thus, by examining judges with similar retention pressures that were selected in different ways, our analyses isolate the impact of the original election on the judges selected to serve and their subsequent voting.

Table 8 reports separate results for non-retiring judges that were originally elected and non-retiring judges that were originally appointed in elective systems. We report only the results of the contribution variables for brevity; the full results are reported in the Appendix. The results show that, regardless of the judges' original selection method, business contributions are associated with an increase in the likelihood of a pro-business vote.

Table 8: Business Contributions and Votes: Impact of Selection Method

	Judges not facing Mandatory Retirement that were Originally Elected to the Bench	Judges not facing Mandatory Retirement that were Originally Appointed to the Bench in an Elective System
Business Contributions	1.34* (0.000)	1.17+ (0.072)
Non-Business Contributions	0.78* (0.000)	0.87+ (0.051)
# of observations	3,129	3,142
Chi2	878	753.3

Table 9 reports the results for lame duck judges: one set of results for originally elected judges and one set for judges originally appointed in elective systems. We report only the results of the contribution variables for brevity; the full results are reported in the Appendix. Regardless of the way the judge was selected for the bench, the relationship between business contributions and pro-business votes disappears in the judges' mandatory last term.

Table 9: Business Contributions and Votes: Impact of Selection Method

	Lame Duck Judges that were Originally Elected to the Bench	Lame Duck Judges that were Originally Appointed to the Bench in an Elective System
Business Contributions	1.07 (0.163)	1.37 (0.758)
Non-Business Contributions	0.98 (0.611)	0.57 (0.643)
# of observations	808	827
Chi2	266.11	202.9

These results show that the circumstances of the judges' initial rise to office cannot explain the divergent results for lame duck judges. In addition to ruling out a counter-explanation, this provides more support for the biasing effects of campaign finance. If selection effects were predominately responsible for the relationship between campaign money and votes, then we would expect that judges selected under different methods would exhibit different voting patterns. However, we find that both elected and appointed judges favor contributors' interests when they will have to run for re-election, and neither set of judges favor contributors' interests when they are liberated from future fundraising concerns. This suggests that it is the retention pressures, not the original selection, that drive the relationship between campaign funds and judicial votes.

Summary of Results

The contrasting results for lame duck judges and non-retiring judges are striking. For non-retiring judges that must face retention, campaign contributions from business groups are associated with more voting for business litigants. But for lame duck judges that cannot run for re-election, there is no meaningful relationship between campaign money and votes. Our robustness checks show that these contrasting results cannot be explained by the older age of lame duck judges, specific characteristics of the states that have mandatory retirement ages, or the circumstances of the judges' initial rise to office. Moreover, the relationship between campaign money and votes remains when there is a possibility that the judges will face re-election, even if they end up leaving the bench for other unanticipated reasons. Thus, only when the possibility of re-election is removed and judges are liberated from the influence of campaign finance considerations do they become free to judge.

These results provide strong evidence that biasing is at least part of the story of campaign money's influence on supreme court justices. We would not argue that selection does not matter at all. Certainly, campaign donors focus their giving on candidates already predisposed in their direction, and that giving increases the chances that those judges will win elections. But our lame duck evidence indicates that biasing is an important cause of the relationship between money and votes. Once seated, judges bend toward monied preferences as they worry about campaign fundraising for their re-election. They are only free to judge once the pressure to fundraise is gone.

This possibility of outright biasing, of judges not voting as they see the law but to boost their re-election prospects, is more worrisome than selection. Selection effects are inherent in judicial elections where we know wealthy donors will push the system toward their preferences by throwing campaign money behind preferred candidates. That comes with the territory. However, even fans of judicial elections should be worried by judges who vote according to their campaign contributors' preferences out of fear about the next election. As troubling as selection seems, judges biased by campaign money is even worse.

Moreover, as we discuss in the next Chapter, the evidence that re-election concerns exert pressure on judges has important implications for reforms. Reformers that are concerned about money in judicial elections often excoriate competitive elections for judges and want to replace judicial elections with appointments. Competitive judicial elections can be undignified free-for-alls and draw judicial candidates into posturing, fundraising, and mudslinging like other candidates for office. However, at least when it comes to the influence of campaign money, our lame duck findings suggest that it may be re-election, not election that is the worse problem. When elected judges are freed from re-election pressure, campaign money no longer seems to affect them, regardless how undignified and pressure-packed the initial election process that put them there. Re-election, and the pressures it puts on judges, needs more attention in the conversations about reform.

