

State Courts, State Legislatures, and Setting Abortion Policy

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Abstract On June 24, 2022, the US Supreme Court decided in *Dobbs vs. Jackson Women's Health Organization* (597 U.S. (2022)) to overturn the constitutional right to abortion, a seismic shift in abortion policy that makes the states key battlegrounds in fights over abortion and broader reproductive rights. This article focuses on the role of state supreme courts in setting state abortion policies. Using an original data set of state court decisions surrounding abortion from the past 20 years, the authors investigate how two overarching factors affect state supreme court decision-making on abortion. First, they track how states' political environments affect the decisions courts make about access to abortion. Second, the authors consider the scope of the abortion policy considered by the courts. The authors find that the partisan makeup of state legislatures does not influence the direction of state supreme courts' rulings on abortion issues, but it does affect the scope of abortion regulation being considered by the courts. Additionally, they find that elected judges tend to be more responsive to constituent preferences when ruling on abortion policies. Overall, these findings illustrate the multi-faceted dynamics involved in state supreme courts' rulings on abortion.

Keywords *Roe v. Wade*, abortion rights, state courts, politics

The US Supreme Court decision in *Roe v. Wade* (410 U.S. 113 (1973)) established that access to an abortion is a protected constitutional right. Yet, in the past 50 years, courts and legislatures have limited access to reproductive health care. Ultimately, the Supreme Court decided on June 24, 2022, in *Dobbs vs. Jackson Women's Health Organization* (597 U.S. (2022)) that the Constitution, in fact, provides no right to abortion. The Supreme Court's decision reverses 50 years of precedent and has led to a

patchwork of laws regarding abortion access that vary state by state. Battles over the right to access abortion health care now occur at the state level, with state courts playing an increasingly important role. State courts have the power to enforce or ignore federal abortion regulations based on their decisions regarding the constitutionality of these laws. Unlike the US Supreme Court, many state courts have direct ties to the electorate. Therefore, public opinion can influence court decisions, and court decisions can also influence public opinion on abortion (Franklin and Kosaki 1989; Johnson and Martin 1998).

Analyzing patterns of courts' abortion decisions is crucial to understanding the politics surrounding abortion policy and where Americans have access (or not) to seek an abortion, especially as there is no longer a federal protection for women and people who may become pregnant to seek abortions. This article takes a separation-of-powers approach to examining the relationship between state high courts and state legislatures in setting abortion policies. We focus on abortion policies at the state level for two reasons. First, the patchwork system of laws governing abortion access across the 50 states creates uneven access to reproductive health care that disproportionately disadvantages those who may become pregnant, especially low-income individuals and people of color (Kreitzer et al. 2021; Ostrach and Cheyney 2014). Second, courts frequently appear to be a major player in setting abortion policy (Kastellac 2018), but it is unclear how frequently state courts affect abortion policy. The power of state courts to expand or restrict access to abortion is set to become even more important now that the US Supreme Court, in the *Dobbs* decision, eviscerated the protection of abortion rights at the federal level.

Using an original data set of state court decisions on abortion from the past 20 years, we investigate how two overarching factors affect how state supreme courts make decisions about abortion policy. First, we track how the state political environment affects the decisions courts make about access to abortion. Here we consider how the partisan composition of state legislatures and judicial elections affect the courts' decision-making on abortion. Second, we consider the scope of the abortion policy considered by the courts. We expect that in some states, depending on the political environment, the cases that come to the courts regarding abortion may be designed to chip away at access to abortion; but in other states the cases considered may be broad in scope, seeking to severely limit abortion access for many people. These are certainly not the only factors likely to affect state court decision-making on abortion, but they offer a pivotal starting point for understanding the role courts play in setting abortion policies.

Studying the political determinants of state court rulings on abortion has crucial implications for the courts' responsiveness to the public and for the courts' role in protecting individual rights. Recent polls indicate that a vast majority of American citizens support abortion rights: 71% of Americans support some form of access to abortion for women and people who may become pregnant, support that reaches across partisan lines (Pew Research Center 2022). Despite public support for abortion rights, the 6–3 majority-conservative US Supreme Court overturned the constitutional right to abortion, threatening the court's legitimacy and public trust in judicial institutions. This current climate highlights the importance of studying the incentive structure for state court judges to rule in line with public opinion. State courts are key battlegrounds in the fight over abortion rights.

Literature Review

Scholarly work on state courts (and courts more generally) considers how both internal and external factors contribute to judicial decision-making. First, individual-level, internal factors such as ideology play a role. Policy preferences of state supreme court justices are consistently predictive of their votes across a variety of issue areas (Bonica and Woodruff 2015; Canes-Wrone, Clark, and Kelly 2014). The influence of ideology on outcomes, however, can be moderated by internal factors such as the methods used to select judges (i.e., whether judges are appointed or elected). Selection method can also moderate the effect of judicial ideology through public opinion or the ideological composition of the other branches of state government (Caldarone, Canes-Wrone, and Clark 2009; Curry and Romano 2018). Selection method also mediates the influence of external factors, primarily public opinion. Judges that face elections, particularly nonpartisan elections, are more likely to issue decisions popular with the public as a form of partisan signaling (Caldarone, Canes-Wrone, and Clark 2009; Canes-Wrone, Clark, and Kelly 2014). Proximity to elections is also important, as judges may be more inclined to consider public opinion and concern about their rulings as elections get closer (Huber and Gordon 2004). Although these pressures are documented especially for judges facing election or reelection, there is also evidence that even those judges chosen by appointment vote strategically (Gray 2017; Shepherd 2009). Moreover, we might expect all of these considerations to be especially pertinent when the courts hear cases that deal with salient issues like abortion (as considered here) or the death penalty, among other topics (Brace and Boyea 2008; Canes-Wrone, Clark, and Park 2012; Canes-Wrone, Clark,

