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Partisanship “All the Way Down” on the U.S. Supreme Court

Lee Epstein*

ABSTRACT

Just as the American public is politically polarized, so too is the U.S. Supreme Court. More than ever before, a clear alignment exists between the Justices’ partisanship and their ideological leanings (known as “partisan sorting”). Disapproval of opposing-party identifiers also appears to have intensified (“partisan antipathy”).

This Article offers evidence of both forms of polarization. It shows that partisan sorting has resulted in wide gaps in voting between Republican and Democratic appointees; and it supplies data on “us-against-them” judging in the form of increasing antipathy toward opposite-partisan presidents. Taken collectively, the data point not to law “all the way down,” as Justice Elena Kagan once asserted, but to partisanship all the way down.

Proposals to curb partisan judging often call on Congress and the President to act. Considering political gridlock in and between the elected branches, these calls seem unrealistic; they also fail to account for the politicians’ incentives to preserve a polarized Court. The implication here is that if change is to occur, it is likely to come from the actors who have the most to gain from de-politicizing the Court: the Justices themselves. Bits of evidence suggest that (some of) the Justices understand the need for self-adjustment.

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I. INTRODUCTION

The American public is politically divided in more ways than one. “Partisan sorting”—a growing alignment between partisanship and ideological leanings—is one division.¹ In the not-so-distant past, sizable fractions of Republicans were pro-choice² and equally sizeable fractions of Democrats had a favorable view of the NRA.³ No longer. Democrats have become more liberal, and Republicans more conservative.⁴

A second form of polarization is partisan antipathy (sometimes called “affective polarization”), which is the tendency to “dislike and distrust those from the other party”⁵—a sort of tribalism, us-against-them mentality. Like partisan sorting, affective polarization too has intensified, influencing Americans’ economic, social, and, of course, political decisions.⁶ Indeed, “fear and loathing across party lines”⁷ is so extreme that when confronted with two policies—say, on welfare reform—that are otherwise identical except for the party endorsing them, Americans rate their own party’s policy more favorably.⁸ Partisan loyalty, in other words, trumps policy considerations.⁹

1. *E.g.*, MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 138 (2009); Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POLITICS 542, 542–43 (2008); Amalie Jensen et al., *City Limits to Partisan Polarization in the American Public*, 9 POL. SCI. RES. & METHODS 223, 223–25 (2021).

2. *See infra* Figure 2.

3. RJ Reinhart, *Record U.S. Partisan Divide on Views of the NRA*, GALLUP (June 18, 2018), <https://news.gallup.com/poll/236315/record-partisan-divide-views-nra.aspx>. Polling data show that Republicans have always had a more favorable view of the NRA than Democrats, but the gap has grown far wider. *Id.* In 1993, 60% of Republicans and 50% of Democrats viewed the NRA favorably. *Id.* By 2018, those figures were 88% (Republicans) and 24% (Democrats). *Id.*

4. *See, e.g., id.*; *see also* Abramowitz & Saunders, *supra* note 1, at 542–43 (discussing the increase of ideological polarization among the public).

5. James N. Druckman et al., *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28, 28 (2021).

6. *See, e.g.*, Leonie Huddy et al., *Expressive Partisanship: Campaign Involvement, Political Emotion, and Partisan Identity*, 109 AM. POL. SCI. REV. 1, 3 (2015); Neil Malhotra & Gregory A. Huber, *Political Homophily in Social Relationships: Evidence from Online Dating Behavior*, 79 J. POLITICS 269, 269–70 (2017); Christopher McConnell et al., *The Economic Consequences of Partisanship in a Polarized Era*, 62 AM. J. POL. SCI. 5, 6 (2018); Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130–31 (2019) (reviewing the studies).

7. Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 690 (2015).

8. Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Polit-*

These are examples from the public and its representatives. Are political divisions also present in the courts? Judges say no. In response to a question at his confirmation proceeding about judicial independence, then-Judge Neil Gorsuch declared, “there is no such thing as a Republican judge or a Democratic judge. We just have judges in this country.”¹⁰ Equally famously, when asked whether empathy should enter into judicial decision-making, nominee Elena Kagan said “it’s law all the way down.”¹¹

But the data say otherwise.¹² The data point *not* to law but to partisanship all the way down.¹³ And that partisanship has manifested itself in both forms of political polarization: a U.S. Supreme Court that is increasingly sorted by party identity and that is marked by partisan antipathy—blue versus red teams.¹⁴

The Parts to follow provide evidence of these claims. Part II explores the increasing importance of party identity among the Justices, and how it has led to partisan sorting. Part III supplies examples of partisan antipathy. Taken together, the data depict a Court that is extremely partisan-

ical Beliefs, 85 J. PERSONALITY & SOC. PSYCHOL. 808, 811 (2003); see also Carlee Beth Hawkins & Brian A. Nosek, *Motivated Independence? Implicit Party Identity Predicts Political Judgments Among Self-Proclaimed Independents*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 1437, 1438–43 (2012); Geoffrey D. Munro et al., *Third-Party Labels Bias Evaluations of Political Platforms and Candidates*, 35 BASIC & APPLIED SOC. PSYCHOL. 151, 152–53 (2013).

9. See Cohen, *supra* note 8, at 811; Munro et al., *supra* note 8, at 152–53.

10. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 70 (2017), <https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf>.

11. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010), <https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf>.

12. See, e.g., Lee Epstein & Eric Posner, *Opinion, If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> (describing data showing that in recent years the “justices have hardly ever voted against the ideology of the president who appointed them.”).

13. See *id.* (discussing actions and data of Justices that show “[t]he court has recently entered a new era of partisan division.”).

14. Although this Article demonstrates these points with systematic data developed through the 2021 term, it is hardly the first to notice political polarization on the Supreme Court. See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 1–14* (2019) (noting and attempting to explain partisan-ideological divisions on the Court); Epstein & Posner, *supra* note 12 (“The court has recently entered a new era of partisan division.”); Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN REV. POL. SCI. 261, 262 (2019) (“The Supreme Court . . . often divides along party and ideological lines in the most prominent . . . and highly contested cases).

polarized—perhaps more so than ever in its history.

To many commentators, this state of affairs is destined to produce negative consequences (perhaps it already has).¹⁵ One set relates to the larger political environment: “[W]ith increasing polarization and the resulting gridlock, the elected branches may lack the wherewithal” to coordinate an attack against the Court or otherwise undo its decisions.¹⁶ Knowing that retaliation against even extreme judicial overreaching is unlikely seems to have enhanced the Justices’ self-confidence to the point where one scholar has characterized the Court as “imperial.”¹⁷

An activist Court is not necessarily a bad thing; it could mean that the Justices will safeguard democracy should, say, a President try to trample constitutional limits.¹⁸ On the other hand, effectively serving as a backstop against an overreaching President requires even-handed treatment of all Presidents, Democrats and Republicans alike. In its current polarized state, however, this requirement isn’t met. The Justices have instead exhibited historical levels of partisan bias, “with appointees of one party [] eager to rein in a power-grabbing president of the opposite party, but supportive of an equally encroaching president of their own party.”¹⁹ Seen in this way, the Justices seem more interested in pursuing their own partisan agendas than in preserving democracy.²⁰

15. See generally Hasen, *supra* note 14, at 273 (“It would be equally simplistic to believe that today’s politics and polarization have no effect on the job of judging, that judges are merely finding neutral principles of law in documents or old cases and applying them in an apolitical manner.”); Epstein & Posner, *supra* note 12 (“For the first time in living memory, the court will be seen by the public as a party-dominated institution, one whose votes on controversial issues are essentially determined by the party affiliation of recent presidents.”).

