

PARTISAN LOYALTY, CASE STRENGTH, AND JUDICIAL DECISIONMAKING

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We apologize for the very preliminary nature of this draft. Although the data isn't final and the text is very far from final, we look forward to getting your thoughts on the initial results.

I. Background

Do judges decide cases, particularly politically sensitive ones, based significantly on their partisan loyalties? By partisan loyalties, we mean to focus on the “low politics of partisan political advantage,” deciding cases “to promote the interests of a particular political party and install its candidates in power.”² But even this rawest form of partisanship is difficult to untangle from ideology.³ For instance, 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. 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. 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.⁴ As a result, this basic

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² Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1409 (2001).

³ 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.*, RICHARD A. POSNER, *BREAKING THE DEADLOCK* 180 (2001); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1435 (2001); Frank I. Michelman, *Suspicion, or the New Prince*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT*, at 123, 124 (Cass R. Sunstein & Richard A. Epstein eds., 2001)

⁴ *See generally* Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787 (2014) (contrasting “coincidental” partisanship with “tribal” partisanship).

methodological complication clouds a simple conclusion that judges are troublingly influenced by partisanship in election law.

In this project, we offer a methodological answer for this complication—candidate-litigated election disputes. We collected data on election cases decided by a state supreme court in which a candidate was a litigant from 2005 through 2014. The cases 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.⁵ These were, we believe, cases where the legal ideological stakes for the merits of the question were typically low. There usually was 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, the *short-term* political impact of the decision would be quite clear for the election involving a candidate-litigant before the court. 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. 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.

⁵ See Mark J. McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 POL. RES. Q. 799, 802, 807-08 (2012) (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).

Our first analysis of this data yielded several salient findings.⁶ First, Republican judges systematically favor their own political party in election cases, controlling for other things, at a rate 36 percent higher than Democratic judges. To be precise, we found that Republican judges decided for their party's interest 59.3 percent of the time, while Democratic judges sided with their party 43.4 percent of the time. 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.

Second, Republican partisan loyalty is not only significantly stronger than Democratic partisan loyalty, it covaries with campaign-finance influences that affect the costs and benefits of siding with one's party, while Democratic partisan loyalty does not. We find that party campaign-finance support is associated with greater partisan loyalty among Republican elected judges, but has no effect on Democratic judges. 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. 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.

Third, partisan 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. Along similar lines, partisan loyalty is discouraged as the volume of attack advertising in past state supreme court elections increases. 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.

In this paper, we extend our initial investigation of judicial partisanship to incorporate an important new variable---the party affiliation of the lower court in these supreme court cases. The supreme court cases in our dataset are appellate decisions reviewing some initial disposition of the case before a state trial court or

⁶ See Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore*, 68 Stan. L. Rev. 1411 (2016).

intermediate appellate court. We have coded these cases to determine the partisanship of the lower court judges and added it to our analysis.

We believe the partisan affiliation of the lower court judges allows us additional leverage on two questions we seek to explore here. The first question is the degree that case strength matters in these highly politicized election cases. Within political science, the attitudinalist school long claimed that law has little influence on the Supreme Court, which decides cases almost based on the policy preferences of its justices.⁷ We hope to explore whether this is true for state supreme courts by introducing an indirect measure of case strength. We infer case strength from the basic premise that a partisan trial judge would prefer to decide election cases in favor of their own party's interest (i.e., in favor a litigant from her own party, or against a litigant from the opposing party) if they have sufficient discretion under the applicable law. Trial judges therefore would be predisposed to favor their own party unless the legal merits of the case compel a decision for the other party. For this reason, decisions by a partisan trial judge against her party's interest can be assumed to be, on average over the run of cases, stronger on the legal merits than decisions in favor of their own party. By comparing supreme court votes in cases with different trial court partisanship, we can see whether law, or at least our indirect measure of case strength, trumps partisanship. Are judges more likely to go against partisan interest in what we assume are the stronger cases for the other party?

The second question is understanding the partisan asymmetry that we described in our earlier findings from initial study of this data. Why do Republicans have greater partisan loyalty in these cases than Democrats? In our preceding article, we speculated on the answer based on political science literature on the different levels of organizational capacity and internal cohesion between the major parties. But this speculation was outside our data, and we hoped to find out more by exploring the underlying partisan asymmetry in greater depth. If Republican and Democratic judges decided election cases differently, we sought greater granularity in describing these differences across varying types of cases, particularly as we added the greater detail of trial court partisanship to the analysis. Did Republican judges decide more cases in their partisan interest because they were less likely than Democrats to accede to case strength to the contrary? Did Republicans display a distinct pattern of appellate judicial decisionmaking, or did they simply mirror Democrats but go to a further partisan

⁷ 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.").

extreme? We investigate these questions and report below our preliminary results, based on roughly three-quarters of our eventual data.