and Kelly 2014). Research in judicial politics suggests a strong influence of judicial selection method on the individual justices, and as a result, on courts' responsiveness to public opinion (Caldarone, Canes-Wrone, and Clark 2009; Hall 2001).

Internal factors are not the only determinants of judicial decision-making, however. Courts do not make decisions in a vacuum; they are constrained and affected by external political actors within and outside the government. Primarily, we might expect state legislatures to act strategically to influence the courts' decisions. State legislatures may propose "court-curbing" policies to limit the power of state supreme courts, particularly in states where judges have life tenure, since they are likely the least responsive to the public (Leonard 2016). Legislatures will alter language in statutes and laws to limit (or expand) the ability of courts to make certain decisions (McGrath 2013). Statutes with more detailed language also reduce the likelihood of judicial review (Randazzo, Waterman, and Fix 2011). These perspectives suggest that state legislatures anticipate and evaluate two factors: first, the ideology or expected preferences of the court; and second, how those preferences will influence any potential disputes that arise before the court (Blackley 2019). These interactions can also influence the initial legislative stage as policy makers are writing law. Some scholars suggest that policy makers (state legislators and governors) anticipate the ideological hostility or friendliness of the court when creating laws and policies governing abortion, the death penalty, education, or even HMOs (Cann and Wilhelm 2011; Langer and Brace 2005; Wilhelm 2007, 2009). That being said, very few of these bills ever become law, so the threat posed by the legislative branch (and the executive branch) against state supreme courts is tenuous at best (Leonard 2022).

This strategic behavior is not limited to state legislatures. States with a legislature lacking adequate professional resources for lawmaking (i.e., low in legislative professionalism) tend to have more laws audited by their state supreme courts (Armaly 2020). There is some evidence that state supreme court justices anticipate and even alter their decisions when the executive branch and the public hold substantively different policy preferences (Schorpp 2012). Importantly, however, this effect can be mediated if the court considers the state legislature to be an ally (Johnson 2017). Beyond state legislatures, interest groups can also play an important external role in influencing outcomes (Wlezien and Goggin 1993). Furthermore, ideological drift from the public is more likely when judges lack partisan connections to their communities (Curry and Romano 2018). Taken together, these complex relationships suggest that the executive,

legislative, and judicial branches of state governments consider one another when making policy and may substantively alter their decisions as a result.

Furthermore, we know that strategic internal and external considerations alter how other courts write their opinions, notably including the US Supreme Court (Black et al. 2016a, 2016b; Owens, Wedeking, and Wohlfarth 2013; Owens and Wohlfarth 2012). Recent research by Romano and Curry (2019) demonstrates that state supreme court justices do the same: they consider who their audience is and alter their language accordingly. According to Romano and Curry's (2019) broader findings, however, we expect that language in abortion decisions will depend on congruence between the judges and the public they serve. Broadly, we might expect that there are incentives to craft decisions in different ways if there is an expectation of pushback among the public for their decisions. Courts may choose to write shallow or narrow decisions (i.e., decisions with limited breadth and precedential impact) if they are seeking to minimize the potential negative impact of a decision. US Supreme Court Justice William Brennan is one example of this phenomenon, when he wrote the majority opinion in *Pennsylvania v. Muniz* (496 U.S. 582 (1990)) that carved out an exception to the *Miranda* rule. This action was noteworthy because his past decisions were in direct contrast to this decision: he wrote in a letter to Justice Thurgood Marshall, "I made the strategic judgment to concede the existence of an exception but to use my control over the opinion to define the exception as narrowly as possible" (quoted in Maltzman, Spriggs, and Wahlbeck 2000).

Finally, institutional mechanisms are likely to influence decisions like the one described above. For example, elected judges are expected to be more concerned with who their audience is and how they craft their opinion (Leonard and Ross 2016; Nelson 2013; Romano and Curry 2019). The political environment, particularly the ideological congruence between the court and the legislature or the public, also influences the court's use of language and should influence the type of opinion written (Romano and Curry 2019). All in all, we expect that state supreme court judges will consider the partisanship of the legislature and the governor, and potentially the policy preferences of the public, in crafting both the direction of their decision and its overall breadth.

