

While partisan warfare is a difficult concept to quantify, the quotes from Bayh and Snowe suggest something more than polarization is ruining their beloved Senate; and although more than ideology is motivating Coburn's Viagra amendment, no easily quantifiable metric can be gathered to measure warfare. In this chapter, I argue that the number of roll call votes caused by senators' amendments is a proxy that can be used systematically to understand partisan warfare in the Senate.

Vitter's attempt to "bribe" Secretary Salazar, the rejection of a bipartisan budget commission by one-time supporters, and the lack of across-the-board participation in the Secret Santa suggest that senators sometimes act not out of their ideological preferences, but out of their desire to win – and to win at almost any cost. The more comprehensive data analysis suggests a systematic explanation with partisan warfare at its roots can explain senators' actions in a way above and beyond their ideology. This analysis suggests that senator amendment activity may be used as the basis of getting at partisan warfare, but not without some refinement, which I hope to conduct in future research.

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The Sources and Consequences of Polarization in the U.S. Supreme Court

Brandon L. Bartels

This chapter examines polarization in the U.S. Supreme Court, primarily from the post-New Deal era to the present. I describe and document how the ideological center on the Court has gradually shrunk over time, though importantly, it has not disappeared altogether. I provide an examination and discussion of both the sources and consequences of these trends. Key insights and findings include:

- Polarization in the Supreme Court has generally increased over time, though this trend has ebbed and flowed. The most robust center existed during the Burger Court of the mid-to-late 1970s, consisting of arguably five swing justices.
- Although the center has shrunk over time on the Court, it still exists due to (1) presidents from Truman to George H. W. Bush not placing exclusive emphasis on ideological compatibility and reliability when appointing justices, (2) an increase in the incidence of divided government, and (3) the rarity of strategic retirements by the justices. Since President Clinton took office, the norms have shifted more firmly to strategic retirements by the justices and presidents placing near exclusive emphasis on ideological compatibility and reliability in the appointment process.
- The existence of swing justices on the Court – even having just one swing justice – has kept Supreme Court outputs relatively moderate and stable despite Republican domination of appointments from Nixon to George H. W. Bush. The elimination of swing justices would likely lead to more volatile policy outputs that fluctuate based on membership changes.
- A "polarization paradox" exists: The incidence of 5-4 case outcomes has increased over time, but the incidence of unanimous outcomes has increased

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as well. Polarization on the Court may be dependent on whether the Court is deciding cases within its “volitional agenda” (politically salient issues) or “exigent agenda” (institutional maintenance).

- A vicious circle exists between polarization on the Court and Supreme Court appointments. With just one swing justice (Kennedy) on the current Court, whoever is president (Obama and beyond) has the chance to create the first ideologically homogeneous majority voting bloc since the Warren Court of the 1960s. Constraints on this ability rest on divided party control of the Senate, the use of the filibuster by the minority party, and the majority’s possibly using the “nuclear option” to eliminate the filibuster for Supreme Court nominations.

How many times have you heard it? “A closely divided Supreme Court ruled today that [*insert ruling on hot-button legal-political issue*]. Justice Kennedy joined the four [*liberal/conservative*] justices in the 5-4 outcome . . .” This frequently reported event is a symptom of increasing polarization in the Supreme Court that has been occurring over time. The Court currently consists of four quite reliable liberal justices, four quite reliable conservative justices, and Justice Kennedy, the lone “swing vote” who generally tends to vote more conservatively than liberally but has voted with the liberals in several important cases. As other scholars have documented (e.g., Devins and Baum 2014), the current Court is arguably the most polarized Court in history. Republican and Democratic justices are now completely divided by ideology – all Republicans vote more conservatively than liberally, and all Democrats vote more liberally than conservatively. The polarizing change that occurred in Congress during the 1970s and especially the 1980s has also occurred in the Supreme Court. In short, the political center is disappearing, and Justice Kennedy is the last holdout.

It hasn’t always been this way. Even as recently as about 35 years ago, as I will document, the Court consisted of a quite robust political center that included multiple – as many as four or five – swing voters at a given time. The political center on the Court has slowly disappeared, especially since the 1980s, which, not coincidentally, tracks the increase in polarization we have seen within and between the elected branches (Poole and Rosenthal 1984; Schlesinger 1985; Rohde 1991; Bond and Fleisher 2000; McCarty, Poole, and Rosenthal 2006; Devins and Baum 2014). The consequences of having zero swing voters relative to the status quo of one would be quite significant. If you think the Court is polarized now, wait until Justice Kennedy is replaced with a reliable liberal or conservative. That is probably not a hypothetical either. Such a move would have significant consequences, both for the nomination and confirmation processes (read: *World War III*) and the general nature and direction of judicial policymaking because the move from one to zero swing justices would represent a substantial and consequential increase in the degree of polarization on the Court.

In this chapter, I will expand on these issues by analyzing the sources and consequences of polarization on the Supreme Court. The time period on which I will focus consists of the Vinson Court and onward – that is, the 1946 to 2012 terms.¹ Not only does this time period contain a wealth of data from the Supreme Court Database (Spaeth et al. 2013), but more substantively, it also marks the early part of the post–New Deal era during which the Court increasingly began to shift its focus to civil liberties and civil rights issue vis-à-vis “famous footnote 4” from *U.S. v. Carolene Products* (1938) (see, e.g., Pacelle 1991). I will also explore the various normative and policy implications that result from some of the insights I uncover.

Hopefully this chapter will encourage further research on polarization in the judicial branch generally, including delving into the sources and consequences of this phenomenon. While polarization among elected elites and the American public has been studied quite extensively,² a similar level of scholarly inquiry of the judiciary has not occurred (see, though, Clark 2009; Devins and Baum 2014). Such lack of attention partly reflects a continuing emphasis on micro-level models of judicial decision making surrounding the influence of ideological, legal, and strategic considerations (e.g., Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Richards and Kritzer 2002; Segal and Spaeth 2002; Bailey and Maltzman 2008; Bartels 2009). And many of the extant macro-level analyses focus on external constraints imposed by Congress and the president (e.g., Spiller and Gely 1992; Segal, Westerland, and Lindquist 2011) or the public (e.g., Mishler and Sheehan 1993; McGuire and Stimson 2004) as opposed to polarization per se. As I will emphasize, the study of polarization in the Supreme Court represents a confluence of various compelling areas of study: judicial appointments, judicial decision making, separation-of-powers dynamics, and the nature of policy outputs generally. Connecting the dots between these areas is the key to producing stimulating explanations of polarization.

THE POLITICAL CONTEXT OF POLARIZATION: JUDICIAL APPOINTMENTS

The degree of polarization – and the resulting shrinking center – has its roots in the changing nature of Supreme Court appointments. The Supreme Court appointment process has always been political (Epstein and Segal 2005), but such political foundations themselves have traditionally encompassed multiple facets, including partisan and ideological compatibility and reliability, patronage, geographic considerations, and demographics (e.g., Epstein and

¹ See Devins and Baum (2014) for a broader historical sweep.

² On the distinction (and controversy) surrounding whether the mass public is polarized or merely better sorted, see Fiorina et al. (2006), Abramowitz and Saunders (2008), and Part 1 of this volume.

Segal 2005; Epstein et al. 2006; Baum 2012; Devins and Baum 2014). As a matter of fact, since FDR, who appointed justices based primarily on ideological/partisan compatibility with his New Deal agenda, presidential emphasis on non-ideological political considerations has come at the expense of ideological compatibility and reliability.

Dahl's (1957) landmark work on the Supreme Court as a policymaking institution essentially assumed that all presidents would appoint justices the way FDR did – on the basis of ideological compatibility, or choosing justices who would essentially vote in accordance with the president's preferences consistently over time. Combining this practice with the fact that the president, up to that point in time, appointed, on average, two justices per term, Dahl argued that the Supreme Court is essentially a partner in the extant political power structure, alongside the elected branches government, and can therefore serve as a powerful legitimacy-conferring mechanism for the policies produced by the elected branches. Dahl's theory and analysis provide a seemingly potent antidote to the "counter-majoritarian difficulty" – the democratic dilemma of how an unelected branch of government could legitimately invalidate laws passed by democratic majorities – and a glimmer of hope for popular constitutionalists (e.g., Tushnet 1999; Kramer 2004).

In terms of thinking through how judicial appointments connect to polarization and the shrinking center, we must understand the foundations on which Dahl's theory rests. First, as mentioned, presidents choose ideologically compatible and reliable justices. Second, there must exist a coherent "ruling regime" between the president and the Senate – implying unified government – and that the Senate defers and likely agrees with the president's choice. Third, fairly regular turnover – via death or retirement – must occur on the Court such that the president (and the ruling regime) is able to secure his ideological imprint on the Court through his appointments. If these conditions are met, the degree of polarization on the Court will be a function of the ideological extremity of the ruling regime and the degree of political turnover in the elected branches. If the parties were more ideologically extreme over time, then when Democrats are in power, they should appoint reliable liberals and when Republicans are in power, they should appoint reliable conservatives. As power changes hands between Democrats and Republicans, the Court will build up robust liberal and conservative blocs of justices. On the other hand, if the party in power is more ideologically moderate or heterogeneous, the Court may contain a more robust political center.

