

Redistricting and the State Supremes

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Abstract: Redistricting cases offer a unique opportunity for scholars to investigate the distinct influence of partisanship on judicial decisions. In this research, we examine redistricting plan review by state supreme courts to determine the influence of partisan loyalties on judicial decisions. We analyze whether judicial selection systems matter, as well as electoral vulnerability of judges. Our judge-level data includes votes on cases heard across the American states from 1961 to present. We find evidence that party loyalty does impact judicial redistricting decisions, particularly in cases that deal with partisan gerrymander claims or when Republican redistricting plans are being challenged. We also find that judicial selection systems matter as well.

In cases that offer measurable benefit to political parties, to what degree will judges vote to benefit their party? To answer this question, this research focuses on redistricting litigation. Judicial redistricting research has historically focused on the federal courts (Cox and Katz 2002; McKenzie 2012) and has confirmed in some ways that partisanship can influence these decisions. Here, we analyze judicial redistricting decisions in state judiciaries. The degree to which party loyalty impacts judicial decisions when the state supreme courts handle such litigation is not yet known, but is undoubtedly an important question.

That judges will side with their own party in redistricting cases is a somewhat common assumption, at least for politicians that count on favorable outcomes and parties that bet on loyal judges. To this end, a judge that votes contrary to this expectation is more attention worthy. Consider high-profile decisions in 2022 in Wisconsin and Ohio in which a single Republican judge voted with a Democratic bloc to form a majority. In Wisconsin, Associate Justice Brian Hagedorn's "swing" vote was described as "independent" by local press, but "imbued with personal preference" and lacking legal analysis by his Republican colleagues on the court. Chief Justice Maureen O'Connor's vote against Republican-favored maps in Ohio actually resulted in immediate calls for impeachment by state Republican leaders.¹

In the Wisconsin and Ohio cases, single-party dominance in the redistricting process was challenged, which heightened both media attention and political response to an individual judge's vote. The examples illustrate how research on state supreme court redistricting votes is both intuitive and timely, particularly as recent U.S. Supreme Court action has re-specified the significance of state court jurisdiction in the redistricting process. Research in state judiciaries

¹ See <https://www.dispatch.com/story/news/2022/03/18/ohio-republicans-want-impeach-maureen-oconnor-over-redistricting/7088996001/>.

also offers the comparison of institutional variation. Judges on state high courts can be appointed like federal jurists, but they can also be elected in partisan and non-partisan contests. While a few have the political insulation of life tenure, most keep their jobs through retention elections or by going up for re-election. Given this, state supreme courts offer a unique setting that can help us understand how institutional rules shape political outcomes.

In this research, we examine redistricting review by state supreme courts to determine the influence of party loyalty on judicial decision making. We analyze how judicial selection systems, partisan identities, and state law impact the degree to which a judge will demonstrate party loyalty. Our judge-level data includes votes on redistricting cases heard across the American states from 1961 to the present. We find that party loyalty does impact judicial redistricting decisions, particularly when the litigation involves partisan gerrymandering claims. We also find that Republican majority plans prompt a more partisan judicial response than Democratic majority plans. Finally, we find that judicial selection systems condition the impact of party loyalty on voting.

The Partisan Stakes of State Supreme Court Redistricting

At the risk of sounding colloquial, motivation for this research comes directly from political headlines.² This is not because state supreme court involvement in redistricting review is a recent phenomenon. Rather, it is because state supreme court redistricting decisions are more impactful now than at any time prior. While federal court decisions remain consequential, the jurisdictional importance of state supreme court decisions in the redistricting process has

² For instance, see <https://thehill.com/homenews/state-watch/589646-state-courts-become-battlegrounds-in-redistricting-fights>; <https://www.politico.com/news/2021/12/13/political-maps-redistricting-state-supreme-courts-524150>; <https://rollcall.com/2022/02/10/state-courts-continue-redrawing-maps-as-supreme-court-backs-off/>.

significantly increased in the contemporary American political landscape. The heightened role for state supreme courts in political reapportionment is best explained by the confluence of several factors.

The most pertinent factor comes from action taken by the U.S. Supreme Court. Specifically, the Court's decision in *Rucho v Common Cause* 588 U.S. ____ (2019) effectively removed federal court jurisdiction over partisan gerrymander claims, citing them as nonjusticiable political questions. The majority opinion by Chief Justice Roberts suggested instead that state courts (or state legislative action) constituted a more appropriate redress for such grievances. The court's decision was high-profile and immediately perceived as consequential by litigants on both sides of the partisan aisle. Eric Holder, former Attorney General and current chair of the National Democratic Redistricting Committee (NDRC) gave remarks to the press soon after: "We'll be fighting in the states to ensure that we have a fair redistricting process. We will use the state courts where we are no longer able to use the federal courts."³ Jason Torchinsky, general counsel for the National Republican Redistricting Trust (NRRT) also provided commentary: "That opens a Pandora's box at the state level. State judiciaries are going to have to wrestle with the same questions" that the Supreme Court just did.⁴

The reaction by Holder and Torchinsky was prescient. While litigants continue to challenge redistricting maps in federal courts, particularly when a claim involves potential Voting Rights Act violations, over half of all redistricting challenges since the *Rucho* decision

³See <https://www.politico.com/story/2019/06/27/supreme-court-gerrymandering-1385960>.