16. Rebecca L. Brown & Lee Epstein, *Is the US Supreme Court a Reliable Backstop for an Overreaching US President? Maybe, but Is an Overreaching (Partisan) Court Worse?*, 53 PRESIDENTIAL STUD. Q. 234, 235 (2023); Lee Epstein & Eric Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 852–53 (2018); Hasen, *supra* note 14, at 262.

17. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022).

18. See Suzanna Sherry, *A Summary of Why We Need More Judicial Activism*, 16 GREEN BAG 2D 449, 450–51 (2013) (“Judicial activism occurs any time the judiciary strikes down an action of the popular branches, whether state or federal, legislative or executive. . . . As many scholars have previously argued, judicial review is a safeguard against the tyranny of the majority, ensuring that our Constitution protects liberty as well as democracy.”).

19. See Brown & Epstein, *supra* note 16, at 242; *infra* Figure 7.

20. See Brown & Epstein, *supra* note 16, at 242 (describing how Justices acting on partisan loyalties creates a Court “of justices acting in service of its own partisan agenda with little concern for preserving democracy”).

This downside of partisan judging leads to another: when the Justices act as members of a political team rather than as judges, they can damage public regard for the Court.²¹ This was Justice Sotomayor’s general point when she wondered whether the Court can “survive the stench” created “in the public perception that the Constitution and its reading are just political acts?”²² Maybe it can’t. Two highly regarded scholars of public opinion, James Gibson and Michael Nelson, put it this way: “[T]he greatest threat to the Court’s legitimacy comes from perceived politicization: judgments that judges are little more than ‘politicians in robes.’”²³ Likewise, “[a]ssaults on judicial independence are made easier when the public comes to view the judiciary as a political body[,]” as the world witnessed in Hungary, Poland, and other illiberal democracies.²⁴ Perhaps this *partially* explains why, in 2022, public confidence in the Supreme Court fell to its lowest in at least fifty years.²⁵

Considering these drawbacks of the polarization so afflicting the Court, this Article’s conclusion gestures toward solutions. The basic idea is that elected actors probably will only aid and abet in perpetuating partisan sorting and affective polarization, and so if change is to occur, it must come from the Justices themselves.²⁶

21. See Hasen, *supra* note 14, at 270–72 (noting that a partisan court has an adverse effect on the public’s confidence in the judiciary).

22. See Transcript of Oral Argument at 15, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

23. James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592, 595 (2017).

24. Epstein & Posner, *supra* note 12.

25. *Public Confidence in the U.S. Supreme Court Is at Its Lowest Since 1973*, AP-NORC CTR. PUB. AFF. RES. (May 17, 2023), <https://apnorc.org/projects/public-confidence-in-the-u-s-supreme-court-is-at-its-lowest-since-1973/>. “Just 26% reported a great deal of confidence [in the Court] in 2021, falling to 18% in 2022—an all-time low since the [General Social Survey] began recording this data in 1973. Further, 36% had hardly any confidence in the Supreme Court—the highest recorded since the GSS began.” *Id.* The decline may reflect perceptions that the Court is increasingly partisan but the Court’s decision overruling *Roe v. Wade* also played a role in the declining confidence. *Id.*

26. See DEVINS & BAUM, *supra* note 14, at 62 (“[E]lite polarization [in Congress] in the current era has had a significant impact on the Supreme Court—and, indeed, on other courts.”).

II. PARTISAN SORTING

“The idea of America as politically polarized . . . has become a cliché.”²⁷ Fair enough, but how is America “politically polarized”? When social scientists and survey organizations use this term, they usually mean two related forms of polarization: partisan sorting and partisan antipathy (covered in Part III).

Commentators define partisan sorting in various ways.²⁸ But the basic idea is that Americans are sorted when Republicans and Democrats consistently divide along ideological lines—that is, when people with “conservative policy positions on national issues . . . identify as Republican partisans and those with more liberal policy positions . . . identify as Democratic partisans.”²⁹

Figure 1 provides a famous example. It shows liberal-conservative partisan polarization in the U.S. Senate, which amounts to the ideological distance between the Democratic and Republican parties based on roll-call votes.³⁰ Notice that the parties were quite different at the end of Reconstruction—no surprise. But thereafter, polarization began to decline, such that by the mid-20th century, the two parties were rather similar, ideologically speaking. But now look at the Senate of the 2010s and 2020s: the gap between the parties has never been wider, indicating extreme sorting.

27. NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES*, Front Cover (2d ed. 2016).

28. E.g., Petter Törnberg, *How Digital Media Drive Affective Polarization Through Partisan Sorting*, 119 PNAS 1, 1–2 (2022) (noting that “partisanship induces party-based sorting which makes individuals’ opinions so strongly correlated with their political ideology that there are, effectively, only one or two issue dimensions.”); Matthew D. Luttig, *The “Prejudiced Personality” and the Origins of Partisan Strength, Affective Polarization, and Partisan Sorting*, 39 ADVANCES POL. PSYCHOL. 239, 239 (2018) (“Democrats and Republicans are more ‘sorted,’ that is, they increasingly share the policy preferences of their party leaders.”).

29. Jensen et al., *supra* note 1, at 223.

30. See Jeff Lewis, *Polarization in Congress*, VOTEVIEW (Jan. 20, 2022), https://voteview.com/articles/party_polarization (providing data for Figure 1); see also *About the Project*, VOTEVIEW, <https://voteview.com/about> (last visited Oct. 18, 2023) (explaining details on the underlying data).

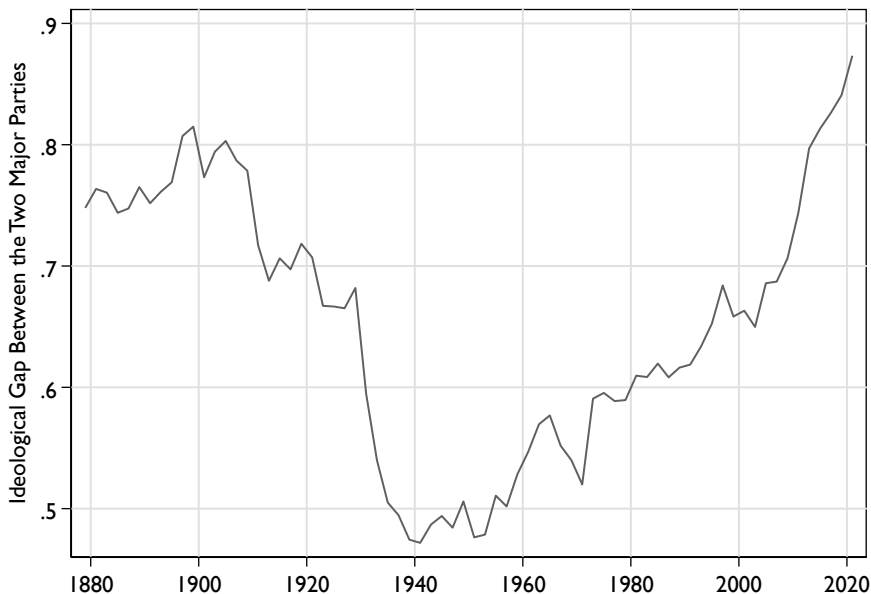


Figure 1. The ideological gap between the Democratic and Republican parties in the U.S. Senate, 46th Congress (1879) to 117th Congress (2021).

