Common Law Judicial Decision Making: The California Supreme Court 1960-1970

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I. INTRODUCTION

Mark P. Gergen & Kevin M. Quinn, Common Law Judicial Decision Making: The New York Court of Appeals 1900-1941, 60 Buff. L. Rev. 897 (2012), uses a two-parameter item response theory ("IRT") model to identify voting patterns in non unanimous decisions by the New York Court of Appeals from 1900 to 1941. We found consistently patterned voting over most of the forty-year period. For some terms patterned voting was strong enough that voting on the New York Court of Appeals could fairly be described as polarized. But analysis of cases in which voting most conformed to the dominant pattern indicates the dominant dimension of disagreement on the court for much of the period was not political or ideological in the usual sense of those terms. Some results were quite surprising. In particular, during the late 1930s the "right" wing of the court in labor and constitutional cases is the pro-plaintiff wing in personal injury cases. We consider this to be evidence that personal injury law was not thought of in instrumental or ideological terms by the judges on the court.

We decided to do a similar study of the California Supreme Court covering the entire 20th Century. One motivation for looking at a second court is to see whether structural differences in how courts take and decide cases affects dissent rates and voting patterns. Having data on the voting behavior of individual judges on multiple courts over a long period of time may also make it possible to see if such factors as length of tenure or proximity to standing for election systematically affect judicial voting behavior. The California Supreme Court seemed an obvious choice for our second study. During the second half of the 20th Century the California Supreme Court replaced the New York Court of Appeals as the preeminent common law court in the U.S. Justice Roger Traynor, who served on the Court from 1940 to 1970, and was Chief Justice from 1964 to 1970, has a length of tenure, stature, and influence comparable to Benjamin Cardozo on the New York Court of Appeals. For much of Traynor's tenure and 16 years following his retirement in 1970[1] the California Supreme Court took strongly liberal positions on a wide range of issues. G. Edward White has written: "If California was a testing ground for governmental theories of modern liberalism, Traynor was an architect of a judicial role compatible with the activities of the modern liberal state."[2] During its liberal period the California Supreme Court had some conservative justices. We would not be surprised to find politicized voting patterns during and after the Traynor era that

[1] The political makeup of the Court changed dramatically after 1986 when Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin were voted off the seven-justice Court in a recall election and replaced by conservative justices appointed by Republican Governor George Deukmejian. The well-funded recall campaign targeted the three Justices' opposition to the death penalty. Much of the funding for the campaign came from business interests.

[2] G. Edward White, American Judicial Tradition: Profiles of Leading American Judges (OUP, 2nd ed.) 296.

are similar to the patterns observed in the U.S. Supreme Court throughout the century. A study of voting patterns in the California Supreme Court over the entire 20th century might provide a window into the politicization of common law judicial decision-making.

This paper presents some early and very preliminary results. Data collection requires downloading ASCII text files from Lexis and writing Python programs to extract as much pertinent information as possible automatically using regular expressions. The goal is to keep hand coding to a minimum. Differences in format and expression in California and New York cases required writing and testing new programs. The programming has been done and we have results for cases decided between Oct. 1, 1960 and Sept. 30, 1970.[3] Some preliminary results are reported here. We hope to collect the remaining data in short order. Changes in format and expression in the California cases over the 20th century may require some additional programming.

II. IDENTIFYING AND DEPICTING PATTERNED VOTING: THE IRT MODEL[4]

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 judges on the court. Call this *independent voting*. In such a world we might still see patterns in voting but the patterns would be a random product of independent voting. In our earlier study the voting data of the New York Court of Appeal made it possible to exclude this hypothesis. It is extremely unlikely that the observed patterns of voting in the New York Court of Appeals for the period from 1900 to 1941 are the random product of independent voting.

This should come as no surprise. Contemporary observers and historians often describe certain judges as allies. Such accounts are based on what the judges reveal about themselves in their written opinions or other writings, the recorded observations of contemporaries, biographical data, and general historical data. We come at the question from an angle that while cruder 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 non-unanimous 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 2-parameter item response theory (IRT) model. Such models are consistent with a simple model of preference-based voting.[5] For our purposes they should be viewed only as empirical

[3] We chose these dates because they correspond with the traditional judicial term. The California Supreme Court does not sit by terms.

[4] The explanation of the IRT model is Mark P. Gergen & Kevin M. Quinn, Common Law Judicial Decision Making: The New York Court of Appeals 1900-1940, 60 Buff. L. Rev. 897 (2012).

[5] Joshua Clinton *et al., The Statistical Analysis of Roll Call Data*, 98 AMER. POL. SCI. REV. 335 (2004).

summaries of observed behavior.[6] Such models have been successfully applied to merits votes from a variety of courts.[7]

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 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.

