

State Courts, State Legislatures, and Setting Abortion Policy

Abstract

The Supreme Court decision in *Roe v. Wade* (410 U.S. 1973) established precedent to protect a woman's right to access an abortion as a protected constitutional right. Yet, in the past 50 years, courts and legislatures have limited access to reproductive health care. In this paper, we focus 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, we investigate how two overarching factors affect how state supreme courts make decisions about abortion policy. First, we track how the political environment of states affects the decisions courts make about access to abortion. Second, we consider the scope of the abortion policy considered by the courts. Our findings show that a dynamic interplay of state's political contexts and the courts accounts for state supreme courts' rulings on abortion. While justices have incentives to rule in line with the state's political climate, these political contexts simultaneously influence the type and the breadth of abortion cases in the court. This interplay, in turn, leads to abortion rulings that are not necessarily consistent with the preference of other state political actors. Our research has implications for state abortion policymaking and for the courts' responsiveness to public opinion.

Introduction

The Supreme Court decision in *Roe v. Wade* (410 U.S. 1973) established precedent to protect a woman's right to access an abortion as a protected constitutional right. Yet, in the past 50 years, courts and legislatures have limited access to reproductive health care. State and federal courts have the power to enforce, or overturn abortion regulations based on their decisions regarding the constitutionality of these laws. Court decisions 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. This manuscript examines the relationship between state 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 women, especially low-income women and women 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 enhance or expand access to abortion is set to be even more important as the Supreme Court appears poised to eviscerate the protections afforded by *Roe v. Wade* and also, *Planned Parenthood v. Casey*, a case that reaffirmed *Roe* and created a new standard that prohibited abortion regulations from imposing an "undue burden" on women seeking them.¹

Using an original data set of state court decisions surrounding 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 political environment of states affects the decisions courts make about access to abortion. Here, we consider how the partisan composition of state legislatures and judicial elections affect the court's 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. 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 of courts around abortion policies.

¹See: <https://bit.ly/3wNNNDV>.

Studying political determinants of state courts' rulings on abortion laws has crucial implications for the court's responsiveness to the public but also the court's role in protecting individual rights. Recent polls indicate that a broad and vast majority of American citizens support abortion rights. A poll from Pew found that 71% of Americans support some form of access to abortion for people who may become pregnant. Moreover, the public's support for abortion access reaches across partisan lines.² Despite public support for abortion rights, the 6–3 majority-conservative Supreme Court is poised to overturn *Roe v. Wade*, potentially 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. The Brennan Center for Justice highlights the increasing importance of *state courts* in interpreting their state's constitution and deciding whether those state constitutions allow for or restrict access to abortion.³

Past Literature

Past work on state courts and abortion policy examines the extent to which institutional and electoral contexts influence the courts' decisions to expand or limit abortion rights at the state level. These interactions at the state level are theorized to be similar to those operating at the federal level: state legislatures may propose “court-curbing” policies to limit the power of state supreme courts (Leonard 2016) or may strategically alter language in statutes and laws to limit (or expand) the ability of courts to make certain decisions (McGrath 2013). These perspectives suggest that state legislatures anticipate and evaluate first, the ideology or expected preferences of the court and second, how those preferences will influence any potential disputes that arise before the court. These interactions can also influence the initial legislative stage, as policymakers are writing law: some scholars suggest that policymakers (state legislators and governors) anticipate the hostility or friendliness of the court when creating abortion, death penalty, education, or even HMO policy (Langer and Brace 2005; Wilhelm 2007, 2009). This strategic behavior is not limited to state legislatures in this relationship, however. There is some evidence that courts anticipate and alter their decisions when the executive and the public hold substantively different policy preferences (Schorpp 2012). Importantly, moreover, this effect can be mediated if the court considers the state legislature to be an ally (Johnson 2017). 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

²See: <https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/>.

³See: [https://www.brennancenter.org/our-work/analysis-opinion/power-state-courts-securing-abortion-](https://www.brennancenter.org/our-work/analysis-opinion/power-state-courts-securing-abortion)

a result.

