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Abstract. *Bush v. Gore* decided a presidential election and is the most dramatic election case in our lifetime, but cases like it are decided every year at the state level. Ordinary state courts regularly decide questions of election rules and administration that effectively determine electoral outcomes hanging immediately in the balance. Election cases like *Bush v. Gore* embody a fundamental worry with judicial intervention into the political process: outcome-driven, partisan judicial decisionmaking. The Article investigates whether judges decide cases, particularly politically sensitive ones, based on their partisan loyalties more than the legal merits of the cases. It presents a novel method to isolate the raw partisan motivations of judges and identifies their partisan loyalty, as opposed to their ideology, by studying a special category of cases: candidate-litigated election disputes. The Article finds that Republican judges display greater partisan loyalty than Democratic judges in election cases where ideology is not a significant consideration. This result is not a function of selection methods, with both elected and appointed judges behaving similarly, but is partially a function of party campaign finance for Republican elected judges, with party loyalty increasing with party money received. However, the effect of party money disappears for more visible election cases and for retiring judges in their final term. What is more, partisan loyalty diminishes when state supreme court elections feature more campaign attack advertising. These findings give reason to rethink judicial resolution of election disputes that require impartial, nonpartisan settlement and offer new insight into judicial partisanship as a more general matter.

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Introduction

Bush v. Gore[1] decided the 2000 presidential election and is still the most dramatic election case of our lifetimes,[2] but cases like it are decided every year at the state level.[3] American law leaves it to ordinary common-law courts to regularly decide questions of election rules and administration that effectively decide electoral outcomes hanging immediately in the balance. These state and local law questions typically pertain to the counting of ballots or candidate eligibility—mundane stuff to be sure—but their political importance far outstrips their legal salience when winning the case means winning an election as well. Election cases such as *Bush v. Gore* embody a fundamental worry with judicial determination of these cases, and therefore these elections: outcome-driven, partisan judicial decisionmaking.

Do judges decide cases, particularly politically sensitive ones, based on their partisan loyalties more than the legal merits of the cases? As election cases become increasingly common in a state court system where nine out of ten judges are elected to office,[4] this question is more important than ever. Of course, following *Bush v. Gore* and related litigation, an entire scholarly literature of criticism sprang up against the Florida Supreme Court and U.S. Supreme Court for deciding state election recount questions to benefit their party-favored candidates in the presidential election.[5] Margaret Jane Radin argued that "five Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices' preference for the Republican Party."[6] Richard Epstein, for his part, responded that "it makes no more sense to condemn the United States Supreme Court for

1. 531 U.S. 98 (2000) (per curiam).

2. *See, e.g.*, Cass R. Sunstein, *Introduction* to THE VOTE: BUSH, GORE, AND THE SUPREME COURT 1, 1 (Cass R. Sunstein & Richard A. Epstein eds., 2001) ("In the fullness of time, the decision is likely to rank among the most controversial decisions in the entire history of the Supreme Court.").

3. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 (2005) (charting the increase in election-related litigation following *Bush v. Gore*).

4. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1105 (2007) (noting that eighty-nine percent of state judges "face the voters in some type of election").

5. *See, e.g.*, RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); THE VOTE, *supra* note 2; Symposium, *The Law of Presidential Elections: Issues in the Wake of Florida 2000*, 29 FLA. ST. U. L. REV. 325 (2001).

6. Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore*?*, *in BUSH V. GORE*: THE QUESTION OF LEGITIMACY 110, 114 (Bruce Ackerman ed., 2002).

its political predilections than it does to condemn the Florida Supreme Court for its."[7]

Determining whether judicial decisionmaking is driven by partisanship, however, presents a vexing methodological problem. It is nearly impossible to disentangle partisanship from simple ideology in most cases of judicial decisionmaking. Given that parties organize along ideological lines, the partisan affiliation of a judge on one hand, and his or her judicial ideology on the other hand, are closely linked and difficult to isolate from one another. Democratic judges tend to decide cases differently than Republican judges.[8] With the different ideological philosophies of the major parties, the partisan split between judges may simply reflect that legitimate ideological disagreement, rather than disparate partisan loyalties, even in politically salient cases.

Take, for instance, Adam Cox and Thomas Miles's study of federal appellate decisions on section 2 liability under the Voting Rights Act.[9] Under section 2, federal judges decide whether a particular jurisdiction has engaged in discriminatory vote dilution on the basis of race.[10] A finding of vote dilution requires the dismantling of the dilutive voting qualification, standard, practice, or procedure in a way that typically increases racial minority political opportunity, which in turn is typically thought to benefit Democratic candidates.[11] With this background, Cox and Miles find the likelihood that a federal judge will vote for the plaintiff in a section 2 case is highly correlated with the partisanship of the President who nominated the judge—Democratic

7. Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, *in* THE VOTE, *supra* note 2, at 13, 36. The Florida Supreme Court ordered a statewide recount of undervotes that seemed likely to benefit trailing Democratic candidate Al Gore, *see* Gore v. Harris, 772 So. 2d 1243, 1247 (Fla. 2000) (per curiam), and was criticized by the U.S. Supreme Court and conservative commentators for impermissibly imposing its own significant departure from the statutory scheme of Florida election law, *see infra* Part I.

8. *See* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 26 fig.2-2 (2006) (finding a partisan split between Republican and Democratic judges across a swath of issues).

9. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

10. *See* Thornburg v. Gingles, 478 U.S. 30, 46-48 (1986).

11. *See* Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CALIF. L. REV. 1589, 1635 (2004) ("The Voting Rights Act was created to ensure that minority voters could fully participate in the political system. Those voters overwhelmingly support Democratic candidates."); Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader's 2004 Ballot Access Litigation*, 7 ELECTION L.J. 301, 307 (2008) ("When a judge rules in favor of a plaintiff in a § 2 vote dilution claim, this usually benefits the electoral interests of the Democratic Party because minority voters often support Democratic candidates.").

judges are significantly more likely than Republican judges to vote for the plaintiff.[12]

However, Cox and Miles cannot determine why Democratic judges are more sympathetic to section 2 plaintiffs. They admit that one possibility is simply ideological—that Democrats are more liberal on voting rights issues than Republicans. But Cox and Miles also speculate that "Democratic and Republican appointees may be inclined to cast votes that favor the electoral prospects of their own political party."[13] This notion of bare partisan loyalty, independent from ideology, cannot be isolated in Cox and Miles's analysis. Indeed, even in reference to the correlation between partisan affiliation and judicial decisions on section 2, Cox and Miles toggle throughout their discussion among the terms judicial ideology,[14] political ideology,[15] partisanship,[16] and party loyalty,[17] all of which arguably have different substantive meanings. In most categories of cases, decisions that politically benefit a judge's party often can alternately be explained as a matter of ideology instead of raw partisanship.

Our study offers a solution for this methodological dilemma and isolates the raw partisan motivations of judges. We identify the judges' partisan loyalty, as opposed their ideology, by studying their decisions in a special category of cases that offer a clean test of partisan loyalty—candidate-litigated election disputes.[18] Although other types of election law cases come with a clear ideological valence, election cases like these are different. Our election cases are relatively rare and present unusually arcane questions of law. In our data, they arise from legal disputes brought typically by or against a candidate in a particular election, many involving either the counting of ballots or the technical eligibility of a candidate in the particular race. Common issues include whether a candidate could be legally regarded as a resident of a particular jurisdiction as required for eligibility for office,[19] whether certain ballots that were not completely filled out could nonetheless be counted as

12. Cox & Miles, *supra* note 9, at 3.

13. *Id.* at 22.

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 19.

17. *Id.* at 51.

18. We distinguish between election cases that deal with a specific dispute related to a particular election, and election law cases, which decide issues of election law that apply more generally to all elections. In this sense, election cases are subspecies of election law cases to the degree that the decision has precedential or other binding effect on later elections, but they are so narrowly focused that they often may not.

19. *See, e.g.*, Harris v. McKenzie, 703 So. 2d 309, 310 (Ala. 1997); Geer v. Kadera, 671 N.E.2d 692, 695-96 (Ill. 1996); Burkhart v. Sine, 489 S.E.2d 485, 491 (W. Va. 1997).

valid votes,[20] whether a candidate was eligible to appear on the ballot notwithstanding certain technical defects in the application of candidacy,[21] and the correct process for appointing a replacement to a vacated office.[22]

These election cases are perfect for our purposes because as far as we can tell, there is no consistent ideological position on the merits of these questions like there is for most other types of cases. These are all plausibly interesting, important questions to which judges may apply their usual philosophical predispositions and judicial ideology. But there is no ideologically conservative or liberal position on how, for example, to construe a state law question of what constitutes a resident for purposes of candidate eligibility, at least none separate from immediate partisan advantage in the case at bar. No resolution of these cases, regardless of ideological content, is even likely to advantage one major party above the other party over the long run.[23] A decision to include a candidate as an eligible resident for this election may help a judge's party this election, but it may just as easily hurt the judge's party the next time the question comes up. However, the short-run partisan payoff in the current election is typically quite clear. One identifiable side will gain an advantage in these cases depending on which way the case is decided.[24] As a result, the most predictable motivation for judges in these cases is the short-term partisan gain of deciding the election in the case itself. If Democratic judges consistently favor Democratic candidates in these types of cases, it is likely that Democratic judges who consistently favor Democratic candidates in election cases (and just so for Republican judges with Republican candidates) are doing so because they are influenced, consciously or not, by a desire to help their party rather than anything else.

Our set of election cases thus combine clear partisan stakes by which to measure judges' partisan loyalty, but they do not carry the usual ideological valence that complicates attribution of a party-favored vote to partisanship as opposed to ideology. This set of cases therefore provides leverage on the long-

20. *See, e.g.*, Roe v. Mobile Cty. Appointment Bd., 676 So. 2d 1206, 1255-57 (Ala. 1995) (per curiam), *overruled on other grounds by* Williamson v. Indianapolis Life Ins. Co., 741 So. 2d 1057 (Fla. 1999); Pelagatti v. Bd. of Supervisors of Elections, 682 A.2d 237, 238-40 (Md. 1995); Delahunt v. Johnston, 671 N.E.2d 1241, 1243 (Mass. 1996).

21. *See, e.g.*, Curry v. Hosley, 657 N.E.2d 1311, 1311 (N.Y. 1995) (per curiam); Pierce v. Breen, 657 N.E.2d 1304, 1305 (N.Y. 1995) (per curiam); Jones v. Johnston Cty. Election Bd., 933 P.2d 872, 872 (Okla. 1996).

22. *See, e.g.*, Nesbitt v. Apple, 891 P.2d 1235, 1241-42 (Okla. 1995); State *ex rel.* Herman v. Klopfleisch, 651 N.E.2d 995, 998 (Ohio 1995) (per curiam).

23. The legal questions in our election cases are thus not only nonideological, but represent what Chad Flanders calls "veil of ignorance rules" as to partisan advantage going forward beyond the present dispute in the cases. Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1378 (2012).