Chapter 4 Appendix

Full Set of Results for Figure 1:
Relationship between Business Contributions and Pro-Business Votes

	All Judges
Business Contributions	1.22* (0.000)
7Non-Business Contributions	0.85* (0.000)
Partisan Re-election Indicator	2.67* (0.657)
Nonpartisan Re-election Indicator	1.17 (0.517)
Retention Election Indicator	1.15 (0.002)
Democratic Judge	0.624* (0.043)
Republican Judge	1.58* (0.040)
State Tort Climate	0.536* (0.002)
State Citizens Ideology	1.01 (0.208)
State Government Ideology	0.99 (0.159)
Business Petitioner Indicator	0.57* (0.000)
Case Strength	1.079* (0.000)
# of observations	10,104
Chi2	2660

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*" indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Figure 2:
Business Contributions and Pro-Business Votes as Retention Approaches

	All Judges
Business Contributions	1.21* (0.000)
Indicator for Fewer than 2 Years until Retention	1.15 (0.319)
Business Contributions * Fewer than 2 Years Until Retention	1.05+ (0.079)
Non-Business Contributions	0.84* (0.000)
Partisan Re-election Indicator	2.88* (0.001)
Nonpartisan Re-election Indicator	1.25 (0.381)
Retention Election Indicator	1.17 (0.620)
Democratic Judge	0.617* (0.039)
Republican Judge	1.58* (0.041)
State Tort Climate	0.526* (0.001)
State Citizens Ideology	1.01 (0.183)
State Government Ideology	0.989 (0.193)
Business Petitioner Indicator	0.571* (0.000)
Case Strength	1.079* (0.000)
# of observations	10,104
Chi2	2659.3

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*" indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 2:
Business Contributions and Votes: Impact of Mandatory Retirement

	Judges not facing Mandatory Retirement	Judges facing Mandatory Retirement
Business Contributions	1.24* (0.000)	1.12 (0.130)
Non-Business Contributions	0.82* (0.000)	0.98 (0.725)
Partisan Re-election Indicator	3.34* (0.003)	1.310 (0.602)
Nonpartisan Re-election Indicator	1.37 (0.346)	1.063 (0.904)
Retention Election Indicator	1.40 (0.381)	0.402 (0.382)
Democratic Judge	0.519* (0.015)	0.723 (0.591)
Republican Judge	1.40 (0.177)	1.734 (0.367)
State Tort Climate	0.454* (0.02)	1.51 (0.363)
State Citizens Ideology	1.015 (0.112)	0.982 (0.252)
State Government Ideology	0.986 (0.175)	1.01 (0.540)
Business Petitioner Indicator	0.588* (0.000)	0.499* (0.000)
Case Strength	1.079* (0.000)	1.074* (0.000)
# of observations	7,610	2,310
Chi2	1949.3	644.9

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*" indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 3:
Business Contributions and Votes: Judge's Age as a Control

	Judges not facing Mandatory Retirement	Judges facing Mandatory Retirement
Business Contributions	1.23* (0.000)	1.11 (0.160)
Non-Business Contributions	0.83* (0.000)	0.98 (0.743)
Judge Age	0.977+ (0.062)	0.986 (0.707)
Partisan Re-election Indicator	3.08* (0.009)	1.43 (0.532)
Nonpartisan Re-election Indicator	1.26 (0.310)	1.19 (0.766)
Retention Election Indicator	1.52 (0.497)	0.436 (0.437)
Democratic Judge	0.492* (0.010)	0.69 (0.547)
Republican Judge	1.34 (0.242)	1.60 (0.462)
State Tort Climate	0.484* (0.009)	1.58 (0.336)
State Citizens Ideology	1.012 (0.232)	0.982 (0.264)
State Government Ideology	0.986 (0.208)	1.01 (0.549)
Business Petitioner Indicator	0.584* (0.000)	0.501* (0.000)
Case Strength	1.080* (0.000)	1.073* (0.000)
# of observations	7,341	2,310
Chi2	1874.2	644.6

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 4:
Business Contributions and Votes: Judges Over Age 60

	Judges over 60 not facing Mandatory Retirement	Judges over 60 facing Mandatory Retirement
Business Contributions	1.24* (0.002)	1.13 (0.113)
Non-Business Contributions	0.83* (0.002)	0.97 (0.692)
Partisan Re-election Indicator	2.41 (0.132)	1.14 (0.794)
Nonpartisan Re-election Indicator	0.98 (0.978)	0.976 (0.963)
Retention Election Indicator	1.12 (0.818)	0.32 (0.265)
Democratic Judge	0.536+ (0.096)	0.756 (0.643)
Republican Judge	1.12 (0.742)	2.22 (0.188)
State Tort Climate	0.341* (0.006)	1.51 (0.338)
State Citizens Ideology	1.013 (0.354)	0.978 (0.152)
State Government Ideology	0.989 (0.452)	1.01 (0.586)
Business Petitioner Indicator	0.528* (0.000)	0.523* (0.000)
Case Strength	1.081* (0.000)	1.074* (0.000)
# of observations	4,332	2,106
Chi2	1086.1	579

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 6:
Business Contributions and Votes: States with Mandatory Last Terms