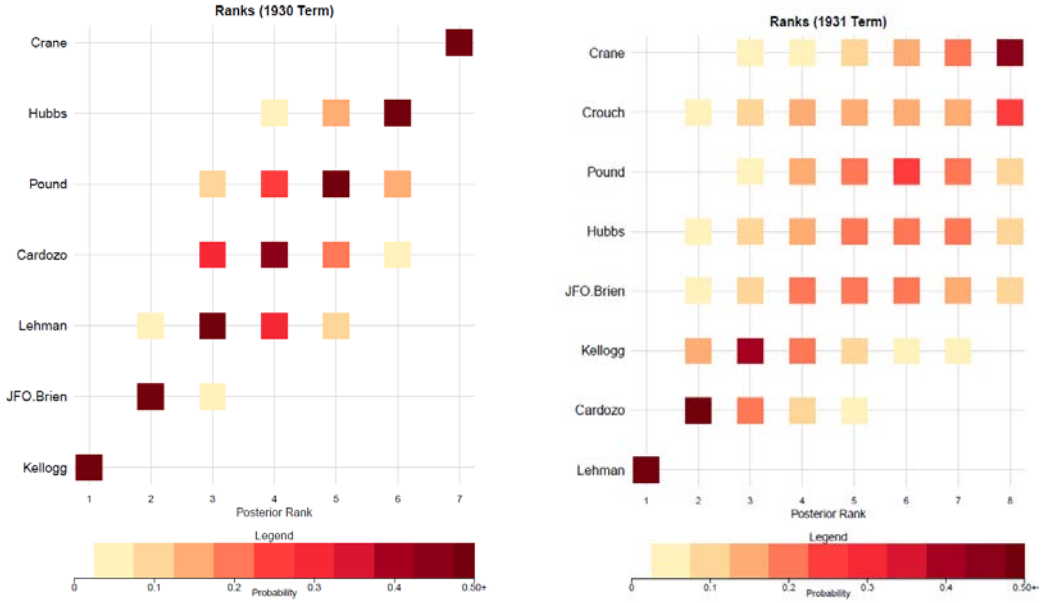
Applying an IRT Model to the United States Supreme Court in the modern era produces clear results—i.e., the estimated ideal points for the Justices (θ) are quite distinct–because voting in non-unanimous cases tends to be highly polarized along familiar ideological and political lines. One thought we had going into the New York study is that applying the IRT Model to the decisions of the New York Court of Appeals in the period we studied 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.

The figure below is from the New York study. It 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 color of each square codes the probability of a particular justice occupying a particular position on the court, with darker colors indicating increased certainty. In the 1931 Term, the estimated ideal points (θ) for Crouch, Pound, Hubbs, and JF 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 eight judge from the left. This produces the muddled results depicted in the right panel of Figure 3. On the other hand, the

[6] Daniel E. Ho & Kevin M. Quinn, How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models, 98 CAL. LAW REV. 813 (2010).

[7] See, e.g., 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 (2002); Benjamin R. D. Alarie & Andrew Green, The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada, 57 UNIV. OF TORONTO LAW J. 195 (2007); Daniel E. Ho & Kevin M. Quinn, Did a Switch in Time Save Nine?, 2 J. LEGAL ANALYSIS 1 (2010).

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. 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.[8]



Posterior Ranks of Ideal Points, 1930 and 1931Terms.

Another way of thinking of what the model depicts is that it shows which judges are likely to vote on the same side when a decision is non unanimous. The model shows that during the 1930 Term Crane and Kellogg rarely or never vote on the same side in a non-unanimous decision. On the other hand, JF O'Brien and Kellogg typically vote on the same side in a non-unanimous decision, as do Crane and Hubbs. Looking at the judges in the middle, the model shows that Pound usually votes with Crane and Hubbs though he occasionally swings the other way. As for Cardozo, the model shows he is inclined to vote with Crane and Hubbs, and that when he does vote with the Crane "wing" of the court he is usually joined by Pound. The results in the 1930 term can be described in this way because the composition of the court does not change during the term. When the composition of the court does change the model can be thought of as a prediction of how judges who did not sit together would have voted had they sat together based on how each voted with the rest of the court.

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.[9] Under the model β_k can

[8] 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 II in the New York paper addresses this point in a bit more detail and explains why it does not undermine the descriptive accuracy of the model.

[9] This terminology comes from the educational testing literature where such models were developed and are still commonly used. In the context of an IRT model applied to test 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.

have a positive or negative value. We are interested in both the real and absolute value of β. 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.[10] 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 the real value 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. In the New York study we focused on β's absolute value because the sign of β had little predictive value on the outcome of a non-unanimous case. The sign of β has great predictive value in California so we pay more attention to that information.

III. RESULTS FROM THE NEW YORK STUDY

This Section briefly summarizes the results from the New York study to provide context for the California data and preliminary results.

The caseload of the New York Court of Appeals from 1900 to 1941 ranged from 400 to 700 cases per term with an average of about 600 cases with no appreciable trend other than a brief downturn around 1920, when the court cleaned up a substantial backload. The majority of the cases are decided without a written opinion. The court has limited control over what cases it decides. Many appeals are as a matter of right. Over the period around 80% to 90% of the court's decisions were unanimous with an average of 86%. There were generally 60 to 100 non-unanimous decisions in a single term.

Throughout the period we studied the New York Court of Appeals had seven elected judges who were elected for fourteen-year terms. Through the 1920 term up to three additional judges designated by the governor from the pool of judges elected to the intermediate appellate courts served on the court. Designated judges served multiple terms. Through the 1920 term cases were decided by seven of what typically was ten available judges. There was fairly constant turnover on the court over the entire period studied. The court had the most stable membership from 1921 to 1925. Six of seven judges served throughout this period. And all seven served together from 1916.

The changing composition of judicial panels within and across terms presents a dilemma in applying the IRT model. Pooling terms multiples the number of non-unanimous cases, which makes patterns in voting more prominent. But pooling terms increases differences in the composition of panels. Differences in panel composition can make patterns in voting less prominent. Generally we chose to analyze single terms for the New York study. We found highly patterned voting in some terms (1918, 1921-1925, and 1940). For other terms voting was less patterned but judges voted in consistent blocks (1901-1904, 1910, 1927-1930,

[10] 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 (2001).

and 1938). There were only a few terms with weak voting patterns (1911, 1926, 1931, and 1939). In some of these terms (e.g., 1926 and 1939) this appears to be a product of a limited number of non-unanimous decisions and a change in the composition of the court.

We pooled terms for 1921-1926 and 1926-1930, splitting 1926 when two conservatives (Hiscock and McLaughlin) left the court and were replaced by two Cardozo allies. The figure below shows the pooled results for 1921-1926. To some extent the pattern is a product of consistent disagreements in personal injury cases. The Crane wing of the court votes for plaintiffs while the McLaughlin wing of the court votes for defendants. In the 1926-1930 period Crane flips to the court's right wing, joining Andrews. It is the Crane wing of the court that consistently favors plaintiffs in non-unanimous personal injury cases during the 1926-1930 terms.