24. *See* Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 306 (2007) (explaining that "election contests often put courts in the position of 'kingmaker'").

studied question of law versus politics in judicial decisionmaking. The entire field of judicial behavior sprouted from the basic question whether judges are guided by their political predispositions in their judicial decisionmaking, and if so, to what degree. We can study this question in the context of election disputes, where the answer is perhaps most salient and in itself intensely important. We collected data on all state supreme court election cases between 2005 and 2015, by the methodology described here, for a total of 407 cases involving 496 individual judges. We report our analysis from this new, comprehensive dataset here for the first time.

First, our analysis of these state supreme court cases reveals that Republican judges are more likely to favor their own party in election cases by a statistically significant margin than are Democratic judges, controlling for other things. We found a similar partisan imbalance in our original data from 1995 to 1998 and replicated the finding in our new dataset.[25] The margin we discovered is staggering: Republican judges decided election cases in their party-favored direction at a thirty-eight percent higher rate than Democratic judges did. Notably, partisan loyalty is not dependent on selection method. In other words, Republican judges favor their party in election cases whether they are selected to the bench by election or political appointment. This result underscores the fact that all selection methods encourage judges to curry favor with whomever controls their retention, whether it is the electorate or partisan officeholders. Political retention methods implicate partisan politics, and elections fare no worse here in terms of partisan pressure than appointment processes.

Second, partisan favoritism by elected Republicans increases as a function of campaign contributions received from the Republican Party and from party-allied interest groups. The Republican Party successfully manages its campaign finance contributions, both directly from party committees and indirectly through its interest group coalition, to enhance judicial partisan loyalty in election cases. This is consistent with our previous work finding greater Republican effectiveness in influencing judicial decisionmaking through campaign finance across the spectrum of issues and finding Democrats less successful.[26] Of course, we assume the Democratic Party too would like to achieve similar partisan loyalty through campaign finance by influencing candidate recruitment up front or by coaxing sitting judges toward greater

25. *See infra* Part III.A (describing these results in more detail).

26. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1292-96 (2013) [hereinafter Kang & Shepherd, *Partisan Foundations*]; 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, 117-19 (2011) [hereinafter Kang & Shepherd, *Partisan Price*].

loyalty with the enticement of future support.[27] However, the Democratic Party simply has not attained the same results through these routes as the Republicans.

Third, we found that partisan favoritism is discouraged by the likelihood of public attention. Partisan loyalty diminished when state supreme court elections recently have featured more campaign attack advertising on television. One can reasonably assume that a state with more attack advertising is likely to have had more intense campaigns and may be more likely to have more intense campaigning in the next election as well. This reduction in partisan favoritism seems at least in part a response to the potential for greater monitoring in more intense campaign environments where detection of judicial bias is more likely and perhaps more costly as a political matter. Along the same lines, we find that any effect of party campaign contributions in encouraging partisan loyalty becomes statistically insignificant for more visible federal and state elections compared to less visible county and local elections. Even if judges are prone to partisanship in election cases, they are less so when they may be exposed as such by the news media or competitive campaigning.

In sum, we find that Republican judges display greater partisan loyalty than Democratic judges in election cases where ideology is not a significant consideration. This result is not a function of selection methods, with both elected and appointed judges behaving similarly. The result is partially a function of party campaign finance for elected Republican judges, with party loyalty increasing with party money received. This effect of money disappeared for more prominent election cases and for retiring judges in their final term. These findings give reason to rethink judicial resolution of election disputes that require impartial, nonpartisan settlement and offer new insight into judicial partisanship as a more general matter.

Part I of the Article introduces the basic dilemma surrounding judicial determination of election law by judges chosen by pervasively political, usually partisan, processes. This problem reached its greatest notoriety in *Bush v. Gore*, growing the scholarly field of election law in the process, but it finds expression in important election disputes every year and certainly will again in this presidential election year. Part II introduces our unique methodological design in studying every election case decided by state supreme courts between 2005 and 2015 and reports our empirical findings on judicial partisanship in election cases. Part II demonstrates how our design provides unusual leverage on identification of judges' partisan loyalty by focusing on cases where specific elections hang in the balance, but the ideological stakes are low. Finally, Part III

27. *Cf.* Kang & Shepherd, *Partisan Foundations*, *supra* note 26, at 1245-46 (describing these separate selection and biasing effects of party campaign finance); Kang & Shepherd, *Partisan Price*, *supra* note 26, at 72, 102-06 (describing separate effects for campaign contributions from business interests).

develops our findings and their importance for election law and judicial behavior.

I. *Bush v. Gore* and Judicial Resolution of Election Law

Bush v. Gore's[28] central importance to the field of election law is both obvious and ironic. Its importance is obvious in the sense that the decision determined the outcome of a presidential election and is the most famous election law case ever decided. The decision not only spawned its own scholarly literature, but it also helped birth the legal academic field of election law with its enduring questions of jurisprudence and democracy that inspire this very symposium. But *Bush v. Gore*'s importance to election law is at the same time ironic. By design, the decision had virtually no precedential value and has been cited just once in more than fifteen years by the Court itself, even then only in a dissenting footnote.[29] In spite of its historical magnitude, *Bush v. Gore* is nearly irrelevant as a doctrinal matter.

The road to *Bush v. Gore* began with the disputed results of the 2000 Florida presidential election. Election night ended without a clear victor, and even when vote tabulation finished the following day, Republican nominee George W. Bush led Democrat Al Gore by only 1784 votes, less than 0.5% of the total state vote. Following an automatic mechanical recount under state law, Bush's lead shrunk to just 327 votes.[30] Gore then requested hand recounts in four counties with substantial Democratic majorities, thus triggering the protest phase of the postelection process. After a Florida trial court denied Bush's request for an injunction, these hand recounts were ongoing but remained incomplete one week after the election on November 14, the usual deadline for county returns. Exercising what she saw as her discretion under state law, Florida Secretary of State Katherine Harris, herself a Republican and state co-chairwoman of Bush's campaign, refused to extend the deadline, excluded the partial results from the hand recounts, and sought to certify Bush as election winner.[31]

From there, the most famous election-related litigation in American history began to unfold. Gore immediately challenged Harris's certification in *Palm Beach County Canvassing Board v. Harris*.[32] Gore lost before the trial

28. 531 U.S. 98 (2000) (per curiam).

29. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2268 n.2 (2013) (Thomas, J., dissenting).

30. *See* WASH. POST, DEADLOCK: THE INSIDE STORY OF AMERICA'S CLOSEST ELECTION, at viii (2001).

31. *See* Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 334 (2001).

32. 772 So. 2d 1220 (Fla. 2000) (per curiam), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98.

court,[33] but the Florida Supreme Court reversed and held that Harris erred in refusing the partial recount results and denying sufficient time to complete the recounts.[34] Harris had ruled that there was not the necessary "error in the vote tabulation" for a hand recount because she read the statutory language narrowly to require a failure of the vote tabulating machinery, which had not occurred.[35] However, the Florida Supreme Court (composed almost entirely of Democratic appointees) interpreted the Florida election code more broadly, in light of Florida's commitment to the right to vote, to authorize a recount because the partial recount revealed discrepancies from the original machine count of votes.[36] The court ordered continuation of the hand recounts and construed ambiguous statutory language to require the Secretary of State to accept the resulting vote counts received by a postponed deadline of November 26.[37] Even so, Miami-Dade and Palm Beach Counties failed to finish their hand recounts by the court's later deadline. The next day, Harris certified Bush as the election winner by a margin of 537 votes without any recounted votes from the two counties.[38] Gore immediately sued in *Gore v. Harris* to contest the results in Miami-Dade and Palm Beach Counties, thus beginning the election contest phase of the postelection process under Florida law.[39]

At this point, the U.S. Supreme Court decided to intervene. The Court first granted Bush's petition for certiorari and ultimately vacated and remanded the Florida Supreme Court's decision in *Bush v. Palm Beach County Canvassing Board* (*Bush I*).[40] The grant of certiorari was unexpected, given the absence of an obvious federal question in the case.[41] Both the petition and grant of certiorari appeared to misinterpret 3 U.S.C. § 5, which guaranteed that state electors would not be challenged by Congress if appointed by December 12, as presenting just such a federal question and potential bar to the Florida Supreme Court's decision.[42] Only later did the Court acknowledge the provision as merely a safe harbor for a state's appointment of electors, rather than any

33. McDermott v. Harris, 2000 WL 1714590 (Fla. Cir. Ct. Nov. 17, 2000); McDermott v. Harris, 2000 WL 1693713 (Fla. Cir. Ct. Nov. 14, 2000).

34. *Palm Beach Cty. Canvassing Bd.*, 772 So. 2d at 1239-40.

35. *See id.* at 1229.

36. *Id.*

37. *Id.* at 1240.

38. *See* Briffault, *supra* note 31, at 336.

39. *See* Gore v. Harris, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4, 2000).

40. 531 U.S. 70, 78 (2000) (per curiam).

41. *See, e.g.*, David A. Strauss, Bush v. Gore: *What Were They Thinking?*, *in* THE VOTE, *supra* note 2, at 184, 193 ("The Court's decision to grant certiorari was very surprising to most observers . . . ."); David Margolick, *The Path to Florida*, VANITY FAIR (Oct. 2004), http://www.vanityfair.com/news/2004/10/florida-election-2000 ("[I]t was inconceivable to [Gore's lawyers] that the Court would intercede . . . .").

42. *See* Strauss, *supra* note 41, at 191-94.

federal prohibition.[43] As a consequence, the Court's ensuing opinion in *Bush I* on December 4 simply remanded back to the Florida Supreme Court to clarify the extent it "saw the Florida Constitution as circumscribing the legislature's authority."[44] Specifically, the Court questioned "the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5" given that the safe harbor "would counsel against any construction of the Election Code that Congress might deem to be a change in the law."[45] In this first decision, the U.S. Supreme Court seemed to caution the Florida courts without the strong medicine of reversing a state supreme court's interpretation of its own state law, at least not yet.

But the U.S. Supreme Court soon felt it necessary to intervene again, this time in the second case, *Gore v. Harris*. On the same day that the Court issued its opinion in *Bush I*, a Florida trial court dismissed Gore's contest lawsuit in *Gore v. Harris*.[46] Then, four days later on December 8, the Florida Supreme Court hurriedly reversed that trial court dismissal in what appeared a significant, potentially decisive victory for Gore.[47] The Florida Supreme Court ruled that the trial court erred in requiring Gore to establish by a "preponderance of a reasonable probability" that the election winner was incorrectly certified to obtain his requested recount.[48] Instead, the court cited the applicable 1999 Florida statute requiring a showing only that "rejection of a number of legal votes [was] sufficient to change or *place in doubt* the result of the election."[49] Gore already met this standard because the Miami-Dade partial recount had uncovered roughly 9000 undervotes excluded from certified totals that separated Bush and Gore by just 537 votes.[50] The court therefore ordered the inclusion of complete hand recounts in Miami-Dade and Palm Beach Counties, once finished, as Gore requested. Going further, the court also ordered an immediate *statewide* recount of all undervotes. The court applied what it construed as broad authority under the state election code's mandate "to provide any relief appropriate under such circumstances" and ordered full recounts not only in Miami-Dade and Palm Beach Counties, but undervote recounts across the entire state even at this late date.[51]

43. *See Bush I*, 531 U.S. at 77.

44. *Id.* at 78.

