

Ideological Polarization on Constitutional Courts

Evidence from Spain

Arthur Dyeve¹ Andreu Rodilla²
artdyevre@gmail.com andreu.rodilla@bsc.es

¹KU Leuven Centre for Empirical Jurisprudence

²Barcelona Supercomputing Center

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**Barcelona
Supercomputing
Center**

Centro Nacional de Supercomputación

Motivation



- We know that constitutional judges' ideology affect their decisions (Epstein et.al, 2012; Vallbé, 2024)
- We know that this could affect courts' legitimacy and efficacy as a check and balance (Stone Sweet, 2000)
- We know that polarization affects voter perceptions about courts (Harguindéguy, 2024)
- But:

Research Question

- Does polarisation affect the decisions of constitutional judges?

How do we define polarization?

- Description:
 - *Tendency to ideologically align in two blocks (see Hasen, 2019).*
- Characteristics:
 - Conflict driven by ideological divide
 - Part of a wider phenomenon affecting whole society
- **Judicial polarization:** Judges tendency to ideologically align in two blocks

Symptoms that polarisation is affecting the judiciary

Hypothesis

Increasing societal political polarization has contributed to greater judicial polarization

Expectations:

- The number of dissenting opinions increase
- Judges' votes increasingly predict their ideology
- The position of the median judge is increasingly at the tails of the ideological distribution
- The median judge, and therefore the court, will vote against the applicant the greater the ideological distance
- Judges with more divergent positions will be less likely to agree with each other
- Judicial polarization indicators are related to societal polarization

Mechanisms of Judicial Polarization

- **Selection mechanism:** parties appoint closest judges (Sunstein et.al, 2007; Binder and Maltzman, 2009)
- **Judges' behavioural mechanism:** judges become more polarised (Barber et.al, 2015; Persily, 2015)
 - Reputation: As audiences become more polarised, ideology is more relevant to protecting their reputation
 - Sincere preferences: Judges are also part of the political system (like voters, they are polarised)
- **Informal incentive mechanism:** judges are pressured or incentivised by the parties, and they accept (Miller, 2004)

Data

Total cases: 23.948

Concrete review: 22.209 (1.028 of them non-unanimous)

Abstract review: 1.739 (412 of them non-unanimous)

Final Matrix: +100K

Litigants Left-Right positions based on the Party Manifestos' Project and RPMP. RILE measure (for litigants ideology and validation).

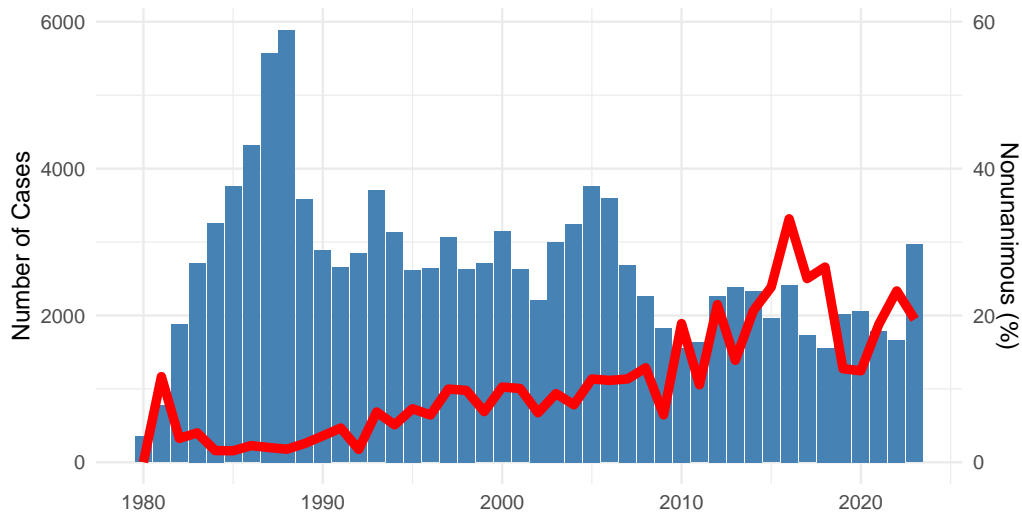
Polarisation index (Dalton, 2008)'s index based on CIS polls and current seats (test correlation).

