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Polarization and the Judiciary

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Polarization and the Judiciary

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Keywords

political polarization, judiciary, Supreme Court, judicial elections, separation of powers

Abstract

The increased polarization in the United States among the political branches and citizenry affects the selection, work, perception, and relative power of state and federal judges, including justices of the US Supreme Court. Polarization in the United States over the last few decades matters to the American judicial system in at least four ways. First, polarization affects judicial selection, whether the selection method is (sometimes partisan-based) elections or appointment by political actors. In times of greater polarization, governors and presidents who nominate judges, legislators who confirm judges, and voters who vote on judicial candidates are more apt to support or oppose judges on the basis of partisan affiliation or cues. Second, driven in part by selection mechanisms, polarization may be reflected in the decisions that judges make, especially on issues that divide people politically, such as abortion, guns, or affirmative action. The Supreme Court, for example, often divides along party and ideological lines in the most prominent and highly contested cases. Those ideological lines now overlap with party as we enter a period in which all the Court liberals have been appointed by Democratic presidents and all the Court conservatives have been appointed by Republican presidents. Third, increasingly polarized judicial decisions appear to be causing the public to view judges and judicial decision making (at least on the US Supreme Court) through a more partisan lens. Fourth, polarization

may affect the separation of powers, by empowering courts against polarized legislative bodies sometimes paralyzed by gridlock. The review concludes by considering how increased polarization may interact with the judiciary and judicial branch going forward and by suggesting areas for future research.

INTRODUCTION

The increased polarization in the United States among the political branches and citizenry ([Barber & McCarty 2015](#), 2016; [Persily 2015](#)), affects the selection, work, perception, and relative power of state and federal judges, including justices of the US Supreme Court. Judges decide cases rather than pass laws. They are not nakedly political actors as state legislators are, and federal judges (and some state judges) have life tenure unless removed from office. Nonetheless, judges make decisions on policy and politics, and it is naïve to believe that the judiciary and judicial branch have been immune to the polarization infecting American politics and society. This article shows that polarization in the United States over the last few decades matters to the American judicial system in at least four ways.

First, polarization affects judicial selection, whether the selection method is (sometimes partisan-based) elections or appointment by political actors. In times of greater polarization, governors and presidents who nominate judges, legislators who confirm judges, and voters who vote on judicial candidates are more apt to support or oppose judges on the basis of partisan affiliation or cues.

Second, driven in part by selection mechanisms, polarization may be reflected in the decisions that judges make, especially on issues that divide people politically, such as abortion, guns, or affirmative action. The Supreme Court, for example, often divides along party and ideological lines in the most prominent and highly contested cases. While the Court has long divided along ideological lines, those lines now overlap with party as we enter a period in which all the Court liberals have been appointed by Democratic presidents and all the Court conservatives have been appointed by Republican presidents.

Third, increasingly polarized judicial decisions appear to be causing the public to view judges and judicial decision making through a more partisan lens, at least with regard to the US Supreme Court. Those on the left like the Court more when it issues liberal decisions, and those

on the right like the Court more when it issues conservative ones.

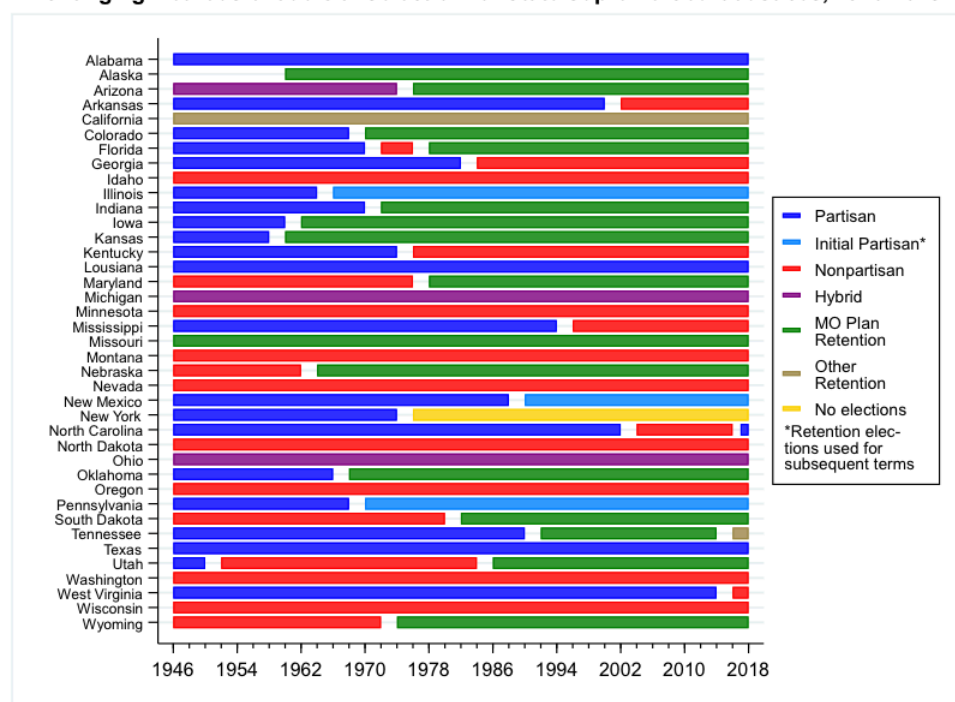
Fourth, polarization may affect the separation of powers. It empowers courts against polarized legislative bodies, which sometimes cannot act thanks to legislative gridlock.

POLARIZATION AND JUDICIAL SELECTION

For federal judicial appointments, from federal district (trial) courts to courts of appeals to the Supreme Court, the president nominates candidates who must be confirmed by a vote of the US Senate. Federal judges have life tenure, unless impeached by the House of Representatives and removed by the Senate. This federal model is not the norm in the states. American jurisdictions use a variety of judicial selection mechanisms. These include gubernatorial or legislative appointment; partisan or nonpartisan elections; initial appointment based on a nonpartisan commission's recommendations to a governor, followed by a yes-or-no judicial retention vote (sometimes referred to as the Missouri plan); and various hybrid systems. Judges may serve for a fixed term, until a mandatory retirement age, or for life unless removed. Over time, some states have changed their methods of judicial selection. **Figure 1** shows changing methods of judicial selection for choosing state Supreme Court justices from 1946 to 2018. The rules differ in some states for selection of state trial court and intermediate appellate court judges. This section considers how the rise of political polarization in the United States affects judicial selection for both federal and state courts.

<COMP: Figure 1 here>

Changing Methods of Judicial Selection for State Supreme Court Justices, 1946-2018



Source: Herbert M. Kritzer, *Justices on the Ballot: Continuity and Change in State Supreme Court Elections* (New York: Cambridge University Press), with updates added. © Herbert M. Kritzer

Figure 1. Changing methods of judicial selection for state Supreme Court justices, 1946–2018. Data are from Kritzer (2015) with updates added. Reprinted with permission.

