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Iddo Porat

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Court Polarization: A Comparative Perspective

IDDO PORAT*

ABSTRACT

Polarization is on the rise around the globe. Political views are driven to the poles, and moderate views are weakened. Many studies have been carried out on the increase in social and political polarization, but far fewer on the effects of polarization on constitutional and supreme courts, and none on a comparative or global scale. This Article attempts to fill this gap. It aims, for the first time, to describe and typologize the effects of political polarization on constitutional and supreme courts in different parts of the world.

The Article identifies three models of such effects: mirror polarization (the U.S.) - in which the court mirrors the political division in society; one-sided polarization (the UK and Westminster model countries) - in which the court reflects one side of the political divide more than the other; and cracks in consensus-based nomination processes (Continental Europe) - in which the rise of fringe parties is challenging the consensus-based nomination of constitutional judges.

The Article concludes that Westminster model countries are shifting from one-sided to mirror court polarization, while the U.S. is witnessing a shift in the opposite direction – from mirror to one-side polarization. Except for recent cases, Europe’s constitutional courts are surprisingly immune from the effects of polarization.

For the U.S. – currently experiencing one of the most severe crises in the history of its Court – this study could provide an important comparative perspective and possible examples for emulation. For non-U.S. audiences, it

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can provide a way of comparing one's system to the extreme level of court polarization in the U.S. and situating it to other systems.

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INTRODUCTION

In the last few decades, there has been a global trend of polarization in politics.¹ Political views tend to be driven to the poles, and moderate views tend to be weakened. Political parties that were once considered small fringe parties gain traction, and leaders of the traditional parties tend to adopt more extreme views.² Political affiliation becomes tribal - it becomes part of one's identity, as does one's animosity towards the opposing political party. Tribalism strengthens extremism, as it diminishes a sense of solidarity and develops a "we" and "they" dichotomy. The stakes of the other side winning become higher, and losing to the other side threatens one's core identity, set of beliefs, and ways of life. Consequently, there are fewer possibilities for compromise and consensus, and a religious-like mentality of uncompromised principles takes hold.³

The U.S. may be one of the most extreme examples of political polarization.⁴ Polls show that in the U.S., people view political polarization as the most pressing issue in U.S. politics, and comparisons between the current level of political divisiveness and that which existed prior to the American Civil War are not uncommon.⁵ Trump's presidency may have presented a

1. THOMAS CAROTHERS & ANDREW O'DONOHUE (EDS.), *DEMOCRACIES DIVIDED: THE GLOBAL CHALLENGE OF POLITICAL POLARIZATION* (Brookings Institution Press, 2019); Thomas Carothers & Andrew O'Donohue, *How to Understand the Global Spread of Political Polarization*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 1, 2019), <https://carnegieendowment.org/2019/10/01/how-to-understand-global-spread-of-political-polarization-pub-79893> ("Polarization is tearing at the seams of democracies around the world, from Brazil and India to Poland and Turkey. It isn't just an American illness; it's a global one.").

2. See, e.g., Dubravka Zarkov, *Populism, Polarization and Social Justice Activism*, 24 EUR. J. WOMEN'S STUD. 197 (2017) (criticizing the rise of right-wing fringe parties in the UK and in Continental Europe); George Eaton, *Corbynism 2.0: The Radical Ideas Shaping Labour's Future*, 147 NEW STATESMAN, <https://www.newstatesman.com/uncategorized/2018/09/corbynism-20-radical-ideas-shaping-labour-s-future> (last updated Sept. 12, 2021) (criticizing the extremism of the Labor Party under Corbin).

3. See *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014) <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> (finding that in 2014, 27% of Democrats and 36% of Republicans believed that the other party is "a threat to the nation's well-being" - double the numbers from 1994).

4. Levi Boxell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26669, 2020), <http://www.nber.org/papers/w26669> ("We measure trends in affective polarization in nine OECD countries over the past four decades. The U.S. experienced the largest increase in polarization over this period.").

5. Laura Paisley, *Political Polarization at its Worst Since the Civil War*, USC NEWS (Nov. 8, 2016), <https://news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/> ("the NOMINATE data generated by James Lo and his co-authors shows that partisan elites in the U.S. are as polarized today as they were around the time of the Civil War.").

certain peak in U.S. polarization, but polarization will likely not go away with the change of administration, as it is a deep-seated and long-term trend that does not depend solely on the personality of one state leader or another.⁶ However, the U.S. is not alone in witnessing polarization in the global sphere. Brexit has brought to new heights political polarization in the UK.⁷ In Western Europe, the great waves of immigration and the rise of nationalism and tensions within the EU following the economic Euro crisis have strengthened both the extreme right and the extreme left parties and weakened the traditional central parties.⁸ A rise in polarization has been identified in many other parts of the world as well.⁹

The recent increase in social and political polarization has been studied by many researchers, including in comparative terms.¹⁰ There are, however, much fewer studies on the effects of polarization on constitutional and supreme or high courts (henceforth “apex courts” or “the courts”)¹¹ and no attempt as of yet to map the effects of polarization on apex courts in a global or comparative context. The purpose of this Article would be to fill this gap. This Article will map the effects of polarization on apex courts in different parts of the world and suggest an initial typology of such effects into three models. The models are *mirror-polarization*, *one-sided polarization*, and *cracks in consensus-based nomination processes*.

By *mirror-polarization*, I mean the fact that polarization in society is replicated directly in the court. This is the case in the U.S., where the Supreme Court (used to be) divided roughly in a way that represented the political division in the country between liberals and conservatives. The U.S.

6. See, e.g., Michael Barber and Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA, 15, 17 (Nathan Persily ed., 2015) (Showing that polarization trends much predate the Trump administration. “Since the 1970s, however, there has been a steady and steep increase in the polarization of both the House and Senate. Other measures of party conflict confirm the trend of increasing polarization in the past 40 years.”).

7. See *infra* note 74 and accompanying text.

8. See *infra* notes 24-27 and accompanying text.

9. See *supra* note 1; See e.g., examples of increased polarization in countries as diverse as Australia, Hungary, and Canada: Luke Mansillo and Nick Evershed, *Australian Politics Becoming More Polarised*, THE GUARDIAN (Aug 7, 2014), <https://www.theguardian.com/news/datablog/2014/aug/07/australian-politics-becoming-more-polarised>; Emilia Palonen, *Political Polarisation and Populism in Contemporary Hungary*, 62 PARLIAMENTARY AFF. 318 (2009), <https://www.theguardian.com/news/datablog/2014/aug/07/australian-politics-becoming-more-polarised> (documenting polarization in post-communist Hungary); Christian Paas-Lang, *Canadians are Polarized, and Intense Party Loyalty Could be to Blame: Study*, GLOBAL NEWS (Sept. 12, 2019), <https://global-news.ca/news/5892865/canada-polarization-study/>.

10. See sources cited *supra* note 9.

11. The U.S. is a notable exception. See discussion *infra* Part II.A.2.

Supreme Court has always been more political than other similar courts around the world. However, it was only due to the dramatic increase in social and political polarization in the U.S., starting in the 1980s and intensifying in the past two decades, that politics became partisan, and there began a clear mirroring of the division between liberals and conservatives in society and in the Supreme Court. I explain this development in terms of judicial decision-making as well as in terms of the nomination process.¹² I conclude, however, that due to the recent development in the makeup of the Court, the U.S. Supreme Court may be in the process of shifting from mirror-polarization to my next model – one-sided polarization. I discuss the meaning of this shift and how this framing of recent developments can help us understand them.

By *one-sided polarization*, I mean the fact that, by and large, the judges on the court reflect more closely one side of the political divide. The Westminster model or British-style parliamentary systems, such as in England, Australia, Canada, New Zealand, and Israel, reflect this model in varying degrees, depending on the country. Since the 1980s, the model of the judiciary based on judicial deference, parliament sovereignty, and the tradition of political constitutionalism that had dominated all these countries began eroding, and apex courts in these systems saw a clear integration of ideas of global constitutionalism, including the adoption of proportionality, human rights talk, judicial activism, and progressive liberalism. These processes started partly for other reasons, but when political polarization deepened, the association of the court with liberal and progressive ideas intensified, amounting to what I call one-sided polarization. As polarization rose so did the association of courts with liberal and progressive ideas, which led to political backlash from conservative circles.¹³ With regard to this model, I detect a recent shift in the opposite direction than in the U.S. Once right-wing parties started nominating their own judges to the courts, Westminster-type courts began having two opposing judicial camps in them – conservative and liberal – as in the U.S. Although, still a long way from the intensity of U.S. court polarization, the Westminster model can nevertheless be described as shifting from a one-sided into a mirror polarization model.

The third model, *cracks in consensus-based nomination processes*, can be seen in Continental Western Europe. Europe's combination of a formalist continental law culture, which creates a non-political perception of judges, with the makeup of constitutional courts based on political consensus and equal shares of different parties in the nominations, has managed to fend off

12. See *infra* Part II.A.

13. See *infra* Part II.B.

polarizing courts so far. However, as political polarization in Europe rises and the traditional center parties weaken vis-a-vis more extreme parties, one can identify some early signs of pressures on this system. One can see some early signs of this evolution in Switzerland and Germany in particular.¹⁴

The typology, I suggest, offers several insights into the phenomena in question. First, it highlights the importance of context and of institutional and cultural differences when analyzing polarization, particularly its effects on courts. In different countries and systems, a similar phenomenon that has global effects – political polarization – may materialize very differently than in other systems. Second, it offers a starting point for the hard work of trying to alleviate judicial polarization (to the extent we see it as a problem). Coming to grips with and understanding this phenomenon is the key to tackling it properly.

My paper is limited to certain countries and judicial systems and does not cover countries in other parts of the world. The selection does follow a certain logic – analyzing courts according to what many consider to be the three main models of constitutional courts and judicial review – the U.S. model, the British model, and the Continental European model.¹⁵ But, obviously, any selection on this scale is somewhat arbitrary, and this review suffers especially from the lack of Global South countries. Further work can extend the models to other countries as well, according to their similarities to one or more of the models I suggest here.