⁴ See also <https://www.politico.com/story/2019/06/27/supreme-court-gerrymandering-1385960>.

have been filed in state courts (16 of 29).⁵ Of the 55 total map disputes in the 2020 redistricting cycle, 30 have been resolved or are ongoing in the state courts, and more than half of those (18) are partisan gerrymander claims.⁶

The expanded scope of state court influence on redistricting is not solely the result of a jurisdictional re-direction of these issues. Factors related to the states themselves have also been significant. In concert with the venue shift are state constitutional provisions that offer protection for claimants not found in the U.S. Constitution. Specifically, over half of all state constitutions (29) have a requirement that elections be “free”. A subset of these (18) further specifies that elections be both free and “open” or “equal.” Beyond this, some states provide redistricting commissions with specific criteria using “free elections” language.⁷ If litigants in states with constitutional “free” election language argue that maps which advantage one party over another result in inherently unequal elections, these provisions create a viable legal pathway for challenges in state judiciaries that does not exist in the federal courts.

A final factor is the success of the *state-court strategy* for some litigants, particularly for challengers from the Democratic Party. The tactic has proven so successful in fact, that Republican strategists describe redistricting litigation as the cornerstone of “sue until blue”

⁵ In comparison, state court challenges in the 2010 redistricting cycle came from 19 of 37 states, according to data published by Ballotpedia. See [https://ballotpedia.org/Redistricting lawsuits relating to the 2010 Census#cite note-327](https://ballotpedia.org/Redistricting_lawsuits_relating_to_the_2010_Census#cite_note-327) for state-by-state descriptions.

⁶ Data available from [https://ballotpedia.org/Redistricting lawsuits in the 2020 redistricting cycle](https://ballotpedia.org/Redistricting_lawsuits_in_the_2020_redistricting_cycle) .

⁷ See <https://www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx> for the summary of state constitutional language. Notably, we do not include Alabama among states with “free” election language in the state constitution, while NCSL does. California, Washington, Montana, Idaho, Arizona, Colorado and Virginia and Florida all provide “fair elections” or “fair districts” language in their constitutions for the drawing of district maps.

politics.⁸ While Democratic legal victories occurred prior to the *Rucho* decision, they have been more noteworthy in the 2020 redistricting cycle.⁹ As of early 2022, high-profile judicial actions in Ohio, Pennsylvania, North Carolina, Wisconsin, and Virginia have supported electoral maps more favorable to Democrats, while pending cases remain in other states.¹⁰

The high-stakes nature of state supreme court redistricting is underscored by journalistic emphasis. CNN's coverage of the recent North Carolina Supreme Court decision in *Moore v Harper* declared the courtroom a place "where redistricting has become a blood sport as intense as the Duke vs. UNC basketball rivalry."¹¹ Clever journalism notwithstanding, the political impact of redistricting and reapportionment cannot be understated. As the Brennan Center asserts, redistricting influences "who wins elections, who is at the table when laws are considered, and what laws are passed."¹² Decisions in the state judiciaries can ultimately dictate the balance of political power across the United States. Given this, the partisan stakes of state supreme court redistricting decisions are sizeable.

State Court Involvement in the Redistricting Process

⁸ To be fair, "sue until blue" is the language used by organizations such as the Republican State Leadership Committee and is not an articulated Democratic platform of activity. See for example <https://www.politico.com/news/2021/12/13/political-maps-redistricting-state-supreme-courts-524150> and <https://www.thestate.com/news/politics-government/state-politics/article198927829.html>.

⁹ For example, the 2017 decision in *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, see <https://www.pubintlaw.org/wp-content/uploads/2017/06/2018-02-07-Majority-Opinion.pdf>

¹⁰ In Pennsylvania, Ohio, and North Carolina, this has meant gains in safe Democratic districts (See *Moore v Harper*, *Toth v Chapman*, and *Adams v Dewine*). In Wisconsin and Virginia, this has meant securing a map that is not as favorable to Republican supermajorities (see *Johnson et al. v Wisconsin Elections Commission* and *In Re: Decennial Redistricting*).