Partisan sorting of course is not limited to the people’s representatives; party identifiers in the public too are increasingly divided along ideological lines—Republicans have shifted to the right and Democrats to the left.³¹ Just consider that in 1994, only 64% of Republicans were more conservative than the median Democrat.³² Twenty years later, in 2014, the 64% figure increased to 92%.³³ The uptick is nearly identical for Democrats, from 70% in 1994 to 94% in 2014.³⁴

The general trend toward sorting plays out in issue after issue, as Figure 2 shows. To be sure, divisions have long existed between Republicans and

31. See studies cited *supra* note 1.

32. PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 10 (2014) [hereinafter POLITICAL POLARIZATION] (noting “partisan antipathy” was more prevalent in the mid-2010s than in the prior two decades).

33. *Id.*

34. *Id.*

Democrats, but in each issue, the gaps widened markedly over the last few decades.³⁵ To wit:

•*Abortion.* In 1995, 42% of Republicans considered themselves pro-choice; in 2023, that percentage reduced to 21%.³⁶ Democrats, in contrast, became increasingly more pro-choice, from 58% in 1995 to 84% in 2023.³⁷ Put another way, the percentage-point gap between party identifiers grew four times, from 16 to 63.³⁸

•*Guns.* In 2000, 78% of Democrats and 46% of Republicans wanted stricter gun control laws—for a percentage-point difference of 32%.³⁹ By 2022, the gap increased to nearly 60% (86% for the Democrats and 27% for the Republicans).⁴⁰

•*Immigration.* Just two decades ago, in 2001, neither a majority of Democrats nor Republicans believed that immigration to the United States should be decreased (37% of the Democrats and 42% of Republicans).⁴¹ By 2022, Republicans overwhelmingly wanted to decrease immigration (69%) and Democrats overwhelmingly did not (17%).⁴²

•*Science.* In 1975, 67% of Democrats and 72% of Republicans had confidence in science.⁴³ In 2021, those percentages were 79% and

35. *See id.* at 19 (showing how the ideological gap between Republicans and Democrats has widened between 1994 and 2014).

36. *See Abortion Trends by Party Identification*, GALLUP, <https://news.gallup.com/poll/246278/abortion-trends-party.aspx> (last visited Nov. 9, 2023) [hereinafter *Abortion Trends*] (noting partisan divide between Republicans and Democrats on the issue of abortion has increased in recent years); *see also* POLITICAL POLARIZATION, *supra* note 32, at 65–66.

37. *Abortion Trends*, *supra* note 36.

38. *See id.*

39. Megan Brennan, *Diminished Majority Supports Stricter Gun Law in U.S.*, GALLUP (Nov. 21, 2022), <https://news.gallup.com/poll/405260/diminished-majority-supports-stricter-gun-laws.aspx> (stating preferences for gun laws “differ sharply” amongst political parties).

40. *See id.*

41. Lydia Saad, *U.S. Immigration Views Remain Mixed and Highly Partisan*, GALLUP (Aug. 8, 2022), <https://news.gallup.com/poll/395882/immigration-views-remain-mixed-highly-partisan.aspx> (“[V]iews on immigration policy have become increasingly polarized.”).

42. *See id.*

43. Jeffrey M. Jones, *Democratic, Republican Confidence in Science Diverges*, GAULLP (July 16,

45%, respectively, for a 34% difference.⁴⁴

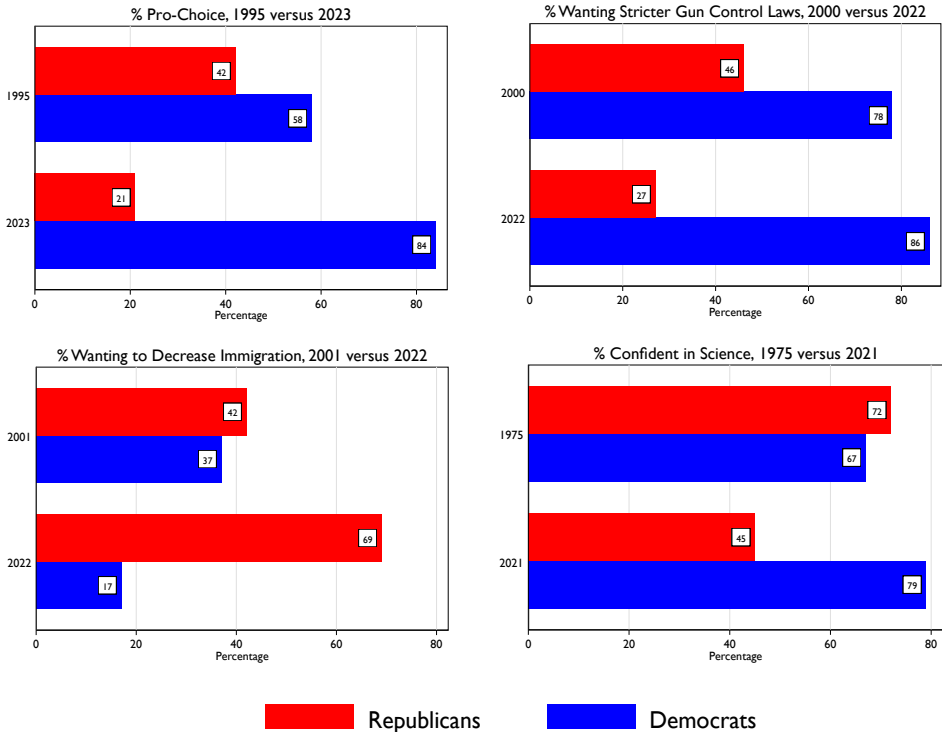


Figure 2. Partisan sorting on four issues over time. Note that in each issue, gaps have long existed between Americans who identify as Republicans versus Democrats, but those gaps have widened over time.

A. Partisanship and Partisan Sorting on the Supreme Court

The bits of data presented so far show a public and its representatives

2021), <https://news.gallup.com/poll/352397/democratic-republican-confidence-science-diverges.aspx> (analyzing partisan divide regarding confidence in science, with Republican confidence declining and Democrat confidence increasing).

44. *See id.*

sorted along partisan-ideological lines. The suggestion is that partisan identity increasingly drives voters’ and legislators’ policy choices, and those choices differ markedly by party.

What of judges? Are they above party politics, as Justices Gorsuch and Kagan maintain? Social science literature suggests that the answer is no⁴⁵—and not just for the Roberts Justices but for Justices going back to at least the Civil War era.⁴⁶ Schmidhauser, for example, reported that litigation related to the “sectional crisis” of 1837–1860 triggered a partisan response: Justices affiliating with the Whigs more often favored the North, and Democratic Justices, the South.⁴⁷ Work on more contemporary Supreme Courts has found that Justices appointed by Republican presidents, relative to Democratic appointees, are pro-business⁴⁸ and pro-religion⁴⁹ and often vote to restrict access to the ballot and invalidate campaign finance regulations.⁵⁰

Looking more generally—across all non-unanimous orally argued decisions since the 1953 term⁵¹—evidence of partisan sorting emerges: for the

45. See TERRI JENNINGS PERETTI, *PARTISAN SUPREMACY: HOW THE GOP ENLISTED COURTS TO RIG AMERICA’S ELECTION RULES* 40–47 (2020) (reviewing literature on judicial partisanship).