Federal Courts

Consideration of political party in federal judicial selection is not new. Even in the nineteenth century, presidents used the appointment of judges to advance their partisan agendas ([Gillman 2002](#)). Although some scholars posited that presidents since Franklin Delano Roosevelt chose Supreme Court justices based in large part on ideological compatibility with the president ([Dahl 1957](#)), many other factors came into play, such as patronage and personal friendships, a trend that continued until the 1980s ([Bartels 2015](#), p. 175; see also [Devins & Baum 2017](#); both works compare periods before and after 1937).

The trend toward presidents choosing more ideologically reliable court appointments began with Democratic president Bill Clinton, following two surprises under Republican president Ronald Reagan. The conservative Reagan appointed perennial “swing” justices Anthony Kennedy and Sandra Day O’Connor ([Bartels 2015](#)). Reagan chose Kennedy after the Senate rejected Judge Robert Bork, a more conservative nominee on some key issues (Epstein & Segal

2005).

The days of ideological surprise from appointed justices appear to be over. Today, presidents place “near-exclusive focus on ideological compatibility and reliability” ([Bartels 2015](#), p. 177). [Devins & Baum \(2017\)](#) argue that although both Democratic and Republican presidents have increasingly taken ideology into account in the last four decades, there has been more dramatic movement on the Republican side since the Reagan administration—the first to consider conservative ideology the paramount criteria for selecting nominees. They further contend that the Federalist Society, a private organization of conservative and libertarian lawyers, judges, and activists, has played a central mediating role in the cultivation and choice of Republican judicial nominees ([Devins & Baum 2017](#)). This trend has only accelerated in the Trump administration. As of November 2017, 17 of President Donald Trump’s 18 federal appeals court nominees have connections to the Federalist Society ([Greenhouse 2017](#)). The Federalist Society has also recommended and screened judicial nominees, including a list of potential Supreme Court nominees President Trump announced while still a candidate ([Devins & Baum 2017](#)).

Why has ideology mattered more as polarization has increased? As [Sunstein et al. \(2006](#), p. 147) note, “No reasonable person seriously doubts that ideology, understood as moral and political commitments of various sorts, helps to explain judicial votes. Presidents are entirely aware of this point, and their appointment decisions are undertaken with full appreciation of it. Senators are aware of this point as well, and throughout American history they have sometimes checked presidential choices for that reason.”

The Senate’s role in confirming Supreme Court justices and lower court judges has changed as polarization has increased, resulting in closer ideological scrutiny of Supreme Court nominees ([Bartels 2015](#), [Binder & Maltzman 2009](#)). Whereas the Senate confirmed conservative Antonin Scalia by a 98–0 vote in 1986 and liberal Ruth Bader Ginsburg by a 96–3 vote in 1993, conservative Samuel Alito was confirmed by a 58–42 vote in 2005 and liberal Elena Kagan by a 63–37 vote in 2010. Senate Democrats cast all of the votes against Alito, nominated by a Republican president, and Senate Republicans cast all of the votes against Kagan, nominated by a Democratic president ([US Senate 2018](#)). The Court’s newest Justice, Brett Kavanaugh, was confirmed on a 50–48 near-party-line vote; only one Democratic senator, Joe Manchin of North Dakota, voted in favor of Kavanaugh’s nomination, and only one Republican senator, Lisa Murkowski of Alaska, did not vote in favor of it ([Stolberg 2018](#)).

Ideology has tended to trump patronage and other political considerations in the appointment of lower federal appellate court judges as well ([Scherer 2005](#)). Partisanship has driven a general decline in the number of lower court confirmations during periods of gridlock and more extreme nominees during periods of full one-party control ([Binder 2008](#), pp. 115–17, 122–24). As polarization among senators has increased, so has the ideological polarization of nominees and the intensity of organized interest group involvement ([Cameron et al. 2013](#)). Public opinion of Supreme Court nominees in each senator’s home state correlates with the likelihood that the senator will vote in favor of the nomination ([Kastellac et al. 2010](#)), and interest groups now use public relations campaigns to drum up public support or opposition to judicial nominees.

Until recently, senators could filibuster judicial nominees, meaning that in a polarized and divided Senate, getting 60 votes to move judicial nominations forward became a challenge. The preferences of the median senator of the majority party and the minority party’s use of the filibuster mattered a great deal for confirmation of federal judges ([Binder & Maltzman 2013](#), [Primo et al. 2008](#), [Rohde & Shepsle 2007](#), [Wittes 2006](#)).

Senators have long used delaying tactics and the filibuster to block judicial nominations ([Bell 2002](#)). But delaying tactics markedly increased as the Senate became more ideologically polarized. Many trace polarization of the judicial confirmation process to President Reagan’s failed Supreme Court nomination of Robert Bork. Epstein & Segal. (2005) find that the Bork nomination did have a polarizing effect but that the current period of politicization originated in the 1960s.

Polarization got worse during the presidency of Republican George W. Bush in 2000–2008 ([Binder & Maltzman 2009](#)) and even more dramatically in 2009–2018 during the presidencies of Democrat Barack Obama ([Binder & Maltzman 2013](#)) and Republican Donald Trump. The Obama years saw Democrats, then in control of the Senate, end the filibuster for non–Supreme Court judicial nominations (dubbed by some the “nuclear option”). Then, after Republicans retook control of the Senate, the Senate refused to schedule a hearing or vote on President Obama’s choice of moderate Judge Merrick Garland to replace Justice Antonin Scalia, who died in office.

At the beginning of the Trump administration, the Republican Senate eliminated the filibuster for Supreme Court nominations, and the Senate confirmed President Trump’s choice of Neil Gorsuch to succeed Scalia mostly along party lines: Three Democrats from states won by

Trump voted for Gorsuch with the rest opposed, and no Republicans voted against him ([US Senate 2018](#)). Gorsuch came with a Federalist Society pedigree as a hard conservative, and he is not expected to be a moderate or swing justice. The newest Justice, Kavanaugh, has the same pedigree and was confirmed on a closer vote.

For lower court appellate nominees, the Republican Senate has begun ignoring the “blue slip,” a Senate procedure that allowed home-state senators to block judicial nominations to which they objected ([Binder 2007](#), [Quinn 2018](#)). There are increasingly few mechanisms a minority party can use to block judicial appointments when the presidency and the Senate are controlled by the same party.

With unified control then, we can expect a president to nominate and the Senate to confirm increasingly ideologically strong candidates in near-party-line votes. When there is split party control between the president and the Senate majority, we can expect polarization to lead to deadlock, as the blocked Garland nomination demonstrates.

