

Judging Law in Election Cases

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INTRODUCTION

How much does law matter in election cases where the partisan stakes are high? At first glance, election cases may seem the worst context for studying the influence of law on judicial decisionmaking. Election cases, which decide the applicable rules for a given election, often determine election outcomes and therefore feature the highest political stakes in the balance. There is great temptation for judges to decide these cases in a partisan fashion to help their side. And we have found empirically in earlier work that judges do often appear influenced by partisanship in deciding these cases for their own parties in a way that suggests politics matter more than law.¹ But in this Article, we argue that election cases actually offer a unique opportunity to study the role of law in judicial decisionmaking precisely *because* we can assume partisanship influences judges in these cases.

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** Professor of Law, Emory University School of Law. Many thanks to Tracey George, Darren Hutchinson, Tonja Jacobi, Jeffrey Segal, Dan Smith, and Emerson Tiller for their valuable comments on earlier versions of this Article. Thanks also to Eitan Blander and Ian Gaunt for excellent research assistance.

1. See Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1436–43 (2016) (finding statistical relationships among judicial partisanship, party campaign finance, and judicial decisions in election cases).

If judges prefer to decide election cases consistent with their partisan interests, then they may decide these cases *contrary* to partisan interests mainly when the out-party litigant's case has strengths sufficient to overcome this usual, countervailing influence of partisan loyalty. For this reason, we use lower court judges' decisions contrary to their partisan interests (e.g., for a litigant from the opposite party, or against one from their own) as a proxy for underlying case strength. Lower court judges' decisions against their partisan interests buck the normal pattern of partisan loyalty and therefore offer an inference of greater case strength compared to other decisions that are consistent with partisan expectations. Put another way, case strength is assumed to be greater for winning litigants when lower court judges went against their own partisan interests to decide for the winning litigants, than in cases where lower court judges predictably decided in favor of their own party's interests. With this inference of case strength in hand, we then can examine whether case strength is predictive for state supreme court decisionmaking in these cases on appeal.

We find that our measure of case strength is predictive of state supreme court decisionmaking in election cases. We find, for instance, that state supreme court justices from both parties are most likely to affirm when case strength is indicated by our measure. This is particularly true when case strength aligns with a justice's own partisan interests such that both law and partisanship direct the same result on appeal. When presented with a winning Democratic litigant who won before a Republican lower court judge, Democratic justices voted to affirm 88.9% of the time on appeal. Republican justices voted to affirm at an 86.4% rate for winning Republican litigants who won before a Democratic judge below. But even when case strength conflicted with a supreme court justice's partisan loyalty, case strength won out most of the time. For instance, when faced with a Republican litigant who triumphed before a Democratic judge below, indicating case strength, Democratic justices still voted to affirm 82.6% of the time despite having to grant final victory to the opposing party. Similarly, Republican justices voted to affirm 66.6% of the time for Democratic litigants who won before a Republican lower court judge. Our other results suggest that where case strength could not be inferred by the lower court disposition, partisanship generally predicted quite a bit, with some interesting complications that we discuss further within.

In Part I, we introduce our earlier work on election cases and judicial partisanship before setting forth our new approach to studying the influence of law on judicial decisionmaking. We describe the special nature of the election cases in our database that allow more persuasive inferences of judicial partisanship than typically derived in empirical

work on judicial behavior. We then explain our new approach for measuring case strength based on counterpartisan decisionmaking by judges. In Part II, we apply our approach to case strength to our dataset and present our results. In a nutshell, partisanship appears to matter as expected and influences decisions, but law, as represented by case strength, matters as much or more. Finally, in Part III, we distinguish our approach to measuring law's influence on judicial decisionmaking from existing approaches and explore the implications of our findings. We find a partisan asymmetry, this time for cases when a state supreme court justice considers a lower court victory by an opposite-party litigant before an opposite-party judge. Democratic and Republican justices decide these cases very differently, and we close by weighing explanations for this finding.

I. THE RIVALRY BETWEEN LAW AND POLITICS IN ELECTION CASES

A. *Partisanship in Election Cases*

In earlier work, we found that judges are regularly influenced by their partisan ties when deciding election cases and suspected that their partisan loyalties have something to do with it.² By partisan loyalties, we mean the “‘low’ politics of partisan political advantage,” in the form of deciding cases “to promote the interests of a particular political party and install its candidates in power.”³ But even this rawest form of partisanship is difficult as an empirical matter to untangle from ideology and the influence of law.

The reason is, for most substantive areas of election law, the ideological positions of the major parties map closely to what would be predicted by raw partisanship and political advantage. Republican judges might vote in favor of voter identification laws, or against vote dilution claims under the Voting Rights Act, because they would like to help the Republican Party as a political matter. However, Republican judges, as ideological conservatives, are also more likely than Democrats to view racial discrimination claims skeptically and to narrowly decide vote dilution claims under the Voting Rights Act.⁴ Although Republican judges' decisions on these questions may produce political benefits for their party, their decisions are motivated not by partisanship in this telling but rather by ideological motivations that

2. See *id.* at 1452.

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

4. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 37–39 (2008).

produce partisan benefits only by coincidence.⁵ This basic methodological complication clouds any simple conclusion that judges are driven by raw partisanship in election law cases. As a result, it is difficult to tell how much law and politics matter in judicial decisionmaking for these cases when the law and politics are all mixed up together.

We offered a new methodological approach for this complication—candidate-litigated election disputes. We collected data on election cases in which a candidate was a litigant decided by state supreme courts from 2005 through 2014. The cases arose as legal disputes usually brought by or against a candidate in a particular election and focused mainly on state election law questions, with particular relevance for an election then-upcoming or which had just occurred. The legal questions thus tended toward obscure statutory questions interpreting state election code, often with very little doctrinal precedent or ideological history.⁶ These were, we think, cases where the legal ideological stakes were typically low. There usually was no consistent, easily identifiable ideological position for either conservatives or liberals about how to decide these cases separate from the partisanship of the litigants. More importantly, to the extent there were conservative or liberal positions in these cases, they did not consistently align with long-term political advantage for either party such that a pattern of partisan favoritism can be explained as ideologically determined.⁷

The general absence of strong ideological predispositions in these election cases foregrounds the short-term political payoff resulting from how the cases are decided. To be clear, the long-term political advantage between the major parties from any particular decision was largely uncertain in the vast run of our cases. It would be difficult, for example, to predict how a ruling today on candidate eligibility requirements would help Democrats or Republicans over the long run, or whether the question would ever matter again. However, the short-term political impact of the decision would be clear for the election involving a candidate-litigant in the case. These election cases generally featured a particular election to which the court's ruling would be applied and which therefore offered a nice test of those judges'

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

6. See Mark J. McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 POL. RES. Q. 799, 802, 807–08 (2012) (finding that judicial partisanship appears lower where legal constraints were higher in one person, one vote cases as compared to voting rights cases and other types of redistricting cases).