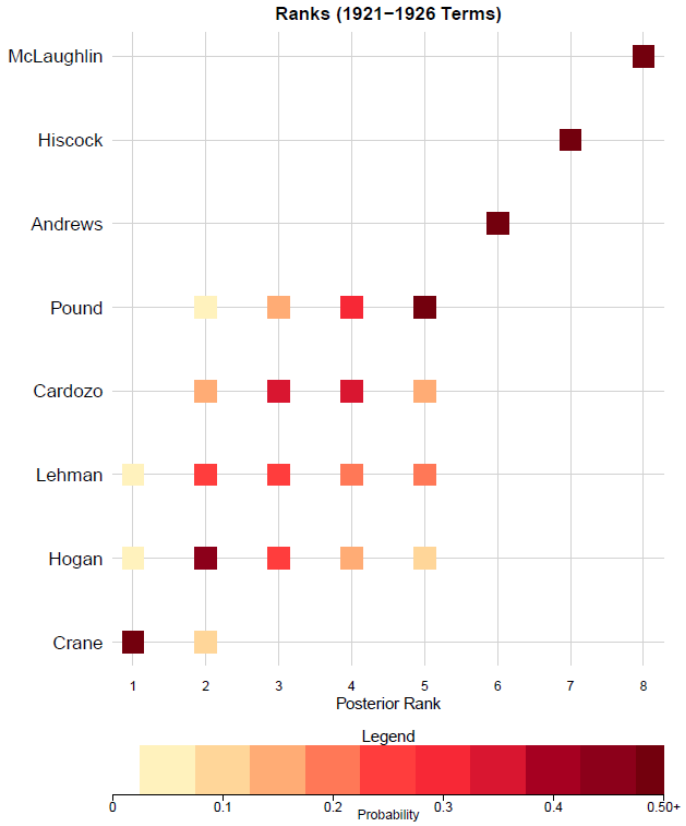


Figure 8 *Posterior Ranks of Ideal Points, 1921 to 1926 Terms Pooled.*

Our general methodological hypothesis is that 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 in the New York study support the methodological hypothesis. We found recurring disagreements in the cases with highly patterned voting for all periods we examined closely except the 1926 to 1930 Terms. For some 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. Furthermore, except for the 1918-1925 period the dominant points of disagreement cannot be described as political or ideological in the usual sense of the terms.

1901-1904 Terms When we looked at the high absolute β cases we found recurring points of disagreement that are quite unlike the recurring points of disagreement we found in later periods. *Monnier v. New York Central RR*[11] illustrates. The case involves an assault and battery claim brought by a train passenger who was expelled from a train after refusing to pay a 5 cent surcharge to purchase a ticket. 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. The court denies the claim splitting 4-3. The majority, concurring, and dissenting opinions all agree that the question at bottom is whether the passenger's claim of right should yield to "process and resort to proper proceedings." What is striking is that what most people would describe as the left wing of the court (which includes a future Democratic Presidential nominee) takes the position that the passenger should have paid the 5 cents and not made such a bother over a contested claim of a trivial right. The other wing takes the position that "The plaintiff and defendant were each bound in the emergency to determine the character of his or its legal rights . . . at their peril."[12] The *Monnier* dissenters always vote for the plaintiff in a handful of high absolute β personal injury cases. And in high absolute β cases involving commercial transactions and real estate conveyances the *Monnier* dissenters take 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. The common theme is that the *Monnier* dissenters consistently take a moralistic position in high absolute β cases. They are willing to bend the law to reach results they feel to be just. The Court's other wing takes a more pragmatic and prudential approach. The pragmatists put a higher value on having certain and predictable rules.

1910-1911 Terms The recurring point of disagreement in the high absolute β in these two terms appears to be between judges who take a legalistic approach in cases and judges who take a more pragmatic approach. For example, judges on what we describe as the court's pragmatic wing held New York could expand use public funds to expand subway lines though it lacked clear legal authority[13] and that a trial judge has the inherent power to order a stenographic record be made of proceedings at the public charge.[14] Judges on what we describe as the legalistic wing strongly dissent in both cases. Judges on the legalistic wing prevail in cases in which the issue is whether the court should preserve long-standing restrictive technical procedural rules and whether the court should bother to resolve a highly technical issue of property rights that might peripherally bear on a foreign dispute.

1918 Term Voting is highly patterned in this term, which is after Cardozo joins the court. Many of the high absolute β cases are personal injury and workers compensation cases. The court's progressive wing (which includes Cardozo) always sides with the plaintiff in these cases. This is in the wake of a legal and political battle over the power of the legislature to

[11] 67 N.E. 569 (1903)(β=-2.963)
[12] 69 N.E. at 573.
[13] *Admiralty Realty Co. v. City of New York*, 99 N.E. 241 (1912)(β=2.463).
[14] *Moynahan v. City of New York* , 99 N.E. 482 (1911)(β=2.778)ad

enact a workers' compensation system.[15] Having lost the political battle, the court's conservative wing does not openly challenge the legislature's power to replace the negligence system with an insurance system. But it 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. The fundamental point of disagreement appears to be over the basic question whether it is appropriate to hold a defendant liable for an accident for which the defendant bears no responsibility in the sense of fault. In other high absolute β cases the court's progressive wing takes progressive positions on the availability of a legal remedy for a wrongfully terminated government employee,[16] the standard of proof of causation in a toxic tort case,[17] and the right of a third party beneficiary to sue on a contract.[18]

1921 to 1926 Terms During the 1921 to 1925 Terms, as during the 1918 Term, voting in personal injury cases strongly corresponds with dominant pattern of voting found by the model. A disproportionately large share of the high absolute β cases is personal injury cases. The progressive wing of the Court always sides with the claimant in these cases and the right wing of the Court always sides with the defendant. While there are relatively few commercial and contract cases with a high absolute β, 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.

