
POLARIZED JUSTICE? CHANGING PATTERNS OF DECISION- MAKING IN THE FEDERAL COURTS

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This article examines patterns of increasing partisan polarization in decisions by federal judges at all three levels of the federal court system. After an initial section briefly discussing the general issue of partisan polarization in American politics, the analysis draws on several extant data sources to present evidence concerning polarization for each of the three levels of courts. In line with the general perception, the analysis shows increasing, and significant, polarization in the behavior of the justices of the Supreme Court depending on the party of the appointing president. However, dividing the cases into the categories of civil liberties and rights, criminal, and economics/regulation, I find no pattern of increased polarization in the economics/regulation area, despite some prominent decisions sharply dividing the Court. Much of the change that has occurred reflects who Presidents have been appointing to the Court.

For the courts of appeals and federal district courts, there is also evidence of increasing differentiation between appointees of the two parties' presidents. Given the more routine nature of cases below the Supreme Court, the gaps and the change at the lower levels are much less. Again, the nature of the changes varies with the types of cases and those changes significantly reflect who is being appointed to the courts.

I. INTRODUCTION

Starting in the 1960s, American politics has become increasingly polarized. This polarization is evident for both political elites¹ and the

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electorate.² The judiciary has not escaped these developments,³ as evident in the conflicts over federal judge's confirmation.⁴ Recent federal judge's confirmation conflicts have gone well beyond the long-standing role played by political partisanship.⁵ Polarization plays

judges; Robert Carp responded to numerous questions I had regarding the data. An earlier iteration of this paper focused specifically on the federal district courts; Professors Carp and Manning appeared as coauthors of that earlier paper which is available on SSRN at <https://ssrn.com/abstract=3007983>. I would also like to thank Reginald Sheehan and Susan Haire for responding to queries about the Court of Appeals Database. Lawrence Baum kindly made available data he has assembled on Supreme Court clerks.

¹ Political elites include, among others, elected officials, other senior government officials, party leaders, and prominent journalists and political commentators.

² See NOLAN MCCARTY, ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006); see generally Gary Jacobson, *Partisan Polarization in Presidential Support: The Electoral Connection*, 30 CONGRESS & PRESIDENCY 1 (2003); see generally NATHANIEL PERSILY, *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* (2015); Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411 (2014); see generally MARC J. HETHERINGTON & THOMAS J. RUDOLPH, *WHY WASHINGTON WON'T WORK: POLARIZATION, POLITICAL TRUST, AND THE GOVERNING CRISIS* (2015); see generally JAMES A. THURBER & ANTOINE YASHINAKA, *AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLIZATION* (2016); see generally ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2011); see generally JAMES E. CAMPBELL, *POLARIZED: MAKING SENSE OF A DIVIDED AMERICA* (2016).

³ See generally Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. (forthcoming May 2019) <https://ssrn.com/abstract=3132088> [<https://perma.cc/SA49-JJB3>] (overviewing the research concerning polarization of the judiciary).

⁴ See generally NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (2005); see generally BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* (2006); see generally SARAH BINDER & FORREST MALTZMAN, *ADVICE AND DISSSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* (2009); see generally AMY STEIGERWALT, *BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS* (2010); see generally Salmon A. Shomade et al., *Lower Federal Court Judicial Confirmation Fights: A Critical Review of the Empirical Literature and Future Research Directions*, 47 PS: POL. SCI. & POL. 149 (reviewing the political science literature on conflict over lower federal court confirmations).

⁵ See generally HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* (1972); see generally SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); see generally

a role in judicial selection in some states as well, particularly in changes to selection systems in states such as North Carolina,⁶ Tennessee,⁷ and Kansas.⁸ It is also evident in some ostensibly

HENRY J. ABRAHAM, JUSTICES & PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (3rd ed. 1992).

⁶ In the early 2000s, North Carolina had switched from partisan to nonpartisan judicial elections; *see generally* NATIONAL CENTER FOR STATE COURTS, *History of Reform Effects: North Carolina*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=NC [<https://perma.cc/GB56-V7LL>] (last visited Feb. 18, 2018). In the 2012 election, Republicans won control of the legislative and executive branch of government for the first time since reconstruction, and in the wake of that success moved to consolidate control of state courts, eventually reverting all state judicial elections back to the partisan format; *see* Trip Gabriel, *They Couldn't Beat the Courts, So They Voted to Change Them*, N.Y. TIMES, Oct. 19, 2017, at A1.

⁷ In 1971, the Tennessee legislature adopted what was labeled the Tennessee Plan, a variant of the Missouri plan (AKA “merit selection”), for Tennessee’s appellate courts; three years later, it returned the Tennessee Supreme Court to partisan elections, but then reinstated the Tennessee Plan for the Supreme Court in 1994; *see* NATIONAL CENTER FOR STATE COURTS, *History of Reform Effects: Tennessee*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=TN [<https://perma.cc/9GJJ-SMYS>] (last visited Feb. 18, 2018). One controversial element of the Tennessee Plan was that it had never been submitted to the electorate as a constitutional amendment. A challenge to the Plan based on the absence of an amendment failed in the Tennessee courts; *Shriver v. Dunn*, 496 S.W.2d 480 (Tenn. 1973). In the 2010 election, Republicans won control of both the legislative and executive branches of Tennessee government for the first time since Reconstruction. Proposals were introduced into the legislature to abolish the Tennessee Plan, and revert to contested elections. Other proposals were introduced to free the governor from being constrained to appoint someone nominated by the Selection Commission. Eventually, a proposed amendment was passed that eliminated the constraint on whom the governor could nominate, with nominations subject to confirmation of the legislature; judges would continue to stand for subsequent terms in retention elections; *see* Margaret L. Behm & Candi Henry, *Judicial Selection in Tennessee: Deciding “the Decider,”* 1 BELMONT L. REV. 143, 166-167 (2014). This action by the legislature came after it had allowed the legislation authorizing the existing nomination commission to lapse; *id.* at 145.

⁸ Kansas was the first state to follow Missouri in adopting a system constraining the governor with a requirement to choose from a slate nominated by an independent commission and using retention elections for subsequent terms. This system was adopted in 1958 for the Kansas Supreme Court, became an option for district courts in 1972, and was specified in the legislation creating the Court of Appeals in 1977; *see* NATIONAL CENTER FOR STATE COURTS, *History of Reform Effects: Kansas*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=KS [<https://perma.cc/2TTH-A7DG>] (last visited Feb. 18, 2018). The Kansas appellate courts came into conflict with

nonpartisan elections for state supreme court justices, perhaps most clearly in elections for the Wisconsin Supreme Court in 2008 and 2011.⁹

the Republican governor, Sam Brownback, and the Republican controlled legislature. Most of the judges on these courts had been named by Brownback's Democratic predecessors. Erik Eckholm, *Outraged by Court in Kansas*, *G.O.P. Sets Out to Reshape It*, N.Y. TIMES, Apr. 2, 2016, at A1 ("Brownback and other conservative Republicans [had] expressed outrage over ... decisions that overturned death penalty verdicts, blocked anti-abortion laws, and hampered Mr. Brownback's efforts to slash taxes and spending,"). Brownback's goal was to gain full control of the selection process by eliminating the constraints created by the mandate to appoint from a list forwarded by a nominating commission. When this proved impossible to do with simple legislation for the Kansas Supreme Court, the legislature proceeded to make that change for the Court of Appeals; see *Kansas Governor Signs Bill Changing Court of Appeals Appointments*, WICHITA EAGLE (Mar. 27, 2013), <http://www.kansas.com/news/politicsgovernment/article/1112192.html> [<https://perma.cc/KS5E-ERT3>]. It was possible to make the change for the Court of Appeals because that court is entirely the creation of the legislature, and there is nothing in the state constitution that constrains how judges of the court are to be selected and retained. To pass a constitutional amendment that would make a similar change for the Kansas Supreme Court requires a two-thirds majority in the state legislature which Republicans have not been able to muster; see Daniel Salazar, *Kansas Supreme Court Selection Change Dies in House*, WICHITA EAGLE (Feb. 4, 2016), <http://www.kansas.com/news/politics-government/article/58419373.html> [<https://perma.cc/FGB9-ZKPK>].

⁹ HERBERT M. KRITZER, JUSTICES ON THE BALLOT: CONTINUITY AND CHANGE IN STATE SUPREME COURT ELECTIONS, 8–12 (2015). In the 2008 election, Justice Louis Butler, the only African American to have served on the Court and who was standing for election after having been appointed to fill a vacancy by Democratic governor Jim Doyle, was defeated by trial court judge Michael Gableman, who received extensive backing from business interests. After the election, the judicial disciplinary body brought charges that Gableman's campaign had run advertisements that violated judicial ethics rules; the Wisconsin Supreme Court failed to impose discipline when it split 3 to 3. Gableman decided not to run for reelection when his term expired in 2018; see Patrick Marley, *Wisconsin Supreme Court Justice Michael Gableman Will Not Seek Second Term*, MILWAUKEE J. SENTINEL (June 15, 2017), <https://www.jsonline.com/story/news/politics/2017/06/15/supreme-court-justice-michael-gableman-not-seek-second-term/399554001/> [<https://perma.cc/53QL-94QE>]. In the April 2011 election, Justice David Prosser faced challenger longtime assistant state attorney general JoAnne Kloppenburg. In the February primary, Prosser had won 55 percent of the vote compared to only 25 percent for Kloppenburg, with two other candidates receiving the remaining votes. The April election became a proxy battle against the Republicans who had gained full control of the other two branches in the 2010 election and had started passing legislation aimed at unions serving teachers and other government employees. Both the 2008 and the 2011 elections produced

Importantly, the polarization extends beyond judicial selection to judicial decisions. This polarization is most prominent in the pattern of decisions by justices of the U.S. Supreme Court,¹⁰ particularly in high visibility cases, such as *Bush v. Gore*,¹¹ and those involving issues such as gun control, LGBT rights, affirmative action, and abortion rights.¹² Substantial polarization also exists in decisions of some state supreme courts.¹³ As discussed in this article, statistical analyses of decision patterns on the U.S. Supreme Court,¹⁴ the U.S.

voting patterns that strongly correlated recent gubernatorial elections. Specifically, the correlation between the county-level percentage for governor and the county-level percentage for supreme court justice, what I label the “partisan correlation,” was .794 in 2008 and .892 in 2011. The Wisconsin Supreme Court elections in 2016 and 2018 also showed very strong partisan patterns. The partisan correlation in 2016, in an election between a justice recently appointed by the Republican governor and a challenger backed by Democrats, was .921, the highest of any Wisconsin Supreme Court election in the state’s history. In 2018, the open-seat election for the position being vacated by Michael Gableman, the partisan correlation with the 2018 gubernatorial election was .917. The correlation between the election results for the 2018 supreme court election and the 2016 presidential election was .891, reflecting that the supreme court election became something of a referendum on Donald Trump’s presidency; see David Weigel, *Democrat Wins Bitter, Costly Race for Wisconsin Supreme Court*, CHICAGO TRIBUNE (Apr. 3, 2018), <http://www.chicagotribune.com/news/nationworld/midwest/ct-wisconsin-supreme-court-election-20180403-story.html> [<https://perma.cc/25C4-48NM>].

¹⁰ See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, SUP. CT. REV. 301 (2016) [henceforth, “*Split Definitive*”]; see generally NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019); Lee Epstein & Eric Posner, *Above Politics No More*, N.Y. TIMES, July 9, 2018, at A23.

¹¹ *Bush v. Gore*, 531 U.S. 98 (2000); see generally HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* (2001); CASS R. SUNSTEIN & RICHARD A. EPSTEIN, *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (2001).

¹² See generally THOMAS M. KECK, *JUDICIAL POLITICS IN POLARIZED TIMES* (2014).

¹³ Michael Wines, *Judges Say, Throw Map Out. Lawmakers Say, Judges First*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/us/pennsylvania-gerrymandering-courts.html> [<https://perma.cc/33R7-M2W7>].

¹⁴ See *infra* notes 92–140, and accompanying text. See James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507 (2007) (analyzing the polarization of public views of the U.S. Supreme Court).

Courts of Appeals,¹⁵ and the federal district courts¹⁶ demonstrate that polarization based on party of the judge or the appointing president goes beyond the high visibility cases. In this article, I explore in-depth patterns of increasing differences in decisions by federal judges depending on the party of the president who appointed them. I find evidence of increasing differentiation at all three levels of the federal court system. At all three levels, the presence or degree of polarization varies by the type of case.

In the next section of this article, I briefly review what we know in broad terms about polarization in American politics. In the following sections, I examine partisan differences in decision patterns at each of the three levels of the federal court system: the U.S. Supreme Court,¹⁷ the U.S. Courts of Appeals,¹⁸ and the federal district courts.¹⁹ Each of these sections combines a review of extant literature related to polarization in decision-making and original analyses drawing on available datasets of decisions for each of the three court levels. In looking at polarization, my focus is on the party of the appointing president rather than the partisan background of the individual judge.²⁰

A. Data and Methodology

In the sections on each of the three levels of courts, I discuss the datasets I employ. All three datasets were compiled by political scientists. One common element among them is the classification of decisions as “liberal” or “conservative.” How a decision is coded depends on the nature of the legal issue that is raised. Generally, a decision favoring a claimant in the civil liberties or civil rights case is labeled liberal; a decision favoring a criminal defendant in a criminal case is labeled liberal; and a decision in an economics or regulatory case is coded liberal if it disfavors a business, either by ruling in favor of an employee (or a union) or by ruling in favor of the government in

¹⁵ See *infra* notes 144–168, 169–178, and accompanying text.

¹⁶ See *infra* notes 198–207, and accompanying text.

¹⁷ See *infra* notes 92–141, and accompanying text.

¹⁸ See *infra* notes 179–186, and accompanying text.

¹⁹ See *infra* notes 208–225, accompanying text, and the Appendix B.

²⁰ Using the data on decision-making by federal district judges, I will show that the party of appointing president distinguishes judges more than does the judges’ own backgrounds (although there is a very high correlation); See *infra*, note 212, and accompanying text.

a regulatory matter.²¹ Coding in this way is not without its problems, particularly in the civil liberties area. For example, a decision upholding the right of anti-abortion protestors to congregate near an abortion facility in a way that may interfere with people seeking to access the facility would generally be coded as a liberal decision.²²

Coding can also be complicated in cases in which the issue is ambiguous. For example, one can view *Rosenberger v. Rector and Visitors of the University of Virginia*,²³ a case involving the denial of university funding to student religious publications while providing funding for secular publications as involving either a freedom of speech issue or an Establishment Clause issue; the coding of justices' decisions in this case as liberal or conservative depends on how the issue is characterized. There can also be a question of which broad category a case should be viewed as falling in. For example, the 2018 case concerning the constitutionality of state laws allowing public worker unions to require non-member employees covered by the union contract to pay an "agency fee" for the union's workplace-related services could be seen as either a labor case or a freedom of expression case, and the coding of the case depends on whether one sees it as raising a labor issue or a First Amendment issue.²⁴

I present the analysis of decision patterns largely through graphics showing the percentage of decisions decided in a liberal direction (henceforth "percent liberal."). In a few places, I report a Pearson product moment correlation to provide a measure of the direction and strength of the relationship.²⁵ I employ simple linear regression to fit a straight line to the trend²⁶ and to test whether the slope of that line (reported as "b") by estimating the probability that a slope as large or larger would be observed by chance if the overtime pattern was in fact random.²⁷

²¹ Decisions in cases involving some types of issues, such as taxes and intellectual property, do not necessarily lead to ready categorization as liberal or conservative.

²² See *Bush v. Gore*, 531 U.S. 98 (2000) (showing the legal substance of the decisions by the conservative bloc on the court would be categorized as liberal with the views of the dissenting liberals as conservative).

²³ *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

²⁴ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

²⁵ H.M. BLALOCK, *SOCIAL STATISTICS* 396–403 (Revised 2d ed. 1979).

²⁶ *Id.* at 382–396.

²⁷ *Id.* at 415–422.

II. CONCEPTUALIZATION AND UNDERSTANDING POLARIZATION

Polarization can be evident in either ideology or behavior. Research on polarization among the citizenry typically focuses on the degree citizens systematically vary in their views regarding policy-related issues which presumably reflect ideology.²⁸ A good example of research showing increased polarization among the citizenry is a series of studies by the Pew Research Center, the most recent of which was published in October 2017. The 2017 Report drew on data Pew collected over a 23-year period, 1994 through 2017.²⁹ Across a set measure of “values” (e.g., view of homosexuality, abortion, importance of hard work, etc.), the difference between self-identified Democrats and Republicans in the average percentage taking a conservative position increased sharply. In 1994, the difference was 15 percentage points; by 2017, it had increased to 36 percentage points. In contrast, there was little change in the gap based on race, age, gender, education, or religious attendance.³⁰ Figure 1 is taken from the Pew Report and shows a hollowing out of the center, with increasingly consistent conservative and liberal positions,³¹ and decreasing overlap between those identifying with each of the parties.³² Pew also found growing political hostility. In 2017, 44 to 45 percent of Democrats and Republicans had “unfavorable” opinions of the other party compared to 20 percent in 1994,³³ a pattern that has been labeled “affective polarization.”³⁴

²⁸ *The Partisan Divide on Political Values Grows Even Wider*, PEW RESEARCH CENTER (Oct. 2017) <http://assets.pewresearch.org/wpcontent/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf>. [<https://perma.cc/2RBL-RNPG>].

²⁹ *Id.* at 1.

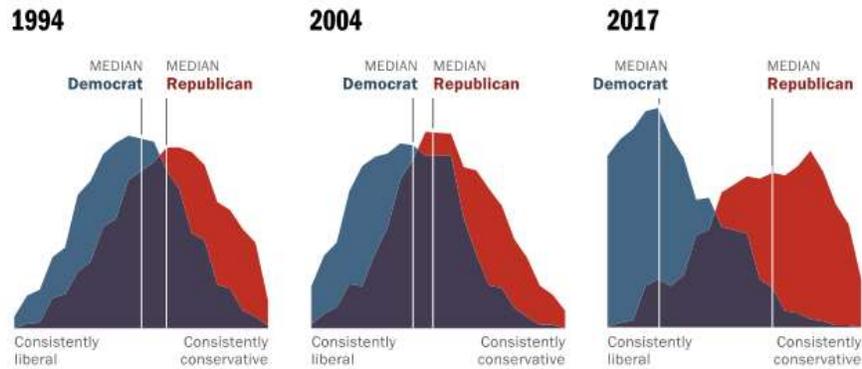
³⁰ *Id.* at 3 (Respondents who said that they “leaned” toward one of the parties were included with those who described themselves as a Republican or a Democrat.); *See also id.* at 7 (providing a list of these 10 values).

³¹ *Id.* at 11. The figure is reprinted here under the terms of the Pew Research Center’s “Terms of Use,” dated May 5, 2018 <http://www.pewresearch.org/terms-and-conditions/> [<https://perma.cc/5SXQ-KGTP>] (last visited Oct. 21, 2018).

³² *Id.* at 12–13.

³³ *Id.* at 5, 65–68.

³⁴ *See generally* Jon C. Rogowski & Joseph L. Sutherland, *How Ideology Fuels Affective Polarization*, 38 POL. BEHAV. 485 (2016).

Figure 1: Polarization in the American Electorate, 1994-2017

Notes: Ideological consistency based on a scale of 10 political values questions (see methodology). The blue area in this chart represents the ideological distribution of Democrats and Democratic-leaning independents; the red area of Republicans and Republican-leaning independents. The overlap of these two distributions is shaded purple.
Source: Survey conducted June 8-18, 2017.

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A second indicator of the increasing partisan polarization of the electorate is the increasing correlation between partisan identification and policy preferences. Political scientists measure party identification along a seven-point scale ranging from “strong Democrat” to “strong Republican.”³⁵ Using data from the American National Election Studies (ANES), Abramowitz and Saunders examined the relationship between responses regarding four policy issues asked about on all of the quadrennial studies between 1972 and 2004: aid to blacks, abortion, health insurance, and jobs/living standards.³⁶ They averaged the correlation across three elections: 1972-1980, 1984-1992, and 1996-2004.³⁷ For the first period, the overall average was .18 (.24 excluding abortion), .25 (.31 excluding abortion) for the second period, and .33 (.38 excluding abortion) for the third period.³⁸ They also looked at the correlation between party identification and self-

³⁵ See generally CAMPBELL ET AL., THE AMERICAN VOTER 121–125 (1960); the intermediate points are “Democrat,” “Independent, leaning Democrat,” “Independent [leaning neither Democrat or Republican],” “Independent, leaning Republican,” and “Republican”.

³⁶ Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?* 70 J. POL. 542, 547 (2008).

³⁷ *Id.* at 547.

³⁸ *Id.*

placement on a seven-point ideology scale and found that it had increased from about .32 in 1972 to over .60 in 2004.³⁹

Cavari and Freedman applied the same method using data from the quadrennial ANES studies between 1984 and 2012.⁴⁰ They looked at six policy issues, the four considered by Abramowitz and Saunders, plus overall government spending and defense spending.⁴¹ For the first three of the presidential election years, the correlation between party identification and preferences regarding five of those policies, the exception being legalization of abortion, was steady, averaging .21.⁴² For the three presidential election years between 1996 and 2004, the correlation for the same five increased, averaging between .38 and .42.⁴³ The correlation between party identification and preferences regarding abortion was close to zero in 1984 and 1988 but then started to increase, and by 1996, it was only slightly below the correlations for the other five policies.⁴⁴ After 2004, the correlations for all six policies increased, both in 2008 when the average for the six was .58 and 2012 when it rose to .67;⁴⁵ however, in 2016, the average correlation dropped substantially to .51.⁴⁶ It is important to note that Cavari and Freedman go on to present analyses suggesting that at least some of the apparent increase in polarization among the public may be an artifact of declining response rates for public opinion surveys.⁴⁷

Studies of elites employ several approaches to assess ideological differences in attitudes and/or behavior. Some studies rely on surveys of elite preferences to provide a measure of ideology.⁴⁸ For federal

³⁹ *Id.* at 546.

⁴⁰ Amnon Cavari & Guy Freedman, *Polarized Mass or Polarized Few? Assessing the Parallel Rise of Survey Nonresponse and Measures of Polarization*, 80 J. POL. 719 (2018).

⁴¹ *Id.* at 721.

⁴² *Id.* at 720.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (The averages reported above were computed by the author using the correlations generously provided by Amnon Cavari) (citing an email to Herbert Kritzer, April 2, 2018).

⁴⁶ The figures for 2016 were provided by Amnon Cavari (email to Herbert Kritzer, April 12, 2018). The correlations dropped for all policy areas; they ranged from .49 to .53, compared to a range of .63 to .70 for 2012.

⁴⁷ Cavari & Freedman, *supra* note 40, at 721–23.

⁴⁸ See generally Jeane Kirkpatrick, *Representation in the American National Conventions: The Case of 1972*, 5 BRIT. J. POL. SCI. 265 (1975); See generally

judges, some researchers have employed measures based on information from the appointment process, such as newspaper commentary⁴⁹ or the ideology of key actors in the appointment and/or election process.⁵⁰ A third common approach is to infer political elites' ideology from their behavior by either relying on interest group ratings⁵¹ or using various types of scaling techniques based on decision/voting information for members of Congress,⁵² for the justices of the U.S. Supreme Court,⁵³ and for state supreme court justices.⁵⁴ A recently developed approach relies on information regarding patterns of campaign contributions to measure ideology of state supreme court justices,⁵⁵ although this type of measure is limited to the years that comprehensive campaign finance reports have been available and to persons who have made political contributions. The indicator of elite polarization I use here is differences in decisions based on either explicit or implicit party affiliation.⁵⁶

In congressional rollcall voting, polarization is evident in the very sharp difference in voting by Republican and Democratic members.

Allen H. Barton, *Consensus and Conflict among American Leaders*, 38 PUBLIC OPINION Q. 507 (1974).

