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Just Choices? Judicial Selection, Ideology, and Partisanship in the Ohio Supreme Court

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by

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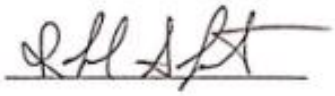
Rachel Schwartz	
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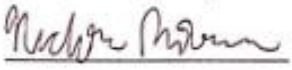
Nick Robinson	
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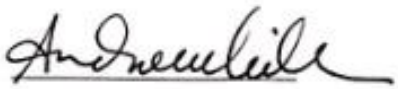
Andrew Mills	
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ABSTRACT

This thesis joins the conversation on judicial selection and impacts on judicial ideology. This is a multifaceted question that engages with the history of judicial selection, differences between states, growing polarization and partisanship, and an influx in campaign spending that can all influence Justices' behavior while on the bench. While other theorists have used more quantitative or statistical analytics, more research is still needed on the nuanced and qualitative questions surrounding the judiciary in the United States, especially on the state level. I look at three Ohio Supreme Court Justices—Maureen O'Connor, Jennifer Brunner, and Sharon Kennedy—and decisions they have penned in three categories of case—criminal justice, low salience, and redistricting—to understand what factors influence judicial behavior. This process-tracing method showed that political affiliation and, to a lesser extent, positive public sentiment, influence judicial behavior, while amicus briefs and financial contributions were not directly impactful but are still relevant to the questions emerging in this area of legal scholarship. These findings are significant as they come at a point of major change in Ohio's judicial selection: a move from the semi-partisan Michigan-Ohio method elections to the fully partisan elections introduced in 2022 by Senate Bill 80 (SB80). This research also emphasizes the importance of State Supreme Courts, an area under-researched in the field and lacking public engagement. By exploring these questions, this thesis is relevant not only to Ohio's modern bench but also encourages research on federal courts and other state benches as well.

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INTRODUCTION

This project attempts to understand the Ohio Supreme Court, its history and culture, and factors that can influence judicial decision-making. I begin with an overview of relevant literature and research, pertaining to previous scholarly findings on the topic (Literature Review, Understanding Selection Method, Other Potential Impacts); a review of how Federalism has impacted states' selection methods and broad trends across the US (History of Judicial Selection); and how the courts operate and are perceived today (Modern Judicial Climate).

I then explain the project of this thesis, laying out possible factors that explain judicial decision-making (Hypotheses), my inductive and qualitative method (Methodology / Process Tracing) and the scope of my research. I explore the backgrounds and ideologies of three specific justices (Ohio's Bench) and select cases from three categories of law that pertain to my hypotheses (Case Selection).

Finally, I present my research for each and offer analysis at three levels: for each case, each legal category, and then a general discussion of how my findings relate to my hypotheses.

There is much to learn from Ohio's Supreme Court, and state-level courts offer an important and under-explored perspective into the importance of the judiciary and how politics have influenced them.

Project Description

i. Background and Significance

The question of judicial selection has been hotly debated for generations. This enduring debate delves into the deeper questions of the role of the judiciary, such as weighing the benefits of accountability versus independence, defining what "just" rulings look like, and how best to remove politics from the branch entirely. This thesis focuses primarily on the latter: partisan and public influence on the bench.

To understand the differences in selection methods and perceptions of the judiciary, a more thorough discussion of the history of the debate is necessary. Theorists, politicians, and legal scholars have established two main schools of thought surrounding the role of the judiciary. Those in favor of an independent bench look to insulate justices from cultural pressures and public opinion, whereas others believe a justice should be accountable to the public they serve, usually through elections.[1] From these competing perspectives, different methods of judicial selections have arisen.

[1] Flango 40

To maintain a balance between state sovereignty and federal control, the United States Constitution leaves the responsibility to choose judicial processes to states. There are currently four main methods of judicial selection in the US:

1. Nonpartisan elections: judicial candidates are selected and voted on without a party affiliation on the ballot.
2. Partisan elections: judicial candidates are selected by political parties and run with an attached party tag on the ballot (Democrat or Republican).
3. Merit appointment: judicial candidates are selected by an independent council, then usually narrowed by a head of state and affirmed with a vote by the legislature.
4. Gubernatorial appointment: judicial candidates are selected by the state's governor.

Many scholars, politicians, and voters attribute the perceived fairness in rulings, or lack thereof, to the method through which that judge was selected. General consensus exists that, in theory, a partisan appointment or citizen-led election will require more accountability from a serving judge, whereas a merit appointment or life tenure helps ensure a greater level of judicial independence, but few studies have illustrated this claim.[2] Thus, it remains a more theoretical debate rather than one that has been empirically tested. While this debate has existed for centuries, increasing political polarization has permeated the judiciary, leading a new question to arise: are certain judicial selection methods more prone to partisan influence? How does the method of selection impact a judge's decision on the bench? If the method of selection is not the main factor influencing judicial decisions, what other factors exist?

ii. Objectives

[2] Geyh 90

The state of Ohio had a unique methodology involving semi-partisan elections. Judicial candidates were selected by political parties but run without a party label on the election ballot.[3] This method was known as the Michigan-Ohio method, named for the two states that used it. However, the Ohio legislature has been debating this for some time, and in 2021, decided to no longer use the Michigan-Ohio method and opted for fully partisan elections with the passage of Senate Bill 80 (SB80). This marks an important step in the modern debate on the role of politics in the court which gives the topic of this thesis increased relevance. Additionally, scholars have recognized a remarkable change from the low-key "old style" judicial campaigns and the more costly, media-saturated "new style" campaigns of the modern era. By researching the impacts of this method this thesis will add to the scholarly debate on the subject and open the door for future scholars to compare their findings now that the legislature has voted to alter the selection method for justices. In addition, this thesis allows for an analysis of other potential impacts on judicial ideology and rulings since the hypotheses are not mutually exclusive.

Today marks a salient period in judicial history, providing an opportunity for this thesis to explore the current moment thoroughly. All three justices represented in my analysis were elected using the Ohio-Michigan method, but only two ran re-election campaigns that were entirely partisan. By comparing three Ohio Supreme Court justices with different political stances, the "old style" versus "new style" of judicial elections, cases of different content and salience, and the influence of politics and money on the modern court, I will explore the multifaceted nature of justice and the utmost relevance of the Ohio Supreme Court.

[3] Nelson 496

LITERATURE REVIEW

Understanding Selection Method

Judicial selection is seen as one of the main influencing factors for judicial decisions. States have fought to create the right balance of independence versus accountability, often leaving states with selection methods that differ from their neighbors'. Ultimately, most scholars agree that the goal of a judiciary is to enable impartial rulings for all, limit political and corrupt influence on decisions, and maintain a public perception of legitimacy.

Where scholars begin to deviate is not in these goals but rather the methods of achieving them. Scholarly research on the subject generally divides into four categories regarding how judicial selection methods can impact judicial behavior and decision making: 1) elections cause problems with legitimacy for the judiciary, 2) merit selection yields no better qualifications and creates an elitist and inaccessible bench, 3) recent polarization poses a threat to all methods of selection, and there is no "one size fits all" solution, and 4) methods of judicial selection do not influence judicial behavior at all.

Elections are a pillar of the democratic system, but their inherently polarized nature is cause for concern when it comes to judicial selection according to many scholars. Alexander Hamilton's outspoken concern about the majoritarian difficulty is reflected in many criticisms of judicial elections.[4] For example, according to Pozen (2008, 279), "by making judges more responsive to majoritarian political influences, elections undermine (in a way that other selection methods do not) the interrelated values of judicial independence, judicial impartiality, the

[4] Frost 22

appearance of impartiality, due process, separation of powers, minority rights protection, constitutionalism, and the rule of law."[5] Furthermore, the rise in inter-party tensions have made increased the popularity of partisan elections, as opposed to other selection methods, in all forms of government. This higher partisan involvement, publicity, and funding has led to "nosier, nastier, and costlier" judicial elections, directly related to more intense party competition.[6] Some even claim that the existence and modern preference towards judicial elections undermines the role of the judiciary altogether.[7] The effects of a more accountable (and potentially less consistent) bench can also influence the rate of litigation: the uncertainty over courts' decisions is directly linked to an increase in litigation.[8]

While judicial elections are imperfect, many have taken issue with merit selection (also known as the Missouri Plan and the Non-Partisan Court Plan) as well. Scholars have long considered merit selection to be elitist, and there is little evidence that it produces better judges. Appointments often lack diversity and responsiveness to the public, and "political cronyism and senatorial backscratching" run rampant.[9] There have also been criticisms of merit appointments allowing an excessive level of independence where judges no longer face accountability or repercussions for their actions. Non-renewable terms, or terms where the judge does not have ability to run for their position again, are found to produce judges with the most independent decisions[10] and judges that are rarely, if ever, disciplined for unfit judging, corruption, unprofessional behavior, and the like.[11] Additionally, the assumption that merit selection yields

[5] Pozen, 279
[6] Geyh 88
[7] Pozen 280
[8] Hanssen 229
[9] Stevenson 1684
[10] Epstein 34
[11] Reddick 7

judges with better qualifications is not inherently true: a study found "no significant differences... they possess comparable legal and judicial experience, and elected judges were no more likely than their merit-selected counterparts to have partisan political backgrounds."[12]

Other studies indicate that recent politicization poses an indiscriminate threat for both elections and appointments. The increased political polarization in recent years has caused senators to block worthy merit appointments due to their being appointed by the opposing party, citing small improprieties or minute details from their past rather than genuine concerns about their character.[13] There is also a noteworthy disconnect between political ideology and philosophy. While appointees are often members of the party that appoints them, their rulings will rarely follow a distinct political agenda. This leads politicians to seek out nominees with radical ideals that will be aligned with the party.[14] These issues are not uniform throughout all states and districts, however. Certain regions have distinct needs and preferences that are more attuned to one mode of selection, so the effort of finding a "best" method may be overly broad. One study found that "the Missouri Plan is ideally suited for rural, progressive states, but less appropriate for populous, industrial states with little party competitiveness,"[15] implying that attempts at finding a concrete solution to the judicial selection question lack the nuance needed to solve the problem.

Finally, many scholars claim that the judicial selection argument is an exercise in theory, and that method of selection has little to no impact on judicial decision making. The very existence of a legal code means that judges must uphold the rule of law, not defer to political

[12]Geyh 90
[13] Solum 662
[14] Solum 670
[15] Flango 41

partisanship or the influence of their electorate. To quote the Code of Judicial Conduct: judges are bound by "the duty not to be swayed by public clamor or fear of criticism; the duty to uphold and apply the law and perform all duties of judicial office impartially; and the duty to act at all times in a manner that promotes public confidence in the independence and impartiality of the judiciary."[16]Failure to uphold these tenets usually ends in investigation, condemnation, and removal.[17] The judicial branch has rules in place to maintain its neutrality, and any judicial decision that undermines this (which tends to be exceedingly rare) is subject to intense scrutiny not present in other branches. Some argue that judges are "selected for their possession of the virtue of justice," and this exists in any method of selection from elections to appointments.[18]

When left as abstract theories or political talking point, these theories do little to further our understanding of how a method of selection may genuinely impact a Supreme Court justice's opinions and conduct. To apply these theories to actual justices, scholars have adopted multiple approaches. These range from multilevel regression analysis via statistics, intense research into historical news editorials, and, of course, looking at judicial opinions themselves. Since it is difficult to isolate selection method as an influence on judicial behavior, it is prudent to look at other potential impacts.

Other Potential Impacts

Without academic consensus on the impact of judicial selection on the fairness of the bench, scholars have looked toward other explanations to explain judicial behavior. In this section, I review literature specifically targeting judicial elections as opposed to other selection

[16] American Bar Association Code of Conduct
[17] Geyh 95
[18] Solum 689

methods (both partisan and non-partisan) to grasp potential effects on Ohio's Supreme Court, as well as review other potential factors that influence judicial decision making.

Many scholars look towards psychology to understand the justices on the bench. The "attitudinal model" assumes that "each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions, they want the outcomes to approximate as nearly as possible those policy preferences."[19] Essentially, the justices' personal beliefs, preferences, and attitudes would be the most influential factor on their decision making. The concept of confirmation bias was also referenced, with scholars arguing that information (including amicus briefs, legal arguments, or public opinion) that aligns with a justice's previously held belief would induce that justice to cling to those beliefs tenaciously (i.e., an amicus brief that reiterates a justice's liberal/conservative viewpoint will encourage that justice to vote in a liberal/conservative direction).[20] Likewise, confrontation with facts that oppose someone's ideas strengthens that person's beliefs, leading to a remarkably polarizing effect when applied to the judiciary.[21] This view of justices as "biased processors" of the information presented to them can be theoretically linked to more partisan decisions as political parties will either nominate or encourage voters to select a justice whose philosophy aligns with the views of the party.

Another camp of scholars suggests there is a more concrete method of influencing justices: money. The theory is that monetary interests, such as political parties, businesses, attorneys, and other interest groups, funnel money into judicial campaigns with the hope that their money will influence the decisions of the justice if elected to the bench. This can often be a

[19] Segal, Cover 558
[20] Becker Kane 255
[21] Becker Kane 255

difficult causal relationship to track since the opposing idea—that interest groups will give money to a candidate *because* they already agree with their opinions and likely future decisions—can result in the same outcomes. While it is difficult to discern whether "decisions follow dollars or dollars follow decisions,"[22] many scholars are able to illustrate a clear correlation between the two, although not necessarily causation. This correlation applies to attorneys who donate to judicial campaigns[23] as well as the tort reform battles in Ohio[24] but not convincingly to the judicial system as a whole. Essentially, monetary interests choose to support a judicial campaign for a few potential reasons: to show support for a candidate they agree with or to encourage a candidate to make decisions attuned with the interests' goals with the potential for future support and donations. According to Kowel (2016, 16), "In a growing number of states, judicial races are evidencing an 'arms race mentality' of rising expenditures, heightened competition, and growing interest group activity. Judicial selection is thus becoming a political process that places pressure on lawyers, business organizations, and interest groups to get involved in the competition to elect judges who will be favorable to their positions."[25] An extension of this theory includes third-party amicus briefs: in contentious elections or when funding is at stake, third parties will directly engage with cases by filing amicus briefs in support of their preferred outcome. [26]

A school of thought that is unique to elections is that public opinion can be a leading source of judicial influence. This theory relies on the idea that, as stated above, elected judges must be more accountable to the public since they rely on their votes to maintain their role on the

[22] Waltenberg 255
[23] Cann 292
[24] Waltenberg 256
[25] Kowel 16
[26] Becker Kane 251

bench. Scholars have found that this relationship is conditional, however, on several other factors: 1) the judge must be interested in reelection, 2) the case must be visible to the public, generally via media, 3) the judge must have an awareness of the public's sentiment, and 4) the issue in the case must be salient.[27] Underlying all of these is the idea that the judge must be in a state that relies on contested elections since other selection methods show no relationship between public opinion and judicial decisions.[28]

The issue of salience was referenced frequently and essentially included any area of law that consistently garnered strong opinions from the public. These mainly included the death penalty, criminal justice more generally, and "family values" cases regarding homosexuality or abortion.[29] It was also noted that nonpartisan justices were more impacted by public opinion in general, and partisan-elected justices were more impacted by *changes* in public opinion.[30] Public opinion measures, when surveys are not readily available, often rely on the imperfect yet powerful variable of media. When attack ads are present, a judge is more likely to consider the public's opinion when drafting their own opinion on a similar issue.[31] While media presence can be a useful tool, it is also important to recognize that media overlaps with other theories, such as campaign contributions, partisan involvement, or special interest groups. Media can help measure public opinion, but it is also critical to understand who is paying for the ads and why.