Our Expectations

Drawing on previous research on determinants of courts' rulings, we focus on the role of state-level political contexts in shaping state courts' ruling on

abortion laws. We first expect that the partisan composition of the state legislature will inform judicial decisions, particularly on politically salient issues like abortion. Judges in state courts are incentivized to make rulings that are in line with the state's political climate, to minimize popular backlash and preserve the court's legitimacy. Following this logic, given the partisan split on abortion rights (Adams 1997; Schlozman 2015), state supreme courts in Republican-controlled states are more likely to issue antiabortion rulings, and proabortion rulings are more likely in Democratic-controlled states. In addition to electoral pressures, judges' rulings may be heavily influenced by their relationship with state legislatures. Judges may be inclined not to overturn legislation when one party dominates the state legislature, fearing that a majority party in the legislature might pass more extreme legislation to advance the party's agenda while they control the state. This pattern may be more pronounced in the presence of unified government (i.e., the governor and a majority party in the state legislature are from the same party) (Brace, Hall, and Langer 2001). The fear of policy retribution could lead justices not to overturn antiabortion legislation when the state legislature is controlled by the Republican Party, whereas incentives to do so will be weaker under a Democratic-controlled legislature.

Next, we consider the effects of judicial elections on state high courts' abortion rulings. There is wide variation in procedures used to select justices. Thirty-eight states use elections to select or retain justices of the state's high court, while 12 states have their justices appointed by the governor or state legislature. Even among those states with elections, the contexts of electoral competition vary greatly. Sixteen states use a hybrid system where justices face uncontested retention elections, 14 of them use contested nonpartisan elections, and eight states employ partisan elections. Each selection method creates a distinct incentive structure for justices, particularly when rendering decisions on contentious issues like abortion. Scholars argue that judicial elections at the state level should facilitate democratic accountability in judicial institutions by motivating judges to render decisions that are more responsive to public opinion (Brace and Boyea 2008; Hall 2001). Caldarone, Canes-Wrone, and Clark (2009) find that judges who seek office in nonpartisan elections issue rulings that better match public opinion than those who seek office in partisan elections. Others find that the electoral incentives judges face vary by the nature of the case. Cases that involve salient and controversial issues create greater incentives to rule consistently with public opinion (Cann and Wilhelm 2011). Following this logic, we expect that justices who face

elections will render decisions in a way that minimizes the possibility of public backlash. For instance, elected justices will be more likely to issue proabortion rulings when considering a policy that restricts the state residents' overall access to abortion than when considering a specific case where the ruling has direct impacts only on the parties involved in the case. This pattern will be particularly evident in states with a strong proabortion sentiment. By contrast, judges in states where they are appointed will be more insulated from such pressures.

Finally, we expect that state courts' rulings on abortion will depend heavily on the type of abortion policy in the case. Since judges have incentives to rule in a way that minimizes the negative public impacts of their decisions, they are more likely to overturn an abortion regulation that entails broad, large-scale changes from the status quo. As we further illustrate in the next section, state supreme courts decide on a wide variety of cases related to abortion regulations, ranging from general abortion rights in the state to more case-specific regulations, such as a minor's access to abortion with or without parental involvement, or protection of abortion clinics. We suspect that state supreme courts are less likely to make antiabortion decisions for cases with broad societal impacts but may chip away at abortion access in a more incremental fashion.

Data Collection

Using an original data set of state supreme court abortion decisions from 2000 to 2021, we examine the interplay between abortion policy making in state courts and state legislatures. We analyze state supreme court decisions to assess whether they support or hinder access to abortion, and we classify the type of restriction considered in these decisions. We then examine the extent to which state-level institutional abortion regimes restrict access to abortion, and we further examine whether court decisions influence certain types of restrictions more than others. We identified a total of 74 unique state supreme court cases related to abortion regulations. We report our full list of state court decisions in table 1. Figure 1(a) shows the distribution of abortion court cases across 50 states from 2000 to 2021. During this period, 25 state high courts ruled on at least one case involving an abortion-related issue.

After we identified cases, we classified the decisions according to whether the case produced a proabortion or antiabortion ruling, which is based on whether the court ruled to expand or limit access to abortion. Any case where the court ruling limited access to abortion was coded as an

Table 1 List of Cases in Data

State	Date	Case title	Position	Type
Nebraska	21-Apr-00	Hron v. Donlan, 259 Neb. 259	Pro	Provider protection
Texas	22-Jun-00	In re Doe, 19 S.W.3d 346	Pro	Young people
New Jersey	15-Aug-00	Planned Parenthood of Cent. New Jersey v. Farmer, 165N.J. 609	Pro	Young people
Tennessee	15-Sep-00	Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1	Pro	Biased counseling
Missouri	31-Jan-01	State v. Planned Parenthood, 37 S.W.3d 222	Pro	Provider protection
Alabama	1-Jun-01	Ex parte Anonymous, 803 So. 2d 542	Anti	Young people
Alabama	21-Jun-01	In re Anonymous, 806 So. 2d 1269	Anti	Young people
Alabama	25-Jun-01	Ex parte Anonymous, 808 So. 2d 1025	Pro	Young people
Alabama	5-Jul-01	Ex parte Anonymous, 808 So. 2d 1030	Anti	Young people
Florida	12-Jul-01	Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036	Anti	Funding/insurance
Mississippi	19-Jul-01	R. B. v. State, 790 So. 2d 830	Anti	Young people
Alaska	27-Jul-01	State v. Planned Parenthood of Alaska, 28 P.3d 904	Pro	Funding/insurance
Alabama	30-Jul-01	Ex parte Anonymous, 810 So. 2d 786	Pro	Young people
Alabama	16-Aug-01	Ex parte Anonymous, 812 So. 2d 1234	Anti	Young people
Alaska	16-Nov-01	State v. Planned Parenthood, 35 P.3d 30	Anti	Young people
Texas	29-Apr-02	In re Jane Doe 10, 78 S.W.3d 338	Pro	Young people
Mississippi	26-Sep-02	In re A. W., 826 So. 2d 1280	Anti	Young people
Texas	10-Oct-02	In re Jane Doe 11, 92 S.W.3d 511	Pro	Young people
Arizona	22-Oct-02	Simat Corp. v. Ariz. Health Care Cost Containment Sys., 203 Ariz. 454	Pro	Funding/insurance
Texas	31-Dec-02	Bell v. Low Income Women of Tex., 95 S.W.3d 253	Anti	Funding/insurance
New York	21-Mar-03	Brighton Residents Against Violence to Children, Inc. v. MW Props., LLC, 304A.D.2d 53	Pro	Provider protection

