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Common Law Judicial Decision Making: The Case of the New York Court of Appeals 1900–1941

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INTRODUCTION

This Article is a first attempt to bring quantitative techniques that have been developed to analyze the behavior of judges on United States Supreme Court to analyze the behavior of judges on a state's highest court over an extended period of time.[1] Our subject is the New

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1. Much of the work on state supreme courts by judicial politics and public law scholars has focused on cross-state comparisons. Some comparisons are largely descriptive. *See* Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright & Stanton Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 774-75 (1981); Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts*, 1870-1970, 30 STAN. L. REV. 121, 122, 124-26 (1977); Robert A. Kagan, Bobby D. Infelise & Robert R. Detlefsen, *American State Supreme Court Justices*, 1900-1970, 9 AM. B. FOUND. RES. J., 371, 373-74 (1984); Stanton Wheeler, Bliss Cartwright, Robert A. Kagan & Lawrence M. Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts*, 1870-

York Court of Appeals from 1900 to 1941. The New York Court of Appeals was the preeminent common law court in the United States during this period, which includes the tenure of Benjamin Cardozo (1914–1932), perhaps the leading common law jurist of the time.[2] This was a period of significant transformation in American law.[3] There was a turn away from styles of judicial argument associated with formalism, or what Roscoe Pound described as "jurisprudence of concepts," and a turn to styles of judicial argument later associated with legal realism, which acknowledges the frailty and plasticity of legal concepts and overtly appeals to concerns of policy or fairness.[4] It was a period of significant transformation in the substantive law of torts (particularly accident law)[5] and of contract. It was a period of significant transformation in state constitutional law in which state legislatures, after much contestation, were given carte blanche to regulate commerce and the workplace under the police power.[6]

Our data consist of all decisions of the New York Court of Appeals during this period. While this was a period of significant transformation in American law, there is a

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1970, 21 LAW & SOC'Y REV. 403, 404-06 (1987). In some cases, state-to-state institutional variability is used to estimate the causal effect of institutions on outcomes. *See* Richard P. Caldarone, Brandice Canes-Wrone & Tom S. Clark, *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Cases*, 71 J. POL. 560, 562 (2009); Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 41-42, 52 (2009);.

2. *See, e.g.*, ANDREW KAUFMAN, CARDOZO 1-2 (1998); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 9-10 (1990).

3. KAUFMAN, *supra* note 2, at 4-5.

4. William Nelson argues the originality of Cardozo's approach to the law is that it conceived of law not as "a science internal law . . . that . . . resulted in mechanical jurisprudence. In its place, he substituted a scientific analysis of societal needs in pursuit of law's ultimate end of achieving social justice." WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980 24 (2001).

5. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN TORT LAW 152 (2004). Witt devotes a chapter to a 1911 decision of the New York Court of Appeals authored by Judge William Werner, which held the state workmen's compensation statute unconstitutional. *Id.* at 152-86.

6. KAUFMAN, *supra* note 2, at 4-5.

striking stability in the frequency of nonunanimous decisions over the period. Over the period, the percentage of nonunanimous decisions fluctuates around an average of 14% of all cases and 25% cases in which there is a written opinion; judges on the New York Court of Appeals were not bashful about disagreeing publicly. Also striking is the frequency of cases decided nonunanimously that are decided per curiam with no opinion or in which there is a majority opinion but no dissenting opinion. Judges on the New York Court of Appeals were willing to record their disagreements publicly without an explanation.

The large number of nonunanimous decisions—typically sixty to one hundred per term—makes it possible to look for patterns of agreement and disagreement among judges for each term and across terms. To investigate this, we fit uni-dimensional item response theory (IRT) models to all nonunanimous decisions for each term. The model usefully captures patterns of agreement and disagreement among judges. For much of the period we study, the model reveals patterned voting. For a significant number of terms, the model reveals the sort of highly-patterned voting that leads outside observers to describe voting as polarized.

Such patterned voting suggests that it is possible to speak of a dominant dimension of disagreement on a court. This raises the question of what the dominant dimension of disagreement might be. Looking at the modern United States Supreme Court, that dimension seems inescapably political. It would be surprising if this was true of the New York Court of Appeals during the period we study, for it was a different time, and the court had a very different docket. To get insights on what may have been the underlying disagreements that produce patterned voting in the New York Court of Appeals, we look for the issues that seem to divide the judges in the cases where they divide along the dominant pattern. We find these issues change significantly over the period we study. In the early years of the twentieth century, the judges seem to divide on three dimensions that might be described as moralism, legalism, and pragmatism. These disagreements do not correspond in a straightforward way with a judge's political or social views. During the period from 1917 to 1925, the dominant divisions seem to implicate views on whether, and to what extent, liability for accidental harm should be fault-based and the appropriate tradeoff between stability and flexibility in the law. One could describe the wings of the court during this period as

progressive and conservative. The departure of two conservative judges from the court in 1926 reveals subtle divisions within what had been the progressive wing of the court. By the late 1930s, the court is divided on recognizable ideological lines in labor and constitutional cases and in personal injury cases. Interestingly, the "right" wing of the court in labor and constitutional cases is the proplaintiff wing in personal injury cases. We think this is evidence that personal injury law was not thought of in instrumental or ideological terms by the judges on the court.

I. DATA COLLECTION AND CODING

The raw data for this project are the records of all cases decided by the New York Court of Appeals from September 1900 to August 1941. These data were manually downloaded as ASCII text files from Lexis in what were typically monthly chunks.[7] Nearly 30,000 cases were downloaded.

Even though these files were downloaded as simple text files with no additional markup or tagging, they are nonetheless highly structured. This allowed us to extract a large amount of information fairly quickly and efficiently by writing a few programs in Python that parsed the textual data using regular expressions. Some variables, such as date, parties, case citations, and the number of words in the opinion, were coded in an entirely automated manner. Other variables, such as the votes of the judges, required some human intervention. However, even here the terms used to describe the voting blocs were typically standardized, which allowed us to rely on machine coding for a majority of the judge-case votes. Cases in which the description of the voting blocs did not match a standard pattern were set aside for human coding. Two research assistants—both of whom are PhD candidates with JDs— along with one of the authors of this Article read and coded the votes from all of these cases. A judge's vote was coded as either being in agreement with the result reached by the minority, not being in agreement with the majority result,

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7. New York Court of Appeals Data, LEXISNEXIS, http://www.lexisnexis.com (search "NY State Cases, Combined" for "court(appeals) and date(geq (1/1/1920) and leq(1/31/1920))").

or missing (due to abstention, absence from the court, etc.).[8] Three-person agreement rates were high. When there were disagreements, the authors read the entire case and made a decision as to the proper coding. In all but a handful of cases, the correct coding was extremely clear.

We also had the research assistants do some selective hand coding of case characteristics that were not possible to automatically extract. For instance, we had them code whether cases from the 1918 term involved a personal injury claim, an insurance claim, or whether they dealt with election law, criminal law, or homicide. We also coded the aspects of the procedural history of the case, including whether the appellate division reversed or modified a ruling of the New York State Supreme Court and whether there was a dissent at the appellate division.

II. BASIC DESCRIPTIVE FACTS

Since there are, to the best of our knowledge, no large-*n* analyses of the New York Court of Appeals during the period from 1900 to 1941, we begin this Part by providing some relatively simple descriptive summaries of the court's aggregate decisions on a term-by-term basis.

We begin by looking at the court's caseload. Throughout this period, appeal to the court was a matter of right in a case involving a nonunanimous decision by the appellate division (the intermediate appellate court) or a reversal or modification of a lower court decision. Appeal also was a matter of right in capital cases and some constitutional cases. In other cases, appeal was by permission, which could

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8. Such coding misses cases in which agreement on the result masks important disagreements about the rationale. For example, *Fougera & Co. v. City of New York*, 120 N.E. 642 (N.Y. 1918), is treated as a unanimous case because the majority and the concurring judges all voted to affirm the result below. Andrew Kaufman describes the case as splitting the court 4-3 on the important question of the constitutionality of a safety ordinance requiring that sellers of patent or proprietary medicines register the active ingredients with the department of health. KAUFMAN, *supra* note 2, at 367. The registry was confidential. *Id.* Cardozo, writing for the majority, holds the ordinance unconstitutional because it applied retroactively while stating that a prospective ordinance would be valid. *Id.* at 368. The concurring judges would not permit even a prospective ordinance. *Id.* at 367-68. Voting patterns in the case are consistent with the dominant pattern in the 1917 term.

be granted by the appellate division, by the New York Court of Appeals, or by leave.[9] Figure 1 plots the total number of cases decided by the court in each term along with the number of cases decided with written opinions. We code a case as having a written opinion whenever the Lexis opinion field has 150 or more words. Looking at Figure 1, we see that the court's caseload averaged about 600 cases per term with some variability up to just over 700 cases per term and down to about 400 cases per term in select years. There is no appreciable trend to the caseload, although there was a sharp downturn around 1920, which corresponds with the court finally clearing a large backlog of cases that had built up. Nonetheless, by the early 1930s the caseload was back near the overall average of about 600 cases per term. Only a fraction of these cases featured a written opinion of 150 or more words—between 24% and 44% of cases, about 200 written opinions per year. To put these numbers into perspective, the United States Supreme Court decided 92 cases in its 2009 term.

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9. Charles S. Desmond, *The Limited Jurisdiction of the New York Court of Appeals—How Does it Work?*, 2 SYRACUSE L. REV. 1 (1950) (providing an overview and data on the frequency of different types of appeal by right and appeal by permission, and by subject matter, during the periods indicated). In 1923 through 1924, of 500 cases that came to the court, 135 were by permission of the New York Court of Appeals or the appellate division. *Id.* at 2-3. In all, 249 cases came by right based on a reversal, modification, or nonunanimous affirmance by the appellate division. *Id.* at 3. The reported reversal rates in appeals by right and appeals by permission are similar in both periods. *Id.*

All Cases

Cases with Written Opinions
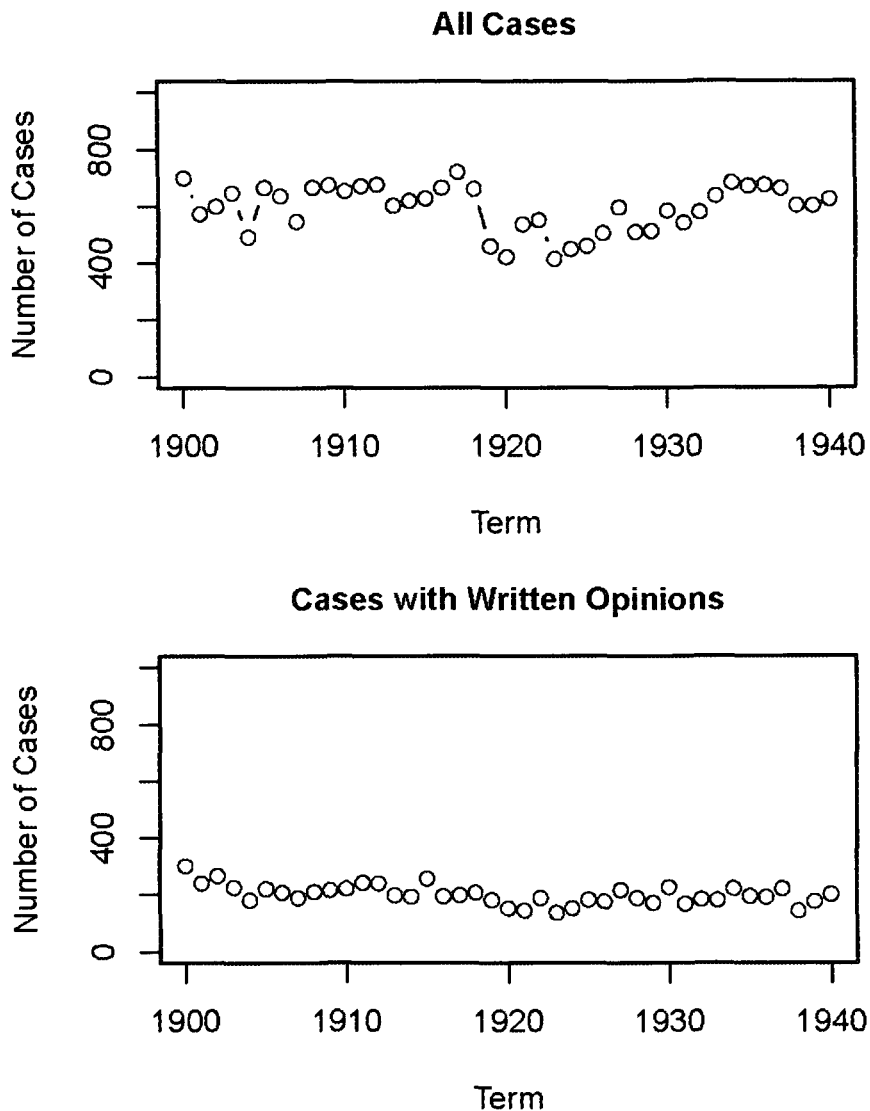
Figure 1. *Total Number of Cases and Number of Cases with Written Opinions Heard by the New York Court of Appeals from 1900 to 1940.*

Figure 2 plots the fraction of all unanimous cases and all unanimous cases with written opinions over this period. Given this very high volume of cases, it is not surprising that only a fraction had substantial written opinions. During the period from 1900 to 1940, unanimous cases as a fraction of all cases in each term hovered fairly steadily

around 0.8 to 0.9 with an average of 0.86. No major temporal trends are apparent in this series. The term-by-term fraction of cases with written opinions that were decided unanimously is a noisier series (due to the much smaller values of the denominator) but it, too, has a flat trend. Not surprisingly, the cases with written opinions were less likely to be decided unanimously. Approximately 62% and 87% of such cases were decided unanimously in any given term with an average of 75%. There are a significant number of nonunanimous cases in which there are no substantial written opinions. There also are a significant number of nonunanimous cases in which dissent is noted but there are no dissenting opinions. This practice seems to decline over time.[10]

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10. Given the possibility of dissent without an opinion, what may be surprising is the frequency in which dissenters made the effort to write an opinion, as writing a dissent is a costly activity that has no direct legal impact. Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis* 3-4 (Univ. of Chi. Inst. for Law & Economics, Working Paper No. 510, 2010).

Unanimous Cases as a Fraction of All Cases

**Unanimous Cases as a Fraction of Cases
with Written Opinions**
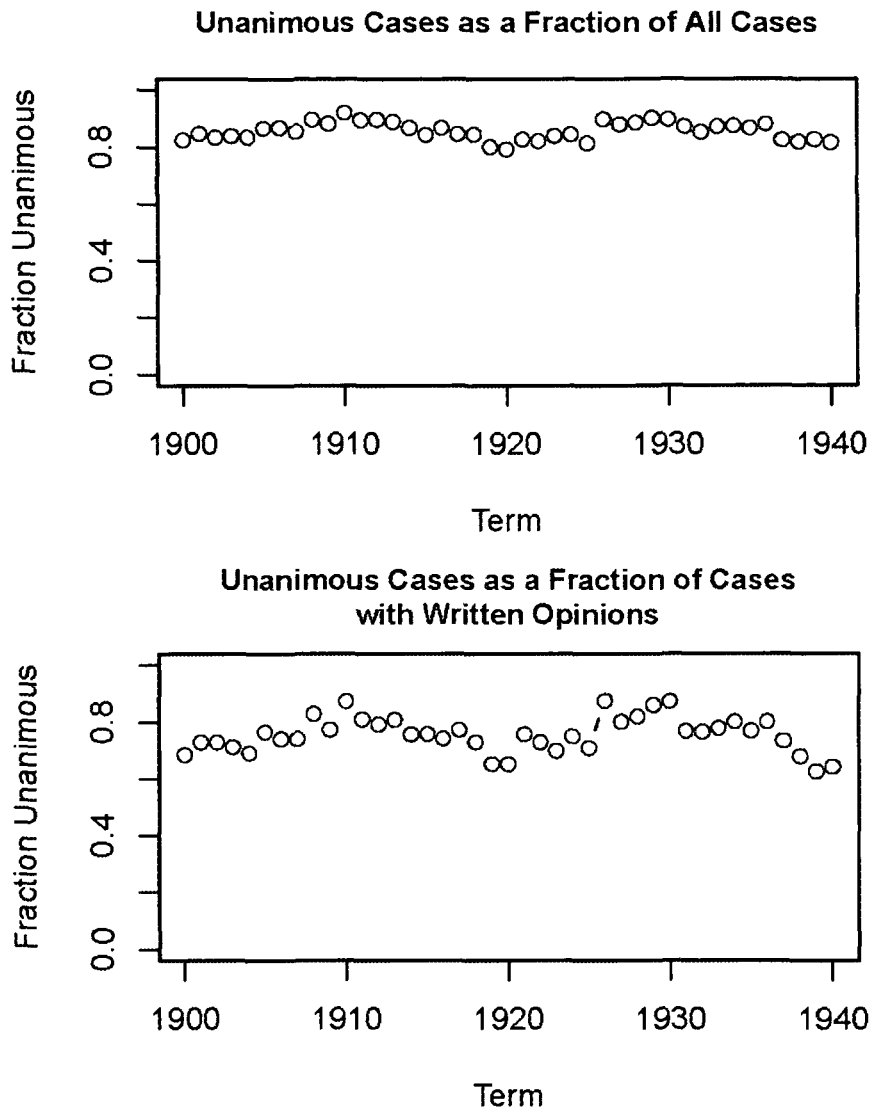
Figure 2(a). *Unanimity and Dissent on the New York Court of Appeals, 1900 to 1940.*

Size of Dissenting Bloc (All Cases)

Size of Dissenting Bloc
(Cases with Written Opinions)
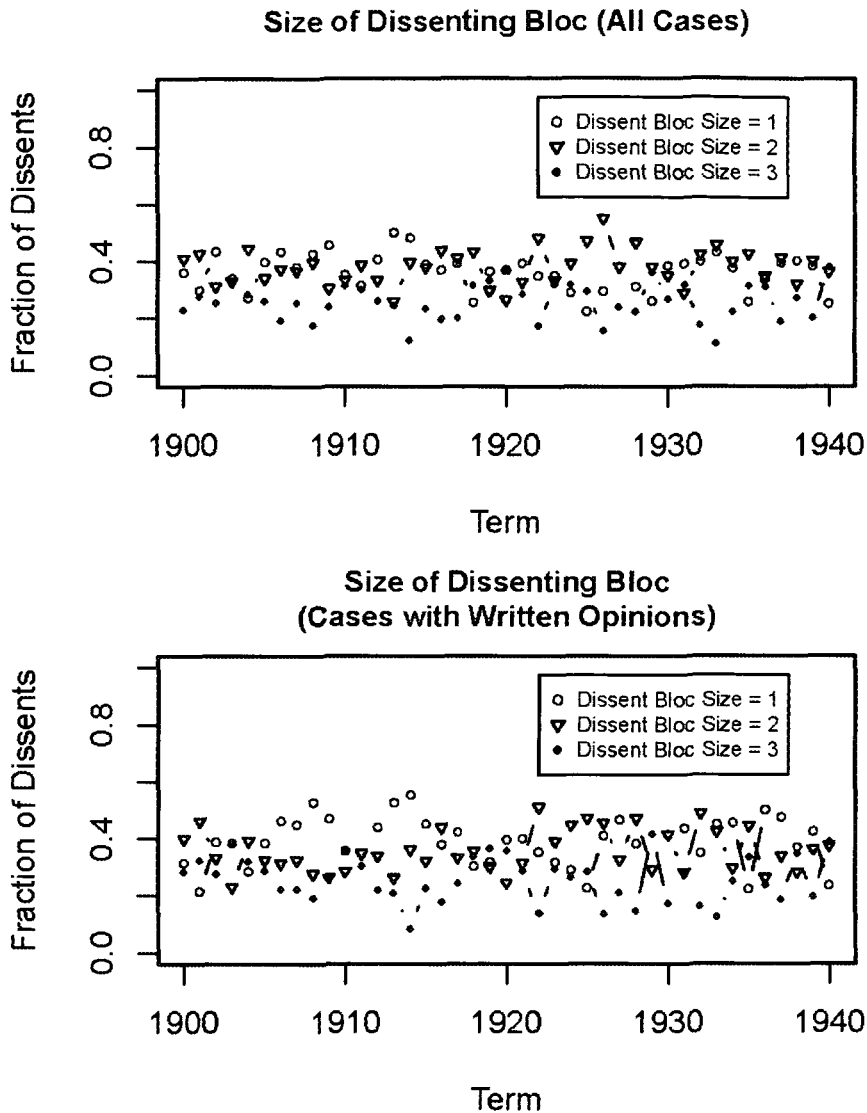
Figure 2(b). *Unanimity and Dissent on the New York Court of Appeals, 1900 to 1940.*

Not all nonunanimous decisions are created equal. A world in which all dissents are sole dissents is qualitatively different from a world in which all dissents are 4-3 splits. Further, as a purely technical point, voting data (taken alone) provides very little information when all of the dissenting blocs are the same size. Thus we have some interest in unpacking the dissents to see whether some

voting splits are relatively infrequent or whether the size of the dissenting bloc changes over time. Figure 2(b) presents this information both for all cases and cases with written opinions. Here we see that all three possible sizes of the dissenting bloc occur at similar rates and that these rates, while noisy, do not exhibit any noticeable temporal trend. Thus it would appear that there is a fair amount of stability in dissent behavior during this time period.

III. IDENTIFYING AND DEPICTING PATTERNED VOTING: THE IRT MODEL

To this point, we have focused our attention on aggregate patterns of behavior—the number of cases heard, term-by-term dissent rates, etc. In this Part, we begin to shift our attention to the individual behavior of the judges. More precisely, our interest is patterns in agreement and disagreement among judges. One can imagine a world in which patterns of voting told us nothing interesting about the underlying views and values of judges. Each judge might have an individual propensity to dissent (perhaps due to ability, strength of convictions, social pressures, etc.) with each judge's decision to join the majority or dissent being independent of the decisions of the other six judges on the court. Call this *independent voting*. In such a world, we might still see patterns in voting—for example, we might see Cardozo tends to agree with Lehman and to disagree with Hiscock—but the patterns would be a random product of independent voting. The voting data of the New York Court of Appeals makes it possible to exclude this hypothesis. As we explain in Appendix One, it is extremely unlikely that the observed patterns of voting in the New York Court of Appeals for the period under study are the random product of independent voting.

This should come as no surprise. Contemporary observers and historians often describe certain judges as allies.[11] Such accounts are based on what the judges reveal about themselves in their written opinions or other

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11. NELSON, *supra* note 4, at 21 (describing Lehman as "the close ally of . . . Cardozo"); *id.* at 22 (describing Pound as Cardozo's "regular ally"); KAUFMAN, *supra* note 2, at 166-67 (stating "Cardozo liked and respected his colleagues, and they liked and admired him," but then going on to describe two recorded incidents of testy exchanges between Cardozo and McLaughlin and Hiscock).

writings, the recorded observations of contemporaries, biographical data, and general historical data. We propose to come at the question from an angle that, while crude, is more systematic and less likely to be biased by preconceptions about how and why judges disagree. We start by looking for patterns in voting in nonunanimous cases. We then look to see if we can identify differences in the subject matter or views expressed in the cases that may explain the observed patterns.

The threshold problem we confront is how to identify and depict patterns in voting. We use a relatively simple strategy—modeling judicial decisions in each term of the court with a two-parameter item response theory (IRT) model. Such models are consistent with a simple model of preference-based voting.[12] For our purposes they should be viewed only as empirical summaries of observed behavior.[13] Such models have been successfully applied to merits votes from a variety of courts.[14]

These models assume that individual judge-specific votes can be coded dichotomously and that the coding decision is consistent across all judges voting on a case. As noted above, we choose to code votes as a being in favor of the majority position or not in favor of the majority position. Given this coding scheme, the IRT model employed here assumes that the probability judge j votes for the majority position on case k is given by $\Phi(-\alpha_k + \beta_k \theta_j)$ where $\Phi(\cdot)$ is the standard normal distribution function and α_k, β_k, and θ_j are parameters to be estimated. α_k captures the propensity to dissent on case k after accounting for β_k and θ_j. The β and θ parameters are of primary interest to us.

The parameter θ_j represents the *ideal point* of judge j. If one favors a uni-dimensional preference-based voting

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12. *See, e.g.*, Joshua Clinton et al., *The Statistical Analysis of Roll Call Data*, 98 AM. POL. SCI. REV. 355 (2004).

13. *See* Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 821-22 (2010).

14. *See, e.g.*, Benjamin R.D. Alarie & Andrew Green, *The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada*, 57 U. TORONTO L.J. 195, 205-06, 225-26 (2007); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 69, 103-04 (2010); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 137, 152 (2002).

interpretation of this model, then judge *j*'s ideal point can be viewed as this judge's most preferred policy position on the latent dimension. If one uses the IRT model as a means of data reduction and summarization, as we do, then judge *j*'s ideal point (θ_j) is of interest primarily for its location relative to the other judges' ideal points. Ideal points that are closer together imply greater voting agreement than do ideal points that are farther apart.

Applying an IRT model to the United States Supreme Court in the modern era produces clear results—i.e., the estimated ideal points for the justices (θ) are quite distinct—because voting in nonunanimous cases tends to be highly polarized along familiar ideological and political lines. One thought we had going into this study is that applying the IRT model to the decisions of the New York Court of Appeals in the period we study might yield muddled results because the court was, by all accounts, less polarized and politicized for much of the period. That is not what we found. In occasional terms, the IRT model does produce muddled results. But in most terms it produces fairly clear results. Further, for some periods these results are stable across terms.

Figure 3 illustrates what we mean by clear and muddled results—using the 1930 term as an example of clear results and the 1931 term as an example of muddled results. These plots represent the estimated probability that each judge's ideal point has a certain rank (left-most, second from the left, third from the left, etc.). The tone of each square codes the probability of a particular justice occupying a particular position on the court, with darker tones indicating increased certainty. In the 1931 term, the estimated ideal points (θ) for Crouch, Pound, Hubbs, and J.F. O'Brien are essentially indistinguishable. The observed data do not allow one to say much about the ranks of these ideal points other than that any of these judges could be anywhere from the third to the eighth judge from the left. This produces the muddled results depicted in Figure 3(b). On the other hand, the results for the 1930 term exhibit much more clarity. Here, the observed data allow us to recover the rank order of the judges ideal points with relatively little uncertainty.
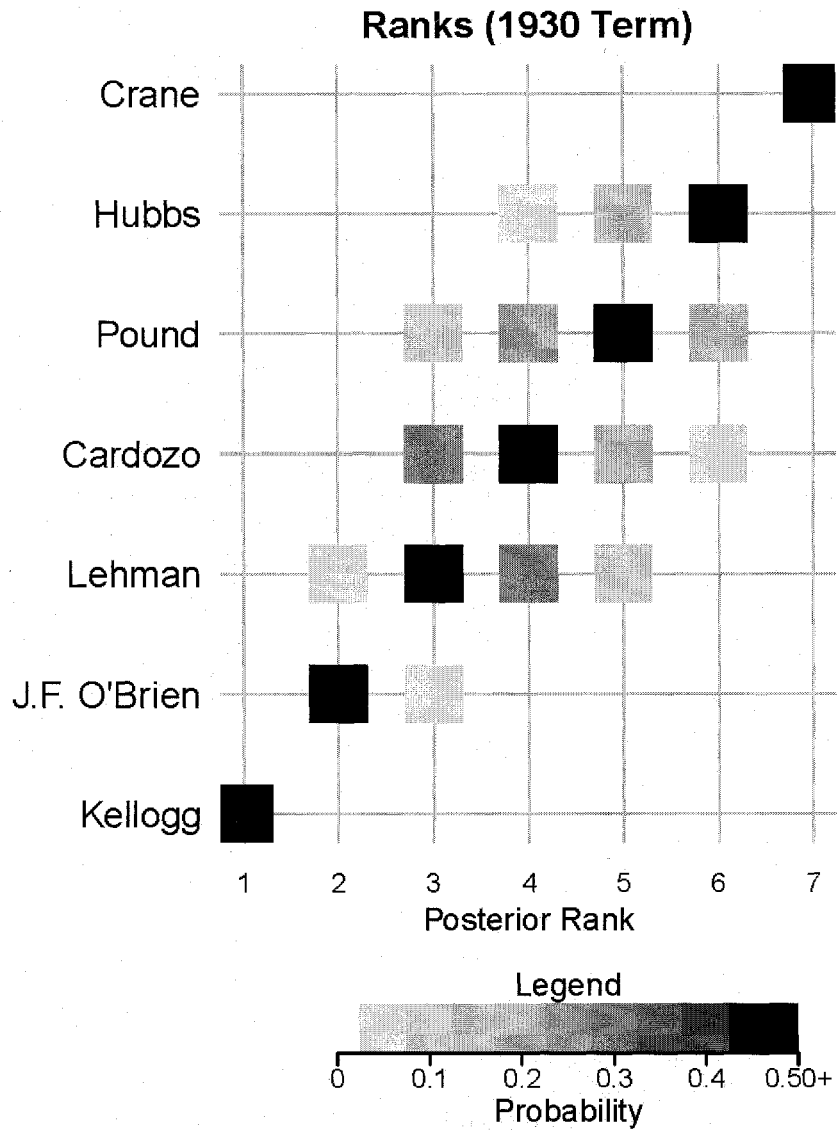
Ranks (1930 Term)

Figure 3(a). *Posterior Ranks of Ideal Points, 1930 and 1931 Terms.*
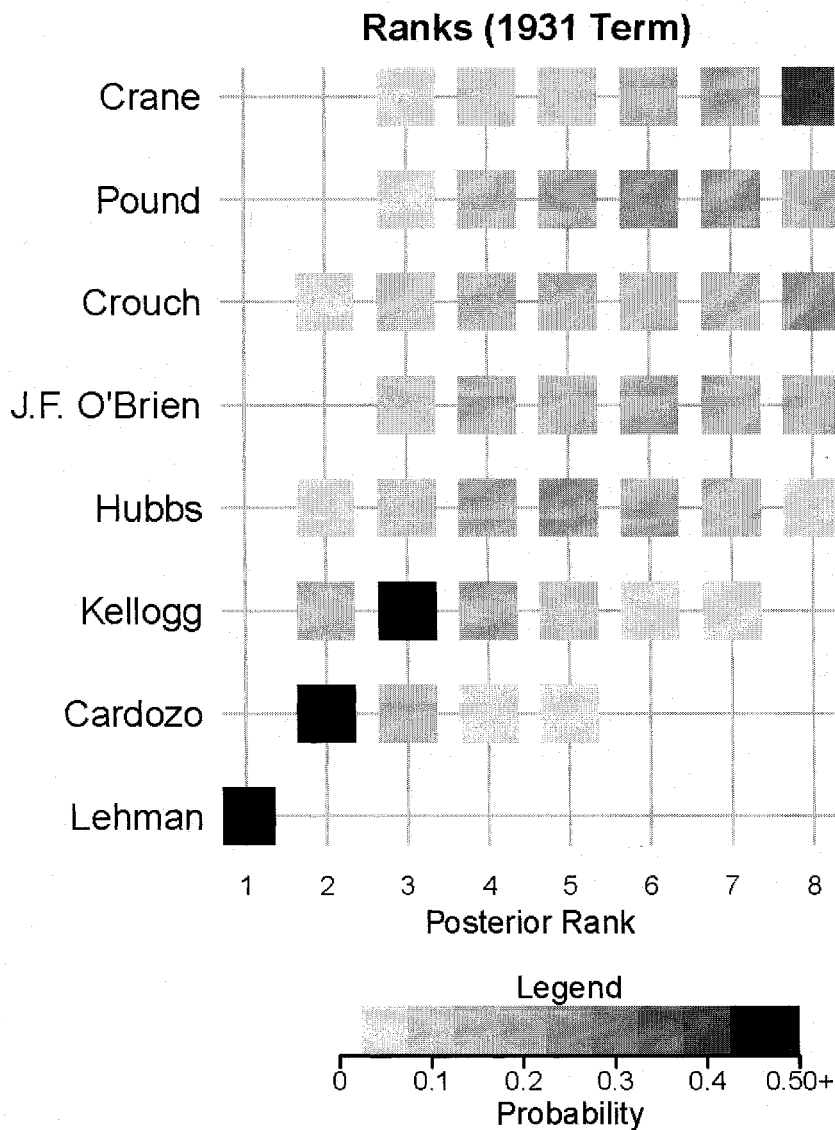
Ranks (1931 Term)

Figure 3(b). *Posterior Ranks of Ideal Points, 1930 and 1931 Terms.*

The results for the 1930 term do not imply that voting is uni-dimensional during the term. They only indicate that the IRT model is a meaningful way to capture associations in voting. We will unpack the nonunanimous decisions from the 1930 term a bit to provide a sense of the voting patterns that can produce such results. There are sixty-one nonunanimous decisions in the 1930 term. The IRT model

captures that either Kellogg or Crane is most likely to be a lone dissenter.[15] It captures that in cases with two dissents, the most likely dissenting pairs are Kellogg-O'Brien, Crane-Pound, and Crane-Hubbs[16] and that judges from opposite wings rarely are a dissenting pair.[17] It captures the most frequent coalitions in 4-3 cases[18] and that judges on opposite wings are less likely to be in a coalition in such cases.[19]

While the model reveals patterns in voting that might otherwise go unnoticed, some information is lost in the process. Different sets of voting data can generate similar results under the model. Thus, one cannot infer voting data from results. One can only infer that there are likely to be general patterns in the voting data. Appendix Two addresses this point in a bit more detail and explains why it does not undermine the descriptive accuracy of the model.