State Courts

For a long period, state judicial elections were mostly sleepy affairs, and in some jurisdictions they remain so, with low turnout and voters casting votes (or abstaining in judicial races) with little knowledge of the judicial candidates. In other jurisdictions, however, polarization and loosening of judicial campaign rules by the US Supreme Court applying First Amendment doctrine to judicial campaigns have made some judicial elections resemble more traditional campaigns ([Gibson 2008](#), [Hojnacki & Baum 1992](#)). Judicial election campaigns in some places became “nastier, noisier, and costlier” ([Schotland 2007](#), p. 1081).

[Kritzer \(2015\)](#) presents the most comprehensive recent study of the role of partisanship in elections for state Supreme Court justices. He finds that voters rely on party cues in judicial elections, and these cues matter most when state courts have taken on issues that polarize voters, such as abortion, same-sex marriage, and the death penalty. In these states, such as Wisconsin, partisan voting for state Supreme Court justices tracks partisan voting for the state’s governor. In states where these issues have not made it to the Supreme Court, there is less polarization. Kritzer also attributes the rise of attack ads in judicial election campaigns to increasing political polarization overall.

[Kritzer \(2015\)](#) finds strong undercurrents of partisanship even in some nonpartisan retention

elections, and other research confirms that partisan politics plays a role in nonpartisan judicial elections ([Rock & Baum 2010](#), [Streb 2009](#)). Parties direct voters how to vote through advertising and campaigning so that reliable partisan judges may be elected even absent a party cue on the ballot. But the absence of explicit partisan information may lower turnout even though nonpartisan elections “still have a strong partisan or ideological element among those who participate” ([Bonneau & Cann 2015](#), p. 102).

Polarization also sometimes matters for judicial appointments. In some states using the so-called Missouri plan for gubernatorial appointment of judges from a list of potential nominees generated by a nonpartisan commission, conservative and business groups have pushed to eliminate the commission’s role in appointment, thereby giving more power to governors and legislatures to make political appointments ([Kritzer 2015](#), p. 255). More generally, [Bonica & Sen \(2017\)](#), p. 587) find that “[s]election systems that rely on merit commissions or nonpartisan elections exhibit lower levels of ideologically based judicial selection...than either gubernatorial or legislative systems or partisan elections. Among other conclusions, this suggests that the decision to elect or appoint judges is far less consequential than the rules that govern the two approaches.”

POLARIZATION AND JUDICIAL DECISION MAKING

Political polarization affects not only judicial selection but judicial decision making as well. Judges frequently have great discretion to decide legal questions, consciously or subconsciously, in line with their policy preferences. If judges are chosen in part for ideological reasons in a polarized selection process, judges’ decisions can be expected to reflect their ideology. Indeed, political party has traditionally been considered a good proxy for ideology of judges ([Pinello 1999](#)); today, party plays a greater role than ever in the selection of judges and provides a better signal of ideological orientation than it has in generations. Still, it is important not to simply conflate party and ideology in all cases, as they sometimes differ ([D’Elia-Kueper & Segal 2017](#)).

Students of judicial politics offer two main models for explaining judicial behavior, especially among judges at higher appellate levels, such as the US Supreme Court. One model, the attitudinal model ([Segal & Spaeth 2002](#)), conceives of judges as deciding cases in line with their preferences. The other model, the strategic model (sometimes referred to as the rational

choice model), views judges as rational actors seeking to vote their preferences as constrained by institutional factors, such as the preferences of other judges on multimember courts or of other political actors, such as Congress, the president, and federal agencies, which will have a role in responding to or implementing judicial orders ([Anderson & Tahk 2007](#), [Bailey 2007](#), [Gooch 2015](#), [Harvey & Friedman 2006](#)). Either way, a judge's preferences matter to judicial decision making. Lower court judges, who must follow precedent from appellate decisions, often are more constrained. If they deviate from precedent, they risk having their decisions reversed.

One reason why courts (especially appellate courts) are polarizing in decision making may be that ideological litigants from the left and right bring disputes over hot-button issues such as gay rights, abortion, immigration, and gun rights to the state and federal courts. "On both sides of the political spectrum, advocates routinely call on judges to block new and unwanted policy changes, to dismantle existing policies to which they object, and to facilitate efforts to change policy legislatively" ([Keck 2014](#), p. 11). Even though the judiciary is polarized by such cases, judges in cases raising controversial issues are less polarized than legislators considering similar issues ([Keck 2014](#)).

United States Supreme Court

Scholars studying ideology and polarization in judicial decision making have paid the most attention, by far, to the US Supreme Court. Studies of Supreme Court decision making typically rely on either or both of two measures of judicial ideology: a static Segal–Cover score of liberal to conservative ideology based on assessments of Supreme Court nominees contained in certain newspaper editorials ([Segal & Cover 1989](#)), and a dynamic Martin–Quinn judicial common space (JCS) score based on the coding of justices' votes once they are on the Supreme Court ([Epstein et al. 2007](#), [Martin & Quinn 2002](#)). Both measures have advantages and disadvantages: Segal–Cover is exogenously derived but static; JCS scores change as justices change over time but raise issues of endogeneity ([Bailey 2007](#); [Gooch 2015](#), pp. 1006–7).

Today no one doubts that the Supreme Court is growing more polarized in its decision making. The Court has long been divided into two ideological camps, liberal and conservative, in a bimodal distribution with a center fluctuating in size. While the Court long has been polarized on the basis of ideology [see [Clark \(2009\)](#) on the ways this polarization has been measured over time], it used to boast a larger center and fewer justices at the poles. Ideological polarization has

increased in the last 50 years ([Gooch 2015](#)). Supreme Court polarization is reflected in oral argument, where justices are more likely to act as advocates for their particular side rather than neutral questioners. [Jacobi & Sag \(2019\)](#) trace the rise of justices as advocates to 1995, the period of greater congressional polarization.

For the past few decades and until recently, the Court featured four generally conservative justices, all appointed by Republican presidents; four generally liberal justices, all appointed by Democratic presidents; and swing justice Anthony Kennedy, who often sided with conservatives but sometimes sided with liberals on issues such as same-sex marriage ([Bartels 2015](#), p. 172; [Devins & Baum 2017](#); [Hasen 2016](#)). Other swing justices preceded Justice Kennedy, such as Justice O'Connor. Unsurprisingly then, the most salient Supreme Court case outcomes of the Rehnquist and Roberts Courts (through 2012) were pretty evenly divided by ideology, with the lean slightly more liberal (52%) than conservative (48%) ([Bartels 2015](#), p. 191).

