JUDICIAL CAMPAIGN FINANCE AND ELECTION TIMING

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INTRODUCTION

After her retirement from the United States Supreme Court, former Justice Sandra Day O'Connor warned that elected judges could be seen as "politicians in robes" and adopted judicial election reform as her professional cause.[1] Justice O'Connor feared that "motivated interest groups [were] pouring money into judicial elections in record amounts"[2] and worried that judicial elections had "turned into 'political prize-fights, where partisan and special interests seek to install judges who will answer to them.'"[3] Our empirical work, described briefly here, arguably confirms Justice O'Connor's fears about judicial elections and campaign finance.

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1. Annemarie Mannion, *Retired Justice Warns Against 'Politicians in Robes*,*'* CHI. TRIB. (May 30, 2013), https://www.chicagotribune.com/suburbs/elmhurst/ct-xpm-2013-05-30-chi-retired-justice-warns-against-politicians-in-robes-20130530-story.html [https://perma.cc/CY8Y-RMM6].

2. Sandra Day O'Connor, Opinion, *Justice for Sale*, WALL ST. J. (Nov. 15, 2007, 12:01 AM), https://www.wsj.com/articles/SB119509262956693711 [https://perma.cc/8JR3-YJZJ].

3. *Judges Behaving Badly*, ECONOMIST (June 28, 2007), https://www.economist.com/united-states/2007/06/28/judges-behaving-badly [https://perma.cc/V98A-WBKN].

Over more than a decade, our work has established that judicial campaign finance influences judicial decision-making by elected state supreme court justices. We have studied the statistical relationship between campaign money and judicial decision-making in a variety of ways at the state supreme court level, but our analysis of the data consistently reaches the same general conclusion: judges' voting in cases tends to favor the interests of their campaign contributors in a predictable and statistically meaningful way.[4]

What has been less clear has been why campaign finance contributions correlate with judicial voting in favor of a judge's particular contributors. Our forthcoming book, *Free to Judge?*,[5] focuses on this question of causality. As every undergraduate who has taken an introductory statistics class could tell you, correlation is not the same as causation, so the consistent correlation between campaign contributions and judicial votes in the contributors' interests does not indicate why, among intuitive explanations, campaign money predicts judicial decision-making in our data. Our book surveys the possible causal mechanisms but ultimately shows that the relationship between campaign finance and decisions is likely driven in significant part by the biasing effect of reelection incentives.

When judges know they must win reelection to keep their jobs, they may feel they must curry favor with past contributors to maintain support for their next reelection campaign.[6] As we explain below, our data indicate that the usual connection between campaign finance money and judicial decisions in favor of contributors can be largely explained by this need for sitting judges to raise support for their reelection. Judges who are eligible for reelection manifest this statistically significant bias toward their contributors' interests, but the typical relationship between past campaign finance money and judicial decisions significantly weakens for lame-duck judges who cannot run for reelection. The reelection incentives that bias judges toward their past supporters are no longer present for lame-duck judges, so their decisions do not favor their campaign contributors the way that decisions by other judges tend to do.

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4. *See, e.g.*, Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016) [hereinafter Kang & Shepherd, *The Long Shadow of* Bush v. Gore]; Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239 (2013); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011) [hereinafter Kang & Shepherd, *The Partisan Price of Justice*].

5. MICHAEL S. KANG & JOANNA M. SHEPHERD, FREE TO JUDGE?: HOW CAMPAIGN FINANCE MONEY BIASES JUDGES (forthcoming 2021).

6. Kang & Shepherd, *The Long Shadow of* Bush v. Gore, *supra* note 4, at 1439–40.

Based on our findings, we believe that reducing reelection pressures is an effective way to reduce the influence of campaign money on elected judges. Specifically, in this Essay, we explore the novel question of how election timing may affect the strength of campaign-finance pressures on state supreme court justices. In our consideration of what other election factors affect money's influence on judges, we noticed that some state supreme court justices run for their seats during presidential election years, alongside intense national and statewide campaigning for a large number of offices, and other judges are elected in years in between presidential election years, so-called off years, that feature a generally less crowded ballot and a quieter campaign environment. We investigate whether running for election in a presidential year, as opposed to an off year, affects the influence of campaign finance money on elected judges' subsequent decision-making.

There are competing theories about how election timing affects judicial campaign finance, and they point in opposite directions. One might suspect that judges elected in a presidential election year—when more candidates are on the ballot for more offices, and therefore more money is raised and spent—would be swept up by the intensity of the partisan election cycle and be more influenced by campaign finance pressures as a result. Alternately, one might suspect that judges running in an off year would be more reliant on their campaign finance contributors for support in the absence of a presidential election effort by their party lifting all boats, such that judges would be more influenced by campaign finance pressures if elected during off years.

We compare judges elected in presidential years to those elected in off years and find that campaign finance exercises a greater influence on judicial decision-making by judges elected in off years. We present and explain our statistical results below, with the tentative conclusion that holding state supreme court elections in off years may help lessen campaign finance influences on those elected judges.