7. See Kang & Shepherd, *supra* note 1, at 1414–15 (describing the cases in greater detail).

partisan loyalty. The combination of short-term political impact and low ideological salience made these cases a good test of judicial partisan loyalty. These cases come as close as we can hope to stripping away the high politics of principle and leave as most salient the low politics of partisan advantage.

Our first analysis of this data yielded several key findings.⁸ First, Republican judges systematically favored their own political party in election cases at a rate 36% higher than Democratic judges. Republican judges decided for their party's interests 59.3% of the time, while Democratic judges sided with their party 43.4% of the time.⁹ As a point of reference, judges appointed on a nonpartisan basis, together with independent judges in partisan election states, favored the Republican litigant in 50.7% of cases involving Republican litigants and favored the Democratic litigant in 59.5% of cases involving Democratic litigants. If anything, these party-neutral judges set a baseline that seems to slightly favor Democrats on the merits.

Second, Republican partisan loyalty is not only significantly stronger than Democratic partisan loyalty, it covaries with campaign finance influences that affect the costs and benefits of siding with one's party. Democratic partisan loyalty does not.¹⁰ We find that party campaign finance support is associated with greater partisan loyalty among Republican elected judges, but has no significant effect on Democratic judges. Campaign contributions from the Republican Party and its allies are associated with an increased likelihood that Republican elected judges will vote in favor of their party's interests. However, it is noteworthy that campaign contributions to Republican elected judges are *not* predictive for lame duck incumbents who are vacating their seats.¹¹

8. See *id.* at 1417–18.

9. We cannot declare that Democratic judges do not display any partisan bias because it is a bit uncertain how often partisan judges would decide for their party in the absence of partisan loyalty. However, in addition to the baseline set by nonpartisan and independent judges mentioned above, the Priest-Klein hypothesis hints that the baseline should be in the ballpark of 50%. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17–19 (1984). State supreme court cases have been appealed at least once, if not twice, which indicates both sides believe they have a chance ultimately to prevail. Party litigants must weigh finite financial resources for these efforts as well as potential damage to their political reputation before litigating any unmeritorious claims. Given these costs, aggregated over 407 cases, the Priest-Klein hypothesis suggests that neither party's objective expectation of victory should diverge significantly from 50%.

10. See Kang & Shepherd, *supra* note 1, at 1437–40 (providing data supporting this conclusion); see also Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1275–83 (2013) (finding a similar partisan asymmetry in campaign finance and judicial decisionmaking across a wider spectrum of cases).

11. See Kang & Shepherd, *supra* note 1, at 1440 (comparing data from judges who run for reelection and retiring judges).

Third, partisan loyalty by Republican judges appears to be tempered by the potential for public attention. The effect of party campaign contributions becomes statistically insignificant for federal and state elections where public attention and media coverage are typically greater.¹² By contrast, the effect of party money in encouraging partisan loyalty remains significant for less visible county and city elections where the public is less likely to notice. Along similar lines, partisan loyalty diminishes as the amount of attack advertising in recent state supreme court elections increases.¹³ Where there has been more attack advertising, incumbent judges might want to avoid facing similar campaign attacks in their next race and thus may be less likely to engage in partisan favoritism that potentially subjects them to greater criticism.

Our results support suspicions that partisanship affects judicial decisionmaking in election cases, particularly for Republican elected judges, but what requires more attention in our analysis is the influence of law. We have found that politics appear to matter in judicial decisionmaking, but of course, there is also a wealth of authority demonstrating that law matters to judges as well.¹⁴ Judges appear to care about legal reasoning, plain meaning, and precedent within a traditional legal model of judicial decisionmaking based on neutral principles. Judges adhere closer to or further from this ideal depending on the clarity of the law and political salience of the case, among other things. However, research demonstrates that law exerts a variable influence on judges such that their decisionmaking cannot be reduced entirely to their political preferences.¹⁵ The harder question, especially for politically salient cases like election disputes, is the degree to which judges are directed by legal reasoning *as opposed* to their political preferences. We seek to investigate this question next by constructing a novel proxy for measuring case strength within our dataset that allows us to gauge the competing influences of law and politics on judges.

12. See *id.* at 1440–41 (discussing the relationship between election visibility and partisan voting).

13. See *id.* at 1442–43 (analyzing data regarding attack ads).

14. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (reviewing the various factors that influence judicial decisionmaking, including precedent); Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465, 466 (2001) ("The entire structure of legal education and the nature of the judicial process in the United States is premised on the assumption that, one way or the other, law matters."); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 *N.Y.U. L. REV.* 1156 (2005); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 *S. CAL. L. REV.* 1989, 1990 (1996).

15. See Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 *NW. U. L. REV.* 517 (2006) (contending that law is both legal and political and suggesting important factors).

B. Law in Election Cases

Law should matter in judicial decisionmaking. By law, we mean that “reasoned judgment from precedent or statute and consideration of [the judicial] role in the legal system.”¹⁶ Law under a traditional legal model of judicial decisionmaking serves as a constraint on judicial discretion. It suggests, at least under certain circumstances, a mode of reasoning under which judicial decisions are more likely to be viewed as correct and legitimate under shared understandings of what legal authority dictates. We assume that judges prefer to decide cases according to their legal merits, all other things being equal. Our objective is to assess the relative influence of the legal merits on judicial decisions in election cases, particularly vis-à-vis the partisan loyalty we already have observed.¹⁷

The fact that law is largely nonideological in our election cases, as we argue above, does not mean that the legal merits in these cases do not matter. We believe that our cases tend not to be ideologically valenced or associated with rich case law precedent, but individual cases can vary in their strength on the merits just like cases in other areas of law. For example, some cases have better or worse facts for the winning litigants. Some cases may be adjudicated under higher or lower standards of proof and review. A lack of rich precedent, textual direction, or ideological valence may mean that appellate adjudication of a winning litigant’s case below may be less predictable than in other areas of law, but there is still variance in case strength that ought to matter. Winning litigants in these cases at the lower court therefore should vary in terms of their case strength and how confident they ought to have been based on the legal merits, independent of partisan considerations, on appeal before the state supreme court.