Table 1 (continued)

State	Date	Case title	Position	Type
Florida	10-Jul-03	N. Fla. Women's Health & Counseling Servs. v. State, 866 So. 2d 612	Pro	Young people
Indiana	24-Sep-03	Humphreys v. Clinic for Women, Inc., 796N.E.2d 247	Anti	Funding/insurance
Florida	23-Oct-03	Amendments to the Fla. Rules of Civil Procedure, 2003 Fla. LEXIS 1903	Pro	Young people
Alabama	7-Nov-03	Ex parte Anonymous, 889 So. 2d 518	Pro	Young people
Alabama	17-Nov-03	Ex parte Anonymous, 889 So. 2d 525	Anti	Young people
Alabama	16-Mar-04	Ex parte Anonymous, 888 So. 2d 1275	Anti	Young people
Florida	30-Jun-05	In re Amendments to the Fla. Rules of Juvenile Procedure, 907 So. 2d 1161	Pro	Young people
Kansas	3-Feb-06	Alpha Med. Clinic v. Anderson, 280 Kan. 903	Pro	Provider protection
Missouri	28-Feb-06	Reprod. Health Servs. of Planned Parenthood, 185 S.W.3d 685 of the St. Louis Region, Inc. v. Nixon	Anti	Biased counseling
Florida	6-Apr-06	State v. Presidential Women's Ctr., 937 So. 2d 114	Anti	Biased counseling
Florida	6-Jul-06	In re Amendments to the Rules of Juvenile Procedure—Forms for Use with Rules of Juvenile Procedure, 934 So. 2d 438	Pro	Young people
Missouri	8-Aug-06	Shipley v. Bates, 200 S.W.3d 529	Pro	Provider protection
Illinois	18-Sep-06	In re Rules, 2006 Ill. LEXIS 1110	Pro	Young people
Missouri	1-May-07	Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 220 S.W.3d 732	Anti	Young people
Alaska	2-Nov-07	State v. Planned Parenthood, 171 P.3d 577	Pro	Young people
New York	5-Dec-08	Gallegos v. City of New York, 2008N.Y. Misc. LEXIS 9816	Pro	Young people
Ohio	1-Jul-09	Roe v. Planned Parenthood Southwest Ohio Region, 122 Ohio St. 3d 399	Pro	Young people

(continued)

Table 1 List of Cases in Data (*continued*)

State	Date	Case title	Position	Type
Ohio	1-Jul-09	Cordray v. Planned Parenthood Cincinnati Region, 122 Ohio St. 3d 361	Anti	Medication abortion
New York	19-Aug-09	Matter of Zallie v. Brigham, 2009N.Y. Misc. LEXIS 4284	Pro	Biased counseling
Nebraska	21-May-10	In re Anonymous 3, 279 Neb. 912	Pro	Young people
Alaska	2-Jun-10	Planned Parenthood v. Campbell, 232 P.3d 725	Anti	Young people
North Dakota	7-Dec-10	B.D.H. v. Mickelson, 2010 ND 235	Anti	Other
Florida	20-Oct-11	In re Amendments to the Fla. Rules of Juvenile Procedure, 75 So. 3d 216	Anti	Young people
Oregon	12-Jan-12	Carson v. Kroger, 351 Ore. 508	Pro	Other
Alabama	23-Mar-12	Ex parte Anonymous, 92 So. 3d 68	Anti	Young people
Oklahoma	4-Dec-12	Nova Health Sys. v. Pruitt, 2012 OK 103	Pro	Biased counseling
Alaska	2-May-13	Desjarlais v. State, 300 P.3d 900	Pro	Other
Nebraska	4-Oct-13	In re Anonymous 5, 286 Neb. 640	Anti	Young people
Kansas	18-Oct-13	In re Kline, 298 Kan. 96	Pro	Provider protection
Louisiana	14-Mar-14	Midtown Med., LLC v. Dep't of Health & Hosps., 135 So. 3d 594	Anti	Provider protection
Kansas	21-Oct-14	State v. Roeder, 300 Kan. 901	Pro	Provider protection
New York	7-Oct-15	In re Our Lady of the Sacred Heart Roman Catholic Church Soc'y of Hamburg, 2015N.Y. Misc. LEXIS 9974	Anti	Provider protection
Alabama	23-Oct-15	Limon v. Sandlin, 200 So. 3d 21	Anti	Young people
South Carolina	28-Oct-15	In re S.C. Elec. Filing Policies & Guidelines, 415 S.C. 1	Anti	Young people
New York	14-Dec-15	In re Peter, 2015N.Y. Misc. LEXIS 10210	Anti	Provider protection
Oklahoma	13-Dec-16	Burns v. Cline, 2016 OK 121	Pro	Other
Florida	16-Feb-17	Gainesville Woman Care, LLC v. State, 210 So. 3d 1243	Pro	Biased counseling
Florida	23-Feb-17	Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918	Pro	Other