I. THE BIASING INFLUENCE OF CAMPAIGN FINANCE ON ELECTED JUDGES

Campaign money influences judicial decisions. By now, we have no real doubts. Empirical scholars, including ourselves, have thoroughly documented a statistically significant relationship between campaign money received by elected judges and the decisions they later make involving their contributors' interests.[7] This research has shown that judges decide cases more favorably to business groups, political

7. *See, e.g.*, Kang & Shepherd, *The Partisan Price of Justice*, *supra* note 4, at 69.

coalitions, lawyers, and political parties, among other actors, who help them get elected to the bench.[8]

The larger question has been *why* money influences judicial decisions. Polling data confirm that the public believes judges decide cases for their contributors as a matter of favoritism toward their supporters.[9] More than three-quarters of the public agree that campaign contributions influence elected judges' decisions.[10] What is worse, judges themselves agree that campaign money affects judicial decisions. An overwhelming eighty percent of judges say that interest groups are using campaign contributions to try to shape legal decisions in their favor.[11] Judges seem to agree that their colleagues are influenced by campaign money even if they usually feel they themselves are not affected by money.[12] Almost half of surveyed judges say that campaign contributions have at least "a little influence" on judicial decisions, and more than half of judges believe that judges "should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign."[13]

One view is that judges decide cases favorably for their supporters because their supporters have selected the right judges to support. Under this view, campaign supporters look for, sometimes recruit, and ultimately contribute financially to judicial candidates with their favored ideological perspectives. With the help of these campaign supporters, judicial candidates win election and then, if the supporters have selected well, decide cases as their supporters hoped they would. Conservative supporters bet on conservative candidates who will decide cases in conservative ways that help them—likewise for liberal and moderate supporters with their candidates. This account is a story of strategic selection, where candidates do not bias their views to help their supporters; candidates and supporters pair up such that campaign support and candidates' subsequent decisions on the bench match up statistically.

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8. *See infra* Section III.D.

9. *See* Kang & Shepherd, *The Partisan Price of Justice*, *supra* note 4, at 87–88.

10. *Id.*

11. *See* GREENBURG QUINLAN ROSNER RSCH. INC., JUSTICE AT STAKE – STATE JUDGES FREQUENCY QUESTIONNAIRE 9 (2002), https://www.brennancenter.org/our-work/research-reports/national-polls-justice-stake (choose "2001 National Bipartisan Survey of 2,500 Judges").

12. *Compare, e.g.*, *id.* at 5 (presenting data indicating that some judges believe campaign contributions influence judicial decisions), *with* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES (Oct. 1, 2006), https://www.nytimes.com/2006/10/01/us/01judges.html [https://perma.cc/3EGT-8ZPX] (quoting former Chief Justice Thomas J. Moyer of the Ohio Supreme Court, who acknowledged public perception that campaign contributions influence judicial decisions but nonetheless reassured that "I know they don't for me").

13. GREENBURG QUINLAN ROSNER RSCH. INC., *supra* note 11, at 5, 11.

By contrast, the U.S. Supreme Court instead endorses a theory of gratitude to explain the potential influence of campaign money on elected judges. In *Caperton v. Massey*,[14] the Court held that one West Virginia Supreme Court justice was required under the Due Process Clause to recuse himself in a case involving a $50 million verdict against the company of a major campaign finance supporter.[15] The campaign finance supporter had spent $3 million on campaign advocacy to help the justice get elected, but the justice refused a petition and public calls for him to recuse, a decision he later regretted publicly.[16]

The U.S. Supreme Court found that the justice, Brent Benjamin, was constitutionally required to have recused himself from his supporter's case.[17] The Court reasoned that the campaign supporter's "significant and disproportionate influence" in getting Benjamin elected coupled with the timing of the election and Blankenship's case offered "a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."[18] As a consequence, the Court reasoned, "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case."[19]

Under this theory of gratitude, judges naturally feel indebted to their supporters and might feel obligated to reciprocate support by deciding cases in their favor. This is less pairing up of likeminded supporters and candidates than candidates being swayed to favor their supporters later on out of gratitude.

However, there is yet another, perhaps more worrisome explanation for the influence of campaign money on judges: self-interested bias. By bias, we do not necessarily mean an explicit quid pro quo where judges and supporters exchange understood favors: campaign money from supporters for favorable decisions by judges. Of course, campaign supporters of judges might hope for and assume such an implicit understanding, perhaps motivating their campaign support in the first place. Still, even short of such a developed understanding, judges might nonetheless feel pressured to decide cases in favor of their past supporters.

14. 556 U.S. 868 (2009).

15. *Id.* at 872.

16. *Id.* at 875, 884; *see* Shauna Johnson, *On the Campaign Trail: Justice Brent Benjamin, State Supreme Court Candidate*, METRONEWS (Apr. 19, 2016, 3:00 PM), https://wvmetronews.com/2016/04/19/on-the-campaign-trail-justice-brent-benjamin-state-supreme-court-candidate/ [https://perma.cc/5XM5-6LLX].

17. *Caperton*, 556 U.S. at 872.

18. *Id.* at 884–85 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

19. *Id.* at 884.

Judges may feel that they have to keep past supporters happy if they hope to stay in office.

