

The Supreme Court is just as polarized as the rest of US politics – and this may have profound implications.

Recent years have seen concerns about political polarization in America come to the fore – one only has to look at the recent fight between Congressional Republicans over the next Speaker of the House or Representatives to witness its effects. But what of judicial polarization? In new research which examines polarization in the US Supreme Court since 1938, Donald Gooch finds that this polarization has also increased, and correlates with congressional and presidential polarization. He argues that this trend is fed by shifts in ideological polarization in the Senate, and in public opinion. If it continues, he writes, polarization may lead to more frequent and powerful attacks on the Supreme Court's authority and supremacy.

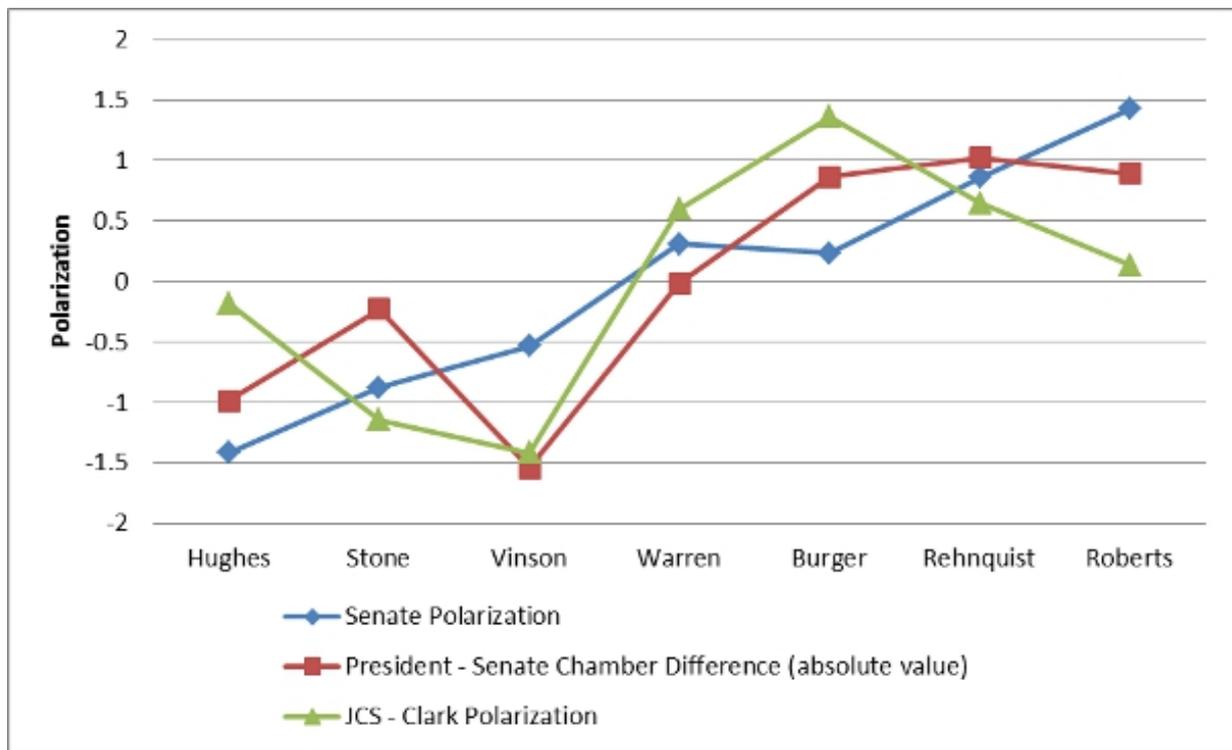


Scholars have long warned of a growing political schism in the American body politic. Popularized by “Red vs. Blue” maps in national elections, political polarization is defined as a widening divide between partisan identifiers and ideologues in the public and political elite. Political polarization is one of the most important recent developments in American politics. Concerns about political polarization in American politics focus on its potential to frustrate political accommodation, stymie political actors, clog political processes, disrupt political institutional environments and, in the extreme, spur violent social unrest. For example, the congressional polarization that emerged in the 1970s has only intensified over time. Polarization has led to greater gridlock, greater partisan rancor between the parties, and greater intraparty cohesion in congressional politics.