Dahl's theory provides an intuitive framework for understanding the conditions that explain increases in polarization over time. In the present era, someone may read this account and say, "That sounds about right." But the history that unfolded from the post-New Deal period all the way up until the 1980s provides events, practices, and conditions that contradict, to an extent, each of the three conditions that seem crucial to Dahl's theory. What happened?

During this period, presidents rarely chose justices *solely* on the basis of ideological compatibility and reliability. Once again, there is always a political reason for presidents appointing a particular justice, but pure ideological compatibility and reliability appeared to be lower than expected on the priority list for most presidents between Truman and George H. W. Bush. Presidents Truman and Eisenhower did not consistently choose justices based on ideological considerations. Truman actually chose mostly moderate to center-right justices (Vinson, Minton, and Clark) and even a Republican (Burton). Truman placed more emphasis on personal friendships and patronage than ideological compatibility. Eisenhower the Republican, of course, appointed two of the architects of the Warren Court revolution: Chief Justice Warren and Justice Brennan. Another of his appointments was Justice Stewart, who was a key swing vote during the Burger era but not a reliable conservative. While it could be said that Eisenhower was perhaps more moderate and did not prefer to appoint reliable conservatives, he did appoint Harlan and Whittaker, both of whom were indeed quite conservative. And it is well known that Eisenhower expressed regret over his appointments of Warren and Brennan. President Kennedy appointed Justice Goldberg, a liberal, and Justice White, a moderate who voted conservatively on some issues, liberal on others, and was another key swing vote during the Burger and Rehnquist eras. White was appointed more out of friendship and loyalty to Kennedy.

President Johnson was the perhaps the first since FDR to consistently appoint ideologically compatible justices in Fortas and Marshall (both reliable liberals), though he also emphasized personal friendship and loyalty, not to mention orchestrating perhaps both vacancies.³ President Nixon appointed Chief Justice Burger and Justice Rehnquist, both reliable conservatives, but also Justice Blackmun, who started out as conservative but ended up becoming moderate and then quite liberal by the end of his career. Nixon also appointed Justice Powell, a southern Democrat who was a swing vote on the Court during the Burger era. President Ford appointed Justice Stevens, a moderate Republican who would eventually become the most liberal member of the Court. Coming out of Watergate, Ford emphasized qualifications and moderation over rigid ideological compatibility, though Ford is often characterized as a center-right president himself. No vacancies occurred under President Carter. President Reagan appointed Justices O'Connor and Kennedy, who would become swing votes, and Justice Scalia, a reliable conservative. Kennedy was perceived as a safe choice after the contentious confirmation process and rejection of Robert Bork and the controversial withdrawal of Douglas Ginsberg due to drug allegations. President George H. W. Bush

³ In order to appoint Thurgood Marshall, whom Johnson wanted to make the first African-American Supreme Court justice, to the bench, LBJ appointed Justice Tom Clark's son, Ramsey Clark, to become U.S. Attorney General. Johnson then convinced Justice Clark to retire from the Supreme Court because his continued presence on the Court would pose too many conflicts of interest with his son.

appointed Justice Thomas – a very reliable conservative – but also Justice Souter, who started out moderate but became a reliable liberal vote in the 1990s until his retirement in 2009.

Starting with President Clinton (who appointed reliable liberals, Justices Ginsburg and Breyer), presidents have increasingly – and successfully – emphasized ideological compatibility and reliability as standards for selecting justices. As I will discuss later in this chapter, it is important to note that all six appointments starting with Ginsburg occurred under unified party control of the Senate and the presidency. President George W. Bush appointed reliable conservatives Chief Justice Roberts and Justice Alito, while President Obama appointed reliable liberals, Justices Sotomayor and Kagan. Obama also emphasized racial and gender diversity with his appointments, but it appears that ideological compatibility was the overarching consideration. One could argue, then, that the practice of presidents consistently appointing justices based purely on ideological compatibility and reliability grounds is a relatively recent phenomenon. Today, presidents place near exclusive focus on ideological compatibility and reliability.

It is important to understand how presidential reliance on pure ideological concerns is driven by the other two conditions underlying Dahl's theory – whether a coherent ruling regime is in place and nature of turnover and replacement on the Court. A president's ability to pack the Court with ideologues and shape the ideological balance of the Court will be constrained by the Senate and the level of scrutiny it places on the president's nominees. This becomes especially relevant when the Senate is controlled by the opposite party as the president, since the president may be inclined to moderate his or her appointments so as to avoid defeat in the Senate (e.g., Moraski and Shipan 1999). The post-New Deal era saw an increase in divided government generally and an increase in divided party control between the president and Senate. Thirty-two of the 70 years (46 percent) between 1945 and 2014 have seen divided party control between the president and Senate. To put that figure in some historical context, divided party control of the president and the Senate occurred in only 10 of the 68 years (15 percent) between 1877 (post-Reconstruction) and 1944. Thus, the concept of a coherent "ruling regime" between the president and the Senate with respect to Supreme Court appointments meant significantly more in the 1877–1944 period than it did from 1945 onward. Simply put, it means that presidents in this latter era were more constrained from placing an exclusive focus on ideological compatibility and reliability.

Ideological polarization in the Senate has also contributed to increasing Senate scrutiny of Supreme Court nominees. As the Warren Court inserted itself into some of the most hot button social and political issues of the day, the Senate placed an increasing focus on ideological considerations as early as the 1950s (Epstein et al. 2006). As the Senate became even more polarized since the 1980s, Senate scrutiny became even stronger. Robert Bork was rejected by

the Senate in 1987, and Clarence Thomas, who faced sexual harassment allegations in the midst of his nomination process, was confirmed with just 52 votes. Interest groups and other elites have also factored very strongly into the equation leading to increased scrutiny in the appointment process (e.g., Caldeira and Wright 1998; Caldeira, Hojnacki, and Wright 2000; Devins and Baum 2014). In short, the president, senators, and policy demanders are intent on appointing ideologically like-minded justices to the bench. But the more the ideological interests of these actors diverge, the less freedom the president has in appointing a completely ideologically compatible justice.

The near-exclusive focus on ideological compatibility and reliability today is also driven by what many present-day ideologues widely agree were "mistaken" appointments. Conservative Republicans raise this concern most prominently, and justifiably so, given the liberal conversions undertaken by Republican-appointed Justices Blackmun (appointed by Nixon), Stevens (appointed by Ford), and Souter (appointed by George H. W. Bush). And two Reagan appointees – Justices O'Connor and Kennedy – became consummate swing justices during the 1990s and 2000s and cast crucial and pivotal liberal votes in several significant cases.

The nature and frequency of turnover on the Court also plays a role in the extent to which the president can place his or her ideological imprint on the Court and shift the Court's balance of power. A president only has the ability to alter the ideological balance of power on the Court if the person s/he is appointing is significantly more ideologically compatible with the president than the person s/he is replacing. In other words, a conservative president will not alter the balance of the Court if s/he appoints a conservative justice to replace an equally conservative justice. A conservative president can only alter the Court's ideological balance if he or she replaces a moderate or liberal departing justice with a strongly conservative justice. In the modern age of "strategic retirements," where justices choose to retire during the tenure of an ideologically like-minded president, the president typically trades in one ideologically compatible justice for another. Thus, given these realities, the only way for the president to alter the ideological balance on the Court is if an ideologically incongruent justice dies on the bench or is forced to retire due to bad health.

From Truman to George H. W. Bush, strategic retirements as I have described them are actually not as frequent as one might think. Chief Justice Vinson and Justice Jackson (appointed by Truman and FDR, respectively) died while President Eisenhower was in office. Though these justices were actually quite conservative on many civil liberties issues, when Eisenhower was given the opportunity to replace these Democrats, he appointed Earl Warren and John Harlan. I have discussed Chief Justice Warren, whom Eisenhower regretted appointing; as mentioned, Justice Harlan was a fairly reliable conservative until his retirement in 1971. Justices Minton (Truman appointee) and Reed (FDR appointee) also retired while Eisenhower was in office, giving Eisenhower four

consecutive opportunities to replace Democrats with Republicans – and five straight opportunities if you count the replacement of Justice Burton (a Republican appointed by Truman) with moderate Potter Stewart. Though it is difficult to fully understand Eisenhower's views on many of the social issues that would eventually come before the Court, his choice of William Brennan to replace Justice Minton would certainly have long-term implications, as Brennan would remain a liberal bulwark on the Court until his retirement in 1990. Eisenhower used half of his opportunities to replace Democrats with Republicans (because of non-strategic retirements and deaths) in order to appoint the two primary leaders of liberal legal change in the 1950s and 1960s. Though again, with civil liberties not quite dominating the Court's agenda in the 1950s, Eisenhower could not have fully forecast the liberal legal change that was about to come via two of his appointments.