Elected judges know they need to be reelected if they want to keep their jobs. To get reelected, they also know they will need campaign financing for their reelection bids, particularly as judicial elections become more competitive and costly.[20] As a result, looking prospectively toward reelection, judges may feel pressure to raise campaign money and curry favor with campaign supporters who have given money to them in the past. Judges likewise may feel pressure to bias their decisions in this direction because of the requirement of reelection. As one former U.S. senator testified about campaign money, "When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation."[21] This pressure is not out of simple gratitude; it is self-interested bias with an eye toward ensuring future campaign support.

How do we sort out causality with these different theories about campaign money's influence on judges? We set out to unravel this question in our forthcoming book, *Free to Judge?*. We realized that all these causal accounts would predict the correlation between campaign finance support and judicial decisions by elected judges. The correlation therefore does not help us confirm one account over the others. But only the self-interested bias story would explain a very consistent statistical pattern in all our data over the years—campaign money has a little effect on lame-duck judges' decisions.[22]

Lame-duck judges are elected judges in their final term because their state law mandates retirement at a certain age. As a result, these lame ducks know when they are elected or reelected to this final term that they are not eligible to run for reelection. To be clear, these elected judges have run for their office, raised money, and won election like other judges eligible for reelection, but only these judges know for sure, from the start of their final term, that they cannot continue on to another term in office. In contrast to other elected judges, these lame ducks therefore face no incentive for reelection, do not need to raise money for reelection, and have no need to bias their decisions in their final terms. If campaign finance money influences lame-duck judges differently from other judges, then it suggests that reelection may be the main source of money's influence.

20. *Choosing Justice? The Need for Judicial Selection Reform*, COMM. FOR ECON. DEV. (Nov. 18, 2015), https://www.ced.org/reports/choosing-justice-the-need-for-judicial-selection-reform [https://perma.cc/5P6T-PLZW].

21. Alan K. Simpson, *A Senate Republican's Perspective*, *in* INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS 119, 121 (Anthony Corrado, Thomas E. Mann & Trevor Potter eds., 2003).

22. Kang & Shepherd, *The Long Shadow of* Bush v. Gore, *supra* note 4, at 1443.

This is exactly what we find in our book—campaign finance money has a weak influence on lame ducks' judicial decisions. In our book, we describe these lame-duck results and rule out other possible explanations for them. We explain that (1) campaign finance influences judicial decisions largely because elected judges are biased toward their campaign supporters and are influenced by reelection pressures; and that (2) this indicates that reelection, not judicial elections in the first place, is the main problem.

What does this mean for reform of judicial elections? In our book, we explain that removing reelection incentives—the source of much of campaign finance's biasing influence on judges—is the key for judicial election reform. It may not be politically feasible to get rid of judicial elections wholesale given their popularity. However, we argue that getting rid of judicial elections probably is not even necessary to address the biasing influence of judicial campaign finance. Instead, we should focus on getting rid of judicial *reelection*.

Getting rid of judicial reelection may come in different forms. Lifetime tenure is one possible method. Federal judges have lifetime tenure and therefore never have to run for reelection or otherwise win office again to keep their jobs after their initial appointments. We note the virtues of lifetime tenure but also note the many problems with lifetime tenure that have been cited in arguments against it.[23] Another method of getting rid of reelection is to require judges to win re-appointment from the governor or legislature rather than win reelection at the ballot box. This would free judges from needing to curry favor with contributors and voters but still require them to win someone's continued approval to keep their jobs. It may just substitute one form of bias for another.

In our book, though, we instead propose judicial election with a single term limit, without possibility of reelection or reappointment. Our proposal has been suggested for the federal judiciary as well, in place of lifetime tenure, and was considered by President Biden's Commission on the U.S. Supreme Court.[24] However, currently, neither the federal judiciary nor any state supreme court operates under a single term limit.[25]

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23. *See, e.g.*, Philip D. Oliver, *Assessing and Addressing the Problems Caused by Life Tenure on the Supreme Court*, 13 J. APP. PRAC. & PROCESS 11 (2012).

24. *See* Adam Liptak, *Biden Panel Wary of Expanding Supreme Court, but Open to Term Limits*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2021/10/14/us/politics/supreme-court-expansion-term-limits.html [https://perma.cc/K2SS-SF9N].

25. *See The Judicial Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/ [https://perma.cc/235W-2Y9S] (last visited Oct. 28, 2021); *State Supreme Courts*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_courts [https://perma.cc/Y5YW-ZJJL] (last visited Oct. 28, 2021).

A single term limit allows judges to serve one long term—in our proposal, fourteen years—but removes the requirement and biasing influence of reelection concerns. Ineligible for a second term, all judges would be like our lame ducks, who showed little influence from campaign finance money. For state judges, we explain how a single term limit would remove reelection incentives but should leave basically unchanged other aspects of judicial tenure and office. A single term limit should preserve the popular institution of judicial elections without bringing with it the biasing influence of campaign finance that currently plagues state judges. Elected judges would be free to judge.

With that introduction to our research, we present in the next Part another reform possibility based on our study of judicial campaign finance. We find that the influence of judicial campaign finance is greater for judges elected in off years relative to judges elected in presidential election years. Apart from getting rid of judicial reelections, as we already have discussed, we explore the possibility of reducing the effects of campaign finance just by shifting the timing of judicial elections to presidential election years.

