

Cozen Currents: Do Election Polls Matter Anymore?

The Cozen Lens

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Everyone loves to hate polls, and with some good reason. But as the midterms near, they provide an important, yet limited, tool for gauging the election.

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The conventional wisdom is that gridlock will block the passage of anything except must-pass bills. Yet there is room for bipartisan legislation to advance under a divided government on a handful of meaningful issues, including Big Tech, crypto, and telehealth, just to name a few.

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Although a divided government will still present opportunities for bipartisan legislative achievements, the Democratic agenda will now shift increasingly to focus on regulatory policy.

Is Polling Error Still a Concern?

Polling is Hard. The 2020 election saw the largest polling error in 40 years. The postmortem hasn't provided any easy answers to the challenges facing the industry today.

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In 2020, the average polling error had a Democratic bias. National polls were on average 3.9 points too favorable to Joe Biden. The average Democratic bias in gubernatorial and Senate races was even larger at 6.0 points.

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There was a Republican bias in the polls back in 2012, but in every election cycle since (2014-2020), the polls in competitive races skewed towards the Democrats to varying degrees.

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In an age of screening cell phone calls and declining trust (response rates to pollsters in the past 20 years have plummeted from over one-third to just six percent), it's harder for pollsters to get a representative sample of public opinion and voting intentions. With how the party coalitions are aligned these days, those most distrustful of a pollster are more likely to vote Republican.

Trust But Verify the Polls. There's no way to know the direction and magnitude of polling error this year. Polls remain important gauges but are just one piece of the midterm puzzle.

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Polling still matters. Polls have a good track record for correctly gauging the electorate, but there's always a margin for error. And the average polling error is still over four points, making the accuracy more challenging in close races.

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Fundamentals still matter. Beyond polling, President Biden's approval rating, the state of the



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economy, and the historical nature of midterms being a referendum on the party in power all favor Republicans. Yet overturning *Roe v. Wade* and the continuing presence of President Trump in the news is keeping Democrats competitive.

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Candidates still matter. Political polarization is still at record levels but candidate quality (or lack thereof) can make all the difference, especially in competitive states and districts.

Polling Questions for 2022. As the midterms are just over one month away, there are key questions to ask as more polls come out.

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Can Democrats over perform Biden's approval rating? During the Trump and Obama era, a party's midterm vote share largely shadowed the president's approval rating. After his approval rating increased over the past two months, Biden remains in the low 40s. In districts with competitive races, it's even worse.

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Where do the undecided voters go? It's not just the polling margins that matter but the vote share. Several races have undecided voters at about 10 percent. These often "independent" voters typically shift more to one party late in the election, making it important to watch for any October surprises.

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How prevalent is ticket splitting? Arizona, Georgia, New Hampshire, and Pennsylvania are all states where polls show noticeable ticket splitting between the gubernatorial and Senate races. The rise of partisanship has brought ticket splitting for federal races to *record lows*, but there's still a meaningful contingency of ticket splitting when it comes to gubernatorial and Senate races.

Don't Underestimate the Next Congress Even If It's Divided

Outlook for Divided Government. Political polarization is as high as ever and party leadership has increased in strength and acrimony, leaving few avenues for bipartisan success if the party heads say no. Things can still get done in a divided government below the radar, however.

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The secret of partisan DC is that *most major legislation* that passes each year is done on a bipartisan basis. It may not generate headlines but it can impact the bottom line. Leadership's top priorities next year will still be partisan ones – campaigning for 2024, oversight hearings, showdowns over must-pass bills. But there are other priorities that can survive under the radar.

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Big Tech could be an area of possible agreement. The Open App Markets Act aims to break Apple and Google's control on their respective app stores and in-app payments. This bill received the most support of those marked up by the Senate Judiciary Committee because both parties feel that it addresses their respective gripes with Big Tech. With the GOP likely to take control of at least one chamber, it may have to be rewritten to pass, but it still seems to be the most feasible.

Crypto Regulation. Democrats and Republicans alike have signaled agreement on some crypto legislation, which could go the distance under a divided government.

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A bill worth watching closely in the next Congress is a framework to regulate stablecoins. This effort is being primarily driven by House Financial Services Committee Chair Maxine Waters

(D-CA) and Ranking Member Patrick McHenry (R-NC). McHenry is in line to take over the committee if the GOP gains the House majority, which will provide for a smooth transition of power. The two are reportedly close to issuing a draft of the bill but they are running into resistance from rank-and-file members in both parties on a number of issues.

