Sources and Consequences of Polarization on the U.S. Supreme Court

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Sources of Polarization

- Changing criteria for judicial appointments
- Demise of patronage and political/electoral considerations
- Recent phenomenon: near-exclusive emphasis on ideological reliability
  - No more liberal Republicans (Souter, Stevens, Blackmun) and conservative Democrats
  - No more “swing justices” (Kennedy and O’Connor)
- Partisan polarization among political elites more generally
- Strategic retirements
- Result: Disappearing center....contrast from past.
The Shrinking Center Over Time

• “The center was in control.”
  – Woodward and Armstrong (1979, 528)

• Today’s Supreme Court
  – Low “swing” or crossover potential among nearly every justice
    – Justice Kennedy....

• “Swing capacity”: In close votes, a justice is likely to be in the majority for both liberal and conservative case outcomes.
Vinson Court, 1946-52 Terms

The chart illustrates the proportion of liberal votes for various terms and justices. The x-axis represents the justices and terms, while the y-axis shows the proportion of liberal votes. The blue bars indicate liberal rulings, and the red bars indicate conservative rulings.

Justices and terms included in the chart are:
- WBRutledge (leaves 48)
- FMurphy (leaves 48)
- TCClark (begins 49)
- WODouglas
- FVMinson
- SFReed
- SMinton
- HHBurton (begins 49)
- FFrankfurter
- RHJackson
Warren Court, 1953-61 Terms

Proportion Lib. Votes

- Liberal Ruling
- Conservative Ruling

- EWarren
- HLBlack
- WODouglas
- TCClark
- PSW Barr
- SMinton
- SFReed
- FFrankfurter
- CEWhittaker
- HHBurton
- JJarlan2
- RHJackson
Warren Court, 1962-68 Terms

Proportion Lib. Votes

Liberal Ruling

Conservative Ruling

TMarshall (begins 67)
WJBrennan
WODouglas
EWarren
AFortas (begins 65)
AJGoldberg (leaves 65)
HLBlack
BRWhite
TCClark (leaves 67)
PStewart
JHarlan2
Proportion Lib. Votes

Burger Court, 1975-80 Terms

Liberal Ruling  Conservative Ruling

Roberts Court, 2005-2012 Terms

Proportion Lib. Votes

Liberal Ruling  Conservative Ruling

DHSouter (leaves 2009)
JPSavens (leaves 2010)
Sotomayor (begins 2009)
EKagan (begins 2010)
RBGinsburg
SGBreyer
AMKennedy
JGRoberts
AScalia
CThomas
SAAlito
Policy Outputs Over Time

• On the whole, long period of low to moderate polarization, but it’s increasing...and will likely continue to increase.

• Direction of policy outputs largely independent of presidential appointments (based on expectations from “ideological reliability” model)
A. Percent Liberal Supreme Court Rulings, 1946-2012 Terms

Term


Vinson  Warren  Burger  Rehnquist  Roberts
Policy Outputs Over Time

• On the whole, long period of low to moderate polarization, but it’s increasing...and will likely continue to increase.

• Direction of policy outputs independent of presidential appointments (based on expectations from ideological reliability appointment model)

• Vinson Court moderation
  – Division among FDR appointees: Douglas, Black, Rutledge v. Frankfurter, Jackson
  – Truman’s moderate to conservative appointees (Vinson, Burton (R), Minton, Clark)
Policy Outputs Over Time

• Warren Court liberalism
  – Brought to you by *Eisenhower* (Warren and Brennan), but also FDR appointees (Black, Douglas); not Truman
  – Kennedy: Mixed (Goldberg v. White)
  – Johnson emphasized ideological reliability: Fortas, Marshall

• Burger Court “center right”
  – Strong center, appointed by in large by Republican presidents (Stewart, Powell, Blackmun, Stevens); also White (Kennedy appointee)
  – Leftward drift: Stevens and Blackmun
Policy Outputs Over Time

- Rehnquist Court: center-right...why not more conservative?
  - Stevens and Souter, liberal drift
  - O’Connor and Kennedy, swing justices

- Roberts Court: center-right
  - Kennedy, the only remaining swing vote
Consequences of Polarization

• Today: One person in middle who’s pivotal on most issues

• Kennedy: the last “swing justice?”

• “Ideological reliability” model of presidential appointment makes presidential elections even more consequential for Supreme Court policy outputs.
  – SC outputs will more closely track presidential ideology (Dahl).

• Will someone evolve into a swing justice for institutional maintenance concerns?
  – E.g., Justice O’Connor

• Benefits of polarization?
  – Legal clarity
Consequences of Polarization

• Polarization paradox?
  – Increase in 5-4 decisions, but an *increase* in unanimous cases as well.
Frequency Distributions (Histograms) of Vote Splits by Chief Justice Era


Vinson (1946-52 Terms)  Warren (1953-68 Terms)

Vote Splits
A. Closely Divided Case Outcomes

B. Unanimous Case Outcomes

C. "Not Close" Case Outcomes

D. Moderately Close Case Outcomes
Consequences of Polarization

• Polarization paradox?
  – Increase in 5-4 decisions, but an *increase* in unanimous cases as well.

• Volitional v. exigent agenda (Pacelle)

• Strategic voting to the extreme at cert stage; risk aversion

• Increase unanimity for legitimacy purposes; offset to closely divided cases?

• Back to legal clarity...bifurcated.