

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

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## 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 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.<sup>1</sup> In the not-so-distant past, sizable fractions of Republicans were pro-choice<sup>2</sup> and equally sizeable fractions of Democrats had a favorable view of the NRA.<sup>3</sup> No longer. Democrats have become more liberal and Republicans, more conservative.

A second form of polarization is partisan antipathy (sometimes called “affective polarization”), which is the tendency to “dislike and distrust those from the opposing party:”<sup>4</sup> 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.<sup>5</sup> Indeed, “fear and loathing across party lines”<sup>6</sup> 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.<sup>7</sup> Partisan loyalty, in other words, trumps policy considerations.

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

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

<sup>2</sup> See *infra* Figure 2.

<sup>3</sup> Polling data show that Republicans have always had a more favorable view of the NRA than Democrats, but the gap has grown far wider. *E.g.*, In 1993 60% of Republicans and 50% of Democrats viewed the NRA favorably. By 2008, those figures were 88% (Republicans) and 24% (Democrats). RJ Reinhart, *Record U.S. Partisan Divide on Views of the NRA*, GALLUP, June 18, 2018, at: <https://news.gallup.com/poll/236315/record-partisan-divide-views-nra.aspx>

<sup>4</sup> James N. Druckman, et al., *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28, 28 (January 2021).

<sup>5</sup> *E.g.*, Leonie Huddy, Lilliana Mason & Lene Aarøe, *Expressive Partisanship: Campaign Involvement, Political Emotion, and Partisan Identity*, 109 AM. POL. SCI. REV. 1 (2015); Neil Malhotra & Gregory Huber, *Political Homophily in Social Relationships: Evidence from Online Dating Behavior*, 79 J. POL. 269 (2017); Christopher McConnell, et al., *The Economic Consequences of Partisanship in a Polarized Era*, 62 AM. J. POL. SCI. 5 (2018). For a review of the studies, see Shanto Iyengar, et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129 (2019).

<sup>6</sup> Shanto Iyengar & Sean J. Westwood, *Fear and Loathing across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690 (2015).

<sup>7</sup> Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERS. & SOC. PSYCHOL. 808 (2003); Carlee Beth Hawkins & Brian A. Nosek, *Motivated Independence? Implicit Party Identity Predicts Political Judgments Among Self-Proclaimed Independents*, 38 PERS. & SOC. PSYCHOL. BULL 1437 (2012); Geoffrey D. Munro, et al., *Third-Party Labels Bias Evaluations of Political Platforms and Candidates*, 35 BASIC & APPLIED SOC. PSYCHOL. 151 (2013).

just have judges in this country.”<sup>8</sup> Equally famously, when asked whether empathy should enter into judicial decision making, nominee Elena Kagan said “[i]t’s law all the way down.”<sup>9</sup>

But the data say otherwise. The data point *not* to law but to partisanship all the way down. 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.<sup>10</sup>

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. Parts III supplies examples of partisan antipathy. Taken together, the data depict a Court that is extremely partisan-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). One set relates to the larger political environment: With 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.<sup>11</sup> 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.”<sup>12</sup>

An activist Court isn’t necessarily a bad thing; it could mean that the justices will safeguard democracy should, say, a president try to trample constitutional limits. 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

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<sup>8</sup> Confirmation Hearing on the Nomination of Hon. Neil M Gorsuch to be an Associate Justice of the Supreme Court of the United States, at 70. Transcript available at: <https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf>

<sup>9</sup> Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, at 103. Transcript available at: <https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf>

<sup>10</sup> Although this Article demonstrates these points with systematic data developed through the 2021 term, it is hardly the first to point out political polarization on the Supreme Court. See, e.g., NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019) (noting and attempting to explain partisan-ideological divisions on the Court); Lee Epstein & Eric Posner, *If the Supreme Court is Nakedly Political, Can It Be Just?*, N.Y. TIMES, July 9, 2018 (“The court has recently entered a new era of partisan division.”); Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN REV. POL. SCI. 261, 261 (2019) (“The Supreme Court... often divides along party and ideological lines in the most prominent...cases”).

<sup>11</sup> Rebecca L. Brown & Lee Epstein, *Is the U.S. Supreme Court a Reliable Backstop for an Overreaching U.S. President? Maybe, but is an Overreaching (Partisan) Court Worse?*, 53 PRESID. STUD. Q., (2023) 255; Lee Epstein & Eric Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829 (2018); Hasen, *supra* note 10.

<sup>12</sup> Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97 (2022).

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.<sup>13</sup> Seen in this way, the justices seem less interested in preserving democracy than in pursuing their own partisan agendas.

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. 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.”<sup>14</sup> Maybe it can’t. Two highly regarded scholars of public opinion, James Gibson and Michael Nelson, put it this way: “the greatest threat to the Court’s legitimacy comes from perceived politicization: judgments that judges are little more than “politicians in robes’.”<sup>15</sup> 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.<sup>16</sup> Perhaps this *partially* explains why, in 2022, public confidence in the Supreme Court fell to its lowest in at least 50 years.<sup>17</sup>

Considering these drawbacks of the polarization so afflicting the Court, 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.<sup>18</sup>

## II. PARTISAN SORTING

“The idea of America as politically polarized...has become a cliché.”<sup>19</sup> Fair enough, but how is America “politically polarized”? When social scientists and

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<sup>13</sup> See Brown and Epstein, *supra* note 11; and *infra* Figure 7.

<sup>14</sup> Justice Sotomayor issued this warning during oral arguments in *Dobbs v. Jackson Women’s Health Organization*, 19-1392, at 15. The transcript is at: [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/19-1392\\_bq7d.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_bq7d.pdf)

<sup>15</sup> 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).

<sup>16</sup> Epstein & Posner, *supra* note 10.

<sup>17</sup> The General Social Survey reports that “Just 26% reported a great deal of confidence [in the Court] in 2021, falling to 18% in 2022 — an all-time low since the GSS began recording this data in 1973. Further, 36% had hardly any confidence in the Supreme Court — the highest recorded since the GSS began.” *Public Confidence in the U.S. Supreme Court is at Its Lowest Since 1973*, May 17, 2023, at: <https://apnorc.org/projects/public-confidence-in-the-u-s-supreme-court-is-at-its-lowest-since-1973/>

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. *Ibid.*

<sup>18</sup> Devins and Baum, *supra* note 10, make a similar point, at 147-150.