Moreover, before the early 2000s, justices' positions on issues were not easily correlated with the views of the party of the nominating president ([Bartels 2015](#)). Gone are justices appointed by Democratic presidents who sometimes voted conservatively (Kennedy-appointed Justice Byron White voted against abortion rights) and justices appointed by Republican presidents who sometimes voted liberally (Ford-appointed Justice John Paul Stevens voted in favor of abortion rights) ([Bartels 2015](#), [Devins & Baum 2017](#)). Today, each justice's ideology is better defined and aligned with the political party of the appointing president. Justices are more likely to be ideologically in line with the interests of their nominating president's party and less likely to drift ideologically (or "evolve").

[Bartels \(2015\)](#) notes a "polarization paradox" whereby the percentage of 5–4 (or other one-vote margin) Supreme Court decisions has been increasing at the same time that the percentage of unanimous opinions is increasing. **Figure 2** shows both of these increases from 1971 to 2016 ([Epstein et al. 2015](#), Washington University Law 2017). Note the sharp drop-off in one-margin decisions and sharp rise of unanimous decisions following the 2016 death of Justice Scalia, a temporary period of a 4–4 evenly divided partisan Supreme Court.

<COMP: Figure 2 here>

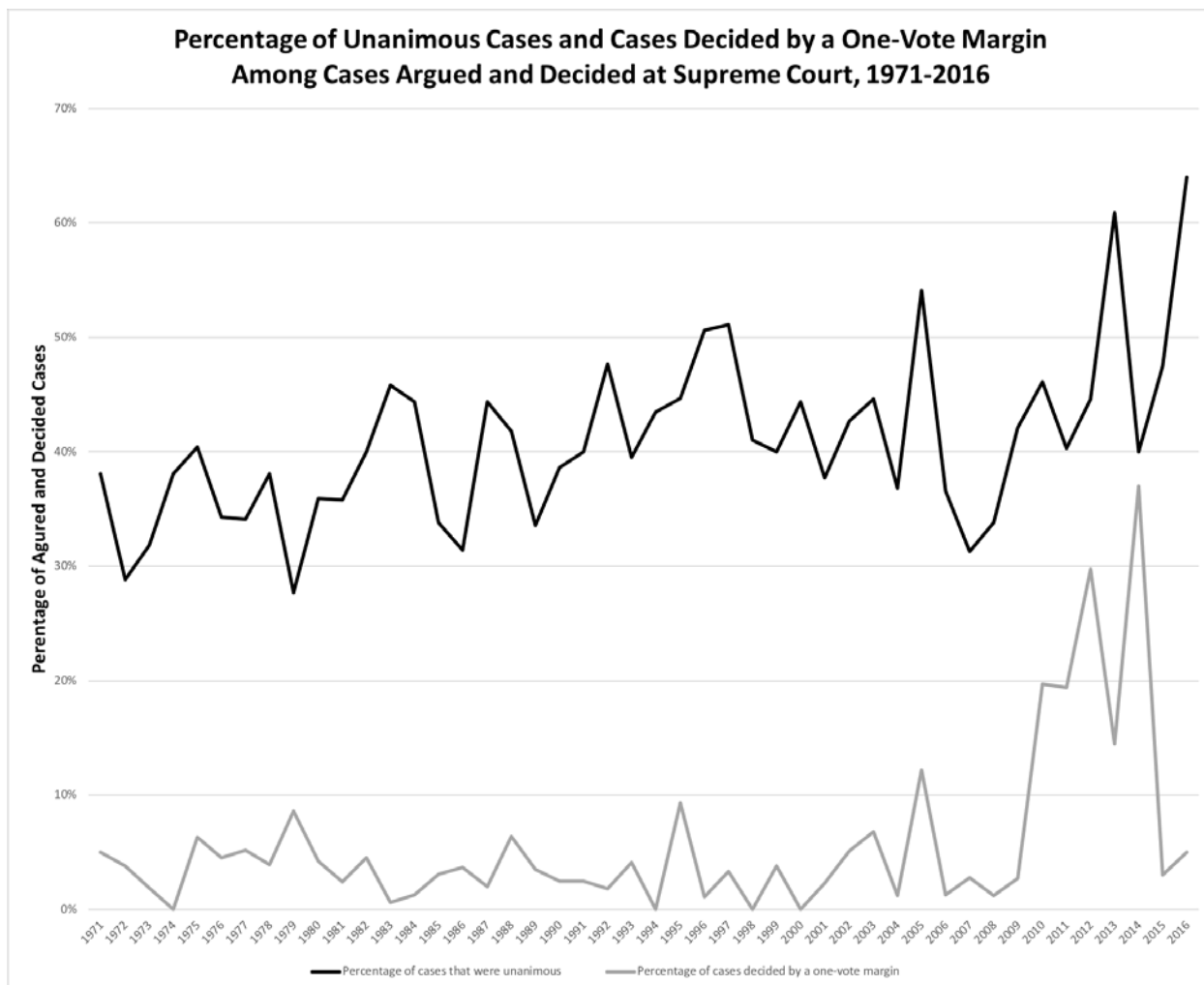


Figure 2. Percentage of unanimous cases and cases decided by a one-vote margin among cases argued and decided per term by the US Supreme Court, 1971–2016. Data are from *The Supreme Court Compendium* ([Epstein et al. 2015](#)) and the Supreme Court Database (Washington University Law 2017).

What explains the pattern of rising unanimous and closely divided opinions? [Bartels \(2015\)](#), building on the work of [Pacelle \(1991\)](#) and [Corley et al. \(2013\)](#), sees the Court as pursuing a bifurcated agenda. In some types of cases (the “volitional agenda”), the Court decides high-salience political and legal issues (such as abortion or gun rights) and is often polarized. In other types of cases (the “exigent agenda”), the Court does the institutional work of providing uniformity and resolving more technical legal questions to maintain judicial supremacy. These are the cases tending toward unanimity.

The rate of one-vote decisions may markedly increase going forward, given the July 2018

retirement of Justice Kennedy and his replacement with Justice Kavanaugh by President Trump. With a clear majority, the conservatives will be less constrained in taking on cases that they know will cleave the Court sharply, and will have less incentive to write moderate or modest decisions.

[Bartels \(2015, p. 196\)](#) explores the consequences of replacing swing Justice Kennedy with an ideologue from either party, a “blockbuster scenario” greatly increasing the polarization of the Court’s “volitional agenda” cases.” Continued polarization seems inevitable unless presidents miscalculate the ideology of their nominees or nominees ideologically evolve while on the Court. Partisan divisions only increased after the extremely partisan confirmation fight over Kavanaugh’s nomination, which included allegations of sexual misconduct against the nominee dating back to high school and college, and the nominee defending himself at a second confirmation hearing related to the allegations by calling them “a calculated and orchestrated political hit” fueled by “revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups” (Liptak 2018).