Though the above literature considers external factors in judicial policymaking, most of the scholarly studies on state courts focus on the internal considerations of state courts. Primarily, scholars interested in state courts consider the influence of elections. The process of election or reelection is at the front of state court judges' minds, an effect also mediated by whether those elections are partisan or nonpartisan (Calderone, Canes-Wrone and Clark 2009; Shepherd 2009). Proximity to elections is also important, as judges may be more inclined to consider public opinion and concern about their rulings when elections get closer (Huber and Gordon 2004). Though these pressures are documented especially for those judges facing election, there is also evidence that even those judges chosen by appointment vote strategically (Shepherd 2008; Gray 2017). 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 Kelly 2014). The congruence between courts, interest groups, and public opinion on abortion is also important (Wlezien and Goggin 1993). Research in judicial politics suggests a strong influence of judge selection method on the court's responsiveness to public opinion (Calderone, Canes-Wrone and Clark 2009; Hall 2001).

As a result, these pressures suggest that public opinion and electoral pressures exert at least some influence on judges in their decision-making processes. Exactly *how* this pressure changes or alters the decisions is dependent on the congruence between the judges and the public they serve, however. Broadly, we might expect, though, that there are incentives to craft decisions in different ways if there is expected pushback for their decisions. Courts may choose to write shallow decisions (i.e., those with limited breadth and limited precedential impact) if they are seeking to minimize the potential negative impact of a decision. Supreme Court Justice William Brennan is one example of this phenomenon, when he wrote the majority opinion in *Pennsylvania v. Muniz* that carved out an exception to the *Miranda* rule. This action was only 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). Therefore, we expect similar incentives to operate in the state court context, that judges will consider both the partisanship of the legislature, 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 in the state legislature would 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 in order to minimize popular backlash and preserve the court's legitimacy. Following this logic, state supreme courts in Republican (Democratic)-controlled states are more likely to issue anti (pro)-abortion rulings. In addition to the electoral pressure, judges' rulings may be heavily influenced by the relationship with state legislatures. Judges may be inclined not to overturn legislation when state legislature is dominated by one party, 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., where the governor and a majority party in the state legislature are from the same party) (Brace, Hall and Langer 2001). This fear of policy retribution could lead justices not to overturn anti-abortion legislation when the state legislature is controlled by the Republican Party, whereas incentive to do so will be weaker under a Democratic-controlled legislature.

Next, we consider the effects of judicial elections on state high courts' rulings on abortion. There is a 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 an uncontested retention elections, and 14 of them use contested nonpartisan elections while 8 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 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). Calderone, Canes-Wrone and Clark (2009) further find that judges who seek office in nonpartisan elections issue rulings that better match public opinion than those in partisan elections. Others show that electoral incentives judges face vary by the nature of the case. Cases that involve salient and controversial issues create greater incentives to rule consistent with public opinion (Cann and Wilhelm 2011). Following this logic, we expect that justices who face elections will render decisions in a way that

minimize the rulings' negative impacts. For instance, elected justices will be more likely to overturn heavily restrictive abortion laws that will bring broad impacts on society. 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 minimizing the negative public impacts of their decisions, they are more likely to overturn an abortion regulation that entails broad and 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 consensus or notification or protection of abortion clinics. We suspect that state supreme courts are less likely to make anti-abortion decisions for cases with broad impacts but may chip away at access to abortions in a more incremental approach.

Data Collection

Using an original dataset of state supreme court abortion decisions from 2000 to 2021, we examine the interplay between abortion policy making between state courts and legislatures. We analyze state supreme court decisions to assess whether they support or hinder access to abortion and classify the type of restriction considered in these decisions. We then analyze the extent to which state-level institutional abortion regimes restrict access to abortion and further examine whether court decisions influence certain types of restriction more than others.

We identified a total of 76 unique state supreme court cases related to abortion regulations.⁴ 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 issue. Alabama's Supreme Court decided the most abortion cases (total of 12), followed by Florida, New York, Alaska, and Missouri.