<sup>19</sup> NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES*, 2<sup>nd</sup> ed. (2016), Book Description, at: <https://mitpress.mit.edu/9780262528627/polarized-america/>

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.<sup>20</sup> 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.”<sup>21</sup>

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.<sup>22</sup> 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-20<sup>th</sup> century, the two parties were rather similar ideologically speaking. But now look at the Senate of the 2020s: the gap between the parties has never been wider, indicating extreme sorting.

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<sup>20</sup> E.g., Petter\_Törnberg, *How Digital Media Drive Affective Polarization Through Partisan Sorting*, 119 PNAS e2207159119 (“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 POL. PSYCHOL. 239 (2018) (“Democrats and Republicans are more ‘sorted,’ that is, they increasingly share the policy preferences of their party leaders”).

<sup>21</sup> Jensen, et al., *supra* note 1.

<sup>22</sup> Data come from Jeff Lewis, *Polarization in Congress* (January 20, 2022), at: [https://voteview.com/articles/party\\_polarization](https://voteview.com/articles/party_polarization). For details on the underlying data, visit <https://voteview.com/about>.

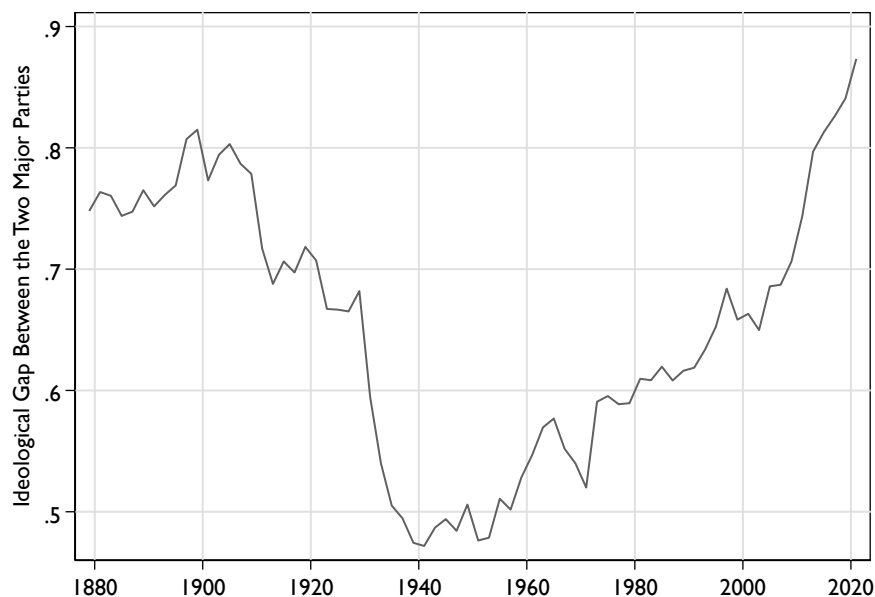


Figure 1. The ideological gap between the Democratic and Republican parties in the U.S. Senate, 46<sup>th</sup> Congress (1879) to 117<sup>th</sup> Congress (2021).

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.<sup>23</sup> Just consider that in 1994, 64% of Republicans were more conservative than the median Democrat. Twenty years later, in 2014, the 64% figured increased to 92%. The uptick is nearly identical for Democrats, from 70% in 1994 to 94% in 2014.<sup>24</sup>

The general trend towards sorting plays out in issue after issue, as Figure 2 shows. To be sure, divisions have long existed between Republicans and Democrats but in each issue the gaps widened markedly over the last few decades. To wit:

- *Abortion*. In 1996, 42% of Republicans considered themselves pro-choice; in 2022, that percentage reduced to 23. Democrats, in contrast, became increasingly more pro-choice, from 58% in 1996 to 88% in 2022. Put another way, the percentage-point gap between party identifiers grew four times, from 16 to 65.<sup>25</sup>
- *Guns*. In 2000, 78% of Democrats and 46% of Republicans wanted stricter gun control laws—for a percentage-point difference of 32. By 2022, the gap increased

<sup>23</sup> See studies cited in *supra* note 1.

<sup>24</sup> Pew Research Center, *Political Polarization in the American Public*, June 12, 2014 at: <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/>

<sup>25</sup>Gallup, *Abortion Trends by Party Identification*, at: <https://news.gallup.com/poll/246278/abortion-trends-party.aspx>

to nearly 60 percentage points (86% for the Democrats and 27 percent for the Republicans).<sup>26</sup>

• *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). By 2022, Republicans overwhelmingly wanted to decrease immigration (69%) and Democrats overwhelmingly did not (17%).<sup>27</sup>

• *Science.* In 1975 67% of Democrats and 72% of Republicans had confidence in science. In 2021 those percentages were 79% and 45%, for a 34 percentage-point difference.<sup>28</sup>

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<sup>26</sup> Megan Brennan, *Diminished Majority Supports Stricter Gun Law in U.S.*, GALLUP (November 21, 2022), at: <https://news.gallup.com/poll/405260/diminished-majority-supports-stricter-gun-laws.aspx>

<sup>27</sup> Lydia Saad, *U.S. Immigration Views Remain Mixed and Highly Partisan*, GALLUP (August 8, 2022) at: <https://news.gallup.com/poll/395882/immigration-views-remain-mixed-highly-partisan.aspx>

<sup>28</sup> Jeffrey M. Jones, *Democratic, Republican Confidence in Science Diverges*, GAULLP (July 16, 2021), at: <https://news.gallup.com/poll/352397/democratic-republican-confidence-science-diverges.aspx>