⁴⁹ See generally, Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

⁵⁰ Micheal W. Giles, et al., *Alternative Measures of Preferences for Judges of the Courts of Appeal* (1998) (Presented at the annual meeting of the Midwest Political Science Association, Chicago) (on file with Emory University); Paul Brace, et al., *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387 (2000).

⁵¹ Herbert M. Kritzer, *Ideology and American Political Elites*, 42 PUB. OPINION Q. 484 (1978); Glenn Sussman & Byron W. Daynes, *The Impact of Political Ideology on Congressional Support for Presidential Policy Making Authority: The Case of the Fast Track*, 22 CONGRESS & PRESIDENCY 141 (1995); Bernard Grofman, et al., *Is the Senate More Liberal than the House? Another Look*, 16 LEGIS. STUD. Q. 281 (1991).

⁵² See generally DUNCAN MACRAE, *DIMENSIONS OF CONGRESSIONAL VOTING* (1958); Keith T. Poole & Howard Rosenthal, *A Spacial Model for Lgislative Roll Call Analysis*, 29 AM. J. POL. SCI. 357 (1985).

⁵³ See generally, Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

⁵⁴ See generally, Jason H. Windett, et al., *Estimating Dynamic Ideal Points for State Supreme Courts*, 23 POL. ANALYSIS 461 (2015).

⁵⁵ See generally, Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J.L. ECON. & ORG. 472 (2015).

⁵⁶ For appointed elites, such as many judges, the party of the appointer serves as an implicit indicator of affiliation in the absence of an explicit indicator.

Although there has long been a partisan difference in that voting pattern,⁵⁷ in the past it was common to find overlap such that some of the more liberal Republicans were more liberal in their roll call voting pattern than were the more conservative Democrats. Although much of this overlap reflected conservative Democrats from the South, one could also find conservative non-southern Democrats such as Senator Frank Lausche from Ohio (1957-1969) and liberal Republicans such as Senators Charles McC. Mathias from Maryland (1969-1987), Clifford Case from New Jersey (1955-79), and Lowell Weicker from Connecticut (1971-89), and Representatives such as Charles Whalen, Jr. from Ohio (1967-1979) and Pete McCloskey from California (1973-75). In the words of one scholar, “[t]he days of Rockefeller Republicans challenging Goldwater Republicans are over, as are the days of the Dixiecrat Democrats doing battle with northern liberal Democrats.”⁵⁸

Over the last several decades, the difference between congressional Democrats and Republicans has sharpened to the point that there is little overlap between them in their roll call voting patterns, either as measured by interest group ratings or indices, such as Poole and Rosenthal’s D-W Nominate scores, that are based on a sophisticated scaling methodology.⁵⁹ An examination of D-W Nominate scores for the 91st, 92nd, 93rd, 111th, 112th, and 113th (1969-74 and 2009-14) Congresses reveals no overlap at all for either chamber during the later period compared to substantial overlap during the earlier period.⁶⁰ Moreover, analyses show that, although Democrats in Congress have moved in a leftward direction since the 1960s, Republicans have generally moved much more sharply in a

⁵⁷ See generally JULIUS TURNER & JR. EDWARD V. SCHNEIER, PARTY AND CONSTITUENCY: PRESSURES ON CONGRESS (1970); MACRAE, *supra* note 52; see generally Gary W. Cox & Keith T. Poole, *On Measuring Partisanship in Roll-Call Voting: The U.S. House of Representatives, 1877–1999*, 46 AM. J. POL. SCI. 477 (2002).

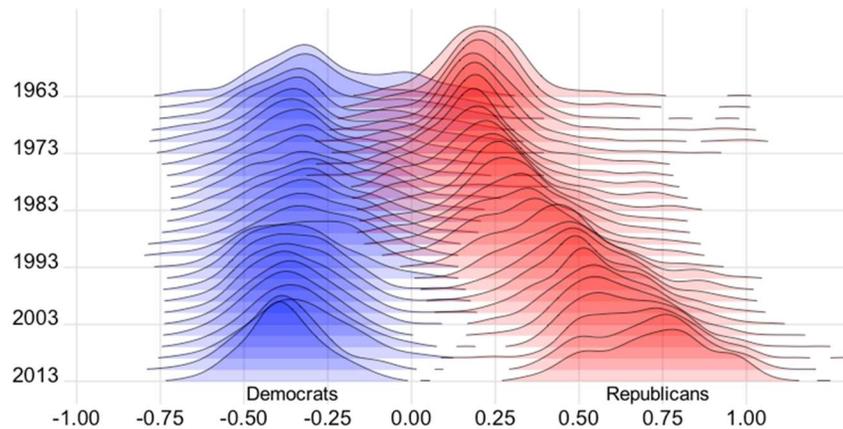
⁵⁸ CAMPBELL, *supra* note 2, at 24.

⁵⁹ Christopher Hare & Keith T. Poole, *supra* note 2, at 424; KEITH T. POOLE & HOWARD ROSENTHAL, IDEOLOGY & CONGRESS 316 (2007).

⁶⁰ CAMPBELL, *supra* note 2, at 25.

rightward direction.⁶¹ These changes are illustrated in Figure 2, created by Ian McDonald.⁶²

Figure 2: Polarization in Voting in the U.S. House of Representation as Measured by the First Dimension DW-Nominate Scores



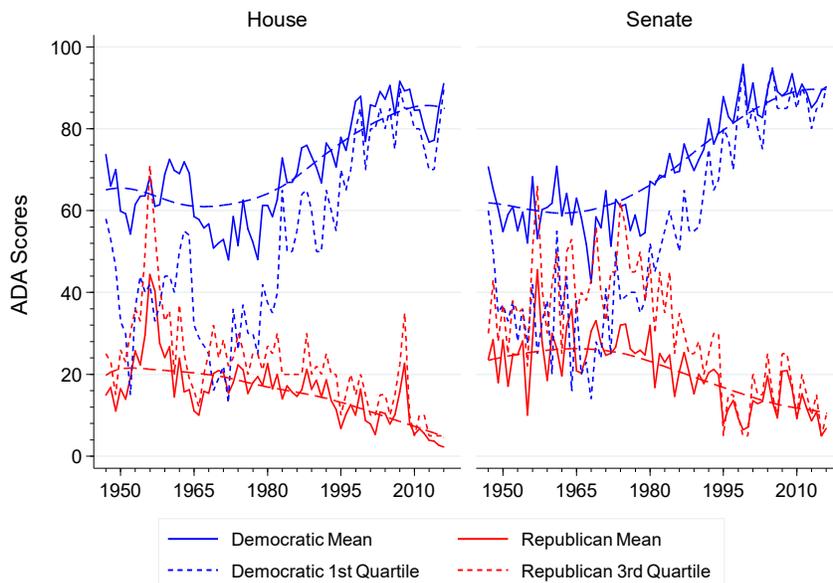
Note: Prepared by Ian McDonald, accessed at <http://rpubs.com/ianrmcdonald/293069>; used with permission. Based on data available at voteview.com.

Stonecash et al. looked at average ratings for members of the House of Representatives by the liberal Americans for Democratic

⁶¹ *The Polarization of the Congressional Parties*, VOTEVIEW, https://legacy.voteview.com/political_polarization_2014.htm (last updated Mar. 21, 2015) [<https://perma.cc/99L5-PSTJ>]; see also THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 51 (2012) (explaining that there have been other periods of very substantial polarization in Congress, such as around the beginning of the 21st century); see David A. Bateman et al., *A House Divided? Roll Calls, Polarization, and Policy Differences in the U.S. House, 1877–2011*, 61 AM. J. POL. SCI. 698, 700 (2016).
⁶² Ian McDonald (@ianrmcdonald), TWITTER (Jul. 21 2017, 1:33 PM), <https://twitter.com/ianrmcdonald/status/888497304663056385> [<https://perma.cc/ATW9-EA5R>] (showing that DW-NOMINATE scores are scaled so that liberal positions align with negative values and conservative with positive; hence, conservative appears on the left of Figure 1 and liberal on the right).

Action for the period 1948 through 2000⁶³ and found that the gap between Democrats and Republicans narrowed from 1960 through about 1978, but then steadily increased.⁶⁴ I obtained the ADA data for the period 1947 through 2016. The solid lines in Figure 3 show plots of the mean ADA (liberalism) scores for the House and the Senate. I used the lowess smoothing procedure⁶⁵ to produce the long-dashed line. The divergence of the two parties' representatives and senators since 1960 is clear in the figure. The short-dashed lines show the degree of polarization.

Figure 3: Congressional ADA Scores, 1947-2016



These lines represent the 25th percentile (first quartile) for the Democrats and the 75th percentile for the Republicans. Through the 1970s, these two lines overlapped from time to time; since then, those two lines have diverged, typically deviating little from their

⁶³ JEFFREY M. STONECASH, ET AL., *DIVERGING PARTIES: SOCIAL CHANGE, REALIGNMENT, AND PARTY POLARIZATION* 8 (2003); *see also* CAMPBELL, *supra* note 2, at 27.

⁶⁴ STONECASH, ET AL., *supra* note 63, at 8.

⁶⁵ William S. Cleveland, *Robust Locally Weighted Regression and Smoothing Scatterplots*, 74 J. AM. STAT. ASSOC. 829, 829 (1979).

respective means. Unlike with the DW-Nominate scores, the two parties diverged similarly.⁶⁶

Scores from the American Conservative Union (ACU),⁶⁷ which started annual ratings in 1971,⁶⁸ show substantial overlap of the parties in the early years but a disappearance in recent years. ACU scores members of Congress so that high values (maximum 100) are conservative and low values (minimum 0) are liberal.⁶⁹ In 1971, five Republicans received scores of 0 and 28 Democrats received scores of 100.⁷⁰ Ten years later, no Republicans received a score of 0 and only four Democrats received scores of 100.⁷¹ By 1981, no Democrats were receiving perfect scores from ACU and no Republicans were receiving zeros.⁷² The most recent ratings, for 2016, show the most conservative Democrat receiving a score of 27; three Republicans receiving scores of 0, but they were all running for President and missed a large number of votes which did not count toward their scores.⁷³

At the state level, there is variation regarding increasing polarization in terms of an increasing gap between Democratic and Republican legislators. According to one analysis, covering the period 1996 to 2013, about half the states were more polarized than Congress, but some states had only modest gaps between the two parties.⁷⁴ In most states the gap was relatively stable.⁷⁵ Still, a small number of states, most prominently California and Colorado, had a sharp increase in the partisan gap over the period of the study; other states with an increasing gap, although less sharp, included Arizona, Idaho, Minnesota, Tennessee, and Texas.⁷⁶ Part of the reason for the variation

⁶⁶ See CAMPBELL, *supra* note 2, at 185.

⁶⁷ *Federal Legislative Ratings*, THE AMERICAN CONSERVATIVE UNION, <http://acuratings.conservative.org/acu-federal-legislative-ratings/> (last visited Feb. 14, 2018).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See CAMPBELL, *supra* note 2, at 185.

⁷⁴ See Boris Shor, *How U.S. State Legislatures Are Polarized and Getting More Polarized*, THE WASHINGTON POST (Jan. 14, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/14/how-u-s-state-legislatures-are-polarized-and-getting-more-polarized-in-2-graphs/?utm_term=.d0268deb28ac [<https://perma.cc/BBN5-LZMG>].

⁷⁵ *Id.*

⁷⁶ *Id.*

may be the relative importance of national policies in matters coming before a state legislature.⁷⁷

III. POLARIZATION IN SUPREME COURT DECISION-MAKING

As noted in the introduction, it is easy to point to prominent cases in which the justices of the Supreme Court divided along partisan lines. More importantly, the evidence of polarization measured quantitatively is just as clear. The ideological screening of potential court nominees has certainly become more systematic, particularly on the Republican side with a central role now played by the Federalist Society,⁷⁸ and this probably means that presidents are unlikely today to be surprised by the decision inclinations of their appointees. That is, it is unlikely that we will see a repeat of a Republican president appointing a justice such as John Paul Stevens or David Souter. At the same time, it is possible that under pressure from a Senate not of the president's party, a president will nominate someone who would be a moderate; some argue that this is what President Obama attempted to do with his nomination of Merrick Garland—that the Senate Republicans blocked.⁷⁹ Also, although much of the discussion of unanticipated decision patterns has focused on Republican appointees who turned out to be more liberal than their appointer might have preferred, there are examples cutting in the other direction. Byron White proved to be considerably to the right of the other Kennedy-Johnson appointees.⁸⁰ Before that, one has appointees of Franklin Roosevelt (Felix Frankfurter, and Robert Jackson) and appointees of

⁷⁷ See Alex Garlick, *National Policies, Agendas, and Polarization in American State Legislatures: 2011 to 2014*, 45 AM. POL. RES. 939 (2017); For a broad analysis of factors that might account for variation in legislative polarization, see *State Legislative Policymaking in an Age of Polarization*, NAT'L CONFERENCE OF STATE LEGISLATURES 2 (2017), http://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Partisanshipf04web.pdf (broadly analyzing factors that might account for variations in legislative polarization).

⁷⁸ See SCHERER, *supra* note 4, at 109–10; LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 52–55 (2005); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 156–61 (2008); MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* 25–27, 30–35 (2013).

⁷⁹ Devins & Baum, *supra* note 10, at 334–35.

⁸⁰ Epstein & Posner, *supra* note 10.

Harry Truman (Fred Vinson, Tom Clark, and Sherman Minton), at least regarding some types of issues.⁸¹

A. Clerk Selection

One decisional indicator of the ideological preference of justices is in whom they choose as law clerks. Ditslear and Baum assembled data regarding the Justices' law clerks to assess whether there had been any change in the pattern of clerk selection.⁸² They applied several analytic methods to examine this question. The most straightforward approach was to compare the proportions of clerks who had previously served with a Democratic-appointed appellate judge across four time intervals (1975-80, 1981-85, 1986-92, and 1993-98).⁸³ The proportion of sitting circuit judges appointed by Democrats varied between 57.7 percent and 32.3 percent across the intervals, but one can look at the difference in the average percentages during each period for Democratic-appointed justices and for Republican-appointed justices to get a sense of increasing polarization based on appointing president.⁸⁴ For the first three intervals, the differences are modest: 10.7, 10.6, and 4.9; for the fourth interval, the difference jumps to 26.7.⁸⁵ Importantly, this polarization does not align with the party of the appointing president because for the last interval two Republican appointees, Justices Souter and Stevens, have the highest percentage of clerks who had served Democratic-appointed judges, and the three highest in the second to last interval were also Republican appointees

⁸¹ See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* 569–72 (6th ed. 2015); see also *infra* figs. 11 & 12.

⁸² See generally Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the US Supreme Court*, 63 J. POL. 869, (2001); see generally Adam Bonica et al., *Measuring Judicial Ideology Using Law Clerk Hiring*, 19 AM. L. & ECON. REV. 129 (2017); see also Adam Bonica et al., *The Political Ideologies of Law Clerks*, 19 AM. L. & ECON. REV. 96 (2017) (discussing an alternate approach to measuring Supreme Court ideology using law clerk information (i.e., the pattern of political donations made by law clerks)).

⁸³ Ditslear & Baum, *supra* note 82, at 880.

⁸⁴ The authors computed the difference between the proportion selected by each justice and the average proportion of Democratic appointees for the time interval. These baseline figures were 48.1, 57.7, 39.0, and 32.3. The authors compute a mean without taking absolute values; I recomputed the means based on the absolute values. When I recomputed these based on absolute values, the mean drops slightly from the first to second time interval (13.9 to 10.7) but then increases sharply to 24.5 in the third interval and 31.3 in the last interval.

⁸⁵ Ditslear & Baum, *supra* note 82, at 880 (my computation).

(Brennan, Stevens, and Blackmun).⁸⁶ Clearly, to the degree that clerk selection is an indicator of polarization, it need not, at least in the past, be tied to the party of the appointing president.

A later article by Baum looked at the pattern of Supreme Court clerk selection for the period 2010-2014.⁸⁷ The degree of polarization had, by then, sharply increased. The difference between the four Democratic-appointed justices and the five Republican-appointed justices was 59.9 percentage points.⁸⁸ For the former, an average of 67.9 percent of their clerks had clerked for Democratic-appointed circuit judges; their individual percentages ranged from 63.2 (Justice Breyer) to 70.0 (Justices Sotomayor and Kagan).⁸⁹ The average for the Republican-appointed justices was 8.0; their individual percentages ranged from 0 (Justices Scalia and Alito) to 20.0 (Justice Kennedy).⁹⁰

Baum generously provided me with the data he assembled on clerk selection for the years 1999 through 2009. Using those data and the figures in the articles, I produced Figure 4. This figure shows some clear shifts. Democratic-appointed justices have held steady in selecting about two-thirds of their clerks from applicants who previously worked with a Democratic-appointed Court of Appeals judge, dropping a bit below that level only in two periods. In the first three periods shown in Figure 4, the clerk selection pattern for Republican-appointed justices tracked the pattern for Democratic-appointed justices, falling 5 to 10 percentage points lower. As the figure shows, the two groups of justices start to sharply diverge in the mid-1990s. Democratic-appointed justices continue to select about two-thirds of their clerks from candidates who had served a Democratic-appointed appellate judge. Republican-appointees sharply shifted their selections to candidates who had served Republican-appointed appellate judges.

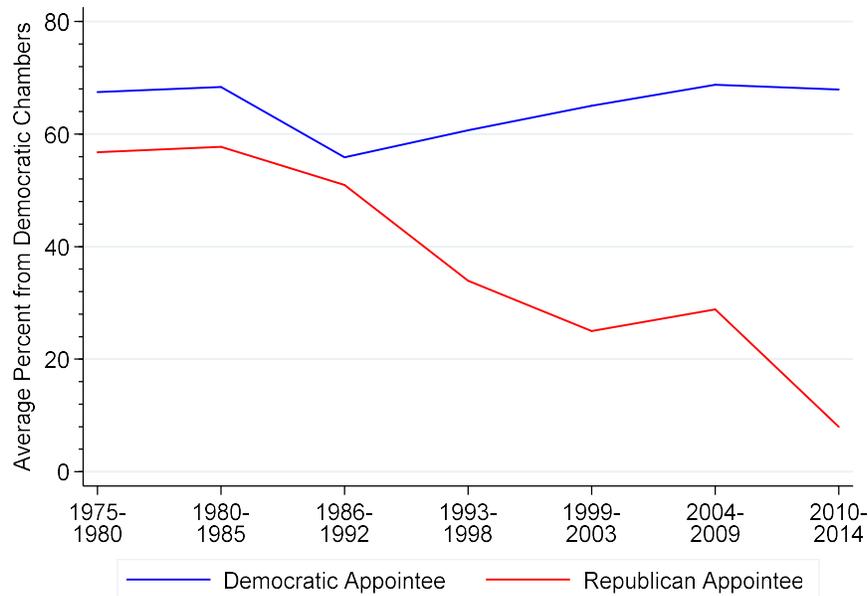
⁸⁶ *Id.*

⁸⁷ See generally Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage between Judges and Justices*, 98 MARQUETTE L. REV. 333 (2014); Devins & Baum, *supra* note 10, at 356 (providing the percentage of law clerks who had previously served with a Republican-appointed lower court judge for hires during the 2004 through 2016 terms; the percentages ranged from a high of 97.9 percent for Thomas (just barely beating out Scalia at 97.7) to a low of 23.4 percent for Ginsburg).

⁸⁸ Baum, *supra* note 87, at 338-39.

⁸⁹ *Id.*

⁹⁰ *Id.*

Figure 4: Supreme Court Clerk Selection

One could posit two extreme versions of clerk selection. At one end, justices might select clerks entirely without regard to who had appointed the appellate judge with whom the candidate had served. In that situation, one would expect the pattern for clerk selection to vary over time reflecting the composition of the appellate bench but not vary depending on the party of the president appointing the justice. That might have been approximately true for the first two periods, based on information reported by Ditslear and Baum, but it ceased to be true by the third period.⁹¹ Alternatively, one might posit that justices generally tend to select clerks with service in appellate court chambers of judges appointed by presidents of the same party as the president who appointed the justice, arguably to increase the likelihood of ideological compatibility between the justice and the clerk. That appears to be increasingly true of Republican-appointee justices; Democratic-appointee justices have, over the entire period, been more likely to choose in that way, but they have not gone as far along this path as have appointees of Republicans in recent years. A third possibility, which is difficult to assess, is that justices choose clerks with experience in appellate chambers where the judge's decision pattern is ideologically similar to the justice's. Data to assess

⁹¹ Ditslear & Baum, *supra* note 82, at 880.

this more than anecdotally are not available, but it does seem to be consistent with the patterns of individual justices.

B. Prior Research on Supreme Court Decision Patterns

Until recently, analyses explicitly examining polarization on the Supreme Court in terms of decisions in cases did not focus on the gap in decision patterns by appointees of Democrats and appointees of Republicans, nor did they emphasize the behavior of the justices. Clark developed and presented measures of polarization based on methods pioneered by Esteban and Ray.⁹² The core of Esteban and Ray measure is a “linear representation of the distance between all individuals.”⁹³ Clark computed the Esteban and Ray measure based on two indicators of judicial ideology,⁹⁴ the Segal-Cover (SC) scores⁹⁵ and the Judicial Common Space (JCS) scores.⁹⁶ Although the latter is based on the justices’ votes, scholars have treated the JCS scores as a measure of ideology.⁹⁷ Using the measures based on JCS, he showed variation between 1953 and 2004, but not a clear pattern of increased polarization over the entire period.⁹⁸ Using the SC scores, his measure shows a jump in polarization around 1970, but then a return to the level during the early 1990s.⁹⁹

Gooch took the measures discussed by Clark, plus others, and modeled change over time.¹⁰⁰ He defined time in two ways: by Chief

⁹² See generally Tom S. Clark, *Measuring Ideological Polarization on the United States Supreme Court*, 62 POL. RES. Q. 146 (2009); see generally Joan Esteban & Debraj Ray, *On the Measurement of Polarization*, 62 ECONOMETRICA 819 (1994).

⁹³ Clark, *supra* note 92, at 149.

⁹⁴ *Id.* 152; see Corey Rayburn Young, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1144–1153 (2010).

⁹⁵ See generally Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). (These scores are based on editorial comment during the time between a justice’s nomination and his or her confirmation by the Senate.)

⁹⁶ See Martin & Quinn, *supra* note 53.

⁹⁷ See, e.g., Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important*, 101 NW. U. L. REV. 1483 (2007).

⁹⁸ Clark, *supra* note 92, at 152.

⁹⁹ *Id.*

¹⁰⁰ See generally Donald Michael Gooch, *Ideological Polarization on the Supreme Court: Trends in the Court’s Institutional Environment and Across Regimes, 1937-2008*, 43 AM. POL. RES. 999 (2015).

Justice and by pre and post *Roe v. Wade*.¹⁰¹ His analysis used data back to the Hughes Court.¹⁰² He found a “strong linear trend of increasing ideological polarization on the Court over chief justice regimes and the pre-Roe to post-Roe jurisprudential regimes.”¹⁰³ He also found a significant correlation between polarization on the Court and Senate polarization.¹⁰⁴

Two recent analyses focus on polarization in the decisions of the individual justices. In a brief op-ed piece in the *New York Times*, Epstein and Posner provided a graph of the annual pattern of voting by appointees of Democratic and Republican presidents in cases decided by a 5-4 or 5-3 vote between 1953 and 2017.¹⁰⁵ It showed that differentiation sharply increased in the 1990s, with the percent liberal by appointees of Democrats on the order of 75 percent or more compared to 40 percent or less for appointees of Republicans.¹⁰⁶ In the 2017 term, the *gap* was 74 percentage points: 88 percent liberal for the Democrats and 14 percent for the Republicans.¹⁰⁷

Devins and Baum explored the patterns of polarization on the Supreme Court.¹⁰⁸ They employed two measures of polarization focused on the percent of conservative votes cast by justices differentiated by the party of the appointing president.¹⁰⁹ The first was the standard deviation of the percent of conservative decisions for each justice, with the justices separated by the party of the appointing president.¹¹⁰ The standard deviation is a measure of variation and the idea of using it as an indicator of polarization is that variation among justices appointed by presidents of one party should decrease as the Court became more polarized. For this measure, they looked at four periods of varying length starting in 1986 and continuing to 2015.¹¹¹ They showed that the standard deviation dropped sharply between 1986-1993 and 1994-2004 for Democratic-appointed Justices; the standard deviation for Republican appointees did not drop until the

¹⁰¹ *Id.* at 1001 (analyzing *Roe v. Wade*, 410 U.S. 113 (1973)).