Table 1 (continued)

State	Date	Case title	Position	Type
Georgia	19-Jun-17	Lathrop v. Deal, 301 Ga. 408	Pro	Other
Ohio	12-Sep-17	Capital Care Network of Toledo v. Ohio Dep't of Health, 153 Ohio St. 3d 362	Pro	Provider protection
Ohio	26-Sep-17	Preterm-Cleveland, Inc. v. Kasich, 153 Ohio St. 3d 157	Pro	Other
Maine	24-Oct-17	Mabel Wadsworth Womens Health Ctr. v. Hamilton, 2017 Me. Super. LEXIS 258	Anti	Funding/insurance
Missouri	23-Jan-18	Doe v. Parson, 567 S.W.3d 625	Pro	Biased counseling
Iowa	29-Jun-18	Planned Parenthood of the Heartland v. Reynolds ex re. State, 915N.W.2d 206	Pro	Biased counseling
New York	28-Dec-18	Roman Catholic Diocese of Albany, N.Y. v. Vullo, 2018N.Y. Misc. LEXIS 11331	Pro	Funding/insurance
Montana	30-Jan-19	Weems v. State, 2019 MT 98	Pro	Expanded scope
Alaska	15-Feb-19	State v. Planned Parenthood of the Great Northwest, 436 P.3d 984	Pro	Funding/insurance
Kansas	26-Apr-19	Hodes & Nauser, MDS, P.A. v. Schmidt, 309 Kan. 610	Pro	Other
Oklahoma	30-Apr-19	Okla. Coalition v. Cline, 2019 OK 33	Pro	Medication abortion
Missouri	30-Jun-20	Planned Parenthood of St. Louis Region v. Dep't of Soc. Servs., 602 S.W.3d 201	Pro	Funding/insurance
New York	2-Jul-20	Roman Catholic Diocese of Albany v. Vullo, 185A.D.3d 11	Pro	Funding/insurance
Alabama	30-Oct-20	Magers v. Ala. Women's Ctr. Reprod. Alts., LLC, 2020 Ala. LEXIS 154	Pro	Provider protection
Iowa	23-Mar-21	Planned Parenthood of the Heartland, Inc. v. Reynolds, 962N.W.2d 37	Pro	Funding/insurance

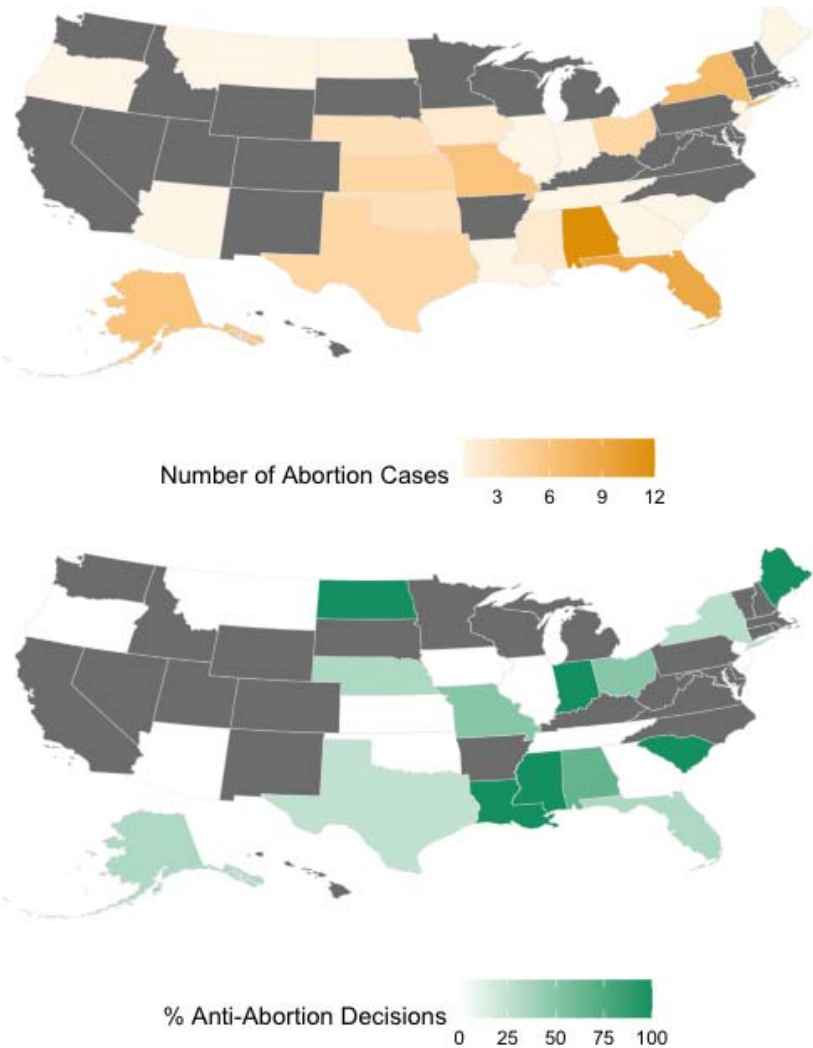


Figure 1 Geographical distribution of state supreme court abortion cases (2000–2021).
(a) Abortion cases
(b) Share of antiabortion decisions

antiabortion decision, and any case where the court preserved the existing abortion access or expanded access is coded as a proabortion decision. Figure 1(b) plots the share of antiabortion decisions in all abortion-related state supreme court cases in each state from 2000 to 2021. The map shows a considerable variation in the share of antiabortion rulings across states.