46. See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 6 (1999) (discussing that so many Justices have been political partisans—all too willing to “carry [their] past partisanship as a badge of honor”—is no great mystery: even to appear on the radar screen of the President and his advisors, some political activity may be necessary); HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 101–03 (5th ed. 2008); John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 *MIDWEST J. POL. SCI.* 1, 47 (1959) (noting partisan selection of Supreme Court Justices dates back to the Lincoln administration).

47. John R. Schmidhauser, *Judicial Behavior and the Sectional Crisis of 1837–1860*, 23 *J. POLITICS* 615, 625 (1961) (noting partisan division amongst “pro-Southern” and “pro-Northern” Justices).

48. See Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920–2020*, 107 *MINN. L. REV. HEADNOTES* 49, 61–63 (2022) (stating Democratic appointees after the Taft Court (1921–1929) are “far less pro-business” than Republican appointees).

49. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 *SUP. CT. REV.* 315, 326–27 (2021) (stating the “top five most pro-religion judges” are ofon the Roberts Court, are Republican appointees, and are “ideologically conservative”).

50. PERETTI, *supra* note 45, at 1–5 (discussing how “the Republican-majority Supreme Court has assisted the GOP with its election reform agenda and helped Republicans win control of the White House, Congress, and multiple state governments.”).

51. Excludes per curiams. Data developed by the author using the U.S. Supreme Court Database. See *Modern Database: 2022 Release 01*, WASH. U. L. (Nov. 2, 2022), <http://supremecourtdatabase.org/data.php> [hereinafter *Modern Database*] (providing “Case Cen-

most part, Justices appointed by Democratic presidents cast more liberal votes than Republican appointees, as Figure 3 shows. Notice that most Democrats appear at the top of the graph, while the Republicans are at the bottom. In the extreme, the difference between the most liberal voter (a Democrat, Thurgood Marshall) and the most conservative voter (a Republican, William Rehnquist) is a staggering 65 percentage points, while the mean difference is over 20 percentage points (65% liberal for the Democratic appointees and 43% for the Republicans).

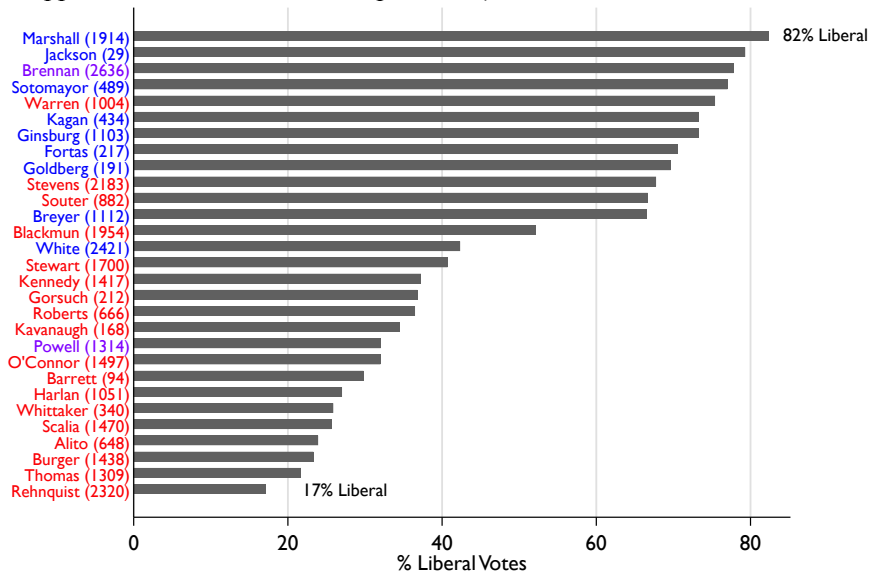


Figure 3. Percentage liberal votes cast in non-unanimous decisions by Justices appointed since the 1953 term, 1953–2022 terms. Republican appointees are labeled in red; Democratic appointees, in blue. Two Justices appointed by Republican presidents were Democrats (Brennan and Powell)—their names are in purple. The numbers in parentheses next to the Justices’ names are the number of votes cast.

In short, knowing the party of the appointing President provides *some*

tered” and “Justice Centered” data); *see also id.* (defining liberal and conservative in terms of case outcomes).

leverage in predicting the ideological direction of the Justices’ votes—but only some. Even setting aside Brennan and Powell (Democrats, but Republican appointees), partisan sorting over the last seven decades is not perfect.⁵² The Republicans Warren, Stevens, Souter, and Blackmun voted more often in the liberal direction than not; and White was more conservative than expected.⁵³ All in all, of the twenty-seven appointees (again, excluding Powell and Brennan), nearly 20% were not partisan-ideologically aligned.⁵⁴

Then again, just as the public and its representatives are increasingly sorted, so too is the Court.⁵⁵ Figure 4 below, which orders the Justices serving on the first four versions of the Roberts Court by their ideology,⁵⁶ makes this abundantly clear (Republican appointees’ names are in red; Democratic appointees are in blue). Note that during Roberts 1–3, two Republican appointees—Souter and Stevens—were on the left, not right side of the Court.⁵⁷ In other words, the Court was not sorted.⁵⁸

52. See *supra* Figure 3 (showing several of the Republican-appointed Justices cast over 50% liberal votes while one Democratic-appointed Justice cast under 50%).

53. See *supra* Figure 3 (showing Justices Warren, Stevens, Souter, and Blackmun all cast over 50% liberal votes while Justice White cast nearly 40%).

54. See *supra* Figure 3 (displaying that the aforementioned Justices comprise roughly 20% of the total twenty-seven Justices during the 1953–2022 terms).

55. See *infra* Figure 4 (showing the Court sees greater division between the Justices with each new term).

56. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 134–53 (2002) (showing details on how the Martin-Quinn scores are calculated); Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1296–1307 (2005).

57. See *infra* Figure 4.

58. See *infra* Figure 4.

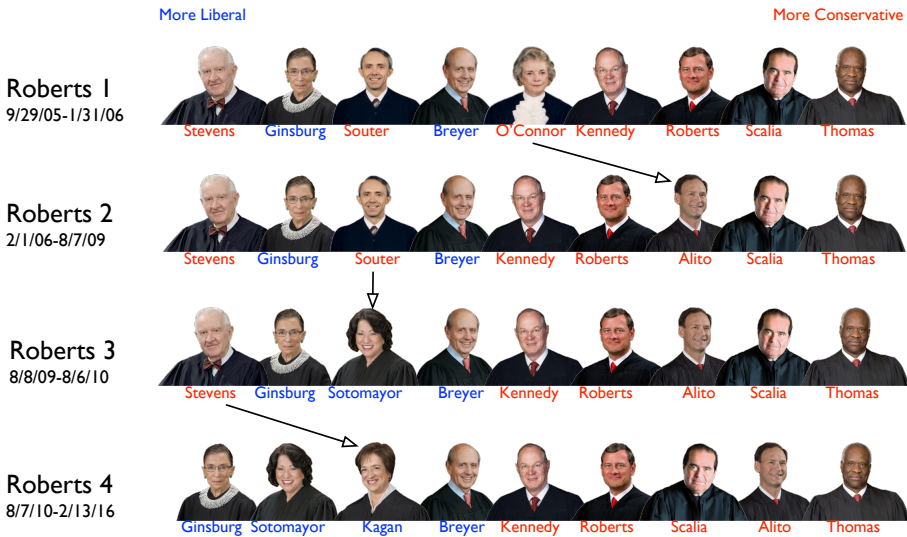


Figure 4. Justices on the first four Roberts Courts, ordered from most liberal to most conservative. Republican appointees are labeled in red; Democratic appointees in blue.