In Part I, I survey, define, and characterize the reasons for political polarization. I also distinguish it from related processes such as democratic backsliding and ethnic polarization. In Parts II, III, and IV, I canvas the three models, separating between the effects on the nomination of judges and on judicial behavior. The Article ends with a conclusion.

14. See *infra* Part II.C.

15. See e.g., Albert H.Y. Chen, *The Global Expansion of Constitutional Judicial Review: Some Historical and Comparative Perspectives*, UNIVERSITY OF HONG KONG FACULTY OF LAW RESEARCH PAPER at 2-3 (2013) (distinguishing between the U.S. model, British ex-colonies, and Continental Europe); Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 J. CONST. L. 977, 979 (2001) (distinguishing between the UK (political constitutionalism) the U.S. (diffused judicial review) and Continental Europe (centralized judicial review)).

I. POLITICAL POLARIZATION

In politics, polarization occurs when political opinions diverge strongly into opposing camps and middle-ground positions are weakened.¹⁶ Measuring political polarization is complex and may change according to the political system. Thus, in multiparty systems, such as Continental Europe, measuring polarization may mean measuring the rising power of fringe parties and the reduced power of the center parties.¹⁷ On the other hand, in two-party systems, such as the U.S. and the UK, measuring polarization may mean measuring the growing power of the radical elements in each party, and the diminishing overlap and mobility between the two parties.¹⁸ There are many other variances in the types of measurements of polarization the political science literature; there is no clear agreement on the way to measure it.¹⁹ However, for the purpose of this Article, I rely on the widely shared (albeit not unanimous) claim that in the past four decades, and especially in the past decade, there has been an increase in political polarization in many parts of the world. In the U.S., there is a very strong scholarly consensus that there has been a sharp increase in polarization in recent decades.²⁰ But, in Europe also, a recent survey found that “with very few exception[s], polarization is on the rise in every single Western European country.”²¹ Notably, “polarization has almost tripled to the point that in most countries, the election with the highest level of polarization since the Second World War has taken place

16. *Polarization*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/polarization> (“a state in which the opinions, beliefs, or interests of a group or society no longer range along a continuum but become concentrated at opposing extremes.”).

17. Thus, in a recent survey measuring polarization in Europe the research measures the percentage of votes for anti-political-establishment parties (APEp) in the last decade and shows that it “has exponentially increased. And with it, the distance between political parties and the irreconcilable differences (either ideological, personalistic, or both) among voters has also increased.” Fernando C. Bértoa & José Rama, *Polarization: What Do We Know and What Can We Do About It?*, 3 FRONTIERS IN POL. SCI. (June 30, 2021), <https://www.frontiersin.org/article/10.3389/fpos.2021.687695>.

18. See *infra* text accompanying note 39.

19. See Aaron Bramson et. al., *Understanding Polarization: Meanings, Measures, and Model Evaluation*, 84 PHIL. OF SCI. 115 (2017) (identifying at least 8 meanings for polarization which lead to 8 different ways to measure polarization); Paul DiMaggio, John Evans, Bethany Bryson, *Have American’s Social Attitudes Become More Polarized?*, 102 AM. J. SOCIO. 690 (1996), <https://www.journals.uchicago.edu/doi/abs/10.1086/230995>.

20. See discussion *infra* Section II.A.1.

21. Bértoa & Rama, *supra* note 17.

in the last 10 years.” Additionally, studies documenting a rise in polarization can be found in many other parts of the world.²²

Polarization can be attributed to local reasons as well as global or cross-country ones. Local reasons vary from one country to another, and I will address some of those when I discuss the countries that are my primary examples. As to global or cross-country reasons, the literature on polarization has discerned at least four distinct reasons for polarization: economic gaps, nationalism, globalization, and changes in the media.

First, the incredible global rise in economic discrepancies between the rich and poor since the 1980s has contributed to social alienation and polarization on a global scale.²³ Second, right-wing sentiments of nationalism, conservatism, and particularism have resurfaced in many countries and elevated polarization. In Europe, such sentiments were suppressed in the first decades following WWII because of the reaction to the devastating effects of nationalism and the continuation of the Cold War, which provided a common enemy and blocked localism and nationalism. As the effects of WWII waned and the Cold War ended, these sentiments resurfaced. In addition, they were fueled by developments in the early 2000s: global terrorism that required tighter border controls, the waves of immigration in the mid-2010s,²⁴ and the economic downturn of the late 2000s.²⁵ All these developments contributed to nationalist and extreme politics, including a backlash against the progressive and cosmopolitan elite that dominated politics in the

22. See, e.g., Carothers & O’Donahue, *supra* note 1 (documenting the rise in polarization in Bangladesh, Brazil, Colombia, India, Indonesia, Kenya, Poland, Turkey, and the United States).

23. See generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014) (documenting the levels of inequality in income and in wealth mainly in the U.S. and in Europe since the 18th century and showing a sharp increase in inequality since the 1980s reaching at the time of publication the highest level since the late 1920s. It also warns of the social dangers of such inequality including social alienation and polarization); See also *infra* note 44 and accompanying text.

24. See, e.g., Danilo Di Mauro & Luca Verzichelli, *Political Elites and Immigration in Italy: Party Competition, Polarization and New Cleavages*, 11 *CONTEMP. ITALIAN POL.* 401, at 406 (2019) (empirically measuring polarization during the immigration crisis in Italy and finding that “during the crisis period, parties of the opposition tended to assume more extreme positions on the threats of immigration to the national economy, riding the wave of public concern for a fragile economy still overshadowed by the Great Recession.”).

25. See generally JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* (2016) (documenting to the effects of the late 2000s recession, as well as the waves of immigration in the 2010s on political extremism and polarization); See also Bértoa & Rama, *supra* note 17, at 6 (“given the magnitude of the 2008 global financial and economic crisis, it is not surprising that the level of polarization exponentially increased during the last decade, especially in those countries most affected by the crisis (e.g., Spain, Greece, Cyprus, and Italy).”).

Post-War decades.²⁶ Third, the rise of a cosmopolitan professional global elite that benefited from a globalized economy and was concentrated geographically mostly in cities, contributed to global polarization. It created a gap between the new elite and local middle and lower classes in rural areas that do not benefit from globalization and may even be hurt by it.²⁷ The final global reason for polarization is the changes in the media: cable TV and, the rise of the internet and social media, which allowed for the creation of media fragmentation, isolated communities who communicate solely between themselves, and political echo chambers, enhancing extremism and polarization.²⁸

Political polarization is related to two other phenomena that will not be the center of my study – ethnic and religious polarization and populism. Societies polarized along ethnic or religious lines include: Belgium (Walloon vs. Flemish), Spain (Catalans vs. Spanish, Basque vs. Spanish), Switzerland (German, French and Italian), Canada (Anglophones vs. Francophones), Northern Ireland (Catholic vs. Protestant), and Israel (Jews vs. Arabs).²⁹ This polarization sometimes coincides with political polarization and may contribute to it. However, the two are distinct issues and do not necessarily correlate for three reasons. First, whereas ethnic and religious polarization is a constant feature of a society, political polarization is not constant and can change dramatically over the years. Second, ethnic and religious polarization is a local feature of a society, while political polarization is a global

26. See Liesbet Hooghe & Gary Marks, *Cleavage Theory Meets Europe's Crises: Lipset, Rokkan, and the Transnational Cleavage*, 25 J. EUR. PUBLIC POL. 109 (2018) (arguing that social division and the rise of right-wing fringe parties is a reaction of traditionally conservative sectors to the imposition of socially liberal values); Ronald Inglehart & Pippa Norris, *Trump, Brexit and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (Harvard Kennedy University, Working Paper, Series 16-026, 2016) (“[T]he surge in votes for populist parties can be explained not as a purely economic phenomenon but in large part as a reaction against progressive cultural change.”).

27. See Inglehart & Norris, *supra* note 26. Rahsaan Maxwell, *Geographic Divides and Cosmopolitanism: Evidence from Switzerland*, 53 COMPAR. POL. STUD. 2061, 2062 (2020) (“highly educated professionals are more likely than people with less education and manual occupations to have cosmopolitan pro-immigration and pro-European Union (EU) preferences.”); KUBLER, D. SCHEUSS ET AL., *THE POLITICAL ECOLOGY OF THE METROPOLIS* 199 (J. Seller et al. ed., 2013); Nial Cunningham & Mike Savage, *An Intensifying and Elite City: New Geographies of Social Class and Inequality in Contemporary London*, 21 CITY 25 (2017).

28. See John V. Duca & Jason L. Saving, *Income Inequality, Media Fragmentation, and Increased Political Polarization*, 35 CONTEMP. ECON. POL'Y 392, 404 (2016) (finding that media fragmentation in the U.S. following the advance of cable TV and social media contributed more to U.S. polarization than income inequality).

29. See generally Marta Reynal-Querol, *Ethnicity, Political Systems, and Civil War*, 46 J. OF CONFLICT RESOL. 29 (2002) (analyzing the relationship between ethnic and religious divisions and civil wars).

phenomenon driven partly by global reasons.³⁰ Third, these two types of polarization affect courts differently. The representation of ethnic and religious groups in courts has long been a feature of apex courts in many countries, including the U.S. Supreme Court, and despite challenges and debates, many consider this an integral and justified part of the judicial system. Political representation, however, presents a different and more complex set of legitimacy challenges to a court and is much more hotly debated.³¹ Therefore, the phenomena that I focus on are distinct from ethnic and religious polarization which compel a separate analysis.

Political polarization should also be distinguished from populism. In academic literature and public discourse, much attention has been given to the rise of populism in many countries, especially in the second decade of the 20th century.³² Populism, in this context, refers to the rise of parties and ideologies that are averse to elites and espouse popular sentiments such as anti-immigration or anti-minority, promote anti-globalization, and are characterized by strong and charismatic leaders.³³ The election of Donald Trump in the U.S., the Brexit movement in the UK, and the rise of the political right in Europe are points in mind. Populism is also related to the democratic backsliding that occurred in Hungary, Poland, and Turkey.³⁴

Unlike religious and ethnic polarization, populism does have strong global or cross-country features and does coincide roughly with political polarization in terms of its timeline and reasons. However, the two are distinct, and focus on different policies – the first concentrates on the political divide in society and, therefore, assumes some democratic competition between the

30. For example, U.S political polarization was very low during the 1950s and 1960s, but has risen dramatically since the 1980s. In contrast, Black and white polarization was very high during the 1950s and the 1960s and is also a constant feature of American society.