- **Judges Ideology:** Based on Item Response Theory. We perform Indifference Point Estimation using a Bayesian framework. We explore the latent preferences with no priors. Values are estimated using Markov Chain Monte Carlo simulation.

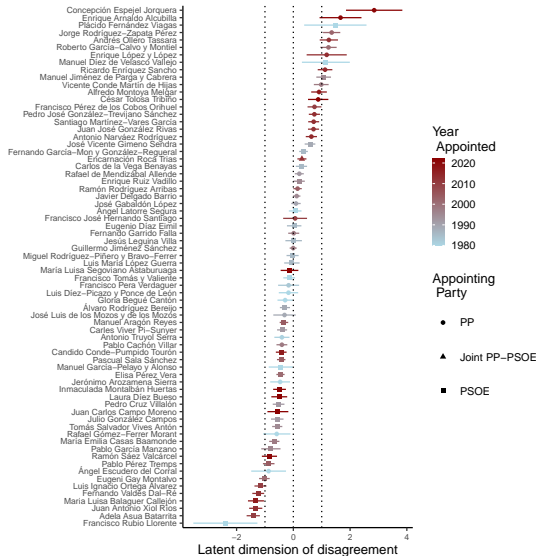
$$Pr(y_{ij}) = \frac{\exp(-\alpha_i + \beta_i\theta_j)}{1 - \exp(-\alpha_i + \beta_i\theta_j)} \quad (1)$$

- **Validation of IPE:** We explore the item curves for the more polarising cases (larger β) and use OLS to test the extent to which the PMP RILE value explains the estimates.
- **Polarization symptoms:** We compute different metrics that capture the level of conflict and the extent to which ideology is evident.
- **Court polarization:** We test the relationship of some of these metrics with Dalton's index.

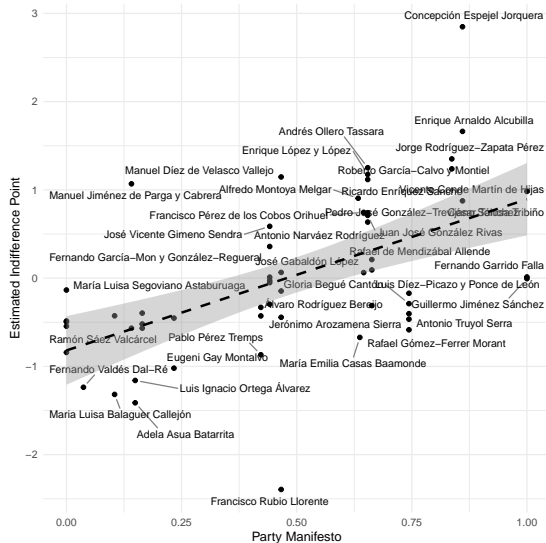
Results I - Dissent Frequency



Results II - Indifference Point Estimates



Results III - Validating Left-Right dimension



Results IV - Validating prediction curves of most polarizing cases

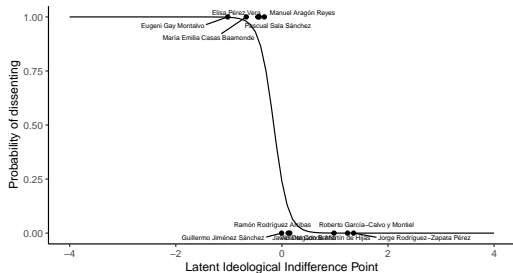


Figure: Voting prediction against actual votes in Order (Auto) 26/2007 (2007).