II. THE TIMING OF STATE SUPREME COURT ELECTIONS: PRESIDENTIAL ELECTION YEARS VERSUS OFF YEARS

Elections during presidential election years are different from elections held during off years. Presidential election years carry the highest stakes on the ballot and draw out the highest efforts of both major parties and therefore the greatest voter turnout.[26] Judicial elections, even state supreme court races, are generally low salience elections that receive less public and media attention than federal and state executive and legislative races.[27] It follows that the politics and campaign finance of down-ballot races, like judicial elections, differ depending on whether they are held during a presidential election year or an off year. We explore how those differences may matter for judicial campaign finance and the possibilities for reform.

Presidential election years obviously involve the highest electoral stakes, with the presidential race at the top of the ballot. The presidential election is the highest profile and most expensive campaign in the country and attracts major media and political attention that motivates the major

26. *See* Kevin Schaul, Kate Rabinowitz & Ted Mellnik, *2020 Turnout Is the Highest in Over a Century*, WASH. POST (Dec. 28, 2020, 4:29 PM), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/ [https://perma.cc/A374-CXQB].

27. Emily Rock & Lawrence Baum, *The Impact of High-Visibility Contests for U.S. State Court Judgeships: Partisan Voting in Nonpartisan Elections*, 10 ST. POL. & POL'Y Q. 368, 369 (2010).

parties to go all out in their efforts to win. Voters, too, are motivated to pay attention and ultimately turn out to vote by the presidential race, which expands the electorate in presidential years.[28] Voter turnout expands in presidential election years relative to off years and is more demographically representative of the broader population in presidential years.[29] As a result, local elections held during off years average roughly thirty percentage points lower turnout than local elections held during presidential election years.[30]

The consequences for judicial campaign finance and its influence on elected judges are obvious. With higher stakes and more voters to reach, campaign fundraising and spending are substantially higher in elections held in presidential election years than those held in off years. The same is true for state supreme court elections held in presidential years compared to those held in off years. Since 2001, total spending in state supreme court races has averaged $71.65 million in 2018 dollars when held during presidential election years.[31] Total spending in state supreme court races held in off years averaged $44.44 million.[32] What is more, at least in recent years, it seems that more state supreme court races went uncontested in off years.[33]

Lower turnout in off-year elections also means that high-propensity voters constitute a larger percentage of the electorate.[34] That is, knowledgeable voters with stronger partisan attachments tend to turn out and form a bigger proportion of the electorate in off-year elections, while less knowledgeable voters with weaker political associations tend to skip non-presidential years at a higher rate.[35] Voters in off-year elections are therefore more likely to vote on down-ballot races, such as judicial races, rather than roll off after voting only on the higher profile races at the top

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28. Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CTR. FOR AM. PROGRESS (July 11, 2018, 12:01 AM), https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/ [https://perma.cc/5U8Q-3ESW].

29. *See, e.g.*, ZOLTAN L. HAJNAL, AMERICA'S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS 24–25 (2010); GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 101 (5th ed. 2001).

30. *See* Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFFS. REV. 645, 655–56 (2003).

31. *See* DOUGLAS KEITH, PATRICK BERRY & ERIC VELASCO, THE POLITICS OF JUDICIAL ELECTIONS, 2017–18, at 4 (2019), https://www.brennancenter.org/sites/default/files/2019-12/2019_11_Politics%20of%20Judicial%20Elections_FINAL.pdf [https://perma.cc/PRG8-ZQLX].

32. *See id.*

33. *See id.*

34. *See* HAJNAL, *supra* note 29.

35. *See id.*; RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 109 (1980).

of the ballot.[36] Studies also find, as a result, that local interest groups have more influence on local officials who are elected in off-year cycles because their support is more influential on high-propensity voters who form a higher proportion of the electorate in those years.[37]

Judicial elections held in off years are therefore likely to be lower intensity races, with less total campaign spending, voter turnout, and party involvement. However, whether campaign finance would exert a lesser influence on judges elected in off election years or presidential election years is not obvious at all.

One might expect that campaign spending is more influential on judges elected in presidential years. There is more campaign spending in presidential election years, and more money is raised in those cycles as part of the larger party election effort.[38] Judges running for election during presidential election years might reasonably feel more pressure to raise campaign money to be competitive in a crowded political environment. They therefore would feel greater need to satisfy potential contributors. Judges running in presidential election years also might feel greater pressure to cooperate with a major party and benefit from the party's election efforts activated during presidential election years. If so, these judges when deciding cases would be more likely to sympathize with the party's ideological and political aims for fear of alienating party support. Under this view, judges running for election during presidential years would be more influenced by campaign finance considerations to decide cases more consistently with their campaign support and home party.

An alternate view is that judges elected in off years are more influenced by campaign finance pressures. Chris Bonneau argues that judges elected in off-year elections can raise more money because off years typically feature fewer additional election races on the ballot.[39] Fewer races mean that judicial candidates face less competition in their pursuit of campaign contributions and therefore are better able to raise money.[40] Furthermore, fewer races mean that state supreme court elections are more likely to receive public and media attention in the absence of federal and statewide races that hog attention in presidential years.[41] A state supreme court race may be the highest profile election in the state

36. Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in Supreme Court Elections*, 52 AM. J. POL. SCI. 457, 459, 463, 466 (2008).