The eight years of JFK and LBJ generated just one out of four opportunities to replace a Republican with a Democrat – JFK replaced Justice Whittaker (who resigned due to disability) with Justice White, who was not a reliable liberal by any means and became a swing vote. On the other hand, Republican Presidents Nixon and Ford had four opportunities, out of five vacancies, to replace Democrats with Republicans. With Nixon making an issue of putting “law and order” justices on the bench during his 1968 presidential campaign, one would think he was looking to appoint reliable conservatives. He was half successful in the long term. He of course replaced Chief Justice Warren with Warren Burger, Fortas with Blackmun (after two previously failed attempts), Black with Powell (a southern Democrat), and then President Ford replaced Douglas with Stevens. Rehnquist replaced Harlan. Nixon certainly moved the Court rightward, and as I will show, the Court's policymaking reflected this change but not nearly as much as one might have forecast. With Blackmun's (and Stevens's) liberal metamorphosis and Powell's moderation, conservatives by the 1980s and 1990s were yearning for more reliable conservatives.

President Reagan's three appointments replaced Republicans with Republicans, though, as mentioned, two of those – Kennedy and O'Connor – turned out to be swing votes who cast their fair share of liberal votes in big cases, while the other – Justice Scalia – is the poster child for “reliable conservative.” It is important to note that in retrospect, Reagan did not shift the ideological balance of the Court because his appointees roughly reflected the ideologies of the justices they replaced. O'Connor replaced the swing vote Justice Stewart; and O'Connor actually maintained a quite conservative voting record in the 1980s and then moderated beginning in the early 1990s. Kennedy replaced Powell, another center-right justice. And Scalia replaced Burger.

Perhaps the biggest blow to liberal hopes was the one-two punch of the health-induced retirements of Justices Brennan and Marshall – liberal icons in their own respects for substantial parts of the twentieth century – during the presidency of George H. W. Bush. In retrospect, Bush was half successful in

transforming the Court – he replaced Thurgood Marshall with Clarence Thomas, who would become the most reliable conservative on the Court. But he replaced William Brennan with David Souter, who would become the third in the trifecta of Republicans-turned-liberals on the Court (alongside Blackmun and Stevens). Souter's liberal metamorphosis was surely the straw that broke the camel's back – perhaps for both conservatives and liberals. For conservatives, this was yet another in a long line of missed opportunities to pack the Court with reliable conservatives. Think of it this way: Since LBJ put Thurgood Marshall on the Court, Republican presidents (Nixon, Ford, Reagan, H. W. Bush; recall Carter had no appointments) had *ten straight appointments – six of which were opportunities to replace Democrats with Republicans*. Upon Justice Thomas's confirmation in 1991, the Court was staffed with eight Republican appointees, the lone Democrat being Justice White, whose voting record by then could be characterized as center-right.⁴ It is no wonder that in the wake of this phenomenon (which conservative policy demanders would surely consider a missed opportunity, to say the least, especially in light of the increasing number of social issues on the Court's agenda), the rallying cry of conservative activists was, “No more Blackmuns, Stevenses, or Souters.” Why not add to that list “O'Connors and Kennedys.” One must remember, however, that different norms pervaded appointments in the 1940s through 1970s than they do today. Although all appointments are political in some way, it was not the norm in those days for ideological compatibility and reliability to be the most dominant consideration. Today, it is.

Starting with President Clinton, justices have strategically retired on a consistent basis so that the president can nominate a justice who is both ideologically compatible and reliable.⁵ Thus, we have come full circle to Dahl's thesis, and the consequences for increased polarization are significant, as I will discuss later. The one lingering contradiction to Dahl's thesis is that since justices are staying on the bench for so long now, presidents rarely get two appointments per term. Since FDR transformed the Court, that trend held for about 30 years: Truman made four appointments in eight years. Eisenhower made five in eight years. JFK/LBJ made four in eight years (although as mentioned, LBJ orchestrated two retirements). Nixon/Ford made five in eight years. The “two-per-term” norm falters starting with Carter, who, as mentioned, did not make any appointments. Reagan made three in eight years. H. W. Bush did make two in four years, but Clinton and George

⁴ The Court that decided the landmark abortion case, *Planned Parenthood v. Casey* (1992), consisted of eight Republican appointees. And the one Democrat on the Court, Justice White, dissented in *Roe v. Wade*. Yet the Court upheld the core of *Roe* that there exists a constitutional right for a woman to obtain an abortion. On the other hand, the Court lowered the level of scrutiny applied to abortion regulations, which gave states more latitude to impose restrictions on this right that did not pose an “undue burden” to a woman seeking to obtain an abortion.

⁵ Note that Republican appointees Blackmun, Stevens, and Souter, each of whom retired under Democratic administrations, had become quite liberal well before their retirements.

W. Bush each appointed just two justices in their eight years as president. The 11-term span from the 1994 term through the end of the 2004 term marks the longest natural court – i.e., period of membership stability – since the 1820s. And Obama has appointed just two justices in his six years so far.

DOCUMENTING THE DISAPPEARING CENTER ON THE SUPREME COURT, 1946–2012

For a large share of the post-New Deal era, we have seen how (1) strictly ideological considerations in the appointment process took a back seat to other political considerations; (2) divided party control of the Senate and presidency often constrained the president's appointments; and (3) some justices transformed ideologically during their tenures. These practices and behaviors help tell a larger story of how polarization was held in check and how a robust ideological center was maintained on the Court. Multiple swing justices on the Court were capable of casting both liberal and conservative votes on highly salient issues of the day. Ideological polarization was relatively low for large chunks of this era, though it has increased as the middle has slowly dwindled in numbers. Measuring and documenting the degree of polarization on the Supreme Court is complicated by a small-*n* problem. Typically, polarization is defined by the ideological distance between the two parties (i.e., between the medians of each party) and the degree of intra-party ideological homogeneity (e.g., Rohde 1991; McCarty, Poole, and Rosenthal 2006; Devins and Baum 2014). Devins and Baum (2014) use Martin and Quinn's (2002) ideological scores to calculate (1) ideological distances between the Republican and Democratic median justices and (2) ideological homogeneity among both Republican and Democratic justices. Clark (2009) applies an existing measure from economics to tap ideological heterogeneity on the Court (using ideological preference scores).

In order to document the shrinking center and the degree of polarization more generally, I focus on the voting behavior of justices and specifically what I call a justice's "swing capacity," or a justice's willingness to join the majority – particularly in close votes (e.g., 5-4 or 6-3) – regardless of whether the case outcome is liberal or conservative. Thus, a justice with a high swing capacity should maintain a small difference in the percentage of times s/he is in liberal versus conservative majorities. Think about the theoretical connection to a truly pivotal (median) voter in a unidimensional policy space: The median voter should theoretically be in the majority 100 percent of the time, regardless of the direction of the collective outcome.

To examine the swing capacity concept, I analyze data consisting of all formally decided Supreme Court cases⁶ spanning the 1946–2012 terms of the

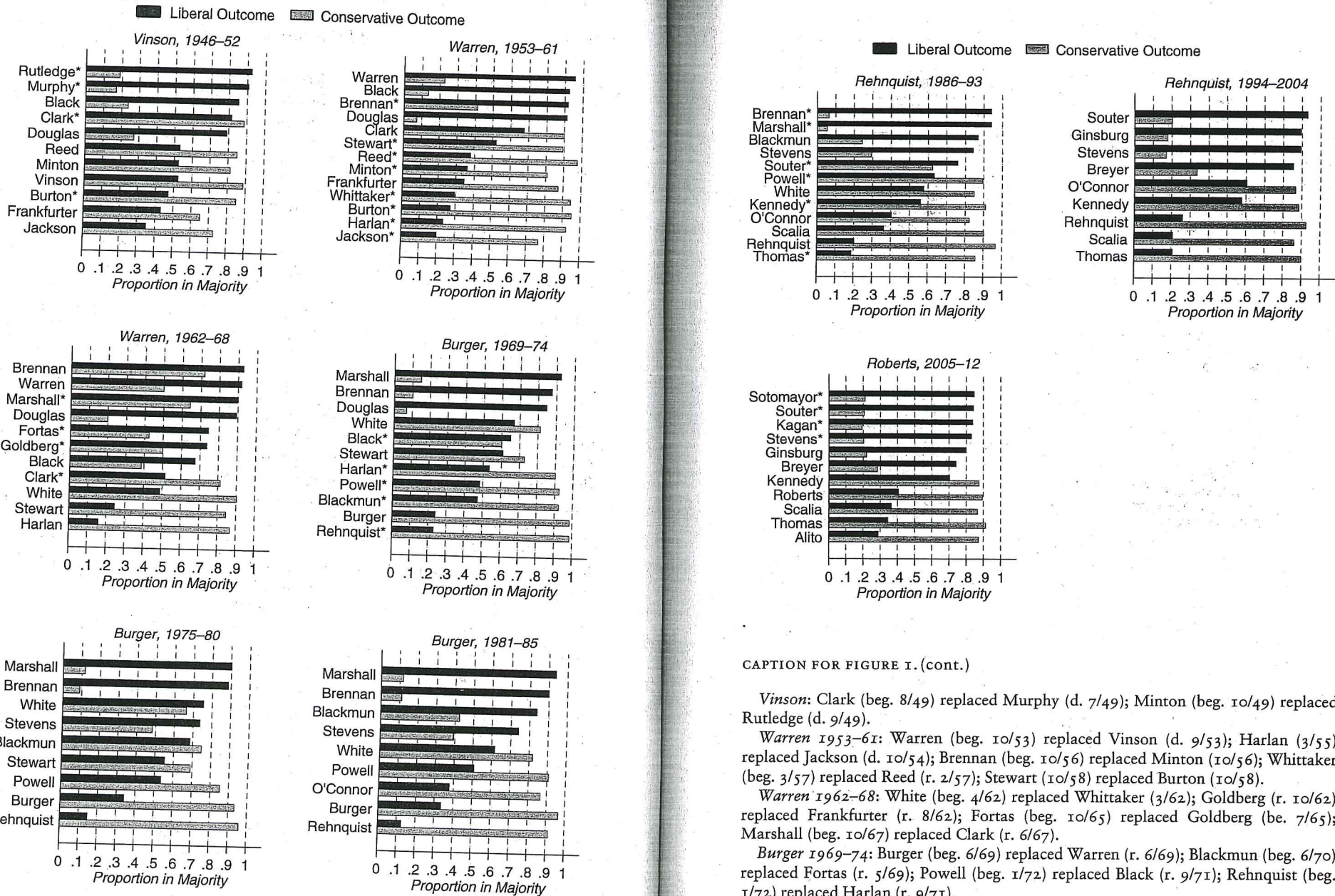
⁶ Formally decided cases are those that receive the full treatment of oral argument and an opinion from the Court. In the Supreme Court Database (Spaeth et al. 2013), these are cases for which the variable *decisionType* = 1, 6, or 7. I use citation as the unit of analysis.