[27] Cann, Wilhelm 564
[28] Canes-Wrone low salience, 674
[29] Canes-Wrone Death Penalty
[30] Canes-Wrone Death Penalty 26
[31] Canes-Wrone low salience

History of Judicial Selection

A fair judiciary is critical to the functioning of a democracy. Therefore, the question of how best to build a "fair" judicial bench in America has existed since the foundation of the country. The Founding Fathers left this responsibility to the states enabling them to decide for their own citizens how their benches will be formed. Because the Constitution gives states the authority to devise their own judicial selection methods and procedures, we see a large variation across states. While the federal government rarely involves itself in state judiciaries, oftentimes trends can be seen across multiple states. As one scholar describes, these trends can be broken into five sections: the premodern unseparated judiciary, judicial aristocracy, judicial democracy, judicial meritocracy, and judicial plutocracy.[32]

Early American courts were plagued with issues of control by the King of England, much to the chagrin of colonists. All judges were appointed and could be removed by the Crown, as Thomas Jefferson remarked, "he has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[33] The reliance on a sole authority to control the judiciaries was a chief concern among the Founding Fathers. After the Revolutionary War, politicians set up a court to seek accountability from the public rather than a single, monarchical individual. The structure of this selection was left to Congress, as was the number of justices required to serve on the Supreme Court. Even more discretion was left to the states, often showing trends in which selection methods were deemed most desirable at various points in history.

[32] Shugerman 9
[33] Jefferson

The 19th century showed intense partisanship across all political spheres, and judicial selection was no exception. To address (but often reinforce) the issue of political factionalism, many states implemented a popular election system. This was thought to counteract high-brow political cronyism and interest groups by returning electoral power to the people. In fact, thirty-five states selected their judges via partisan elections by 1909.[34] Other states even opted for non-partisan elections, where judges would run without a political affiliation on the ballot. Political scientist Matthew Streb (Shugerman 2012, 28) explains: "this Progressive reform was designed to cripple the powerful city machines' control over the nomination process and remove divisive national partisan interests from state and local elections… Nonpartisan judicial elections were perceived as a way to clean up corruption and cronyism in the judicial selection process while still keeping judges accountable to the people."[35] Nonpartisan elections served to maintain judicial accountability while lessening the effects of party polarization.

The year 1913 marked the first use of a truly non-partisan judicial selection method and the foundation for modern merit selection. To steer judicial selection away from electoral politics, the Missouri Plan proposed an "independent commission recruits and vets candidates based on qualifications, not party affiliation or connection."[36] Arising from concerns of an uninformed public and rampant factionalism, merit selection seemed like the logical next step in judicial selection methods.[37] The Missouri Plan's popularity boomed between 1950 and 1980, an era dubbed "the merit revolution" by some scholars.[38] However, merit selection did not win universal support and corruption still played a role. According to Kowal (2016), "Business

[34] Kowal 6
[35] Shugerman 28
[36] Kowal 6
[37] Goldschmidt 2
[38] Shugerman 219

interests, working with state bar associations, played a significant role in the spread of merit selection. Opposition came mostly from plaintiffs' lawyers, organized labor, and big city political machines."[39] Despite demographic and economic similarities to Ohio, Missouri's smaller labor unions (usually the most vocal opponents to merit selection plans) enabled the system to be put into effect.[40]

Often seeing results from involvement in merit selections, business interests further involved themselves in judicial selections into the 1980s. The so-called era of "friendly courts" started with businesses realizing it was cheaper and quieter to fund judicial campaigns rather than lobby politicians. The Republican Party used a platform to limit the "litigation crisis"—a fear that American citizens would sue growing corporations at higher rates knowing they may receive greater settlements, such as a settlement of $2.86 million for a woman burned by a hot cup at McDonald's—to push tort reform, often starting with the courts.[41] These reform efforts mark the point where political parties—not just interest groups—sought to use judicial selection as a political tool. Merit selection – often considered the least politicized of the selection methods – began to fall out of favor as political parties became more involved. In fact, after 1994 no new merit selection expansion proposals passed.[42] States returned to election-style selections in full force, while merit selection or executive appointment remained popular in federal courts. Seeing an opportunity to have their voices heard, the public "began to look to state courts as a new arena in which to pursue their goals."[43]

[39] Kowal 7
[40] Shugerman 198
[41] Kowal 7
[42] Fischer 2019
[43] Kowal 8

In the face of a seemingly unsympathetic Supreme Court of the United States (SCOTUS), public interest returned to state supreme courts during the late 1990s and early 2000s. Many interest groups, businesses, and individuals realized that more change could be enacted on the state level than at the federal level[44] and civic engagement culminated in rapid change for state courts and previously unmatched levels of political partisanship, attention from interest groups, and public pressure on the bench.

Modern Judicial Climate

The 2000 election is considered by scholars to be a "Watershed Year" for judicial elections, regarding spending, publicity, and public involvement. In a now-famous article, law professor Roy A. Schotland of Georgetown Law Center described earlier judicial elections as being "sleepy, low-key affairs," while modern judicial affairs are "nastier, nosier, [and] costlier."[45] Indeed, in the years between 2000 and 2009, state supreme court candidates raised a total of $206.9 million, compared to $83.3 million raised between 1990 to 1999.[46] In 2000, the average amount of money raised for a supreme court campaign was over $640,000.[47] In a noteworthy study, scholars recognized that "million-dollar races" (i.e., campaigns that raise over a million dollars) were all either partisan or nonpartisan elections; and that merit-plan or quasi-merit-plan retention elections (Missouri-plan merit appointments) never rose to this level of spending.[48]

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[44] Sutton
[45] Pozen 300
[46] Shephed and Kang 2016
[47] Goldberg 8
[48] Shugerman 253

Political parties, businesses, interest groups, and attorneys began donating to campaigns in record numbers.

A landmark ruling in 2002 raised other concerns about judicial independence and insulation from politics. In *Republican Party of Minnesota v White,* SCOTUS ruled in a 5-4 decision that states cannot prohibit a candidate for judicial office from "announcing his or her views on disputed legal or political issues."[49] While this was limited by the 2008 decision in *Caperton v Massey,* the latter only requires recusal when there is substantial money involved, not simply political affiliation or partisan conflict of interest.[50] Thus, the most recent era of Supreme Court partisanship was cemented in stare decisis (the legal standard that future courts will adhere to this precedent and follow this logic).

Less than a decade later, the SCOTUS ruling in the landmark *Citizens United v FEC* in 2010 led to a bona fide funding explosion. The main consequence of the case is the ruling that "limiting independent expenditures on political campaigns by groups such as corporations, labor unions, or other collective entities violates the First Amendment because limitations constitute a prior restraint on speech."[51] *Citizens United* allows for unlimited independent spending in elections. As a result, special interest groups have been inclined to fund parallel campaigns and to contribute directly to candidates they find to be friendly towards their goals.

This new era in judicial elections is a remarkable one: spending, partisan involvement, and judicial publicity are high, while constituents' faith in the independence of the branch is low. This lack of separation between branches blurs the lines of an independent judiciary, and it is critical to continue researching judicial decisions, ideology, and public perceptions at both the

[49] Zacchari 138
[50] Caperton v Massey 556 U.S. 868
[51] Justia Law Citizens United

federal and state level. As such, the public perception of federal courts frequently informs the public's opinion of their state courts as well. As Justice O'Connor explained: "There is no distinction in the mind of the public between the United States Supreme Court and the state courts… our state courts, then, have the same decline [in trust] as federal courts. Not as precipitously, but on the downward slope. And that is very troubling."[52] Troubling, indeed. As the public trust in SCOTUS fades, it is more important than ever to understand the function and perception of state courts as well.

Some scholars, such as Segal and Cover, look at corpus linguistics, news articles, and editorials to evaluate judicial ideologies. Albeit imperfect, since they measure perceived over actual ideology and exclusively measure ideologies from before a nomination to the bench, this approach offers a unique way to analyze court decisions beyond the opinions themselves. This content-analytic approach both measures and supports the attitudinal model mentioned in the "Other Factors" section.[53] This approach also helps to explain benchmarks to define "liberal," "moderate," and "conservative" based on language used in the opinions as well as the proscribed punishments and leanings of the decisions themselves.[54] In a similar vein, other scholars have established clearer measurements for demarcating "partisanship" within judicial decisions.[55]

Still others use empirical or statistical methods to rank judicial decisions or opinions numerically on a scale. This helps eliminate subjective coding that may be unconsciously influenced by party affiliation bias.[56] There are two extensive and frequently referenced statistical measurements in the field: one proposed by Tonja Jacobi (further refined by Andrew

[52] Fisher 2022, 11:27
[53] Segal, Cover 557
[54] Segal, Cover 559
[55] Bonica, Sen 99
[56] Bonica, Sen 102

Sag) and the other by Andrew Martin and Kevin Quinn (2002). Martin and Quinn developed what they call a "dynamic response model" using item response theory. They measure and then average judicial decisions of individual justices on the US Supreme Court.[57] However, their measures do not account for inter-year comparisons; such comparative usage would require the assumption that every year's docket is comparable, an assumption many scholars are unwilling to make.[58] The Jacobi Measures, however, fill in these blanks. Using a mix of attitudinal, collegial, and judicial-utility measures, Jacobi seeks to estimate judicial decisions regarding any case in any year. While this is consistent across different dockets,[59] the Jacobi Measures fail to explore *why* justices decide the way they do.

Studies look to complex statistical analysis to examine the impartiality of judicial decisions and potential impacts of partisan influence or public opinion.[60] While quantitative approaches can offer an interesting perspective on broader correlations across time and circumstances, I am looking instead to deeply understand the current moment and recent past—understanding Ohio court politics at the emergence of a more political judicial climate—which requires a qualitative route.

HYPOTHESES

In this section, I will be laying out a series of hypotheses informed by the literature above. Various potential factors have been proposed and tested by other scholars (as seen in the

[57] Martin, Quinn
[58] Segal
[59] Sag, Jacobi 16
[60] Canes-Wrone 23

'Literature Review' section), and I use these to build hypotheses relevant to the modern Ohio bench. I have sketched out causal pathways between X variables (the potential influencing factor) and Y variables (their potential impact on judicial decision-making) below.

X_1: Public opinion hypotheses

X_1A: If public opinion is high, a justice will not deviate from their ideology.

X_1B: If public opinion is low, a justice will soften their language or deviate from their ideology and advocate more "popular" positions.

X_1C: If a justice has unpopular opinions, the public will offer less financial support and vote them off the bench.

X_1D: If a justice has popular opinions, the public will offer more financial support and vote to keep them on the bench.

Many scholars argue that public opinion and media attention can help explain judicial behavior, including Canes-Wrone in her articles "Judicial Selection and Death Penalty Cases" and "Judicial Elections, Public Opinion, and Decisions on Lower-Salience Issues" as well as Cann and Wilhelm's "Case Visibility and the Electoral Connection in State Supreme Courts."

Based on this research, when I see high levels of public approval regarding a specific justice or a decision they have made—characterized by positive media coverage, an increase in positive comments from individuals on social media, and public opinion polls—I can expect a justice to continue ruling the way she has been i.e., we will not see a significant deviation from

her established ideology in favor of "popular" outcomes. I am specifically looking at criminal justice cases for this hypothesis. Scholars have found that the public is more aware (and opinionated) on cases involving crime and usually seek a justice with a strong hand who is not "soft on crime."[61] A justice that diverges from public opinion on an issue—particularly decisions that are "soft" on the offender—is likely to face public backlash that could then either encourage them to be more aligned with public expectations on future decisions or be less popular in the polls at an upcoming election.

I expect to see a greater change in judicial behavior when a justice is considered *unpopular* since research suggests that judges are more sensitive to change in public opinion rather than public opinion itself. When there are lower levels of public approval, especially when sentiment was formerly neutral or high, I expect to see greater leniency in opinions that may be unpopular, specifically criminal justice cases (softer wording when writing for the majority, fewer concurrences, essentially avoiding the public eye), OR rulings that deviate from previous, unpopular positions. To avoid being soft on crime, previously liberal justices might take a stronger stance towards punishment. Additionally, I only expect to see this behavior on issues with a higher public profile, specifically criminal justice cases, since these cases are the most followed by the public and more widely reported by the media.[62]

X_2: Friends of the court hypotheses

[61] Cann Wilhelm
[62] Roberts, 101

X_2A: If there are no amicus briefs filed, the justice will pen an opinion aligning with their usual rhetoric, language, and ideology.

X_2B: If amicus briefs for only one side are filed, the majority opinion will echo some of the language and citations used in the brief.

X_2C: If amicus briefs for both sides are filed, the majority will echo the language of one interest group while the dissent references the other.

Based on Segal and Cover's paper "Ideological Values and the Votes of U.S. Supreme Court Justices," and Becker-Kane's research from "Lobbying Justice(s)? Exploring the Nature of Amici Influence in State Supreme Court Decision Making," I sketch ways that amicus briefs can impact judicial decision-making.

In cases with multiple amicus curiae briefs filed, this hypothesis would be supported if a judicial decision rules in favor of the side with more amicus briefs, especially if language or arguments are borrowed from these briefs to be used in the opinion itself. This will be notable if a justice mentions specific repercussions from their decision (ex: "this decision will help z group" if group z was also mentioned in an amicus brief, or if a justice refers to policy information, since typically justices are insulated from policy since it is not their role to change it. If there are no amicus briefs filed, I do not expect a justice to deviate from their typical ruling or language.

X_3: "Show me the money" hypotheses

X_3A: If a justice does not receive financial support from an interest group, they will maintain their typical ideological stance.

X_3B: If a justice receives financial support from an interest group, they will be "friendlier" to that group and side with them in their penned opinions.