Up to now we have focused on the θ parameters that capture patterns of agreement and disagreement among judges. We turn now to the case specific parameter β_k. In the IRT literature, this is commonly referred to as a *discrimination* parameter.[20] Under the model, β_k can have a

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15. There are sole dissents in twenty-four cases. Crane and Kellogg each had six. Hubbs, O'Brien, and Pound each had three. Cardozo had two and Lehman one.

16. There are twenty-two cases with two dissenters. The pairs indicated in the text dissented in ten.

17. Kellogg and Hubbs join in dissent in three cases. There are no dual dissents from the pairs Kellogg-Crane, O'Brien-Crane, or O'Brien-Hubbs.

18. There are fifteen 4-3 cases. In three, the court splits precisely as the model indicates with no crossover voting. In two, Cardozo crosses over Pound to join Crane and Hubbs. In two, Lehman crosses over Cardozo and Pound to join Crane and Hubbs. The remaining eight cases are one-time coalitions.

19. Crane and Kellogg vote together in three of fifteen 4-3 cases, twice in majority and once in dissent. Crane and O'Brien vote together in four cases. Hubbs and O'Brien vote together in three cases. Hubbs and Kellogg vote together in six cases. By comparison, Crane and Hubbs vote together in ten cases. Kellogg and O'Brien also vote together in ten.

20. This terminology comes from educational testing literature where such models were developed and are still commonly used. *See, e.g.,* FRANK B. BAKER, THE BASICS OF ITEM RESPONSE THEORY 22 (2001); FREDERIC M. LORD, APPLICATIONS OF ITEM RESPONSE THEORY TO PRACTICAL TESTING PROBLEMS 13 (1980); WIM J. VAN DER LINDEN & RONALD K. HAMBLETON, HANDBOOK OF MODERN ITEM RESPONSE THEORY 88 (1997). In the context of an IRT model applied to test

positive or negative value. We primarily are interested in β's absolute value. If the absolute value of β_k in case k is high, then the voting patterns in case k are well represented by the model.[21] If the absolute value of β_k in case k is near 0, then the voting patterns in case k are not well represented by the model. The sign of β_k in case k indicates which wing of the court (as the wings are depicted by the model) prevailed in case k when the absolute value of β_k is high. Thus when β_k is large and positive, the ideal points of the judges are highly predictive of their votes on case k with the members of the majority having ideal points to the right of the minority judges. Since our interest generally is the disagreements among judges that produce patterned voting, and not the results in a given case (i.e., which wing prevailed), our interest is in the absolute value of β.

Voting data from the 1930 term illustrates how the case-specific parameter β_k correlates with how well the model captures voting patterns in case k. There were sixty-one nonunanimous decisions. The ten cases with the highest absolute β are 5-2 or 4-3 decisions (and one 4-2 decision) in which the court splits precisely as the model predicts.[22] The next ten cases in value of absolute β are sole dissents by Kellogg or Crane.[23] In these twenty cases, there is no cross-over voting. The next ten cases in value of absolute β include coalitions imperfectly captured by the model, such as three 4-3 cases in which Cardozo crosses over Lehman to join Crane and Hubbs dissent.[24] Conversely, cases in which the absolute values of β are close to 0 are not well represented by the model. During the 1930 term, the ten cases with the lowest absolute value of β include six cases with sole dissents by Cardozo, Lehman, or Pound, two 5-2

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items coded as correct/incorrect, the value of β_k tells researchers how well test item k discriminates between high and low ability test takers.

21. For a similar analysis of votes based on the estimated β parameters see Simon Jackman, *Multidimensional Analysis of Roll Call Data via Bayesian Simulation: Identification, Estimation, Inference and Model Checking*, 9 POL. ANALYSIS 227, 228-30 (2001).

22. The range in absolute β is 2.722 to 2.443.

23. The range in absolute β is 2.35 to 2.193.

24. The range in absolute β is 2.176 to 1.667.

cases in which Lehman and Pound dissent, and two 4-3 cases with unusual coalitions.[25]

IV. CHANGING PATTERNS OF VOTING AND DISAGREEMENT IN THE NEW YORK COURT OF APPEALS

In this Part, we look more closely at patterns of voting in the New York Court of Appeals captured by the model during selected terms and periods. We also offer some tentative claims about the underlying differences in views and values that produce such patterned voting. Behind these claims is a more general methodological hypothesis: when voting on a court is patterned, the characteristics of cases in which voting best fits the pattern (i.e., cases with a high absolute β) are likely to tell us something about the underlying differences in views and values among the judges that produce patterned voting. Our findings support the methodological hypothesis. We find recurring disagreements in the cases with highly patterned voting for all periods we examine closely except the 1926 to 1930 terms. For the 1918 and 1921 to 1926 terms, these recurring disagreements correspond to fundamental points of disagreement between judges on the court that have been observed by scholars using more conventional methods. Importantly, the character of these recurring disagreements changes over time. Our tentativeness largely goes to how to describe these recurring disagreements.

A. *The 1901 to 1904 Terms*

The composition of the court was fairly stable during the 1901 to 1904 terms. Ten judges served on the court at some time during the four terms. Eight judges served all four terms.[26] Judson Landon served only in the 1901 term.[27] Chief Justice Alton B. Parker served on the court through the 1903 term. He resigned from the court in summer 1904 to run for the U.S. presidency as the Democratic candidate.[28] Seven of the ten serving in the 1901 term were elected.

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25. The range in absolute β is .004 to .294.

26. Cela W. Martin retired from the court in the middle of the 1904 term at age 70 under a mandatory retirement rule. FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847–1932, at 229 (1985).

27. He also retired at age 70. *Id.* at 225.

28. *Id.* at 226-29.

Three served by appointment; they were Landon, Edgar M. Cullen, and William E. Werner.[29] They were appointed in 1900 by the governor under an 1899 amendment authorizing the appointment of up to three judges from the New York State Supreme Court (the trial court of general jurisdiction) to assist the court with its workload. We discerned no differences in the workload and voting behavior of elected and appointed judges at any time. The last year an appointed judge served was 1920.[30] Appointment generally seems to have been a stepping stone to an elected position. Cullen was appointed to replace Parker as chief justice and was elected to a full fourteen-year term as the nominee of both major parties in 1904.[31] Werner ran for a regular seat on the Republican ticket against John Gray in 1902 and lost.[32] He ran again in 1904 as the nominee of both major parties and was elected.[33] Some judges continued to serve by appointment after failing to gain elected seats.[34]

We fit the basic uni-dimensional IRT model discussed above to the nonunanimous vote data from each term. Figure 4 displays the posterior ranks of the judges' ideal points for each term. Comparing the four terms side by side illustrates some general phenomena that hold throughout the forty-year period we study. Looking at the 1904 term, note that the model was able to rank the judges on the Edward Bartlett, Martin, and Vann wing of the court with a high probability of their posterior rank between each other as well as within the court as a whole. We will describe this

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29. Throughout the period we study, the court had seven elected judges who were elected for fourteen-year terms. *Id.* at 207-14. An 1899 constitutional amendment authorized the governor to designate up to three additional judges from the pool of judges elected to the New York State Supreme Court to assist the court with its workload. *See* N.Y. CONST. art. VI, § 2; *see also* BERGAN, *supra* note 26, at 224-25. Cullen, Landon, and Werner were the first three judges designed to the serve on the New York Court of Appeals. BERGAN, *supra* note 26, at 225.

30. *Id.* at 261-62.

31. *Id.* at 229-30.

32. *Id.* at 225-26.

33. *Id.* at 229.

34. Werner continued to serve after his defeat in 1902. *Id.* at 226. Chase continued to serve after he was defeated by Seabury in 1914. *Id.* at 253, 261.

as highly patterned voting. Voting within the Denis, O'Brien, Grey, and Cullen wing of the court is less patterned in the 1904 term. Turning to the 1903 term, you see highly patterned voting within the O'Brien, Gray, and Parker wing of the court but not within the Bartlett, Martin, and Vann wing. Turning to the 1901 term, there is a fairly strong pattern of voting across all ten judges, but there is a weak pattern in voting looking at the two major clusters of judges. Finally, in the 1902 term there is somewhat less pattern in the voting except that Bartlett, Vann, and Martin predictably align on one wing apart from the other six judges.
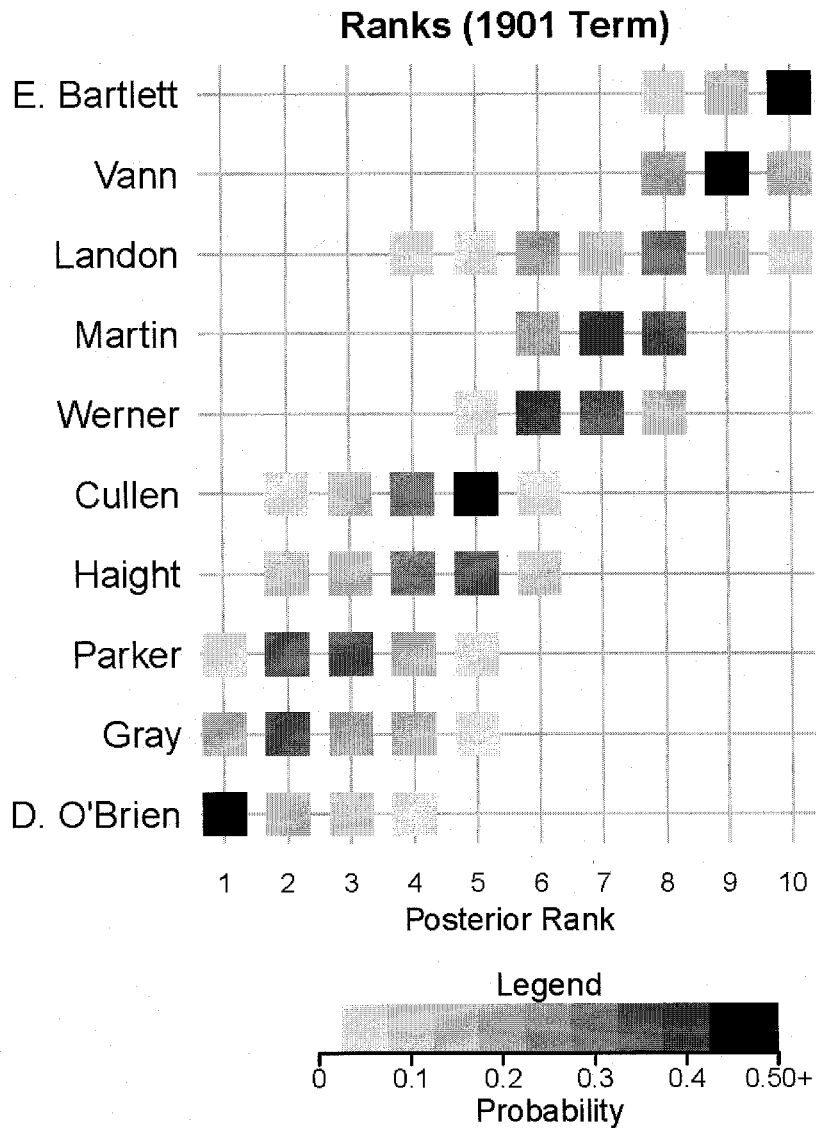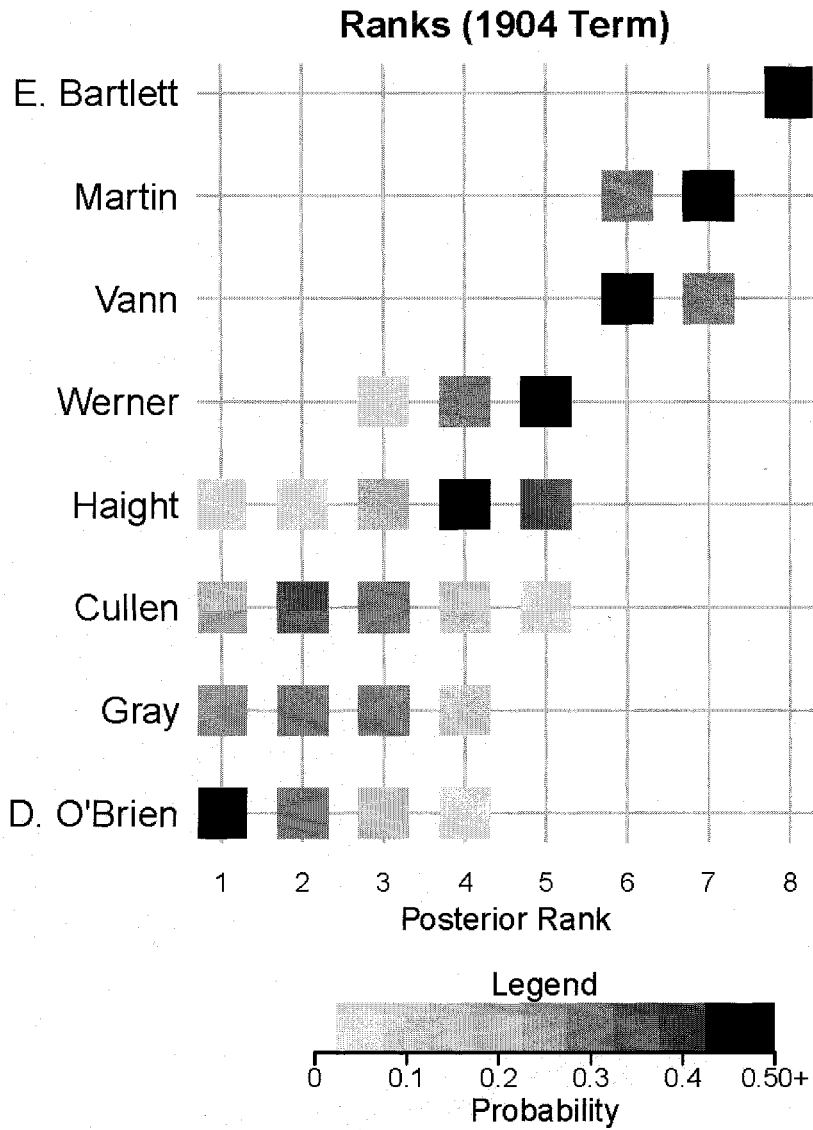
Ranks (1901 Term)

Figure 4(a). *Posterior Ranks of Ideal Points, 1901 to 1904 Terms.*
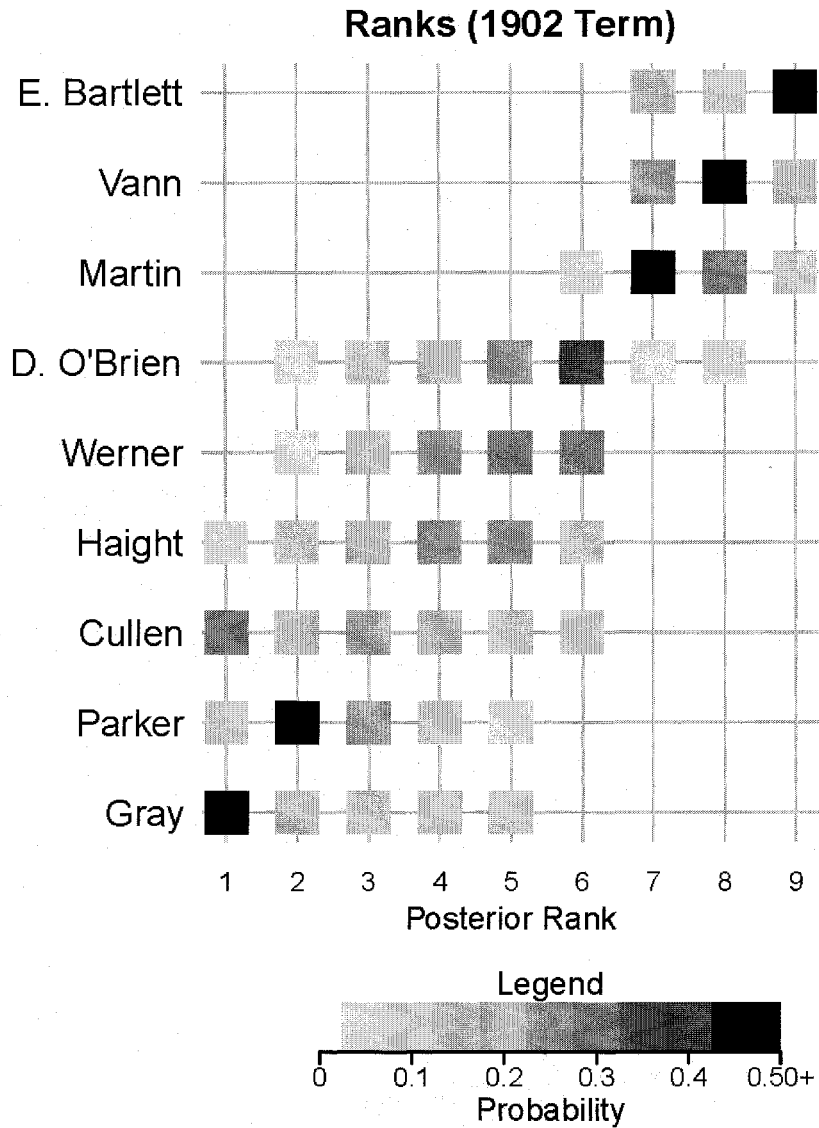
Figure 4(b). *Posterior Ranks of Ideal Points, 1901 to 1904 Terms.*
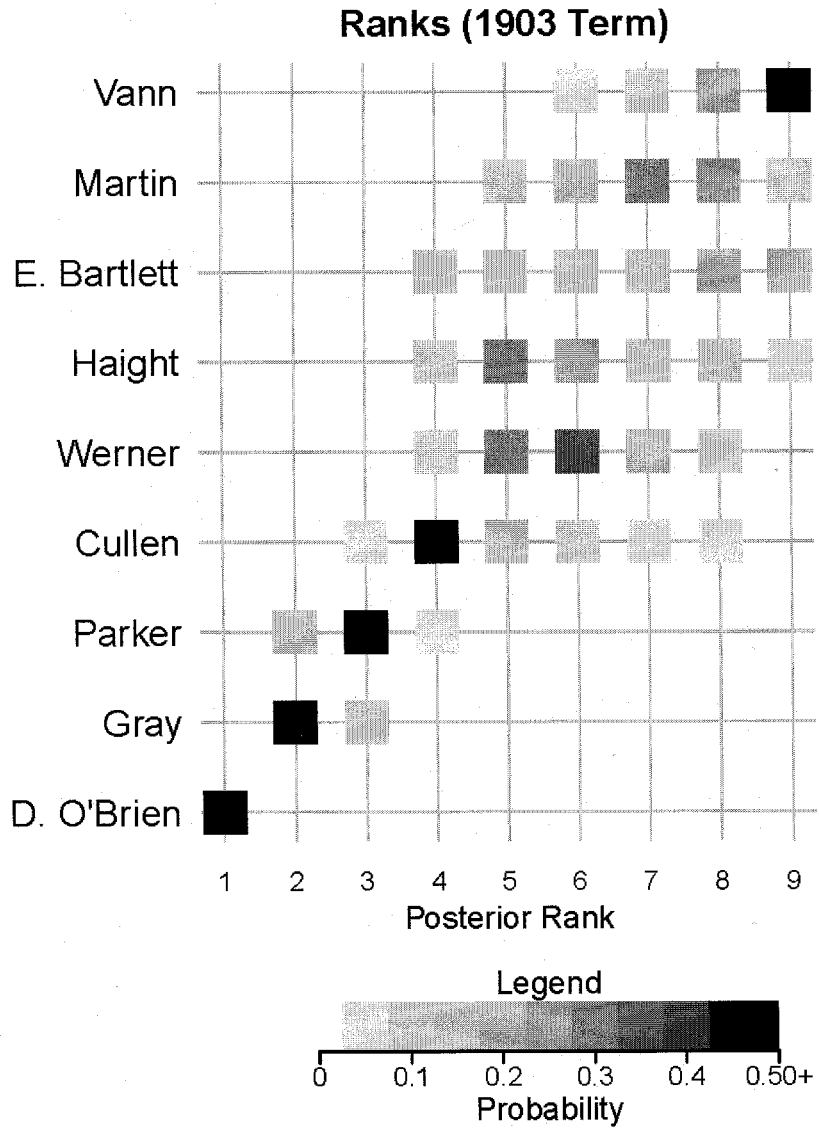
Figure 4(c). *Posterior Ranks of Ideal Points, 1901 to 1904 Terms.*

Ranks (1904 Term)

Figure 4(d). *Posterior Ranks of Ideal Points, 1901 to 1904 Terms.*

Figure 4 illustrates there is some movement in posterior ranks of judges across adjacent terms. Occasionally movement across adjacent terms is quite significant. Denis O'Brien anchors the wing of the court with Parker, Gray, and Cullen except in the 1902 term, where he is situated between the three judges solidly on the other wing (Bartlett, Martin, and Vann) and the rest of the court. Such large shifts in the posterior ranks of the judges' ideal points across adjacent terms are infrequent, but they do occur. Most movement across adjacent terms is as you see in Figure 4. Judges who are in a cluster will swap positions. For example, Werner, Haight, and Cullen stay together while swapping positions. Not surprisingly, there is more movement across greater spans of time. Sometimes there is significant movement in adjacent terms when the membership of the court changes. Later in this Article, we present a striking example of this around the 1926 term.

The fuzziness in posterior ranks and movement across adjacent terms without a change in membership may occur for several reasons. To some extent it is a byproduct of the limited number of nonunanimous decisions each term.[35] The IRT model assumes the voting behavior of judges is driven by a single latent dimension. Plainly, this is false. Some disagreements among judges will be for reasons that have little or nothing to do with differences in views and values that affect voting in a systematic way. Disagreements in judgments that are largely factual in nature may have this quality. Disagreements on purely technical legal issues may also have this quality. Such voting is not random, but the model assumes that such concerns are orthogonal to the pattern captured by the model, and so, random from the point of view of the model. The observed patterns in voting indicate much voting is not random in this sense. Even if disagreement in voting is a product of disagreements on relatively stable underlying views and values, we would expect some fuzziness and movement in posterior ranks. Multiple views and values may influence judicial decision making. Some of these views and values may be somewhat interdependent, and may appear roughly uni-dimensional in their combined effect on voting, but others will be more

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35. There are ninety-eight nonunanimous decisions in the 1901 term, ninety in the 1902 term, one hundred four in the 1903 term, and eighty-one in the 1904 term.

independent. Different views and values will dominate in different types of cases. We see an example of this in the 1918 term where we find patterned voting that is quite different from the dominant pattern in criminal cases. Thus, a change in the mix of the cases may alter the posterior ranks of judges. During the period from 1900 to 1920, a randomly selected subset of judges who serve in a term will vote in each case. The luck of the draw among cases may alter posterior ranks.

While there is some fuzziness and movement in posterior ranks of judges over the 1901 to 1904 terms, there also is a great deal of clarity and stability in the posterior ranks in each term and across terms. It is extraordinarily unlikely such patterned voting occurs by coincidence. Instead, it suggests that voting is being influenced by differences in views and values of judges that are fairly stable and that influence decisions across a significant number of cases. While the IRT model assumes a single dimension of difference, the model is agnostic as to what this dimension might be. Our methodological hypothesis is that an examination of the cases in which voting is most patterned (i.e., the cases with a high absolute β) may provide insight about the underlying disagreements in views and values that produce patterned voting.

One thing is clear: the differences that divide the court in the high absolute β cases in the 1901 to 1904 terms are quite unlike the differences that divide the court in later periods. The differences resist simple categorization, so we will proceed by describing some high absolute β cases that are suggestive of the recurring differences during the 1901 to 1904 terms. *National Protective Ass'n of Steam Fitters & Helpers v. Cumming*[36] poses the politically, economically, socially, and legally fraught question of whether an action in tort lies against a labor union for interfering with the employment of nonunion workers by refusing to allow its members to work alongside nonunion workers and threatening to strike if they were not discharged.[37] The court splits 4-3 holding the union is not liable in tort.[38] Parker, O'Brien, Haight, and Gray are in the majority, with

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36. 63 N.E. 369 (N.Y. 1901) (β = -3.014).

37. *Id.* at 372.

38. *Id.* at 374.

Parker writing for the majority that workers had the right to combine and threaten to withhold services to secure better terms of employment so long as they did not act out of malice.[39] Vann, Bartlett, and Martin dissent.[40] They take a position alongside the Massachusetts Supreme Judicial Court in 1900 (over a dissent by Holmes) and a conservative House of Lords in 1901 that such combined conduct is actionable.[41]

While voting in a case like *Steam Fitters* seems inevitably to have a political dimension, other high absolute β cases show that the differences between the Vann, Bartlett, and Martin wing of the court from the O'Brien, Gray, and Parker wing are not solely or even primarily political in the ordinary sense of the term. *Monnier v. New York Cent. & Hudson River R.R.*[42] is an assault and battery claim brought by a train passenger who was expelled from a train after refusing to pay a four cent surcharge to purchase a ticket.[43] The passenger refused to pay the surcharge on the train for the valid reason that the ticket office was closed in the station where he boarded the train.[44] The court denies the claim splitting 4-3. The majority, concurring, and dissenting opinions all agree that the question at the bottom is whether the passenger's claim of right should yield to "process and resort to proper proceedings."[45] The majority (O'Brien, Parker, and Haight) and concurring judge (Cullen) take the position that the passenger should have paid the four cents and not made such a bother over a contested claim of a trivial right.[46] Bartlett, Martin, and Vann dissent.[47] They take the position that "[t]he plaintiff and defendant were each bound in the emergency to determine

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39. *Id.* at 369.

40. *Id.* at 380.

41. *Id.* at 379-80 (Vann, J., dissenting).

42. 67 N.E. 569 (1903) (β = -2.963).

43. *Id.* at 569-70.

44. *Id.* at 570.

45. *Id.* at 572; *id.* at 572 (Cullen, J., concurring); *id.* at 573 (Bartlett, J., dissenting).

46. *Id.* at 570-72; *id.* at 572 (Cullen, J., concurring).

47. *Id.* at 573.

the character of his or its legal rights . . . at their peril."[48]
Their wing is in the majority in another case involving a
conflict between a rail passenger and an overbearing
conductor. In *Gillespie v. Brooklyn Heights R. Co.*,[49] Martin,
Bartlett, Haight, and Cullen join to hold that a railway may
be liable for the emotional distress suffered by a passenger
who is verbally humiliated by a conductor.[50] Gray, Parker,
and O'Brien dissent.[51]

A significant number of high absolute β cases involve
personal injury claims. In these cases, the Bartlett, Martin,
and Vann wing always votes for the plaintiff. There is a
range of issues in these cases. Most turn on narrow legal or
factual issues.[52] Some of the cases are decided per curiam
without any opinion. In some there is a dissenting opinion,
which is unusual for that period. At least one case[53] turns on
a question of general importance: whether negligence in
wiring a building had to be established on the state of the art

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48. *Id.* at 573 (Cullen, J., concurring).

49. 70 N.E. 857, 863 (N.Y. 1904) (β = 3.022).

50. *Id.* at 863.

51. *Id.*

52. *Green v. Metropolitan St. Ry. Co.*, 63 N.E. 958, 958-59 (N.Y. 1902) (β = -
3.099), is a 4-3 decision reversing a jury verdict for a boy injured by a railcar on
the ground that it was error to exclude a physician's testimony regarding what
the boy had told him regarding the cause of the accident. The court split on
whether the boy's statement to the physician was privileged under a statute
privileging communications made for purpose of treatment. *Id.* Martin, Vann,
and Werner joined in dissent. *Id.* at 960. *Rider v. Syracuse Rapid Transit*, 63
N.E. 836, 838-39 (N.Y. 1902) (β = -3.03), is a 4-3 decision reversing summary
judgment for the plaintiff in a rail crossing accident on the ground that the issue
of contributory negligence should have been submitted to the jury. Bartlett,
Martin, and Vann dissent. *Id.* at 845. *Tremblay v. Harmony Mills*, 64 N.E. 501,
502 (N.Y. 1902) (β = 2.66), is a 4-3 decision affirming a judgment for the plaintiff
in a slip and fall case. Bartlett, Martin, Vann, and Cullen are in the majority.
Id. at 504. Gray, Parker, and O'Brien dissent. *Id. Howard v. Ludwig*, 64 N.E.
172, 173-74 (N.Y. 1902) (β = 2.641), is a 4-3 decision affirming a judgment for
the plaintiff on negligence claim where the issue was whether the driver was
acting as the defendant's servant. Bartlett, Martin, Vann, and Haight are in the
majority. *Id.* at 175. Gray, O'Brien, and Parker dissent. *Id.*

53. Herzog v. Mun. Elec. Light Co., 72 N.E. 1142, 1142 (N.Y. 1904) (per
curiam) (β = -3.083) (sustaining summary judgment for the defendant in a 4-3
per curiam decision).

at the time the wiring was done.[54] Four judges on the court's left-wing vote to sustain the appellate division answering this question yes.[55] Bartlett, Martin, and Vann dissent.[56]

In several high absolute β cases involving commercial transactions and real estate conveyances, the Bartlett, Martin, and Vann wing of the court takes a flexible approach in applying rules to reach an arguably fair result on the facts. The other wing of the court opts for the result that advances the interests of certainty and predictability.[57] Two other high absolute β cases stand out. In one, the issue was whether a water company had a right to an injunction

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54. Herzog v. Mun. Elec. Light Co., 85 N.Y.S 712, 714-15 (N.Y. App. Div. 1904), *aff'd per curiam*, 72 N.E. 1142 (N.Y. 1904) (β = -3.083).

55. *Herzog*, 72 N.E. at 1142-43.

56. *Id.*

57. In *Uihlein v. Matthews*, 64 N.E. 792, 793-94 (N.Y. 1902) (β = -2.916), the court holds that the parol evidence rule bars consideration of strong evidence that a quit claim deed given in resolution of a controversy over boundary was not meant by the parties to absolve the grantee of a restriction on the use of property (it could not be used for a saloon) earlier imposed by the grantor in conveying the right to use three inches of land and a party wall. The suit was against a successor who acquired the property with knowledge of the restriction. *Id.* at 793. Bartlett writes a dissent joined by Martin and Vann. *Id.* at 796. *Cullinan v. Bowker*, 72 N.E. 911, 912-13 (N.Y. 1904) (β = -3.025), holds that an agent could not give a clerk the power to execute a bond, even though everyone proceeded on the assumption had the power, where the instruments giving the agent his authority and the bonds themselves made it clear to the plaintiff that a bond had to be executed by the agent. Vann writes a dissent in which Bartlett and Martin join. *Id.* at 916. *Critten v. Chemical Nat'l Bank*, 63 N.E. 969, 972 (N.Y. 1902) (β = -2.467), holds that the loss from forged checks is cast on the account-holder whose name was forged when the account-holder had notice of the forgery in time stop it because previously forged checks had been returned to it. Vann and Bartlett dissent taking the position that the general rule of constructive notice should not apply when the agent of the account holder who received the notice was the forger himself. *Id.* at 974-75 (Vann, J., dissenting). *Stecher Lithographic v. Inman*, 67 N.E. 213, 213-14 (N.Y. 1903) (β = 2.228), holds that a statement by a third party regarding the sufficiency of performance of a contract was admissible when an agent of the party opposing admission of the statement did not object to the statement at the time it was made. Bartlett, Martin, and Vann are in the majority this time because Haight joins them. *Id.* at 216. Parker writes a dissent in which Gray and O'Brien concur. *Id.* The gist of Parker's argument in dissent is that the case is not within the rare situations in which a statement of third party is treated as an admission and that not correcting the erroneous admission of the statement would "establish an unfortunate precedent." *Id.* at 214-15 (Parker, C.J., dissenting).

to enable it to lay pipes underneath a city street without the city's consent and over its objections.[58] The majority answers the question yes based on a close technical analysis of the relevant contracts and statutes.[59] Bartlett writes a dissent in which Martin and Vann join.[60] After taking on the majority's technical arguments, Bartlett argues that the water company had an ulterior and illegal motive for seeking the power to lay the pipes, which was to put itself in a position to compete with the city as a water supplier.[61] In the dissenters' view, such bad faith justified denying the injunction whatever the company's technical rights.[62] Finally, there is a franchise tax case on the question of whether capital invested in real estate, held for investment or lease, is "employed within this state," and so subject to the franchise tax.[63] In a 1904 decision, a 4-3 majority bows to precedent and holds the capital is not subject to the franchise tax.[64] In 1905, the result flips with Bartlett, Vann, Haight, and Werner finding a way to distinguish the precedent.[65] Strikingly, the dissent of the court's left-wing in the 1905 case is very much about the importance of having clear, dependable rules.[66]

What we perceive of as the recurring point of disagreement in which voting is patterned during the 1901 to 1904 terms is unlike what we find in later terms, including the 1910 and 1911 terms. In the 1901 to 1904 terms, what the model describes as the court's right-wing consistently takes a moralistic position in high absolute β cases. The judges on this wing show themselves willing to bend the law to reach results they feel to be just. The court's

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58. Rochester & L.O. Water Co. v. City of Rochester, 68 N.E. 117, 117 (N.Y. 1903) (β = -2.503).