1927 to 1930 Terms Cardozo becomes Chief Justice in this period. *Palsgraf v. Long Island Railroad*[19] is representative of the muddle we found both in voting patterns and in the absence of dominant underlying points of disagreement in the high absolute β cases. *Palsgraf* 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. But it is the court's right wing that sides with the plaintiff. The Cardozo-Lehman wing sides with the defendant. This patterns hold for 20 of 21 personal injury cases with an absolute β greater than 2: the Cardozo-Lehman wing sides with the defendant and against recovery. The Crane wing of the court sides with the plaintiff.

1938 to 1940 Terms Voting is very highly structured during these terms. Investigation of the cases yielded perhaps our most surprising result. The court's right wing consistently voted as one would expect in a significant number of high absolute β cases involving labor disputes and disputes over the state's regulatory power. But the court's right wing also sided with the plaintiff in 32 of the 33 personal injury cases. We conclude:

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[16] *McGraw v. Gresser*, 123 N.E. 84 (1919)(β = -2.934)(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).

[17] *Stubbs v. City of Rochester*, 124 NE 137 (1919)(β = -2.902)(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).

[18] *Seaver v. Ransom*, 120 NE 639 (1918)(β = -2.781)(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 for he would leave the niece the value of the house in his will).

[19] 162 N.E. 99 (1928)(β=-2.803).

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 than became commonplace later in the century.

IV. CALIFORNIA SUPREME COURT: 1960-1970

We analyzed cases decided by the California Supreme Court between Oct. 1, 1960, and Sept. 30, 1970. There were 533 non-unanimous decisions during the 10-year period. This was out of 1509 decisions we identified as merits-based.[20] The number of non-unanimous decisions ranges from a low of 33 in 1963 to a high of 79 in 1969. Unlike the New York Court of Appeals, the California Supreme Court largely controls its docket. Appeal is automatic only in death penalty cases. Review of a discretionary case is granted if at least four of the seven justices vote to grant review.[21] In recent years the court has received around 5,200 for review each year of which it grants review in around 83 cases.[22] During the period we study petitions for review were granted in slightly less than 10 percent of cases.

A justice is nominated by the Governor and appointed after confirmation by a three-member commission composed of the Chief Justice, the Attorney General of California, and senior presiding justice of the California Court of Appeals. In principle a justice serves a 12-year term at which point he or she is subject to a retention election on a yes-no vote. In practice justices stand for retention more frequently.[23] No justice was defeated in a retention election from 1926 to 1986 when three justices were removed from the court. Even when a justice is not removed a retention election can be a focal point for criticism of a politically unpopular decision. For example, Traynor faced a barrage of criticism in a 1966 retention election as a result of his opinion holding invalid under the Equal Protection Clause of the 14th Amendment of the US Constitution a provision of the California Constitution adopted by

[20] The Lexis file includes many decisions that are not on the merits. Some of these decisions are on procedural motions involving cases pending before the court. Some involve appeals of disciplinary actions taken by the State Bar. Initially we used a screen based on the number of words in a decision. After looking at some random samples of cases that passed this screen we found a handful of non-merit decisions mostly involving disciplinary actions. These were eliminated without losing any merits decisions by screening out decisions without an identified author. The California Constitution requires an opinion in every case the court decides. The practice is to identify an author.

[21] Goodwin Liu, How the California Supreme Court Actually Works: A Reply to Professor Bussel, 61 UCLA L. Rev. 1246 (2014), describes contemporary practice.

[22] The court's practice is unusual in one respect. After review is granted the Chief Justice will assign the case to a justice who will write a "calendar memo" that often takes the form of a preliminary draft of an opinion. The calendar memo is reviewed and criticized by the other justices who exchange preliminary responses. The calendar memo is revised in response and may even be reassigned to a justice whose approach can attract a majority. A case is set for oral argument only after there is a tentative majority for a proposed result and an outline of a rationale.

[23] Each seat on the court is subject a retention election every 12 years. Usually a justice will retire during the 12-year term for his or her seat. When a justice is appointed to fill the open seat he or she must stand for retention at the next gubernatorial election and then again at the end of the 12-year term.