	Judges not facing Mandatory Retirement	Judges facing Mandatory Retirement
Business Contributions	1.28* (0.000)	1.12 (0.130)
Non-Business Contributions	0.76* (0.000)	0.98 (0.725)
Partisan Re-election Indicator	5.73* (0.000)	1.310 (0.602)
Nonpartisan Re-election Indicator	2.637* (0.010)	1.063 (0.904)
Retention Election Indicator	1.866 (0.284)	0.402 (0.382)
Democratic Judge	0.579 (0.145)	0.723 (0.591)
Republican Judge	1.819 (0.107)	1.734 (0.367)
State Tort Climate	0.337* (0.000)	1.51 (0.363)
State Citizens Ideology	1.008 (0.520)	0.982 (0.252)
State Government Ideology	0.996 (0.701)	1.01 (0.540)
Business Petitioner Indicator	0.628* (0.000)	0.499* (0.000)
Case Strength	1.077* (0.000)	1.074* (0.000)
# of observations	3,939	2,310
Chi2	1013.6	644.9

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 7:
Business Contributions and Votes: Judges Over Age 60

	Judges in Last Term because of Mandatory Retirement	Judges in Last Term because of Voluntary Retirement, Death or Illness, Appointment to Another Job, or Failed Retention	Judges in Last Term because of Voluntary Retirement
Business Contributions	1.12 (0.130)	1.31* (0.002)	1.36* (0.001)
Non-Business Contributions	0.98 (0.725)	0.77* (0.002)	0.74* (0.001)
Partisan Re-election Indicator	1.310 (0.602)	3.59* (0.042)	3.45 (0.121)
Nonpartisan Re-election Indicator	1.063 (0.904)	1.63 (0.308)	1.48 (0.465)
Retention Election Indicator	0.402 (0.382)	1.11 (0.851)	1.12 (0.853)
Democratic Judge	0.723 (0.591)	0.469+ (0.068)	0.477 (0.106)
Republican Judge	1.734 (0.367)	1.52 (0.296)	1.35 (0.493)
State Tort Climate	1.51 (0.363)	0.356* (0.011)	0.255* (0.005)
State Citizens Ideology	0.982 (0.252)	1.011 (0.416)	1.020 (0.200)
State Government Ideology	1.01 (0.540)	1.00 (0.875)	1.00 (0.951)
Business Petitioner Indicator	0.499* (0.000)	0.543* (0.000)	0.445* (0.000)
Case Strength	1.074* (0.000)	1.078* (0.000)	1.079* (0.000)
# of observations	2,310	2,772	2,250
Chi2	644.9	750.5	597.4

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 8:
Business Contributions and Votes: Impact of Selection Method

	Judges not facing Mandatory Retirement that were Originally Elected to the Bench	Judges not facing Mandatory Retirement that were Originally Appointed to the Bench in an Elective System
Business Contributions	1.34* (0.000)	1.17+ (0.072)
Non-Business Contributions	0.78* (0.000)	0.87+ (0.051)
Partisan Re-election Indicator[91]	.	4.76* (0.027)
Nonpartisan Re-election Indicator	0.596 (0.163)	1.47 (0.485)
Retention Election Indicator	0.830 (0.857)	2.25 (0.209)
Democratic Judge	0.71 (0.403)	0.72 (0.789)
Republican Judge	1.30 (0.459)	2.61 (0.448)
State Tort Climate	0.586+ (0.097)	0.44* (0.041)
State Citizens Ideology	1.04* (0.027)	1.02 (0.189)
State Government Ideology	0.94* (0.003)	0.99 (0.879)
Business Petitioner Indicator	0.736* (0.032)	0.446* (0.000)
Case Strength	1.073* (0.000)	1.084* (0.000)
# of observations	3,129	3,142
Chi2	878	753.3

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

[91] The variable indicating a partisan re-election is dropped as the base category in this analysis.

Full Set of Results for Table 9:
Business Contributions and Votes: Impact of Selection Method

	Judges facing Mandatory Retirement that were Originally Elected to the Bench	Judges facing Mandatory Retirement that were Originally Appointed to the Bench in an Elective System
Business Contributions	1.07 (0.163)	1.37 (0.758)
Non-Business Contributions	0.98 (0.611)	0.57 (0.643)
Partisan Re-election Indicator[92]	.	0.04 (0.442)
Nonpartisan Re-election Indicator	0.628 (0.234)	1.32 (0.555)
Retention Election Indicator[93]	.	0.098 (0.497)
Democratic Judge	0.304* (0.000)	0.232* (0.016)
State Tort Climate	2.02 (0.112)	0.312 (0.134)
State Citizens Ideology	0.93* (0.000)	0.89 (0.476)
State Government Ideology	1.07* (0.005)	1.06 (0.695)
Business Petitioner Indicator	0.629* (0.070)	0.485* (0.026)
Case Strength	1.065* (0.000)	1.081* (0.000)
# of observations	808	827
Chi2	266.11	202.9

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

[92] The variable indicating a partisan re-election is dropped as the base category in this analysis.
[93] The variable indicating a republican judge is dropped as the base category in this analysis.