According to scholars such as Waltenberg, Cann, Kowel, and Becker-Kane, money can have an impact on judicial decision-making. In this hypothesis, I am looking toward non-partisan interest group involvement to better differentiate between my fourth hypothesis that addresses party affiliation more deeply. These groups include private businesses, special interest groups, or organizations. If these groups offer endorsements, funding, and advertisements for a candidate, I expect to see either greater leniency or higher levels of support for the topic the group represents. For example, if a donation comes from a group that represents the falsely accused, the justice may be more lenient on a contentious criminal trial. Likewise, a business's donation may elicit "pro-business" opinions and a friendlier support for the sector.

Unfortunately, my analysis does not allow me to establish any causal connection between campaign donations and judicial decision making; however, examining the presence of a correlation between these two variables is still an important first step in understanding the links between money and judicial decisions. It is not in the scope of this study to decipher whether the money was given to the candidate because they already showed favorable views towards the group's interest or whether the group intended to encourage future friendliness.

X_4: Party pressure hypotheses

X_4A: If there is more political involvement – characterized by a higher election turnout – the Justice will be more aligned with the ideals of their nominating party.

X_4B: If there is more political involvement – characterized by a closer race (i.e., the election results will be in-line with other party-based elected offices) – the Justice will be more aligned with the ideals of their nominating party.

X_4C: If a justice has political backing, their opinions will be in-line with party goals.

X_4D: If a justice deviates from party goals, they will lose support from the party.

Based on scholarship from Pozen, Geyh, Solum, and others, judicial elections are becoming polarized and politicized. I anticipate that upcoming elections in the Ohio Judiciary will indeed be "nastier, nosier, and costlier" due to party involvement. For this hypothesis to be true, I expect to see closer elections post the passing of Senate Bill 80 (SB80) (due to increased partisan involvement that encourages voters to cast their ballot along party lines), higher levels of endorsement, advertising, funding for justices from political parties or adjacent lobbying groups, and increased voter turnout. Historically, judicial elections in Ohio tend to have low turnout due to lack of knowledge from the public. As Maureen O'Connor explained, "about 70% of Ohioans have said loud and clear that they don't want to stop voting for the judiciary. Yet, when it comes to elections, there is inevitably a drop-off when it comes to voting for the judiciary."[63] As an example, in 2012 only 40% of Ohioans voted for judges. The addition of the

[63] O'Connor State of the Judiciary Address, 32:22

party affiliation (R or D next to the judge's name on the ballot) is thought to increase voter turnout since citizens are increasingly likely to vote based on political parties.[64]

I will be specifically looking at language used within redistricting cases since they are the most politicized (directly dealing with political parties) and will likely be scrutinized by the endorsing party. If I see a Justice using language that mirrors political buzzwords or concerns raised by their party's members in the legislative or executive branches, this is an indicator of party alignment. Since the outcome of *League* directly influences Ohio's political parties for years to come, those parties will likely want to support Justices that affirm their beliefs and criticize those who do not. This can cause problems since all but one of the *League of Women Voters*—the set of redistricting cases—opinions were written Per Curiam; the opinions are not attributed to a single author but released on behalf of the entire bench. The original case was penned by Democratic Justice Melody Stewart. I am focusing on individual dissents and press releases drafted by justices regarding *League*. Whereas judicial elections are usually considered "sleepy affairs," party affiliation is expected to encourage voters to cast a ballot in the judicial race who previously would not. However, increased voter turnout can also be attributed to changes in public opinion (hypothesis 1) so voter turnout will be considered a secondary piece of evidence.

METHODOLOGY (PROCESS TRACING)

[64] Atske for PEW Research 2021

The nuances surrounding judicial ideology and opinions pose a challenge related to measurement and comparison. After researching other ways scholars have measured judicial ideology, I recognized that both statistical analysis and qualitative analysis have benefits and drawbacks. For the questions I seek to answer, qualitative analysis (and specifically process tracing) enables a nuanced approach that can take into account the multifaceted nature of the Ohio Supreme Court.

I formed my analysis based on existing theories in the field of judicial research. But this qualitative approach also allows me to remain open to inductive findings that can then inform new theories on the topic. Since judicial selection is such a complicated topic, there are many nuances that will come to light during my research that will be of value to academic and political communities. Based on my research, I have created a series of hypotheses that will continue to be informed by inductive discoveries throughout the process. This methodology is becoming increasingly popular in the political science field and is especially well suited for a multifaceted question such as this.[65]

As I collected my data, I organized it in a methodology known as "process tracing" to look for patterns. Process tracing involves sketching out a potential causal pathway and looking for evidence of the observable implications. In this thesis, I established my hypotheses based on scholarly research to understand how different variables can impact judicial decision-making and ideology. Originating from cognitive psychology, the process-tracing method is well-suited for understanding individual decision making as well as structural explanations.[66]

[65] Yom
[66] Bennet 5

SCOPE

This thesis does not intend to answer whether an independent or accountable judiciary is "best", nor does it argue that one judicial ideology—liberal or conservative leaning—is superior to the other. Instead, I look to how these ideologies may be formed and influenced. Understanding these nuances can help the public understand how to build the fairest bench in the eyes of the people it serves.

The debate over judicial selection has implications for a key pillar of democracy, and the nuances of creating the "fairest" judiciary mean that it is unclear if there will ever be a perfect solution. Nonetheless, research in the field is paramount to creating a justice system that upholds American values and is trusted by the public. The methods for selecting a bench are likely to continue changing over time and increased research will help bring to light which method(s) best serve the public or whether they impact judicial rulings at all.

While I do account for the history of judicial selection methods in Ohio and beyond, this thesis focuses on the modern bench. This perspective offers multiple benefits: firstly, it encompasses justices selected in the "old-style" elections that were seen as less partisan and less costly (O'Connor, as an example) as well as their "new-style" contemporaries (Brunner and Kennedy as examples) who seek political party nominations in vastly more heated and publicized elections. This allows me to look at court decisions being released in the same political climate and era (meaning I do not have to control for extensive changes in public opinion, partisan support, or other confounding variables) while still benefitting from the recent changes in the "new-style" campaigns. Secondly, selection of cases between three types of

cases—redistricting, criminal justice, and low salience—allows me to look at the impact of variables in cases with varying levels of public interest, politicization, and media coverage.

Additionally, information from elections since 2000 is more accessible. Prior to 2000, Supreme Court opinions, campaign funding information, and public advertisements are harder to find. Finally, the modern judiciary in Ohio offers a unique perspective on the questions posed above. It is a time of remarkable change both in the method of judicial selection and partisan (and public) interest in the bench.

Almost all cases researched for this thesis were decided within the past decade, apart from Cordray v Midway Motor Sales in 2009. Since O'Connor's promotion to chief justice in 2010, she has penned fewer opinions and I had fewer relevant cases from which to choose; since Cordray is a low-salience case, the age should not be of significant bearing on results.

Ohio's Bench

In 1802, the first Ohio Constitution proscribed that all justices "shall be appointed by a joint ballot of both Houses of the General Assembly, and shall hold their offices for the term of seven years," (rather than the traditional lifetime appointment) "if so long they behave well."[67] Supreme Court justices were not to be paid more than one thousand dollars annually and ultimately tasked the bench that they should "by virtue of their offices, be conservators of the peace throughout the State."[68] This original court, comprised of three justices—Return Miegs Jr., William Sprigg, and Samuel Huntington—were also required to ride horseback across Ohio, a

[67] O.H. Const. 1802
[68] O.H. Const. 1802

practice known as "riding the circuit."[69] However, early justices in the state faced issues of partisanship and legislative interference. For example, during a hotly contested court battle over jurisdiction and fair jury concerns, Federalist justices were almost impeached by Republican legislators who failed to convict the justices of "willfully, wickedly, and maliciously" attempting "to introduce anarchy and confusion in the government of the state of Ohio" by only a single vote.[70] This was an early battle to keep political partisanship out of the courts, but it was far from the last.

Ohio was not immune from the partisanship that accompanied the 19th century. The state was among thirty-five others to use partisan selection that later opted to reform the system further by introducing nonpartisan elections for its justices in 1912. Unlike other states at the time, the justices would not have a party affiliation listed on the ballot. Ohio never went so far as to adopt the Missouri plan or merit selection. In 1938 and again in 1987, Ohio legislators proposed a turn away from nonpartisan elections in favor of merit selection. In both proposals, the amendment was voted down, and Ohio never used the Missouri Plan. With elections still dominating the judicial system, the state saw a significant increase in campaign contributions post-2000 from businesses as well as political parties. Even Ohio's Chief Justice at the time, Thomas J. Moyer, recognized that this funding explosion diminished public faith in the courts. Perhaps in reaction to public concern over court politization, the Ohio Supreme Court was moved to the Ohio Judicial Center on February 17, 2004. The move marked "the first time ever in Ohio's 200-year history that the judiciary is now housed separately from the other two branches, emphasizing its unique and independent role in state government."[71] Chief Justice

[69] Ohio Supreme Court History, Timeline
[70] Tarr 41
[71] Ohio Supreme Court History, Timeline

Maureen O'Connor herself proposed changes to the method of judicial selection in 2014, suggesting a non-partisan, open primary and the two most popular candidates would be on the ballot.[72] This idea gained no traction and was not considered by legislators.

However, political parties started a movement at the state level to opt for entirely partisan judicial selection, with the Ohio-Michigan Method now being referred to as the Michigan Method after Ohio's change in judicial elections. Introduced by the Senate in February 2021 as part of the 134th Ohio General Assembly, state senators voted on Senate Bill 80: a move from a non-partisan ballot to one that includes party affiliations for certain offices, including Supreme Court justices. The bill stated "[there] shall be printed, in less prominent type face than that in which the candidate's name is printed, the name of the political party by which the candidate was nominated or certified." The bill passed 24/9 in the Senate and 52/37 in the House of Representatives, going into effect in September 2021.[73] The votes were almost entirely along party lines, with Republicans in favor of the bill and Democrats opposed.

As of the writing of this thesis in 2023, Ohio's Supreme Court consists of seven justices: Jennifer Brunner, Melody J. Stewart, Michael P. Donnelly, R. Patrick DeWine, Patrick F. Fischer, Sharon L. Kennedy, and Maureen O'Connor. In this thesis, I will be looking at the biographies and opinions of three specific justices on the court: the retiring chief justice O'Connor and the two justices campaigning to be the next chief justice, Kennedy and Brunner. Their elections offer a unique perspective into how the court has changed in recent years. O'Connor represents "old-style" elections and an era where the court was insulated, whereas Kennedy and Brunner are affiliated with their political parties during their campaign. In this

[72] Fisher 2022, 8:30
[73] Gavarone, SB80 2022

section, I will provide a brief overview of each justices' history prior to their work on Ohio's Supreme Court, their judicial ideologies (in their own words, as much as possible), significant endorsements and funding information, and a table of election results and funding throughout their careers on the bench to help contextualize.

Maureen O'Connor

O'Connor served as the tenth chief justice for the Ohio Supreme Court and the first woman to hold the position. She was a proponent of modernizing the courts and standardizing felony sentencing. She previously served as a prosecuting attorney for Summit County, Ohio's first liaison to the Department of Homeland Security post 9/11, and co-chaired the National Task Force on Fines, Fees, and Bail Practices in 2016.[74] As of the writing of this thesis, O'Connor was the only chief justice to age out of the role—all others have either lost an election or passed away while in office. She jokingly referenced that she had "reach[ed] the age of Constitutional senility."[75] Of the three justices researched, O'Connor intentionally stays out of the public eye. She has no social media, rarely speaks to reporters, and most of her writings are either through court opinions, live-broadcast oral arguments, or, recently, political addresses on topics such as the state of the judiciary.

Chief Justice O'Connor was nominated by the Republican Party in the 2002 primary, but per the now-defunct Ohio-Michigan method of judicial selection, she ran as an Independent on the ballot for the primary election. Since then, she has been vocal about the importance of interparty compromise and dangers of partisanship to the judiciary. She was frequently the deciding vote on politically divisive issues since the court's makeup until January 2023 was 5/4

[74] Ohio Supreme Court biography
[75] Fisher 2022, 3:37

in favor of the Republican Party. Her ideology is less definable along partisan lines, but she cites textualism and "plain reading" in many of her opinions. She states that "judges should limit themselves to interpreting the law and the Constitution, and should leave policy debates where they belong—in the legislature."[76]

In her final State of the Judiciary address, O'Connor focused on bipartisanship, public engagement in the court, and the duties that public service requires. In her public comments, O'Connor focuses on the theory behind her role in the judiciary rather than specific policies or issues. She explains: "You don't take your politics, you don't take your religion, you don't take a lot of things into consideration…they don't color how you do your job and if they do…you don't deserve to wear the robe."[77] She also consistently advocates for an independent, non-political or partisan bench, saying "You need only to look at my record to understand that I support the independence of the judiciary,"[78] and that "When they say, 'she broke from her party,' they don't understand that there was never an allegiance to a party to begin with on the court."[79] Her role as a public servant is one where she is detached from the growing partisanship and polarization seen in other brancher: "When you are charged as a public servant to do your job, do your job and leave politics out of it…You work for the good of the people, all of the people, and not political parties. Each of us is called to do that."[80] Ultimately, she wants the judiciary to work cooperatively with one another and independently as their own body, unchanged by partisan pressure. She said: "I believe in the work of compromise. There don't always have to be losers for there to be winners."[81]

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[76] "O'Connor v Black: How We Chose," 2002
[77] Tebben 2022
[78] O'Connor 2022, 22:25
[79] Fisher 2022, 6:51
[80] O'Connor 2022, 39:05
[81] O'Connor 2022, 5:38

In addition to her proposal to alter Ohio's judicial selection method, she has been outspoken about her belief in an independent judiciary saying: "I think it's unfortunate that we have the system that we have, that is even more politicized because the Supreme Court and the appellate courts now have a designation of either an 'R' or a 'D' and that's what the voter is looking at on their ballot. I think that sends the wrong message."[82]

O'Connor Election Information[83]

Table 1

Election Year	Number of Votes	% of Registered Voters	Campaign Funding*[84]	Percent of Votes Won	Incumbent?
2016	3,562,413	45.31%	$10,200	100% (unopposed)	Y
2010	2,232,724	27.78%	$889,165.93	67.6%	N-Running for Chief Justice
2008	2,970,588	35.84%	$863,278	67.1%	Y
2002	1,709,673	24.03%	$1,736,852	58.3%	N

*I calculated funding for all justices from January 1st until November 10th of the election year.