We introduce law into our analysis with a novel proxy measure for the winning litigant’s case strength in our state supreme court decisions—the interaction between the party affiliation of the winning litigant and of the lower court judge below. The state supreme court cases in our dataset are appellate decisions reviewing a disposition of the case by a state trial court or intermediate appellate court. We coded the cases to determine the partisanship of the lower court judges below and added it to our analysis. If the lower court judge is partisan, we assume, all things being equal, that the judge would ideally prefer to decide in favor of her party’s interests (which means for her in-party

16. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 253 (1997).

17. See Section I.A.

litigant or against the other major party's litigant). But things are not always equal. As we have explained, cases vary in terms of their legal merits such that they may cut in favor of, or against, the judge's party in a particular case. Some cases present legal merits that encourage a partisan decision, while other cases present legal merits that discourage one. The case strength of any particular case may align with the lower court judge's partisan loyalty or may conflict with it.

The partisan affiliation of the lower court thus enables us to infer something about the strength of the winning litigant's case. Our intuition is simple. We infer case strength from the basic premise that partisan lower court judges would prefer to decide election cases in favor of their own party's interest if they have sufficient discretion under the applicable law. Lower court judges therefore are predisposed to favor their own party unless the legal merits of the case compel a decision for the other party. When a lower court judge decides the case *against* her party's interests, the decision cannot be explained simply by partisan loyalty. Instead, when a Republican judge decides in favor of a Democratic litigant or a Democratic judge decides in favor of a Republican litigant, it suggests that the winning out-party litigant's legal case was strong enough to overcome a countervailing influence of partisan loyalty. For this reason, decisions by a partisan lower court judge against her party's interest can be assumed to be, on average over the run of cases, stronger on the legal merits than decisions in favor of her own party. We therefore use a lower court decision contrary to partisan loyalty as a proxy for greater case strength for the winning litigant.

Michael Bailey, Brian Kamoie, and Forrest Maltzman rely on a similar intuition in their study of the solicitor general's influence on the U.S. Supreme Court.¹⁸ They found that Supreme Court Justices were particularly responsive to the solicitor general's amicus briefs when he took an ideologically unexpected position in the case. An ideologically incongruous position by the solicitor general suggests that the position was not simply political, but instead more likely to have been motivated by the substantive merits of the case. For instance, “[g]iven that the liberal S.G. is predisposed toward supporting liberal outcomes, these justices could reasonably infer that the S.G.’s decision to support a conservative position is driven by legal concerns.”¹⁹ The common intuition is that a legal position taken contrary to political loyalty signals substantive strength on the merits, irrespective of partisanship.

18. See Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72 (2005).

19. *Id.* at 76.

Based on this logic, we can identify cases where the winning litigant's case is likely to be stronger and where this likelihood is less on average. In our dataset, we expect that the strongest cases on average for the winning litigant in the lower court will be where the partisanship of the winning litigant and the lower court judge do not match. These are cases where the lower court judge decided for the winning litigant even though it went against the judge's partisan interests. Table 1 sets forth the four categories of cases where we see this type of partisan mismatch between the lower court judge and the winning litigant. On appeal before the state supreme court, we expect the likelihood of voting to affirm to be higher on average in these four categories of cases if substantive law actually matters to supreme court justices and influences their decisionmaking.

TABLE 1: PARTISAN MISMATCH BETWEEN WINNING LITIGANT AND LOWER COURT

	Party of winning litigant in lower court	Party of lower court judge (or majority party if panel)	Party of supreme court justice
(1)	Dem	Rep	Dem
(2)	Rep	Dem	Rep
(3)	Rep	Dem	Dem
(4)	Dem	Rep	Rep

Not only do we expect affirmance to be more likely for these stronger substantive cases, but we also can differentiate among these four categories of cases based on the partisanship of the state supreme court on appeal. In predicting affirmance in these election cases, we expect votes to affirm to be more likely in categories (1) and (2) where the supreme court justice's partisanship matches the winning litigant's than in categories (3) and (4) where they do not. For categories (1) and (2), the supreme court justice receives what should be a stronger case on average for the winning litigant, because the lower court judge of the opposing party already has gone against partisanship to decide for the litigant. On appeal, then, the supreme court justice reviews a case where the law is likely to be on the winning litigant's side, and in categories (1) and (2), one in which the partisan loyalty of the supreme

court justice also encourages affirmance. Law and partisan loyalty coincide on appeal for affirmance.²⁰

For categories (3) and (4), the cases are again strong for the winning litigant, but the partisanship of the winning litigant and the supreme court justice on appeal no longer match. Law boosts the winning litigant's chances of affirmance above average, but partisan loyalty works against the winning litigant. As a result, we would expect the affirmance rates will be higher for categories (1) and (2) where law and partisan loyalty coincide, than for categories (3) and (4) where they do not. Again, we do not have any concrete expectations about whether partisan loyalty or case strength will win out in categories (3) and (4) where they conflict, but we know that partisan loyalty matters and expect it will cut into the affirmance rate relative to categories (1) and (2).²¹

There are four remaining categories of cases where there is no signal of case strength by our measure. Table 2 presents the election cases where the partisanship of the winning litigant and lower court judge are matched. These cases are effectively the baseline for saying that the affirmance rate for the strong cases in Table 1 should be higher than average. Affirmance should be higher for the cases in Table 1 where there is an inference of case strength for the winning litigant relative to these cases in Table 2 where there is not. For the cases in Table 2, the lower court has decided these cases consistently with partisan loyalty. This fact does not mean that partisan loyalty fully explains the decision as opposed to law. It simply means that the lower court reached its decision in favor of the winning litigant without needing to overcome partisan loyalty in the opposite decision. As a consequence, in contrast to the cases in Table 1, there is no inference about case strength.