59. *Id.* at 119-21.

60. *Id.* at 126.

61. *Id.* at 125-26 (Bartlett, J., dissenting).

62. *Id.*

63. People *ex rel.* Ft. George Realty Co. v. Miller, 71 N.E. 463, 463 (N.Y. 1904) (β = -2.293).

64. *Id.* at 463-64. Martin, Bartlett, and Vann dissent. *Id.* at 464.

65. People *ex rel.* Wall & H. St. Realty Co. v. Miller, 73 N.E. 1102, 1103, 1106 (N.Y. 1905) (β = 2.501).

66. *Id.* at 1106 (Cullen, C.J., Gray, O'Brien, J.J., dissenting).

left-wing takes a more pragmatic and prudential approach. The pragmatists put a higher value on having certain and predictable rules.

One famous low absolute β from the 1903 term warrants mention before we move on. The court split 4-3 in *People v. Lochner*,[67] narrowly upholding a law setting maximum hours for workers in a bakery that the United States Supreme Court later held to violate substantive due process.[68] Whatever may have been the differences in values and views that divided the New York Court of Appeals in *Lochner*, they do not appear to correspond with the differences that divided the court in most cases in which they divided during this period.[69]

B. *The 1910 and 1911 Terms*

We look closely at the 1910 and 1911 terms because probably the most important decision of the court politically during the forty-year period we study is from the 1910 term. This is *Ives v. S. Buffalo Ry. Co.*,[70] in which a unanimous court held the New York workmen's compensation statute unconstitutional.[71] The reaction to *Ives* led to significant changes in the membership of the court.[72] As you will see,

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67. 69 N.E. 373, 380 (N.Y. 1904) (β = .505) (Gray, Haight, and Parker were in the majority, while Bartlett, Martin, and O'Brien joined in the dissent), *rev'd*, Lochner v. New York, 19 U.S. 45 (1905).

68. *Lochner*, 19 U.S. at 64-65.

69. *See* KAUFMAN, *supra* note 2, at 364-65 (observing the lack of patterned voting in cases involving constitutional challenges to economic and social regulation).

70. 94 N.E. 431 (N.Y. 1911). Werner wrote the opinion for the court. *Id.* Cullen wrote a concurring opinion in which Willard Bartlett joined. *Id.* at 449-50 (Cullen, C.J., concurring).

71. *Id.* at 448.

72. BERGAN, *supra* note 26, at 245-47 (attributing Werner's loss to Bartlett in 1913 race for Chief Judge to hostile public reaction to decision). Witt supplies details, noting that Werner lost the support of the Progressive Party when he refused to repudiate his decision in *Ives* and that the votes cast for Learned Hand, the Progressive nominee, swamped the margin by which Werner lost. WITT, *supra* note 5, at 177-78. Seabury's public criticism of *Ives* may have helped him gain the support of the Democratic Party in 1914, which helped him defeat Chase. *Id.* at 252-53. Ironically, this criticism may have led to Cardozo's selection over Seabury in 1914. KAUFMAN, *supra* note 2, at 128 (noting "several

the view that liability for accidental harm is fault-based that was uncontested in *Ives* appears as a recurring point of disagreement in the 1918 term and continues through the mid-1920s. We find what would later come to be described as an explicitly realist turn in the rhetoric of one wing of the court in the 1918 term and thereafter. We see nothing like this in the 1910 and 1911 terms. While the dramatic changes in the character of the disagreements occur around the 1918 term, there are discernible differences in the underlying points of disagreement in the 1901 to 1904 terms and the 1910 and 1911 terms. The 1910 and 1911 terms provide another window on common law decision making while styles of reasoning associated with formalism dominated.

The membership of the court is stable in the 1910 and 1911 terms. There are seven elected and two appointed judges.[73] Figure 5 depicts the posterior rank of the judges' ideal points for each term. The patterns of voting are weaker than they were in the 1901 through 1904 terms, particularly in the 1910 term.[74] Still there are some constants. Chief Justice Cullen and Willard Bartlett are distinctly on one wing of the court both terms. Hiscock is distinctly on the other. Werner tends to ally with Cullen and Bartlett. Chase and Vann tend to ally with Hiscock. Gray is consistently in the center. Collin and Haight move around.

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judges of the New York Court of Appeals opposed Seabury's nomination because Seabury had publicly branded the court as reactionary for its decision in the *Ives* case.").

73. Chase and Hiscock served by appointment both terms. BERGAN, *supra* note 26, at 231.

74. This may partly be attributable to the abnormally low number of nonunanimous decisions during the 1910 term (there were fifty-five). On the other hand, the results for the 1909 term are even more muddled, with seventy-four nonunanimous decisions.
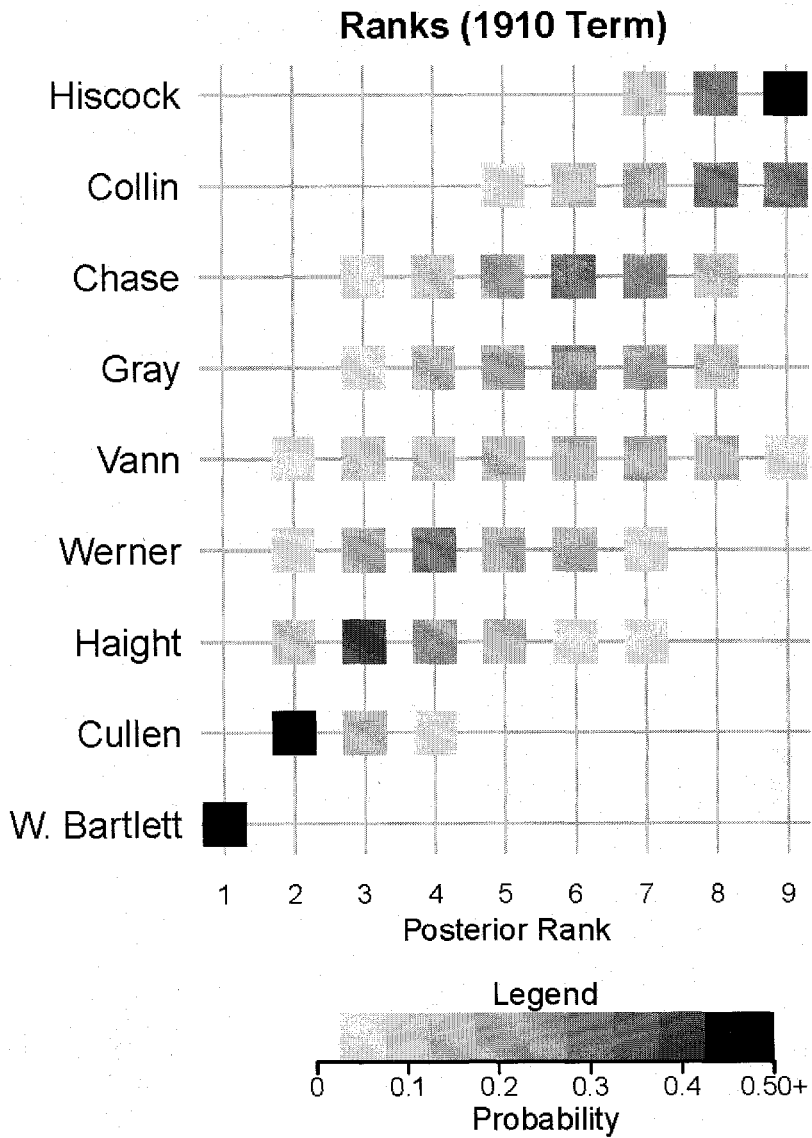
Ranks (1910 Term)

Figure 5(a). *Posterior Ranks of Ideal Points, 1910 to 1911 Terms.*
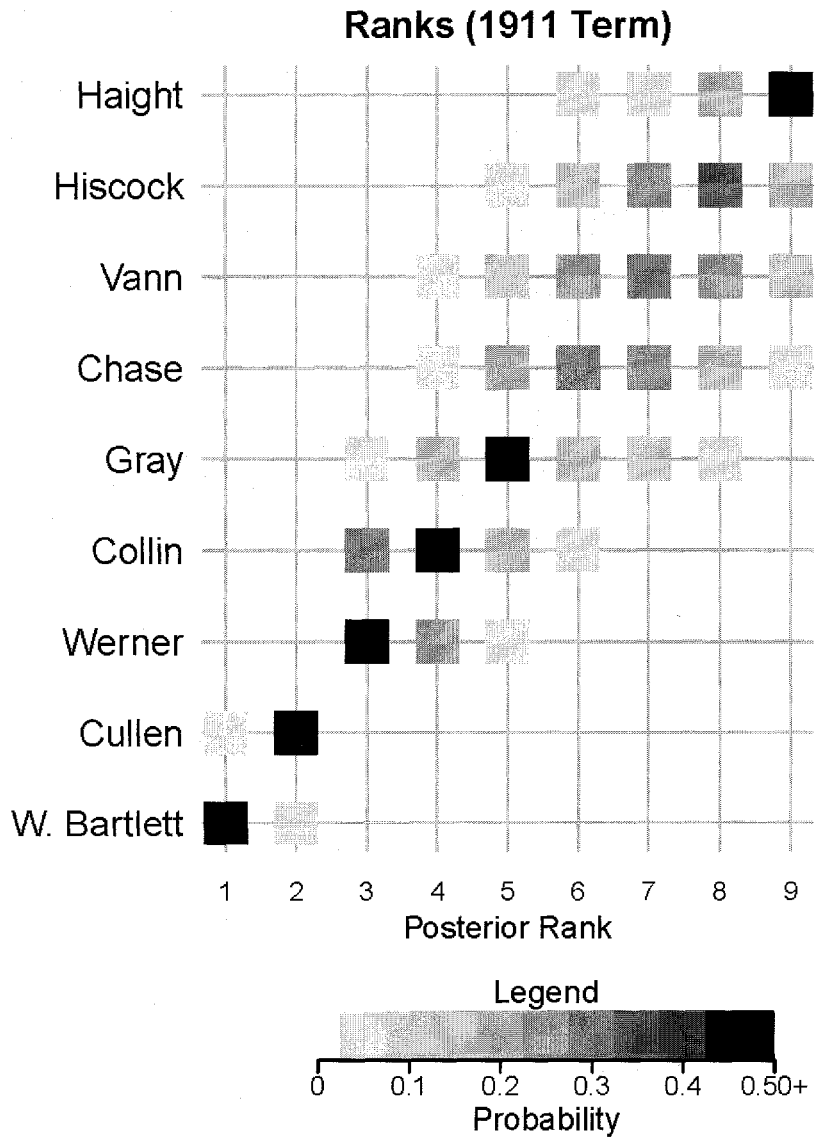
Ranks (1911 Term)

Figure 5(b). *Posterior Ranks of Ideal Points, 1910 to 1911 Terms.*

Turning to the high absolute β cases, we find a number of cases in which the Cullen, Willard Bartlett, and Werner wing takes striking positions. In *Admiral Realty Co. v. City of New York*,[75] Cullen and Werner read separate dissents[76] to a 4-2 decision allowing New York City to use public funds to expand the subway system interconnecting new public lines with the existing private lines.[77] Hiscock's majority opinion emphasizes the need to extend and unify the subway system and the inability of the city to accomplish this end by other means.[78] Cullen and Werner will have none of it. Werner concedes the merits of the city's plan but counters, "the plain duty of the courts is to uphold the Constitution as it is written, even though it may be, for the time being, a hindrance to beneficent results."[79] Willard Bartlett, joined by Cullen, takes a similar stance in his dissent in *Moynahan v. City of New York*[80] with much less momentous stakes. The court held 5-2 that a trial judge has the inherent power to order a stenographic record be made of proceedings at the public charge.[81] Willard Bartlett dissents writing:

> Stenography is a modern innovation in our courts of law. To say that the power to order the stenographic minutes of a trial inheres in the court is to say that it has always existed, which is contrary to the fact, or that it necessarily grows out of some pre-existing power, which I cannot see and do not concede.[82]

In two high absolute β cases, the Cullen, Willard Bartlett, and Werner wing is part of a majority that narrowly construes recent statutes to preserve long-standing, restrictive procedural rules over dissents by the opposite wing of the court.[83] In another high absolute β case with a 4-3

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75. 99 N.E. 241 (N.Y. 1912) (β = 2.463).

76. *Id.* at 250 (Cullen, J., dissenting); *id.* at 255 (Werner, J., dissenting).

77. *Id.* at 244, 249-50.

78. *Id.* at 246. Collin, Haight, and Vann join Hiscock. *Id.* at 258.

79. *Id.* at 257 (Werner, J., dissenting).

80. 98 N.E. 482 (N.Y. 1911) (β = 2.778) (denying the court's power to order stenographic minutes at trial); *id.* at 486-87 (Bartlett, J., dissenting).

81. *Id.* at 484-85.

82. *Id.* at 486-87.

83. *See* Brisbane v. Pennsylvania R.R. Co., 98 N.E. 752, 753-54 (N.Y. 1912) (β = -2.524) (ruling in a 4-3 decision to narrowly construe a recent general

split, the underlying disagreement appears to be over whether New York courts should bother to hear a claim asking them to resolve a highly technical issue under New York law that might never be of any practical relevance to the outcome of an Ohio dispute over a will.[84] Chase dissents, joined by Hiscock and Gray, writing, "[w]ith the crowded condition of our courts we should not unnecessarily assume jurisdiction" to advise an Ohio court.[85] Cullen responds for the majority, joined by Willard Bartlett, Haight, and Vann, writing, "[i]f the question whether the plaintiffs are now seised in fee of an undivided interest in the real estate is not a practical one, pray what would be such?"[86] In all of these cases, the Cullen, Willard Bartlett, and Werner wing takes what could be described as a strongly legalistic position while the Hiscock and Chase wing takes a more pragmatic position.[87]

It is difficult to ascribe any political valance to the dominant voting patterns in the 1910 and 1911 terms. If we described the position of Cullen, Willard Bartlett, and Werner based on the judges with whom they tend to align in other terms, then we would describe them as the left or progressive wing of the court.[88] Looking forward, in three of

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jurisdiction statute to preserve the rule that New York courts do not have jurisdiction over tort claims arising out of the state); Pouch v. Prudential Ins. Co. of Am., 97 N.E. 731, 732-33 (N.Y. 1912) (β = -2.257) (ruling in a 5-2 to narrowly construe a contemporary statute to deny availability of interpleader).

84. Monypeny v. Monypeny, 95 N.E. 1, 1-2 (N.Y. 1911) (β = -2.117).

85. *Id.* at 5 (Chase, J., dissenting).

86. *Id.* at 2.

87. *See, e.g.*, Robinson v. Martin, 93 N.E. 488, 488 (N.Y. 1910) (β = 2.27613) (discussing in a 4-3 decision whether a term in a will devising the remainder in a trust established for the testator's son to his "unmarried daughters" at the time of his son's death is an illegal restraint on marriage). Cullen, joined by Bartlett and Haight, argues in dissent that it is, invoking the weight of authority that conditions restraining marriage are void. *Id.* at 491 (Cullen, C.J., dissenting). The majority upholds the restriction, noting the confusion in the law and the lack of any justification for not respecting the testator's wishes if he did not intend the limitation to discourage his daughters from marrying and it did not have that practical effect. *Id.* at 491.

88. *See* WITT, *supra* note 5, at 152-86 (providing a nuanced account of the political and judicial views of Werner, who wrote the opinion for the court in *Ives*). According to Witt, Werner was a Lincoln republican with "(small-d) democratic tastes" who was "turned off by excesses of wealth." *Id.* at 156-57. Werner found the life of a judge somewhat stultifying, but became imbued with

the four terms Cardozo and Willard Bartlett serve together, they have a strong tendency to vote together and against Hiscock and Chase. Looking backward, Cullen and Werner generally align with Parker and Denis O'Brien in the terms they serve together. In a handful of high absolute β cases from the 1910 and 1911 terms, their wing takes what most would describe as progressive positions. Thus, in the four high absolute β personal injury cases from the 1910 term, the Willard Bartlett, Cullen, and Werner wing always sides with the plaintiff.[89] In a 4-3 case from the 1910 term on whether a liability limitation on discount tickets shields a carrier from liability for negligence, their wing of the court sides with the passengers in a dissent arguing that terms limiting liability should be construed narrowly.[90]

Willard Bartlett, Cullen, and Werner are no less inclined than judges on the opposite wing to invalidate legislation.[91] Indeed, in the three high absolute β cases from the 1910 and 1911 terms involving constitutional challenges to legislation, their wing votes to invalidate. One of these cases is *Admiral Realty Co. v. City of New York*,[92] which was a challenge to New York's use of public funds to expand the subway system and interconnect private lines.[93] In a case from the 1910 term, the court split 4-2 in invalidating as

the "theory of the heroic guardian judge," a "warrior[] against the encroachments of combination, class legislation, and paternalism." *Id.* at 159-60.

89. *See* Wilson v. Wyckoff, Church & Partridge, 93 N.E. 1135, 1135 (N.Y. 1911) (per curiam) (β = -2.401) (ruling for the plaintiff in a 5-2 decision with Bartlett, Cullen, and Werner in the majority and Werner absent); Brown v. Long Island R.R. Co., 94 N.E. 1092, 1092 (N.Y. 1911) (per curiam) (β = -2.284) (4-3 decision); Hungerford v. Village of Waverly, 93 N.E. 1122, 1122 (N.Y. 1910) (per curiam) (β = 2.124) (5-1 decision, with Willard Bartlett not voting); Kircher v. Iron Clad Mfg. Co., 94 N.E. 1095, 1095 (N.Y. 1911) (β = -2.065) (per curiam) (4-3 decision).

90. Gardiner v. N.Y. Cent. & H.R.R. Co., 94 N.E. 876, 879-80 (N.Y. 1911). The dissent is by Vann who is joined by Cullen and Willard Bartlett. *Id.* at 880.

91. The paucity of high β cases involving constitutional challenges to social and political legislation bears out Andrew Kaufman's observation of decisions prior to 1914. "When persuasive arguments were made in favor of [freedom of contract and protecting the public welfare] the court was nearly always split, often in unpredictable ways, and the pattern of results was eclectic, almost erratic." KAUFMAN, *supra* note 2, at 365.

92. 99 N.E. 241 (N.Y. 1912).

93. *Id.* at 244.

outside the police power a statute requiring transient vendors who purport to sell goods that are acquired from a bankrupt company or that are damaged by water or fire to obtain a license.[94] Chase and Hiscock dissent.[95] In a case from the 1911 term, the court split on a challenge to two provisions of a law replacing the old convention system for nominating party candidates with a new primary system.[96] Cullen's dissent is a passionate warning against paternalism and excessive regulation.[97] But it is not accurate to describe their position as favoring private interests over public or against regulation per se. In the case involving licensing vendors, they object to the regulation as anticompetitive and harmful to consumers.[98] Cullen's dissent in the challenge to the law that set up a primary system champions popular democracy while railing

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94. People *ex rel.* Moskowitz v. Jenkins, 94 N.E. 1065, 1066-67 (N.Y. 1911) (β = -2.018).

95. *Id.* at 1068.

96. Hopper v. Britt, 98 N.E. 86, 87-88 (N.Y. 1912) (β = 2.503). Under the first challenged provision, the party emblem appeared on the primary ballot alongside the name of the committee candidate, indicating he was the official party candidate. *Id.* at 87. Under the second challenged provision, a candidate's name could appear only once, even though multiple groups nominated him. *Id.* The trial court held both provisions invalid. *See* Hopper v. Britt, 133 N.Y.S. 778, 778 (N.Y. App. Div. 1912), *aff'd*, 98 N.E. 86 (N.Y. 1912). The appellate division held the first valid and the second invalid. *Id.* at 779-80. The New York Court of Appeals affirmed the appellate division 4-2. *Hopper*, 98 N.E. at 89. The model gave the case a high β because Collin and Cullen dissented with four judges to the right of Collin forming the majority. *Id.* at 88-89. This is a bit misleading as Collin dissented on the part of the decision invalidating the second provision while Cullen dissented on the part upholding the first provision. *Id.*

97. Cullen noted the following regarding paternalism and excessive regulation:

> The great misfortune of the day is the mania for regulating all human conduct by statute, from responsibility for which few are exempt, since many of our most intelligent and highly educated citizens, who resent as paternalism and socialism legislative interference with affairs in which they are interested, are most persistent in the attempt to regulate by law the conduct of others. The great mass of such laws, wise or unwise, it is within the power of the Legislature to enact. But the limits of that power, in my judgment, are passed when public officers assume to dictate to their masters, the electors, the principle on which the latter shall choose them. *Id.* at 89 (Cullen, C.J., dissenting).

98. *Moskowitz*, 94 N.E. at 1066-67.

against political elites telling the people how they should choose their candidates.[99]

In both periods we have examined to this point, the recurring disagreements in cases in which voting is most highly patterned appear to be more legal than political or social. In the 1901 through 1904 terms, the recurring disagreement is between judges who take a moralistic view of the law and judges who take a more pragmatic and prudential view. In the 1910 through 1911 terms, the recurring disagreement is between judges who take a more legalistic view and judges who take a more pragmatic view. As we shall see, matters change significantly in the coming years as the membership of the court changes. Five of the eight judges who served during these terms depart the court by 1916. During this same period, ten new judges join the court. Three of these come and go by 1915. By 1918 the membership stabilizes and includes a core of six judges who will serve together for a decade. Cardozo is among them.

C. *The 1918 Term*

We dig deeply into the 1918 term because patterns of voting and recurring points of disagreement emerge that continue and are sharply unlike what we observed in prior terms. Ten judges cast votes in the 1918 term. Figure 6 displays the posterior ranks of the judges' ideal points. Looking at Figure 6, we see that McLaughlin anchors one end of the court while Hogan, Pound, and Cardozo anchor the other.[100] Looking only at nonunanimous votes cast in the 1918 term, one gets the sense that voting on the New York Court of Appeals is highly patterned with Cardozo, Pound, and Hogan on one wing of the court and Hiscock, Collin, Chase, and McLaughlin on the other.[101] When we say voting is highly patterned we mean that the ideal points of judges from one wing of the court are well-separated from the ideal

99. *Hopper*, 98 N.E. at 88-89.

100. Note that what is "right" and what is "left" is completely arbitrary. As is standard with these sorts of models, we constrain two judges that rarely agree with each other to have ideal points on the opposite sides of 0. Here those judges are Cardozo and McLaughlin.

101. The posterior ranks of the judges are fairly stable from 1917 on. The posterior ranks from the 1915 and 1916 terms are quite different.

points of judges on the other wing of the court. Indeed, in 1918 it is also the case that there is a bloc of centrists—Andrews, Crane, and Cuddeback—who are reasonably well-separated from the judges at either wing of the court.
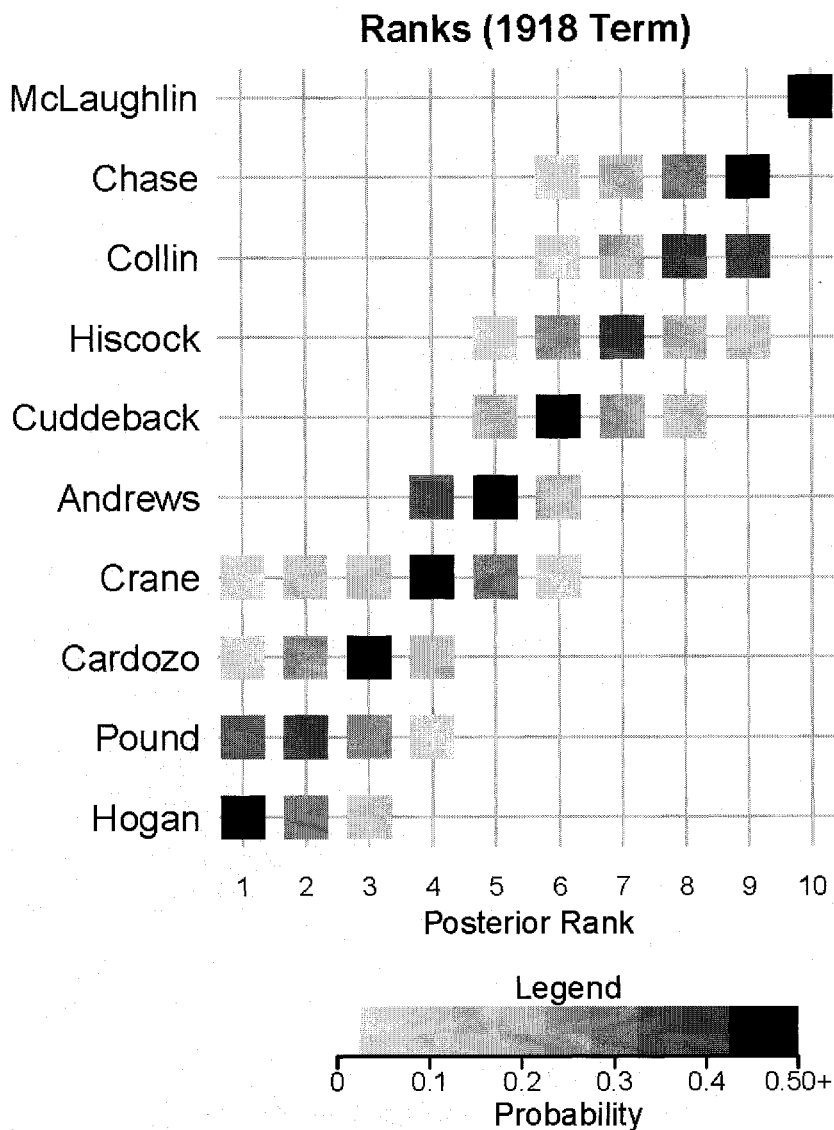
Ranks (1918 Term)

Figure 6. *Posterior Ranks of Ideal Points, 1918 Term.*

Again we proceed on the assumption that reading high β cases provides an insight on the underlying differences in views and values that produce such patterned voting. [102] A large number of the cases in which the alignment of judges corresponds with the predicted alignment (i.e., high absolute β cases) are in the general category of personal injury claims, in which we include workmen's compensation claims. Judges on the Hogan and Pound wing of the court generally vote for the plaintiff while judges on the McLaughlin wing of the court generally vote for the defendant. [103] Often in these cases there is no written opinion. A majority affirming the appellate division will do so per curiam with the dissenting judges merely noting their disagreement. [104] The other cases in the 1918 term in

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102. As noted above, a decision with a high absolute value of β fits the predicted pattern. A famous example is *Seaver v. Ransom*, 120 N.E. 639, 642 (N.Y. 1918) (β = -2.781), where Hogan, Pound, Cardozo, and Crane are in the majority and Hiscock, Collins, and Andrews dissent. A decision with a low absolute value of β does not fit the predicted pattern. A famous example from the 1917 term is *Wood v. Lucy Lady Duff Gordon*, 118 N.E. 214, 215 (N.Y. 1917) (β = 0.597), where Cardozo, Cuddeback, McLaughlin, and Andrews are in the majority and Hiscock, Chase, and Crane are in dissent. In the 1918 term, there were one hundred eight decisions with a dissent. The maximum absolute value for β was 2.935. Absolute β was greater than 2.0 in thirty-six cases and less than .5 in eighteen cases.

103. Routinely does not mean always. In one low β decision, *Skrodanes v. Knickerbocker Ice Co.*, 123 N.E. 890, 890 (N.Y. 1919) (per curiam) (β = -0.263), McLaughlin joins Hogan, Crane, and Cuddeback in a 4-3 per curiam affirmance of a decision for the plaintiff in a workplace negligence claim. Hiscock, Chase, and Collin dissent. *Id.* The case is unlike those collected in the following note because there was no disagreement below either between the appellate division and special term (the trial court) or within the appellate division.

104. *See, e.g.*, Dugan v. Harry J. McArdle, Inc., 122 N.E. 879, 879 (N.Y. 1919) (per curiam) (β = 2.935) (Hogan, Cardozo, and Pound dissent to per curiam affirmance of decision reversing worker's compensation award); Guida v. Pa. Ry. Co., 121 N.E. 871, 871 (N.Y. 1918) (β = 2.764) (per curiam) (Hogan and Crane dissent to per curiam affirmance of decision reversing worker's compensation award); Kolb v. Brummer, 123 N.E. 874, 874 (N.Y. 1919) (per curiam) (β = 2.587) (Hogan, Cuddeback, and Crane dissent to per curiam affirmance of decision reversing worker's compensation award); Zenner v. Brooklyn Heights R.R. Co., 122 N.E. 895, 895 (N.Y. 1919) (per curiam) (β = 2.471) (Cardozo and Pound dissent to per curiam affirmance of decision for defendant in negligence claim); Latronica v. S. Blvd. R.R. Co., 123 N.E. 875, 875 (N.Y. 1919) (per curiam) (β = -2.461) (Chase and McLaughlin dissenting to per curiam affirmance of decision for plaintiff in personal injury case).

which the judges split strongly on the predicted lines in affirming the appellate division without opinions are two insurance cases,[105] an employment case,[106] and a utility rate case.[107] The Hogan and Pound wing sides with the insured, the employee, and the rate payers. In many of these cases there is a disagreement below, either within the appellate division or between the appellate division and the trial court or the Workmen's Compensation Commission. These are cases where the appeal is a matter of right and not leave. In almost all of these cases, the issue is a factual or technical legal issue of no apparent general relevance.[108] The decision not to write opinions probably is explained by the heavy workload of the court. Until the early 1920s the court had a large backlog of cases. The practice appears to be for the majority to write an opinion if they reverse the

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105. Wikoff v. New Amsterdam Cas. Co., 123 N.E. 894, 894-95 (N.Y. 1919) (per curiam) (β = -2.917) (Hiscock, Chase, and McLaughlin dissent to per curiam affirmance of decision for insured on accident policy on the issue of whether claim was covered by exclusion for hazardous employment); Goldstein v. New York Life Ins. Co., 124 N.E. 898, 898 (N.Y. 1919) (per curiam) (β = 2.774) (Cardozo, Pound, and Andrews dissent to per curiam affirmance of decision for insurer denying life insurance claim on ground policy was fraudulently obtained). There are two similar high β insurance cases in the 1919 term. Bollard v. New York Life Ins. Co., 126 N.E. 900, 900 (N.Y. 1920) (β = 2.987) (per curiam) (Hogan, Pound, and Elkus dissent to per curiam affirmance of decision for insurer denying life insurance claim on the ground that the policy was fraudulently obtained); Pataki v. Standard Accident Ins. Co., 127 N.E. 917, 917 (N.Y.1920) (per curiam) (β = 2.936) (Cardozo, Pound, and Crane dissent to per curiam affirmance of decision for insurer denying accident insurance claim on the ground that the policy was fraudulently obtained).

106. O'Connor v. City of New York, 121 N.E. 881, 881 (N.Y. 1918) (per curiam) (β = 2.898) (Hogan, Cardozo, and Pound dissent to per curiam affirmance of decision against policeman contesting basis for calculating pension).

