Common Law Judicial Decision Making: The California Supreme Court

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I. INTRODUCTION

A two-parameter item response theory ("IRT") model often is used as a tool to identify the relative positions of Justices of the U.S. Supreme Court on the political and ideological spectrum, and to predict how the replacement of a Justice is likely to alter the political balance of the Court. In a previous paper, 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), we used the IRT model to identify voting patterns in non-unanimous decisions by the New York Court of Appeals from 1900 to 1941, and to investigate whether patterns in voting were on political and ideological lines. We found consistently patterned voting for 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 indicated that 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 at that time.

We decided to do a similar study of the California Supreme Court covering the entire 20th Century. 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 after his retirement in 1970 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."[1] During its liberal period the California Supreme Court had conservative justices. We would not be surprised to find politicized voting patterns during and after the Traynor era that are similar to the patterns that have been observed in the U.S. Supreme Court throughout the century. But would we find politicized patterns of voting for the entire century? And would there be significant parts of the California Supreme Court's docket in which voting would not conform to a dominant political or ideological pattern?

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

This paper presents some early and very preliminary results covering the years from 1959 to 2010. The preliminary results are unsurprising. Voting is highly patterned along familiar political and ideological lines. We find similar patterns of voting in constitutional cases, death penalty cases, search and seizure cases, and personal injury cases throughout the 51-year period. Our results for this period are preliminary because we have more work to do cleaning up the data. We would like suggestions about how we might go about interpreting the data using quantitative techniques and metrics. We use an array of approaches here. We are not presenting results from earlier in the 20th century because that data needs a significant amount of cleaning up. Our preliminary results from earlier in the 20th century show voting patterns more along the lines of what we found in the New York study.

The paper proceeds as follows. Section II explains the IRT Model. Section III provides some general introductory information about the California Supreme Court and explains how we chose periods to study. Sections IV through VI present the general results of the model dividing the 51 years into five periods: 1959-1969, 1970-1976, 1977-1986, 1987-1995, and 1996-2010. In this paper we focus on the 1959 to 1969 period and the periods immediately before and after the removal of three liberal Justices by a recall vote in 1986. Our results are consistent with a simple and familiar story of a long period of liberal ascendancy followed by a long period of conservative ascendancy.

II. IDENTIFYING AND DEPICTING PATTERNED VOTING: THE IRT MODEL[2]

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 over a selected period of time

[2] Some of this section is adapted from Mark P. Gergen & Kevin M. Quinn, Common Law Judicial Decision Making: The New York Court of Appeals 1900-1940, 60 Buff. L. Rev. 897, 907-913 (2012).

with a 2-parameter item response theory (IRT) model. Such models are consistent with a simple model of preference-based voting.[3] For our purposes they should be viewed only as empirical summaries of observed behavior.[4] Such models have been successfully applied to merits votes from a variety of courts.[5]

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.

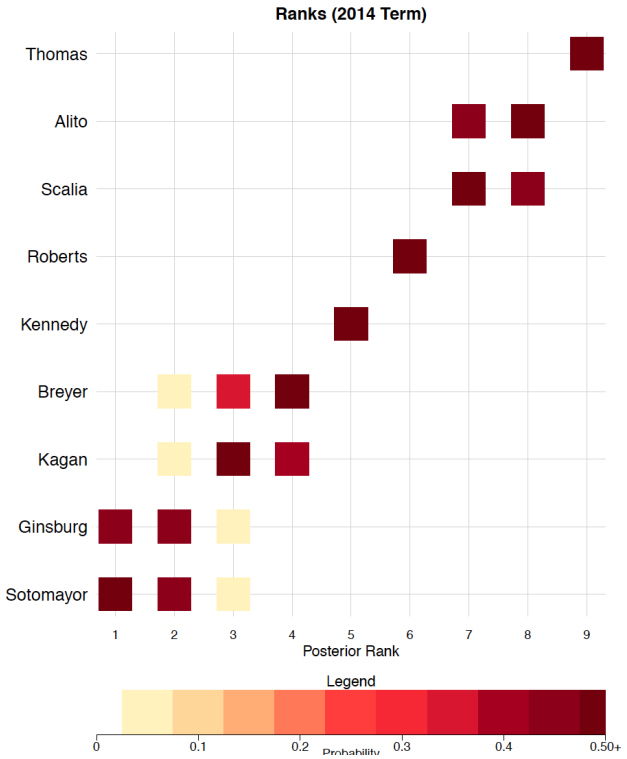
The parameter θ_j represents the *ideal point* of judge j. If one favors a uni-dimensional policy preference-based voting interpretation of this model, then judge j's ideal point can be viewed as this judge's most preferred policy position on the latent dimension. If one uses the IRT model as a means 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 (the value of θ for each Justice) are quite distinct–because voting in non-unanimous cases tends to be highly polarized along familiar ideological and political lines. The figure below shows the posterior ranks of the United States Supreme Court in the 2014 Term. To be clear, an IRT model is agnostic about the latent dimensions of agreement or disagreement among judges on a court that produces strongly patterned voting. The model is interpreted to capture political and ideological disagreements because the relative θ values for the Justices are consistent with perceptions of the Justices' different political and ideological views.

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

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

[5] 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).



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. It is tempting to assume that when the model reveals clear and stable patterns of voting these patterns reflect ideological and political disagreements between judges similar to disagreements between Justices of the United States Supreme Court. Certainly voting patterns in the California Supreme Court since 1959 align with what we know of the Justices ideological and political views. But this is less clear with respect to voting patterns in the California Supreme Court earlier in the century, and it appears not to be the case respect to voting patterns in the New York Court of Appeals from 1900 to 1940.

It is important to keep in mind that when the model finds clear and stable patterns of voting it only means that it is possible to capture recurring associations in voting within a court with a uni-dimensional model during the period being studied.[6] Another way of thinking of what the model depicts is that it shows which judges are likely to vote together when a decision is non unanimous during the period being studied. Returning to the figure for the U.S. Supreme Court in the 2014 Term, what the model captures is that Justice Sotomayor or Justice

[6] 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.

Ginsburg almost never voted on the same side as Justice Thomas or Justice Alito in a case in which a decision was non unanimous. The model also captures that Justice Breyer was more likely be on the same side as Justice Roberts than were either Justices Sotomayor or Ginsburg.

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.[7] Under the model β_k can 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.[8] In other words, the voting pattern in a case is consistent to the dominant pattern. For example, in a 5-4 decision by the U.S. Supreme Court in 2014 Justice Kennedy will be the 5th vote forming a majority with the four Justices to his right or left. Or in a 6-3 decision Breyer or Roberts will join Kennedy and the other wing of the Court. 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. THE CALIFORNIA SUPREME COURT

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.[9] 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 popular referendum in 1964 to give persons the absolute right to sell or lease property to

[7] 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.

[8] 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).

[9] 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 (or is promoted to the seat of Chief Justice) he or she must stand for retention at the next gubernatorial election and then again at the end of the 12-year term. Thus a new justice is likely to face two retention elections in the first 12 years he or she serves on the Court.

whomever they choose.[10] Traynor was retained by a vote of 65 percent. In 1962 he was retained by a vote of 89.7%.[11]

The California Supreme Court largely controls its docket. Appeal is automatic only in death penalty cases, of which there are a significant number. Review of a discretionary case is granted if at least four of the seven justices vote to grant review.[12] In recent years the court has received around 5,200 petitions for review each year of which it grants review in around 83 cases.[13] The table below provides a breakdown from 1950 to 2010, by decade,[14] of the number of cases decided by the California Supreme Court with an opinion, the number of non-unanimous cases, and the rate of non-unanimous cases. We only count decisions we identify as merits-based.[15] The last column reports the number of justices who served on the seven-member California Supreme Court during the decade, which gives a rough sense of the turnover rate.