37. *See* Sarah F. Anzia, *Election Timing and the Electoral Influence of Interest Groups*, 73 J. POL. 412, 412, 424 (2011); SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 202 (2014).

38. *See* KEITH, BERRY & VELASCO, *supra* note 31, at 4.

39. Chris W. Bonneau, *Campaign Fundraising in State Supreme Court Elections*, 88 SOC. SCI. Q. 68, 80 (2007).

40. *Id.*

41. *See id.* at 40.

during an off year, which it never is during a presidential election year. As a result, judicial candidates running in off-year elections may get more political scrutiny and pressure than they would running in presidential years. Supreme court candidates also need to run and win on their own individual strengths in off years to a greater degree, without the support of the usual party-wide effort mobilized for the entire slate during a presidential election year.[42]

It is unclear then whether judges running in presidential years or judges running in off years are more likely to be influenced by campaign finance pressures. We answer this question in the next Part by studying state supreme court justices and comparing those elected in presidential election years with those elected in off years to see how these justices are affected differentially by campaign finance.

III. JUDICIAL ELECTION TIMING: EMPIRICAL METHODOLOGY

To explore whether the timing of judicial elections influences the role of money on judicial decision-making, we compiled a 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 fifty states.[43] The data include variables that reflect case participants, case outcomes, and individual judges' voting. We supplement these data with institutional variables that describe aspects of the judicial system of each state and with detailed information about each judge's background and career.

Our sample of cases includes cases between a business litigant and a non-business litigant. We limit our analysis to business cases for several reasons. First, business cases make up almost one-third of the cases before the state supreme courts.[44] Second, business cases are the best place to empirically isolate the relationship between campaign finance and judicial decisions. Business groups typically devote more substantial resources to judicial campaigns than other interest groups.[45] In fact, over the past two

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42. *See* Hall & Bonneau, *supra* note 36, at 463.

43. Business cases were identified by a key search in Westlaw. Once all business cases were identified within a given state and year, twenty-five cases were randomly selected for the sample. If there were twenty-five or fewer cases in a given state and year, all available cases were coded.

44. *See* Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 136 (1977).

45. *See, e.g.*, JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 18 (Jesse Rutledge ed., 2006), https://www.brennancenter.org/sites/default/files/2019-08/Report_New-Politics-of-Judicial-Elections-2006.pdf [https://perma.cc/R7PY-W7YD].

decades, business groups have been among the largest direct contributors to judicial campaigns and have dominated interest group spending on television campaign advertising.[46] In addition, business groups typically have a more focused agenda and clearer preferences than other interest groups. Whereas business groups generally favor pro-business and pro-tort reform judges, the plaintiffs' bar is typically much more diverse in its economic interests because it represents a diverse range of clients.[47]

Although our empirical analyses focus on business cases and business contributions, our results have important implications for all interest groups. We expect that a similar relationship between judicial decisions and campaign funds exists for any interest group that contributes significantly in judicial election campaigns.

We use a series of multivariate regression models to test the relationship between campaign contributions from business groups and judges' voting in business cases. A regression analysis measures the relationship between a dependent variable (in our case, judges' votes) and a series of explanatory variables (other characteristics of each state, judge, and case).[48] In this way, our analyses isolate the relationship between judicial decisions and campaign contributions from the relationship between judicial decisions and other factors.

A. 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. Certainly, the outcomes of many individual cases in our analysis have little, if any, impact on the welfare of most businesses as a general matter. Moreover, not every vote for a business litigant is necessarily an instance of pro-business bias. However, our large sample of cases allows us to measure whether there is any relationship between business groups' contributions and judges' voting for business litigants over a wide range of cases.

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46. KEITH, BERRY & VELASCO, *supra* note 31, at 7; SAMPLE, JONES & WEISS, *supra* note 45, at 8, 18.

47. *See, e.g.*, David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 904–05 (2015); Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiff's Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 237–39 (2001).

48. Amy Gallo, *A Refresher on Regression Analysis*, HARV. BUS. REV. (Nov. 4, 2015), https://hbr.org/2015/11/a-refresher-on-regression-analysis [https://perma.cc/P579-V3AZ].

B. Explanatory Variables

To measure the impact of business contributions on judges' votes, the explanatory variable in which we are primarily interested is a measure of campaign contributions from business groups in each judge's most recent election.[49] Our estimations include one of two measures of campaign contributions: either the total dollar amount of campaign contributions from business groups or the percentage of each judge's total contributions that come from business groups. Both measures aggregate the contributions from several different sectors that are generally supporters of pro-tort reform and pro-business judges: agriculture, communications, construction, defense, energy, finance, real estate and insurance, health care, transportation, and a general business category.[50]

The estimation sample for our regressions that use the dollar amount of business contributions is the entire sample of judges ruling in business cases, whether the judges received any contributions or not. Thus, these estimations measure the impact of money across all judges. In contrast, the estimation sample for our regressions that use the percentage of total contributions from business sources is limited to judges who received some campaign contributions.[51] Thus, these estimations measure the impact of business money on elected judges who receive some campaign funding.