II. Data and Results

To explore the relationship between political partisanship, strength of case, and judicial decisionmaking, we assembled a comprehensive new dataset of election cases from several different sources. First, a team of independent researchers from Emory University School of Law collected and coded roughly 2,500 votes in election cases from all fifty states from 2005 to 2014.⁸ 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.⁹ The team was instructed to code cases in which a major-party candidate in an upcoming or just decided election was listed as a litigant, but to remove voter identification, campaign finance, redistricting, and voting rights cases as too ideologically valenced for our purposes, as well as flagging other inappropriately ideological cases outside those categories. 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, not unlike the 2000 Florida *Bush v Gore* litigation in the state courts.

The researchers coded whether each justice, sitting as a member of a multi-judge appellate panel, cast a partisan vote for the litigant representing the interests of the judge's political party. We defined a partisan vote as 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 judge is coded as voting in favor of her party's interest 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 election

⁸ 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.

⁹ 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 Electionis 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

candidate in a case with a Republican judge), a partisan vote is one in which the judge votes against the opposing-party litigant. For example, in a case involving a Democratic candidate contesting the results from an election that he lost, a Republican judge voting to affirm the election results would be coded as having cast a partisan vote.

The team also coded details of each election case including the issue in the case, the geographic basis of the contested election, and the litigants in the case. Additionally, the team collected data on each judge including their political party affiliation,¹⁰ the method by which the justices were selected for the court, and the date of next reelection or reappointment.

Of the initial 400 cases, 245 cases involved either a Republican or Democratic litigant and was decided by state supreme court justices for which our research assistants were able to determine political party affiliation. Our initial results, reported in Table 1, reveal that, compared to Democratic justices, Republican justices are more likely to vote for their own party or against the opposing party in the election cases.

Table 1: Partisan Voting in Full Data

	Percentage of Cases in Which State Supreme Court Justices Vote for Same Party or Against Opposing Party
Democratic Justices	43.4% (309)
Republican Justices	59.3% (565)

¹⁰ 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: 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.

To further investigate the disparity between Republican and Democratic justices' partisanship, research assistants then examined the lower court proceedings of the 245 cases with party-identified justices and partisan litigants. The researchers gathered information on which litigant initially brought each case in the lower court as either plaintiff or appellant, the party affiliation of the lower court judges,¹¹ and the winner in the lower court proceedings. Several cases dropped out of the data during the coding process: cases of first impression before the state supreme courts in which there were no lower court proceedings; cases for which no political party affiliation of lower court judges could be determined; and cases for which there was no clear winner in the lower courts. Of the first 197 cases coded, the researchers found detailed information on the lower court proceedings for 98 cases heard in 31 states. Thirty of the cases were heard in state intermediate appellate courts before the supreme court appeal, while the other 68 were appealed directly from the trial court to the state supreme court. The trial court cases were typically heard by a single judge, while a panel of judges generally presided over the intermediate appellate court cases. When the lower court data was merged with the data on state supreme court justices' votes, the data included 526 individual votes from 213 individual supreme court justices.

Tables 2 and 3 report the initial data detailing the winner in the lower court, the party affiliation of the lower court judge (or the majority party of the panel), and the supreme court affirmance of the lower court decisions. Table 2 reports the affirmance rates for Republican state supreme court justices, and Table 3 reports the rates for Democratic justices.

Table 2: Affirmance of Lower Court Decisions: Republican Supreme Court Justices

Winner in Lower court	Party of lower court judge (or majority party if panel)	Likelihood of affirming lower court decision	<i>n</i>
Dem	Dem	37%	84
Rep	Rep	85%	39
Dem	Rep	74%	38
Rep	Dem	92%	39

¹¹ The political party of the judges was determined from election records, newspaper articles, campaign contribution data, and other web searches.

Table 3: Affirmance of Lower Court Decisions: Democratic Supreme Court Justices

Winner in Lower court	Party of lower court judge (or majority party if panel)	Likelihood of affirming lower court decision	<i>n</i>
Rep	Rep	62%	21
Dem	Dem	47%	78
Rep	Dem	85%	34
Dem	Rep	92%	12

Although the number of observations is small for some cells, the results generally indicate that strength of case, even in politically-charged election cases, can override partisanship. In Table 4, it is evident that the supreme court justices of both parties are likely to affirm the lower court's decision when the lower court decided in favor of a litigant from the opposing political party. In these cases, the lower court put aside partisanship to decide in favor of a litigant from the opposing party, suggesting that the case in favor of the opposing-party litigant was quite strong. The supreme court affirmance of the lower court's decision confirms this; case strength dominates any partisanship of the supreme court justices too.

Table 4: Case Strength and Partisan Voting

Winner in Lower court	Party of lower court judge (or majority party if panel)	Supreme Court Justice's party	Likelihood of affirming lower court's vote	<i>n</i>
Dem	Rep	Dem	92%	12
Rep	Dem	Rep	92%	39
Rep	Dem	Dem	85%	34
Dem	Rep	Rep	74%	38

Predictably, both Democratic and Republican supreme court justices are more likely to affirm a lower courts' ruling that favors a litigant from the justices'

own political party. That is, Democratic justices are more likely to affirm a case in favor of a Democratic litigant (92 percent) than a Republican litigant (85 percent), even though that means affirming a Republican lower court's decision. Similarly, Republican supreme court justices are more likely to affirm a case in favor of a Republican litigant (92 percent) than a Democratic litigant (74 percent), even though they are affirming a Democratic court's opinion. Although the differences are only statistically significant for the Republican justices' voting, the patterns suggest that, even for strong cases, partisanship plays some role.