20. See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159 (1998) ("Judges are more likely to obey legal doctrine when such doctrine supports the partisan or ideological policy preferences of the court majority.").

21. See, e.g., *id.* ("In those cases in which doctrine does not support the partisan or ideological policy preferences of the court majority, we expect somewhat more disobedience.").

TABLE 2: PARTISAN MATCH BETWEEN WINNING LITIGANT AND LOWER COURT

	Party of winning litigant in lower court	Party of lower court judge (or majority party if panel)	Party of supreme court justice
(5)	Rep	Rep	Rep
(6)	Dem	Dem	Rep
(7)	Dem	Dem	Dem
(8)	Rep	Rep	Dem

The cases in Table 2 instead may reveal something about the degree of partisanship by the state supreme court justices. In these cases, justices may be less constrained by law and freer to exercise their partisan discretion in favor of in-party litigants and against out-party litigants. In categories (5) and (7), Democratic and Republican supreme court justices can help their in-party litigants simply by upholding their in-party lower court's judgment. In categories (6) and (8), supreme court justices can help their in-party's interests by reversing the out-party lower court's decision for the out-party litigant. The winning litigant in these cases may have compelling legal cases on the merits, or they may not. We cannot infer one way or the other about case strength where the lower court acted according to partisan expectation. But the cases in Table 2 may reveal the shape and magnitude of differences in partisan loyalty between Democratic and Republican supreme court justices for these cases where partisan loyalty is most likely to appear.

Our measure of case strength gives us leverage on two questions about state supreme court decisionmaking that we hope to explore here. The first question is the degree to which case strength matters to state supreme court justices in these highly politicized election cases. Within political science, the attitudinalist school long claimed that law has little influence on the U.S. Supreme Court, which decides cases almost entirely based on the policy preferences of its Justices.²² Although that extreme view has moderated with the development of the study of judicial behavior, the rivalry between legal and political influences on judicial decisionmaking still speaks to the heart of the field. By

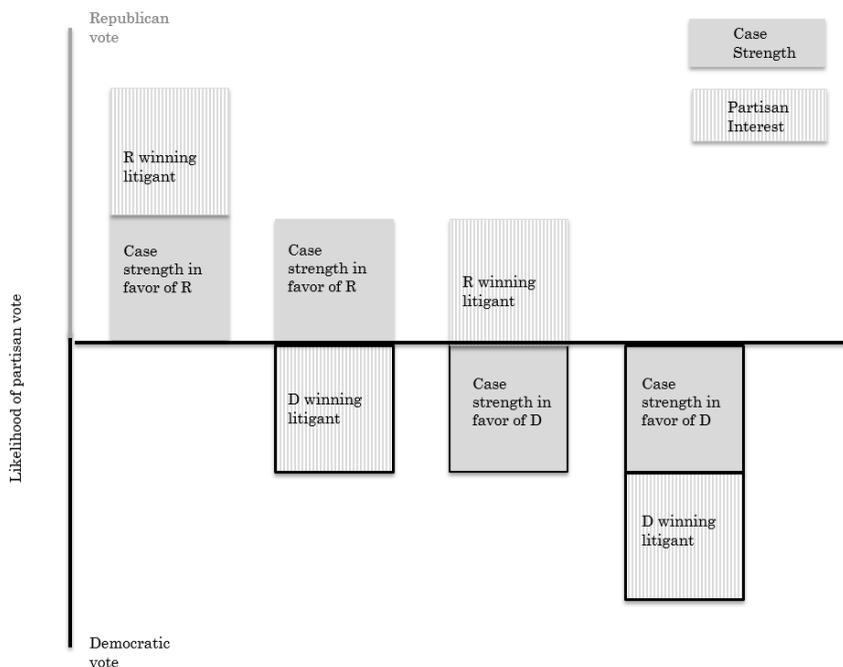
22. See, e.g., Jeffrey R. Lax & Kelly T. Rader, *Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?*, 72 J. POL. 273, 273 (2010) ("Now, a common view in political science, that of Spaeth and Segal (1999) and Segal and Spaeth (2002), is even more extreme: law has little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

comparing state supreme court votes in cases with different lower court partisanship, we can explore the degree to which law, or at least our indirect measure of case strength, trumps partisanship. Do justices go against partisan interest in what we assume are the stronger cases for the other party?

A second question is understanding the partisan asymmetry that we described in our earlier findings from initial study of this data. Why do Republicans display greater partisan loyalty in these cases than Democrats? In our preceding article, we theorized an answer based on political science literature on the different levels of organizational capacity and internal cohesion between the major parties.²³ We hoped to find out more by exploring the underlying partisan asymmetry in greater depth. If Republican and Democratic justices decided election cases differently, we sought more granularity in describing these differences across varying types of cases in Figure 1, particularly as we added the greater detail of case strength and lower court partisanship to the analysis. Figure 1 illustrates how the influence of case strength and partisan loyalty can reinforce or conflict for both Democratic and Republican justices in deciding whether to affirm.

23. See Kang & Shepherd, *supra* note 1, at 1448–49.

FIGURE 1: HYPOTHESIZED INTERACTION OF CASE STRENGTH AND PARTISANSHIP



Do Republican justices decide more cases in their partisan interest because they are less likely than Democratic justices to accede to case strength to the contrary? Do Republicans display a distinct pattern of appellate judicial decisionmaking, or do they simply mirror Democrats but go to a further partisan extreme? We investigate these questions and report below.

II. DATA AND RESULTS

To explore political partisanship, case strength, and judicial decisionmaking, we rely on a comprehensive dataset of election cases from several different sources. First, a team of independent researchers from Emory University School of Law collected and coded roughly 2,500 votes in election cases from all fifty states from 2005 to 2014.²⁴ The team began with a dataset of all state supreme court cases within our time period classified by the Westlaw Key Number System under six election

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

law subcategories.²⁵ The team was instructed to code cases in which a major-party candidate in an upcoming or recently decided election was listed as a litigant, but to remove voter identification, campaign finance, redistricting, and voting rights cases as too ideologically valenced for our purposes, as well as flagging other inappropriately ideological cases outside those categories. The resulting final dataset included votes from more than 400 election cases and almost 500 state supreme court justices. As a practical matter, the final dataset consisted primarily of election disputes focused on state law questions, not unlike the 2000 presidential election litigation in the Florida state courts.