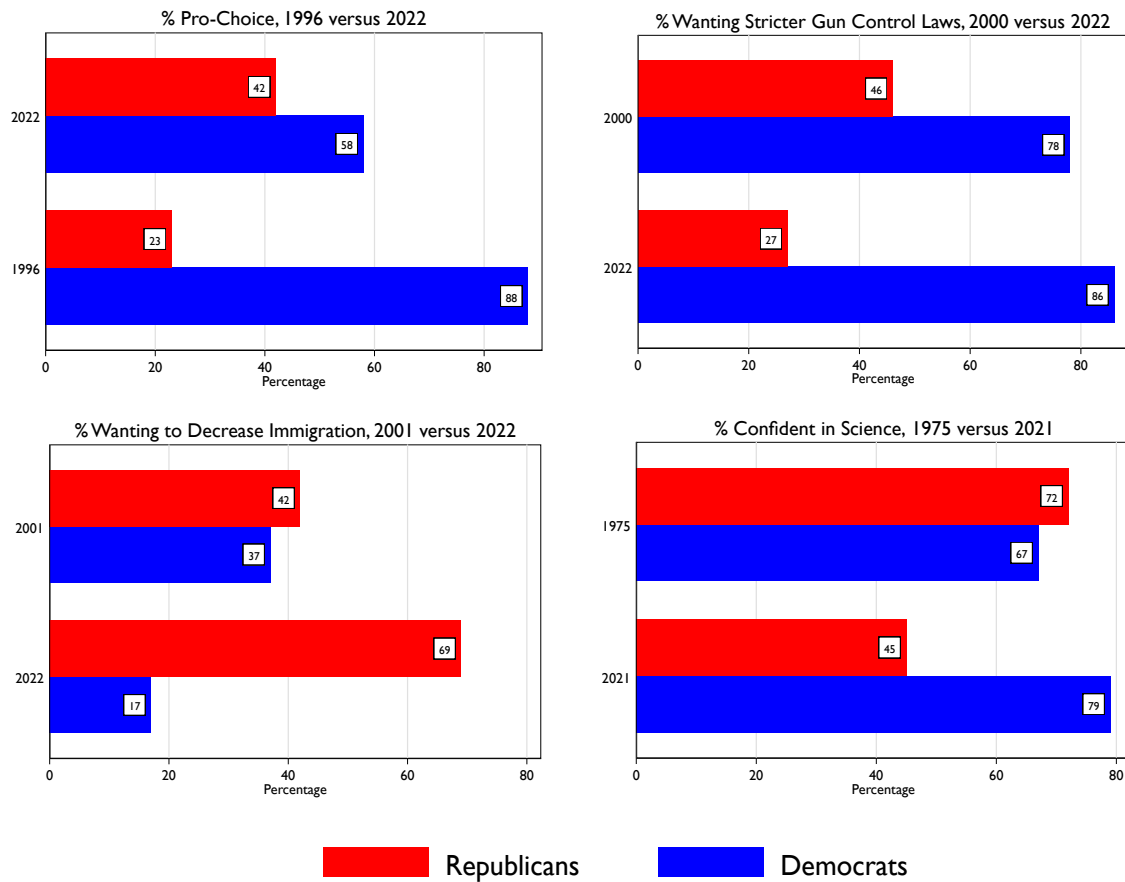


Figure 2. Partisan sorting on four issues over time. Note that in each issue, gaps have long existed between Americans who identify as Republicans v. Democrats, but those gaps have widened over time.

### A. Partisanship and Partisan Sorting on the Supreme Court

The bits of data presented so far show a public and its representatives 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 no<sup>29</sup>—and not just for

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<sup>29</sup> For a review of literature partisanship and judging more generally, see TERRI JENNINGS PERETTI, *PARTISAN SUPREMACY: HOW THE GOP ENLISTED COURTS TO RIG AMERICA'S ELECTION RULES* 40-57 (2020).



the Roberts justices but for justices going at least back to the Civil War era.<sup>30</sup> 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.<sup>31</sup> Work on more contemporary Courts has found that justices appointed by Republican presidents, relative to Democratic appointees, are pro-business<sup>32</sup> and pro-religion;<sup>33</sup> and often vote to restrict access to the ballot and invalidate campaign finance regulations.<sup>34</sup>

Looking more generally—across all non-unanimous orally-argued decisions since the 1953 term<sup>35</sup>—evidence of partisan sorting emerges: For the 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).

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<sup>30</sup> That so many justices have been political partisans—all too willing to “wear[] their 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. DAVID ALASTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT JUSTICES* (1999). See also HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* (2008); John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 *MIDWEST J. POL. SCI.* 1 (1959).

<sup>31</sup> John R. Schmidhauser, *Judicial Behavior and the Sectional Crisis of 1837-1860*, 23 *J. POL.* 615 (1961).

<sup>32</sup> Lee Epstein & Mitu Gulati, *Essay: A Century of Business in the Supreme Court, 1920-2020*, 107 *MINN. L. REV. HEADNOTES* 49 (2022).

<sup>33</sup> Lee Epstein & Eric Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 *SUP. CT. REV.*, 315 (2021).

<sup>34</sup> Peretti, *supra* note 29.

<sup>35</sup> Excludes per curiams. Data developed by the author using the U.S. Supreme Court Database, at: <http://supremecourtdatabase.org>. Definitions of liberal and conservative, are at: <http://supremecourtdatabase.org/documentation.php?var=decisionDirection>