Decade	Total merits cases	Non-unanimous	Rate	Justices who served
1950-1959	1415	542	38.3%	10
1960-1970	1648	572	34.7%	10
1971-1980	1337	519	38.8%	14
1981-1990	998	478	47.9%	12
1991-2000	657	432	65.8%	17
2001-2010	720	288	40.0%	12

A threshold question is what periods to study. Since our eventual goal is to study a 100-year time period we decided not to use a year as a period of study because this was too cumbersome. Initially we broke cases down by decade but we found that decade intervals did not align well with turnover on the Court. The most important change in membership of the Court occurred between 1986 and 1987 when three liberal Justices lost in a bitter recall election and were replaced by three conservative Justices. The results reported in this paper divide cases from 1959 to 2010 into five periods ranging in length from seven years to fifteen years

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

[11] 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.

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

[13] 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.

[14] We treat the start date of a decade as October 1 of the first year in the decade and the end date as September 30 of the first year of the next decade. Thus, the 1960s include cases decided between October 1, 1960, and September 30, 1970. This follows the convention of the U.S. Supreme Court, which term year begins October 1. The California Supreme Court does not follow this convention.

[15] 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.

with a goal of roughly evening out the number of Justices who participated each period. The shorter periods are when turnover on the Court was the highest.[16]

Another threshold question is the date on which to begin a period. The California Supreme Court does not divide its docket into terms separated by a long recess. Justices can retire from or be appointed to the Court at any time during the year. Typically there is an interval of one month to several months between when a retiring justice leaves the Court and his or her successor joins the Court. To further muddy matters a justice can be reported as voting on a case in which the decision is issued after the justice leaves the Court. For example, while 12 justices served on the Court between January 1, 1987, and December 31, 1995, our results show 15 justices voting on cases in which a decision was issued during this period. This is because the three justices who were recalled from the Court and therefore had to retire no later than December 31, 1986, voted in five cases in which the decision was issued on January 2, 1987. For purposes of this paper we decided to begin a period on January 1 of the first year in the period and end a period on December 31 of the last year. The consequences of this choice are largely aesthetic. When a justice participates in very few non-unanimous cases during a period this may muddle the location of that justice in the results produced by the model but it does not alter the relative locations of the other justices.

This paper will focus on three of the five periods: 1959-1969, 1977-1986, and 1987-1995. Our results are consistent with a simple story that conforms to the conventional wisdom concerning the California Supreme Court during this period. Voting is polarized on what appear to be political and ideological lines both generally and across a range of issue areas, including the death penalty and personal injury cases. Liberals were ascendant during the 1960s and generally for the period leading up to the 1986 election, when three liberal Justices were removed from the Court in a recall election. Conservatives were ascendant from 1987 to 2010. While the results are unsurprising they are unlike what we found in the study of the New York Court of Appeals from 1900 to 1940.

IV. 1959-1969

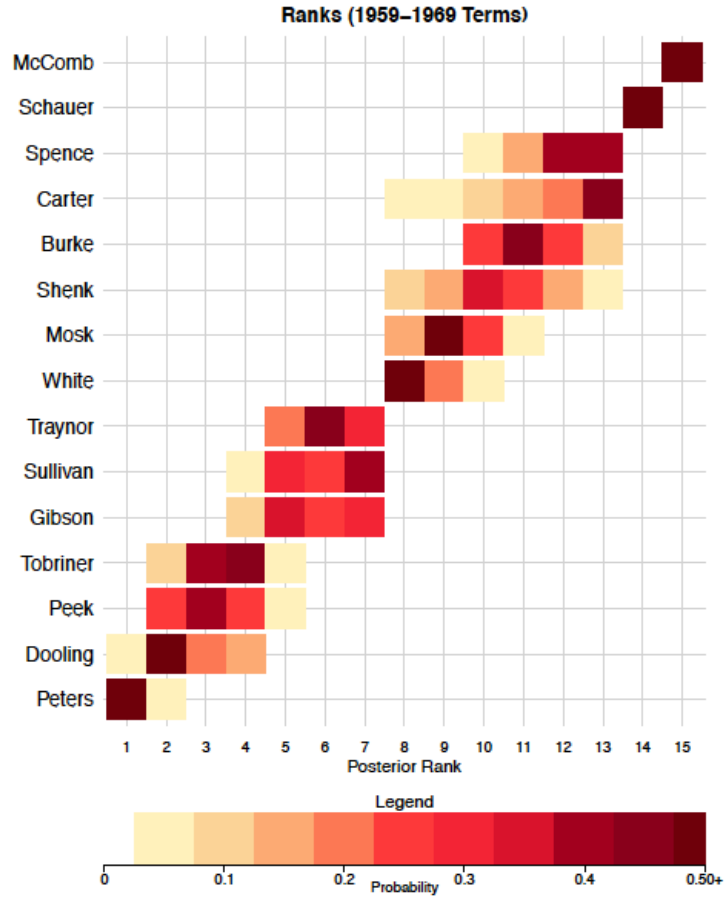
This Section takes a closer look at cases decided by the Court in the period between January 1, 1959, and December 31, 1969.[17] Fifteen justices served on the California Supreme during this eleven-year period. Thirteen were appointed by Democratic governors (Culbert Olson[18] and Pat Brown). Spence and McComb were appointed by moderate Republicans (Earl Warren and Goodwin Knight respectively). All are white men. The figure below shows the posterior ranks of the fifteen justices. The two justices appointed by Republican governors cluster in the upper right corner. For the moment we will describe this as the McComb wing and the other wing as the Peters wing. Here are the posterior ranks of the justices who served

[16] We also ran the model dividing cases from 1959-2010 into nine periods ranging from five to ten years in length. The results are similar. We will present the results using fewer longer periods in the interest of concision.

[17] The case information used in this Section comes from an early run of the data in which a handful of non-unanimous cases were omitted. The posterior ranks are from a later run. The addition of the handful of cases did not alter the Justice's posterior ranks.

[18] Gibson, Schaeur, and Traynor.

during the eleven-year period. Carter and Shenk served for short periods in 1959 and were involved in very few non unanimous decisions so they should be disregarded.[19]



Some of the justices who appear in the figure never sat together. For example, Tobriner succeeded to Dooling's seat so the two never sat together. The model predicts that had Tobriner and Dooling 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. Sometimes when three justices appear in a cluster (like Gibson, Sullivan, and Traynor in the diagram) two of the three will have non-overlapping tenures or tenures that overlap only slightly.

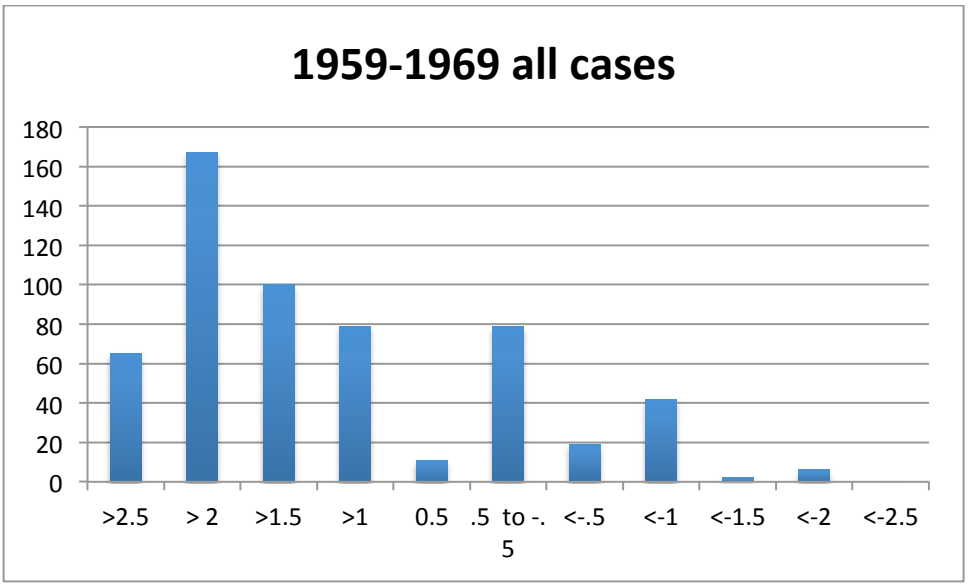
The table below shows the period each justice held office. The top line is the chief justice. Traynor was elevated to chief justice by Governor Pat Brown in August 1964. Brown appointed Stanley Mosk to Traynor's seat. Justices appointed by Democratic governors are in blue and justices appointed by Republican governors are in red.