But that changed in 2010 (Roberts 4). With the appointment of Elena Kagan, the Court, for the first time in its history “had clear ideological blocs that coincided with party lines.”⁵⁹ Put another way, perfect partisan-ideological sorting emerged five years into the Roberts Court; and that sorting persists with all the Democrats on the left side of the Court, and the Republicans on the right.⁶⁰

B. *The Effect of Partisan Sorting*

That the Court is perfectly partisan sorted has, unsurprisingly, manifested itself in the Justices’ voting, just as it has for Americans and members of Congress.⁶¹ Figure 5 provides but one example. It shows the percentage of

59. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301 (2016).

60. See *infra* Figure 8.

61. See *infra* Figure 5 (demonstrating that during the Roberts Court terms, liberal votes cast by

liberal votes cast by Republican and Democratic appointees in non-unanimous orally argued decisions.⁶²

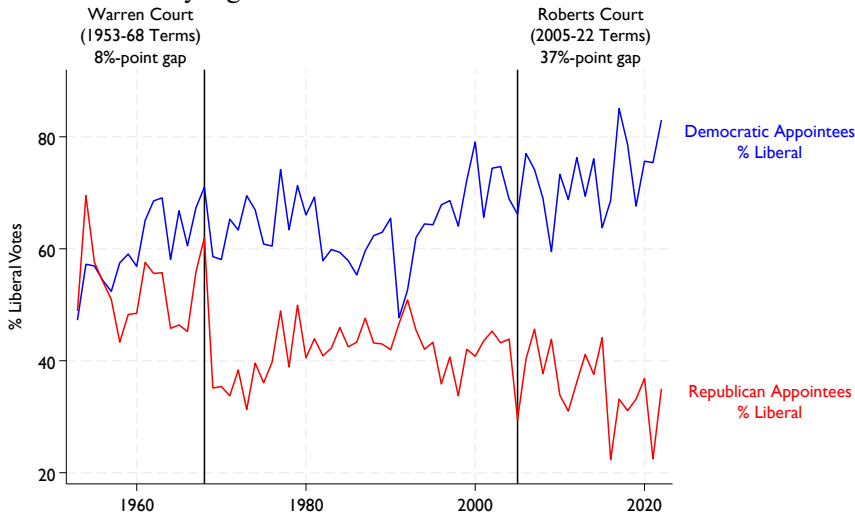


Figure 5. Percentage liberal votes in non-unanimous orally argued decisions, by Democratic and Republican appointees, 1953–2022 terms.

Notice that a gap almost always exists between the two types of appointees, with the Democrats usually casting more liberal votes. But the division has increased.⁶³ During the Warren Court years, the difference between the

Republican-appointed Justices has never surpassed 50% while Democrat-appointed Justices has never been under 50%); *Large Shares of Voters Plan To Vote a Straight Party Ticket for President, Senate and House*, PEW RES. CTR. (Oct. 21, 2020), <https://www.pewresearch.org/politics/2020/10/21/large-shares-of-voters-plan-to-vote-a-straight-party-ticket-for-president-senate-and-house/> (“In voting for both the House and Senate, partisanship prevails.”).

62. See *infra* Figure 5 (showing data excluding per curiams); *Modern Database*, *supra* note 51 (showing data used to develop Figure 5); *Decision Direction*, WASH. U. L., <http://supremecourtdatabase.org/documentation.php?var=decisionDirection> (last visited Oct. 4, 2023) (containing the definitions of what constitutes liberal and conservative for the data collection).

63. See *supra* Figure 5 (showing since the Warren Court years the percentage of liberal votes by Democratic appointees has risen while it has decreased for Republican appointees); see also Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court’s Partisan Divide Hasn’t Been This Sharp in Generations*, FIFTYTHREE (July 5, 2022, 1:08PM), <https://fiftythree.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in->

Republicans and Democrats was but eight percentage points (53% versus 61% liberal, respectively). In the Roberts years, the gap grew to nearly five times that: thirty-seven percentage points separated the Democratic and Republican Justices. (It is worth noting, though, that between the 2021 and 2022 terms, the difference decreased by 5%. Part IV returns to this point).

That is the overall picture, but the widening divide between the blue and red sides of the Court is evident in many salient areas of the law as well.⁶⁴ Take business, religion, and voting cases.⁶⁵ Although it is true that in each of these areas the Democratic appointees (since the 1953 term) always cast more liberal votes than the Republican appointees, the differences are far more pronounced on the Roberts Court, as Figure 6 shows.⁶⁶ Voting and campaign finance cases are especially noticeable—from a ten percentage-point difference between the Republicans and Democrats during the Warren Court to a sixty percentage-point difference in the Roberts years.⁶⁷ But the gaps have widened in the other areas too.⁶⁸

generations/.

64. See *infra* Figure 6 (showing increasing political polarization in voting patterns among Supreme Court Justices across various Chief Justice terms).

65. See *infra* Figure 6.

66. See *infra* Figure 6; Epstein & Gulati, *supra* note 48, at 64 (analyzing over a century of Supreme Court decisions where businesses were either the petitioner or respondent, finding that “as the Court grew more business-friendly under the Burger, Rehnquist, and Roberts Courts, gaps continued to emerge between the Democrat and Republican appointees—with the largest (thirteen percentage points) during the Roberts Court.”); Epstein & Posner, *supra* note 49, at 345 (demonstrating the increase in the difference between Republican and Democrat nominees in the percentage of Supreme Court Justice votes in favor of religion under the Roberts Court, reaching 33%); Rebecca L. Brown et al., *When It Comes to Electoral Disputes, State Justices Are Less Reliable GOP Allies Than U.S. Supreme Court Justices—and That’s the “Problem” (even a Modified Version of) the Independent State Legislature Claim Hopes to Solve*, 708 ANNALS AM. ACAD. POL. & SOC. SCI. 208 (2023) (providing data on voting).

67. See *infra* Figure 6 (showing that under the Warren Court 81% of Democratic appointee votes and 71% of Republican appointee votes were “democracy protective,” (a spread of 10%), whereas under the Roberts Court 80% of Democratic appointee votes and 20% of Republican appointee votes were “democracy protective” (a spread of 60 %)).

68. See *infra* Figure 6 (showing that, interestingly, the Roberts Democrats are more favorable toward business than Republicans of the previous three eras. Nonetheless the gap between the Democrats and Republicans on the Roberts Court is wider than ever).

