

# PARTISAN VOTING ON THE CALIFORNIA SUPREME COURT

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## ABSTRACT

*When did ideology become the major fault line of the California Supreme Court? To answer this question, we use a two-parameter item response theory (IRT) model to identify voting patterns in non-unanimous decisions by California Supreme Court justices from 1910 to 2011. The model shows that voting on the court became polarized on recognizably partisan lines beginning in the mid-1900s. Justices usually did not vote in a pattern that matched their political reputations and party affiliation during the first half of the century. This began to change in the 1950s. After 1959 the dominant voting pattern is partisan and closely aligns with each justice's political reputation. Our findings after 1959 largely confirm the conventional wisdom that voting on the modern court is on political lines. But our findings call into question the usual characterization of the Lucas court (1987–1996) as a moderately conservative court. Our model shows that the conservatives dominated the Lucas court to the same degree the liberals dominated the Traynor court (1964–1970).*

*More broadly, this Article confirms that an important development occurred in American law at the turn of the half-century. A previous study used the same model to identify voting patterns on the New York Court of Appeals from 1900 to 1941 and to investigate whether those voting patterns were best explained by the justices' political reputations. That study found consistently patterned voting for most of the 40 years. But the dominant dimension of disagreement on the court for much of the period was not*

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*political in the usual sense of that term. Our finding that the dominant voting pattern on the California Supreme Court was non-political in the first half of the 1900s parallels the New York study's findings for the period before 1941. Carrying the voting pattern analysis forward in time, this Article finds that in the mid-1900s the dominant voting pattern became aligned with the justices' political reputations due to a change in the voting pattern in criminal law and tort cases that dominated the court's docket. Together, these two studies provide empirical evidence that judicial decision-making changed in the United States in the mid-1900s as judges divided into ideological camps on a broad swath of issues.*

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#### INTRODUCTION

Voting by justices on the California Supreme Court is widely perceived as being on political and partisan lines, with Democratic justices taking liberal positions and Republican justices taking conservative positions across a wide gamut of issues. For example, G. Edward White has written of Roger Traynor, who served on the court from 1940 to 1970 and was chief justice from 1964 to 1970: “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.”<sup>1</sup> When Ronald Reagan ran for governor in 1966, he promised to “curb what he condemned as the militantly liberal ‘activism’ of the Traynor Court.”<sup>2</sup> In 1986, conservative interest groups successfully campaigned against three liberal Democratic justices in retention elections so a Republican governor could appoint three conservative Republicans to their seats. The campaign highlighted the liberal justices’ hostility to the death penalty (and their

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1. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 296 (expanded ed. 1988).

2. Harry N. Scheiber, *The Liberal Court: Ascendancy and Crisis, 1964–1987*, in *CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER* 327, 332 (Harry N. Scheiber ed., 2016).

softness on crime generally), while much of the funding to defeat the three liberals came from business groups who were upset by court decisions harming their interests.<sup>3</sup>

We find that voting on the California Supreme Court became polarized on political and partisan lines beginning in the mid-1900s. Justices on the California Supreme Court have always voted in *some* cases in a pattern that aligns with what we know of their political views (we call this a justice's *political reputation*).<sup>4</sup> In particular, justices have often voted in a pattern that aligns with their political reputations in cases that have a strong political dimension, such as cases involving conflicts between labor and capital and cases involving constitutional challenges to state regulation. But strongly political cases tend to be a small part of a state high court's docket, which instead is dominated by criminal law and private law cases.<sup>5</sup> In those cases, justices on the California Supreme Court usually did not vote in a pattern that aligned with their political reputations during the first half of the 1900s. Consequently, during that period the dominant pattern of voting did not align with the justices' political reputations. This changed in the middle of the century as justices began to vote on political and partisan lines in criminal law and private law cases (particularly tort cases), making partisan voting the dominant pattern. That has remained the dominant pattern up to 2011, when our dataset ends.

We use a two-parameter item response theory (IRT) model to identify voting patterns in non-unanimous decisions by California Supreme Court justices from 1910 to 2011. The IRT model often is used as a tool to identify

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3. *Id.* at 479–82.

4. We use the term *political reputation* to describe the information we have on a justice's political positions. For older periods most of this information is from secondary sources, in particular CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER, *supra* note 2, which provides a history of the court from 1849 to 2010. Biographical information about a justice's political background and limited information about a justice's political reputation can be found in 2 J. EDWARD JOHNSON, HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA, 1900–1950 (1966), which is a collection of largely hagiographical essays on individual justices. For more recent periods, there is a wealth of references to a justice's political positions.

5. The California Supreme Court's docket in recent years (as measured by petitions for review granted and written opinions issued) generally consists of approximately 25% capital cases with the remainder divided between civil and non-capital criminal cases. Chief Justice Ronald M. George, Cal. Supreme Court, State of the Judiciary, Address to a Joint Session of the California Legislature (Mar. 25, 2008), <https://www.courts.ca.gov/7876.htm> (“Twenty to twenty-five of the opinions issued by our court each year are in these very lengthy and time-consuming capital cases.”); JUDICIAL COUNCIL OF CAL., 2018 COURT STATISTICS REPORT (2018) [hereinafter 2018 REPORT], <https://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf> [<https://perma.cc/T3QX-UV8B>]; JUDICIAL COUNCIL OF CAL., 2008 COURT STATISTICS REPORT (2008), <https://www.courts.ca.gov/documents/csr2008.pdf> [<https://perma.cc/Z69H-7BSQ>]. As the most recent example, in fiscal year 2016–2017 the court published 92 opinions and resolved 20 automatic capital appeals; it granted review in 76 cases (40 civil petitions and 36 non-capital criminal petitions); and it received 14 automatic capital appeals. 2018 REPORT, *supra*, at 25–35.

the relative positions of United States Supreme Court Justices on the political spectrum, and to predict how replacing a Justice is likely to alter the Court's political balance. In a previous paper,<sup>6</sup> two of us 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 those voting patterns aligned with the justices' political reputations. We found consistently patterned voting for most of the 40-year period. For some periods patterned voting was strong enough that voting on the New York Court of Appeals could fairly be described as polarized. But our analysis of cases in which voting most conformed to the dominant pattern indicated that the main dimension of disagreement on the court for much of the period was not political in the usual sense of that term.

Our finding in this Article that the dominant voting pattern on the California Supreme Court was non-political in the first half of the 1900s parallels our findings in New York for the period before 1941. This paper carries the voting pattern analysis forward in time and finds that in the second half of the 1900s the dominant California Supreme Court voting patterns align with the justices' political reputations, and that voting in criminal law and private law cases (particularly tort cases) became polarized on political and partisan lines. Together the two papers provide empirical evidence that judicial decision-making changed in the United States in the mid-1900s: it became polarized on political and partisan lines across a wide variety of cases. The California voting data suggests the process was gradual, and it cannot be attributed to changes in judicial personnel: in California the transformation occurred in a period of stable court membership between 1939 and 1959. We do not explore the reasons that might explain this transformation in judicial decision-making.

The model also supports the conventional wisdom about California Supreme Court decision-making after 1959: voting is on political and partisan lines, and the pattern of the justices' disagreements over case outcomes conforms to their political reputations. This correspondence is clear across all sources of information. A justice's political reputation is based on how he or she votes in a relatively small number of high visibility cases, or it is based on his or her political reputation before joining the court. But the IRT model's estimation of a justice's relative position on a left-right spectrum is based on his or her voting in a large number of cases. After 1959, the justices' political reputations correspond to their votes regardless of whether the reputation is based on their pre-appointment history, their high-

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6. Mark P. Gergen & Kevin M. Quinn, *Common Law Judicial Decision Making: The Case of the New York Court of Appeals 1900-1941*, 60 *BUFF. L. REV.* 897, 897-98 (2012) [hereinafter *New York Paper*].

profile votes, or a larger dataset. Finally, the model casts doubt on the common description of the Lucas court (1987–1996) as a moderately conservative court. Our results show that the conservatives dominated the Lucas court to the same degree as the liberals dominated the Traynor court. If nothing else, this finding highlights the need for a conversation about the criteria for characterizing a court as moderate or extreme.

In the next Part, we explain the IRT model. Part II overviews our results for the California Supreme Court for the entire 101 year period we study (1910–2011). Parts III through VI look more closely at specific periods, which we divide into 1910–1939 (the early years), 1939–1959 (the transitional years), 1959–1987 (the liberal court), and 1987–2011 (the conservative court).

## I. IDENTIFYING AND DEPICTING PATTERNED VOTING: THE IRT MODEL

Our interest is patterns in agreement and disagreement among judges. One can imagine a world in which voting patterns 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, and so forth) independent of the other judges' own decisions. Call this *independent voting*. In such a world, we might still see patterns in voting, but those patterns would be a random product of independent voting.

In our earlier study the New York Court of Appeals voting data made it possible to exclude that hypothesis. It is extremely unlikely that the observed voting patterns in the New York Court of Appeals from 1900 to 1941 were 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 voting patterns 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 voting patterns in non-unanimous cases. We then look to see if the pattern conforms to what we know of the judges' political views. We also then look to 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 with a two-parameter IRT model. Such models are consistent with a simple model of preference-based voting.<sup>7</sup> They have been successfully applied to merits votes from a variety of courts.<sup>8</sup> For our purposes IRT models should be viewed only as empirical summaries of observed behavior.<sup>9</sup>

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 relative to the majority position: in favor or not in favor. 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  $\alpha_k$ ,  $\beta_k$ , and  $\theta_j$  are parameters to be estimated.  $\alpha_k$  captures the propensity to dissent on case  $k$  after accounting for  $\beta_k$  and  $\theta_j$ . The  $\beta$  and  $\theta$  parameters are of primary interest to us.

The parameter  $\theta_j$  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 we do) as a means of voting data reduction and summarization, then judge  $j$ 's ideal point ( $\theta_j$ ) 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: the estimated ideal points for the Justices (the value of  $\theta$  for each Justice) are quite distinct because voting in non-unanimous cases tends to be highly polarized along familiar political lines. The figure below shows the posterior ranks<sup>10</sup> 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

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

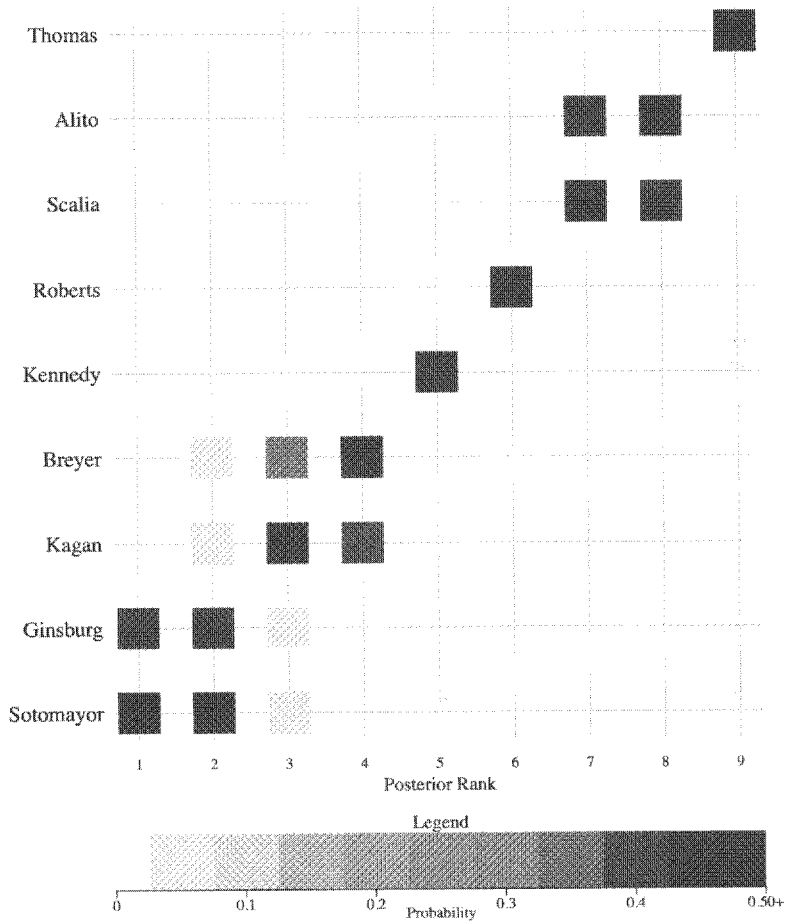
8. See, e.g., Benjamin R.D. Alarie & Andrew Green, *The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada*, 57 U. TORONTO L.J. 195 (2007); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002); Jason H. Windett et al., *Estimating Dynamic Ideal Points for State Supreme Courts*, 23 POL. ANALYSIS 461 (2015).

9. Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 818 (2010).

10. The posterior rank of a justice's ideal point is simply the estimated probability that the justice in question occupies a particular rank order position (first from the left, second from the left, and so forth).

political disagreements because the relative  $\theta$  values for the justices are consistent with perceptions of the justices' different political views.

FIGURE 1. Ranks (2014 Term)



In the previous study, we assumed that applying the IRT model in the study of non-unanimous New York Court of Appeals decisions would yield muddled results because that court was by all accounts less polarized and politicized for much of the studied period. That is not what we found. In a few 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 voting patterns these patterns reflect political disagreements between judges, similar to disagreements between justices of the United States Supreme Court. Voting patterns in the California Supreme Court after 1950 do align with what we know of the justices' political views. But this generally is not true with respect to voting patterns in the California Supreme Court earlier in the century, and it generally is not true with respect to voting patterns in the New York Court of Appeals from 1900 to 1941.

It is important to keep in mind that when the model finds clear 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.<sup>11</sup> 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 above for the United States Supreme Court in the 2014 term, what the model captures is that Justice Sotomayor or Justice Ginsburg rarely 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 to be on the same side as Chief Justice Roberts than were either Justices Sotomayor or Ginsburg.

Up to now we have focused on the  $\theta$  parameters that capture patterns of agreement and disagreement among judges. We turn now to the case specific parameter  $\beta_k$ . In the IRT literature this is commonly referred to as a *discrimination* parameter.<sup>12</sup> Under the model,  $\beta_k$  can have a positive or negative value. We are interested in both the real and absolute value of  $\beta$ . If the absolute value of  $\beta_k$  in case  $k$  is high, then the voting patterns in case  $k$  are well represented by the model.<sup>13</sup> In other words, the voting pattern in a case is consistent with the dominant pattern. For example, in a 5–4 decision by the United States Supreme Court in 2014, Kennedy will be the fifth 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

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11. 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, *supra* note 6, addresses this point in a bit more detail and explains why it does not undermine the descriptive accuracy of the model.

12. 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  $\beta_k$  tells researchers how well test item  $k$  discriminates between high and low ability test takers.

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



Court. If the absolute value of  $\beta_k$  in case  $k$  is near 0, then the voting patterns in case  $k$  do not conform to the dominant pattern.

Even when voting on a court is highly patterned there are some cases in which voting does not conform to the dominant pattern. For example, there could be a non-unanimous decision in which Sotomayor or Ginsburg join Thomas or Alito. When the dominant pattern of voting across all cases aligns with the judges' political views, then one can infer that decision-making in case  $k$  is unlikely to be influenced by the judges' political views when the absolute value of  $\beta_k$  is near 0. Conversely, in the California Supreme Court during some of the periods we study the dominant pattern of voting does not conform to what we know of the justices' political views. This is evidence that the underlying disagreement that is the basis for the dominant voting pattern is not political in the usual sense of the term. There is additional supporting evidence for this hypothesis when we find cases in which voting does align with what we know of the justices' political views, including cases in which justices make arguments that express an ideological point of view, and the absolute value of  $\beta$  in these cases is near 0. This also suggests the dominant pattern of disagreement reflects something other than political or ideological disagreements between justices.

The sign of  $\beta_k$  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  $\beta_k$  is high. When  $\beta_k$  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. The New York study focused on  $\beta$ 's absolute value because the sign of  $\beta$  had little predictive value on the outcome of a non-unanimous case. The sign of  $\beta$  has greater predictive value in California so we pay more attention to that information.

## II. OVERVIEW OF CALIFORNIA FINDINGS

We draw several conclusions from our analysis:

- For most of the periods in the early years (before 1950) the dominant dimension of disagreement on the court does not appear to be political.
- Voting is fairly strongly patterned from 1939 on.
- The 1950s are a transition period, with voting becoming more patterned on political and partisan lines.
- In later periods, the posterior ranks of the justices closely conform to their political reputations.

The table below shows from 1910 to 2011 the number of cases decided by the California Supreme Court with an opinion,<sup>14</sup> the number of non-unanimous cases, and the rate of non-unanimous cases. We only count decisions we identify as merits-based.<sup>15</sup> We also only count non-unanimous decisions in which at least five justices who were regular members of the court voted.<sup>16</sup> The last column reports the number of full-time justices who served on the seven-member California Supreme Court during the period indicated.<sup>17</sup> These numbers give a rough sense of the turnover rate on the court during each period.

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14. The California Supreme Court largely controls its docket. Review is mandatory only in capital cases, which are about one-third of the court's annual docket. Discretionary review is granted if at least four of the seven justices vote to grant review. Goodwin Liu, *How the California Supreme Court Actually Works: A Reply to Professor Bussel*, 61 UCLA L. REV. 1246, 1251 (2014) (describing contemporary practice). In recent years, the court has received around 4,000 petitions for review annually, and it grants review in 82 cases annually on average. 2018 REPORT, *supra* note 5, at 26, 28, 30; Cal. Constitution Ctr., *SCOCA Year in Review 2017: (Almost the) Brown Court*, SCOCABLOG (Sep. 24, 2017), <http://scocablog.com/scoca-year-in-review-2017-almost-the-brown-court> [<https://perma.cc/LP8H-NSSW>]; Brandon V. Stracener, *SCOCA Year in Review 2018: Still Not the Brown Court*, SCOCABLOG (Oct. 24, 2018), <http://scocablog.com/scoca-year-in-review-2018-still-not-the-brown-court> [<https://perma.cc/GFK2-8YT6>]. The court's handling of decided cases 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 becomes the preliminary draft opinion. The calendar memo is reviewed and critiqued 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. THE SUPREME COURT OF CALIFORNIA 20–22 (7th ed. 2019), [https://www.courts.ca.gov/documents/The\\_Supreme\\_Court\\_of\\_California\\_Booklet.pdf](https://www.courts.ca.gov/documents/The_Supreme_Court_of_California_Booklet.pdf) [<https://perma.cc/229P-CFJB>]. The California Supreme Court operates year-round and does not observe a term system similar to that used by the U.S. Supreme Court.

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 California 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-merits 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 a written opinion in every case the court decides. The practice is to identify an author, but occasionally opinions are designated per curiam.

16. This excludes non-unanimous cases in which three or more pro tem justices voted. The number of such cases is trivial except during periods in which there is high turnover on the court.

17. The court started with three justices serving six-year terms in 1849 and expanded to five justices serving ten-year terms in 1862. But those courts predate our study period. Since the 1879 California Constitution's adoption, the court has continuously operated with seven members.

TABLE 1. California Supreme Court Decisions 1910 to 2011

<i>Period</i>	<i>Total Merits</i>		<i>Rate</i>	<i>Justices who served</i>
	<i>Cases</i>	<i>Non-unanimous</i>		
1910–1915	1081	29	2.7%	8
1915–1926	2784	122	4.4%	20
1926–1939	2560	153	6.0%	13
1939–1948	1344	318	23.7%	10
1949–1959	1404	566	40.3%	8
1959–1970	1658	560	33.8%	14
1970–1977	972	329	33.8%	9
1977–1987	1168	556	47.7%	13
1987–1996	671	392	58.4%	13
1996–2011	1017	497	48.9%	11

There were relatively few non-unanimous cases before 1939. For some years (roughly 1918 to 1927) there also was a high rate of turnover on the court, including seven justices who served less than two years. High turnover and a small number of non-unanimous cases can make it difficult to discern a pattern in voting. Yet we find patterned voting for many (but not all) of the periods before 1939. Our major claim about these early years is that for most of these periods the dominant dimension of disagreement on the court does not appear to be political. Several findings support this claim:

- The dominant pattern of voting usually does not align with what we know of the justices' political views.
- We see no political dimension in many cases in which voting conforms to the dominant pattern.
- And there are cases that raise issues with a strong political dimension, and the voting patterns in these cases frequently do track the justices' political reputations. But the absolute value of  $\beta$  in these cases is low.<sup>18</sup>

18. The period from 1915 to 1921 is an exception. During this period the dominant pattern of voting does align with what we know of the justices' political views and there is an evident political dimension in a significant number of cases in which the absolute value of  $\beta$  is high. Many of these cases are workers' compensation cases. This is similar to what we found in New York during roughly the same time.

Voting patterns clarify a great deal starting in September 1939, after Gibson becomes chief justice.<sup>19</sup> He held this post until 1964. Gibson instituted procedural reforms that decreased the court's caseload. This may explain the significant increase in the rate of non-unanimous decisions after 1940: dissenting is a luxury, particularly when a dissenter is expected to write an opinion. Meanwhile, the membership of the court became quite stable. The justices who served during this period all had long periods of service that substantially overlapped.<sup>20</sup>

The model finds fairly strongly patterned voting from 1939 on. The increase in the number of non-unanimous cases and the decrease in justice turnover may explain some of the increase in the clarity of voting patterns. The posterior ranks of the justices from 1939 to 1948 and 1949 to 1959 are in the two diagrams below. The uncertain posterior ranks of Houser and Waste from 1939 to 1948 are because they voted in relatively few non-unanimous cases, all before 1942.

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19. Carter and Gibson joined the court in September. The first opinions in which Carter and Gibson participate were issued on October 5, so we chose October 4 as the break date.

20. Traynor served for 30 years (1940-1970), Gibson for 25 years (1939-1964), Schauer for 22 years (1942-1964), Carter for 20 years (1939-1959), Edmonds for 19 years (1936-1955), and Spence for 15 years (1945-1960). McComb joined the court late in this period (1956) and served for 21 years.

FIGURE 2. Ranks (1939-1948)

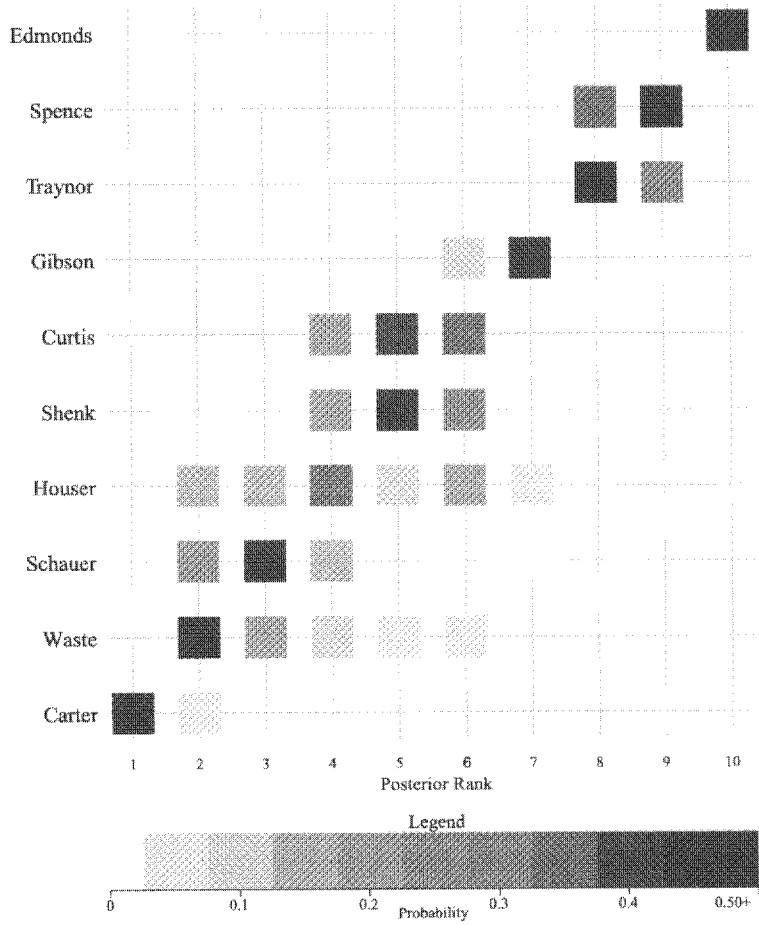
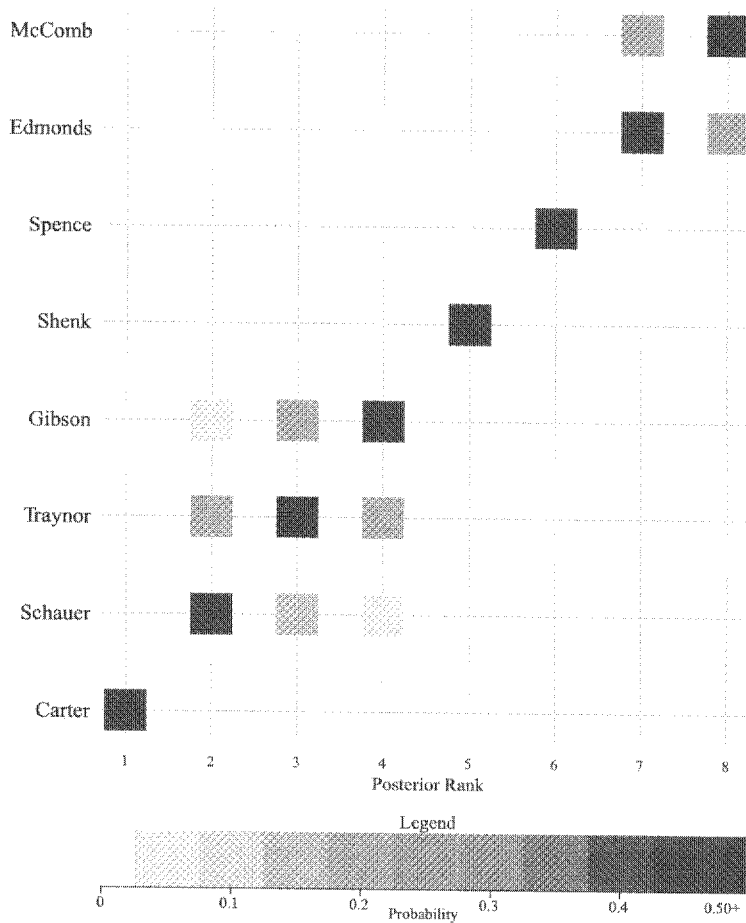


FIGURE 3. Ranks (1949–1959)



Charles J. McClain provides a broad-brush description of the political reputations of the justices who served on the court during this period:

If we look at the eight justices with longest tenure on the [Gibson] court, we can, painting with a broad brush, say that Gibson, Traynor and Carter were the liberals; Shenk and Spence the conservatives. Justices Schauer and Edmonds were less conservative than Shenk and Spence but clearly less activist than the three liberals. McComb, who replaced Edmonds in 1956, was somewhat more conservative than him.<sup>21</sup>

21. Charles J. McClain, *The California Supreme Court, 1940–1964: The Gibson Era*, 3 CAL. SUP.

The justices' posterior ranks correspond reasonably well with McClain's description of their political reputations from 1949 to 1959 but not from 1939 to 1948. This is one basis for our conclusion that voting became more patterned on political and partisan lines during this period. We use the terms *left wing* and *right wing* to describe where the model places a justice. We use words like *liberal*, *progressive*, or *conservative* to describe a justice's political reputation. We use *partisan* to describe a justice's party affiliation.

The 1950s could be described as a period of transition. In later periods the posterior ranks of the justices closely conform to their political reputations. The posterior ranks from 1949 to 1959 do not precisely correspond to the justices' political reputations. The moderate Schauer (a Republican) is on the left while the conservative Shenk is at the center. This is because Schauer generally voted with the liberals in criminal law cases while Shenk generally voted with the liberals in tort cases in the 1950s. From 1949 to 1959, the liberals Gibson, Traynor, and Carter (all Democrats) were on the court's left wing and were clearly to the left of the conservatives Shenk and Spence (both Republicans). Yet from 1939 to 1948, Gibson and Traynor were on the court's right wing, between Shenk and Spence.

When we examine the cases we find more evidence showing that the voting was more politically polarized from 1949 to 1959 than from 1939 to 1949. From 1949 to 1959, many of the cases with a high absolute value of  $\beta$  had a strong political dimension and the justices voted in these cases in a way that conformed to their political reputations. By comparison, from 1939 to 1948 many of the cases with a high absolute value of  $\beta$  did not have a political dimension, and in the few that do, the voting coalition crossed political lines. These cases involved conflicts between the state and a property owner or a taxpayer. The liberal Carter joined with the conservative Shenk and the moderate Schauer in siding with the property owner or the taxpayer against the state. Meanwhile Gibson and Traynor joined with Edmonds and Spence to side with the state against the property owner or taxpayer.