[Figure 1 about here.]

After we identified cases we classified the case decisions 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 *Anti-Abortion Decision*. Figure 1(b) plots the share of *Anti-Abortion Decisions* in all abortion-related state

⁴See the appendix for our full list of state court decisions

supreme court cases in each state that happened during 2000 to 2021. The map shows a considerable variation in the share of anti-abortion 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 anti-abortion rulings. For instance, in states like Florida, Alaska, and New York, only one-third of cases resulted in anti-abortion rulings, despite having a relatively large number of abortion cases. By contrast, states like Maine, North Dakota, Mississippi, South Carolina, and Louisiana had only one abortion-related state supreme court case, where the court issued an anti-abortion ruling.

Finally, we created a measure of case typology based on the specific abortion policy addressed in the case. We classified the cases into the following six different categories: (1) policies regarding young people's access to abortion (*Young people*), (2) expanding the scope of healthcare professionals who can perform abortion services (*Expanded scope*), (3) guaranteeing prescriptions of abortion pills (*Prescription guarantee*), (4) protection of abortion clinics and healthcare professionals who provide abortion services (*Clinic protection*), (5) biased counseling requirement and/or mandatory waiting periods for pregnant people seeking abortion care (*Biased counseling*), and (6) general abortion rights (*Abortion rights*).

Results

We first consider how the frequency and the ruling of state court abortion cases vary by the partisanship of state legislature. The left panel of Figure 2 plots histograms of the cases disaggregated by the party controlling state legislature and the outcome of the ruling. A majority of the abortion cases (39 out of 76 cases) were from states where their legislature was controlled by the Republican party. Another noticeable pattern is that state courts more frequently issue pro-abortion rulings when the state legislature is controlled by the Republican party than when it is controlled by the Democratic party or split between the two parties.

[Figure 2 about here.]

We test whether there is a meaningful difference in the frequency of anti-abortion rulings between Democratic- and Republican-controlled state legislatures using a difference-in-means test. The right panel of Figure 2 confirms that the proportion of anti-abortion rulings is higher in Democratic states than Republican states by roughly 25 percentage points. This difference is of a sizeable effect, as it accounts for more than half of a standard deviation of the variable *Anti-Abortion Decision*.

[Figure 3 about here.]

This finding is in contrast to our expectation that state courts will issue abortion rulings consistent with the position of a legislative majority. We suspect that the breadth of abortion policy in the cases brought to the courts explains the lower frequency of anti-abortion rulings in Republican controlled states. In other words, anti-abortion 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 abortion access. Figure 3 illustrates this point by showing the distribution of different abortion policy types across cases 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 comprise the vast majority. By contrast, state supreme courts in Republican states considered a variety of abortion policies, including general abortion rights, 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 not just bring more abortion cases to the state supreme court but also the ones that have broader impacts on the state's abortion access.

As shown in Figure 3, anti-abortion rulings were less frequent among cases with broad societal impacts, such as those on abortion rights in the state, than cases with narrower impacts, such as young people's access to abortion, in both Democratic- and Republican-controlled states. 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.

Next, we test our expectation regarding the effect of judge selection methods.⁵ As seen in Figure 4, courts where their justices are popularly elected issued anti-abortion rulings more frequently than where justices are appointed by governor or state legislature. However, the difference in means between two groups was not statistically significant at a conventional level.

[Figure 4 about here.]

Our findings suggest the multifaceted dynamics in state supreme courts' rulings on abortion issue. 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

⁵Jason Windett generously shared data on judge selection method as an extension to Windett, Harden and Hall (2015). Among 26 cases where justices were elected, only 3 cases were non-partisan elections and the rest of the cases were partisan elections.

time, these political contexts heavily influence the type and the breadth of abortion cases that are brought to the court, structuring justices' decisions. As a consequence, state supreme courts rulings on abortion may not always be consistent with the state's political climate.