¹⁰² *Id.* at 1016.

¹⁰³ *Id.* at 1032.

¹⁰⁴ *Id.*

¹⁰⁵ Epstein & Posner, *supra* note 10.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Split Definitive*, *supra* note 10, at 317–19.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 317–18.

¹¹¹ *Id.* at 318–19.

last period they examined, 2010-2015.¹¹² The high standard deviation for Democratic-appointed Justices in the 1986-1993 period reflected that the only such justices during that period were the very liberal Thurgood Marshall and the relatively conservative (for the time) Byron White; the standard deviation dropped when White retired and was replaced by Ruth Bader Ginsburg. The standard deviation for Republicans stayed high until both John Paul Stevens and David Souter retired during the Obama administration, with the former replaced by Elena Kagan and the latter by Sonia Sotomayor.

Devins and Baum's second indicator of polarization is the difference in the percentage of conservative votes between Democratic-appointed and Republican-appointed Justices.¹¹³ For this analysis, they looked at three periods: 1953-1993, 1994-2009, and 2010-2015.¹¹⁴ The gap between the two groups was about 10 percentage points for the first period, rose to about 16 for the second period, and then to 20 percentage points for the last period.¹¹⁵ Note that these figures were based on all decisions, both unanimous and nonunanimous.¹¹⁶

C. *Additional Analyses*

To assess partisan-based polarization in the decision patterns of Supreme Court justices in more detail, I conducted analyses using two data sources, the Supreme Court Database¹¹⁷ and the Judicial Common Space scores.

1. **Analyses Using the Supreme Court Database**

The Supreme Court Database (SCDB) contains data on decisions back to the first decision in 1791.¹¹⁸ There are two broad versions available.¹¹⁹ The "Modern" version extends back only to the 1946 term of the Vinson Court, continuing, as this is written, through the

¹¹² *Id.* at 319.

¹¹³ *Id.* at 320.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ E-mail from Lawrence Baum, Professor of Political Science, Ohio State University, to author (July 28, 2018) (on file with author).

¹¹⁷ *Index, The Supreme Ct. Database*, WASH. U. L., <http://scdb.wustl.edu/index.php> [<https://perma.cc/CS3J-LFCW>].

¹¹⁸ *Id.*

¹¹⁹ *Id.*

2017 term.¹²⁰ It offers several ways of defining units of analysis: Supreme Court citation, Supreme Court docket number, and legal issue (“issue/legal provision”).¹²¹ The “Legacy” version of the SCDB extends to 1791, but only allows analyses based on the Supreme Court citation. For the core analysis, I used the “Modern” version with the unit of analysis being the legal issue. I chose to use the legal issue as the unit of analysis because it is not unusual for a Justice’s vote to differ in its ideological direction across issues within a case. Between the 1946 and 2017 terms, the Court decided 13,453 issues involving 8,893 cases defined as a court citation; using issue as the basis of analysis, the dataset contains 119,838 justice votes.¹²² Coders categorized as most votes as either liberal or conservative as described previously.¹²³ Some votes, 6,703 (5.6 percent), could not be categorized as liberal or conservative, leaving 113,135 votes for analysis. Across this set of votes, 52.6 were in the liberal direction, 59.8 percent for appointees of Democrats, and 47.2 percent for appointees of Republicans. These percentages go down slightly (to 58.8 percent) for appointees of Democrats if unanimous decisions are excluded; the decrease is greater (to 43.0 percent) for appointees of Republicans. In Appendix A, I replicate and extend the analyses shown in the main body of the paper using the legacy version of the dataset. Appendix A discusses the characteristics of the legacy version. The results differ minimally, but using that version allows some consideration of decision patterns in the 1930s and the first half of the 1940s.

¹²⁰ See *Analysis Specification- Modern Data (1946-2017), The Supreme Ct. Database*, WASH. U. LAW, <http://scdb.wustl.edu/analysis.php> [<https://perma.cc/2KAK-W7ZD>].

¹²¹ *Id.*

¹²² See *Modern Database, The Supreme Ct. Database*, WASH. U. LAW, <http://scdb.wustl.edu/data.php> [<https://perma.cc/PY3B-7U6U>].

¹²³ See *supra* note 20 and accompanying text; see also Harold Spaeth et al., *Supreme Court Database Code Book*, WASH. U. L. (Oct. 17, 2018) http://scdb.wustl.edu/_brickFiles/2018_02/SCDB_2018_02_codebook.pdf [<https://perma.cc/K7W3-BKGY>].

Figure 5: Liberalism by Party of Appointing President and Natural Court, 1946-2017 Terms

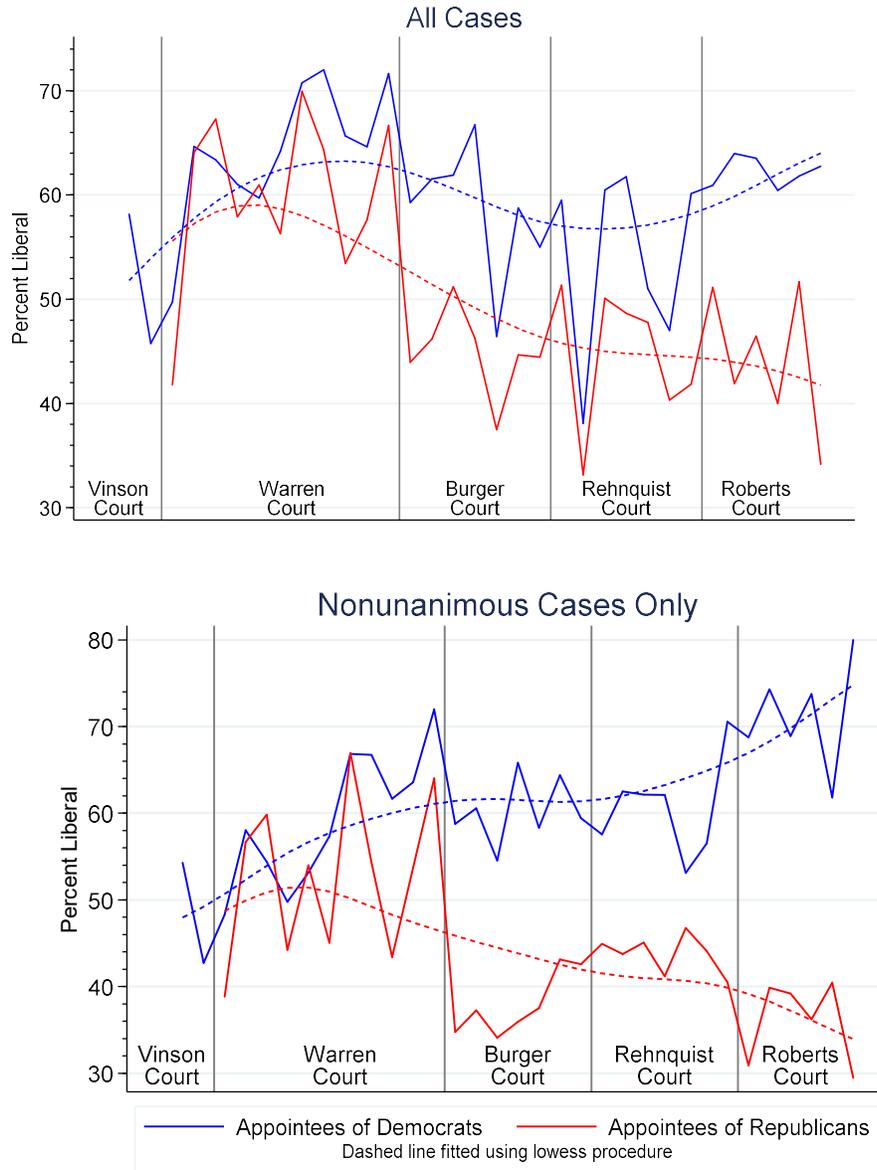


Figure 5 shows the pattern of liberal voting for each natural court for appointees of Democrats and appointees of Republicans.¹²⁴ Using natural courts as the time unit rather than term provides more stability, given the larger number of cases that tend to be covered by a natural court compared to the number of each term. It is also, in some sense, the natural unit if one is interested in how patterns shift as the membership on the Court changes. The top panel shows the pattern for all cases and the bottom pattern for nonunanimous cases only. The growing gap is evident in both figures. Across all cases, appointees of Republicans have moved more consistently in a conservative direction; appointees of Democrats have, over time, moved in both directions, although starting with the Rehnquist Court, they have moved more in the liberal direction. Looking only at nonunanimous cases, appointees of both parties' presidents have moved consistently in opposite directions, liberal for Democrats and conservative for Republicans. Figure 6 shows the size of the partisan gap, both for all votes and for votes excluding unanimous decisions.¹²⁵ Although there is a lot of year-to-year variation, the trend in the difference between the two groups of justices is one of a growing gap. The gap increases from under 10 percent during the early periods of the Warren Court to about 20 percent for all decisions and 40 percent for nonunanimous decisions in the most recent periods of the Roberts Court. That difference reflects, by definition, that there is no gap in decisions in unanimous cases.¹²⁶

One potential issue is that the types of cases being decided by the Supreme Court have changed since the Vinson Court era.¹²⁷

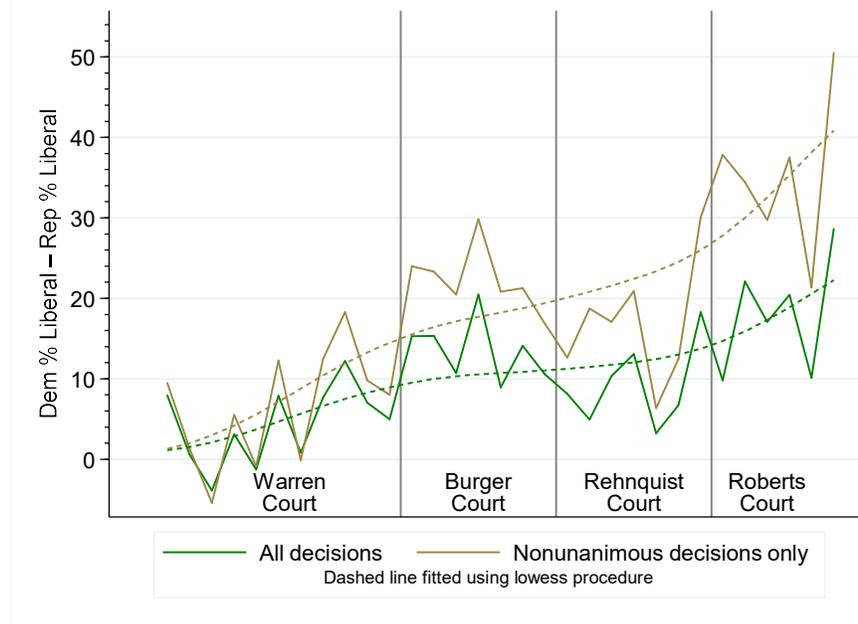
¹²⁴ See *infra* fig. 5; *Natural Court, The Supreme Ct. Database*, WASH. U. LAW, <http://scdb.wustl.edu/documentation.php?var=naturalCourt> [<https://perma.cc/SS4L-VVVR>] (“A natural court is a period during which no personnel change occurs.”).

¹²⁵ Although the Modern SCDB includes the Vinson Court, all justices serving on that court were appointed by either Franklin Roosevelt or Harry Truman; hence, Figure 5 starts with the Warren Court.

¹²⁶ A plot of the direction of unanimous decisions over the 33 natural courts shows increasing liberalism starting with the Warren Court (peaking at about 80 percent of unanimous decisions in the liberal direction. That starts to taper off during the last two natural courts of the Warren era. Liberalism then declines until the middle of the Rehnquist Court; since then the percentage of unanimous decisions in the liberal direction has been relatively stable, averaging 48 percent over the last eight natural courts.

¹²⁷ See RICHARD L. PACELLE, JR., *THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION*

Figure 6: Voting Gaps in Supreme Court Justices Decisions, 1954-2017 Terms



passim (1991); see also DREW NOBLE LANIER, OF TIME AND JUDICIAL BEHAVIOR: UNITED STATES SUPREME COURT AGENDA-SETTING AND DECISION-MAKING, 1888-1997 (2003); see also EPSTEIN ET AL., *supra* note 81, at 96-102; Marcus E. Hendershot et al., The Brethren as Baristas: Percolation and Spillover Within the U.S. Supreme Court's Agenda 10 (Apr. 10, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1766850 [<https://perma.cc/9DKC-87BN>] (follow "Download This Paper").

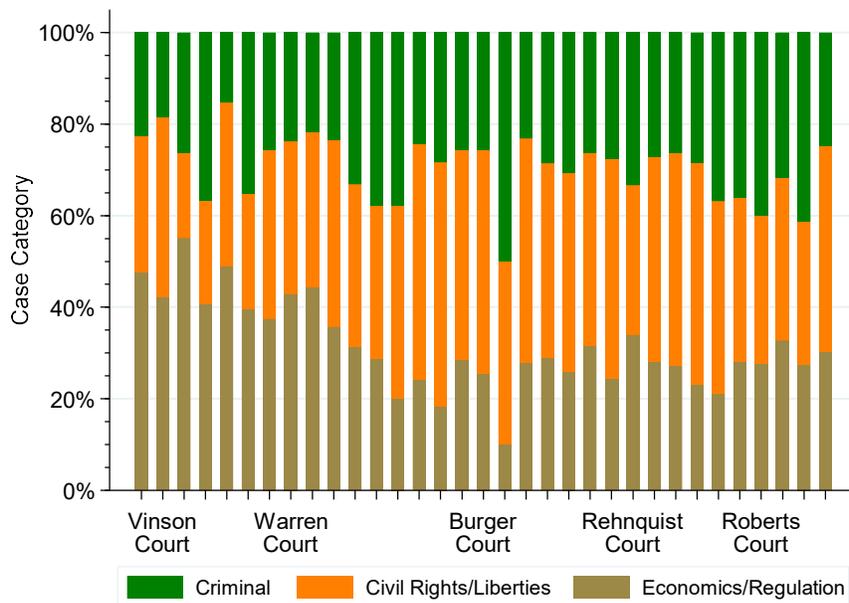
Figure 7: Changing Agenda of the Supreme Court

Figure 7 shows the proportion of cases for each of three broad categories—criminal, civil liberties/civil rights, and economic/regulation (including labor and employment)—by natural court. Although there is substantial variation from natural court to natural court, the broad trend is a decline in economics/regulation and an increase in civil liberties/civil rights and possibly criminal matters. At least some of the changing gap shown in Figures 4 and 5 may reflect differences in decision patterns depending on type of case.

Figure 8 shows the percent liberal by party of appointing president separately for each of the three broad issue areas, both for all cases and for nonunanimous cases only. The gaps between appointees of Democrats and appointees of Republicans are summarized in Figure 9. Very clearly the changes in the gap between appointees of the two parties is coming in cases other than those involving economics and regulation, and that is true both for all cases and for nonunanimous cases only. There is at most a minimal gap for cases involving economic and regulatory issues. The patterns for the other two issue areas are very similar, both regarding liberalism and the size of the gap.

Figure 8: Liberalism by Party of Appointing President, Natural Court, and Issue Area

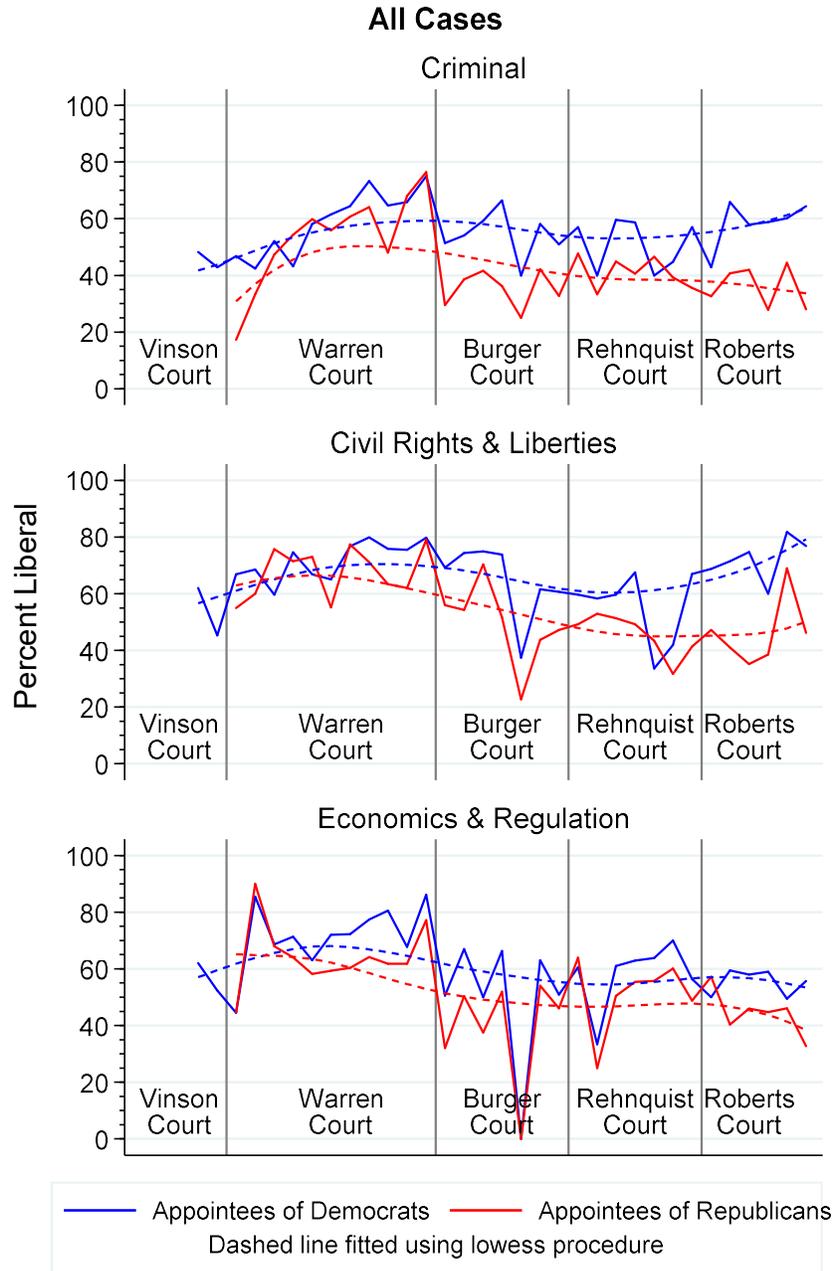


Figure 8 (continued)

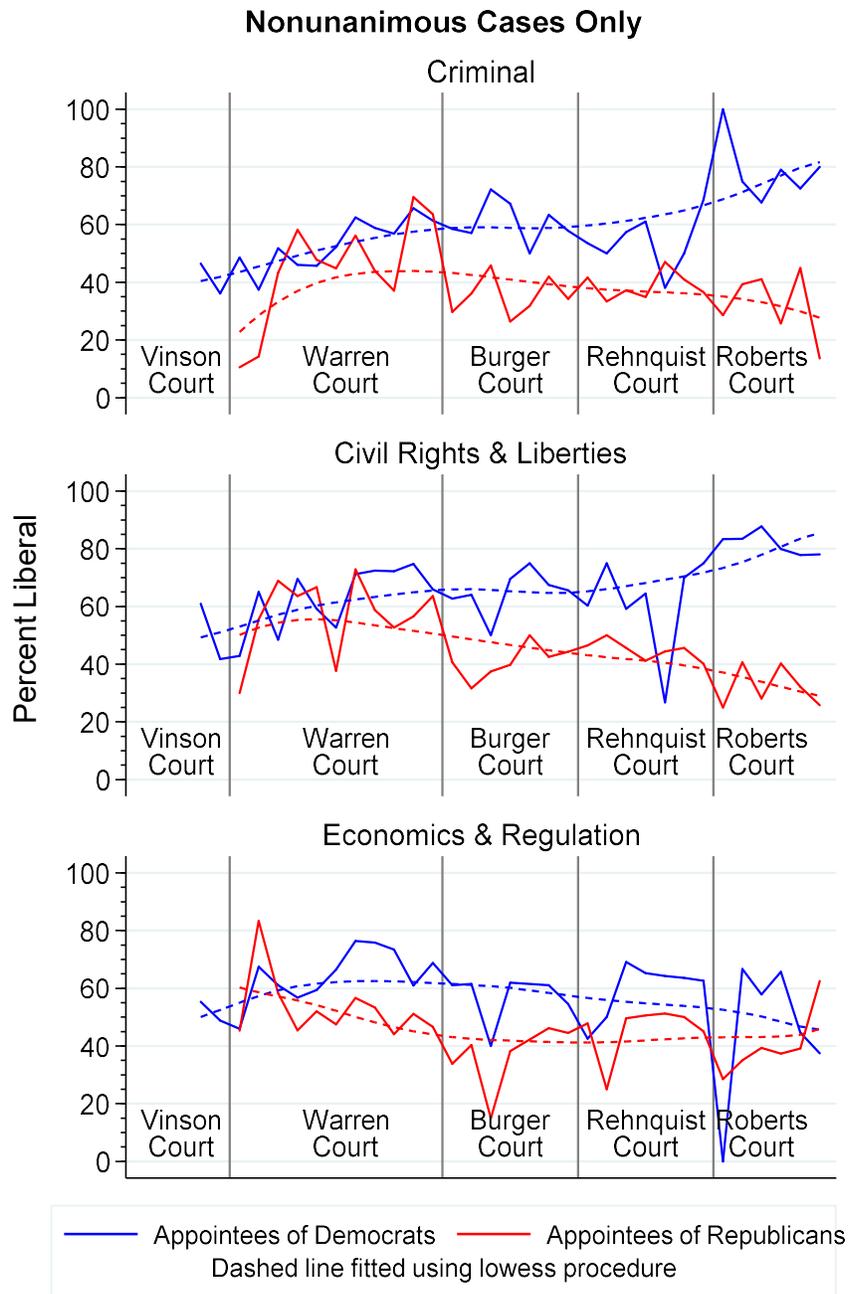
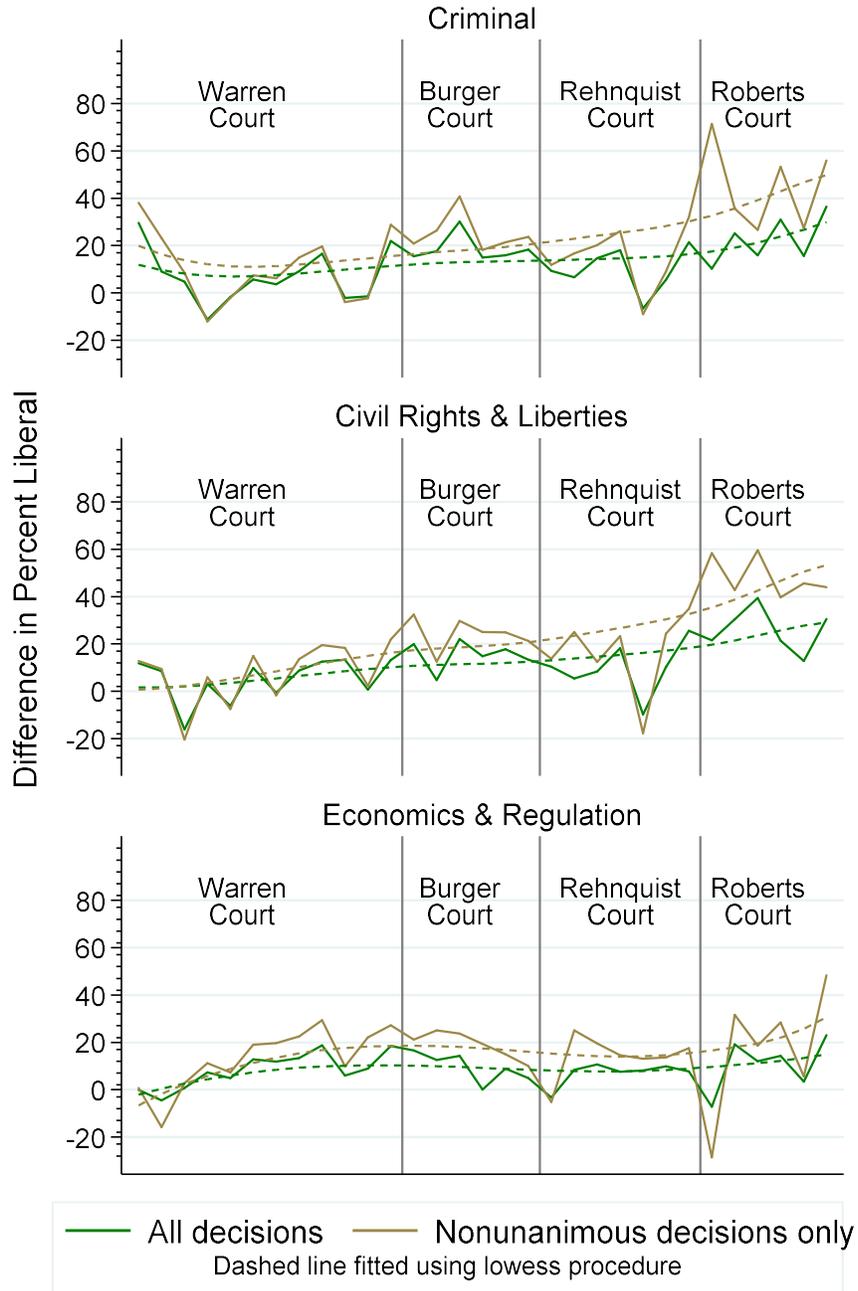


Figure 9: Voting Gaps in Supreme Court Justices Decisions by Broad Issue Areas



2. *Analyses Using Judicial Common Space Scores*

The Judicial Common Space (JCS) scores, which Clark used,¹²⁸ are also known as the Martin-Quinn scores. They are based on a sophisticated scaling methodology similar to that used to derive D-W Nominate scores for members of Congress.¹²⁹ These scores are derived from the justices' decisions during each term and provide a term-specific measure for each justice. Although the scaling technique is agnostic regarding ideology, in practice, negative values indicate a liberal pattern and positive values a conservative pattern; for consistency with other results reported in this article, I reversed the JCS values so that high values indicate a liberal pattern. One limitation is that the available scores are not disaggregated by case type. Scores are available for court terms going back to 1937.