Court. Collected from the Supreme Court Database (Spaeth et al. 2013), the data contain 7,400 cases and 66,335 justice-votes. This covers five Chief Justice eras: the Vinson, Warren, Burger, Rehnquist, and Roberts Courts. All of the years are reported with respect to the Court's annual *terms*, which range from October of the term year to September of the following year. For example, the 1946 term ranges from October 1946 to September 1947. For this analysis, I have subdivided the entire 1946–2012 terms into nine relatively cohesive time periods where there was a relatively low degree of membership change (or at least a relatively low degree of consequential membership change) but also contains a large enough number of cases to draw meaningful conclusions. I also try to keep the total number of eras relatively low. In some eras (e.g., Warren 1953–61), there is frequent membership change, but other eras are pure natural courts with no membership change (i.e., the last two Burger eras and the 11-term Rehnquist Court from 1994 to 2004).

Figures 1 and 2 present graphical representations of the swing capacity concept. Figure 1 presents the proportion of the time each justice is in the majority when the outcome is liberal and when it is conservative. These proportions are calculated for relatively close votes, which I limit to 5-4 and 6-3 outcomes.⁷ Each graph is sorted by proportion in the liberal majority. Note that a high swing capacity occurs when the gap between the two bars (for liberal and conservative majority) is small, since that represents a justice's tendency to be in the majority regardless of whether the Court's ruling is liberal or conservative. On the other hand, a large gap between the bars represents a low swing capacity, since it indicates a justice's tendency to be in the majority contingent on whether the outcome is liberal or conservative. Figure 2 presents graphs of these gaps between the bars in Figure 1. Specifically, Figure 2 graphs the absolute difference between a justice's proportion in the majority for a liberal outcome and the proportion in the majority for a conservative outcome. Once again, smaller absolute differences represent higher swing capacities, and the graph is sorted from small differences to large ones. The asterisks in the graph indicate that a justice did not serve on the Court for the entire time period. The notes below each Figure include who replaced whom and the term in which the replacement occurred.

For the most part, Figures 1 and 2 paint a picture of generally increasing polarization over this time period. During the Vinson Court, Justice Clark became a solid swing vote once he joined shortly before the 1949 term. He joined liberal and conservative majorities over 80 percent of the time in close votes. To a lesser extent, Justices Minton and Reed also served as swing votes during the Vinson Court, both having joined liberal majorities just over 50 percent of the time and conservative majorities just over 80 percent of the time.

⁷ More specifically, I define close votes as those where the difference in majority and minority votes is ≤ 3 . This mostly captures 5-4 and 6-3 outcomes, but it can also encompass close outcomes when the number of participating justices is fewer than nine (e.g., 5-3 outcomes on an eight-member Court where a justice recuses him- or herself).



CAPTION FOR FIGURE 1. (CONT.)

Vinson: Clark (beg. 8/49) replaced Murphy (d. 7/49); Minton (beg. 10/49) replaced Rutledge (d. 9/49).

Warren 1953-61: Warren (beg. 10/53) replaced Vinson (d. 9/53); Harlan (3/55) replaced Jackson (d. 10/54); Brennan (beg. 10/56) replaced Minton (10/56); Whittaker (beg. 3/57) replaced Reed (r. 2/57); Stewart (10/58) replaced Burton (10/58).

Warren 1962-68: White (beg. 4/62) replaced Whittaker (3/62); Goldberg (r. 10/62) replaced Frankfurter (r. 8/62); Fortas (beg. 10/65) replaced Goldberg (be. 7/65); Marshall (beg. 10/67) replaced Clark (r. 6/67).

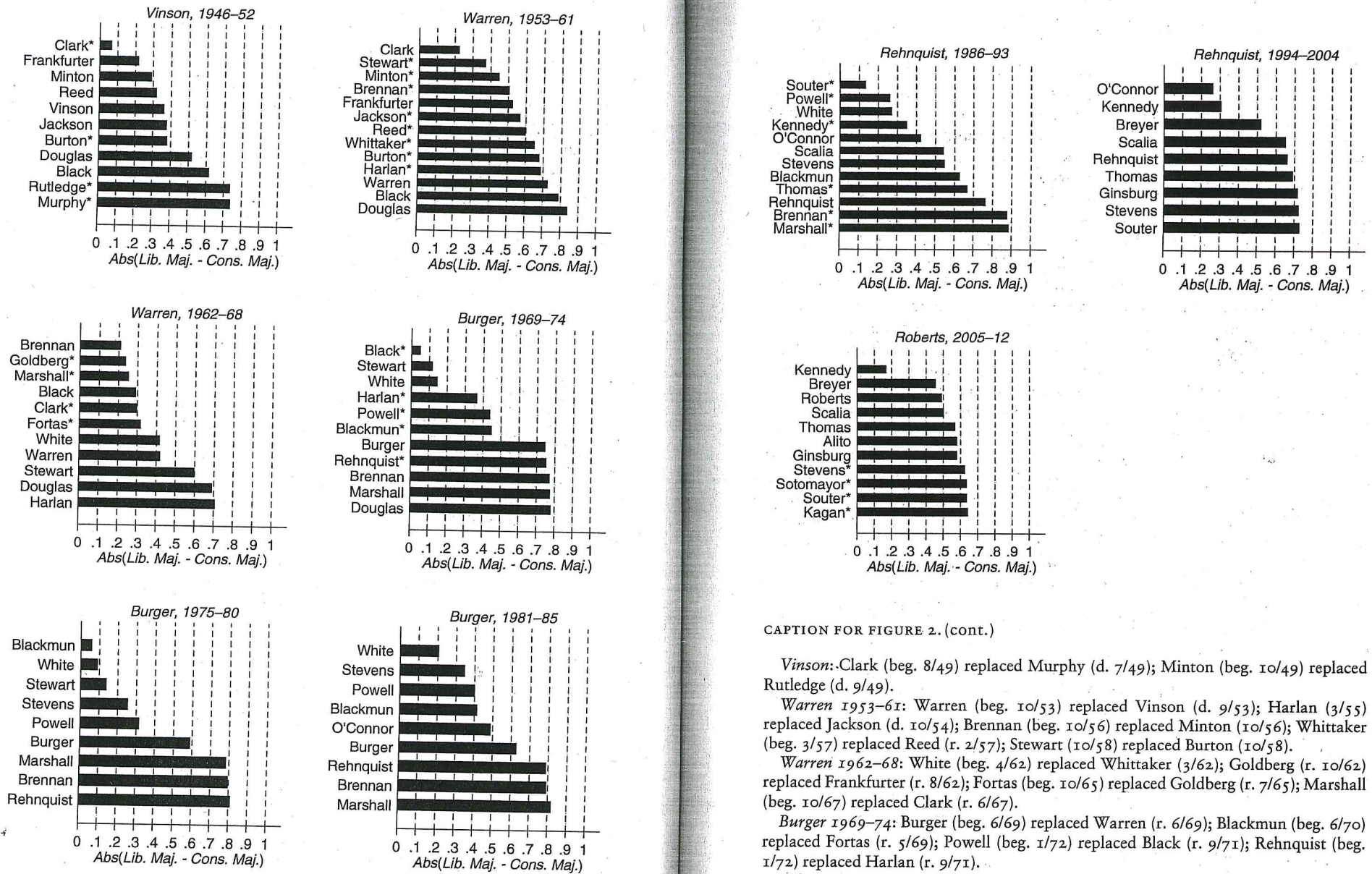
Burger 1969-74: Burger (beg. 6/69) replaced Warren (r. 6/69); Blackmun (beg. 6/70) replaced Fortas (r. 5/69); Powell (beg. 1/72) replaced Black (r. 9/71); Rehnquist (beg. 1/72) replaced Harlan (r. 9/71).