The final basis for our conclusion is that in both periods we find cases that have a strong political dimension, and in which the pattern of voting does align with the justices' political reputations. These tend to be civil rights and civil liberties cases. *Perez v. Sharp*<sup>22</sup> and *Board of Education v. Mass*<sup>23</sup> illustrate. Both are 4-3 decisions. In 1948, *Perez* held unconstitutional a

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CT. HIST. SOC'Y Y.B. 3, 66 (1998).

22. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) ( $\beta=0.0038$ ).

23. *Bd. of Educ. v. Mass*, 304 P.2d 1015 (Cal. 1956) ( $\beta=-2.58$ ).

California statute prohibiting interracial marriage.<sup>24</sup> And in 1956, *Mass* held a schoolteacher could not be fired for refusing to testify before the House Un-American Activities Committee.<sup>25</sup> The liberals Gibson, Traynor, and Carter were in the majority in both cases while the conservatives Shenk and Spence dissented in both cases. In *Perez* the absolute value of  $\beta$  is 0.0038, which means that the voting pattern in the case does not correspond to the dominant pattern during the period. In *Mass* this value is 2.58, which means the voting pattern in the case strongly corresponds to the dominant pattern.

We identify two differences in the voting data that explain why the justices' posterior ranks more closely align with their political reputations from 1949 to 1959 than from 1939 to 1948. One difference is that there were more non-unanimous cases in the 1950s than in the 1940s that have a strong political dimension. There are such cases in every period, and we find that the voting pattern in such cases often aligns with the justices' political reputations. This is not surprising if for no other reason than that a justice's political reputation is in part shaped by how he or she votes in cases that are perceived as presenting political issues. There are simply more such cases from 1949 to 1959 than there were from 1939 to 1948. The other difference is that voting patterns in criminal law cases and tort cases, which make up a large share of the court's docket, more closely aligned with the justices' political reputations from 1949 to 1959 than they did from 1939 to 1948. The increase in the number of criminal law cases, and the increase in voting on political lines in these cases, is particularly significant. This was also the beginning of what came to be called a due process revolution in criminal law.

The 1950s were a transition period. The dominant voting pattern from 1949 to 1959 does not precisely align with the justices' political reputations, and voting patterns in criminal law cases and tort cases do not precisely align with the justices' political reputations. But after 1959, the dominant voting pattern on the court always closely aligns with the justices' political reputations, and the voting pattern in criminal law and tort cases (as well as other types of cases) always aligns (more or less closely) with the dominant pattern. The diagram below shows the posterior ranks of the justices from 1959 to 1970. The conservatives and Republicans are on the right and the liberals and Democrats are on the left.

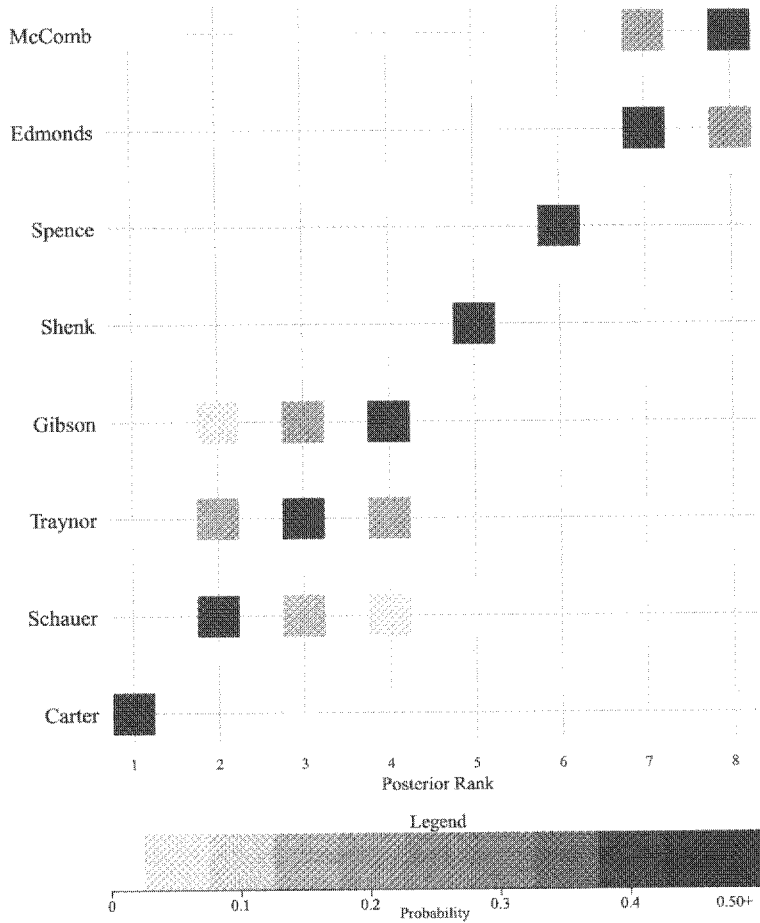
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24. *Perez*, 198 P.2d at 18.

25. *Mass*, 304 P.2d at 1019.

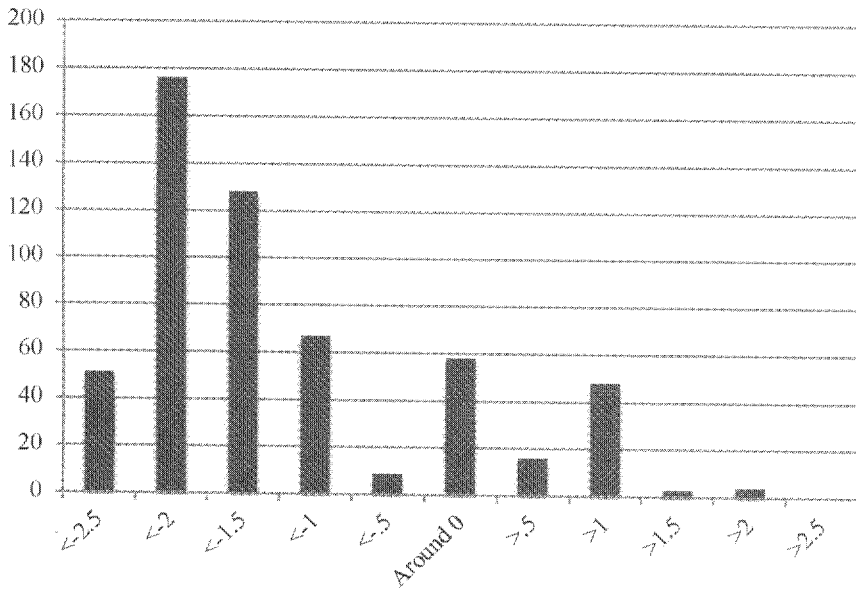


FIGURE 4. Ranks (1959–1970)



The year 1959 also begins a period of left wing and liberal dominance of the California Supreme Court that ran to January 1987. When we say that a wing of the court dominated, we mean that this wing usually prevailed in cases in which the court split along the dominant line. The diagram below captures this. It shows the distribution in the value of  $\beta$  for the 560 non-unanimous cases decided from 1959 to 1970.

FIGURE 5. 1959–1970



The sign of  $\beta$  indicates which wing prevailed. When the sign of  $\beta$  is negative, the left wing prevailed. The absolute value of  $\beta$  indicates how closely voting in a case conformed to the dominant pattern. The absolute value of  $\beta$  is greater than 1.5 in 362 cases from 1959 to 1970. These are cases in which voting most conforms to the dominant pattern. The left wing prevailed in 355 of these cases while the right wing prevailed in only seven of these cases. The left wing prevailed in all 51 cases in which the absolute value of  $\beta$  is greater than 2.5, which means that the left wing always prevailed in 5–2 and 4–3 cases in which voting conforms to the dominant pattern.

The combination of highly polarized voting and left-wing dominance is also captured by the average value of  $\beta$  across all cases during a period. If the left wing and right wing prevailed in approximately the same number of cases during a period, then the average value of  $\beta$  across all cases would be close to zero during the period. Indeed, the average value of  $\beta$  across all cases generally is close to zero for periods prior to 1948.<sup>26</sup> But the average value of  $\beta$  across all cases is -1.41 from 1959 to 1970. And the average value of  $\beta$

26. The average value of  $\beta$  across all cases is positive 0.61 from 1949 to 1959 because of a large number of solo dissents by Carter.

across all cases indicates that the left wing remained similarly dominant during Wright's tenure as chief justice (-0.74 from 1970 to 1977) and Bird's tenure as chief justice (-0.67 from 1977 to 1987), though not to the same degree as from 1959 to 1970.

California law from 1959 on resembles a pendulum arc. California law swung to the left until 1987, and (like a pendulum) as California law swung further to the left, the rate of change slowed. This is reflected in an increase in the number of 4-3 and 5-2 cases in which voting conforms to the dominant pattern and the conservative wing of the court prevails. These cases often feature justices at the court's center joining with justices on the court's right to reject a liberal position on constitutional, criminal, or tort law that in retrospect is far outside the mainstream of American law.

The pendulum of California law abruptly reversed in January 1987 after three liberal justices (Bird, Grodin, and Reynoso) lost in a bitter retention election and were replaced by three conservative justices (Arguelles, Eagleson, and Kaufman), who were appointed by Republican Governor Deukmejian.<sup>27</sup> They joined conservative justices Lucas and Panelli to give the conservatives a solid 5-2 majority. The dramatic change in the court's political composition is captured by the two diagrams below, which show the posterior ranks of the justices from 1977 to 1987 and 1987 to 1996. Again the conservatives and Republicans are on the right and the liberals and Democrats are on the left.

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27. The specific break date is January 3, 1987, because January 2 is the date of the last opinions in which the three justices who were not retained participated.

FIGURE 6. Ranks (1977-1987)

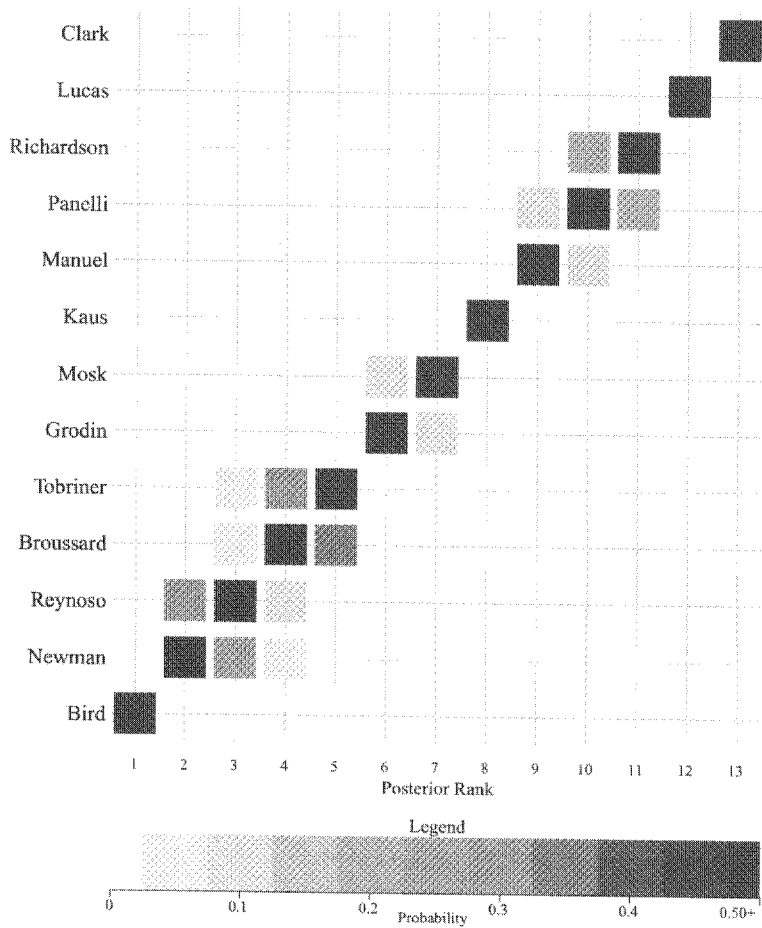
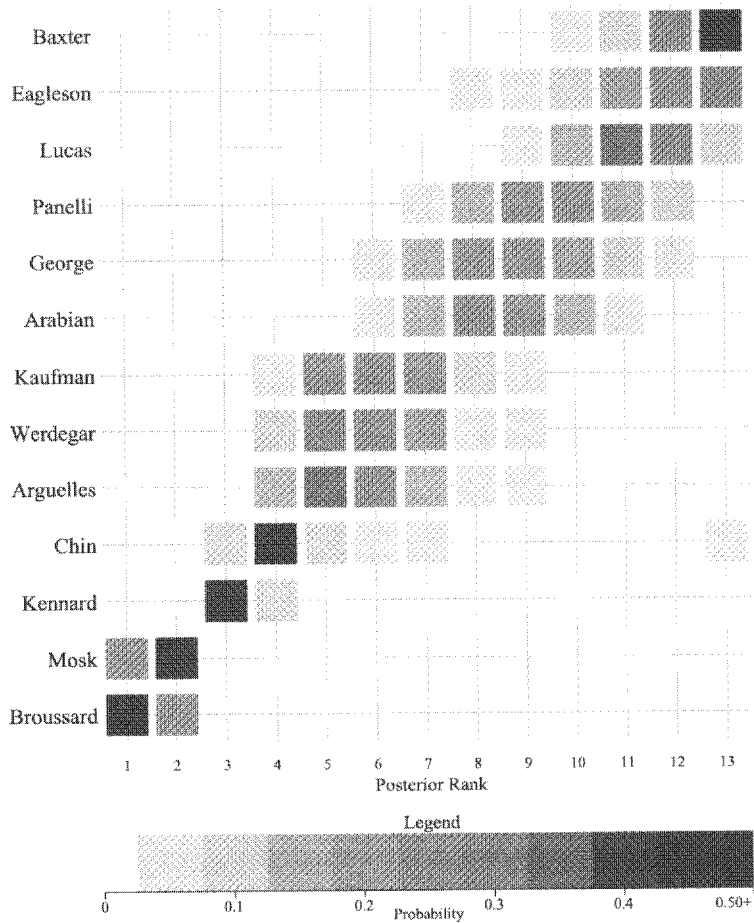


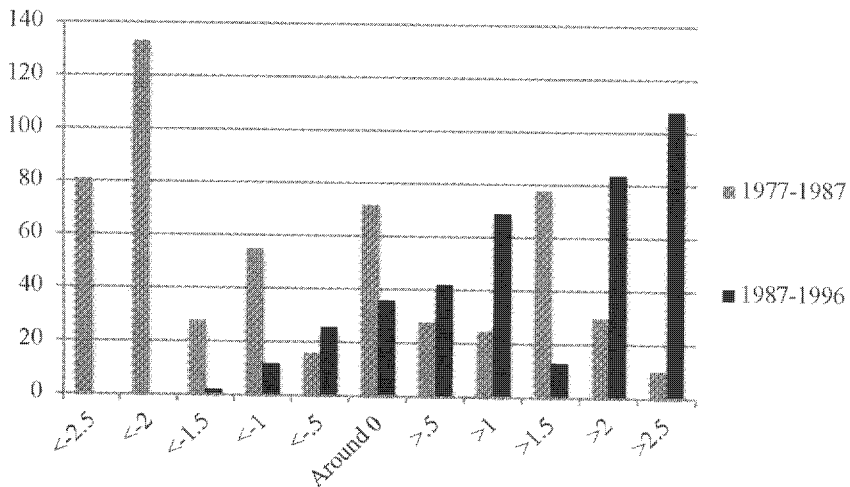
FIGURE 7. Ranks (1987–1996)



Before 1987, the court’s left-liberal-Democratic wing generally prevailed in cases in which voting conformed to the dominant pattern. After 1987, the court’s right-conservative-Republican wing almost always prevailed in cases in which voting conformed to the dominant pattern. The diagram below compares the distribution in the value of  $\beta$  from 1977 to 1987 and 1987 to 1996. From 1977 to 1987 the left wing prevailed in 214 of 254 cases in which the absolute value of  $\beta$  is greater than 2. From 1987 to 1996 the right wing prevailed in all 192 cases in which the absolute of  $\beta$  is greater than 2. The average value of  $\beta$  for the two periods succinctly captures this

shift. This value is -0.67 from 1977 to 1987 and 1.46 from 1987 to 1996.

FIGURE 8. Average Value of  $\beta$  1977–87 and 1987–96



The Lucas court (1987–1996) is often described as a moderate conservative court. The voting data calls this description into question. The conservative wing of the court was as dominant from 1987 to 1996 as the liberal wing was dominant from 1959 to 1970. This is because the five conservative justices rarely broke ranks to join the liberals, Mosk and Broussard, and the centrist Kennard, to form a majority in a non-unanimous case. The Lucas court's reputation as a moderate conservative court is attributable to voting patterns in a handful of high visibility constitutional law cases. The voting pattern in criminal law cases and tort cases was not moderate. Voting in these types of cases generally conforms to the dominant pattern, and the right wing always prevails in cases in which voting conforms to the dominant pattern. On the other hand, the voting data supports the description of the George court (1996 to 2011) as a moderate conservative court. During that period, while voting in criminal law and tort cases generally conformed to the dominant pattern the left wing occasionally prevailed in these cases.

We suspect that observers describe the Lucas court as moderately conservative because they perceive its positions to generally fall somewhat right of center on the observer's subjective range of legally possible results. The observer's view on the range of what is legally possible is the implicit benchmark. The model provides another way to approach the question of

whether a court should be described as extreme, moderate, or centrist. This is because the model tells us how often a wing of a court prevails in decisions in which voting conforms to the dominant pattern. This approach defines the range of what is legally possible not from the observer's subjective perspective but as the range of positions judges on a court are willing to take. This approach would not work if a court were composed of judges who all had the same political views. But the California Supreme Court has always had judges with widely divergent political views, and at least since 1939 its members have not been reluctant to express dissenting views.

### III. 1911–1939: THE EARLY YEARS

The three decades from 1910 to 1940 have been described as an “Age of Reform” with respect to politics and governance in California generally.<sup>28</sup> Major progressive reforms included creating a workers’ compensation system, increasing railroads and public utilities regulation, increasing health and safety regulation, water law reform, criminal justice system reform, and increasing municipal land use regulation. The period also saw a great deal of political and social turmoil involving working class rights and alien oppression. Many of these developments led to California Supreme Court litigation.

Some progressive reforms during this period involved reforms to the court’s institutional structure. From the court’s establishment in 1849 to 1934, justices were elected to their seats, though then (as now) a justice often began service by being appointed to an open seat.<sup>29</sup> The large number of justices who served by appointment became a point of controversy in the 1920s. Before 1911, the political parties controlled nominations for election to the court. Reforms backed by the Progressive Party instituted a direct

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28. Lucy E. Salyer, *The California Supreme Court in an Age of Reform, 1910–1940*, in CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER, *supra* note 2, at 141.

29. California changed to nonpartisan ballots for judicial elections in 1911, and since 1934 all state appellate justices have been appointed by the governor to fill the unexpired remainder of a departing justice’s term; the new justice then stands for retention election. CAL. CONST. art. VI, § 16; David A. Carrillo, *The California Judiciary*, in GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE 299, 322–23 (Ethan Rarick ed., 3d ed. 2013); John H. Culver, *The Transformation of the California Supreme Court: 1977–1997*, 61 ALB. L. REV. 1461, 1464 n.18 (1998). Under the present system, the timing of when a justice stands for election is a bit complicated. When a justice is appointed to the court, he or she stands for retention election at the next gubernatorial election. The term of service on the court is 12 years, but when a justice fills a seat in mid-term, he or she must stand for election at the end of the unexpired term of the retiring justice. Thus, a justice who is appointed to the court may stand for election twice in the first 12 years he or she is on the court—once at the first gubernatorial election after he or she is appointed and again at the end of the unexpired term of the retiring justice. Gerald F. Uelmen, *Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333, 336–37 (1988) (describing the history behind this system).

primary to eliminate party control over nominations.<sup>30</sup> Later, unhappiness within the bar over the spectacle of two sitting justices competing for the position of chief justice in the 1928 election, and two other sitting justices being beaten by challengers, led to this system being changed in 1934.

The court had an enormous caseload throughout the period, with a multi-year backlog of pending undecided cases. It also used a department system, with the court divided into two permanent departments of three associate justices that had authority to decide a case unless at least four justices voted to decide a case en banc.<sup>31</sup> The chief justice chose the department to which a case was assigned. At the beginning of the period we study, over half of the court's cases were decided solely by a department. These percentages gradually shifted over the period so that by 1939 almost all cases were decided en banc. We counted only en banc decisions that were merits based. The number of these decisions rises gradually from 1911 to 1939, as does the percentage of non-unanimous cases.

The diagram below shows the posterior ranks of the nine justices who served on the court from 1910 to 1915. This is based on 29 non-unanimous cases.

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30. Salyer, *supra* note 28, at 192.

31. Gordon Morris Bakken, *The Court and the New Constitution in an Era of Rising Industrialism, 1880-1910*, in CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER, *supra* note 2, at 65, 73. For the demise of the department system, see Charles J. McClain, *The Gibson Era, 1940-1964*, in CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER, *supra* note 2, at 245, 309 n.21.



FIGURE 9. Ranks (1910–1915)



The justices’ posterior ranks from 1910 to 1915 do not align with what we know of their political views.<sup>32</sup> The Republican Party dominated state politics throughout this period, but the party was split between progressives and conservatives. This split was formalized in 1912 when the Progressive Party was formed. Every justice who served on the court during this period

32. Sullivan voted in a handful of non-unanimous cases and never dissented. He was a progressive. JOHNSON, *supra* note 4, at 33–34. Most of the justices who served during this period obtained their seats by direct election. Lorigan was appointed by Governor Henry Gage and Sloss was appointed by Governor George Pardee. Both were Republican governors. Sullivan was appointed by the Progressive Governor Hiram Johnson.

was Republican. Contemporaries and historians use the terms progressive and conservative when describing a justice's political views. During this period the posterior ranks do not correlate closely with the justices' political reputations. For example, Shaw is identified as a progressive—yet he is on the court's right wing to the right of Henshaw, Lorigan, and Melvin, all of whom are identified as conservatives.<sup>33</sup> Beatty, who was chief justice, is on the far left wing, and his reputation is as being apolitical.<sup>34</sup>

The fact that the justices' posterior ranks do not align with what we know of their political views is one basis for our conclusion that the dominant dimension of disagreement among the justices during this period was not political. In addition, there is no discernible political dimension in six of the eight cases in which the absolute value of  $\beta$  is greater than 2.<sup>35</sup> Most of these cases involved procedural issues or interpretation, with the court's right wing favoring a more flexible approach to applying procedural rules or to interpreting texts and the left wing favoring a stricter and less flexible approach.<sup>36</sup>

The justices split on political lines (conservatives versus progressives) in three of the 29 non-unanimous cases. At least one of these three cases had an obvious political dimension.<sup>37</sup> *Pacific Telephone and Telegraph Co. v.*

33. Salyer, *supra* note 28, at 147–48. Sullivan served for six months from August 1914 to January 1915, replacing Beatty as chief justice. He voted in none of the 29 cases. For Shaw's party affiliation, see Oscar T. Shuck, *Federal and State Judiciary—Past and Present*, in *HISTORY OF THE BENCH AND BAR OF CALIFORNIA* 653, 743 (Oscar T. Shuck ed., 1901).

34. Gordon Bakken describes Beatty's reputation as follows: "His disagreements were procedural rather than partisan; principally, Beatty maintained that precedents should not be allowed to stand when they were manifestly unjust under present circumstances. Further, in focusing upon substantive issues and the weight of legal reasoning, he refused to allow partisan consensus building." Bakken, *supra* note 31, at 97. Beatty was a Republican. See Shuck, *supra* note 33, at 658–59.

35. The one clear exception is *Pacific Telephone & Telegraph Co. v. Eshleman*, 137 P. 1119 (Cal. 1913). The voting conforms to the dominant pattern ( $\beta=2.03$ ) because we coded the case as a 5–1 decision, with Sullivan and Sloss concurring with the conservatives and Angelotti dissenting. *Id.* at 1138 (Sloss, J., concurring); *id.* at 1143 (Angelotti, J., dissenting). The other possible exception is *In re Shay*, 117 P. 442, 445–46 (Cal. 1911) ( $\beta=2.25$ ), which held the court had the power to hold a lawyer for the Southern Pacific Railroad in contempt for writing a letter defaming the court. Angelotti and Beatty dissented, arguing the court did not have this power because the letter did not impair the court's operation. *Id.* at 446 (Angelotti, J., dissenting).

36. The right wing prevailed in the four high  $\beta$  cases in which there was a 4–3 or 5–2 split. See *Rocca v. Boyle*, 135 P. 34, 35 (Cal. 1913) ( $\beta=2.77$ ) (holding San Francisco charter empowers an official to hire and agree to pay a special detective without approval of Board of Supervisors); *Wright v. Beeson*, 112 P. 1091, 1091–92 (Cal. 1911) ( $\beta=2.8$ ) (holding contract for sale of securities was severable, so it could be altered in part without a writing by performance); *Barendt v. McCarthy*, 118 P. 228, 228 (Cal. 1911) ( $\beta=2.96$ ) (holding members of San Francisco Board of Health who were forcibly ousted by mayor could challenge the action legally by seeking an injunction to restore their offices and telling them to seek relief through a pro quaranto writ); *Hall v. Bartlett*, 112 P. 176, 178–79 (Cal. 1910) ( $\beta=2.96$ ) (holding sheriff's deed given in a foreclosure sale is valid notwithstanding its ambiguity while the dissent argues context requires definiteness).

37. In *Huntley v. Board of Trustees*, 131 P. 859, 862 (Cal. 1913) ( $\beta=-0.06$ ), Beatty joined the

*Eshleman* involved a constitutional challenge to progressive legislation that increased the Railroad Commission's power to regulate public utilities and limited the California Supreme Court's power to review the commission's factual findings.<sup>38</sup> The conservatives prevailed in a decision that "reasserted judicial control over the Railroad Commission" by finding the challenged order to be an unconstitutional taking.<sup>39</sup> Beatty did not participate in the case. Two progressives, Shaw and Sloss, concurred with the result and with the holding that the order was an unconstitutional taking while taking a position on a jurisdictional issue that would have circumscribed judicial control over the commission. Angelotti dissented, agreeing with his fellow progressives on the jurisdictional issue and disagreeing that the order was an unconstitutional taking.

The results for the next period, 1915–1921, are atypical for the years before 1949 because it shows the most strongly patterned voting of all the pre-1949 periods, and the posterior ranks align with what we know about the justices' political views. The diagram below shows the justices' posterior ranks for 1915–1921, based on 79 non-unanimous cases. The ambiguity of Shurtleff's posterior rank is attributable to the fact that he voted in no non-unanimous cases.

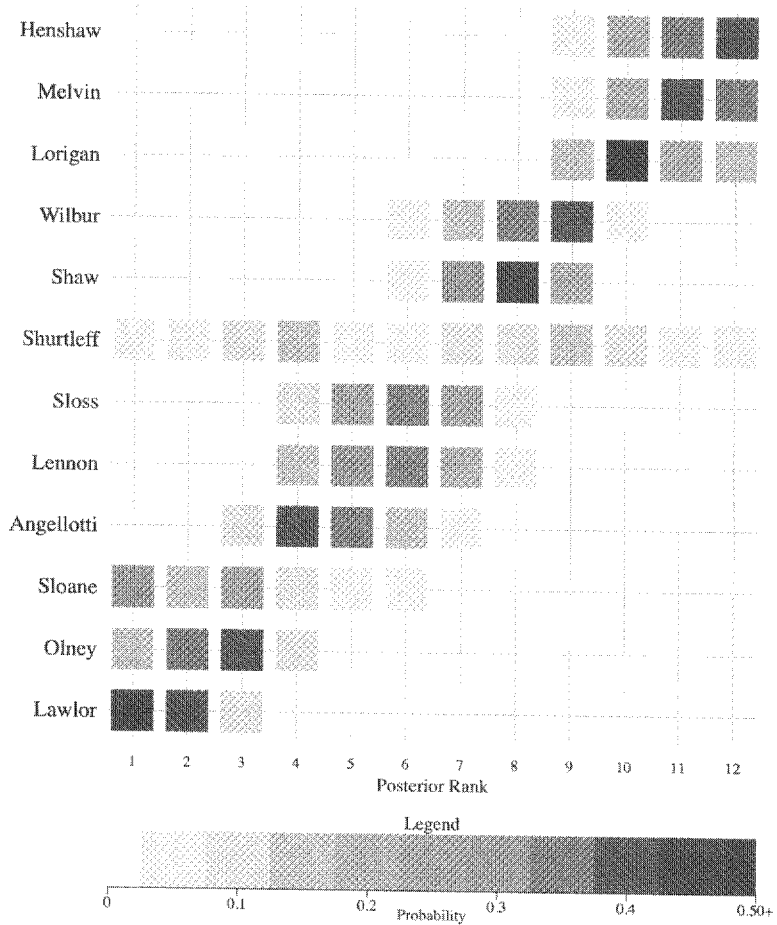
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conservatives to invalidate a city tax assessment on grounds of inadequate notice. In *People v. Loper*, 112 P. 720, 726 (Cal. 1910) ( $\beta=-0.06$ ), the conservatives and the progressives disagreed over whether a defendant's confession to a murder was procured through duress and intimidation when the defendant made the confession several days after he was threatened. The conservatives sided with the defendant.