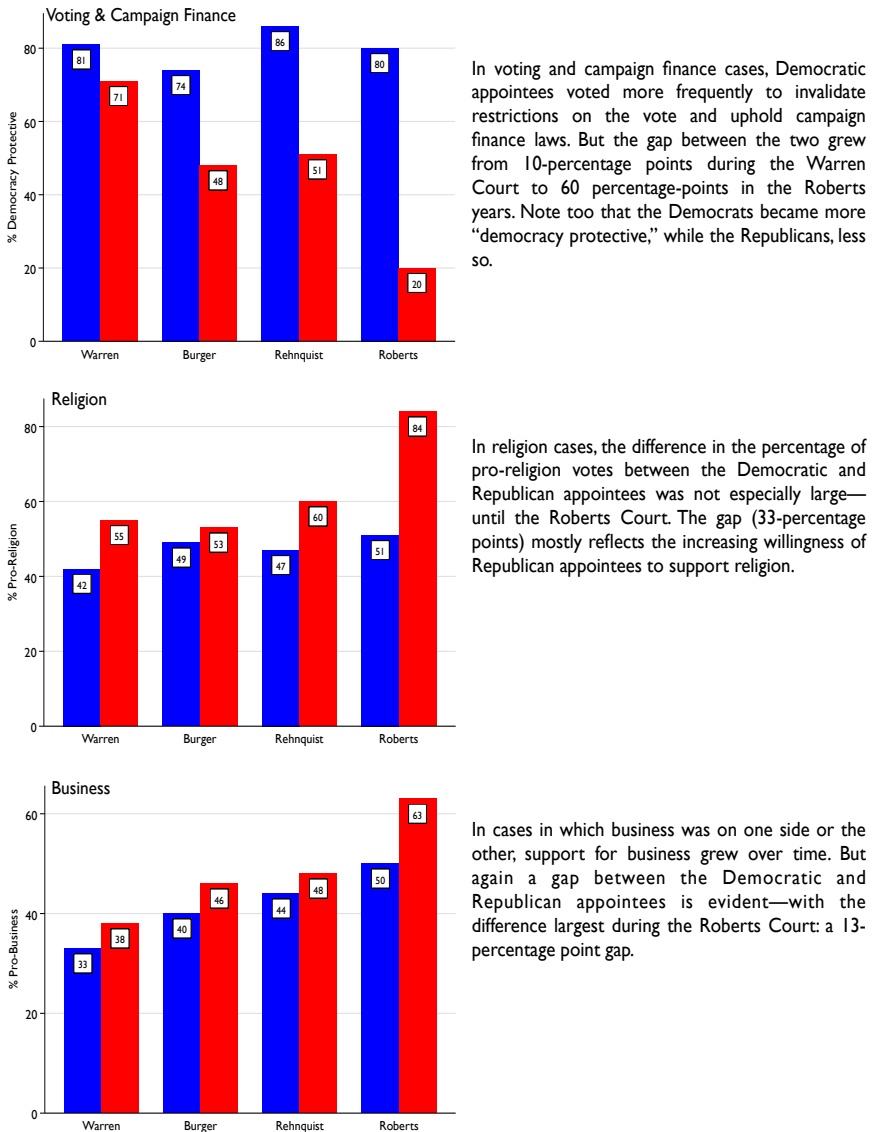


Figure 6. The growing partisan divide on the U.S. Supreme Court in three areas of the law, from the Warren to Roberts Courts, 1953–2021 terms. The panels show the percentage of (1) pro-campaign regulation and anti-voting

restriction (“democracy-protective”) votes, (2) pro-religion votes, and (3) pro-business votes.

III. PARTISAN ANTIPATHY (A.K.A. “AFFECTIVE POLARIZATION”)

Partisan sorting is not the only manifestation of our politically divided society. Scholars have told us that the United States is affectively polarized, with party identifiers *instinctively divvying* up the world into *us* (their party) against *them* (the other party)⁶⁹ and, ultimately, expressing more favorable views toward co-partisans and more negative views toward opposing partisans.⁷⁰

That was not always the case. Responding to a survey in 1994, only 17% of Republicans and 16% of Democrats had a “very unfavorable” view of the opposing party.⁷¹ By 2022, those percentages jumped to 62% and 54% respectively.⁷²

69. Lilliana Mason, “*I Disrespectfully Agree*”: The Differential Effects of Partisan Sorting on Social and Issue Polarization, 59 AM. J. POL. SCI. 128, 129 (2015). See generally, Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 SCI. AM. 96, 102 (1970) (“Socialization into ‘groupness’ is powerful and unavoidable”); Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33, 33–47 (William G. Austin and Stephen Worchel eds., 1979).

70. James N. Druckman & Matthew S. Levendusky, *What Do We Measure When We Measure Affective Polarization?*, 83 PUB. OPINION Q. 114, 115 (2019). This line of thinking on affective polarization follows from a sea of change in the literature on partisanship over the last two decades. *Id.* at 114. Once analyzed as a manifestation of other group memberships, ANGUS CAMPELL ET AL., THE AMERICAN VOTER (U. Chi. Press 1976) or as the product of rational evaluation of the parties’ positions, Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 147 (1957), attachment to a party is now conceptualized as an independent form of social identity. See, e.g., Iyengar & Westwood, *supra* note 7, at 690; DONALD GREEN ET AL., PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS 26 (2002) (discussing partisanship and political identity); Steven Greene, *Social Identification Theory and Party Identification*, 85 SOC. SCI. Q. 136, 137–38 (2004); Mason *supra* note 69, at 129 (describing contemporary thinking as “[p]artisan identity . . . as a social identity . . . means that a partisan behaves more like a sports fan than like a banker choosing an investment. Partisans feel emotionally connected to the welfare of the party; they prefer to spend time with other members of the party; and when the party is threatened, they become angry and work to help conquer the threat, even if they disagree with some of the issue positions taken by the party.”) In other words, recasting partisanship as identification with a group leads to “a host of behavioral consequences,” including in-group favoritism and out-group bias. Iyengar et al., *supra* note 6, at 130.

71. POLITICAL POLARIZATION, *supra* note 32, at 11.

72. PEW RESEARCH CTR., AS PARTISAN HOSTILITY GROWS, SIGNS OF FRUSTRATION WITH THE TWO-PARTY SYSTEM 11 (2022).

More systematic research confirms the survey data. Bias in favor of co-partisans and against opposing partisans, according to the studies, is so extreme that it exerts consequential causal effects on social choices such as, whom to date;⁷³ on economic decisions, such as whom to hire; and of course, on political behavior.⁷⁴ While “[p]artisans . . . may say that they prefer their party because of the party’s positions on issues,” the data show that “they also prefer the party simply because it is their home team.”⁷⁵ Studies referenced earlier make this quite clear: when confronted with two policies that are otherwise identical except for the party endorsing them, party identifiers rate their own party’s policy far more favorably.⁷⁶

However interesting, these studies pertain to *ordinary Americans*.⁷⁷ What of judges? Because their institution’s legitimacy may depend on appearing nonpartisan,⁷⁸ “there’s no such thing as Republican or Democratic judges” has become something of their battle cry.⁷⁹ The suggestion is that judges (unlike the rest of us) can “suppress or convert” their emotions and biases in service of impartiality—of treating all parties equally without regard to their identity.⁸⁰

It turns out, though, that experiments on hundreds of judges demonstrate that judges are just as human as *ordinary Americans*.⁸¹ Not only do judges fall prey to hindsight bias when assessing probable cause⁸² and use anchor-

73. Malhotra & Huber, *supra* note 6, at 271–73.

74. See Iyengar et al., *supra* note 6, at 130–31.

75. Mason, *supra* note 69, at 130.

76. See studies cited *supra* note 8.

77. See studies cited *supra* note 8 (providing analysis of studies performed on *ordinary Americans*, as opposed to other types of subjects such as judges).

78. Gibson & Nelson, *supra* note 23.

79. Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/politics/supreme-court-judges-partisanship.html>.

80. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 32 (2008) (declaring that “[g]ood judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.”).

81. See, e.g., Holger Spamann & Lars Klöhn, *Justice is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255, 273 (2016); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 9 (2007).