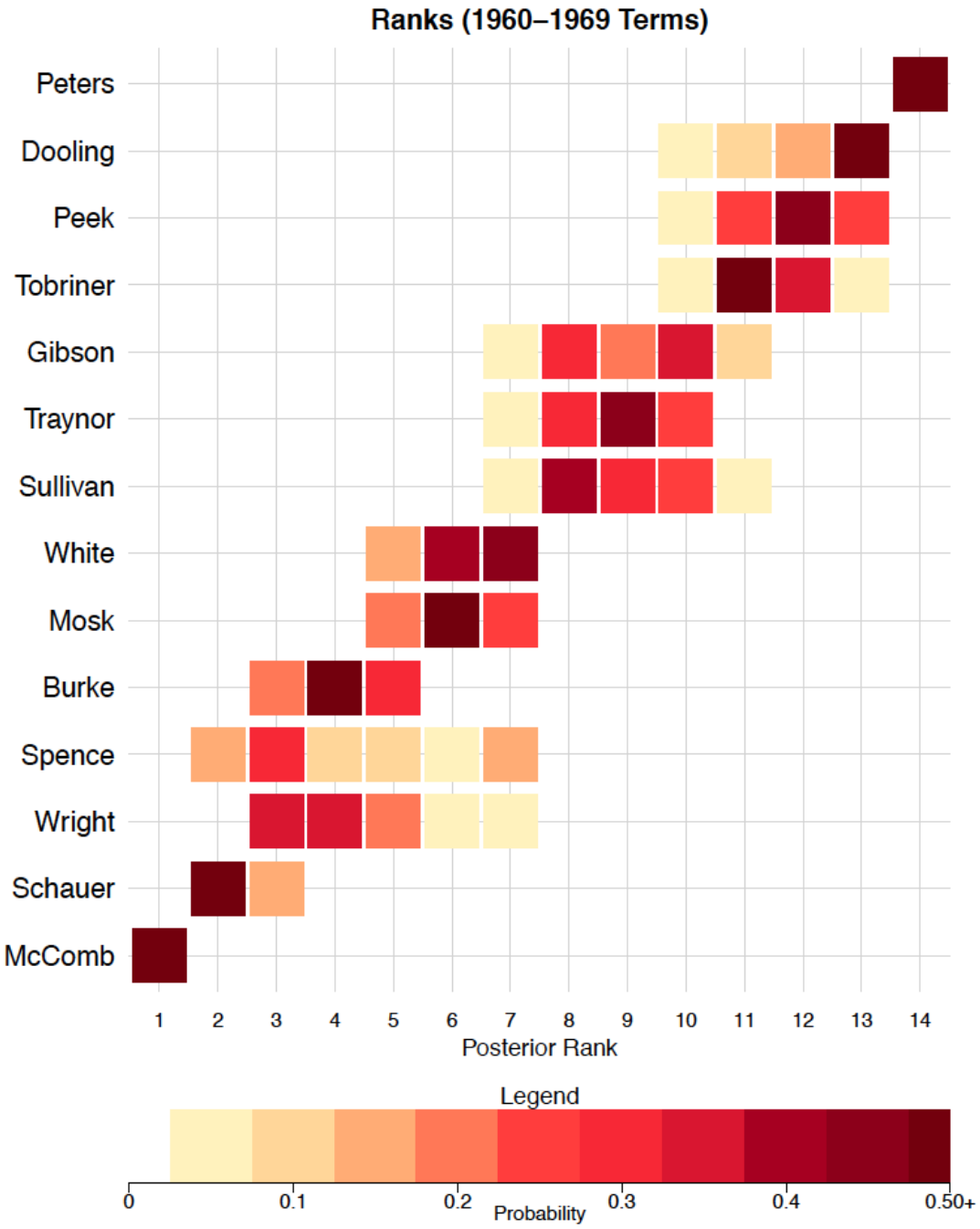
popular referendum in 1964 to give persons the absolute right to sell or lease property to whomever they choose.[24] Traynor was retained by a vote of 65 percent. In 1962 he was retained by a vote of 89.7%.[25]

Fourteen justices served on the California Supreme Court from January 1961 to December 1970. Eleven of the fourteen were appointed by Democratic governors (Culbert Olson[26] and Pat Brown). Spence and McComb were appointed by moderate Republicans (Earl Warren and Goodwin Knight respectively). Wright was appointed by Ronald Reagan in 1970. All are white men. The figure below shows the posterior ranks of the fourteen justice. The three justices appointed by Republican governors are clustered in the lower left corner. We will describe this as the McComb wing and the other wing as the Peters wing.

[24] Mulkey v. Reitman, 413 P.2d 825 (Cal. 1966)(β=1.25).

[25] Gerald F. Uelmen, California Judicial Retention Elections, 28 Santa Clara L. Rev. 333, 341 (1988). Traynor stood for retention in 1966 because he was appointed to the seat of Chief Justice's in 1964.

[26] Gibson, Schaeur, and Traynor.



The table below shows the period each justice held the office. The top line is the chief justice. Traynor was elevated to chief justice by Governor Pat Brown in August 1964. Brown appointed Stanley Mosk to Traynor's seat. The posterior ranks of the justices illustrate a point made earlier. Tobriner succeeds to Dooling's seat so the two justices never sit together. The model predicts that had they sat together they typically would have voted together in non-unanimous cases. The prediction is based on how each voted with the other members of the court alongside whom both served.

1961	1962	1963	1964	1965	1966	1967	1968	1969	1970
Gibson				Traynor					Wright
Traynor				Mosk					
Peters									
McComb									
Dooling		Tobriner							
Spence				Burke					
White		Peek				Sullivan			

During the decade we study the posterior ranks of a retiring justice and his successor typically are close. The balance of the court does not significantly change when there is a personnel change. The major exception is when Donald Wright replaces Traynor as chief justice.[27] A minor exception is when Peek replaces White. Peek's posterior rank places him on the Peters wing. White is in the center. Another minor exception is when Gibson steps down as chief justice and Mosk joins as an associate justice. The model puts both of them at the court's center but Gibson is on Peters' side of center while Mosk is on McComb's side of center.