Taken together with the map in figure 1(a), we see that the sheer number of court abortion cases does not necessarily align with the frequency of antiabortion rulings.

We also created a case typology based on the specific abortion policy addressed in the case. Our typology follows NARAL Pro-Choice America's classification for states' abortion regulations with some modifications, such as the addition of the medication abortion category. We classified the cases into the following eight categories, which we believe are mutually exclusive: (1) policies regarding young people's access to abortion (young people), (2) expanding the scope of health care professionals who can perform abortion services (expanded scope), (3) guaranteeing prescriptions of abortion pills (prescription guarantee), (4) protection of abortion clinics and health care professionals who provide abortion services (provider protection), (5) biased counseling requirement and/or mandatory waiting periods for pregnant people seeking abortion care (biased counseling), (6) state funding and insurance coverage for abortion (funding/insurance), (7) regulations regarding the use of abortion pills (medication abortion), and (8) other abortion regulations (other).

Results

We first consider how the frequency and the ruling of state court abortion cases vary by the partisanship of state legislatures. The left panel of figure 2 plots distributions of the cases disaggregated by the party controlling state legislature and the outcome of the ruling. Most of the abortion cases (39 out of 74 cases) were from states where their legislature was controlled by the Republican Party.

We use a difference-in-means test to analyze whether there is a meaningful difference in the frequency of antiabortion rulings between Democratic- and Republican-controlled state legislatures. The bottom panel of figure 2 shows that the proportion of antiabortion rulings is roughly 20 percentage points higher in Democratic states than in Republican states, although this difference is not statistically significant.

This finding does not confirm our expectation that state courts will issue abortion rulings consistent with the position of a legislative majority. We suspect, however, that the breadth of abortion policy in the cases brought to the courts explains the lower frequency of antiabortion rulings in Republican-controlled states. In other words, antiabortion stakeholders may see a greater opportunity to slowly chip away at abortion access in Democratic states that are more likely to pass policies that support

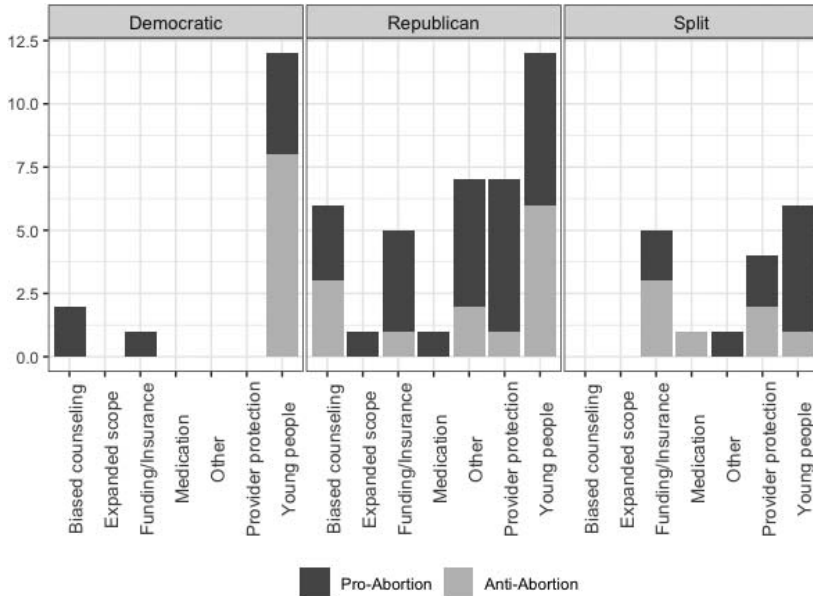


Figure 3 Type of abortion regulation addressed in state court cases by state legislature party control (2000–2021).

abortion access. Figure 3 illustrates this point by showing the distribution of different abortion policy types across states with Democratic, Republican, and split state legislatures. Abortion cases in Democratic states covered only a narrow set of abortion policies, where cases regarding young people's access to abortion constituted the vast majority. Most of these cases also had a narrow scope because their rulings had direct impacts only on the parties involved in the case. By contrast, state supreme courts in Republican states considered a variety of abortion policies, including funding and insurance, biased counseling requirement, expanded scope, and young people's access to abortion. This finding implies that when the state legislature is controlled by the Republican Party, political actors do not just bring more abortion cases to the state supreme court; political actors also bring cases that have a wide-ranging influence on abortion access in the state.