The researchers coded whether each justice, sitting as a member of a multi-judge appellate panel, cast a partisan vote. We defined a partisan vote as a vote either for a justice's own party or against the justice's opposing party in election cases. In cases involving a litigant from the same party as the justice, the justice is coded as voting in favor of her party's interest when the justice votes in favor of the litigant from the same party. In cases not involving a litigant from the same party but involving a litigant from the opposing party (for example, a Democratic election candidate in a case with a Republican justice), a partisan vote is one in which the justice votes against the opposing-party litigant. For example, in a case involving a Democratic candidate contesting the results from an election that he lost, a Republican justice voting to affirm the election results would be coded as having cast a partisan vote.

The team also coded details of each election case, including the issue in the case, the geographic basis of the relevant election, and the litigants in the case. Additionally, the team collected data on each justice, including her political party affiliation,²⁶ the method by which the justice was selected for the court, and the date of her next reelection or reappointment. Of the initial 400 cases, 245 cases involved either a Republican or Democratic litigant and were decided by state supreme

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

26. Determining the party affiliations of judges elected in partisan elections is straightforward: each judge is listed on the ballot as the nominee from one of the political parties or as an independent. For judges appointed by the governor, we use the party of the governor as a proxy for the party affiliation of the judge. Many judges elected in nonpartisan elections also have evident party affiliations: some states use partisan primaries to choose candidates for the general election, some judges make their party affiliation clear in campaign materials, and the party affiliation of other judges is apparent given the contributions to the judges' campaigns. For the few judges appointed or elected by the legislature, we use the majority party of the state legislature as a proxy for the party affiliation of the judge.

court justices for which our research assistants were able to determine political party affiliation. Our initial results, reported in Table 3, reveal that, compared to Democratic justices, Republican justices are more likely to vote for their own party or against the opposing party in the election cases.

TABLE 3: JUDICIAL PARTISAN LOYALTY IN FULL DATA

	Rate at which state supreme court justices vote for same party or against opposing party
Democratic justices	43.4% (309)
Republican justices	59.3% (565)

To further investigate judicial partisanship, research assistants then examined the lower court proceedings of the 245 cases with party-identified justices and partisan litigants. The research assistants gathered information about which litigant initially brought each case in the lower court as either plaintiff or appellant, the party affiliation of the lower court judges,²⁷ and the winning litigant in the lower court proceedings. Several cases dropped out of the data during the coding process: cases in which there were no lower court proceedings; cases for which no political party affiliation of lower court judges could be determined; and cases for which there was no clear winner in the lower courts. The research assistants found detailed information on the lower court proceedings for 126 cases heard in thirty-one states. Thirty-seven of the cases were heard in state intermediate appellate courts before the supreme court appeal, while the other eighty-nine were appealed directly from the trial court to the state supreme court. The trial court cases were typically heard by a single judge, while a panel of judges generally presided over the intermediate appellate court cases. When the lower court data was merged with the data on state supreme court justices' votes, the data included 773 individual votes from 286 individual supreme court justices.

Tables 4 and 5 report the rates at which supreme court justices voted to affirm the lower court judgment subdivided by the party affiliation of the winning litigant below and the party affiliation of the lower court judge (or the majority party of the panel). Table 4 reports

27. The political parties of the judges sometimes could be determined from election records, newspaper articles, campaign contribution data, and other web searches where partisanship could not be determined as described above.

the affirmance rates for Republican state supreme court justices, and Table 5 reports the rates for Democratic justices.²⁸

TABLE 4: VOTING BY REPUBLICAN SUPREME COURT JUSTICES

Winner in lower court	Party of lower court judge (or majority party if panel)	Likelihood of vote affirming lower court decision	<i>N</i>
Dem	Dem	35.7%	98
Rep	Rep	64.7%	68
Dem	Rep	66.6%	42
Rep	Dem	86.4%	44

TABLE 5: VOTING BY DEMOCRATIC SUPREME COURT JUSTICES

Winner in lower court	Party of lower court judge (or majority party if panel)	Likelihood of vote affirming lower court decision	<i>N</i>
Rep	Rep	66.7%	36
Dem	Dem	53.7%	90
Rep	Dem	82.6%	46
Dem	Rep	88.9%	18

Although the number of observations is small for one cell, the results generally indicate that case strength for the winning litigant below, even in politically charged election cases, can override partisanship. In Table 6, it is evident that the supreme court justices of both parties are likely to affirm the lower court's decision when the lower court decided in favor of a litigant from the opposing political party. In these cases, the lower court put aside partisanship to decide in favor of an out-party litigant, suggesting case strength in favor of the out-party litigant. High rates of supreme court justices voting to affirm these lower court decisions, listed in Table 6, suggest that case strength dominates the partisan loyalty of the supreme court justices as well.

28. We refer to the rate at which supreme court justices individually vote to affirm the lower court as their affirmance rate, even though actual affirmance of a lower court decision can be effectuated only by a group vote of a supreme court as a collective institution. Individual justices cast only individual votes to affirm.

TABLE 6: VOTING IN CASES WHERE PARTISANSHIP OF WINNING LITIGANT AND LOWER COURT DO NOT MATCH (STRONGER CASES)

Winner in lower court	Party of lower court judge (or majority party if panel)	Supreme court justice's party	Likelihood of vote affirming the lower court	<i>N</i>
Dem	Rep	Dem	88.9%	18
Rep	Dem	Rep	86.4%	44
Rep	Dem	Dem	82.6%	46
Dem	Rep	Rep	66.6%	42

Predictably, both Democratic and Republican supreme court justices are more likely to affirm a lower court ruling that favors a litigant from the justices' own political party. That is, Democratic justices are more likely to affirm a strong case in favor of a Democratic litigant (88.9%) than a Republican litigant (82.6%), even though that means affirming a Republican lower court's decision. Similarly, Republican supreme court justices are more likely to affirm a case in favor of a Republican litigant (86.4%) than a Democratic litigant (66.6%), even though they are affirming a Democratic lower court's opinion. Although the differences are only statistically significant for the Republican justices' voting (p -value is 0.03), the patterns suggest that, even for strong cases, partisanship plays some role.