107. Pub. Serv. Comm'n v. Iroquois Natural Gas., 123 N.E. 885, 886 (N.Y. 1919) (per curiam) (β = 2.74) (Hogan and Crane dissent to per curiam affirmance of decision denying Public Service Commission's request for injunction to a rate increase pending its approval).

108. In *Dugan*, the issues are whether the employer's business was storage and whether the employer and insurer were prejudiced by inadequate notice. 122 N.E. at 879. In *Guida*, the issue is whether the employee was engaged in interstate commerce and so outside the scope of workmen's compensation. 121 N.E. at 871. In *Kolb*, the issue is whether a workmen's compensation policy was in force at the time of the accident. 123 N.E. at 874. In *Zenner*, the issue is whether the plaintiff's conduct is contributory negligence as a matter of law. 122 N.E. at 895.

appellate division. Typically in such nonunanimous cases there is a majority opinion and dissents will be noted without opinion.

To get some sense as to whether these patterns are representative of all the 1918 term cases we plot the presence of three case characteristics—whether the case had a personal injury component, whether there was a dissent at the appellate division, and whether there was disagreement between the appellate division and the New York State Supreme Court—on the case's value of β. To aid visualization, we superimpose a nonparametric estimate of the probability of the attribute in question—say, a personal injury component—given β. If a particular type of case tends to be well represented by the model, then we should see a U-shaped relationship. These plots appear in Figure 7. One fact apparent from Figure 7 is that there are a significant number of cases where the appeal is not by right.

Figure 7 reinforces the impression that whatever the differences in underlying views and values may be that produce highly patterned voting, these differences correspond with differences in views that affect how judges vote in personal injury cases. The U-shaped curve in the upper-left panel of Figure 7(a) shows that personal injury cases are disproportionately among the cases with a high absolute β, these being the cases in which the pattern of voting is most consistent with the model. The top-right panel also shows a very strong U-shaped relationship between β and whether there was a dissent at the appellate division. The bottom-left panel shows a similar, albeit muted, relationship between β and whether there was disagreement among the lower courts (i.e, whether the appellate division reversed or modified the lower court's ruling). Even more striking are the patterns that emerge when looking at personal injury cases with and without either an appellate division dissent or lower court disagreement. These are cases where the appeal is by leave and not as a matter of right. There is basically no relationship between β and an indicator of personal injury *and* lack of appellate division dissent or between β and an indicator of personal injury *and* a lack of lower court disagreement. On the other hand, there are very strong U-shaped relationships between β and an indicator of personal

injury *and* presence of appellate division dissent or between β and an indicator of personal injury *and* a presence of lower court disagreement. One possible explanation for these patterns is that Appellative Division dissent and lower court disagreement are acting as proxies for the underlying difficulty of the case—the extent to which each side to the dispute has seemingly compelling legal reasons to support its position. Cases that are difficult for the lower courts are likely also difficult for the New York Court of Appeals. In such situations, some degree of dissent is not unlikely. Important, however, is the fact that in personal injury cases these dissents are highly patterned in the sense that they tend to form around very similar voting blocs. It is not a stretch to think that this stability is related to fundamental disagreements about the role of law in settling such disputes. On the other hand, when there is not some form of disagreement below the New York Court of Appeals, the case in question may well be a relatively easy case in which there is little room for judicial discretion. The dissents in these cases, to the extent there are many dissents, are likely due to a range of idiosyncratic factors and thus are not well represented by the IRT model.

Personal injury cases stand out in another respect in the 1918 term. Nonunanimous decisions are significantly more likely in a personal injury case. Based on a sample of fifty unanimous cases from the 1918 term, we estimate 33.7% of personal injury cases were nonunanimous compared to 12.6% of other cases.[109] The presence of a personal injury component nearly triples the probability of a dissent in a case.

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109. Flipping this around, 14.3% of unanimous cases were personal injury cases while 37% of nonunanimous cases were personal injury cases.
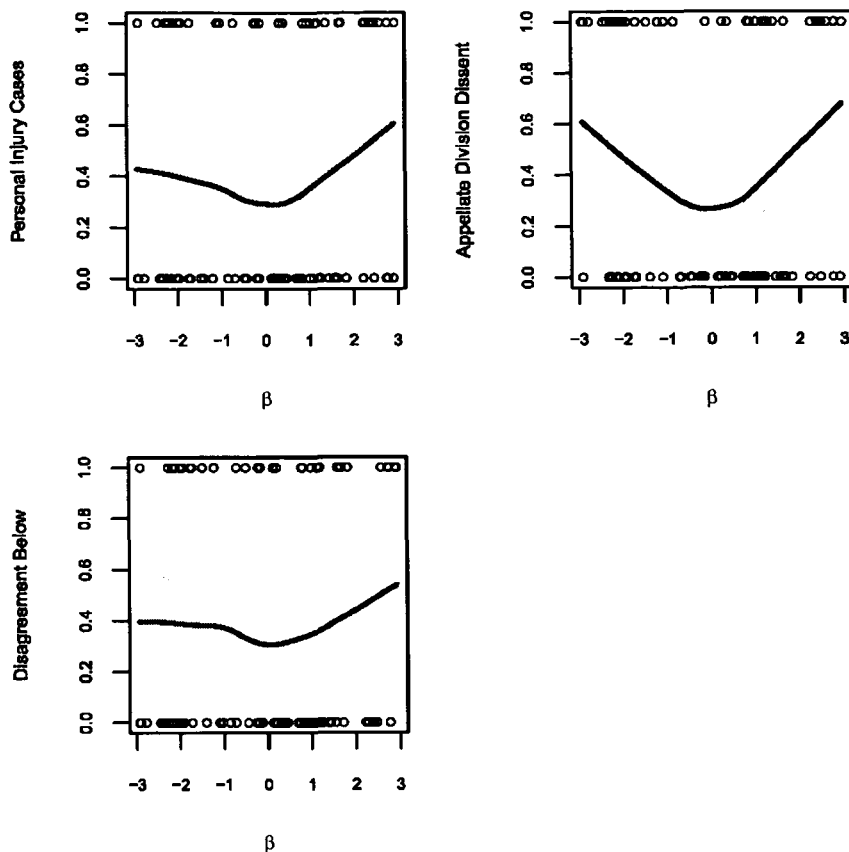
Figure 7(a). *Relationship Between Personal Injury Cases, Appellate Division Dissent, Lower Court Disagreement, and β in 1918.* Each point is a nonunanimous case from the 1918 term. On the y-axis is an indicator of whether the case in question was of the type labeled (1 if it was, 0 if not). The x-axis plots the value of $β$ for the case. The dark line is a loess smooth which estimates the probability that that a randomly selected cases with a given $β$ value will have the characteristics given by y-axis label. The shaded band is a 95% confidence band. For example, there is a just over a 40% chance that a 1918 case with a $β$ equal to -3.0 will be a personal injury case (see top-left panel).
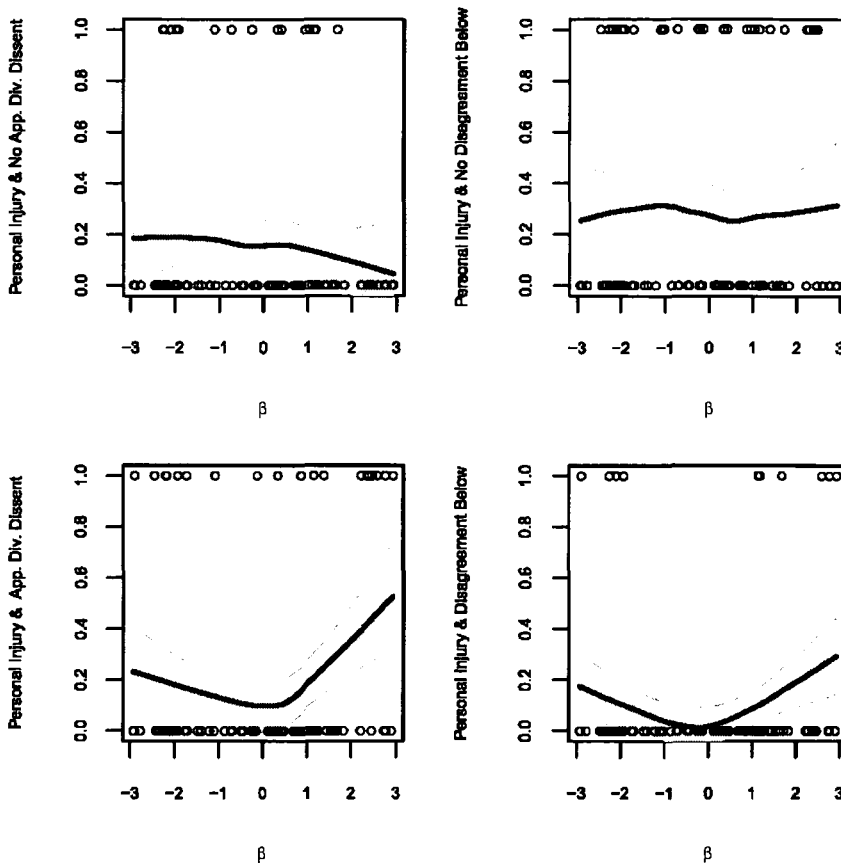
Figure 7(b). *Relationship Between Personal Injury Cases, Appellate Division Dissent, Lower Court Disagreement, and β in 1918.* Each point is a nonunanimous case from the 1918 term. On the y-axis is an indicator of whether the case in question was of the type labeled (1 if it was, 0 if not). The x-axis plots the value of β for the case. The dark line is a loess smooth which estimates the probability that that a randomly selected cases with a given β value will have the characteristics given by y-axis label. The shaded band is a 95% confidence band.

The handful of written opinions in which the alignment of the judges strongly fits the dominant alignment provides some inkling about the underlying views that create such patterned voting. *McGraw v. Gresser*[110] is a 4-3 decision

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110. 123 N.E. 84 (N.Y. 1919) (β = -2.934) Pound writes for the majority and is joined by Hogan, Cardozo, and Andrews. *Id.* at 85. Hiscock, Collin, and Cuddeback dissent without opinion. *Id.*

finding that a wrongfully discharged civil servant had a
right to recover back wages from the official who removed
him in a tort action as well as right to reinstatement
through a mandamus action.[111] The majority cites what it
describes as the "great case" of *Ashby v. White*[112] for the
proposition that "where there is a right there is a
remedy."[113] This celebrates a controversial position in tort
law at the time, which is that tort law is open to novel
claims of wrong.[114] *Stubbs v. City of Rochester*[115] is a 4-3
decision holding that there is sufficient evidence to go to a
jury on the question of causation in a typhoid fever case
even though the plaintiff could not eliminate sources other
than the defendants' contaminated water as cause of his
infection where statistical and other evidence made it
possible to say with "reasonable certainty" that defendant's
contaminated water caused his infection.[116] This relaxes
what had been the rule on causation because strict
application of the rule would have made recovery impossible
"in any case based upon like facts."[117] *Seaver v. Ransom*[118] is
a 4-3 decision holding that a niece could recover as a third-
party beneficiary of a death-bed promise made by the
husband of the dying aunt that she could forego remaking
her will to leave her house to the niece because he would
leave the niece the value of the house in his will.[119] The
majority opinion concedes that a strict application of the

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111. *Id.*

112. (1703) 92 Eng. Rep. 126, 126-27, 128-38 (K.B.).

113. *McGraw*, 123 N.E. at 85. This maxim once meant that if there was no
remedy, then there was no legal right.

114. It is striking that Pound, the author of the opinion, thought it worthwhile
writing an opinion to express this position. The court affirms the appellate
division. *Id.* at 85. During that period, typically an affirmance is per curiam
without an opinion. Reversals are usually with an opinion stating reasons.

115. 124 N.E. 137 (N.Y. 1919) (β = -2.902). Hogan writes for the majority
joined by Cardozo, Pound, and Andrews. Hiscock, Chase, and McLaughlin
dissent.

116. *Id.* at 140.

117. *Id.*

118. 120 N.E. 639 (N.Y. 1918) (β = -2.781) Pound writes the majority opinion
joined by Hogan, Cardozo, and Crane. *Id.* at 642. Hiscock, Collin, and Andrews
dissent. *Id.*

119. *Id.* at 639-40, 642.

New York rule might deny the claim, but justifies reaching the opposite result based on the equities of the case and the disarray in the New York third party beneficiary cases, observing that the outcome in these cases "must rest upon the peculiar circumstances of each case rather than upon the law of some other case."[120]

A crude explanation for the pattern of decisions is that the Hogan-Pound wing of the court is proplaintiff while the McLaughlin wing is prodefendant. Looking at written opinions from other terms in which the court sorts along similar lines suggests a more principled point of disagreement. In cases from the 1919 and 1920 terms, the two wings divide on the basic question of whether it is appropriate to hold a defendant liable for an accident for which the defendant bears no responsibility in the sense of fault.[121] The insistence by judges on the McLaughlin wing that liability depends on personal responsibility echoes a view at the heart of *Ives v. S. Buffalo Ry. Co.*[122] This is a controversial decision in the 1911 term unanimously holding a New York workmen's compensation statute unconstitutional on the view that it is impermissible to hold

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120. *Id.* at 641 (quoting Wright v. Glen Tel. Co., 95 N.Y.S. 101, 103 (N.Y. Sup. Ct. 1905)).

121. *Verschleiser v. Joseph Stern Son, Inc.*, 128 N.E. 126, 127-29 (N.Y. 1920) (β = -2.708) holds 5-2 that an injury arising from a fight within the workplace is covered by workmen's compensation. Elkus writes for the majority (joined by Hogan, Cardozo, and Crane) that the statute should be interpreted broadly and is a general insurance scheme. *Id.* at 128. McLaughlin writes in dissent (joined by Hiscock) that the injury must be a risk associated with employment, which the fight was not. *Id.* at 129 (McLaughlin, J., dissenting). Chase concurs in the judgment of the majority but not the opinion. *Id.* at 129. *Canavan v. City of Mechanicville*, 128 N.E. 882, 882-84 (N.Y. 1920) (β = 2.909) holds 4-3 that the liability of a municipal water supplier, for supplying water contaminated with typhoid, must be grounded in negligence, and not strict liability, under a theory of implied warranty. Collin writes for the majority (joined by Hiscock, McLaughlin, and Andrews) arguing that it is unfair and bad policy to hold a water supplier liable when it is impossible for a supplier to prevent the water from being contaminated. *Id.* at 884. Pound and Elkus take the unusual step of reading separate dissents. *Id.* at 887. Hogan dissents without opinion. *Id.*

122. 94 N.E. 431 (N.Y. 1911). Chase and Collin are the only Judges who participated in the decision in *Ives* who also remained on the Court in the 1918 term. Hiscock was on the court in the 1911 term when *Ives* was decided, but did not participate in the decision.

an employer liable for an accident for which the employer bore no responsibility.[123]

John Fabian Witt argues the decision in *Ives* grounds on a nineteenth century view that tort liability is a matter of personal responsibility and fault.[124] Witt juxtaposes this with a view we associate with a theory of enterprise liability, which justifies liability on what Witt describes as managerial and actuarial grounds.[125] The decision in *Ives* was very controversial politically and legally.[126] *Ives* was quickly reversed by a state constitutional amendment.[127] Its reasoning was repudiated by the United States Supreme Court in a series of cases a few years later.[128] New York enacted a new workmen's compensation statute.[129] The author of the decision in *Ives*, Judge Werner, lost in a race for the position of chief judge in 1913 in an election that was believed to swing on the unpopularity of the decision.[130] He resigned from the court shortly thereafter.[131] By the 1918 term, no one on the court openly questions the power of the legislature to replace the negligence system with an insurance system. But the McLaughlin wing of the court consistently resists efforts to expand the universe of cases covered by the insurance system and opposes efforts to impose liability through the common law in cases in which they did not think the defendant responsible for the injury.

Another striking feature of the opinions that express the collective views of the judges on the Hogan-Pound wing is the description of the law as open and flexible. *Seaver v. Ransom* is not alone in giving what later is described as a realist account of the law. Cardozo sounds a similar theme

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123. *Id.* at 436.

124. WITT, *supra* note 5, at 163-74.

125. *Id.* at 196.

126. *Id.* at 152.

127. *Id.*

128. *Id.*

129. *Id.* at 176.

130. *Id.* at 177-79.

131. *Id.*

two terms later in *Hynes v. New York Cent. R.R. Co.*[132] when he writes "This case is a striking instance of the dangers of 'a jurisprudence of conceptions' . . . the extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.'"[133] If we go back a few years earlier we find opinions in nonunanimous cases that express the collective views of judges on the opposite wing of the court in those years that explicitly stake out a strikingly different conception of law. These opinions argue for outcomes the authors sometimes concede to be inequitable on the ground that any rule that would get them to an equitable outcome creates too much legal uncertainty or is simply not possible using the traditional toolkit of legal concepts.[134]

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132. 131 N.E. 898, 898-900 (N.Y. 1921) (β = -2.835) (holding that a sixteen-year-old boy killed by a falling electric wire after playing in public waters and climbing onto a diving board on a railroad bulkhead, is allowed to recover even though he technically was a trespasser). Hiscock, Chase, and McLaughlin dissent. *Id.* at 900.

133. *Id.* at 900 (quoting Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 611 (1908)).

134. *Pittsburgh Westmoreland Coal Co. v. Kerr*, 115 N.E. 465, 466-67 (N.Y. 1917) (β = 2.608), is a 5-2 decision in which the majority reasons that subrogation is governed by general equitable principles similar to those that apply to a mistaken payment of money, i.e., they liberalize subrogation by associating it with what we think of as general principles of unjust enrichment. Crane and Cuddeback dissent arguing that allowing recovery from an innocent recipient of stolen funds that are paid on a note creates unacceptable uncertainty regarding the finality of payment. *Id.* at 469-70 (Crane, J., dissenting). *Zeiser v. Cohn*, 101 N.E. 184, 188-89 (N.Y. 1913) (Gray, J., dissenting) (β = -2.585), is a 4-3 decision in which Hiscock, Collin, and Gray object to implication of a vendor's lien to avoid unjust enrichment on the ground that the plaintiff had an adequate remedy at law and so cannot have an equitable remedy and expressing a worry that a vendor's lien is a new and extraordinary equitable doctrine that ought not be carried too far. *Pollitz v. Wabash R.R. Co.*, 100 N.E. 721, 726-27 (N.Y. 1912) (Cullen, C.J., dissenting) (β = 2.955), is a 4-3 decision in which the dissent takes the position that laches and acquiescence are not available as defenses to a claim in which the plaintiff seeks legal and not equitable relief because laches and acquiescence come out of equity and not law.
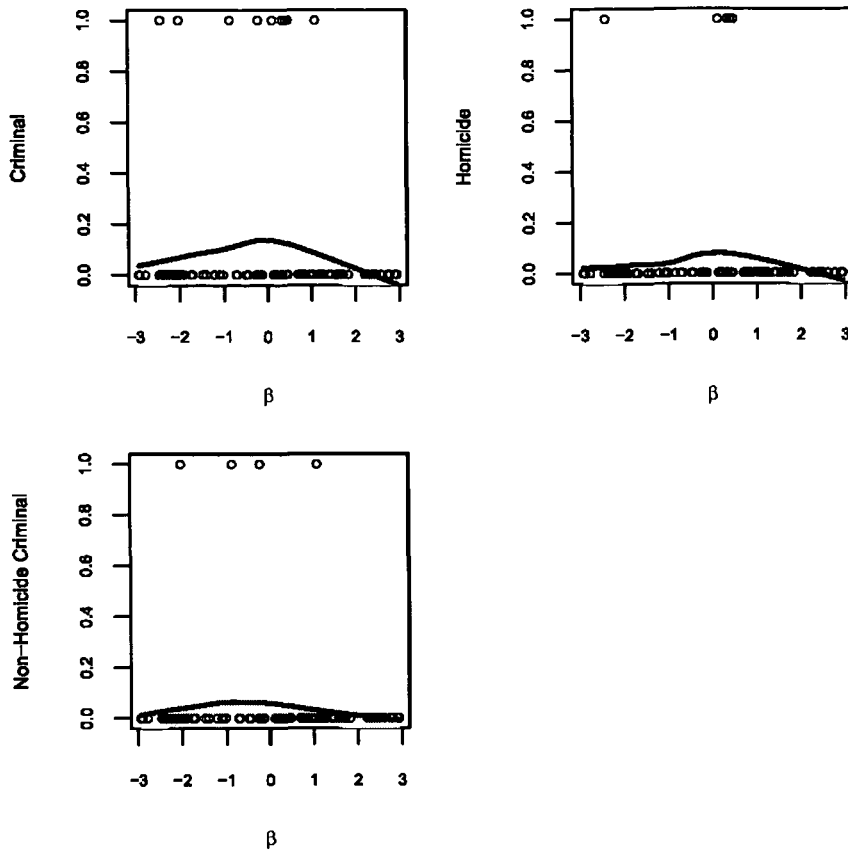
Figure 8. *Relationship Between Criminal Cases and β.*

Criminal cases, particularly homicide cases, stand out in that the judges consistently align in patterns that are unlike the dominant alignment captured by the IRT model.[135] Figure 8 shows that criminal and homicide cases in the 1918 term in which there is a dissent cluster in the low

135. There are twenty-seven cases in which the absolute value of β is less than .5. In nine, a judge not usually on the wing of the court dissents alone. Crane does this four times, Chase and Cuddeback two each, and Collin once. The low β cases other than the criminal and personal injury cases discussed in the text and notes following are a grab bag. These include a 4-3 split decision whether the Surrogate Court has an implied power to deny a commission to a neglectful trustee or executor; three tax cases, two involving a disagreement over the meaning of "net income;" a 4-3 split on the power of the Railroad Commission to order a rebate of a rate it finds to be unreasonable; a conversion case with a 5-2 split; and six contract cases with either a 4-3 or 5-2 split.

β range. The relatively small number of criminal and homicide cases mute the nonparametric estimate of the probability of a low β in these cases. Nevertheless the estimate appears as a discernible hill cresting near a 0 β, which is opposite the pattern found in personal injury cases. While there are consistent voting patterns in criminal and homicide cases, the alignment is strikingly different than that captured by the IRT model. During the 1918 term, Cardozo and Cuddeback generally vote with the prosecutor in nonunanimous homicide cases while Hiscock, Hogan, and Pound generally vote with the accused.[136]

There are six personal injury cases with a low absolute β.[137] The most interesting of these involves a challenge to

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136. There were five nonunanimous homicide decisions in the 1918 term. In *People v. Linton*, 121 N.E. 883, 883-84 (N.Y. 1918) (per curiam) (β = .115), a 4-3 court affirms a homicide conviction per curiam with Collin, Cardozo, Pound, and Andrews in the majority and Hiscock, Hogan, and Crane dissenting on the ground the verdict is against the weight of the evidence. In *People v. Esposito*, 121 N.E. 344, 346 (N.Y. 1918) (β = .34), a 5-1 court votes to reverse a homicide conviction on grounds of prosecutorial misconduct. Hiscock, Chase, Collin, Hogan, and McLaughlin are in the majority. *Id.* Cuddeback is the sole dissent. *Id.* In *People v. Minsky*, 124 N.E. 126, 128 (N.Y. 1919) (β = .413), a 4-2 court reverses a homicide conviction on the ground of a violation of an evidentiary rule by the prosecutor. Pound, Hiscock, Collin, and Andrews are in the majority. *Id.* at 128. Cuddeback and Cardozo dissent, voting to affirm the conviction on the ground that the error was harmless. *Id.* at 128 (Cuddeback, Cardozo, J.J., dissenting). In *People v. Verrino*, 122 N.E. 888, 888 (N.Y. 1919) (per curiam) (β = .471), the court affirms a homicide conviction 5-2, with Collin, Cuddeback, Cardozo, Crane and Andrews in the majority and Hiscock and Pound dissenting. *People v. Van Zandt*, 120 N.E. 725, 725 (N.Y. 1918) (per curiam) (β = -2.424), is the only homicide decision in the term in which voting patterns aligned with the IRT. This is a 5-2 reversal of a homicide conviction on the ground that the jury should be instructed on the relevance of the defendant's severe state of intoxication on whether he could form the intent necessary for first degree murder. *Id.* The defendant's counsel had not sought such an instruction. *Id.* Andrews writes a brief opinion in which Hiscock, Hogan, Cardozo, and Pound concur. *Id.* Chase and McLaughlin dissent. *Id.* In a non-homicide criminal case, *People v. Rodgers*, 123 N.E. 882, 882 (N.Y. 1919) (per curiam) (β = -.207), the court splits 5-2 to affirm a robbery conviction, with Chase, Collin, Cuddeback, Crane and Andrews in the majority and Hogan and McLaughlin dissenting.

137. The most atypical of these is a 5-2 decision in *Di Salvio v. Menihan Co.*, 121 N.E. 766 (N.Y. 1919) (β = .319). The majority reverses a workmen's compensation award holding that a plaintiff was not injured in the scope of employment when he left his station to say goodbye to a fellow worker who had been drafted; he then caught his hand in machinery. *Id.* Hiscock writes the majority opinion, which holds that this stretches the concept of scope of

the constitutionality of a statute authorizing the Industrial Commission to award compensation for personal disfigurement in a workplace accident without a showing of lost earning power.[138] Five judges vote to affirm the award.[139] Cardozo, McLaughlin, and Andrews vote to affirm on a broad reading of the legislative power to decide what losses should be covered by the insurance scheme.[140] The other four judges take the position that the insurance scheme should be construed to cover only lost earning power to avoid a difficult constitutional question.[141] Hiscock and Pound concur in the judgment affirming the award on the ground that loss of earning power may be presumed in a case of disfigurement absent evidence to the contrary.[142] Chase and Hogan dissent and vote to remit the case to require a specific finding of loss of earning power.[143]

D. *The 1921 to 1926 Terms*

The practice of appointing judges from the New York State Supreme Court to the New York Court of Appeals to assist the seven elected judges ended with the 1920 term.[144] Thereafter the same seven judges vote on each case unless a judge is absent from a case for a special reason or there is a turnover in the membership of the court during a term.

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employment beyond its breaking point. *Id.* at 766-67. The alignment is unusual because Hogan concurs, while Chase and Crane dissent. *Id.* at 768. Skrodanes v. Knickerbocker Ice Co., 123 N.E. 890 (N.Y. 1919), is discussed earlier. *See* cases cited *supra* note 103. Three cases involve sole dissents. In *Plass v. Central New England Ry. Co.*, 123 N.E. 852, 853 (N.Y. 1919) (β = -.135) (Collin, J., dissenting), Collin is the sole dissent on what appears to be an issue of appellate procedure. In *Michalski v. Am. Mach. & Foundry Co.*, 122 N.E. 233, 234 (N.Y. 1919) (β = -.212), Chase is the sole dissent to a decision reversing a verdict for an injured worker on grounds of evidentiary insufficiency. In *Martinkovics v. Lehigh Coal & Navigation Co.*, 121 N.E. 877, 877-78 (N.Y. 1918) (β = .338) (per curiam), Cuddeback is the sole dissent to per curiam affirmance of a judgment for the plaintiff in a workplace injury case.

138. *See* Sweeting v. Am. Knife Co., 123 N.E. 82, 83-84 (N.Y. 1919) (β = .411).

139. *Id.* at 84.

140. *Id.* at 83.

141. *Id.* at 84 (Pound, J., concurring).

142. *Id.*

143. *Id.* (Chase, Hogan, J.J., dissenting).

144. BERGAN, *supra* note 26, at 262.

There is little turnover from 1921 to 1925. Indeed, the seven who serve in 1921—Hiscock, as Chief Judge, with Andrews, Cardozo, Crane, Hogan, McLaughlin, and Pound—serve together from the 1916 term, when Andrews, Crane, and McLaughlin join the court, through to the 1923 term when Lehman replaces Hogan.[145] This change does not disrupt voting patterns. The major disruption occurs in the 1926 term when Kellogg and J.F. O'Brien replace Hiscock and McLaughlin.[146]

Figure 9 displays the posterior ranks of the judges' ideal points for the 1921 to 1926 terms. Voting is highly patterned for all terms except 1926, where the model produces unusual results. Putting the 1926 term to the side for the moment, the posterior ranks are very consistent and similar to 1918.[147] McLaughlin and Hiscock consistently anchor the right-wing of the court. Andrews generally is to the left of these two and to the right of center.[148] Cardozo, Crane, Hogan, Lehman, and Pound change positions relative to each other but always are to the left of McLaughlin and almost always are to the left of Hiscock[149] and Andrews.[150]

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145. *Id.* at 259-60, 270.

146. *Id.* at 270-71; NELSON, *supra* note 4, at 21-22.

147. These general patterns also hold for these seven judges—Hiscock, Andrews, Cardozo, Crane, Hogan, McLaughlin, and Pound—in the 1917, 1919, and 1920 terms. Hiscock and McLaughlin always are to the right of the other five. Andrews always is the left of these two (as well as Collin) and to the right of the other four. Cardozo, Crane, Hogan, and Pound change positions relative to each other. Posterior ranks for the 1916 term are quite muddled.
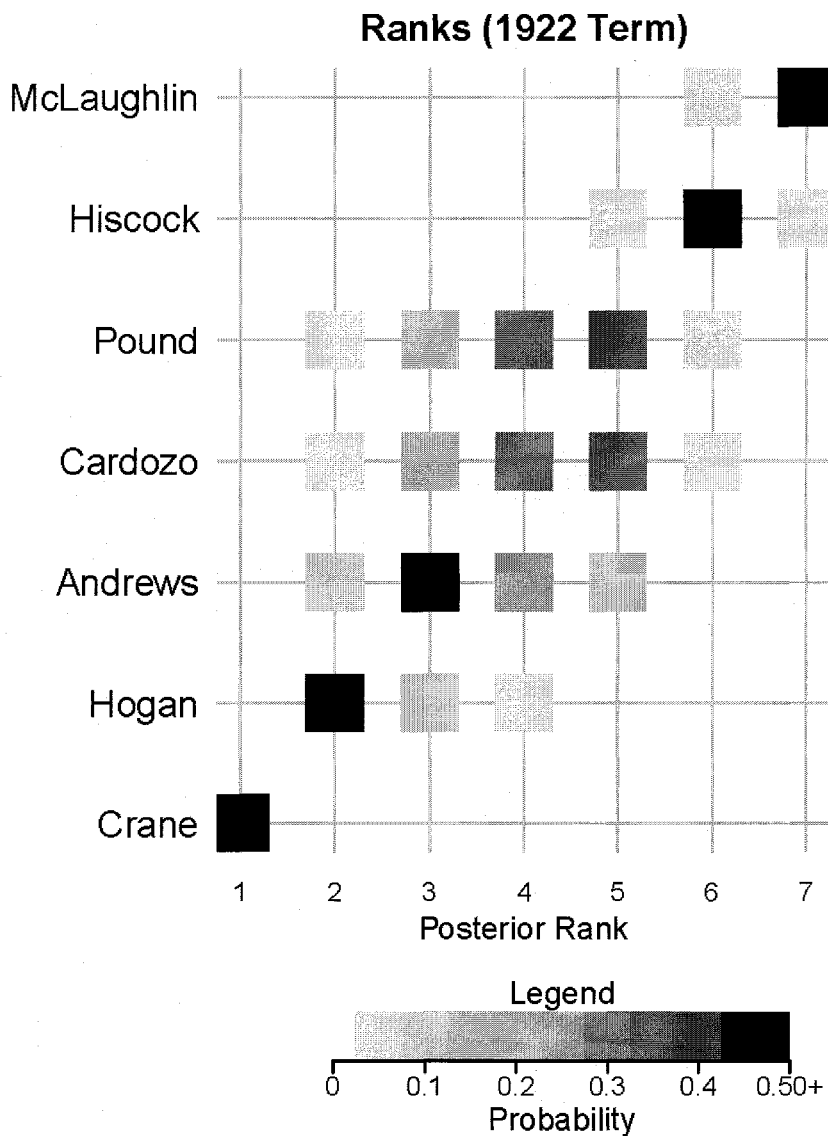
148. The exceptions are 1922 and 1924.

