

SCOCA Year in Review 2018: Still Not the Brown Court

OVERVIEW

Ordinarily a court year-in-review article overviews significant cases and any changes in the court's personnel. Because the California Supreme Court is currently enduring its longest-ever seat vacancy — over thirteen months and counting — we evaluated the impact pro tem justices are having on the court's voting record. We draw several conclusions:

- There is a voting record distinction between the senior justices and the justices appointed by Governor Brown;
- The pro tem justices do not vote in lockstep with the Chief Justice or the majority;
- Which governor appointed a pro tem justice does not correlate with pro tem voting;
- Justice Liu produces by far the most opinions;
- There is a disparity between how often the Brown appointees vote with the majority and how many majority opinions they write; and
- Productivity may not have dropped without seven permanent justices.

We assumed (consistent with conventional wisdom) that pro tem justices would defer to the Chief Justice or the majority. The data shows this assumption is false.

Methodology

We examined all opinions published after August 31, 2017 in which Justice Werdegar did not participate, up to August 30, 2018. There are 89 opinions.[1] The justices' votes are categorized by simple majority vote, concurring and dissenting, concurring, and dissenting; we also counted how many opinions in each category a justice wrote. The pro tem justices are counted as one justice. To evaluate whether it is a valid distinction, we divided the six permanent justices into two groups: senior (the Chief Justice, Chin, Corrigan) and Brown (Liu, Cuéllar, Kruger).

For another take on this issue, see the September 28, 2018 Daily Journal (Kirk Jenkins, Horvitz & Levy LLP) analyzing data concerning the court's productivity over the same period.

ANALYSIS

Data Tabulation

From our data we calculate these results:

	Chief	Chin	Corrigan	Liu	Cuéllar	Kruger	Pro Tem
TOTAL OPINIONS	13	19	15	32	17	19	2
WROTE MAJORITY	12	16	13	16	13	16	0
WROTE SEPARATELY	1	3	2	16	4	3	2
WROTE CON/DIS	0	3	1	3	0	0	0
WROTE CONCURRING	1	0	1	5	2	3	1
WROTE DISSENT	0	0	0	8	2	0	1
MAJORITY VOTES	85	86	85	70	82	81	78
CON/DIS VOTES	2	3	1	3	2	2	3
CONCURRING VOTES	1	0	2	8	3	5	4
DISSENTING VOTES	1	0	1	8	2	2	4

Initial Conclusions

- The senior justices are in the majority more often: 256 to 233.
- The Brown justices write slightly more majority opinions: 45 to 41.
- The Brown justices dissent more often: 12 to 2.
- The Brown justices write separately more often: 23 to 6.
- Pro tem justices rank next to last in majority votes. The pro tem non-majority votes (11) equal all senior non-majority votes combined.

Senior Justices and Brown Justices Form Distinct Voting Blocs

The senior and Brown justices show voting bloc characteristics in their votes and concurrence rates. The voting record shows that the three senior justices are in the majority more often (256) than the Brown appointees (233). The same disparity exists if we include the pro tem justices: 334 majority votes when pro tem justices are grouped with the senior justices, versus 311 majority votes when pro tem justices are grouped with the Brown justices. And of course, the non-majority votes (concurring and dissenting, concurring, dissenting) show the same pattern: the senior justices cast 11 non-majority votes versus 35 cast by Brown justices.

This lends some credence to the theory that if Governor Brown appoints someone to replace Justice Werdegar, a four-Brown-member voting bloc could emerge. Our concurrence matrix also supports this theory. It shows higher concurrence rates within the two groups than it does across them. Interestingly, the Chief Justice agrees with the Brown justices on average as often as that group does with itself. And Justices Chin and Liu have the lowest inter-group concurrence rates.

Senior justices	Brown justices	
Chief-Chin 95%	Liu-Cuéllar 96%	
Chief-Corrigan 98%	Liu-Kruger 96%	
Chin-Corrigan 96%	Cuéllar-Kruger 95%	
Average: 96.33	Average: 95.67	
Chief-Browns	Chin-Browns	Corrigan-Browns
Chief-Liu 94%	Chin-Liu 92%	Corrigan-Liu 93%
Chief-Cuéllar 97%	Chin-Cuéllar 94%	Corrigan-Cuéllar 95%
Chief-Kruger 96%	Chin-Kruger 94%	Corrigan-Kruger 96%
Average: 95.67	Average: 93.33	Average: 94.67
Liu-Seniors	Cuéllar-Seniors	Kruger-Seniors

Liu-Chief 94%	Cuéllar-Chief 97%	Kruger-Chief 96%
Liu-Chin 92%	Cuéllar-Chin 94%	Kruger-Chin 94%
Liu-Corrigan 93%	Cuéllar-Corrigan 95%	Kruger-Corrigan 96%
Average: 93.00	Average: 95.33	Average: 95.33

But one fact contradicts the Brown majority hypothesis: there are no instances in this period of an all-senior or an all-Brown dissent. There are no opinions in which all three justices in each bloc unite against each other. Although the justices may have formed distinct voting blocs, they do not move lock-step within those blocs — a welcome indication of the justices voting independently.