¹¹ See <https://www.cnn.com/2022/03/14/opinions/gerrymandering-state-courts-daley/index.html>

¹² See <https://www.brennancenter.org/issues/gerrymandering-fair-representation/redistricting/fight-fair-maps>

Redistricting authority in each state is designated by state law. Most states assign this role primarily or fully to the state legislature. In roughly half of all states, “commissions” may also participate in the redistricting process with varying degrees of authority. Of course, even in states with commission structures in place, state legislatures have input and influence on the redistricting process. Redistricting plans are like other state laws in that once maps are created, they can generally be subject to gubernatorial veto. Similarly, redistricting plans or processes can also be subject to legal challenge in a judicial forum.¹³

There are several ways that state courts may be involved in the redistricting process. Some states have a prescribed role for judges to either select members of commissions or serve on commissions (Levitt and Wood 2010). Courts may also be asked directly to draw district lines. District line-drawing by state courts can be prompted when legislatures reach an impasse over maps, or when timely revisions are needed on commission plans. Courts may also draw district lines when their own decisions have upheld challenges to redistricting maps, and upcoming elections necessitate immediate action. In the 2000 and 2010 redistricting cycles, state legislative district lines were drawn by courts in 11 states, and congressional lines in nine states (Levitt and Wood 2010).

While such direct involvement by courts in redistricting is impactful, it is somewhat uncommon. Thus, the primary role that state courts have in the redistricting process occurs once litigants challenge the legality of the map-drawing process, or the district maps themselves. Such litigation is common, and state supreme court review of redistricting plans is either automatic or triggered by citizen request in nearly half of all states (Levitt and Wood 2010). In these cases,

¹³ For a thorough primer on redistricting rules and processes, see generally McDonald (2004).

judges review redistricting plans that are crafted or influenced by state political majorities, and their decisions reflect a judge's support (or not) of those political majorities.

Party Loyalty and Judicial Behavior

Given that the primary role of state supreme courts in redistricting is voting in cases that involve challenges to redistricting plans or processes, this research seeks to understand the impact of party loyalty on these votes. While there is ample research that examines the influence of law, attitudes, and strategy on judicial voting (i.e., Murphy 1964; Gillman 2001; Segal and Spaeth 1993; Epstein and Knight 1998), there is less research that explores the specific influence of a judge's party on votes. When scholars do take up this question, they traditionally examine election-law-related cases, with the majority specifically focused on redistricting litigation in the federal courts. The findings of this research generally show that a judge's partisanship can be a meaningful influence on decision making.¹⁴

In prior research, Lloyd (1995) examined U.S. District Court redistricting decisions and found that judges who shared the partisan affiliation of the majority party in the legislature struck down contested redistricting plans at a lower rate than judges whose partisan affiliation differed. Cox and Katz (2002) found evidence of similar behavior in federal courts, finding that "friendly" courts were more likely to uphold plans than "hostile" ones. Research by McKenzie (2012) provides a more exhaustive analysis of cases heard from 1981 to 2007, finding evidence of "constrained" partisanship in redistricting decisions. Specifically, in cases where redistricting guidelines do not offer judges clear guidance, the influence of partisanship is significant, even controlling for ideological preferences. Peterson's (2019) research goes one step further, and

¹⁴ See also Meaders 2002, who determined that partisanship was not a systematic influence on judicial decision-making across all cases examined.

suggests that judges demonstrate “sophisticated partisan calculations” in redistricting decisions. While he also finds that redistricting decisions tend to favor the electoral interests of a judge’s own party, his analysis reveals that judges strategically target districts with the intention of disadvantaging the opposing party.

A similar analysis of judicial redistricting does not exist for the state courts, but scholars have examined their decisions in other election-law areas with mixed results. Graves (2003) examined ballot access cases from the mid-1990s and found evidence of partisan voting, conditioned by a state’s method of judicial selection. Specifically, he found that appointed justices or those selected by non-partisan elections were less likely to demonstrate a partisan influence on voting than those selected in partisan elections. Meanwhile Kopko’s (2008) analysis of ballot access claims in fifteen states showed that a judge’s partisan affiliation was not a statistically significant determinant of voting. Kang and Shepherd’s (2011; 2016) early analysis of election dispute cases showed that partisanship influences judicial voting in significant and measurable ways, particularly for Republican judges who receive campaign contributions from the Republican party or Republican interest groups. However, their more recent work (Kang and Shepherd 2017) shows that legal issues matter as much, if not more than partisan loyalty.

While the evidence from state courts may not be definitive, the federal courts redistricting analyses offer insight that party loyalty may be consequential for judicial decision making. Given the obvious importance of state supreme courts in the future of redistricting, and specifically on partisan gerrymander claims, the goal of this research to understand how party loyalty shapes judicial redistricting decisions in these courts. To accomplish this, we first examine the motivation of party loyalty itself.

Why Party?