Indeed, other voting patterns confirm the importance of partisanship, especially among Republican supreme court justices. As reported in Table 7, Democratic supreme court justices voted to affirm about half of the cases appealed from a Democratic lower court that found in favor of a Democratic litigant. However, for Republicans, the likelihood of affirming a lower Republican court's ruling in favor of a Republican litigant is 64.7%.

TABLE 7: VOTING IN CASES WHERE PARTISANSHIP OF WINNING LITIGANT AND LOWER COURT MATCH, PART ONE

Winner in lower court	Party of lower court judge (or majority party if panel)	Supreme court justice's party	Likelihood of vote affirming the lower court	<i>N</i>
Dem	Dem	Dem	53.7%	90
Rep	Rep	Rep	64.7%	68

Additionally, Republican supreme court justices exhibit a predictable pattern in their review of Democratic lower court decisions in favor of Democratic litigants. As reported in Table 8, Republican supreme court justices vote to affirm decisions by a Democratic lower court in favor of a Democratic litigant only 35.7% of the time—the lowest affirmance rate for Republican justices across all categories of cases. The low affirmance rate is consistent with the other voting patterns of Republican justices. Without a partisan mismatch between winning litigant and lower court, there is no inference here indicating case strength. Moreover, the winning litigants in these cases are Democrats, so partisan loyalty encourages Republican supreme court justices to overturn the lower court decisions.

TABLE 8: VOTING IN CASES WHERE THE PARTISANSHIP OF WINNING LITIGANT AND LOWER COURT MATCH, PART TWO

Winner in lower court	Party of lower court judge (or majority party if panel)	Supreme court justice's party	Likelihood of vote affirming the lower court	<i>N</i>
Rep	Rep	Dem	66.7%	36
Dem	Dem	Rep	35.7%	98

However, the same pattern of hostility against the out-party is not true for Democratic supreme court justices. Democratic justices vote to affirm Republican lower court decisions in favor of Republican litigants 66.7% of the time, far greater than the corresponding 35.7% rate for Republican affirmance of Democratic decisions in favor of Democrats. More surprisingly, this affirmance rate in favor of Republican litigants actually is higher than Democrats' 53.7%

affirmance rate of Democratic lower court decisions in favor of Democratic litigants.

What is odd is that the Democratic justices in our dataset were more likely to vote to affirm Republican decisions in favor of Republicans than vote to affirm Democratic decisions in favor of Democrats. In either case, there was no inference of case strength based on mismatched partisanship between lower court and winning litigant. One would predict that, all other things being equal, Democratic justices would be more likely to affirm Democratic decisions in favor of Democrats rather than Republican decisions for Republicans. At least in the former set of cases, partisan loyalty encourages affirmance, while in the latter set, partisan loyalty seems to discourage it. The difference between these two affirmance rates, it should be noted, is not statistically significant, but even the absence of difference between the rates is surprising. It is possible that this result is simply an anomaly as a function of the small number of cases where a Democratic justice voted on a Republican lower court decision in favor of a Republican litigant. There were only 36 cases that fell into this category, compared to a much greater number for the other three possible categories of matched partisanship between lower court and winning litigant. We discovered no obvious explanation based on closer study of the characteristics of these cases, though we discuss some possibilities in the next Part.

III. LAW'S INFLUENCE AND PARTISAN ASYMMETRY (AGAIN)

Within political science, the attitudinalist school long claimed that law has little to no influence on the U.S. Supreme Court, which decides cases based on the policy preferences of its Justices.²⁹ In this direction, political science has comprehensively documented a consistent partisan divide between Democratic and Republican judges at virtually every level of the American judiciary. But empirical work on judicial decisionmaking has also demonstrated that law matters as well to judges. Legal precedent and reasoning construct a judicial methodology for resolving cases, identify stronger and weaker cases in the process, and constrain judicial discretion to decide cases according to judges' political preferences. Both politics and law matter, but the difficult question is when and how politics and law matter, particularly if the political stakes are high. In our study of election cases, we find

29. See, e.g., Lax & Rader, *supra* note 22, at 273. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (articulating the attitudinalist model).

that case strength generally produces consensus irrespective of partisanship, but when justices are less constrained by law, a familiar asymmetry in partisanship recurs. Republican judicial decisionmaking, at least among state supreme court justices, appears particularly influenced by partisanship where there is no signal of case strength, while Democratic decisionmaking appears unassociated with partisan considerations by comparison.

We find that Democratic and Republican state supreme court justices largely agree in affirming what we code as strong cases for the winning litigant below. Democratic justices voted to affirm strong cases for winning Republican litigants 86.4% of the time and strong cases for winning Democratic litigants 88.9% of the time. Republican justices voted to affirm strong cases for winning Republican litigants 86.4% of the time and winning Democrats 66.6% of the time. These rates are greater than the overall affirmance rate of 54.5% in our data and greater than the affirmance rate of 51.3% for cases we did not code as strong cases. Substantive case strength for the winning litigant appears to matter even in these election cases where the partisan stakes are high.

As expected, both Democratic and Republican justices were more likely to vote to affirm strong cases for winning in-party litigants than for out-party litigants. For the former, justices are motivated not only by the legal merits of the winning litigant's case but also potentially by partisan loyalty. Where law and partisan loyalty are so aligned, we saw the highest affirmance rates across all categories of cases by both Republican and Democratic justices. When justices were presented with strong cases for winning out-party litigants, affirmance rates remained relatively high, but not as high for in-party litigants. In these cases, the strong case of the winning litigant encouraged affirmance but also would be tempered by the countervailing influence of partisanship. Affirmance by Democratic justices decreased slightly from 88.9% to 86.4%, but affirmance by Republican justices fell off more significantly from 86.4% to 66.6%. That said, affirmance rates remained relatively high for strong cases even for out-party litigants. In this sense, case strength prevailed over partisanship when they conflicted, particularly for Democratic justices.