Figure 10 shows the average of the reversed JCS scores separately for appointees of Democrats and appointees of Republicans for each term starting with 1937 and continuing through the 2017 term. Appointees of Democrats shifted sharply in a liberal direction through the years of the Warren Court; as will be clear below, this reflects personnel changes on the Court. There is then a slight tendency to shift back in the conservative direction until the middle of the Rehnquist Court period before resumption of a pattern of increasing liberalism.¹³⁰ Note that this regression is not intended to fully model the decision patterns, but is used here simply to assess whether the pattern could have been generated through a simple random process¹³¹ and to measure the magnitude of the trend. For Republicans, the figure shows a steady trend in the conservative direction. Simple regression confirms the pattern, showing a .008 annual decrease over the entire time period;¹³² if the analysis is limited to terms starting with 1953 (to

¹²⁸ See *supra* notes 68–73 and accompanying text.

¹²⁹ See Martin & Quinn, *supra* note 53, at 135.

¹³⁰ A simple regression using term to predict reversed JCS score over the entire period shown in Figure 10 shows slightly more than a .01 annual increase ($b=.012$, $t=3.11$, $p=.003$) in liberal decisions by the appointees of Democrats. I did not do a regression analysis for the simple liberal voting measure shown in Figures 5 and 7 because the unit of time was natural court which varies in actual length.

¹³¹ A simple random process might involve creating two sets of tiles, one set showing each year and the other showing the percent liberal for each year, placing the two sets of tiles in two boxes, and then randomly drawing a tile for each box and matching them to create an observation.

¹³² $b=-.008$, $t=-3.57$, two-tailed $p=.001$.

avoid the gap shown in the figure and match the loess line), the annual decrease doubles to .017.¹³³

Figure 10: JCS Scores by Party of Appointing President, 1937-2017 Terms

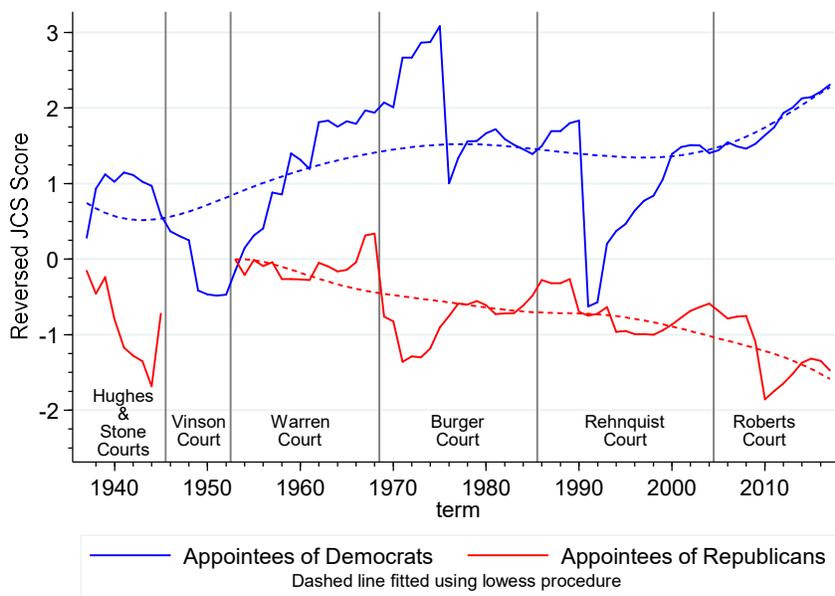
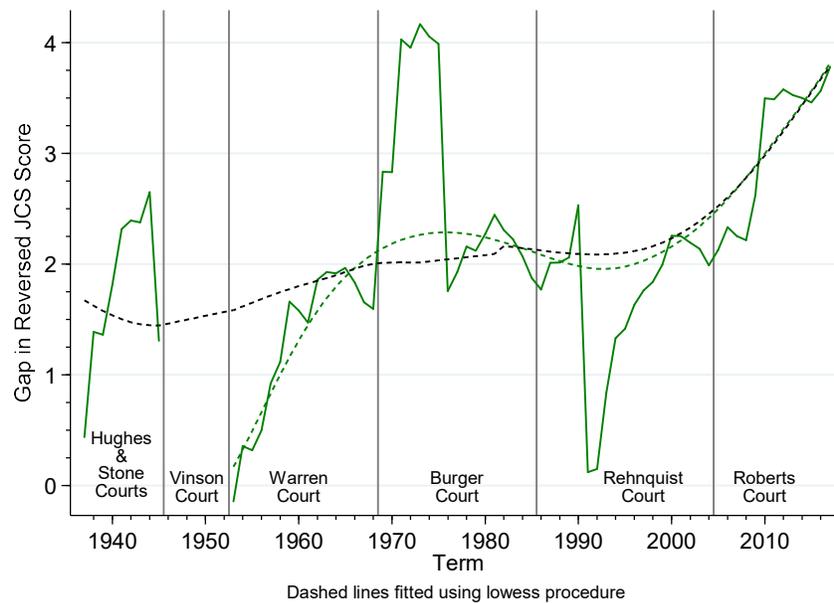


Figure 11 summarizes the gap in those averages between the two sets of appointees. As noted previously, no comparisons are available for the Vinson Court because all justices on the Court during that period were appointed by either Roosevelt or Truman. Because of this gap, the figure includes two smoothed lines, one over the entire period and one starting with the Warren Court. As the figure shows, there have been periods when the gap between appointees of Democrats and Republicans was increasing sharply and periods of reasonable stability. The two periods of an increasing gap were during the Warren Court and during the Roberts Court. The former reflects, in significant part, the conservative nature of Truman's appointees which effectively depressed the gap at the beginning of the Warren Court.¹³⁴

¹³³ $b = -.017$, $t = -7.16$, two-tailed $p < .001$.

¹³⁴ All four of Truman's appointees fall on the conservative side of the JCS scale.

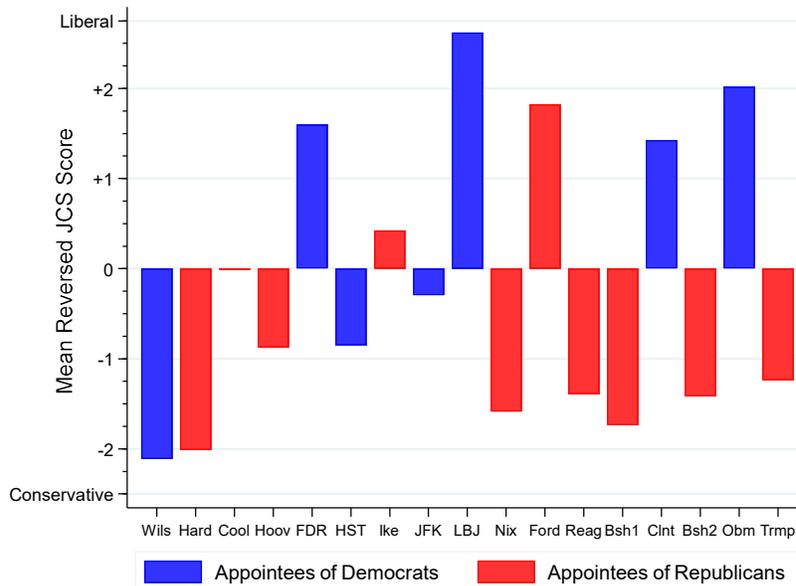
Figure 11: Gap in Averaged JCS Scores, 1937-2017 Terms

In fact, as shown in Figure 12, the appointees of three of the four Democratic presidents prior to Lyndon Johnson had average JCS scores on the conservative side.¹³⁵ Starting with Johnson, the only president whose appointee(s) averaged opposite what one might predict was Gerald Ford, whose only appointee was John Paul Stevens. Also, the last appointee whose record ran against the appointer's likely preference was David Souter (mean reversed JCS score +0.78), but the first Bush's average is still strongly conservative because his other appointee, Clarence Thomas, is the most conservative (mean reversed JCS score -3.52) of any of the 45 justices who served on the Court any time between 1937 and 2017.¹³⁶

¹³⁵ The reason that Kennedy shows up on the conservative side is that Arthur Goldberg, who had a strongly liberal record (see the second bar for Kennedy in Figure 12), was on the Court for less than three years (Johnson appointed Goldberg ambassador to the United Nations, and replace him with Abe Fortas); Byron White, Kennedy first appointee who had a moderately conservative record, served on the Court for 31 years.

¹³⁶ Plots using the percent liberal rather than JCS are consistent with what is shown in Figure 12 and 13.

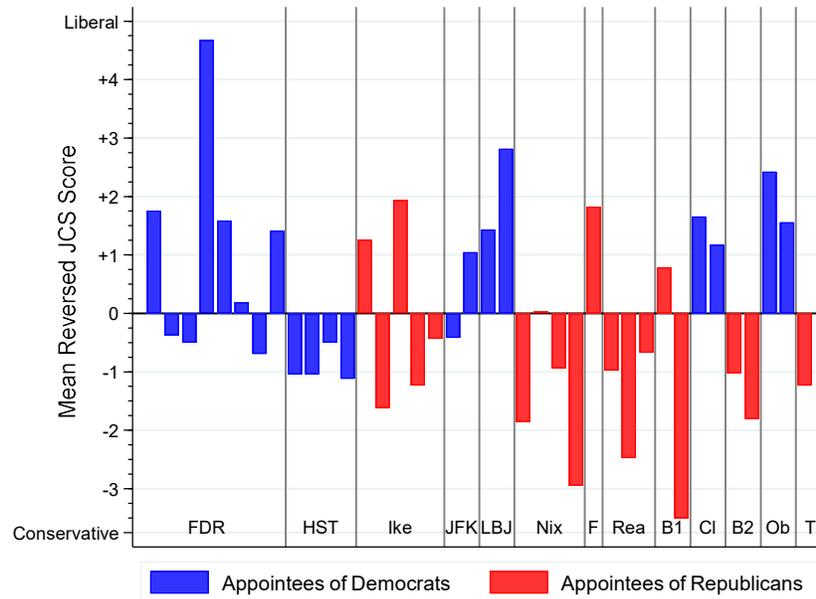
Figure 12: Average JCS Scores by Appointing President, 1937-2017 Terms



The three measures of partisan polarization in decisions by Supreme Court justices do not provide entirely consistent results over the entire period examined. However, they are consistent in showing that over the last decade or so, there has been an increasing gap between appointees of Democrats and appointees of Republicans. As Figure 13 shows, that increase reflects the success presidents—starting with Ronald Reagan—have had in predicting the decision patterns of their appointees. The only “disappointment” for those five presidents would have been David Souter. For Democratic presidents, the last “disappointment” was Kennedy’s appointee Byron White. Some small portion of the change over time shown in the figures represent shifts by individual judges.¹³⁷ However, with only one or two exceptions, the magnitude of those within-Justice changes are small compared to changes reflecting who was appointed to the Court.

¹³⁷ See Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801, 806 (1998); see also Lee Epstein et al., *Ideological Drift among Supreme Court Justices: Who, When, and How Important?* 101 NW. L. REV. 1483, 1528–29 (2007).

Figure 13: Average Reversed JCS Scores by Justice, 1937-2017 Terms



Summary: Supreme Court

There is little surprising in the analyses presented above showing that the decision patterns on the Supreme Court reflect increasing polarization of the justices. The one result that may be surprising is the relative absence of polarization in economic/regulation cases, although one can certainly point to individual cases where such polarization is evident.¹³⁸ Presidents starting with Johnson have, with one exception, succeeded in appointing justices whose ideological decision pattern is consistent with the president's own presumed ideological preference. The polarization on the Court mostly reflects the departure from the Court of Justices whose decision pattern failed to conform to the President's presume expectation. One question is to what degree the polarization will increase with President Trump's appointment. Early indications are that Justice Gorsuch has planted himself to the far right of the Court, perhaps even to

¹³⁸ See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619–20 (2018) (finding that the Federal Arbitration Act trumps (no pun intended) the National Labor Relations Act, even though the NLRA was passed after the FAA, by a 5-4 decision with a conservative majority).

the right of the Justice Scalia whom he succeeded. The departure of Justice Kennedy, who had been the median justice since Justice O'Connor's departure, is likely to further polarize the Court in the wake of the confirmation of Justice Brett Kavanaugh.

IV. POLARIZATION IN DECISION-MAKING BY JUDGES OF THE U.S. COURT OF APPEALS

The Court of Appeals decides most cases in three-judge panels, with the vast majority of them unanimous.¹³⁹ Almost certainly, a major reason for the high degree of unanimity is that a significant fraction of appeals do not raise difficult issues of law or fact. Many of the appeals may be last-ditch efforts to avoid undesirable outcomes.¹⁴⁰ In some cases, even a low chance of success is worth the cost of an appeal if a successful appeal will avoid a very unfavorable outcome.¹⁴¹ The high likelihood of unanimity serves to depress the observed differences between Democratic-appointed judges and Republican-appointed judges. For this reason, early quantitative research on decisions by Court of Appeals judges focused on nonunanimous decisions.¹⁴² That research did find statistically significant differences in decisions in economics and labor cases based on the judge's partisan background but found no statistically discernible differences in criminal or civil liberties cases.¹⁴³ Has that situation changed over time?

¹³⁹ DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 11, 105–07 (2000); *see also* Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 493 (1975).

¹⁴⁰ For an analysis of the decisions to file an appeal in civil cases, *see* SCOTT BARCLAY, AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES (1999).

¹⁴¹ Some appeals may be initiated more as a bargaining strategy to induce a settlement that would be a better outcome than the decision being appealed rather than there being any significant expectation of success if the appeal reaches a decision.

¹⁴² Sheldon Goldman, *Backgrounds, Attitudes and the Voting Behavior of Judges: A Comment on Joel Grossman's Social Backgrounds and Judicial Decisions*, 31 J. OF POL. 214, 217–20 (1969) (defining “nonunanimous” to include decisions in which the Court of Appeals overturned a decision of a district court).

¹⁴³ Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–1964*, 60 AM. POL. SCI. ASS'N. 374, 380–81 (1966).

A. Prior Research Regarding Partisan Differences in the Court of Appeals

Several studies speak to whether there are increasing differences in the decisions of judges of the U.S. Court of Appeals based on the judge's own partisan background or the party of the appointing president. These studies employ one of two major datasets of decisions of the Court of Appeals. The first is a publicly available dataset created by Donald Songer and his students.¹⁴⁴ Songer based the original version of the dataset on a random sample of cases drawn from each circuit for each year for the period 1925-1988, producing a total sample of 15,315 cases.¹⁴⁵ Songer and his students subsequently completed extensions to the dataset, the first added cases through 1996, and the second added cases through 2002.¹⁴⁶ This dataset has been used extensively by Songer, his students, and others.¹⁴⁷ The second is a dataset created by Sunstein et al., focusing on the period 1995 to 2004¹⁴⁸ That dataset consists of 6,408 published decisions by

¹⁴⁴ SONGER ET AL., *supra* note 139, at xiii–xviii.

¹⁴⁵ See Donald R. Songer, *Documentation for Phase 1*, THE UNITED STATES COURTS OF APPEALS DATA BASE, 3–9 (Oct. 21, 2008), <http://nebula.wsimg.com/69ed1f8ecc35094d9de4d2d76147f753?AccessKeyId=96203964AD4677DE3481&disposition=0&alloworigin=1> [<https://perma.cc/7G5C-MC7T>] (detailing that for the period 1925 to 1960, 15 cases were randomly drawn from each circuit; starting in 1961, the sample for each circuit was increased to 30 cases. “The universe of cases for each circuit/year was defined as all decisions reported with opinions published in the Federal Reporter for a given circuit in a single calendar year. To be counted as a published opinion the decision must announce a disposition of the case (e.g., affirmed, remanded, dismissed) and must state at least one reason for the decision. If a decision met these criteria, it was included in the universe of cases to be coded regardless of the form of the decision.”).

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 22 (2007) (reporting a decisional ideology score for presidential cohorts from Truman through Bush, scored such that an average of 3.0 would be perfect liberalism and 1.0 would be perfect conservatism. Averaging by the party of the president produces 1.88 for appointees of four Democrats and 1.70 for the appointees of the four Republicans. More important for my purposes is that the means combining Democratic and Republican cohorts through Carter (i.e., including Eisenhower and Nixon appointees), the mean is 1.85 compared to a mean of 1.60 combining Reagan and Bush appointees).

¹⁴⁸ CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 18, 163 n.26 (2006) (exact period varies somewhat when it was “necessary to produce a sufficient number of cases in a particular category”).

three-judge panels, covering a wide range of case types,¹⁴⁹ with cases for inclusion identified through Lexis searches or by shepardizing prominent cases.¹⁵⁰

Songer et al., reported differences in voting by the appellate judges by the judges' own party background for the three broad categories of civil rights/civil liberties, criminal, and labor and economic regulation, across five unequal length periods ending with 1970-88.¹⁵¹ In the two earliest periods, 1925-36 and 1937-45, they found that the percent liberal for Republican judges was actually higher than was the percent liberal for Democrats in the civil rights/civil liberties and criminal categories, although in the later of these two periods, the gap was only 0.1 (4.3 and 3.9 for the earliest periods).¹⁵² Only in labor and economic cases was the liberal percentage consistently higher for Democrats than for Republicans.¹⁵³ In the later three periods, Democrats were more liberal in their decisions than Republicans by 2.6 to 11.3 percentage points with most of the differences falling in the range 4.9 to 6.6.¹⁵⁴ There was no consistent pattern of increase over time.¹⁵⁵ For the most recent period included in their table, the differences ranged from 5.5 to 6.4 percentage points.¹⁵⁶

A strict comparison between Songer et al.'s results and Sunstein et al.'s results is not possible. First, the former's results were based on the party of the judge while the latter were based on the party of the appointing president.¹⁵⁷ Second, Songer et al. drew a random sample

¹⁴⁹ *Id.* at 17-18 (total of 24 distinct case types).

¹⁵⁰ *Id.* at 156-63, 157 n.5. It appears that authors included all cases found through their searches that met at their inclusions criteria. They limited their search for criminal appeals, other than death penalty cases, to a subset of circuits, presumable as a means of limiting the number of cases.

¹⁵¹ SONGER ET AL., *supra* note 139, at 115-17. The authors do provide a table showing percent liberal for each period by presidential cohort, but this table does not provide enough information to derive summary figures by party of appointing president for each period.

¹⁵² *Id.* at 115.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ The percent of appointees for which the party of the President and the appointee's own party coincide is very high. For presidents Roosevelt through Reagan, this percentage ranges from 82.1 percent for Carter to 96.2 percent for

of cases without regard to the kind of issue, while Sunstein et al. selected cases falling into specific issue areas. Third, Songer et al. included *en banc* decisions¹⁵⁸ while Sunstein et al. limited their analysis to cases decided by three-judge panels.¹⁵⁹ Nonetheless, a comparison is useful given that Sunstein et al. examined a later period. Although Songer et al. did not provide overall figures combining issue areas, for their latest period, 1970-88, the three areas of civil rights/civil liberties, criminal, and labor and economic regulation, had similar gaps between Democratic judges and Republican, 5.5 to 6.4 percentage points, as noted previously.¹⁶⁰ For the 1995 to 2004 period covered by Sunstein et al., the gap between appointees of Democrats and appointees of Republicans across all of their categories was 12 percentage points.¹⁶¹ They reported gaps for 23 individual issue areas, and showed that there was substantial variation.¹⁶² The largest gap was 40 percentage points for LGBT rights cases with the second largest at 28 percentage points for affirmative action cases.¹⁶³ Cases dealing with punitive damages fell at the other end of the spectrum, with no difference; several other issues—criminal appeals (other than capital punishment), takings, and federalism—had gaps of less than five percentage points.¹⁶⁴ When I averaged the gaps for issues falling into the three broad categories reported by Songer et al., there was no difference, with all of them falling at about 14 percentage points.¹⁶⁵ Clearly, to the degree that it is appropriate to extend the inquiry using Sunstein et al.'s analysis, the gap between appointees of Democrats and appointees of Republicans appears to have increased.

Reagan. For all but two, Carter and Truman, the percentage is between 93.0 percent and 96.2 percent. See GOLDMAN, *supra* note 5, at 355.

¹⁵⁸ This is not explicitly stated, but I assume it is the case because the public version of SONGER, ET AL.'s, dataset that I analyze below. See discussion *infra* Part IV.B (including *en banc* decisions).

¹⁵⁹ SUNSTEIN ET AL., *supra* note 148, at 17.

¹⁶⁰ SONGER ET AL., *supra* note 139, at 115.