31. In consociational political systems, such as Belgium, this arrangement is set in legislation. Whereas in other countries, like the U.S. and Israel, arrangements are set up in nomination custom (such as the representation of African-Americans, Jews and Catholics in the U.S. Supreme Court); *See generally* Anita Böcker & Leny de Groot-van Leeuwen, *Ethnic Minority Representation in the Judiciary: Diversity Among Judges in Old and New Countries of Immigration*, THE JUD. Q. (2007), <https://www.rechtspraak.nl/SiteCollectionDocuments/Ethnic-representation-in-the-judiciary.pdf>.

32. *See generally* BENJAMIN MOFFITT, THE GLOBAL RISE OF POPULISM (Stanford University Press 2016); Nadia Urbinati, *Democracy and Populism*, 5 CONSTELLATIONS 110 (1998); David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521 (2018).

33. *See* JAN WERNER MÜLLER, WHAT IS POPULISM? (University of Pennsylvania Press 2016).

34. *See generally* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

two political sides.³⁵ In contrast, the second focuses on the attempt of one side of the map to take over or weaken the democratic process.

With regard to the judiciary, populism and democratic backsliding studies concentrate on governmental attempts to capture the judiciary and weaken the rule of law institutions, including constitutional courts, attorney generals, ombudsmen, etc.³⁶ Political pressure to change or intervene in the rule of law institutions is a possible polarization effect. Political polarization heightens political anxieties and stakes, creating pressure to influence all centers of power, including the courts. Polarization, however, can also manifest itself in internal court processes, such as when the court is being polarized and divided clearly between the two opposing sides, without any change in democratic rules, or when reform attempts are within the scope of legitimate democratic changes.³⁷ I will, therefore, sometimes refer to populism when describing polarization, especially when other sources do so,³⁸ but I wish to keep the two separated for the purposes of my discussion.

II. MIRROR POLARIZATION: THE UNITED STATES

Political polarization is an all-encompassing social phenomenon. It is, therefore, not surprising that it can influence the way courts operate, especially when it comes to apex courts which bear the highest political profile. However, the way polarization affects courts varies between different jurisdictions and political systems. Obviously, the extent to which a court is, either formally or informally, subject to political considerations or viewed as a political actor (the level of court politicization) may affect the extent and ways polarization affects it. Among the other factors that affect court polarization, one can list: the kind and intensity of the general polarization in society, the reasons for polarization, the constitutional culture, the institutional design of the court, the way judges are elected, and more.

35. Polarization can still exist in semi-authoritarian regimes, that do not completely control the opposition, and even in authoritarian regimes. However social division and polarization would remain below the surface until the authoritarian regime starts to weaken.

36. See, e.g., MARK GRABER ET AL., CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark Graber, Stanford Levinson & Mark Tushnet eds., 2018); STEPHEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE: WHAT HISTORY REVEALS ABOUT OUR FUTURE (2018); Gabor Halmi, *Rights Revolution and Counter-Revolution: Democratic Backsliding and Human Rights in Hungary*, 14 LAW & ETHICS HUM. RTS. 97 (2020); Bojan Bugarič & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEMOCRACY 69, 72–75 (2016).

37. Counter examples of populism from the left include, in Latin America: Peron, Chavez, AMLO (the Mexican president) and Bolivia (see correspondence with Sergio and Tom Ginsburg).

38. See, e.g., Di Mauro & Verzichelli, *supra* note 25.

In this Part, I will canvass the three models of the effects of polarization on courts that are at the center of this Article, beginning with mirror polarization. I begin by describing the process of general polarization in the society or societies in question and the reasons that led to it. Then, I move on to describe how polarization affected courts in accordance with the models I ascribe them.

A. Political Polarization in the United States

The U.S. is currently experiencing one of the highest levels of political polarization in its history,³⁹ and, according to some accounts, it is comparable today to the levels of polarization that predated the American Civil War.⁴⁰ The U.S. is also said to have one of the highest levels of polarization comparatively, as shown in several comparative surveys that place it first in terms of polarization levels.⁴¹ Most Americans today perceive polarization to be a serious problem.⁴²

Political polarization was not always high in the U.S. Surveys show low levels of political polarization during the first decades following WWII and through the 1970s. In fact, there was concern that the two parties were not

39. According to a Pew Research Center Survey in 2014, “[t]he overall share of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades from 10% to 21%. And ideological thinking is now much more closely aligned with partisanship than in the past. As a result, ideological overlap between the two parties has diminished: today, 92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican.” *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/>. The same survey found that in 2014, 27% of Democrats and 36% of Republicans believed that the other party is “a threat to the nation’s well-being” – double the numbers from 1994; *See also* Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide*, PEW TRUST MAG. (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide> (“Americans have rarely been as polarized as they are today.”).

40. *See* Paisley, *supra* note 5.

41. Dimock & Wike, *supra* note 39. (“This 47-percentage-point gap [between Republicans and Democrats] was the largest gap found between those who support the governing party and those who do not [regarding its dealing with the COVID 19 pandemic] across 14 nations surveyed. Moreover, 77% of Americans said the country was now more divided than before the outbreak, as compared with a median of 47% in the 13 other nations surveyed.”).

42. *See, e.g.*, Chris Jackson, Neil Lloyd, James Diamond, & Jocelyn Duran, *Most Americans Believe Political Hostility and Divisiveness Between Ordinary Americans Is a Serious Problem*, IPSOS (Dec. 13, 2021), <https://www.ipsos.com/en-us/news-polls/polarization-december-2021> (“Eight out of ten Americans believe political hostility and divisiveness in the news media (81%), between politicians (81%), between ordinary Americans (81%), and on social media (80%) is a serious problem.”).

distinct enough, leaving the voter with no real choice between alternatives.⁴³ What are the reasons for the sharp rise of polarization since the 1980s? First, there are global reasons as mentioned earlier: global rising in economic gaps, changes in the media, and a growing cosmopolitan elite. During the two decades following WWII, the U.S. enjoyed relatively low levels of economic gaps. However, since the 1970s, and especially since the 1980s, there has been an increased divergence in income and wealth between the lower and the upper percentiles. The wealth of the upper classes grew exponentially faster than the rest of the country, reaching staggering gaps on levels seen only about a century ago.⁴⁴ As mentioned earlier, high levels of economic gaps enhance social alienation and polarization.

In the media sector, the appearance of cable TV in the U.S. in the 1980s increased polarization, allowing for segmentation of the media market and creating news outlets that catered to specific ideological audiences.⁴⁵ This phenomenon was later intensified with social media. Globalization and the rising of the mobile and global elite enhanced alienation between city cosmopolitan centers and the rest of the country, and weakened a shared sense of destiny and community, as was especially apparent in the 2016 elections.⁴⁶

At least two other reasons can be tied to the U.S. First is its two-party system which helps emphasize differences and requires each party to

43. See sources cited *infra* note 48.

44. Data from IRS Census shows that in 2016 13% of all income (after deducing tax) comes from the top 1%. Income disparities resembles those that were not seen in the U.S. since the 1920s. In terms of income gains over time, the same source shows that income gains in the U.S. have been shared equally among the different percentiles from 1947 until around 1980. However, in the years 1980 to 2015 the income of top 1 percent has risen by 226% while those of all other percentile groups have risen only between 47% and 85%. In terms of wealth disparities are even more dramatic. According to the Federal Reserve's Survey of Consumer Finances, in 2016 39% of all the wealth in the U.S. was concentrated by the hands of the 1st percentile. Chad Stone, Danilo Trisi, Arloc Sherman, & Jennifer Beltrán, *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET AND POL'Y PRIORITIES (Jan. 13, 2020), <https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality>.

45. See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008); CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* (2009); MATTHEW LEVENDUSKY, *HOW PARTISAN MEDIA POLARIZE AMERICA* (2013). Filipe Campante, Daniel Hojman, *Media and Polarization: Evidence from the Introduction of Broadcast TV in the United States*, 100 J. OF PUB. ECON. 79, 91 (2013) ("There has been a steady increase in elite polarization in the U.S. since the 1970s, which has coincided with at least three significant structural changes in the American media environment – the rise of talk radio, the expansion of cable TV, and the Internet – all associated with content differentiation and market segmentation. Our approach suggests that these changes may have contributed to increase polarization.").

46. See Dante J. Scala & Kenneth M. Johnson, *Political Polarization along the Rural-Urban Continuum? The Geography of the Presidential Vote, 2000–2016*, 672 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 162 (2017).

underscore its distinctiveness.⁴⁷ This tendency increased significantly after Southerners, who historically associated with the Democratic Party, began moving to the Republican party in the 1960s, making the two parties much more ideologically cohesive and distinct.⁴⁸ Second, the high level of judicialization in the U.S. and the close relationship between law and politics has likely contributed to the high polarization in the U.S. A judicial solution to a political problem is usually more binary and less inclined to compromise than political solutions, which increases polarization. The court's controversial decisions in the 1970s, such as legalizing abortion and abolishing the death penalty, likely contributed to polarization.⁴⁹

B. Court Polarization in the United States Supreme Court

1. Polarization in Judicial Decision-Making

How did political polarization affect the U.S. Supreme Court? The political nature of the U.S. Supreme Court is nothing new and predates the current wave of political polarization; it was acknowledged as early as De Tocqueville's account of the American legal system in 1831.⁵⁰ The unique political nature of the U.S. Supreme Court was in part due to the power of

47. See Dimock & Wike, *supra* note 39 (“America’s relatively rigid, two-party electoral system stands apart by collapsing a wide range of legitimate social and political debates into a singular battle line that can make our differences appear even larger than they may actually be.”).