This approach for identifying case strength is novel and quite different from the usual methodology in political science. The typical approach to gauging the impact of law on judicial decisionmaking is to operationalize the varied factual circumstances of individual cases for a specific, fixed question of law. By doing so, political scientists can assess judicial outcomes based on the strength of the facts for the litigants and therefore gauge the degree to which judges appear guided

by the strength of the facts as prescribed by law. A good example of this approach is Herbert Kritzer and Mark Richards's study of U.S. Supreme Court decisionmaking in search and seizure cases.³⁰ Kritzer and Richards coded the facts of search and seizure cases to determine the location or object of the search; whether the search was full or partial; whether a warrant was obtained; whether the lower court found the officer had probable cause; whether the search was incident to lawful arrest, followed but was not incident to lawful arrest, or followed unlawful arrest; and finally, whether the search fell under an accepted exception to the requirements for a warrant.³¹ They found that these relevant facts generally influenced the Justices' voting in these cases in the expected direction given the case law and controlling for ideology, and that these facts shifted in influence predictably with changing precedent on search and seizure. Kritzer and Richards concluded that law mattered and constrained judicial discretion in these cases.³²

Our approach has a potentially important advantage over this established method of operationalizing law. It permits analysis of an entire area of law, encompassing the wide diversity of legal questions in the election cases from our dataset. The fact-based method for operationalizing law requires a generally fixed, somewhat narrow legal question for which the factual predictors of case outcomes are the same across individual cases. To predict case strength, the established method must assume that a particular factual condition will increase the likelihood of a particular judicial decision across all cases, so the associated legal question must be fixed across cases irrespective of judge and jurisdiction. Our approach does not similarly limit us to a single, narrow legal question to infer case strength. We infer case strength from partisanship, rather than case-specific facts, and have no need to keep constant the relevant legal question to be decided by the court. As a result, we can aggregate across a range of different legal questions and more easily collect a dataset of sufficient size for meaningful analysis. The alternative of studying only a single legal question in these election cases, such as candidate eligibility based on residential status, would not have been feasible. The applicable law varies too much across jurisdictions, and more importantly, there are too few such specific cases in our period of study to generate robust analysis.

30. See Herbert M. Kritzer & Mark J. Richards, *The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence*, 33 AM. POL. RES. 33 (2005).

31. *Id.* at 42–43.

32. See *id.* at 52 (rejecting “the proposition of the attitudinalists that there is at best negligible evidence that law matters”).

Although we find partisan consensus on strong cases, we found partisan divergence where there was no signal of case strength. We inferred case strength where there was a partisan mismatch between winning litigant and lower court, but for cases where the partisanship of the winning litigant and lower court matched, we could make no inference of case strength. On these comparatively “weaker” cases, we found that Democratic and Republican justices voted quite differently. Democratic justices voted to affirm Democratic lower court decisions in favor of Democratic litigants at a rate of 53.7%. They actually voted to affirm Republican lower court decisions in favor of Republican litigants at an even higher rate of 66.7%. Partisan loyalty to Democratic litigants seems rebutted by this unexpected pattern.

By contrast, Republican justices displayed a predictable pattern of partisan loyalty in cases without a signal of case strength. Republicans voted to affirm Republican lower court decisions in favor of Republicans 64.7% of the time, but they voted to affirm Democratic lower court decisions in favor of Democrats just 35.7% of the time, the lowest rate across all categories of cases. Republican justices voted to affirm decisions in favor of their party at a significantly higher rate in these “weaker” cases than decisions in favor of the Democratic litigant.

One possibility is that Republican justices are more influenced by their partisan loyalty and vote, at a much higher rate than Democratic justices, in their party’s interest when case strength is not indicated. Under this interpretation, Democratic supreme court justices are less influenced by partisan loyalty and therefore affirm both Republican and Democratic lower courts’ partisan decisions at roughly similar rates of 66.7% and 53.7%, respectively. The fact that Democratic justices actually vote to affirm Republican victories at a higher rate than Democratic victories evidences their lack of partisanship. By contrast, the corresponding spread between favoring in-party lower court decisions favoring the in-party on one hand, and favoring out-party lower court decisions favoring the out-party on the other hand, is large for Republican justices and in the predictably partisan direction. All in all, this greater partisanship by Republicans in these cases accounts for most of the partisan asymmetry discovered in this and even our earlier work.

There is support in political science for the notion that Republicans are more prone to partisanship along these lines. Political science documents the Republican Party’s superior campaign finance and institutional capacities. The Republican Party enjoys clear institutional advantages vis-à-vis the Democratic Party in terms of state and local party budget size, organizational complexity, expertise in media relations and campaign operations, and financial support for

candidates,³³ all of which continue through today.³⁴ These advantages contribute to Republican effectiveness in achieving party goals, including the profile of candidates who reach the state supreme court and how they vote once on the bench. In addition, the Republican Party enjoys greater internal homogeneity than the Democratic Party. There is greater ideological agreement among Republicans because Republicans are more solidly conservative than Democrats are solidly liberal at every level of the two parties.³⁵ Republican advantages in homogeneity made it easier over the years for the Republicans to stay unified, maintain confidence in the party's ideological direction, and exercise loyalty to their party's candidates. This greater loyalty to the party likely holds true even for the party's elected judges sitting on state supreme courts in these election cases.

This account of partisan asymmetry fits the existing political science, but we also offer an alternative wrinkle less grounded in any empirical literature. Republican justices voted to uphold lower court decisions by Republicans at a rate of 66.6% in favor of Democratic litigants and a rate of 64.7% in favor Republican litigants. They also

33. See James L. Gibson et al., *Assessing Party Organizational Strength*, 27 AM. J. POL. SCI. 193, 213 (1983) (noting that Republican party organizations showed greater organizational strength with less intraregional variation); James L. Gibson et al., *Party Dynamics in the 1980s: Change in County Party Organizational Strength, 1980–1984*, 33 AM. J. POL. SCI. 67 (1989); Gary C. Jacobson, *Party Organization and Distribution of Campaign Resources: Republicans and Democrats in 1982*, 100 POL. SCI. Q. 603, 603 (1985).