To determine whether the timing of a judge's reelection affects the relationship between business contributions and judicial voting, we interact our contribution variables with an indicator for whether the judge's reelection falls during a presidential election. Our sample of business cases includes votes in 2,439 different cases from 183 individual judges who do not face reelection during a presidential election. It includes votes in 1,961 different cases from 108 unique judges who do face reelection during a presidential election.

Our analyses separate the relationship between judges' votes and each included explanatory variable. Thus, to isolate the relationship between business contributions and judges' voting in business cases, it is important to control for as many other factors as possible to ensure that the results are not caused by something other than campaign finance. The

49. We follow the common practice of transforming each contribution measure into its natural logarithm because of the non-linearity observed in bivariate analysis.

50. 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. Nat'l Inst. on Money in Pol., *Mission & History*, FOLLOWTHEMONEY.ORG, https://www.followthemoney.org/about-us/mission-and-history [https://perma.cc/VPW5-ZPKA] (last visited Oct. 29, 2021).

51. The percentage calculation for a judge who received no contributions would be undefined because the denominator—total contributions—would be zero.

control variables we include fall into three categories: judge-level variables, state-level variables, and case-level variables. All of these may be related to how a judge votes in a given case. That is, a judge's vote may be partly determined by his or her own characteristics, such as 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 type of retention election. First, in our analyses of the total dollar contributions from business groups, our regression controls for the total dollars coming from non-business contributors in each judge's most recent election.[52] This variable provides a measure of the potential influence from interests and sectors opposed to (or unrelated to) business interests.

Next, we include each judge's party affiliation.[53] 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 ideology and voting on the one hand and campaign finance and voting on the other.

We also include the type of election that each judge will face for his or her retention—partisan, nonpartisan, or an unopposed retention election. Compared to unopposed retention elections, partisan and nonpartisan elections are more competitive and require the candidates to raise more campaign funding.[54] Thus, including the type of retention election as an explanatory variable will control for different judges' needs 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 the tort liability climate to isolate the influence of business contributions on pro-business votes from the

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52. Again, we follow the common practice of transforming each contribution measure into its natural logarithm because of the non-linearity observed in bivariate analysis.

53. Party affiliation was compiled from The American Bench, a directory with biographical information on over 20,000 judges. *The American Bench*, FORSTER-LONG, LLC, https://www.forster-long.com/americanbench [https://perma.cc/N32S-TRBM] (last visited Oct. 29, 2021). 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.

54. Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 27–28, 27 tbl.6 (2004).

underlying state law.[55] In states with existing law that favors business interests, we would expect justices 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.[56] Judges' voting may be influenced by the attitudes of the public and of other governmental officials in a state if they fear that displeasing these groups could result in negative consequences. 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. Data show that petitioners are more likely to win on appeal, so this variable controls for the likelihood of a judge casting a pro-business vote regardless of business campaign contributions.[57] Second, we 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.[58]

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55. 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. LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX: 2010 REPORT (2010), http://www.civiljusticenj.org/wp-content/uploads/2014/08/2010_Tort_Liability_Index.pdf [https://perma.cc/4MPU-5KQL].

56. We use the Berry measure of citizen and government ideology. William D. Berry, Evan J. Ringquist, Richard C. Fording & Russell L. Hanson, *Measuring Citizen and Government Ideology in the American States, 1960–93*, 42 AM. J. POL. SCI. 327, 327, 330–33 (1998).

57. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1470–72 (2009).

58. 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 justices' 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 justices would support the business position. In reality, if five of the other justices supported the business position, this variable would indicate a stronger-than-average case. In contrast, if only one other justice voted in favor of business instead of the predicted four, the variable would indicate that the case was very weak.

As is standard and appropriate in such analyses,[59] the models also include a set of state indicator variables, or fixed effects, that capture any other constant, systematic differences across states, such as systematic differences in the state law or attitudes toward business.[60]

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

Table 1. Descriptive Statistics

Variable	Mean	Standard Deviation
Pro-business Vote	0.49	0.49
Business Contributions	$84,790	$234,855
Total Contributions	$196,443	$397,244
Percentage Business Contributions	0.24	0.23
Retention Election Indicator	0.31	0.46
Nonpartisan Reelection Indicator	0.32	0.47
Partisan Reelection 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

C. Methodology

In all analyses, we use a logistic regression, or logit, which is designed for models where the dependent variable can take only two values; in our model, each judge's vote (the dependent variable) can only be for or against the business litigant. More specifically, we estimate a multilevel logit regression. Our multilevel model controls for dependence both across decisions in individual cases and across all decisions by a specific court. That is, judges' decisions in a particular case are unlikely to be independent of each other; there is likely a relationship between how different judges hearing the same case will decide because of the

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

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

underlying facts of the case. Similarly, the decisions of judges on the same court are unlikely to be independent of each other over time because the judges share not only the court, but also the state, the state's laws, and other environmental factors that may influence judges' decisions. Our analyses accommodate this dependence by estimating a multilevel logit with a random intercept across cases and across states.

Because the raw logit results are difficult to interpret in terms of the probability of a judge's vote in favor of business litigants, we present the results in odds ratios. 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 variables held constant.

We also report the p-value associated with each logit coefficient.[61] 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.