48. See Ilyana Kuziemko & Ebonya Washington, *Why Did the Democrats Lose the South? Bringing New Data to an Old Debate*, 108 AM. ECON. REV. 2830 (2018) (showing that racial attitudes explained Southern whites’ exodus from the Democratic Party between the 1950s and the 1980s); See also Denise-Marie Ordway, ‘Racially conservative’ Attitudes Led White Southerners to Leave Democratic Party, THE JOURNALIST’S RES. (Oct. 25, 2018), <https://journalistsresource.org/politics-and-government/racism-white-southerners-democrats-republicans/> (“Before 1950, nearly 80 percent of white adults who lived in the 11 states of the former Confederacy identified as Democrats, compared with about 40 percent of white adults in other parts of the country... By the early 2000s, about 30 percent of white adults in the South and nationwide identified as Democrats.”).

49. Antonin Scalia wrote that *Roe v. Wade* (the U.S. Supreme Court decision that legalized abortion before the third trimester) “destroyed the compromises of the past [and] rendered compromise impossible for the future,” and that it “fanned into life an issue that has inflamed our national politics in general.” *Planned Parenthood of Southeastern, Pennsylvania v. Casey*, 505 U.S. 833, 995 (1992); Justice Ruth Bader Ginsburg similarly wrote that “*Roe* ... halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue.” Ruth Bader Ginsburg, *Speaking in A Judicial Voice*, 67 NYU L. REV. 1185, 1208 (1992).

50. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 78-85 (Henry Reeve trans., Adlard & Saunders 1883)(1835).

judicial review that the Court had exercised since 1803, long before most other courts followed suit.⁵¹

Ideological divisions in the Court are also not new. There have been opposing ideological camps on the Court since the early 20th century. Examples include the division between the pro-Lochnerian and anti-Lochnerian camps in the early 1900s⁵² and the Frankfurter and Black judicial camps over judicial deference and interpretation in the 1950s.⁵³ Additionally, the idea that Supreme Court justices decide according to their political views dates back to the 1950s when the first published study found a correlation between the justices' political views and their actual decisions.⁵⁴

However, court politicization recently became progressively overt and partisan, mirroring societal and political division with increasing precision and consistency. While the Court was divided into camps in the past, those divisions could not have been marked as neatly as partisan divisions between two parties or even between conservative and liberal ideologies. For example, the famous Black versus Frankfurter debate was not along party divisions, but rather along methodological ones. Both "New Dealers," Black and Frankfurter, were nominated by the same Democrat, - President Roosevelt.⁵⁵ In addition, although politics has measurably affected the justices' decisions since the 1950s, justices did not vote consistently according to the ideological line of the party of their nominating president. Often they switched sides or developed independent jurisprudences that could be antithetical to that party's interests.⁵⁶

51. See *Marbury v. Madison*, 5 U.S. 137 (1803) (determining the Court's power of judicial review).

52. See generally Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1994).

53. See JAMES F. SIMON, *THE ANTAGONISTS HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989).

54. Classic empirical studies include: Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976); and John B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837-1964*, 31 AM. J. POL. SCI. 259 (1987).

55. These two justices bitterly divided, and split the Court, on almost every issue possible - from free speech and religious rights to formalism and textualism versus pragmatism and balancing - but they were both elected as Roosevelt's New Dealers. See SIMON, *supra* note 53.

56. See Brandon L. Bartels, *The Sources and Consequences of Polarization*, in *AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION* 171 (James Allen Thurber & Antoine Yoshinaka eds., 2015) (arguing that before the early 2000s, justices' positions on issues were not easily correlated with the views of

However, increasingly since the 1980s, and most notably in the past two decades, justices began deciding more predictably than ever before according to party line.⁵⁷ As Richard Hasen writes, “today, party... provides a better signal of ideological orientation than it has in generations... Justices are more likely to be ideologically in line with the interests of their nominating president’s party and less likely to drift ideologically (or “evolve”).”⁵⁸ Empirical studies that follow the decision pattern of U.S. judges show that since the 1980s, the distinctiveness of the conservative and liberal divide on the Court has risen mirroring the political division in this country. Studies measuring court polarization show clear evidence of growing polarization on the Court.⁵⁹

It is true that even today, party alignment is never absolute or exhaustive, and one can still identify “swing votes.”⁶⁰ But, such occurrences of

the party of the nominating president, and that the most robust center existed during the Burger Court of the mid-to-late 1970s, consisting of arguably five swing justices).

57. Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (And Upholding) Federal, State, and Local Laws*, 61 EMORY L. J. 737, 737-38 (2011) (“[T]he Justices’ votes to strike (and uphold) statutes seem to reflect their political preferences toward the policy content of the law, and not an underlying preference for restraint (or activism). In a nutshell, liberal Justices tend to invalidate conservative laws and conservative Justices, liberal laws.”); David Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, THE ATLANTIC (June 29, 2012), <https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/> (“From 1801 to 1940, less than 2 percent of the Supreme Court’s total rulings were resolved by 5-to-4 decisions. Since then, more than 16 percent of the Court’s rulings have been decided by “minimum-winning coalitions.” In the two most recent Courts, more than a fifth of all rulings were decided by 5-to-4 votes ... At least two-thirds of the 5-4 rulings during the Roberts Court have split along ideological lines.”).

58. See Richard Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 266, 267 (2019) (“The Martin-Quinn dynamic ideal point trends show a growing partisan divide on the Supreme Court in recent decades, as seen in Figure 1. Prior to the 1990s, voting patterns reveal substantial ideological overlap of justices appointed by Republicans and Democrats. Following the retirement of John Paul Stevens in 2009, justices separated into two distinct ideological voting blocks along party lines.”).

59. See Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSP. 97 (2021) (Using Martin-Quinn scores for Supreme Court justices the authors argue that “[a]s the salience of judicial ideology has grown in recent years, so has judicial polarization. Judges appointed to the federal courts, from both parties, are increasingly being selected based on their partisan bona fides and being drawn from the ideological extremes.”).

60. Chief Justice John Roberts, who was nominated by a Republican president, occasionally votes with the liberal block and against the conservative block. He is considered by some to be the new “swing vote” on the Supreme Court. See, e.g., Tom McCarthy, *John Roberts Is Now Supreme Court’s Swing Vote – To Conservatives’ Disdain*, THE GUARDIAN (June 30, 2020), <https://www.theguardian.com/law/2020/jun/30/john-roberts-supreme-court-conservatives> (noting that Justice Roberts has voted with the majority in “52 out of 52 recent cases” and surveying the different rulings in which he joined the liberal justices on the court).

independent voting are now rare, and these phenomena align with a decline in the public legitimacy of the Supreme Court.⁶¹

2. Polarization in Nominations

The second manifestation of mirror polarization in the U.S. Supreme Court is the nomination process. Again, the nomination process of justices in the U.S. has always involved politics. The U.S. Constitution assigns nominations of federal judges to the president with the approval of the Senate.⁶² Furthermore, the nomination of judges is separate from the nomination of other political offices, such as cabinet secretaries, ambassadors, and other executive members - all going through the same process. As it has played out over the years, the actual nomination process often involves a lot of politics — much of it overt and unabashed.⁶³

However, despite the role of political considerations in nominations, there was a culture of Senate approval and presidential nominations based on merit. This culture persisted through the 1980s and early 90s with the nominations of Antonin Scalia (1986) by a 98-0 majority in the Senate and of Ruth Bader Ginsburg (1993) by a 96-3 vote. But as social and political polarization grew, the nomination process began to mirror more precisely the political division in society.⁶⁴ Thus, in the confirmation of Chief Justice

61. Amelia Thomson-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis*, FIVETHIRTYEIGHT (Oct. 1, 2018), <https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis> (reviewing perceptions of the Court's legitimacy); See also Kuhn, *supra* note 57, ("Sixty-three percent of Americans said in autumn 2011 that they have a "great deal" or a "fair amount" of faith in it. Yet that is the lowest share to express trust in the judicial branch since 1976, when Gallup first asked the question.")

62. U.S. Const. art. II, § 2, cl. 2.

63. Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002) (documenting how presidents used the appointment of judges to advance their partisan agenda during the 19th century); MELVIN UROFSKY, *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 389 (1994) (describing how one of the nominations to the Court, of John Rutledge by George Washington, was not confirmed by the Senate, among others, because of his position on a political issue.); Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5 (1993) (a political deal was also behind the nomination of Earl Warren to Chief Justice, as Dwight Eisenhower promised Warren— then the popular governor of California—the position of Justice if he would withdraw his candidacy in the Republican Party primaries).

64. By many accounts, the turning point was the failed nomination of Robert Bork to the U.S. Supreme Court. See, e.g., Nina Totenberg, *Robert Bork's Supreme Court Nomination Changed Everything, Maybe Forever*, NAT'L PUB. RADIO (Dec. 19, 2012), <http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybeforever> (quoting Tom Goldstein saying that "Liberal groups turned around and blocked him [Bork] precisely because of those

Roberts (2005), 22 votes were against (all Democrats) and 78 in favor, including only 22 Democrats. But as time passed, the confirmations were decided increasingly by a smaller margin, and fewer Democrats voted for Republican nominees and vice versa. Thus, Justice Kagan was confirmed in a 63 to 37 vote, Alito in a 53 to 42 vote, and Gorsuch in a 54 to 45 vote. In the last nomination of Justice Barrett, party alignment was perfect, 52 to 48, and not a single Democrat voted for her nomination by a Republican president.⁶⁵

Another factor in the nomination process is the search for “sure bets.” This entails that a candidate be clearly aligned with the ideological line of the party rather than opting for consensus or moderate figures, as was often the case in previous years. Similarly, the extent of prying into the nominees’ past has dramatically increased to ensure they are associated with either a liberal or a conservative agenda. As Hasen notes, “the days of ideological surprise from appointed justices appear to be over.”⁶⁶ Today, presidents place “near-exclusive focus on ideological compatibility and reliability.”⁶⁷

3. *Mirror Polarization Turning into One-Sided Polarization*

The U.S. model is therefore aptly characterized as manifesting mirror court polarization. The most recent nomination to the Supreme Court seems to pose a challenge to this assertion. After the last nomination of Amy Coney Barrett to the Supreme Court, there is now a conservative majority of 6 to 3 on the Court - the most significant clear majority of one camp in decades. The recent landmark *Dobbs* decision,⁶⁸ which has polarized the U.S., is an

[conservative] views. Their fight legitimized scorched-earth ideological wars over nominations at the Supreme Court, and to this day both sides remain completely convinced they were right.”). Others trace the process earlier to the 1960s. See LEE EPSTEIN & JEFFREY SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 86 (2005).