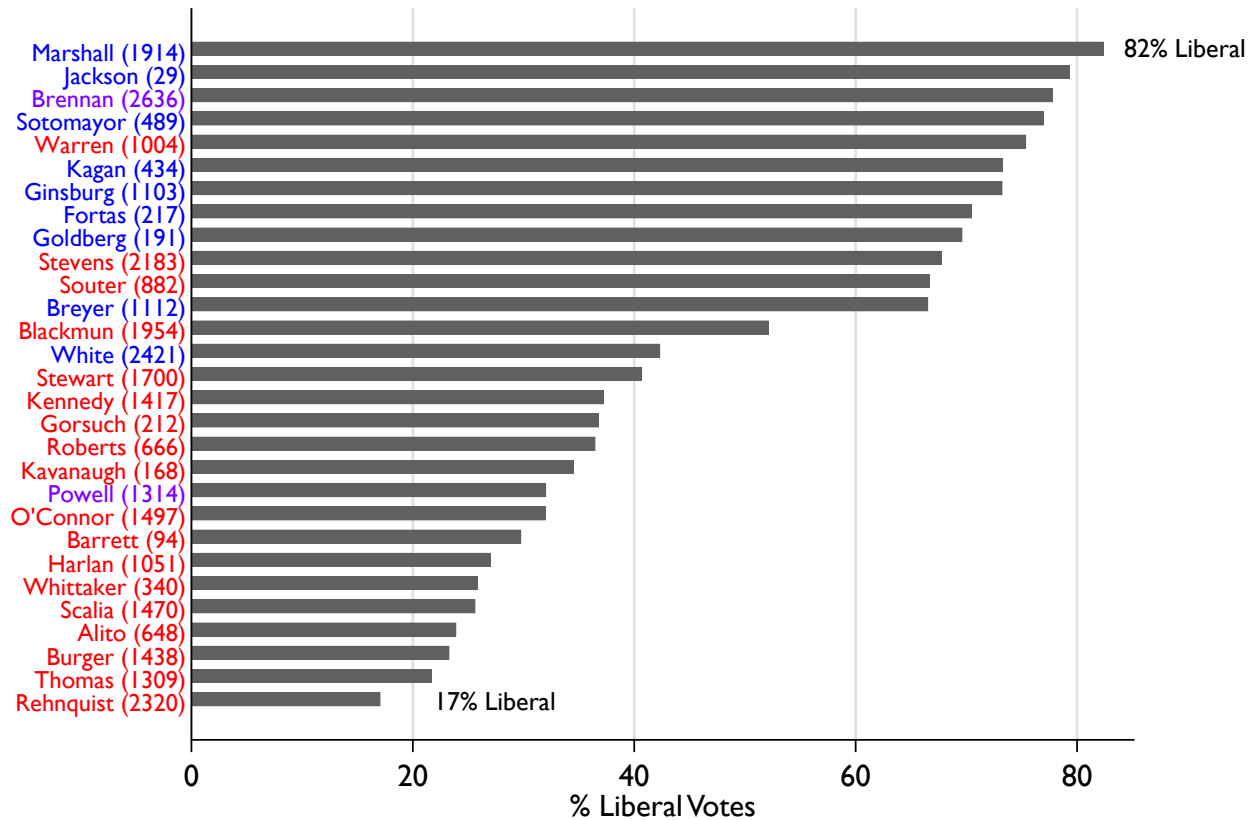


Figure 3. Percentage liberal votes cast in non-unanimous decisions by justices appointed since the 1953 term, 1953-2022 terms. Republican justices are labeled in red; Democratic appointees, in blue. Two justices appointed by Republican presidents were Democrats (Brennan and Powell). Their names are in 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* 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 isn’t perfect. The Republicans Warren, Stevens, Souter, and Blackmun voted more often in the liberal direction than not; and White was more conservative than expected. All in all, of the 27 appointees (again excluding Powell and Brennan), nearly 20% were not partisan-ideologically aligned.

But—and this is a big but—just as the public and its representatives are increasing sorted, so too is the Court. Figure 4 below, which orders the justices serving on the first four versions of the Roberts Court by their ideology,<sup>36</sup> makes this

<sup>36</sup> Ideological alignments are based on the justices’ ideological (Martin-Quinn) scores, available at: <https://mqscores.lsa.umich.edu/measures.php>. For details on how the scores are calculated, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo*

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. In other words, the Court was not sorted.

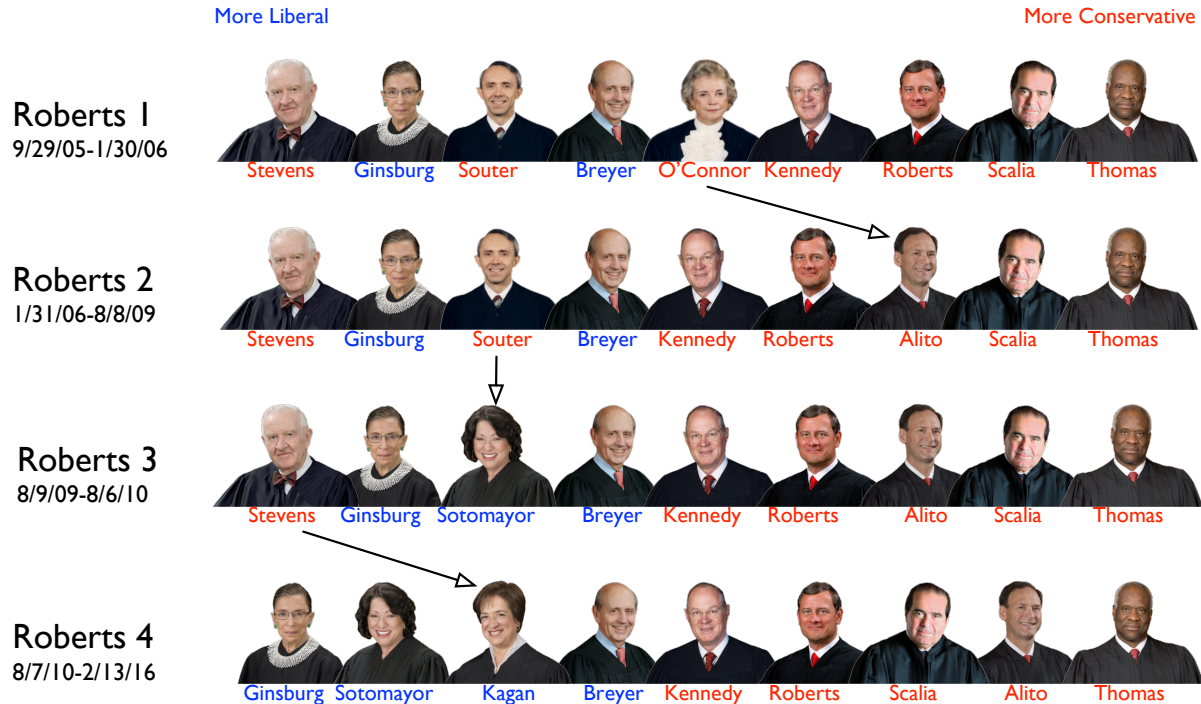


Figure 4. Justices on the first four Roberts Courts, ordered from most liberal to most conservative. Republican appointees are labeled in red; Democratic appointees, in blue.

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.”<sup>37</sup> 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.<sup>38</sup>

for the U.S. Supreme Court, 1953-1999, 10 POL. ANALYSIS 134 (2002); Andrew D., Martin, Kevin Quinn, & Lee Epstein, *The Median Justice on the U.S. Supreme Court*, 83 N.C. L. REV. 1275 (2005).

<sup>37</sup> Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2017 SUP. CT. REV. 301, 301 (2017).