[19] Carter anchored the Court's left wing during the 1940s and 1950s. His location in this diagram is a product of his being involved in very few non-unanimous decisions during the first three months of 1959.

	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969
Gibson							Traynor				
Traynor							Mosk				
Carter	Peters										
McComb											
Spence		Dooling			Tobriner						
Schauer							Burke				
Shenk		White			Peek				Sullivan		

During the period from 1959 to 1969 the posterior ranks of a retiring justice and his successor typically are close. When Peters replaced Carter might appear to be an exception but Carter anchored the Court's left wing during the 1940s and 1950s. The major exception is when Dooling replaced Spence in the middle of 1960. Spence was McComb's side of the center of the Court during the 1950s and near McComb on the wing of the Court in the diagram above. Dooling is next to Peters on the Peters wing of the Court. 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 the 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 the 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 570 non-unanimous cases decided from 1959 to 1969.



The pattern is striking. Assume for the moment that the underlying dimension of disagreement being captured by β reflects general political or ideological disagreements in American society between people whose views and values are described as liberal on one side and conservative on the other. Assume further that Peters anchors the liberal wing of the court and McComb anchors the conservative wing. If you will give us these assumptions, then the model shows the liberal wing 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 570 non-unanimous cases there are 238 in which the absolute value of β is greater than 2. The liberal wing prevails in 232 of these cases. The conservative wing prevails in 6 cases. All six of these cases are from 1959 and 1960 before Spence left the Court. If we instead use an arbitrary cutoff of a 1.5 absolute β to identify cases in which voting breaks down on liberal vs. conservative lines, then the liberal wing prevails in 332 cases and the conservative wing prevails in 8 cases.

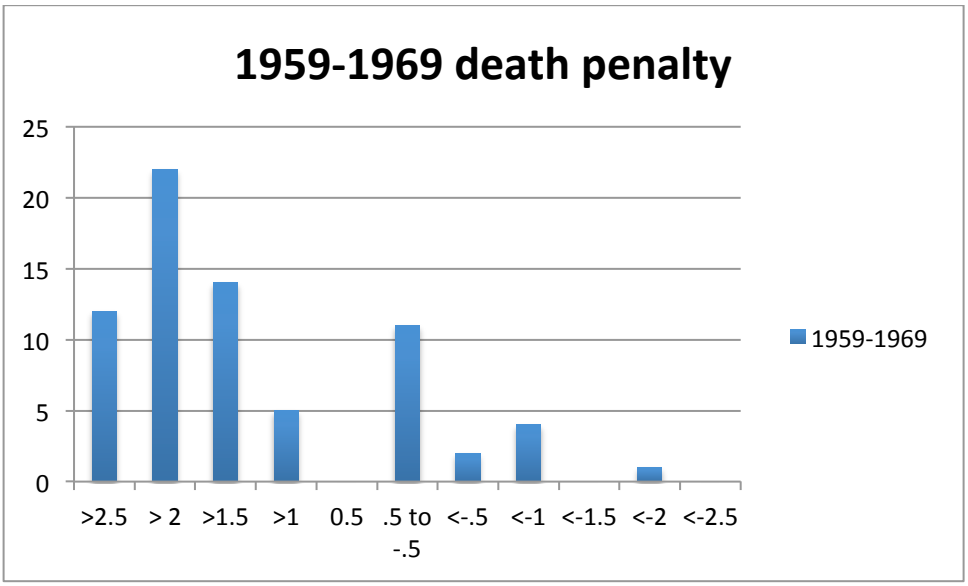
Is it plausible that the underlying dimension of disagreement being captured by β is political or ideological? Circumstantial and anecdotal evidence certainly supports the hypothesis. The two republican appointees cluster on one wing. A contemporary observer concluded after reading dissents by Peters and McComb in cases decided in the 1970s that when they dissented it was "along lines of ideology and broad policy."[20] 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."[21]

One way to answer the question whether the underlying dimension of disagreement being captured by β is political or ideological is to read cases in which β cases has a high absolute value to see if we could identify recurring points of disagreement that might explain patterned voting. When we did this in the New York study we often found no evident political or ideological dimension. 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. Many of the high absolute β have an evident political or ideological dimension when we look at them. But it would be tiresome to read the 232 cases with absolute 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

[20] Julian H. Levi, Introduction to the Oral History of Donald R. Wright, California Legal History (Vol. 9 2014).
[21] New York Times (June 21, 2001).

β. In addition, β's sign should predict the result in a case. Death penalty cases seem a good candidate.[22] "Death penalty" is a core term or appears in the outcome of 71 of the 570 non-unanimous cases.[23] The table below shows the β distribution of the 71 cases, all of which 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 absolute value of β is greater than 1 in 64 of the 71 cases. In 59 cases the value is positive, indicating the Court's leftwing prevailed. In all 59 cases the result is favorable to the criminal defendant. In the 5 cases in which the Court's right wing prevailed the result is unfavorable to the criminal defendant.



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 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 not 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

[22] 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.

[23] 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.

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.

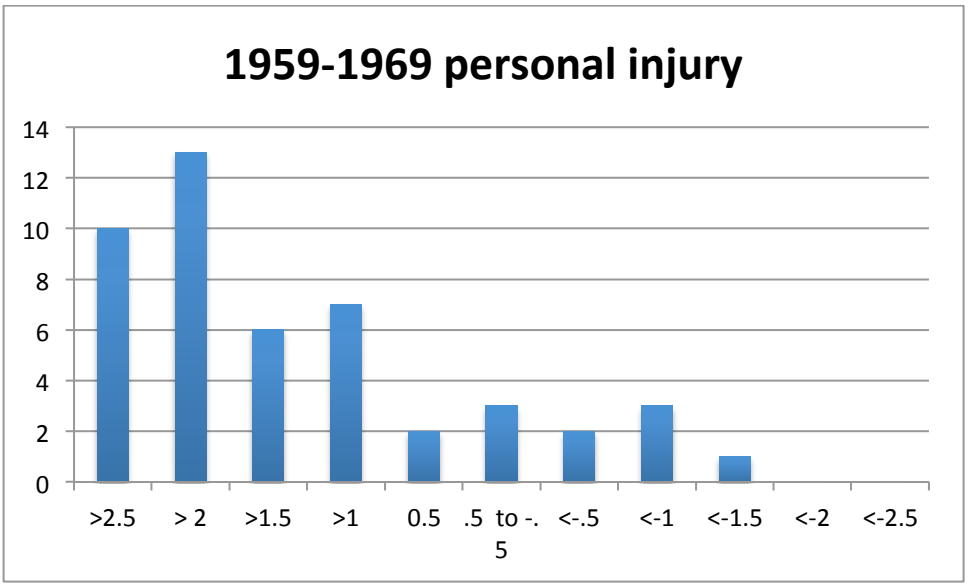
Core Term	Number of cases	% β>1.5	% β<1.5
speech	9	77.8%	22.2%
search and seizure	17	76.5%	23.5%
probable cause	24	75.0%	25.0%
negligence	31	71.0%	29.0%
employee	17	70.6%	29.4%
death penalty	71	69.0%	31.0%
all cases	**570**	**59.6%**	**40.4%**
constitutional rights	22	59.1%	40.9%
civil procedure	179	55.9%	44.1%
tax	26	42.3%	57.7%
property	63	34.9%	65.1%

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 24 cases in which "probable cause" appears as a key term. The sign of β predicts the outcome in 22 of the 24 cases. The two cases in which β's sign does not predict the outcome involve private litigation.[24] The other 22 are criminal cases.

The voting pattern in the California Supreme Court in personal injury cases conforms to the dominant pattern during the 1960s. The diagram below shows the value of β in 47 cases we identified as personal injury cases.[25]

[24] 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.

[25] We initially screened for cases in which torts or civil procedure appears in the head notes field and negligence, negligent, personal injury, products liability, or immunity appears in the core terms field. The cases were hand checked and two were dropped.