¹⁶¹ SUNSTEIN ET AL., *supra* note 148, at 19–21.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ One might ask why this figure is less than the 12 percent overall. First, it does not weight by number of cases in each category, which ranged from a low of 22 for LGBT rights, to 1,387 for criminal appeals. Second, there is one category of cases, Commerce Clause matters, that is missing from the table. Third, some issue categories did not fit clearly into one of the broad categories, and most of those had small gaps. See *id.*

There is a second way to examine the possibility of polarization on the Court of Appeals: the effect of panel composition. A body of research on the Court of Appeals in recent years considered the effect of panel composition, in terms of both partisan background¹⁶⁶ and demographics, such as race¹⁶⁷ or gender.¹⁶⁸ The relevant question here is whether the panel effects related to the partisan composition of the panel have changed over time. Kastlelec used Songer's Court of Appeals Database to examine this question over the period 1961 through 2002.¹⁶⁹ He grouped the data into five-year intervals, except for the last two periods, where he used a four-year interval (1996-99) and a three-year interval (2000-02).¹⁷⁰ He found that the difference in decision patterns for all Democratic-appointed panels compared to all Republican-appointed panels increased overtime.¹⁷¹ For most of the periods prior to the mid-1980s, the gap between all Republican-appointed panels and all Democratic-appointed panels was modest, averaging six percentage points;¹⁷² the gap grew over the last four periods, 14 percentage points for 1986-1990 and 1991-1995, 22 percentage points for 1996-1999,¹⁷³ and then reaching 24 percentage points for the final period.¹⁷⁴ Looking at split panels, Kastlelec found the presence of an Republican-appointed judge on a majority

¹⁶⁶ SUNSTEIN ET AL., *supra* note 148, at 19–24; Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeals*, 107 YALE L. J. 2155, 2168 (1998).

¹⁶⁷ Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 325–26 (2004); Jonathan P. Kastlelec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 167 (2013).

¹⁶⁸ Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 389 (2010); Farhang & Wawro, *supra* note 167, at 299, 325–26; Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 320 (2004).

¹⁶⁹ Jonathan P. Kastlelec, *Panel Composition and Voting on the U.S. Courts of Appeals Over Time*, 64 POL. RES. Q. 377, 380–84 (2011) (the analysis excludes cases decided *en banc*).

¹⁷⁰ *Id.* at 383–85.

¹⁷¹ *Id.*

¹⁷² Jonathan Kastlelec, *Panel Composition and Voting on the U.S. Courts of Appeals Over Time*, POL. RES. Q. app. at 9 (2011), http://www.princeton.edu/~jkastell/Panel_Effects_Over_Time/kastlelec_web_appendix.pdf [<https://perma.cc/8BTN-9B3P>].

¹⁷³ *Id.*

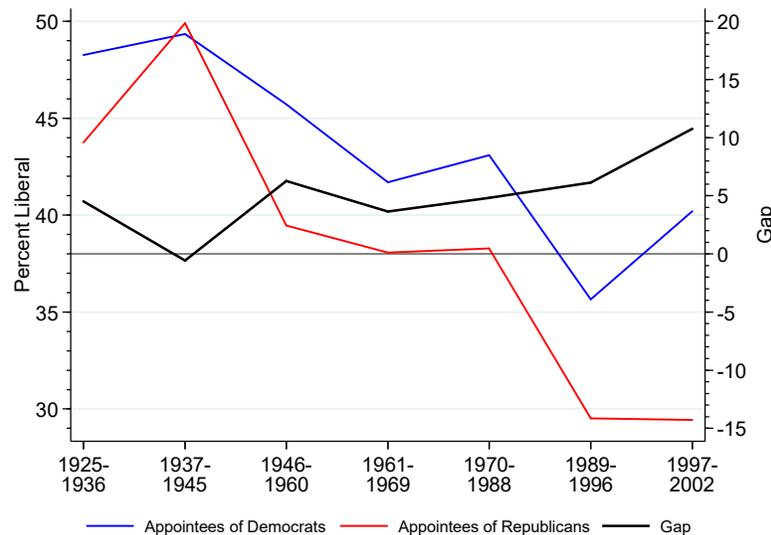
¹⁷⁴ *Id.*; Kastlelec, *supra* note 169, at 385 (giving figures that would make the difference only 23 percentage points).

Democratic-appointed panel had a moderating effect in the later periods, but he found no similar moderating effect of the presence of an Democratic-appointed judge on a majority Republican-appointed panel.¹⁷⁵

B. Analysis of the Updated Songer Dataset

The availability of Songer's dataset, along with an update through 2002, makes it possible to extend the published analyses based on that dataset.¹⁷⁶ I merged those data with information on the judges' background, including party of the appointing president and the judge's own party.¹⁷⁷

Figure 14: Liberal Decision Propensity, U.S. Court of Appeals, 1925-2002



¹⁷⁵ Kastlelec, *supra* note 169, at 387.

¹⁷⁶ *U.S. Appeals Court Database*, JUDICIAL RESEARCH INITIATIVE AT UNIVERSITY OF SOUTH CAROLINA, <http://artsandsciences.sc.edu/poli/juri/appct.htm> [<https://perma.cc/CJL8-JQP3>]. The data for the period 1997 through 2002 was prepared by Ashlyn K. Kuersten and Susan B. Haire. See SUNSTEIN ET AL., *supra* note 148; see also *supra* text accompanying note 148 (explaining details on the dataset).

¹⁷⁷ *Attributes of U.S. Federal Judges Database*, JUDICIAL RESEARCH INITIATIVE AT UNIVERSITY OF SOUTH CAROLINA, <http://artsandsciences.sc.edu/poli/juri/attributes.htm> [<https://perma.cc/C7EN-SAAD>]. These data were compiled by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski.

Figure 14 shows the percent liberal by party of the appointing president for the five time periods reported by Songer et al. (1925-46, 1937-45, 1946-90, 1961-69, and 1970-88), plus the two last periods for which data are available, (1989-96 and 1997-2002).¹⁷⁸ It also shows, using the righthand axis, the difference between the two groups of judges in the percent of liberal decisions ("Gap").¹⁷⁹ Interestingly, for one of the time periods, 1937-1945, there was virtually no difference in the liberalism in the decisions of appointees of the two parties' presidents. In all the other periods, appointees of Democrats were more likely to make liberal decisions than were appointees of Republicans. For most periods, the gap is around five to six percentage points. For the two most recent periods, the gap grows to almost 11 percentage points. It is unfortunate that data are not currently available to bring the series forward another 10 to 15 years.

As is true with the U.S. Supreme Court, the types of cases the U.S. Court of Appeals decides have changed over time.¹⁸⁰ In fact, as Figure 15 shows, the changes at the Court of Appeals have been much more dramatic than at the Supreme Court. Over the period covered in the figure, civil liberties/civil rights cases went from a negligible share of the docket (under 2 percent) to about a quarter in the last period shown. Criminal cases went from 15 percent to over 30 percent for the periods starting in 1961. Concomitantly, economics-related cases dropped from over 84 percent to just under 40 percent. Given this significant change, it is paramount to consider the three broad issue areas separately.

¹⁷⁸ I was unable to precisely replicate the figures reported by Songer et al., *supra* note 139, at 115. Exactly why that is the case is unclear, although the differences most likely reflect updates and corrections to the original version of the data.

¹⁷⁹ I have not included a lowess line in the figure because of the small number of data points; for the same reason, I did not estimate a simple regression.

¹⁸⁰ See SONGER ET AL., *supra* note 139, at 54-56.

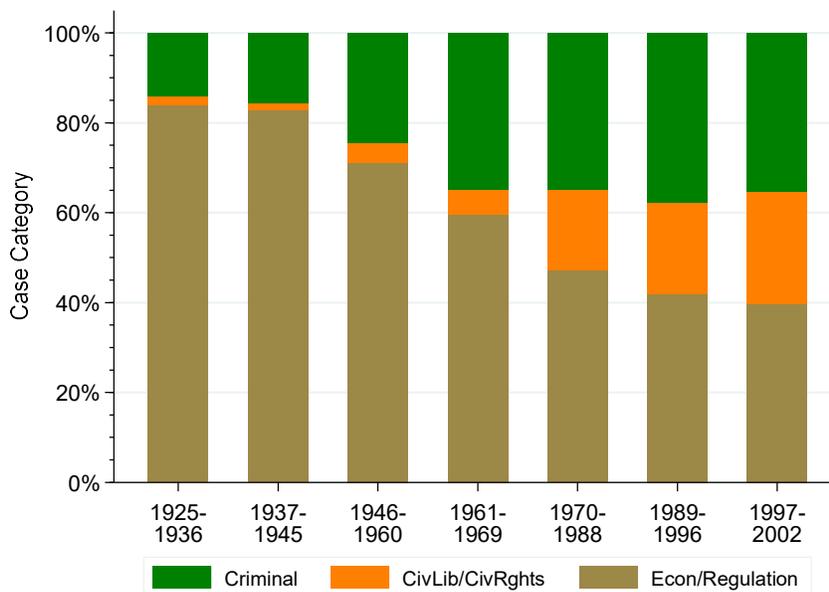
Figure 15: Changing Agenda of the U.S. Court of Appeals

Figure 16 replicates Figure 14 separately for the three areas. The likelihood of a liberal decision clearly varies by issue area. For criminal cases, it ranges between 21.0 and 29.4 for appointees of Democrats and 15.5 and 22.8 for appointees of Republicans. For civil liberties/civil rights, the range for appointees of Democrats is 33.8 to 48.8, if one omits the first period (when it was 17.4, but based on only 23 observations) and, for appointees of Republicans, the range is 29.3 to 32.2, if one omits the second period (when it was 14.0 based on only 24 observations). Liberal decisions were most likely in the economics/regulation area: 45.3 to 55.0 for appointees of Democrats and 41.0 to 55.4 for appointees of Republicans.

Turning to the gaps, when assessing whether there is evidence of increasing polarization, some caution is necessary in interpreting the apparent differences in liberal propensity. The number of observations is, for some comparisons, very small and some of those differences may reflect nothing more than sampling variation. For example, in two periods, appointees of Democrats appear to have been less likely to render a liberal decision in a civil liberties/civil rights case than appointees of Republicans. However, the number of observations were small: 23 by appointees of Democrats and 53 by appointees of

Republicans in 1925-36; the comparable figures for 1946-1960 are 176 and 89. Neither of these differences meets the standard threshold of statistical significance.¹⁸¹ In fact, only two of the six comparisons for the first three periods meet the threshold of statistical significance: economics/regulation for 1925-1936 and civil liberties/civil rights for 1937-1945. For the five later periods, all but two comparisons of the liberalism propensity of appointees of Democrats versus appointees of Republicans achieve statistical significance.¹⁸²

¹⁸¹ Difference of proportions tests: $Z=-1.346$ (one-tailed $p=.089$) for 1925-1936; $Z=-1.342$ (one-tailed $p=.090$) for 1946-1960. There is also a de minimis difference (less than one percentage point) in the “wrong” direction for economics/regulation for the period 1937-1945.

¹⁸² Both are in the category civil liberties/civil rights for 1946–1960 and 1961–1969.

Figure 16: Liberal Decision Propensity by Area of Law, U.S. Court of Appeals, 1925-2002

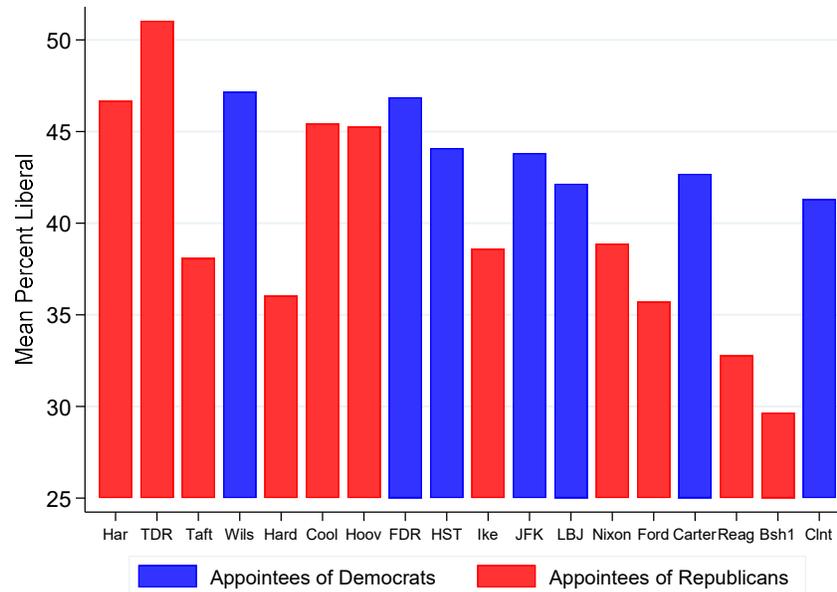


For the most recent period, the difference between appointees of Democrats and appointees of Republicans in liberal propensity is similar for the three areas, 9.4 percentage points for economics/regulation cases, 11.0 percentage points for civil liberties/civil rights cases, and 12.0 percentage points for criminal cases. For both criminal cases and economics/regulation cases, this represents an increase of roughly 5 percentage points from the immediately prior period. Neither change can be attributed to chance.¹⁸³ The difference for civil liberties cases has been relatively stable over the last two periods: 10.1 percentage points and 11.0 percentage points. None of the specific comparisons of the gap for civil liberties/civil rights achieves statistical significance, but that gap has grown steadily over the last four periods, starting at 3.7 percentage points for the 1961-1969 period. One can conclude that there has been an increasing difference between the decision patterns of appointees of Democrats compared to appointees of Republicans. However, the size of the gap is much more modest than the Supreme Court.

As was true for the Supreme Court, the increasing conservatism of Republicans on the Court of Appeals is largely a function of who presidents are appointing. Figure 17 shows the average percent liberal by appointing President. There has been relatively little change across Democratic appointers since Truman. In contrast, since Nixon, Republicans have made increasingly conservative appointments. It is likely that most of the shifts in decision patterns by judges of the Court of Appeals shown in the prior figures reflects personnel changes; whether and how much of the shifts over time reflects changes by sitting judges is not clear.

¹⁸³ This is based on tests of the differences of differences of proportions. See BLALOCK, *supra* note 25, at 234-36. The two tests produce the following results: $Z=2.415$ (one-tailed $p=.008$) and $Z=1.693$ (one-tailed $p=.045$).

Figure 17: Court of Appeals: Average Percent Liberal by Appointing President



C. Summary: Court of Appeals

In summary, based on both prior research and the analysis presented here, through the early 2000s, there was an increasing gap between the decision patterns of appointees of Democrats and appointees of Republicans sitting on the U.S. Court of Appeals. In broad terms, both for the three issue areas and all cases taken together, the gap between appointees of the two parties was, by that time, approximately ten percentage points. This is roughly half the gap observed for Supreme Court decisions for most of the natural courts during the Roberts era.¹⁸⁴ Unfortunately, data are not currently available to ascertain whether the gap continued to widen or has remained stable since the mid-2000s.

¹⁸⁴ See *supra* notes 128–29; see also *supra* text accompanying notes 128–29.

V. POLARIZATION IN DECISION-MAKING BY FEDERAL DISTRICT JUDGES

Decisions at both the Supreme Court and Court of Appeals levels are usually accompanied by a written explanation for the decision.¹⁸⁵ In contrast, most decisions by district court judges do not produce written explanations that can be coded as is done with the opinions of the appellate courts. One result is that there is much less research on decisions of the federal district courts. The research that has been done is largely based on the subset of district court decisions that are accompanied by a written opinion,¹⁸⁶ even though it is also clear that published decisions are not representative of all decisions made by federal district judges.¹⁸⁷ At least one study has shown that when unpublished decisions are included in the analysis the party differences may disappear.¹⁸⁸ Nonetheless, the discussion that follows relies on published decisions by federal district court judges.

A. *Prior Research*

Research on published decisions by federal district judges shows, at least since the 1960s, measurable differences in the direction of published decisions rendered by federal district judges depending on the judges' own partisan backgrounds¹⁸⁹ and/or on the party of the

¹⁸⁵ Exceptions at the Supreme Court level occur in decisions when the vote among the justices is tied due to a vacancy or recusal, when a case is dismissed as improvidently granted, and when a pending case is reversed and/or remanded in light of a decision the Court has recently made.

¹⁸⁶ One exception to this would be the study of criminal sentencing by federal judges. See Beverly Blair Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. CIN. L. REV. 597, 597 (1973). See also Herbert M. Kritzer, *Political Correlates of the Behavior of Federal District Judges: A "Best Case" Analysis*, 40 J. POL. 25, 26 (1978).

¹⁸⁷ Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 782 (1992); Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1133 (1990).

¹⁸⁸ Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 259 (1995). A study of sentencing of draft resisters during the Vietnam War also failed to find statistically discernible differences in sentence severity between appointees Democrats and Republicans. See Kritzer, *supra* note 186, at 44, 52.

¹⁸⁹ ROBERT A. CARP & C. K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 6 (1983); C. K. ROWLAND & ROBERT A. CARP,

appointing president.¹⁹⁰ The size of these differences varies with issue area but are often modest,¹⁹¹ and there may be specific areas for which the judge's party background fails to predict the direction of the judge's decision.¹⁹²

There is one analysis focused specifically on polarization in decision-making by federal district court judges. Sennewald et al. employed a dataset constructed by Carp and Manning covering roughly half of the district court decisions published in the *Federal Supplement* over an approximately 85-year period.¹⁹³ The dataset identifies the president who appointed the judge, the judge's party (if it could be identified), the type of case (area of law),¹⁹⁴ and the direction of the decision (liberal or conservative) coded in the same way as are decisions of the Supreme Court and Court of Appeals.¹⁹⁵ The dataset omits cases in areas of law in which decisions lack a clear political direction: patents, admiralty, tax, bankruptcy appeals, and land condemnation; it also excludes common law claims based on state law that would have been brought under the court's diversity jurisdiction, including most tort, contract, property, and family law

POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 1 (1996); C. K. Rowland & Robert A. Carp, *A Longitudinal Study of Party Effects on Federal District Court Policy Propensities*, 24 AM. J. POL. SCI. 291, 291 (1980).

¹⁹⁰ Robert A. Carp et al., *A First Term Assessment: The Ideology of Barack Obama's District Court Appointees*, 97 JUDICATURE 128, 136 (2013); Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 298 (1993).

¹⁹¹ PETER CHARLES HOFFER ET AL., *THE FEDERAL COURTS: AN ESSENTIAL HISTORY* 278–79 (2016).

¹⁹² Barbara M. Yarnold, *Factors Related to Outcomes in Religious Freedoms Cases, Federal District Courts: 1970–1990*, 19 JUST. SYS. J. 181, 181 (1997); CASS R. SUNSTEIN ET AL., *supra* note 148, at 47 (finding judges' party backgrounds may not predict the direction of the judges' decisions in the Federal Courts of Appeals, at least for the period they studied from 1995–2004).

¹⁹³ Marc A. Sennewald et al., *The Polarization of the Judiciary*, 23 PARTY POL. 657, 659 (2017).

¹⁹⁴ The "type of case" code employed 31 categories. See the Appendix for a list of these categories along with the number of cases in each, both for 20-year periods and overall, as well as an analysis based on the specific codes.

¹⁹⁵ See *supra* notes 20–23; see also *supra* text accompanying notes 20–23. Other information coded includes the *Federal Supplement* citation, judge identifier, the month and year of the decision, the federal district and circuit, the judge's year of appointment, and the judge's race and gender.

cases.¹⁹⁶ Otherwise, the dataset includes all cases meeting inclusion criteria; unlike the Court of Appeals Database, it is *not* based on a random sample of decisions.¹⁹⁷

The authors calculated annual liberalism scores separately for judges identified as Democrats and judges identified as Republicans,¹⁹⁸ and then split the data into two periods: 1934 to 1966 and 1967 to 2008. In the earlier period, they found a 2.6 percentage point difference (44.1 versus 41.5) in the percentage of liberal decisions by Democratic judges compared to Republican judges.¹⁹⁹ In the later period, the gap increased to 10.2 percentage points (46.8 percent for Democrats versus 36.6 for Republicans).²⁰⁰ Omitting cases categorized as civil liberties as a way of controlling for the sharp increase over time in the role of those cases in the dataset, the early period gap was about the same as for all cases (2.3 percentage points) but the later gap was smaller (7.6 percentage points).²⁰¹ Sennewald et al. also looked at Presidential cohorts and found little difference between judges appointed by Truman and Eisenhower but clear differences between the Johnson and Nixon appointees.²⁰²

B. Analysis of District Court Decisions

The Carp and Manning dataset has been made available for others to analyze,²⁰³ and that allows me to move beyond the results reported by Sennewald et al. As was the case regarding both the Supreme Court and the Court of Appeals, my goal is descriptive. I seek to identify an increasing gap between the decision pattern of Democratic-appointed

¹⁹⁶ Professor Carp personally coded most cases in the dataset. Students coded a small subset under his supervision.

¹⁹⁷ See Robert A. Carp & Kenneth L. Manning, *Carp-Manning U.S. District Court Database*, U. MASS. DARTMOUTH: COLLEGE OF ARTS & SCIENCES, <http://districtcourtdatabase.org/> [<https://perma.cc/FV7A-PJE6>]. See also Robert A. Carp & Kenneth L. Manning, *Announcing the Archival of the Carp-Manning U.S. District Court Database*, 25 L. & CTS. 4, Spring 2015, at 4, 4–5, <http://lawcourts.org/pubs/newsletter/spring15.pdf> [<https://perma.cc/G62X-9V93>].

¹⁹⁸ Sennewald et al., *supra* note 193, at 659 (noting decisions by judges whose party background could not be identified were excluded from their analysis).

¹⁹⁹ *Id.* at 660.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 661.

²⁰³ Robert A. Carp & Kenneth L. Manning, *Carp-Manning U.S. District Court Database*, U. MASS. DARTMOUTH: COLLEGE OF ARTS & SCIENCES, <http://districtcourtdatabase.org/> [<https://perma.cc/FV7A-PJE6>].

judges and the decision pattern of Republican-appointed judges appointed and whether any such gap varies depending on the type of legal issue involved. As with the analysis of Supreme Court decision-making, I do not seek to model either decision-making by federal district judges or the gap between Democratic-appointed judges and those appointed by Republicans; nonetheless, I do employ simple regression analyses to verify temporal patterns.

As previous noted, the Carp-Manning dataset is based on federal court decisions published in the *Federal Supplement*. Carp and Manning generously provided me with the most recent version of the dataset that includes cases decided as late as 2016. Specifically, the dataset I employ includes cases from as late as 2014, going through page 1358 of volume 30, series 3 of the *Federal Supplement*, plus a scattering of later volumes.²⁰⁴ I limit my analysis to the 116,953 cases decided between 1934 and 2014.²⁰⁵ Because the dataset is based on what was included in specific volumes of the *Federal Supplement*, the dataset does not include all relevant cases decided prior to 2014 that will eventually appear in the *Federal Supplement*. Another difference in the dataset I used compared to that used by Sennewald et al. is that social security cases had been added.²⁰⁶ One final difference is that I had a research assistant recode a small subset of cases that had been coded early in the development of the dataset using a category that was later replaced by two separate categories.