Why Supreme Court justices and other judges vote on the basis of ideology is a complex question. In an important new work, [Baum \(2017, p. 194\)](#) demonstrates that the ideology of justices is not “fixed and simple.” Instead, it reflects justices’ “affect toward political and social groups” such as labor unions or religious organizations, driven by perceptions of these groups among fellow elite liberals (Democrats) or conservatives (Republicans) ([Baum 2017, p. 23](#)). “[I]deology is also a part of [the justices’] social identities, drawing them toward positions that they perceive as appropriate for conservatives or liberals to take” ([Baum 2017, p. 191](#)). It is “likely that identification as a conservative or liberal is a significant element in the social identities of many and perhaps most justices,” influencing ideology on the Court ([Baum 2017, p. 8](#)), and this identification is reenforced by signals sent by a cadre of increasingly polarized lawyers litigating before the Court ([Southworth 2018](#)). Baum’s analysis suggests that polarization affects Supreme Court judicial decision making in much more subtle and subconscious ways than commonly assumed.

Federal Courts of Appeals and Federal District (Trial) Courts

Ideology matters on federal appeals courts and federal district (trial) courts as well, but not as much as on the Supreme Court, where the justices have much greater freedom of decision.

Lower court judges tend to defer to higher appellate courts even when the appellate decision is not in line with their ideologies ([Cross 2007](#); [Epstein et al. 2013](#), pp. 191–96). Federal appellate judges are less ideological than Supreme Court justices, in part because of the need for fidelity to Supreme Court precedent and in part because of the lower ideological stakes ([Epstein et al. 2013](#), p. 199). Ideology and party tend to play the smallest role on federal district courts, in part because lower court judges try to follow precedent from higher courts and avoid being reversed ([Cross 2007](#); [Epstein et al. 2013](#), p. 253; [Kritzer et al. 2017](#); [Sunstein et al. 2006](#)).

Still, it is fair to say that ideology matters in a considerable share of cases decided by the lower federal courts. [Sunstein et al. \(2006\)](#), having examined more than 6,000 decisions by three-judge federal appeals courts, report that 52% of the votes of Democratic-appointed judges were liberal compared to 40% of the votes of Republican-appointed judges. Results differed across circuits and were not uniform. Further, judges seemed to be influenced by their fellow panel members; judges sitting with others from the same party were more likely to vote together in the ideological direction of the party. The decisions of panels made up of three Democratic-appointed judges differed significantly from those of panels of three Republican-appointed judges. The authors also note a “whistleblower effect,” whereby “a single judge of a different party from the court’s majority can have a moderating effect on a judicial panel” ([Sunstein et al. 2006](#), p. 148; on the importance of these whistleblowers, see [Cross & Tiller 1998](#)).

[Cox & Miles \(2008\)](#) find that federal appellate judges deciding voting rights cases differ by party and even more by race: Minority judges are twice as likely as white judges to find voting rights liability, and white judges are more likely to find liability when seated on a panel with a minority judge. [Kastellac \(2013\)](#) reports similar findings about the effect of placing African-American judges on federal appellate panels with white judges deciding affirmative action cases. White judges are much more likely to decide in favor of the affirmative action position with a minority judge on the panel.

In a study of decisions surrounding abortion, affirmative action, gay rights, and gun rights, [Keck \(2014\)](#) finds significant differences in the votes of Democratic- and Republican-appointed federal judges. He observes asymmetry, with Republican-appointed judges almost evenly split between liberal and conservative outcomes but Democratic-appointed judges consistently supporting liberal outcomes ([Keck 2014](#), p. 139). On cases involving religious rights under the First Amendment’s Establishment Clause, [Sisk & Heise \(2012\)](#) find a partisan divide (a “God

gap”) among judges.

Election Cases

Judicial decisions in election cases may reflect the most tribal type of partisanship. Tribal partisans “may favor public action purely because the policy in question is perceived to benefit those with a shared partisan affiliation, or because the policy in question is perceived to injure partisan opponents, wholly divorced from—or stronger yet, contrary to—the policymaker’s conception of the policy’s other merits” ([Levitt 2014](#), p. 1798). Judges may behave most like partisans in cases involving the rules for elections, where the party’s future power may be at stake. Thus, scholars have found that in cases involving election issues, such as redistricting, voter identification, or campaign finance, judges often vote for the result that would help their political party. (Hasen 2018, [Kopko 2015](#), McKenzie 2012; but see Kopko 2008, finding that judges do not always rule in ways that would benefit their own party in ballot access cases).

The pattern persists in state courts as well. [Kang & Shepherd \(2016\)](#) find that both elected and appointed state court judges tend to decide election disputes in line with the interests of their political party, with Republican judges more swayed by party than Democratic judges.

The most famous example of judicial partisanship in election cases may be *Bush v. Gore*, the Supreme Court’s controversial decision ending the disputed 2000 presidential election. In *Bush v. Gore*, the justices not only divided along ideological lines but also reversed their usual jurisprudential commitments to the interpretation of the Constitution’s Equal Protection Clause in election cases to side with the candidate whose election they were more likely to favor ([Baum 2017](#); [Gillman 2001](#); [Hasen 2012](#), ch. 1; [Baum 2017](#), p. 29). Still, they did not divide strictly along party lines, and two of the more liberal justices, Justices Breyer and Souter, agreed in part with the Equal Protection analysis of the conservative majority.

State Courts

[Kang & Shepherd \(2016\)](#) caution that there is no reason to believe their analysis of partisan decision making by state Supreme Court justices in election cases is confined to those cases. Indeed, there is every reason to believe that partisanship in decision making among appellate-level state court judges will parallel the findings for federal courts, with state Supreme Court justices, who have the final say on matters of state law, being the most polarized among state judges.

[Kritzer \(2015\)](#) finds that certain types of cases trigger greater partisanship and polarization on state Supreme Courts using partisan election mechanisms. More study of polarization across different types of judicial selection mechanisms and different types of state judgeships would be helpful. For example, it is not clear that nonpartisan elections or retention elections lead to lower judicial polarization. [Kritzer \(2015\)](#) notes that nonpartisan judicial elections may still be subject to partisan influences, and [Shepherd \(2009\)](#) finds that in retention elections—which should be the least politicized of judicial elections—judges facing a Republican electorate will issue more conservative decisions and those facing a Democratic electorate will issue more liberal decisions. [Kang & Shepherd \(2011\)](#) show that campaign contributions from business interests to elected judges running for reelection increase the chances of those judges voting to favor business interests, a correlation that disappears for judges facing mandatory retirement. [Heise \(2016\)](#) confirms this finding and extends it to contributions from antibusiness interests.