Rehnquist 1986-93: Scalia (beg. 9/86) replaced Burger (r. 9/86) [Rehnquist replaced Burger as Chief Justice, but Scalia's entrance was due to Burger's vacancy.]; Kennedy (beg. 2/88) replaced Powell (r. 6/87); Souter (beg. 10/90) replaced Brennan (r. 7/90); Thomas (10/91) replaced Marshall (r. 10/90); Ginsburg (beg. 8/93) replaced White (r. 6/93).

Roberts 2005-12: Roberts (beg. 9/05) replaced Rehnquist (d. 9/05); Alito (1/06) replaced O'Connor (r. 1/06); Sotomayor (beg. 9/09) replaced Souter (r. 6/09); Kagan (beg. 8/10) replaced Stevens (r. 6/10).

FIGURE 1. Justices' Proportions of Majority Votes for Liberal and Conservative Outcomes in Close Votes

Note: Asterisks indicate that a justice did not serve during the entire time span. Recall that years above are reported in the Court's terms, which begin in October of the term year and end in September of the following year. Time periods within which there were membership changes are reported below. "beg." = begins; "d." = died; and "r." = retired.



CAPTION FOR FIGURE 2. (CONT.)

Vinson: Clark (beg. 8/49) replaced Murphy (d. 7/49); Minton (beg. 10/49) replaced Rutledge (d. 9/49).

Warren 1953-61: Warren (beg. 10/53) replaced Vinson (d. 9/53); Harlan (3/55) replaced Jackson (d. 10/54); Brennan (beg. 10/56) replaced Minton (10/56); Whittaker (beg. 3/57) replaced Reed (r. 2/57); Stewart (10/58) replaced Burton (10/58).

Warren 1962-68: White (beg. 4/62) replaced Whittaker (3/62); Goldberg (r. 10/62) replaced Frankfurter (r. 8/62); Fortas (beg. 10/65) replaced Goldberg (r. 7/65); Marshall (beg. 10/67) replaced Clark (r. 6/67).

Burger 1969-74: Burger (beg. 6/69) replaced Warren (r. 6/69); Blackmun (beg. 6/70) replaced Fortas (r. 5/69); Powell (beg. 1/72) replaced Black (r. 9/71); Rehnquist (beg. 1/72) replaced Harlan (r. 9/71).

Rehnquist 1986-93: Scalia (beg. 9/86) replaced Burger (r. 9/86) [Rehnquist replaced Burger as Chief Justice, but Scalia's entrance was due to Burger's vacancy.]; Kennedy (beg. 2/88) replaced Powell (r. 6/87); Souter (beg. 10/90) replaced Brennan (r. 7/90); Thomas (10/91) replaced Marshall (r. 10/90); Ginsburg (beg. 8/93) replaced White (r. 6/93).

Roberts 2005-12: Roberts (beg. 9/05) replaced Rehnquist (d. 9/05); Alito (1/06) replaced O'Connor (r. 1/06); Sotomayor (beg. 9/09) replaced Souter (r. 6/09); Kagan (beg. 8/10) replaced Stevens (r. 6/10).

FIGURE 2. Justices' Swing Capacities: Absolute Difference between Proportion of Liberal Majority Votes and Conservative Majority Votes

Note: Asterisks indicate that a justice did not serve during the entire time span. Recall that years above are reported in the Court's terms, which begin in October of the term year and end in September of the following year. Time periods within which there were membership changes are reported below. "beg." = begins; "d." = died; and "r." = retired.

Figure 2 shows that Justice Frankfurter had the second highest swing capacity during the Vinson era, but his overall majority percentages in both liberal and conservative outcomes were lower than those for Minton and Reed. Chief Justice Vinson and Justices Jackson and Burton had moderate swing capacities, while Douglas, Black, Murphy, and Rutledge voted quite liberally and were rarely in the majority in conservative case outcomes. On the whole, the average swing capacity (*vis-à-vis* the absolute differences reported in Figure 2) during the Vinson era is 0.33,⁸ which is actually quite low and suggests fairly low degree of polarization, especially starting in the 1949 term when moderates Clark and Minton replaced liberals Rutledge and Murphy. After this change, there were four justices on the Court with relatively high swing capacities (*i.e.*, with differences in Figure 2 of around .3 or less).

The Warren Court from 1953 to 1961 was much more polarized than the Vinson era. Although the Court became increasingly liberal in this era, the close votes in this period broke liberal 54 percent to 46 percent. As seen in Figures 1 and 2, Justice Clark was again a solid swing vote in these close votes and was essentially the lone swing vote until Justice Stewart joined the Court at the beginning of the 1958 term. And Stewart's swing capacity (Figure 2) cannot be considered substantial, though he was in the majority in just over 50 percent of liberal outcomes and about 90 percent of conservative outcomes. The Court was quite polarized in this era, particularly in the latter half, with liberal justices Warren, Black, Douglas, and Brennan (once he joins) pitted against the more conservative Frankfurter, Whittaker, Burton, and Harlan. The liberals won out most of the time, though not by much. Outcomes of 5-4 were relatively frequent (around 20 percent, which is quite high historically, as I discuss in Figure 4) in the latter part of this period. Justice Clark was frequently the swing vote in such decisions, and was a pivotal vote on many of the close rulings that generated both liberal and conservative outcomes.

The "Second Warren Court" from the 1962-68 terms brought increasing liberalism and an increasing number of liberal justices on the Court. In close votes during this time period, 64 percent of outcomes were in the liberal direction. About 27 percent of outcomes were the result of close votes, which is the lowest rate out of the nine periods analyzed here.⁹ Interestingly enough, the justices during this period with the highest swing capacity are liberals, those being Brennan, Goldberg (left before the 1965 term), Marshall (joined during the 1967 term), and Black. During this time, the Court was not polarized but lopsidedly liberal. The results suggest that only Stewart and Harlan joined the majority in close, liberal outcomes less than 50 percent of the time (White is just under 50 percent at 49 percent). Justices Clark and White can be considered swing votes to some extent, having joined liberal majorities about half the time

⁸ This average is calculated as the median of the term-level median of justices' absolute differences between majority proportions in liberal and conservative outcomes.

⁹ The rate of close votes for all other eras ranges between 35 percent and 40 percent.

and conservative majorities between 80 percent and 90 percent of the time. Since outcomes in these close votes were heavily tilted in the liberal direction, it is important to remember that in all votes during this period, all justices except for Harlan cast more liberal than conservative votes. Once again, for many votes, there was a high baseline capacity for a liberal majority given the solid liberal bloc that was on the Court at the time.

The first six terms of the Burger Court represent a marked contrast from the liberal Warren Court. As discussed, President Nixon was able to make four appointments in the first three years of his presidency; three of those were to replace liberal justices (Warren, Fortas, Black) with more conservative ones (Burger, Blackmun, Powell); the fourth was Rehnquist, who would be a very reliable conservative, replacing Harlan. By the 1971 term, the liberals, who held a robust majority during the second Warren Court, fell into the minority with just Marshall, Brennan, and Douglas carrying the torch during the early part of the Burger Court. While close outcomes leaned heavily liberal during the latter Warren era, the opposite held in the first years of the Burger Court, with 63 percent of close decisions garnering conservative outcomes. Ideological change on the Court also influences how the Court's agenda changes, with the Court taking a different mix of cases during this era compared to the Warren Court. While the Court made a significant right turn, this era also marks the beginning of the development of a fairly robust center. Justices Stewart and White became solid swing justices; in his last two terms on the Court, Justice Black also had a high swing capacity, as he became less liberal toward the end of his career. In close votes, both Stewart and White joined liberal majorities more than 60 percent of the time and conservative majorities 70 percent and 80 percent, respectively, of the time. This Court begins to see a more even distribution across the entire ideological spectrum, with reliable liberals who rarely joined conservative majorities, the swing justices as mentioned, and an increasing number of reliable conservatives, particularly Burger and Rehnquist, who rarely joined liberal majorities.

The Burger Court from the 1975-80 terms consisted of the most robust center on the Court during the entire 1946-2012 time period. First off, this era saw six consecutive terms without any membership change. In the close votes analyzed in Figures 1 and 2, 63 percent of case outcomes were conservative, though we do see several swing justices being willing to join liberal majorities. In fact, Figures 1 and 2 suggest that there were arguably five swing justices on the Court during this era - Blackmun, White, Stewart, Stevens, and Powell. All have swing capacities (Figure 2) of around .3 or lower (Powell is just over .3) and each joined liberal or conservative majorities 50 percent of the time or more (Stevens is just under 50 percent for conservative majorities). At the poles are Marshall and Brennan, who rarely joined conservative majorities, and Burger and Rehnquist, who rarely joined liberal majorities. The robust center that existed on the Court in this period is definitely unique for the entire time period examined.