Political scientists understand party loyalty most directly from observations of American voting behavior (Campbell et al. 1960; Miller 1991; Miller and Shanks 1996), but also from observations of the legislative and executive branches of government (i.e., Erikson et al 2002). For “single-minded seekers of reelection,” party loyalty can translate into electoral advantage (Cox and McCubbins 2005; 2007), although excessive partisanship can also create electoral liability, particularly on divisive votes (see Carson et al. 2010). Party loyalty can also determine institutional advancement for members of Congress, and consequently their legislative success (Coker and Crain 1994). Party loyalty is easily understood as motivation for those that serve in the “political” branches of government, but less so for judges who are historically perceived as neutral arbiters of the law. In the traditional adage, judges are legal-minded rather than electoral- or policy-minded.

Political scientists who study courts counter this traditional framework, claiming that it ignores both theoretical and real-world analysis of judicial decision making. While judicial actors are influenced by legal considerations, scholars find that judges are also motivated by political preferences (or attitudes) and long-term strategy. Attitudinal motivation refers to judicial choice that incorporates sincere policy preferences with less regard for anything else, including the law (Segal and Spaeth 1993; 2002). Strategic motivation prioritizes long-term over immediate goals and incorporates a judge’s policy preferences alongside the actions of other relevant actors (e.g. Epstein and Knight 1998).

How do considerations of party loyalty factor into these conventional models of judicial choice? A judge’s partisanship is most obviously not a legal consideration. Of course, scholars have also argued that partisanship should be considered separate from attitudinal or strategic models of decision making. There is some obvious overlap between partisanship and political

ideology, which is a key component of the attitudinal decision model (Graves 2003). Still, partisanship is a distinct concept from ideology and preferences (Lloyd 1995). Further, Kopko (2008) maintains that preferences of the attitudinal model reflect *issue* preferences rather than *litigant* preferences (p. 306), and generally relate to civil liberties or economic issues. For this reason, some see party loyalty as a distinct question of influence.

Whether party loyalty reflects a judge's attitudes or strategic choice may be debatable, but what is not debatable is that party can be motivation for judges. Judges, like other political actors, prefer that their party get the benefits of a "win." The desire may be fundamentally related to both attitudinal *and* strategic considerations by a judicial actor. Pederson (2019) explains that a judicial decision motivated by party loyalty may occur because a judge wants to increase the likelihood of their party's governance, which in turn increases the likelihood of their preferred public policies. He adds that "judges may simply prefer one political party to another and thus seek to positively influence that party's electoral fortunes irrespective of specific policy goals" (p.342). Finally, a judge may be motivated by party by virtue of their own political ambitions or long-term electoral goals. A "win" for a judge's party may increase the likelihood of some future that the judge has in mind, that will be better supported with the judge's party in power. From all this, we have a baseline expectation in our research:

In redistricting cases, judges are more likely to vote for litigants that represent the interests of their own party given the significant stakes involved in the case, ceteris paribus. This impact should be more pronounced in partisan gerrymandering cases.

Alternative Factors of Influence

While our main variable of interest is partisan loyalty, we are also interested in factors that might condition party voting. In this section we operationalize alternative explanations of judicial behavior and consider their impact on redistricting votes.

Legal Considerations

As stated earlier, the law factors into judicial decisions. Prior research suggests that redistricting law *constrains* redistricting decisions, at least when precedent is clear. In other words, if legal guidelines provide clear directives, judges should be less inclined to vote based on party loyalty. Meanwhile, ambiguous precedent creates an alternative voting “opportunity”. McKenzie offers that “motivated by either strategic or psychological forces, judges are more likely to favor their own party in redistricting when a lack of clarity in precedent provides them with that window of opportunity” (2012, p. 802).

Extant literature suggests several legal considerations in redistricting litigation. McKenzie’s (2012) analysis in the federal court system controls for the type of challenge involved (partisan gerrymandering, racial gerrymandering, or Voting Right Act violation) as well as the type of redistricting plan under review (Congress, legislative, or both). While these legal categories may provide some legal direction in federal review, they arguably provide little evidence of clear legal precedent in the state court context, at least when considered alone. Instead, it is instructive to consider state laws that prescriptively addresses these issues.

As discussed earlier, some state constitutions include “free elections” language under which litigants challenge redistricting plans. These provisions provide additional legal criteria for judges in these states to consider on litigation involving elections and, in some states, the district map itself. Thus, there is additional legal guidance for judges in these states. Alternatively, state constitutions that do not include such language leave more room for ambiguity, as judges in

states without constitutional directives have no additional legal criteria to consider. Given this, we control for state constitutions that contain “free elections” language in our analysis. We consider these provisions to be a legal constraint on judicial behavior, which leads to our second general expectation:

In redistricting cases, a judge’s vote will be more constrained in states with constitutional “free elections” language than in those without.