38. Pac. Tel. & Tel. Co., 137 P. at 1120–21 ( $\beta=2.03$ ).

39. Salyer, *supra* note 28, at 150–54.

FIGURE 10. Ranks (1915–1921)



Unlike earlier and later periods in this era, the voting patterns generally conform to the justices' political reputations. The conservatives Henshaw, Melvin, and Lorigan are clustered on the right wing while the progressives Angellotti, Sloss, and Shaw are clearly to their left. Wilbur (on the right) was a Republican appointed by Herbert Hoover to the United States Court of Appeals. Lawlor (on the far left) was an orphan of Irish immigrant parents, had a working class background, and was a Democrat who worked for William Jennings Bryan.<sup>40</sup> Lennon (on the left) ran against Waste for the

40. JOHNSON, *supra* note 4, at 36–37.

position of chief justice in 1926, holding himself out as a justice who would serve the people and not the governor and business interests.<sup>41</sup> Yet other justices are oddly positioned in the posterior ranks during this period, given what we know of their political views. For example, Olney's position alongside Lawlor on the far left is odd. Olney, a Republican, is described as having "powerful connections" and served as general counsel for the Western Pacific Railroad for many years and represented major corporate clients.<sup>42</sup>

The non-unanimous cases include 16 workers' compensation cases. Voting in these cases aligned both with the dominant pattern and with the position taken being what one would predict if the justices' political views influenced their voting.<sup>43</sup> *Western Indemnity Co. v. Pillsbury*<sup>44</sup> gives a sense of the nature of the underlying disagreements. This was a challenge to the constitutionality of the new workers' compensation law.<sup>45</sup> Sloss, Angelotti, and Lawlor voted to uphold the law without reservation. Shaw, Lorigan, and Melvin concurred, but argued that the law was constitutional only because it established a voluntary insurance scheme and was not compulsory. Henshaw dissented, arguing the law was outside the police power even though it was voluntary.

The New York study found similar disagreements during roughly the same period. Judges with a progressive reputation supported the new workers' compensation system that shifted the cost of industrial accidents to employers through no-fault liability. Judges with a conservative reputation opposed the imposition of liability without fault. In both New York and California, the model finds that after the constitutionality of the workers' compensation law was established, whenever either court confronted problems in implementing the law, the judges generally voted to resolve these issues consistent with their underlying positions on the legitimacy of a no-fault liability system. For example, cases often arose that involved the issue whether an injury is sufficiently connected to work to be covered. This basically is a line-drawing problem. Progressives who supported workers' compensation took an expansive view on what constitutes a work-related accident while conservatives who opposed workers' compensation took a

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41. *Id.* at 47.

42. Salyer, *supra* note 28, at 232 n.142.

43. The absolute value of  $\beta$  exceeds 2.0 in nine cases and is between 1.5 and 2.0 in another four. The sign of  $\beta$  predicts the result in all 13 of the cases, with the result being favorable to the employee when  $\beta$  is negative and favorable to the employer when  $\beta$  is positive. The sign of  $\beta$  also predicts the outcome in four negligence cases. In three of these cases voting patterns closely conform to the dominant pattern.

44. *W. Indem. Co. v. Pillsbury*, 151 P. 398, 406 (Cal. 1915) ( $\beta=-0.98$ ).

45. Salyer, *supra* note 28, at 163-64.

narrow view.<sup>46</sup>

There may be a political dimension in a few other cases in which voting conformed to the dominant pattern, and as with the workers' compensation cases the results are what one would predict if the justices' political views influenced their voting.<sup>47</sup> But we will not belabor this point. There is no evident political dimension in many of the cases in which  $\beta$  has a high absolute value. And in some cases, the justices took surprising positions in light of their political views, at least from our perspective. For example, *People v. Griesheimer*<sup>48</sup> involved a challenge to whether an indictment satisfied the particularity requirement when it omitted an element of the alleged crime.<sup>49</sup> The progressives voted to affirm the conviction while the "strongest defenders of due process in criminal procedure came from the 'conservative' wing—Justices Lorigan, Melvin, and Henshaw."<sup>50</sup> We saw something similar in New York during this period: in the early 1900s, judges with conservative reputations tended to be sticklers for enforcing individual rights in criminal law cases.

That we find some patterned voting on political lines in this one period does not shake our conclusion that voting on the California Supreme Court was not usually on political lines before 1949. During periods in which voting is not usually on political lines, there are some cases in which voting is on political lines. The results from 1915 to 1921 may be attributable to the 16 non-unanimous workers' compensation cases—20% of the total pool of non-unanimous cases—in which voting is on political lines. This block of cases could drive the result given the relatively small number of non-

46. *E.g.*, *Kimbol v. Indus. Accident Comm'n*, 160 P. 150, 152 (Cal. 1916) ( $\beta=-2.68$ ) (holding workplace injury causally unrelated to workplace related risks is covered); *Great W. Power Co. v. Pillsbury*, 149 P. 35, 40 (Cal. 1915) ( $\beta=2.14$ ) (holding worker's failure to use protective gloves was willful misconduct, precluding recovery). The court also divided along the dominant pattern in cases that raised other types of line drawing problems. *Moore Shipbuilding Corp. v. Industrial Accident Commission*, 196 P. 257, 260 (Cal. 1921) ( $\beta=-2.80$ ), involved the question whether a dependent child of a workman killed in an accident could recover where the decedent lived with the child's mother. *Southern Pacific Co. v. Industrial Accident Commission*, 161 P. 1139, 1139 (Cal. 1916) ( $\beta=2.25$ ), involved the question whether a railroad flagman was involved in interstate commerce that divested the Commission of jurisdiction. The companion cases *Carstens v. Pillsbury*, 158 P. 218 (Cal. 1916) ( $\beta=2.26$ ) and *Sturdivant v. Pillsbury*, 158 P. 222 (Cal. 1916) ( $\beta=2.25$ ), involved the question whether the Commission could resolve a claim against a defendant other than the plaintiff's employee.

47. In *Mulville v. City of San Diego*, 192 P. 702, 703–04 (Cal. 1920) ( $\beta=2.69$ ), a conservative majority held the city did not have the power to issue a bond to build a "pleasure-pier" that largely would be outside the city's boundaries. *Slayden v. O'Dea*, 189 P. 1066, 1069–70 (Cal. 1920) ( $\beta=2.62$ ), and *Griffin v. San Pedro, Los Angeles, & Salt Lake Railroad Co.*, 151 P. 282, 282 (Cal. 1915) ( $\beta=2.57$ ), are personal injury cases involving railroad crossing accidents, and in both cases, a conservative majority reversed a verdict for the plaintiff.

48. *People v. Griesheimer*, 167 P. 521, 527 (Cal. 1917) ( $\beta=-2.64$ ).

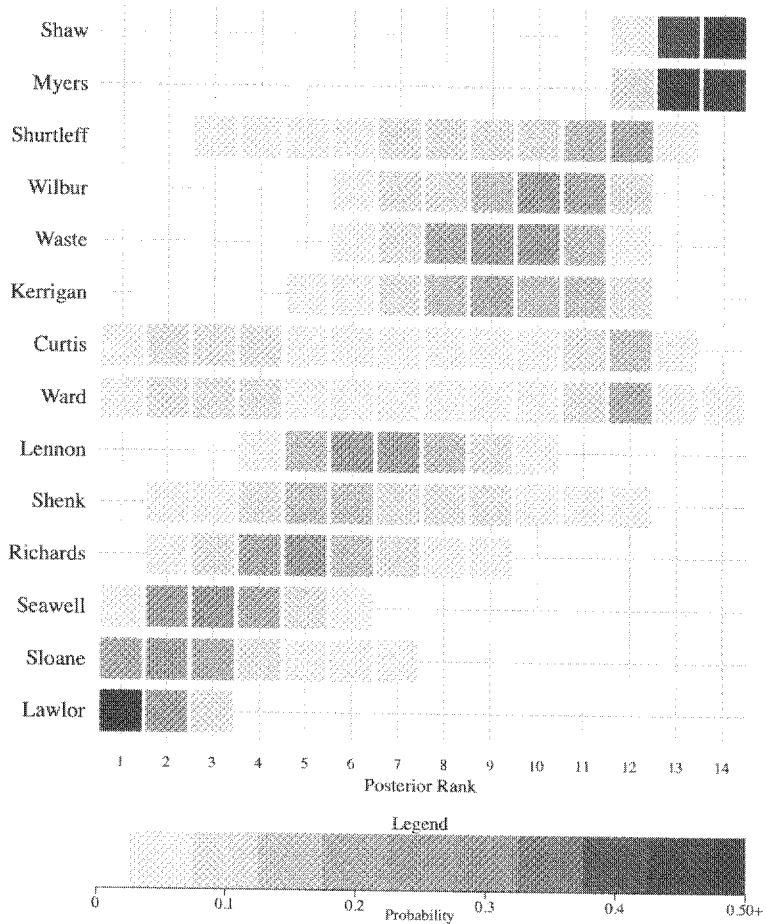
49. *Id.*

50. Salyer, *supra* note 28, at 171.

unanimous cases and the generally weakly patterned character of voting before 1939.

We find very weakly patterned voting from 1921 to 1926, as shown in the justices' posterior ranks diagram below, which is based on 43 non-unanimous cases. The uncertainty about some of the justices' posterior ranks is attributable to those justices voting in zero or very few non-unanimous cases: Ward voted in no non-unanimous cases, Curtis in one, and Shurtleff in six and always with the majority.

FIGURE 11. Ranks (1921–1926)



Between 1921 and 1926, the justices’ posterior ranks do not align with what we know of their political views. Myers, whose posterior rank is on the far right, is described as “a Los Angeles Progressive.”<sup>51</sup> Lennon and Waste is an odd couple to be at the court’s center. Running against Waste for the position of chief justice in 1926, Lennon accused Waste and other members of the court of being in the pocket of the Republican governor while he ran

51. Salyer, *supra* note 28, at 177. Myers was active in the Progressive Party and received his first judicial appointment from Progressive Governor Hiram Johnson. JOHNSON, *supra* note 4, at 88, 97. He endorsed Democrat Pat Brown for Attorney General in 1946. *Id.* at 89.



as “the people’s Chief Justice.”<sup>52</sup> In later years, Richards<sup>53</sup> and Seawell<sup>54</sup>—who are on the court’s left wing alongside Lawlor—took conservative positions in cases involving conflicts between property rights and the state’s regulatory power, and on labor and civil liberties issues.

There is a pattern from 1921 to 1926 of the left wing collectively favoring individual plaintiffs who were seeking compensation for losses from businesses. The high absolute  $\beta$  non-unanimous cases include four workers’ compensation cases and four negligence cases. The voting conformed to the dominant pattern in all eight cases with the left wing always favoring the claimant or the plaintiff and the right wing always favoring the defendant.<sup>55</sup> Voting also conformed to the dominant pattern in a 5–2 decision in which the right wing prevailed and, relying on the customary absence of a warranty, held that a seed merchant does not warrant that the seed is of the type ordered.<sup>56</sup> But recall that the court’s left wing during this period included Richards and Seawell, who took conservative positions on many issues. And Lawlor’s position on the extreme left can partly be attributed to some strikingly illiberal positions he took in solo dissents. He wrote a solo dissent in a case in which the majority held unconstitutional the application of the Alien Land Law to prohibit a Japanese American from purchasing land as legal guardian for his two-year-old daughter.<sup>57</sup> And he wrote solo dissents in four criminal cases that were decided in the criminal defendant’s favor.<sup>58</sup>

We also find weakly patterned voting in the next two periods, shown below, which cover Waste’s term as chief justice. The posterior ranks are based on 72 non-unanimous cases from 1926 to 1932<sup>59</sup> and 81 non-

52. Salyer, *supra* note 28, at 192–93.

53. He is described as a Republican. JOHNSON, *supra* note 4, at 97.

54. He is described as a Democrat. JOHNSON, *supra* note 4, at 82. When he ran for the position on the court in 1922 and 1934, it was as a nonpartisan. JOHNSON, *supra* note 4, at 82–84.

55. The most significant of the four workers compensation cases doctrinally is *Fidelity & Casualty Co. v. Industrial Accident Commission*, 216 P. 578, 580 (Cal. 1923) ( $\beta=2.52$ ), which involved the issue of whether a trucker working under an exclusive contract was an employee covered by the statute. This split the court 4–3 along the dominant pattern with the right wing favoring the employer. The absolute  $\beta$  values of the eight cases range from 1.51 to 2.52. The negligence cases include three railroad crossing accidents and a medical malpractice case.

56. *Miller v. Germain Seed & Plant Co.*, 222 P. 817, 822–23 (Cal. 1924) ( $\beta=2.55$ ) (Seawell, J., dissenting).

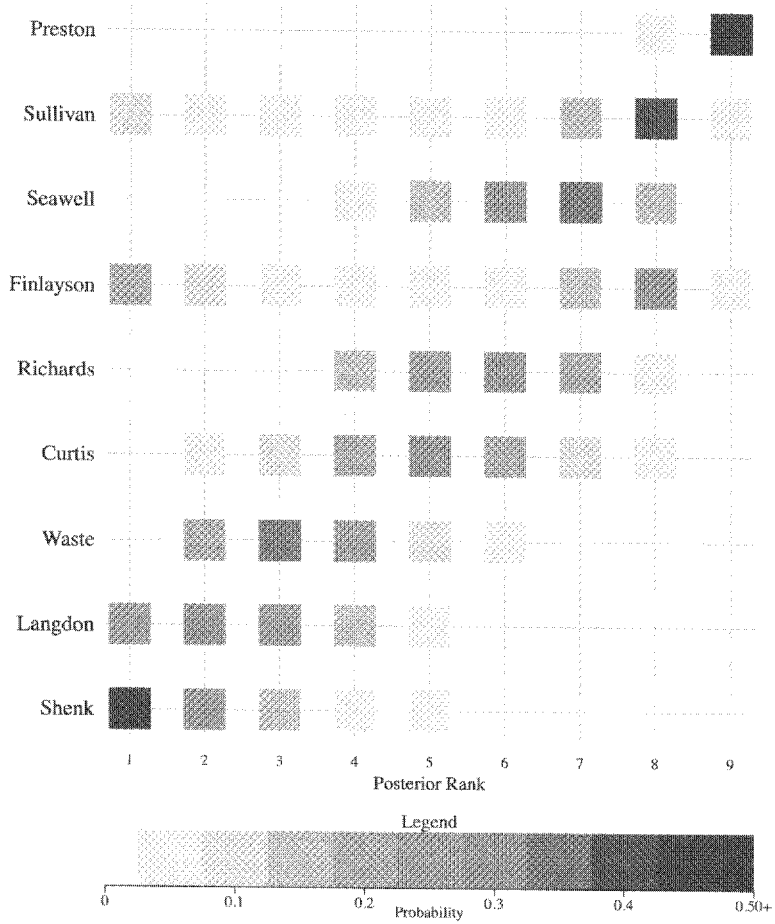
57. *In re Estate of Yano*, 206 P. 995, 1001–03 (Cal. 1922) ( $\beta=2.19$ ).

58. Two of these were death penalty cases. *Ex parte Watts*, 241 P. 886, 887–92 (Cal. 1925) ( $\beta=1.99$ ) (resolving procedural issue concerning availability of writ of habeas corpus); *People v. Roe*, 209 P. 560, 568–70 (Cal. 1922) ( $\beta=1.62$ ) (reversing conviction because of instruction on self defense was confusing and prejudicial).

59. Of those 72 cases, 44 were solo dissents by regular justices. In 16 cases, two regular justices dissented. In 12 cases, three regular justices dissented. Preston’s place on the wing may be due to his having an unusually large number of solo dissents (18 of 44). The next highest numbers of solo dissents were Shenk with eight and Langdon with seven. Seawell had none.

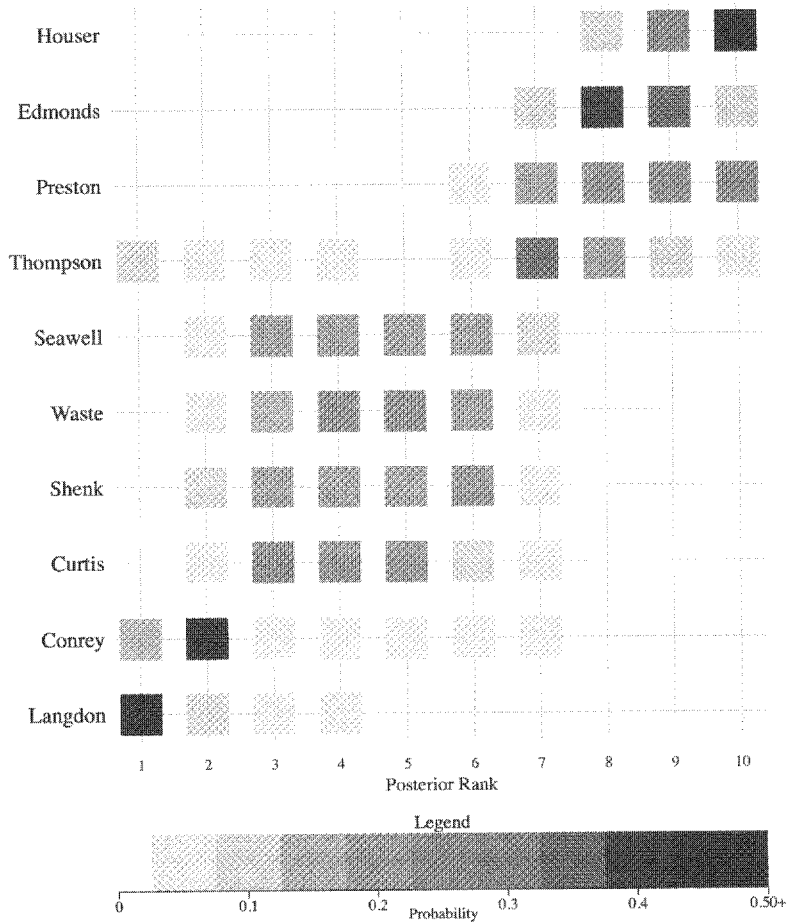
unanimous cases from 1932 to 1939.<sup>60</sup>

FIGURE 12. Ranks (1926–1932)



60. Of those 81 cases, 44 were solo dissents by regular justices. In 30 cases, two regular justices dissented. In seven cases, three regular justices dissented.

FIGURE 13. Ranks (1932–1939)



Putting the short-timers (Finlayson, Sullivan, and Conrey) to the side,<sup>61</sup> the uncertainty of the justices' posterior ranks cannot be explained by the absence of data on their voting behavior. The court's membership was fairly stable during both periods. Five justices (Curtis, Langdon, Seawell, Shenk, and Waste) served the entirety of both periods. The other five justices served all or a significant part of the periods in which they appear.<sup>62</sup> And there are

61. Finlayson voted in no non-unanimous cases. Sullivan voted in one. Conrey voted in five.

62. Richards served 1924–1932, Preston 1926–1935, Thompson 1932–1937, Edmonds 1936–1955, and Houser 1937–1942.

fairly large blocs of non-unanimous cases in both periods, including a substantial number of 4–3 and 5–2 decisions.<sup>63</sup> The uncertainty regarding Thompson's posterior rank from 1932 to 1939 is particularly striking. Even though he served almost the entire 1932 to 1939 period (and so he voted in a large number of non-unanimous cases, sometimes siding with the majority and sometimes siding with the dissent) the model cannot confidently predict which justices he would be likely to side with if there had been another non-unanimous case.

The justices' posterior ranks do not align with what we know of their political views from either 1926 to 1932 or 1932 to 1939. Judges with conservative reputations are scattered across the posterior ranks. Shenk, who is on the court's far left wing from 1926 to 1932 and is near the center from 1932 to 1939, has been described as “[a] man of conservative bent, thought hardly an ideologue, he was partial to business interests and somewhat hostile to government regulation.”<sup>64</sup> Preston, who is on the court's right wing in both periods, is described as “a conservative Democrat and former prosecutor.”<sup>65</sup> Thompson, who the model is unable to place, was accused of being a conservative ideologue and was appointed “over the protests of many Progressive Republicans and spokesmen of labor.”<sup>66</sup> The court's few progressives or liberals are also scattered across the posterior ranks. Alongside Shenk on the court's far left wing is Langdon, who was a progressive and was lauded as “The Brandeis of California's Supreme Court.”<sup>67</sup> And on the right wing is Edmonds, who has been described as a liberal on this court, though not “in the sense that the term would be applied to men like Carter or Traynor.”<sup>68</sup> Edmonds had a moderate reputation on the Gibson court, yet the model places him on the far right.

The 1926 election was a significant moment in the court's history. In that election, five members of the court (Richards, Shenk, Curtis, Finlayson, and Sullivan) held their seat by appointment by Republican Governor Friend

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63. There were 72 non-unanimous cases from 1926 to 1932, including 12 4–3 decisions and 15 5–2 decisions. There were 81 non-unanimous cases from 1933 to 1939, including seven 4–3 decisions and 30 5–2 decisions.

64. McClain, *supra* note 21, at 5.

65. Salyer, *supra* note 28, at 189. Preston was singled out for criticism by the left for his harsh questioning of Tom Mooney's lawyers when the court heard the appeal of Mooney's conviction for a bombing at a pro-war parade in 1916. This largely hagiographic collection of judicial biographies remarks that “[t]here were those who ascribed Preston's aversion to freeing Mooney and Billings to undue conservatism.” JOHNSON, *supra* note 4, at 126. For more on the Mooney case see Salyer, *supra* note 28, at 172–76.

66. JOHNSON, *supra* note 4, at 140.

67. *Id.* at 135.

68. *Id.* at 150.

Richardson.<sup>69</sup> The large number of appointed justices was one issue in the 1926 election. Lennon ran against Waste for the position of chief justice. He accused Waste (who was originally appointed to the court by Republican Governor William Stephens and later appointed as chief justice by Richardson) and the other appointed members of the court of being in the pocket of Governor Richardson and business interests. But Lennon died before the election, so Waste won by default. Two other challengers defeated incumbents who had been appointed by Governor Richardson: Preston defeated Finlayson and Langdon defeated Sullivan. Unhappiness in the legal establishment with the spectacle of the 1926 election led to a significant change in how justices stand for election. In 1934, a system was instituted (which continues to this day) in which sitting justices run unopposed in retention elections. If a sitting justice chooses not to run, the governor nominates a replacement. The 1934 reforms also created a three-person Commission on Judicial Appointments that approves the governor's nominees.<sup>70</sup> No justice lost in a retention election under this system until 1986.<sup>71</sup>

Despite its historical significance (rivaled only by the 1986 retention election) it does not appear that the 1926 election affected voting patterns. We see no discernible political dimension in cases in which voting conformed to the dominant pattern from 1926 to 1932. There were twelve 4–3 cases during this period. In five of these cases, the absolute value of  $\beta$  is greater than 1.5. None of the five cases have an evident political dimension.<sup>72</sup> On the other hand, it is possible to see a political dimension in a few of the 4–3 cases in which voting does not conform to the dominant pattern. Two of these cases squarely raised questions involving the balance between private property rights and the public interest in modernizing urban infrastructure,<sup>73</sup>

69. Three of the five—Curtis, Finlayson, and Sullivan—were Democrats.

70. Salyer, *supra* note 28, at 193.

71. Gerald F. Uelman, *California Judicial Retention Elections*, 28 SANTA CLARA L. REV. 333, 334 (1988).

72. *Winthrop v. Indus. Accident Comm'n*, 2 P.2d 142, 143 (Cal. 1931) ( $\beta=2.60$ ) (worker's compensation case in which a right-wing majority votes for the employee with the court dividing on the sufficiency of evidence on causation); *Haight v. Marin Mun. Water Dist.*, 284 P. 926, 927–28 (Cal. 1930) ( $\beta=2.53$ ) (business fraud case in which the court divided on the sufficiency of the evidence on bad faith and damages, a right-wing majority held there was sufficient evidence); *Lane v. Pellissier*, 283 P. 810, 811 (Cal. 1929) ( $\beta=1.80$ ) (dispute on the effect of a clerical error in entering a judgment of a trial court on the timeliness of an appeal); *City and County of San Francisco v. Tillman Estate Co.*, 272 P. 585, 586–87 (Cal. 1928) ( $\beta=2.19$ ) (eminent domain case in which the court divided on whether the trial court's error in the order in which the parties presented evidence of value required reversal, a left-wing majority held it did not); *Hulsman v. Ireland*, 270 P. 948, 949–52 (Cal. 1928) ( $\beta=2.59$ ) (partnership case in which the court divided on the sufficiency of evidence that spouses were partners, right-wing majority held there was sufficient evidence to overrule the lower court).

73. *S.H. Chase Lumber Co. v. Railroad Commission*, 300 P. 12, 18 (Cal. 1931) ( $\beta=0.55$ ), involved the question of the power of the Railroad Commission to take land to construct separated grade railroad

while a third case involved a conflict between property owners over a restrictive covenant that prevented profitable development of urban land.<sup>74</sup> In these cases Curtis and Richards came down strongly in favor of property rights (calling them “sacred”) while Preston and Shenk strongly favored the public interest and development.<sup>75</sup> Langdon, Seawell, and Waste were “centrists” on these issues. Yet Langdon and Preston are at opposite ends of the posterior ranks, and Seawell (the other justice who obtained his seat by direct election, defeating Shurtleff in 1922) is in the middle of the posterior ranks. Another 4–3 case in which voting does not conform to the dominant pattern involved whether state statutes should be interpreted liberally to enable a minor injured in a shop class in school to bring a negligence action.<sup>76</sup> Curtis, Langdon, Seawell, and Waste voted to allow the claim. Richards, Shenk, and Preston dissented.

We can see a political dimension in a large number of cases from 1932 to 1939, but we can see no pattern in the voting in these cases. Perhaps there is both a political dimension and patterned voting in three 5–2 cases in which Edmonds and Houser—who the model places on the court’s far right wing—

crossings and determine appropriate compensation to affected landowners. The court held the Commission had the power, but that compensation must be judicially determined. Richards’ opinion for the majority sharply criticizes the dissent’s argument that “[p]rivate property rights are no more sacred than the governmental rights of the state or a county or municipality therein. It is in fact not interference with private property as such but is an effectual carrying out of the regulatory power lodged in the [C]ommission. In order to give the police power full and effective operation, private rights are supplanted so far as involved in the execution of such power.” *Id.* at 21. Langdon and Curtis joined in Richards’ majority opinion. *Id.* at 18. Seawell concurred, suggesting that the law might be less protective with respect to the “taking of corporate property, where the habitation of the citizen is not involved.” *Id.* at 18. (Seawell, J., concurring).

*Irish v. Hahn*, 281 P. 385, 389 (Cal. 1929) ( $\beta=0.231$ ), was a statutory and constitutional challenge to special charges imposed by Pasadena on local businesses to fund improvements of the electric distribution system. The court upheld the charge. Curtis, Richards, and Seawell dissented, arguing the charge violated the Equal Protection Clause and was a taking without just compensation. *Id.* (Curtis, J., dissenting).

74. *Downs v. Kroeger*, 254 P. 1101, 1103–05 (Cal. 1927) ( $\beta=0.544$ ), held that a court could exercise equitable discretion not to enforce a restrictive covenant preventing commercial development on land when much of the area had become commercialized. Richards, Curtis, and Waste dissented, arguing the reciprocal covenants were “sacred.” *Id.* at 1105. (Richards, J., dissenting).