Implications

Our research speaks to the extent to which setting abortion policy at the state level is removed from elected representatives and conducted by state judicial systems that may or may not be elected by the people. While there is a normative expectation that courts remain removed from the pressures of public opinion, state courts can not only act against public opinion on the issue of abortion but 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 women and people who may become pregnant. Finally, our research contributes to the literature on judicial institutions by broadening existing knowledge of judicial independence of state courts. Are the courts truly independent of other state institutions like the executive or the judiciary? Our initial results here suggest not, and that interactions between all three branches of state government hold substantive and important consequences for abortion policy.

With the United States Supreme Court poised to open the door for states to enact restrictive abortion policies, the state courts will be a critical battleground for abortion policy. 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. We focused much of our analyses on abortion restrictions, but courts could also be a venue that upholds abortion access in some state. For example, a state-level court in Michigan recently placed an injunction against enforcement of the state's 1931 law banning abortion which, in the short term, preserves access to abortion in the state.

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Figure 1: Geographical Distribution of State Supreme Court Abortion Cases (2000-2021)

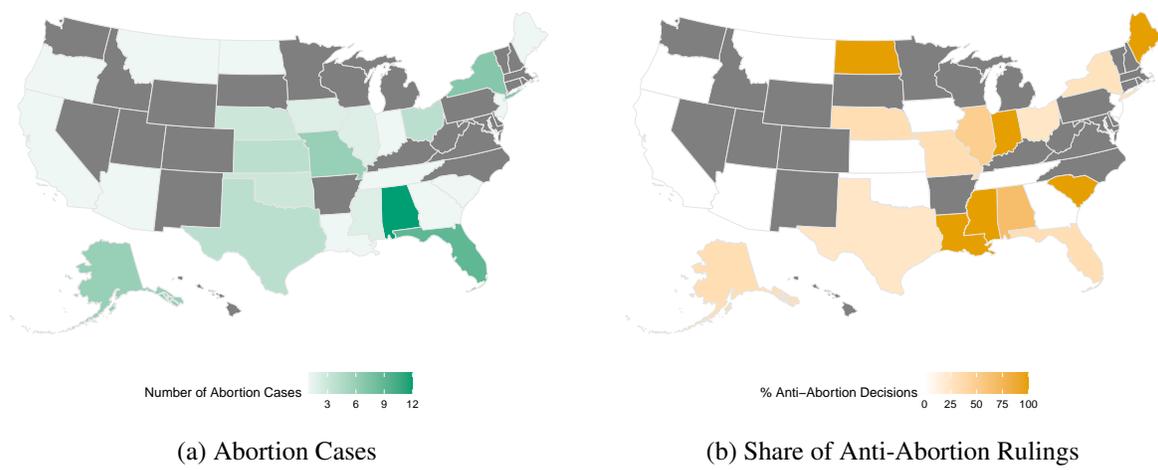


Figure 2: State Court Abortion Cases by State Legislature Party Control, 2000 to 2021