D. Empirical Results

We begin by estimating the baseline relationship between contributions from business groups and judges' voting in business-related cases. Table 2 reports the results from our multilevel logit regressions. The first column of results shows that the total amount of business contributions has a positive and statistically significant relationship with judges' voting in favor of business litigants. The magnitudes of the odds ratios indicate that a doubling of business contributions is associated with, on average, a 32% increase in the likelihood of a judge casting a pro-business vote. Similarly, the coefficient on non-business contributions shows that a doubling of these contributions is associated with an average 19% decrease (1–0.81) in the odds of casting a pro-business vote.

61. 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. GREENE, *supra* note 59, at 649.

The second column of results in Table 2 shows that business groups' share of total contributions is also positively and statistically significantly related to judges' voting for business litigants. The magnitude of the odds ratio for the percentage business contributions variable shows that a one-percentage-point increase in business groups' share of total contributions is associated with a 3% increase in a judge's probability of voting for the business litigant. Because this estimation is limited to elected judges who receive some amount of campaign funding, the results indicate that, even among elected judges who raise money, business money is associated with pro-business votes.

Table 2. Relationship Between Business Contributions and Pro-Business Votes[62]

	Vote in Favor of Business Litigant	Vote in Favor of Business Litigant
Business Contributions	1.32* (0.000)	
Non-business Contributions	0.81* (0.000)	
Percentage Business Contributions		1.030* (0.000)
Partisan Reelection Indicator	2.89 (0.134)	*baseline category*[63]
Nonpartisan Reelection Indicator	1.15 (0.849)	0.52* (0.021)
Retention Election Indicator	4.61 (0.200)	1.68 (0.416)
Democratic Judge	0.576* (0.000)	0.636* (0.012)
Republican Judge	1.31+ (0.061)	1.27 (0.172)
State Tort Climate	0.776 (0.822)	0.910 (0.774)
State Citizens Ideology	1.01 (0.847)	1.063* (0.001)
State Government Ideology	1.01 (0.870)	0.942* (0.012)
Business Petitioner Indicator	0.59* (0.000)	0.66* (0.000)
Case Strength	1.071* (0.000)	1.069* (0.000)
State Fixed Effects # of observations Chi-square	Yes 10,104 3283	Yes 5,654 1854

Next, we test whether the relationship between business contributions and a judge's voting for business litigants differs depending on whether

62. 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 a "+" indicates statistical significance at the .10 level.

63. Because our analysis of the percentage of business contributions is limited to judges who received some amount of campaign funding (i.e., elected judges), the analysis drops one category of elections to use as a baseline of comparison for the other election indicator variables.

the judge's reelection falls during a presidential election. As previously discussed, campaign spending may have a greater influence on judges facing reelection during a presidential election because these judges need to raise more funds to be competitive in a crowded political environment.[64] Alternatively, campaign funds may have less influence on judges facing reelection during a presidential election because these judges can rely on straight party voting in presidential election years, reducing their dependence on funders' support for victory. Moreover, with fewer and more partisan voters turning out in off-year elections, judges facing reelection during these years may be more dependent on funders' support to promote their candidacy.

To test the role of election timing in the relationship between campaign money and judicial decisions, we add to our model an interaction term between the measure of business contributions and an indicator variable for a reelection during a presidential election. An interaction term reveals how the relationship between business contributions and voting differs for judges facing reelection during a presidential election. Table 3 reports the results. The first column shows that money continues to have a positive relationship with votes, as indicated by the positive coefficient on total business contributions. However, the statistically significant negative coefficient on the interaction term indicates that this positive relationship decreases for judges facing a presidential election reelection. The magnitudes of the coefficients indicate that, while a doubling of business contributions is associated with a 32% increase in a judge's likelihood of casting a pro-business vote, this likelihood is seven percentage points less for judges facing reelection during a presidential election. That is, a doubling of business contributions for judges facing a presidential election reelection is associated with only a 25% (32–7) increase in pro-business decisions.

Similarly, the second column of results shows that, while an increasing percentage of contributions from business sources is associated with a greater likelihood of casting pro-business votes, this likelihood is less for judges who face a reelection during a presidential election. Specifically, the coefficients indicate that a one-percentage-point increase in business groups' share of total contributions is associated with a 3% increase in a judge's probability of voting for the business litigant, but for judges facing a presidential election reelection, this probability is one percentage point less. That is, for judges facing reelection during a presidential election, a one-percentage-point increase in business groups' share of total contributions is associated with only a 2% increase in pro-business votes.

64. *See supra* Part II.

Table 3. Election Timing's Impact on Relationship Between Contributions and Votes[65]

	Vote in Favor of Business Litigant	Vote in Favor of Business Litigant
Business Contributions	1.32* (0.000)	
Business Contributions * Presidential Election Indicator	0.93* (0.017)	
Non-business Contributions	0.82* (0.000)	
Percentage Business Contributions		1.030* (0.000)
Percentage Business Contributions * Presidential Election Indicator		0.99+ (0.090)
Partisan Reelection Indicator	2.09 (0.180)	*baseline category*[66]
Nonpartisan Reelection Indicator	0.859 (0.788)	0.50* (0.016)
Retention Election Indicator	4.58* (0.013)	1.74 (0.384)
Democratic Judge	0.586* (0.002)	0.638* (0.013)
Republican Judge	1.22 (0.210)	1.25 (0.195)
State Tort Climate	0.401* (0.002)	0.849 (0.621)
State Citizens Ideology	1.01 (0.457)	1.058* (0.002)
State Government Ideology	0.99 (0.496)	0.946* (0.020)
Business Petitioner Indicator	0.643* (0.000)	0.66* (0.000)
Case Strength	1.068*	1.069*

65. 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 a "+" indicates statistical significance at the .10 level.