82. Jeffrey J. Rachlinski et al., *Probable Cause, Probability, and Hindsight*, 8 J. EMPIRICAL LEGAL STUD. 72, 73 (2011).

ing and other simplifying heuristics in making numerical estimates,⁸³ they also show signs of in-group bias, responding more favorably to litigants with whom they identify or sympathize.⁸⁴ For example, under experimental conditions, judges support women (over men) challenging strip-search policies, are more willing to discharge credit card debt when the debtor ran up charges helping a sick mother (rather than paying for a spring break vacation), and favor in-state (versus out-of-state) litigants in environmental disputes.⁸⁵

Suggestive as they may be, these experimental findings do not speak directly to the concern here: partisan antipathy. Do judges “instinctively divide up the world into [a partisan] in group . . . and an out group,”⁸⁶ as many Americans now seem to do?⁸⁷

There are certainly stories of us-against-them behavior by judges:⁸⁸ making snarky comments about opposing partisan politicians,⁸⁹ giving speeches that seem suited for political rallies,⁹⁰ hiring clerks (almost exclusively) from co-partisan appellate chambers,⁹¹ and on and on.

83. See, e.g., Jeffrey J. Rachlinski et al., *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695, 696 (2015).

84. Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings*, 93 TEX. L. REV. 855, 869–71 (2015).

85. *Id.* at 883–90, 893–95.

86. Iyengar et al., *supra* note 6, at 130.

87. *Id.* (“[O]rdinary Americans see the political world through a partisan prism.”).

88. See generally Simon Lazarus, *How to Rein in Partisan Supreme Court Justices*, BROOKINGS (Mar. 23, 2022), <https://www.brookings.edu/blog/fixgov/2022/03/23/how-to-rein-in-partisan-supreme-court-justices/> (encouraging Congress to strengthen ethical codes and procedural standards for Justices).

89. Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html>, (discussing Justice Ruth Bader Ginsburg (in)famously stating, “I can’t imagine what this place would be—I can’t imagine what the country would be—with Donald Trump as our president[.] . . . For the country, it could be four years. For the court, it could be—I don’t even want to contemplate that.”); see also Joan Biskupic, *A Question of Judgment*, CNN (Jan. 6, 2017, 5:36 PM), <https://www.cnn.com/2017/01/06/politics/ruth-bader-ginsburg-unprecedented/index.html> (discussing Justice Ginsburg called Trump a “faker” in an interview with CNN).

90. See Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html>.

91. Adam Liptak, *A Sign of the Court’s Polarization: Choice of Clerks*, N.Y. TIMES (Sept. 6, 2010), <https://www.nytimes.com/2010/09/07/us/politics/07clerks.html>; see also DEVINS & BAUM, *supra* note 14, at 117–18.

More systematic data too indicate partisan antipathy.⁹² Figure 7 provides some data from the Justices’ voting for the President in “high-stakes decisions”⁹³ when the President is of the same political party as the Justice and when the President is of a different political party.⁹⁴

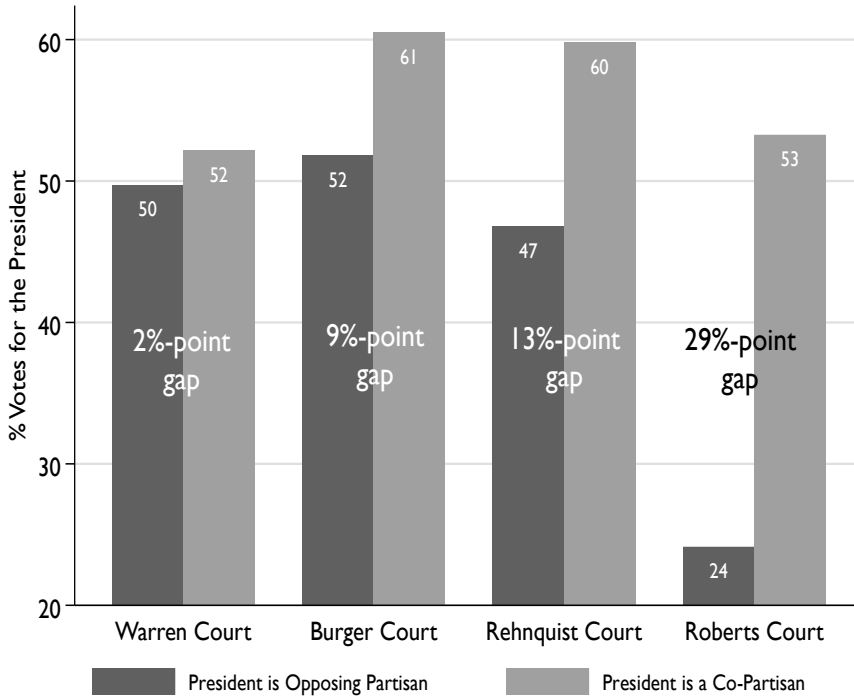


Figure 7. Percentage votes in favor of the President in high-stakes disputes, by whether the President and the Justice are of the same political party and by Chief Justice era, 1953–2021 terms.

Note that in each Court era, the gray bars are always higher than the

92. See *Partisan Antipathy: More Intense, More Personal*, PEW RES. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/>.

93. See Brown & Epstein, *supra* note 16, at 241 fig.4 (“‘High-Stakes Decisions’ are those that received front-page *New York Times* coverage on the day after they were issued or that appeared in constitutional law casebooks.”).

94. See *infra* Figure 7 (developed using dataset from Brown & Epstein, *supra* note 16, at 241).

black bars, indicating that Justices tend to favor co-partisan presidents. That is, Republican appointees more frequently vote for Republican presidents and vice versa for Democratic appointees. But again, the gap has grown far wider over time, from two percentage points during the Warren Court to twenty-nine percentage points in the Roberts era—indicating more and more antipathy toward opposite partisan presidents or, if you prefer, favoritism toward co-partisans.

Then again, *preliminary* data for the 2022–2023 term show a different pattern: no significant difference emerges between the Republican and Democratic appointees in their support for the Biden administration.⁹⁵ Whether this is the start of a new trend or a blip is hard to know because the numbers are small.

IV. DISCUSSION

All the data in this Article end with today. What about the future? Is the present the future?

Well, that is a little like asking: for how much longer will political polarization abuse American society? Unfortunately, no one answer emerges from the social science literature on *why* America is so polarized. Some point the finger at the growth of partisan media,⁹⁶ others, at wealth disparity;⁹⁷ and still others, to an effort by the two political parties to distinguish themselves by moving away from centrist policies.⁹⁸ For this reason, it is hard to come up with definitive answers and, ultimately, solutions.

95. Adam Liptak, *Along with Conservative Triumphs, Signs of New Caution at Supreme Court*, N.Y. TIMES (July 1, 2023), <https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html> (reporting on data in LEE EPSTEIN ET AL., PROVISIONAL DATA REPORT ON THE 2022 TERM 2–3 (2023), <https://epstein.usc.edu/s/2022TermDataReport.pdf>).

96. See, e.g., Matthew S. Levendusky, *Why Do Partisan Media Polarize Viewers?*, 57 AM. J. POL. SCI. 611, 611 (2013); Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2565, 2597 (2017). But see Markus Prior, *Media and Political Polarization*, 16 ANN. REV. POL. SCI. 101, 101 (2013) (arguing that there is “no firm evidence that partisan media are making ordinary Americans more partisan.”).