Strategic Considerations

The strategic model of judicial behavior conceptualizes judicial motivation as driven by preferred policy outcomes, balanced against other considerations. Unlike a judge solely motivated by policy preferences, a strategic judge may be willing to forgo an immediate preferred outcome (a policy win) to accomplish a long-term gain. In voting models, a judge motivated by attitudes is expected to vote policy preferences on all cases, while a strategic judge may sometimes vote against preferences based on a longer-term calculation.

The bulk of research on strategic judicial behavior comes from the federal courts. Life tenure on these courts insulates judges from the political repercussions for their decisions that could result in job loss. The institutional design of these courts shapes the assumption that policy preferences are a priority for judges on these courts, and that such preferences motivate judicial decisions. In contrast, this institutional design is rare in the state supreme courts, as lifetime appointments exist in only a handful of states. Instead, most state court judges are accountable to an electorate or governmental elites for job retention. Thus, long-term strategy for

state supreme court judges likely includes factors related to job security.¹⁵ Sheperd (2009) refers to the influence of career pressures on state supreme court voting as “retention politics.”

Analysis of the influence of retention politics on voting behavior suggests that elected judges may be the most pressured by retention concerns. Hall’s (1987; 1992) analysis of death penalty decisions showed that elected judges were more likely to alter voting behavior near the end of their terms. Similarly, Huber and Gordon (2004) found that elected judges imposed longer sentences as their reelection neared. Partisan elected judges may be most sensitive to retention politics, as they are less likely to dissent in controversial topics (Hall and Brace 1996) and more sensitive to the preferences of the body that retains them. This is particularly true when these judges decide highly salient cases, of which redistricting decisions most certainly fall into (Cann and Wilhelm 2011).

Given that retention is an important motivation for judges in the state courts, such concerns may impact judicial voting on redistricting cases. In terms of party loyalty, retention politics may constrain the degree to which a judge will vote for a preferred party win. This leads to our final general expectation:

In redistricting cases, the impact of party loyalty on a judge’s vote will vary across judicial selection and retention systems.

A Model of Party Loyalty Influence in Redistricting Litigation

Data and Analysis

¹⁵ To be fair, there are likely other strategic calculations for judges on state supreme courts such as concern about being reversed either by higher courts or future judges (see, for example, Landes and Posner 1976; Miceli and Cosgel 1994; Whitman 2000; Rasmussen 1994).

To understand whether judges in the state supreme courts are influenced by party loyalty in redistricting decisions, our model analyzes a judge's decision to uphold (or not) a redistricting plan as a function of whether the judge shares affiliation with the political majority in charge of redistricting (or not). We focus on the political majority in charge of redistricting because, as Michael C. Li explains, "By far, the biggest predictor of whether a state will draw fair maps is whether a single party controls the map drawing process. Single-party control, whether by Democrats or Republicans, creates an almost irresistible temptation for the party in charge to make decisions behind closed doors with predetermined partisan or other discriminatory objectives driving the outcome" (2021, p. 5). The political majority, in other words, often reveals something about the partisan nature of the redistricting plan.

Our data include 1412 state supreme court redistricting votes, which comprises voting in 219 redistricting cases that were heard in all states from 1961 to present. The primary variable of interest in our model measures partisanship overlap between the judge and the political majority in charge of the redistricting process. This variable is a composite of two separate indicators: a judge's party identification and the party identification of the legislative majority at the time of redistricting. A judge's party identification was obtained primarily from data used by Brace, Langer, and Hall's (2000) party-adjusted judge ideology (PAJID) scores, along with the PAJID update by Hughes and Wilhelm (n.d.). Where PAJID data files were not available, the party identification of judges was obtained from state judicial websites, judicial biographies, media searches, and Ballotpedia. The party identification of the legislative majority is operationalized as the party that controls the state legislature at the beginning of a decade. This information was obtained from historical partisan composition timeline records published by the

National Conference of State Legislatures (NCSL). This data is summarized, along with all other descriptive statistics, in Table 1.

Table 1 Here

Table 2 Here

A preliminary look at the data reveals only minor evidence of party loyalty in redistricting voting. Table 2 shows approval rates from Republican and Democratic judges for redistricting plans drawn under each type of majority government. This cursory analysis shows that Republican judges approve Republican majority plans at a higher rate than Democratic judges. Similarly, Democratic judges vote to uphold plans drafted under Democratic majorities at a higher rate than Republican judges. The evidence is similar when we consider the subset of cases that deal specifically with partisan gerrymander claims.