75. Salyer describes *Herminghaus v. Southern California Edison Co.*, 252 P. 607 (Cal. 1926) ( $\beta=1.64$ ) as a “landmark decision” upholding riparian rights and rejecting policy arguments for a system for allocating water entitlements that would have discouraged shockingly inefficient uses of water. Salyer, *supra* note 28, at 200. It was a 6–1 decision with Shenk in dissent. The result was changed by a constitutional amendment in which Shenk took a leading role. See Salyer, *supra* note 28, at 200–02. In *Peabody v. City of Vallejo*, 40 P.2d 486, 498–99 (Cal. 1935), a unanimous court gave effect to the amendment to hold that the plaintiff’s riparian rights did not entitle him to use water unreasonably to saturate his land when the water was needed by Vallejo. See Salyer, *supra* note 28, at 203. In *Chow v. City of Santa Barbara*, 22 P.2d 5, 18–19 (Cal. 1933) ( $\beta=-2.02$ ), the court rejected a takings claim involving riparian rights in a 6–1 decision. Preston dissented. *Id.* at 6. Salyer concludes, “On the whole, the water cases of the 1930s were a vindication for many of the principles of water regulation advocated since the Progressive Era.” Salyer, *supra* note 28, at 204.

76. *Ahern v. Livermore Union High Sch. Dist.*, 284 P. 1105, 1106–07 (Cal. 1930) ( $\beta=-0.889$ ).

dissent from decisions that reject constitutional challenges to taxes and fees.<sup>77</sup> There is a strong political dimension in two 5–2 cases involving constitutional challenges to business regulation, one upholding the Fair Trade Act<sup>78</sup> and the other invalidating a city ordinance imposing a license fee on laundries located outside the city.<sup>79</sup> But there is no pattern in the voting in the two cases. In the first case, Thompson and Shenk dissented; the model places them slightly left and right of center, respectively. In the second case, Langdon and Seawell dissented; the model places them at the far left and slightly right of center, respectively. A 4–3 case held that alienage could be presumed when the defendant was of Japanese ancestry (he had an English surname).<sup>80</sup> The model places the three-justice majority coalition (Langdon, Seawell, and Waste) at the court's far left and center along with a pro tem justice. The dissenters were slightly left or slightly right of center (Curtis, Shenk, and Preston), according to the model. In another case the court, in a 4–3 decision, reversed a murder conviction and invalidated a statutory presumption that carrying a weapon without a license was presumptive evidence of homicidal intent. The majority coalition included two justices on the far left wing (Langdon and Curtis), a justice on the right wing (Thompson), and a pro tem justice.<sup>81</sup> There is no discernable voting pattern in these cases.

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77. In *In re Sidebotham*, 85 P.2d 453, 455 (Cal. 1938) (Edmonds, J., dissenting) ( $\beta=-2.899$ ), the disagreement was over whether the "the legislature may constitutionally require the owner of real estate who desires to sell it in five or more parcels to notify the real estate commissioner of his intention so to do and to pay \$50 or more for 'an examination of the project.'" *De Aryan v. Akers*, 87 P.2d 695, 696 (Cal. 1939) ( $\beta=-2.882$ ), involved a constitutional challenge to application of a sales tax to a contract made before the tax was enacted. In *People v. Mahoney*, 91 P.2d 1029, 1034 (Cal. 1939) ( $\beta=-2.768$ ) (Edmonds, J., concurring), Edmonds and Houser argued that a rule that gave conclusive effect to a factual finding of the Board of Equalization in a tax dispute was "contrary to all fundamental principles."

78. *Max Factor & Co. v. Kunsman*, 55 P.2d 177, 178 (Cal. 1936) ( $\beta=-1.534$ ). Waste's majority opinion begins with the ringing proposition "this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the Legislature." *Id.* at 181. Thompson answered with the equally ringing proposition in dissent: "The question, then, in this case, may be phrased as follows: Has the Legislature exceeded its powers as limited by some inhibition of the Constitution in which the people have defined for themselves an economic policy and in which they have set up a safeguard against the infringement by the Legislature of some natural right with which they are endowed?" *Id.* at 188 (Thompson, J., dissenting). For more on the case see Salyer, *supra* note 28, at 276–78.

79. *Bueneman v. City of Santa Barbara*, 65 P.2d 884, 890 (Cal. 1937) ( $\beta=1.567$ ).

80. *People v. Morrison*, 22 P.2d 718, 721 (Cal. 1933) ( $\beta=-1.509$ ).

81. *People v. Murguia*, 57 P.2d 115, 116–17 (Cal. 1936) ( $\beta=-0.786$ ). More generally, the absolute value of  $\beta$  is low in criminal law cases involving procedural challenges to convictions.

## IV. 1939–1959: THE TRANSITIONAL YEARS

This period covers most of Gibson's term as chief justice. It has been described as "an extraordinarily eventful one for the California Supreme Court . . . [which] in a series of decisions, some of which might be truly called pathbreaking, transformed major sectors of the state's public and private law," making the court "perhaps the most highly regarded state appellate court in the nation."<sup>82</sup> The court revolutionized tort law and made major reforms in criminal law. The court also wrestled with racially discriminatory laws, and laws targeting groups and causes perceived as subversive. These civil rights and civil liberties cases produced a large number of non-unanimous decisions that always divided the court in a pattern that aligns with the justices' political reputations. What changed during the second half of this period was that there were more non-unanimous votes in other types of cases (particularly in criminal law and tort cases) in a pattern that aligns with justices' political reputations.<sup>83</sup> Because such cases constitute a large share of the court's docket, the justices' posterior ranks correspond much more closely to their political reputations from 1949 to 1959 than they did from 1939 to 1948.

The two diagrams below illustrate that transition. The most significant changes in posterior ranks are in the positions of Gibson and Traynor (who have liberal reputations) in relationship to the positions of Shenk and Spence (who have conservative reputations). From 1939 to 1948, Gibson and Traynor are on the court's right wing between Shenk and Spence.<sup>84</sup> From 1949 to 1959, Gibson and Traynor are solidly to the left of Shenk and Spence. The posterior ranks from 1949 to 1959 do not precisely conform to the justices' political reputations; this is why we describe the 1950s as a period of transition. Schauer has a moderate reputation and is at the court's left. Shenk has a conservative reputation and is to the left of Edmonds, who had a moderate reputation. In later decades, the justices' posterior ranks always closely align with their political reputations.

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82. McClain, *supra* note 21, at 3–4.

83. It is important to remember that many of the court's most influential opinions are unanimous during this period. This is particularly true in the area of tort law. *E.g.*, *Biakanja v. Irving*, 320 P.2d 16, 18–19 (Cal. 1958) (adopting flexible criterion for duty analysis); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 287 (Cal. 1952) (establishing an action for intentional infliction of emotional distress); *Malloy v. Fong*, 232 P.2d 241, 246–47 (Cal. 1951) (eliminating the doctrine of charitable immunity); *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948) (adopting the doctrine of alternative liability); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 439–40 (Cal. 1944) (applying the *res ipsa* doctrine to impose something close to strict liability when bottlers reused bottles); *Ybarra v. Spangard*, 154 P.2d 687, 691 (Cal. 1944) (applying the *res ipsa* doctrine to multiple defendants).

84. The uncertainty with respect to the position of Houser and Waste is because they served for a very short part of the period, and so voted in very few non-unanimous cases. Waste voted in only 11 of the non-unanimous cases. Houser voted in 31 non-unanimous cases.



FIGURE 14. Ranks (1939–1948)

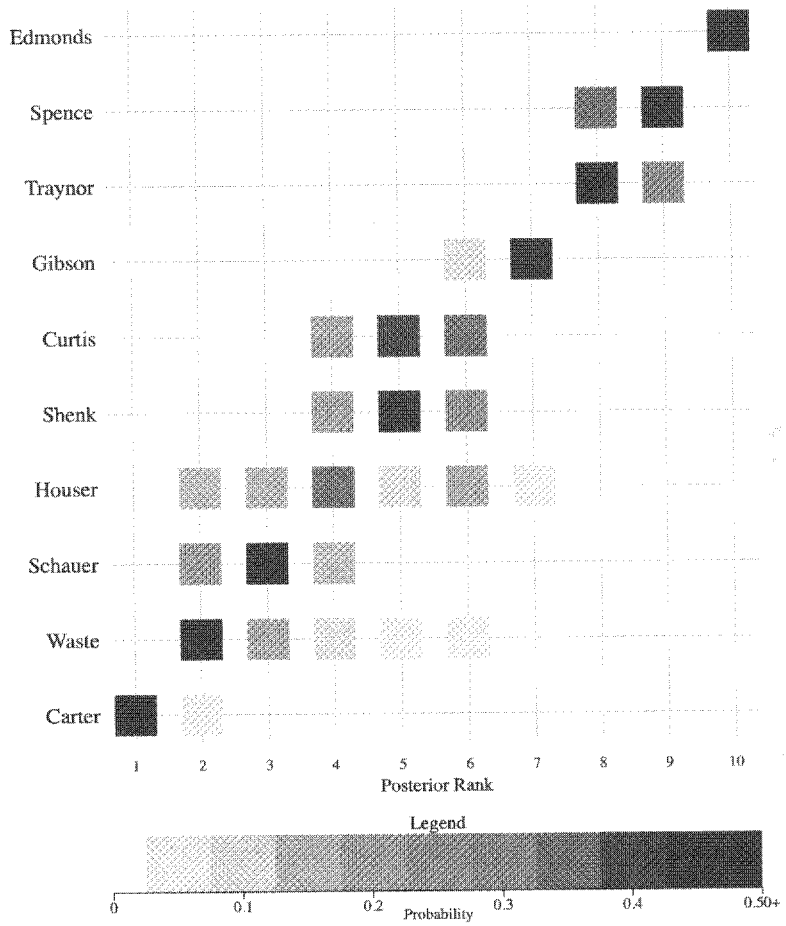
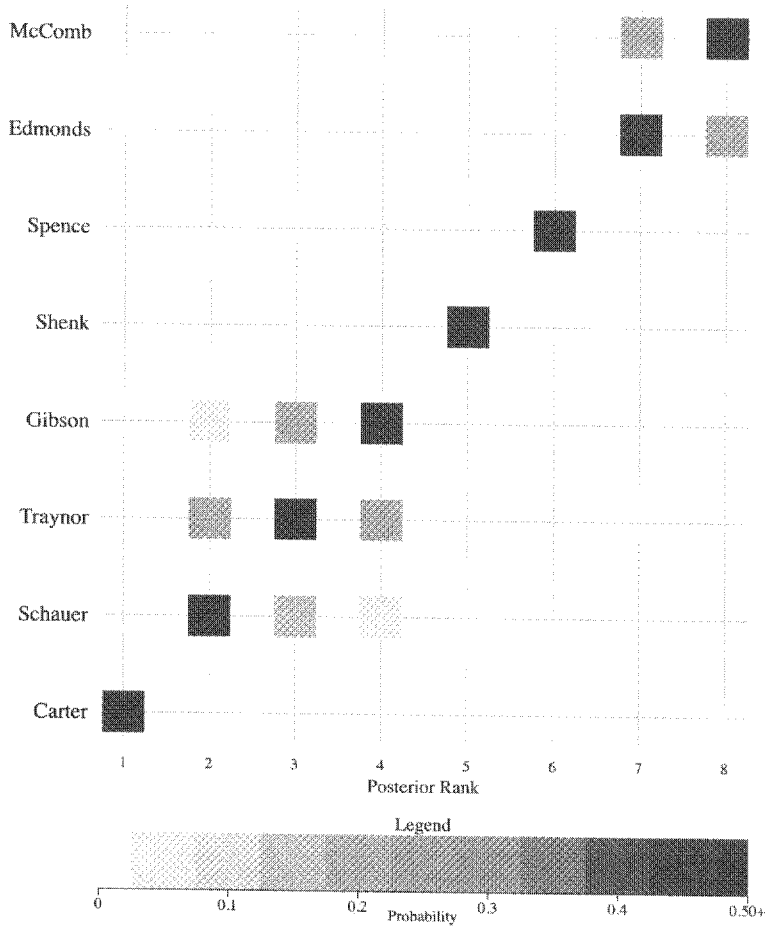


FIGURE 15. Ranks (1949–1959)



A comparison of the ten cases in which the absolute value  $\beta$  is highest in each period gives a rough sense of the different tenor of the underlying disagreements that created the different patterns of voting in these two decades. From 1939 to 1948, six of the top ten cases involved disputes between taxpayers or property owners and the state with the court's left wing (the liberal Carter, the moderate Schauer, and the conservative Shenk) siding with the taxpayer or the property owner.<sup>85</sup> A right-wing majority composed

85. *Long Beach City High School District v. Stewart*, 185 P.2d 585, 590 (Cal. 1947) ( $\beta=2.907$ ), is an eminent domain case. The right-wing majority held the land should be valued based on residential

of the conservative Spence, the moderate Edmonds, and the liberals Gibson and Traynor ruled for the state in five of these six cases. Gibson joined the left wing to vote for the taxpayer in the sixth case. In another case four justices on the right wing upheld revocation of a real estate broker's license. The three justices on the left wing dissented, arguing that there was insufficient evidence to revoke the license based on a close scrutiny of the record.<sup>86</sup> The tenth case was a medical malpractice claim. Gibson joined the left wing to reverse a verdict for the defendant, holding there was insufficient evidence to negate the inference of negligence under the *res ipsa* rule.<sup>87</sup> Traynor was among the dissenters.

On the other hand, many of the top-ten cases from 1949 to 1959 have a strongly political flavor. A pair of cases in the top ten in 1955—*People v. Cahan*<sup>88</sup> and *People v. Berger*<sup>89</sup>—adopted the exclusionary rule in California, overturning a 5–2 decision from 1942 where the court had refused to adopt the exclusionary rule with Carter and Houser dissenting and Gibson and Traynor joining the conservatives to form a majority.<sup>90</sup> In the 1955 cases, Gibson and Traynor joined Carter and Schauer to adopt the exclusionary rule.<sup>91</sup> In *Priestly v. Superior Court*,<sup>92</sup> the same four justices reversed a

use as per zoning restriction. *Id.* The left-wing dissent argued the land should be valued based on industrial use, which was four times the amount awarded. *Id.* at 591–92 (Schauer, J., dissenting). *People v. Maxfield*, 183 P.2d 897, 898 (Cal. 1947) ( $\beta=2.86$ ), is a tax case. The right-wing majority held the state has the right to accounting for profits earned prior to redemption of property sold in tax auction. *Id.* The left-wing dissent disagreed. *Id.* at 899 (Shenk, J., dissenting). *Johnston v. Board of Supervisors*, 187 P.2d 686, 695 (Cal. 1947) ( $\beta=2.86$ ), is a zoning case. The right-wing majority allowed an injunction to prevent the zoning board from issuing a permit for a fish cannery in Marin County, interpreting the zoning ordinance as not allowing the permit. *Id.* *Wilkins v. City of San Bernardino*, 175 P.2d 542, 551–52 (Cal. 1946) ( $\beta=2.84$ ) (Carter, J., dissenting), is another zoning case. The left wing argued in dissent that the challenger was entitled to violate the zoning ordinance that was unconstitutional as applied to him, because of its harsh effect. *Id.* *Lovett v. Bell*, 180 P.2d 335, 338 (Cal. 1947) ( $\beta=2.84$ ), is a rent control case. The right-wing majority sided with a tenant resisting eviction from motor home in which they lived under a wartime rent control ordinance. *Id.* The left-wing dissent argued *res judicata* and the injustice of allowing the tenants to avoid a contract from which they benefitted. *Id.* at 340–41 (Schauer, J., dissenting). *Miller v. McKenna*, 147 P.2d 531, 534–35 (Cal. 1944) ( $\beta=2.77$ ), is a tax case. The left-wing majority held a long-ago tax sale was defective because of inadequate notice, and that curative legislation did not fix the problem. *Id.* Traynor's dissent argued small errors in levying and collecting taxes should be disregarded. *Id.* at 538–39 (Traynor, J., dissenting).

86. *Rattray v. Scudder*, 169 P.2d 371, 378 (Cal. 1946) ( $\beta=2.84$ ).

87. *Dierman v. Providence Hosp.*, 188 P.2d 12, 14–15 (Cal. 1947) ( $\beta=2.76$ ).

88. *People v. Cahan*, 282 P.2d 905 (Cal. 1955) ( $\beta=2.65$ ); see McClain, *supra* note 21, at 54–56 (providing the history behind the case and its legal context).

89. *People v. Berger*, 282 P.2d 509 (Cal. 1955) ( $\beta=2.65$ ).

90. *People v. Gonzales*, 124 P.2d 44, 46–47 (Cal. 1942) ( $\beta=2.14$ ).

91. Monrad Paulsen surmises “[t]he difference between 1942 and 1955 was simply this: In 1942 Chief Justice Traynor believed that police self-restraint or the standard legal remedies would generally confine police action within the boundaries of constitutional guarantees; by 1955 it was painfully clear that such a belief could no longer be sustained.” Monrad G. Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CALIF. L. REV. 103, 106 (1965).

92. *Priestly v. Superior Court*, 330 P.2d 39 (Cal. 1958) ( $\beta=2.63$ ).

narcotics possession conviction finding a lack of probable cause for the search.<sup>93</sup> The same four justices voted together in favor of the criminal defendant in three other top-ten cases that involved procedural challenges to a conviction.<sup>94</sup> Another top-ten case, *Board of Education v. Mass*, is a 4–3 decision holding that a schoolteacher could not be fired for refusing to testify before the House Un-American Affairs Committee.<sup>95</sup> Four justices (Gibson, Traynor, Schauer, and Shenk) reached this result by interpreting the Dilworth Act not to cover the teacher's conduct. Carter concurred, arguing the court should have invalidated the Act. Edmonds and Spence dissented. Cases such as *Mass* involving constitutional challenges to laws that targeted Communists and other subversive groups generally split the court on a liberal-conservative axis, but with the three liberals usually losing. In *Mass*, the three liberals prevailed because the moderate Schauer and the conservative Shenk joined them.

Taking a step back to look at the overall universe of non-unanimous cases, there were 318 non-unanimous cases from 1939 to 1948 and 566 non-unanimous cases from 1949 to 1959. The total number of merits decisions was roughly the same in both periods (1,344 and 1,404), so the increase in non-unanimous cases is the result of a significant increase in the percentage of non-unanimous cases: 23.7% from 1939 to 1948 increased to 40.3% from 1949 to 1959. Slightly more than half of the increase is accounted for by a higher number of solo dissents by Carter. The subject matter areas with the largest numeric and percentage increases in non-unanimous cases are criminal law,<sup>96</sup> tort,<sup>97</sup> evidence (many of these are tort cases and criminal law cases),<sup>98</sup> and contracts.<sup>99</sup> There also are large percentage increases in non-unanimous cases in family law<sup>100</sup> and insurance law,<sup>101</sup> though these cases are relatively few in number.

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93. *Id.* at 42–44.

94. *People v. Acosta*, 290 P.2d 1 (Cal. 1955) ( $\beta$  = -2.61), and *People v. Carmen*, 228 P.2d 281 (Cal. 1951) ( $\beta$  = -2.57), both involved disagreements over whether an error in an instruction was harmless. *People v. Robinson*, 269 P.2d 6, 8–9 (Cal. 1954) ( $\beta$  = -2.61), involved a disagreement over whether a criminal defendant was entitled to a continuance so he could obtain independent counsel.

95. *Bd. of Educ. v. Mass*, 304 P.2d 1015, 1019 (Cal. 1956) ( $\beta$  = -2.58).

96. This information is gleaned from the headnotes. From 1939 to 1948, 55 non-unanimous cases were identified as involving criminal law in the headnotes. From 1949 to 1958, there were 141 such cases.

97. The number of cases identified in the headnotes as involving tort increased from 49 to 103.

98. The number of cases identified in the headnotes as involving evidence increased from 50 to 94.

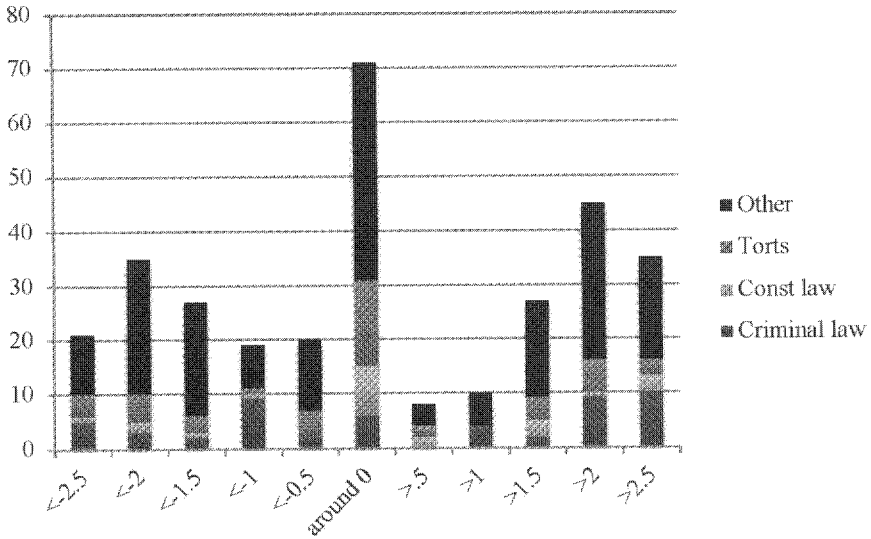
99. The number of cases identified in the headnotes as involving contracts increased from 55 to 90.

100. The number of cases identified in the headnotes as involving family law increased from 22 to 50.

101. The number of cases identified in the headnotes as involving insurance law increased from 10 to 25.

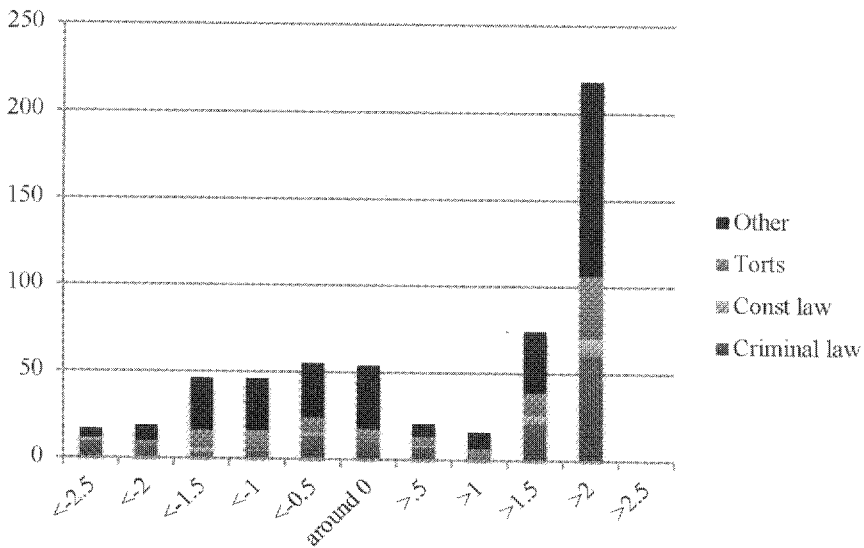
The diagrams below show the distribution in the value of  $\beta$  for each period. We distinguish between constitutional law, criminal law, and tort cases.<sup>102</sup> Neither wing of the court dominated in either period if solo dissents by Carter are ignored.

FIGURE 16. 1930–1948 (n=318)



102. This is based on the headnotes. We count cases with both criminal law and constitutional law in the headnotes as criminal law cases. We count cases with both criminal law and tort in the headnotes as tort cases.

FIGURE 17. 1949–1959 (n=566)



The large number of cases in the 2–2.5 bin from 1949 to 1959 is misleading. Of these 218 cases, 128 are solo dissents by Carter.<sup>103</sup> Solo dissents by Carter from 1949 to 1959 comprise 22.6% of the total number of non-unanimous cases. By comparison, Carter had 49 solo dissents from 1939 to 1948,<sup>104</sup> which is 15.4% of the total number of non-unanimous cases. The increase in the number of solo dissents by Carter (79) accounts for slightly more than half of the total increase in the number of non-unanimous cases (148). One consequence of the frequency of Carter's solo dissents is that the sign of  $\beta$  strongly correlates with the outcome in tort and in criminal law cases. This is because Carter virtually always sides with a personal injury plaintiff and a criminal defendant in a non-unanimous case.<sup>105</sup>

To better understand the source of the change in the justices' posterior ranks between the two periods it is useful to look at 4–3 decisions, of which there are 82<sup>106</sup> from 1939 to 1948 and 137<sup>107</sup> from 1949 to 1959. These are around a quarter of the total number of non-unanimous cases in each period.

103. This is a remarkable number of solo dissents. During the same period (1949–1959), Gibson had no solo dissents, Spence had three, Traynor had four, McComb had ten, Shenk had 12, Edmonds had 20, and Schauer had 27.

104. These cases are divided with 20 in the 1.5–2.0 bin and 29 in the 2.0–2.5 bin.

105. We have not examined all of the cases. In the cases examined, we found one non-unanimous workers' compensation case in which Carter did not side with the plaintiff.

106. This includes 14 cases in which a pro tem justice participated.

107. This includes six cases in which a pro tem justice participated.

The IRT model captures patterns of agreement and disagreement among justices. A significant increase in the frequency of 4–3 cases in which the three liberals (Carter, Gibson, Traynor) vote together is an immediate cause of the change in posterior ranks between the two periods. There are 25 such cases from 1939 to 1948, which is 30.5% of all 4–3 cases, while there are 68 such cases from 1949 to 1958, which is 49.6% of all 4–3 cases.<sup>108</sup> There is a disproportionately large increase in the number of 4–3 cases in which the three liberals join in dissent. There are four 4–3 cases in which the three liberals joined in dissent from 1939 to 1948, and 27 such cases from 1949 to 1958.<sup>109</sup> Many of these 27 cases have a strong political dimension, and we discuss them in more detail below.

As one would expect, there also is an increase in the frequency of 4–3 cases in which the two conservative justices (Shenk and Spence) vote together and against the three liberal justices. There are 11 such 4–3 cases between 1945 and 1948 in which the liberals and conservatives are on opposite sides. The three liberals and two conservatives also split in two 5–2 cases between 1945 and 1948. There is a significant political dimension in a number of these cases.<sup>110</sup> This is an instance of something we observed

108. The three liberals voted together in 25 5–2 cases from 1939 to 1948 and 43 5–2 cases from 1949 to 1959.

109. Traynor joined with Edmonds and Spence in roughly the same number of 4–3 cases during the two periods (11 from 1939 to 1948 and 12 from 1949 to 1959). While the numbers are similar, the share of total 4–3 cases is much smaller, dropping from 13.9% to 8.8%. Traynor never joined Edmonds and Spence in dissent in a 4–3 case from 1949 to 1959 while he joined the two conservatives in dissent in four 4–3 cases from 1939 to 1948.

110. There also is a political dimension in a few of the ten 4–3 and 5–2 cases from earlier in the period, before Spence replaced Curtis, in which the three liberals were on one side and Shenk and Curtis were on the other side. We do not see a political dimension in six of the cases. There is a strong political dimension in two cases that involve labor disputes and squarely raise free speech issues. *Steiner v. Long Beach Local No. 128 of the Oil Workers International Union*, 123 P.2d 20, 25 (Cal. 1942) ( $\beta=0.708$ ), held that a court could enjoin all picketing in any form when picketers had gone “far beyond what may reasonably be termed peaceful picketing” and “[t]he use of vile and abusive language and threats of violence amounts to physical intimidation.” Carter’s dissent begins: “The inevitable effect of the majority opinion in this case will be the abrogation of the constitutional guarantees of freedom of speech, press and assembly, and, for all practical purposes, will operate as a denial of the right of organized labor to exercise those rights by engaging in peaceful picketing.” *Id.* at 28. (Carter, J., dissenting). The dissent continues to accuse the majority of misstating the facts. *Emde v. San Joaquin County Central Labor Council*, 143 P.2d 20, 28–29 (Cal. 1943) ( $\beta=-0.021$ ), reversed a verdict of actual and punitive damages against a union and its leaders who accused a company of restricting its operations to avoid the law on the ground the comments were privileged.

Carter also sided with Gibson in voting to grant a rehearing of a decision that upheld a contempt conviction of union leader Harry Bridges for publicly denouncing a decision of the trial court favoring the American Federation of Labor over the Congress of Industrial Organizations. *Bridges v. Superior Court*, 94 P.2d 983, 985 (Cal. 1939). This was before Traynor joined the court, so we do not count it among the ten cases. Carter sided with the conservative majority in *Times-Mirror Co. v. Superior Court*, 98 P.2d 1029, 1041 (Cal. 1940), which upheld a contempt conviction of the conservative L.A. Times for editorials criticizing the trial court.