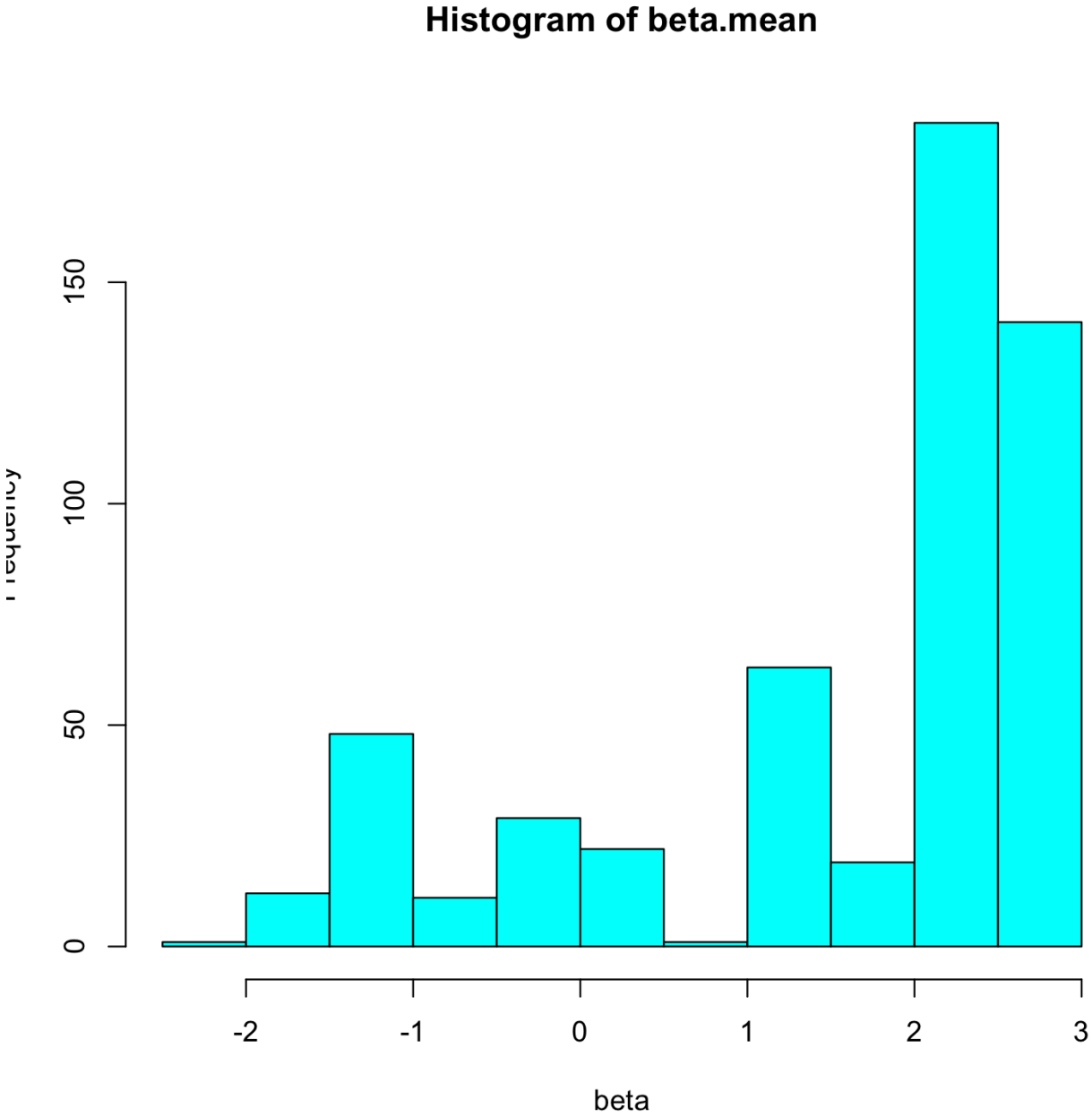
The model assigns each non-unanimous case a specific parameter β_k, which can have a positive or negative value. If the absolute value of β_k in case *k* is high, then the model well represents voting patterns in case *k*. If the absolute value of β_k in case *k* is near 0, then the model does not well represent voting patterns in case *k*. If the value of β_k is high and positive, then Peters' wing of the court prevails in a case in which the model well-represents voting patterns. If the value of β_k is low and negative, then McComb's wing of the court prevails in a case in which the model well-represents voting patterns.

The figure below shows the distribution of β for the 533 non-unanimous cases during the period we study. The pattern is striking. Assume for the moment that the underlying dimension of disagreement being captured by β is political or ideological. Assume further that Peters anchors the leftwing and McComb anchors the rightwing. If you will give us these assumptions, then the model shows the leftwing was in close to complete control of the California Supreme Court during the 1960s. On these assumptions, voting is on political or ideological lines when the absolute value of β in a case is high. Use 2 as an arbitrary cutoff to identify such cases. Of the 533 non-unanimous cases there are 220 in which the absolute value of β is greater than 2. The leftwing prevails in 219 of these cases. The rightwing prevails in one case.[28] If we use an arbitrary cutoff of a 1.5 absolute β to identify cases in which voting

[27] Julian H. Levi, Introduction to the Oral History of Donald R. Wright, California Legal History (Vol. 9 2014), suggests contemporary observers did not perceive Wright's appointment or position on the court as a sharp break with the Traynor years. Levi observes that Wright authored opinions taking liberal positions on death penalty, criminal law, and negligence law typically for a unanimous court. Looking at the pattern of dissents during the period Wright served as chief, from 1970 to 1977, Levi opines "Justices Clark, McComb, and Peters dissented along lines of ideology and broad policy. Justices Mosk, Richardson, Sullivan, and Burke, when they disagreed, did so on specific factual determinations or on narrow technical grounds."

[28] This is Lockridge v. Superior Court, 3 Cal.3d 166 (1970)(β=-2.282843133). The police seized a gun belonging to robbery victims in executing a search warrant that was later declared to be invalid. The serial number of the gun led to the

breaks down in what we assume is political or ideological differences, then the left-wing prevails in 335 cases and the right-wing prevails in seven cases.[29]



Is it plausible that the underlying dimension of disagreement being captured by β is political or ideological? Circumstantial and anecdotal evidence certainly supports the hypothesis. The three republican appointees cluster on one wing. A contemporary observer

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defendant being charged with a crime after the victims identified his photograph. The court split 4-3 in holding the victim's testimony should not be excluded as "fruit" of an illegal search. Wright, McComb, Mosk, and Burke are in the majority. Peters, Tobriner, and Sullivan dissent.

[29] People v. Floyd, 1 Cal.3d 694 (1970)(β=-1.611369269), has the second lowest β. A 4-3 majority affirms a death sentence rejecting several grounds for reversal. Burke, McComb, Mosk, and Sullivan, are in the majority. Peters, Traynor, and Tobriner dissent. By comparison there are 333 cases with a β of greater absolute value than β's absolute value in *People v. Floyd*.

concluded after reading dissents by Peters and McComb in cases decided in the 1970s that when they dissented it was "along lines of ideology and broad policy."[30] The posterior ranks of the justices conform to assessments of their positions on the court that emphasize political views and ideology. For example, Mosk's obituary describes him as "liberal" while noting that "he also showed flexibility and a knack for anticipating political events," and that "a few of his decisions went against the liberal grain."[31]