149. The exception is 1924.

150. The exception is 1922.
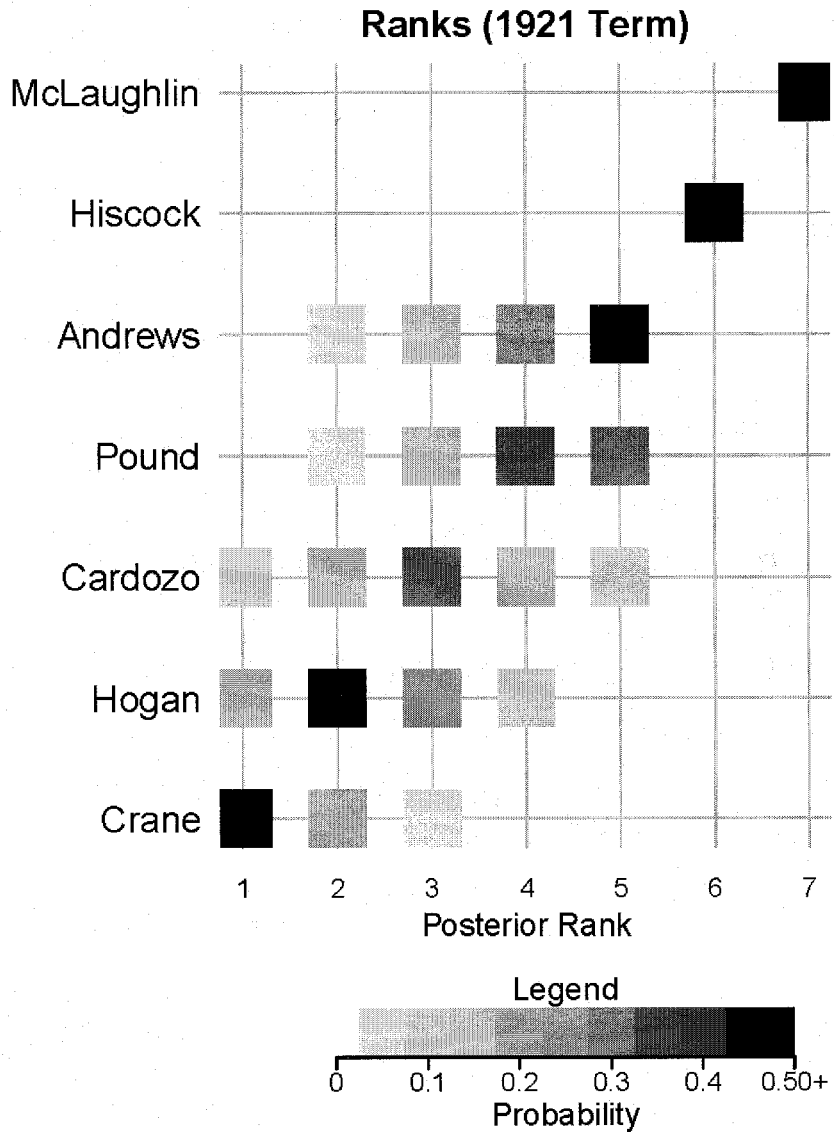
Figure 9(a). *Posterior Ranks of Ideal Points, 1921 to 1926 Terms.*

Ranks (1922 Term)

Figure 9(b). *Posterior Ranks of Ideal Points, 1921 to 1926 Terms.*

Ranks (1923 Term)

Figure 9(c). *Posterior Ranks of Ideal Points, 1921 to 1926 Terms.*
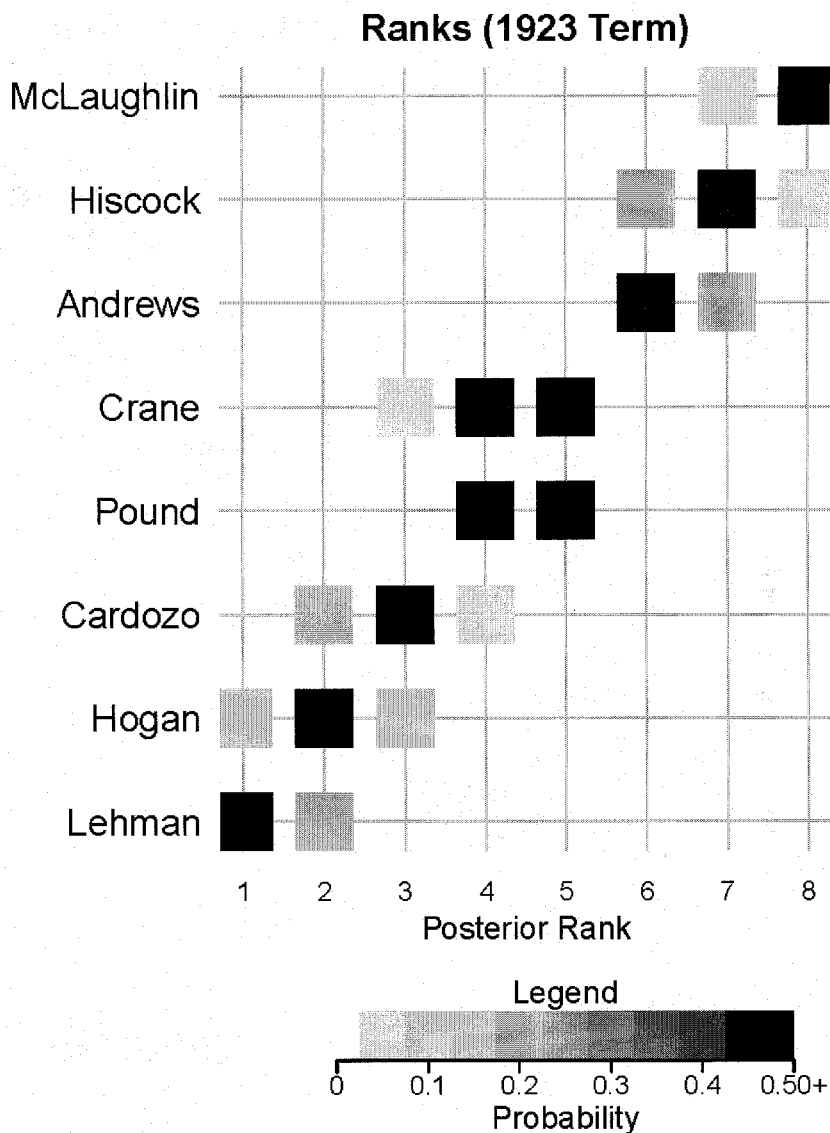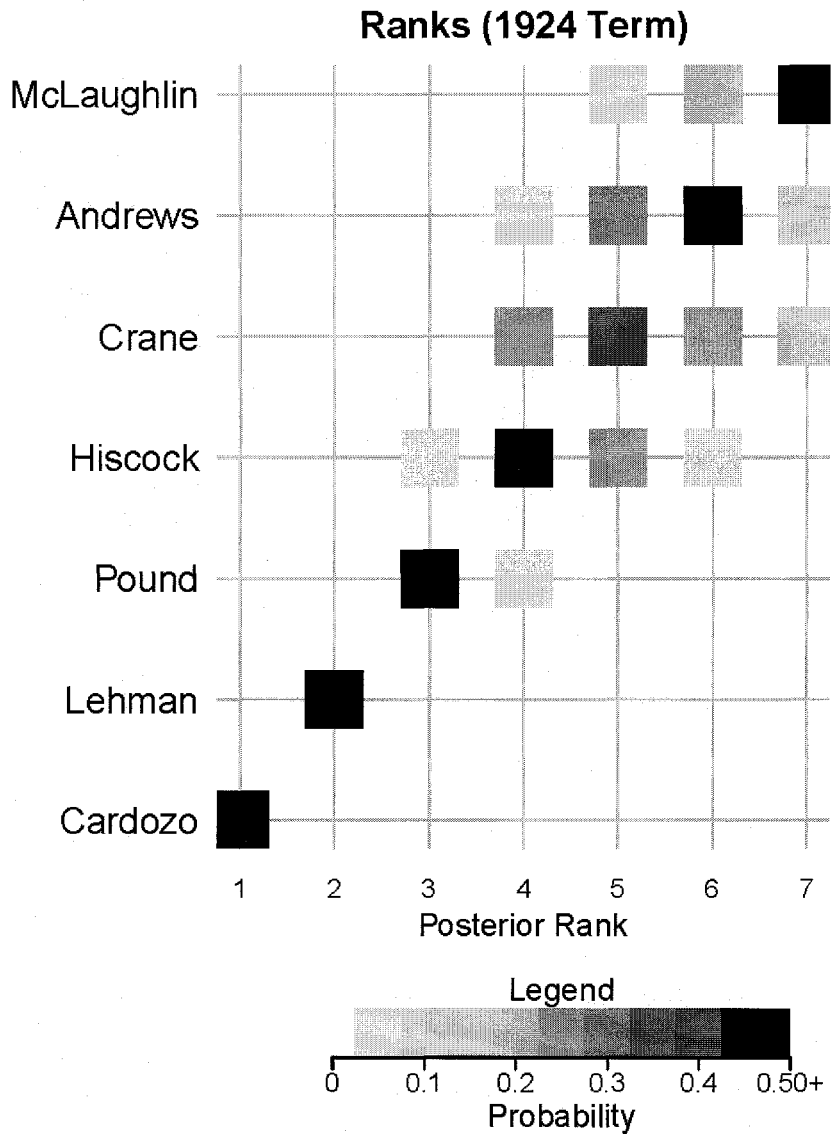
Ranks (1924 Term)

Figure 9(d). *Posterior Ranks of Ideal Points, 1921 to 1926 Terms.*

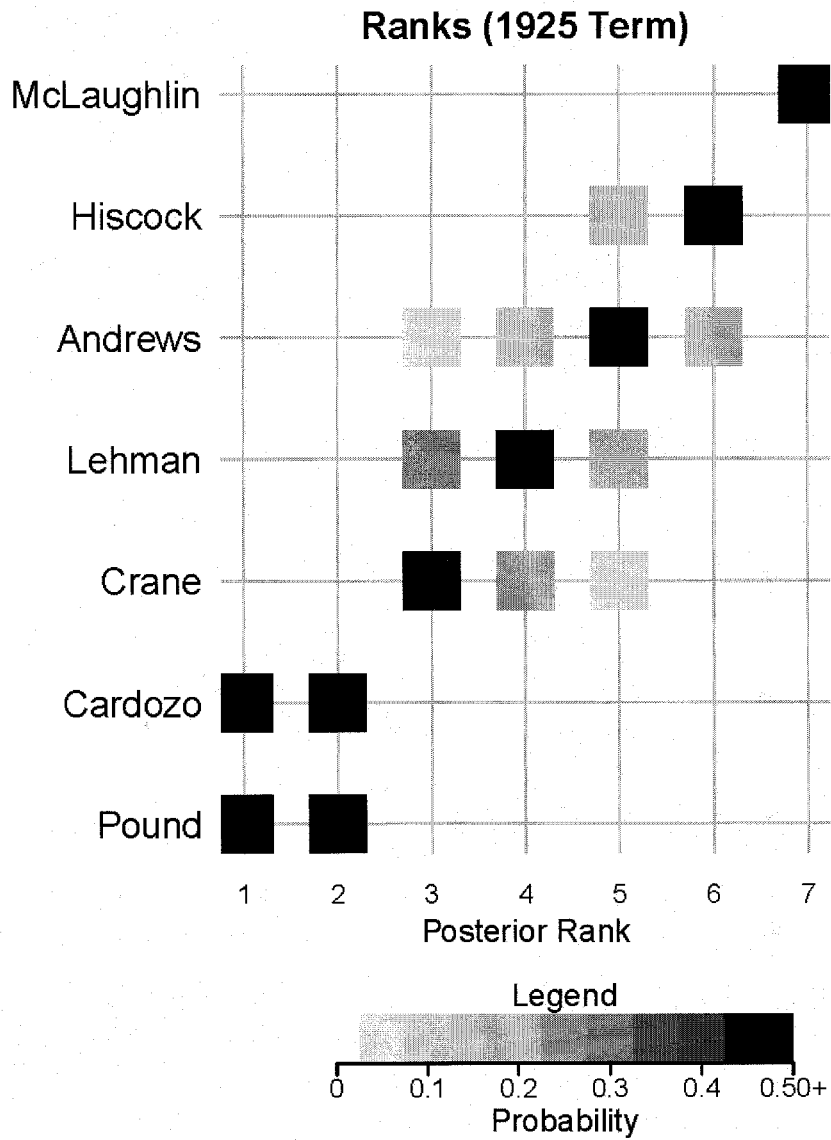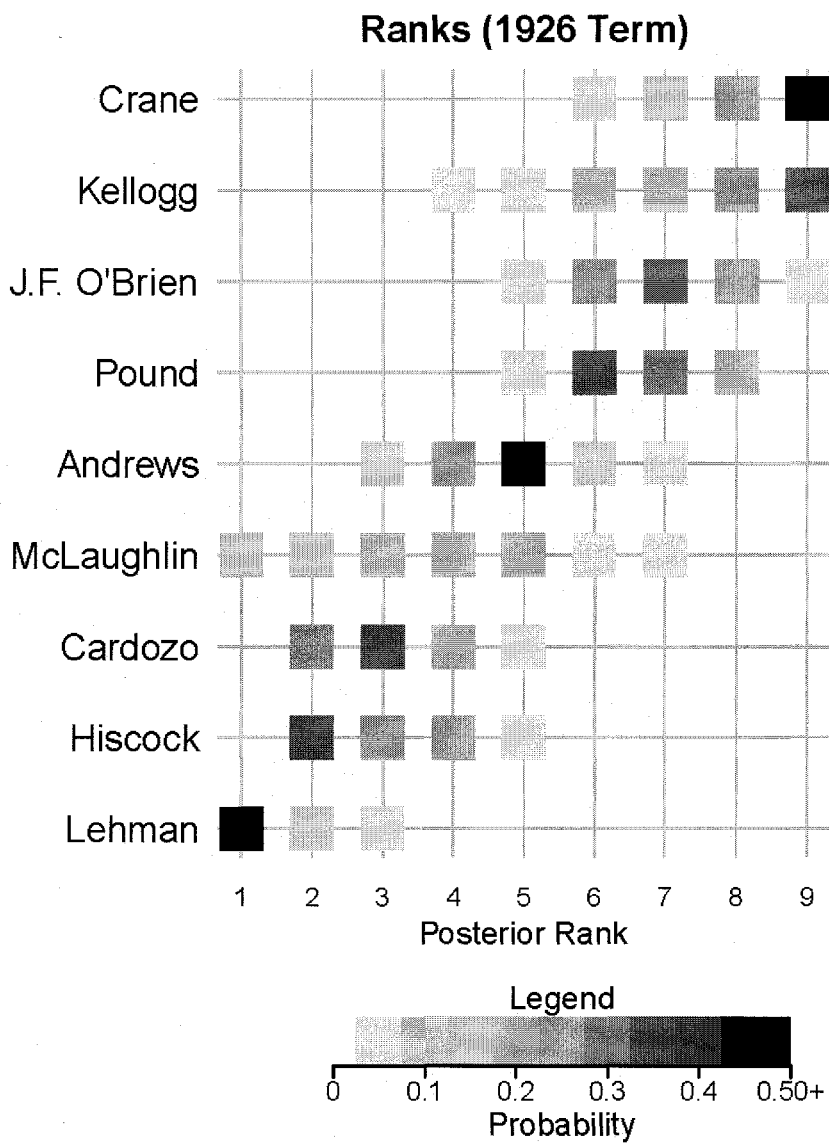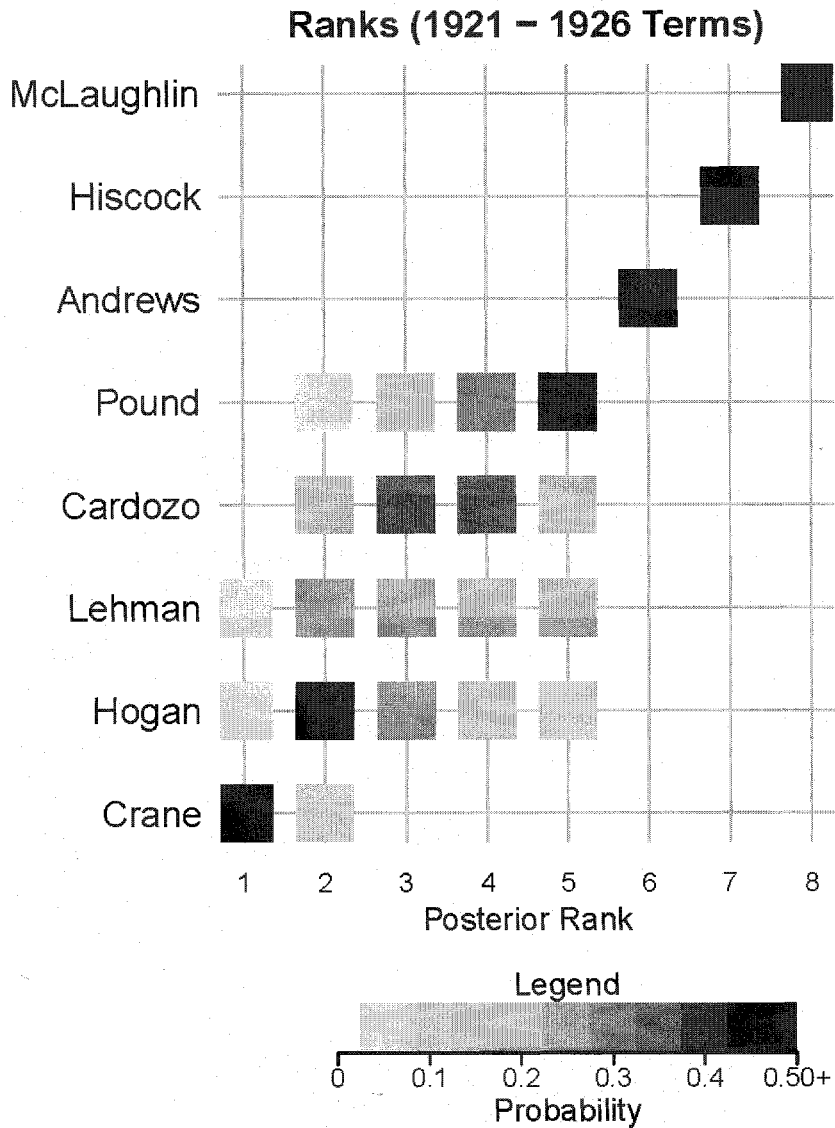**Figure 9(e).** *Posterior Ranks of Ideal Points, 1921 to 1926 Terms.*

Ranks (1926 Term)

Figure 9(f). *Posterior Ranks of Ideal Points, 1921 to 1926 Terms.*

The atypical results for 1926 do not shake our confidence in the earlier results. Kellogg and J.F. O'Brien replace Hiscock and McLaughlin in midterm, splitting the cases decided during the term roughly evenly between them. As you shall see when we turn to the 1927 to 1930 terms, the turnover in 1926 has a significant impact on voting patterns. The switch in midterm confounds the model by cutting in half the number of nonunanimous decisions that can be used to predict the votes of the five judges who voted in all cases decided in the 1926 term in relation to the transient pairs of judges, each of which voted in roughly half the cases. The sharp differences in voting patterns before and after the switch further confound the model because there may be little overlap in patterns in the two blocks of cases.

Figure 10 displays the posterior ranks of the judges' ideal points pooling all nonunanimous decisions during the 1921 to 1925 terms and the 1926 term before Hiscock and McLaughlin leave the court. Pooling terms increases the number of observations, and so, the strength of the rankings of judges for whom the patterns hold across pooled terms. McLaughlin, Hiscock, and Andrews now clearly appear on the court's right-wing and clearly in that order. Crane stands fairly clearly on the left-wing. The pooled rankings are very similar to the rankings for the 1921 term. The greatest dissimilarity is between the pooled rankings and the 1924 term. Crane moves from the far left to third from the right. Cardozo and Lehman move to the far left. Crane also is to the right of Cardozo and Lehman in the 1923 and 1925 terms. We will come back to this point.

Ranks (1921 – 1926 Terms)

Figure 10. *Posterior Ranks of Ideal Points, 1921 to 1926 Terms Pooled.*

During the 1921 to 1925 terms, as during the 1918 term, voting in personal injury cases strongly corresponds with the dominant pattern of voting found by the model. A disproportionately large share of the high absolute β cases

are personal injury cases (approximately one-third).[151] The left-wing of the court *always* sides with the claimant in these thirty-three cases and the right-wing of the court *always* sides with the defendant.[152] This pattern persists when we look at the pooled cases from the 1921 to 1925

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151. During the period there are thirty-six personal injury cases with an absolute β of 2 or greater. There are only eight personal injury cases with an absolute β of .5 or lower. This is from a pool of 401 nonunanimous cases, of which 136 have an absolute β of 2.0 or greater and sixty-six have an absolute β of .5 or lower. Summary statistics from workmen's compensation cases are consistent. The average absolute β in the twenty-four nonunanimous workmen's compensation cases is 1.98.

152. *See infra* notes 155-76 and accompanying text. We define high absolute β cases as those where $[\beta] > 2.0$. The cutoff is arbitrary. Looking more closely at cases from the 1921 to 1925 terms, we find the pattern persists below a β of 2.0. There are twenty-five personal injury cases with an absolute β between 1.5 and 2.0. In twenty-three, the plaintiff prevails if β's sign is negative, meaning the left-wing prevails, and the defendant prevails if the sign positive. Voting may follow the pattern in one of the two non-conforming cases. In *Longacre v. Yonkers R.R. Co.*, 140 N.E. 215, 216-18 (N.Y. 1923) (β = 1.697), the appellate division reversed a judgment for the plaintiff and entered a verdict for the defendant. The majority agreed with the appellate division that the verdict could not stand because of an error in admitting evidence of the trolley company's own rules to establish negligence. *Id.* at 217-18. The majority reversed the appellate division to order the claim be retried. *Id.* at 218. It is not clear who this is a victory for. The basis for Cardozo and McLaughlin's dissent is not indicated. *Id.* In the other nonconforming case, *Hayden v. New York Rys. Co.*, 134 N.E. 826, 827 (N.Y. 1922) (β = 1.506), the jury returned a verdict for the defendant in a case involving a collision between a taxi in which the plaintiff was a passenger and another car. The plaintiff did not call the taxi driver as a witness. *Id.* at 827-28. The New York Court of Appeals held it was error to instruct the jury that it could draw an adverse inference from this. *Id.* at 828. Crane and Andrews dissent without opinion. *Id.*

One of the cases from the 1924 term, *Moore v. Van Beuren & New York Bill Posting Co.*, 148 N.E. 753, 753 (N.Y. 1925) (per curiam) (β = 1.554), warrants further mention for research by Andrew Kaufman, who provides a window to view the court's internal workings. *See* KAUFMAN, *supra* note 2, at 283-84. Cardozo was assigned the report for the case. *Id.* at 283. In his report, Cardozo advocated reversing the appellate division, and reinstating the jury verdict, arguing that the rule that was the basis for the decision below limiting the liability for a carelessly caused fire to the immediate victims was arbitrary and inconsistent with the rule elsewhere. *Id.* While Crane and Lehman went along with Cardozo he was not able to get a fourth vote. *Id.* The result is a per curiam affirmance of the appellate division with no opinion by anyone. *Moore*, 148 N.E. at 753.

terms.[153] The pooled analysis also includes cases from the 1926 term before Hiscock and McLaughlin leave the court. While there are only four nonunanimous personal injury cases during this period, the voting patterns strongly correspond with the overall pattern.[154]

Some of the disagreement in personal injury cases can be attributed to fundamental disagreements over whether and the extent to which liability for accidental harm is fault-based. This is described as the fundamental issue in a 4-2 workmen's compensation case from the 1924 term,

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153. There is significant overlap in the identity of the high absolute β cases. The table below shows the number of high absolute β cases using the arbitrary cutoff points of 2.0 and 1.5 for both the term and pooled analyses. We exclude cases from the 1926 term. *See infra* note 154. Column one is the number of cases with β above the indicated value in both the term and pooled analysis, Columns two and three are the number of cases with β above the indicated value in one but not the other, and Column four is the number of cases with the indicated β in one or both. The differences in β between the term and pooled analyses tend to be relatively small. For example, of the fourteen cases with an absolute β greater than 2.0 in the term analysis alone, eleven have an absolute β greater than 1.5 in the pooled analysis.

	Term and Pooled	Term alone	Pooled alone	Term or Pooled
$[\beta] > 2.0$	22	14	10	46
$[\beta] > 1.5$	46	13	8	67

In all forty-six cases with an absolute β greater than 2.0 in either analysis the verdict appears to be a victory for the claimant if the sign is negative and appears to be a victory the defendant if the sign is positive. This also is true for the forty-six cases with an absolute β greater than 1.5 in both analyses. This is not surprising for these two sets of cases are almost identical. Two cases may not fit the pattern in the term analysis. *See supra* note 152. One case is against the pattern in the pooled analysis. *See* Sanders v. N.Y. Cent. R.R., 148 N.E. 739, 739 (N.Y. 1925) (β = 1.989) (per curiam). Crane dissents to 4-1 per curiam decision affirming a negligence verdict for the plaintiff. *Id.* Pound was absent. Hiscock did not vote.

154. All four cases have high β values in the pooled analysis. Three anticipate voting patterns later in the decade for when Cardozo and Lehman join Hiscock and McLaughlin in decisions for the defendant. *See* Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 65 (N.Y. 1926) (pooled β = 1.981); Murphy v. Stanley Court Realty & Constr. Co., 154 N.E. 625, 625 (N.Y. 1926) (per curiam) (pooled β = 2.012); Jablonor v. Vill. of Rockville Ctr,, 154 N.E. 625, 625 (N.Y. 1926) (per curiam) (pooled β = 2.057). Russell v. Recker, 154 N.E. 627, 627 (N.Y. 1926) (per curiam) (pooled β = -2.709) (Hiscock and McLaughlin dissent to a 5-2 per curiam decision for the claimant).

McCarter v. La Rock.[155] An employee working on his employer's property was killed by fragments from an exploding souvenir shell on a neighbor's property.[156] The majority holds the injury not covered by the Workmen's Compensation Act.[157] Hiscock writes:

> This appeal in effect presents the question whether [the Act] is to be interpreted as furnishing a species of insurance against all injuries received in the course of employment, or whether it is to be interpreted as meaning that there must be a traceable, causal connection between the employment and the risk which has caused the injuries.[158]

Cardozo and Lehman dissent.[159] Several high absolute β workmen's compensation cases involve the question of whether a freak injury is within the scope of employment.[160] It may well be that a judge's views on the fundamental issue influence where he draws what is an essentially arbitrary line. In several high absolute β negligence cases the disagreement appears to be over the degree of fault or responsibility necessary for liability.[161] These cases raise the

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155. 148 N.E. 523, 523, 526 (N.Y. 1925) (β = 2.751).

156. *Id.* at 523.

157. *Id.* at 526.

158. *Id.* at 523.

159. *Id.* at 526.

160. See Connelly v. Hunt Furniture Co., 147 N.E. 366, 366 (N.Y. 1925) (β = -2.219) (involving employee of undertaker who died as a result of being infected with gangrene in handling corpse); Domres v. Syracuse Safe Co., 148 N.E. 727, 727 (N.Y. 1925) (per curiam) (β = -2.348) (involving employee injured while sitting in door of workplace during lunch hour when car leapt curb and struck him); Roberts v. J.F. Newcomb & Co., 138 N.E. 443, 444 (N.Y. 1922) (per curiam) (β = -2.645) (holding 5-2 in a per curiam affirmance); Fried v. Quinlan, Inc., 152 N.E. 399, 399 (1926) (per curiam) (β = 2.612) (involving employee killed in altercation at work).

161. *See, e.g.,* Rosebrock v. Gen. Elec. Co., 140 N.E. 571, 572 (N.Y. 1923) (per curiam) (β = -2.45) (determining whether G.E. was liable for delivering a transformer with protective wooden blocks that the utility company negligently failed to remove, resulting in a disastrous explosion); Reid v. Westchester Lighting Co., 140 N.E. 712, 712-13 (N.Y. 1923) (β = 2.362) (determining whether a gas company may be held liable for defects in pipes it installs in a house resulting in a fatal leak when the company no longer supplied gas to the house; Cardozo concurs only on the narrowest ground for finding no liability, which is that the defendant had no notice pipes were in a defective condition); Belair v.

same fundamental issue and present a similar line-drawing problem. Of course, the disagreement could be on other grounds. A large handful of cases involve disputes over contributory negligence, where the disagreement might be on the facts, the standard of care, or the degree of deference due the jury.[162] In one high absolute β case involving the question whether a release was fraudulently obtained, the left-wing of the court explicitly argues that the jury's verdict should be respected, even though the evidence for it was weak.[163] Still, it is possible in these cases that a judge's views on the underlying issue influence how he resolves a close factual or legal question.[164] This is a charitable explanation for the voting alignment in a high absolute β case where the left-wing of the court takes the position that an injury is outside the scope of employment while the right-wing takes the opposite position.[165] A less charitable explanation is that voting in the case is result-driven. It was to the advantage of the claimant that the injury be deemed outside the scope of employment because it opened the door to a high-value negligence claim.

State, 150 N.E. 551, 551 (N.Y. 1925) (per curiam) (β = 2.639) (determining whether by taking control of a highway the state assumes responsibility for a pre-existing condition); Schumer v. Caplin, 150 N.E. 139, 140 (N.Y. 1925) (β = 2.774) (determining whether violation of Industrial Commission safety rules is negligence per se).

162. *See, e.g.*, Horton v. N.Y. Cent. R.R. Co., 142 N.E. 345, 345 (N.Y. 1923) (β = -2.453); Chamberlin v. Lehigh Valley R.R. Co., 144 N.E. 512, 512 (N.Y. 1924) (β = -2.434); Shapiro v. N.Y. Cent. R.R. Co., 147 N.E. 202, 203 (N.Y. 1924) (per curiam) (β = -2.369); Baker v. Dingwell Bros., 147 N.E. 194, 194 (N.Y. 1924) (per curiam) (β = -2.173).

163. McNamara v. Eastman Kodak Co., 133 N.E. 113, 118-19 (N.Y. 1921) (Crane, J., dissenting) (β = 2.403).

164. *Fancher v. Boston Excelsior Co.*, 139 N.E. 265 (N.Y. 1923) (β = -2.71), invites this explanation. The issue was whether a claimant who was paid by the piece for work done by other men under his supervision was an employee or independent contractor. *Id.* at 265. In this case—and Tallon v. Interborough Rapid Transit Co., 134 N.E. 327, 328-30 (N.Y. 1922) (McLaughlin, J., dissenting) (β = -2.453)—the dissenters appear to have a stronger argument on the law.

165. *Tallon*, 134 N.E. at 328; *id.* at 328 (McLaughlin, J., dissenting). The issue was whether an IRT employee killed in an accident while commuting to work with a pass was injured within the scope of employment. *Id.* at 327-28.

The judges align precisely as the model depicts in *Robinson v. Robins Dry Dock & Repair Co.*[166] The case provides a window on the complex and sometimes chaotic developments in the law of workplace injuries during this period. The plaintiff's husband was killed in 1918 while employed by Robins in a maritime occupation.[167] In 1917, the United States Supreme Court held that the exclusive remedy for workers employed in maritime occupations was under the federal common law and that states did not have the power to bring maritime occupations within their workmen's compensation systems.[168] Congress quickly enacted a law to reverse this decision to allow workers in maritime occupations to bring workmen's compensation claims under state law.[169] Relying on this law, the plaintiff sought and obtained death benefits through the workmen's compensation system.[170] The benefits were halted after the United States Supreme Court held in 1920 that the 1917 federal legislation was an unconstitutional delegation of the federal legislative power to the states.[171] By this time the statute of limitations had run on the plaintiff's wrongful death claim.[172] The New York Legislature stepped in to enact retroactive legislation relieving plaintiffs in the widow's position from the statutory bar so they could bring a common law claim.[173] In a 4-3 decision, the New York Court of Appeals held this was constitutionally permissible even though it could be said to deny the defendant of a vested right.[174] Lehman's opinion for the majority quotes at length from an opinion by Oliver Wendell Holmes, Jr., on the Massachusetts Supreme Judicial Court, arguing that not all vested rights are of the similar stature, that constitutional rules could not have "the exactness of mathematics," and that some rules "end in a penumbra

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166. 144 N.E. 579 (N.Y. 1924) (β = -3.047).

167. *Id.* at 579.

168. S. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917).

169. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 156.

170. *Robinson*, 144 N.E. at 580.

171. *Knickerbocker Ice Co.*, 253 U.S. at 160.

172. *Robinson*, 144 N.E. at 580.