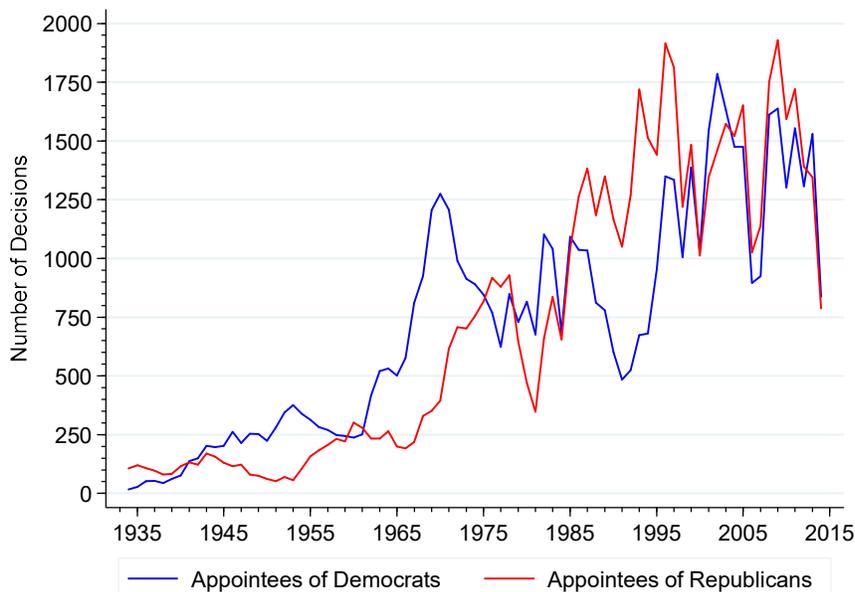
Figure 18 shows the number of decisions each year separately for Republican and Democratic appointees. For 1934 through 1940 the dataset includes between 100 and 200 decisions a year combining appointees of both parties; between 1941 and 1950, there were between 270 and 380 cases per year, and through most of the 1950s, the number was in the 300s. The annual number of cases first exceeded 1,000 per year in 1967 and over the last two decades there have generally been between 2,000 and 3,600 cases per year. For the analyses, I computed the percentage of decisions decided in a liberal direction separately for Democratic-appointed judges and for Republican-appointed judges each on an annual, biennial, or quadrennial basis, depending on whether I had partitioned by issue area, and if partitioned, how finely.

²⁰⁴ The overall dataset also includes cases from a scattering of volumes after the 30th. I omitted those 549 cases from the dataset I analyzed.

²⁰⁵ I dropped 149 cases decided prior to 1934 and 488 decided after 2014.

²⁰⁶ In social security cases, decisions favoring the claimant are coded as liberal.

Figure 18: Number of Decisions by Year and Party of Appointing President

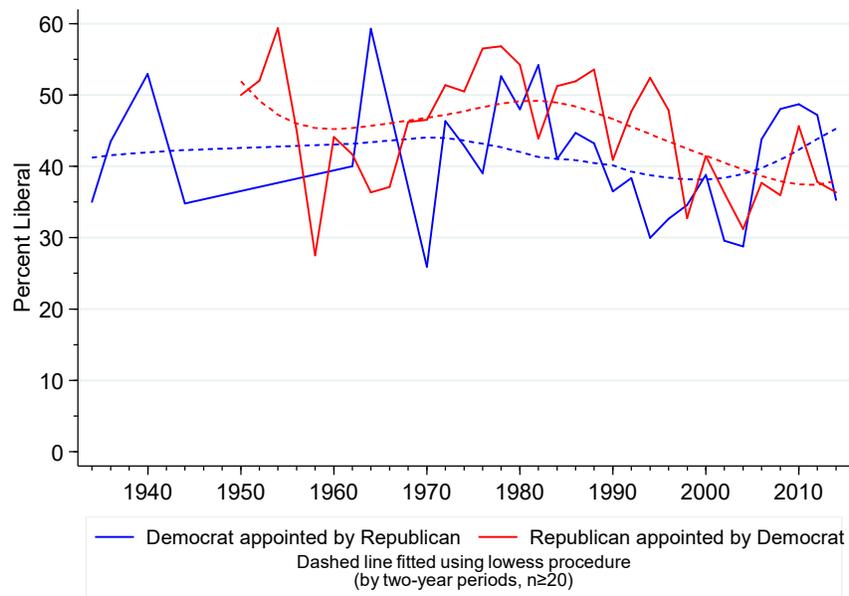


1. Judge's Party or Appointing President's Party?

In the analyses of the Supreme Court and the Court of Appeals, I focused on the party of the appointing President. Sennewald, et al.'s primary analysis employed the party of the judge. That required them to omit decisions by judges who could not be identified with a party. Here I show why it is probably best to rely on the appointing president's party, rather than the judge's party, even though the party background of most federal judges aligns with the party of the president who appointed them. Figure 19 plots the biennial percent liberal by judge's party for the 6,976 decisions (6.05 percent of all decisions in the dataset) by judges appointed by a President of the opposite party; I used biennial percentages because of the relatively small number of cross-party appointments. As the figure shows, decisions by judges with Republican backgrounds appointed by Democratic presidents have tended to be more likely to be in a liberal direction than are decisions by judges with Democratic backgrounds who were appointed by Republican presidents. That is, it appears that the party of the appointing president tends to trump any prior party background of the appointee, although this may have shifted over the

last 10 years covered by the data.²⁰⁷ Because less than 10 percent of cases in the dataset were decided by judges who either had partisan affiliations opposite to that of the appointing president or for whom it was not possible to identify a partisan affiliation,²⁰⁸ there is little difference in the patterns I show using party of the appointing president compared to what would be seen using party of the judge.

Figure 19: Liberal Percent by Party of the Judge, Cross-Party Appointees Only



2. Overall Pattern: A Growing Gap

Figure 20 shows the annual percent liberal for all cases by the party of the appointing president, in red for Republican-appointed

²⁰⁷ My finding is consistent with a study of interparty judicial appointments that used length of sentences imposed by federal district judges in New York as an indicator of behavior. The author of that study concluded that “a lower federal judge’s ideology is in large part a function solely of the nominating president’s ideology”; see Jonathan Remy Nash, *Interparty Judicial Appointments*, 12 J. EMPIRICAL LEGAL STUD. 664, 664–65 (2015).

²⁰⁸ The data set includes 3,974 (3.4 percent of all decisions) by judges for whom no information could be found regarding the judge’s own party affiliation.

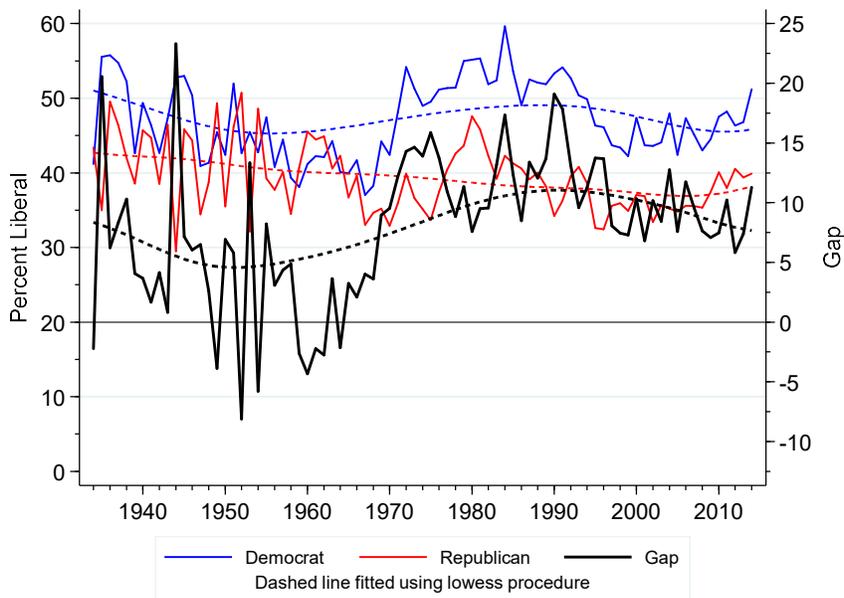
judges and blue for Democratic-appointed judges.²⁰⁹ It also shows the gap between the two groups of judges, plotted in black and scaled according to the right-side axis; the horizontal line across the middle of the figure represents no gap. As the figure shows, there was a narrow and highly variable gap up until 1970; there were even a few occasional years when the appointees of Republicans had a slightly higher percentage of liberal decisions than did the appointees of Democrats. Starting around 1970 the gap widens, although the percentage of liberal decisions tends to decline for both groups of judges starting in the mid-1990s. The lowess lines shown in the figure indicate an apparent long-term pattern of decreasing liberalism for appointees of Republican presidents. This is confirmed by simple linear regressions using year to predict the annual percent liberal.²¹⁰ For appointees of Republican presidents, the percent liberal declines by three-quarters of a percentage point each decade.²¹¹ In contrast, appointees of Democratic presidents show periods of increasing liberalism and periods of decreasing liberalism; there is no linear relationship for Democratic-appointed judges.²¹²

²⁰⁹ The gap between Democratic and Republican appointees increases markedly in the mid-1960s. *See also* Sennewald et al., *supra* note 193, at 660 fig.1.

²¹⁰ I reemphasize that I am not in any sense seeking to fully model the trend, but rather to simply test whether there are secular trends in the patterns for the two sets of judges.

²¹¹ Regression results: $b=-.076$, $t=-3.67$, $r^2=.146$, two-tailed $p<.001$.

²¹² Regression results: $b=.017$, $t=.71$, $r^2=.006$, two-tailed $p=.481$.

Figure 20: Liberal Percent by Party of the Appointing President

Based on this analysis, there was an increased gap between appointees of Democrats and appointees of Republicans in their overall decision patterns, at least as measured by published decisions starting in the mid-1950s and continuing into the 1990s. However, over the last 20 years shown in Figure 20, the gap moderated somewhat. This moderation reflected both a decrease in the liberal pattern for appointees of Democrats over the last 20 years shown and an increase in the liberal pattern for appointees of Republicans over the last 10 years shown. Moreover, although the gap is measurable, it is not huge, only 9 percentage points for the 2004-2014 period,²¹³ about the same magnitude found for the Court of Appeals.²¹⁴

C. Can the Changes Be Explained by Realignment in the States of the South?

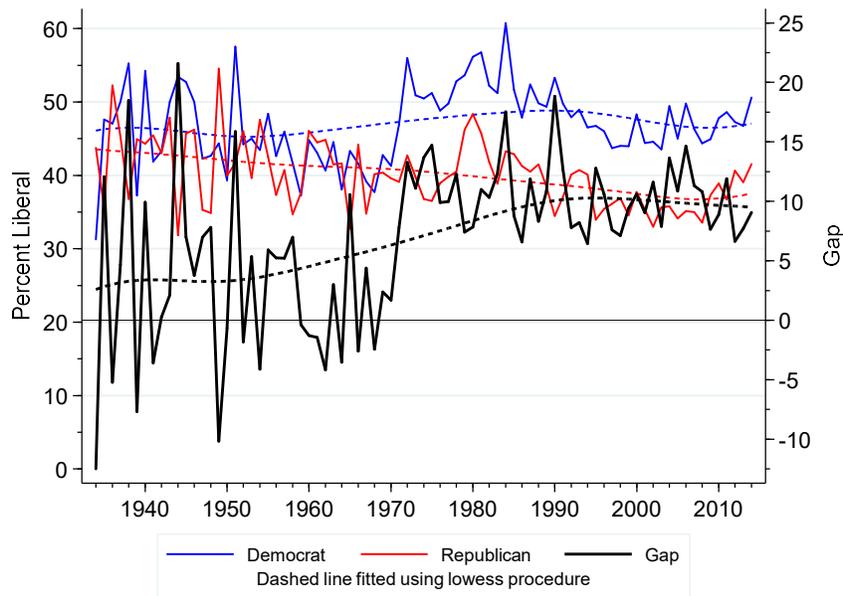
One possible explanation for some of the shifts appearing in Figure 20, particularly for Democratic-appointed judges, is the change in the southern states from one-party Democratic to one-party Republican. This might account for the period of increasing liberalism

²¹³ The two averages for the period are 46.6 and 37.6; a matched pairs t-test is statistically significant ($t=13.09$, $p<.001$).

²¹⁴ See *infra* Part IV.

of Democratic-appointed judges as the very conservative southern Democratic judges retired or died.²¹⁵ To test this, I replicated Figure 20 omitting judges from the 11 states of the Confederacy. There are some differences between Figure 20 and Figure 21 that are worth noting. First, the liberalism of Democratic-appointed judges does not show the dip during the 1950s as it did when the Democratic-appointed southern judges were included. Second, the moderation of the gap over the final 20 years that could be seen in Figure 20 is less evident in Figure 21. Even with the differences, clearly the broad patterns cannot be explained by regional differences.

Figure 21: Liberal Percent by Party of the Appointing President Omitting Judges from the Southern States of the Confederacy

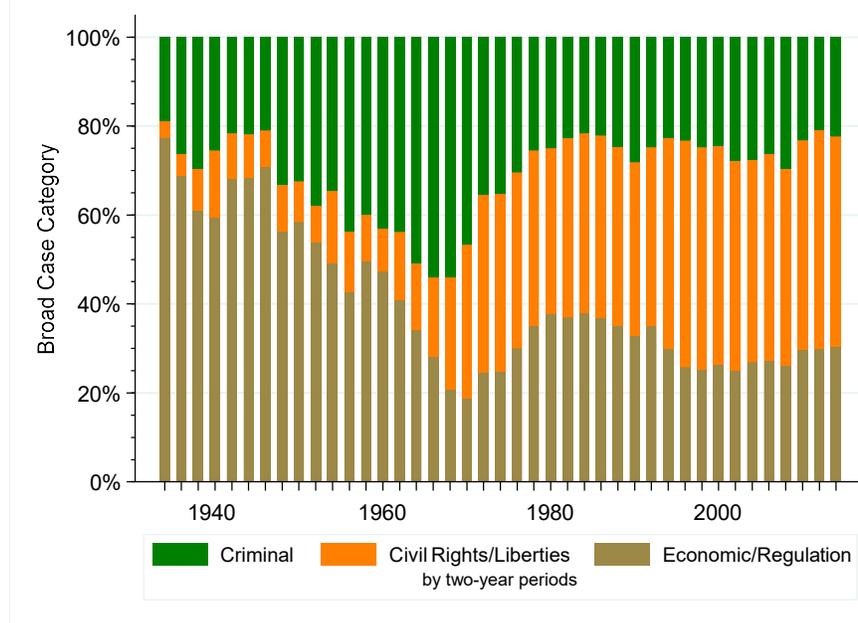


²¹⁵ I do not want to over generalize here. There were certainly some extremely conservative Democrats, such as Harold Cox of Mississippi. See Carol Caldwell, *Harold Cox: Still Racist After All These Years*, AM. LAW. July 1979, at 1, 27–29. However, there were also many brave southern judges, particularly when it came to efforts to desegregate schools. See generally J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961).

D. Do the Shifts Reflect Changes in the Types of Cases Being Decided?

As was true for the other two levels of courts, the nature of cases resulting in published decisions by federal district judges has changed substantially over the 80 years covered by the District Court database. Some specific types of cases have disappeared entirely, and new kinds of cases have appeared. I grouped most decisions into the same three broad categories: civil liberties, criminal, and economics/regulation used for the other court levels.²¹⁶ Figure 22 shows the changing distribution of decisions among the three broad categories over the period of my analysis.

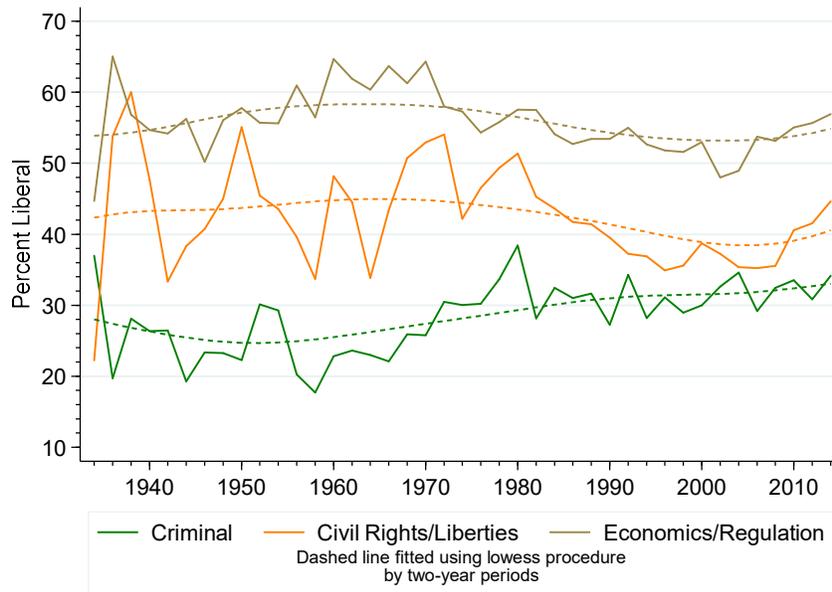
Figure 22: The Changing Agenda in Published Decisions U.S. District Court Judges



²¹⁶ Three of the specific categories, comprising 6.3 percent of all decisions in the dataset, did not fit into one of the three broad categories: social security appeals (4,243 cases), immigration (3,049 cases), and military exclusion (26 cases).

Economics and regulation have declined as a share of the published federal district court decisions, with a much larger share involving civil rights and civil liberties. The share comprised by criminal cases increased in the 1950s and 1960s but then decreased sharply starting around 1970.²¹⁷ Moreover, as shown by Figure 23, the likelihood of a liberal decision varies depending on the broad category and the pattern of change in that likelihood varies depending on the category, increasing since the 1960s (after having slightly decreased) in criminal cases, but showing the opposite pattern for the other two categories.

Figure 23: Likelihood of a Liberal Decision by Broad Case Category: All Judges



Figures 23 and 24 use biennial data rather than annual data because there are many years when the number of decisions in one or more of the three broad categories is very small, more so after splitting judges by party of the appointing President. Even using biennial data,

²¹⁷ The decreasing share of criminal cases in the 1970s reflected both increasing numbers of the other two categories and a sharp drop in the number of published decisions involving criminal cases. The 1970-71 biennium saw 1,533 criminal case decisions; the number dropped steadily during the 1970s and bottomed out at 523 during the 1980-81 biennium.

there are some periods for which the number of decisions available is very small. Consequently, for the analysis comparing appointees of the two parties' presidents, I dropped any observation that was based on fewer than 20 decisions. The 20-decision-minimum rule required dropping five observations for appointees of Democrats and seven for appointees of Republicans out of a total of 246 observations;²¹⁸ of the remaining 234 observations, all but 25 had at least 50 observations.

Table 1: Simple Linear Regressions by Broad Areas of Law^a

	Appointees of Democratic Presidents			Appointees of Republican Presidents		
	b	se	r ²	b	se	r ²
Criminal	.230***	.032	.589	.045	.028	.038
Civil Rights & Civil Liberties	.005	.058	.000	-.131*	.049	.182
Economics, Regulation, and Labor & Employment	-.047	.030	.059	-.066*	.037	.076

^aDependent variable is percent liberal; single predictor is biennium.

[#]p<.10; *p<.05; **p<.01; ***p<.001 (all two-tailed)

Figure 24 and Table 1 show separate patterns and statistics for the three broad areas. For all three, there is a consistent tendency—as shown by the smoothed, lowess lines—for appointees of Democratic presidents to be more likely to make a liberal decision than appointees of Republican presidents. However, the pattern of change differs for the three broad areas:

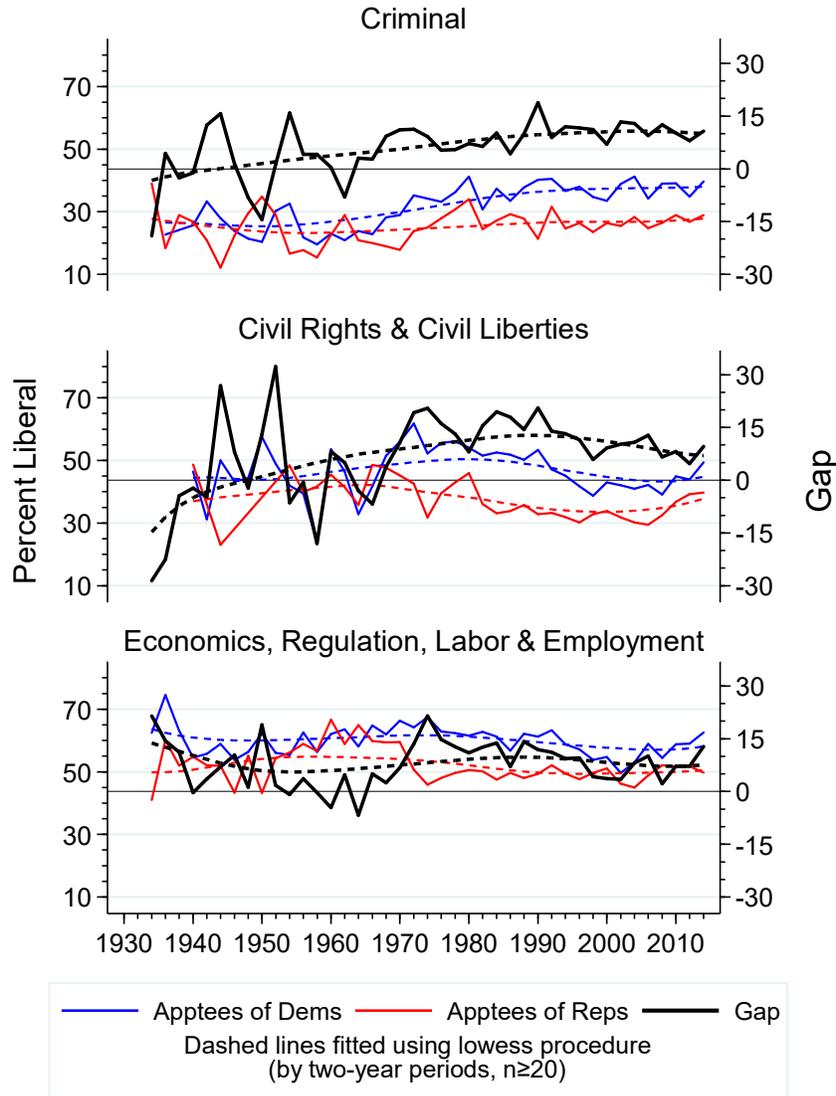
- In criminal cases, appointees of presidents of both parties tended to become more liberal, although the trend is much stronger for appointees of Democrats. Only for the Democratic-appointed judges is the trend statistically significant.

²¹⁸ Five of the dropped observations were from the 1930s; there were two each for the late 1940s and early 1950s.

- In civil rights and civil liberties cases during the 1970s, the two groups of judges diverged with appointees of Democrats becoming more liberal and appointees of Republicans becoming more conservative. Appointees of Republicans continued their movement in the conservative direction over the past two decades. However, appointees of Democrats reversed course and moved in a conservative direction starting in the mid-1980s. Over the entire period, appointees of Republicans became more conservative while appointees of Democrats had little net change. The trend for the Republican-appointed judges is statistically significant.
- In cases involving economics, regulation, and labor/employment, both groups of judges moved modestly in a conservative direction with appointees of Republicans starting that shift in the mid-1960s and appointees of Democrats not until around 1980. The trend is statistically significant for Republican-appointed judges but not for Democratic-appointed judges.²¹⁹

²¹⁹ The trend for Democratic-appointed justices is not that different, but it is sufficiently weaker so as not to meet the conventional standard for statistical significance.

Figure 24: Liberal Percent by Party of Appointing President for Three Broad Areas of Law

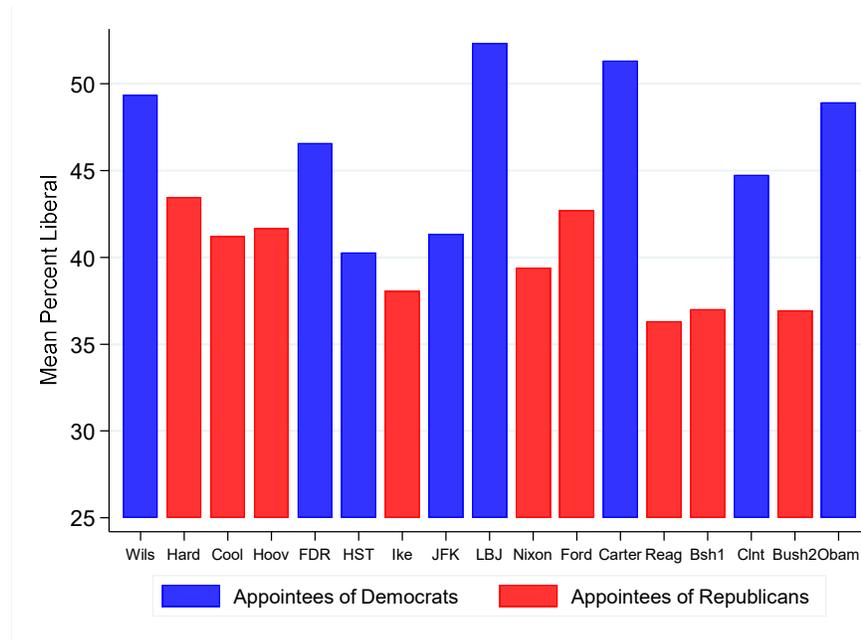


As shown by the regression analyses reported in Table 1, the increase in liberal decisions among appointees of Democratic presidents in criminal cases offsets the conservative shift in economics, regulation, and labor/employment cases, resulting in an overall pattern of no trend. Among appointees of Republicans, two of

the three broad areas had patterns of increasing likelihood of conservative decisions while the other area manifested no trend; this produced the overall pattern of increasing conservatism by appointees of Republicans.