97. See, e.g., MCCARTY ET AL., *supra* note 27, at 71–113; Alexander J. Stewart et al., *Polarization Under Rising Inequality and Economic Decline*, 6 SCI. ADVANCES 4201, 4201 (2020).

98. See Vicky Chuqiao Yang et al., *Why Are U.S. Parties So Polarized? A “Satisficing” Dynamical Model*, 62 SIAM REV. 646, 646–47 (2020); see Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563, 564–65 (2008). But see JAMES E. CAMPBELL, *POLARIZED: MAKING SENSE OF A DIVIDED AMERICA* 148–50 (2018) (arguing that polarization is more bottom-up than top-down).

Nonetheless, at least for the federal courts this much seems clear: despite calls from commentators for elected actors to solve the problem of a polarized Court,⁹⁹ those actors are unlikely to provide relief.¹⁰⁰ In the first place, legislation (or constitutional change) that might help ease partisan polarization—for example, altering the process for appointing Justices or forcing the Court to decide more cases¹⁰¹—seems like an impossible dream considering gridlock in and between the political branches (the very same gridlock, by the way, that has emboldened the Justices).¹⁰²

Then there is the lack of a filibuster for Supreme Court nominees,¹⁰³ which gives elected actors incentive to preserve partisan sorting. To see why consider Figure 8, which places the Justices on a left (most liberal) to right (most conservative) continuum,¹⁰⁴ and suppose that a Democrat wins the next presidential election but that the party loses control of the Senate. Were one of these Justices to leave the Court, what is the incentive for Sen-

99. See PRESIDENTIAL COMM’N ON THE SUPREME COURT OF THE U.S., DRAFT FINAL REPORT 20–21 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf> (summarizing various reform proposals—most of which require some congressional actions).

100. See Brown & Epstein, *supra* note 16, at 235 (“What with increasing polarization and the resulting gridlock, the elected branches may lack the wherewithal to retaliate against even extreme judicial overreaching—likely enhancing the justices’ self-confidence.”). See generally Nolan McCarty, *Polarization, Congressional Dysfunction, and Constitutional Change*, 50 IND. L. REV. 223, 228 (2016) (explaining that the deep-rooted polarization within the American legislative bodies prevents elected officials from remedying the polarization of the Supreme Court).

101. See generally BENJAMIN ALARIE & ANDREW J. GREEN, COMMITMENT AND COOPERATION ON HIGH COURTS (2017) (conducting a comparative analysis of the highest courts in the US, UK, Canada, India, and Australia and making the intuitive point that the more political actors involved in selecting Justices, the more political (ideological/partisan) the resulting court. For this reason, some societies have moved to appointment by committees composed of, say, lawyers and judges). Likewise, scholars have shown that courts with a mandatory docket tend to be more legalistic in their decision-making. Put another way, docket control is a near prerequisite for ideological (if not partisan) voting. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 2–3 (2002); Jon Kare Skiple et al., *How Docket Control Shapes Judicial Behavior: A Comparative Analysis of the Norwegian and Danish Supreme Courts*, 9 J. L. & CTS. 111, 112 (2021); Keren Weinshall et al., *Ideological Influences on Governance and Regulation: The Comparative Case of Supreme Courts*, 12 REG. & GOVERNANCE 334, 334 (2018).

102. See McCarty, *supra* note 100, at 235–36 (discussing the growing challenges for legislators to influence the other branches of government and to unify itself in promoting policy because they are so politically and ideologically divided).

103. See Scott Bomboy, *Senate Kills Supreme Court Filibuster in Historic Moment*, NAT’L CONST. CTR. (Apr. 6, 2017), <https://constitutioncenter.org/blog/senate-kills-supreme-court-filibuster-in-historic-moment> (reporting that the Senate eliminated the filibuster for Supreme Court nominees).

104. See Martin & Quinn, *supra* note 56.

ate Republicans to confirm any Democratic nominee? Probably not much, so it is likely vacancies would pile up.

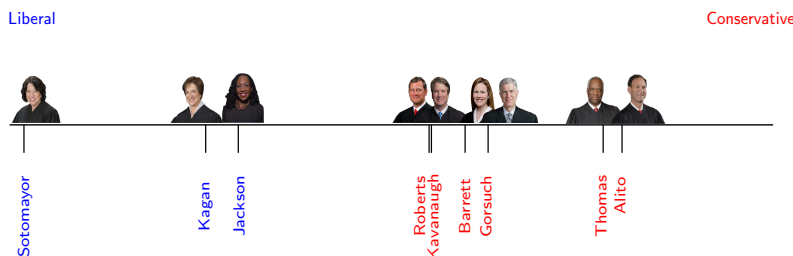


Figure 8. Justices aligned from most liberal to most conservative, showing the ideological spaces between the Justices, 2022 term. Republican appointees are labeled in red; Democratic appointees, in blue.

Now imagine that the next President and Senate are of the same political party. What is the incentive for the President to nominate a more moderate member of his party—a Byron White on the Democratic side or a Republican like Anthony Kennedy? Without the possibility of a filibuster, not much. So either way—unified or divided government—elected actors probably will only aid and abet in perpetuating partisan sorting and affective polarization.¹⁰⁵

Seen in this way, the most likely source of change is none other than the Justices themselves. Although they too could attain benefits in preserving polarization (especially Justices in the dominant political party), those may be offset by concerns about the effect of partisan judging on their institution’s independence, integrity, legitimacy, and even their own legacies.¹⁰⁶ And, if history is any indication, the Justices know how to alleviate those concerns. Sometimes they’ve steered clear of hot-button issues,¹⁰⁷ but even

105. See DEVINS & BAUM, *supra* note 14, at 62 (making a similar point).

106. See, e.g., Gibson & Nelson, *supra* note 23, at 612–14.

107. As the Court did in its 2016 term. See, e.g., Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 17, 2017),

when they cannot, the Justices have found ways to unite as a Court and not divide as members of political teams. We only have to remember that some of the Court’s great moments came in unanimous decisions: there is *Brown v. Board of Education*¹⁰⁸ of course. But also consider the Watergate Tapes case,¹⁰⁹ in which all the Justices came together to hold that President Nixon did not enjoy “an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”¹¹⁰ Even Nixon’s Justices—the Justices he appointed—voted against him.¹¹¹ The conspicuous lack of partisanship in that case was stunning and likely did much to bolster the public’s support for the Court.

The upshot is that with concerted effort, the Justices can eliminate the red and blue boxes that have so dominated the Roberts years; and, along the way, restore the confidence in their institution.¹¹²

<https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html> (“The court issued ‘a lot of . . . cautiously unanimous opinions—that is, opinions that are carefully written to decide cases on relatively narrow grounds and to steer clear of big jurisprudential tar pits’”).

108. 347 U.S. 483 (1954).

109. *United States v. Nixon*, 418 U.S. 683 (1974).

110. *Id.* at 706.

111. Warren Weaver, Jr., *Opinion by Burger: Name of President Is Left in Indictment as Co-Conspirator*, N.Y. TIMES (July 25, 1974), <https://www.nytimes.com/1974/07/25/archives/opinion-by-burger-name-of-president-is-left-in-indictment-as.html> (“Today’s ruling was made with three of President Nixon’s appointees joining in, the vote against him.”).

112. See generally Gibson & Nelson, *supra* note 23 (finding the biggest threat to the court is politicization).

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Partisanship “All the Way Down”
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