There is a fairly strong political dimension in another 4–3 decision reversing the conviction of labor organizers for criminal conspiracy. *People v. Dail*, 140 P.2d 828 (Cal. 1943). The case arose from

earlier: during periods in which the dominant pattern of voting on the court does not align with the justices' political reputations, there are cases in which the voting pattern does align with their political reputations. Three of the 13 cases have a very strong political dimension: a 4-3 decision that held unconstitutional a state law banning interracial marriage;<sup>111</sup> a 4-3 decision that upheld a state law denying fishing licenses to "alien Japanese";<sup>112</sup> and a 5-2 decision that held unconstitutional a state law prohibiting the use of school buildings for public meetings by groups that were engaged in subversive speech.<sup>113</sup> A fourth case (also 5-2) has a fairly strong political dimension since it involved a free speech issue in a labor setting: whether there was cause to fire an employee working on a military construction project when the employee tried to organize other workers.<sup>114</sup> There may be a political dimension in six other cases.<sup>115</sup> We see no political dimension in three of these 13 cases.<sup>116</sup> In all cases in which we see a political dimension,

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the battle between the American Federation of Labor and the Congress of Industrial Organizations to organize truck drivers. The defendant had been convicted of conspiracy to use threats and intimidation. The challenge was to the jury instructions, which "erroneously advised the jury that all concerted activities by combinations of workers are illegal." *Id.* at 838 (Edmonds, J., concurring and dissenting). The dissent argued the error was harmless. *Id.* at 846 (Curtis, J., dissenting).

There may be a political dimension in another 5-2 case in which Shenk and Curtis dissented to a decision holding that a newspaper had to contribute to the unemployment compensation fund for wages paid to newsboys though they were paid less than the minimum entitling them to compensation. *Cal. Emp't Comm'n v. L.A. Down Town Shopping News Corp.*, 150 P.2d 186, 188-89 (Cal. 1944).

111. *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948) ( $\beta=0.0004$ ). The low value of  $\beta$  is because Edmonds voted with the liberals while Schauer voted with the conservatives, which is unusual.

112. *Takahashi v. Fish & Game Comm'n*, 185 P.2d 805 (Cal. 1947), *cert. granted*, 333 U.S. 853 (1948) ( $\beta=0.732$ ).

113. *Danskin v. San Diego Unified Sch. Dist.*, 171 P.2d 885, 897 (Cal. 1946).

114. *Greene v. Hawaiian Dredging Co.*, 157 P.2d 367 (Cal. 1945).

115. Two cases involved the issue of job protection of municipal employees. One case decided an issue of general importance, which was that a public employee was entitled to a full and formal hearing when the city charter provided an employee only could be fired for cause. *La Prade v. Dep't of Water & Power*, 162 P.2d 13 (Cal. 1945) ( $\beta=-1.37$ ). The other case decided a narrower issue. *Steen v. Bd. of Civil Serv. Comm'rs*, 160 P.2d 816 (Cal. 1945) ( $\beta=-1.354$ ) (changing a long-standing interpretation of the Los Angeles City Charter to give a discharged employee 90 days to challenge his discharge after the Board rejected his appeal, rather than 90 days after the notice of discharge).

In three cases the liberals (who were joined by Schauer) voted to reverse a conviction because of a procedural error while the dissent argued the error was harmless, pointing to overwhelming evidence of guilt and the heinous nature of the crime. *People v. Collup*, 167 P.2d 714, 719 (Cal. 1946) ( $\beta=-1.396$ ), gives you the flavor. The dissent argued that an evidentiary error was harmless in a case involving what the dissenting opinion described as "drunken debauch and the brutal treatment" of a "deranged victim." *Id.* at 719 (Spence, J., dissenting). The other two cases are *People v. Bob*, 175 P.2d 12 (Cal. 1946) ( $\beta=-1.381$ ), and *People v. Kane*, 166 P.2d 285 (Cal. 1946) ( $\beta=-1.31$ ).

Another case involved a disagreement over the scope of an appellate court to review a trial court order holding a lawyer in contempt for demanding he be given an opportunity to ask questions of prospective jurors in voir dire when there was an accusation his client had tried to tamper with the jurors. The liberals were in the majority (again joined by Schauer), favoring review. *Gallagher v. Mun. Court*, 192 P.2d 905, 913-14 (Cal. 1948) ( $\beta=-1.358$ ).

116. *Rosemary Properties v. McColgan*, 177 P.2d 757 (Cal. 1947) ( $\beta=0.718$ ), involved the interpretation of the term dividend in a tax statute. There is a long academic dissent by Traynor that shows



the liberals and conservatives vote the way we would expect them to vote if their political views influenced their decision.

Many more 4–3 and 5–2 cases from 1949 to 1959 split the three liberals and the two conservatives. Many of these cases have a strong political dimension. We have already noted the three 4–3 cases that adopted and applied the exclusionary rule. The value of  $\beta$  is quite low in these cases (around -2.60) because Schauer joined the liberals in these cases while Edmonds joined the conservatives, which aligns with their posterior ranks. There also is a very strong political dimension in many of the 27 4–3 cases in which the three liberals are in dissent. In these cases, Schauer broke with the three liberals and voted with Edmonds and the conservatives.<sup>117</sup> *State Board of Dry Cleaners v. Thrift D-Lux Cleaners, Inc.* invalidated minimum price provisions in the Dry Cleaner's Act as violating the Due Process Clause.<sup>118</sup> Five cases grew out of the Red Scare. Three were test cases brought by progressive churches challenging on First Amendment grounds municipal laws that denied the charitable tax exemption to organizations engaged in subversive speech.<sup>119</sup> *Prince v. City and County of San Francisco* involved the question whether an individual tax exemption for veterans could be conditioned on a veteran not being a member of the Communist Party or other subversive organization.<sup>120</sup> *Black v. Cutter Laboratories* held that an arbitration award that directed a lab producing antibiotics to reinstate an employee who was an avowed member of the Communist Party was illegal and unenforceable because it violated public policy.<sup>121</sup> Three cases involved issues bearing on whether the National Labor Relations Act preempted state law so that a state court could not enjoin picketing in labor disputes in which the National Labor Relations Board declined to exercise jurisdiction.<sup>122</sup> *McKinley v. California Employment Stabilization Commission* concerned whether employees locked out in a labor dispute

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his expertise in tax law. *Id.* at 764 (Traynor, J., dissenting). *Moxley v. Title Insurance Trust*, 165 P.2d 15 (Cal. 1946) ( $\beta=0.705$ ), involved the question of the power of a court sitting in equity to dissolve a trust earlier than the designated date upon the request of the sole beneficiary. *Vaughn v. Jonas*, 191 P.2d 432 (Cal. 1948) ( $\beta=-1.399$ ), involved a disagreement over whether a failure to specifically plead malice precluded an award of punitive damages in an assault and battery case.

117. The value of  $\beta$  in these 27 cases range from 1.923 to 2.161.

118. *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29, 36 (Cal. 1953) ( $\beta=2.161$ ).

119. *First Unitarian Church of L.A. v. County of Los Angeles*, 311 P.2d 508 (Cal. 1957) ( $\beta=1.955$ ); *People's Church of San Fernando Valley v. County of Los Angeles*, 311 P.2d 540 (Cal. 1957) ( $\beta=1.979$ ); *First Methodist Church of San Leandro v. Horstmann*, 311 P.2d 542 (Cal. 1957) ( $\beta=1.975$ ).

120. *Prince v. City & County of San Francisco*, 311 P.2d 544, 545 (Cal. 1957) ( $\beta=2.049$ ).

121. *Black v. Cutter Labs.*, 278 P.2d 905, 916 (Cal. 1955) ( $\beta=2.042$ ).

122. *Charles H. Benton, Inc. v. Painters Local Union*, 291 P.2d 13 (Cal. 1955) ( $\beta=2.009$ ); *Garmon v. San Diego Bldg. Trade Council*, 291 P.2d 1 (Cal. 1955) ( $\beta=1.984$ ); *Sommer v. Metal Trades Council*, 254 P.2d 559 (Cal. 1953) ( $\beta=1.927$ ).

were entitled to unemployment benefits.<sup>123</sup> Three cases involved a challenge to a term in contracts between water districts and the United States that provided no one landowner could receive water for more than 160 acres of land from a project built with interest-free federal money. The conservative majority held the limitation was invalid under a state statute while raising an array of constitutional objections to the limitation.<sup>124</sup> These cases belie the view that the disagreement between the liberals and conservatives was over the legitimacy of judicial activism: both wings of the court were willing to rely on constitutional and public policy arguments to overturn legislation and private arrangements that they found objectionable.

The 27 cases in which the three liberals dissent also include four criminal law cases and six tort cases. In all four criminal law cases the dissenters argued there was insufficient evidence to support an indictment for conspiracy.<sup>125</sup> In the six tort cases, the dissent argued in three cases for a liberal application of the *res ipsa* doctrine to find liability in an exploding bottle case,<sup>126</sup> for a liberal application of the attractive nuisance doctrine to find liability when a sand pile collapsed and killed a child trespasser,<sup>127</sup> and for a liberal application of the last clear chance doctrine to find liability when a pedestrian walked in front of a moving trolley bus.<sup>128</sup> Another was a medical malpractice case featuring a disagreement over whether there was sufficient expert testimony to establish negligence.<sup>129</sup> What is striking about this case is that Carter accused the majority of acting in bad faith in refusing to respect a jury verdict that had been affirmed by the lower courts. Gibson and Traynor wrote a separate concurrence to the dissent (which was unusual during this period) arguing the case should be sent back to the trial court to be retried, possibly to disassociate themselves from Carter's criticism of his colleagues.

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123. *McKinley v. Cal. Emp't Stabilization Comm'n*, 209 P.2d 602, 603-04 (Cal. 1949) ( $\beta=2.069$ ). There were two other employment benefit cases in which the political dimension is less clear. *Gonzales v. Indus. Accident Comm'n*, 325 P.2d 993 (Cal. 1958) ( $\beta=2.048$ ) (involving a dispute over the appropriate disability rating, which determined the amount of disability compensation); *Gowanlock v. Turner*, 267 P.2d 310 (Cal. 1954) ( $\beta=2.064$ ) (deciding whether a municipal charter guarantees transit employees a minimum number of hours).

124. *Ivanhoe Irrigation Dist. v. All Parties*, 306 P.2d 824, 854-55 (Cal. 1957) ( $\beta=2.070$ ); *Santa Barbara Cty. Water Agency v. All Parties*, 306 P.2d 875, 885 (Cal. 1957); *Madera Irrigation Dist. v. All Persons*, 306 P.2d 886, 894 (Cal. 1957) ( $\beta=1.923$ ).

125. *People v. Osslo*, 323 P.2d 397, 427 (Cal. 1958) ( $\beta=1.970$ ); *Weber v. Superior Court*, 216 P.2d 871, 872-73 (Cal. 1950) ( $\beta=1.967$ ); *Mold v. Superior Court*, 216 P.2d 874, 875 (Cal. 1950) ( $\beta=2.048$ ); *Lorenson v. Superior Court*, 216 P.2d 859, 868-69 (Cal. 1950) ( $\beta=1.974$ ).

126. *Trust v. Arden Farms Co.*, 324 P.2d 583, 590 (Cal. 1958) ( $\beta=2.032$ ).

127. *Knight v. Kaiser Co.*, 312 P.2d 1089, 1095 (Cal. 1957) ( $\beta=1.983$ ).

128. *Doran v. City & County of San Francisco*, 283 P.2d 1 (Cal. 1955) ( $\beta=1.942$ ).

129. *Moore v. Belt*, 212 P.2d 509, 517-18 (Cal. 1949) ( $\beta=2.027$ ).

We put to the side the question of whether we can discern a political dimension to the disagreements in these four criminal law and six tort cases that split the three liberals and the two conservatives, and in which the three liberals dissent. The important point for our purposes is the alignment between the voting pattern in cases with a strong political dimension and the voting pattern in these ten cases. This is part of a larger development. The voting pattern of a few justices in criminal law and tort cases changed between the two periods,<sup>130</sup> bringing the general pattern of voting in criminal law and tort cases more closely into line with the justices' political reputations. Putting it crudely, Traynor moved somewhat to the left (towards Carter) while Schauer and Shenk moved somewhat to the right (towards Spence and McComb) in criminal law cases and tort cases.

During both periods when a criminal defendant or a tort plaintiff prevails in a 4-3 case, the majority coalition usually included the three liberals. From 1939 to 1948, a fourth justice almost always joined the three liberals to form a majority. In criminal law cases, Schauer always joined with the liberals to provide the fourth vote.<sup>131</sup> In tort cases, Shenk usually joined with the three liberals to provide the fourth vote.<sup>132</sup> From 1949 to 1959, a criminal defendant and personal injury plaintiff who got the votes of the three liberals usually still prevailed. Schauer still often added the fourth vote in a criminal law case<sup>133</sup> while Shenk still often added the fourth vote in a tort case.<sup>134</sup> But Schauer split with the three liberals in four criminal law cases while Shenk split with the three liberals in six tort cases. This is one of the differences between the two periods that we crudely describe as characterized by Schauer and Shenk moving somewhat to the right. Their votes in these seven cases creates a distance between each of them and the three liberals in criminal law and tort cases from 1949 to 1959 that did not exist from 1939 to 1948.

We describe Traynor as moving to the left in criminal law and tort cases based on several differences between the periods. There are many more 4-3 cases in which Traynor joins with Carter and Gibson from 1949 to 1959 (15 criminal law cases and 17 tort cases) than from 1939 to 1948 (seven and five respectively). Meanwhile there is a large group of 4-3 cases in which a criminal defendant or a tort plaintiff prevails from 1939 to 1948 with Traynor

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130. Criminal law cases include all cases with "Criminal Law" in the headnote field. Tort and personal injury cases includes all cases with either "Tort" or "Workers' Compensation" in the headnote field or with a term associated with a personal injury claim in the core terms field.

131. There were nine such cases.

132. There were three such cases. Schauer added the fourth vote in one other case. The three liberals dissented in one case, which involved a defamation claim against labor leaders.

133. There were nine such cases. Spence added the fourth vote in one other case.

134. There were eight such cases. Edmonds added the fourth vote in two other cases.

in dissent.<sup>135</sup> There are fewer such cases from 1949 to 1959.<sup>136</sup> One could say of 1939–1948 that Traynor was to the right of Shenk in tort cases and to the right of Schauer in criminal law cases because Shenk and Schauer were more likely than Traynor to side with Carter and Gibson in these types of cases.<sup>137</sup> The same could not be said of 1949–1959. There is a similar shift in Traynor's voting alignment in 5–2 cases in which he dissented. When Traynor joined in a dissent in a 5–2 case from 1939 to 1948 he almost always joined a conservative. When he joined a dissent in a 5–2 case from 1949 to 1959 he usually joined Carter.<sup>138</sup>

#### V. 1959–1987: THE LIBERAL COURT

Harry Scheiber describes 1964–1987 as a period of liberal ascendancy.<sup>139</sup> The model captures this while also showing that the court's liberal wing became dominant in 1959 or 1960, during the last years of Gibson's tenure as chief justice, after Democratic Governor Edmund G. (Pat) Brown appointed the liberals White and Dooling to replace the conservatives Shenk and Spence. This gave the liberals a 5–2 majority, if Schauer is counted as a conservative. The other change is that Peters replaced Carter in 1959, taking his place on the court's far left wing.

The diagrams below show the justices' posterior ranks from 1959–1964 (to the end of Gibson's tenure as chief justice) and from 1964–1970 (Traynor's tenure as chief justice).

135. There were four such tort and personal injury cases. The majority coalition always included Carter and Shenk. Gibson was in the majority in three cases, Schaeur in two, and Edmonds and Houser in one each. There were three such criminal law cases with the majority coalition always being Carter, Gibson, Schaeur, and Shenk.

136. There were two such tort and personal injury cases and one such criminal law case. There were three other criminal law cases in which Traynor joined the majority in ruling for the defendant and Gibson dissented.

137. Traynor sided with Carter and Gibson in six 4–3 tort and personal injury cases from 1939 to 1949. One of these six cases involved a defamation claim against a labor union, three involved issues of statutory interpretation, and another was a breach of warranty claim. Traynor was on the other side from Carter and Gibson in five of six 4–3 cases in which the issue was the sufficiency of the evidence on a negligence claim.

138. From 1939 to 1948, Traynor dissented in seven tort and personal injury cases that were decided in favor of the plaintiff, joining Edmonds in six cases and Schaeur in one case. Meanwhile, he dissented in only one 5–2 case that was decided in favor of the defendant, joining Carter. From 1949 to 1959, Traynor joined Carter in dissent in four personal injury and tort cases (siding with the plaintiff). Traynor dissented in four other cases that were decided in favor of the plaintiff, joining Spence in three and Schauer in one. In criminal law cases that were decided 5–2, Traynor joined in three dissents from 1939 to 1948, siding with the state, and joining Edmonds in two cases and Spence in one. From 1949 to 1959, Traynor joined Carter in dissent in four criminal law cases that were decided 5–2. He joined a conservative in dissent in two other cases.

139. Scheiber, *supra* note 2, at 327.

FIGURE 18. Ranks (1959–1964)

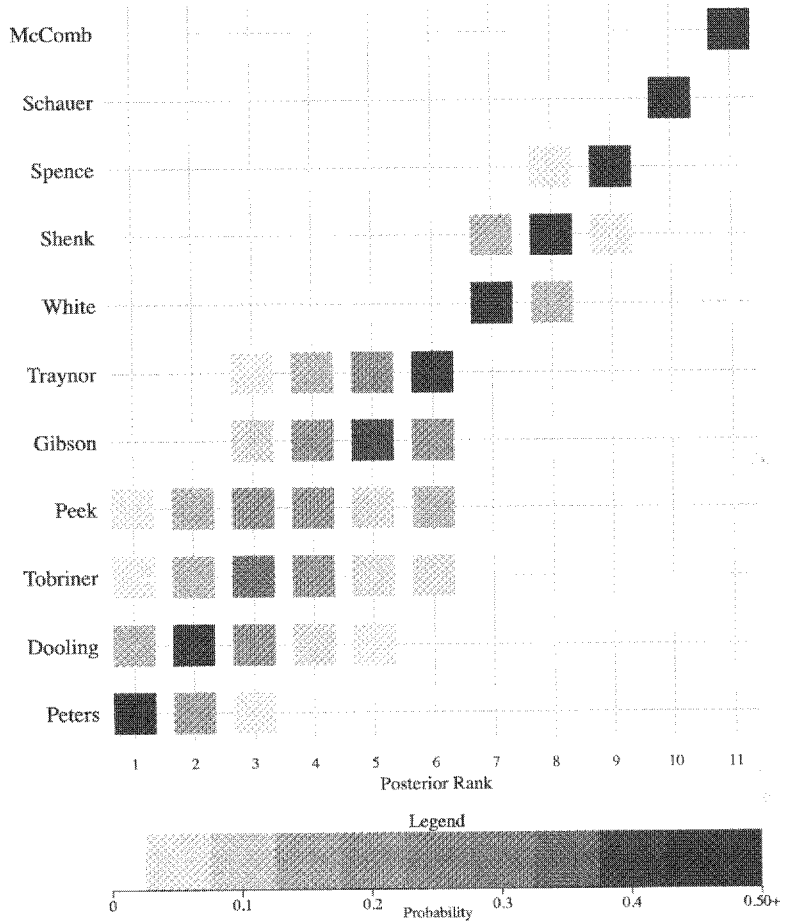
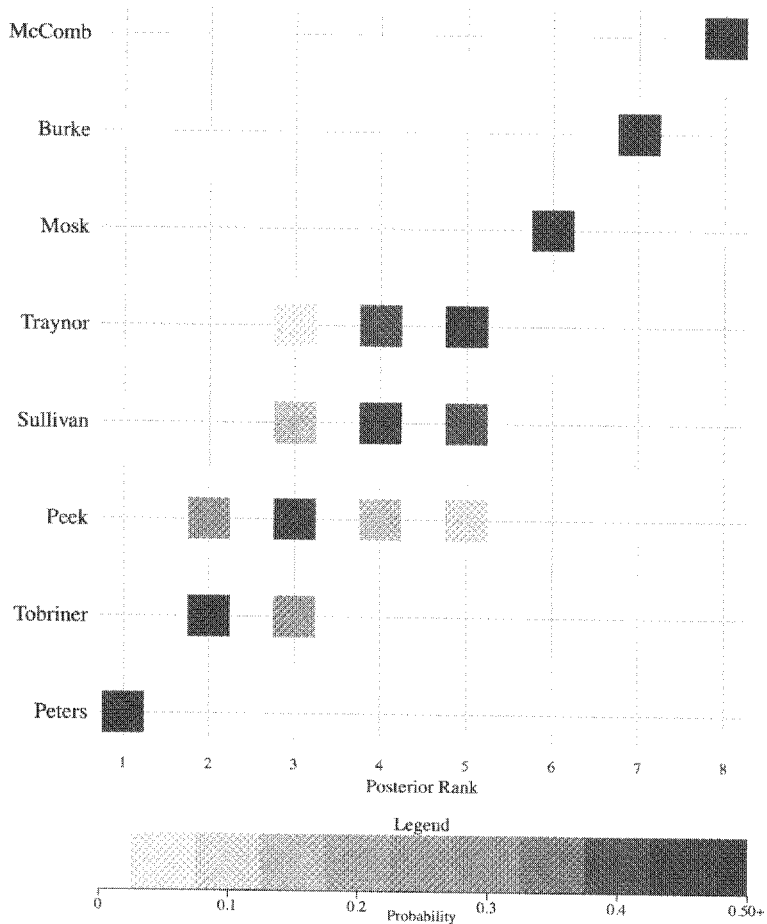


FIGURE 19. Ranks (1964–1970)



The justices' posterior ranks closely align with their political reputations in both periods.<sup>140</sup> The three justices appointed by Republican governors (McComb, Spence, and Shenk) cluster on the right wing from 1959 to 1964. Scheiber describes McComb, who is on the far right, as "the only staunchly conservative justice on the Court" in the 1960s.<sup>141</sup> Next to

140. 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." Julian H. Levi, *Introduction to the Oral History of Donald R. Wright*, 9 CAL. LEGAL HIST. 1, 9 (2014).

141. Scheiber, *supra* note 2, at 331.

McComb on the right wing is Burke, who joined the court in 1964. Burke was a Republican. Democratic Governor Brown appointed Burke on Traynor's recommendation because Brown "was concerned that the Supreme Court bench should have at least a minimal balancing of political affiliations among the justices."<sup>142</sup> Scheiber describes Peters, who is on the far left, as "perhaps the most formidable, consistent champion of liberal constitutionalism to sit on the Court in the entire era."<sup>143</sup> Filling out the left wing, Dooling, Peek, Sullivan, and Tobriner also have liberal reputations. Mosk's position to the right of center on a liberal court is consistent with the description of his political views in his obituary, which describes him as "liberal" while noting that "he also showed flexibility and a knack for anticipating political currents," and that "a few of his decisions went against the liberal grain."<sup>144</sup>

The change in Schauer's posterior rank is striking.<sup>145</sup> Like Burke, Schauer was a Republican who was appointed to the court by a Democratic governor (Culbert Olson) to preserve political balance. Schauer was on the court's left wing from 1939 to 1948 and on the court's far left wing from 1949 to 1959. As we have seen, his position on the left wing during these decades is attributable to his often voting with the liberals in civil rights, civil liberties, and criminal law cases. We have also seen that Schauer began to break with the liberals in some civil rights, civil liberties, and criminal law cases from 1949 to 1959, including a large number of 4-3 cases in which he joined the conservatives to form a majority. Schauer's position on the court's far right wing from 1959 to 1964 is attributable to his joining with McComb in dissent in over half of the non-unanimous cases (111 of 208).<sup>146</sup> Half of these are criminal law cases (38) or tort cases (17).

The diagrams below illustrate the extent to which 1959-1970 was a period of liberal ascendancy. They show the distribution of  $\beta$  for the 208 non-unanimous cases decided from 1959 to 1964 and the 352 non-unanimous cases decided from 1964 to 1970.<sup>147</sup> In both periods, the left wing prevailed in almost every case in which voting conforms to the dominant

142. *Id.* at 328-29.

143. *Id.* at 328.

144. *Stanley Mosk, 88, Long a California Supreme Court Justice*, N.Y. TIMES, June 21, 2001, at C13.

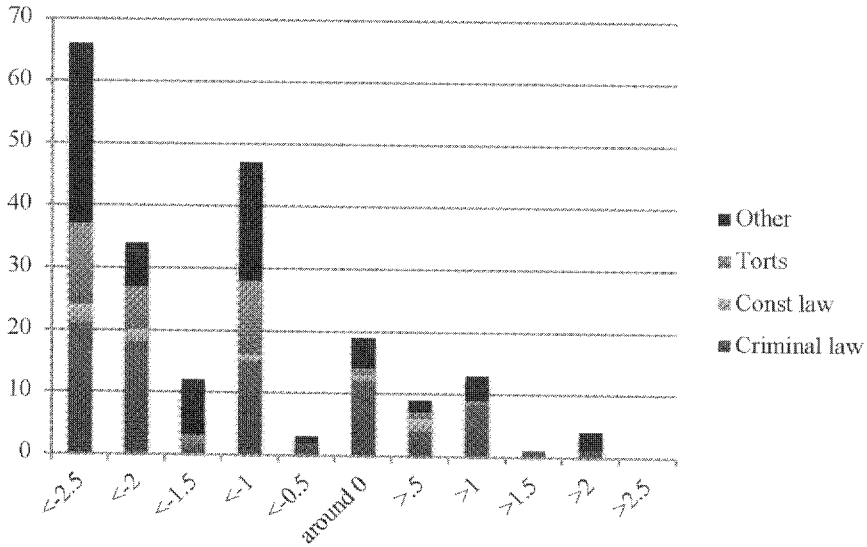
145. J. Edward Johnson said Schauer, "who at one time was termed a 'liberal' by those knowing him, has during the past fifteen years become regarded as one of the more conservative members of the Supreme Court." JOHNSON, *supra* note 4, at 199.

146. Of these cases, 87 were 5-2 or 4-2 decisions. Seven were 4-3 with Spence as the third dissenter.

147. The increase in the number of non-unanimous cases is attributable to an increase in the rate of merits cases in which there was a dissent. From 1959 to 1964, there was a dissent in 26.4% of merits cases. The rate was 40.5% from 1964 to 1970.

pattern. From 1959 to 1964, the left wing prevailed in 122 cases in which the absolute value of  $\beta > 1.5$ , while the right wing prevailed in just five cases. The same figures for 1964–1970 are 246 to 4.<sup>148</sup>

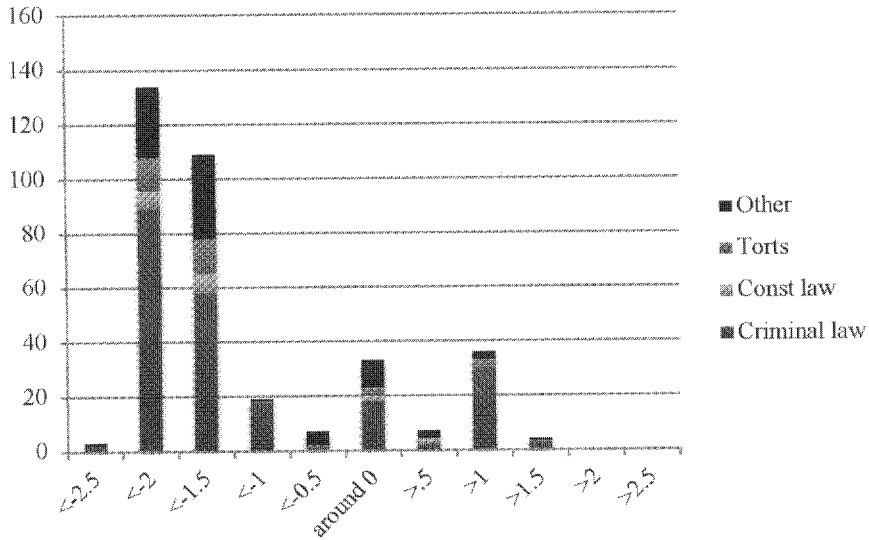
FIGURE 20. 1959–1964 (n=208)



148. The dominance of the left wing over these two periods is also captured by the average value of  $\beta$ . This figure is -1.47 from 1959 to 1964 and -1.42 from 1964 to 1970.