The results produced by the model can also be used to test the hypotheses. One possibility is to read high absolute β cases to see if the disagreement between the majority and dissent are political or ideological. We will quickly summarize the top ten cases to give you an idea of what such an exercise turns up. The highest β case holds public employees have a right to strike.[32] The next case abolishes the tort defense of governmental immunity.[33] It was legislatively reversed two years later. Case three holds a jury must be instructed that mental illness short of insanity may preclude a murder conviction.[34] Case four reverses the lower courts to hold voters of a predominantly minority city presented sufficient evidence that the City of San Jose obtained a positive vote in favor of consolidation by buying votes and other illegal conduct.[35] Case five holds that a lessor and a realtor have a duty to warn a lessee of hidden dangers in leasing a home.[36] Case six reverses a death penalty verdict. The disagreement is over whether an erroneous instruction in the penalty phase may have influenced the outcome in a case with gruesome facts.[37] Case seven interprets a statute to require tax over-payments by a retailer be refunded to customers who were charged the tax.[38] Case eight involves a disagreement over a standing question under the community property law.[39] Case nine reverses a kidnapping conviction. The disagreement between the majority and the dissent appears to be over what approach the court should take in cases in which it believes an indigent defendant has been inadequately represented by appointed counsel.[40] Case ten holds that damages are not awarded in an eminent domain action for noise, fumes, dust, impairment of view, and loss of privacy by having a freeway built in one's front yard.[41]

Political and ideological disagreements are at or seem to be just beneath the surface in many of these cases. At a minimum one and maybe three of the cases lack any evident political or ideological dimension. The absence of an apparent political or ideological dimension in a few of the high β cases does not call into question the hypothesis that β is capturing political or ideological disagreements. Judges who often find themselves in agreement because of shared political or ideological views and values sometimes will find themselves in agreement for reasons that have nothing to do with politics or ideology.

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[30] Julian H. Levi, Introduction to the Oral History of Donald R. Wright, California Legal History (Vol. 9 2014).
[31] New York Times (June 21, 2001).
[32] Los Angeles Metropolitan Transit Authority v. The Brotherhood of Railroad Trainman, 54. Cal.2d 684 (1960).
[33] Muskopf v. Corning Hospital District, 55 Cal.2d 211 (1961).
[34] People v. Henderson, 60 Cal.2d 482 (1963).
[35] Canales v. City of San Jose, 3 Cal.3d 118 (1970).
[36] Merrill v. Buck, 58 Cal.2d 552 (1962).
[37] People v. Kroeger, 61 Cal.2d 236 (1964).
[38] Decorative Carpets, Inc. v. State Bd. of Equalization, 58 Cal.2d 252 (1962).
[39] Harris v. Harris, 57 Cal.2d 367 (1962).
[40] People v. Oliver, 55 Cal.2d 761 (1961).
[41] People v. Symons, 5 Cal. Rptr. 808 (1960).

In the New York study we found no evident political or ideological dimension when we examined cases with a high absolute β. This compelled us to dig deeper into the high absolute β cases to see if we could identify recurring points of disagreement that might explain patterned voting. The decisions of the California Supreme Court during the 1960s present a very different kettle of fish. It would be tiresome to read the 218 cases with β greater than 2 to try to identify the number in which the disagreement between the majority and dissent has a political or ideological dimension. In the end we do not think the exercise would be productive because of the problem of observer bias in identifying the influence of politics and ideology in judicial decisions. We do not trust ourselves to make this determination.

Perhaps a more satisfactory way to come at this problem is to identify a type of case in which we expect a judge's politics or ideology is likely to influence a judge's decision. If β is capturing political or ideological differences, then these cases are likely to have a high absolute β. In addition, β's sign should predict the result in a case. Death penalty cases seem a good candidate.[42] "Death penalty" is a core term or appears in the outcome of 70 of the 533 non-unanimous cases.[43] The table below shows the β distribution for the 70 cases, which all involve death penalty appeals. The table shows a death penalty case is likely to have a high absolute β. In addition, the sign of β perfectly predicts the result in the high and low β cases. The death penalty is reversed in all 53 cases with $\beta>1$ and it is affirmed in all 8 cases with $\beta<-1$. The death penalty is also reversed in all 9 cases with $0<\beta<.5$.[44]

β value	-2 to -1.5	-1.5 to -1	-.1 to -.5	-.5 to 0	0 to .5	.5 to 1	1 to 1.5	1.5 to 2	2 to 2.5	2.5 to 3
Number of cases	1	5	2	0	9	0	6	14	25	8

Another way to come at this problem is to compare β distributions across different types of cases. Each case file has a list of core terms that can be used to identify cases by type albeit with some degree of imprecision. It would be some evidence β is capturing political or ideological differences if types of cases in which a judge's political or ideological views are likely to influence a decision have relatively high absolute β values while types of cases in

[42] The campaign to abolish the death penalty has waxed and waned throughout American history. The 1960s were a heady decade for the abolitionists. In the United States public support for the death penalty reached an all-time low of 42% in 1966. In the United Kingdom the death penalty was suspended in 1965 and abolished in 1969.

[43] There are 45 unanimous cases in which "death penalty" appears as a core term or in the outcome during the period we examine. A death sentence was unanimously affirmed in 40 cases and unanimously reversed in 3 cases. In 2 cases there was no death sentence.