[82] Fisher 2022, 14:04
[83] Ohio Secretary Of State, Election Results
[84] Searchable Campaign Finance Data

In 2009 (her last election facing opposition), O'Connor was unanimously endorsed by the Ohio Republican Party Central Committee[85] as well as the Ohio Fraternal Order of Police for her "unmatched administrative experience."[86] She was also endorsed by the Buckeye Firearms Association in both 2002 and 2008.[87] The National Federation of Independent Business (NFIB) Ohio, The Ohio Society of CPAs, and the *Columbus Dispatch* newspaper all offered support for O'Connor as well.[88,] To note, O'Connor's election website was taken down since she is no longer running to remain on the bench. Frequently, campaign websites are the best sources of endorsements and testimonials, so I had to rely instead on self-published endorsements that remain online. She received glowing praise from potential successor Jennifer Brunner who said, "Ohio's judicial branch has been in highly capable hands for nearly 12 years with my friend and colleague, Chief Justice Maureen O'Connor. I plan to respect and treat her impressive accomplishments as a springboard to further advancing new and current initiatives to develop courts that serve all Ohioans with fairness, equality and respect." But I did not find that Kennedy publicly referenced O'Connor during her campaign.[89] Even under the Ohio-Michigan Method of judicial selection, the vast majority of campaign contributors were registered Republicans.

Jennifer Brunner

Justice Jennifer Brunner was elected to the Ohio Supreme Court in 2020 and ran for chief justice in 2022. She was also a candidate for the US Senate in 2010 and worked as Ohio's first

[85] Columbus Dispatch Staff Writer, 2009
[86] McDonald, 2010
[87] "O'Connor v Black: How We Chose," 2002
[88] Geiger 2016, CPA Staff Writer, 2020, Columbus Dispatch Staff Writer, 2010
[89] Brunner 2021

female Secretary of State from 2007 until 2011. She was elected to state appeals court in the 10th circuit from 2014 to 2020. After graduating from Miami University law school, she founded her own law firm in 1988 with a focus on election, campaign finance, and international law.

Brunner focused much more on the tangible issues faced by Ohio's Supreme Court and how law affects citizens in their daily living. She advocated for a much more accessible and responsive bench, frequently remarking that "the courts belong to the people,"[90] and that "[her] campaign is based on my vision for a justice system in Ohio that operates with accountability, openness and fairness to all and that promotes access to justice--a judicial campaign for and about people."

Like O'Connor, she also emphasized cooperation; she wanted to "help Ohioans have access to their courts while working with judges throughout Ohio as responsive public servants promoting fairness, equality and respect for all persons…I believe that when one person is helped, many benefit, and I am passionate about the ways our courts can help people when we work together with a common vision."

She commented on specific policies she advocated for, supported, and accomplished while working on the bench, including bail reform, technological advancements that "promote greater access to justice", pandemic-specific changes including remote access to court, reliance on sentencing data to "identify systemic racism in the criminal justice" throughout the state,[91] and to ease access to for transgender individuals "to support a quality of life many of us take for granted."[92]

[90] Brunner 2021
[91] Brunner 2021
[92] Brunner 2021

As exemplified by her more policy-aware and consequentialist approach, Brunner is more of a "living constitutionalist." This aligns her with former United States Supreme Court Justices like Stephen Breyer and David Souter. She explained: "The Ohio Constitution is amended a lot more frequently by votes of Ohio voters, but it's a living document in that it still works for us today, but it's not something that should change at a whim. There are times when courts need to overrule a previous decision, but politics has no place in our courts, that shakes the confidence of people in our rule of law."[93] When asked about the significance of party makeup on the court, Brunner responded: "You take an oath to the law and the Constitution. It's really not a partisan issue."[94] She summarized her philosophy as follows: "We work to make the law work for everyone and we do it to the best of our understanding and our ability," she said. "If judges take a public service attitude, then every morning they have to look at themselves in the mirror and say, 'Did I do right by people today? Did I do right by the law? Did I do right by my promises?' And they don't have to try to pigeonhole themselves into I'm this or I'm that."[95]

[93] Trau 2022
[94] Tobias 2019
[95] Trau 2022

Brunner Election Information[96]

Table 2

Election Year	Number of Votes	% of Registered Voters	Campaign Funding[97]	Percent of Votes Won	Incumbent?
2022	1,807,133	22.5%	$1,101,437.82	43.92%	N-Running for Chief Justice
2020	2,995,072	37.1%	$1,009,203.08	55.34%	N

In addition to being endorsed by the Ohio Democratic Party Executive Committee, she also received endorsements from local Democratic caucuses and groups and various unions and worker coalitions such as the Ohio Nurses Association, the Cincinnati Federation of Teachers, and Teamsters Local 413.[98] She also received endorsement from Planned Parenthood Advocates of Ohio, Cleveland Mayor Justin Bibb, Columbus Mayor Andrew Ginther, and the newspaper Cleveland.com.[99] The newspaper called her "the best-qualified candidate to lead Ohio's judiciary in a collegial, constructive manner".[100]

[96] Ohio Secretary Of State, Election Results
[97] Searchable Campaign Finance Data
[98] Brunner 2021
[99] Cleveland.com Editorial Board, 2022
[100] Cleveland.com Editorial Board, 2022

Sharon Kennedy

Justice Kennedy first joined the court in 2012 having been elected to fill an unexpired term. She was elected to her first full term in November 2014. Before her time on the bench, Kennedy worked as a police officer at the Hamilton Police Department before graduating from the University of Cincinnati College of Law in 1991. She created the Advisory Committee to the Budget Work Group to assist with count financing, "seeing the need to bring private sector financial know-how to the government." In addition to working in both the public and private sectors, she also worked as a part-time magistrate assisting law enforcement and private citizens seeking warrants for arrest and fought on behalf of Ohio taxpayers under AG Betty D. Montgomery.

Kennedy emphasized the importance of a traditional, reliable, and restrained Ohio Supreme Court. During her campaign, she remarked that, "we live in the greatest country in the world. As Americans we are free. Free to say, write, dream, achieve, and do what we desire. Our freedom comes from our Creator and is protected against the over-reach of government by the Constitution. The only one of its kind, the Constitution guarantees our freedom by limiting and balancing the government's power among three separate, but equal branches. As a former police officer and current Justice of the Ohio Supreme Court, I took an oath to uphold the Constitution of the United States of America, the State of Ohio, and the laws of this State. With your support, I will continue to honor the Constitution by upholding the law, not creating it or legislating from the bench."[101] Her statements on national pride, limited government power, and the economy align her with textualists and right-wing thinkers. She also emphasized the importance of a

[101] Kennedy 2022

reliable, predictable court: "[Ohio citizens] look at the Court... as when the court in the 1990s was not predictable, the economy and Ohio suffered. And they can see in the sense of urgency that if the court turns again, that that could have a negative impact on the economy."[102]

She consistently emphasized the importance of judicial restraint and refused to "legislate from the bench." She writes: "[I] believe judges say what the law says, not what it should be...It's really pretty simple. We expect judges to decide cases, particularly at the Ohio Supreme Court, and exercise restraint. Decide only the issues necessary to resolve the legal matter in front of you. Use only the text of the constitutional provision or statute or contract to distill meaning and then apply it to the facts in you case. That's it. It's very simple." Without mentioning Democrats by name, Kennedy said there is "another side" that does not share the views of Republicans. "They believe in the law, unless something else is necessary," she said. "What else could be necessary other than you want an outcome? You are desirous of an outcome that is not provided for in the law, and we don't believe in that."[103]

She believes Ohioans have three concerns:

- "One is their God-given constitutional rights...concern about government overreach, loss of individual liberty, and freedom.
- "Secondly is always the economy…they're really feeling the concern over the inflation...gas prices, rising food costs...And the shrinkage is what they call inflation ...shrink inflation, as well, because packages of food are smaller, obviously for companies because they're also trying to make ends meet. I think the growing concern of an ever-growing workforce shortage, which people do not understand.

[102] Hunnell 2022
[103] Baker 2022

Everywhere they turn, someone is looking to hire...The question is why aren't they working? I don't have answers for people when they ask that.

- "And the last thing they always talk about is community safety. It wasn't so long ago, they were all sitting at home, watching American cities burn. They are concerned. Can that come back? What happens? They can see and witness all of the law enforcement agencies who are trying to hire now...massive number of law enforcement officers leaving service."[104]

Kennedy considers herself a textualist. Textualism is the judicial ideology that documents are meant to be read plainly, looking at how individuals would have interpreted the document at the time of its writing. She explains, "if it's unambiguous as you read it, applying the common language and it makes perfect sense, then you just simply apply it to the facts."[105] The most important of these documents to legal scholars is the Constitution. Kennedy "believe[s] the Constitution is an enduring document for all of time...I didn't need to change the Constitution in order for a new media to apply."[106]

[104] Hunnell 2022
[105] Trau 2022
[106] Trau 2022

Kennedy Election Information[107]

Table 3

Election Year	Number of Votes	% of Registered Voters	Campaign Funding[108]	Percent of Vote Won	Incumbent?
2022	2,307,425	28.73%	$1,702,841.39	56.08%	N-Running for Chief Justice
2020	2,735,041	33.88%	$1,244,057	55.07%	Y
2014	1,828,156	23.59%	$833,934.34	72.54%	Y
2012	2,347,060	29.39%	$794,743.60	57.03%	N

Kennedy received endorsements from the Ohio Republican Party, local and regional Republican associations, the Buckeye Firearms Association, National Rifle Association, and Ohio Right to Life.[109] Though originally endorsed by Cleveland.com in 2014, they revoked their support in 2020 following her comments regarding the overturning of *Roe v Wade* and unwillingness to participate in a debate.[110] This is the only instance of publicly revoked endorsement found through this research. Kennedy signed a letter alongside fellow conservative

[107] Ohio Secretary Of State, Election Results
[108] Searchable Campaign Finance Data
[109] Kennedy For Ohio, 2022
[110] Cleveland.com Editorial Board, 2022

justices Pat Fischer and Pat DeWine explaining that, "no such discussion is possible with several members of [the Cleveland.com] editorial board who have gone out of their way to denigrate and belittle nuanced legal concepts in the interest of advocating a particular policy outcome," and that she could not expect to be met with fairness and objectivity.[111]

She received donations and endorsement from the religious-political association Ohio Value Voters who stated: "Justice Kennedy has consistently protected the rights of Ohio citizens in every aspect of her amazing career. As a police officer, attorney and extensive jurist, Sharon has stood strong ensuring our safety and constitutional rights."[112] She was also endorsed by Senator Rob Portman via Twitter.[113]

[111] Tobias 2022
[112] Ohio Value Voters Voting Guide 2022
[113] Portman 2019

EMPIRICAL ANALYSIS

CASE SELECTION

Table 4

	Criminal Justice	**Low-Salience**	**Redistricting**
O'Connor 2003-2022	State v Froman 2020	Cordray v Midway Motor Sales 2009	League of Women Voters v Ohio Redistricting Commission 2022
Brunner 2020-2022	Dubose v McGuffey 2022	Motorists Mutual Insurance v Ironics 2022	----------
Kennedy 2012-present	State v Drain 2022	State v Turner 2020	----------

Criminal Justice Cases

Criminal justice cases garner the most public interest of all State Supreme Court cases. Due to media cycles and an interested constituency, these cases are most likely to represent my first hypothesis, X_1—public opinion. Liberal justices tend to focus on the rights of the accused, whereas a conservative-leaning justice focuses on just punishment and public safety. Frequently, citizens want a justice who is "tough on crime," and will show their preferences either through the media or through the ballot box. It is thought that elected justices are more responsive to these preferences since their place on the bench relies on the votes of their constituents.

Maureen O'Connor: State v Froman (2020)

CASE FACTS

State v Froman is a 2020 case regarding an appeal from a man on death row. Terry Lee Froman, the appellant, was found guilty of aggravated murder of his ex-girlfriend Kimberly Thomas and her son Michael Eli Mohney by a Warren County jury. The murder of Mohney took place in Kentucky, while the kidnapping and murder of Thomas crossed state lines and took place in Ohio.

Froman, Thomas, and Mohney lived together until Thomas ended her relationship with Froman. After being asked to move out, Froman went to Thomas's workplace and told a coworker, "Kim has made me lose everything, now I will make her lose everything no matter the cost."[114] Gunshots were heard at Thomas's residence a few days later, where Mohney's body was found DOA. A videotape at a gas station on this same date shows a naked Thomas attempt to run from a vehicle registered to Froman, and then Froman grabbing her by the hair and pushing her back into the vehicle.[115] Froman's cellphone was then used to track his location, fleeing from his home in Mayfield, Kentucky to Ohio where he was apprehended. Froman frequently called friend and police informant David Clark, where he told Clark, "[Clark]: Have you thought about letting her go? [Froman]: Have I thought about it? No, not at all," "Man, I already took one life, and I'm about to go ahead and take two [more]," and "I'm gonna kill her

[114] *Froman* at {¶ 5}
[115] *Froman* at {¶ 5}

dude," before the call disconnected.[116] Clark called back and was told by Froman: "She dead. I shot myself…I shot myself, and I shot her three times."[117]

Froman's guilt in the murders and kidnapping were not in question during the Supreme Court Case. Froman's defense attorney conceded in opening arguments: "As you're well aware of over the last several days, we are not obviously contesting that [Froman] caused the death of Ms. Thomas. He acknowledged that, he will acknowledge that, and that's what the evidence will show in this matter."[118] Thus, the defense chose to focus on mitigation—avoiding the death penalty—rather than questioning the facts of the case. Instead, Froman's counsel focused on procedural, administrative, courtroom, and prejudicial errors such as:

1) Ohio does not have jurisdiction since Froman killed Mohney in Kentucky and is not a resident of Ohio, and the inclusion of those case facts in the trial regarding Thomas' murder was prejudicial;[119]
2) There were jurors who had expressed racial bias and bias towards the death penalty during voir dire (the process of questioning and selecting individuals to sit on a jury);[120]
3) Froman had to wear leg shackles during the trial;[121]
4) The Prosecutor made improper comments to witnesses and called Froman by his nickname, "Tricke;"[122]

[116] *Froman* at {¶ 17}
[117] *Froman* at {¶ 19}
[118] *Froman* at {¶ 140}
[119] *Froman* at {¶ 35}, {¶ 42}
[120] *Froman* at {¶ 48}
[121] *Froman* at {¶ 69}
[122] *Froman* at {¶ 118}, {¶ 130}

5) Defense counsel was ineffective due to their choice to concede guilt, failure to call enough mitigation witnesses, and the fact that they were not licensed to practice law in the Commonwealth of Kentucky.

RULING

The Ohio Supreme Court ultimately concluded that "the death sentence imposed in this case is appropriate and proportionate to death sentences that we have upheld in similar cases."[123] O'Connor upheld the lower court's finding. Froman was guilty of the offense and received a death sentence. Froman has since appealed and is petitioning for Writ of Certiorari from the United States Supreme Court.

ANALYSIS

O'Connor dismissed the propositions of law in the order Froman raised them but paid special attention to the concern over the racial bias expressed by one of the jurors. Juror 49 checked the box "strongly agree" for a comment stating that "some races or ethnic groups tend to be more violent than others," then elaborating with her written statement that "statistics show more Black people commit crimes. And certain religions have violent beliefs."[124] During small group voir dire, the prosecutor questioned her on this statement, asking: "Do you agree that race should not

[123] *Froman* at ¶ 186
[124] *Froman* at ¶ 53

play any role in the decision-making process whatsoever?" To which juror 49 responded: "I totally agree."[125] The defense attorney did not object to juror 49's inclusion on the final jury.