<sup>38</sup> See *infra* Figure 8.

## 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. Figure 5 provides but one example. It shows the percentage of liberal votes cast by Republican and Democratic appointees in non-unanimous orally-argued decisions.<sup>39</sup>

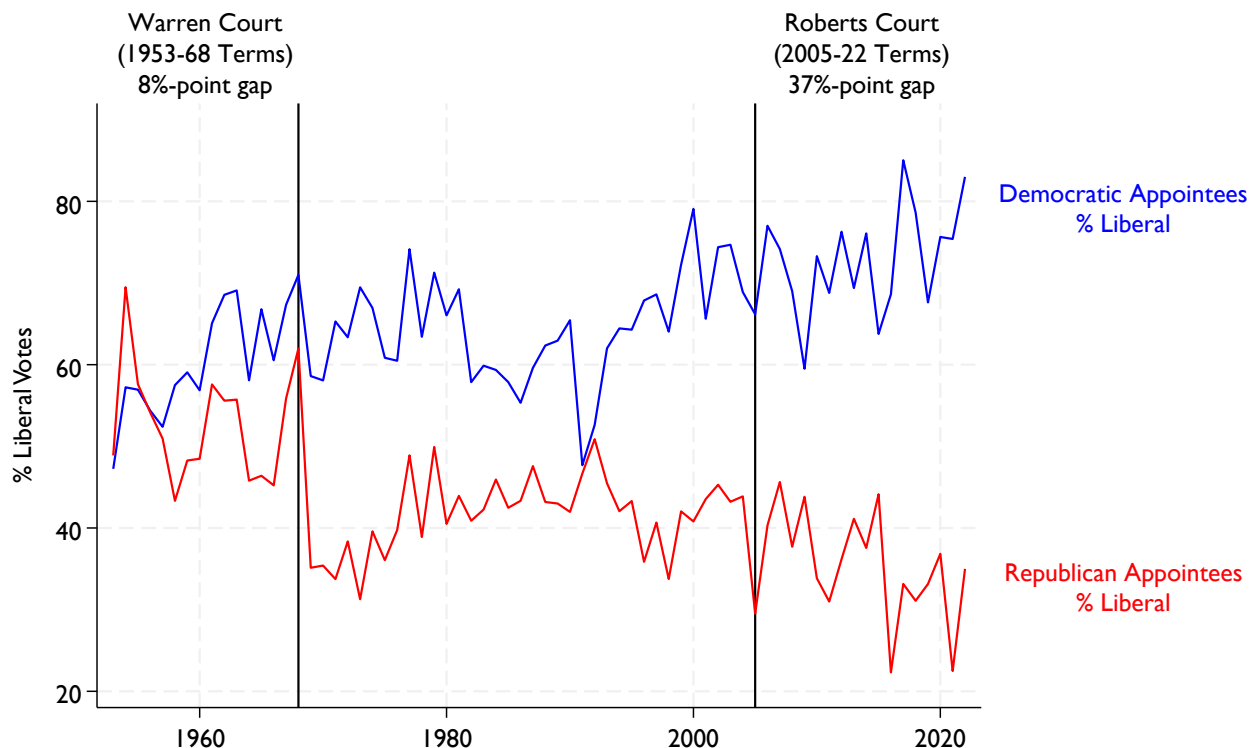


Figure 5. Percentage liberal votes in non-unanimous orally-argued decisions, by Democratic and Republican appointees, 1953-2022 terms.

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. During the Warren Court years, the difference between the Republicans and Democrats is but 8 percentage points (53% v. 61% liberal, respectively). In the Roberts years, the gap grew to nearly 5 times that: 37-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-percentage points. Part IV returns to this point.)

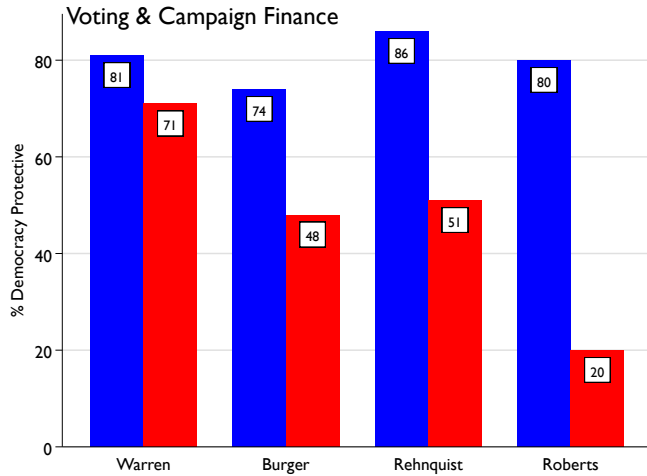
<sup>39</sup> Excludes per curiams. Data developed by the author using the U.S. Supreme Court Database, at: <http://supremecourtdatabase.org>. Definitions of liberal and conservative, are at: <http://supremecourtdatabase.org/documentation.php?var=decisionDirection>

That’s 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. Take business, religion, and voting cases. 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.<sup>40</sup> Voting and campaign finance cases are especially noticeable—from a 10 percentage-point difference between the Republicans and Democrats during the Warren Court to a 60-percentage point difference in the Roberts years. But the gaps have widened in the other areas too.<sup>41</sup>

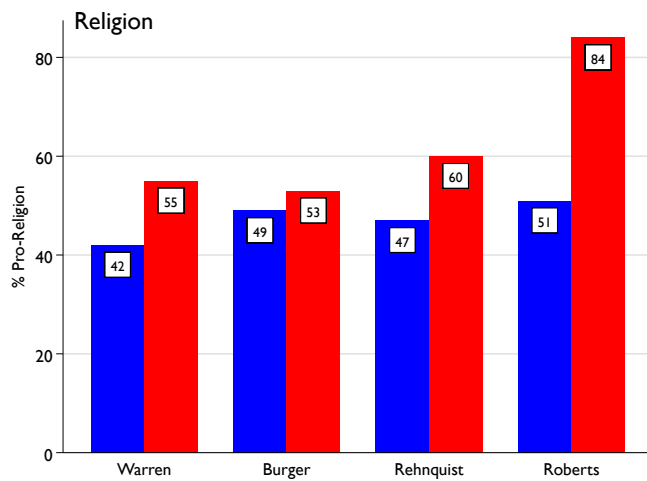
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<sup>40</sup> Data on business are from Epstein & Gulati, *supra* note 32; data on religion are updated from Epstein & Posner, *supra* note 33; data on voting are from Rebecca L. Brown, Lee Epstein, & Michael J. Nelson, *When It Comes to Electoral Disputes, State Justices are Less Reliable GOP Allies than U.S. Supreme Court Justices—and That’s the “Problem” the Independent State Legislature Claim Hopes to Solve* (May 3, 2023) (on file with the authors).