[44] We looked at these 9 cases to see what might explain the low β. In 6 of the 9 cases a judge on the liberal wing dissents on an issue other than reversal of the death penalty arguing for a result more favorable to the criminal defendant. People v. Risenhoover, 70 Cal.2d 39 (1968)(Peters dissents arguing court should use its discretionary power to impose life sentence rather than order retrial on penalty phase); People v. Morse, 70 Cal.2d 711 (1969)(Traynor dissents arguing for reversal on guilt); People v. Jackson, 67 Cal.2d 96 (1967)(Peters dissents arguing for reversal on guilt; People v. Quicke, 71 Cal.2d 502 (1969)(Peters dissents arguing for reversal on guilt); In re Tahl, 1 Cal.3d 122 (1969)(Peters dissents arguing for more thoroughgoing reforms of plea procedures); People v. Bandhauer, 66 Cal.2d 524 (1967)(Peters dissents arguing for reversal on guilt). People v. Mitchell, 61 Cal.2d 353 (1964), is unusual because McComb joined the liberals in voting to reverse the death penalty leaving Schaeur on the right as the sole dissenter. In two of the cases the low β appears to be a product of miscoding. People v. Rosoto, 62 Cal.2d 684 (McComb incorrectly coded as voting with majority); People v. Teale, 70 Cal.2d 497 (Peters incorrectly coded as concurring).

which such views are unlikely to influence a decision have relatively low absolute β values. The table below reports some results. We use absolute β=1.5 as an arbitrary cutoff to identify cases in which patterns of voting conform with the dominant pattern and absolute β=.5 as an arbitrary cutoff to identify cases in which patterns of voting do no conform with the dominant pattern. The table shows that voting patterns conform to the dominant pattern in cases in which "speech," "search and seizure," or "probable cause" appears as a key term. Voting patterns do not conform to the dominant pattern in cases in which "property" or "tax" appears as a key term. If you are willing to accept the premise that a judge's politics or ideology is more likely to influence his vote in cases involving speech, search and seizure, and probable cause than in cases involving property and tax, then these results are some support for the hypothesis that β is capturing political and ideological disagreements.

Core Term	**Number of cases**	**% β>1.5**	**% β<.5**
All cases	533	64%	10%
Speech	9	89%	11%
Search and seizure	18	78%	0%
Probable cause	29	76%	0%
Death Penalty	70[45]	87%	13%
Negligence	26	69%	4%
Employee	18	67%	6%
Constitutional Rights	27	52%	15%
Property	54	39%	15%
Tax	18	44%	28%

We can test this. If we are correct in the premise that the underlying dimension of disagreement being captured by β has something to do with a judge's political or ideological views, and if we are correct in the premise that a judge's political or ideological views are likely to influence how a judge votes in a type of case, then β's sign should predict the outcome of a case of that type. To check this we looked at the 29 cases in which "probable cause" appears as a key term. The sign of β predicts the outcome in 27 of the 29 cases. The two cases in which β's sign does not predict the outcome involve private litigation.[46] The other 27 are criminal cases. In 22 with β>1 the result is favorable to a criminal defendant or parolee facing parole revocation. In 5 with β<-1 the result is unfavorable to a criminal defendant.

The voting pattern in the California Supreme Court in personal injury cases conforms to the dominant pattern during the 1960s. The table below shows the value of β in 44 cases we identified as personal injury cases.[47]

[45] This includes 9 cases where "death penalty" appears in the outcome but not as a key term.

[46] Stationers Corp. v. Dun & Bradstreet, 62 Cal.2d 412 (1965), is a libel action. Probable cause comes up as a tangential point on an issue of privilege. White Lighting Co. v. Wolfson, 68 Cal.2d 33 (1968), is a breach of contract action. Probable cause comes because there is a claim for abuse of process.

[47] 40 cases were found searching for "negligence," "wrongful death," "personal injury," "res ipsa," and "negligent." This still missed some cases so additional searches were done using "tort," "duty," and "liability." All of the cases so identified were then manually screened. Cases involving insurance claims are not included.

β value	-2 to -1.5	-1.5 to -1	-.1 to -.5	-.5 to 0	0 to .5	.5 to 1	1 to 1.5	1.5 to 2	2 to 2.5	2.5 to 3
Number of cases	1	5	0	1	2	0	9	7	12	7

The sign of β strongly predicts the outcomes. In 36 of the 37 cases with β>0 the plaintiff in the personal injury action prevails. In 6 of the 7 cases with β<0 the defendant prevails. (The two misfits have β values of 1.27 and -.25 so voting in these particular cases does not strongly conform to the dominant pattern.) A large handful of the cases make significant changes in the law. Muskopf v. Corning Hospital[48] abolishes governmental immunity. Johnson v. California[49] carves holes in a statute enacted after *Muskopf* to reinstate governmental immunity. *Johnson* establishes immunity is the exception and not the rule. Rowland v. Christian[50] establishes an occupier of land owes a general duty of care to someone on the land and eliminates the limited duty rules applicable to trespassers and social guests. Dillon v. Legg[51] allows a bystander claim for nervous shock when a mother saw her child killed by an automobile. Klein v. Klein[52] abolishes interspousal immunity for negligence. The one important negative β case—Seeley v. White[53]—holds a products liability claim is not available for pure economic loss. But most of the cases do not involve such momentous issues. Many cases whittle away at the margins of existing rules on res ipsa, nondelegable duty, contributory negligence, and assumption of risk to make it easier for plaintiffs to recover.

This pattern is quite unlike what we found in the New York Court of Appeals in 1938-1940. There it was the court's right wing that consistently sides with the plaintiff in non-unanimous personal injury cases. In California in the 1960s it is the court's left wing that consistently sides with the plaintiff in such cases. There are too few contract and commercial law cases to determine if voting in these areas also conforms to the dominant pattern. The voting pattern in the two most significant contract cases decided during the decade—Masterson v. Sine[54] and PG&E v. G.W. Thomas Drayage & Rigging Co.[55]—conforms to the dominant pattern. The two cases liberalized California law on contract interpretation.

[48] 55 Cal.2d 211 (1961)(β=2.69).
[49] 69 Cal.2d 782 (1968)(β=1.89).
[50] 69 Cal.2d 108 (1968)(β=2.40).
[51] 68 Cal.2d 728 (1968)(β=1.05)
[52] 58 Cal.2d 692 (1962)(β=2.57). Its companion Self v. Self, 58 Cal.2d 683 (1962), did the same for intentional torts.
[53] 63 Cal.2d 9 (1965)(β=-1.04).
[54] 68 Cal.2d 222 (1968)(β=2.57)
[55] 69 Cal.2d 33 (1968)(β=2.06)