To better understand the influence of party loyalty, we construct empirical models that predict a judge's vote to uphold a redistricting plan. In addition to our party loyalty variable, we include a dichotomous variable that indicates whether the state constitution includes "free elections" language. We include indicators for the type of judicial selection system used within a state using data from the National Center for State Courts (NCSC). We group judges into the following selection systems: partisan election, non-partisan election, appointment, or merit. Our analysis includes dichotomous control variables that indicate whether a decision is unanimous, as well as the specific redistricting cycle that the litigation occurred.¹⁶

¹⁶ The following variables were included but had no statistical significance in any model, thus we do not discuss here: type of claim involved (VRA, racial gerrymander, or multiple), type of redistricting plan (state, federal, both), judicial ideology (using data from Bonica and Woodruff 2015 for all years available), and commission-drawn plans. We also controlled for decisions post- 1986 (*Davis v. Bandemer*), and decisions post-2019 (*Rucho v Common Cause*).

Our first model includes all judges in the data. We consider both majority party loyalty as well as opposition party loyalty on votes to uphold redistricting plans. Our second model analyzes Republican and Democratic judges separately to consider differences in party loyalty voting by partisan affiliation. Our final model analyzes judges in each selection system to compare the influence of party loyalty across systems. We use logistic regression in all models, and estimate robust standard errors, using fixed effects for each state and each redistricting cycle. We present the results from the statistical analyses in the following section, and include changes in predicted probabilities of our significant variables of interest.

Results

Table 3 Here

The results of analyses of judges in all redistricting cases, as well as in the subset of partisan gerrymander cases is presented in Table 3.¹⁷ In our model of all cases, we find evidence that judges support litigants that represent the interests of their party. While roughly 67% of all judges vote to approve redistricting plans in all cases, a judge is more likely to uphold a redistricting plan if the judge belongs to the party of the legislative majority and less likely to uphold the plan if the judge does not belong to that party. In terms of substantive impact, the predicted probability that a judge will vote to uphold a redistricting plan in a non-unanimous case is .53 if that judge is the same party as the legislative majority, and only .47 if that judge is a member of the opposition party, a difference of 12.8 percent.

As expected, when we examine the subset of cases with partisan gerrymander challenges, the evidence for party loyalty is significant and slightly more pronounced. Substantively, the

¹⁷ Importantly, we present results for both majority party judges as well as opposition party judges, as the omitted category includes a) judges with no discernable partisan ties, or b) partisan judges voting on plans in divided (no majority) legislatures.

predicted probability that a judge will vote to uphold a plan in non-unanimous cases is .58 if the judge belongs to the majority party, and .50 if the judge is a member of the opposing party, a 16 percent difference in likelihood. Both sets of results suggest that, overall, majority and opposition party loyalty can impact judicial votes in redistricting cases.

These results also show that “free elections” provisions in state constitutions have no significant impact on the likelihood that a judge will vote to uphold a redistricting plan. In analyses of both majority and opposing party judges, and in the subset of partisan gerrymander cases, these provisions provide no significant legal constraint on voting. Finally, and not surprisingly, judges are more likely to uphold a redistricting plan when the court decision is unanimous.

Table 4 Here

To consider whether the impact of party loyalty differs between partisan types, we perform separate analyses on Republican and Democratic judges. These results are presented in Table 4. Surprisingly, analysis of all cases shows that observable partisan differences have more to do with the type of plan being challenged than the judges as partisan types. Party loyalty is evident in judges of both parties when Republican majority plans are challenged, but in judges of neither party when Democrat majority plans are challenged.

In the results for all cases, Republican judges are significantly more likely to uphold a redistricting plan if the plan is drafted under a Republican legislature. In the same scenario, a Democrat judge is more likely to vote against this plan. Substantively, Republican judges are 23 percent more likely to approve Republican majority plans than Democrat judges in non-unanimous cases. Interestingly, state laws also have a significant impact on challenges to Republican redistricting plans. If a state has a “free election” constitutional clause, the predicted

probability of a judge approving the plan decreases by .11 in non-unanimous cases. Meanwhile, we find no evidence of majority party loyalty or opposition party loyalty when Democratic plans are challenged in our all-cases analyses.

When we examine the subset of partisan gerrymander challenges, the evidence is similar and pronounced. Once again, challenges to Democratic majority plans reveal no evidence of party loyalty voting. However, when judges hear partisan gerrymander challenges to Republican majority plans, the predicted probability of a Republican judge upholding the plan is .81, while a Democrat judge is .24. Simply put, Republican judges are 3.5 times more likely to uphold Republican majority redistricting plans under partisan gerrymander challenges, or Democratic judges are 3.5 times more likely to vote against these plans. These are unquestionably stark partisan reactions.

Table 5 Here

Our final models analyze the impact of party loyalty on judicial redistricting decisions across selection system types. We present separate results in Table 5 for partisan elected judges, nonpartisan elected judges, appointed judges, and merit selected judges. We include majority party judges and minority party judges in each model, with the omitted category being judges in states with no majority party (or judges with no party affiliation).