45. *Id.*

46. Gore v. Harris, 2000 WL 1770257, at *1 (Fla. Cir. Ct. Dec. 4, 2000), *rev'd*, 772 So.2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore (*Bush II*), 531 U.S. 98 (2000); *accord* POSNER, *supra* note 5, at xiii.

47. *Gore*, 772 So.2d 1243.

48. *Id.* at 1255-56.

49. *Id.* (quoting FLA. STAT. § 102.168(c) (2000)).

50. *Id.* at 1256.

51. *Id.* at 1261 (emphasis omitted) (quoting FLA. STAT. § 102.168(8)).

For a majority of U.S. Supreme Court Justices, this second decision by the Florida Supreme Court was simply a bridge too far. As later described by one of her clerks, Justice Sandra Day O'Connor "thought the Florida court was trying to steal the election and that they had to stop it."[52] The U.S. Supreme Court immediately halted all the recounts, issuing a stay of the Florida Supreme Court decision in less than twenty-four hours.[53] The Court also treated Bush's stay petition as an implied petition for certiorari, which the Court then granted with oral argument the next business day, on December 11.[54] The Court's splintered decision in *Bush v. Gore*, issued by the following evening, reversed the Florida Supreme Court and terminated the recounts, effectively guaranteeing Bush's presidential victory.[55]

For our purposes, the doctrinal details are less critical than the overarching narrative, but in a widely criticized opinion, *Bush v. Gore* ruled that the ordered recounts violated equal protection.[56] The majority opinion reasoned the Florida Supreme Court's mandate that recounted votes be judged for the "intent of the voter" was insufficiently specific such that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[57] As Justices Stevens and Breyer pointed out in dissent, ballots already were counted very differently from county to county, by virtue of the very different balloting systems used from county to county.[58] However, the majority determined that the Florida recounts failed minimal constitutional standards at least as necessary for "the special instance of a statewide recount under the authority of a single state judicial officer."[59] The majority notably disclaimed application of its equal protection concerns to "election processes generally."[60] A majority of Justices further held that it was too late to continue the recount

52. Margolick, *supra* note 41 (quoting a former clerk of Justice O'Connor's). Justice O'Connor has updated her view of *Bush v. Gore* slightly since retirement. She explained:

> Obviously the court did reach a decision and thought it had to reach a decision . . . . It turned out the election authorities in Florida hadn't done a real good job there and kind of messed it up. And probably the Supreme Court added to the problem at the end of the day.

Dahleen Glanton, *O'Connor Questions Court's Decision to Take Bush v. Gore*, CHI. TRIB. (Apr. 27, 2013), http://articles.chicagotribune.com/2013-04-27/news/ct-met-sandra-day-oconnor-edit-board-20130427_1_o-connor-bush-v-high-court (quoting Justice O'Connor).

53. Bush v. Gore, 531 U.S. 1046, 1046 (2000) (mem.).

54. *Id.*

55. 531 U.S. 98, 110-11 (2000) (per curiam).

56. *Id.* at 103.

57. *Id.* at 105-06.

58. *Id.* at 125-26 (Stevens, J., dissenting); *id.* at 147 (Breyer, J., dissenting).

59. *Id.* at 109 (majority opinion).

60. *Id.*

with amended procedures that satisfy equal protection. This five-Justice majority ruled that the Florida legislature intended the conclusive resolution of the presidential election by the safe harbor under 3 U.S.C. § 5 on December 12, which had already arrived.[61] To continue the recount beyond this date, as Justices Breyer and Souter urged in dissent, would be "in violation of the Florida Election Code," according to these five Justices.[62]

The litigation surrounding the 2000 Florida presidential election is most significant here as a salient model of election litigation's defining characteristics. First, the litigation focused on mundane, nonideological questions of state election code and local election administration. The legal issue before the Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris* was whether an "error in the vote tabulation" necessary for a hand recount under the Florida election code meant only a failure of vote tabulating machinery, or whether it could encompass other mistakes in vote tabulation causing a discrepancy from a sample manual count.[63] In *Gore v. Harris*, the basis for the Florida Supreme Court's reversal was that the trial court incorrectly required Gore to show by a "preponderance of a reasonable probability" that the claimed irregularities cost him the election result.[64] The court clarified that Gore instead needed to show only that the election result had been "placed in doubt" by the claimed irregularities to qualify for a hand recount under the state code.[65] These legal questions in the abstract did not carry any meaningful ideological valence. To the degree that they carried any ideological valence, it did not predictably align with partisan advantage one way or the other. Neither major party therefore should have foreseen a recurring stake in any precedent-setting resolution of these questions. A pro-recount ruling under Florida law for Gore might have helped Democrats in the 2000 election, but might well have backfired for the future and helped losing Republican candidates over the long term. There was no particular way to know how the resolution of these legal questions would help or hurt either major party beyond this election. This legal unimportance arguably freed the judges from the usual ideological precommitments in deciding how to handle them.

Second, the ideological banality of these election questions, coupled with uncertainty about their political consequences over the longer term, put special salience on their short-term political consequences. Indeed, election litigation very often decides the outcome of an election, so the short-term

61. *Id.* at 110.

62. *Id.* at 111.

63. 772 So. 2d 1220, 1228-29 (Fla. 2000).

64. 772 So. 2d 1243, 1255 (Fla. 2000).

65. *Id.*

political consequences are not only quite salient, but also quite clear.[66] During the 2000 postelection process, it was obvious throughout whether any particular legal judgment would help or hurt each party candidate's chance of winning the presidency for the next four years. And the basic indeterminacy of these election questions cleared space for judges, as well as other political actors in the 2000 postelection process, to exercise any discretion with their party's short-term interest of winning the immediate election foremost in mind. In *Bush v. Gore*, the U.S. Supreme Court seemed intent on ensuring that the *only* effect of the decision would be deciding the election at bar. The Court deliberately limited its precedential effect to the special circumstances of the case, a proverbial "one-day-only ticket."[67] In *Bush v. Gore*, and election cases like it, the short-term effect on the election outcome predominated over ideological considerations.

Third, the partisanship of the many judges and political actors in the 2000 postelection process uncannily predicted their decisionmaking for and against Bush and Gore. No one was surprised when Secretary of State Katherine Harris refused to accept hand recount results and certified Bush as the winner. Harris was a partisan statewide-elected official who co-chaired Bush's Florida campaign and later won office as a U.S. congresswoman.[68] It was the decisions of the U.S. Supreme Court that elicited the greatest outrage, and in particular the Court's unlikely equal protection ruling that won a majority in *Bush v. Gore* and ended the Florida recount. The Court's unusual willingness to intervene twice into the distinctly state-level matter of election administration and then overrule the state supreme court on its application of largely state law was surprising and even suspicious given the momentous political stakes.[69] Jed Rubenfeld contended that *Bush v. Gore* was worse than *Plessy v. Ferguson* because at least *Plessy* insisted on constitutional principles genuinely held, while "*Bush v. Gore* had nothing to do with such principles. It had to do with one thing: who won the election."[70] Jeffrey Rosen likewise argued that *Bush v. Gore* made it impossible to believe the rule of law meant anything "larger than

66. *See, e.g.*, POSNER, *supra* note 5, at 160 ("Once the outcome of a close election is known, the choice of a method of recounting likely to change the outcome is all too easy.").

67. *See* Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 GREEN BAG 2d 155, 163 & n.33 (2013) (describing *Bush v. Gore* as "the modern opinion most closely associated with that trope" and listing other scholars using variations on the same label).

68. *Harris, Katherine*, U.S. HOUSE REPRESENTATIVES: HISTORY, ART & ARCHIVES, http://history.house.gov/People/Detail/15566 (last visited June 6, 2016).

69. *See, e.g.*, Howard Gillman, *Judicial Independence Through the Lens of* Bush v. Gore*: Four Lessons from Political Science*, 64 OHIO ST. L.J. 249, 259 (2003) ("No precedent existed for Supreme Court involvement in a dispute over a state's presidential electors.").

70. Jed Rubenfeld, *Not as Bad as* Plessy. *Worse., in BUSH V. GORE*, *supra* note 6, at 20, 35.

the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor."[71]

For their part, the Court's defenders grounded their arguments in an even dimmer view of the Florida Supreme Court's decisions. Like Justice O'Connor, they suspected the Florida court of trying to steal the presidential election through dubious interpretations of state election law and justified the U.S. Supreme Court's actions as a necessary, if extraordinary, response.[72] Michael McConnell explains that the Court was in the awkward position of "either allow[ing] a state court to decide the national presidential election through what appeared to be one-sided interpretations of the law, or render[ing] a decision that would call its own position, above politics, into question."[73] Richard Posner agrees that *Bush v. Gore* is therefore defensible as rough justice to counteract the Florida Supreme Court's grievous errors throughout the process, "deforming Florida's election law" in Gore's favor.[74] For this reason, Richard Epstein contends, *Bush v. Gore* was greeted with public relief, notwithstanding academic denunciation, because the "mistakes of the Florida Supreme Court were large enough to constitute a gross deviation from the Florida statutory scheme."[75] As one scholar skeptically summarized, "the best that can be said is that the Court trumped the supposed lawlessness of the Florida Supreme Court with lawlessness of its own."[76]

Indeed, while academic commentators alleged judicial partisan bias in *Bush v. Gore*, partisanship quite accurately predicted the academics' own normative assessments of the decisions as well. Left-leaning law professors aggressively attacked the reasoning of *Bush v. Gore*, while right-leaning law professors were the few legal academics to defend the decision.[77] Partisanship seems more likely to color one's perspective on election issues when they bring with them virtually no ideological valence and promise very little recurring salience beyond a particular election. Given the weaknesses of all the judicial decisions through the process, "[l]iberals find it easier to attack the U.S. Supreme Court for *Bush v. Gore* than to defend the Florida supreme court, and conservatives find it easier to attack the Florida supreme court than to defend the U.S.

71. Jeffrey Rosen, *Disgrace*, NEW REPUBLIC (Dec. 24, 2000), https://newrepublic.com/article /70674/disgrace.

72. *See* Evan Tsen Lee, *The Politics of* Bush v. Gore, 3 J. APP. PRAC. & PROCESS 461, 470 (2001).

73. Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v. Gore, *in* THE VOTE, *supra* note 2, at 98, 101.

74. Richard A. Posner, Bush v. Gore*: Prolegomenon to an Assessment*, *in* THE VOTE, *supra* note 2, at 165, 183.

75. Epstein, *supra* note 7, at 37.

76. Strauss, *supra* note 41, at 204.

77. *See* Erwin Chemerinsky, *How Should We Think About* Bush v. Gore*?*, 34 LOY. U. CHI. L.J. 1, 5-6 (2002) (observing this division).

