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PERSPECTIVE

## Everyone gets along on the California Supreme Court

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The California Supreme Court and the U.S. Supreme Court are moving in opposite directions — but not in the way you might think. The most common description of the federal high court is that it leans conservative, and California's high court is generally described as leaning liberal. Both courts saw changes in their memberships in the past five years that provided even more evidence for those characterizations: A Republican president appointed six of the nine justices on the current U.S. Supreme Court, and Democratic governors appointed five of the seven current California Supreme Court justices. But those facts have divergent effects on the two courts, which create major differences in how those courts decide their cases. The California Supreme Court decides nearly 90% of its cases unanimously with its liberal majority, while the U.S. Supreme Court decides less than half of its cases unanimously with its conservative majority.

To illustrate just how different the U.S. and California high courts are, we looked at their consensus ratio: unanimous versus nonunanimous decisions in a given year. We compared the vote splits in all California and U.S. Supreme Court merits decisions in the five-year period from January

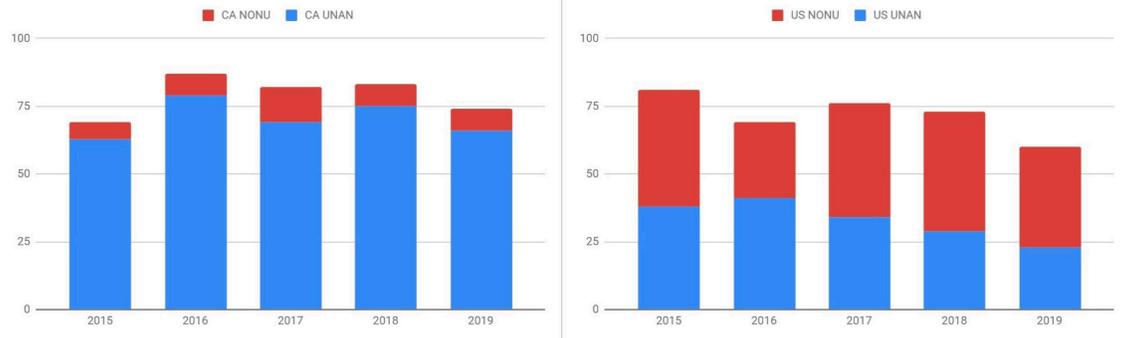


Chart 1

2015 to December 2019. For the California court we used our own database of opinions and votes. For the U.S. court we used the majVotes and minVotes fields from the latest release of Professor Harold J. Spaeth's Supreme Court Database. We counted a decision as unanimous regardless how many justices were in the majority if no justice dissented — so an 8-0 U.S. Supreme Court decision or a 6-0 California Supreme Court decision is unanimous for our purposes even though one justice did not participate. We counted any other vote pattern as nonunanimous.

As Chart 1 illustrates, consensus dominates the current California Supreme Court, with unanimous opinions constituting approximately 90% of all decisions in each year, while the dominant feature of U.S. Supreme Court decisions is the relative rarity of unanimous decisions. The overall average of unanimous California Supreme Court decisions in this five-year period is 89.16%, while the overall average of

unanimous U.S. Supreme Court decisions in the same period is 45.83%.

These disparate consensus ratios support our point that the existence of a partisan majority on a court does not necessarily translate into partisan voting behavior. Granted, the history of both courts features long periods of dominance by either a liberal or a conservative wing. And given the current dominance of such wings on both courts, one would expect similar (but inverted) voting patterns in their decisions today. Using the political party of the appointing executive as a proxy, the federal high court has a 6-3 conservative majority, while California's has a 5-2 liberal majority — both are roughly equivalent ratios and percent advantages, but with the parties reversed. Yet the partisan voting behavior that features so prominently in current U.S. Supreme Court decisions (and equally so in past California Supreme Court eras) is simply absent from California's high court today.

The conventional wisdom would have predicted otherwise. Californians had good reason to fear that the four justices appointed by Gov. Jerry Brown in his second governorship would politicize the state high court. Gov. Brown's appointments in his first governorship are a classic example of partisan bloc voting behavior — disastrously so. His second set of appointments resulted in a 4-3 liberal majority, which Gov. Gavin Newsom's recent appointment increased to 5-2. Yet our analysis shows that so far there is no liberal-conservative split on California's high court.

Instead, our California Supreme Court data in this five-year period show consistent and persistent high consensus rates, even with a majority of Democratic appointees. That makes California's high court the inverse of the federal high court in important ways. The U.S. Supreme Court in recent years was closely divided, with one justice on the border having a powerful effect as the so-called "swing" justice

(Justice Anthony Kennedy or Chief Justice John Roberts), and more than half of its cases were decided nonunanimously. Conversely, the overwhelming majority of California high court decisions in the same period were unanimous, with few 4-3 splits and no swing justice.

The partisan voting behavior on the U.S. Supreme Court is to some degree expected, and understandable. The surprise is that California's current high court does not behave similarly, both because it also features a similarly dominant wing, and because its history shows strong patterns of partisan voting behavior. There are various possible explanations for the current California high court's counterintuitive behavior. We think three factors have powerful effects here: The California judicial selection process does not involve legis-

lative confirmation, so the path to the bench is less partisan; the California Supreme Court drafts opinions before it orders argument, which requires a greater degree of collaboration in preparing a decision; and we infer that California's chief justice has established a consensus culture in a conscious break from the court's past.

By itself this snapshot of the current voting patterns on the U.S. and California high courts has little predictive value for future behavior. Yet one expects patterns of behavior to persist: Absent some institutional change, if a partisan wing shows no hesitation to wield its voting advantage in close cases, the surprise would be if that behavior changed, not that it continued. Similarly, California's high court has a well-established unanimous voting pattern, a strong con-

sensus culture, and no expected change in leadership. Hoping for increased consensus on the U.S. Supreme Court, with its stable 6-3 conservative ma-

jority, is probably an idle act. Looking for aggressive partisan behavior on the California Supreme Court in the near future should be similarly futile. ■

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