As shown in figure 3, antiabortion rulings were less frequent among cases with broad societal impacts, such as impacts on funding and insurance coverage for abortion service in the state, than among cases with narrower impacts, such as young people's access to abortion, in both

Democratic- and Republican-controlled states. Here, we consider broad impacts to consist of limitations on the ability for anyone who might become pregnant to get an abortion. These include limits on the time frame during which a woman can seek an abortion, such as SB 8 in Texas, which mandated that people cannot seek an abortion after fetal cardiac activity is detected, typically at six weeks past a person's last menstrual period. Narrow impacts include limitations on abortion access for a subset of the people who might need or seek an abortion. A narrow impact arises from a case that involves a single person seeking access to abortion and where only that single person seeking access is affected by the outcome. Many of the cases with narrow impacts involved young people seeking alternative remedies to parental involvement requirements. These are cases where a 16- or 17-year-old sought permission from the court to obtain an abortion because the young person could not meet the parental involvement requirements. Twenty-two out of 32 cases in our data set that belong to the "young people" category yielded rulings that had direct impacts only on the parties involved in the case, instead of having a broad society-level impact. This confirms our expectation that the incentive to minimize the negative impacts of their decisions leads judges to refrain from supporting abortion regulation with a broader scope. Interestingly, the same pattern does not appear when the state legislature is split.

In addition to the type of abortion policy, the nature of the underlying law being considered might account for the difference in frequency of antiabortion decisions. We classified the cases based on the type of ruling, as shown in table 2. Our classification shows that supreme courts in states with Republican-controlled legislatures considered antiabortion state laws much more frequently than those in Democratic-controlled states. State courts in Republican-controlled states struck down 16 out of 24 antiabortion state laws, and they upheld the other eight antiabortion state laws. There was only one case where a state supreme court in a state with a Democratic-controlled legislature considered an antiabortion law (Tennessee in 2000), and the court struck down the law.

Our investigation shows that most cases on abortion in state supreme courts during this period were at least partially based on state constitutional grounds. Among 35 cases in our data, 13 cases were based on state constitutions, and 16 were based on both federal and state constitutions. This pattern suggests a considerable level of independence for state supreme courts in abortion-related decisions.

Following previous work on state supreme courts emphasizing the role of judicial ideology (Bonica and Woodruff 2015; Canes-Wrone, Clark, and

Table 2 Types of State Supreme Court Rulings on Abortion

Antiabortion rulings			
	Democratic	Republican	Split
Upheld antiabortion law	0	8	4
Struck down proabortion law	0	1	0
Affirmed state government's action	0	0	1
Affirmed lower court's decision	8	3	0
Affirmed nonstate plaintiff's rights	0	0	2
Reversed lower court's decision	0	1	0
Total	8	13	7
Proabortion rulings			
	Democratic	Republican	Split
Upheld proabortion law	2	0	1
Struck down antiabortion law	1	16	1
Amendment	0	1	1
Affirmed state government's action	0	1	2
Struck down state government's action	1	1	0
Affirmed lower court's decision	0	4	2
Reversed lower court's decision	3	3	3
Total	7	26	10

Kelly 2014), we additionally examined whether the ideology of supreme court justices is associated with the likelihood of the court issuing antiabortion rulings. Figure 4 plots the relationship between the median ideology score of state supreme courts and the proportion of antiabortion rulings (the number of antiabortion rulings divided by the total number of abortion-related cases). The ideology scores for individual justices come from Bonica and Woodruff (2012), which cover 2000–2010. A higher value of justice ideology score indicates more conservatism. The plot suggests that there is no clear relationship between judge ideology and the proportion of antiabortion rulings.

Next, we test our expectation regarding the effect of judge selection methods. As seen in figure 5, courts with justices that are popularly elected issued antiabortion rulings more frequently than courts with justices that are appointed by the governor or state legislature. However, the difference in means between two groups was not statistically significant at a conventional level.

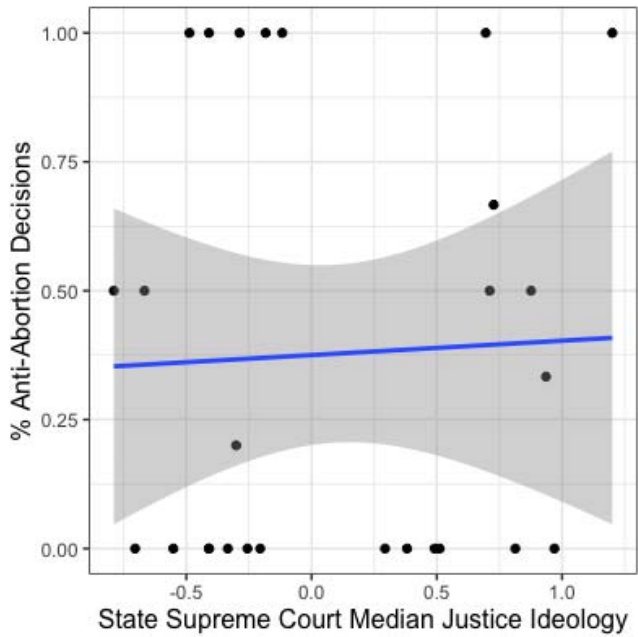


Figure 4 Proportion of antiabortion decisions by state supreme court median justice ideology.