Supreme Court."[78] The partisan divide over *Bush v. Gore* reinforces findings that decisionmakers, and judges prominent among them, are predisposed toward reasoning that reaches their politically preferable outcomes when the stakes are as high as they are in election cases.[79]

Election cases like *Bush v. Gore* therefore foreground any worries about judicial partisan bias. Within political science, the attitudinalist school long claimed that law has little to no influence on the Supreme Court, which decides cases almost entirely based on the policy preferences of its Justices.[80] Writing seven years before *Bush v. Gore*, leading attitudinalists Jeffrey Segal and Harold Spaeth predicted "if a case on the outcome of a presidential election should reach the Supreme Court, . . . the Court's decision might well turn on the personal preferences of the justices."[81] Segal and Spaeth later gloated that "[w]hile *Bush v. Gore* may appear to be the most egregious example of judicial policy making . . . history is replete with similar examples."[82] In this direction, political science has comprehensively documented a consistent partisan divide between Democratic and Republican judges at virtually every level of the American judiciary. Cass Sunstein and his coauthors, for instance, found that Democratic appointees to the federal appellate courts took the liberal position in twelve percent more cases than Republican appointees, with significantly larger differences in ideologically salient cases like gay rights and affirmative action.[83] In addition, Sunstein and his coauthors discovered that federal judges voted in even more predictably partisan fashion when assigned to a judicial panel entirely of their own party.[84] Our own work on state supreme courts revealed a similar partisan divide that increased further with the major parties'

78. POSNER, *supra* note 5, at 180.

79. *See, e.g.*, Kyle C. Kopko et al., *In the Eye of the Beholder?: Motivated Reasoning in Disputed Elections*, 33 POL. BEHAV. 271, 273 (2011); Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 273-84 (2009); *see also* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767-68 (2008) (finding, for example, that Republican judges tend to uphold conservative policies and Democratic judges tend to uphold liberal ones).

80. *See, e.g.*, Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 J. POL. 273, 273 (2010) ("Now, a common view in political science, that of Spaeth and Segal (1999) and Segal and Spaeth (2002), is even more extreme: law has little or no influence over the case votes of Supreme Court Justices.").

81. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 70 (1993).

82. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 2 (2002).

83. SUNSTEIN ET AL., *supra* note 8, at 22-24.

84. *Id.* at 23-24.

campaign finance involvement.[85] Such findings substantiate a meaningful, predictable difference in the way that Democratic and Republican judges decide cases.

The partisan divide between Democratic and Republican judges is particularly clear in cases dealing with election law. Adam Cox and Tom Miles found that Democratic federal appointees were fifty percent more likely than Republican appointees to vote in favor of liability in section 2 cases under the Voting Rights Act, controlling for other considerations.[86] They found that a significant partisan divide remains even for cases dealing with at-large elections (where the likelihood of a violation was typically simpler to identify), even after a key Court decision narrowing and clarifying section 2 liability, and was exacerbated by panel effects like those discussed by Sunstein and his co-authors.[87] Along similar lines, Randall Lloyd found that Democratic district court judges were thirty-six percent more likely to vote against a state-level reapportionment plan than Republican judges.[88] Lloyd explained that his finding was "consistent with expectations that reapportionment is a civil liberties issue where conservatives are more sparing in their antiplan decisions."[89] An interesting forthcoming study finds that Republican judges are far more likely to vote to uphold voter identification laws while Democratic judges are far more likely to vote against them.[90] Before *Crawford v. Marion Country Election Board* clarified the law, eight out of ten Republican judges decided in support of voter identification laws compared to no Democrats among the sample of ten judges deciding such a case.[91]

Despite a clear connection between party affiliation and judicial decisionmaking, a basic methodological complication clouds the conclusion that judges are troublingly influenced by partisan bias in election law. The complication is that partisanship and the related but distinct influence of judicial ideology are closely intertwined. A Republican judge might vote in favor of voter identification laws, or against vote dilution claims under the Voting Rights Act, because she would like to help the Republican Party as a political matter. Generally speaking, voter identification laws help Republicans win elections, and vote dilution claims on balance probably hurt Republicans, so the judge's votes may seem motivated by partisanship. But a

85. Kang & Shepherd, *Partisan Foundations*, *supra* note 27, at 1288-94.

86. Cox & Miles, *supra* note 9, at 21, 38-39.

87. *See id.* at 19-29 (finding a partisan gap in decisions even after Johnson v. De Grandy, 512 U.S. 997 (1994)).

88. Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 417-18 (1995).

89. *Id.* at 418.

90. *See* Terri L. Peretti, Judicial Partisanship in Voter Identification Litigation (2015) (unpublished manuscript) (on file with author).

91. *Id.* at 24.

Republican judge is likely to be conservative as a matter of judicial ideology as well. A counterexplanation of the judge's votes then is simply that the Republican is predisposed as a conservative to favor concerns about order and voter fraud over countervailing worries about political participation, which leads her to support voter identification laws irrespective of the partisan consequences. The Republican judge is also likely, as a conservative, to view racial discrimination claims with greater skepticism and more narrowly interpret vote dilution claims under the Voting Rights Act. Although the Republican judge's decisions on these questions may yield partisan political benefits for her party, her decisions are motivated not by partisanship in this account but attributable to essentially ideological motivations and produce partisan political benefits only incidentally.[92]

This confounded relationship between ideology and partisanship makes raw partisanship very difficult to study as a methodological matter. By raw partisanship, we mean the "'low' politics of partisan political advantage," deciding cases "to promote the interests of a particular political party and install its candidates in power."[93] Justin Levitt similarly contrasts other forms of partisanship from this type of "tribal" partisanship to "benefit those with a shared partisan affiliation, or . . . injure partisan opponents, wholly divorced from—or stronger yet, contrary—to the policymaker's conception of the policy's other merits."[94] But even this raw form of partisanship remains difficult to untangle from ideology.[95] In most substantive areas of election law, the ideological positions of both parties map closely to what would also be predicted by raw partisanship and political advantage. Because of this confounded relationship, at least one well-regarded study of judicial partisanship, which looked at redistricting cases, employed the party affiliation of the judge as its predictive measure of both partisan and ideological influences on the judge's decisions.[96] Other studies trying to isolate partisanship in judicial decisionmaking reach quite mixed results, and the ideological valence of election law questions complicates confident identification of the independent influence of partisanship.[97] The underlying

92. *See generally* Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1793-1800 (2014) (contrasting "coincidental" partisanship with "tribal" partisanship).

93. Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1409 (2001).

94. Levitt, *supra* note 92, at 1798.

95. One shorthand for presenting this question in *Bush v. Gore* was a common hypothetical about whether the Court would have reached the same outcome had Bush and Gore had reversed places in the litigation. *See, e.g.*, POSNER, *supra* note 5, at 180; Balkin, *supra* note 93, at 1435; Frank I. Michelman, *Suspicion, or the New Prince*, *in* THE VOTE, *supra* note 2, at 123, 124.

96. *See* Lloyd, *supra* note 88, at 415-16.

97. *See* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER 80 (2002); Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader's 2004*

footnote continued on next page

legal questions in election law are so ideologically and politically sensitive that it is hard to cleanly unpack these independent influences. Judicial ideology and politics for something like voting rights are so interconnected that it is very difficult to locate when ideology and partisanship depart and are not bound together in some way.[98]

We offer a methodological solution to this problem—candidate-litigated election disputes. As we describe in greater detail in the next Part, we collected data on every election case decided by a state supreme court in which a candidate was a litigant from 2005 through 2014. *Bush v. Gore* was unusual as an election case in at least one respect—the U.S. Supreme Court's decision purported to address questions of federal statutory and constitutional law. Nonetheless, the Florida court decisions leading to *Bush v. Gore* more typically turned on state election questions such as whether "an error in vote tabulation" was restricted to vote-counting machinery malfunctioning in *Palm Beach County Canvassing Board v. Harris*. Likewise, the cases in our dataset arose as legal disputes usually brought by or against a candidate in a particular election and focused almost exclusively on state election law questions, with special relevance for an election then-upcoming or which had just occurred. The legal questions therefore tended heavily toward obscure statutory questions interpreting state election code, often with very little doctrinal precedent or ideological pedigree.[99] Like the state court cases leading to *Bush v. Gore*, these were, we believe, cases where the legal ideological stakes for the merits of the question were typically low. There usually is no consistent, easily identifiable ideological position for either conservatives or liberals about how to decide these cases separate from the identity of the litigants. More important, to the extent there are conservative or liberal positions on these cases, they do not sufficiently align with long-term political advantage for either party such that a pattern of partisan favoritism can be explained as ideologically determined.

The absence of strong ideological predispositions in these election cases foregrounds the short-term political payoff hanging on how the cases were decided. To be clear, the *long-term* political advantage between the major parties from any particular decision was largely uncertain in the vast run of our cases. It would be difficult, for example, to predict how a specific ruling on candidate eligibility requirements would help Democrats or Republicans over the long run, or even whether the question would ever matter again. However,

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Ballot Access Litigation, 7 ELECTION L.J. 301, 316-20 (2008); Mark J. McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 POL. RES. Q. 799, 808-09 (2012).

98. *See, e.g.*, FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 47-56 (2009) (assessing the methodological challenge).

99. *Cf.* McKenzie, *supra* note 97, at 802, 807-08 (finding that judicial partisanship appears lower where legal constraints were higher in one person, one vote cases as compared to voting rights cases and other types of redistricting cases).

the *short-term* political impact of the decision would be quite clear for the election involving a candidate-litigant before the court. Like the Justices who decided *Bush v. Gore*, the judges in candidate-litigated cases "know which candidate will benefit from any given resolution."[100] Our election cases generally featured a particular election to which the court's ruling would be applied and which therefore offered a test of those respective judges' partisan loyalty. While the ideological stakes and long-term partisan stakes in these cases were clouded by uncertainty in our election cases, these short-term political consequences of deciding for or against a candidate-litigant were, by contrast, very prominent when the election outcome could swing in the balance.

The combination of short-term political consequence and low ideological salience in our cases makes them a good test of judicial partisan loyalty. These cases come close to stripping away the high politics of political principle and leave as most salient the low politics of partisan advantage. Although one might insist that our cases too present ideological choices for judges, we have trouble ourselves identifying a consistent valence in them. Even if there is some identifiable ideological content to these election cases, they are as close as we can imagine to matching low ideological content with high partisan political impact. Previous empirical work attempting to isolate party loyalty in similar fashion examined areas of election law such as redistricting and voter identification with far higher ideological stakes and which therefore present far greater complications for causal inference.[101]

The long shadow of *Bush v. Gore* extends beyond the basic question of judicial impartiality in election cases. Richard Nixon once reportedly explained that he did not aggressively seek recounts after the 1960 presidential election because "[c]harges of 'sore loser' would follow me through history and remove any possibility of a further political career."[102] If there were ever such stigma associated with an election challenge, it has waned dramatically since *Bush v. Gore*. The prominent example of *Bush v. Gore* appears to have sufficiently inured the public to election challenges that losing candidates grew comfortable going to court for postelection judicial intervention. Rick Hasen reports that election challenge litigation, which should include the cases in our dataset, has risen dramatically since *Bush v. Gore*. From 1996 through 1999, the annual average number of election challenge cases was 94; in the years since

100. Einer Elhauge, *The Lessons of Florida 2000*, POL'Y REV., Dec. 2001 & Jan. 2002, at 15, 15; *see also* Robert A. Schapiro, *Article II as Interpretive Theory:* Bush v. Gore *and the Retreat from* Erie, 34 LOY. U. CHI. L.J. 89, 116 (2002) ("In the *Bush v. Gore* litigation, the courts interpreted the laws after the election, and each decision clearly benefited one side or the other. A veil of ignorance was no longer possible.").