65. Because our analysis of the percentage of business contributions is limited to only judges who received some amount of campaign funding (i.e., elected judges), the analysis drops one category of elections to use as a baseline of comparison for the other election indicator variables.

	(0.000)	(0.000)
State Fixed Effects	Yes	Yes
# of observations	7,186	5,654
Chi-square	2372	1851

Our results indicate that the timing of reelection does have an influence on the relationship between money and votes. Next, we determine whether the type of reelection is an important factor on the degree of this influence. Partisan, nonpartisan, and retention elections vary in important ways that could determine the degree of business influence on judges. For example, whereas partisan and nonpartisan elections are typically contested, judges run unopposed in retention elections.[67] Incumbent judges in partisan and nonpartisan elections have higher loss rates than incumbent judges in retention elections.[68] Additionally, judges facing partisan and nonpartisan elections raise substantial funds to finance their campaigns, while judges facing retention elections often raise very little or no money.[69] Other studies have shown that these differences in competitiveness and campaign fundraising across election types are associated with different judicial decisions. For example, compared to judges facing retention elections, judges facing partisan and nonpartisan elections are more likely to avoid unpopular voting on politically salient issues and are more likely to impose capital sentences.[70]

To test the influence of election type, we estimate regressions using the total dollar amount of business contributions for each election type. Table 4 reports the results. Limiting our sample of cases to individual election types significantly reduces the number of observations in each estimation, likely contributing to the loss of statistical significance. Nevertheless, the coefficients on the amount of business contributions remain positive regardless of election type, and the coefficients on the interaction variable remain negative regardless of election type. The interaction variable is statistically significant only for judges facing nonpartisan elections, but this is likely explained by a significantly larger

67. Bonneau, *supra* note 54; Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 804 (2004).

68. Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 177 (Matthew J. Streb ed., 2007); *cf.* William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 343 (1987).

69. Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS, *supra* note 68, at 59, 63.

70. *See, e.g.*, 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 a Case Study*, 49 J. POL. 1117 (1987).

sample size in this estimation. In general, these results are consistent with reelection timing exerting an influence on the relationship between business contributions and pro-business votes, regardless of election type.

Table 4. Election Type and Election Timing[71]

	Partisan Reelections: Vote in Favor of Business Litigant	Nonpartisan Reelections: Vote in Favor of Business Litigant	Retention Elections: Vote in Favor of Business Litigant
Business Contributions	1.17* (0.023)	1.42* (0.000)	1.14 (0.258)
Business Contributions * Presidential Election Indicator	0.93 (0.146)	0.879* (0.001)	0.938 (0.437)
Non-business Contributions	0.90+ (0.068)	0.790* (0.000)	0.784* (0.010)
Democratic Judge	0.390* (0.000)	0.589* (0.004)	0.628 (0.275)
Republican Judge	*baseline category*	1.22 (0.225)	*baseline category*
State Tort Climate	0.43+ (0.095)	0.197* (0.000)	0.253+ (0.089)
State Citizens Ideology	1.00 (0.950)	1.09* (0.021)	1.16+ (0.088)
State Government Ideology	0.99 (0.831)	0.957 (0.103)	*dropped*
Business Petitioner Indicator	0.706+ (0.058)	0.593* (0.000)	0.954 (0.889)
Case Strength	1.065* (0.000)	1.069* (0.000)	1.075* (0.000)
State Fixed Effects	Yes	Yes	Yes
# of observations	1,974	4,431	707
Chi-square	675	1414	215

71. 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 a "+" indicates statistical significance at the .10 level.

CONCLUSION

In our forthcoming book, *Free to Judge?*, we conclude that reelection pressures explain why elected judges favor their past campaign finance contributors in their judicial decision-making. Our empirical work consistently finds a relationship between campaign money and judicial decisions among elected state supreme court justices. However, we also consistently find that this relationship fades for one group: lame-duck judges in their mandatory final term. The decisions of these judges appear to be little influenced by money.

These results powerfully suggest, as our book demonstrates, that the biased decision-making of elected judges can be largely explained by the need for judges to shore up campaign finance support for their reelection runs. In the book, we propose focusing on limitation of reelection pressures as the key to judicial election reform. We suggest electing judges to a single long term without the possibility of reelection or reappointment.

In this Essay, we propose that another reform, shifting judicial elections from off years to presidential election years, also would likely reduce the association between campaign finance and judicial decisions. Using a dataset of business cases from all fifty states over a three-year period, our analysis reveals that the timing of judges' reelections influences the relationship between campaign funding and judicial decisions. We find empirically that, for judges facing reelection during presidential election years, the relationship between business funding and pro-business voting is weaker. Although our results suggest that this reform would not completely eliminate the biasing influences of campaign finance, a shift in the timing of judicial elections would be a relatively simple reform for those states interested in limiting the influence of money on their elected judges.