

Ideological Polarization on Constitutional Courts

Evidence from Spain

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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 is 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.

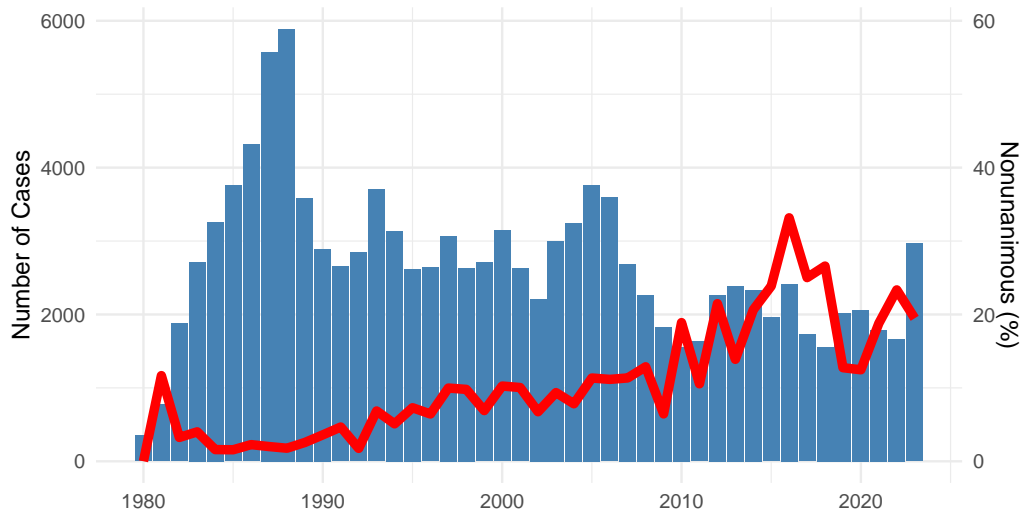
Polarisation index based on CIS polls and seats resulting from the elections (Dalton, 2008)

- **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.

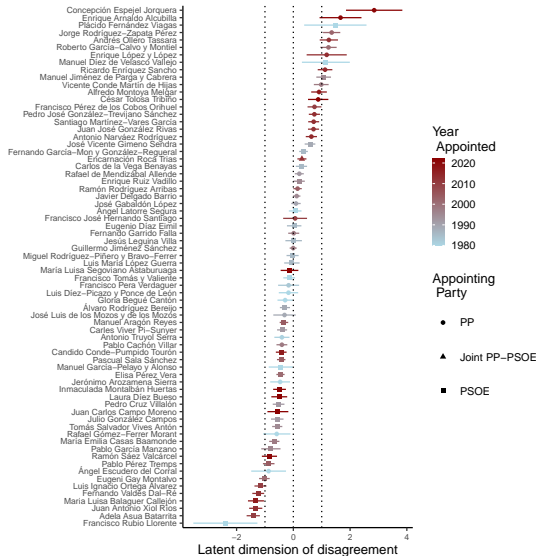
$$Pr(y_{ij}) = \frac{\exp(-\alpha_i + \beta_i\theta_j)}{1 - \exp(-\alpha_i + \beta_i\theta_j)} \quad (1)$$

- **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.
- **Predictability of court outcomes:** We compute the difference between the *Median Judge* and the *litigants* RILE position and we test to what extent difference explain votes using an OLS.
- **Court polarization:** We compute the difference between judges' estimate positions and we test to what extent it explains the voting divide.

Results I - Dissent Frequency



Results II - Indifference Point Estimates



Results III - Validating Left-Right dimension



Results IV - Validating prediction curves of most polarizing cases

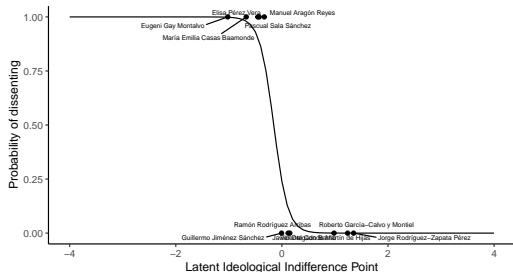


Figure: Voting prediction against actual votes in Order (Auto) 26/2007 (2007).

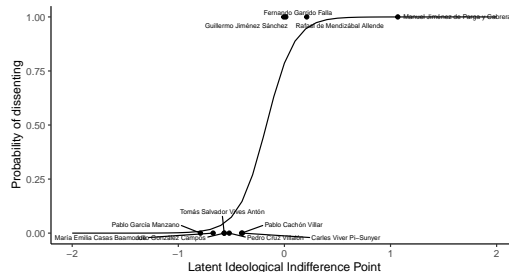
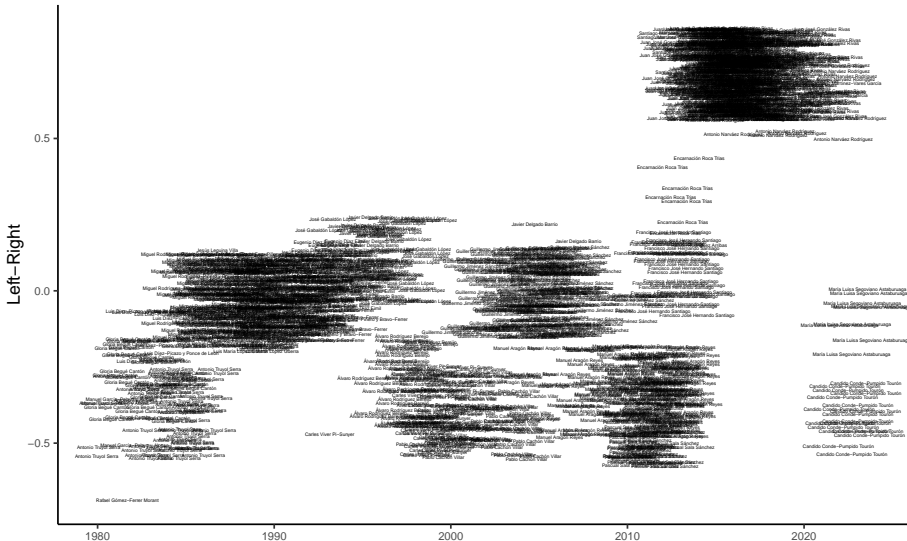


Figure: Voting prediction against actual votes in Decision 46/2001 (2001).

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