The amicus brief filed by the Ohio Association of Criminal Defense Lawyers focused only on the concern of racial bias among jurors, and no other propositions of law raised by the defendant. They asserted: "racial bias can infect juror deliberations" and "simply, a person who harbors racial bias has no business sitting on a jury in any case with a defendant who is African American. The impropriety is particularly glaring in a capital case such as this one where the defendant is African American and the victim is white."[126] The unique nature of capital punishment, and a historical pattern of race tainting the judicial process led the OACDL to insist on the reversal of the death penalty conviction.

It is interesting that O'Connor paid special note to the racial bias concern in the opinion. It was dismissed under much of the same grounds as many of the "ineffective assistance" claims and on the same basis as a juror's predisposition to vote in favor of the death penalty; "we reject Froman's claim in proposition of law No. 3 that he was denied his right to an impartial jury due to the seating of juror No. 49. For the same reason, we reject Froman's ineffective-assistance claim in proposition of law No. 4 with respect to juror No. 49."[127] It would be simple to dismiss the racial bias claim with the same language and pay it no extra attention. However, O'Connor does address the racial bias claim in more detail. The only distinct factor is the existence of the amicus brief, so it is likely that O'Connor wanted to address the amici concerns even if she was not swayed by their content. She explained: "On the whole, we conclude that juror No. 49's responses on her general questionnaire do not show her inability to be impartial in this case,

[125] *Froman* at ¶54
[126] OACDL as Amicus Curiae, 4
[127] *Froman* at ¶ 67

based on her assurance during voir dire that she could set aside her opinions on race and decide the case based on the evidence."[128] O'Connor extends the benefit of the doubt to the juror, explaining, "[that] we have noted that prospective jurors often have difficulty articulating their views during voir dire."[129] This decision to uphold the death penalty, as well as the detachment in describing Froman's crime, are both in line with O'Connor's conservative style, but it is worth noting that she does not avoid the racial bias concerns. She also weighs the mitigating factors and the aggravating factors with approximately the same length of analysis and weight given, recognizing that the mitigating factors are not enough to overturn the conviction.

Additionally, it is worth noting that this case took place in 2020, a year when O'Connor was not seeking future reelection. While she does uphold the death-penalty in this case, her language was still empathetic and not something that could be universally described as "tough on crime." In fact, there were no dissents in the case, meaning even the liberal justices agreed with her decision and language.

Jennifer Brunner: Dubose v McGuffey (2022)

CASE FACTS

Dubose was one of the most widely publicized and discussed Ohio Supreme Court cases during the 2022 election cycle, highlighting the public's interest in criminal justice cases. Justin DuBose and codefendant Jamie Shelton were charged with the murder of Shawn Green during an alleged robbery of marijuana in Hamilton County.[130] The case does not deal with the facts of the

[128] *Froman* at ¶ 57
[129] *Froman* at ¶ 67
[130] *DuBose* at ¶ 2

crime, instead focusing on a bail dispute. Due to his ties to the community, limited financial means, and no significant criminal record, DuBose requested a "reasonable" bail. The state asked for a bail of $1,500,000, equal to that of Shelton's. Dubose's bail was set at $750,000 for the murder charge and an additional $750,000 for the aggravated robbery charge.[131] The court reduced his bail but then reinstated the original amount, which DuBose continued to appeal.

His writ of habeas corpus (a document that brings the accused before the court to ensure his imprisonment is lawful) stated: "DuBose's high bail was effectively a denial of bail, without the trial judge making any of the required statutory findings to hold a defendant without bail," and focused on the nonfinancial conditions—electronic monitoring of DuBose's location, no contact with the victim's passport, and surrendering of his passports—as effective enforcements rather that the "excessive" bail.[132]

The state focused on "(1) the serious nature of the crime, (2) the safety concerns expressed by the family, and (3) DuBose's alleged use of a fake ID."[133] Indeed, the victim's grandmother stated during an appeal hearing that "I would like you to keep his bond where it was. We don't feel safe with him out on bond…[my daughter would be] scared to death if he gets out."[134] The incident regarding DuBose's alleged use of a fake ID and flight risk referenced the fact that DuBose was arrested in Las Vegas and used a fake ID when approached by police on an unrelated matter claiming to be "Kevin Polanski" from California.[135] DuBose countered

[131] *Dubose* at ¶ 3
[132] *DuBose* at ¶ 8
[133] *DuBose* at ¶ 29
[134] *DuBose* at ¶ 5
[135] *DuBose* at ¶ 6

this this claim with evidence such as his frequent posts on social media showing his whereabouts and that he stayed in hotels under his own name.[136]

RULING

In a majority opinion penned by Brunner, the court decided in favor of DuBose and found his bail to be excessive. Brunner and the majority found that the bail set in *DuBose* was indeed excessive, and while nonfinancial conditions such as mandatory alcohol treatment, protection orders, and limits on travel could be imposed due to public safety concerns, such concerns could not impact the bail amount for a defendant.

ANALYSIS

Dubose was a case that held considerable media attention during the 2022 Ohio Supreme Court elections, highlighting the divide between "tough-on-crime" candidates and those more empathetic to defendants. Despite the noteworthy public focus, no amicus briefs were filed. Although there could be many reasons for this, the lack of amicus briefs is worth noting. There could be no vested interest in the case due to its more procedural content (bail amounts), or the case was never anticipated to be watershed and therefore its decision—a polarizing decision in an election year—only gained attention after its publication, giving interests no reason to file briefs *before* the case had been decided.

[136] *DuBose* at ¶ 32

Brunner focused extensively on the importance of a reasonable bail to the accuse and how it upholds a defendants' rights stating: "Pretrial release not only makes it easier for an accused person to prepare a defense, it also upholds the presumption of innocence by ensuring that a person is not punished before being convicted." She further elaborated: "The sole purpose of bail is to ensure a person's attendance in court. "Bail ensures appearance. Therefore, the conditions placed on it must relate to appearance and the reasons for forfeiture to nonappearance," [137] and that "Both the United States Constitution and the Ohio Constitution prohibit excessive bail."[138]

This is a notably contrary to the "tough on crime" positions held by the other two justices, who focus on empathy towards the victim or victim's family, the importance of public safety, and even to the extent of using punishment as a deterrent to other potential criminals. Those positions garner strong public support; Brunner's focus on defendant rights does not. That is not to say Brunner excuses criminals or does not believe in public safety. She said: "As explained above, public safety, although of the utmost importance, is not a factor relevant to the calculation of the bail amount, which is concerned only with ensuring the defendant's future appearance in court,"[139] and that "we do not minimize the importance of the safety concerns of the victim's family in this case."[140] She instead turned to the ways in which *nonfinancial* appeals can be altered to prioritize public safety such as "restrictions on travel and association, completion of alcohol and drug abuse treatment, and orders of no contact with witnesses in the case,"[141] directly referencing DuBose's appeals.

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[137] *DuBose* at {¶ 11}
[138] *DuBose* at {¶ 12}
[139] *DuBose* at {¶ 31}
[140] *DuBose* at ¶ 24
[141] *DuBose* at ¶ 24

Brunner faced widespread backlash against her decision in the case, including from Justice Kennedy. In her dissent, Kennedy stated that, "Courts have rejected the view that bail is excessive merely because the accused cannot afford it."[142] Additionally, due to the circumstances of his case, she argued that DuBose was not even entitled to a writ of habeas corpus since he did not prove that the previous court abused its discretion. Kennedy made it clear that bail amount is at the discretion of the court, and she did not believe the higher bail set at the beginning of his case was "unreasonable, arbitrary, or unconscionable."[143] She directly critiqued the majority, ending her dissent with: "Instead, the majority basically picks and chooses among the trial court's findings, deferring to some and rejecting others, before coming to its own conclusion that the trial court's findings that it accepts warrant a reduction of the bail amount."[144]

Kennedy did not leave her criticism of the *DuBose* outcome on the bench, remarking to media outlets: "As a result of that, these cases are happening all over where violent offenders are having very low bonds set because what the court then said is the only two things you can consider, what the defendant can afford and whether they're likely to come back."[145] She made her "tough on crime" ideology a touchstone of her campaign for Chief Justice, and much of the Republican Party had similar messaging. In fact, Ohio Republicans pushed for an amendment to the Ohio Constitution that would *require* judges to consider public safety when determining bail. The amendment—known as State Issue 1 on the 2022 ballot—passed with a wide margin during the general election.[146]

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[142] *DuBose* dissent at ¶ 49
[143] *DuBose* dissent at ¶ 51
[144] *DuBose* dissent at ¶ 57
[145] Baker 2022
[146] Bischoff 2022

Chief Justice O'Connor, however, defended Brunner. Concurring with Brunner but without penning an opinion, she later explained: "We must consider each case on the facts. Ohio deserves judicial leadership that follows the law and the constitution. It deserves judicial leadership that is free from political pressure and works to get things right."[147] She went as far to criticize her fellow Republicans' response to the ruling, explaining that "to manufacture fear and continue a pattern of jailing the people who can least afford release doesn't protect society. It only assures that money assures the level of freedom and civil rights that one enjoys."[148]

Brunner maintained a liberal perspective to the *DuBose* case, but suffered when it came to media attention: attack ads and news articles criticizing her found a foothold before the 2022 election.[149] Although there were no verified polls to gauge official public sentiment, it is noteworthy that those who opposed—both in the 2022 judicial and legislative elections—won their seats using "tough on crime" language and prioritization of public safety.

Sharon Kennedy: State v Drain (2022)

CASE FACTS

Another death-penalty case, *State v Drain* addresses the sixteen propositions of law brought up by the appellant Victoria Drain. Drain had offered two separate confessions, saying one version "was a 'vague account of the murder,' while the new version was 'the whole account.'"[150] The case facts take details from both, but the general timeline is consistent. Drain had planned to kill another inmate who was a child molester and sought the support of the

[147] Fisher 2022, 48:17
[148] Fisher 2022, 49:24
[149] Gaines 2022
[150] *Drain* at ¶ 15

victim, Richardson, whom she believed to be "easy to manipulate".[151] Richardson refused to help, and Drain worried he might report her plan.[152] She offered him a drug so that he would enter her cell, where she then killed him. She struck him with a ceiling fan, threatened to sodomize him with a pencil, and then stuck the pencils into Richardson's eye and "stomp[ed] it all the way in".[153] A correctional officer followed bloody footprints that led to Drain's cell, where Richardson's body was found.[154]

There were two aggravating factors, the first being "prior calculation and design" and the other being Drain's existing detention for a felony.[155] Although originally pleading not guilty, Drain later waived a jury trial and pleaded no contest to the indictment.[156] The trial was the grounds for multiple of Drain's appeals. There was only one prosecution witness, the trooper who found Richardson's body, and two defense witnesses, one of whom was Drain's daughter who she insisted not testify.[157] Drain also refused to admit her medical history of mental health history in the trial, saying: "[T]his is the time most people in similar circumstances may offer up some type of empty apology or make a pathetic plea for forgiveness while trying to capture the Court's sympathy by presenting all the troubles of my childhood and past troubles. I… have decided to spare everyone involved of [sic] those fake formalities."[158]

Drain claimed her defense attorney offered "ineffective assistance," the testimony from the trooper that admittedly amounted to hearsay, and the exhibits put forth by the prosecution

[151] *Drain* at ¶ 16
[152] *Drain* at ¶ 17
[153] *Drain* at ¶ 19
[154] *Drain* at ¶ 4
[155] *Drain* at ¶ 22
[156] *Drain* at ¶ 23
[157] *Drain* at ¶ 23
[158] *Drain* at ¶ 83

that she believed to be "irrelevant and prejudicial."[159] Additionally, Drain took issue with the process of her trial due to the COVID-19 pandemic. She contended that she was "unconstitutionally forced her to choose between two fundamental rights—i.e., the right to a speedy trial and the right to an impartial jury."[160]

RULING

Since the defense failed to raise most of these concerns *during* the trial, especially in regards to exhibit admittance, concerns with testimony, and lack of support from her defense council, the Supreme Court dismissed all of Drain's 19 propositions of law. Quoting Drain in reference to her waiver of a jury by her peers, "Drain stated that she was not 'trying to force a death or a life sentence' but was 'simply agreeing to the truth of the facts in [her] indictment, and leaving the rest up to the 3 judge panel. No more, no less.'"[161]

ANALYSIS

The conservative, "tough on crime" stance seen in this opinion is in line with Kennedy's ideology. She does, however, use subjective descriptors in multiple instances, which is not a common occurrence in textualist opinions. The insertion of these adjectives lends the opinion a somewhat personal tone. For example, she states that, "Trooper Stanfield's testimony was supported by *abundant* evidence,"[162] while Drain's assertion that she would have changed her

[159] *Drain* at ¶ 35 , ¶ 112 , and ¶ 65
[160] *Drain* at ¶ 50
[161] *Drain* at ¶ 85
[162] *Drain* at ¶ 114

mind if she had been granted a stay during COVID was "*highly speculative*" (emphasis added).[163] Additionally, she described Drain as "complaining" five times in the opinion as opposed to "contends," "asserts," or "claims."[164] The term "complain" has a decidedly dismissive connotation, and was used only once in total in either *Dubose* or *Froman.*

Kennedy made special note of Drain's "blame" on the justice system and how it led to her actions as an adult: "Drain claimed to have been subjected to 20 hours a day of solitary confinement as a 13-year-old juvenile offender. Therefore, she continued, 'your system' had 'contribut[ed] to those experiences… which molded me in my perceptions,' and this 'in itself is my choice form of mitigation,'"[165] cites Kennedy, reflecting that Drain "appeared to lay some blame on the justice system, in particular the juvenile judge who incarcerated her at age 13."[166] She explained that, "the tone of Drain's unsworn statement leaves us in considerable doubt about Drain's remorse," and that "while accepting responsibility, Drain repeatedly refused to apologize for her deeds and in fact stated that she stood behind them."[167] Kennedy explicitly cited Drain's blame of the justice system multiple times while considering mitigating factors.