The center begins to dissipate during the last years of the Burger Court (1981–85 terms), which on the whole maintains a similar conservative tenor compared to the previous era. Of closely divided outcomes, 61 percent were conservative. Justice Stewart retired and was replaced by Justice O'Connor before the 1981 term. Other justices who were swing votes in the prior era had low swing capacities in this era. For Blackmun and Stevens, this results from leftward ideological drift, with these justices now joining conservative majorities just 40 percent of the time and liberal majorities a little more than 80 percent and 70 percent of the time, respectively. Justice Powell's swing capacity also decreased, as he became slightly more conservative in this era. He still joined liberal majorities about 50 percent of the time, but he was also a reliable vote for conservative outcomes, joining conservative majorities 90 percent of the time. Whereas Powell was still an important swing vote, Justice White had the highest swing capacity in this era, joining liberal majorities over 60 percent of the time and conservative majorities over 80 percent of the time.

This story continues in the first part of the Rehnquist Court (1986–93 terms), which again maintained conservative levels compared to the prior era. In cases with close votes, about 64 percent were decided in the conservative direction. Justice White continued to be a key swing justice on the Court; note that Justice Powell served just one term in this era. The middle was essentially reconstituted by new justices who joined the Court during this era, such as Justices Kennedy (begins during the 1987 term) and Souter (who joins at the start of the 1990 term). Souter, appointed by George H.W. Bush, would eventually become a reliable liberal vote, but he started out as a swing vote, having joined conservative majorities just over 60 percent of the time and liberal majorities about 75 percent of the time. Justice Kennedy joined liberal majorities over 55 percent of the time, though he joined conservative majorities 90 percent of the time. The middle continued to dissipate while the ideological poles solidified, with Brennan (retired July 1990), Marshall (retired October 1991), and then former swing votes Stevens and Blackmun becoming fairly reliable liberals, and O'Connor, Rehnquist, and new Justices Scalia (begins in 1986) and Thomas (begins 1991) becoming quite reliable conservatives. In short, increasing ideological polarization begins to set in during this period, with reliable ideologues on the left and right but still enough swing justices who hold down the center and prevent extreme Supreme Court outcomes.

The 11-term natural Court from 1994 to 2004 represents the Court as we tend to think of it today: a fairly polarized Court, though with a genuine center that keeps the Court moderated in its policy outputs. The Court consisted of four reliable liberals (Ginsburg, Breyer, Stevens, and Souter; the latter two now becoming quite consistently liberal after being past swing justices), three reliable conservatives (Rehnquist, Scalia, and Thomas), and two center-right justices, O'Connor and Kennedy. Note that it is not until this era that O'Connor solidifies her swing justice status. Her first decade (or more) displayed fairly reliable conservative tendencies and a much lower swing capacity. During this

era, however, Justices O'Connor's and Kennedy's swing capacities, from Figure 2, are .26 and .31, respectively. In close votes during this era, the Court ruled in the conservative direction 52 percent of the time – a sharp decrease from the prior four periods. Both Justices Kennedy and O'Connor voted with the majority in roughly 60 percent of liberal case outcomes, which is quite high, suggesting that these justices were willing to cast the swing votes in numerous closely divided liberal outcomes. They were also willing to grant the conservative side a significant number of victories in close votes, having each joined conservative majorities a little less than 90 percent of the time. The four reliably liberal and three reliably conservative justices maintained very low swing capacities (Breyer showing the highest among the reliable ideologues); none of them come anywhere close to crossing over to the other side 50 percent of the time. While the ideological poles continue to solidify, the center, although smaller than previous eras, is crucial in terms of moderating Court outputs. Both O'Connor and Kennedy showed a strong willingness to cross over to the liberal side, which means that no ideological bloc had a majority that could run the table in producing consistently liberal or conservative outputs.

Finally, we get to the Roberts era, which was more polarized than the prior era due to O'Connor's retirement and the entrance of Justice Alito – a reliable conservative. Additional replacements (Roberts replaced Rehnquist; Sotomayor replaced Souter; Kagan replaced Stevens) during this era did not change the ideological makeup of the Court because the replacements were ideologically similar to the departing justices. Thus, in this era, we see a straightforward pattern: four reliable liberals, four reliable conservatives, and Justice Kennedy as the lone swing vote. During this era, 60 percent of rulings in close votes broke in the conservative direction. With O'Connor gone, Justice Kennedy's swing capacity becomes even higher, at .17 (Figure 2). No other justice comes even close to that level of swing capacity. In close votes during this era, Justice Kennedy was in the majority a staggering 70 percent of the time when the Court's outcome are liberal. Kennedy continued to join conservative majorities at a high rate, just less than 90 percent of the time. During this era, Justice Kennedy is the lone swing vote and demonstrates among the highest swing capacities reported in Figure 2 across all eras. Once again, whereas the Court is arguably the most polarized it has been since 1946, Kennedy's swing vote status is crucial to moderating Supreme Court outcomes. As long as someone like Kennedy holds down the center in many cases, the Court's outputs will not necessarily reflect ideologically homogeneous voting blocs that hold majorities on the Court. It is interesting to note how the conservatives maintain higher crossover potential than the liberals during this era. Chief Justice Roberts joined liberal majorities in close votes roughly 40 percent of the time; Scalia and the other conservatives are not far behind that number. While parsing this differential is beyond the scope of this chapter, it likely has its roots in agenda change over time.

CONSEQUENCES OF POLARIZATION FOR SUPREME COURT POLICYMAKING

Several patterns emerge on the Supreme Court in the post-New Deal period. Polarization has generally increased, although with some ebbs and flows. Especially in more recent times, we have seen ideological hardening on the left and right and a shrinking center, but unlike in Congress, where the center has virtually disappeared, a meaningful center still exists on the Court, and in a small chamber such as the Supreme Court, it only takes one swing justice to constitute a meaningful center. This center was quite large in parts of the Burger era, leading Woodward and Armstrong (1979: 528) to conclude in their classic work, *The Brethren*, that “the center was in control.” Today, the center is arguably still in control, but it is a center of one – Justice Kennedy. This reality gives comfort to some people and agitation to others. Those who are comforted by this reality, particularly liberals, see that the Court is still able to produce a good share of significant liberal legal policy despite Republican domination of Supreme Court appointments since President Nixon. In the eyes of many conservatives, Kennedy’s swing status signals a lack of principled behavior. There is, of course, additional cause for concern. For those bothered by the counter-majoritarian difficulty, having just one swing voter seemingly exacerbates this dilemma. The fate of a significant share of salient legal issues is left in the hands of one individual, Justice Kennedy, who is the pivotal vote on many of these issues.

Figure 3 presents a general view of Supreme Court policy outputs since the 1946 term.¹⁰ Figure 3A presents the percentage of Court rulings that were decided in the liberal direction; data and coding on liberal versus conservative rulings come from the Supreme Court Database (Spaeth et al. 2013). The solid line is a lowess, non-parametric line of best fit that tracks the general trend over time. During the Vinson and Warren Courts, outputs are as expected – fairly moderate during the Vinson Court, and then a significant left turn during the Warren Court, particularly during the 1960s. The onset of the Nixon-driven Burger Court and into the Rehnquist Court provided a right turn in policymaking, but not as drastic of a right turn as might have been expected given Republican dominance in appointments for almost 25 years (10 consecutive Republican appointments from Nixon to H. W. Bush). On the whole, outputs were actually quite moderate from the Burger Court onward, hovering around 45 percent. And this trend continued into the Roberts Court.

What might give liberals even more hope and conservatives greater despair are the patterns from Figure 3B, which plots the percentage of liberal rulings in salient cases only. I use Epstein and Segal’s (2000) measure of salience, based on whether the Court’s ruling was covered on the front page of the *New York*

¹⁰ Portions of this section reflect similar discussions from Bartels and Johnston (2013), who report and interpret very similar graphs as those contained in Figure 2.

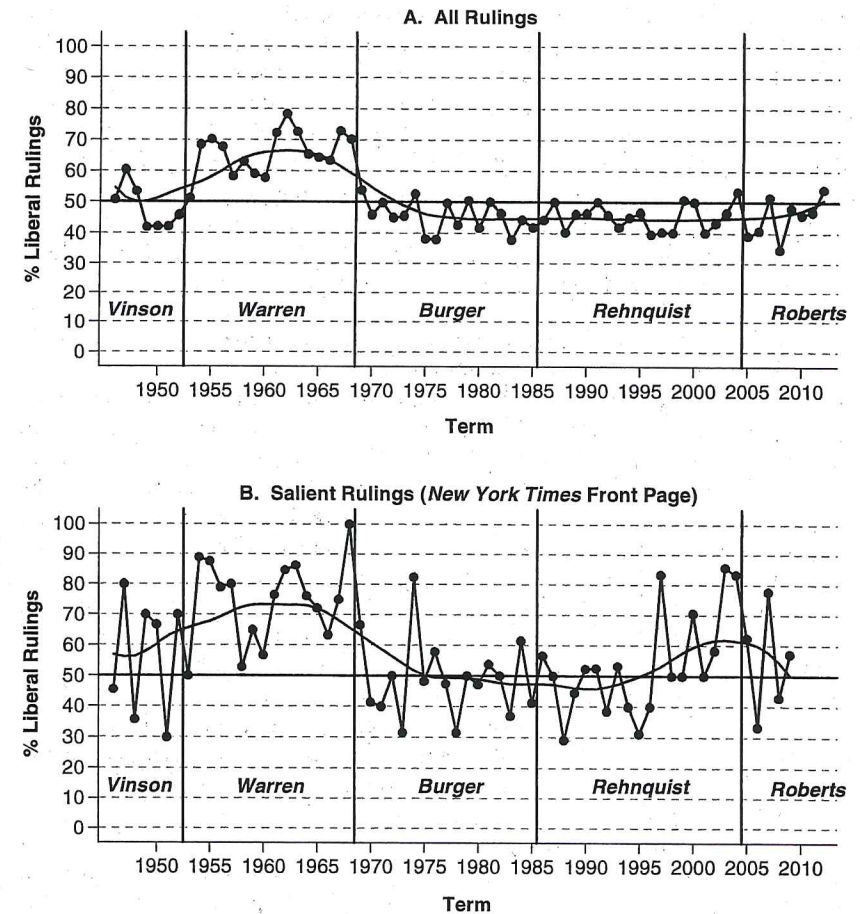


FIGURE 3. Supreme Court Liberalism, 1946–2012 Terms

Note: In each graph, the dots represent the percentage of liberal rulings in each term. The solid line is a nonparametric lowess smoother that gives a sense of the pattern over time.