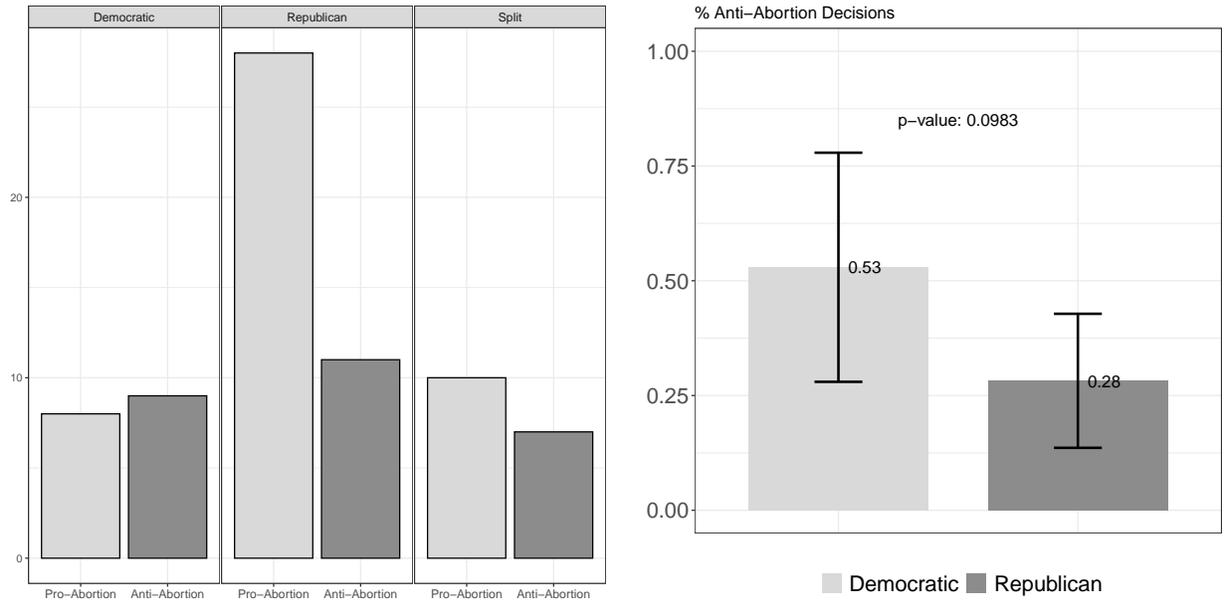


Figure 3: Type of Abortion Regulation Addressed in State Court Cases by State Legislature Party Control, 2000 to 2021

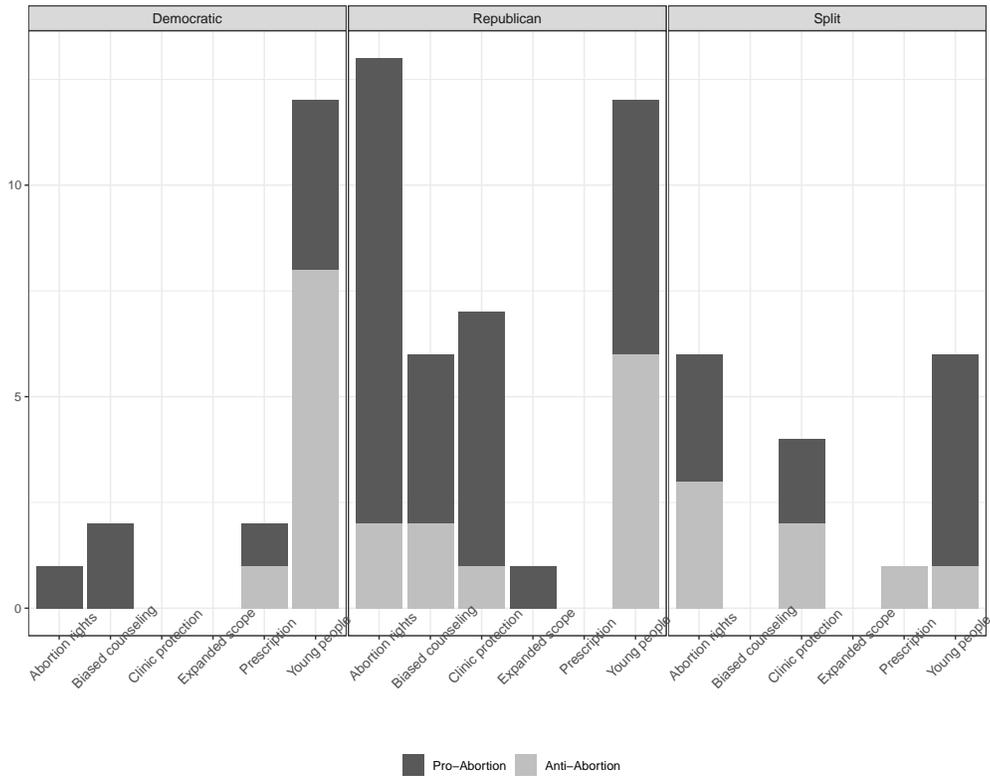


Figure 4: Anti-Abortion Rulings by Judge Selection Methods