101. *See* Lloyd, *supra* note 88; McKenzie, *supra* note 97; Peretti, *supra* note 90.

102. G. SCOTT THOMAS, A NEW WORLD TO BE WON: JOHN KENNEDY, RICHARD NIXON, AND THE TUMULTUOUS YEAR OF 1960, at 256 (2011) (quoting Nixon).

Bush v. Gore, the annual average has jumped to 245 through 2014.[103] As a result, courts now are asked more than ever to hear election challenges, and they do so under the intense pressures of today's media-saturated, polarized politics. The legacy of *Bush v. Gore* is thus not only its indictment of judicial impartiality but also its inauguration of this new era of election litigation. The consequent escalation in election litigation means the questions raised by *Bush v. Gore* persist today and arguably are more important than ever.

II. An Empirical Study of Judicial Partisanship in Election Cases

A. Data and Methodology

To explore the relationship between political partisanship and judicial decisionmaking in election cases, we assembled a comprehensive new dataset of judicial behavior and election cases from several different sources. First, a team of independent researchers from Emory University School of Law collected and coded roughly 2500 votes in election cases from all fifty states ranging from 2005 to 2014.[104] The team began with a dataset of all state supreme court cases within our time period classified by the Westlaw Key system under six Election Law subcategories.[105] The team was instructed to remove voter identification, campaign finance, redistricting, and voting rights cases as too ideologically valenced for our purposes, as well as to flag other inappropriately ideological cases outside those categories, and to code remaining cases where a major-party candidate in an upcoming or just-decided election was listed as a litigant. The resulting final dataset included votes from more than 400 election cases and almost 500 state supreme court judges. As a practical matter, the final dataset consisted primarily of election disputes focused on state law questions, along the lines of the 2000 Florida election litigation in the state courts. Roughly the same number of cases in our dataset were initially brought by Democratic and Republican plaintiffs, and they enjoyed a similar rate of success at the trial court before the case reached the state supreme court.

The researchers coded whether each judge, sitting as a member of a multi-judge appellate panel, cast a partisan vote for the litigant representing the

103. Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1603 (2016); *see also* Joshua A. Douglas, *Discouraging Election Contests*, 47 U. RICH. L. REV. 1015, 1016 (2013) (noting and criticizing the same trend for election contest cases).

104. This coding project was supported financially by a grant from the American Constitution Society and administered by Emory University School of Law to pay our team of student research assistants. The American Constitution Society had no input over the study or this Article.

105. *See infra* note 114.

interests of the judge's political party. The team also coded details of each election case including the issue in the case, the geographic basis of the contested election, the litigants in the case, and the voting of other judges in each case. Additionally, the team collected data on each judge including political party, the method by which the justices were selected for the court, and the date of next reelection or reappointment.

Second, these data were merged with data on campaign contributions from the National Institute on Money in State Politics (NIMSP), a nonpartisan, nonprofit charitable organization dedicated to accurate, comprehensive, and unbiased documentation and research on campaign finance at the state level.[106] The NIMSP receives its data in either electronic or paper format from the state disclosure agencies with which candidates must file their campaign finance reports. The NIMSP compiles the information for all state-level candidates in the primary and general elections, and then assigns donors an economic interest code based on both information contained in the disclosure reports and deeper research into the donor's characteristics and agenda.[107] From the NIMSP data, we compiled campaign contribution data for all judges in our sample who were candidates in partisan or nonpartisan state supreme court races.

Third, we aggregated data on campaign contributions from interest groups to create separate measures of contributions from conservative interest groups and contributions from liberal interest groups. Political parties mobilize campaign financing from allied coalitions to influence judicial decisionmaking in their party-preferred direction. The Democratic Party and its coalition of allied interest groups generally seek to produce more liberal decisions. At the same time, the Republican Party and its coalition of allied interest groups generally seek to produce more conservative decisions. Thus, to test the influence of party campaign finance on judicial decisions, we collected quantitative data on contributions from both formal party committees and their allied interest groups. The interest groups we define as "conservative" and allied with Republicans are general business groups, financial/real estate business groups, insurance companies, medical groups, and conservative single-issue groups.[108] These interest groups tend to be the primary supporters

106. *Mission & History*, NAT'L INST. ON MONEY IN ST. POL., http://www.followthemoney.org/about-us/mission-and-history (last visited June 6, 2016).

107. *About Our Data*, NAT'L INST. ON MONEY IN ST. POL., http://www.followthemoney.org/our-data/about-our-data (last visited June 6, 2016).

108. The conservative single-issue groups include groups associated with the following issues: abortion policy, pro-life, anti-gun control, Christian Coalition, religious right, foreign and defense policy, limited government, school choice advocates, and Republican Party-based groups that are not official party committees.

of judges with relatively conservative ideology.[109] The interest groups we define as "liberal" and allied with Democrats are labor unions, lawyers, and liberal single-issue groups.[110] These interest groups tend to be the primary supporters of judges with more liberal ideology.[111] Table 1 reports the average total contributions from both interest group and party sources per judge for an election in our sample. The average is computed only for judges receiving any contributions from each group, and the number in parentheses in each cell reports the number of judicial candidates receiving contributions from each group.

Table 1
Political Party Contributions to
State Supreme Court Candidates in Our Sample[112]

	Average Total Contributions to Republican Candidates	Average Total Contributions to Democratic Candidates
Contributions from Republican Party Committees	$108,871 (73)	$15,492 (9)
Contributions from Conservative Interest Groups	$221,810 (101)	$40,361 (64)
Contributions from Democratic Party Committees	$41,081 (7)	$124,241 (31)
Contributions from Liberal Interest Groups	$147,198 (101)	$252,577 (65)

We perform various estimations to test the relationship between political party, campaign contributions, and partisan loyalty in election cases. The general estimation equation for the model is the following:

109. RACHEL WEISS, INST. ON MONEY IN STATE POLITICS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES 4 (2005), http://host-69-144-32-180.kls-mt.client.bresnan.net/press/Reports/200508251.pdf.

110. The liberal single-issue groups include groups associated with the following issues: abortion policy, pro-choice, animal rights, elderly/Social Security, gay/lesbian rights and issues, minority and ethnic groups, pro-environmental policy, public school advocates, women's issues, and Democratic Party-based groups that are not official party committees.

111. WEISS, *supra* note 109, at 4.

112. NAT'L INST. ON MONEY IN ST. POL., http://www.followthemoney.org (last visited June 6, 2016).

$$(1)\ \text{Prob}(\text{VoteForParty}=1|x) = F(\beta_0 + \beta_1*\text{PartyAffiliation} + \beta_{2*}\text{PartyContributions} + \beta_3*\text{Judge} + \beta_4*\text{State} + \beta_5*\text{Case})$$

The dependent variable is a vote either for a judge's own party or against the judge's opposing party in election cases. In cases involving a litigant from the same party as the judge, the dependent variable takes a value of 1 when the judge votes in favor of the litigant from the same party. In cases not involving a litigant from the same party but involving a litigant from the opposing party (for example, a Democratic candidate in a contested election in a case with a Republican judge), the dependent variable takes a value of 1 when the judge votes against the opposing-party litigant. For example, in a case involving a Democratic candidate contesting the election results with claims that the absentee ballots are invalid, where a Republican judge votes to affirm the election results (voting against the Democratic candidate) the dependent variable would take a value of 1. Table 2 reports the percentage of cases in which Republican and Democratic judges vote for their own party or against the opposing party in the raw data.

Table 2

Partisan Voting in the Raw Data

	Percentage of Cases in Which Judge Votes for Same Party or Against Opposing Party
Democratic Judges	43.4% (309)
Republican Judges	59.3% (565)

The figure in parentheses reports the number of judge votes from which the average is computed.

The two measures of political party support are *PartyAffiliation* and *PartyContributions. PartyAffiliation* is simply the political party of the judge. Determining the party affiliation of judges elected in partisan elections is straightforward; the judges are listed on the ballot as the nominee from one of the political parties or as an independent. For judges appointed by the governor, we use the party of the governor as a proxy for the party affiliation of the judge. Many judges elected in nonpartisan elections also have evident party affiliations that our coders were able to determine with additional research: some states use partisan primaries to choose candidates for the general election, some judges make their party affiliation clear in campaign materials, and the party affiliation of other judges is apparent given the contributions to the judges' campaigns. For the few judges appointed or elected by the legislature, we use the majority party of the state legislature as a proxy for the party affiliation of the judge.

PartyContributions is included in many estimations and is the sum of the contributions from the judge's political party and allied interest groups from

the judge's most recent election. For judges affiliated with the Republican Party, this variable measures the judge's contributions from the formal Republican Party committees and from conservative interest groups: general business groups, financial/real estate business groups, insurance companies, medical groups, and conservative single-issue groups. For judges affiliated with the Democratic Party, this variable measures the judge's contributions from the formal Democratic Party committees and liberal interest groups: labor unions, lawyers, and liberal single-issue groups.

All estimations also include a series of judge-level, state-level, and case-level variables to control for other factors that might be related to judges' voting. First, *Judge* includes a variable indicating the length of time in years that the individual judge has served on the court and a variable indicating the number of years until the judge's next reelection or reappointment. These variables control for voting changes throughout a judge's career and term.

Second, *State* controls for various state-level characteristics that may be related to judges' voting. It includes an indicator for whether the state retains supreme court judges through partisan or nonpartisan elections to control for the known influence of retention method on judges' voting. *State* also contains a measure of the Democratic advantage in the state—the difference between the percentage of state residents identifying as Democrats or leaning Democratic and the percentage identifying as Republicans or leaning Republican.[113] This variable measures whether judges' voting is related to the political preferences of the states' residents. We also incorporate state indicators or fixed effects to control for any other constant, systematic difference across the states, such as systematic differences in party cohesiveness, the regularity of judicial dissent, or particularities of the elections challeged in court.

Third, *Case* includes various case-level variables that may be related to judges' voting. *Case* includes indicator variables for the general issues in the case: (1) voter issues that involve the acceptable qualification and registration of voters, (2) nomination issues that concern the legality of nomination procedures, and (3) election conduct issues that encompass ballot concerns, voting procedures, and the accurate determination of results. The base category includes general election issues such as the purpose of elections and the appointment and powers of election officers.[114] *Case* also includes an indicator for whether any litigant is a government official acting in her official

113. *State of the States: Democratic Advantage 2014*, GALLUP, http://www.gallup.com/poll/125066/state-states.aspx (last visited June 6, 2016).

114. We used the Westlaw Key Number System to define issue categories: Election Districts, Boards, and Officers is 142TII. Voters is Westlaw Key Number 142TIII. Political Activity and Associations is 142TIV. Nominations is Westlaw Key Number 142TVI. Conduct of Election is Westlaw Key Number 142TVII. Offenses and Prosecutions is 142TX. The base category is Westlaw Key Number 142TI and 142TII. However, some of these categories ultimately contributed very few, if any, cases to our final dataset.

capacity. For example, many cases challenging a state decision or policy are brought against the secretary of state or representative from the board of elections. For certain estimations, *Case* incorporates an indicator for the visibility of the case as measured by the geographic level of the challenged elections. In our data, we assume federal and state elections are more visible elections, whereas we consider elections in the counties, cities, or other small areas as less visible. Finally, *Case* includes an indicator variable for whether the case was unanimously decided to control for very obvious or one-sided cases that are less likely to be decided along party lines.