173. *Id.*

174. *Id.*

where the Legislature has a certain freedom in fixing the line," particularly "to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice."[175] Lehman goes on, echoing Holmes, to observe "the difficulty and the danger of giving a general judicial definition" of the constitutional limits on the power of the legislature to encroach on vested rights, and to argue that whatever this limit may be, it did not prevent legislating away a right in "extreme . . . cases where both instinct and reason revolt at the proposition . . . contrary to all prevailing ideas of justice."[176]

Turning to commercial and contract cases with a high absolute β, while they are relatively few in number, we find the right-wing of the court consistently takes a position or makes arguments that could be described as formalistic while the left-wing of the court takes a more open and flexible position.[177] Cardozo appears to be a centrist on these

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175. *Id.* at 581 (quoting Danforth v. Groton Water Co., 59 N.E. 1033, 1034 (1901)).

176. *Id.* at 581-82. *Nod-Away Co. v. Carroll*, 148 N.E. 512, 512-13 (N.Y. 1925) (per curiam) (β = -2.44), is the only other high absolute β case involving a constitutional challenge to a state statute. The majority upholds retroactive application of a statute regulating rents, declining to reach the constitutional question because it was raised too late. *Id.* Crane and McLaughlin dissent arguing that an emergency statute regulating unreasonable rents to protect tenants from rent increases should not apply to an agreed rent made by a new tenant and that if it did apply it would be unconstitutional. *Id.* at 513 (Crane, J., dissenting).

177. In *Cammack v. J.B. Slattery & Bros.*, 148 N.E. 781, 784 (N.Y. 1925) (β = 2.733), Cardozo and Lehman dissent on the issue whether an agreement under seal may be modified by a parol agreement. Hiscock's majority opinion concedes "the anachronistic absurdity of giving to seals at the present day the solemnity and force which they once justly possessed" but takes the position that the rule must be changed by the legislature. *Id.* at 782. In the same term, the court divides 4-3 in *Susquehanna Steamship Co. v. A.O. Andersen & Co.*, 146 N.E. 381, 382-83 (N.Y. 1925) (β = -2.218), on the ability to use extrinsic evidence to establish mutual mistake as a basis for reformation of a contract and on whether the factual issue is for the jury. In other cases, the two wings of the court split on whether a formal instrument could be subverted with extrinsic evidence to establish fraud, notice of a vitiating cause, and the like. *See, e.g.*, Reynolds v. Title Guarantee & Trust Co., 148 N.E. 514, 515-16 (N.Y. 1925) (β = -2.671); Brown v. Brown, 147 N.E. 177, 177 (N.Y. 1924) (per curiam) (β = -2.175) (challenge to separation agreement); Title Guarantee & Trust Co. v. Pam., 134 N.E. 525, 528 (N.Y. 1922) (β = -2.772); McNamara v. Eastman Kodak Co., 133

issues. In a pair of much-criticized high β decisions declining to enforce agreements with indefinite terms, Cardozo and Pound join the conservatives McLaughlin, Hiscock, and Andrews.[178] In *The Growth of the Law*, Cardozo explained his thinking in one of these cases: "[t]he court subordinated the equity of a particular situation to the overmastering need of certainty in the transactions of commercial life."[179] The greater tolerance of the left-wing for informality and flexibility cuts in interesting directions in some noncommercial cases. For example, in a high absolute β case from the 1922 term, the court's left-wing holds that the fact a magistrate took ten months and numerous hearings to adjudicate the relator to be insane and subject to commitment did not divest the magistrate of jurisdiction, entitling the relator to release, even though the statute clearly contemplated an immediate action by the magistrate upon arraignment.[180] Cardozo argues extensive delay was

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N.E. 113, 114 (1921) (β = 2.403). In each of these cases, the court's left-wing permits or would permit the subversion. For example, Kleiman v. Clean Wash Paint & Varnish Remover Co., 154 N.E. 609, 609 (N.Y. 1926) (per curiam) (β = - 2.521), may be similar. It is a per curiam affirmance of a verdict for the plaintiff on a fraudulent inducement claim. *Id.* at 609-10. A dissent in the appellate division argues the verdict was against the weight of the evidence. Kleiman v. Clean Wash Paint & Varnish Remover, Co., 212 N.Y.S. 846, 846 (N.Y. App. Div. 1925) (Crouch, J., dissenting), *aff'd*, 154 N.E. 609 (N.Y. 1926). In *Lord Constr. Co. v. Edison Portland Cement Co.*, 138 N.E. 39, 41 (N.Y. 1923) (β = 2.563), the split is on the ability to use estoppel to bar enforcement of a contract by its terms based on an arguably deceptive failure to warn. In *Ford v. Snook*, 148 N.E. 732, 732-33 (N.Y. 1925) (per curiam) (β = 2.587), the issue seems to be whether evidence of custom and usage may be used to vary the express terms of contract. In *Brocia v. F. Romeo & Co.*, 148 N.E. 331, 331 (N.Y. 1925) (β = 2.786), the disagreement involves procedural flexibility. The case holds that a plaintiff cannot plead breach of one contract and then predicate a claim upon a different contract made in modification of the first. *Id.* at 332-33.

178. Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co., 139 N.E. 470, 473 (N.Y. 1923) (β = 2.404). Crane and Hogan dissent. *Id. Goldstein v. Standard Accident Ins. Co.*, 140 N.E. 235, 237 (N.Y. 1923) (β = 2.446), is similar. Both are from the 1922 term. Cardozo joins Hiscock and McLaughlin in dissent in *Aldrich v. New York Life Ins. Co.*, 139 N.E. 245, 247-49 (N.Y. 1923) (β = - 2.333), where the majority found an ambiguity in a contract of an insurance agent and then applied a presumption interpreting the ambiguity in favor of the agent to allow a claim for renewal commissions.

179. BENJAMIN CARDOZO, THE GROWTH OF THE LAW 110-11 (1924).

180. People *ex rel.* Edwards v. Superintendent, 139 N.E. 553, 554-55 (N.Y. 1923) (β = -2.333).

permissible absent abuse by the magistrate or prejudice to the lunatic since the possibility of some delay was implicit in the statutory system.[181]

The voting patterns depicted by the model in the 1926 term are atypical. The model places Hiscock and McLaughlin on the left-wing of the court alongside Cardozo and Lehman. The atypical patterns appear to be a product of a change in personnel on the court during the term— Kellogg and J.F. O'Brien replace Hiscock and McLaughlin— and a significant shakeup in voting patterns that occurs around this change. Splitting the term leaves too few nonunanimous cases (thirty-one) for the model to find much of a pattern. When we pool these cases with cases from the 1921 to 1925 terms we find similar voting patterns in personal injury cases until the turnover. Two high β cases in the pooled analysis warrant mention. In these cases, Cardozo and Lehman join the conservative wing of the court in decisions favoring business interests through what appears to be highly formalistic reasoning.[182] These cases are a reminder that Cardozo was, on some issues, a centrist.

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181. *Id.* There are occasional high β cases in which the left-wing employs formalistic reasoning. In *People* ex rel. *Gottschalk v. Brown*, 143 N.E. 653, 654-55 (N.Y. 1924) (β = -3.026), the left-wing of the court held that a father could be extradited to Ohio for the crime of non-payment of child support because his presence in Ohio for a few hours while he was in arrears satisfied the formal requirement for extradition that the father had been in the act of committing the crime while in Ohio. Another such case may be In re *Blumenthal's Estate*, 141 N.E. 911 (N.Y. 1923) (β = -2.504). A husband and wife sold property they held as tenants by the entirety and took back a note secured by a mortgage. *Id.* at 911. The issue in the case is whether they held the note as tenants in common or by the entirety. *Id.* The court determined whether the wife's heirs received the entire value of the mortgage or whether they shared it with the husband's heirs. *Id.* at 911-12. The majority held the law does not recognize a tenancy by the entirety in a chose in action. *Id.* at 913. McLaughlin writes a dissent arguing that the tenancy by the entirety should be recognized by analogy to chattels because that is the likely intent of the husband and wife. *Id.* at 913-14 (McLaughlin, J., dissenting).

182. In *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 58 (N.Y. 1926) (pooled β = 1.981), the court held 5-2, with an opinion by Cardozo, that a parent company could not be held liable for the negligence of a subsidiary on theory it ran connected roads as a consolidated enterprise. Crane and Pound dissent. *Id.* at 65. Richard Posner has criticized the decision arguing there were good reasons to hold the parent company liable based on its conduct in the litigation and that Cardozo's opinion "substitut[ed] . . . words for thought." POSNER, *supra* note 2, at 119-20. *But cf.* KAUFMAN, *supra* note 2, at 424-25. *People* ex rel. *Studebaker*

Voting patterns in the 1924 term suggest Cardozo and Lehman were systematically to Crane's left on some issues. There are seventy-four nonunanimous cases in the 1924 term. Twenty-three of these have an absolute β greater than 2.0, our arbitrary cutoff defining cases in which voting strongly corresponds with the overall pattern.[183] We set to the side nine cases in which Crane joins the left-wing of the court and one case in which he does not vote. [184] Remaining are thirteen cases in which Crane sides with McLaughlin and/or Hiscock and against Cardozo and Lehman. The issues in these cases are suggestive.[185] The one personal injury case is the previously-mentioned *McCarter v. La Rock* case,[186] a 4-2 decision with Cardozo and Lehman dissenting. The case was characterized by Hiscock as raising a fundamental question about the nature and scope of worker's compensation.[187] In *Nod-Away Co. v. Carroll*,[188] Crane writes a dissent in which McLaughlin joins challenging the constitutionality of an emergency rent

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Corp. of America v. Gilchrist, 155 N.E. 68, 69-70 (N.Y. 1926) (pooled β = 2.005), involves the issue of the respect due the corporate form in a different context. The court held 5-2 that the profits of a parent corporation could not be consolidated with a subsidiary's losses in determining income subject to the franchise tax. *Id.* The majority holds the statute does not afford this power and that it could not be implied. *Id.* at 72. Crane and Pound dissent arguing that the commission had the power to make a reasonable allocation of income and expense when the company's books clearly were inaccurate and the company provided no reasonable method. *Id.* at 73 (Crane, J., dissenting).

183. Another nineteen cases have an absolute β greater than 1.5.

184. In seven cases where Crane joins a coalition with Cardozo, Lehman, and Pound, β is below -2.0 in both the term analysis and the pooled analysis, indicating the left-wing prevails and that voting is consistent with the patterns in both the term analysis and the pooled analysis. This includes four personal injury cases. In two cases with β's of -1.626 and -1.649 in the pooled analysis, Hiscock joins Crane and what the model describes as the left-wing of the court in the 1924 term. One of these two cases is a personal injury case.

185. *People v. Mayo*, 148 N.E. 732, 732 (N.Y. 1925) (per curiam) (β = -2.639), is a counterpoint to the cases discussed below. This is a 4-3 per curiam affirmance of a bigamy conviction invoking section 542 of the Code of Criminal Procedure, which is the harmless error rule. *Id.* Crane joins conservatives McLaughlin and Andrews in dissent. *Id.*

186. 148 N.E. 523, 526 (N.Y. 1925) (per curiam) (β = 2.751).

187. *Id.* at 523.

188. 148 N.E. 512 (N.Y. 1925) (β = -2.44). This is a 4-2 decision with Andrews absent. *Id.* at 514.

control statute.[189] In *People v. Weinberger*,[190] Crane joins a dissent by Andrews arguing that an obscenity conviction should not be overturned on a technical ground.[191] In *Gillette Bros. v. Aristocrat Rest., Inc.*,[192] Crane joins a dissent by McLaughlin arguing for an interpretation of a lease to protect a landlord's interest in a fashion—which the majority described as "[w]orking a forfeiture"[193]—as unnecessary to protect the landlord's interests.[194] In In re *Kelly*,[195] Crane joins a dissent by McLaughlin arguing for narrow interpretation of an arbitration clause to preserve the jurisdiction of courts.[196] In a handful of contract and business law cases, Crane joins the right-wing in hewing to traditional rules or formalistic application of a rule disagreeing with Cardozo and Lehman.[197] Crane's conservative voting behavior in these cases is consistent with what one might expect of a Republican stalwart.[198]

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189. *Id.* at 513.

190. 146 N.E. 434 (N.Y. 1925) (β = -2.381). This is a 4-2 decision with McLaughlin absent. *Id.* at 436.

191. *Id.* at 436 (Andrews, J., dissenting).

192. 145 N.E. 748 (N.Y. 1924) (β = -2.021).

193. *Id.* at 750.

194. *Id.* at 750-51 (McLaughlin, J., dissenting).

195. 147 N.E. 363 (N.Y. 1925) (β = -2.048).

196. *Id.* at 364-65 (McLaughlin, J., dissenting).

197. Four cases are discussed in note 177. *See* Cammack v. J.B. Slattery & Bros., 148 N.E. 781 (N.Y. 1925) (β = 2.733); Reynolds v. Title Guarantee & Trust Co., 148 N.E. 514 (N.Y. 1925) (β = -2.671); Ford v. Snook, 148 N.E. 732, 732 (N.Y. 1925) (per curiam) (β = 2.587); Brocia v. F. Romeo & Co., 148 N.E. 331 (N.Y. 1925) (β = 2.786). The disagreement in *Mandell v. Moses*, 147 N.E. 192, 192-93 (per curiam) (N.Y. 1924) (β = 1.712), a 5-2 case with Cardozo and Lehman dissenting, appears to be over a factual question: whether members of sheep breeder's association were involved in a joint undertaking exposing them to joint and several liability. The majority holds yes. *Id.* That is Kellogg's basis for dissenting in the appellate division. *See* Mandell v. Moses, 205 N.Y.S. 254, 258-59 (App. Div. 1924) (Kellogg, J., dissenting), *aff'd*, 147 N.E. 192 (N.Y. 1924) (per curiam). The issue in In re *Hart*, 147 N.E. 174, 174 (N.Y. 1924) (β = 1.651) (per curiam), another 5-2 case with Cardozo and Lehman dissenting, is whether an administrator of an estate has standing to appeal an allowance of fees. The majority holds no. *Id.* It is not clear what the disagreement is in *Bowlby v. McQuail*, 148 N.E. 757, 759 (N.Y. 1925) (per curiam), a 5-1 case with Lehman dissenting and Cardozo not voting.

198. *See* NELSON, *supra* note 4, at 21.

E.   *The 1927 to 1930 Terms*

William Nelson has described the turnover in personnel on the court during the 1926 term and the election of Cardozo to the position of chief judge in 1926 as transformative.[199] According to Nelson, Cardozo acquired a "working majority" with the departure of Hiscock and McLaughlin, the election of Kellogg (a Republican who "allied" with Cardozo), and the appointment of O'Brien (a Roman Catholic Democrat with long service as council for New York City).[200] The other change is in 1928 when Hubbs replaces Andrews. Nelson describes Hubbs as a "Republican stalwart" alongside Andrews and Crane.[201]

Figure 11 shows the posterior ranks of the judges' ideal points for the 1927 to 1930 terms. Voting in the 1930 term seems fairly patterned, particularly at the wings. Voting in the 1929 term also seems fairly patterned though somewhat less so. Voting in the 1928 term is least patterned. Comparing terms, there is a fair bit of stability on one wing. Crane is always at the wing and Hubbs is always alongside Crane once Hubbs joins the court in 1928. Pound consistently is center-right. The relative positions of the other judges are fuzzy and/or there is a fair bit of movement in positions across terms. This is particularly true of Kellogg. One constant is that Cardozo is alongside Lehman. Looking at the four terms together, we would describe the results from the model as muddled. Voting is much less patterned than earlier in the decade.

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199. *Id.* at 22.

200. *Id.* at 21.

201. *Id.*
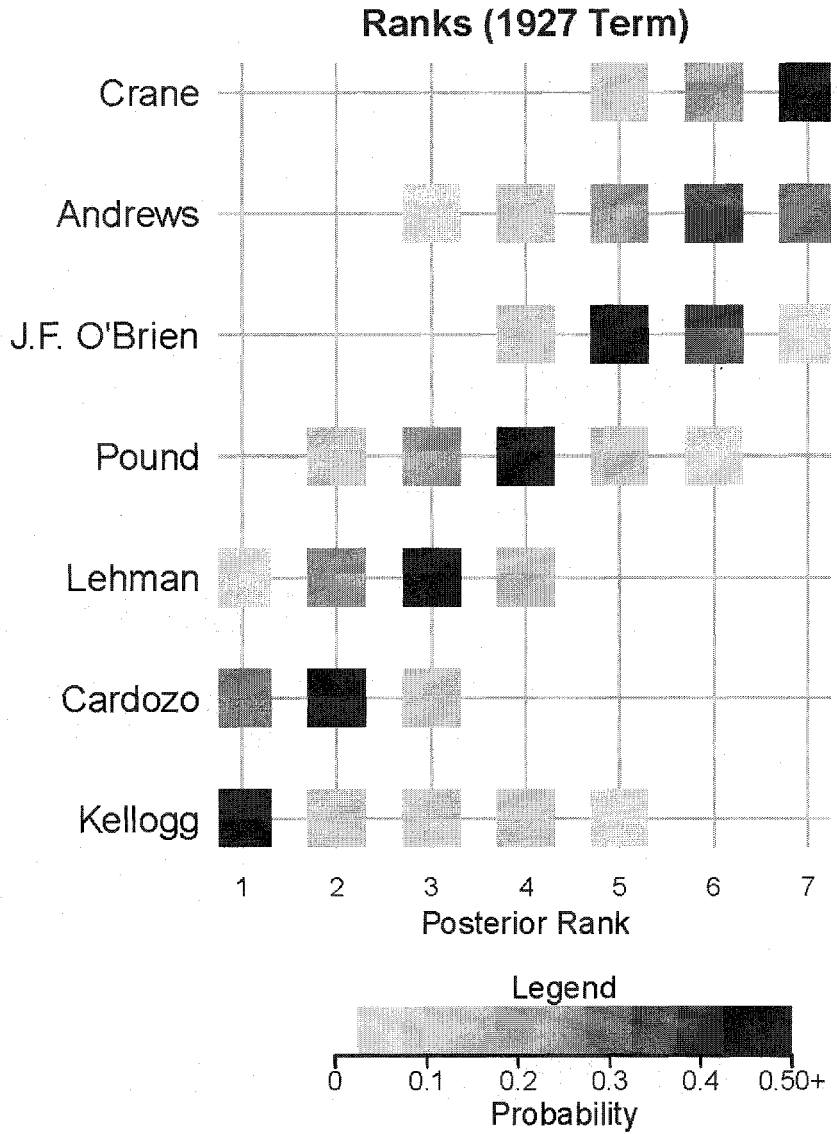
Ranks (1927 Term)

Figure 11(a). *Posterior Ranks of Ideal Points, 1927 to 1930 Terms.*

Ranks (1928 Term)
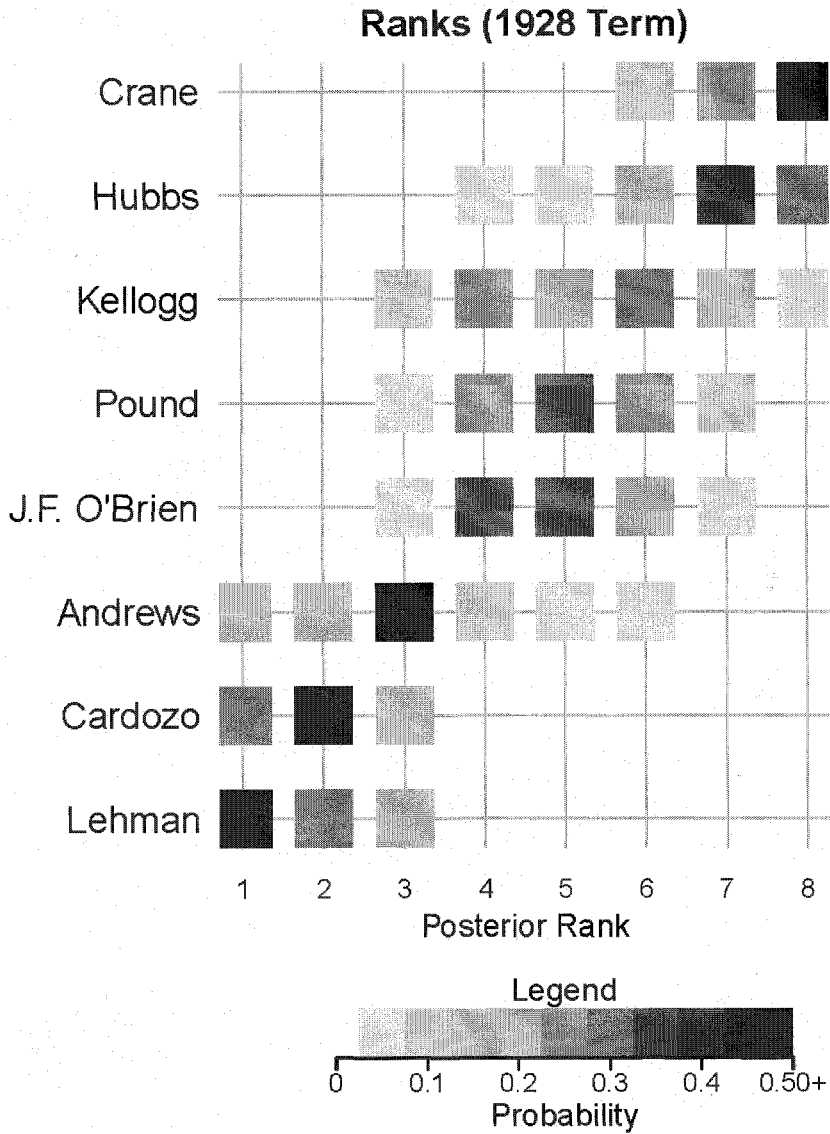
Figure 11(b). *Posterior Ranks of Ideal Points, 1927 to 1930 Terms.*
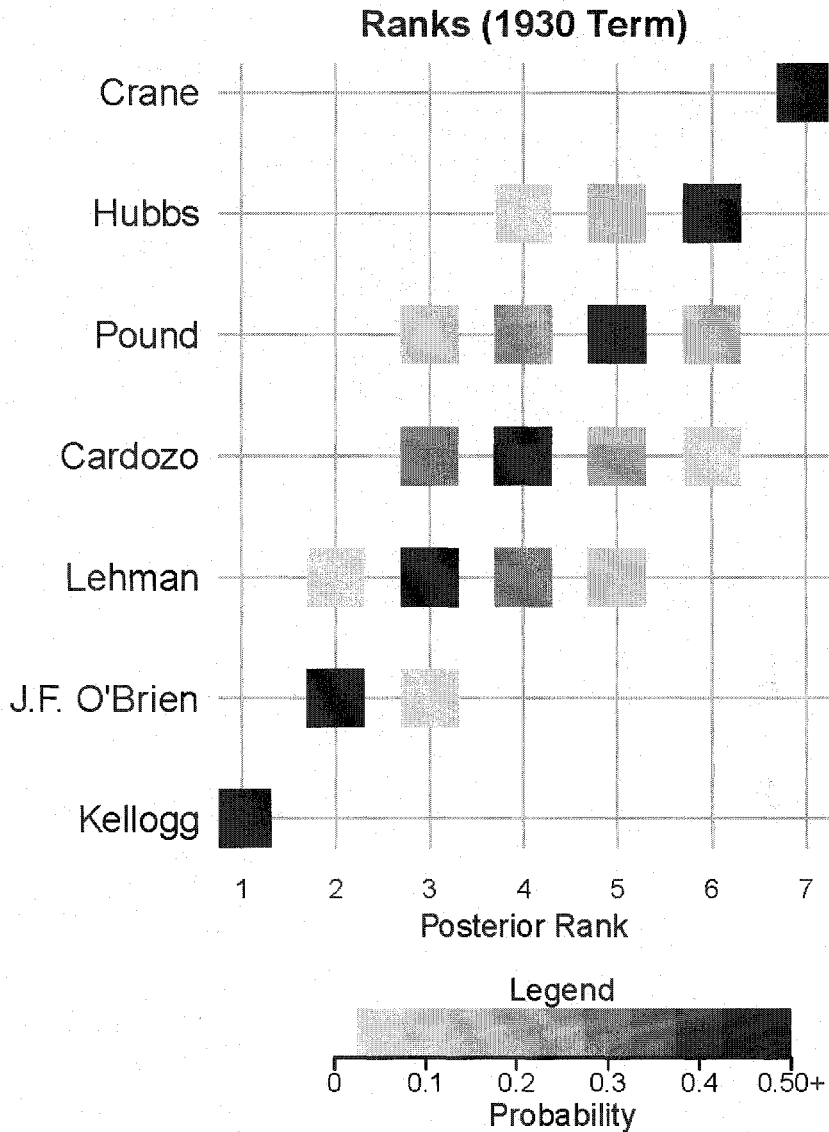
Ranks (1929 Term)
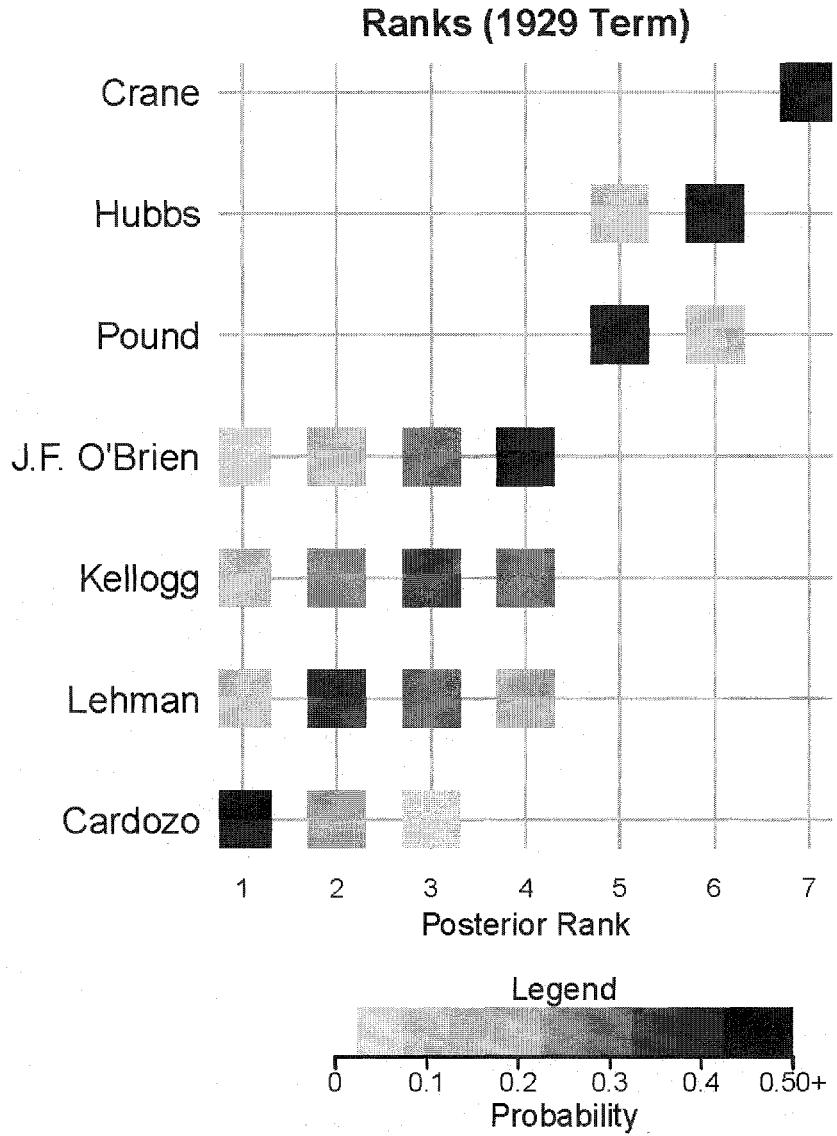
Figure 11(c). *Posterior Ranks of Ideal Points, 1927 to 1930 Terms.*

Ranks (1930 Term)

Figure 11(d). *Posterior Ranks of Ideal Points, 1927 to 1930 Terms.*

A likely explanation of the muddle is that the underlying disagreements among the judges on the court during this period are narrower than in earlier or later periods. There is other evidence in support of this hypothesis. While the difference is not dramatic, the rate of nonunanimous decisions declines from around 18% to 20% to around 15% to 16%, which is the lowest percentage during the entire period 1900 to 1940. The only period in

our study with a comparably low rate is around 1910. The position of Crane on the court's far right from 1927 to 1930 may be telling. Until Lehman joins the court in 1923, Crane consistently is to Cardozo's left. Crane is center or center-right from 1923 to 1925. He moves to the far right in 1926 when Hiscock and McLaughlin depart.[202]

Figure 12 shows the posterior ranks when we pool cases from the 1926 term, beginning when Kellogg and J.F. O'Brien join the court, through the 1930 term. The most significant change is in Kellogg's position. Looking at voting behavior in the 269 nonunanimous decisions decided during this period, the model indicates Kellogg typically sides with Cardozo and Lehman.

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202. With the exception of 1932, Crane remains on the far right of posterior distributions until 1936. Thereafter he is center-left.

Ranks (1926 – 1930 Terms)
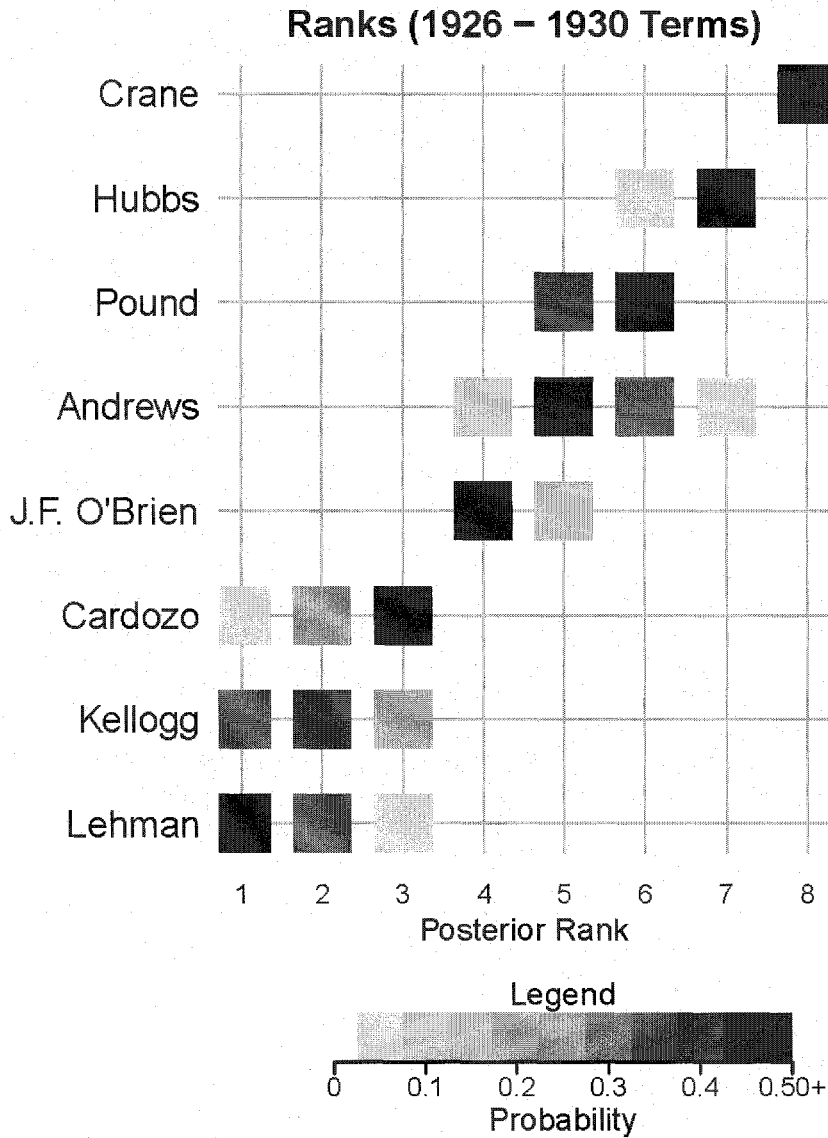
Figure 12. *Posterior Ranks of Ideal Points, 1926 to 1930 Terms Pooled.*

Looking at the cases reinforces the impression that whatever differences may define the voting patterns of the judges, they are not the sort of fundamental disagreements that are discernible earlier in the decade. *Palsgraf v. Long*

Island R.R. Co.[203] has the second highest absolute β in cases from the 1927 term, meaning voting patterns tightly correspond to the posterior ranks of the judges' ideal points that term. Cardozo's majority opinion is joined by Kellogg, Lehman, and Pound,[204] the court's left-wing according to the model. Andrews's dissent is joined by Crane and O'Brien,[205] who are on the right-wing of the court. Cardozo finds for the defendant, overriding the jury and the lower court, making liability to a remote victim of an accident an issue of duty—which is for the court to decide—and, as some say, taking a cavalier approach to the facts.[206] Andrews takes the position that liability to a remote victim of an accident is not amenable to being resolved by rules and is best resolved by the jury case by case.[207]

As in earlier terms, in a number of cases that split the court along what the model finds to be the dominant pattern, the fundamental disagreement seems to be over whether a rule should give way to reach a fair or just result. During the 1927 through 1930 terms, whatever patterns there may be in the voting cannot be attributed to differences on this fundamental point. Sometimes the Crane-Hubbs wing advocates for a more flexible approach.[208] For example, in one case in the 1927 term, Andrews, Crane, and O'Brien dissent to what they describe as an over-literal interpretation of a statute that left minority shareholders exposed to having their interests "annihilated."[209] In other cases, it is the Kellogg-Cardozo wing that advocates for a

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203. 162 N.E. 99 (N.Y. 1928) (β = -2.803).