FIGURE 21. 1964–1970 (n=352)



The diagrams distinguish between criminal law, constitutional law, and tort cases. Criminal law cases comprised a large share of the non-unanimous cases in both periods. Tort cases comprised a large share in the first period.<sup>149</sup> In both periods, voting patterns in tort cases are consistent with the overall voting pattern, which closely aligns with the justices' political reputations. This completed the transformation in the voting pattern in tort cases that we observed from 1949 to 1959. The voting pattern in criminal law cases differs from the overall voting pattern from 1959 to 1964 in the direction of being

149. The court also voted on political lines in non-unanimous cases involving issues of the regulatory power of the state, property rights, civil rights, civil liberties, and labor issues. From 1959 to 1964, these cases included the following: *Wollam v. City of Palm Springs*, 379 P.2d 481, 488 (Cal. 1963) ( $\beta=-2.50$ ) (invalidating municipal ordinance regulating use of sound trucks as overboard in claim brought by a labor union); *Consol. Rock Prods. Co. v. City of Los Angeles*, 370 P.2d 342, 352 (Cal. 1962) ( $\beta=-2.66$ ) (rejecting constitutional challenge to zoning restriction that shut down rock and gravel operations), *appeal dismissed*, 371 U.S. 36 (1962); *DiGenova v. State Bd. of Educ.*, 367 P.2d 865, 872 (Cal. 1962) ( $\beta=-2.63$ ) (ordering reinstatement of teacher fired for "lewd behavior" on grounds that the statute justifying termination could not be applied retroactively); *ACLU v. Bd. of Educ.*, 359 P.2d 45, 53 (Cal. 1961) ( $\beta=-2.03$ ) (requiring board to allow union to hold public meetings at junior high school); *People ex rel Dep't of Pub. Works v. Symons*, 357 P.2d 451, 455 (Cal. 1960) ( $\beta=-2.57$ ) (holding that property owner could not recover damages for diminution in value of property from highway); *Messner v. Journeymen Barbers, Int'l Union of Am., Local 256*, 351 P.2d 347, 357 (Cal. 1960) ( $\beta=-2.68$ ) (holding that coercing owners of small business to sign a closed shop agreement that would require them to join a union is a permissible purpose of picketing); *Petri Cleaners, Inc., v. Auto. Emps. Local No. 88*, 349 P.2d 76, 88 (Cal. 1960) ( $\beta=-2.59$ ) (companion case to *Messner*); *People ex rel. Dep't of Pub. Works v. Chevalier*, 340 P.2d 598, 603 (Cal. 1959) ( $\beta=-2.32$ ) (rejecting challenge to exercise of eminent domain).

somewhat less patterned on political lines. But the voting pattern in criminal law cases is consistent with the overall voting pattern from 1964 to 1970, which is on political lines. In addition, there was a large increase in the number and share of criminal law cases in which there was a dissent from 1964 to 1970.<sup>150</sup>

For most of the periods that we study, the sign of  $\beta$  predicts whether the outcome in a criminal law case is favorable to the defendant and whether the outcome in a tort case is favorable to the plaintiff. Justices the model places on the left wing favored criminal defendants and tort plaintiffs while justices the model places on the right wing favored the prosecution in criminal cases and tort defendants. What changed is that after 1959, the justices on the court's left wing were Democrats who had liberal political reputations while justices on the court's right wing were Republicans who had conservative political reputations. This was not the pattern before 1949.

In many of the criminal law and tort cases in which  $\beta$  has a high absolute value, the majority and dissent disagreed on a factual issue or a narrow legal issue. But in a significant number of these cases, the disagreement was on an issue of broad importance.<sup>151</sup> In tort law, *Muskopf v. Corning Hospital District* abolished governmental immunity.<sup>152</sup> *Johnson v. State* carved holes in a statute enacted by the California legislature to override *Muskopf* and reinstate governmental immunity, establishing immunity as the exception and not the rule under the new statute.<sup>153</sup> *Rowland v. Christian* established that an occupier of land owes a general duty of care to someone on the land and eliminated the limited duty rules applicable to trespassers and social guests.<sup>154</sup> *Connor v. Great Western Savings & Loan Ass'n* adopted an expansive concept of a joint venture to hold a lender liable for construction defects when the real estate developer who was responsible for the defects was insolvent.<sup>155</sup> *Dillon v. Legg* allowed a bystander claim for nervous shock

150. Criminal law cases were 41.8% of non-unanimous cases from 1959 to 1964 (87 of 208) and 62.2% (219 of 352) from 1964 to 1970. The sharp increase in the number non-unanimous criminal law cases from 1964 to 1970 is attributable to a combination of an increase in the number of merit decisions in criminal law cases and an increase in the percentage of these cases that were decided non-unanimously.

151. The voting patterns in the two most significant contract cases decided during the decade, which liberalized California law on contract interpretation, conform to the dominant pattern. See *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645-46 (Cal. 1968) ( $\beta=-1.986$ ) (requiring preliminary consideration of parol evidence to a contract's terms to understand its meaning); *Masterson v. Sine*, 436 P.2d 561, 564 (Cal. 1968) ( $\beta=-2.31$ ) (allowing admission of parol evidence in interpretation of contracts where there is only partial integration and evidence does not contradict written terms).

152. *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961) ( $\beta=-2.54$ ).

153. *Johnson v. State*, 447 P.2d 352 (Cal. 1968) ( $\beta=-1.84$ ).

154. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) ( $\beta=-2.35$ ).

155. *Connor v. Great W. Savings & Loan Ass'n*, 447 P.2d 609 (Cal. 1968) ( $\beta=-2.48$ ).

when a mother saw her child killed by an automobile.<sup>156</sup> And *Klein v. Klein* abolished interspousal immunity for negligence.<sup>157</sup>

In criminal law, many of the cases in which the justices voted in line with their political reputations were important building blocks in what has been called a due process revolution. *People v. Fioritto* has been described as “California’s Miranda progeny.”<sup>158</sup> *People v. Dorado* required police to inform an individual who was answering questions about a crime of his right to counsel when they began to consider him a suspect.<sup>159</sup> *People v. Ibarra* lowered the bar for establishing ineffective assistance of counsel.<sup>160</sup> *People v. Henderson* held that double jeopardy barred a defendant who originally received a life sentence that was reversed on appeal from being given a death sentence if he was retried and convicted.<sup>161</sup> *People v. Shelton* held that a defendant’s consent to a request by the police to search his home was coerced when the defendant opened the door, revealing evidence of narcotics possession, after the police demanded the door be opened.<sup>162</sup> And *People v. Trout* held that holding a defendant’s spouse in custody as an accomplice to encourage the defendant to confess made his confession involuntary.<sup>163</sup>

The number of non-unanimous cases in which the defendant appealed a death sentence increased sharply during the 1960s. “Death penalty” appears in the “outcome” or “core term” field in 13 non-unanimous cases from 1949 to 1959,<sup>164</sup> in 23 such cases from 1959 to 1964, and in 47 such cases from 1964 to 1970. The number of cases in which the criminal defendant prevailed increased as sharply. The defendant prevailed in three of 13 non-unanimous cases from 1949 to 1959, 21 of 23 such cases from 1959 to 1964, and in 40 of 47 such cases from 1964 to 1970.<sup>165</sup> In the two

156. *Dillon v. Legg*, 441 P.2d 912, 925 (Cal. 1968) ( $\beta=-1.14$ ). The absolute value of  $\beta$  is relatively high because Traynor joined Burke and McComb in dissent. *Id.* at 925 (Traynor, C.J., dissenting); *id.* at 928 (Burke, J., dissenting).

157. *Klein v. Klein*, 376 P.2d 70, 73 (Cal. 1962) ( $\beta=-2.53$ ). *Klein*’s companion case, *Self v. Self*, 376 P.2d 65, 70 (Cal. 1962), did the same for intentional tort. The liberal wing prevailed in all of the cases noted in this paragraph. However, the conservative wing of the court prevailed in *Seely v. White Motor Co.*, 403 P.2d 145, 151–52 (Cal. 1965) ( $\beta=0.98$ ), a 6–1 decision which held that a products liability claim is not available for pure economic loss.

158. Scheiber, *supra* note 2, at 428; see *People v. Fioritto*, 441 P.2d 625, 627 (Cal. 1968) ( $\beta=-2.37$ ) (holding that warnings outlined in the United States Supreme Court’s opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966), must be given to individuals in police custody).

159. *People v. Dorado*, 394 P.2d 952, 953 (Cal. 1964) ( $\beta=-2.60$ ).

160. *People v. Ibarra*, 386 P.2d 487, 490–91 (Cal. 1963) ( $\beta=-2.44$ ).

161. *People v. Henderson*, 386 P.2d 677, 686 (Cal. 1963) ( $\beta=-2.54$ ).

162. *People v. Shelton*, 388 P.2d 665, 668 (Cal. 1964) ( $\beta=-2.47$ ).

163. *People v. Trout*, 354 P.2d 231, 236 (Cal. 1960) ( $\beta=-2.51$ ).

164. There were 33 merits decisions with “death penalty” in the outcome or core terms fields from 1949 to 1959.

165. There were 111 merits decisions with “death penalty” in the outcome or core terms fields from

later periods, the sign of  $\beta$  perfectly predicts the outcome in a death penalty case and voting patterns strongly correspond to the dominant pattern. To be clear, there were a significant number of affirmances of death sentences throughout the 1960s. Unlike the Bird court years, these were typically unanimous decisions. Yet many of these defendants were never executed; 105 inmates on death row were spared from execution in 1972 when the California Supreme Court held the death penalty unconstitutional in *People v. Anderson*.<sup>166</sup>

Ronald Reagan made the court's decisions favoring criminal defendants an issue in the 1966 gubernatorial race, in which he defeated Pat Brown. In the following decades, Republicans often accused Democrats (and Democratic judges) as being soft on crime. Reagan leaned even harder on the court's decision in *Mulkey v. Reitman*, which invoked the federal Equal Protection Clause to invalidate an initiative measure that sought to overturn legislation prohibiting discrimination in the rental and sale of housing.<sup>167</sup> Scheiber reports that the "intensity of criticism" of the decision (which included a "barrage of hate mail") induced Peek, who wrote the majority opinion, to resign in December 1966.<sup>168</sup> The timing of his resignation allowed the lame duck Pat Brown to appoint Sullivan to replace Peek, denying Reagan the opportunity to fill the seat.

Reagan's first opportunity to appoint a California Supreme Court justice was in early 1970, when Traynor was required to retire as chief justice under a mandatory retirement rule. Reagan appointed Wright as Traynor's successor. Reagan later described this appointment as his "biggest mistake."<sup>169</sup> Wright's authorship of the majority decision in *Anderson* holding the death penalty unconstitutional is often cited as a major factor in Reagan's disappointment. Reagan's other appointments were Clark in March 1973 (replacing Peters) and Richardson in December 1974 (replacing Burke). Scheiber describes the two as being "regarded as fully reliable conservatives who would challenge the liberal block."<sup>170</sup> Scheiber paints

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1959 to 1970. A casual inspection of the cases in which there was no dissent suggests that almost all such cases affirmed the conviction and penalty.

166. *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) ( $\beta=-2.07$ ).

167. *Mulkey v. Reitman*, 413 P.2d 825, 834 (Cal. 1966) ( $\beta=-1.98$ ), *aff'd*, 387 U.S. 369 (1967). Scheiber covers the history of the case and a companion case, both of which were upheld by the United States Supreme Court in a 5-4 decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967). Scheiber, *supra* note 2, at 354-60. Scheiber describes the decision and the housing discrimination issue more generally as an "albatross" around the necks of the Democratic party, which "played a major part in turning voters against Governor Brown in his bid for a third gubernatorial term, and electing Ronald Reagan as governor in November 1966." *Id.* at 359-60.

168. Scheiber, *supra* note 2, at 358.

169. *Id.* at 333.

170. *Id.*

Clark as a mediocrity who won Reagan's attention as a campaign manager in the gubernatorial race and his trust as executive secretary when Reagan was governor.<sup>171</sup> Scheiber paints Richardson in more flattering terms as an able "legal craftsman."<sup>172</sup>

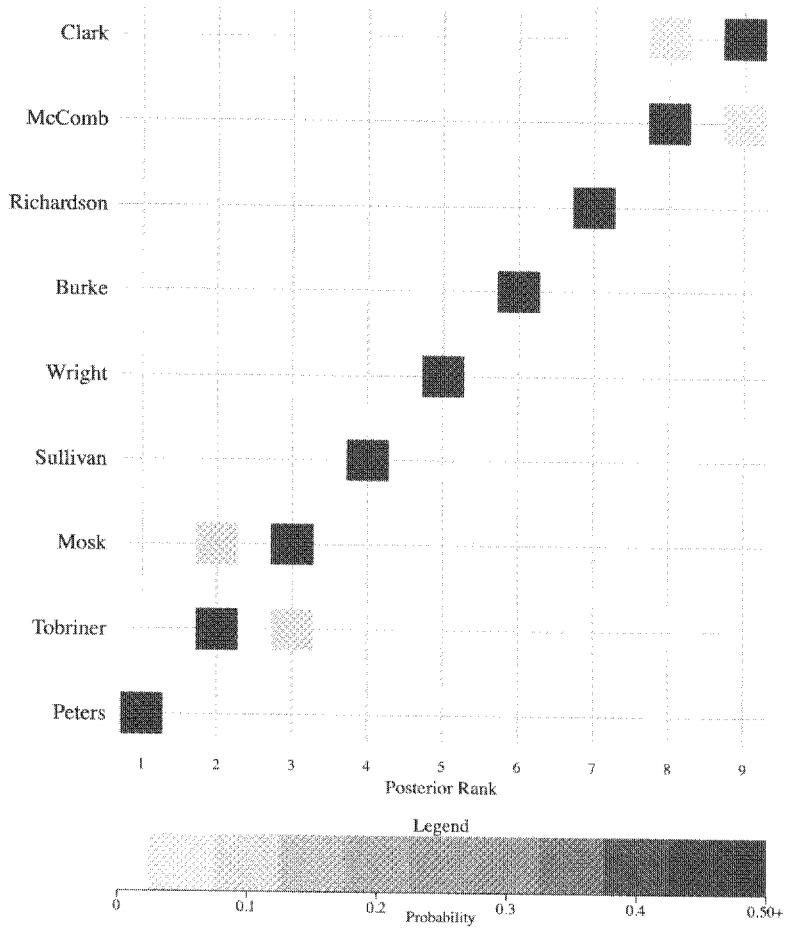
The diagram below shows the posterior ranks of the justices who served from 1970 to 1977, which was Wright's tenure as chief justice. Voting is highly patterned, and the justices' posterior ranks closely correspond to their political reputations.

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171. *Id.* at 333–34.

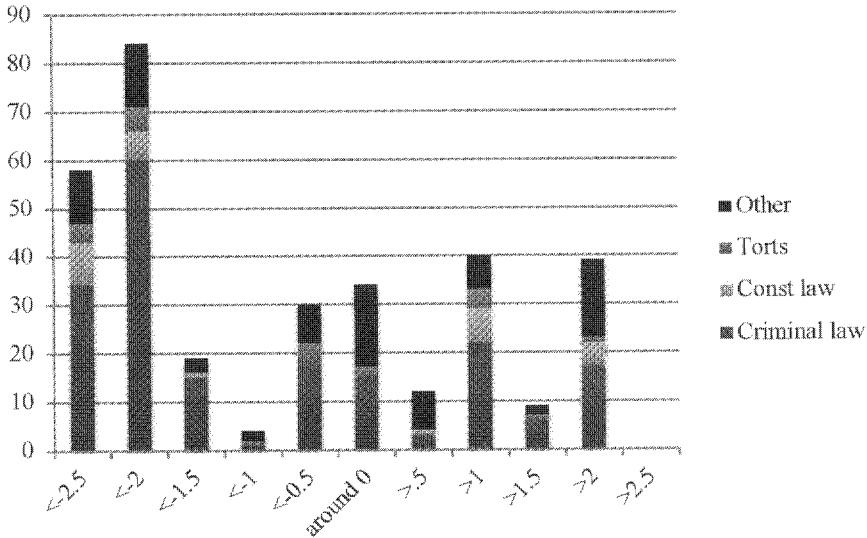
172. *Id.* at 335.

FIGURE 22. Ranks (1970–1977)



The diagram below, which shows the distribution of  $\beta$  for 1970–1977, illustrates that the liberals continued to dominate during this period, though not to the same degree as they did in the 1960s. Criminal law cases continued to comprise the majority (190 of 329) of the total number of non-unanimous cases. There were 29 constitutional law cases and 23 tort cases.

FIGURE 23. 1970–1977 (n=329)



The voting pattern in constitutional law cases<sup>173</sup> and criminal law cases<sup>174</sup> conforms to the dominant pattern. We will briefly describe some of the cases in which  $\beta$  has a high absolute value to sketch issues that split the court on political lines. These were generally 4–3 cases or 5–2 cases in which Wright joined the liberals (Peters, Tobriner, Mosk, and Sullivan). The most significant constitutional law case is *Serrano v. Priest*, which held that the system of funding public schools through local property taxes was unconstitutional under the state Equal Protection Clause.<sup>175</sup> Other equal protection cases struck down filing fee requirements to be a candidate for public office,<sup>176</sup> and a two-year residency requirement for filing as a candidate for city council.<sup>177</sup> In the speech arena, the court invalidated an anti-littering ordinance as facially overbroad when the ordinance was being used to prevent distribution of handbills;<sup>178</sup> held an anti-obscenity licensing ordinance was unconstitutional on its face because it lacked an adequate

173. The absolute value of  $\beta$  is greater than two in 20 of 29 cases and less than one in one case.

174. The absolute value of  $\beta$  is greater than two in 111 of 190 cases and less than one in 33 cases.

175. *Serrano v. Priest*, 557 P.2d 929, 957–58 (Cal. 1976) ( $\beta$ =-2.76).

176. *Knoll v. Davidson*, 525 P.2d 1273, 1284 (Cal. 1974) ( $\beta$ =-2.74).

177. *Thompson v. Mellon*, 507 P.2d 628, 636 (Cal. 1973) ( $\beta$ =-2.63). However, Wright joined the conservatives to reject an equal protection challenge to a residency requirement for jury service. See *Adams v. Superior Court*, 524 P.2d 375, 380 (Cal. 1974) ( $\beta$ =2.28).

178. *Van Nuys Publ'g Co. v. City of Thousand Oaks*, 489 P.2d 809, 816 (Cal. 1971) ( $\beta$ =-2.70).

standard defining what was obscene;<sup>179</sup> and held a probationary school teacher could not be terminated for reading his composition (which included the words "white-mother-fucking pig") to his tenth-grade English class.<sup>180</sup> Yet Wright split with the liberals and joined the conservatives in reversing a decision from a few years earlier that had held that the First Amendment required an owner of a shopping center to allow the distribution of political materials.<sup>181</sup>

In criminal law, one of the cases that split the court 4–3 on the dominant pattern involved the question whether testimony obtained in violation of *Miranda* could be used for purposes of impeachment. The United States Supreme Court answered "yes." The California Supreme Court answered "no," with Wright joining the liberals.<sup>182</sup> Another decision raised the standard for admitting evidence of prior convictions for purposes of impeachment to limit the chilling effect on an accused who wanted to testify.<sup>183</sup> *In re Rodriguez* held a sentence of life imprisonment for engaging in lewd conduct with a child to be cruel and unusual punishment.<sup>184</sup> *People v. Richards* held that probation could not be conditioned on a defendant paying restitution to his victim.<sup>185</sup> A search and seizure case held that the police did not have probable cause to arrest a woman when she refused to consent to allow the police to search her apartment when they believed a youth they were pursuing was hiding in the apartment.<sup>186</sup> Another case held that it was an unreasonable invasion of privacy for the police to pat down an apparently intoxicated driver before giving him a ride in their car to his destination.<sup>187</sup>

The tort cases present a more mixed picture during 1970–1977.<sup>188</sup> The court does not split on the dominant pattern in the two most significant tort cases. These were *Li v. Yellow Cab Co.*, which abolished the defense of contributory negligence,<sup>189</sup> and *Tarasoff v. Regents of the University of*

179. *Perrine v. Mun. Court*, 488 P.2d 648, 651–52 (Cal. 1971) ( $\beta=-2.64$ ).

180. *Lindros v. Governing Bd. of Torrance Unified Sch. Dist.*, 510 P.2d 361, 368–69 (Cal. 1973) ( $\beta=-2.63$ ).

181. *Diamond v. Bland*, 521 P.2d 460, 463 (Cal. 1974) ( $\beta=2.33$ ), *rev'g* 477 P.2d 733 (Cal. 1970).

182. *People v. Disbrow*, 545 P.2d 272, 280 (Cal. 1976) ( $\beta=-2.80$ ). This was reversed by Proposition 8 in 1982 (the "Victim's Bill of Rights"). See CAL. CONST. art. I, § 28; see also *People v. May*, 748 P.2d 307, 312 (Cal. 1988) (holding that Proposition 8 abrogated *Disbrow*). The contrary U.S. Supreme Court decision was *Harris v. New York*, 401 U.S. 222 (1971).

183. *People v. Rist*, 545 P.2d 833, 838–39 (Cal. 1976) ( $\beta=-2.82$ ).

184. *In re Rodriguez*, 537 P.2d 384, 394–95 (Cal. 1975) ( $\beta=-2.83$ ).

185. *People v. Richards*, 552 P.2d 97, 102 (Cal. 1976) ( $\beta=-2.77$ ).

186. *People v. Wetzel*, 520 P.2d 416, 420 (Cal. 1974) ( $\beta=-2.83$ ).

187. *People v. Scott*, 546 P.2d 327, 333 (Cal. 1976) ( $\beta=-2.78$ ).

188. The absolute value of  $\beta$  is greater than two in 10 of 23 cases and less than one in seven cases.

189. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1230 (Cal. 1975) ( $\beta=-0.75$ ).



*California*, which held that a mental health care professional who learns that a patient plans to attack a specific victim has a duty to take measures to protect the victim.<sup>190</sup> Mosk joined Clark and McComb in dissent in both cases while Burke joined the majority in *Li* and Richardson joined the majority in *Tarasoff*. The tort cases in which voting conforms to the dominant pattern include a case that allowed a nuisance claim against the Santa Monica airport<sup>191</sup> and a case that held a county was not immune from a false imprisonment claim.<sup>192</sup> To these one might add a procedure case that adopted an expansive theory of minimum contacts and rejected application of the *forum non conveniens* doctrine to allow a Californian to recover on a wrongful death claim when her husband was killed in a Nevada automobile accident.<sup>193</sup>

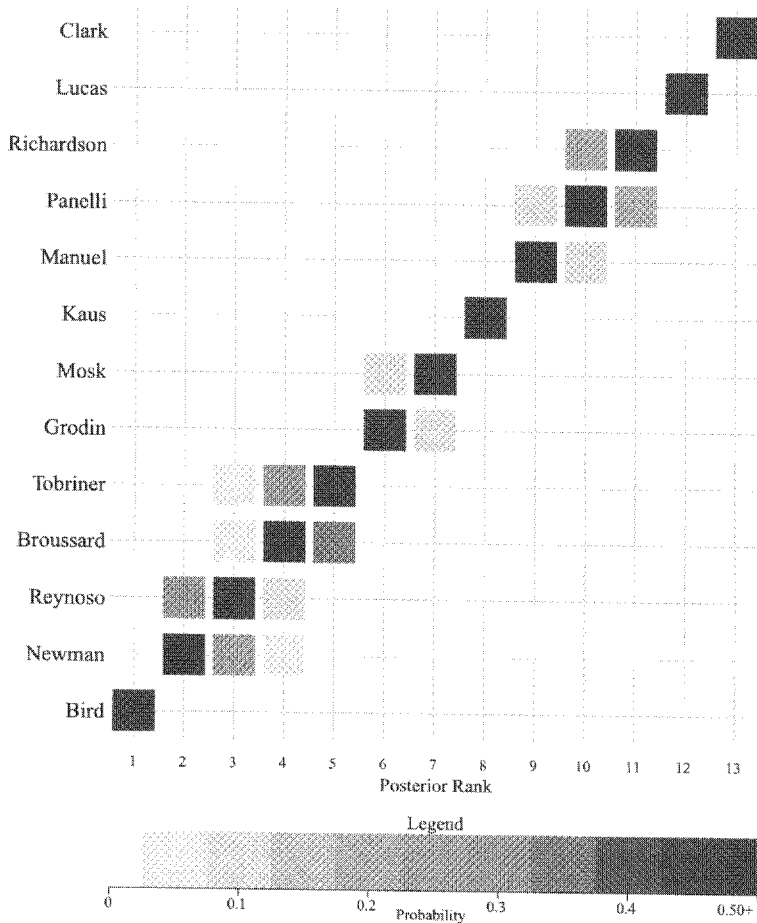
Clark replacing Peters in March 1973 could have significantly changed the court's political balance. The model places Clark on the extreme right wing and Peters on the extreme left wing. This reduced the liberal bloc to three justices (Tobriner, Mosk, and Sullivan) and gave the conservatives a majority when Wright voted with them. But Wright generally voted with the liberals in cases that divided on partisan lines. There were 49 cases in which the court split 4–3 after Clark replaced Peters. The three liberals voted as a bloc in 37 of these cases. Of these 37 cases, Wright joined the three liberals in 33 cases and the conservatives in only four cases. These 33 cases include important decisions in the areas of criminal law, constitutional law, and tort. No wonder Reagan was disappointed with Wright.

Wright retired in February 1977. That year, Governor Edmund Gerald (Jerry) Brown, Jr. appointed Bird as chief justice, and appointed Manuel to replace Sullivan and Newman to replace McComb. This shifted the court's balance significantly to the left, with five liberals and two conservatives. The balance shifted even more to the left when Brown appointed Broussard to replace Clark in 1981. This left Richardson as the court's sole conservative until he retired in 1984. Brown also appointed Kaus (replacing Manuel in 1981), Reynoso (replacing Tobriner in 1982), and Grodin (replacing Newman in 1982). The Republicans retook the governor's office in 1983, and Governor Deukmejian appointed Lucas to replace Richardson in 1984 and Panelli to replace Kaus in 1985.

The diagram below shows the posterior ranks of the justices who served during 1977–1987, which was Bird's tenure as chief justice.

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190. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345–46 (Cal. 1976) ( $\beta=-0.54$ ).  
 191. *Nestle v. City of Santa Monica*, 496 P.2d 480, 490 (Cal. 1972) ( $\beta=-2.52$ ).  
 192. *Sullivan v. County of Los Angeles*, 527 P.2d 865, 868–69 (Cal. 1974) ( $\beta=-2.68$ ).  
 193. *Cornelison v. Chaney*, 545 P.2d 264, 269 (Cal. 1976) ( $\beta=-2.77$ ).

FIGURE 24. Ranks (1977-1987)



The justices’ posterior ranks closely correspond to Scheiber’s description of their political views.<sup>194</sup> The posterior ranks also closely correspond to the justices’ “liberalism scores” assigned by Emmert and Traut in a 1994 paper.<sup>195</sup> Those scores are based on a content analysis of newspaper

194. See Scheiber, *supra* note 2, at 335-43. He describes Bird and Reynoso as holding strongly liberal views on issues of race, gender, and social justice, Newman as “reliably supportive” of Bird, and Broussard as someone who “would generally align with the liberal bloc in his early years.” *Id.* He describes Manuel as “less liberal, less abrasive, and far less controversial” than Bird. *Id.* at 338. He describes Kaus as “a moderate in a liberal court.” *Id.* at 339.

195. See Craig F. Emmert & Carol Ann Traut, *The California Supreme Court and the Death*

editorials and articles that discussed the justices' qualifications when nominated.<sup>196</sup> Newman had the highest liberalism score (1.00), followed by Bird (0.98), Reynoso (0.94), Grodin (0.93), Broussard (0.70), Kaus (0.39), Manuel (0.13), Panelli (-0.50), Richardson (-0.50), Lucas (-0.92), and Clark (-1.00).<sup>197</sup>

The diagram below shows the distribution of  $\beta$  for this period, again separating criminal law, constitutional law, and tort cases. The cases in the "1.5–2 bin" include 51 solo dissents by Bird.<sup>198</sup> Around one-quarter of the cases in the "around 0" bin are cases in which the model counts justices on the court's two wings as joining in a dissent when they actually split, with the justices on the two wings joining in and dissenting from different parts of the majority opinion. In all of these cases, either the justices on the left wing dissent from a part of the majority opinion they find to be too conservative, or justices on the right wing dissent from a part of the majority opinion they find to be too liberal. Slightly less than half of the cases in this bin are solo dissents by justices that the model places at the center. There are very few 4–3 and 5–2 cases in which justices on the different wings actually vote together.<sup>199</sup>

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*Penalty*, 22 AM. POL. Q. 41, 47 (1994).