B. Results

We present the results of several estimations that test the relationship among ideology, campaign contributions, and partisan voting in election cases. The results are presented in Tables 3 through 7. Because the raw probit results are difficult to interpret, we present the marginal effects of each variable on the probability of a judge voting for their own party or against the opposing party in election cases.

Table 3 reports the results of our estimation that tests the relationship between political party affiliation and partisan voting in election cases. The dependent variable indicates whether a judge casts a vote for either her own party or against her opposing party. The estimation sample includes only judges that affiliate with either the Republican or Democratic Party. Affiliation with the Democratic Party is the base category excluded from the estimations; thus, the coefficient on Republican party affiliation indicates Republican judges' differential partisan voting compared to Democratic judges.

The first column reports the estimation results when only an indicator for party affiliation and state and year fixed effects are included. The second column reports the results with the full set of control variables. The positive and significant coefficients on the Republican affiliation variable reveal that, compared to Democratic judges, Republican judges are significantly more likely to vote in favor of their own party or against the opposing party. The magnitudes of the coefficients reveal that Republican judges are thirty-six percentage points more likely to cast partisan votes in election cases.

Table 3
Partisan Voting in Election Cases: Political Party Affiliation

	No Controls	Full Set of Controls
Republican	0.384* (.072)	0.361* (.077)
Tenure on Court		-0.006+ (.003)
Years to Next Retention		-0.0004 (.003)
Judges Retained in Partisan/Nonpartisan Elections		0.408* (.161)
Democratic Advantage Score		-0.004 (.009)
Voter Issues		0.117 (.082)
Nomination Issues		0.066 (.094)
Election Conduct Issues		0.140 (.086)
Government Official Litigant		-0.090 (.074)
Important Election		-0.015 (.076)
Unanimous Decision		0.057 (.074)
State and Year Fixed Effects	Y	Y
Number of Observations	998	951
Pseudo R-squared	0.149	0.166

Standard errors clustered by case are in parentheses. * and + represent significance at the 5% and 10% levels, respectively. Indicators for year and state fixed effects are not reported for the sake of brevity.

Table 4 reports the results from estimations that add variables for campaign contributions. Conservative contributions include contributions from the Republican Party and allied conservative interest groups—general business groups, financial/real estate business groups, insurance companies, medical groups, and conservative single-issue groups. Liberal contributions include contributions from the Democratic Party and allied liberal interest groups—labor unions, lawyers, and liberal single-issue groups. Because judges raise contributions only in states that use elections to select judges, the sample is limited to election cases in these states. The campaign contributions are interacted with the Republican judge indicator; the coefficients thus reveal the additional effect that contributions have on Republican judges.

The results reveal that while Republican judges remain systematically more likely than Democratic judges to cast partisan votes, contributions from conservative sources increase the likelihood that a Republican judge will vote either for her own party or against the opposing party. In contrast, contributions from liberal sources decrease the likelihood that a Republican judge will vote for her own party or against the opposing party. The magnitudes of the coefficients on the interaction variables indicate that, for every $10,000 contribution from conservative sources, Republican judges are approximately three percentage points more likely to cast a partisan vote. The relationship between liberal contributions and partisan voting is much smaller in magnitude; for every $10,000 contribution from liberal sources, Republican judges are approximately 0.8 to 0.9 percentage points less likely to cast a partisan vote.

Table 4
Partisan Voting in Election Cases: Campaign Contributions

	No Controls	Full Set of Controls
Republican	0.543* (.077)	0.529* (.090)
Republican Party * Conservative Contributions	0.028+ (.016)	0.031+ (.016)
Republican Party * Liberal Contributions	-0.008* (.003)	-0.009* (.004)
Tenure on Court		-0.003 (.005)
Years to Next Retention		0.004 (.005)
Democratic Advantage Score		0.028* (.012)
Voter Issues		0.406* (.154)
Nomination Issues		-0.280 (.093)
Election Conduct Issues		-0.147 (.120)
Government Official Litigant		-0.098 (.100)
Important Election		-0.050 (.121)
Unanimous Decision		0.088 (.089)
State and Year Fixed Effects	Y	Y
Number of Observations	437	415
Pseudo R-squared	0.263	0.294

Standard errors clustered by case are in parentheses. * and + represent significance at the 5% and 10% levels, respectively. The contribution variables report contributions per $10,000 amounts. Indicators for year and state fixed effects are not reported for the sake of brevity.

Next we test whether the relationship between contributions and partisan voting depends on the reelection pressures facing a judge. More than thirty states have mandatory retirement laws that compel judges to retire sometime between age seventy and seventy-five.[115] By examining the voting of judges in their last term before mandatory retirement, we test whether elected judges

115. *See Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited June 6, 2016).

continue to cast partisan votes when they no longer need to attract campaign funds or advertising support. If elected judges vote differently as their retirement approaches, this would support the hypothesis that the need to raise future campaign funds influences elected judges' partisan voting.

Table 5 reports the results of separate estimations for judges that do not face future reelection and for judges that do. The significant coefficients on the Republican affiliation variable indicate that, regardless of reelection pressure, Republican judges are more like to cast partisan votes in election cases than Democratic judges. However, the variables on the contribution variables indicate that partisan voting decreases when judges do not face reelection pressures. For retiring judges, conservative contributions actually *decrease* the likelihood of Republican judges casting partisan votes, and liberal contributions seem to have no effect. In contrast, the results for judges facing reelection pressure are in the expected direction. Although the small sample size of retiring judges could account for the anomalous coefficients, the results suggest that when judges do not need to raise future campaign funds, they no longer favor their party in election cases.

Table 5

Partisan Voting in Election Cases: Retention Pressure

	No Reelection Pressure	Reelection Pressure
Republican	0.538+ (.219)	0.553* (.093)
Republican Party * Conservative Contributions	-0.17* (.08)	0.054+ (.029)
Republican Party * Liberal Contributions	0.0013 (.009)	-0.011+ (.005)
State- and Year-Fixed Effects	Y	Y
Number of Observations	89	302
Pseudo R-squared	0.461	0.312

Standard errors clustered by case are in parentheses. * and + represent significance at the 5% and 10% levels, respectively. All control variables and indicators for year and state fixed effects are not reported for the sake of brevity.

We next examine whether partisan voting depends on the visibility of the case and the likelihood that a judge's partisan voting will be noticed. First, we examine whether judges' partisan voting is different in more visible cases involving federal and state elections compared to county or city-level elections. Table 6 reports the results of separate estimations for cases involving more visible elections—or federal and state elections—compared to less visible elections—county and city elections. The results indicate that the relationship between party contributions and partisan voting is significantly stronger in cases involving less visible elections, suggesting that judges are less likely to

cast partisan votes when their partisan voting may be noticed and criticized.[116] The greater influence of party contributions in less visible elections, relative to more visible ones, helps explain the fact that Republican judges voted in favor of their party only 49% of the time in more visible elections, but 66% of the time in less visible ones.

Table 6
Partisan Voting in Election Cases: Visibility of Elections

	Less Visible Elections	More Visible Elections
Republican	0.473* (.135)	0.770* (.081)
Republican Party * Conservative Contributions	0.112* (.045)	-0.002 (.009)
Republican Party * Liberal Contributions	-0.011* (.005)	-0.010+ (.006)
State and Year Fixed Effects	Y	Y
Number of Observations	234	196
Pseudo R-squared	0.271	0.4516

Standard errors clustered by case are in parentheses. * and + represent significance at the 5% and 10% levels, respectively. Indicators for year and state fixed effects are not reported for the sake of brevity.

Second, we explore the relationship between campaign attack ads and partisan voting. In 2012, seventeen states spent over $30 million on televsion ads in state supreme court elections.[117] We expect a relationship between attack ads and judicial voting because the quantity of attack ads in recent supreme court elections serve as a rough proxy for expected campaign intensity for sitting judges' next reelection bids. Attack ads may curb judges' partisan voting if judges seeking reelection are worried about a record of partisanship when the coming election campaign is expected to be more intense. Partisan voting would make a judge a more likely target of opposition and may even provide salient content for attack advertisements themselves. For these reasons, we have found in previous work that the number of attack

116. The significant coefficients on the Republican variable indicate that, compared to Democratic judges, Republican judges are more likely to vote with their party in both less visible and more visible elections. However, campaign money strengthens the Republican judges' partisan voting in only the less visible elections.

117. ALICIA BANNON ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2011-12: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS 19-20 (Laurie Kinney & Peter Hardin eds., 2013), http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf.

ads in recent supreme court elections are related to predictably adapative judicial behavior that preempts negative attacks against them.[118] Thus, in states with a history of more attack ads in supreme court elections, we may expect to see less partisan voting in election cases along the same lines.

Our measure of attack ads is the average number of attack ads that aired in the two most recent election cycles in each state. We compiled data on attack ads from the Brennan Center for Justice's "Buying Time" project.[119] Since 2000, the Brennan Center has collected all available televised state supreme court campaign ads that were aired in states holding supreme court elections. Their data on ad airings are calculated and prepared by Kantar Media/CMAG, which captures satellite data in the nation's largest media markets. We utilized the Brennan Center's data measuring the number of television ads aired during each judicial election from 2008 to 2013.

Table 7 reports the results. The negative and significant coefficients indicate that more attack ads aired during state supreme court races, the less likely judges are to favor their own party in election cases. The magnitude of the coefficients indicate that each additional attack ad is associated with a reduction in the likelihood of partisan voting by 0.03 or 0.05 percentage points. Put another way, every additional 100 attack ads aired in previous races can be expected to reduce partisan voting by roughly five percentage points on average.

Table 7
Partisan Voting in Election Cases: Attack Ads

	No Controls	Full Set of Controls
Attack Ads	-0.0003* (.0001)	-0.0005* (.0002)
State- and Year-Fixed Effects	Y	Y
Number of Observations	267	254
Pseudo R-squared	0.327	0.404

Standard errors clustered by case are in parentheses. * and + represent significance at the 5% and 10% levels, respectively. Control variables and indicators for year and state fixed effects are not reported for the sake of brevity.

In sum, we find that Republican state supreme court judges favor their party's interests at a far greater rate than their Democratic counterparts in

118. *See* Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 945-48 (2016) (reviewing MELINDA GANN HALL, ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS (2015)).

119. *Buying Time—Campaign Ads*, BRENNAN CTR. FOR JUST. (June 1, 2013), http://www.brennancenter.org/analysis/buying-time.

state election disputes. Republicans are thiry-six percentage points more likely to vote in favor of their party's interests—a strikingly large and statistically significant margin. We find this partisan loyalty is not dependent on selection method but does increase as a function of party financial support among elected judges. This special enhancement from campaign finance largely goes away among lame duck judges vacating their seat and facing no retention pressure. However, the potential for public discovery appears to condition partisan loyalty among judges. Republican judges are less likely to favor their party's interests when the state's supreme court elections have featured more attack advertising on television in the past. The effect of party money in encouraging Republican party loyalty also disappears in our results when the relevant election at bar is a more visible federal or state race, as opposed to a less visible local one.