Brunner dissented from Kennedy's majority opinion, stating: "I agree that appellant Victoria Michelle Drain's convictions should be affirmed. I dissent, however, from the majority's decision to reject Drain's claims of ineffective assistance of counsel and to affirm her death sentence. I would therefore remand this case for a new mitigation hearing."[168] Brunner cites Drain's medical and mental health history more extensively, whereas Kennedy cited that

[163] *Drain* at ¶ 105
[164] *Drain* at ¶ 107 , ¶ 110
[165] *Drain* at ¶ 170
[166] *Drain* at ¶ 182
[167] *Drain* at ¶ 184
[168] *Drain* at ¶ 189

"Drain made a specific point of—indeed, seems to have taken pride in—her refusal to present any "medical mental health excuses."[169] Brunner mentioned Drain's "significant trauma" including self-harm, gender dysphoria, and serious mental illnesses that the majority did not give enough weight. She additionally critiqued the majority for their dismissal of Drain's change in opinion on what mitigating evidence to include: "These statements do not establish that Drain instructed her attorneys not to present evidence of actual mental-health diagnoses made by mental-health professionals, much less that she instructed her attorneys not to present any mitigating evidence except testimony from her cousin and childhood friend."[170]

Brunner validated Drain's concerns, especially regarding inefficient council. She stated: "the approximately 1,900 pages of mitigation evidence Drain's attorneys compiled and submitted to the trial court as defendant's exhibit A is not as substantial as the page count might make it seem" and that, "given that Drain was facing a death sentence, more was required."[171] This empathy towards the defendant is emblematic of her ideology as a whole. Brunner insisted: "[Drain] is not what is sometimes referred to as 'the worst of the worst.'"[172] Kennedy, on the other hand, makes no such distinction between Drain and the so-called "worst of the worst."

CRIMINAL JUSTICE DISCUSSION

The criminal justice case grouping focuses on X_1: Public Opinion, but the existence of amicus briefs in one of the cases makes X_2: Friends of the Court relevant as well.

[169] *Drain* at ¶ 82
[170] *Drain* dissent at ¶ 194
[171] *Drain* dissent at ¶ 196
[172] *Drain* dissent at ¶ 197

O'Connor's decision in *Froman* had no public backlash and understandably had the most subdued language. O'Connor's future opinions shared her neutral language and more conservative stance, barely deviating from what we see in *Froman*. Similarly to O'Connor, Kennedy's decision in *Drain* was aligned with her past and future opinions and did not face public backlash.

The research does not, however, support the idea that negative public opinion would cause a change in ideology or decision-making from an unpopular justice. Brunner's opinion in *DuBose* is especially relevant here, since the decision faced noteworthy public and media backlash but her future opinions did not deviate from her ideological stance and empathetic language (such as State v Hough, State v Towne, and *In Re D.R.*).

We cannot attribute Brunner's loss nor Kennedy's victory in the 2022 election to any specific decision or stance. However, the controversy surrounding *DuBose* in the weeks and months preceding the election is relevant to include. The debate of defendants' rights versus public safety became its own issue on the ballot in direct response to the controversy with the Republican Party's introduction of State Issue 1, which ultimately passed with flying colors, garnering 77.6% of the vote.[173] Multiple media outlets, individuals, and the Republican Party all confirmed their support for Kennedy explicitly on the basis of her commitment to public safety. This supports both the hypothesis that citizens reward popular (usually "tough on crime" decisions) at the ballot box and Justices are supported by political parties for maintaining policies of which the party approves.

[173] Bischoff 2022

Regarding amicus briefs, it does not appear that Justices were persuaded by the additional arguments since the majority opinion did not agree with, follow the arguments of, or mirror language used within the briefs. In *Froman*, the amicus brief did not inform the majority opinion; the case was decided against the result vouched for by the amicus brief. Interestingly, though, O'Connor paid special attention to the main concern addressed by the amici: racial bias. While the brief did not impact her decision, it did impact *how* she wrote about the case and what points she focused on.

Low Salience Cases

Low salience cases are court cases that garner little to no public, media, or academic scrutiny. Usually dealing with domestic disputes, personal injury law, insurance or policy claims, and other subject matter, the only interested parties in these cases are those directly involved in the dispute or those who have a stake in its outcome. Interested parties are the ones with high capacity to fund campaigns, run advertisements, and file amicus briefs, so I am looking at my hypotheses 2 and 3: X_2: Friends of the Court, and X_3: "Show Me the Money". Political parties and the general public do not generally engage in low-salience cases, since they involve insurance disputes, company legal battles, and other mundane controversies of law. Of the cases discussed in the project, only the low salience cases had one or more amicus briefs on *each* side of the case.

Maureen O'Connor: Cordray v Midway Motor Sales (2009)

CASE FACTS

Cordray v Midway Motor Sales is a case that dealt with the leasing and subleasing of automobiles with tampered-with odometers. There were four parties at play in this case: General Motors Corporation, who sold vehicles, Midway Motor Sales who bought these vehicles from General Motors Corporation for sale or lease at its dealership, Modern Building Supply Inc.,[174] who leased a set of vehicles from Midway Motor Sales with specified miles limits of approximately 30,000 miles, and GMAC, a financial institution associated with Midway Motor Sales.[175] The heart of the suit dealt with a discovery that occurred after GMAC had re-acquired and sold at auction many of the vehicles that had been leased to Modern Building Supply Company that many of the cars' odometers had been tampered with.[176] GMAC reported this to the Attorney General, assisted with the investigation, and either bought the vehicles back or compensated the owners for the discrepancy in mileage.[177]

Midway Motor Sales had entered into a secret agreement with Modern Building Supply Company that allowed Modern Building Supply Company to exceed the 30,000-mile limit on the lease and then alter the odometers before reselling them to GMAC.[178] GMAC, unaware of this agreement, signed the following affidavit before reselling the vehicles:

1) I (we) certify to the best of my (our) knowledge that the odometer now reads □□□,□□□ miles and is the actual mileage of the vehicle unless one of the following statements is checked.
2) □ The mileage stated is in excess of the mechanical limits.

[174] *Midway* at {¶ 5}
[175] *Midway* at {¶ 6}
[176] *Midway* at {¶ 9}
[177] *Midway* at {¶ 9}
[178] *Midway* at {¶ 7}

3) □ The odometer reading is not the actual mileage.[179]

GMAC did not check box 2 or 3. The legal question, then, was whether GMAC was responsible for the misleading odometers. The Ohio Supreme Court needed to decide whether the "Consumer Sales Practices Act" and the "Odometer and Rollback Disclosure Act" should be read as strict-liability statutes, and if this situation was exempt due to the time of the odometer tampering in relation to GMAC's ownership of the vehicles.[180]

RULING

A strict-liability statute would incorporate a "knowledge elementi," i.e. the defendant *knew* that their actions were in violation of a specific law. O'Connor and the majority in this case held that the statutes are not strict liability, and that "liability can be imposed only if it is established that the defendant knowingly violated the statute," meaning GMAC would not be held responsible.[181] Additionally, the court addressed the "previous-owner defense" or "previous-owner argument" (the argument that GMAC would be relieved of responsibility if the tampering was done by a "previous owner;" Midway transferred ownership to GMAC after they were leased to Modern Building Supply but before the odometers were changed).[182] O'Connor held that the previous-owner defense was available regardless of whether the vehicles were previously owned at the time of the tampering, so GMAC was not responsible.[183]

[179] *Midway* at {¶ 19} , {¶ 20} , {¶ 21}
[180] *Midway* at {¶ 11} , {¶ 12}
[181] *Midway* at {¶ 3} , {¶ 38}
[182] *Midway* at {¶ 6} , {¶ 11}
[183] *Midway* at {¶ 32}

ANALYSIS

No parties in this case contributed to O'Connor's campaign in either 2008 or 2010. Therefore, I do not find support for the "Show Me the Money" hypothesis in this case. There were, however, two amicus curiae briefs filed in this case, both on behalf of Midway Motor Sales. The brief from American Financial Services Association (AFS) and Association for Consumer Vehicle Lessors focused on the legal grounding of the case (namely critiquing the lower court's ruling that the statute should be read as strict liability) whereas National Automobile Dealers Association and Ohio Automobile Dealers Association focused instead on the economic, business, and well-being concerns that would arise from an unfavorable ruling. AFS focused primarily on a case whose precedent allowed the lower court to determine the statute to be strict liability: *Flint v Ohio Bell Tel. Co*. AFS titled a portion of their brief "The Leading Case is Wrong."[184] O'Connor made no such assertion in her opinion, instead *distinguishing,* rather than overturning, *Flint.*[185]

It is immediately evident that O'Connor employed a textualist approach to this case, with her language: "the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation…We find that the language of [the statute] is plain and unambiguous. [It] provides as follows: 'No transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06 of the Revised Code.'"[186] O'Connor also relied on pari materia, a legal approach where a law must be analyzed in conjunction with other laws of the same subject

[184] AFS as Amici, 3
[185] *Cordray* at P 14
[186] *Midway* at {¶ 16}

matter. This approach emphasized O'Connor's adherence to statutory standards and precedent without as much concern for specific case outcomes. This pari materia approach also meant that O'Connor could establish legislative intent without deeply examining the implications of a certain ruling (which is usually an approach preferred by living-constitutionalists). Thus, the amicus brief from National Automobile Dealers' strong language (that it could be "devastating to a dealer,"[187] "the General Assembly could not possibly have intended to put dealers, salespersons, etc., in jail or bar them from selling cars in Ohio for an innocent and unknowing violation" putting their "freedom and livelihood at stake"[188] and that it could "unfairly and unreasonably trigger criminal penalties"[189] had no bearing on O'Connor's decision.

She also focused on the importance of judicial restraint regarding the interpretation of the statute, reflective of her conservative judicial ideology. When asked to make a judgement on the temporal element of the affidavit, O'Connor instead responded: "The language employed in the previous-owner exception is plain and unambiguous. There is no temporal requirement for a transferor to qualify for the previous-owner exception. Such a requirement plainly does not exist in the statute. Therefore, there is no occasion for the court to resort to other means of interpretation. This court would *invade the province of the legislature and violate separation of powers if it rewrote the statute* to include a requirement that the previous owner be the owner of the vehicle at the time of the odometer tampering."[190]

[187] NAD as Amici, 7
[188] NAD as Amici, 8
[189] NAD as Amici, 9
[190] *Motorists Mutual* at ¶ 36, emphasis added

Jennifer Brunner: Motorists Mutual Insurance v Ironics (2022)

CASE FACTS

Motorists Mutual Insurance v Ironics is an insurance dispute. The parties in the case are Ironics, a company that buys and sells metal and metal waste, Owens, a glass container manufacturer, and Motorists Mutual Insurance, Ironics' insurer.[191] Owens purchased metal product from Ironics that it then used to make containers. However, Owens later discovered that Ironics' product contained "chrome stones" that severely impacted the stability and safety of the glass containers, meaning 1,850 of the glass containers needed to be scrapped.[192] Ironics' product had been contaminated because of its materials processor subcontracted the screening to another company that allowed the material to fall on the ground but continuing being processed until it was returned to Ironics.[193] Owens sued Ironics for "breach of contract, breach of warranties contained in the purchase orders for the tube scale, violations of the Uniform Commercial Code, negligence, and product liability."[194] Ironics sought assistance from its insurer, Motorists Mutual Insurance, since it had both a "general liability policy" and a "commercial umbrella policy."

The court was tasked with determining whether "property damage" occurred, since Motorists claimed that "tangible property" cannot be Ironics' but must belong to some other party.[195] Citing the integrated-system rule, Motorists claimed that the integration of Ironics' metal product into the containers produced by Owens meant the property was still Ironics'. If

[191] *Motorists Mutual* at ¶ 2
[192] *Motorists Mutual* at ¶ 3
[193] *Motorists* at ¶ 4
[194] *Motorists* at ¶ 5
[195] *Motorists* at ¶ 11

property damage did occur, the court must then decide if Motorists was responsible for the claim based on the economic-loss doctrine.

There were two amicus briefs filed for this case, one from United Policyholders on behalf of Ironics, and the Ohio Insurance Institute on behalf of Motorists Mutual Insurance. Ohio Insurance Institute insisted that: "The policy "[is] not a guarantee or contractual performance bond,"[196] and that Ironics is entirely at fault: Ironics breached its contractual obligation to Owens by delivering contaminated tube … Ironics had total control over the quality of its product—the task that all business are expected to manage to deliver conforming products—[and] failed in that task."[197] OII extensively cited *Wisconsin Pharmacal* as justification for their stance. OII also criticized the lower court, saying ". To merely "assume" something is an "occurrence" is a fundamental error in the analysis."[198] On the other side, United Policyholders insisted that only Ironics' interpretation of "property damage" should be held: "To hold otherwise would absolve the insurance industry of longstanding promises made to policyholders."[199] Directly addressing OII's brief, UP argues that OII and Motorists seek to "unreasonably restrict coverage by inserting language not found in the four corners of the Policies,"[200] which they argue "contradicts both longstanding rules of policy interpretation and common sense."[201]

[196] OII as Amici, 7
[197] OII as Amici, 5
[198] OII as Amici, 9
[199] UP as Amici, 2
[200] UP as Amici, 2
[201] UP as Amici, 11

RULING

The court ruled that a) property damage did occur that was "neither expected nor intended from the standpoint of the insured" and that none of the exclusions put forth by Motorists applied.[202] Thus, Ironics was entitled to protection under Motorists' umbrella policy and Owens could rightfully seek relief.

ANALYSIS

Although not explicitly a textualist, Brunner also employed a plain meaning approach: "We apply the plain meaning of the policy's language 'unless another meaning is clearly apparent from the contents of the policy'…When contractual language is clear, we look no further than the writing itself to determine the parties' intent."[203] Brunner also explained her overturning of precedent in more detail, specifically in a case called *Wisconsin Pharmacal* referenced by the lower court to support their decision. By overturning the decision of the lower court, this meant she was either distinguishing or overturning the cited case; she did not adhere to its precedent since "not one court in another state has followed its holding."[204] She summed up: "Ultimately, we see no support for Motorists' interpretation of 'property damage.' Nothing in the term itself or in the term's definition in the policy indicates that damage to a multicomponent product is to be regarded as damage to the insured's product. If that were what the parties intended, Motorists could have included language in its umbrella policy making that intention clear, but it did not do so"[205]

[202] *Motorists* at ¶ 61
[203] *Motorists* at ¶ 8
[204] *Motorists* at ¶ 35
[205] *Motorists* at ¶ 22

Interestingly, Brunner once again offered a *solution* to the parties' concerns instead of simply passing down a ruling and leaving future actions up to the legislature or relevant parties. She wrote: "If Motorists believes that claims such as those at issue here should not be covered under the terms of its policy, it remains free to seek agreement to language indicating such in its future contracts, consistent with applicable law."[206] While her statement is of course not legally binding, other justices did not offer this sort of practical solution. Statements like these are why "living constitutionalism" is a topic of debate; proponents believe judicial remedies and solutions are more appropriate for a changing judicial landscape, while critics find them to be overstepping judicial bounds on topics that should be left to other branches of government.

While she does not mirror language or arguments from either amicus brief, Brunner does pay special attention to *Wisconsin Pharmacal* and describes how the court defined and found, instead of just assumed, "occurrence." This reflects the findings in the criminal justice cases, where Justices call attention to certain aspects of a case addressed in an amicus brief, even if they do not change the outcome.