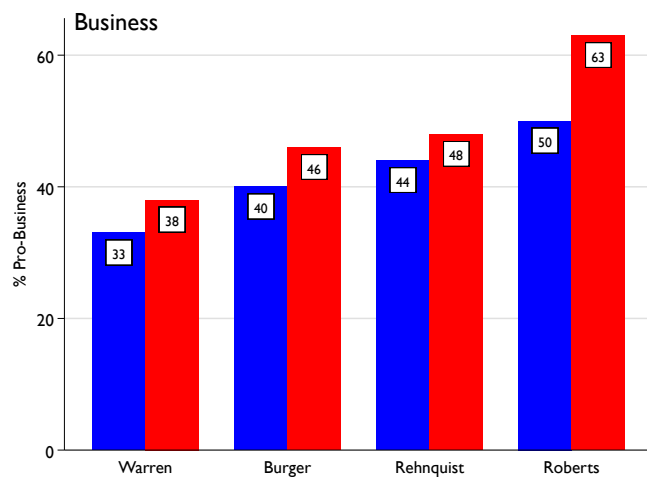
<sup>41</sup> Business cases are interesting. The Roberts Democrats are more favorable toward business than Republicans of the previous three eras. Nonetheless the gap between the Democrats and Republicans on the Roberts Court are wider than ever.



In voting and campaign finance cases, Democratic appointees voted more frequently to invalidate restrictions on the vote and uphold campaign finance laws. But the gap between the two grew from 10-percentage points during the Warren Court to 60 percentage-points in the Roberts years. Note too that the Democrats became more “democracy protective,” while the Republicans, less so.



In religion cases, the difference in the percentage of pro-religion votes between the Democratic and Republican appointees was not especially large—until the Roberts Court. The gap (33-percentage points) mostly reflects the increasing willingness of Republican appointees to support religion.



In cases in which business was on one side or the other, support for business grew over time. But again a gap between the Democratic and Republican appointees is evident—with the difference largest during the Roberts Court: a 13-percentage point gap.

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 (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 isn’t 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)<sup>42</sup> and, ultimately, expressing more favorable views toward co-partisans and more negative views toward opposing partisans.<sup>43</sup>

That was not always the case. Responding to a survey in 1994, only 21% of Republicans and 17% of Democrats had a “very unfavorable view” of the opposing party. By 2022, those percentages jumped to 62 and 54 respectively.<sup>44</sup>

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;<sup>45</sup> on economic decisions, such as whom to hire; and of course, on political behavior.<sup>46</sup> While “[p]artisans may say that they prefer their party because of the party's positions on

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<sup>42</sup> 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 (1970); Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*. In *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS*, ed. William G. Austin and Stephen Worchel (1979), 33–47.

<sup>43</sup> James N. Druckman & Matthew S. Levendusky, *What Do We Measure When We Measure Affective Polarization?* 83 PUB. OP. Q. 114 (2019). This line of thinking on affective polarization follows from a sea-change in the literature on partisanship over the last two decades. Once analyzed as a manifestation of other group memberships (Angus Campbell, et al., *THE AMERICAN VOTER* [1960]) 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 [1957]), attachment to a party is now conceptualized as an independent form of social identity. See, e.g., Iyengar & Westwood, *supra* note 6; DONALD GREEN, BRADLEY PALMQUIST, & ERIC SCHICKLER, *PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS* (2002); Steven Greene, *Social Identification Theory and Party Identification*, 85 SOC. SCI. Q. 136 (2004).

Mason *supra* note 42, at 129, aptly describes contemporary thinking:

Partisan 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 5, at 130.

<sup>44</sup> Pew Research Center, *As Partisan Hostility Grows, Signs of Frustration with the Two-Party System* (August 9, 2022)

at: <https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/>

<sup>45</sup> Gregory A. Huber & Neil Malhotra, *Political Homophily in Social Relationships: Evidence from Online Dating Behavior*, 79 J. POL. 269 (2017).

<sup>46</sup> For a review, see Iyengar, et al., *supra* note 5.

issues, the data show that “they also prefer the party simply because it is their home team.”<sup>47</sup> 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.<sup>48</sup>

However interesting, these studies pertain to “ordinary Americans.” What of judges? Because their institution’s legitimacy may depend on appearing non-partisan,<sup>49</sup> “there’s no such thing as Republican or Democratic judges” has become something of their battle cry.<sup>50</sup> 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.<sup>51</sup>

It turns out, though, that that experiments on thousands of judges demonstrate that the judges are just as human as “ordinary” Americans.<sup>52</sup> Not only do the judges fall prey to hindsight bias when assessing probable cause<sup>53</sup> and use anchoring and other simplifying heuristics in making numerical estimates,<sup>54</sup> they also show signs of in-group bias, responding more favorably to litigants with whom they identify or sympathize.<sup>55</sup> 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.<sup>56</sup>

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 out group,”<sup>57</sup> as many Americans now seem to do?

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<sup>47</sup> Mason, *supra* note 42, at 130.

<sup>48</sup> See studies cited in *supra* note 7.

<sup>49</sup> Gibson & Nelson, *supra* note 15.

<sup>50</sup> Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View*, N.Y. TIMES, September 16, 2019.

<sup>51</sup> *E.g.*, Justice Antonin Scalia and his co-author declared, “Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.” ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).

<sup>52</sup> *E.g.*, Holger Spamann & Lars Klohn, *Justice is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255 (2016); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007)

<sup>53</sup> Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Probability, Probable Cause, and the Hindsight Bias*, 8 J. EMPIRICAL LEGAL STUD. 72 (2011).

<sup>54</sup> *E.g.*, Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 INDIANA L. J. 695 (2015).

<sup>55</sup> Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings*, 93 TEXAS L. REV. 855 (2015).