65. Richard Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262 (2019) (“The increased polarization in the United States among the political branches and citizenry...affects the selection, work, perception, and relative power of state and federal judges, including justices of the U.S. Supreme Court... In times of greater polarization, governors and presidents who nominate judges, legislators who confirm judges, and voters who vote on judicial candidates are more apt to support or oppose judges on the basis of partisan affiliation or cues.”).

66. *Id.* at 263.

67. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (2016) (showing the involvement of the Federalist society in the vetting process for Republican nominees).

68. See generally *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. (2022) (concluding that the U.S. Constitution does not confer a right to abortion).

indication of conservative control on the Court and the inability of the liberal minority to overcome it. More importantly, this advantage seems relatively stable, threatening to undermine the mirror polarization model, and shifting the U.S. towards another model - one-sided polarization.

Arguably, a shift has already occurred in the U.S., and it should no longer be categorized as a mirror polarization model but as a one-sided polarization model. However, the shift is incomplete, and it is different in its features compared to one-sided polarization in the Westminster World. First, the shift to one-side polarization occurs only in judicial decision-making and not in the realm of nomination. Nominations are expected to continue to be polarized evenly between conservatives and liberals, mirroring the political divide in society. Even so, while nomination battles reflect the political division in society, their outcome is expected to maintain the conservative advantage for the foreseeable future. As polarization heightens, conservative judges can time their retirement to when there is a conservative president, allowing them to maintain their advantage in the Court.

In addition, as the discussion in the next part will show, how the Westminster model systems developed into one-sided polarization is distinct from the U.S. Supreme Court. The political one-sidedness on the courts of the Westminster model developed independently of direct political influence. It was subsequently, at least in principle, more stable and less contingent than the U.S. current political advantage on the Court. The logic of the U.S. system of judicial nomination, as set in the U.S. Constitution, is that there be a balance of power on the Court reflecting the turn of hands between governments on both sides of the political spectrum. Except for the heightened polarization that increased strategic behavior of judges in their retirement, it was expected the system would correct itself over time. Thus, the U.S. system is described as a mirror polarization system, experiencing a glitch in the system that could have self-corrected. In Westminster, the one-sidedness of court polarization is not exactly a glitch but, as will be described, a result of long-term and deep-seated developments. These developments concern possible solutions which would differ between the U.S. and Westminster model countries, but this topic is outside the scope of this Article.

III. ONE-SIDED POLARIZATION – WESTMINSTER MODEL COUNTRIES

Whereas the first model – mirror polarization – dealt with a court polarized into two political camps, mirroring the political polarization in society, the second model discussed in this section deals with courts where polarization favors one side. I identify this model with countries belonging to,

or influenced by, the British parliamentary and judicial model – what is termed “the Westminster Model.” As this part and the next apply to sets of countries rather than only one, the discussion will necessarily be painted with much broader strokes than Part I including unavoidable generalizations.

A. Political Polarization in the United Kingdom and Westminster Model Countries

The term Westminster model alludes to a set of political arrangements that originated in Britain and were left in place in some of its former colonies.⁶⁹ Westminster model countries also share similar legal and judicial institutions – different from the U.S. and Continental Europe. The countries that fall under this category and will be discussed here are the UK, Canada, Australia, New Zealand, and Israel (henceforth “Westminster model countries.”) There are other countries that are also categorized as Westminster model countries. These five countries were selected because they are among the core countries of the Westminster model (especially the first four), but also because they form a relatively coherent group in terms of judicial and constitutional arrangements relevant to my discussion on court polarization.⁷⁰ In terms of polarization, Westminster model countries vary in the intensity and reasoning for polarization. Still, in all of them, there are clear

69. These include, among others, an executive made of ministers that form a cabinet and are also usually members of parliament; a prime minister as head of the executive; a coalition government that needs the support of a majority in parliament; a formal head of the opposition; a symbolic head of state; a house speaker; and an independent and non-partisan civil service. See AREND LIJPHART, PATTERNS OF DEMOCRACY 9 (2012) (outlining the classical characterization of Westminster model democracies); Mark Bevir, *The Westminster Model, Governance and Judicial Reform*, 61 PARLIAMENTARY AFF. 559 (2008); AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES (1984); *But see* Meg Russell & Ruxandra Serban, *The Muddle of the ‘Westminster Model:’ A Concept Stretched Beyond Repair*, 56 GOV’T & OPPOSITION 744 (2021); Matthew Flinders et al., *‘Stretched But Not Snapped:’ A Response to Russell and Serban on Retiring the ‘Westminster Model,’* GOV’T & OPPOSITION, 353-369 (2022) (showing a recent debate as to whether the concept has lost its meaning).

70. Other countries that are often listed as Westminster model countries are Ireland, India, Singapore, Hong Kong, and several former African and Oceanic colonies. However, surveys of Westminster model countries vary and often select only some countries for review depending on the purpose of the review. See, e.g., Cheryl N. Collier & Tracey Raney, *Understanding Sexism and Sexual Harassment in Politics: A Comparison of Westminster Parliaments in Australia, the United Kingdom, and Canada*, 25 SOC. POL. 423 (2018). For the purposes of my review, the countries listed above present the most coherent set in terms of judicial arrangements and political and constitutional structure. A few countries stand apart from this list: Ireland because of its civil law tradition; India because it has had a constitution with a bill of rights since its independence; and Singapore and Hong Kong because of their democratic challenges.

signs of increased political polarization in recent years.⁷¹ Compared to the U.S., the level of polarization in these countries is lower, but considering that the polarization process started later in Westminster model countries, it may still rise in the future. Polarization in Westminster model countries is tied with the global reasons discussed above: the rising gap between the rich and poor,⁷² the increasing alienation between the global and mobile elite and the local middle and lower classes,⁷³ the rise in nationalism and localism, and the changes in the media. Other reasons are more localized.

In the UK, the Brexit vote was among the chief reasons for rising polarization, as it divided British society almost in two. This division took shape in extreme forms that demonized the other political side, and the political rift that evolved paralleled socio-economic and geographical divisions. Brexit, however, represented only one facet of a growing divide in Britain over several other issues, such as the support of the EU project, immigration, and nationalism vs. cosmopolitanism.⁷⁴ Another indication of polarization in the UK is political radicalization, expressed emphatically during the Corbin era in the Labor party, accentuating the ideological gaps between left and right.⁷⁵ Surveys show a distinct rise in polarization in Britain since the 2000s, reaching its peak in the 1980s.⁷⁶

In Israel, the persona of former prime minister, Binyamin Netanyahu (Bibi), is at the center of fierce polarization that divides Israeli society into two demarcated camps (“Bibists” and “anti-Bibists.”) This remains the case even after Netanyahu has left office as prime minister. But, as with Brexit, polarization emanates from long-dated wide divisions beginning in the 1980s

71. See source cited *supra* note 70.

72. See, e.g., Inglehart & Norris, *supra* note 26 (explaining polarization in the UK partly by referring to economic gaps).

73. See, e.g., Cunningham & Savage, *supra* note 27.

74. See Shannon Schumacher, *Brexit Divides the UK, But Partisanship and Ideology Are Still Key Factors*, PEW RSCH. CTR. (Oct 28, 2019), <https://www.pewresearch.org/fact-tank/2019/10/28/brexit-divides-the-uk-but-partisanship-and-ideology-are-still-key-factors/> (showing that “A question that has divided British politics—whether to leave the European Union or remain part of it—aligns with attitudes toward the EU, immigration and the country’s culture, but traditional cleavages along party lines and the left-right ideological spectrum still exist on other topics, according to a new Pew Research Center survey.”).

75. See Eaton, *supra* note 2; Bill Blackwater, *Morality and Left-Wing Politics: A Case Study of Jeremy Corbyn’s Labour Party*, 24 RENEWAL: A J. OF SOC. DEMOCRACY 3 (2016) (documenting how Jeremy Corbyn’s Morality Politics increased extremism and polarization).

76. See Boxel et al., *supra* note 4, at 18 (showing a steep incline in affective polarization levels in the UK from 2005 to 2020).

correlated with socio-economic and religiosity differences. Surveys show very high levels of polarization in Israel.⁷⁷

Polarization in Australia, Canada, and New Zealand is less distinct than in the UK and Israel. Still, the issue receives increasing attention in politics and the media, including the effects of polarized written, broadcast, and social media. In this respect, there is an increased resemblance to the U.S.⁷⁸

B. The Westminster Model of a Professional Court

The legal and judicial systems of Westminster model countries share several features in common. These countries operate within a common law tradition; are headed by a supreme court or a court of a similar title, and have no separate constitutional court; have a unique attorney general office; and have similar administrative law traditions and processes for judicial nominations.⁷⁹

Some of these features are also shared by the U.S. However, unlike the U.S., before 1982, these countries did not have a constitutional bill of rights that conferred the power of judicial review in human rights matters to their highest court. Rather, there was a strong tradition of *parliamentary sovereignty*, meaning parliament (rather than the constitution) was viewed as the highest source of authority in the country, and the Court was extremely reluctant to interfere with parliament's autonomy.⁸⁰

Systems operating under parliamentary sovereignty have also been termed systems of *political constitutionalism*.⁸¹ In contrast to *legal*

77. See generally Lotem Bassan-Nygate & Chagai M. Weiss, *It's Us or Them: Partisan Polarization in Israel and Beyond* 3 MENA POL. NEWSL. 1 (2020).

78. Shannon Molloy, *Australia Has Never Been More Divided on Social and Political Issues. Are We Becoming the U.S.?*, NEWS.COM.AU (Oct. 12, 2018), <https://www.news.com.au/finance/work/leaders/australia-has-never-been-more-divided-on-social-and-political-issues-are-we-becoming-the-us/news-story/0891d42f4ce4e23c92aba59769ab60e9>; See also Luke Mansillo & Nick Evershed, *Australian Politics Becoming More Polarized*, THE GUARDIAN (Aug. 7, 2014), <https://www.theguardian.com/news/datablog/2014/aug/07/australian-politics-becoming-more-polarised> ("So, using the standard deviation as a measure of polarisation, we can see it has increased over time.").