Figure 25 shows the percent liberal by presidential cohort. Interestingly, there is little difference among the appointees of Reagan and the two Bushes, the last three Republican presidents whose appointees appear in the dataset served between 1981 and 2009, nor is there a lot of difference among the cohorts of the five Republican presidents prior to Reagan. There is much more variation among the cohorts of the Democratic presidents,²²⁰ and this explains the lack of any consistent over-time pattern for appointees of Democrats that was shown in Figure 22.

Figure 25: Liberalism in District Court Decisions by Presidential Cohort



²²⁰ This variation cannot be explained as a result of Democratic presidents prior to Johnson appointing conservative southern Democrats; rerunning Figure 24 omitting the eleven states of the Confederacy has minimal effect on the pattern shown in Figure 24.

E. Summary: Federal District Courts

Regarding published decisions by judges of the federal district courts, the analysis shows an overall pattern of an increasing difference in the likelihood of a liberal decision by appointees of Democrats compared to appointees of Republicans. However, the gap leveled off by the late 1990s and has perhaps even narrowed. This may be due to the likelihood of a conservative decision by appointees of the last three Republican presidents included in the dataset (Reagan and the two Bushes) being constant, while the liberalism of appointees of the intervening Democratic president, Bill Clinton, was substantially below that of Presidents Johnson, Carter, and Obama. The analysis of the three broad issue areas suggests that any narrowing of the gap in recent years came largely in civil rights and civil liberties cases. However, even after taking all this into account, the gap is on the order of 10 percentage points, essentially the same as what the analysis showed for the Court of Appeals for the most recent period that data were available for that court.

VI. SUMMARY AND CONCLUSION

Decision making by justices of the Supreme Court has become increasingly polarized. The fact that a significant percentage of decisions are unanimous tends to dampen the gap between appointees of Democrats and appointees of Republicans. However, focusing on the decisions in nonunanimous cases, the gap has widened sharply during the Roberts Court to the point that the average for the first six natural courts (through the 2017 term) under Roberts has been 35.5, compared to 17.0 for the six natural courts during Rehnquist's tenure.²²¹ Even these figures understate the degree of polarization because the gap has actually declined in nonunanimous economics/regulatory cases, averaging 5.1 percentage points during Roberts's tenure compared to 14.0 during Rehnquist's. In contrast, the average gaps under Roberts for criminal and for civil rights/civil liberties have been 46.8 and 49.7 percentage points compared to 15.3 and 16.8 under Rehnquist.

The analysis also shows a growing gap for the Court of Appeals. That gap is much less pronounced as one would expect, given that the

²²¹ The average for the seven natural courts during Burger's tenure was 22.4. The average gap for the 11 natural courts during Warren's tenure was 6.4.

Court of Appeals must decide all cases presented to it that are not withdrawn by the parties. However, in contrast to the Supreme Court, the gap has grown to about the same level for each of the three broad issue areas, on the order of 10 percentage points. The analysis also showed that, starting with President Nixon and continuing at least through the first President Bush, Republican presidents made increasingly conservative appointments; the lack of data after 2002 precludes drawing any conclusions about whether the second President Bush continued this trend. In contrast, there was relatively little variation in the liberal decision patterns of appointees of Democratic presidents over the last half century included in the dataset (i.e., Truman through Clinton).

Kastellac's analysis of the impact of panel composition suggests that the figure above may, in some sense, understate polarization on the Court of Appeals. He found that the gap between panels composed entirely of appointees of Democrats compared to panels composed entirely of appointees of Republicans had grown to 24 percentage points. This constituted a quadrupling from for the periods covering 1961 through 1985. An unanswered question regarding the Court of Appeals is whether the various measures of polarization have continued to grow since the early 2000s and whether the second President Bush continued the pattern of Republican presidents appointing increasingly conservative judges to the Court of Appeals.

Regarding published decisions by judges of the federal district courts, my analysis shows that the gap between Democratic-appointed judges and Republican-appointed judges increased starting in the 1960s to the point that it is, for the most recent years examined, on the order of 10 percentage points. Thus, the gaps for the two lower federal courts, are on the same order, and considerably smaller than for the Supreme Court. However, given that the data for the Court of Appeals ends before a significant number of decisions by judges appointed by either the second Bush or Obama, it may well be that the gap for the Court of Appeals now exceeds that for the district courts.

Returning to the question that motivated this article: has the federal judiciary become increasingly polarized in line with what has happened more generally in American politics? The best answer is either "yes, but ..." or "sort of." Looking at the gross overall pattern, there is an increasing divergence between judges appointed by Democratic presidents versus those appointed by Republican presidents. That divergence largely reflects change among Republican

appointees, most likely in who Republican presidents appointed. Even with some evidence of increasing polarization, the gaps I found in decisions by lower court judges are much smaller than what exists at the top of the federal judicial hierarchy.²²² Moreover, the gaps one finds for the federal courts, at all levels, pales in comparison to the gap one finds for parallel issues in the U.S. Congress.²²³

Thus, although there is evidence showing increasing polarization in the federal judiciary, the data suggest that federal courts seem to have not polarized to the same extent that has been seen in other branches of government. Perhaps, in the end, this is not too surprising. It is in the trial courts, and to a significant degree on the Court of Appeals, where one might expect that the legal model of judicial behavior – that is, the understanding that judges’ decision making is primarily driven by law, facts, and precedent rather than their own personal policy preferences – would be most often manifested. This is evident in the parallel movement over time I describe for the district courts in the Appendix for many of the detailed subcategories of cases.

²²² KECK, *supra* note 12, at 138–139; SUNSTEIN & EPSTEIN., *supra* note 11, at 126–128.

²²³ KECK, *supra* note 12, at 147.

APPENDIX A

Analysis Using the “Legacy” Supreme Court Database

As discussed previously, the “Legacy” version of the SCDB extends back to 1791, with cases defined by citation. For the analysis presented here, I started with the 1933 term of the Court. I begin with the 1933 term because the resulting analysis closely parallels the periods examined for the Court of Appeals and the district courts. Also, by 1933, the Supreme Court is well into the period when it has substantial control over its docket under the terms of the Judiciary Act of 1925, commonly called the Judges’ Bill.²²⁴ For the 1933 through 2017 terms, this version of the SCDB contains about 10,100 cases, with over 98,000 votes by individual justices.²²⁵ Omitting the votes that could not be coded liberal or conservative leaves 91,440 votes for analysis.

One of the problems with using the “Modern” version of the SCDB is that all justices who served on the Vinson Court were appointed by Democrats. Extending the analysis back to 1933, thus adding the last years of the Hughes Court and the entire Stone Court period, provides a mix of Democratic-appointed and Republican-appointed justices prior to the Warren Court. Figure A1 is modeled on Figure 5. Using the citation-based unit, it differs little from Figure 5 starting with the Warren Court, but it also extends back to include some years of the Hughes Court. It makes clear that the gap between Democratic-appointed justices and Republican-appointed justices was modest until sometime into the Warren Court. The smoothed line shows a gap for all cases that was generally less than five percentage

²²⁴ See *Judges’ Bill*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/judges-bill> [<https://perma.cc/5HMZ-GTD5>]. See also Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1 (2008) (providing a general history of the adoption of the Judges’ Bill). Also, Devins and Baum report that their examination of the years prior to 1937 revealed little in the way of partisan polarization on the Court. Devins & Baum, *Split Definitive*, *supra* note 10, at 310.

²²⁵ The actual “Legacy” version of the SCDB covers the terms from 1791 through 1945. The “Modern” version, in its three formats, covers 1946 through 2017. For my analysis I merged the “Legacy” version with the citation-based version of the “New” version. For simplicity, refer to this merged, citation-based dataset as the “Legacy” version of the SCDB.

points, and on the order of ten percentage points when the analysis is limited to nonunanimous cases.

Figure A1: Liberalism by Party of Appointing President and Natural Court, 1933-2017 Terms

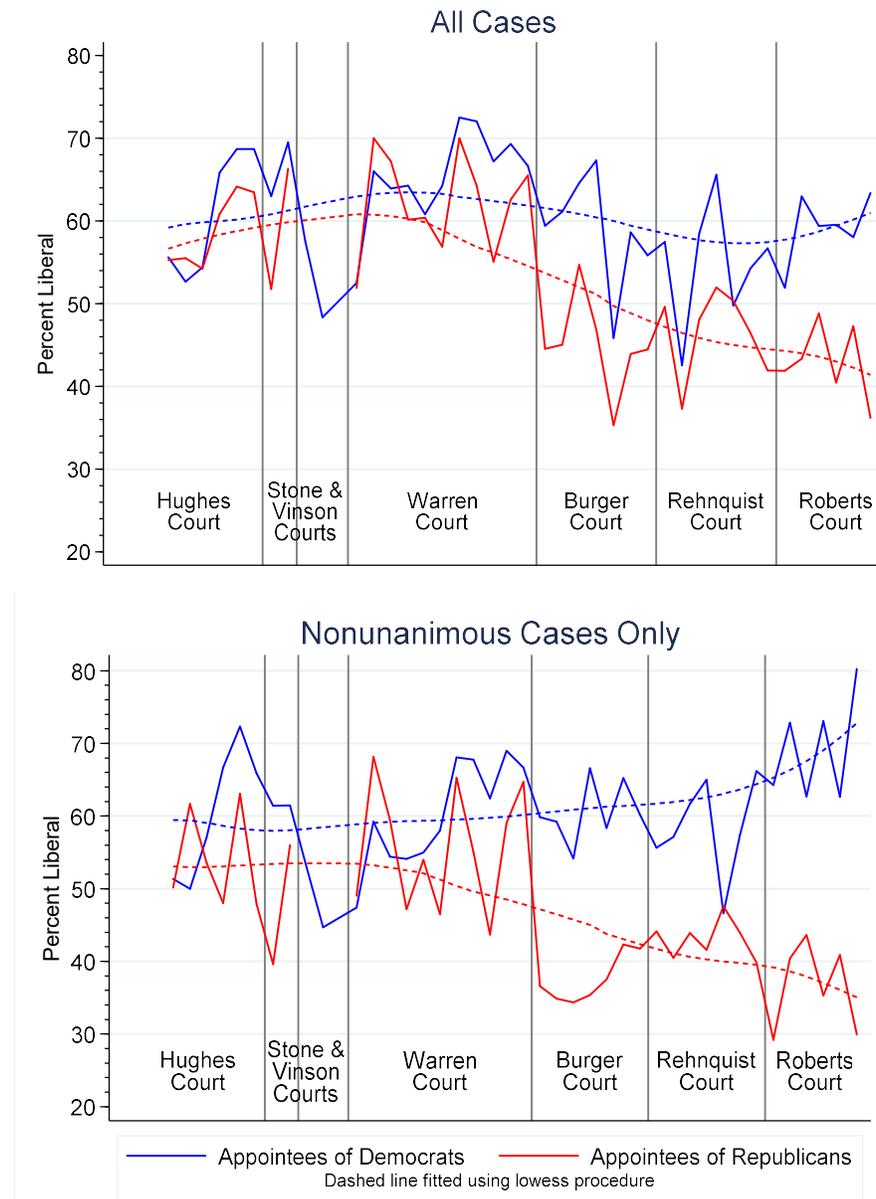


Figure A2 shows the ideological voting pattern for each presidential cohort. It makes clear that prior to Lyndon Johnson, the differences among presidential cohorts was not that sharp. Moreover, there was no consistent pattern of greater tendency of liberalism depending on the president's party. Kennedy's cohort is just barely on the liberal side, but that reflects his liberal appointee, Arthur Goldberg, who served on the Court for only three years before Lyndon Johnson convinced him to accept appointment as the U.S. ambassador to the United Nations; in contrast, Kennedy's moderate to conservative appointee, Byron White, served on the Court for 31 years. The only liberal cohort by a Republican president after 1960 was Ford's, and his cohort consisted of a single Justice, John Paul Stevens.

Figure A2: Liberalism by Presidential Cohort, 1933-2017 Terms

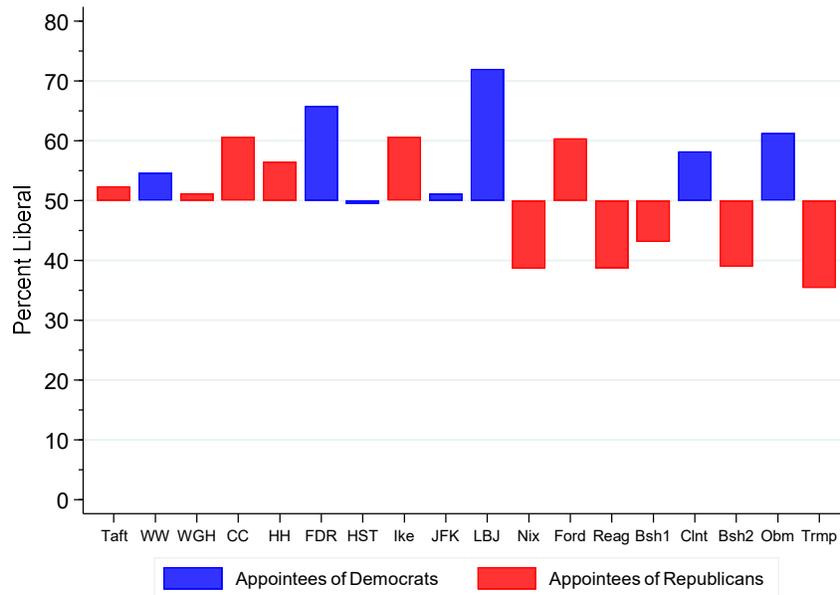


Figure A3 replicates Figure 7, extending back to the 1933 term and using citation rather than issue as the unit of analysis. There is no appreciable difference in what the figure shows for the Vinson Court forward compared to Figure 7. Figure A3 does make it clear the even greater dominance of economic and regulatory cases prior to the Vinson Court, and, with the exception of one natural court under Chief

Justice Hughes, the particularly small share of the docket composed of criminal cases.

Figure A3: Supreme Court Agenda Pattern, 1933 to 2017 Terms, by Natural Court

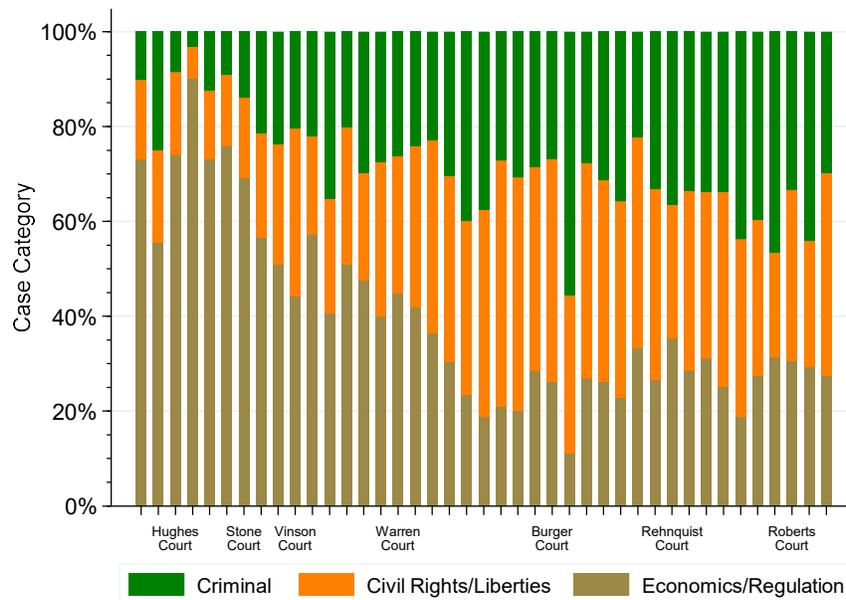
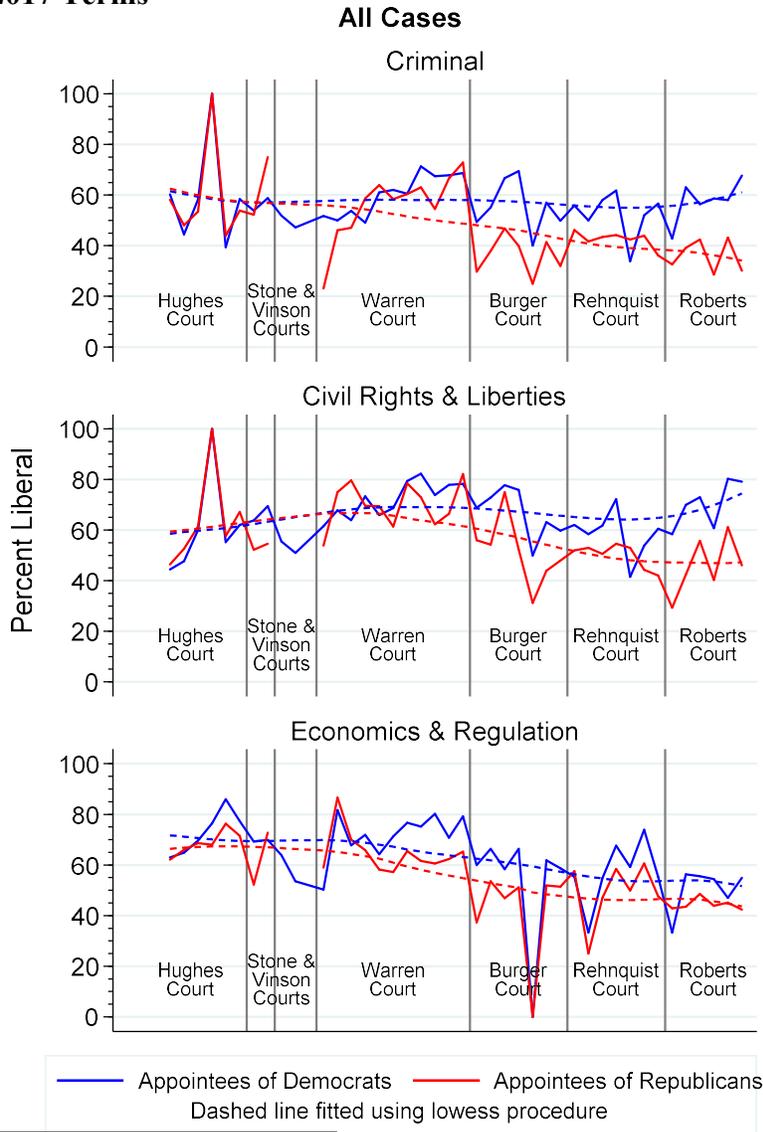


Figure A4 extends Figure 8 back to the 1933 term. Looking at the subgraphs for Criminal cases and for Civil Rights & Liberties cases for all cases (i.e., including unanimous cases), the smoothed line for Democratic-appointed justices is indistinguishable from that for Republican-appointed justices prior to the Warren Court. The gap for the smoothed lines for Economic/Regulations cases is small, about five percentage points. Looking at the subgraphs restricted to nonunanimous cases, there is little or no difference for criminal cases until the Warren Court; recall that there were no decisions by Republican-appointed justices during the Vinson Court because all justices on that Court had been appointed by either Roosevelt or Truman. For Civil Rights & Liberties cases, the Republican-appointed Justices were more likely to vote liberal than were the Democratic-appointed Justices, both of whom, McReynolds and Brandeis, were appointed by Woodrow Wilson; the conservative tint of Wilson's appointees is due to McReynolds, who cast conservative votes in 23 of the 30 nonunanimous Civil Rights & Liberties cases he participated

in.²²⁶ For Economics/Regulation cases, the gap for nonunanimous cases increases during the Warren and Burger Courts, but then starts to converge so that there is little difference by the most recent period of the Roberts Court.

Figure A4: Liberal Voting by Natural Court and Legal Area, 1933 to 2017 Terms



²²⁶ Woodrow Wilson himself was conservative when it came to civil rights questions. See RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 361–63 (1965).

