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PERSPECTIVE

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# The secret to SCOCA's consensus

By David A. Carrillo  
and Stephen M. Duvernay

It's well-known that the current United States Supreme Court has a low unanimity rate, and that the current California Supreme Court has a high unanimity rate. But why that's so has been elusive until now. When we analyzed these metrics last year in Everyone gets along on the California Supreme Court, we only had five years of data and no clear sense of why the two courts were so different. Revisiting that question now with more data and a better perspective, we think the answer lies in process, leadership, and culture.

Over the past decade (2011 to 2021) the California and U.S. high courts are distinguishable both on their overall unanimity rate and the inter-justice agreement rates. The U.S. Supreme Court unanimity rate compiled from Harvard Law Review figures in that period shows a yearly average of 36.24%. For the California Supreme Court in that period we calculate an annual average of 84.63% unanimous decisions. Similarly, the SCOTUSblog U.S. Supreme Court justice agreement matrix shows that the high court justices agree with each other far less often than California justices agree among themselves.

The California Supreme Court's current average annual 85% unanimity rate is also high compared with the court's historical performance. A 100-year study of California's high court

shows that from the 1950s until around 2010 the justices exhibited strong partisan voting patterns and low consensus rates. Yet the court's most recent decade shows no such partisan voting patterns. Rather, the current decade better resembles the unpatterned voting and higher consensus of the court's decades before 1950.

We think the current high California Supreme Court unanimity rate is explained mostly by its unique frontloaded case-deciding procedure, with X factors of leadership personality and consensus culture. By contrast, the U.S. Supreme Court's inverted case-deciding process fosters a more competitive culture that is less amenable to a leader's personality. It's also true that the federal high court confronts divisive national issues that may simply be harder to resolve, suggesting that comparing respective consensus rates is an apples-to-oranges comparison, and that if we controlled for those cases the consensus rates might be closer.

The California high court's case-deciding procedure partially explains its consensus rate. As Justice Goodwin Liu described the court's opinion-drafting process in How the California Supreme Court Actually Works: A Reply to Professor Bussel (2014) 61 UCLA L. Rev. 1246, after briefing is complete the Chief Justice assigns a justice to write a preliminary draft opinion, known as a calendar memorandum. That calendar memo receives lengthy critiques and proposed changes from the

other six chambers. The authoring justice combines those critiques into a preargument memorandum that details the comments and responses to the calendar memo, and provides point-by-point responses.

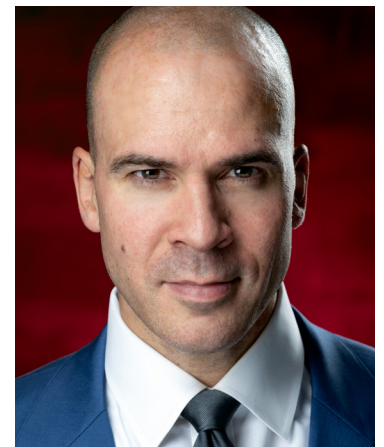
In past appearances at the SCOCA Conference, Chief Justice Tani Cantil-Sakauye credited this rigorous preargument drafting process as the court's path to unanimity. She noted that this process, which involves multiple editing rounds to address critiques from every justice, reduces the number and frequency of separate opinions. The war of memos can result in multiple rounds of calendar memoranda, ultimately resolving most objections, and the process can extend for months until the court reaches a consensus. Only then is the case ordered to argument.

There is a practical reason for the court to frontload its work in

this way. California Constitution Article VI, section 19 bars judges from receiving their salary "while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." Benjamin Shatz explained this rule's practical result in Understanding the 90-Day Rule, Los Angeles Lawyer (December 2007): "California's appellate courts typically ensure timely compliance by entertaining oral argument only after they have a tentative decision." This inverts U.S. Supreme Court procedure, where the case is assigned to a chambers only after oral argument, and there are already five votes to decide the case.

Drafting an opinion before argument allows the court to arrive at some level of consensus before engaging with counsel. After oral argument a second round of in-

**David A. Carrillo** is the executive director of the California Constitution Center at Berkeley Law. **Stephen M. Duvernay** is an attorney in private practice and the chief senior research fellow at the California Constitution Center.



ternal review occurs: another barrage of critique memos, producing revised opinion drafts that circulate with lengthy explanations. The final result is the product of three distinct phases of examination: preargument analysis, argument with counsel, and post-argument revision. This framework encourages modification to secure votes and avoid separate opinions where possible.

This process contributes to the high unanimity rate. But it cannot be the full explanation, because the court has used the same process for decades — including decades when California’s unanimity rate was far lower. We suspect that the X factors are two soft-power influences: the Chief Justice’s leadership style and the receptiveness of the other six justices to a consensus culture.

A court’s culture changes over time, and a court’s internal tone can be influenced by its leader. Given the disparate results from the same process over different time periods, the personal leadership style of a Chief Justice must be a factor. A Chief Justice can (as the current one does) establish a culture that encourages the assigned justice to assimilate changes to accommodate other justices.

Or not — for example, the autocratic leadership style employed by former Chief Justice Rose Bird was well-documented by Preble Stolz in *Judging Judges*. He described her as “an inept politician who preferred to rely on the power of her position rather than her ability to persuade colleagues. . . . Bird consulted no one, angered many, and relied entirely on naked legal authority for reasons that

were obscure.” The current Chief Justice has said publicly that she pursues consensus with her colleagues and encourages them to do the same. Just so: the start of the current high-consensus period roughly coincides with the current Chief Justice taking office in 2011.

Finally, we cannot discount the fact that five of the court’s current members were appointed in this 10-year period by successive Democratic governors. Arriving at the court close in time, from ideologically similar appointing authorities, likely has subtle effects on similarly disposed minds. Yet we discount the theory that these justices think alike and vote together based solely on this coincidence. The current decade-long period of high unanimity also includes years when more Republican appointees served, and the

past decade’s yearly unanimity rate shows no clear pattern with at most a modestly increasing trend line in that period.

We conclude that the California Supreme Court’s decade-long run of an annual 85% average unanimity rate is primarily due to the court’s procedure of robust opinion-drafting before argument. That cannot be the only explanation, because this procedure also existed in years with lower unanimity rates. We explain the difference by identifying distinctions between the leadership styles employed by, and the workplace cultures encouraged by, successive Chief Justices. There may be a small effect from the particular grouping of justices serving presently, but the data show that this is not significant. The soft power of being first among equals is the secret sauce.