Kennedy wrote alongside Justice Pat DeWine, concurring with the majority in judgment only (but disagreeing on how the conclusion should have been reached). She wrote that the majority deals too much in dicta and adds unnecessary (and inapplicable) context, stating, "the majority opts to use this case to write something of a treatise on insurance law. It invokes various insurance doctrines and cites numerous cases from other jurisdictions. But while it may conceivably interest some to know that the economic-loss doctrine "prevents 'the tortification of contract law'…none of this is necessary to resolve the dispute about the meaning of a contract.

[206] *Motorists* at ¶ 61

The majority's musings are simply dicta."[207] Essentially, she is critiquing Brunner's opinion for overstepping judicial bounds and writing on topics that are not relevant to this exact case.

Sharon Kennedy: State v Turner (2020)

CASE FACTS

This 2020 case—*State v Turner*—deals with traffic laws, regulations, and whether a police officer has "probable cause" and "reasonable suspicion" to pull over a driver who drove on—but not across—the white line on the far right side of a lane. There are two questions at issue: the statutory question of whether Turner broke the law and the Constitutional question of whether the officer was justified in stopping Turner and then arresting him.

A State Highway Patrol Trooper, who is not named in the case, stopped Turner along Old State Route 74, a two-lane, two-way road.[208] The trooper testified that he witnessed Turner's two right tires touch the white line on the righthand side of the lane, which he referred to as the "fog line." The trial court could not see this on the officer's dash cam, but would "take the trooper at his word."[209] Turner, who was charged with operating a vehicle while under the influence of alcohol and a marked-lanes violation, moved to suppress the evidence of his intoxication because it was obtained under a traffic stop where "the trooper did not have probable cause or a reasonable and articulable suspicion to initiate the stop."[210] The state argued that the statute (R.C.

[207] *Motorists* at ¶ 88
[208] *Turner* at ¶ 5
[209] *Turner* at ¶ 6 , ¶ 8
[210] *Turner* at ¶ 5 , ¶ 6

4522.33(A)(1)) stated that a vehicle may not touch the lines on the road and must remain "entirely within" the lines.[211]

RULING

The court took the trooper at his word and accepted the assertion that Turner's car touched the white line.[212] However, they held that "the single solid white longitudinal line on the right-hand edge of a roadway—the fog line—merely "discourages or prohibits" a driver from "crossing" it; it does not prohibit "driving on" or "touching" it.[213] Thus, they reversed the judgment regarding Turner's marked-lanes violation. It left the constitutional question—whether the traffic stop was lawful, which hinged on the idea that the trooper had "reasonable and articulable suspicion" that Turner had broken the law—to the lower court.[214]

ANALYSIS

Given her history in law enforcement, Kennedy was an interesting choice to author this opinion. While her understanding of traffic laws made her well-equipped to lead with the statutory question, it could be a conflict of interest regarding the constitutional question. Recall that she was a police officer; she could be more forgiving of officers' mistakes since she may have experienced similar situations. Thus, her decision to return the constitutional question to the

[211] *Turner* at ¶ 13
[212] *Turner* at ¶ 14
[213] *Turner* at ¶ 3
[214] *Turner* at ¶ 9

lower court—only deciding that Turner did not, in fact, break the law—rendered this concern moot.

There were two amicus briefs filed in this case. The one from David Yost, Ohio's Attorney General (OAG), focused on the statutory question (since "he (OAG David Yost) has a special interest in advising the State Highway Patrol how and when to enforce traffic laws,")[215] but also the constitutional question. He explained the situation as "the trooper lawfully stop[ping] Turner because he observed Turner breaking the law."[216] Yost argued that under "common sense" and safety concerns, Turner broke the law, but even if he had not, the trooper's action was simply a reasonable mistake of law: "When an officer makes a search or seizure based on a reasonable mistake of law, the search or seizure complies with this restriction."[217]

The Ohio Association for Criminal Defense Lawyers submitted a brief, "out of concern that the client-base of the organization's membership will suffer the consequences of the national trend to permit more significant and less-justified intrusions of law enforcement to go unchecked as the meaning of the Fourth Amendment unfolds."[218] While they did explain that Turner did not break the law, their focus was on the constitutional question at hand; they insisted the question should not be raised at all (since the State of Ohio did not "timely raise" the concern) and if it was raised, the Court should find that the trooper's search was *not* reasonable. To support this, they focused on two previous cases (State v Brown and State v Jones) and the balance between government interest and individual freedom. They cited "the Ohio Constitution's strong respect for personal privacy"[219] and ultimately concluded that "there is in fact no legitimate state interest

[215] David Yost as Amici, 3
[216] David Yost as Amici, 1
[217] David Yost as Amici, 3
[218] OACDL as Amici, 1
[219] OACDL as Amici, 13

in violating the privacy and freedom of movement of a person who has not violated the law when no other concerns of emergency or exigency are present. In a case such as this one, where the Defendant was simply driving without violating the traffic laws, the public should expect that such a person will be permitted to continue driving unimpeded."[220] They were far less forgiving of the officer's "mistake of law," explaining that: "Enforcing the traffic laws is the most basic task of law enforcement. Given the potential loss of liberty and privacy that will result from even a limited stop and investigation by the police, it is objectively unreasonable for officers not to know the most basic laws that they are duty bound to enforce."[221]

Ultimately, these amicus briefs did not appear to impact Kennedy's decision; neither group got what they wanted. The cases referenced in the OACDL brief were *not* cited in Kennedy's opinion, and she ultimately maintained the constitutional question even if she was not the one answering it (she simply referred to the lower court). Yost's explanation of why Turner did indeed break the law were not referenced, and ultimately Kennedy overturned the lower court's decision.

LOW SALIENCE DISCUSSION

In the low salience cases, I focused on X_2: Friends of the Court as well as X_3: Show me the money. Amicus briefs may lead a justice to address a specific element of a case in more detail, but ultimately do not sway the justice's opinion nor inform the opinion. This does not support X_2B or X_2C (which hypothesized that a justice would echo the language and arguments

[220] OACDL as Amici, 14
[221] OACDL as Amici, 15

of an amicus brief in either the majority opinion or dissent) since, in all the low salience cases above, the amicus briefs were either not mentioned in the majority or filed behalf of the ultimately losing party.

Additionally, I rarely found a company contributing to a judicial campaign in the years preceding their case in court. Occasionally an *employee* would contribute (usually no more than $200) but CEOs, executives, and the company itself were not found to be major contributors. In this same vein, attorneys and municipal judges contributed to Ohio Supreme Court candidates, but this research did not show that those contributions took place immediately preceding or following a case where the attorney or judge was involved.[222] Thus, the low salience case category did not show much support for the X_3 hypotheses.

Redistricting Case—League of Women Voters

League of Women Voters v Ohio Redistricting Commission is a unique set of cases. They offer a different perspective on judicial ideology and partisanship. Since most of the five *League* opinions were written per curium (with the majority opinion being released without an author and with no explicit denotation of who wrote it), it is more difficult to attribute ideas and language to a specific justice. Therefore, I rely heavily on public statements, concurring or dissenting opinions, and quotes from news sources rather than the majority opinions seen in the other two case sections. One of the most publicized and polarized cases in recent Ohio Supreme Court history, *League of Women Voters* is a glimpse into the more partisan or political nature of

[222] LaRose Searchable Campaign Finance Data 2008, 2018, 2020, 2022

the modern court. Thus, I am most interested in my third and fourth hypotheses here: X_3: "Show Me the Money" and X_4: Party Pressure.

CASE FACTS

In November 2015, Ohioans voted for a constitutional amendment that would change the process of redistricting to make it more representative and less partisan. The objective was creating "a bipartisan process with the goal of having district boundaries that are more compact and politically competitive."[223] This spurred the creation of the Ohio Redistricting Commission assigned to adopt new voting maps after each census to better represent Ohio constituents. The Commission consisted of seven members including the Governor, the Auditor of the State, the Secretary of State, and four members appointed by the majority and minority leaders of the General Assembly. Due to the makeup of the Ohio legislature, the Commission was split 5/2 in favor of Republicans. Despite the intention to create a bipartisan process, the Commission voted on map adoption along party lines each time, rendering the adopted maps to be valid for only four years instead of the proposed ten.

On January 12, 2022, the Ohio Supreme Court, led by Republican Chief Justice Maureen O'Connor deemed the proposed map to be unconstitutional. The Court cited that, along with other unconstitutionalities, the most prominent problem was with the Commission's inability to meet the standards set forth by Section 6 of the amendment that: "No general assembly district plan shall be drawn primarily to favor or disfavor a political party…[and] the statewide proportion of districts whose voters favor each political party shall correspond closely to the

[223] League of Women Voters of Ohio v. Ohio Redistricting Comm., Slip Opinion No. 2022-Ohio-65.

statewide preferences of the voters of Ohio."[224] This was mainly due to the fact that the Commission proposed maps with 67 Republican-leaning House seats and 32 Democratic-leaning House seats, and the projection that "under the Senate map that was adopted, the Republican candidates would win an average of 17% more seats than Democratic candidates for the same vote share"[225] despite the mutually accepted statistic that showed Republicans winning 54% of vote shares and Democrats 46% across the past ten years.

The Commission continued to propose new maps, which were subsequently found unconstitutional by the Ohio Supreme Court four additional times for distinct reasons usually regarding Section 6. The Commission argued that Section 6 is "aspirational" rather than "mandatory" by creating Democratic-leaning districts that led by a smaller margin than historic standards require, qualifying them as "contested" rather than Democratic-leaning,[226] and even resubmitting previously struck-down maps at later deadlines.[227] By arguing that the court-imposed deadlines could not be implemented until all appeals were filed (within a 90-day deadline), Federal Courts "chose the best of our bad options," selecting one of the rejected maps to use for the 2022 primary and general elections.[228]

There was only one brief filed in this case (which was then updated and refiled in response to the ongoing legal battle), from a coalition of nine activist organizations including The Ohio Environmental Council, Ohio Organizing Collaborative, Ohio Farmers Union, LEAD Ohio, Red Wine & Blue, OPAWL—Building AAPI Feminist Leadership, Innovation Ohio, Ohio Coalition on Black on Black Civic Participation/Ohio Unity Coalition, and Ohio Citizen Action.

[224] League {¶ 46}
[225] League {¶122}
[226] League II
[227] League V
[228] Chow 2022

The brief from Ohio Advocacy Organizations—the name to recognize the collective nine groups—documented many of the same arguments as seen in the majority opinion, including: concerns of the maps unduly favoring one party; the existence of other, constitutional maps that were thrown out in favor of one favoring Republicans; and unconstitutionality under Article XIX of the Ohio Constitution.[229] The language, however, is more descriptive and creative than that used in the majority opinion, as is typical of amicus briefs. For example, the brief urges that "Ohioans certainly do not deserve to spend more resources fighting for issues they care about simply because one political party has enshrined its power over another. When Ohio has gerrymandered maps, everyone loses,"[230] and that "the Ohio Redistricting Commission's actions affect us all, diluting the power of every vote from Lake Erie to the Ohio River."[231]

Although the legal arguments were much the same, the brief focused on the real-world effects of a gerrymandered map, something the majority opinion did not emphasize. These concerns included: "When faced with the direct and present impacts of climate change, the rising costs of water and electricity, and air pollution surrounding their communities, Ohioans cannot afford to wait any longer for fair representation in Congress. Partisan gerrymandering subverts the fundamental values of democracy, not only diluting partisan power but often cracking apart communities of color. It subverts the goals of representation of the people of Ohio in Washington D.C. Ohio can only have a healthy environment if we have a healthy democracy. We can only have a healthy democracy if all Ohioans, no matter their race, class, or national origin, believe their vote actually matters."[232]

[229] OAC as Amici, 19, 24, and 32
[230] OAC as Amici, 3
[231] OAC as Amici, 2
[232] OAC as Amici, 2

Maureen O'Connor

Maureen O'Connor was at the forefront of the *League* debate, both as Chief Justice of the court and also frequently the deciding vote in the decisions. She sided with the petitioners—League of Women Voters—against the Ohio Redistricting Committee every time, despite backlash from the Republican Party. She insisted it was not, nor ever should be, a partisan issue: "I believe in an independent judiciary. I always have. And whether you vote as a 'D' or an 'R' or an I when you put on the robe and take to the bench you are sworn to administer justice and follow the law."[233] She had two main areas of focus in her public responses to the case: the rights of Ohio's voters and the need for an impartial, independent, and non-partisan judiciary.

To her first point, she explained: "voters overwhelmingly voted to amend the Ohio Constitution to end partisan gerrymandering. What voters have learned this year is that Article 11 is not living up to its promise. It did not prevent gerrymandering, and it did not prevent the use in the upcoming election on November 8th of unconstitutional maps that were drawn both for the congressional and general assembly districts. The Supreme Court had declared five times that the maps put forth were unconstitutional. The bottom line is that Article 11 has no discernable or enforceable effect to curb gerrymandering in Ohio."[234] She frequently paralleled the rights and desires of Ohio citizens contrasted with the unconstitutional outcomes brought on by the Ohio Redistricting Commission.

This phrasing is remarkably similar to the introduction to the OAC amicus brief, which states: "Ohioans believed its elected officials would follow the will of the Ohio Supreme Court.