The sign of β strongly predicts the outcomes. In 36 of 37 cases in which β>1 the plaintiff prevails. The exception is a case from 1959 when Spence was on the Court. In the four cases in which β<-1 the defendant prevails. A large handful of cases in which absolute β>1 involve significant policy issues. *Muskopf v. Corning Hospital*[26] abolishes governmental immunity. *Johnson v. California*[27] carves holes in a statute enacted by the California legislature to override *Muskopf* and reinstate governmental immunity. *Johnson* establishes immunity is the exception and not the rule under the new statute. *Rowland v. Christian*[28] 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*[29] allows a bystander claim for nervous shock when a mother saw her child killed by an automobile. *Klein v. Klein*[30] abolishes interspousal immunity for negligence. The one important negative β case—*Seely v. White*[31]—holds a products liability claim is not available for pure economic loss. The liberals did not vote as a bloc in all of these cases. Traynor joins the dissent in *Dillon* and writes the majority opinion in *Seely*. Most of the personal injury cases do not involve such momentous issues. Many positive β cases work 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 as late as 1938-1940. There it was the court's conservative wing that consistently sided with the plaintiff in non-unanimous personal injury cases. In California in the 1960s it is the court's liberal wing that consistently sided with the plaintiff in such cases. We have not yet examined contracts cases to determine if voting in these cases also conforms to the dominant pattern. It is noteworthy that the voting patterns in the two most significant contract cases decided during

[26] 55 Cal.2d 211 (1961)(β=2.47).
[27] 69 Cal.2d 782 (1968)(β=1.89).
[28] 69 Cal.2d 108 (1968)(β=2.40).
[29] 68 Cal.2d 728 (1968)(β=1.05)
[30] 58 Cal.2d 692 (1962)(β=2.57). Its companion Self v. Self, 58 Cal.2d 683 (1962), did the same for intentional torts.
[31] 63 Cal.2d 9 (1965)(β=-97).

the decade—*Masterson v. Sine*[32] and *PG&E v. G.W. Thomas Drayage & Rigging Co.*[33]—conform to the dominant pattern. The two cases liberalized California law on contract interpretation.

V. 1970 TO 1976

Ten justices served on the Court between January 1, 1970, and December 31, 1976. Traynor participated in a handful of cases before Donald Wright replaced him as Chief Justice early in 1970. As you can see from the table below, over the seven years the balance of the Court shifted as three Justices appointed by Governor Ronald Reagan replaced Justices appointed by Democratic governors.[34]

	1970	1971	1972	1973	1974	1975	1976
Traynor	Wright						
Mosk							
Peters					Clark		
McComb							
Tobriner							
Burke						Richardson	
Sullivan							

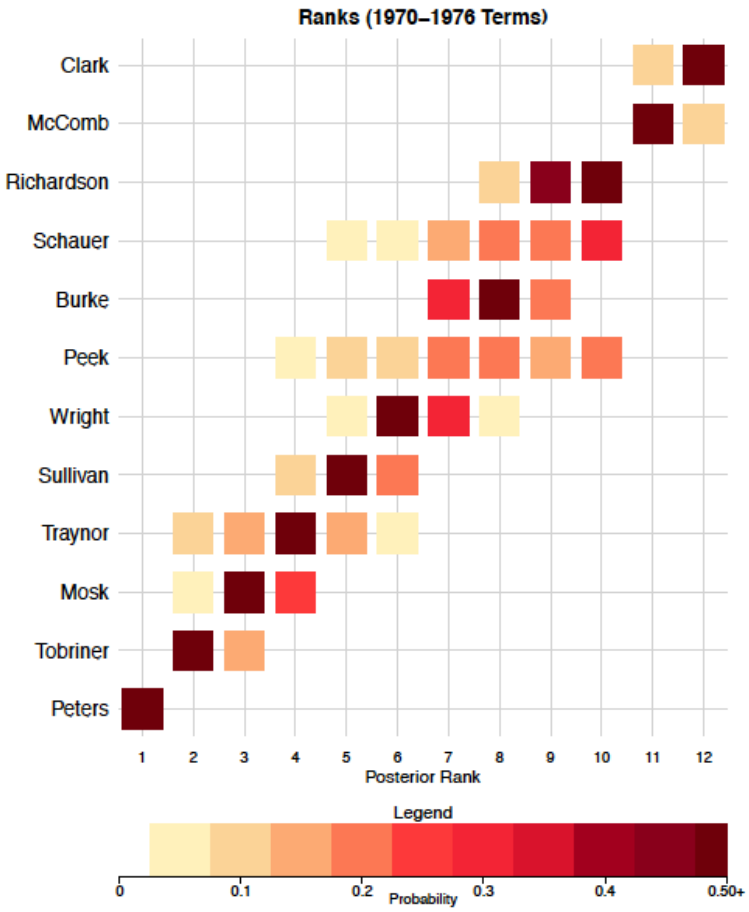
The diagram below shows the posterior ranks of the Justices who voted in non-unanimous cases during the seven-year period. Retired Justices Peek and Schauer appear in the diagram because they participated in a case by designation to replace a Justice who could not participate in a decision.[35] Traynor served for a short period in 1970. Republican appointees cluster in the upper-right hand corner, except for Wright. Wright's position is consistent with his reputation as a centrist. Ronald Reagan described Wright as his greatest disappointment as a judicial appointment.

[32] 68 Cal.2d 222 (1968)(β=2.57)

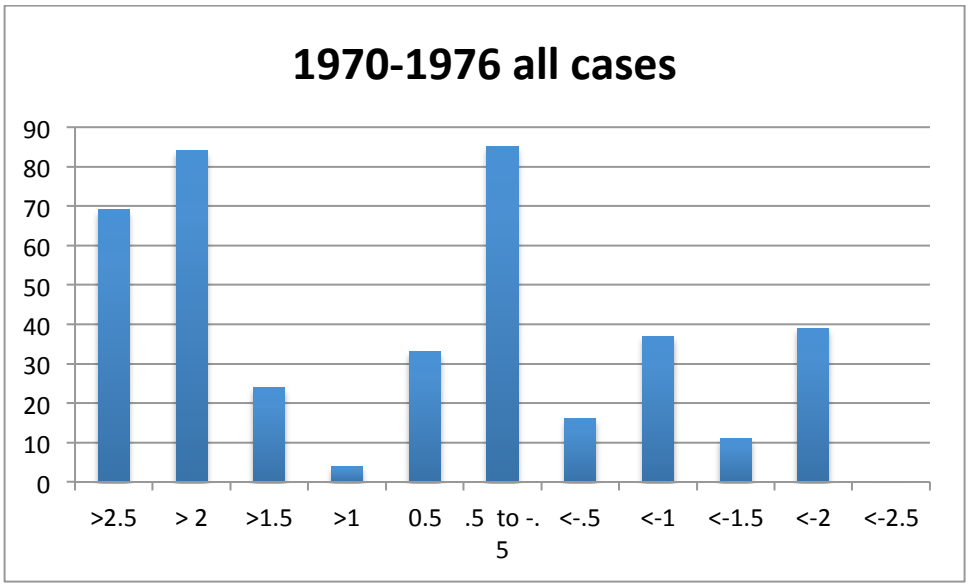
[33] 69 Cal.2d 33 (1968)(β=2.06)

[34] Burke and Peters were appointed by Pat Brown. Traynor was appointed by Olson and promoted to Chief Justice by Pat Brown.

[35] Schauer voted in 10 cases and Peek in 4 cases.



The chart below shows the distribution for the 402 non-unanimous cases decided in the seven-year period. As one would expect given the change in the Court's composition over the course of the period, the liberal wing of the Court was less dominant looking at the period as a whole. The relatively large number of cases in which absolute $\beta<.5$ is misleading. This is the product of five or fewer sitting justices voting in a case. We will explain this "short bench" phenomenon in the next Section.



VI. 1977 TO 1995

This Section examines two periods before and after the 1986 election when three liberals—Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin—were removed from the Court after a bitter recall campaign in which the three justices' opposition to the death penalty was targeted.[36] The table below shows every justice who served on the Court over the eighteen-year period surrounding the election.