79. See *supra* text accompanying note 70; See sources cited *supra* note 15.

80. See sources cited *supra* text note 69.

81. See Richard Bellamy, *Legal Constitutionalism: From the Separation Of Powers to Rights and Judicial Review*, ENCYC. BRITANNICA (July 30, 2019), <https://www.britannica.com/topic/constitutionalism/> (outlining the distinction and discussing some of the criticism of legal professionalism, including that it is less egalitarian than political constitutionalism: "whereas political constitutionalism responds to majority views for enhanced and more equal public goods, legal constitutionalism has inhibited such reforms on grounds of their

constitutionalism, in which the court is entrusted with the protection of constitutional principles and human rights, *political constitutionalism* means that the political organs – parliament and the executive – protect and promote constitutional principles and values (either written or unwritten), including human rights. Australia and Canada (unlike New Zealand, the UK, and Israel) had constitutions even before 1982. They needed constitutions due to their federal systems and needed rules to govern the relations between the states and the union. However, their constitutions were (and still are in Australia) strictly “institutional” regulating the workings of the branches of government - and did not confer on the court any powers to intervene in sensitive moral or policy issues relating to human rights.⁸²

The inability to engage in judicial review (other than on institutional matters) immunized apex courts in the Westminster model from political involvement, which explained their low political profile compared to the U.S. Supreme Court.⁸³ Thus, judges in these countries were rarely identified with a particular ideology; no surveys were carried out to determine the ideological leanings of judges as in the U.S., and apex court judges were not well-known public figures. Concurrently, the nomination of judges in Westminster model countries was not politicized. Although judges in these countries (excluding Israel) were nominated by the executive, the actual nomination process was never political in the partisan or ideological sense, but was based primarily on professional merit and consultation with the legal profession.⁸⁴

Another difference from the U.S. is that the legal profession in British-based systems was associated with conservatism and the high class, not with a reformist or revolutionary force in society. This is unlike the U.S., where from the 1960s, courts were involved in dealing with social campaigns

interfering with individual property and other rights.”); Panu Minkkinen, *Political Constitutionalism Versus Political Constitutional Theory: Law, Power, and Politics*, 11 INT’L J. CONST. L. 585 (2013) (distinguishing between political constitutionalism and consensus-based theories).

82. See DAVID ERDOS, *DELEGATING RIGHTS PROTECTION: THE RISE OF BILLS OF RIGHTS IN THE WESTMINSTER WORLD* 10 (2010) (documenting the change in the Westminster World that was, previously, devoid of Bills of Rights).

83. See Jeremy Waldron, *The Core Case Against Judicial Review*, 115 YALE L. J. 1346, 1349-50 (2006) (relying on this fact to criticize judicial review).

84. Judicial nomination is done by the Minister of Justice and Attorney General in Canada, by the cabinet in Australia and New Zealand, and by a committee of professionals (created in 2009 to select judges for the then newly formed Supreme Court; prior to this reform, the Lord Chancellor, a cabinet member, made the nomination). Since 1953, judges are chosen by a selection committee comprised of two ministers, two parliament members, three presiding Supreme Court judges, and two members of the bar. See *supra* text accompanying note 69; See also *The Appointment, Tenure and Removal of Judges Under Commonwealth Principles: A Compendium and Analysis of Best Practice*, BINGHAM CTR. FOR THE RULE OF L. (2015).

against inequality for African-Americans, women, the LGBTQ community, the death penalty, and the prohibition on abortion. In Westminster model countries, parliamentary committees discussed and determined such debates.⁸⁵

C. Erosion of the Professional Model and One-Sided Polarization

The professional model of the judiciary described above began changing as early as the 1980s and heavily in the 1990s. The UK, New Zealand, Australia, Canada, and Israel were not immune from the strong influences of the culture of human rights, liberal constitutionalism, and the models of activist constitutional courts emanating from the U.S. and Continental Europe in the second half of the 20th century.⁸⁶ Compared to the innovative and morally assured spirit from the U.S. and the European courts, Westminster model courts seemed dull and archaic. Both judges and politicians in the Westminster model could not detach themselves from this global trend toward human rights protection and liberal constitutionalism. They gradually began eroding the ethos of parliamentary sovereignty, political constitutionalism, and conservative non-political lawyers and judges.⁸⁷

In terms of the judiciary, these changes are often surveyed under constitutional migration of ideas, transjudicial communications,⁸⁸ or global constitutionalism, which reached their peak in the 1990s.⁸⁹ In Westminster model countries, they were manifested, among others, in adopting concepts from EU human rights adjudication, such as proportionality, which, since the 1990s, became the lingua franca of global constitutionalism.⁹⁰ For the UK,

85. See WALDRON, *supra* note 83 (advocating the UK model of parliamentary committees over the U.S. model of adjudicative decisions in major societal controversies).

86. See ERDOS, *supra* note 82.

87. See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (documenting the global rise in the power of judges, including in Westminster countries); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 1* (2000); Iddo Porat, *Towering Judges and Global Constitutionalism in TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES* 21, 25-26 (Rehan Abeyratne & Iddo Porat eds., 2021) (documenting the empowerment of judges, including in Westminster model countries, especially in the 1990s and onwards).

88. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101 (1994).

89. See generally David S. Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1231-34 (2011).

90. See Bilika H. Simamba, *Proportionality as a Constitutional Ground of Judicial Review With Special Reference to Human Rights*, 16 OXFORD U. COMMONWEALTH L. J. 125 (2016) (documenting the insertion of proportionality review in commonwealth jurisdictions).

once it joined the EU in 1973, there was a direct influence of EU law on its local legal sphere.⁹¹

In terms of political changes, these countries witnessed attempts to adopt a constitutional bill of rights with judicial review. The first to directly depart from political constitutionalism was Canada. In 1982, it adopted the Charter of Rights and Freedoms and gave its Supreme Court the power of judicial review in human rights matters. This had a profound influence on all other systems in this model. Thus, New Zealand adopted its Bill of Rights Act in 1990; Israel adopted two human rights Basic Laws in 1992 – Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty; the UK adopted the Human Rights Act in 1998; and in Australia, the State of Victoria and the Australia Capitol Territory (Canberra) adopted their own bills of rights – the Victoria Charter of Human Rights and Responsibilities Act 2008, and The Human Rights Act 2004.⁹² While the Constitution of Australia does not include a bill of rights, the High Court of Australia read into Australia's Constitution an “implied freedom of political communication” in 1992.⁹³

The changes listed above had two profound effects on the interaction between the courts and politics: first, the relevant courts became more activist and politically engaged, and second, they gradually became associated with liberal viewpoints, resulting in one-side polarization.

Why this association with liberalism? First, ideologically, the political left adheres to the liberal and cosmopolitan ideas manifested in global constitutionalism and bills of rights more so than the conservative and locally oriented political right.⁹⁴ Therefore, the human-rights-based empowerment of the judiciary aligned ideologically more with the liberal than with

91. See, e.g., JAIME ARANCIBIA, JUDICIAL REVIEW OF COMMERCIAL REGULATION 133-96 (2011); See Andrew Gamble, *The Constitutional Revolution in the United Kingdom*, 36 PUBLIUS 19, 25-26 (2006); Adrienne Stone, *Proportionality and Its Alternatives*, in CURRENT ISSUES IN AUSTRALIAN CONSTITUTIONAL LAW: TRIBUTES TO PROFESSOR LESLIE ZINES 170, 178-79 (John Griffiths & James Stellios eds., 2020) (documenting the use of proportionality in Australian High Court adjudication).

92. See generally ERDOS *supra* note 82; Iddo Porat, *The Platonic Conception of the Israeli Constitution* in THE INVISIBLE CONSTITUTION IN COMPARATIVE PERSPECTIVE 268, 270, 275-78 (Rosalind Dixon & Adrienne Stone eds., 2017) (documenting the Israeli “constitutional revolution” by which the Israeli Supreme Court extended the two new Basic Laws of 1992 into a full constitution).

93. *Australian Cap. Television v Commonwealth* [1992] HCA 45 (Austl.) (establishing the “implied freedom of political discourse.”).

94. See Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, COLUM. J. TRANSNAT'L. L. 72 (2008) (analyzing the liberally associated spread of proportionality as part of Global Constitutionalism); PORAT, *supra* note 87 (describing the advent of Global Constitutionalism, including in Westminster model countries as part of a liberal politics upsurge reaching its peak in the 1990s after the fall of the Soviet Union).

conservatives. Thus, it was liberal governments or parties that initiated the enactment of bills of rights.⁹⁵ Second, according to several scholars, the empowerment of the judiciary in Westminster model countries served the left politically. According to David Erdos, the drive for bills of rights in Westminster model countries was partly motivated by a reaction to strong governments headed by the right and a means to curb their executive power.⁹⁶ Ran Hirschl describes a similar process in Israel where the left, once it lost its political hegemony to the right in the 1980s, looked for a way to retain its political influence by empowering the judiciary and enhancing its liberal human rights mechanisms.⁹⁷

The outcome was that the courts in the relevant countries (to varying degrees) began being associated with the liberal left and criticized by the political right for activism and overzealous liberalism. These countries shifted from predominantly non-political and professional courts to greater political involvement being generally associated more with liberal viewpoints – i.e., one sided-polarization. With increased political polarization, this association became clearer, and right-wing accusations of the courts for being too liberal,⁹⁸ including attempts to reform and “rebalance” them increased. Thus, in recent years, there have been many reform attempts from

95. In Canada, the Charter of Rights and Freedoms (1982) was enacted by the Liberal Party headed by Pierre Trudeau; In New Zealand the Bill of Right Act 1990 was enacted by the Labour government and was initiated by the Minister of Justice and also prime minister for a year Geoffrey Palmer; in the UK the Human Rights Act 1998 was enacted by the Labour government headed by Tony Blair; In Israel the two Basic Laws of 1992 were enacted by the initiative of liberal left and center parties in a national coalition government of both left and right wing parties headed by the right wing prime minister Yitzhak Shamir. In Victoria the Victoria Charter of Human Rights and Responsibilities Act 2008 was enacted by the Victoria Labor government; The Human Rights Act 2004 of the Australian Capital Territory was enacted by Labor party government of the ACT. *See generally* ERDOS, *supra* note 82.