Times the day after the ruling was issued. Data on salient cases are available from the 1946–2009 terms. In salient rulings, outputs were quite liberal in the Vinson and Warren eras and on average moderate during the Burger Court. The real surprise results are from the Rehnquist and Roberts Courts, where outputs in salient rulings during these periods were more liberal (52 percent) than conservative (48 percent). The long natural Court from the 1994–2004 terms seems to account for the greatest levels of liberalism, particularly the 1997–2004 terms, where 64 percent of the Court’s 92 salient

rulings were decided liberally.¹¹ And 57 percent of salient rulings were decided liberally during the first five terms of the Roberts Court.

Bringing various parts of this essay together, then, the trends from Figure 3 present some very important insights. First, as long as there is a genuine center on the Court – *even if there is just one swing justice* – the Court is capable of moderation, that is, generating a quite balanced mix of liberal and conservative outcomes. In highly salient cases, the so-called conservative Court during the contemporary era has been capable of producing its fair share of liberal rulings.¹² The existence of a middle, then, is desirable for those who prefer a balanced, moderate tenor to Supreme Court policymaking. It also implies greater stability in outputs generally, as seen in Figure 3A from the Burger Court onward, which is beneficial for lower courts, the other branches of government, and the states who have to comply with the Court's rulings. It is easier for these actors to deal with and anticipate a moderate and stable Court than one that is highly volatile in its outputs, switching from liberal to conservative whenever there is a membership change. On the other hand, when the center is quite small, like it is now with just Justice Kennedy, the small set of swing justices can seem to many like dictators – in many cases, whichever way they decide, the Court decides as well. This is disconcerting that on a Court that is not directly accountable to popular will in the first place, the non-democratic character of the Court is exacerbated by the fact that many rulings can come down to one or two justices. The existence of swing justices, though, depends on there being reliable liberals and conservatives on the Court. Reliable ideologues, if they want to have influence, must be willing to move to the center on occasion. The existence of ideologues on the extremes empowers swing justices to be pivotal on many issues in which the ideologues are sharply divided.

As for what influences the existence of a robust ideological center, the answer has been quite clear, at least from Truman to H. W. Bush: Presidents have not made ideological compatibility and reliability a dominant consideration in the nomination process. Placing this motivation as secondary has been the result of various political considerations, including, as mentioned, patronage, electoral reasons, and constraint by the Senate. Given these considerations, presidents during this era have appointed numerous justices who have served as genuine swing justices. In the conclusion, I will elaborate further on the implications of the new era of ideological compatibility and reliability as the primary motivations in presidents' appointments.

¹¹ The numbers of salient rulings begins to decrease in the 1980s, as the Court's caseload becomes smaller in general. While the number of salient rulings is in the mid-to-low double digits in the 1990s and very early 2000s, the number drops to the high single digits from 2003 onward.

¹² See the Supporting Information, Section A of Bartels and Johnston (2013) for some examples of highly salient liberal rulings in the contemporary era.

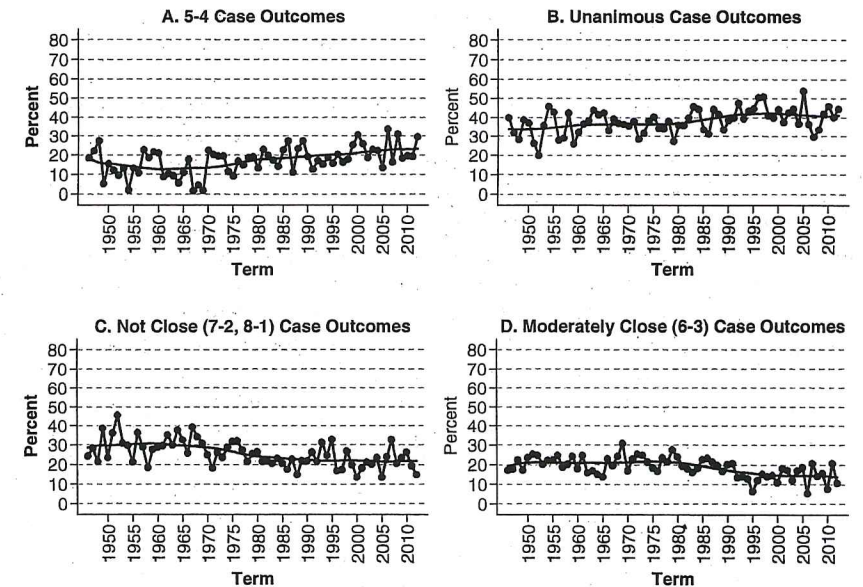


FIGURE 4. Percentage of Various Vote Splits over Time

Note: In each graph, dots represent the percentage of outcomes with the associated vote split for each term. The solid line is a nonparametric lowess smoother that gives a sense of the pattern over time.

POLARIZATION PARADOX?

What is the effect of polarization on the general degree of consensus/dissensus in vote splits over time?¹³ One might think that with increasing polarization over time, the occurrence of closely divided (e.g., 5-4 and 6-3) rulings would increase while the occurrence of unanimous rulings would decrease. Figure 4 presents data on the degree of change in the occurrence of various vote splits over time. Figure 4A and 4B presents 5-4 and unanimous outcomes,¹⁴ respectively, whereas Figure 4C and 4D presents “not close” (7-2 and 8-1) and moderately close (6-3) outcomes, respectively.¹⁵ Although the patterns are subtle, Figure 4

¹³ For an in-depth analysis of consensus and unanimity on the Court, see Corley, Steigerwalt, and Ward (2013).

¹⁴ Figure 4A includes all cases decided by one vote, both 5-4 outcomes and the less frequent 4-3 outcome where seven members participated. Figure 4B includes all unanimous cases, most of which occur when all nine justices participate, but some include 8-0 outcomes where a justice recuses him- or herself or 8-0/7-0 outcomes where fewer than nine justices are on the Court because of a pending presidential appointment.

¹⁵ “Not close” outcomes include instances where the difference between the number of majority votes and the number of minority votes is ≥ 4 and ≤ 7 . Most of these outcomes are 7-2 or 8-1,

reveals what I refer to as a “polarization paradox.” Whereas the occurrence of closely divided outcomes (5-4) increases over time, which is what we would expect given generally increasing polarization, the occurrence of unanimous opinions actually increases as well and is generally quite high. The occurrence of “not close” and “moderately close” outcomes actually decreases over time. What this suggests is that the distribution of vote splits has actually polarized over time – increases at the vote split extremes of unanimity and closely divided and decreases in not close and moderately close outcomes – but not in the way we would expect given a shrinking middle and more reliable ideologues.

Figure 4A shows that one-vote differences have occurred between just above 0 percent of the time (in the late Warren Court) to over 30 percent in the Roberts era. It is interesting that the highest occurrences of 5-4 outcomes occur in this contemporary era with just one swing justice and reliable ideologues on the left and right. There is some volatility in these rates during this era, ranging from a little more than 10 percent to just over 30 percent. Some of the lowest rates of 5-4 outcomes occurred during the Warren Court of the 1960s, which is actually not all that surprising since liberal justices had comfortable majorities on the Court. The Burger Court of the mid-to-late 1970s, where a robust center existed, experienced 5-4 rates of between 9 percent and 19 percent.

Rates of unanimity range from 20 percent to just over 50 percent and have slowly climbed over time. Although the average change over time is not drastic, it nonetheless begs the question of why we would see such high rates of unanimity in an age of increasing polarization (see Corley, Steigerwalt, and Ward 2013). Some of the highest unanimity rates have occurred in an era of quite high polarization, during the Rehnquist Court of the 1990s and into the Roberts Court period. The highest rate of unanimity (54 percent) actually occurred during the first term (2005) of Chief Justice Roberts’ career; the 5-4 rate is also quite low that term, at 13.5 percent. Of course, Chief Justice Roberts made it widely known that his goal was to increase rates of unanimity in order for the Court to speak with one voice and enhance its legitimacy (e.g., Rosen 2007). Unanimity spiked upward in his first term, but it fell back to normal levels a few years later.