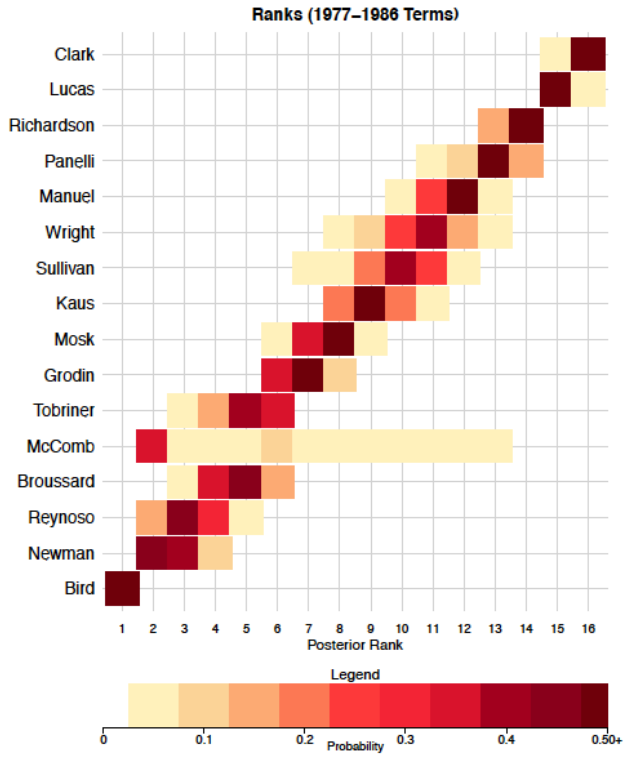
	1977	1978	1979	1980	1981	1982	1983	1984	1985
Wright	Bird								
Mosk									
Clark						Broussard			
McComb	Newman					Grodin			
Tobriner						Reynoso			
Richardson								Lucas	
Sullivan	Manuel					Kaus			

1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
Bird	Lucas								
Mosk									
Broussard						George			
Grodin	Eagleson				Baxter				
Reynoso	Kaufman			Arabian					
Lucas	Arguelles			Kennard					
Panelli								Werdegar	

[36] Harry N. Scheiber, The Liberal Court Ascendancy and Crisis, 1964-1987, in Constitutional Governance and Judicial Power (Scheiber, ed., 2016), at 479-483.

The recall of the three justices in the 1986 election on top of Kaus's retirement in late 1985 changed the political composition of the Court dramatically, if one defines the political affiliation of a justice by the political party of the governor who appointed the justice. The Court swung from having six justices appointed by Democrats and one appointed by a Republican in 1985 to having five justices appointed by Republicans and two appointed by Democrats at the beginning of 1986. Deukmejian also promoted Lucas—a former friend and law partner—to Chief Justice in 1987.

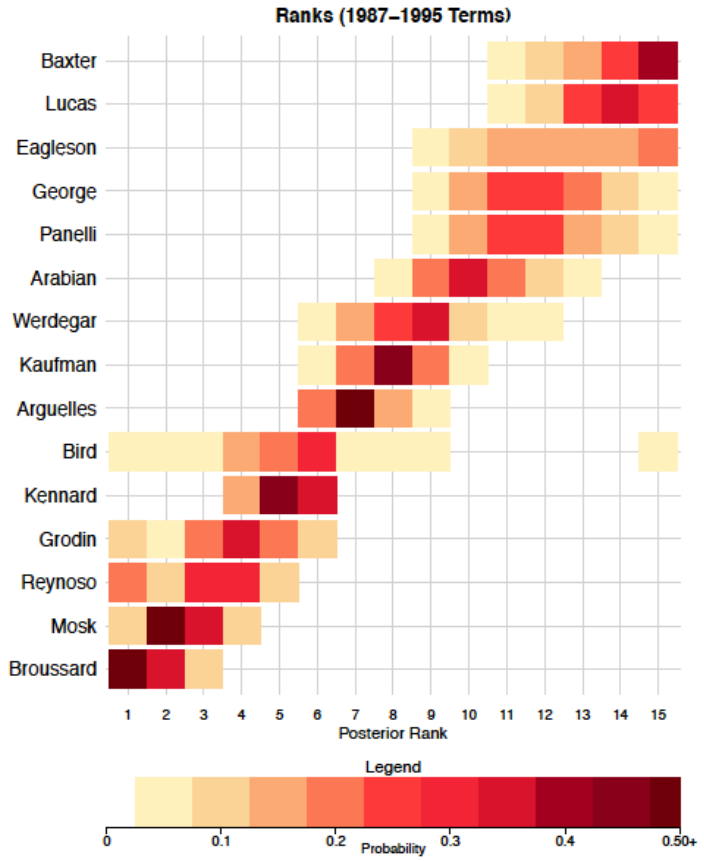
The diagrams below show the posterior ranks of the justices who voted in cases decided in the period from January 1977, to December 1986, and in cases decided in the period from January 1987 to December 1995.[37] As in the earlier period, the rankings of the justices are consistent with accounts of a justice's political or ideological views. For example, Justice Wiley Manuel is described as "[a] judicial centrist . . . [who] would often be the swing vote"[38] and Justice Otto Kaus is described as a "moderate in a liberal court."[39] This is consistent with their rankings, which are slightly right of center among the 16 justices who voted in cases decided 1977 to 1986. The positions of McComb and Wright should be disregarded for they voted in very few cases in 1977. The results for 1977-1986 suggest the Court shifted somewhat to the left in 1981 when Clark, Manual, Tobriner, and Newman were replaced by Brussard, Kaus, Grodin, and Reynoso.



[37] Bird, Grodin, and Reynoso appear in the 1987-1995 diagram because they voted in a small handful of cases reported as decided in early 1987. Wright, McComb, and Sullivan served for short periods in 1977.

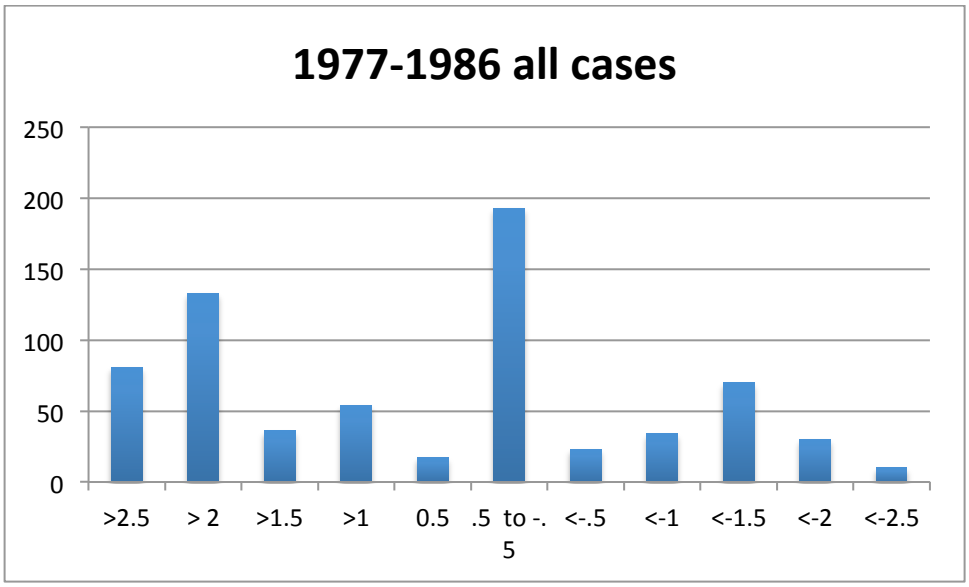
[38] Harry N. Scheiber, The Liberal Court Ascendancy and Crisis, 1964-1987, in Constitutional Governance and Judicial Power (Scheiber, ed., 2016), at 339.