In addition to state fixed effects, we include year fixed effects to capture general trends in party support or partisan voting over time.[120] We estimate a series of ordinary probit models with *t*-statistics computed from standard errors clustered by case.

III. Judicial Partisanship

To paraphrase Jack Balkin, election cases reverse the famous maxim that the courts follow the election returns and allow the courts to decide the election returns instead.[121] This temptation in election cases to decide a particular election, coupled with the general lack of ideological salience in these cases, gives our new analysis the unique potential to identify raw partisanship in judicial decisionmaking by state supreme courts. As one election law scholar notes, "the conventional rules that most states used for adjudicating disputes over the counting of ballots were sufficiently malleable that judges prone to partisanship could easily manipulate those rules to support a decision for their favored candidate."[122] Just so more generally for many sundry state election disputes among candidates in our dataset. It is precisely this risk of partisanship in election litigation that worries election law scholars and is so troubling in cases like *Bush v. Gore*.

120. We are unable to include judge-level indicators because each judge's party affiliation generally does not change across years.

121. Balkin, *supra* note 93, at 1439; *see also* FINLEY PETER DUNNE, MR. DOODLEY AT HIS BEST 77 (Elmer Ellis ed., 1949).

122. Edward B. Foley, *The* McCain v. Obama *Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 471, 477 (2010).

A. Understanding Partisan Loyalty in Election Cases

Our results support suspicions that partisanship affects judicial decisionmaking in election cases. Our most robust finding is that Republican judges systematically favor their own political party in election cases, controlling for other things, at a rate thiry-six percentage points higher than Democratic judges. Of course, *Bush v. Gore* is the most prominent example of a case where judges' partisanship allegedly trumped fidelity to judicial philosophy on arcane issues of election administration with limited generalizability. But our results suggest that the problem of partisan favoritism in election cases extends beyond the odd historical case like *Bush v. Gore*. Instead, we find systematic partisanship across ten years of state supreme court cases over roughly 500 judges and 400 cases. Because the law for adjudicating election cases is too indefinite to preempt flexible judicial interpretation, any partisan bias can have determinative impact on the outcomes of many state and local elections, particularly as election-related litigation has become more common.

Partisan loyalty in election cases does not appear to be a function of a particular method for judicial selection. That is, elected judges and appointed judges appear to behave similarly when it comes to partisan loyalty in our study. This should not be surprising, even for critics of judicial elections. Past work on judicial decisionmaking has consistently found that judges are responsive to their retention incentives.[123] Judges who face reelection play to their voters' preferences, while judges who must be reappointed by their governor or legislature likewise play to the preferences of whoever decides their retention. Because both sets of judges need their party's support in either an election or reappointment setting, they appear to behave roughly the same in terms of partisan favoritism that would cater to their party audience.

The finding that Republican judges display greater partisan loyalty than Democratic judges is robust in both magnitude and significance and mirrors our findings of partisan asymmetry in previous work. We found in earlier work that the Republican Party is more effective in shaping judicial decisionmaking by state supreme courts through judicial campaign finance across the spectrum of cases.[124] In addition, our analysis of election-case data from 1995 to 1998 likewise found greater Republican party loyalty to mirror what we find here.[125] We say only that Republican judges seem to display

123. *See* Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 342 (2002); Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 171 (2009); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 158 (1999).

124. *See* Kang & Shepherd, *Partisan Foundations*, *supra* note 26, at 1244-45.

125. In this earlier unpublished study with far fewer cases and votes, we found that Republican judges were significantly more likely to vote in favor of Republican

footnote continued on next page

greater partisan loyalty, deciding for their party's interest 59.3% of the time, than Democratic judges, who sided with their party 43.4% of the time. We cannot say that Democratic judges do not display any partisan bias because the normative baseline is elusive here. It is somewhat uncertain how often partisan judges should decide for their party in the absence of partisan loyalty. That said, as a point of reference, judges appointed on a nonpartisan basis, together with independent judges in partisan election states, favor the Republican litigant in 50.7% of cases involving Republican litigants and favor the Democratic litigant in 59.5% of cases involving Democratic litigants. If anything, these party-neutral judges set a baseline that seems to favor the Democratic side slightly on the merits. In addition, the Priest-Klein hypothesis hints that the baseline should be in the ballpark of 50%.[126] These are state supreme court cases that have been appealed at least once, if not twice, which suggests that they are legal disputes that both parties believe they have a chance to win. Party litigants must consider their finite financial resources for such efforts[127] as well as potential costs to their political reputation that cut against litigating disputes they are too likely to lose.[128] Considering this calculus, aggregated over 407 cases, Priest-Klein suggests that neither party's objective expectation of victory should diverge very dramatically from 50%.

More importantly, the inference of Republican partisanship on the bench is given credibility by our other empirical findings. We find that the degree of partisan loyalty from Republican judges, but not from Democratic judges, is dependent on political context that affects the cost-benefit calculus of partisan loyalty but does not bear on the legal merits of the cases. That is, Republican partisan loyalty is not only significantly stronger than Democratic partisan loyalty, it covaries with political factors that affect the costs and benefits of siding with one's party, while Democratic partisan loyalty does not. These influences support suspicions, even if they cannot definitively confirm them, that greater Republican partisan loyalty is motivated by political

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litigants or against Democratic litigants in election cases, than Democratic judges were to vote in favor Democrats or against Republicans. In addition, we found that, while Republican Party contributions were associated with increases in the probability that Republican judges will vote in favor of their party's interests, Democratic Party contributions had no statistically significant association with the probability that Democratic judges will vote for party interests.

126. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17-19 (1984).

127. *See* 52 U.S.C. § 30116 (2014); Steven T. Walther, Fed. Election Comm'n Advisory Opinion 2009-04, at 1 (2009) (permitting and regulating party fundraising for federal election recount and contest expenses).

128. *See, e.g.*, Edward B. Foley, *The Founders'* Bush v. Gore*: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23, 61-62 (2010) (describing historical instances of candidates weighing the potential damage to their political viability before pursuing election challenges).

considerations, not otherwise driven by the merits of the legal questions presented.

First, we find that party campaign-finance support is associated with greater partisan loyalty among Republican elected judges, but has no effect on Democratic judges. One plausible explanation for why party campaign money might bolster partisan loyalty by party officeholders is straightforward and intuitive. Officeholders need campaign money to get elected in the first place and to retain office in subsequent reelection campaigns. To the degree that the major parties are an important source of campaign finance for their candidates and officeholders, this need gives the parties significant leverage through their resources to put more loyal candidates onto the state supreme courts, and it encourages sitting judges to decide for their party if their prospective campaign finance needs are forefront in their minds.

In our data, we find that campaign contributions from the Republican Party and its allies are associated with an increased likelihood that Republican elected judges will vote in favor of their party's interests. Furthermore, campaign contributions from the Democratic Party and its allies are associated a slightly lower likelihood that Republican elected judges will side with their own party, but the magnitude of the relationship is small. We also estimate the relationship between contributions and voting for Democratic judges; the results report no statistically significant effects of either formal party or party-allied interest group contributions for Democratic judges. In short, partisan loyalty in election cases predictably responds to campaign finance influences for elected Republican judges, while showing no effect for Democratic judges.

The results here actually confirm our earlier work based on older data. In this earlier work, we analyzed election cases from the State Supreme Court Data Archive for all fifty state supreme courts from 1995 to 1998, but because of the limited time span, our analysis of judicial decisionmaking in these earlier election cases included only 200 individual judge votes and only seventy-eight votes for judges with campaign contribution data. Nevertheless, the results from this limited sample indicated with weak statistical significance that only Republican party affiliation and Republican party contributions were associated with judges voting either for their own party or against the opposing party in election cases. Our campaign finance results are also consistent with previous findings that the Republican Party appears more effective than the Democratic Party at using judicial campaign finance to affect state supreme court decisions across a whole spectrum of issues beyond election cases.[129] Republicans may do so by using campaign finance to better select candidates on the front end or to better incentivize judges on the back end, but whatever the means, campaign finance contributions bear a greater

129. *See* Kang & Shepherd, *Partisan Foundations*, *supra* note 26, at 1275-85.

relationship with partisan loyalty for Republican elected judges in these cases than for Democratic elected judges.[130]

It is noteworthy that the influence of campaign contributions on Republican elected judges is *not* statistically significant for lame duck incumbents who are vacating their seats. This finding indicates that selection does not fully explain the relationship between campaign contributions and partisan loyalty in these cases.[131] If selection of more partisan judges in the first place accounted for all or most of the relationship between party campaign finance and loyalty, then we would expect lame duck judges in their final term to demonstrate a comparable degree of partisanship as others from the same party.

Second, we find that judicial loyalty by Republican judges appears to be tempered by the potential for public exposure. The effect of party campaign contributions becomes statistically insignificant for more visible federal and state elections where public attention is typically greater. By contrast, the effect of party money in encouraging partisan loyalty remains significant for less visible county and city elections. As a partial result, Republican state supreme court judges were more likely to decide in favor of their party's interests with respect to a county or city election, at a 66% rate compared to 49% for a statewide or federal election. Of course, the political stakes are greater for the higher offices decided by statewide and federal elections. However, the prospect of news media coverage and publicity is greater as well. Greater news coverage and publicity surrounding statewide and federal elections attach a higher cost to a judge's perceived partisanship that might offset the greater importance of the office at stake. Judges would reasonably fear being perceived as a biased partisan on the statewide stage because the main priority for incumbent reelection is usually to avoid high-profile criticism and controversy.

Along similar lines, judicial favoritism is discouraged as the volume of attack advertising in past state supreme court elections increases. Although attack advertising might not affect supreme court election outcomes as much as many suspect,[132] its specter still may influence judges who do not want to inspire party opposition and provide controversial fodder for attack

130. *See id.* at 1245-46 (distinguishing between causal mechanisms of selection and biasing).

131. *See* Carlos Berdejó & Noam Yuchtman, C*rime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741, 742 (2013) (finding an influence of election proximity for judicial sentencing decisions but finding no such relationship for lame duck judges); Brandice Canes-Wrone et al., *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23, 30, 33, 35 (2014) (finding similar disappearance of influence for lame duck judges in death penalty cases).

132. *See* HALL, *supra* note 118, at 124, 161 (showing that attack ads affect incumbent vote share only in nonpartisan state supreme court elections, but not in partisan ones, and do not affect voter participation in partisan races).

advertising against them in their next race.[133] In states where there has been more attack advertising in the recent state supreme court elections, incumbent judges might want to avoid facing the same intensity of campaign attacks in their next race and be less likely to engage in partisan favoritism that potentially subjects them to greater criticism. This finding arguably offers grounds for optimism. Judge Guido Calabresi argues that "it is necessary, it is essential, that any unprincipled opinion be decried long and loud by all and sundry" for otherwise "judges would be free to give full vent to their own, unrepresentative, policy preferences."[134] For state supreme court judges, this worry about loud public criticism in the next election seems to serve as a similar corrective to partisan favoritism. The possibility of public scrutiny appears to matter.