34. See Sidney M. Milkis & Jesse H. Rhodes, *George W. Bush, the Republican Party, and the “New” American Party System*, 5 PERSP. ON POL. 461, 461 (2007) (assessing the successful effort of the Bush II administration in building the Republican party at the congressional, grassroots, and organizational levels); Anthony Paik et al., *Political Lawyers: The Structure of a National Network*, 36 LAW & SOC. INQUIRY 892, 907 (2011) (noting that conservative group networks are stronger than liberal group networks); see also Thomas B. Edsall, Opinion, *Billionaires Going Rogue*, N.Y. TIMES: CAMPAIGN STOPS (Oct. 28, 2012, 10:53 PM), <http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/> [<https://perma.cc/9QGV-9KY2>] (“In recent years, the Democratic Party organization has gained some strength and it plays a much more active role in campaigns at all levels than in the past, but as an institutional force capable of command and control, it remains light years behind the Republican Party.”).

35. See MATT GROSSMANN & DAVID A. HOPKINS, *ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS* (2016) (characterizing the Republican Party as an ideological movement, and the Democratic Party as a social group coalition); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (rev. ed. 2016) (describing ideological cohesion and extremism of the national Republican Party); D. Jason Berggren, *Two Parties, Two Types of Nominees, Two Paths to Winning a Presidential Nomination, 1972–2004*, 37 PRESIDENTIAL STUD. Q. 203, 210–11 (2007) (describing the different political cultures of the Republican and Democratic Parties); Christopher Bruzios, *Democratic & Republican Party Activists & Followers: Inter- & Intra-Party Differences*, 22 POLITY 581, 601 (1990) (“The data presented in this study not only show a Republican party with fewer intra-party differences than the Democrats, but also an electorate shifting to the right.”); Barry C. Burden, *Candidate Positioning in US Congressional Elections*, 34 BRIT. J. POL. SCI. 211, 219–20 (2004) (concluding that almost all Republicans are uniformly to the right of political center, but that Democrats are less cohesively left of center).

affirm Democratic lower court decisions in favor of Republican litigants at an 86.4% rate. It is for Democratic lower court decisions in favor of Democrats where the affirmance rate drops dramatically to 35.7%. What is more, the lowest affirmance rate by Democratic justices is for the same set of cases—Democratic lower court decisions in favor of Democratic litigants. The Democratic justices' affirmance rates for other categories of cases are higher, if not necessarily by a statistically significant margin.

In this alternative telling, it may be that Democratic lower court decisions for Democratic litigants are somehow suspect such that even Democratic justices voted to affirm only 53.7% of the time. Democratic distrust of Democratic lower courts actually would be surprising. Research suggests that judges tend to trust their in-party judges more than out-party judges for authority, and especially so as case salience increases.³⁶ By contrast, in this alternative telling, both Republican and Democratic justices are more confident in Republican lower courts and affirm their partisan decisions for Republicans at nearly the same rate.³⁷ This alternative interpretation gains credibility from the fact that Democratic lower courts decided for Democratic litigants in 76% of cases, compared to a much lower 46.4% rate by Republican lower courts in favor of Republican litigants. Perhaps state supreme court justices of both parties are simply correcting for partisanship by the Democratic lower courts in these particular cases.

We urge a bit of caution in this interpretation. It appears compelling mainly because Democratic justices vote to affirm Republican lower court decisions for Republicans at a higher rate than Democratic lower court decisions for Democrats. This counterpartisan pattern suggests that Democratic justices distrust Democratic lower courts by comparison. But the number of cases where Democratic justices reviewed Republican lower court decisions for Republicans is quite small and very sensitive to a slight variance in the data. Just four additional votes to reverse in these cases would have erased this counterpartisan pattern and made Democratic affirmance rates identical for Republican and Democratic lower court decisions in favor

36. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87, 119 (2008) (finding that federal appellate judges tend to cite judges of the opposite party significantly less, especially in cases dealing with high-stakes subject matter).

37. Another, slightly different, possibility is that Republican lower courts are better than Democratic ones at anticipating state supreme court preferences in these cases and better tailor their judgments to draw approval. See Stephen J. Choi et al., *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518, 519 (2012) (theorizing that federal district courts seek appellate affirmance and tailor decisions to circuit judges' partisan preferences).

of their respective in-party litigants. If these rates were identical for Democratic justices, then it would appear most clearly that the Democratic justices were affirming election cases almost identically regardless of litigant partisanship, while votes by Republican justices diverged severely depending on the winning litigant's partisanship in these cases.

CONCLUSION

This Article provides substantive and methodological payoffs for the study of law's influence on judicial decisionmaking. Substantively, we show that law matters for judicial decisionmaking even when political considerations are highly salient. Case strength in election cases increases the likelihood that state supreme court justices decide in the winning litigant's favor. Case strength matters for both Democratic and Republican justices, whether the winning litigant is of the same party or not. As expected, justices from both parties were most likely to vote to affirm when case strength aligned with their partisan interests, in roughly nine cases out of ten. However, case strength regularly trumped partisan loyalty where they conflicted as well. Justices from both parties voted to affirm at high rates when the winning litigant below was from the opposite party but nonetheless brought a relatively strong case.

Methodologically, we reach these findings about the influence of law by a new means of operationalizing case strength. We leverage the clear expectation of judicial partisanship in election cases, supported by our earlier work, to identify cases where we can infer sufficient case strength on the legal merits to overcome the usual tendency toward partisan loyalty. Election cases provide the cleanest setting to apply our operationalization of case strength because these are cases where an expectation of judicial partisanship is unusually high, and there are few other explanations for the partisan patterns of judicial decisionmaking to be found. As a result, marked deviation from partisan expectation in these cases offers a particularly clear inference of case strength that we exploit here. That said, our methodological innovation of inferring case strength on the merits might nonetheless be transferable to other categories of decisions beyond election cases. The basic insight we develop here is inferring case strength indirectly from patterns of judicial decisionmaking that defy the usual expectations of judicial ideology or partisanship. Where judges decide cases in ways that cannot be explained by reference to the typical predictive political criteria, it suggests that judges may be motivated by case-specific legal considerations that override the political ones.