96. ERDOS, *supra* note 82 (“[Bills of rights were] prompted politically by a relatively weak and backward-looking ‘aversive’ reaction against perceived abuses of power under the previous administration.”).

97. HIRSCHL, *supra* note 87; *See also* Ruth Gavison, *Constitutions and Political Reconstruction? Israel’s Quest for a Constitution*, 18 INT’L SOCIO. 53, 53 (2003) (arguing that the Israeli Supreme Court’s expansive interpretation of the 1992 Basic Laws was a liberally driven “constitutional process designed to arrest - rather than facilitate and reflect – [conservative] social, political and demographic changes.”).

98. *See, e.g.*, Sam Fowles, *Ministers’ Attacks on Judges Threaten UK Democracy, Warns New Report*, OPEN DEMOCRACY (June 8, 2022, 12:00 AM), <https://www.opendemocracy.net/en/boris-johnson-ministers-attack-judges-priti-patel-supreme-court/>; For academia driven conservative-oriented attacks in Australia, *see* Tom Campbell, *Activism – Justice or Treason*, 10 OTAGO L. REV. 307, 313-14 (2003) (provocatively suggesting that activist judges should be tried for treason); *See* Iddo Porat, *Solving One-Side Polarization: Supreme Court Polarization and Politicization in Israel and the U.S.*, 15 LAW & ETHICS HUM. RTS. 221, 241 (2021) (documenting the right-wing attacks against the Israeli Supreme Court).

right-wing or conservative parties, especially in the UK and Israel.⁹⁹ In Israel, there is clear statistical data indicating a one-sided polarization of the court. As of 2019, support for the Israeli Supreme Court among left-wing voters was at a rate of 88 percent, whereas among right-wing voters, it was only 33 percent.¹⁰⁰

In addition, in all three countries, a judicial nomination scheme, that had been stable and undisputed for many years, has recently become contested to address or fend off increased court politicization.¹⁰¹ Australia and New Zealand have experienced a conservative backlash against what was considered a one-sided liberal court and the nomination of conservative judges in the 1990s and early 2000s.¹⁰²

99. Edward Malnick, *Supreme Court to Be Overhauled to Curtail Its Constitutional Powers: Reforms Being Considered Include a New Name for the Body to Make Clear That It Is Not a U.S.-Style Constitutional Court*, THE TELEGRAPH (Nov. 14, 2020, 9:30 PM), <https://www.telegraph.co.uk/politics/2020/11/14/britains-supreme-court-faces-overhaul-concerns-us-style-election/>; Ella Glover, *Boris Johnson 'Planning Reforms Which Would Let Ministers Overrule Judicial Decisions'*, INDEPENDENT (Dec. 6, 2021, 6:10 AM), <https://www.independent.co.uk/news/uk/politics/boris-johnson-reforms-judicial-review-b1970290.html>; Jessica Elgot, *Johnson Publishes Plans to Regain Power From Courts and MPs: Legislation Will Ban Courts From Ruling on Dissolution of Parliament and Allow PM to Call Elections*, THE GUARDIAN (Dec. 1, 2020, 9:55 AM), <https://www.theguardian.com/politics/2020/dec/01/boris-johnson-publishes-plans-to-take-power-back-from-courts-and-mps>; See Porat, *supra* note 99 (documenting the reform initiatives from right-wing parties and MP's, such as a general override clause that would allow the parliament to override court annulment of legislation).

100. TAMAR HERMANN, OR ANABI, WILLIAM CUBBISON & ELLA HELLER, THE ISRAELI DEMOCRACY INDEX 48 (2019) (Isr.) (indicating that 59% of Israelis think that judges are affected in their decisions by their political inclinations to a great or considerable extent).

101. Owen Bowcott, *Lady Hale Warns UK Not to Select Judges on Basis of Political Views*, THE GUARDIAN (Dec. 18, 2019, 12:47 PM), <https://www.theguardian.com/law/2019/dec/18/lady-hale-warns-uk-not-to-select-top-judges-on-basis-of-political-views> (responding to conservative government suggestion to have hearings for Supreme Court nominations in the UK); See *Hearings for Prospective Supreme Court Justices to Be Broadcast Live*, TIMES OF ISRAEL (Apr. 11 2022, 2:30 PM), <https://www.timesofisrael.com/hearings-for-prospective-supreme-court-justices-to-be-broadcast-live/> (explaining Israel recently held open hearing for judicial nominations have been decided on, another step in an ongoing debate over judicial nominations); See also Sa'ar pans *Opposition Bill 'Politicizing' Selection of Supreme Court Judges*, TIMES OF ISRAEL (June 13, 2022, 4:54 PM), <https://www.timesofisrael.com/saar-pans-opposition-bill-politicizing-selection-of-supreme-court-judges/> (describing current Minister of Justice's rejection of right-wing opposition bill regarding the selection of judges to the Supreme Court).

102. See ERDOS, *supra* note 82.

D. One-Sided Polarization and Political Polarization

The shifts in the professional model of the judiciary and the court's association with the liberal left began in the 1980s and 1990s when levels of political polarization in the relevant countries were still relatively low. One may argue that one-sided polarization is not an accurate term when applied to Westminster countries since the changes described above were not caused by polarization. This is, however, only partly correct. It is true that, unlike in the U.S., there is no one-directional causal relationship between the increased political polarization and the polarization of the court. However, one can say that the two phenomena – court polarization and the intensification of political polarization – are interrelated and result from similar processes.

First, as mentioned before, the more political polarization increased, the greater court identification with one viewpoint became distinct, which drew the court directly into the political debate. Thus, the highly polarizing Brexit debate identified the UK Supreme Court as an activist, threatening conservatives rather than liberals. Secondly, the same set of reasons that created one-sided court polarization was later responsible for the development of political polarization in Westminster model countries. As mentioned above, polarization is related to a backlash against the increased political power and perceived hegemony of the liberal and cosmopolitan elite. The same increase in the political power of the liberal cosmopolitan elite is also related to the bills of rights initiatives in the Westminster model countries. Finally, the court itself may be a contributing factor to political polarization, as its increased involvement in political affairs can increase political polarization, like in the U.S.

E. One-Sided Polarization Turning into Mirror Polarization

In several of the relevant countries, there are some indications that the one-sided polarization model might be shifting gradually into a mirror polarization model. As conservative and right-wing parties realize that the court is becoming more of a central political player and generally inclined to the progressive and liberal side of the political map, they wish to interfere and change this process. Hence, in several of the Westminster model countries, one sees attempts from the right to curb the power of the court, but also, more interestingly, to put in place conservative judges who would rebalance the court. Thus, judicial nominations in Westminster model countries become more political, as in the U.S., and one can distinguish between conservative and liberal judges within the judiciary as in the U.S. In Canada, the UK, and Israel, it is common to refer to some judges as liberal or conservative (not

only as activist or deferential), which was almost unthinkable in these jurisdictions only two decades ago.¹⁰³

Some Westminster model countries might be heading into an American-model mirror-polarization. It should be noted that those systems are still very different from the U.S. in levels of court polarization. This is partially because the legal culture in Westminster model countries is still embedded in the professional model, making it much harder to admit all-out political nomination and decision-making. But the pressures toward such a model seem to mount as the political stakes go up. In Israel, for example, where court polarization is very high, one might argue that U.S.-style mirror polarization has already arrived.¹⁰⁴

IV. CRACKS IN THE CONSENSUS-BASED MODEL

We move now from the U.S. and Westminster model countries, which represented a clear opposition between the two models - mirror polarization and one-sided polarization - to Continental Europe and a more tenuous relationship between the judiciary and polarization. There are two main relevant differences between Continental Europe and both the U.S. and the Westminster model systems: one relating to the nature of the political party system and the other to the structure of the apex court and its relation to politics. I turn to these two differences to provide background about the developments in society and the courts following polarization.

103. Sean Fine, *Canada's Supreme Court is Off-Balance as 'Large and Liberal' Consensus on the Charter Falls Apart*, THE GLOBE AND MAIL (Jan. 15, 2022), <https://www.theglobeandmail.com/canada/article-canadas-supreme-court-is-off-balance-as-large-and-liberal-consensus-on/> ("For the first time, the Supreme Court had split almost entirely by party of appointment – just like its U.S. counterpart. Judges chosen by Conservative prime minister Stephen Harper were on one side, and judges named by Liberal prime ministers on the other, with a lone exception on each side."); Alex Dean, *The Government Wanted to Rein in the Supreme Court. Now It May Not Need to*, THE PROSPECT MAG. (Oct. 16, 2021), <https://www.prospectmagazine.co.uk/politics/the-government-wanted-to-rein-in-the-supreme-court-now-it-may-not-need-to-hale-reed-prorogation> (describing an increased cleavage in the UK Supreme Court between conservative and liberal judges, and the general tendency of the court to become more conservative); THE ECONOMIST, *Britain's Supreme Court Takes a Conservative Turn: It Rejects More Human-Rights Claims and Sides with Public Bodies More Often* (June 2, 2022), <https://www.economist.com/britain/2022/06/02/britains-supreme-court-takes-a-conservative-turn> (documenting the decline in success rates of petitions against the government in the UK Supreme Court).

104. *Britain's Supreme Court Takes a Conservative Turn: It Rejects More Human-Rights Claims and Sides with Public Bodies More Often*, THE ECONOMIST (June 2, 2022, 10:00 AM), <https://www.economist.com/britain/2022/06/02/britains-supreme-court-takes-a-conservative-turn> (documenting the decline in success rates of petitions against the government in the UK Supreme Court).