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The other major crypto legislation that could advance next year is a bill to give the Commodity Futures Trading Commission more authority to oversee crypto spot markets. The Senate Agriculture, Nutrition, and Forestry Committee held a hearing on a draft earlier this month, in which it was well received by members of both parties. Importantly, it has also gained support in the House from Rep. Sean Patrick Maloney (D-NY), who chairs the subcommittee in the House Agriculture Committee that has jurisdiction over this issue. Similar legislation has been introduced by Republican members of the committee as well, though it has not had any related activity.

Telehealth. Access to telehealth services has bipartisan support but congressional action on this issue is a matter of timing.

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The public health emergency (PHE) for the pandemic is possibly ending in January. President Biden's recent comment about the pandemic being over gives some reason to believe the PHE won't be extended after that. A PHE cessation would trigger a five-month countdown clock necessitating passage of a law that would maintain current telehealth flexibilities; otherwise, after that point, telehealth policy would revert to pre-pandemic rules if Congress fails to pass a new law. The House passed a bipartisan bill this past summer on an overwhelming 416-12 vote that would extend the current rules around telehealth in Medicare until the end of calendar year 2024.

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Telehealth has been less of a priority for the Senate, and although there are bipartisan supporters of telehealth in the upper chamber, no committee chair or ranking member has raised its profile to be the focus of a committee markup or attempt to attach legislation to another "must-pass" bill.

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Timing makes it difficult to include telehealth in a must-pass bill in the lame duck session, but the looming deadline after the PHE ends could spur action in the Senate next year.

Still, the Regulatory Shift is Coming

Regulatory Toolbox Becomes Best Option. President Biden will be looking to cement key policies and prepare for the 2024 campaign with an aggressive regulatory agenda.

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With his legislative wins behind him, his focus will shift towards what can be done through regulatory and executive actions. Filling out still vacant agency roles will be important to ensure achieving as many of these regulatory goals as possible. Many of these still open seats are expected to come up for votes in the lame duck session, including Gigi Sohn to the Federal Communications Commission, Richard Revesz to the Office of Information and Regulatory Affairs, and Jessica Looman to the Department of Labor's Wage and Hour Division.

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Biden has also already appointed several progressive regulators who will gladly pick up the mantle. They understand the time pressure of getting their agenda through now knowing the potential for a future Republican administration that may seek to roll back some of their reforms.

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While unable to outright stop Biden's regulators, Republicans will still likely make it more difficult for them to complete their agenda. They can try to cut the agencies' budgets and hold regular oversight hearings to force the regulators to defend their work. The conservative courts may act as a further check, though this threat will not make Biden's regulators reconsider their priorities.

A Stable of Progressives. Many of the regulators Biden has appointed are viewed as progressives that are not shy about pushing the boundaries of their roles.

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At the Federal Trade Commission (FTC), Chair Lina Khan is looking to move forward with a rulemaking on "commercial surveillance" to address data privacy and security. The FTC has issued an advanced notice of proposed rulemaking to solicit feedback. Likely, it will look to formally propose a rule late this year or early next.

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The Securities and Exchange Commission (SEC) is aiming to finalize its rule requiring climate disclosures from public companies in the coming months. This has been increasingly politicized since its introduction and will likely be challenged in court when finalized, particularly in the wake of the *West Virginia v. EPA* decision. SEC Chair Gary Gensler expressed concern about the rule's ability to withstand judicial review which was part of the reason for its delay.

Finance and Labor in the Spotlight. Biden has made clear his support for the labor movement, but through his regulatory nominees, he has also indicated a desire to crack down on the financial sector.

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The Consumer Financial Protection Bureau (CFPB) has not officially issued any proposed rules related to buy-now, pay-later, but following a [recent report](#), it is clear that CFPB Director Rohit Chopra intends to do so in the coming months. In the interim, there is a risk that Chopra chooses to pursue an enforcement action, which would force companies to comply with his intended rules earlier.

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The Department of Labor has said it is working on a rulemaking pertaining to worker classification, which would have implications for gig workers. Biden has tried to fashion himself as one of the most pro-labor presidents, which leads many to expect that the rule will be strongly tilted in that direction. This rule may not be released until Looman is confirmed as she is currently only serving as the acting administrator and that vote will not happen until after the election.