204. *Id.* at 105.

205. *Id.*

206. *See* POSNER, *supra* note 2, at 38-43.

207. *Palsgraf*, 162 N.E. at 105.

208. *Valz v. Sheepshead Bay Bungalow Corp.*, 163 N.E. 124, 125 (N.Y. 1928) (β = 2.088), is a challenge to a default judgment foreclosing an equity of redemption. The issue is whether to overlook a formal defect in service of process by publication. *Id.* The plaintiff published in two papers but one was not the paper provided by the court. *Id.* The defendants challenging the default judgment had actual notice and chose not to appear because they thought the interest valueless at the time. *Id.* at 125-26.

209. *In re* Dresser, 161 N.E. 179, 180 (N.Y. 1928) (per curiam) (β = -2.881) (O'Brien, J., dissenting).

more flexible approach. In *Dodd v. Martin*,[210] Pound writes for Crane, Andrews, and O'Brien to hold that a trial judge has no power to withdraw a guilty plea entered as a result of misunderstanding of the law by all involved, explaining that "[t]he Legislature has provided a mechanistic rule to take the place of the discretionary powers of the judge in passing sentence on second offenders. The Executive may relieve from the hardship of a particular case. We cannot."[211] Cardozo, Kellogg, and Lehman dissent.[212] In another high absolute β 4-3 decision from the 1928 term, the Kellogg-Cardozo wing of the court adopts what a contemporaneous observer described as a "strained theory of admissions"[213] to prevent an insured from recovering for risks outside the policy.[214] The evidence showed the plaintiff's deceased son was uninsurable, which precluded recovery on a life insurance policy.[215] In a 4-3 decision from the 1929 term, the Crane-Hubbs wing holds a mortgagee was acting in his rights in declaring default and demanding payment in full when the mortgagor mistakenly failed to pay full interest.[216] O'Brien wrote for the majority, "[p]laintiffs may be ungenerous, but generosity is a voluntary attribute and cannot be enforced even by a chancellor."[217] Cardozo's dissent is an eloquent argument on behalf of the power of equity to relieve the mortgagor from its mistake and avoid the harsh effects of default.[218]

Palsgraf is representative of a pattern in high absolute β personal injury cases for the 1927 to 1930 terms.[219] In

210. 162 N.E. 293 (N.Y. 1928) (β = 2.616).

211. *Id.* at 295.

212. *Id.*

213. Recent Case, *Admissions—By Parties and Privies—Beneficiary's Proofs of Loss as Admission of Contents*, 43 HARV. L. REV. 132, 133 (1929).

214. *See* Rudolph v. John Hancock Mut. Life Ins. Co., 167 N.E. 223, 224-25 (N.Y. 1929) (β = -2.354).

215. *Id.* at 224.

216. *See* Graf v. Hope Bldg. Corp., 171 N.E. 884, 884-85 (N.Y. 1930) (β = 2.38).

217. *Id.* at 885.

218. *Id.* at 886-89 (Cardozo, C.J., dissenting).

219. The 1927 term is unusual in that there are six personal injury cases with a β less than .5 and only two, including *Palsgraf*, with a β greater than 2. During the 1930 term there are six personal injury cases with β > 2 and one with β < .5; during the 1929 term there are eight personal injury cases with β >

twenty of twenty-one personal injury cases with an absolute β greater than 2, the Cardozo-Lehman wing sides with the defendant and against recovery.[220] The diversity of issues in

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2 and two with $\beta < .5$; and during the 1928 term there are five personal injury cases with $\beta > 2$ and two with $\beta < .5$.

220. There are several cases with $\beta > 2$. *See, e.g.*, Hendricks v. New York, N.H. & H. R. Co., 167 N.E. 449, 449-50 (N.Y. 1929) ($\beta = 2.918$) (reversing appellate division and reinstating judgment for plaintiff in F.E.L.A. claim); McDonald v. People's Gas & Elec. Co. of Oswego, 164 N.E. 592, 592 (N.Y. 1928) (per curiam) ($\beta = 2.931$) (affirming per curiam judgment for plaintiff, rejecting argument that driver was operating vehicle for own purposes); Bezue v. N.Y., N.H. & H. R. Co., 176 N.E. 828, 828-29 (N.Y. 1931) ($\beta = 2.638$) (affirming per curiam F.E.L.A. award and finding employee engaged in interstate commerce); Kenney v. Lord & Taylor, Inc., 173 N.E. 853, 853 (N.Y. 1930) (per curiam) ($\beta = 2.281$) (affirming workmen's compensation award for employee injured while dancing at dinner held by employer in its building); Reville v. Kurte, 168 N.E. 416, 416 (N.Y. 1929) (per curiam) ($\beta = 2.219$) (affirming per curiam judgment for plaintiff in personal injury claim for improper lighting of tenement); Vecchio v. Combined Constr. Co., 177 N.E. 145, 145 (1931) (per curiam) ($\beta = 2.21$) (affirming per curiam upward adjustment of workmen's compensation award based on new evidence); Westfelt v. Atlas Furniture Co., 177 N.E. 147, 147 (N.Y. 1931) (per curiam) ($\beta = 2.157$) (affirming per curiam workmen's compensation award with Kellogg's sole dissent); Westerman v. Equip. & Supply Co., 170 N.E. 125, 125 (N.Y. 1929) (per curiam) ($\beta = 2.044$) (affirming per curiam workmen's compensation award where employer argued employee was struck by train because he was intoxicated).

Additionally, there are several cases with $\beta < -2$. *See, e.g.*, Hyland v. Cobb, 169 N.E. 401, 401-02 (N.Y. 1929) ($\beta = -3.048$) (reversing judgment for plaintiff in dog bite case where the issue was whether Gramercy Park was a public place, which would make a dog being off its leash a violation of ordinance, and could therefore be admitted as evidence negligence); Hart v. N. Union Gas Co., 170 N.E. 143, 143-44 (N.Y. 1929) (per curiam) ($\beta = -2.946$) (affirming an appellate division decision to reverse judgment for the plaintiff in personal injury claim— a pregnant woman had stepped on a utility pipe that moved, causing her to fall—on the ground of contributory negligence as a matter of law in stepping on pipe); Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) ($\beta = -2.803$); Schrader v. New York, C. & St. L. R.R. Co., 172 N.E. 272, 273-74 (1930) (per curiam) ($\beta = -2.648$) (finding contributory negligence as a matter of law where a motorist took no precautions in crossing railroad tracks); Toole v. New York Cent. R.R. Co., 173 N.E. 898, 898 (N.Y. 1930) (per curiam) ($\beta = -2.566$) (finding contributory negligence as a matter of law in a railroad crossing automobile accident); Fredette v. Vill. of Whitehall, 164 N.E. 593, 593 (N.Y. 1928) (per curiam) ($\beta = -2.334$) (affirming per curiam summary judgment for municipality in a slip and fall case); Mack v. Brooklyn City R.R. Co., 177 N.E. 186, 186 (1931) (per curiam) ($\beta = -2.174$) (affirming per curiam directed verdict for railroad on ground that conductor was acting outside of scope of employment when he assaulted passenger; Cardozo joins in the dissent); Trebitsch v. Goelet Leasing Co., 170 N.E. 140, 140 (N.Y. 1929) (per curiam) ($\beta = -2.102$) (affirming per

curiam judgment notwithstanding verdict for building owner on ground that elevator operator who assaulted plaintiff was not acting within scope of employment; Crane is the sole dissenter); Smith v. Northport Waterworks Co., 170 N.E. 128, 128 (N.Y. 1929) (per curiam) (β = -2.089) (affirming per curiam judgment employee was not injured in scope of employment; Crane is the sole dissenter).

The pattern holds in cases involving collateral issues affecting recovery. *See, e.g.*, Finkelstein v. New York Merch. Co., 170 N.E. 127, 127 (N.Y. 1929) (per curiam) (β = -2.622) (holding costs of care not covered by workmen's compensation); Beekman v. W.A. Brodie, Inc., 163 N.E. 298, 298 (N.Y. 1928) (per curiam) (β = -2.152) (holding workmen's compensation carrier cannot be bound by estoppel or waiver as result of the conduct of the employer); Price v. Nat'l Sur. Co., 159 N.E. 662, 662 (N.Y. 1927) (per curiam) (β = 2.279) (holding loss of services of an infant child and medical expenses for her cure are within provision of highway law requiring bond to cover injury "to persons or property").

One case does not fit the pattern. *See* Haefeli v. Woodrich Eng'g Co., 175 N.E. 123, 126-28 (N.Y. 1931) (β = -2.244) (Crane was the sole dissent to decision verdict for plaintiff where the disagreement appears to be whether an error in the jury instruction required retrial).

The pattern continues in cases with an absolute β > 1.5. *See, e.g.*, Chaloux v. Royal Knitting Co., 177 N.E. 143, 143 (N.Y. 1931) (per curiam) (β = -1.963) (holding that shooting by lunatic while at work was not within the scope of employment); Greene v. Sibley, Lindsay & Curr Co., 177 N.E. 416, 417 (N.Y. 1931) (β = -1.91) (finding no negligence as a matter of law in a slip-and-fall case); Burke v. Bonat, 174 N.E. 635, 635-36 (N.Y. 1931) (β = -1.91) (reversing verdict for plaintiff injured during product demonstration on the ground that jury should have been required to find the salesman was acting within scope of his employment); Jacob v. City of New York, 177 N.E. 181, 181 (N.Y. 1931) (per curiam) (β = -1.887) (per curiam) (affirming summary judgment for defendant after a poorly stabilized fence fell on a pedestrian); Lee v. New York, Ontario & W. Ry. Co., 171 N.E. 790, 790 (N.Y. 1930) (per curiam) (β = 1.835) (reversing lower courts on the ground that there was no evidence of negligence in maintaining a railroad crossing); French v. New York Rys. Corp., 175 N.E. 312, 312 (N.Y. 1930) (per curiam) (β = -1.604) (affirming appellate division decision to reverse verdict for plaintiff on the ground of contributory negligence as a matter of law; Cardozo joins in the dissent); Bond v. Schenectady Ry. Co., 167 N.E. 455, 456 (N.Y. 1929) (β = 1.807) (reversing judgment for defendant notwithstanding verdict, holding contributory negligence was a question for the jury on these facts; Lehman was the sole dissenter); Morini v. Erie R.R. Co., 171 N.E. 773, 773 (N.Y. 1930) (per curiam) (β = 1.613) (affirming per curiam workmen's compensation award). There is one case that does fit the pattern. *See* Andrews v. L. & S. Amusement Corp., 170 N.E. 506, 507-08 (1930) (β = 1.674) (holding that an on-the-job injury that was a result of an epileptic seizure was not within the scope of employment; Crane wrote the majority opinion and O'Brien and Cardozo dissented).

the cases makes it difficult to discern a substantive theme other than that judges on the Cardozo-Lehman wing are more disposed to resolve issues of negligence and contributory negligence as a matter of law. The pattern holds in the pooled analysis, including cases decided in the 1926 term after Kellogg and J.F. O'Brien join the court.[221]

There is another pattern in a large handful of high absolute β criminal cases where the issue is the harmlessness of a technical or procedural error or evidentiary sufficiency. In every such case, save one, the Cardozo-Lehman wing sides with the criminal defendant.[222] This is a reversal from Cardozo's voting pattern in his early years on the court, when he almost always sides with the state in nonunanimous criminal cases. The pattern is even stronger in the pooled analysis, which picks up cases from the 1926 term after Kellogg and J.F. O'Brien join the court and additional cases from the 1928 term where Kellogg joins Lehman in siding with a criminal defendant. In the pooled analysis there are twenty criminal cases with an absolute β greater than 1.5. The Lehman-Kellogg-Cardozo wing of the court sides with a criminal defendant in

221. For these purposes, we count as personal injury cases only those cases denoted by the case report as involving negligence or worker's compensation issues. Sixty-five such cases are in the pool. This excludes some cases discussed in note 220, where we include cases involving personal injury claims for which no issue is identified. Of these, fourteen cases have an absolute β greater than 2.0. In thirteen of the fourteen, β's sign correlates with whether there is a victory for the claimant with the court's right-wing siding with the claimant. Eighteen cases have an absolute β greater than 1.5 and less than 2.0. In seventeen of the eighteen, voting follows the pattern.

222. *See, e.g.*, People v. Zackowitz, 172 N.E. 466, 466, 468-71 (N.Y. 1930) (β = -2.992) (reversing and ordering a new trial in homicide conviction based on improper introduction of character evidence with the dissent argueing the error was harmless); People v. Wagner, 162 N.E. 521, 521 (N.Y. 1928) (per curiam) (β = 2.582) (dissenting to holding that error in a self-defense instruction was harmless); People v. Spickler, 175 N.E. 111, 112 (N.Y. 1931) (per curiam) (β = -2.540) (reversing homicide conviction on ground that doubt regarding witness identification requires a new trial); People v. Jackerson, 159 N.E. 715, 716-17 (N.Y. 1928) (β = 2.517) (dissenting to affirmance of conviction where the issue appeared to be the lower court's failure include an element of the charge); People v. Sugarman, 162 N.E. 24, 25 (N.Y. 1928) (β = 2.168) (dissenting alone, Cardozo votes to affirm a conviction, citing the defect as a technical evidentiary error). *People v. Galtraf*, 166 N.E. 342, 342 (N.Y. 1929) (per curiam) (β = 2.98), is the lone exception. A 6-2 majority affirmed the appellate division per curiam in dismissing an indictment. *Id.*

nineteen of the cases.[223] *People v. Doran*[224] is evocative of some of the underlying disagreements that may produce such patterned voting. The issue in the case was whether a confession of a defendant convicted of a homicide in the course of an armed robbery was coerced.[225] While there was some evidence of coercion (it was undisputed that the confession was given while the defendant was being held incommunicado and that he was interrogated by a police officer wearing a boxing glove), Crane wrote for the majority that there was sufficient evidence the confession was not coerced to sustain putting the issue to the jury and an implicit finding that it had not been coerced.[226] Crane's opinion can be read to suggest that if there was an error, it was harmless because there was overwhelming evidence of

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223. There are diverse issues. The issue in some cases appears to be whether a procedural error was harmless or whether evidence was sufficient. *See, e.g.*, People v. Fisher, 164 N.E. 336, 339-41 (N.Y. 1928) (Lehman, J., dissenting) (pooled β = 2.484) (affirming homicide conviction, with a strong dissent by Lehman arguing that trials of co-defendants should have been severed); People v. Pesky, 173 N.E. 227, 227 (N.Y. 1930) (per curiam) (pooled β = 2.446) (affirming obscenity conviction); People v. Malkin, 164 N.E. 900, 903-04 (N.Y. 1928) (pooled β = -1.851) (ordering new trial for several defendants convicted of assault in context of union action on ground that admitting evidence of violent activity of union in other contexts was prejudicial error). In other cases the issue is whether the defendant's conduct was within the scope of the crime. *See, e.g.*, People v. Hope, 177 N.E. 402, 404-05 (N.Y. 1931) (Kellogg, J., dissenting) (pooled β = 1.592) (holding that hijacking an occupied car is kidnapping; Kellogg is the sole dissent). Several cases involve economic crimes. *See, e.g.*, People v. Hudson View Gardens, Inc., 171 N.E. 790, 790 (N.Y. 1930) (per curiam) (pooled β = -2.992) (reversing a conviction for running an illegal laundry on the ground that defendant's laundry was not open to the public); People v. Noblett, 155 N.E. 670, 673-74 (N.Y. 1927) (pooled β = -2.17) (dismissing an indictment for larceny on the ground that the defendant's conduct—receiving money under false pretenses—was not within the crime); People v. Nakamori, 177 N.E. 166, 166 (N.Y. 1931) (per curiam) (pooled β = -1.65) (reversing a conviction for illegal gambling); People v. Thompson, 167 N.E. 575, 575-76 (N.Y. 1929) (pooled β = -1.563), (reversing a conviction for illegal practice of medicine); People v. Farson, 155 N.E. 724, 727 (N.Y. 1927) (pooled β = 2.275) (holding an indictment for securities price manipulation to be sufficiently clear); People *ex rel.* Atkins v. Jennings, 161 N.E. 326, 329 (N.Y. 1928) (Crane, J., dissenting) (pooled β = 2.025) (granting habeus corpus based on what Crane argues in dissent was technical evidentiary flaw in the record).

224. 159 N.E. 379 (N.Y. 1927) (pooled β = 2.025).

225. *Id.* at 381.

226. *Id.* at 389.

guilt,[227] which perhaps prompted Andrews to write in a concurring opinion that clarity of guilt could not cloak coercion of a confession else we "revert to the rack and thumbscrew."[228] Everyone in the majority, including Crane, concurred with Andrews on this point.[229] Lehman wrote a dissent, joined by Cardozo, arguing that the claim that the confession was not coerced defied "reason and common sense" and while "courts should not hamper the police by technical rules nor reverse a just conviction because of technical error, but the courts cannot sanction disregard of the substantial rights of an accused."[230]

Several memorable cases with strong dissenting opinions come from this period, including *Allegheny College v. Nat'l. Chautauqua Cnty. Bank,*[231] *Meinhard v. Salmon,*[232] and *Mitchill v. Lath.*[233] For our purposes, what is noteworthy about these cases is that voting in them does not fit the dominant pattern. In other periods, this might tend to suggest that the views and values that divide the judges in these cases are unlike the views and values that divide the judges in most cases in which they disagree. We hesitate to draw even this weak conclusion during this period for we cannot discern recurring disagreements in the cases in which the judges divide along what the model finds to be the dominant pattern. This is unlike every other period we examined closely. The most comparable period to

227. *Id.* at 382-84.

228. *Id.* at 386 (Andrews, J., concurring).

229. *Id.* at 389.

230. *Id.* at 388-89 (Lehman, J., dissenting).

231. 159 N.E. 173 (N.Y. 1927) (β = .494). The case holds charitable subscriptions are legally binding. Cardozo's opinion cuts the legs out from under the bargain theory of consideration while saying kind things about promissory estoppel. *Id.* at 175. Andrews and Kellogg dissent. *Id.* at 178.

232. 164 N.E. 545 (N.Y. 1928) (β = -.389). The majority holds a silent partner was entitled to half the profits from a venture entered into by the active partner taking over a lease that had been held by the partnership. *Id.* at 545-46, 548-49. The active partner did not disclose the opportunity. *Id.* at 546. Cardozo's opinion became the canonical expression of the view of the general duty of loyalty owed by a fiduciary. *Id.* at 546. Andrews, Kellogg, and O'Brien dissent. *Id.* at 553.

233. 160 N.E. 646 (N.Y. 1928) (β = -.797). The majority embraces a strong form of the parol evidence rule, placing certainty and predictability in business transactions before fairness in the result. *Id.* at 646-47. Lehman and Crane dissent. *Id.* at 650.

the 1927–1930 terms in this respect is the 1910–1911 terms, where the recurring disagreement we discern is subtle.

Two possibly related findings in this period stand out. One is Crane's shift in position on the court. He starts the decade on the model's far left-wing, moves to the center in 1923 to 1925, and then to the far right in the 1926 through 1930 terms. The other is the pattern of voting in personal injury cases. In high absolute β personal injury cases, the sign of β is a good indicator of the victor. This holds true throughout the decade except for 1926 (though the pattern weakens a bit in 1925). What changes is that in the 1927 through 1930 terms a positive sign (meaning the right-wing prevails) signals a victory for the plaintiff. In this respect, Crane's behavior in personal injury cases remains constant over the 1920s. He always is on the wing siding with the plaintiff in cases with patterned voting throughout the decade. From this perspective, it is the behavior of Cardozo and Lehman that changes. The change occurs around the time of the departure of Hiscock and McLaughlin from the court.

This is not evidence that the views of Crane, Cardozo, or Lehman influencing their decisions in personal injury cases changed during the decade. Nor is it evidence that Cardozo and Lehman shifted from a proplaintiff position to a prodefendant position in personal injury cases. Voting patterns in nonunanimous cases are not evidence of bias, for at any point in time, most personal injury cases decided by the court are decided unanimously with a mix of results. The voting patterns in nonunanimous personal injury cases only show that in cases in which the result is up for grabs, for whatever reason, certain judges tended to vote together for a result favoring the plaintiff while other judges tended to vote together for a result favoring the defendant. In the period from 1917 to 1925, we think we can discern an underlying disagreement on the importance of fault to liability that partly explains the pattern. Views on such related issues, as the degree of deference to be given to the jury, may also play a part.[234] As for the change in voting patterns in personal injury cases after 1926, if we assume that the views and values which influence voting in

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234. Contemporary observers understood these two things were connected by a prevailing jury sentiment favoring compensation. *See* NELSON, *supra* note 4, at 95-96.

personal injury cases are largely stable, then a likely inference is that Crane's views and values are closer to those of Cardozo and Lehman than to those of Hiscock and McLaughlin. The interest in forming a coalition brings Crane, Cardozo, and Lehman together, tending to elide the differences that divide them. The departures of Hiscock and McLaughlin bring these differences out into the open.[235]

Our findings support some hypotheses that have been offered to explain Cardozo's behavior in *Palsgraf*. They support the claim that Cardozo was insensitive to the plight of Mrs. Palsgraf.[236] More precisely, Cardozo's pattern of voting in personal injury cases suggests he was more inclined than judges on the other wing of the court to vote for an outcome that left a victim of an accident without compensation. Given Cardozo's voting behavior earlier in the decade, it may be more accurate to say that he was less inclined than judges on the other wing to allow his sympathies for the plaintiff to divert him from a result he thought desirable for other reasons. This is consistent with the alignment of Cardozo and Crane in commercial and contract cases.

As for what these other reasons might have been, Andrew Kaufman argues *"Palsgraf* was simply Cardozo's attempt to clarify basic negligence doctrines."[237] William Nelson argues that Cardozo's opinion in *Palsgraf* was an attempt to "work out the tension between the competing paradigms of liability,"[238] referring on the one hand to an old paradigm that left losses where they lie unless a defendant's negligence was an immediate and direct cause of a harm and, on the other hand, a new paradigm in which

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235. The rules for assigning opinions tend to encourage such behavior. Each case was assigned to one judge to write a memorandum laying out the issues and recommending a disposition. This was done at random. If that judge voted in the majority, then the opinion was assigned to him unless he chose to defer. If he was in the dissent, then the opinion was assigned to the first judge around the conference table to vote for the majority position. The judges sat around the table in the order of seniority. The judge who wrote the memo voted first and then they went around the table. *See* Mario M. Cuomo, *The New York Court of Appeals: A Practical Perspective*, 34 ST. JOHN'S L. REV. 197, 216-17 (1960).

236. JOHN T. NOONAN JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 142-43 (1976).

237. KAUFMAN, *supra* note 2, at 301.

238. NELSON, *supra* note 4, at 97.

an actor whose large-scale enterprise created the conditions in which an accident occurred could be held liable without much in the way of fault. Our findings arguably support both hypotheses. They support Nelson if voting in personal injury cases generally is uni-dimensional along lines that are captured by the competing paradigms. Voting patterns in the early part of the decade might reflect the conflict between the old paradigm (which best captures the views of the court's right-wing) and the new paradigm (which best captures the views of the court's left-wing). Cardozo's voting pattern across the entire decade is what we would expect of someone trying to work out the tension between the two paradigms. Our findings support Kaufman's[239] insofar as they show that Cardozo and Crane were not that far apart on whatever underlying values drive voting in personal injury cases. This gives more subtle motivations along the lines of those suggested by Kaufman space to operate. Crane's voting behavior suggests other factors may have been at work in producing patterned voting. It is striking that Crane voted with the court's right-wing in *McCarter v. La Rock*,[240] a case that was framed as presenting the conflict between the two paradigms. Looking at Crane's voting behavior over the entire decade, and indeed through the 1930s, one gets the impression that when a legal or factual issue was in doubt he was inclined to vote for recovery in personal injury cases.

F. *The 1938 to 1940 Terms*

Voting is much more highly structured during the 1938 to 1940 terms than it is in the early 1930s. Figure 13 depicts the posterior ranks of the judges each term. The results for the 1940 term are remarkably clear. The results for the other two terms are reasonably clear, particularly once one discounts for the high turnover on the court during the 1939 term, which tends to obfuscate patterns. Crane, Hubbs, and J.F. O'Brien left the court during the 1939 term and were replaced by Conway, Lewis, and Sears.[241] The

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239. KAUFMAN, *supra* note 2, at 301.

240. 148 N.E. 523, 526 (N.Y. 1925) (β = 2.751).

241. Lehman's brother, who was governor, appointed Sears to fill Lehman's position as Associate Justice when Lehman was elected to the position of Chief

voting patterns are stable across terms. Rippey, Hubbs, and Conway stand distinctly on one wing. Lehman stands distinctly on the other wing with Sears joining Lehman on the wing for his short time on the court.
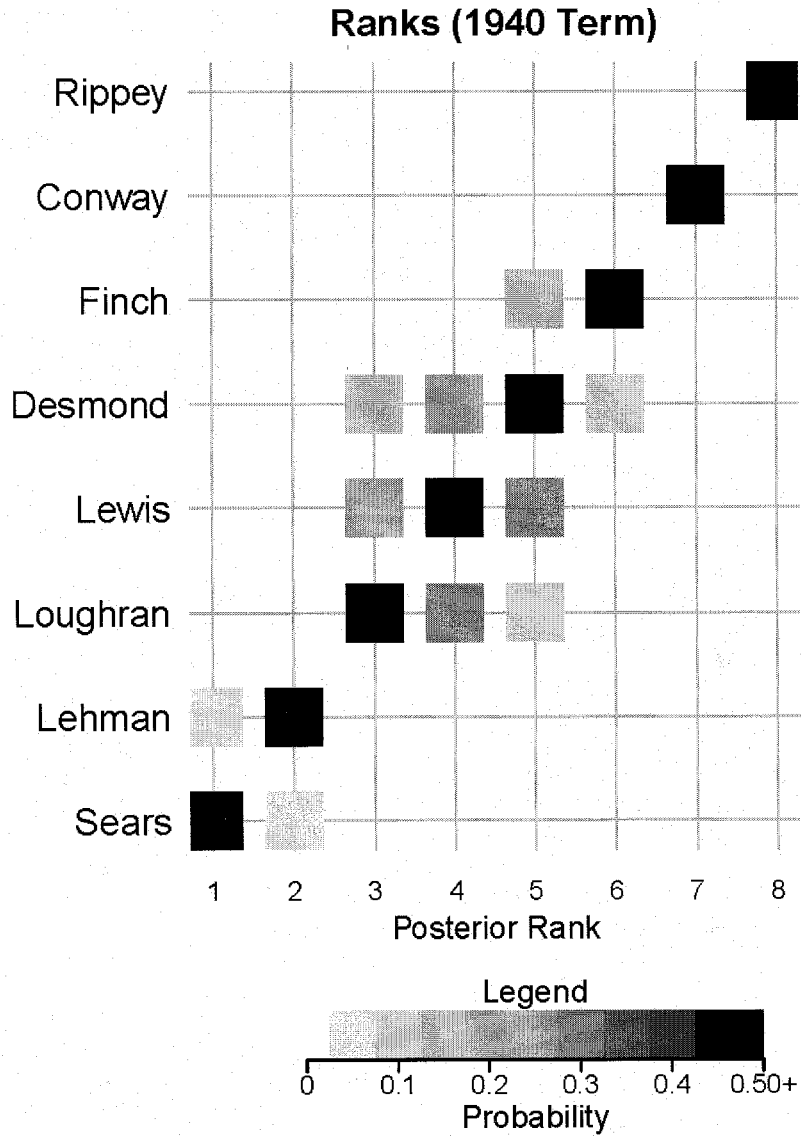

Justice. Desmond replaced Sears in the 1940 term when Sears reached the mandatory retirement age.
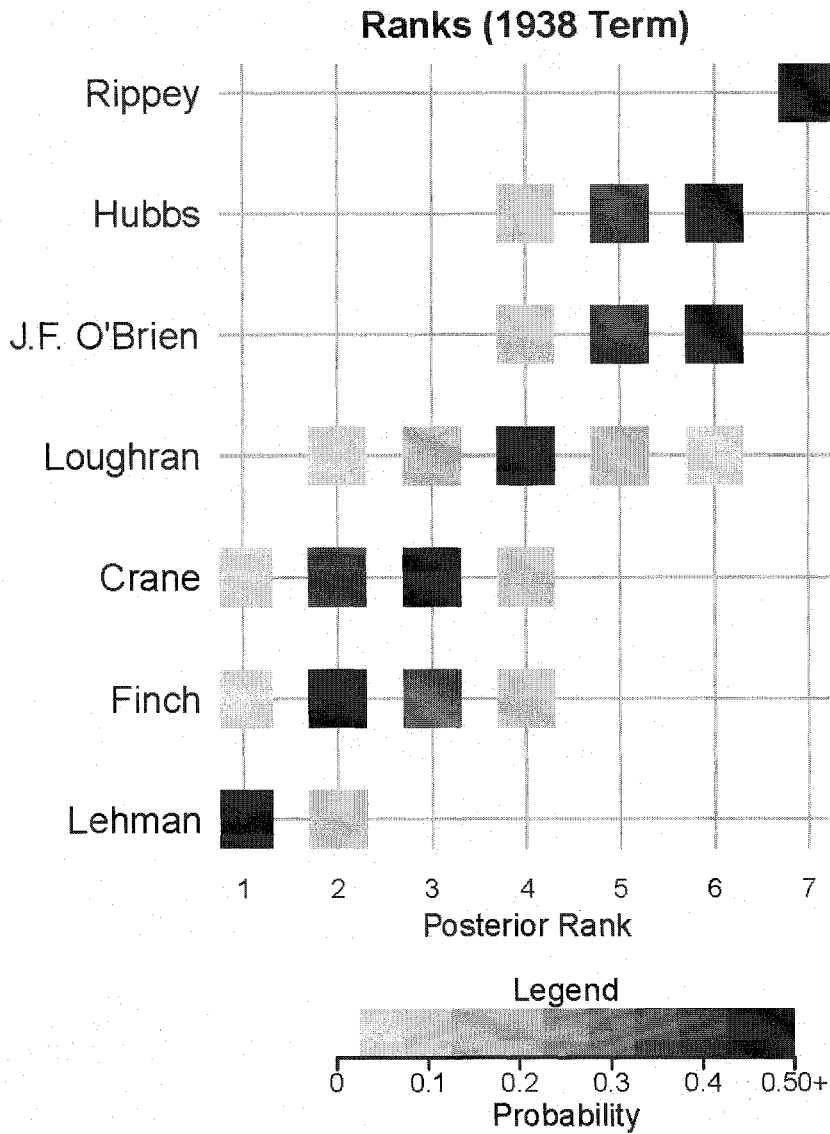
Figure 13(a). *Posterior Ranks of Ideal Points, 1938 to 1940 Terms.*

Ranks (1939 Term)
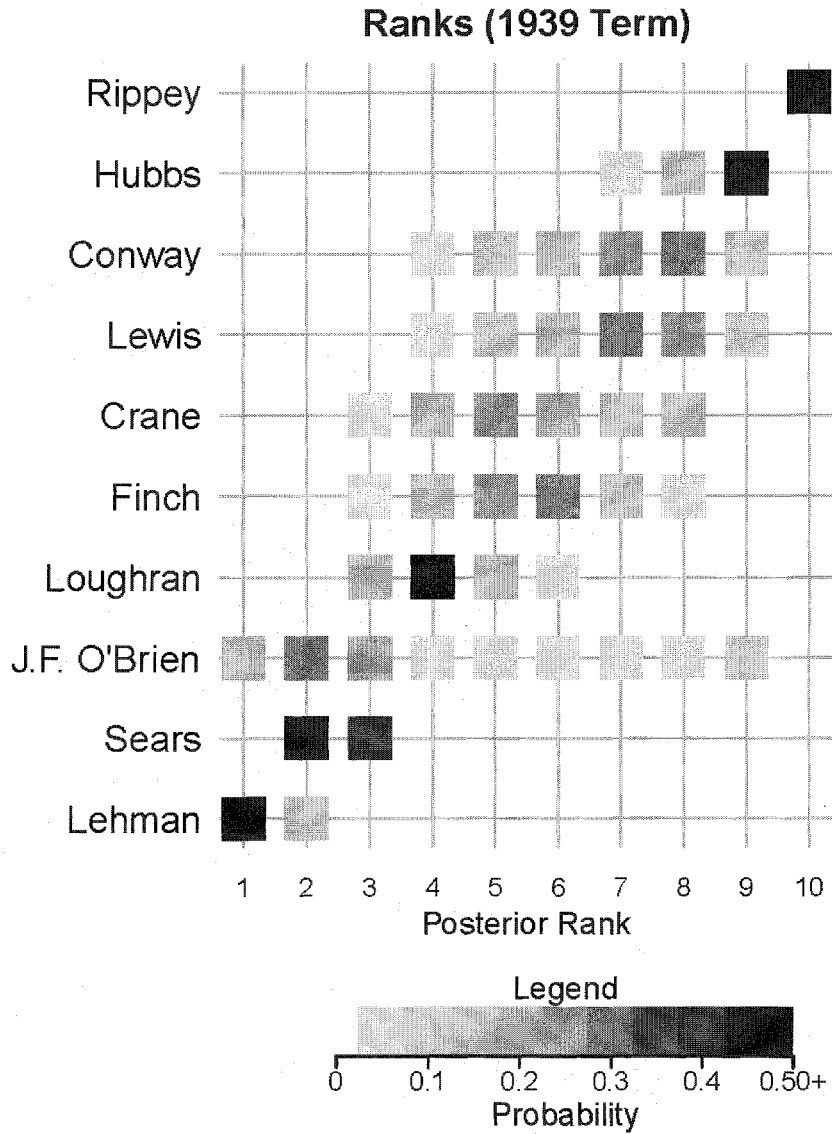
Figure 13(b). *Posterior Ranks of Ideal Points, 1938 to 1940 Terms.*

Ranks (1940 Term)

Figure 13(c). *Posterior Ranks of Ideal Points, 1938 to 1940 Terms.*

The high absolute β cases during the period suggest ideological differences contribute to the patterned voting. During the 1940 term, the court divided along the lines depicted by the model in a 4-3 decision rejecting an equal protection challenge to a health regulation which denied licenses to independent milk distributers while grandfathering existing distributors.[242] Several cases from the 1939 term involve challenges to legislative or administrative action as unconstitutional or as arbitrarily exercised. The left-wing always sides with the government and the right with the challenger.[243] These voting patterns correspond with patterns in several prominent decisions on the constitutionality of wage and price regulations earlier in the 1930s.[244]

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242. Stracquadanio v. Dep't of Health of New York, 32 N.E.2d 806, 809-10 (N.Y. 1941) (β = -2.8).