POLARIZATION AND PUBLIC OPINION ON THE SUPREME COURT

Public approval of the Supreme Court’s job performance historically has been high compared to other government institutions, but approval of the Court has fallen in recent years. For example, the Court’s approval in polling by Gallup was at 62% in 2001 but 49% in 2017 ([McCarthy 2017](#)). Although noting methodological issues with polling about the Supreme Court, which cause difficulty in comparing levels of public approval of the Court over time, [Sinozich \(2017\)](#) reports an unprecedented decline in public approval from the 1970s to the present. The author argues that the reasons for the decline are uncertain and not necessarily tied to specific events. “What is clear is that Americans today, if they didn’t before, understand the Court as a body within the political sphere. They see decisions as political events and see the justices as political (that is, self-interested and strategic) actors” ([Sinozich 2017](#), pp. 192–93).

Gallup’s public opinion polling, as described in [Figure 3](#), shows volatility by party in public approval of the Court. After the Supreme Court’s 2000 decision ending the presidential election, Democratic approval dropped sharply. Democratic approval spiked, and Republican approval plummeted, after some liberal decisions in the 2010s affirming same-sex marriage rights and upholding provisions of the Affordable Care Act. At the end of the survey period, Republican approval rose from a dismal 18% to a generous 65% after the 2017 appointment of Neil Gorsuch

to the Supreme Court. At the same time, Democratic approval fell from 75% to 40%.

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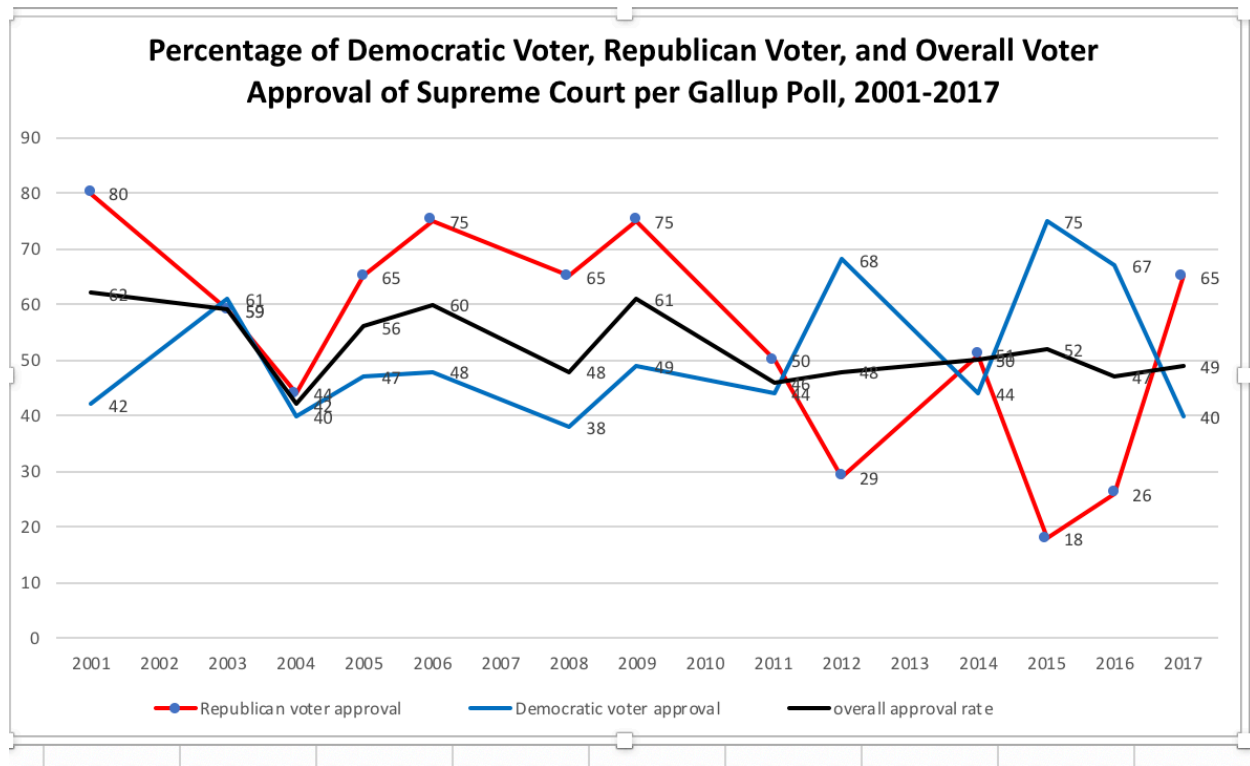


Figure 3. Percentage of Democratic voter (blue), Republican voter (red), and overall voter (black) approval of the Supreme Court per Gallup polls, 2001–2017.

What drives shifting approval ratings? Perception of ideological disagreement with the Court may matter as much as actual ideological disagreement ([Bartels & Johnston 2013](#)). If Republicans see the Supreme Court as liberal, they may disapprove of the Court even if its opinions are not fairly classified as liberal.

Measuring “legitimacy” rather than public approval, [Gibson \(2007\)](#) sees broader public support for the Supreme Court and little partisan variation in respondents’ respect for the Court as an institution. [Gibson & Nelson \(2014, p. 209\)](#) offer a few theories to explain this pattern:

It could be due to the fact that procedural concerns override policy dissatisfaction... or that no partisan or ideological differences exist in American[s’] views of how the Court makes its decisions. Lack of polarization may also reflect the fact that the Supreme Court is currently making about 50% of

its decisions in a conservative direction and 50% in a liberal direction....

Consequently, conservatives are about half pleased with the Court's decisions, just as liberals are about half pleased with the rulings. Moreover, support for the Court seems to reflect more fundamental political values (such as support for democratic institutions and processes). Again, few ideological or partisan differences exist on basic democratic values. Finally, Americans seem to view Supreme Court decision-making processes as principled, not partisan.

Even if [Gibson & Nelson \(2014\)](#) are right to see relatively little variance by party in acceptance of the Supreme Court's legitimacy, with the Court now lacking a swing justice and dividing into two firm ideological camps, public opinion may shift dramatically and diverge by party on both approval and eventually legitimacy. Indeed, experimental work shows that identifying a decision to voters as the product of the Court's Republican majority increases the acceptance of the opinion among Republican voters and diminishes it among Democratic voters ([Nicholson & Hansford 2014](#)). A partisan Court's approval ratings may well begin to reflect greater polarization in society. [Gibson & Caldeira \(2009\)](#) illustrate the increasing contentiousness of Supreme Court nominations by examining the Alito confirmation fight, suggesting that the Court's legitimacy could well be beginning to suffer because of polarization.

The limited polling of public approval of other courts suggests that many members of the American public believe that the partisan background of judges influences court decisions either somewhat or a lot ([Bybee 2010](#), p. 16). But much more work on public opinion and state courts in times of polarization is necessary ([Streb 2011](#), pp. 158–61).

POLARIZATION AND THE JUDICIARY'S POWER IN A SYSTEM OF SEPARATION OF POWERS

Understanding the connection between polarization and judicial power is perhaps less intuitive than understanding the connection between polarization and judicial selection, judicial decision making, or public opinion about the Supreme Court. Roughly speaking, when polarization leads to gridlock in Congress or between Congress and the president, it can empower other political actors, including the courts.