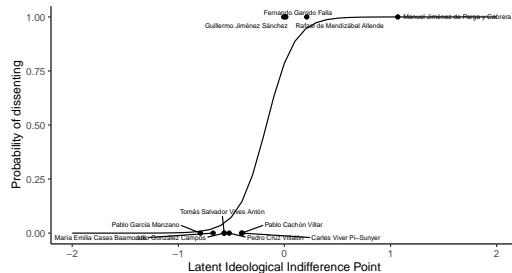
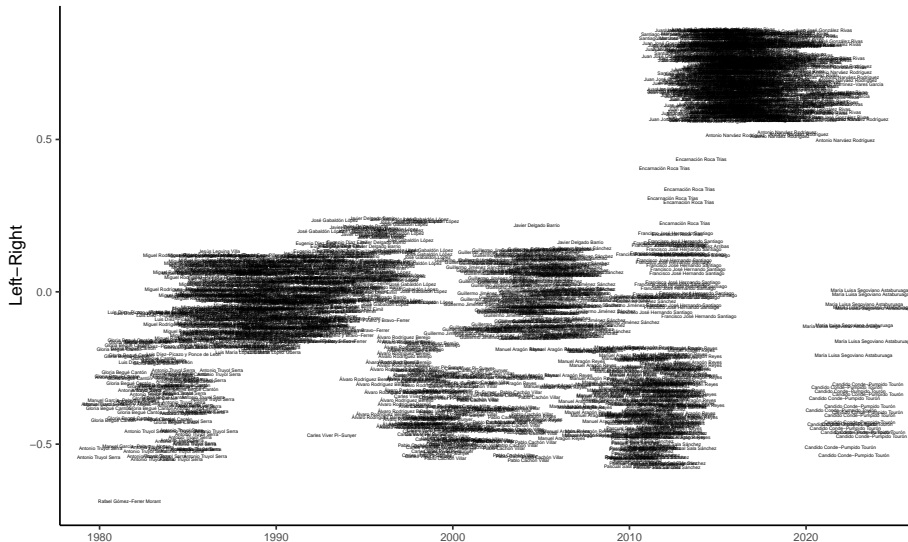


Figure: Voting prediction against actual votes in Decision 46/2001 (2001).

Results V - Median Judge



Results VI - Median Judge & Litigant Success

	<i>Dependent variable:</i>		
	Vote (1 = pro-applicant, 0 = pro-respondent) Model 1	Model 2	Model 3
(Intercept)	0.54*** (0.02)	0.81*** (0.16)	0.83*** (0.16)
Median-Applicant Ideological Distance	-0.16*** (0.06)	-0.13** (0.06)	-0.14** (0.06)
Year Fixed Effects	No	Yes	Yes
Judge Random Effects	No	No	Yes
R ²	0.01	0.06	
Adj. R ²	0.01	0.03	
Num. obs.	1207	1207	1207
AIC			1874.47
BIC			2103.79
Log Likelihood			-892.24
Num. groups: id_juez			19
Var: id_juez (Intercept)			0.01
Var: Residual			0.24

*** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$

Results VII - Dyadic Disagreement

Dependent Variable:	Pairwise Agreement				
	(1)	(2)	(3)	(4)	(5)
<i>Variables</i>					
Constant	5.412*** (0.0869)	1.795*** (0.1196)			
Distance App' Parties	-0.0727*** (0.0017)	13.81*** (0.3169)	14.53*** (3.013)	14.53*** (1.152)	13.54*** (1.215)
Year	-0.0022*** (4.35×10^{-5})	-0.0004*** (5.98×10^{-5})			
Distance App' Parties \times Year		-0.0069*** (0.0002)	-0.0073*** (0.0015)	-0.0073*** (0.0006)	-0.0068*** (0.0006)
Year FE			Yes	Yes	Yes
Case FE				Yes	Yes
Judge FE					Yes
Observations	198,419	198,419	198,419	198,419	198,419
R ²	0.02794	0.03725	0.04629	0.42244	0.43294
Within R ²			0.01885	0.03401	0.01829

*Signif. Codes: ***: 0.01, **: 0.05, *: 0.1*

Note: The dependent variable is coded as 1 = pro-applicant, 0 = pro-defendant.

- The ideological composition of courts significantly influences their outcomes
- Constitutional Courts not seem to be immune to political polarization
- Polarisation can be influential in turning constitutional revision into a political instrument with important consequences for the basic consensuses of liberal democracy:
 - Citizens perception about the judiciary (legitimacy)
 - Legislative encroachments by the judiciary (representation)
 - Less consensus on constitutional limits to political power (checks and balances)
- Unravelling the three mechanisms identified would be important to better develop context-specific solutions