The majority of institutional polarization studies emphasize Congress. Judicial polarization, in contrast, is underexplored as an aspect of political polarization and as a determinant of judicial behavior. By examining individual justice polarization and ideological extremity over full tenures on the United States Supreme Court since 1938 and how Court polarization responds to polarization in coordinate institutions over the same time period, I find: strong evidence of increasing Court polarization and that Court polarization correlates with congressional and presidential polarization since the 1950s. Court polarization is a real and significant political phenomenon in America.

Figure 1 shows the normalized polarization trends in the Court's institutional environment across the regimes of Chief Justices. It depicts polarization trends for the Supreme Court, the Senate (standard deviation of senator ideology per congressional term), and the President vis-à-vis the Senate chamber median (absolute difference between President's ideology score and the median Senator's ideology score). Notice the strong apparent linear trend over time in the polarization of all three institutions, interrupted only by the drop in polarization observed between the Senate chamber median and the President during the Vinson regime. The strength of the correlation between the President-Senate chamber median difference and that of Court polarization over the regimes is striking. A remarkable consistency exists in the peaks and valleys of Court polarization and the ideological distance between the President and the Senate chamber median across chief justice regimes from Hughes to Roberts.

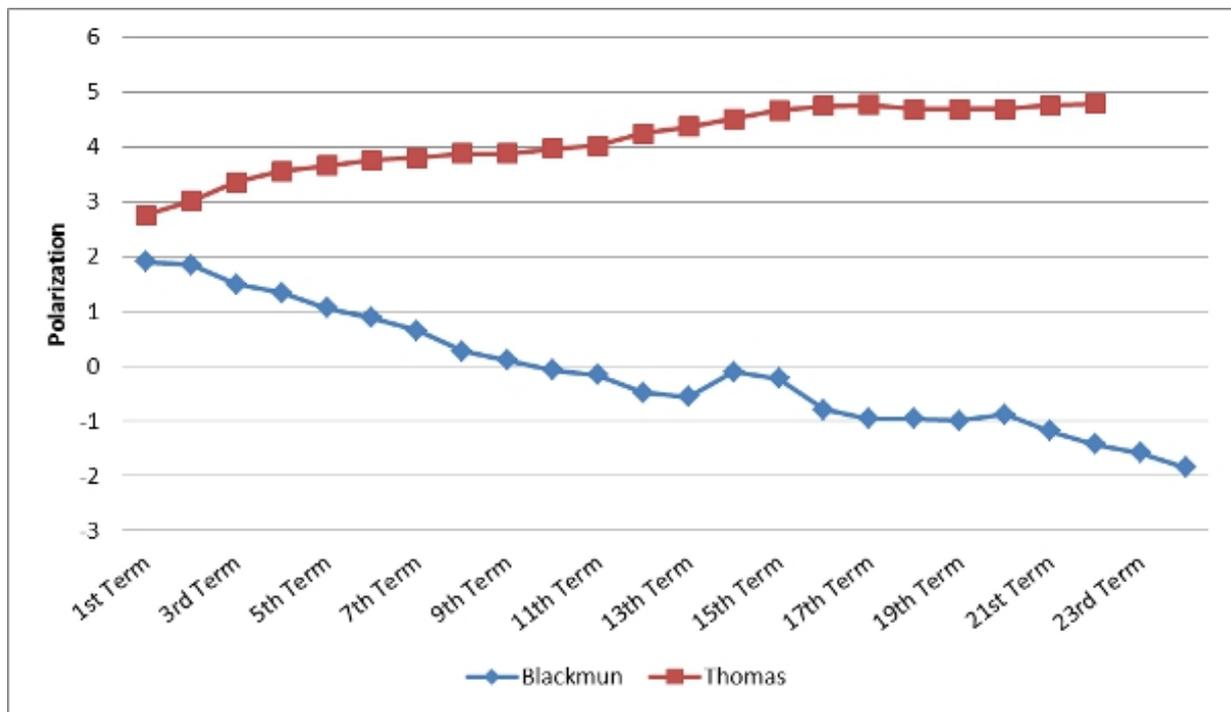
Figure 1 – Polarization Trends in Senate, President-Senate, and Court Polarization (JCS) across Chief Justice Regimes



What is the most parsimonious explanation for these results? An increasingly polarized Senate, through its advice-and-consent role, has produced a mirror image of itself on the Court. Court and Senate polarization may, in turn, be a function of polarization in the American electorate. Thus, even though the Court is somewhat insulated from democratic forces, the Court is subject to macro-polarization trends (directly and indirectly) through the institutional context. The Court is responsive to the polarization of entrepreneurial interest groups, such as the Federalist Society (conservative) and the Coalition for a Fair and Independent Judiciary (liberal).