<sup>56</sup> *Ibid.*

<sup>57</sup> Iyengar, et al., *supra* note 5.



There are certainly stories of us-against-them behavior by judges:<sup>58</sup> making snarky comments about opposing partisan politicians,<sup>59</sup> giving speeches that seem suited for political rallies,<sup>60</sup> hiring clerks (almost exclusively) from co-partisan appellate chambers,<sup>61</sup> and on and on.

More systematic data too indicate partisan antipathy. Figure 7 provides just a bit from the justices' voting for the president in high-stakes disputes<sup>62</sup> when the president is of the same political party as the justice and when the president is of a different political party.<sup>63</sup>

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<sup>58</sup> See generally Simon Lazarus, *How to Rein in Partisan Supreme Court Justices*, BROOKINGS, March 23, 2022, at: <https://www.brookings.edu/blog/fixgov/2022/03/23/how-to-rein-in-partisan-supreme-court-justices/>

<sup>59</sup> (In)famously, Justice Ruth Bader Ginsburg saying, “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.” Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES, July 10, 2016. Ginsburg also called Trump “a faker” in an interview with cnn. Joan Biskupic, *A Question of Judgment*, CNN, January 6, 2017.

<sup>60</sup> See Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES, November 13, 2020.

<sup>61</sup> Adam Liptak, *A Sign of the Court’s Polarization: Choice of Clerks*, N.Y. TIMES, September 6, 2010. See also Devins and Baum, *supra* note 10, at 131.

<sup>62</sup> High-stakes decisions are those that were reported on the front page of the *New York Times* on the day after they were issued or that were mentioned in constitutional law casebooks as implicating executive power. For more details see, Brown & Epstein, *supra* note 11.

<sup>63</sup> Data developed by the author from a dataset used in Brown & Epstein, *supra* note 11.

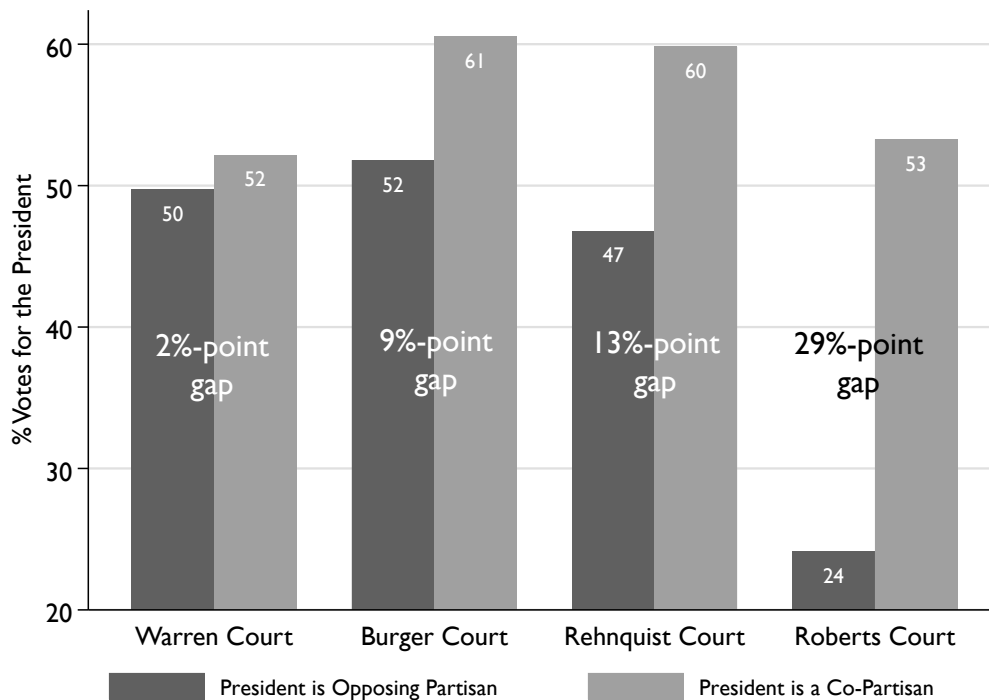


Figure 7. Percentage votes in favor of the president in high-stakes disputes, by whether the president and the justice are of the same political party and by Chief Justice era, 1953-2021 terms.

Note that in each Court era the gray bars are always higher than the 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 2-percentage points during the Warren Court to 29 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 2022-23 term show a different pattern: no significant difference emerges between the Republican and Democratic appointees in their support for the Biden administration. Whether this is the start of a new trend or a blip it is hard to know because the numbers are small. Still, Part IV, immediately below, returns to this point.)

#### IV. DISCUSSION

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

Well, that’s 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;<sup>64</sup> others, at wealth disparity;<sup>65</sup> and still others, to an effort by the two political parties to distinguish themselves by moving away from centrist policies.<sup>66</sup> For this reason, it’s hard to come up with definitive answers and, ultimately, solutions.

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,<sup>67</sup> those actors are unlikely to provide relief. 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 cases<sup>68</sup>—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).

Then there’s the lack of a filibuster for Supreme Court nominees, 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)

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<sup>64</sup> E.g., Matthew S. Levendusky, *Why Do Partisan Media Polarize Viewers?*, 57 AM. J. POL. SCI. 611 (2013); Gregory J. Martin, & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM ECON. REV. 2565 (2017). For a more skeptical view, see Markus Prior, *Media and Political Polarization*, 16 ANNU. REV. POLIT. SCI. 101 (2013).

<sup>65</sup> E.g., McCarty, et al., *supra* note 19 ; Alexander J. Stewart, et al., *Polarization Under Rising Inequality and Economic Decline*, 6 SCI, ADVANCES 4201(2020).

<sup>66</sup> Vicky Chuqiao Yang, et al., *Why Are U.S. Parties So Polarized? A “Satisficing” Dynamical Model*, 62 SIAM REV. 646 (2020); Morris P. Fiorina and Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANNU. REV. POLIT. SCI. 563 (2008). But see James E. Campbell, *POLARIZED: MAKING SENSE OF A DIVIDED AMERICA* (2018) (arguing that polarization is more bottom-up than top-down).

<sup>67</sup> For a summary of various reform proposals—most of which require some congressional actions—see Presidential Commission on the Supreme Court of the United States, *Draft Final Report* (December 2021), at: <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>.