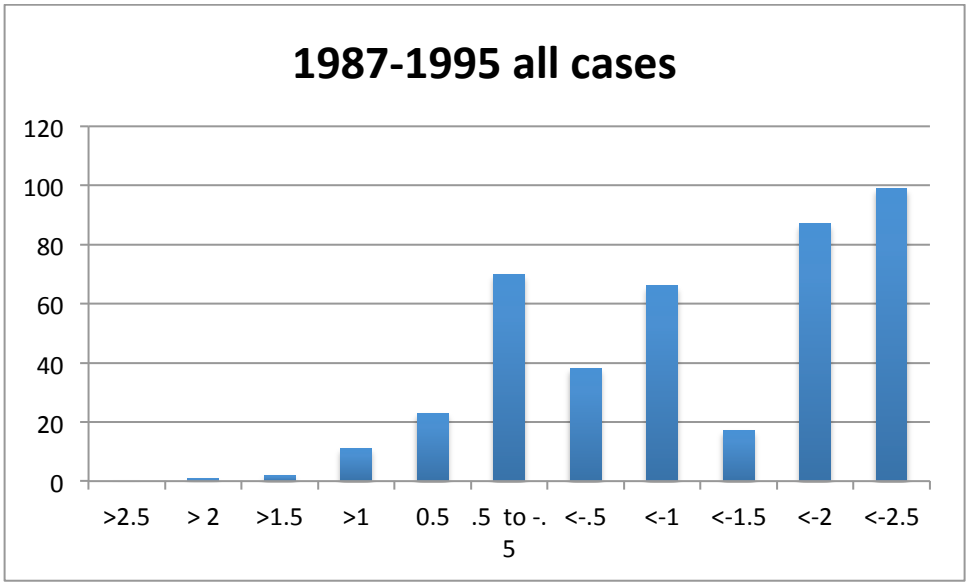
[39] Id.



The political composition of the Court changed dramatically in 1987. The recall election and Kaus's retirement resulted in four Justices who the model places on the Court's center or left wing (Bird, Reynoso, Grodin, and Kaus) being replaced by four Justices who the model places on the Court's center or right wing (Eagleson, Kaufman, Arguelles, and Panelli).

The data confirms the widely held view that the effect of the election was to shift the center of the Court from the left to the right. A crude way to measure this is to compare how the two wings of the Court fared in cases in which the pattern in voting is consistent with the dominant pattern. There were 681 non-unanimous cases in the 1987-1995 period and 414 non-unanimous cases in the 1987-1995 period. Voting conforms to the pattern identified by the model when the absolute value of β is high. Using the arbitrary cutoff of an absolute value of beta of 2.0 to identify cases in which voting conforms to the dominant pattern, then in the 1987-1995 period the liberal wing prevailed in 31.4% of non-unanimous cases and the conservative wing prevailed in 5.9% of non-unanimous cases. In the 1987-1995 period the conservative wing prevailed in 44.9% of non-unanimous cases while the liberal wing prevailed in 0.2% of non-unanimous cases when voting conforms to the dominant pattern. The charts below provide a more complete breakdown of the β distributions in the two periods. The liberal wing prevails when β is positive. The conservative wings prevails when β is negative.





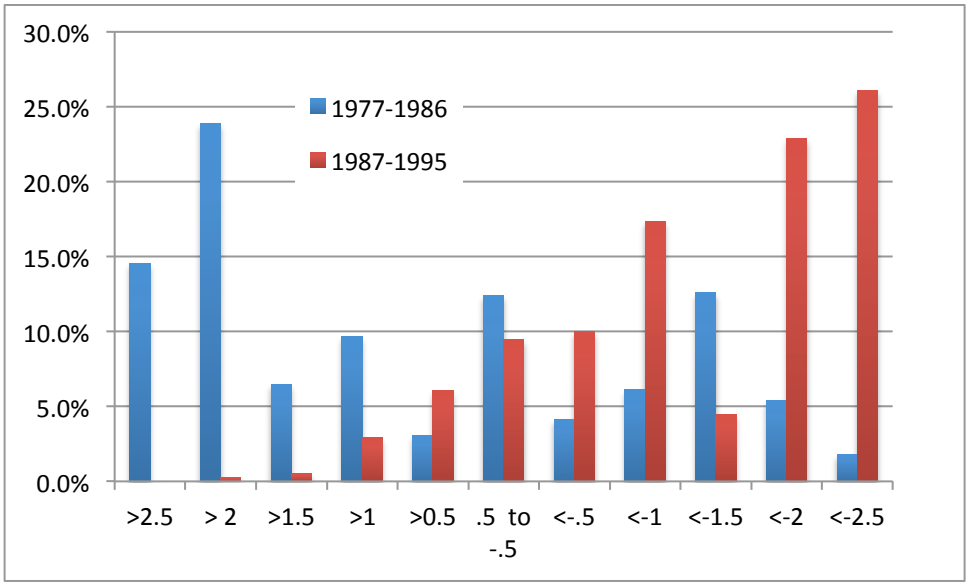
The relatively large number of cases in the two periods in which absolute β<.5 is misleading. This is the product of five or fewer sitting justices voting in a case. We will call this the "short bench" phenomenon. In the 1977-1986 period there are 124 cases (of a total of 681 non unanimous cases) in which five or fewer sitting justices are reported as voting in a case.[40] The model reports a β value close to zero in all of these cases.[41] In approximately 1/5th of these cases the short bench appears to be product of justices who voted in the majority not being identified in the Judges field. We will fix this by hand coding these cases. But in most the

[40] The voting of 6 rather than 7 sitting justices in a case has a muted negative effect on the absolute value of β. For example, excluding cases in which 5 or fewer sitting justices vote, there are 557 non-unanimous cases in the 1977-1986 period, including 370 cases with 7 sitting justices voting and 187 cases wit 6 sitting justices voting. The absolute value of β>2.5 in 91 (16.3%) of all cases, 65 (17.6%) of cases with 7 sitting justices voting, and 16 (8.6%) of the cases with 6 sitting justices voted.

[41] In 100 cases β<.064. In the other 24 β<.18.

cases the short bench is a product of two or more sitting justices not participating in a case. When this occurs two or more courts of appeals judge will participate in a case by assignment so there is a full complement of seven judges to decide a case.[42] In some cases there is less than a full complement of seven judges.[43] We hand checked a sample of these cases and found very few instances of true cross over voting, by which we mean voting that does not conform to the dominant pattern. In almost every case that we hand checked one or two sitting justices on the Court wings dissents, which is consistent with what the model would predict. In other words, in most cases the low reported β value in short-bench cases is not due to justices voting in a way that is inconsistent with the dominant pattern. The same phenomenon occurs in the 1987-1995 period. While it involves fewer cases (34 of 414 non-unanimous cases) these cases comprise slightly more than half of the cases in which the reported absolute value of β<.5.

The chart below excludes cases in which β<.5 because five or fewer sitting justices are reported as voting in case. It compares the β distribution for the two periods using the percentage of cases in the specified β range, rather than the number of cases, to sharpen the comparison. It may provide a somewhat more accurate picture of the effect of the 1986 election on the pattern of outcomes. We do not exclude short-bench cases in the analysis that follows. We will flag when the short bench phenomenon is a source of cases in which absolute β<.5.