The most obvious result of our separate analyses is that the impact of party loyalty on judicial votes in redistricting cases varies by selection system type. Specifically, we find no evidence of party loyalty in the votes of judges chosen by nonpartisan elections, some evidence in the votes of judges chosen by partisan elections and government appointment, and the most evidence of party loyalty in the votes of judges chosen by merit selection. In merit selection states, judges in the majority party are significantly more likely to approve plans, while judges in

the opposition party are more likely to vote against plans. These differences are more pronounced than other selection system types. Interestingly, “free elections” clauses seem to impact redistricting decisions in government appointment states, as these significantly reduce the likelihood that a judge will vote to approve a redistricting plan.

The results of these analyses suggest, at minimum, that retention politics can condition the degree to which judges will vote based on partisan preferences. The results are not altogether intuitive since partisan elected judges and nonpartisan elected judges do not seem to be impacted in the same way by concerns of electoral accountability. Judges chosen in the 13 states that use nonpartisan elections seem less inclined to support a redistricting plan just because it comes from their own party, which could be because party identification is less meaningful for judges in these states. Of course, it could be something else altogether. The clearest evidence of party loyalty comes from merit selected judges who are held electorally accountable via retention elections. Thus, it may be that initial selection matters less in these decisions than concerns of job retention itself.

Conclusion

In this research, we find that judges are more likely to uphold redistricting plans when they belong to the party of the political majority, and less likely when they belong to the opposition party. This is especially true when plans are challenged by claims of partisan gerrymandering. We also find evidence that party loyalty shows up more when Republican majority plans are challenged. In other words, Republican majority plans prompt a more partisan judicial response than Democratic majority plans. Finally, we find that the institutional design of the state court system matters, as party loyalty impacts judges to a greater or lesser extent depending on how they attain or keep their seat on the court.

It is not surprising that judges often vote in redistricting cases for litigants that represent the interests of their own party. What else impacts their decisions in these cases? Our results suggest that state supreme court justices are not generally constrained by provisions in state constitutions that mandate “free” elections. While states that have such constitutional provisions provide a legal pathway for litigants to challenge redistricting plans, they do not provide a consistent legal answer for judges who review these claims. Obviously, judges in these states may decide to interpret these provisions differently in the future. Beyond this, judges are impacted by the behavior of their colleagues, as unanimity is a highly significant factor in state supreme court decisions to uphold redistricting plans.

The findings of this research give empirical credence to an assumption about judicial behavior that shapes contemporary redistricting strategy for both Democrat and Republican parties. This strategy has already entered its next phase: judicial recruitment. Adam Kincaid, executive director of the NRRT, observed in a 2019 interview after the *Rucho* decision, "The next phase of redistricting is going to be about groups doubling down on their attempts to flip state courts."¹⁸ Two years later, he reflected on events that included a successful “court flip” by Democrats in Pennsylvania: "I think a lot of people started to view the state supreme courts as partisan actors in redistricting after that point. I don't know anywhere in the country where Republicans have flipped a state supreme court and then sued to have a map overturned. That's a Democrat play."¹⁹ Whether a Democrat play or not, Republicans have joined the fray. The Republican financed Judicial Fairness Initiative spent over \$11 million on judicial races from

¹⁸ See <https://www.politico.com/story/2019/06/27/supreme-court-gerrymandering-1385960>.

¹⁹ See <https://www.politico.com/news/2021/12/13/political-maps-redistricting-state-supreme-courts-524150>

2015 to 2020. Of course, elected state supreme courts are not the only strategic targets, as appointed courts may be just as susceptible to court flipping attempts (albeit with potentially fewer constraints). After the adoption of a new Congressional map in Florida in the 2010 redistricting cycle that earned Democrat seat gains, Florida's Republican Governor Ron DeSantis has appointed three conservative justices since taking office in 2019.

Unequivocally, the significance of state supreme courts in redistricting is not lost on either the right or left. Further, it is logical for parties to include state judiciaries in their strategies, as our research demonstrates that party organizations can benefit from courts staffed by judges that are more "friendly" to their redistricting efforts. This is especially true in a political landscape where redistricting challenges are increasingly based on claims of partisan gerrymandering. As our evidence demonstrates, the outcomes of these decisions are highly correlated with the collective partisanship of the only judges that are now allowed to review such cases- state court judges. In the future, we look forward to inquiry that investigates the success of partisan attempts to influence redistricting outcomes via judicial recruitment efforts on these courts.