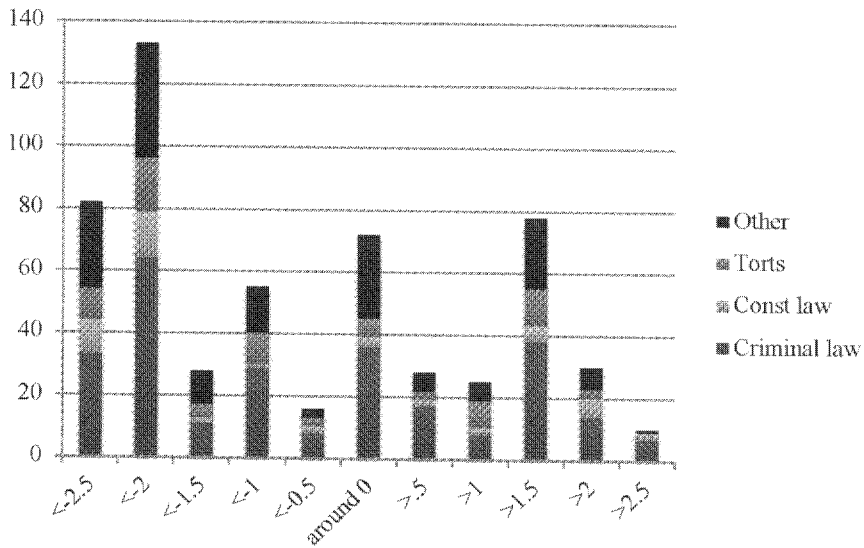
196. *Id.* at 45–46.

197. *Id.* at 47.

198. Clark had the next largest number of solo dissents with 35, which are in "–1.5–1" bin.

199. *Taylor v. Superior Court*, 598 P.2d 854, 859 (Cal. 1979) ( $\beta=-0.008$ ), is a rare example. There, the court held that driving while intoxicated fits the definition of malice, justifying an award of punitive damages. *Id.* at 859. Bird and Newman joined Clark in dissent. *Id.* at 859 (Bird, C.J., concurring and dissenting); *id.* at 866 (Clark, J., dissenting).

FIGURE 25. 1977–1987 (n=557)



The voting patterns in constitutional law, criminal law, and tort cases all conform to the dominant pattern. We begin with a sample of the many tort cases in which voting conforms to the voting pattern. The most important tort cases were *Sindell v. Abbott Laboratories*, which adopted the novel theory of market share liability,<sup>200</sup> and *Molien v. Kaiser Foundation Hospitals*, which adopted an expansive theory of liability for negligent infliction of emotional distress.<sup>201</sup> The court's liberal justices incurred the insurance industry's wrath with the decision in *Royal Globe Insurance Co. v. Superior Court*, which held that a third party could sue a liability insurer for bad faith refusal to settle a claim.<sup>202</sup> Other cases in which voting conforms to the dominant pattern held that the state was liable for not erecting median barriers on a freeway;<sup>203</sup> that set-offs in comparative negligence should not be applied when this would reduce recovery against a liability insurer;<sup>204</sup> and that a physician could be held liable for not specifically explaining the risks of not taking the test when a patient declined

200. *Sindell v. Abbott Labs.*, 607 P.2d 924, 937–38 (Cal. 1980) ( $\beta = -2.60$ ).

201. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 821, 823 (Cal. 1980) ( $\beta = -2.15$ ).

202. *Royal Globe Ins. Co. v. Superior Court*, 592 P.2d 329, 332 (Cal. 1979) ( $\beta = -2.91$ ). Harry Scheiber describes the industry response to the decision. Scheiber, *supra* note 2, at 389.

203. *Ducey v. Argos Sales Co.*, 602 P.2d 755, 763 (Cal. 1979) ( $\beta = -3.02$ ).

204. *Jess v. Herrmann*, 604 P.2d 208, 215 (Cal. 1979) ( $\beta = -2.74$ ).

to take a recommended diagnostic test.<sup>205</sup>

*Robins v. Pruneyard Shopping Center* is an important constitutional case that held the California Constitution protects speech and petitioning in a privately-owned shopping center.<sup>206</sup> Other significant constitutional and civil liberties cases in which voting conforms to the dominant pattern held employment discrimination based on sexual orientation actionable;<sup>207</sup> upheld limits on campaign contributions;<sup>208</sup> struck down a municipal ordinance that required occupants of a house to be family members;<sup>209</sup> and invoked the right of association to overrule a discovery order that would have required plaintiffs in a nuisance action against a municipal airport to disclose their political associations.<sup>210</sup> The right wing prevailed in a case that held a Spanish-speaking plaintiff did not have a right to an interpreter in a civil case under the common law or as a matter of due process.<sup>211</sup> Voting conforms to the dominant pattern in all of these cases.

The significant criminal law cases in which the liberal wing prevailed and voting conforms to the dominant pattern include a short-lived decision that rejected the *M'Naghten* insanity test and adopted the modern test.<sup>212</sup> The case was reversed by Proposition 8 (the "Victim's Bill of Rights") in 1982.<sup>213</sup> Other significant criminal law cases held the San Francisco pretrial and detention system violated due process;<sup>214</sup> mandated a prison newspaper publish two articles prison officials had deemed inappropriate;<sup>215</sup> and held that the presence of an undercover police officer in meetings to plan a sit-in violated the protestors' right to communicate privately with counsel.<sup>216</sup> Meanwhile, the conservative wing prevailed in a case that rejected a

205. Truman v. Thomas, 611 P.2d 902, 907-08 (Cal. 1980) ( $\beta$ =-2.83).

206. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979) ( $\beta$ =-2.71).

207. Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 613 (Cal. 1979) ( $\beta$ =-2.86). While the claim was brought under a statute, the majority relied on constitutional principles to imply a prohibition against discrimination in the statute. *Id.*

208. Citizens Against Rent Control v. City of Berkeley, 614 P.2d 742, 749 (Cal. 1980) ( $\beta$ =-2.81).

209. City of Santa Barbara v. Adamson, 610 P.2d 436, 442 (Cal. 1980) ( $\beta$ =-2.80).

210. Britt v. Superior Court, 574 P.2d 766, 777 (Cal. 1978) ( $\beta$ =-2.80).

211. Jara v. Municipal Court, 578 P.2d 94, 9697 (Cal. 1978) ( $\beta$ =2.57).

212. People v. Drew, 583 P.2d 1318, 1326 (Cal. 1978) ( $\beta$ =-2.82).

213. See CAL. CONST. art. I, § 28. Proposition 8 withstood a constitutional challenge in *Brosnahan v. Brown*, 651 P.2d 274, 289 (Cal. 1982) ( $\beta$ =0.92). The low  $\beta$  score is attributable to it being unusual for Newman and Reynoso to cross over and join Broussard and Mosk to vote with the conservative wing. Moreover, *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985) ( $\beta$ =1.50), held that Proposition 8 abrogated the "vicarious exclusionary rule" and the right of a defendant to suppress evidence seized in violation of the California Constitution, but not the U.S. Constitution.

214. Van Atta v. Scott, 613 P.2d 210, 222 (Cal. 1980) ( $\beta$ =-2.82).

215. Bailey v. Loggins, 654 P.2d 758, 769 (Cal. 1982) ( $\beta$ =-2.82).

216. Barber v. Municipal Court, 598 P.2d 818, 828 (Cal. 1979) ( $\beta$ =-2.80). *In re Johnson*, 598 P.2d 834, 835 (Cal. 1979) ( $\beta$ =-2.77), applied the same rule to release a convicted defendant.

constitutional challenge to rules excluding ex-felons and residents from jury service,<sup>217</sup> and a case that upheld the "time honored practice" of allowing a prosecutor to condition release of a misdemeanant from custody on agreeing to release potential civil liability claims and stipulate to probable cause.<sup>218</sup>

The right wing also eventually prevailed in a highly publicized case, *People v. Tanner*, which involved a statute that imposed an enhanced sentence if a gun was used in commission of the crime.<sup>219</sup> A left-wing majority initially affirmed the trial court, which had held that it had the power to disregard the statute and dismiss a charge when it was in the interest of justice.<sup>220</sup> This was a 4-3 decision where voting conforms to the dominant pattern. The case had received a great deal of press attention, and Bird was accused of delaying the decision until after the 1978 election, in which she was retained by a close vote. The case was reheard and the right wing prevailed in a decision that reversed the trial court on the legal rule while preserving the outcome.<sup>221</sup> The concurrence by Newman and the concurrence-in-part by Bird decry the politicization of the case, and the "shrill, clamorous campaign inspired and nurtured by experienced, well-financed, ambitious, and posse-like 'hard on crime' advocates."<sup>222</sup>

The campaign in 1986 against Bird, Grodin, and Reynoso in their retention elections emphasized their opposition to the death penalty.<sup>223</sup> Bird famously never voted to affirm a death sentence. Voting closely conforms to the dominant pattern in two of the four cases in which the court affirmed a death sentence.<sup>224</sup> Voting also conforms to the dominant pattern in a few of the death penalty cases that raised significant legal questions. These include *Hovey v. Superior Court*, which held it was impermissible to use peremptory challenges to exclude jurors who had moral objections to the death penalty from the guilt phase of a trial,<sup>225</sup> *People v. Trevino*, which overturned a judgment of guilt for murder when the prosecutor systematically used his

217. *Rubio v. Superior Court*, 593 P.2d 595, 602 (Cal. 1979) ( $\beta=2.52$ ).

218. *Hoines v. Barney's Club, Inc.*, 620 P.2d 628, 635 (Cal. 1980) ( $\beta=2.54$ ).

219. *People v. Tanner (Tanner I)*, 587 P.2d 1112, 1115 (Cal. 1978).

220. *Id.* at 1124.

221. *People v. Tanner (Tanner II)*, 596 P.2d 328, 331 (Cal. 1979) ( $\beta=2.48$ ).

222. *Id.* at 347 (Newman, J., concurring); *id.* at 358 (Bird, C.J., concurring and dissenting).

223. See Scheiber, *supra* note 2, at 480.

224. The two cases where voting conforms to the dominant pattern were *People v. Allen*, 729 P.2d 115, 157 (Cal. 1986) ( $\beta=2.42$ ), and *People v. Fields*, 673 P.2d 680, 709 (Cal. 1983) ( $\beta=1.98$ ). The other two cases were *People v. Jackson*, 618 P.2d 149, 177 (Cal. 1980) ( $\beta=1.15$ ), and *People v. Harris*, 623 P.2d 240, 256 (Cal. 1981) ( $\beta=0.94$ ). The relatively low values of  $\beta$  in the latter two cases are because Mosk—who was a centrist generally—joined Bird in dissent. See *Jackson*, 618 P.2d at 195 (Mosk, J., dissenting); *Harris*, 623 P.2d at 268 (Bird, C.J., dissenting). Tobriner also joined the dissent in *Jackson*. See *Jackson*, 618 P.2d at 195 (Mosk, J., dissenting).

225. *Hovey v. Superior Court*, 616 P.2d 1301, 1314 (Cal. 1980) ( $\beta=-2.65$ ). On the case's significance, see Scheiber, *supra* note 2, at 439-40.

peremptory challenges to exclude jurors with Hispanic surnames;<sup>226</sup> and *Carlos v. Superior Court*, which held the death penalty required the defendant be found to have had intent to kill.<sup>227</sup>

## VI. 1987–2011: THE CONSERVATIVE COURT

Bird, Grodin, and Reynoso lost their retention elections in November 1986. Republican Governor Deukmejian appointed Lucas as chief justice and Arguelles, Eagleson, and Kaufman as associate justices.<sup>228</sup> This gave conservatives a 5–2 majority on the court. The three new associate justices, all of whom had long tenures on lower courts, served on the Supreme Court for relatively brief periods. All three retired quickly enough for Deukmejian to be able to appoint their successors: Kennard replaced Arguelles in 1989, Arabian replaced Kaufman in 1990, and Baxter replaced Eagleson early in 1991. Republican Governor Wilson, who took office in 1991, appointed George to replace Broussard in 1991 and Werdegar to replace Panelli in 1994.

The diagram below shows the posterior ranks of the justices who served during 1987–1996, which includes Lucas's entire tenure as chief justice. Chin appears because he voted in a handful of non-unanimous cases in 1996.

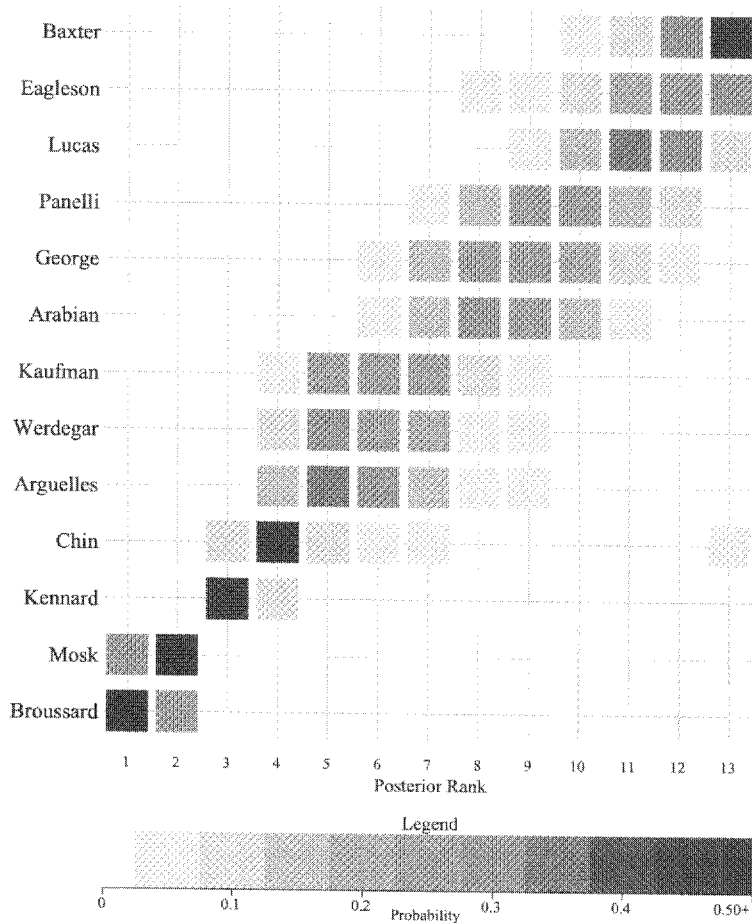
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226. *People v. Trevino*, 704 P.2d 719, 733–34 (Cal. 1985) ( $\beta=-2.51$ ). On the case's significance, see Scheiber, *supra* note 2, at 440.

227. *Carlos v. Superior Court*, 672 P.2d 862, 877 (Cal. 1983) ( $\beta=-2.44$ ). On the case's significance, see Bob Egelko, *The Lucas Years, 1987–1996*, in CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER, *supra* note 2, at 515, 522–23.

228. Eagleson and Kaufman were Republicans. Arguelles was a Democrat.

FIGURE 26. Ranks (1987–1996)



The positions of the three justices on the left wing conform to their political reputations. Broussard and Mosk were the surviving liberals from the Bird court; recall that Mosk was a centrist on the Bird and Sullivan courts and slightly right of center on the Traynor court. When Kennard was appointed to the court she was “a little-known Los Angeles jurist with a sparse resume.”<sup>229</sup> Emmert and Traut assign Kennard a slightly lower liberalism score than Arabian and Panelli based on a content analysis of

229. Egelko, *supra* note 227, at 519.



newspaper stories and editorials when they were appointed to the court.<sup>230</sup> This suggests there was an expectation she would be a moderate conservative. Kennard's voting record quickly established her reputation "as an independent and unpredictable centrist."<sup>231</sup> The other justices generally are described as moderate conservatives, as is the Lucas court collectively.<sup>232</sup> Baxter, Eagleson, and Lucas are described as being more conservative than the others. This is consistent with their posterior ranks.<sup>233</sup>

The diagram below shows the distribution of  $\beta$  for this period, separating criminal, constitutional, and tort law cases. The voting data calls into question the description of the Lucas court as moderately conservative. The court's right wing is as dominant during this period as the left wing was dominant from 1959 to 1970.

230. Emmert & Traut, *supra* note 195, at 45–47. Broussard has the highest liberalism score (0.70), followed by Arabian (-0.45), Panelli (-0.50), Kennard (-0.64), Kaufman (-0.90), Arguelles (-0.91), Lucas (-0.92), and Eagleson (-0.93). *Id.* at 47.

231. Egelko, *supra* note 227, at 519.

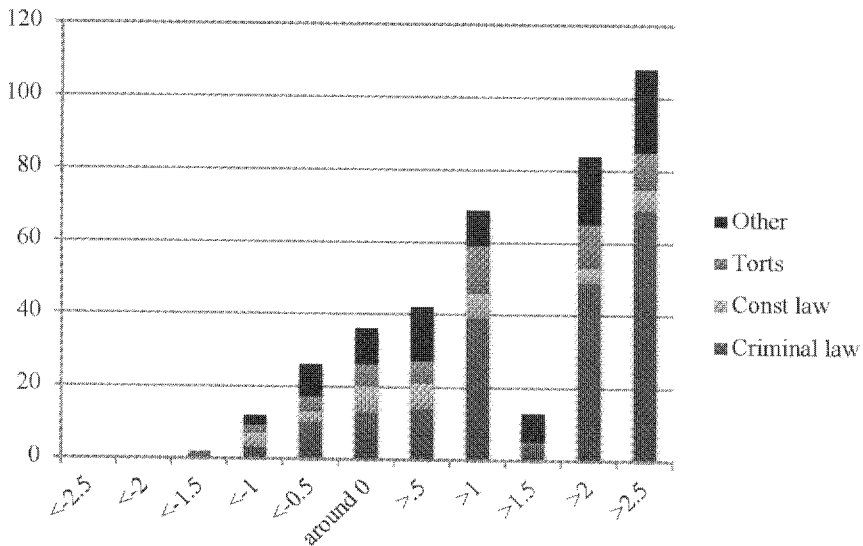
232. Culver describes the Lucas court as "a cautious court," that "blunted, but did not reverse, the direction of the high court under Bird, other than in the field of criminal law." Culver, *supra* note 29, at 1476–77.

233. The posterior ranks of the justices during 1987–1996 correspond fairly closely to their estimated ideal points based on their political contributions. Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J.L. ECON. & ORG. 472 (2014), describes the methodology. The estimates, which are referred to as CFScores, for the California Supreme Court are at *Adam Bonica*, STAN. UNIV., <https://web.stanford.edu/~bonica/data.html> [<https://perma.cc/PRJ4-A3D2>]. When possible, Bonica and Woodruff estimate a judge's CFScore by political contributions made to the judge. When this data is unavailable, they use political contributions made by a judge. In California, only Werdeger's CFScore is based on political contributions made to her. Bonica and Woodruff report the CFScores for 11 of the 13 justices, from right to left as follows: Panelli (1.104), Eagleson (0.95), Lucas (0.788), Arabian (0.545), Baxter (0.483), Kaufman (0.401), Kennard (0.34), Werdeger (-0.488), George (-0.908), Broussard (-0.929), Chin (-0.966). *Id.* (follow "State Supreme Court Ideal Point Estimates" hyperlink). George and Baxter are the two most significant misfits. George's political contributions put him on the court's left wing while his voting record puts him at the center. Baxter's political contributions put him at the court's center (which is to the right), but his voting record puts him on the far right. Kennard is also a misfit.

Bonica and Woodruff provide support for describing the California Supreme Court as moderately conservative after 1996. They calculate the median CFScores for a court over time and for all state courts. *See* Bonica & Woodruff, *supra*, at 488 fig. 3. The median CFScore of the California Supreme Court was well to the right of the average for all state courts from 1990 to 1996, when it moved to the center, which is zero on CFScore scale. *Id.* at 488. Our data also suggests the right wing of the court was less dominant after 1996. The CFScores suggest that after the shift in 1996 the court could broadly be described as centrist since the median CFScore of justices on the court was close to the median CFScore of all state supreme judges.

Windett and colleagues calculate the ideal points for state supreme court judges in all states for the period 1995 to 2010 using the IRT model. Windett et al., *supra* note 8, at 463. They compare this to the ideal points estimated using the CFScore model. *Id.* Then, they scale the IRT estimates using the CFScore estimates to generate a hybrid estimate (which they label the SDIRT measure). *Id.* at 464. This analysis produces a measure that puts the California Supreme Court somewhat to the left of center of all state supreme courts, aggregating the 16 years. This analysis also indicates that the California Supreme Court was more ideologically homogenous than most state supreme courts. These results are depicted visually in Figure 1. *Id.* at 465 fig 1.

FIGURE 27. 1987–1996 (n=392)



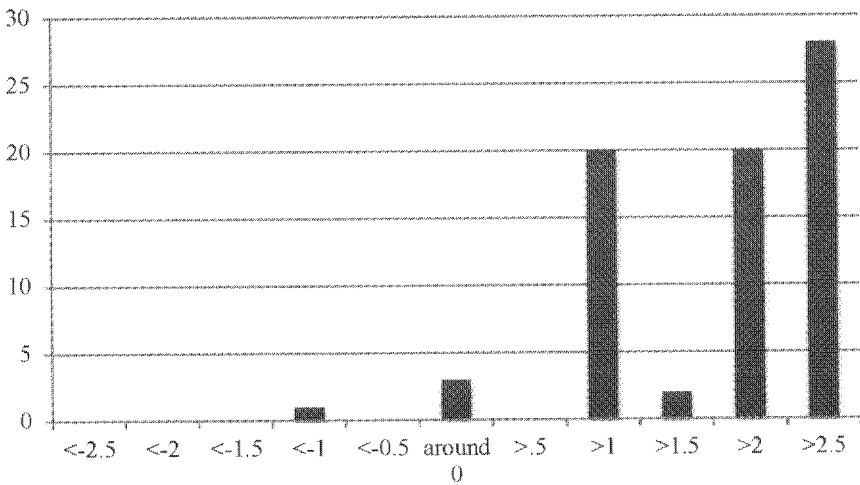
We see little in the voting record in criminal law cases that warrants describing this as a moderately conservative court. The criminal law cases in which voting strongly conforms to the dominant pattern include many cases that reversed pro-defendant decisions by the liberal court or that signaled that errors by prosecutors and judges would be treated more leniently.<sup>234</sup> And the right wing prevailed in all but one of the 127 cases in which the absolute value of  $\beta$  is greater than 1.5.<sup>235</sup>

234. Bob Egelko highlights the following cases that fit this description in a history of the period. All were decided 5–2 with Kennard or Broussard joining Mosk in dissent. *People v. Cahill*, 853 P.2d 1037, 1059 (Cal. 1993) ( $\beta=2.67$ ), abolished a long-standing rule of mandatory reversal rule for admission of coerced or involuntary confession. See Egelko, *supra* note 227, at 529. *People v. Johnson*, 767 P.2d 1047, 1057 (Cal. 1989) ( $\beta=2.64$ ), overruled *Trevino*. See Egelko, *supra* note 227, at 528. *In re Jackson*, 835 P.2d 371, 395 (Cal. 1992) ( $\beta=2.56$ ), showed that the “Lucas Court was far more tolerant than its predecessor of mistakes and even misconduct in capital trials.” Egelko, *supra* note 227, at 524. *People v. Allison*, 771 P.2d 1294, 1317 (Cal. 1989) ( $\beta=2.53$ ), held that the fact the trial judge appeared to confuse the defendant with another person in explaining why the death penalty was warranted did not require reversal. See Egelko, *supra* note 227, at 525. *People v. Morales*, 770 P.2d 244, 259 (Cal. 1989) ( $\beta=2.51$ ), adopted an “[e]xpansive [i]nterpretation of [l]ying in [w]ait.” Egelko, *supra* note 227, at 525. *In re Clark*, 855 P.2d 729, 762 (Cal. 1993) ( $\beta=2.46$ ), “clamp[ed] down on successive writ filings.” Egelko, *supra* note 227, at 526. Also noteworthy is *People v. May*, 748 P.2d 307, 312 (Cal. 1988) ( $\beta=0.97$ ), which held that Proposition 8 abrogated *Disbrow*. See Egelko, *supra* note 227, at 529. The low  $\beta$  value is misleading. Eagleson dissented on other grounds but joined the majority on the major point. See *May*, 748 P.2d at 313 (Eagleson, J., concurring). Mosk, Broussard, and Kennard dissented on the major issue. *Id.* at 323–24 (Mosk, J., dissenting).

235. The one case in which the left wing prevailed held that defendants could obtain information on previous brutality charges against an arresting officer through discovery even though they did not

The right wing was even more dominant in capital cases. The diagram below shows the distribution of  $\beta$  for death penalty cases. All 20 cases in the “1–1.5 bin” featured solo dissents by either Mosk or Broussard, and all but one of them were decided before Kennard joined the court. The single case in which the left wing prevailed was a 4–3 decision reversing the death penalty in a case in which the prosecutor repeatedly misled the jury about how to weigh the absence of mitigating factors.<sup>236</sup> Kaufman and Panelli joined Mosk and Broussard to reverse.<sup>237</sup>

FIGURE 28. 1987–1996: Death Penalty (n=74)



We also see little in the voting record in tort cases that warrants describing the California Supreme Court during this time as a moderately conservative court. Voting in tort cases generally conforms to the dominant pattern and the right wing prevailed in all but one of these cases.<sup>238</sup> We will describe some 5–2 tort cases in which Broussard or Kennard join Mosk in dissent to provide a sense of the issues that split the court on the dominant

allege they were victims of brutality. *City of Santa Cruz v. Municipal Court*, 776 P.2d 222, 228–29 (Cal. 1989) ( $\beta=-1.76$ ).

236. *People v. Edelbacher*, 766 P.2d 1, 37 (Cal. 1989) ( $\beta=-1.07$ ).

237. *Id.* at 37 (Mosk, J., concurring); *id.* at 39 (Panelli, J., concurring).

238. The one case in which voting conforms to the dominant pattern and in which the left wing prevailed involved a narrow issue. *Draper v. City of Los Angeles*, 802 P.2d 367, 371 (Cal. 1990) ( $\beta=-1.55$ ), held the plaintiff in a personal injury action established that her incapacitation disabled her from filing a timely claim, justifying tolling the statute of limitation. Arabian joined Mosk, Broussard, and Kennard in a 4–3 decision. *Id.*

pattern. They include cases that held sexual harassment to be outside the scope of employment;<sup>239</sup> held there was no respondeat superior liability for sexual assault;<sup>240</sup> imposed restrictive requirements for a securities fraud claim under state law;<sup>241</sup> restricted public policy claims for wrongful termination;<sup>242</sup> narrowed the availability of a bystander claim for emotional disturbance;<sup>243</sup> adopted an "insurer friendly" rule on coverage of a loss that has multiple sufficient causes;<sup>244</sup> and held an employee has no right of action under the Government Claims Act against a public entity that violated the prevailing wage law.<sup>245</sup> Add to these an insurance case that overruled *Royal Globe* to hold that a third party has no right to sue a liability insurer for bad faith failure to settle.<sup>246</sup> The court split 4–3 along the dominant pattern in *Foley v. Interactive Data Corp.* to eliminate the tort claim for bad faith breach of contract,<sup>247</sup> with Kaufmann joining Mosk and Broussard in dissent.<sup>248</sup>

The court's reputation as moderately conservative is partly based on several prominent constitutional law cases. The left wing never prevailed in a constitutional law case in which the absolute value  $\beta > 1.5$ . But the constitutional law cases in which voting conforms to the dominant pattern are not particularly memorable. These include a case with dicta calculated to significantly weaken the constitutional protection of pornographic bookstores from prohibitory zoning ordinances;<sup>249</sup> a case that held the one-person-one-vote principle does not apply to a special assessment district;<sup>250</sup> a case that held constitutional spending limits on municipalities applied to pension contributions;<sup>251</sup> a case that held growers (not a court or the labor relations board) should determine appropriate restrictions when growers are required to give labor organizers access to farm workers in a work camp;<sup>252</sup> and a case that held plaintiffs in a medical malpractice action could not

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239. *Farmers Ins. Grp. v. County of Santa Clara*, 906 P.2d 440, 459 (Cal. 1995) ( $\beta=2.63$ ).

240. *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 367 (Cal. 1995) ( $\beta=2.58$ ).

241. *Mirkin v. Wasserman*, 858 P.2d 568, 574 (Cal. 1993) ( $\beta=2.58$ ).

242. *Gantt v. Sentry Ins.*, 824 P.2d 680, 692 (Cal. 1992) ( $\beta=2.63$ ).

243. *Thing v. La Chusa*, 771 P.2d 814, 829–30 (Cal. 1989) ( $\beta=2.58$ ).

244. *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 708 (Cal. 1989) ( $\beta=2.58$ ). Bob Egelko described the rule as "insurer friendly." Egelko, *supra* note 227, at 538.

245. *Aubry v. Tri-City Hosp. Dist.*, 831 P.2d 317, 322 (Cal. 1992) ( $\beta=2.63$ ).