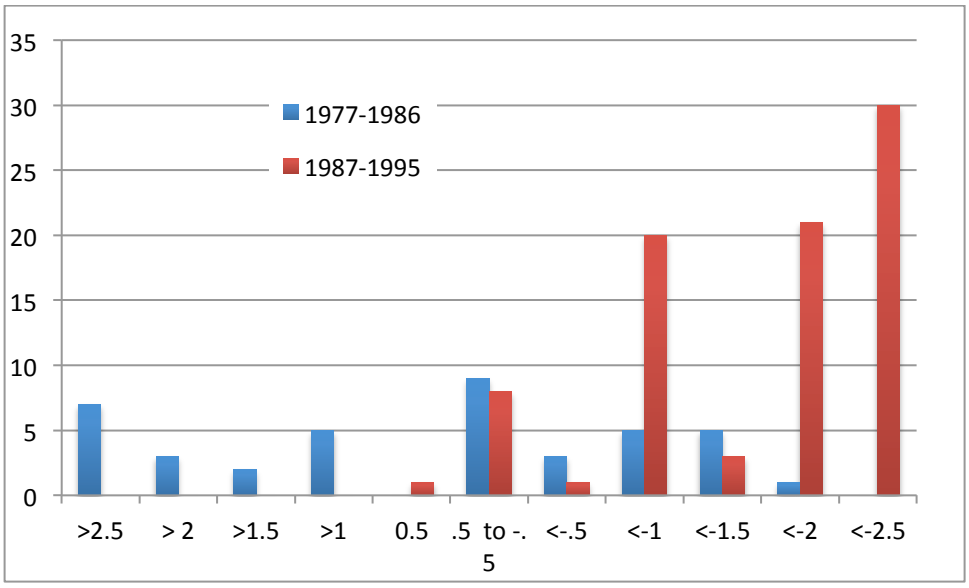


The change in the Court's composition had a dramatic effect on the pattern of outcomes in cases in which "death penalty" appears in the core term field or in the outcome field. There are 40 such cases in the 1977-1986 period and 84 such cases in the 1987-1995 period. We hand checked a sample of the cases and all involved the death penalty. The chart below shows the value of β in these cases. The liberal wing of the Court prevailed in the great majority of

[42] Southern California Edison Co. v. Public Utilities Commission, 20 Cal.3d 813 (1978)(4 sitting justices and 3 court of appeals judges voting by assignment).

[43] See, e.g., People v. Romero, 31 Cal.3d 685 (1982)(4 sitting justices and 2 court of appeals judges voting by assignment).

the cases in the 1977-1986 period while the conservative prevailed in virtually all of the cases in the 1987-1995 period. The sign of β is a near-perfect predictor of the outcome in a case. When β is positive (meaning the liberal wing prevails) a death sentence is almost always reversed. When β is negative (meaning the conservative wing prevails) a death sentence is almost always affirmed.



The dramatic change in outcomes in death penalty cases is unsurprising. The campaign to remove Bird, Grodin, and Reynoso highlighted their opposition to the death penalty. It was widely reported in the campaign that Bird had voted to reverse the death sentence in every case that came before the Court while she was Chief Justice, and that the Court reversed the death sentence in over ninety percent of such cases.[44]

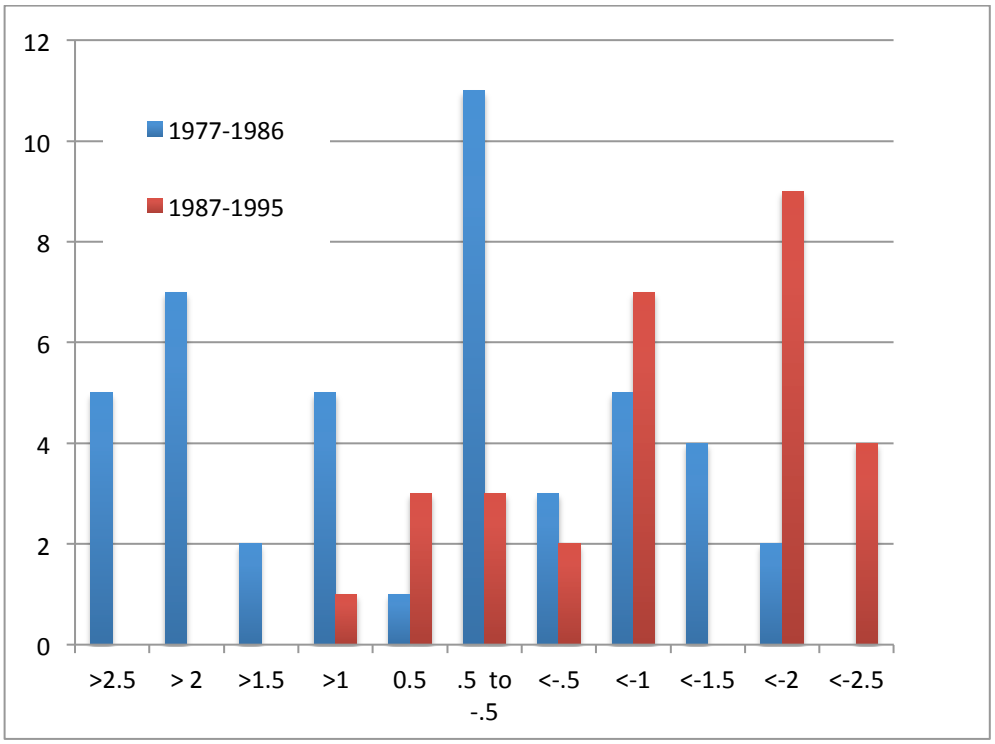
The pattern of β values in the diagram understates the extent to which voting in death penalty cases divides on the dimension being captured by β in the 1977-1986 period. In 9 of 40 death penalty cases in the 1977-1986 period the absolute value of β is less than .5, indicating voting in the case did not conform to the dominant pattern. This might suggest disagreements between justices not captured by the model had a material influence on voting in a material number of death penalty cases. But in 5 of the 9 cases justices the model places on the Court's wings dissented on different points, with the conservative justice taking a position favorable to the state and the liberal justice taking a position favorable to a defendant.[45] These cases have a low β only because the model lumps dissenting justices together. The low β value in the other four cases is attributable to the short bench phenomenon.

[44] Harry N. Scheiber, The Liberal Court Ascendancy and Crisis, 1964-1987, in Constitutional Governance and Judicial Power (Scheiber, ed., 2016), at 482-483 provides a balanced account of the handling of the issue. He reports that in the two years before the election the Court voted to reverse the death penalty in 42 of 43 cases. But the campaign highlighted two cases—Carlos v. Superior Court, 35 Cal.3d 131 (1983), and People v. Garcia, 36 Cal.3d 539 (1984)—in which justices on the Court's conservative wing joined the majority.

[45] People v. Brown, 40 Cal.3d 512 (1985); People v. Balderas, 41 Cal.3d 144 (1985); People v. Yates, 34 Cal.3d 644 (1983); People v. Leach, 41 Cal.3d 92 (1982); People v. Burgener, 41 Cal.3d 505 (1986).

We observe a pattern similar to that observed in death penalty cases in personal injury cases in both periods. We count 45 personal injury cases in 1977-1986 period and 29 such cases in the 1987-1995 period. Voting in personal injury cases often divides on the dimension being captured by β with the Court's liberal wing generally prevailing in non-unanimous cases in the 1977-1986 period and the conservative wing almost always prevailing in non-unanimous cases in the 1987-1995 period.

The chart below shows the distribution of β in personal injury cases for both periods. Unlike in the death penalty cases, there is some genuine cross over voting in personal injury cases when absolute β<.5. In 3 of the 11 cases in the 1977-1986 period in which the absolute β<.5 Clark joins in a majority that includes Bird, crossing over justices the model places on the Court's liberal wing.[46] In 7 of the 11 cases the low β value is attributable to the short bench phenomenon.