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Table 1: Descriptive Statistics, Redistricting Cases in State Supreme Courts 1961-2022

	Percentage in Data	Frequency
<u>Vote-Level Data</u>		
Total Judge-Votes		1412
Votes to Uphold Plan	65.4%	924
Republican Judge-votes	43.0%	607
Democratic Judge-votes	55.5%	783
Independent/ Partisan Unknown Judge-votes	1.6%	22
<u>Case-Level Data</u>		
Total Cases		219
Congressional Map Challenges	9.1%	20
State Legislative Map Challenges	88.6%	194
Congressional and State Challenges	2.3%	5
VRA claims	31%	68
Racial gerrymander claims	7.8%	17
Partisan gerrymander claims	12.3%	27
Republican majority plan challenges	46.1%	101
Democratic majority plan challenges	42%	92
Divided government/ nonpartisan plan challenges	11.9%	26
1960 Redistricting Cycle Cases	18.7%	41
1970 Redistricting Cycle Cases	15%	33
1980 Redistricting Cycle Cases	13.2%	29
1990 Redistricting Cycle Cases	14.7%	32
2000 Redistricting Cycle Cases	18.3%	40
2010 Redistricting Cycle Cases	15.5%	34
2020 Redistricting Cycle Cases	4.6%	10
Unanimous Cases	59.8%	131

Table 2: Judicial party loyalty, 1961-2022

All redistricting cases

	Republican Majority Plan Approval Rate	Democratic Majority Plan Approval Rate
Republican Judges	67.7%	64.2%
Democratic Judges	63.4%	68.1%
Overall	65.3%	67.1%

N= 1412 votes

Partisan gerrymander cases

	Republican Majority Plan Approval Rate	Democratic Majority Plan Approval Rate
Republican Judges	76.3%	76.9%
Democratic Judges	66.7%	68.0%
Overall	70.2%	71.6%

N= 168 votes

Table 3: Vote to uphold redistricting plan

All redistricting cases

		Δ Predicted Probability Non-unanimous Court
Majority party	.80** (.18)	.59→.53
Opposition party	.55* (.30)	.59→.47
“free elections” provision (FEP)	-.42 (.29)	
Unanimous decision	1.06** (.20)	
Constant	-.23 (.47)	
BIC	1773.57	
N=1412		

Robust standard errors clustered on states are in parentheses.

Models include fixed effects for each redistricting cycle, results are not reported.

*Significant at $p < 0.05$.; **Significant at $p < 0.01$

Partisan gerrymander cases

	Majority Judges Model	Δ Predicted Probability Non-unanimous Court
Majority party	.86** (.31)	.85→.58
Opposition party	.54* (.34)	.85→.50
“free elections” provision (FEP)	-.12 (.32)	
Unanimous decision	2.22** (.60)	
Constant	-.45 (.19)**	
BIC	200.01	
N=168		

Robust standard errors clustered on states in parentheses.

*Significant at $p < 0.05$.(one-tailed test); **Significant at $p < 0.01$

Table 4. Vote to uphold redistricting plan by partisanship

All redistricting cases			
	Republican Majority Plans	Δ Predicted Probability Non- unanimous Court	Democratic Majority Plans
Majority party	1.53** (.60)	.44→.48	-.55 (.58)
Opposition party	1.14* (.75)	.44→.39	-.43 (.53)
“free elections” provision	-.66* (.32)	.29→.18	-.43 (.50)
Unanimous decision	1.35** (.36)		1.2** (.40)
Constant	-.38 (.77)		-.74 (1.20)
BIC	765.2 N=614		764.25 N=601

Robust standard errors clustered on states are in parentheses.

Models include fixed effects for each redistricting cycle, results are not reported.

*Significant at $p < 0.05$.; **Significant at $p < 0.01$

Partisan gerrymander cases

	Republican Majority Plans	Δ Predicted Probability Non-unanimous Court	Democratic Majority Plans
Majority party	2.61** (.80)	.49→.81	-.63 (.58)
Opposition party	-2.52** (.82)	.49→.24	.60 (.59)
“free elections” law	1.04 (.77)		-.52 (.65)
Unanimous decision	omit		1.16** (.57)
Constant	-2.23* (.87)		1.25* (.71)
	N=84		N=74

Robust standard errors in parentheses.

*Significant at $p < 0.05$.; **Significant at $p < 0.01$

Table 5. Vote to uphold redistricting plan by selection system type, all cases

	Partisan Elected Judges	Nonpartisan Elected Judges	Government Appointed Judges	Merit Selection Judges
Majority party judge	.52(.05)**	.06 (.35)	.50 (.26)**	.37 (.20)**
Opposition party judge	-.43(.29)	.17 (.37)	.49 (.29)**	-.32 (.20)*
“free elections” provision	-.46 (.39)	.12 (.24)	-.45 (.26)**	-.23 (.20)
Unanimous decision	.05 (.30)	.68 (.23)**	.81 (.29)**	1.22 (0.20)**
Constant	.63 (.35)	.09 (.37)	.44 (.31)*	.24 (.19)
N	229	351	342	490

Robust standard errors in parentheses.

Models include fixed effects for each redistricting cycle, results are not reported.

*Significant at $p < 0.05$. (one-tailed test); **Significant at $p < 0.01$