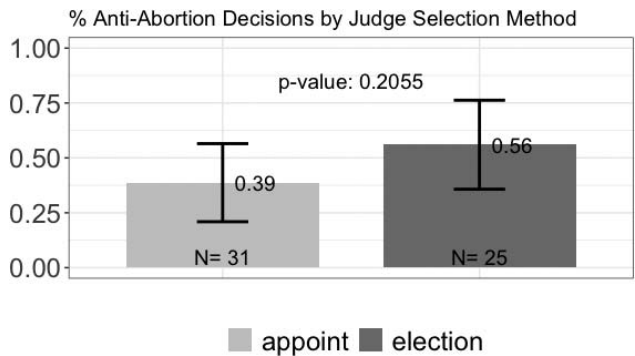


Figure 5 Antiabortion rulings by judge selection methods.

We also investigate the possibility that elected justices adjust their rulings on abortion to public opinion on the issue. We expect that elected justices will be incentivized not to issue antiabortion rulings in states with strong proabortion sentiment. To capture state-level public opinion on abortion, we use Caughey and Warshaw’s (2018) social policy liberalism

Table 3 The Effect of Judge Selection Mode and Policy Liberalism on the Probability of Antiabortion Ruling

	Dependent variable: antiabortion ruling
Elected judge	-1.973 (2.119)
Policy liberalism	-0.202 (0.839)
Elected judge × policy liberalism	-7.367* (4.397)
Constant	-5.203 (4.130)
Observations	49
Log likelihood	-21.403
AIC	66.806

Note: Models also include case number, partisanship in legislature; * $p < 0.1$.

score (although the score is only available through 2014). We present results from bivariate logistic regression analysis in table 3, and we display predicted probabilities of making an antiabortion ruling in figure 6. We find that when controlling for other covariates, the likelihood of elected judges issuing antiabortion rulings decreases as the state's policy liberalism score increases. This finding suggests that judicial elections motivate state supreme court justices to become responsive to constituent preferences when making decisions regarding abortion regulations.

Our findings illustrate the multifaceted dynamics in state supreme courts' rulings on abortion. When ruling on a contentious and salient issue like abortion, state supreme court justices have incentives to rule in line with the state's public opinion and the political climate in the state's political institutions. At the same time, these political contexts heavily influence the type and breadth of abortion cases brought to the court, structuring justices' decisions. Consequently, a state supreme court's abortion rulings may not always be consistent with that state's political climate.

Implications

Our research speaks to the extent to which decisions regarding abortion policy at the state level are removed from elected representatives and determined by judges that may or may not be elected by the people. While there is a normative justification that courts ought to be removed from the

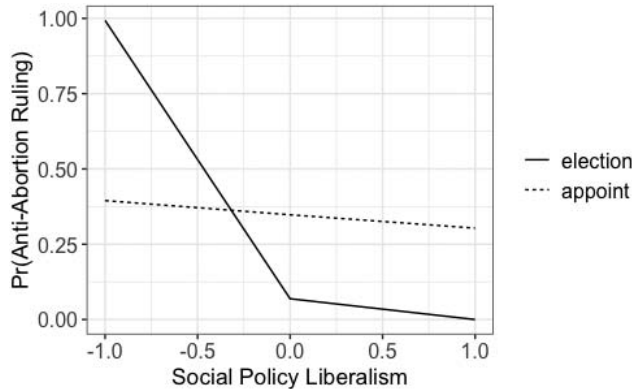


Figure 6 Predicted probabilities of antiabortion ruling by policy liberalism and judge selection methods.

pressures of public opinion, state courts not only act against public opinion on abortion but also rule in a way that restricts individual rights. Our findings also hold implications for understanding the uneven and inequitable patterns of access to abortion for people who may become pregnant. Finally, our research contributes to the literature on judicial independence of state courts. Are the courts truly independent of other state institutions, such as the executive or the judiciary? Our initial results here suggest that they are not and that interactions between all three branches of state government hold substantive and important consequences for abortion policy.

Now that the US Supreme Court has opened the door for states to enact restrictive abortion policies, the state courts will be a critical battleground for this policy. State courts were previously deferential to the precedent set in *Roe*, but now that no such federal protection exists, these courts are no longer constrained by any federal policy, leaving the door open for state courts to decide cases in a variety of potentially unexpected ways. In states that lack explicit protections for abortion, it will be up to state courts to decide whether to permit abortion restrictions. We found that in states where the Republican party held a majority in the state legislature, state courts were more likely to consider challenges to abortion policies. It is possible that these state courts will vary in the extent to which they permit or restrict abortion. States are bound by their own state constitutions in crafting abortion policy, and there is considerable variation across states in the extent to which state constitutions recognize an implicit or explicit right to abortion. For example, the state of Alaska has a constitutional right

to abortion in their state constitution, limiting the ability of state legislatures to restrict abortion access. Alternatively, in Kansas, the state supreme court recognized an implied right to abortion in that state's constitution, and in 2022 voters rejected a constitutional amendment that specifically said abortion is not protected in the state's constitutions. We focused much of our analyses on abortion restrictions, but courts could also be a venue that uphold abortion access in some states. For example, a state-level court in Michigan recently placed an injunction against enforcement of the state's 1931 law banning abortion, which preserves access to abortion in that state in the short term. If there is no federal guarantee of abortion access, state courts will have the duty to determine whether abortion policies passed by state legislatures are constitutional based on state constitutions.

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