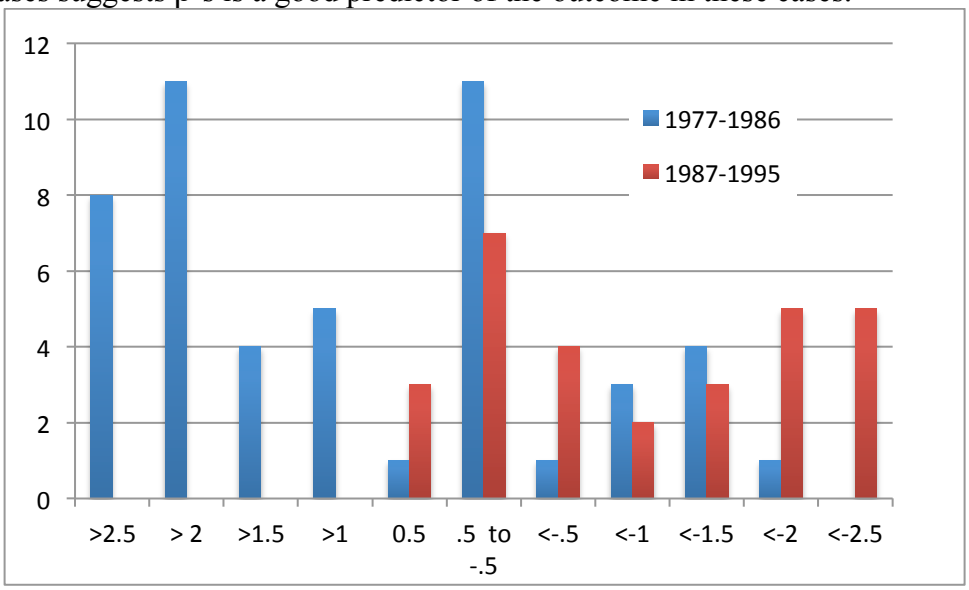


As with the death penalty cases, β's sign is a good predictor of the outcome of a personal injury case when absolute β>1. The few exceptions are cases from the 1977-1986 period in which a Justice on the extreme left wing of the Court argues in a solo dissent for an

[46] Edmiston v. Superior Court, 22 Cal.3d 699 (1978)(holding trial court cannot order medical exam of party to be taped, Tobriner and Newmay dissent); Thompson v. Alameda County, 27 Cal.3d 741 (1980)(holding county was immunity from liability for releasing dangerous juvenile offender, Tobriner and Mosk dissent); Davis v. Air Technical Industries, Inc., 22 Cal.3d 1 (1978)(holding trial court erred in requiring one tort defendant to pay share of legal fees of other tort defendant, Mosk and Manuel dissent);

even more liberal result than that which was reached by the Court.[47] Many of the high absolute β cases involve significant policy issues. Pre-1977 cases in which β>2 include *Sindell v. Abbott Laboratories*[48] (creating market share liability), *Jess v. Herrmann*[49] (adopting a rule under which a claimant's culpability would not reduce recovery from a tortfeasor's liability insurer through a setoff), and *Molien v. Kaiser Foundation Hospitals*[50] (expanding liability for negligently inflicted emotional distress). Post-1977 cases in which β<-2 include *Thing v. La Chusa*[51] (imposing bright-line restrictions on a bystander's claim for emotional disturbance in the interest of legal certainty), *Bily v. Arthur Young & Co.*[52] (adopting a restrictive rule of negligence liability for accountants), *Anderson v. Owens Corning Fiberglass Inc.*[53] (adopting state-of-art defense in failure to warn products liability case), and *Brown v. Poway Unified School Dist.*[54] (tightening the ability to use res ipsa doctrine to establish liability in a slip and fall case).

We may observe a similar pattern in cases in which the term "Contracts" appears in the Headnote. We counted 49 such cases in the 1977-1986 period and 29 such cases in the 1987-1995 period. The chart below shows the value of β in these cases. A preliminary inspection of these cases suggests β's is a good predictor of the outcome in these cases.



[47] For example, Ochoa v. Superior Court, 39 Cal.3d 159 (1985), held that parents of juvenile who died as a result of the failure of a detention facility to provide medical treatment could bring a claim for negligent infliction of emotional distress against the facility with respect to the distress they suffered in observing their son at the facility when he was ill and not receiving proper attention. This denied the parents recovery for distress they suffered in learning of their child's death, including in particular the distress the father suffered when his wife told him of her last visit to the son, when the son was in extremis and her pleas that their own physician be allowed to attend to the son were rebuffed. Justice Bird dissented, arguing this restriction on the claim was unwarranted.

[48] 26 Cal.3d 588 (1980)(2.64).

[49] 26 Cal.3d 131 (1978)(2.79).

[50] 27 Cal.3d 916 (1980)(2.16).

[51] 48 Cal.3d 644 (1987)(-2.65).

[52] 3 Cal.4th 370 (1992)(-2.57).

[53] 53 Cal.3d 987 (1991)(-2.30).

[54] 4 Cal.4th 820 (1993)(-2.34).

The pattern of voting in cases in which the term "Constitutional Law" appears in the headnote field suggests the underlying dimension of disagreement being captured by β is similar to the underlying dimension of disagreement that dominates voting patterns on the U.S. Supreme Court during this period. For example during the Bird years the Court split 4-3 (with Richardson, Clark, and Manual dissenting) to uphold limits on campaign contributions,[55] to find a First Amendment to speech and petition in a privately owned shopping center,[56] to hold a municipal ordinance unconstitutionally overbroad in a suit brought by the owner of a pornographic arcade,[57] and to strike down a zoning ordinance restricting multi-family housing as a violation of privacy rights.[58] The Court's conservative wing sometimes prevailed during the Bird years in constitutional cases when Mosk joined Richardson, Clark, and Manual.

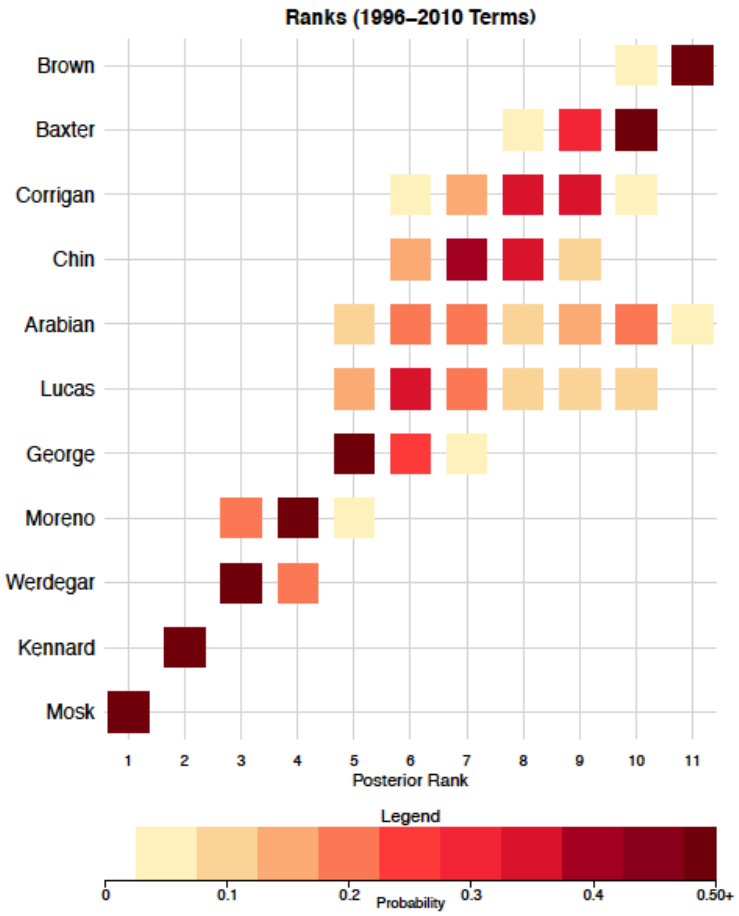
VII. 1996 TO 2010

There is little turnover on the Court during this 15 year period. Janice R. Brown and Ming W. Chin replaced Lucas and Arabian in 1996. George replaced Lucas as chief justice. With Mosk's retirement in 2006 no justice on the Court was appointed by a Democratic governon. Corrigan was appointed by Arnold Schwarznegger.

1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
	George													
	Chin													
Baxter														
Mosk							Moreno							
Werdegar														
	Brown									Corrigan				
Kennard														

The diagram below shows the posterior ranks of judges who voted in cases decided between January 1, 1996, and December 31, 2010. Arabian and Lucas served for short periods in 1996.

[55] Citizens Against Rent Control v. City of Berkeley, 27 Cal.3d 819 (1980)(2.87)
[56] Robins v. Pruneyard Shopping Center, 23 Cal.3d 899 (1979)(2.87).
[57] People v. Wheatley Glaze, 27 Cal.3d 841 (1980)(2.86).
[58] City of Santa Barbara, 27 Cal.3d 123 (1980)(2.86).



The chart below shows the β distribution of outcomes in the 543 non-unanimous cases decided in this fifteen-year period. The 121 with absolute β<.5 include around 44 cases in which this appears to be the product of the short bench phenomenon.