Indeed, other voting patterns confirm the importance of partisanship, especially among Republican supreme court justices. As reported in Table 5, Democratic supreme court justices affirm about half of the cases appealed from a Democratic lower court that found in favor of a Democratic litigant. However, for Republicans, the likelihood of affirming a lower Republican court's ruling in favor of a Republican litigant is 85 percent. The difference between the two proportions is statistically significant at $p < 0.01$. Importantly, the Republicans' 85 percent affirmance rate is higher than the 74 percent likelihood that Republican supreme court justices will affirm a lower Republican court's vote in favor of a Democratic candidate. Although the difference is not statistically significant ($p < .11$), the pattern suggests that the high affirmance rate cannot be entirely explained by the Republican supreme court justices' confidence in the lower Republican court's decision; partisan loyalty in favor of in-party litigants is important too.

Table 5: Partisan voting among Republican and Democratic judges

Winner in Lower court	Party of lower court judge (or majority party if panel)	Supreme Court Justice's party	Likelihood of affirming lower court's vote	<i>n</i>
Dem	Dem	Dem	47%	78
Rep	Rep	Rep	85%	39

Additionally, Republican supreme court justices exhibit a predictable pattern in their affirmances of Democratic lower courts' decisions in favor of Democratic litigants. As illustrated in Table 6, Republican supreme court justices affirm only 37 percent—the lowest affirmance rate for Republican justices across all combinations of lower court and litigant political affiliations—of decisions from a Democratic lower court in favor of a Democratic litigant. The low affirmance rate

is consistent with the other voting patterns of Republican justices. Without the opposing party support of the lower court, there is no reason to think these were particularly strong cases. Moreover, the litigants are Democrats, so partisanship would push the Republican supreme court justices to overturn the lower court decisions.

Table 6: ??

Winner in Lower court	Party of lower court judge (or majority party if panel)	Supreme Court Justice's party	Likelihood of affirming lower court's vote	<i>n</i>
Rep	Rep	Dem	62%	21
Dem	Dem	Rep	37%	84

However, with a quarter of our data yet to be reported and not represented here, we cannot explain in these partial results why Democratic judges affirm 62 percent of lower Republican court decisions in favor of Republican litigants. Recall that Democratic judges affirmed only 47 percent of lower Democratic court decisions in favor of Democratic litigants. It is possible that this difference is an anomaly due to the low number of observations. Indeed, the difference is not statistically significant because of the small *n*.

We need to collect the rest of our data before we can make any firm conclusions, but we see two potential directions the data may eventually take us. One possibility is that Democratic supreme court justices are less influenced by the lower court's partisanship and therefore affirm both Republican and Democratic lower courts' partisan decisions at roughly similar rates that approach 50 percent. By contrast, the Republican supreme court justices are more affected by the lower court's partisanship and strongly tend to affirm a Republican lower court's decision in favor of Republicans and reverse a Democratic lower court's decision in favor of Democrats. The spread between favoring in-party lower court decisions favoring the in-party on one hand, and favoring out-party lower court decisions favoring the out-party on the other hand, is therefore much larger for Republican justices than Democratic justices. This telling helps explain why Democratic justices are more sympathetic to decisions in favor of Republicans than Republican justices are to those in favor of Democrats.

Alternatively, it may be that Democratic lower courts are less trustworthy than Republican lower courts such that even Democratic supreme court justices

affirm their decisions in favor of Democrats only 50 percent of the time. In this alternate telling, *both* Republican and Democratic justices second-guess the partisan decisions of Democratic lower courts and therefore neither Republican nor Democratic justices affirm Democratic lower courts' partisan decisions less than 50 percent of the time.¹² By contrast, both Republican and Democratic justices are more confident in Republican lower courts and both affirm their partisan decisions more than 50 percent of the time. We have no reason right now to question the trustworthiness of Democratic lower courts vis-à-vis Republican ones, but we will have to see where the final data lead.

III. Conclusion

Our early results suggest that partisanship plays a role in state supreme court decisionmaking in election cases, especially for Republican justices. However, it also suggests that, for particularly strong cases, case strength appears to be a more important influence on voting than partisanship.

¹² Another slightly different possibility is that Republican lower courts are better than Democratic ones at anticipating state supreme court decisionmaking and better tailor their judgments to draw approval. See Stephen J. Choi, Mitu Gulati, & Eric A. Posner, What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals, 28 J. L. Econ. & Org'n 518 (2011) (theorizing that federal district courts seek appellate affirmance and tailor decisions to circuit judges' partisan preferences).