243. *See, e.g.*, Franklin Soc'y. for Home Bldg. & Sav. v. Bennett, 24 N.E.2d 854, 856 (N.Y. 1939) (β = -2.516) (rejecting constitutional and statutory challenge to a tax on recording mortgages); McCarthy v. LaGuardia, 28 N.E.2d 715, 716 (N.Y. 1940) (per curiam) (β = -2.238) (rejecting a petition that compensation paid to clerks of justices of municipal court as "so unreasonably low and inadequate that it constituted an arbitrary and illegal exercise" of statutory power); Finn v. City of New York, 25 N.E.2d 966, 967-68 (N.Y. 1940) (β = -2.104) (rejecting public official's challenge to ordinance providing that his acceptance of reduced salary was a release of claim that reduction was unconstitutional); Cowen v. Reavey, 28 N.E.2d 390, 393-94 (N.Y. 1940) (β = 2.138) (invalidating conditions set for participation in civil service exam as excluding members of bar who did not graduate from a qualified law school and over-weighing subjective factors; the dissent argues agency decision is discretionary and unreviewable).

244. In *People* ex rel. *Tipaldo v. Morehead*, 200 N.E. 799, 800-01 (N.Y. 1936) (β = 1.991), in a 4-3 decision, the court held a minimum wage law violated the due process clause on the authority of *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525 (1923). Crane wrote the majority opinion and was joined by O'Brien, Hubbs, and Finch. *Tipaldo*, 200 N.E. at 811. Lehman wrote a dissenting opinion and was joined by Crouch and Loughran. *Id.* In *Darweger v. Staats*, 196 N.E. 61, 66-67 (N.Y. 1935) (β = 1.994), in a 4-3 decision, the court held the delegation of unlawful legislative power to the state counterpart to the National Industrial Recovery Act as unconstitutional. Again, Crane wrote the majority opinion and was joined by O'Brien, Hubbs, and Loughren. *Id.* at 72. Again, Lehman wrote the dissent and was joined by Crouch and Finch. *Id.* Voting patterns are different in *W.H.H. Chamberlin, Inc. v. Andrews*, 2 N.E.2d 22, 27 (N.Y. 1936) (β = .285), which upheld New York's Unemployment Insurance Law (1935) in a 5-2 decision. Crane wrote the majority opinion. *Id.* at 32. Hubbs and O'Brien dissented. *Id.*

The court splits along the lines indicated by the model in a number of labor cases from the 1938 and 1940 terms. In the 1938 term, the court split 4-3 in two cases rejecting multibarreled challenges to the 1937 Labor Relations Act.[245] There was a similar split in a 4-3 decision dismissing an injunction to restrain a labor union from picketing a family-owned business to protest unionized employees being replaced by family members. [246] Turning to the 1940 term, a 4-3 decision reversed a conviction for disorderly conduct of peaceful union picketers engaged in secondary picketing on constitutional and statutory grounds.[247] However, labor did not always win. In a 4-2 decision, the court embraces the doctrine of prima facie tort to supply a basis for an injunction to prevent the Musician and Stagehands' Unions from protesting the use of machinery to replace live musicians.[248] The majority held this was not a lawful objective.[249] A similar majority held that the anti-injunction statute did not cover picketing for an unlawful objective.[250] A 4-3 decision chastises the labor board for allowing workers to invalidate an existing union agreement with an employer by selecting another union as their bargaining

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245. Metro. Life Ins. Co. v. New York State Labor Relations Bd., 20 N.E.2d 390, 392 (N.Y. 1939) (β = -2.636). Loughran writes for the majority, rejecting all the challenges including an argument that white collar workers were not employees covered by the Act. *Id.* at 394-95. The dissent was on the last point, "without considering other grounds involved." *Id.* at 396 (O'Brien, Hubbs, Rippey, J.J., dissenting). *Bank of Yorktown v. Boland*, 21 N.E.2d 191, 191 (N.Y. 1939) (per curiam) (β = -2.644), was the same lineup in a per curiam remand of similar claims declining to address certified questions.

246. Boro Park Sanitary Live Poultry Mkt. v. Heller, 21 N.E.2d 687, 687-88 (N.Y. 1939) (β = -2.393). The court also split as indicated by the model in People v. Schenk, 17 N.E.2d 457, 457-58 (N.Y. 1938) (per curiam) (β = 2.264) (per curiam affirmance of conviction for criminal coercion by labor union).

247. People v. Muller, 36 N.E.2d 206, 206-07 (N.Y. 1941) (β = -2.8).

248. Opera on Tour, Inc. v. Weber, 34 N.E.2d 349, 353-54 (N.Y. 1941) (β = 2.41).

249. *Id.*

250. Am. Guild of Musical Artists v. Petrillo, 36 N.E.2d 123, 125-26 (N.Y. 1941) (β = 2.03).

representative.[251] Finch wrote: "the decision found by the
Labor Board puts a premium upon industrial unrest."[252]

During all three terms, many of the high absolute β
cases are personal injury cases, including both negligence
cases and workmen's compensation cases. The court's right-
wing consistently sides with the plaintiff in these cases
while the left-wing consistently sides with the defendant.
There are thirty-three personal injury cases with an
absolute β greater than 2.0 during the three terms. The
Rippey (or right-wing of the court sides with the plaintiff in
thirty-two of the thirty-three personal injury cases.[253] Two-
thirds of these cases (twenty-one) are per curiam decisions
without opinion. In most of the cases without an opinion,
the disagreement seems to be on the application of settled
rules of law to the facts, usually whether there was
sufficient evidence to submit an issue to the jury.[254] In many

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251. Triboro Coach Corp. v. New York State Labor Relations Bd., 36 N.E.2d
315, 315-16 (N.Y. 1941) (β = 2.39).

252. *Id.* at 316.

253. The exception involves an issue unrelated to personal injury law—the
right of a widow suing as her husband's executrix to be excused from the cost of
litigating an appeal under a statute excusing a "poor person." Fontheim v. Third
Ave. Ry. Co., 24 N.E.2d 95, 95 (N.Y. 1940) (β = 2.179). Lehman dissents. *Id.* at
96. *Morse v. Buffalo Tank Corp.*, 19 N.E.2d 981 (N.Y. 1939) (β = 1.703), is a
fairly high β case in which the left-wing sides with plaintiff. The court held 5-2
that a business was not liable to a ten-year-old boy injured by a fire started by
other boys with waste gasoline taken from the business after hours even though
the defendant was aware of the theft and misuse of its waste gasoline and did
nothing to prevent it. *Id.* at 982. The majority treated the issue as one of
attractive nuisance. *Id.* at 983-84. Lehman, in an opinion joined by Loughran,
dissented, arguing correctly that the issue was not attractive nuisance but
whether the theft and misuse of the gas was a superseding cause, which was a
question for the jury on these facts. *Id.* at 986-87 (Lehman, J., dissenting).

254. Five are premises liability cases in which the court splits 4-3 or 5-2. *See*
Simmons v. Radio Printing Corp., 18 N.E.2d 866, 866 (N.Y. 1939) (per curiam)
(β = 2.614); Schumm v. 25th Props., Inc., 28 N.E.2d 725, 726 (N.Y. 1940) (per
curiam) (β = 2.611); Rosenberg v. City of New York, 21 N.E.2d 877, 877 (N.Y.
1939) (per curiam) (β = 2.588); Sauter v. City of New York, 20 N.E.2d 1010, 1010
(N.Y. 1939) (β = 2.577); McCaffrey v. City of New York, 20 N.E.2d 1009, 1009
(N.Y. 1939) (per curiam) (β = 2.536). *Vroman v. State*, 24 N.E.2d 975, 975 (N.Y.
1939) (per curiam) (β = -2.51), involves a claim against the state that it was
negligent to have a bridge girder that obtruded in a public highway. In
Proefrock v. Denney, 28 N.E.2d 44, 44-45 (N.Y. 1940) (per curiam) (β = -2.226),
the issue seems to be whether there was sufficient evidence an operator of a
train was negligent in failing to stop when the plaintiff's automobile crossed the

of these cases the defendant's negligence was in failing to eliminate dangerous condition on its business premises or public area it controlled.

O'Hanlon v. Murray[255] may provide a window on some of the underlying disagreements that produce the patterns we find. This is a wrongful death claim brought on behalf of a man run over by a subway train.[256] A passenger spotted the man unconscious on the tracks.[257] The passenger notified subway attendants, who rescued the man from the tracks but left him unconscious near the edge of the platform.[258] The man revived and stepped in front of an oncoming train.[259] The jury returned a verdict for the victim after being presented with two theories of negligence: 1) that the station agents were negligent in leaving the man where they did, and 2) that the motorman was negligent in not stopping the train to avoid hitting the victim.[260] The appellate division reversed.[261] The court then reversed the appellate division 4-3.[262] Rippey and Conway—who the model places at the far right—voted to reinstate the jury verdict, arguing that while the evidence suggested the motorman could have avoided the accident had he used reasonable care was slim, it was sufficient to support a jury

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tracks. In *Cammarata v. Nassau Appliance Co.*, 27 N.E.2d 205, 205 (N.Y. 1940) (per curiam) (β = 2.097), the issue seemed to be entirely factual, whether one could infer a truck was being driven in the scope of employment. The factual circumstances are not indicated in *Bordes v. Murray*, 31 N.E.2d 513, 513 (N.Y. 1940) (per curiam) (β = 2.78). The case history only states the issues were whether there was sufficient evidence to put the issues of negligence and the absence of contributory negligence to the jury. *Id.* Lehman is the sole dissenter in two slip and fall cases that are described as turning on a factual issue. *See* Joseph v. Horn & Hardart Co., 32 N.E.2d 831, 832 (N.Y. 1941) (per curiam) (β = 2.46); Walz v. Paul Helfer Inc., 36 N.E.2d 640, 640-41 (N.Y. 1941) (per curiam) (β = 2.31).

255. 34 N.E.2d 339 (N.Y. 1941) (β = 2.55).

256. *Id.* at 839.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 340.

261. O'Hanlon v. Murray, 19 N.Y.S.2d 655, 655 (N.Y. App. Div. 1941), *rev'd*, 34 N.E.2d 339 (N.Y. 1941).

262. 34 N.E.2d at 340.

verdict.[263] Finch and Desmond—who the model places at the near right—voted to reverse and remand, arguing there was insufficient evidence to support the verdict on the theory of the motorman's negligence, but that there was an actionable claim of negligence based on the failure of the attendants to be more proactive.[264]

Looking more generally at the twelve high absolute β personal injury cases with a written opinion, only one resolves a legal issue of general importance and it is on a fairly technical point.[265] Curiously, during the 1938 to 1940

263. *Id.* (Rippey, J., concurring).

264. *Id.*

265. That case is *Delaney v. Philhern Realty Holding Corp.*, 21 N.E.2d 507, 509 (N.Y. 1939) (β = -2.299), in which the court split 5-1 in a decision reversing a verdict for the plaintiff and ordering a new trial on the ground a defendant is entitled to a contributory negligence defense on a nuisance claim when nuisance is pled alongside negligence so long as the defendant's conduct is not an absolute nuisance or a nuisance per se. Rippey dissented. *Id.* at 511. There are other illustrative cases as well. *See, e.g.*, O'Hanlon v. Murray, 34 N.E.2d 339 (N.Y. 1941); (*see supra* Part IV.F); Fontheim v. Third Ave. Ry. Co., 24 N.E.2d 95 (N.Y. 1939) (*see supra* note 253); Volk v. City of New York, 30 N.E.2d 596, 597 (N.Y. 1940) (β = 2.73) (holding that a nurse was injured in the scope of employment when a co-worker gave her an injection after the nurse became ill eating food); Brown v. New York State Training Sch. for Girls, 32 N.E.2d 783, 784-85 (N.Y. 1941) (β = -2.26) (holding that when a farmer injured on the job died as a result of mistakenly taking a mercury tablet instead of a sedative the mistake, was a superseding cause, making death benefits unavailable under workmen's compensation); Goldstein v. State, 24 N.E.2d 97, 101 (N.Y. 1939) (β = 2.228) (holding member of state militia is not an employee for purposes of workmen's compensation and may bring negligence claim with Lehman dissenting on a procedural point regarding the availability of appellate review); Daus v. Gunderman & Sons, Inc., 28 N.E.2d 914, 917 (N.Y. 1940) (β = -2.21) (deciding whether a decision of the State Industrial Board entered under an appellate order is a final decision not open to review on factual questions); Keener v. Tilton, 28 N.E.2d 912 (N.Y. 1940) (β = 2.146) (finding in a 4-1 decision that a street car company may be liable for injuries sustained by a passenger who stepped into a foot-deep hole upon exiting the car on a dark street; Lehman was the sole dissent); Mead v. Louer, 33 N.E.2d 534, 535 (N.Y. 1941) (β = -2.12) (holding jury instruction that required motorman to anticipate victim's negligence erroneous because it eliminated contributory negligence as a defense); Clarke v. Town of Russia, 28 N.E.2d 833, 834-35 (1940) (β = -2.077) (deciding whether a member of the town board illegally employed to work on highway was an employee of the town covered by workmen's compensation so that his widow and child could recover when he was killed on the job; Sears writing an opinion for the majority holding no); Weinfeld v. Kaplan, 26 N.E.2d 287, 288 (N.Y. 1940) (β = -2.055) (holding neither landlord nor tenant were

terms, in the handful of nonunanimous personal injury cases that do resolve legal issues of more general importance, voting is not along the dominant pattern. There are unusual coalitions with judges on the right-wing sometimes voting against the plaintiff and judges on the left-wing voting with the plaintiff.[266] We hesitate to draw any conclusions from this because of the difficulty of assessing the perceived significance of a case at the time and the small number of cases that appear significant to us. In one libel case self-described as presenting a significant issue, the Rippey wing shows itself willing to liberalize the law to redress careless conduct.[267]

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liable to workman injured on premises as a result of an independent contractor creating dangerous condition); Renzo v. Reid Ice Cream Corp., 17 N.E.2d 778, 778-79 (N.Y. 1938) (β = 2.039) (deciding whether a widow whose remarriage was void was entitled to reinstatement of workmen's compensation benefits during the period between the purported remarriage and the determination that it was void).

266. *Tedla v. Ellman*, 19 N.E.2d 987, 990-91 (N.Y. 1939) (β = .741), is the most well-known personal injury decision from the period. It is a 5-2 decision that creates a significant exception to a rule that violation by a plaintiff of a safety statute is negligence per se. Lehman wrote the majority opinion. *Id.* at 992. O'Brien and Finch dissent. *Id.* In *De Salvo v. Stanley-Mark-Strand Corp.*, 23 N.E.2d 457, 458 (N.Y. 1939) (β = -1.097), the court held 4-2 that a theatre owner was not negligent as a matter of law when two patrons were knocked over a low balcony and hit someone sitting below because the owner had a right to rely on the design by a reputable architect in accordance with building regulations. Loughran joins Rippey in dissent. *Id.* at 459. In *Hennessy v. Walker*, 17 N.E.2d 782, 785 (N.Y. 1938) (β = .953), the court divides 5-2 in narrowly construing a statute that made an owner of a "motor vehicle" liable for the negligence of someone operating the vehicle with the owner's consent not to cover negligence in the use of an attached trailer. Rippey wrote the majority opinion. *Id.* at 787. Crane and Loughran dissented. *Id*; *see also* Morse v. Buffalo Tank Corp., 19 N.E.2d 981, 985 (N.Y. 1939) (β = 1.703); *supra* dissussion Part IV.F.

267. Rose v. Daily Mirror, 31 N.E.2d 182, 182-83 (N.Y. 1940) (β = -2.78). The *Daily Mirror* mistakenly reported in an obituary of the plaintiffs' husband and father that he was a notorious criminal. *Id.* The majority held this was not actionable libel, stating:

> [I]t has long been accepted law that a libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation. . . . [T]he complaint of these plaintiffs can be sustained only if we are prepared to construct a far-reaching extension of the law of libel as it has been generally understood in this State for many years. *Id.*

We are not sure what to make of the fact that the conservative wing of the court on regulatory and labor issues consistently sides with the plaintiff in personal injury cases that split the court. In a number of personal injury cases that turn on technical legal issues, one gets the sense that judges on the right-wing are influenced by sympathy for plaintiffs, particularly widows and children. In other cases that turn on factual issues, the voting patterns may be explained by giving greater deference to the jury. Whatever the explanations, this pattern is opposite of what we expect you would find in state supreme courts at least from the 1970s on. One conclusion we draw is that as late as 1940, judges on the New York Court of Appeals thought of personal injury law in less ideological and instrumental terms that became commonplace later in the century.

CONCLUSION

This Article is an initial attempt to see what can be learned about a state's highest court by using methods traditionally applied to the United States Supreme Court. Rather than focusing on a limited number of high profile cases and/or judges, we examine the decisions of all judges on all nonunanimous cases that came before the New York Court of Appeals from 1900 to 1941. We find that voting on the New York Court of Appeals was patterned for much of the period and highly patterned for parts. Patterned voting raises the possibility that disagreements are a product of deep and broad underlying differences in views and value. Our hypothesis was that examining cases in which voting is most patterned might illuminate whether there are such underlying differences and what they might be. We believe our findings support the hypothesis. Structured voting in the New York Court of Appeals during the period we study does seem to be the product of recurring disagreements on such fundamental matters as the degree to which liability for accidental harm should be fault-based; the relative value of formality and flexibility in law; a backward-looking versus a forward-looking perspective; and deference due to oth-

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Finch's dissent, in which Rippey and Conway joined, objects strenuously to the unfairness of not compensating the plaintiffs, who awoke the morning after their loved one's death "to find blazoned forth in a morning newspaper that decedent was a notorious criminal [when] . . . [t]he slightest effort at verification would have shown the falsity of the story." *Id.* at 183 (Finch, J., dissenting).

er institutional actors, such as the legislature, the executive, and juries. The underlying points of disagreement that drive patterned voting seem to change over time. But while there are significant changes—particularly during the Cardozo era—we also find some interesting consistencies. Perhaps the most striking of these is the fact that at both the beginning and end of the forty-year period we study, it is judges on the court's right-wing who consistently vote with plaintiffs in tort cases that divide the court. This is unlike the period around 1920 where it has been suggested a new paradigm of liability without direct fault replaced the old paradigm.

APPENDIX ONE: EXCLUDING THE INDEPENDENT VOTING HYPOTHESIS

Conceptually, we can test the likelihood that the observed patterns of voting are produced by independent voting in the following way. First we use the observed vote data from a particular term to compute a test statistic t_{obs}. Possible choices for this test statistic are discussed below. Then we can generate new vote data under the null hypothesis that the independence model is correct. This can be accomplished by independently permuting the votes (coded dissent/no dissent) of each judge. After a particular permutation dataset is generated, say permutation dataset i, the test statistic of interest can be calculated using the permutation dataset. Call this t_i. Repeat this procedure, creating M permutation datasets along with M associated values of the test statistic of interest. If t_{obs} is unusual relative to the collection $\{t_1,...,t_M\}$ then we have reason to believe that the observed data were not generated in a way consistent with the independence model.

The test statistics that we consider all make use of the collection of term-specific, pairwise *agreement scores* between judges in nonunanimous cases.[268] The agreement score between judge j and j' is simply the fraction of cases in which j and j' voted the same way out of the total number of

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268. Agreement scores have long been used to summarize judicial behavior. *See, e.g.*, C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890, 893-94 (1941). For a discussion of agreement scores within the context of ideal point models, see KEITH T. POOLE, SPATIAL MODELS OF PARLIAMENTARY VOTING 19-26 (2005).

cases that j and j' sat together on. The collection of agreement scores thus provides a concise summary of the voting behavior of the judges and the resulting voting coalitions.

Since each term of the court produces numerous pairwise agreement scores—a term in which only seven judges sit produces twenty-one agreement scores—we need to find some way to collapse the collection of agreement scores down to a scalar test statistic so that we can more easily compare the observed agreement scores to the permutation agreement scores.[269] We chose to do this in two ways. In the first, we subtract the smallest agreement score in a term from the largest agreement score giving us the range of the agreement scores in that term. In the second, we subtract the 25th percentile of the agreement scores from the 75th percentile resulting in the interquartile range of the agreement scores.
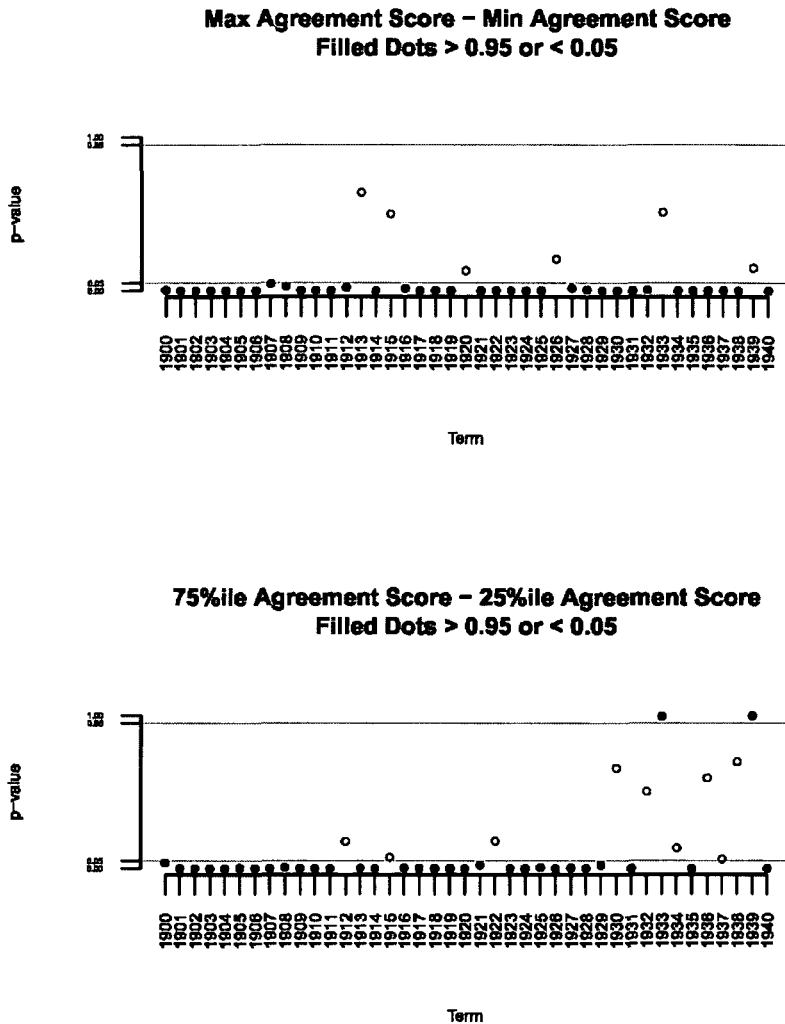
Having chosen these test statistics we can now test the independence model by comparing the observed statistics to their permutation distribution. More specifically, we generate 1001 permutation datasets and associated test statistics and then calculate the fraction of these permutation test statistics that are greater than or equal to the observed test statistic. This produces a permutation p-value. Given our choice of test statistic, an observed test statistic that is either much greater or much less than the permutation test statistics is evidence against the independence model. Thus, a p-value that is *either* close to 0 *or* close to 1 is evidence against the independence model.

Figure A1 presents these term-specific p-values graphically. Here we see that the p-values for the agreement score range are nearly all less than 0.05. This means that the observed agreement score range was typically greater than that expected under the independence model. Looking at the p-values for the interquartile range of the agreement scores we again see p-values that are generally close to 0. The p-values from the

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269. The permutation data were generated by permuting the full term-specific vote data. Unanimous cases were included in these datasets. In order to make the tests of the independence model comparable to other tests discussed later, the agreement scores for both the observed and permutation data were calculated only using the nonunanimous cases.

1930s data are somewhat higher. However, taken as a whole, these results strongly suggest that the data from most terms are not consistent with the independence model—there appear to be meaningful associations among the judges' decisions in most terms.

Max Agreement Score – Min Agreement Score
Filled Dots > 0.95 or < 0.05

Term

75%ile Agreement Score – 25%ile Agreement Score
Filled Dots > 0.95 or < 0.05

Term

Figure A1. p-*values from Term-by-Term Tests of a Null Hypothesis of Independent Judicial Voting with Varying Propensities of Dissent.* Solid points denote p-values that are either above 0.95 or below 0.05.

APPENDIX TWO: A POSTERIOR CHECK OF THE DESCRIPTIVE
ADEQUACY OF THE MODEL

We use the IRT model to describe patterns in voting. A possible concern is that our model-based summaries are
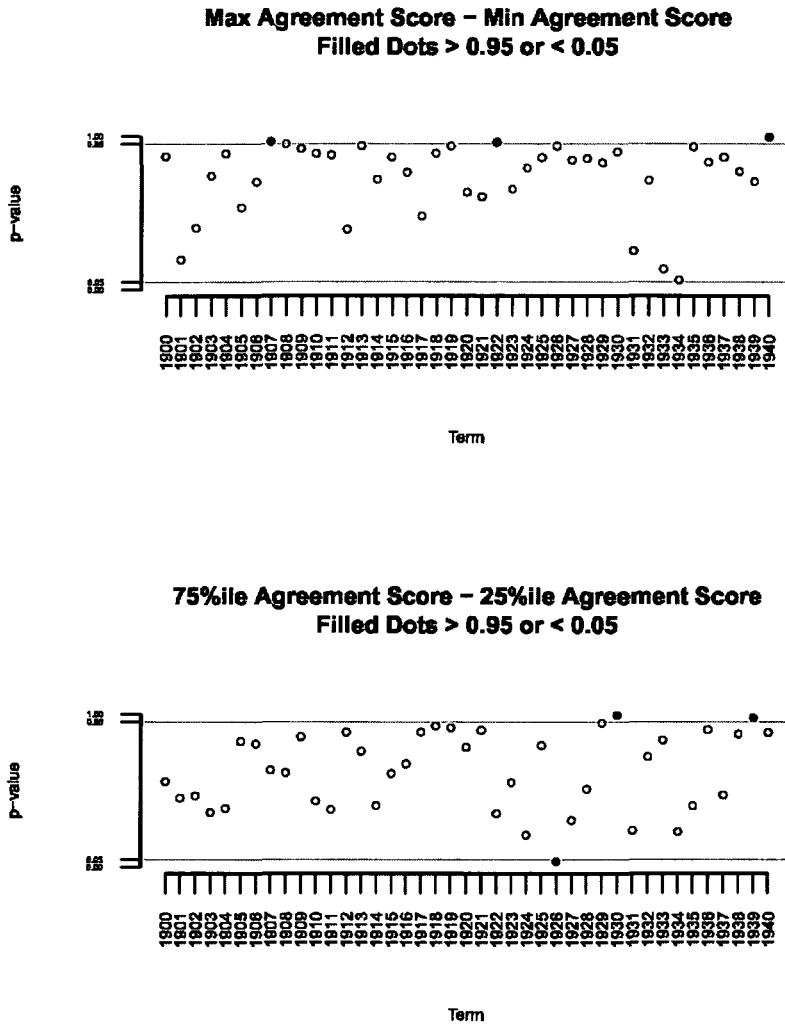
missing important aspects of the data. While all models, by their very nature, are simplifications of reality (and thus omit some aspects of the observed data) we would hope that our fitted model could reproduce voting data that look like the observed data in many meaningful respects. If data generated from our fitted model does not look like the observed data, we would be concerned that the descriptive inferences in the body of this paper are heavily dependent on our choice of assumptions.

To allay this concern we employed *posterior predictive checks*.[270] The basic idea here is to compare the observed data set to synthetic datasets that were generated from the posterior predictive distribution. More specifically, we compare the observed range and interquartile range of the agreement scores in each term to the range and interquartile range of agreement scores calculated from datasets synthetically generated from the posterior predictive distribution. A *posterior predictive* p-*value* can be constructed by calculating the fraction of synthetic test statistics that are greater than or equal to the observed test statistic. Figure A2 presents these posterior predictive *p*-values graphically. The vast majority of the *p*-values fall in the range between 0.05 and 0.95, thus providing no strong evidence against the descriptive adequacy of the IRT model—at least for the chosen test statistics.

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270. *See* Andrew Gelman, *Exploratory Data Analysis for Complex Models*, 13 J. OF COMPUTATIONAL & GRAPHICAL STAT. 755, 758-59 (2004); Andrew Gelman et al., *Posterior Predictive Assessment of Model Fitness via Realized Discrepancies*, 6 STATISTICA SINICA 733, 736-37 (1996); Herbert Hoijtink & Ivo W. Molenaar, *A Multidimensional Item Response Model: Constrained Latent Class Analysis Using the Gibbs Sampler and Posterior Predictive Checks*, 62 PSYCHOMETRIKA 171, 179 (1997); Xiao-Li Meng, *Posterior Predictive p-Values*, 22 ANNALS OF STAT. 1142, 1142-44 (1994).

Max Agreement Score – Min Agreement Score
Filled Dots > 0.95 or < 0.05

Term

75%ile Agreement Score – 25%ile Agreement Score
Filled Dots > 0.95 or < 0.05

Term

Figure A2. *Posterior Predictive p-values Based on Term-Specific Uni-dimensional Ideal Point Models.* Solid points denote *p*-values that are either above 0.95 or below 0.05.