Although the federal government structure separates power among the legislative, executive,

and judicial branches, separation-of-powers dynamics differ during periods of strongly polarized parties, such as the current era. As [Levinson & Pildes \(2006\)](#) argue, polarization leads to “separation of parties, not powers.” This means we see less executive and legislative competition, and more competition between Democrats and Republicans, across political branches.

Gridlock due to partisan competition in the political branches creates space for the courts (especially the Supreme Court) to move the law toward their preferences without provoking a political counterreaction. [Graber \(2016, p. 143\)](#) writes that “the combination of ideological parties, polarized elites, divided government, and electoral instability disconnect[s] courts from the rest of the political system.” He makes a normative argument that “the resulting judicial independence weakens the case for judicial supremacy in contemporary constitutional politics” because the “course of judicial decision-making turns on accidents of retirements, deaths, and appointments, as well as the peculiarities of ‘stealth’ justices” ([Graber 2016](#), pp. 143, 145).

Whether or not an increase in judicial power during periods of polarization is desirable, there seems little question the trend is accelerating. One piece of evidence concerns congressional overrides of Supreme Court statutory decisions. When the Court decides the meaning of congressional statutes (rather than the meaning of the US Constitution), Congress may override that interpretation through new legislation. Although such legislative overrides were common during the twentieth century ([Eskridge 1991](#)) and included many bipartisan overrides reinterpreting civil rights and other key statutes, in recent years overriding has been rare. The exception is that partisan overrides appear in periods when one party controls the presidency and the House of Representatives with a filibuster-proof majority in the Senate ([Buatti & Hasen 2015](#), Hasen 2013). [Christiansen & Eskridge \(2014\)](#) and [Christiansen et al. \(2015\)](#), using somewhat different methodology than Hasen (2013) and Eskridge (1991), find that overrides began to decline later than the period identified by Hasen (2013), but agree that the current period of polarization and gridlock in Congress has greatly diminished the number of Congressional overrides.

CONCLUSION AND AREAS FOR FUTURE RESEARCH

Empirical research on judicial behavior negates the simplistic notion that judges are mere

“partisans in robes” ([Nicholson & Hansford 2014](#)). Judicial behavior does not simply reflect partisan politics, at least not in the way we see it in polarized legislative bodies. When Supreme Court justices provide uniformity and federal supremacy through unanimous or near-unanimous decisions on important questions of federal statutory or constitutional law, it is fair to view the Court as doing law and not politics. The same applies when lower court judges faithfully apply existing precedent to legal questions.

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. We know that Democratic-appointed and Republican-appointed judges decide many types of legal disputes differently, especially disputes over the issues that divide the American polity generally, such as abortion rights, gun rights, and same-sex marriage. They divide most sharply in cases concerning the rules for running elections, where judges (whether appointed or elected) tend to vote in the most tribally partisan way.

Seeing judges as part-time partisans in a polarized era raises a host of empirical and normative questions. Empirical research might explore: (a) Do judicial selection mechanisms affect the extent to which judges act in partisan ways? (b) To what extent is the decline in public approval of the Supreme Court, and its volatility in support by party, related to increasing polarization of the Court? (c) Do more polarized state Supreme Courts undermine the public’s confidence in the rule of law in those states? (d) How will further increases in polarization in the political branches and the electorate affect judicial selection, judicial decision making, and public support for courts as independent institutions? Normative questions include: (a) Should appellate courts be constructed to assure some partisan balance to trigger the whistleblowing function of judges from the minority party? (b) Should the US Constitution be amended to provide 18-year fixed terms for US Supreme Court justices, to allow greater rotation so that the partisan balance on the Court better reflects the partisan balance in society? (c) Are special election courts with an even number of party-appointed judges a better tribunal for deciding disputes over matters of election law?

There is no reason to believe that political polarization will soon disappear from American life. The sooner society figures out how to manage the influence of polarization on the judiciary, the better the prospects for the rule of law and the public’s confidence in the judiciary.

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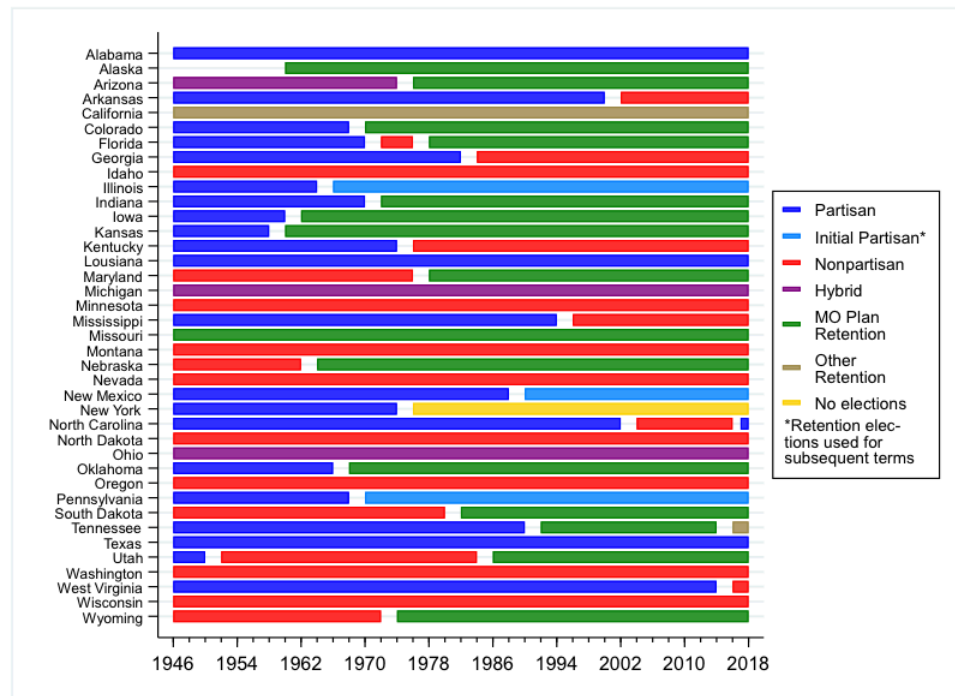
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Changing Methods of Judicial Selection for State Supreme Court Justices, 1946-2018



Source: Herbert M. Kritzer, *Justices on the Ballot: Continuity and Change in State Supreme Court Elections* (New York: Cambridge University Press), with updates added. © Herbert M. Kritzer

Figure 1.