[233] O'Connor 2022, 35:18
[234] O'Connor 2022, 36:19

Instead, Ohioans just voted in a primary under the 2022 gerrymandered congressional map, depriving them of the fairness and justice they voted for in 2018."[235] O'Connor then writes: "The comments I have gotten from the public…all positive about the redistricting. The people were paying attention. How could they not?"[236]

Her stance on the matter can be summed up as follows: "I think you need to read the Constitution, I think you need to read the opinions that decided each and every map that was presented by the redistricting commission, and I think that will explain where the majority was when it issued these five rulings based on five unconstitutional maps. And it had nothing to do with politics, and that is what is so disconcerting, that people want to link it to me as a registered Republican. That's my voter registration—that is all it is. It's not a guidepost, it is not a commandment, it does not affect how I do my job or how I view cases and rule on cases. It never has."[237]

O'Connor has been "both praised and vilified for breaking with [the] Republican party over the issue of redistricting."[238] This is understandable, since her stance against the party that nominated her (under the Ohio-Michigan Method in 2002) is rare in an era of politicization of the courts. She is not withholding in her critique of her party, saying that "they set a horrible example" for refusing to follow the rulings of the Ohio Supreme Court.[239] In fact, her portrait was removed from GOP headquarters after her consistent Democrat-alignment in *League,* and Justices DeWine and Kennedy did not attend its unveiling.[240]

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[235] OAC as Amici, 1
[236] Fisher 2022, 14:44
[237] Fisher 2022, 6:41
[238] Fisher 2022, 5:25
[239] Fisher 2022, 13:25
[240] Tebben 2022

This case defined much of O'Connor's late career, and she intends to continue the fight after leaving the bench. One of her goals after her term ended on December 31, 2022, is to push for a voter's amendment to the Constitution where issues like this could be resolved without having elected officials on a redistricting committee. She wants a committee "not driven by politics but rather by what is fair…fair representation and justice."[241]

Jennifer Brunner

Like O'Connor, Brunner was in the majority and found each proposed map to be unconstitutional. In the backlash that followed, Brunner was outspoken in her support of the Chief Justice as well as her future endeavors. She said, "A citizen-based commission would, I think, be welcomed by most Ohioans. And so I wish Chief Justice O'Connor every success as she moves forward to do that when she takes on her new role."[242] Brunner concurred with O'Connor's opinion in the first *League* as well as penned her own concurrence. In this concurrence, Brunner focused on something the majority did not: the Equal Protection clause of the Ohio Constitution. She explained that Article I, Section 2 provides that "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary," and that this language, broader than the Federal 14th Amendment, allows for "the equal protection and benefit of the people."[243] This reading of the case supports not only Brunner's Democratic affiliation but also her liberal, remedy-seeking ideology as a whole. She explained further: "With

[241] O'Connor 2022, 37:27
[242] Tobias 2022
[243] *League I* concurrence at ¶ 151

depressed voter turnout, all electors and voters are affected. This may result in doubt and lack of confidence in the democratic process—that is, whether the outcome of an election by so few voters as compared to electors is truly the will of the people…Gerrymandering and its resulting effects undermine a government that is intended for the benefit and equal protection of the people."[244]

While it can reasonably be expected that Brunner, a Democratic nominee, would side with Democrats in the case, she faced criticism for a different reason: potential conflicts of interest. Relevant to my third hypothesis, it is worth noting that Brunner has been consistently in support of and supported by League of Women Voters of Metropolitan Columbus, including recruiting members,[245] speaking at their events,[246] and collecting donations from members of the OAC (who filed the amicus brief in the case).[247] The Ohio GOP expressed concern over this, reporting that "two weeks and counting, Justice Brunner refuses to answer to Ohio voters on conflicts of interest with litigants" and calling for her to recuse herself.[248] However, it is unclear whether this poses a bona fide conflict of interest since Brunner has faced *League of Women Voters* as a defendant during her time as Secretary of State over a separate matter,[249] and since Brunner holds the same opinion on similar cases with plaintiffs with whom she has no connection.[250]

[244] *League I* concurrence at ¶ 156
[245] Brunner via Facebook, 2016
[246] Hirsch 2010
[247] LaRose Searchable Campaign Finance Data, 2020, 2022
[248] OH GOP, 2022
[249] *League of Women v Brunner, 2008*
[250] *Nieman v Larose, 2022*

Sharon Kennedy

Kennedy has accused the majority and concurrences of overstepping their judicial bounds. In her dissent, she said, "It might be inconvenient for the majority, but the plain language of Article XI, Section 9(D) limits our authority to review General Assembly-district plans,"[251] and that the amendment "gives this court an important but *limited* role in reviewing a General Assembly-district plan. The majority today, though, finds the constitutionally imposed limits unduly constraining, so it chooses to disregard them."[252] She cited her own majority opinion in Cleveland v State, repeating, "The purpose of our written Constitution is to define and *limit* the powers of government and secure the rights of the people."[253]

She also criticized what she perceived to be policy-based decision making on behalf of the majority, saying that "instead of applying the inconvenient textual limits on this court's authority set forth in Section 9(D)(3), the majority ignores them in favor of its own policy preferences."[254] This is a weighty accusation, especially at a point where the public is losing faith in both the federal and state judiciary due to its increased politicization and polarization.

Kennedy called the issue of redistricting "the fight of our life," also referencing former US Attorney General Eric Holder by name when saying Holder and other progressive groups were trying to influence the process in Ohio. Kennedy said Holder and other groups "were fighting to put judges on the Ohio Supreme Court that would do what they're doing with

[251] *League* Dissent at ¶ 216
[252] *League* Dissent at ¶ 187, emphasis added
[253] *League* Dissent at ¶ 206, emphasis added
[254] *League* Dissent at ¶ 190

redistricting."[255] Due to these comments, Brunner's campaign spokesperson called for Kennedy to recuse herself from the case.

REDISTRICTING DISCUSSION

League of Women Voters v Ohio Redistricting Commission put O'Connor, Brunner, and Kennedy in an unusual position. "The justices have found themselves front and center when typically they are supposed to remain in the background."[256] The personal and political backlash surrounding the case reaffirms the idea that we are, indeed, in a moment of intense polarization and politicalization of the courts. The hypotheses of interest in the redistricting cases are X_3: Show me the Money, and X_4: Party Pressure.

When it comes to campaign finances, politicians, interest groups, and lower court judges do contribute to judicial campaigns. However, these contributions are relatively small, and rarely do these contributions come in years where the person or group is involved with a case at the Ohio Supreme Court.

Brunner and Kennedy were heralded for towing the party line, while O'Connor, the only justice who did *not* vote in favor of the political party that nominated her, was shunned and discredited. The dueling insistences of recusal only highlight this polarization further. the hypocrisy of political parties. Only *their* justices can be partisan, but the other side must recuse themselves. A reflection of an ever-growing politicization of the court, the drama surrounding the Supreme Court seems more like circus politics than ever before.

[255] Rultenberg 2022
[256] Rultenberg 2022

DISCUSSION

X_1: Public Opinion Hypotheses

Negative public opinion does not lead a Justice to change or alter their ideological stance and language, but it is relevant to their election or re-election campaign. Voters support "tough on crime" candidates with popular opinions, frequently through financial contributions or at the ballot box, and similarly withhold support from a Justice facing public or media backlash.

Table 5

Sub-Hypothesis	**Analysis**
X_1A: No deviation if no public backlash	In the cases of *Froman* and *Drain,* the public widely supported the justices' upholding of the death penalty. Thus, Justices O'Connor and Kennedy did not deviate in future opinions when the public already aligned with their decision-making
X_1B: Justice softens language or deviates from ideology following public backlash	I did not find support for this hypothesis; the only cases with major "backlash" were Brunner's decision in *DuBose* and the entirety of the *League of Women Voters* saga, depending on the political party. In no circumstance did a justice "soften" her language after harsh public response
X_1C: Voters "punish" a justice with unpopular at the ballot box and on the campaign funding trail	While there is support for the first element of this hypothesis (given that Brunner lost an election directly following an unpopular opinion in Dubose), the second prong is more complicated. Brunner had lower levels of overall campaign contributions than her competitor Kenny, however, she had almost double the number of individual contributors.

	Essentially, the public still supported Brunner with their money, but in smaller amounts.
X_1D: Voters support popular opinions at the ballot box and with financial contributions	The substantial electoral contributions for Kennedy's 2022 campaign – taking place after immense public and party support from her dissents in *DuBose* and *League* gives credence to this theory, although we cannot establish causation from this case alone.

X_2: Friends of the Court Hypotheses

Amicus briefs did not encourage a Justice to mirror their language or use their arguments in either majority opinions or dissents. Although the data does not support the existing X_2 hypotheses, the criminal justice category did shine light on a previously unconsidered aspect of amicus briefs: even if they do not influence a justice's opinion, the justice frequently paid special attention to the concerns brought up in the brief and discussed it at length in their opinion. This is also true for *Midway*, where Brunner made special note of an amicus brief's argument while disagreeing with it.

Table 6

Sub-Hypothesis	**Analysis**
X_2A: no amicus briefs, no deviation	This hypothesis – essentially a null hypothesis - is supported because the only cases without amicus briefs, *DuBose* and *Drain,* aligned closely with the Justice's existing ideological stance.

X_2B: One amicus brief will mean the majority opinion will echo the language and argument seen in the brief	Only in *League* did data show the majority decision reflecting the language in an existing amicus brief, but the political nature of the redistricting battle means that this amicus brief overlaps with the partisan hypotheses. Additionally, the X_2 hypotheses refer only nonpartisan interest groups whereas OAC was directly politically aligned. Otherwise, no cases had only one amicus brief filed where the brief also aligned with the outcome of the opinion.
X_2C: If there are two competing amicus briefs, one will be echoed in the majority and the other the dissent	In the low salience cases with two opposing amicus briefs, neither the majority nor the dissent reference the arguments, concerns, or language used in the amicus briefs. This is true in both *Midway* and *Turner*, where the amicus briefs had no discernable impact on the judicial decision.

X_3: "Show Me the Money" Hypotheses

Money is certainly a factor in the modern court environments. While individual contributions are unlikely to make a Justice "friendlier" to a specific group or individuals, higher campaign contributions on the whole are likely indicators of a won election.

Table 7

Sub-Hypothesis	**Analysis**
X_3A: No financial contribution, no deviation in opinion-making	Due to the ever-increasing financial engagements with the courts (even O'Connor's first election in 2002 raised over 1.7 million in funding),[257] we were unlikely to see a judiciary unaffected by money. However, justices appeared fairly consistent in their decision-making and rarely did interest

[257] Table 1

	groups make large contributions in a year the court heard a case pertaining to them
X_3B: Financial contributions lead to a greater "friendliness" on the bench	It is unlikely that any individual contributions had a significant impact on a justice's decision. Given that there are thousands of contributors to each candidate per election cycle, often giving less than $1,000 in donations, the research presented by this thesis does not support the idea that individual or organization contributions have any significant bearing.

X_4: Party Pressure Hypotheses

Partisan pressure from both Democrats and Republicans is present on the modern Supreme Court bench. Post-SB80, there is higher campaign turnout and closer elections. Parties are likely to maintain or increase support for a Justice whose opinion aligns with party agenda, and will likewise "punish" or distance themselves if a Justice differs.

Table 8

Sub-Hypothesis	**Analysis**
X_4A: More political involvement – based on a higher election turnout – means a Justice will align with their nominated party	This hypothesis is supported. Event considering natural fluctuations based on election year and which positions are being filled, Ohio Supreme Court elections have gained increasing numbers of voters in the post-2000 court atmosphere. O'Connor saw only 1.7 million votes in 2002 (24% of registered voters) but over 3.5 million in 2016 (45% of registered voters).[258] Kennedy, received approximately commensurate votes in 2012 (2.37 million) and 2022 (2.3 million)[259], even though 2012 was a presidential election

[258] Table 1
[259] Table 3

	year and 2022 was an "off-year" that attracts significantly fewer voters. I do not consider Brunner because she only joined the bench in 2020. Both Brunner and Kennedy are more aligned with their nominating party that O'Connor.
X_4B: More political involvement – based on a relatively closer race – means a Justice will align with their nominated party	O'Connor won her election for Chief Justice with almost 67.6% of the vote in 2010, significantly higher than the proportion of registered Republican voters at the time.[260] Brunner and Kennedy's election in 2022, however, closely mimicked the partisan breakdown of the state: 56% R to 44% D.[261] (For reference, Ohioans voted 53% for Vance (R) and 46% for Ryan (D)[262] in the 2022 Senate Race and 54% for Trump and 45% for Biden in 2020.[263] Both Brunner and Kennedy are more aligned with their nominating party that O'Connor.
X_4C: Political backing aligns with party-approved decisions from the bench	In most circumstances, justices align with the beliefs of the party that nominated them. For example, the only dissenter in *League* was O'Connor; all other justices split (presumably) along party lines. The same can be said of the criminal justices cases, with both Kennedy and O'Connor supporting a strong "rule of law" approach whereas Brunner was more concerned with defendants' rights.
X_4D: Deviations from the party line means a justice loses party support	This hypothesis is strongly supported by the backlash faced by Chief Justice O'Connor after her decisions in the *League* case. Republican-affiliated media condemned her and her fellow Republican-nominated justices stopped affiliating themselves with her, potentially fearing that they, too, could lose party support.

[260] Table 1
[261] Tables 2, 3
[262] LaRose Senate Vote Breakdown 2022
[263] LaRose Vote Breakdown 2020

FUTURE RESEARCH

The fight to understand the influencing factors on judicial ideology and decision-making is far from over. While this thesis attempts to understand the impacts of public opinion, amicus briefs, financial contributions, and partisan pressure on the modern Ohio Supreme Court bench, there are still other factors to explore and other benches worth analyzing.

For example, there exists a temporal element that has yet to be explored for states with judicial elections. It is well-supported that legislators and politicians frequently change their behavior and public image to bolster support before their elections,[264,] but less research has been done on whether this phenomenon impacts the judicial sphere as well. This could potentially explain the more subdued language in *Froman* versus the harsher critique of the defendant in *Drain,* but that is beyond the scope of this paper.

Also outside the scope of this paper, but no less worthy of deeper research and exploration, are the questions of justice, fairness, and what we expect and deserve from our courts. Is it critical to have an independent and isolated bench, or one that is accessible to the public? How do our evolving definitions of justice and equality play a role in how we select our judges? Political theorists have grappled with definitions of justice for centuries, and the debate will continue for many more. These philosophical conversations need to be further developed alongside empirical studies of the real-world impacts of the judicial branch.

[264] Conconi et. al., Jones 2021

Additionally, it is worthwhile to explore other states' benches through this qualitative, process-tracing methodology. Since many states have variation in selection, a cross-referencing approach would be beneficial to understand the impacts of different selection methods. Federal courts would benefit from this kind of analysis as well, but my research has shown that Federal courts tend to get much greater attention in the public and academic spheres than the oft-ignored state courts.

Years from now, it would be beneficial to understand how State Bill 80 (SB80) and the *League of Women Voters* cases impact Ohio in the longer-term. Will there continue to be increased spending on judicial elections and closer races, as scholars hypothesize? Since this thesis explores only the transitional period between the Ohio-Michigan method of selection and Ohio's new, fully partisan process, similar research on different periods in Ohio judicial history (as well as into the future) could help give a more contextualized understanding.

CONCLUSION

State Supreme Courts offer vital insights into judicial culture and politics, and Ohio is no exception I have illustrated how financial contributions, political party affiliation, and public or media attention can all impact judicial decision-making in noteworthy ways. Indeed, "tough-on-crime" stances are still championed by the public and Justices face serious risk if they deviate from their appointing-party's expectations. The research presented in this thesis is not only relevant to the three justices and seven main cases discussed here, but to legal scholarship as a whole. Ohio's movement from Ohio-Michigan style selection to fully-partisan elections is only

one example of a dangerous trend of politicization sweeping our court system. The support for the party pressure hypotheses contribute to scholarship that suggests that election-based selection methods leave benches more vulnerable to partisanship. As our country becomes polarized, we risk our judiciary—the independent branch supposed to temper partisan fighting—doing so as well. If public opinion, money, and politics have infiltrated Ohio’s highest court, a deep understanding of the court system is more critical than ever.

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