Figure A4: Continued

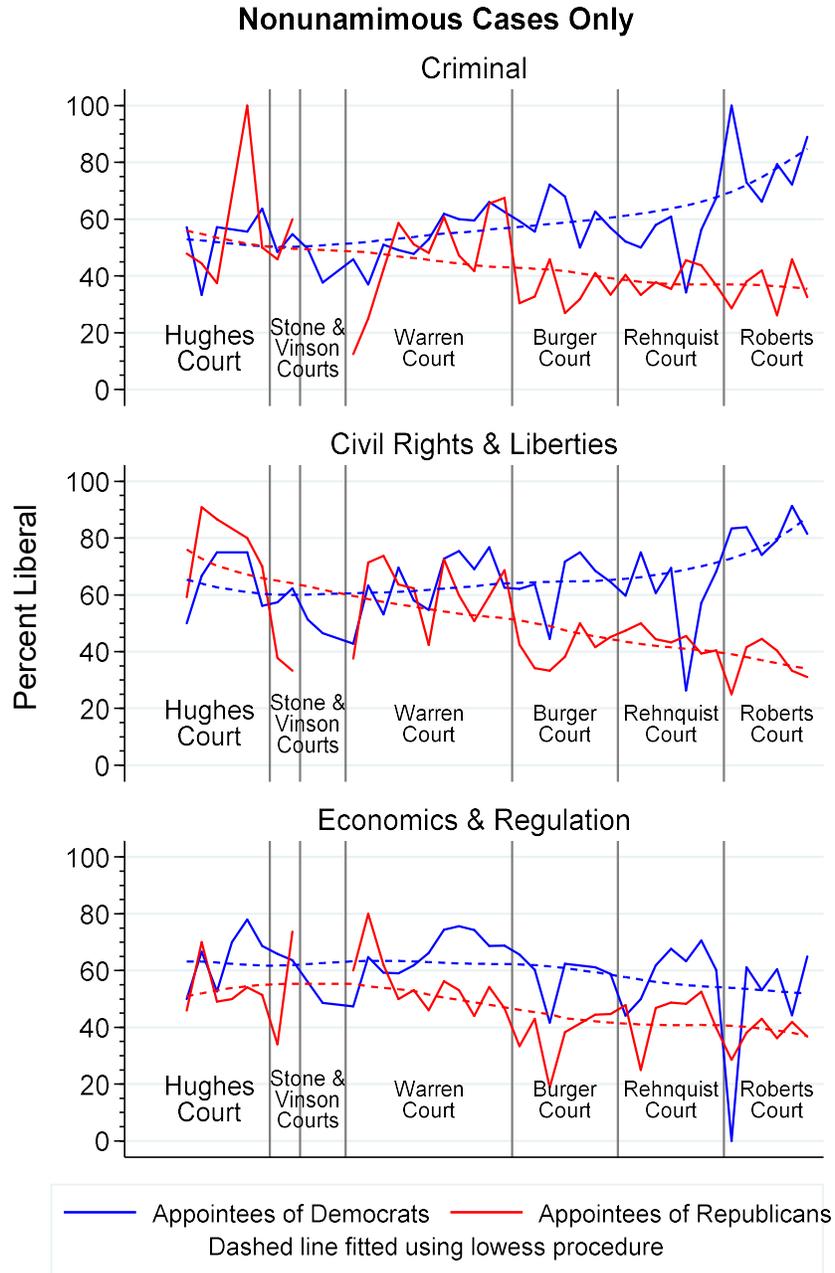
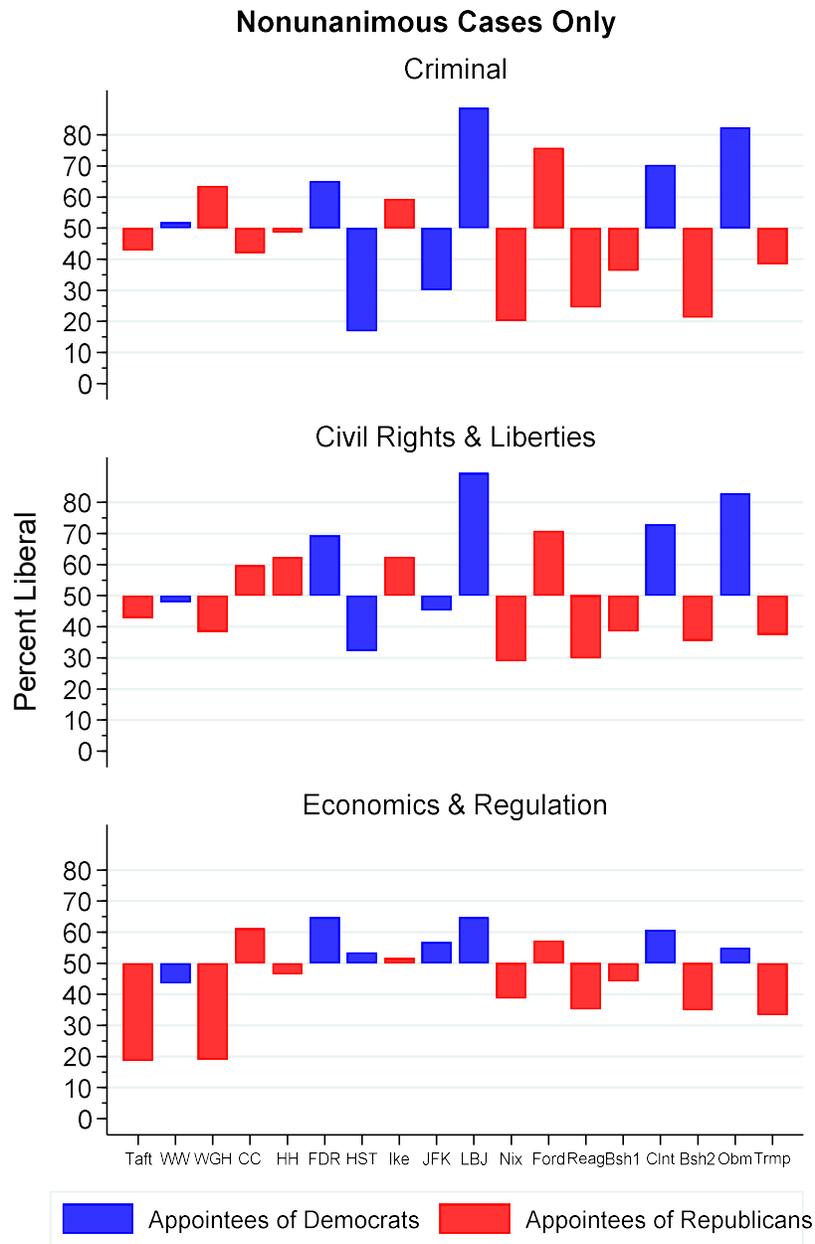


Figure A5 shows the liberal voting percentage for each presidential cohort separately by legal area, both for all cases and limited to nonunanimous cases. It is clear from these two figures that the divergence between Democratic-appointed justices and Republican-appointed justices really starts with Johnson's appointments, particularly if one discounts the one-justice (Stevens) Ford cohort. The cohorts prior to Johnson's do not consistently align as liberal, if Democratic-appointed, or conservative, if Republican-appointed. Two of the pre-Johnson Democratic-appointed cohorts are more conservative in criminal cases than any of the Republican-appointed cohorts pre-Johnson.

Figure A5: Liberal Voting by Presidential Cohort and Legal Area, 1933-2017 Terms



Figure A5 (continued)



APPENDIX B

Federal District Court Decisions by Detailed Case Categories

In this appendix, I report patterns of change in decisions by federal district judges using detailed case categories. This is possible due to the presence of over 115,000 cases in the dataset. Table B1 shows the number of cases in each category both in total and for time intervals. Not surprisingly, on an annual basis or even a biennial basis, there were many years with fewer than 20 observations for a specific-issue-category/appointing-party combination.²²⁷ Consequently, I used four-year intervals. Even using four-year intervals, slightly more than a quarter (213 of 836) of observations failed to meet my 20-decision minimum; 177 of these dropped observations were for periods prior to 1970. Of the remaining 623 observations, 454 (72.9 percent) were based on at least 50 decisions.

Table B1: Numbers of Observations by Detailed Category over Time

NATURE OF CASE	PERIOD				Total
	1934-53	1954-73	1974-93	1994-2014	
Criminal					
Habeas Corpus-US	402	1,038	728	884	3,052
Habeas Corpus-State	221	2,886	2,521	3,169	8,797
Criminal Court Motion	507	3,115	4,715	8,176	16,513
Contempt of Court	14	38	0	1	53
Nonconviction-Criminal Case	163	396	620	629	1,808
Sentencing Guidelines	0	0	0	971	971

²²⁷ Some of the specific categories, such as sentencing guidelines and rent control plus many of the specific types of discrimination claims, did not exist for the entire period.

Civil Rights/Civil Liberties

Native American Rights	71	100	278	425	874
Voting Rights	23	209	440	504	1,176
Racial Discrimination	80	964	2,106	2,531	5,681
14th Amendment	31	1,579	5,876	11,799	19,285
Freedom of Expression	165	781	1,305	1,972	4,223
Freedom of Religion	70	456	475	725	1,726
Women's Rights	0	35	1,402	2,210	3,647
Handicapped Rights	2	0	484	3,640	4,126
Reverse Discrimination-Race	0	0	82	144	226
Reverse Discrimination-Sex	0	0	22	29	51
Right to Privacy	0	0	260	799	1,059
Age Discrimination	0	0	532	1,300	1,832

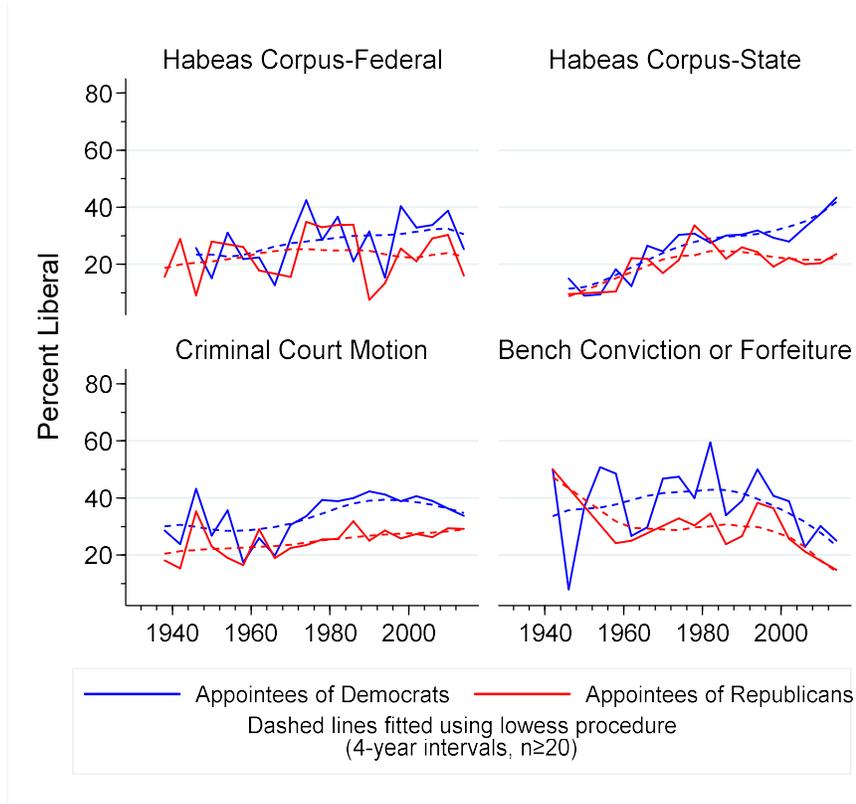
Economics & Regulation

Union v. Company	182	921	1,403	944	3,450
Member v. Union	15	287	612	321	1,235
Employee v. Employer	695	534	3,234	6,298	10,761
Commercial Regulation	762	1,473	2,410	2,145	6,790
Environmental Regulation	136	372	1,408	2,152	4,068
Local/State Economic	151	377	1,460	1,850	3,838

Labor Dispute-Govt v. Union or Employer	53	13	1	0	67
Rent Control, Excess	682	139	121	25	967
NLRB v. Employer	301	443	560	1,155	2,459
NLRB v. Union	56	320	202	97	675
Other					
Social Security Appeal	0	971	1,709	1,563	4,243
Military Exclusion	13	1	2	10	26
Immigration	688	738	432	1,208	3,066
TOTAL	5,483	18,186	35,400	57,884	116,953

Criminal

The detailed coding includes six specific areas related to criminal cases. However, one of those, contempt of court, has only 56 observations. A second area, sentencing guidelines, has only existed since the mid-1980s, making it impractical to try to map long-term changes. Using four-year periods and the 20-decision minimum, the number of data points for a category varied from as few as 14 to as many as 20. Figure B1 and Table B2 show the results for the four remaining subsets of criminal cases. For clarity, given the small size of individual plots in Figures B1 through B3, I have omitted the lines representing the size of the gaps.

Figure B1: Specific Criminal Areas

In federal habeas corpus cases, the movement for Democratic appointees was in a liberal direction and the trend was marginally statistically significant; there was no clear pattern for Republican appointees. In contrast, there were clear differences between the two groups of appointees in state habeas corpus cases in the years since about 1970. Prior to that time, there was little difference between appointees of the two parties, with both moving in a liberal direction. Starting in the 1970s, there was a growing gap with appointees of Democrats moving in a liberal direction and appointees of Republicans moving slightly in a conservative direction. The decline for Republicans does not show in the simple regression results in Table B2 because the initial movement in the liberal direction

dominates that result and the overall pattern is nonlinear.²²⁸ It is somewhat surprising that appointees of Democrats moved so sharply in a liberal direction given the constraints on review of state habeas corpus petitions created by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. Based on the AEDPA, the Supreme Court “has decided a long series of cases interpreting [the act’s] limits on the power of federal courts to issue writs of habeas corpus when state prisoners challenge their convictions.”²²⁹

Table B2: Simple Linear Regressions for Criminal Law Categories^a

	Appointees of Democratic Presidents			Appointees of Republican Presidents		
	b	se	r ²	b	se	r ²
Habeas Corpus – Federal	.165 [#]	.095	.160	.037	.091	.010
Habeas Corpus – State	.398***	.051	.791	.123	.072	.173
Criminal Court Motion	.173**	.065	.281	.112*	.045	.257
Bench Conviction or Forfeiture	-.065	.133	.014	-.259*	.101	.353

^a Dependent variable is percent liberal; single predictor is biennium. Four-year intervals; number of observations varies between 14 and 20.

[#]p<.10; *p<.05; **p<.01; ***p<.001

In cases involving bench trials or decisions on property forfeitures in criminal cases, appointees of Republican presidents moved in a

²²⁸ This nonlinearity can be captured by adding a quadratic term to the regression. See BLALOCK, *supra* note 25, at 326–327. Doing so increased the R² to .524, and both the linear and quadratic terms are statistically significant (p<.01 for both).

²²⁹ LAWRENCE BAUM, *IDEOLOGY IN THE SUPREME COURT* 87 (2017).

consistently conservative direction and the pattern is statistically significant. Appointees of Democrats moved in a similar direction starting in about 1990, although the overall trend is not statistically significant probably because prior to 1990, these judges had a slight tendency in the more liberal direction.²³⁰ Both groups moved in a liberal direction in decisions regarding other kinds of criminal court motions; the gap between the groups was fairly constant over the entire period.

The similarity of movement for Democratic and Republican appointees in two of the subcategories of criminal matters raises the question of whether that similarity was coincidental or reflected trial court judges responding to statutory changes and Supreme Court decisions. Trial judges are usually constrained when applying relatively clear law, whether it be statutory or case law. Moreover, when the law is clear, one would expect to see similarity in lower court decision patterns overtime. However, there are some patterns that seem to run against the constraining influence of statutes and/or the Supreme Court. Specifically, why did appointees of Democrats continue to move in a liberal direction in state habeas corpus cases after the passage of the AEDPA in 1996? Figure B1 does show a conservative shift around the time the act was passed, but the movement in a liberal direction resumed almost immediately.

Civil Rights and Civil Liberties

Figure B2 and Table B3 show the patterns for eight categories of civil rights and civil liberties cases. I combined three separate discrimination categories—age discrimination, disability discrimination, and Native American rights—into a single “other discrimination” category. Even after collapsing the data into four-year periods, there was only one observation for appointees of Republicans prior to the four-year period 1956-59.²³¹ Consequently, although there were more observations for appointees of Democrats prior to the 1956-59 period, I limited the analysis to decisions starting with that period.²³² Although this leaves a maximum of 15 observations for

²³⁰ Adding a quadratic term to capture the shift in the direction of movement does not, for this set of decisions, produce statistically significant results.

²³¹ There was total of eight, 1 for 1940-43, 1 for 1944-47, 2 for 1948-51, and 4 for 1952-53.

²³² The one earlier observation meeting the 20-or-more criterion for appointees of Republicans was freedom of expression for the period 1940-1943.

each party's appointees for a specific category, 10 of the 120 potential observations for the periods included in the analysis were completely missing and another 17 failed to meet the 20-or-more requirement. Not until the 1984-87 period was there an observation for all eight categories, and for three of the other four-year periods there were only one or two data points.

A general observation from Figure B2 is that the pattern in most of the lowest lines shows, although Democratic appointees were more likely to make liberal decisions than were Republican appointees over the last several decades, a pattern of convergence in several categories in the later years (e.g., racial discrimination and gender discrimination). Moreover, no category shows a pattern of increasing divergence. Also, as shown in Table 3, all the statistically significant trends, regardless of the party of the appointing president, were in a conservative direction. The broad trend toward more conservative decisions in the specific areas of civil rights and civil liberties is consistent with the pattern shown previously in Figure B1.

Figure B2: Specific Civil Rights and Civil Liberties Categories

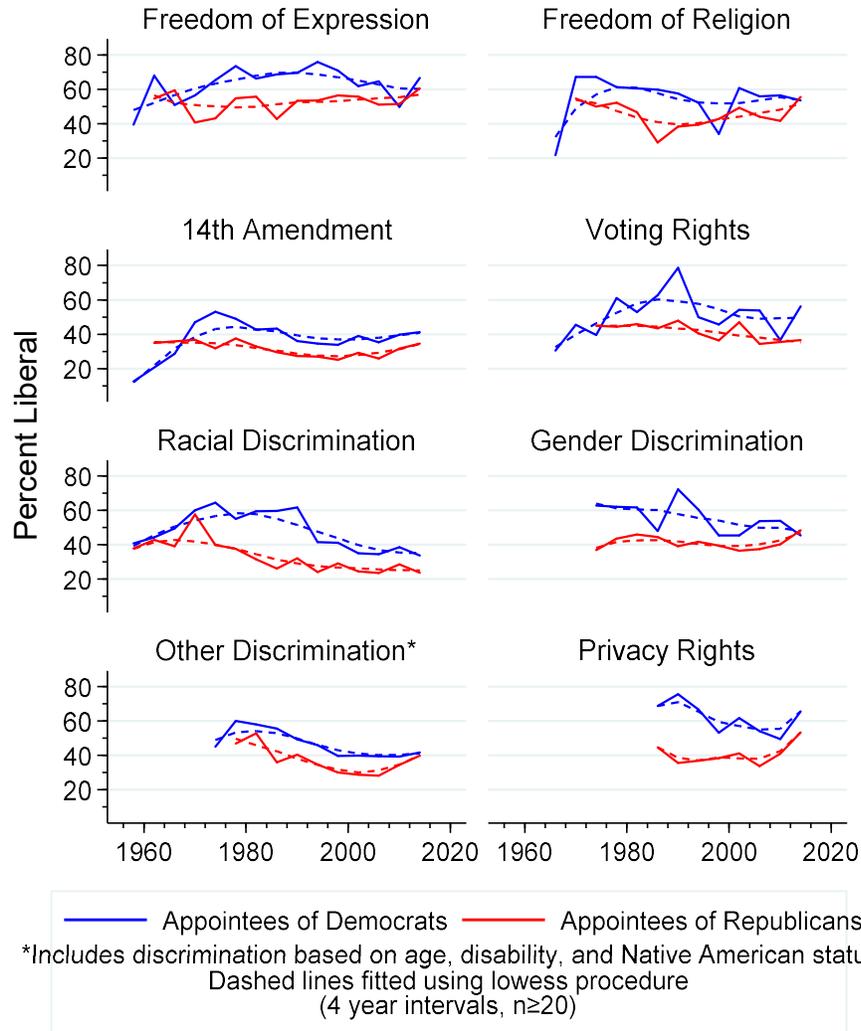


Table B3: Simple Linear Regressions for Civil Rights and Civil Liberties Categories^a

	Appointees of Democratic Presidents			Appointees of Republican Presidents		
	b	se	r ²	b	se	r ²
Freedom of Expression	.175	.147	.099	.101	.1041	.034
Freedom of Religion	.041	.250	.002	.016	.194	.001
14 th Amendment	.123	.162	.046	-.128 [#]	.067	.251
Voting Rights	.163	.236	.041	-.265*	.090	.490
Racial Discrimination	-.314 [#]	.148	.257	-.405***	.094	.590
Gender Discrimination	-.400 [#]	.182	.348	.005	.098	<.001
Other Discrimination ^b	-.446**	.130	.566	-.410 [#]	.183	.385
Privacy Rights	-.536	.301	.346	.345	.290	.191

^aFour-year intervals; number of observations varies between 8 and 15.

^bIncludes discrimination based on age, disability, and Native American status.

[#]p<.10; *p<.05; **p<.01; ***p<.001

Economic, Regulatory, and Labor & Employment

Figure B3 and Table B4 provide information on the patterns for eight specific categories dealing with economics, regulation, or labor and employment.²³³ The number of data points ranged from 7 to 21.²³⁴

²³³ I omitted one category that included a mix of cases brought by the government against employers and compensation claims by injured employees under several compensation plans created under federal law (e.g., FELA and the Jones Act).

²³⁴ The maximum number of observations was 21. Five potential observations were missing entirely; another 44 failed to meet the 20-case minimum.

As with the other areas, the lowess lines show that appointees of Democratic presidents tended to be more likely to decide in a liberal direction compared to appointees of Republican presidents, although the gaps for most categories is small. For two categories, commercial regulation and union vs. company, there was a trend of increasing liberalism for both groups of judges, while for two other categories, member vs. union and NLRB vs. employer, decisions of both groups of judges were increasingly conservative. It would be difficult to argue that there was a clear pattern of a growing gap for any of the categories although for one, state or local economic regulation, there was a period with a sizable gap lasting about 20 years from 1970 to 1990. Here, even more than for some of the subcategories of criminal and civil rights/civil liberties, one sees significant parallel movement over time for the two groups of judges. This is further indication that some of the movement in decision patterns at the trial level is probably in response to legal changes that the trial judges must implement.

Figure B3: Specific Economic, Regulatory, and Labor & Employment Categories

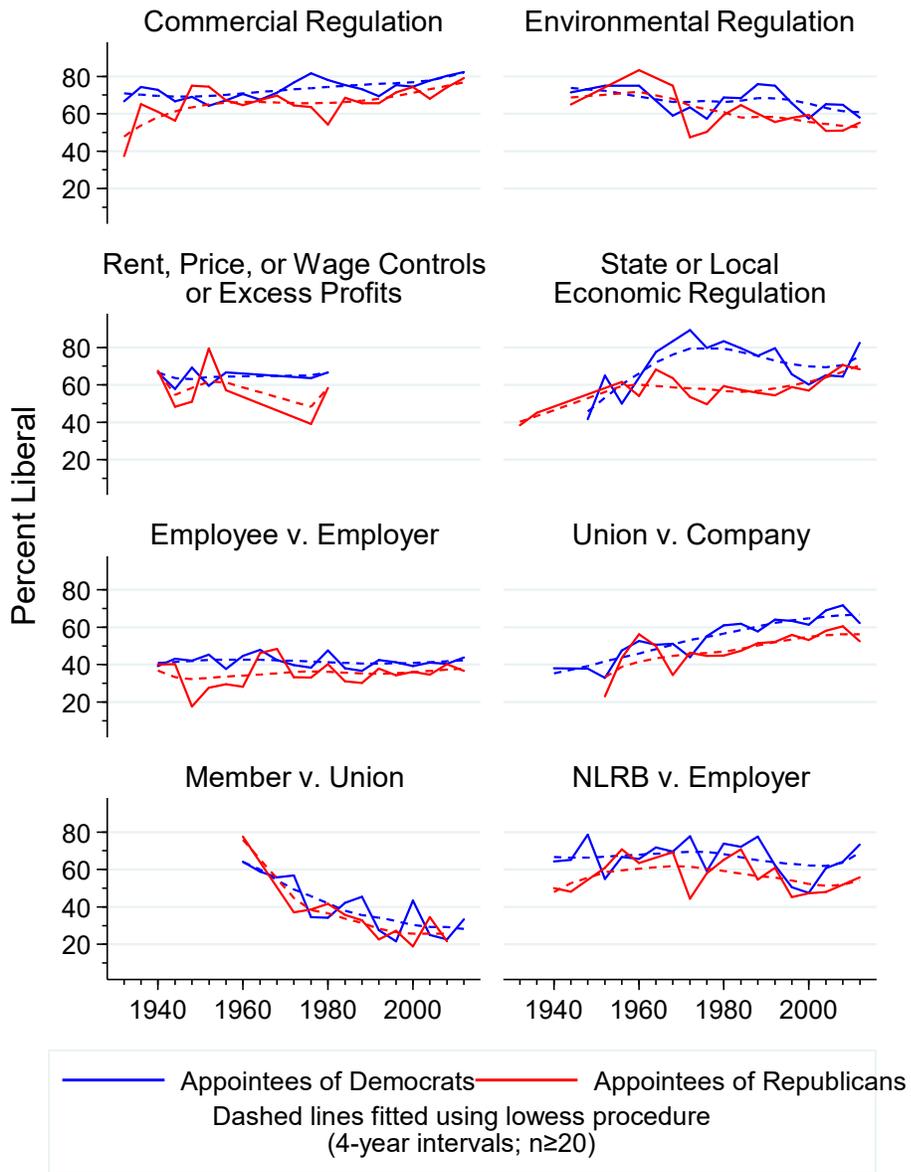


Table B4: Simple Linear Regressions for Specific Economics, Regulation, and Labor & Employment Categories^a

	Appointees of Democratic Presidents			Appointees of Republican Presidents		
	b	se	r ²	b	se	r ²
Commercial Regulation	.142***	.036	.454	.191*	.070	.280
Environmental Regulation	-.136	.084	.169	-.279*	.124	.298
Rent, Price, or Wage Controls, or Excess Profits	.043	.119	.026	-.298	.355	.123
State or Local Economic Regulation	.178	.169	.073	.234**	.069	.437
Employee v. Employer	-.022	.034	.024	.056	.075	.032
Union v. Company	.462***	.054	.819	.335**	.096	.462
Member v. Union	-.687***	.145	.652	-.888**	.209	.668
NLRB v. Employer	-.076	.094	.037	-.089	.101	.045

^aFour-year intervals; number of observations varies between 7 and 21.

#p<.10; *p<.05; **p<.01; ***p<.001