B. Assymmetrical Partisanship: Causes and Implications

Collectively, our findings suggest that Republican elected judges in particular appear influenced in election cases by political considerations that both temper and exaggerate their partisan loyalty, apart from the basic legal analysis that applies to the case. What accounts for the Republican edge in judicial partisan loyalty? For one thing, we know from political science on the major parties that the Republican Party enjoys superior campaign finance and institutional capacities. Beginning in the 1970s, the Republican Party initiated an expensive party-building effort that strengthened coordination and capacity at the state and local levels.[135] This effort yielded clear institutional advantages vis-à-vis the Democrats in terms of state and local party budget size, organizational complexity, expertise in media relations and campaign operations, and financial support for candidates,[136] all of which appear to persist through today.[137] These institutional advantages contribute to the

133. *See* Kang & Shepherd, *supra* note 118, at 945-48 (finding evidence for such judicial behavior).

134. Guido Calabresi, *In Partial (but Not Partisan) Praise of Principle*, *in* BUSH V. GORE, *supra* note 6, at 67, 78.

135. *See generally* M. Margaret Conway, *Republican Political Party Nationalization, Campaign Activities, and Their Implications for the Party System*, 13 PUBLIUS 1 (1983).

136. *See* James L. Gibson et al., *Assessing Party Organizational Strength*, 27 AM. J. POL. SCI. 193 (1983); James L. Gibson et al., *Party Dynamics in the 1980s: Change in County Party Organizational Strength, 1980-1984*, 33 AM. J. POL. SCI. 67 (1989); Gary C. Jacobson, *Party Organization and Distribution of Campaign Resources: Republicans and Democrats in 1982*, 100 POL. SCI. Q. 603, 603 (1985).

137. *See* Sidney M. Milkis & Jesse H. Rhodes, *George W. Bush, the Republican Party, and the "New" American Party System*, 5 PERSP. ON POL. 461, 461 (2007); Anthony Paik et al., *Political Lawyers: The Structure of a National Network*, 36 LAW & SOC. INQUIRY 892, 907 (2011); *see also* Thomas B. Edsall, Opinion, *Billionaires Going Rogue*, N.Y. TIMES (Oct. 28, 2012, 10:53 PM), http://nyti.ms/1g99XD0 ("In recent years, the Democratic Party organization has gained some strength and it plays a much more active role in

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Republican Party's effectiveness in achieving partisan aims, including influence over the types of candidates who reach the state supreme court and how they decide cases once on the bench. The Republican advantage specifically in party campaign finance obviously bears out in our finding that Republican loyalty is enhanced by party campaign contributions for elected Republicans.

In addition, the Republican Party benefits from greater party homogeneity than the Democratic Party. Political science has documented greater ideological agreement among Republicans than Democrats and shows Republicans to be more solidly conservative than Democrats are solidly liberal at every level of the two parties.[138] In short, Republicans enjoy greater internal cohesion among officeholders, activists, and voters, which leaves fewer disagreements to settle and greater consensus about party aims and positions.[139] The Republican historical advantage in cohesion made it easier for the Republicans to stay unified, maintain confidence in the party's ideological direction, and exercise loyalty to their party's candidates. This greater loyalty to the party likely holds true even for the party's elected judges sitting on state supreme courts when they decide these election cases. One obvious lesson from our work is the need for much further empirical study of the major parties' internal differences, a subject that we show would reveal a far better understanding of what is happening in judicial elections and decisionmaking in particular.

More broadly, our findings raise concerns about judicial settlement of election cases and point up the wisdom of clear ex ante rules that obviate the need to tempt partisan loyalty. As Beth Garrett argued shortly after *Bush v. Gore*, an election dispute is "a prototypical example of a decision that is best made according to rules and procedures determined long before the identities of the two candidates are known."[140] Such predetermination eliminates the worry that later judicial resolution, once the candidates are known, "will doubtlessly result from partisanship rather than from principle,"[141] as our

campaigns at all levels than in the past, but as an institutional force capable of command and control, it remains light years behind the Republican Party.").

138. *See, e.g.*, THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012); D. Jason Berggren, *Two Parties, Two Types of Nominees, Two Paths to Winning a Presidential Nomination, 1972-2004*, 37 PRESIDENTIAL STUD. Q. 203, 210-11 (2007); Christopher Bruzios, *Democratic & Republican Party Activists & Followers: Inter- & Intra-Party Differences*, 22 POLITY 581, 601 (1990); Barry C. Burden, *Candidate Positioning in US Congressional Elections*, 34 BRIT. J. POL. SCI. 211, 219-20 (2004).

139. We refer to the Republicans' historical advantages along these lines, which admittedly seem challenged by the fractiousness of their 2016 presidential primary process.

140. Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 979 (2001).

141. *Id.*

work here substantiates. Garrett proposed more comprehensive election standards and procedures to limit the likelihood of later controversies that draw courts into the political thicket. Along these lines, Steven Huefner likewise calls for ex ante consideration of a detailed set of election questions through a model election code.[142] The obvious limitation of this approach is that ex ante anticipation and settlement of election-related controversies is difficult and leaves ample room for disputes to nonetheless arise.[143] Indeed, in *Bush v. Gore* itself, the Florida legislature had recently attempted to clarify the election contest procedures in the state election code to forestall just such a mess. Even earlier, Congress had put in place, following the Hayes-Tilden presidential election of 1876, the Electoral Count Act of 1887 to specify a political process through Congress for resolving exactly the type of partisan controversy that arose in *Bush v. Gore*.[144] Neither attempt preempted the Supreme Court's intervention or sense of necessity about its intervention.[145]

As a consequence, we suspect our findings lend greatest support for nonpartisan election adjudication that altogether avoids the risk of partisan judging we document here. Election law scholars have proposed the establishment of nonpartisan panels, for instance, to resolve election disputes among parties and candidates and to remove partisan decisionmakers from the pressures of major-party politics.[146] Although we offer our results with a healthy measure of caution, we think they present the strongest evidence so far of raw partisanship influencing judicial decisionmaking where partisanship matters most—adjudicating elections. We endorse nonpartisan election adjudication less out of enthusiasm for nonpartisan institutions or process than out of worry about partisanship in the settlement of election cases like those in our dataset. These petty fact-specific cases frequently arise from the hurly-burly of elections that make them difficult to anticipate and present too many opportunities for one-off decisions with little concern beyond the outcome in the election case at bar. It is this one-off quality of the Court's equal protection

142. Huefner, *supra* note 24, at 310-11.

143. *See* Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 49 (2013) ("The problem, of course, is that it is virtually impossible to create standards for every conceivable election failure.").

144. *See* Elizabeth Garrett, *Leaving the Decision to Congress*, *in* THE VOTE, *supra* note 2, at 38, 50-52.

145. *See* POSNER, *supra* note 5, at 160-63 (arguing approvingly that the Court felt it necessary to intervene and prevent the Florida Supreme Court from stealing the election); Strauss, *supra* note 41, at 184-85 (arguing the same but critically).

146. *See* Douglas, *supra* note 143, at 51-56 (proposing a largely nonpartisan panel for adjudicating election contests); Edward B. Foley, *Virtue over Party: Samuel Randall's Electoral Heroism and Its Continuing Importance*, 3 U.C. IRVINE L. REV. 475, 476 (2013) (criticizing partisan election administration and adjudication while praising nonpartisan alternatives); Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575, 576-77 (2013).

reasoning in *Bush v. Gore* that rendered it, as critics alleged, so seemingly inconsistent with the rule of precedent and law.[147] Without the normal constraints of judicial lawmaking, at least in lower-profile elections, our results suggest that the temptation of partisan favoritism may be too high to justify great faith in judicial pragmatism in these sorts of cases. Our work here substantiates worries about partisanship on the bench sufficiently to boost the case for nonpartisan approaches to resolving election-related litigation, both leading up to and after the election.[148]

The obstacle to nonpartisan election adjudication is that the current regime of state-court adjudication, as we have shown, produces an obvious distributional skew between the major parties. The problem that our findings document is not just judicial partisanship in election cases, but an asymmetrical pattern of judicial partisanship. The Republicans benefit more from judicial partisan loyalty than Democrats under the current system of state-court adjudication that has burgeoned since *Bush v. Gore*. This surge in election litigation dovetails with a concomitant surge in the partisanship and intensity of state supreme court elections over the same period of time. It also dovetails with a growing consciousness among party elites that election law matters politically and the attendant use of election law as a means to advance partisan policy and electoral goals.[149] All this seems to us no coincidence. The very circumstances that have combined to produce the partisanship of today's state-court election adjudication are also likely to block any nonpartisan reform of the process as well.[150] This is the fundamental problem of political

147. *See, e.g.*, Balkin, *supra* note 93, at 1448 (characterizing *Bush v. Gore* as "likely to be regarded as a sport, a one-shot case, with no continuing precedential impact").

148. Our colleagues Mary Dudziak and Fred Smith suggest the possibility of permitting federal removal as a remedy for worries about partisan state court adjudication. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-28 (1977) (expressing the preference for the superior institutional competence and objectivity of federal courts over state courts). For these types of election claims, federal removal would require a paired, sufficiently weighty federal claim to provide grounds for a federal question jurisdiction. It is also an open question whether federal courts still are superior fora than state courts, if they ever were. *See* Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 798-99 (1995); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 606-21 (1999); *see also* Gillman, *supra* note 69, at 264 ("[W]hile judicial independence may sometimes free a judge from unwanted political pressure, those structures do nothing to prevent an insulated judge from indulging her or his own political preferences or private agendas.").

149. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012) (detailing this development since *Bush v. Gore*).

150. *See* Gillman, *supra* note 69, at 250 (assuming a "regime politics" view that institutional structures are selected and maintained for the political advantages they secure for the dominant lawmaking coalition).

entrenchment that defines the field of election law.[151] It may be impossibly intractable when it involves and compromises the judiciary, because in the Elysian design, courts should be the very institutions entrusted with breaking up these kinds of party lockups in the political process.[152]

Conclusion

More than a decade and a half has passed since *Bush v. Gore*, but its legacy is the regular adjudication of election disputes by state courts. This new role of state courts has occurred over a time when state court elections have become as partisan and intensely politicized as they ever have been. One result, we find here, is that partisanship plays a significant role in how legal election disputes are contested and decided. Although it is methodologically difficult to disentangle partisanship from judicial ideology in most cases, our work here also is suggestive that party loyalty influences judicial decisionmaking even beyond these election cases. Our methodological design allows us to reveal systematic evidence of raw partisanship in judicial decisionmaking for election cases that is difficult to expose in other categories of cases. Even so, there is little reason to believe that partisanship influences judges *only* in election cases.[153] It could be that our work here exposes just the tip of the proverbial iceberg. If judges are influenced, consciously or not, by loyalty to their party in election cases, they are likely tempted to do so in other types of cases as well, even if it is methodologically difficult to isolate partisanship as cleanly there.[154]

151. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

152. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, at vii (1980).

153. *See* Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505, 508 (2012) (studying partisanship and ideology of federal appellate judges across all cases).

154. *See* Lammon, *supra* note 79, at 250-53 (distinguishing between judicial partisanship and ideology and discussing the challenges of doing so).