While I do not intend to provide a comprehensive answer to this “polarization paradox,” I use one compelling perspective centering on Supreme Court agenda setting that provides insight as to why we see such a paradox. From the trends in Figure 4, it seems clear that even in a polarized era, the Court continues to maintain what Pacelle (1991) calls a “bifurcated agenda.” According to Pacelle, underlying the Court’s selection of the cases it will hear and decide on (at the certiorari stage) are two basic sub-agendas: (1) the *volitional agenda*, which contains the hot-button legal-political issues that

when all nine members participate. They also include, for example, 6-2 and 7-1 outcomes, for instances where fewer than nine justices participate. “Moderately close” outcomes include instances where majority votes minus minority votes is two (5-3) or three (6-3). The former instance rarely occurs.

are highly salient to the justices and that allow justices to pursue their policy goals; and (2) the *exigent agenda*, which contains cases on which the Court must settle legal questions, resolve lower court splits, and therefore manage the judicial hierarchy by giving clear signals to the lower courts and performing basic functions of institutional maintenance. Building on this view, Corley et al. (2013) provide empirical support to the notion that settling legal questions and creating national legal standards are very important considerations at the certiorari stage (see also Perry 1991). Moreover, Corley et al. provide important evidence from the 1989 term that unanimous rulings are just as likely as non-unanimous rulings to contain a lower-court split or a very important legal question, both of which are very important considerations at the certiorari stage. And cases in which there is a perceived need at the certiorari stage to settle a legal issue and issue a final ruling that applies to everyone tend to elicit quite high unanimity rates.

These are important explanations suggesting that polarization on the Court is actually bifurcated – it is alive and well within the volitional agenda but much less pronounced within the exigent agenda. The Court clearly has the capacity to engage in policymaking that has implications for the other branches of government, the states, and the American people. The justices have policy goals, and they presumably seek to have those goals achieved in certain legal areas. But the Court also has basic responsibilities concerning institutional maintenance. The Court sits at the head of the federal judicial hierarchy, and it is widely perceived to maintain judicial supremacy, meaning it has the final say on constitutional meaning for everyone. On the one hand, the Court is a political institution in the sense that it sometimes makes policy decisions on some of the most important issues in American politics. In these cases, the justices are quite polarized, just as many political elites in Washington are. But that’s only part of the story of what the justices do, of course, invoking Pacelle’s (1991) bifurcated agenda perspective and Corley et al.’s (2013) perspective on unanimity and consensus. The Court is also in the business of clarifying important legal questions for the lower courts and governments at the state and federal levels. For these cases, the Court is often able to speak in one voice – or at least a quite consensual voice. Surely this story does not constitute an exhaustive explanation of the polarization paradox as I have posed it. But it does suggest that polarization is not highly operative on every single case the Court decides. Polarization depends on the goals of the justices in how they are selecting cases and in which sub-agenda the case belongs – the exigent agenda or the volitional agenda.

CONCLUSION

The implications of the preceding discussion on Supreme Court polarization are numerous and leave room for many further examinations of this important concept. I conclude with a discussion of the implications for presidential

nominations and Senate confirmation. As this chapter has implied, the linkage between the appointment process and polarization on the Court is a sort of vicious circle. The degree of polarization on the Court and in the Court's policymaking are driven by how presidents appoint and the Senate scrutinizes nominees, whereas whom the president nominates and how the Senate scrutinizes a nominee is driven in large part by the ideological makeup and polarization on a given Court. The implications are extremely tangible for the contemporary Court, which has four quite reliable ideologues on both the left and the right and a center of just one justice. Supreme Court vacancies in this context, particularly where the Senate is also very polarized, could trigger some unique events and actions in the appointment and confirmation process never before seen. I explain the situations as follows.

If either Justice Kennedy or a justice who is ideologically incongruent with the sitting president should die or retire, we will likely witness the most politically cantankerous appointment and confirmation process in history. I refer to this as the "blockbuster scenario." If such a scenario occurred, the president would have the opportunity to create the first ideologically reliable/homogeneous majority coalition since the liberal coalition on the Warren Court of the 1960s. This could happen during an Obama presidency if, for example, Justice Kennedy or one of the reliable conservatives were to retire or die; President Obama would then have the chance to add a fifth reliable liberal (alongside Ginsburg, Breyer, Sotomayor, and Kagan), thereby creating a solid liberal majority on the Court. The same would hold if a Republican succeeds President Obama and Justice Kennedy or a liberal justice dies or retires. And as a matter of fact, the blockbuster scenario is actually guaranteed to occur because Justice Kennedy will have to vacate (via retirement or death) at some point. He will most likely strategically retire during a Republican administration (if he does not die before that, either during a Republican or Democratic administration), at which point a Republican president would have the opportunity to create a reliably conservative majority (alongside Roberts, Scalia, Thomas, and Alito). Given the nature of polarization on the Court at this point, the long-term ideological makeup of the Court and the nature of its policymaking will be extremely sensitive to which justice dies or retires and whether the justice who vacates is ideologically incongruent with the president.

No matter how this blockbuster scenario should occur, several additional factors will come into play: (1) whether the president's party controls the Senate; (2) whether the minority party would filibuster a president's nominee (in the event that the president's party controls the Senate); and (3) whether the majority party would use the "nuclear option" to rule out a filibuster and force a majority vote (in the case where the president's party controls the Senate).

Consider first the scenario where the president's party controls the Senate. Under this condition, the president will surely feel emboldened to nominate an ideologically reliable individual. The minority party in the Senate would certainly observe that the president would have the ability to create a solid

majority voting bloc on the Court, and it would likely be tempted to filibuster the nominee in order to send a clear signal to the president to nominate someone more moderate. Thus, the next question is whether the majority party would invoke the nuclear option, which would eliminate the possibility of a filibuster, force a simple majority vote, and ensure that the president's nominee secures a seat on the Court, thereby creating an ideologically congruent and reliable majority coalition on the Court. In November 2013, Senate Majority Leader Harry Reid and the Democrats invoked the nuclear option to eliminate filibusters for most presidential nominations to the executive branch and the federal judiciary, *except for the Supreme Court*. Under this scenario, then, a war in the Senate would ensue over whether to eliminate the filibuster for Supreme Court nominations, as surely the minority would strongly consider the option of filibustering the president's nominee in this situation. This scenario, then, would bring to light all of the consequences of polarization across branches of government – in the Senate, between the Senate and the president, and pertaining to the Supreme Court.

Consider next the scenario where the president's party does not control the Senate. This process would be slightly more politically tame because in the Senate, the filibuster option would be off the table. Moreover, the president would be forced to back away from appointing a rock-solid, ideologically reliable nominee. The president would be constrained to nominate an individual who could secure at least 51 votes from the opposite party. This is a tall task indeed in an increasingly polarized Senate, and it would likely mean that the president would have to appoint a more moderate nominee. We have actually not seen a nomination and confirmation process under divided party control of the president and Senate since President George H. W. Bush nominated Clarence Thomas. The last six appointments (Ginsburg, Breyer, Roberts, Alito, Sotomayor, and Kagan) have occurred under unified party control of the president and Senate. And all have yielded quite reliable ideologues. With the Republicans regaining control of the Senate as a result of the 2014 midterm elections, this scenario could occur during the last two years of President Obama's time in office. Of course, appointments in the last two years have typically spelled trouble for the president (e.g., Epstein et al. 2006), leaving him or her in a very weak position where the Senate has an incentive to delay the process and wait until the next presidential election after which a more like-minded president may be elected.

I conclude by returning to the vicious circle between appointments and polarization on the Court. As this chapter has made clear, the consequences of increasing polarization on the Court with a center of one and reliable ideologues on the left and right will be quite substantial for the next Supreme Court appointment process, particularly under the "blockbuster scenario" previously described. Depending on which justice leaves and why (strategic retirement, death, non-strategic retirement due to health concerns), the next membership change could be extremely consequential for the long-term

trajectory of Supreme Court policymaking. In the blockbuster scenario with unified party control of the presidency and Senate and the elimination of the filibuster, the president could secure the first ideologically homogeneous majority voting bloc since the Warren Court of the 1960s. The center would disappear altogether, but the question remains whether a sitting justice would step up and fill in the center gap, akin to how Justice O'Connor moved toward the center in the early-to-mid 1990s.

If the center does indeed disappear and the Court contains an ideologically homogeneous majority voting bloc, we will witness the most polarized Court in history, a Court that would be substantially more polarized than the Court of 2014 with a center of one. Recall that with a bifurcated agenda (Pacelle 1991; Corley, Steigerwalt, and Ward 2013), the Court would still likely maintain consensual decision making in cases where institutional maintenance concerns are prominent – that is, the exigent agenda. But a significantly more polarized Court could potentially alter the dynamics of case selection at the certiorari stage as well. It is clear that within the volitional agenda, a completely polarized Court with no center would be extremely consequential for the shape of policymaking, where an ideologically homogeneous majority voting bloc could simply run the table on hot-button legal-political issues. We would likely see more extreme policy outputs, providing a deviation from the patterns of moderation in Figure 3. What is most stunning is that this extreme polarization scenario just discussed will be triggered by just *one* membership change on the Court, a change that could occur as the result of chance (e.g., death) or the strategic retirement of Justice Kennedy.

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PART III

POLARIZATION IN THE STATES