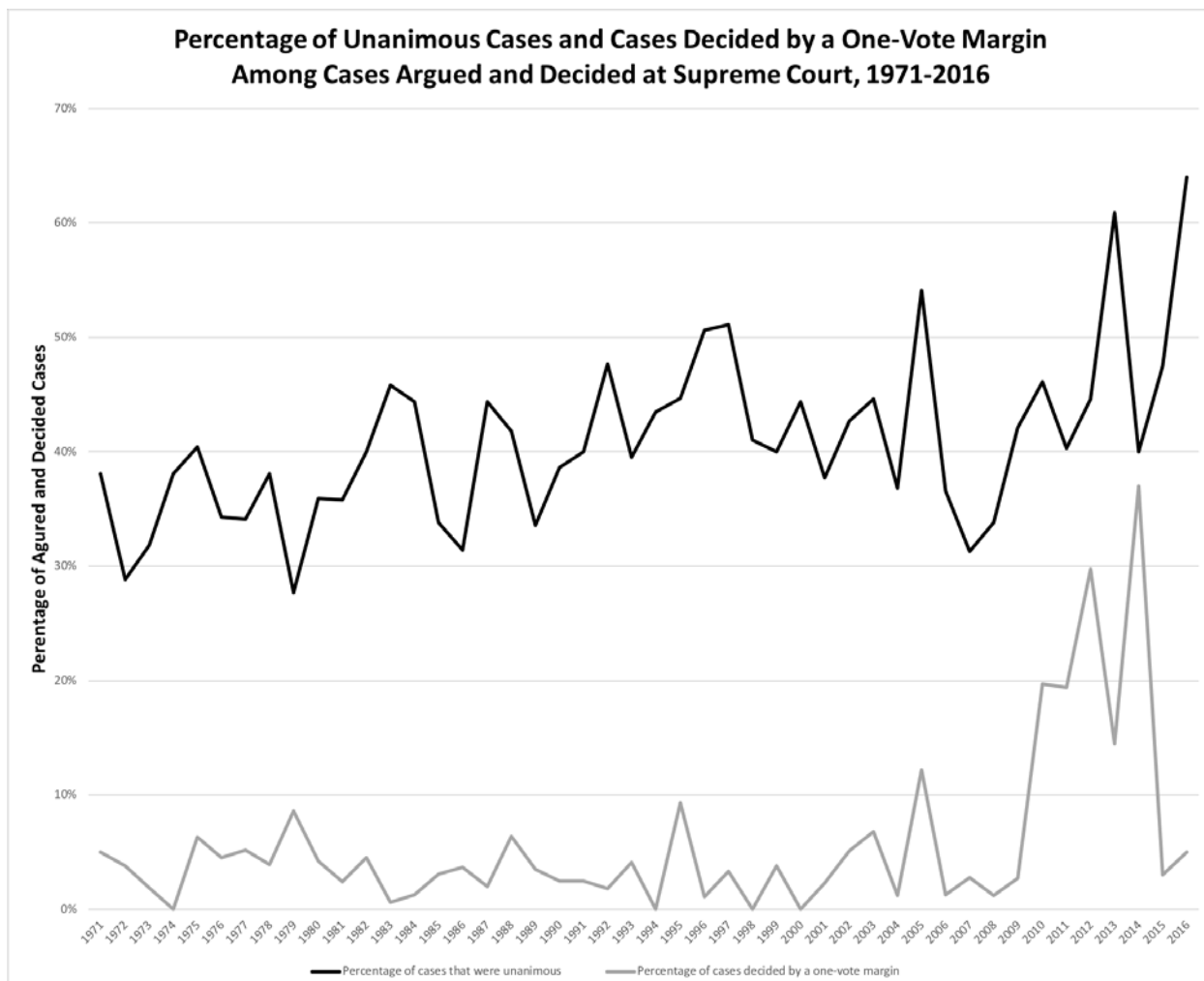


Figure 2.

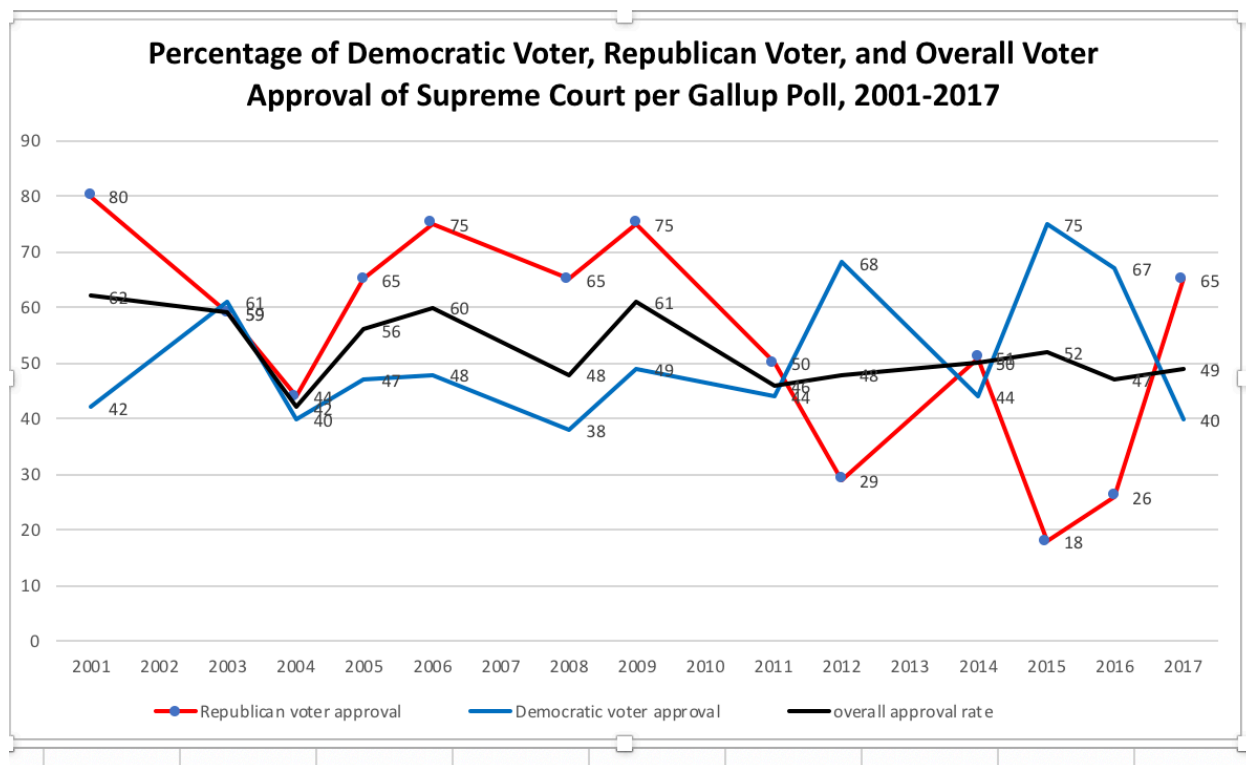


Figure 3.