<sup>68</sup> A comparative analysis of the highest courts in the US, UK, Canada, India, and Australia makes 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. BENJAMIN ALARIE AND ANDREW J. GREEN, *COMMITMENT AND COOPERATION ON HIGH COURTS* (2017). 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* (2002); Jon Kare Skiple, *How Docket Control Shapes Judicial Behavior: A Comparative Analysis of the Norwegian and Danish Supreme Courts*, 9 J. L. & CTS. 111 (2021); Keren Weinshall, et al., *Ideological Influences on Governance and Regulation: The Comparative Case of Supreme Courts*, 12 REG. & GOVERNANCE, 334 (2018).

continuum,<sup>69</sup> 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's the incentive for Senate Republicans to confirm any Democratic nominee? Probably not much, so it's likely vacancies would pile up.

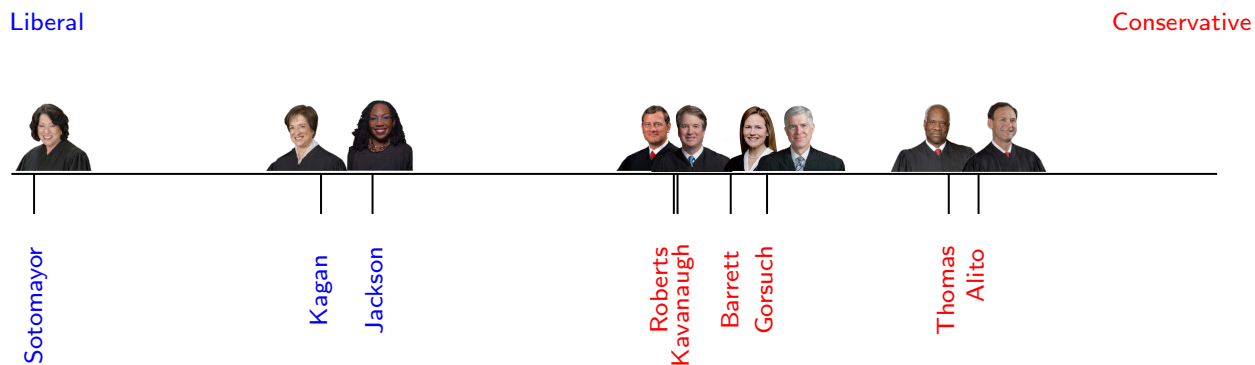


Figure 8. Justices aligned from most liberal to most conservative, showing the ideological spaces between the justices, 2022 term. Republican appointees are labeled in red; Democratic appointees, in blue.

Now imagine that the next president and Senate are of the same political party. What's 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.<sup>70</sup>

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 dominating 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.<sup>71</sup> And, if history, even recent history, is any indication the justices know how to alleviate those concerns. Steering clear hot-button issues and spending a term or two or three resolving circuit splits in statutory interpretation cases<sup>72</sup>—the kinds of disputes on which the justices seem to work together as a court and not as members of political teams—is one possibility but there

<sup>69</sup> See *supra* note 36.

<sup>70</sup> Devins and Baum, *supra* note 10, make a similar point, at 147-150.

<sup>71</sup> See, e.g., Gibson & Nelson, *supra* note 15.

<sup>72</sup> See, e.g., Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES, June 17, 2017.

are others: avoiding “ostentatious partisanship”<sup>73</sup> and adopting an ethics code, to name just two.<sup>74</sup>

There are some hints that the Court is moving in this direction. Even though some very salient 2022-23 decisions were issued by a 6 (Republican)-to-3 (Democratic) partisan split,<sup>75</sup> the three liberals prevailed in important cases too, mostly because two or even three of the center justices joined them.<sup>76</sup> It is also true that the percentage liberal gap between the Democratic and Republican appointees narrowed and no partisan difference emerged in disputes involving the Biden administration.<sup>77</sup>

Whether these indicators of a less polarized Court are telling of things to come remains to be seen. What does seem clear: 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.<sup>78</sup>

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<sup>73</sup> Lazarus, *supra* note 58. This includes amplifications of partisan messages, however unwittingly, such as when Amy Coney Barrett declared that her court “is not compromised of a bunch of partisan hacks” while appearing with the Republican minority leader, Senator Mitch McConnell, at the McConnell Center. To some commentators this was “an event that seem[ed] torn out of the pages of the Onion.” David Sirota, *Amy Coney Barrett Says that the Supreme Court Aren’t “Partisan Hacks.” Oh Really?* THE GUARDIAN, September 15, 2021.

<sup>74</sup> E.g., American Bar Association, *Supreme Court Justices Should Follow Binding Code of Ethics*, ABA House Says, February 27, 2023; Abby VanSickle, *In Bipartisan Bill, Senators Urge Supreme Court to Adopt Ethics Code*, N.Y. TIMES, April 26, 2023.

<sup>75</sup> Especially *303 Creative LLC v. Elenis*, 600 U.S. \_\_\_ (2023) (“The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees.”); *Biden v. Nebraska*, 600 U.S. \_\_\_ (2023) (The HEROES Act... “does not allow the Secretary of Education to rewrite that statute to the extent of canceling \$430 billion of student loan principal.”; *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. \_\_\_ (2023) (“Harvard’s and the University of North Carolina’s [race-based] admissions program violate the Equal Protection Clause of the Fourteenth Amendment”).

<sup>76</sup> E.g., *Allen v. Milligan*, 599 U.S. \_\_\_ (2023) (Roberts and Kavanaugh joined the three Democratic appointees to reject an Alabama voting map that diluted the voting power of Black voters); *Moore v. Harper*, 600 U.S. \_\_\_ (2023) (Roberts, Kavanaugh, Barrett, and the three Democratic appointees rejected a strong version of the independent state legislature claim).

<sup>77</sup> See *supra* Parts IIB and III, respectively. Also see Adam Liptak, *Along with Conservative Triumphs, Signs of New Caution at Supreme Court*, N.Y. TIMES, July 1, 2023 (reporting on data in Lee Epstein, Andrew D. Martin, and Kevin Quinn, *Provisional Data Report on the 2022 Term*, June 30, 2023, at: <https://epstein.usc.edu/s/2022TermDataReport.pdf>).

<sup>78</sup> Gibson and Nelson, *supra* note 15.