Justices evolve ideologically over time. The evidence on Court polarization suggests that ideological movement on the Court tends to be in one direction—justices tend to become more liberal the longer they are on the Court. Consider two examples: Harry Blackmun and Clarence Thomas. In 1970, Harry Blackmun served his first term on the Court. At the time, only Chief Justice Burger was more conservative than Blackmun. In his tenth term on the Court, Justice Blackmun crossed the ideological Rubicon, joining the Court’s left-leaning justices (Figure 2). By his final term in 1993, Justice Blackmun was as far to the Court’s ideological left as he had been to the Court’s ideological right when he began his career. As a second example, Justice Clarence Thomas, is widely considered to be a stalwart of conservatism on the Court. He holds the extreme rightward location in the judicial common space. Even Justice Thomas, however, has evolved ideologically over his career. Unlike Blackmun, Thomas has moved further to the right. Justice Thomas’s absolute ideological evolution is only half that of Blackmun’s, but Thomas has become nearly twice as conservative as he was when he first joined the Court.

Figure 2 – Career Trends in JCS scores for Justice Thomas and Justice Blackmun



What explains this ideological drift? These ideological sojourns are not made in a vacuum. Just as Court polarization is a function of the Court's internal and external environments, individual justices are buffeted by internal and external factors during their judicial decision-making. Justices are part of the Brethren, a small clique of specialized judicial actors. Thus, they may be influenced by the strategic internal judicial environment and interpersonal justice relationships. The Court exists in a unique and competitive institutional context. This context constrains judicial behavior. Justices are responsive to mass and elite public opinion. There is strong evidence justices evolve ideologically on the Court in response to shifts in the ideological polarization in the Senate. Other external factors create leftward headwinds. The Court is responsive to legal elites and legal institutions shaping the debate over judicial policy. Institutions like the American Bar Association reflect the liberal tilt among legal professionals; these institutions help establish a range of judicial policies acceptable to the leftward shifted legal elite. Favorable press coverage of justices becoming more liberal, the so-called "Greenhouse Effect," may induce more justices to evolve in the left ideological direction. Within, justices may serve as ideological lodestones, drawing fellow justices to their own ideological viewpoint. My analysis suggests that this movement is not merely a function of drift, but rather the consequence of the political environment within which the Court makes policy. Elite polarization entrepreneurs, public opinion shaped by media coverage, and institutional constraints may all play a part in causing justices to move to the Left over their careers.

What are the implications of this analysis? Court polarization and polarization in the Court's strategic environment influence justice ideological disposition and evolution. These two types of Court polarization may have wide-ranging effects on: the judicial nomination process, the Senate judicial confirmation process, and, subsequently, the policy output of the Court. Ideological polarization influences competition between the branches over policy. Justices becoming more liberal over time influences policy debates concerning the life-tenure of justices. It could change how presidents, particularly Republican presidents, choose nominees for the Court. The emergent ideological polarization on the Court has profound implications for how the Court will figure in the national political discourse and how its interactions with polarization forces will affect the constitutional order. A polarized Court is more vulnerable to the attacks of reconstructive presidents. Presidents may take advantage of Court polarization to politicize Court decisions in a bid to detract from the Court's constitutional authority and to challenge judicial supremacy.

Polarization bodes ill for the prospects of consensus among the branches on constitutional meaning. President Obama's 2010 State of the Union challenge to the Supreme Court over Citizens United and Justice Alito's "not true" rejoinder is illustrative of the Court-president conflict that polarization may engender. Polarization may lead to more frequent and more powerful attacks on judicial authority and judicial supremacy. These implications make it clear that judicial polarization is an important phenomenon of the U.S. Supreme Court and a topic ripe for further study.

This article is based on the paper, *'Ideological Polarization on the Supreme Court: Trends in the Court's Institutional Environment and Across Regimes, 1937-2008'*, in *American Politics Research*.

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