246. *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58, 68, 71 (Cal. 1988) ( $\beta=2.54$ ).

247. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401 (Cal. 1988) ( $\beta=1.57$ ).

248. *Id.* at 402 (Broussard, J., concurring and dissenting); *id.* at 412 (Kaufman, J., concurring and dissenting); *id.* at 418 (Mosk, J., dissenting).

249. *City of National City v. Wiener*, 838 P.2d 223, 232 (Cal. 1992) ( $\beta=2.64$ ).

250. *S. Cal. Rapid Transit Dist. v. Bolen*, 822 P.2d 875, 884 (Cal. 1992) ( $\beta=2.61$ ).

251. *S.F. Taxpayer's Ass'n v. Bd. of Supervisors*, 828 P.2d 147, 156 (Cal. 1992) ( $\beta=2.56$ ).

252. *Sam Andrews' Sons v. Agric. Labor Relations Bd.*, 763 P.2d 881, 894–95 (Cal. 1988) ( $\beta=2.56$ ).

complain that unauthorized disclosure of their medical information violated their privacy rights because they had a diminished expectation of privacy.<sup>253</sup>

Voting does not conform to the dominant pattern in several of the most publicized constitutional law cases decided by the court during this period. These cases involved issues of social value that were important to religious conservatives. They were *Sands v. Morongo Unified School District*, which banned high school graduation prayers;<sup>254</sup> *Smith v. Fair Employment and Housing Commission*, which refused to recognize a religious exception to a law prohibiting housing discrimination where a property owner refused to rent to an unmarried couple;<sup>255</sup> and *American Academy of Pediatrics v. Lungren*, which upheld a parental consent requirement for a minor seeking an abortion.<sup>256</sup> The decision in *Lungren* did not stand for long. Lucas retired in 1996, and after Governor Wilson appointed George as chief justice and Chin as associate justice, the original decision in *Lungren* was withdrawn and a new decision held the parental consent requirement unconstitutional.<sup>257</sup>

The diagram below shows the posterior ranks of the justices who served during 1996–2011. We chose as a break date when Governor Wilson appointed Brown to replace Arabian in 1996. Democratic Governor Gray Davis appointed Moreno to Mosk's seat in 2001 after Mosk died. Republican Governor Arnold Schwarzenegger appointed Corrigan to replace Brown in 2006.<sup>258</sup>

253. *Heller v. Norcal Mut. Ins. Co.*, 876 P.2d 999, 1006 (Cal. 1994) ( $\beta=2.62$ ).

254. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 821 (Cal. 1991) ( $\beta=-1.07$ ). Bob Egelko further discusses the case. Egelko, *supra* note 227, at 543. Arabian and Lucas joined Mosk, Broussard, and Kennard in the majority. *Sands*, 809 P.2d at 821 (Lucas, C.J., concurring); *id.* at 842 (Arabian, J., concurring). Panelli and Baxter dissented. *Id.* at 844 (Panelli, J., dissenting); *id.* at 859 (Baxter, J., dissenting).

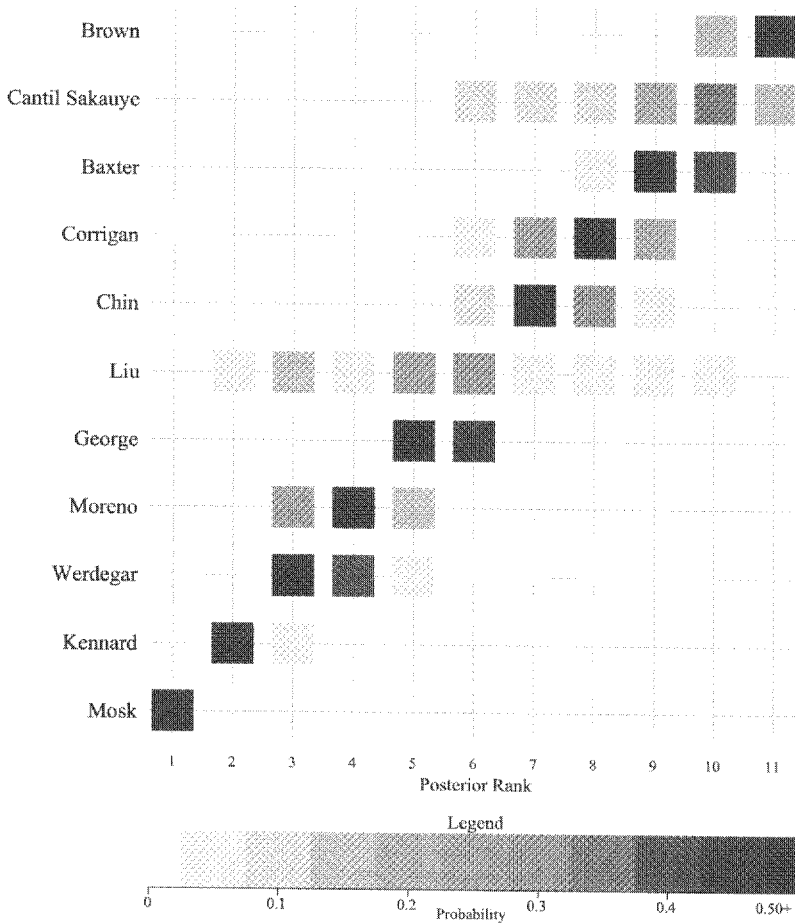
255. *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 931 (Cal. 1996) ( $\beta=0.03$ ). Bob Egelko further discusses the case. Egelko, *supra* note 227, at 542. Werdegar wrote the majority opinion with Mosk, Arabian, and George joining. *Smith*, 913 P.2d at 912; *id.* at 931 (Mosk, J., concurring). Lucas, Kennard, and Baxter dissented. *Id.* at 939 (Kennard, J., concurring and dissenting); *id.* at 957, 980 (Baxter, J., concurring and dissenting).

256. *Am. Acad. of Pediatrics v. Lungren*, 912 P.2d 1148, 1169–70 (Cal. 1996) ( $\beta=0.04$ ). Bob Egelko further discusses the case. Egelko, *supra* note 227, at 545–46. Mosk wrote the majority opinion and was joined by Lucas, Baxter, and Arabian. *Lungren*, 912 P.2d at 1151, 1170. Kennard, George, and Werdegar dissented. *Id.* at 1170 (Kennard, J., dissenting), 1188 (George, J., dissenting), 1197 (Werdegar, J., dissenting).

257. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 831 (Cal. 1996) ( $\beta=-0.35$ .) Chin added the fourth majority vote. *Id.* The low  $\beta$  value is because Mosk crossed over to vote with justices whom the model places on the court's right wing.

258. The uncertainty of the posterior ranks of Cantil-Sakauye and Liu is because they joined the court in 2011 and so they only voted in a few non-unanimous cases. Schwarzenegger appointed Cantil-Sakauye to replace George as chief justice in January 2011. Governor Brown appointed Liu in September 2011 to replace Moreno.

FIGURE 29. Ranks (1996–2011)



Putting aside Cantil-Sakauye and Liu (who served less than a year during this period) the justices’ posterior ranks correspond with their political reputations.<sup>259</sup> From left to right, Mosk is the only justice who served during this period who was described as a liberal; but recall that his

259. There is significant divergence between the posterior ranks and the CFScores reported by Bonica and Woodruff, with the exception of the three conservative justices on the court’s right wing. From right to left, the CFScores of the justices are: Brown (0.786), Corrigan (0.545), Baxter (0.483), Kennard (0.340), Werdegar (-0.488), Cantil-Sakauye (-0.619), George (-0.908), Chin (-0.965), and Moreno (-1.52). See Bonica & Woodruff, *supra* note 233, for more information about using CFScores to estimate judicial ideology.

reputation on a liberal court was as a moderate. Kennard's reputation was as an "independent" and a "centrist."<sup>260</sup> After she was sworn in, the Los Angeles Times described Werdegar as "an independent conservative" who "is viewed as generally conservative but likely to take more moderate positions on occasion than the other four conservatives on the seven-member high court."<sup>261</sup> Moreno described himself as a "moderate-to-liberal centrist."<sup>262</sup> George was described as a moderate Republican who "reflect[ed] the spirit of Sandra Day O'Connor's tenure—independent and nonideological."<sup>263</sup> Chin was described as a "moderately conservative Court of Appeal justice" who was "not likely to substantially alter the conservative bent of the state high court."<sup>264</sup> Corrigan was described as a "moderate Republican"<sup>265</sup> whose "record was tough on law-and-order issues and more moderate on social questions."<sup>266</sup> Baxter was described as one of the court's "most conservative voices."<sup>267</sup> Brown's reputation was as an "archconservative."<sup>268</sup>

The diagram below shows the distribution of  $\beta$  for this period, separating criminal law, constitutional law, and tort cases. The voting data supports the description of the George court as a moderate court.<sup>269</sup> Based

260. Egelko, *supra* note 227, at 519.

261. Maura Dolan, *New High Court Justice Sworn In: Law: State Commission Unanimously Confirms Kathryn Werdegar, Who Declines to State Her Views on the Death Penalty*, L.A. TIMES (June 4, 1994, 12:00 AM), [http://articles.latimes.com/1994-06-04/news/mn-126\\_1\\_high-court](http://articles.latimes.com/1994-06-04/news/mn-126_1_high-court) [<https://perma.cc/U9B9-SJ4B>].

262. Maura Dolan, *State High Court's Moreno Raises Profile*, L.A. TIMES (Sept. 26, 2009, 12:00 AM), <http://articles.latimes.com/2009/sep/26/local/me-moreno26> [<https://perma.cc/26CT-Z9SF>] ("They got exactly what they wanted in me, which is a moderate-to-liberal centrist."). See Molly Selvin, *Defining a Branch, Finding the Center: The George Court, 1996–2010*, in CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER, *supra* note 2, at 576.

263. Carolyn Lochhead, *Bush Asks Senators for Advice on Court Pick / White House Move Garner Bipartisan Support with Its Attempts to Avoid Another Bitter Battle*, S.F. GATE (July 13, 2005, 4:00 AM), <https://www.sfgate.com/politics/article/Bush-asks-senators-for-advice-on-court-pick-2622599.php> [<https://perma.cc/Q76J-JFT9>].

264. Maura Dolan, *State High Court Justice Sworn in Amid Protests*, L.A. TIMES (Mar. 2, 1996, 12:00 AM), [http://articles.latimes.com/1996-03-02/news/mn-42134\\_1\\_state-high-court](http://articles.latimes.com/1996-03-02/news/mn-42134_1_state-high-court) [<https://perma.cc/E3NQ-EHRG>].

265. This is her self-description. Maura Dolan, *Gov. Names Moderate to High Court*, L.A. TIMES (Dec. 10, 2005, 12:00 AM), <http://articles.latimes.com/2005/dec/10/local/me-supreme10> [<https://perma.cc/P65X-N7TH>] ("I think I would probably be a centrist anyplace I found myself. . . I was a moderate Democrat, and now I am a moderate Republican . . . I am moderate on virtually all things.").

266. Selvin, *supra* note 262, at 575.

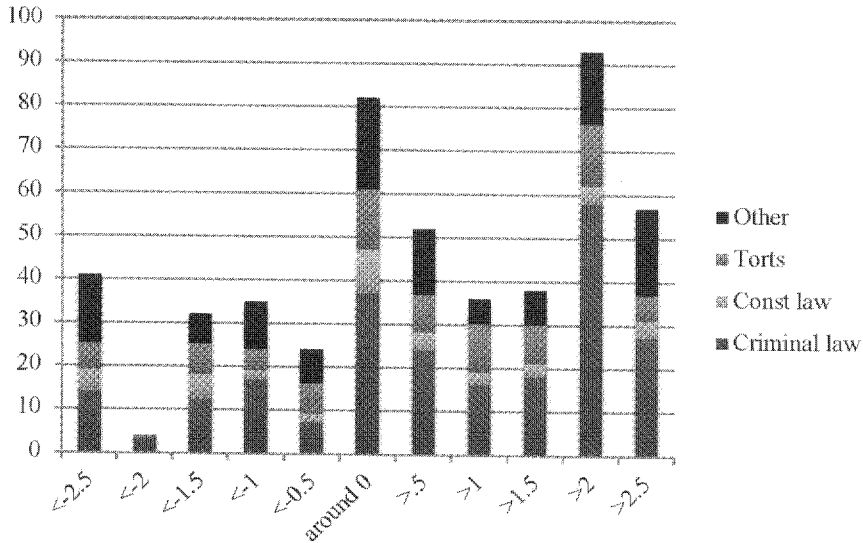
267. *Id.* at 576.

268. *Out of the Mainstream, Again*, N.Y. TIMES (Oct. 25, 2003), <https://www.nytimes.com/2003/10/25/opinion/out-of-the-mainstream-again.html> [<https://perma.cc/7Q7J-UJ8B>]. The NAACP labeled Brown as an "Extreme Right-Wing Judicial Nominee." JULIAN BOND ET AL., NAACP, CIVIL RIGHTS FEDERAL LEGISLATIVE REPORT CARD, 109TH CONGRESS 2005 & 2006 (2007), <https://www.naacp.org/wp-content/uploads/2016/04/109thCongress.pdf> [<https://perma.cc/MG7S-3SYA>]; see also Selvin, *supra* note 262, at 575 (describing Brown as a conservative ideologue).

269. Selvin describes George, Werdegar, and Chin as "part of the new moderate majority." Selvin,

on the voting data, we would describe it as a moderately conservative court because the right wing prevailed more often than the left wing in cases in which voting conforms to the dominant pattern. But unlike in the Lucas court, the left wing prevails in a significant number of cases.

FIGURE 30. 1996–2011 (n=494)



The voting pattern in constitutional, criminal, and tort law cases generally (but not always) conforms to the dominant pattern. To overview the disagreements in these cases we will describe cases in which the court split 4–3 on the dominant pattern. One goal is to illustrate that patterned voting cuts across a wide range of issues. We begin with constitutional cases. The most famous is *In re Marriage Cases*, which held an initiative statute that only recognized a marriage between a man and a woman violated the state constitution’s Equal Protection Clause.<sup>270</sup> The left wing also prevailed in cases that held Nike’s statements defending its labor practices and factory work conditions were commercial speech and could be regulated;<sup>271</sup> rejected

*supra* note 262, at 576–77.

270. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) ( $\beta=-2.86$ ). Voting also conformed to the dominant pattern in *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 499 (Cal. 2004) ( $\beta=2.58$ ), a 5–2 decision that held the Mayor of San Francisco, Gavin Newsom, could not refuse to enforce the statute prohibiting gay marriage because he considered it unconstitutional.

271. *Kasky v. Nike, Inc.*, 45 P.3d 243, 262 (Cal. 2002) ( $\beta=-2.64$ ).



a regulatory takings claim;<sup>272</sup> rejected an inverse condemnation claim involving a rent control ordinance;<sup>273</sup> and upheld a grandparent visitation statute.<sup>274</sup> The right wing prevailed in cases that rejected an Indian tribe's claim of sovereign immunity from suit;<sup>275</sup> held a wife could compel her husband to disclose his sexual activities in a divorce proceeding because she claimed he had negligently infected her with AIDS;<sup>276</sup> held a shopping mall could not enforce a rule prohibiting union members from urging customers to boycott a store in the mall;<sup>277</sup> and held an owner of a private apartment building could prohibit a tenant's association from distributing materials in the building.<sup>278</sup>

The court split 4–3 in 56 criminal law cases. In 29 of these cases, the absolute value of  $\beta$  is greater than 2.5, meaning voting tightly conforms to the dominant pattern. The right wing prevailed in 18 of these cases and the left wing in 11. The right wing always favored the prosecutor while the left wing always favored the criminal defendant.<sup>279</sup> We will describe the five cases with the highest  $\beta$  values, recognizing this is somewhat arbitrary. The conservative majority prevailed in all five cases. A few cases involved disagreements on legal issues. *People v. Soto* held that lack of consent was not an element of the crime of lewd acts with a child under 14, rejecting the position of several appellate courts that the element of force or duress entails absence of consent.<sup>280</sup> *People v. Monge* held the rule against double jeopardy does not prevent retrial of a prior charge that ended in a plea agreement to establish a basis for sentence enhancement under the three-strikes law.<sup>281</sup> *People v. Wells* answered “yes” to the “unsettled” legal question whether a police officer could stop a vehicle and detain the driver based on an

272. *Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1204 (Cal. 1998) ( $\beta$ =-2.63).

273. *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1007 (Cal. 1999) ( $\beta$ =-2.60).

274. *In re Marriage of Harris*, 96 P.3d 141, 154 (Cal. 2004) ( $\beta$ =-2.64).

275. *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1140 (Cal. 2006) ( $\beta$ =3.05).

276. *John B. v. Superior Court*, 137 P.3d 153, 167 (Cal. 2006) ( $\beta$ =3.01).

277. *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 754 (Cal. 2007) ( $\beta$ =2.86).

278. *Golden Gateway Ctr. v. Golden Gateway Tenant's Ass'n*, 29 P.3d 797, 810 (Cal. 2001) ( $\beta$ =2.77).

279. The right wing was more dominant in death penalty cases with voting patterns that almost always conform to the dominant pattern. There are 34 cases in which “death penalty” appears in a relevant field. The absolute value of  $\beta > 2.0$  in 19 of these cases and  $> 1.5$  in another five. The absolute value of  $\beta < 0.5$  in only two cases, and in one of these, justices on the left and right wings dissented to different parts of the majority opinion. The model depicts the left wing as prevailing in 4 of the 34 cases. But in only two of these were the death penalty set aside. Of the other two, one case involved a procedural stay. In the other, the court affirmed the death penalty. *In re Seaton*, 95 P.3d 896, 905 (Cal. 2004) ( $\beta$ =-1.38). Brown concurred and dissented, arguing that the entire system of post-conviction review should be torn up root and branch. *Id.* at 905–06 (Brown, J., concurring and dissenting).

280. *People v. Soto*, 245 P.3d 410, 415 (Cal. 2011) ( $\beta$ =2.93).

281. *People v. Monge*, 941 P.2d 1121, 1133 (Cal. 1997) ( $\beta$ =2.94).

anonymous tip that accurately described the vehicle and its location.<sup>282</sup> The other two cases were disagreements in applying a standard to a factual issue. In *People v. Medina*, three gang members were involved in a fistfight with the victim, and one of the gang members pulled out a gun and shot the victim.<sup>283</sup> The majority held the shooting was a “natural and probable consequence” of gang violence, upholding the attempted murder conviction.<sup>284</sup> The dissent disagreed, because the defendants did not know their companion had a gun.<sup>285</sup> In *People v. Reynoso*, the court rejected a *Batson* challenge when a prosecutor excluded two Hispanic women from a jury of a Hispanic defendant on grounds the dissent and the lower court found pretextual.<sup>286</sup>

There are ten 4–3 tort cases in which voting conforms to the dominant pattern. Each wing prevailed in five. Two of these cases also involved constitutional issues and are described above.<sup>287</sup> The right wing prevailed in cases that held a plaintiff suing for legal malpractice may not recover lost punitive damages;<sup>288</sup> refused to establish a tort action for intentional spoliation or destruction of evidence;<sup>289</sup> held a fast food restaurant could not be held liable to a customer who was shot by a robber when the cashier refused to open the register because there is no duty to obey a robber;<sup>290</sup> and held a plaintiff who was assaulted in a low income apartment complex with deficient security could not recover because she could not identify her assailants, and so could not establish they gained access due to deficient security.<sup>291</sup> The left wing prevailed in cases that held waiver of class arbitration in a consumer form contract to be unconscionable in circumstances in which it practically foreclosed redress for fraudulent

282. *People v. Wells*, 136 P.3d 810, 816 (Cal. 2006) ( $\beta=2.93$ ).

283. *People v. Medina*, 209 P.3d 105, 108 (Cal. 2009) ( $\beta=2.98$ ).

284. *Id.* at 111, 115.

285. *Id.* at 116 (Moreno, J., dissenting).

286. *People v. Reynoso*, 74 P.3d 852, 869 (Cal. 2003) ( $\beta=2.95$ ).

287. *See Kasky v. Nike, Inc.*, 45 P.3d 243, 262 (Cal. 2002) ( $\beta=-2.64$ ); *John B. v. Superior Court*, 137 P.3d 153, 167 (Cal. 2006) ( $\beta=3.01$ ); *supra* text accompanying notes 271, 276.

288. *Ferguson v. Lief, Cabraser, Heimann & Bernstein, LLP*, 69 P.3d 965, 973 (Cal. 2003) ( $\beta=2.87$ ).

289. *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 233 (Cal. 1999) ( $\beta=2.70$ ).

290. *Ky. Fried Chicken of Cal., Inc. v. Superior Court (KFC)*, 927 P.2d 1260, 1269–70 (Cal. 1997) ( $\beta=2.84$ ). For a critique of the majority’s reasoning, see Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265, 321 (2006). They group *KFC* with *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 83 (Cal. 1997) ( $\beta=2.60$ ), a 5–2 decision that rejected a claim by a rider who was thrown from a horse frightened by loud noises from a garbage truck operating in a parking lot near a bridle path. Esper & Keating, *supra*, at 322. They also group it with *Sharon P. v. Arman Ltd.*, 989 P.2d 121, 133 (Cal. 1999) ( $\beta=1.43$ ), a 5–2 decision that “held that operators of commercial parking garages had no duty to take precautions against criminal activity in the absence of similar crimes in the past,” while narrowly defining similar crimes. Esper & Keating, *supra*, at 319.

291. *Saelzler v. Advanced Grp.* 400, 23 P.3d 1143, 1155 (Cal. 2001) ( $\beta=2.47$ ).

activity;<sup>292</sup> held a recreational use immunity statute does not relieve landowners of a duty to avoid negligence in driving;<sup>293</sup> held statutory immunity for emergency care rendered at the scene of an emergency applies only to medical care;<sup>294</sup> and held the attorney-client privilege did not prevent a successor trustee from discovering confidential communications between the predecessor and its attorney.<sup>295</sup>

The period from 1996 to 2011 had an atypically large number of cases (82) in the “around 0” bin. These were cases in which voting least conforms to the dominant pattern. In around 60 of these cases, justices on opposite wings joined in a 4–3 or 5–2 decision.<sup>296</sup> These included a significant number of constitutional, criminal, and tort law cases. Sometimes the disagreement in these cases appears to have been on a technical legal issue or a factual issue where a judge’s political or ideological views and values might not be expected to influence the vote.<sup>297</sup> But sometimes the disagreement was on issues where we might expect a judge’s political or ideological views to have influenced the vote. The unusual voting pattern in these cases is a reminder that political and ideological disagreements may not always neatly sort into liberal or conservative, that politics sometimes makes strange bedfellows, or that judges may sometimes set aside their political views.

For example, the cases in the “around 0” bin from 1996 to 2011 include cases on the constitutionality of a parental abortion consent law;<sup>298</sup> the regulation of hate speech in the workplace;<sup>299</sup> whether Proposition 209’s prohibition on affirmative action should be read broadly or narrowly;<sup>300</sup>

292. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) ( $\beta$ =–2.61).

293. *Klein v. United States*, 235 P.3d 42, 49 (Cal. 2010) ( $\beta$ =–2.81).

294. *Van Horn v. Watson*, 197 P.3d 164, 169 (Cal. 2008) ( $\beta$ =–2.71).

295. *Moeller v. Superior Court*, 947 P.2d 279, 288 (Cal. 1997) ( $\beta$ =–2.59).

296. Eleven cases are unusual solo dissents by justices the model places at the center (Werdegar, Chin, and George). Based on a casual examination, we estimate another 10 to 15 were cases in which justices on opposite wings dissented to different parts of the majority opinion. We count these as justices joining in a dissent.

297. *People v. Holt*, 937 P.2d 213 (Cal. 1997), might be an example. It was a rare death penalty case in which the court did not split on the dominant line. The disagreement between the majority and dissent was over whether a trial judge’s mistake on a point of law influenced his decision not to modify the death sentence. *Id.* at 262–63; *id.* at 271–72 (Werdegar, J., concurring and dissenting).

298. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 831 (Cal. 1997) ( $\beta$ =–0.35).

299. *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 861 (Cal. 1999) ( $\beta$ =0.27) (plurality opinion) (holding injunction of employee’s conduct was not a prohibited prior restraint with Baxter and Chin joining George). Werdegar wrote a separate concurring opinion, *id.* at 863 (Werdegar, J., concurring), and Mosk, Kennard, and Brown wrote separate dissents, *id.* at 878 (Mosk, J., dissenting); *id.* at 882 (Kennard, J., dissenting); *id.* at 890 (Brown, J., dissenting).

300. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1085 (Cal. 2000) ( $\beta$ =0.29) (holding program that encouraged hiring women and minority subcontractors violated the California Constitution, with Mosk, Baxter, and Chin joining Brown). Kennard wrote a separate concurring opinion, *id.* at 1092 (Kennard, J., concurring), and Werdegar joined George in concurrence and dissent, *id.* at 1092,

whether a state bond program to benefit religious colleges violated the Establishment Clauses of the California and United States Constitutions;<sup>301</sup> whether a Texas resident who posted a California company's proprietary information on the web could be sued in California;<sup>302</sup> whether a student who was sexually molested by a teacher could sue someone who wrote a positive recommendation for the teacher and did not disclose sexual misconduct;<sup>303</sup> whether a "pay if paid" clause in a construction subcontract that imposes the risk of nonpayment on a subcontractor violates public policy,<sup>304</sup> and whether discharging a firearm in a grossly negligent manner could be a predicate for a second degree felony murder conviction.<sup>305</sup>

### CONCLUSION

This Article uses an IRT model to investigate voting patterns on the California Supreme Court from 1910 to 2011. The model confirms the conventional wisdom that the court's justices often voted on political and partisan lines. But the model also shows that this was not the dominant pattern before 1949. Before 1949, in periods when voting was strongly patterned the pattern does not conform to the justices' political reputations, and in some periods, voting was weakly patterned. In these years, justices generally did vote in a pattern that conformed to their political reputations in cases with strong political dimensions. But this was not the dominant pattern. It became the dominant pattern as justices began to vote with increasing frequency in criminal law and private law cases (particularly tort cases) in a pattern that conformed to their political reputations and party affiliations. This change occurred gradually in the 1950s. The model also captures the swing in the political pendulum on the California Supreme Court from 1959

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1107 (George, C.J., concurring and dissenting).

301. Cal. Statewide Cmty. Dev. Auth. v. All Persons Interested, 152 P.3d 1070, 1082, 1085 (Cal. 2007) ( $\beta=0.41$ ) (upholding validity of program with Baxter, Corrigan, and George joining Kennard in the majority opinion). Werdegar and Moreno joined Chin in dissent. *Id.* at 1086, 1100 (Chin, J., dissenting).

302. Pavlovich v. Superior Court, 58 P.3d 2, 13 (Cal. 2002) ( $\beta=-0.44$ ) (holding that there was not minimum contacts, with Kennard, Moreno, and Werdegar joining Brown in the majority opinion). Chin and George joined Baxter in dissent. *Id.* at 27 (Baxter, J., dissenting).

303. Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 594 (Cal. 1997) ( $\beta=0.20$ ) (allowing the claim with Brown, George, and Mosk joining Chin in the majority). Baxter and Werdegar joined Kennard in dissent. *Id.* at 595-96 (Kennard, J., concurring and dissenting).

304. Wm. R. Clarke Corp. v. Safeco Ins. Co., 938 P.2d 372, 381 (Cal. 1997) ( $\beta=0.02$ ) (holding clause violates public policy, with Brown, George, and Werdegar joining Kennard in the majority opinion). Mosk and Baxter joined Chin in dissent, arguing that the law should give effect to contractual allocation of risk. *Id.* (Chin, J., dissenting).

305. People v. Robertson, 95 P.3d 872, 883 (Cal. 2004) ( $\beta=0.11$ ) (holding that discharging a firearm in a grossly negligent manner could be a predicate for a second degree felony murder conviction with Baxter, Chin, and Moreno concurring with George in the majority opinion). Kennard, Werdegar, and Brown wrote separate dissents. *Id.* at 886 (Kennard, J., dissenting); *id.* at 891 (Werdegar, J., dissenting); *id.* at 892 (Brown, J., dissenting).

to 2011. The liberal wing dominated from 1959 to 1970 and remained dominant through January 1987, though the momentum of the leftward movement slowed as the conservative wing prevailed in an increasing number of cases. This pendulum turned in 1987 when three liberal justices were replaced by three conservative justices. The model calls into question the frequent characterization of the court in 1987 to 1996 as a moderately conservative court, as the court's conservative wing dominated this period to the same extent the liberal wing dominated the 1960s.



# NOTES

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