A. Two Differences Between United States/ United Kingdom-Based Systems and Continental Europe

As to the political party system, Britain and the U.S. have been characterized for over two centuries by politics of two major parties, alternating in taking power and struggling for domination in a democratic system. On the other hand, Continental Europe was characterized by more fragile democratic systems and much younger democracies. In most of Continental Europe, the two-party system did not develop in the same manner. Instead, these countries developed a system based on a big center (center right or center left), accompanied by fringe parties, which continued to characterize Europe after democracy was finally firmly established following WWII.¹⁰⁵

This structure also reflected a difference in political culture. The Anglo-American world – the U.S. in particular - was built on a political culture of conflict and pluralism, where the outcome of the democratic process reflects the power struggle between two big parties. The U.S. also reflected this in its constitutional system that is based on checks and balances, where not only parties were pitted one against the other, but also the different branches of government - the president, Congress, and the Supreme Court. On the other hand, the political culture in Europe, as manifested in Germany, was an organic conception of the polity based on cooperation around a shared set of values instead of pluralism and conflict.¹⁰⁶

The effects of WWII also contributed to the development of a big center in European countries and a consensus-based conception of the polity. A crucial sign of the upcoming breakdown of German democracy was the fact that, in the 1932 July elections of the Weimer republic, the Social Democratic center party received only 21.6%, while the extreme non-liberal parties - the Nazi Party from the right and the Communist Party from the left - received 37% and 14%, respectively, amounting to more than 51% of the total vote.¹⁰⁷ The lesson from the devastating effects of this political extremism

105. See generally MATTHEW SOBERG SHUGART & MARTIN P. WATTENBERG, MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS? (2003) (analyzing advantages and disadvantages of the two-party and the multi-party system to suggest a mixed model); DAVID J. SAMUELS & MATTHEW SHUGART, PRESIDENTS, PARTIES, AND PRIME MINISTERS: HOW THE SEPARATION OF POWERS AFFECTS PARTY ORGANIZATION AND BEHAVIOR (2010) (analyzing variation in the relationships among presidents, parties, and prime ministers across the world's democracies).

106. See MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE, 44-63 (2013) (conflating the political culture of the U.S. and Europe to explain constitutional differences).

107. See Jerome Kerwin, *The German Reichstag Elections of July 31, 1932*, 26 AM. POL. SCI. REV. 921 (2013).

was the formation of political moderation and a strong center capable of outlawing extreme non-democratic and non-liberal parties through the doctrine of militant democracy.

The second and related main difference between the Anglo-American world and Continental Europe relates to the structure of the apex court and its relation to politics. As described earlier, the U.S. and British courts assumed either one of two positions vis-a-vis the political system: either reflecting some degree of political struggle - the U.S. model; or separating itself completely from politics - the British model (before the 1980s). In Post WWII Europe, a third model evolved - a politically oriented but consensually based court. This was the model around which the constitutional courts in Europe were created.¹⁰⁸

European constitutional courts combine political orientation with legitimation based on objectivity and professionalism. On the one hand, they are conceived as political organs. Thus, judges on constitutional courts are selected, in most European countries, by a combination of parliamentary and executive votes. In practice, judicial slots are often allocated to political parties according to their size.¹⁰⁹ On the other hand, these courts are not conceived of as political in the ideological and conflictual sense, and are not expected to take part in political or ideological struggles. They are conceived of as objective and impartial, including a very high level of consensus around them across all parts of the political spectrum. This was achieved largely because of a political culture that is based on shared values and a strong center. The judges manifested center values in their rulings, providing an objective shape in concrete cases.¹¹⁰

B. Polarization and Cracks in the Center and Consensus-Based Model

As mentioned in Part I, gradually, the center and consensus-based political model started to erode, and forces of polarization arose in European politics. In Part I, I described how the passing of time from the trauma of WWII, coupled with historical developments such as the rise of immigration,

108. See generally ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000) (documenting the development of the constitutional courts in Europe and the increase in their political power).

109. See *id.* at 32-38.

110. See JACCO BOMHOFF, *BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE*, at 77 (2003) (describing the legal culture in Germany in particular that views judiciaries as objective even when applying open-ended doctrines such as balancing and proportionality, through the idea of “objective value order.”).

economic inequality, and global terrorism, allowed for the resurfacing of polarizing forces that were previously suppressed under the new liberal order. The politics of the first two decades of the 21st century reflected these changes, with a dramatic rise in extreme parties, mainly from the right, and with a legitimacy crisis of the entire project of the new liberal Europe, especially of the European Union that embodies it.¹¹¹

The effects of polarization did not leave the courts unaffected. However, such effects are far more nuanced and recent in Continental European Courts than in the U.S. and UK-based courts. The main effect of polarization on European constitutional courts is the creation of new tensions around the previously consensus-based nomination process of judges. Therefore, I termed the court polarization model in Continental Europe, “cracks in consensus based-nominations.” Two countries show signs of this process – Switzerland and Germany.

In Switzerland, judicial nominations are conducted through a political process. A proposal to move from a political nomination to a professional one via a professional committee was defeated in 2001. Judges are selected by a simple majority vote of the combined two houses of parliament. In effect, since the 1950s, nominations were based on a political consensus model in which each of the three big parties nominated judges in proportion to each party’s size in parliament. Since the 1950s, this model has worked relatively well, with the number of judges on the Federal Supreme Court nominated by each party reflecting the relative size of the parties.¹¹²

Referring to the previous discussion, one might wonder whether this arrangement fits the description of a mirror polarization model. It does not because it does not bear any relation to social and political polarization, but is based on the opposing idea of consensus. There is indeed a mirroring of the political structure regarding slots on the constitutional courts, but the judges nominated are not expected to act in accordance with the party ideology that nominated them. In other words, there is no mirroring of political polarization pertaining to decision-making. In addition, there is no mirror polarization in the nomination process, as the process is not conflictual or divisive but consensual. How such a system can exist – a system in which parties nominate judges but the judges are not political - might be a mystery for an Anglo-American skeptical and cynical audience. Such a system, however, does work – or, more precisely, it worked until the effects of

111. *See supra* notes 24-26 and accompanying text; *See also* CHRISTIAN SCHWEIGER, *EXPLORING THE EU’S LEGITIMACY CRISIS: THE DARK HEART OF EUROPE* (2016) (documenting the legitimacy crisis of the European Union since the economic crisis of 2007-08).

112. *See* Adrian Vatter, *Switzerland on the Road from a Consociational to a Centrifugal Democracy?*, 22 *SWISS POL. SCI. REV.*, at 59 (2016).

polarization reached Continental Europe and drove the nomination process, according to Vatter, from a “consensus based model to a battleground around the nomination process.”¹¹³

The Swiss political party map throughout most of the second half of the 20th century was made of three center-based political parties. Since the 1990s, however, a fourth party, the fringe right-wing party, Swiss people’s Party (SVP), began a dramatic rise in popularity and share in parliament. Over time, the SVP surpassed all other parties and became the largest party in the Swiss parliament. This required a reshuffling of the balance of power on the Court and brought about battles around nominations in what was previously a quiet, consensus-based nomination process. Because the once-fringe party grew dramatically in power, a situation arose where the center parties remained overrepresented in the Court, and the SVP claimed its proportional share. It is unclear whether this nomination battleground will remain or settle down as the SVP reaches its proportionate share of judges on the Court. Still, it attests to the undoing of a previously consensus-based status quo.¹¹⁴

In Germany, a similar process has occurred, but only at the state level and not at the federal level. The very high vote threshold of 5% in German federal elections does not allow small and extreme right-wing pirates to enter the German parliament – the Bundestag. In the 2017 elections, the extreme right-wing Alternative für Deutschland (AfD) received almost 5% of the vote but that was not enough to enter the Bundestag. However, AfD did win elections at the state level, and similar to Switzerland, state-level elections became a battleground for the nomination of judges. For instance, when the AfD nominated Sabine Reger as a judge at the constitutional court of Baden-Württemberg in 2018, the big parties were in a dilemma. On the one hand, they did not want to legitimize a judge belonging to such an extreme right-wing party. On the other hand, opposing a judge of a party that was elected democratically could be viewed as undemocratic and sidestepping political opponents. The center parties ended up cooperating with the nomination of Reger, but it remains to be seen how these tensions evolve and whether similar high-stakes dilemmas occur in the future.

113. *See id.*

114. *See* Rahel Freiburghaus & Adrian Vatter, *The Political Side of Consociationalism Reconsidered: Switzerland between a Polarized Parliament and Delicate Government Collegiality*, 25 SWISS POL. SCI. REV., at 357 (2019).

CONCLUSION

Constitutional and supreme courts worldwide are experiencing strong strains and new challenges from the forces of political polarization ravaging many polities. However, not all jurisdictions react the same way to the pressures of polarization. This Article aimed to give a general framework and typology for the different ways different courts are affected by and react to political polarization. Doing so it has found surprising similarities between jurisdictions, as well as important distinctions. It has also shown that courts and judiciaries are not stable but are in a state of flux, shifting between one model to another.

This Article showed that the U.S. is currently shifting from a mirror polarization to a one-sided polarization model. First, I demonstrated how political polarization in the makeup of the U.S. Supreme Court created a mirror polarization model in the U.S. But following the latest nomination to the U.S. Supreme Court, and manifested by the polarizing *Dobbs* decision, a stable majority of conservatives on the Court threaten to undermine not only this model but moves the U.S. into a one-sided polarization model.

In Westminster-model countries, courts that used to be associated with the liberal left (one-sided polarization) are being polarized into an American-style, liberal versus conservative fight (mirror polarization). The only system that shows relative immunity and stability is the Continental European model, but it also faces challenges owing to the upsurge of polarization.

If there is one lesson to be drawn from this study, it is that “one-sided polarization” – the court identifying with one side of the political map - is not a stable situation. Once courts in the Westminster World became associated with the liberal left, pressure from the right inevitably amounted, driving those courts to change. The U.S. managed to sustain its politically associated judiciary, even as adjudication became increasingly partisan because the Court was not completely one-sided. Now that it is, it is hard to see how this could be a stable situation. Europe might give us a clue as to how to combine political courts with consensus building. But as Europe is facing new challenges, and as institutional differences from both the U.S. and Westminster model countries are great, much more work is needed for us to draw on its experience to benefit either of these two jurisdictions.

The Article, therefore, does not provide an answer but tries to provide a basis for the more challenging task to come – addressing court polarization and stabilizing the current struggling judiciaries around the world.