Pro Tem Justices Do Not Reliably Vote with the Majority or the Chief Justice

The pro tem justices do not vote uniformly with the Chief Justice or the majority. As expected, the pro tem justices authored no majority opinions and wrote separately just twice. This is expected because they are necessarily the least senior justice, so pro tem justices typically are not assigned majority opinions. And there is a strong practical disincentive for a pro tem justice to write separately: those Court of Appeal justices remain responsible for their own dockets when sitting by assignment, so producing another opinion is a significant additional burden.

The pro tem justices do not align as often with the majority as the other justices. Counted as a single justice, the pro tems rank next to last in majority votes. The pro tem justices are in the minority more often than any other individual justice except Justice Liu. And that pro tem “justice” is in the minority far more often than the senior justices: the pro tem non-majority votes (11) equal all senior non-majority votes combined.

This contradicts the conventional wisdom that a pro tem always defers to the Chief Justice or the majority. Instead, our numbers show pro tem justices disagreeing with the Chief Justice in eight out of 89 opinions (or about 9%), including four times when the Chief Justice wrote an opinion.[2] This ties for the second-highest disagreement comparison between the pro tem and permanent justices:

Pro tem justices disagreeing with permanent justices					
Chief	Chin	Corrigan	Liu	Cuéllar	Kruger
8	7	5	7	8	9

Although their disagreement rate with the individual justices is slightly higher for

the Brown justices than the senior justices, the more telling result is how often the pro tem justice votes in the majority: at just 78 majority votes, the pro tem justices are in the minority at a rate consistent with the Brown justices. The takeaway here is that the pro tem justice aligns with the Brown justices more often than they do with the senior justices. But this does not appear to have changed the result in any given case, with one notable exception.

That exception is *T.H. v. Novartis Pharmaceuticals Corp.*, where the pro tem justice’s vote determined the result and broadened the holding.[3] In an opinion written by Justice Cuéllar, with Justices Chin, Liu, and pro tem Justice Mauro joining, the majority affirmed the Court of Appeal decision allowing plaintiffs leave to amend their complaint. Justice Corrigan concurred in part, dissented in part, and filed an opinion in which the Chief Justice and Justice Kruger joined. The case turned on the existence of a legal duty. If one exists, then plaintiffs could amend their complaint. But if no legal duty exists, then the trial court properly denied plaintiffs leave to amend. Justice Corrigan agreed with the majority that a legal duty existed in one sense but dissented from the majority’s holding that the legal duty exists in another sense: “although I join the majority’s decision to affirm *Conte v. Wyeth, Inc.* [ruling brand-name drug manufacturers have a duty as to product warnings even for generic bioequivalent versions of the drug], I dissent from [the majority’s] holding that predecessor manufacturers have a duty to warn their successors’ customers about risks of a product they no longer make or sell.”[4] Because the three justices writing separately would have held that no duty exists, in their view the Court of Appeal decision allowing leave to amend should have been reversed. Although the pro tem justice’s vote affected the outcome here, this case stands alone against a pattern of pro tem justice votes that did not change the result.

A Pro Tem Justice’s Appointing Governor Does Not Correlate to Voting Behavior

We also tabulated the pro tem justices’ year appointed and appointing governor. We found no voting pattern correlated with appointing governor.

Pro tem justices sorted by appointing governor					
	Deukmejian	Wilson	Davis	Schwarzenegger	Brown

Number	10	9	20	25	25
Percent	11.3%	9.01%	22.7%	28.4%	28.4%

There is no noticeable trend among pro tem justices agreeing with the bloc of Brown Supreme Court appointees. For example, governors Brown and Schwarzenegger appointed an equal number of the pro tem justices who voted in the cases we examined. The Brown pro tems and the Schwarzenegger pro tems are no more likely to agree with either the permanent Brown justices or the others (the Chief Justice and Justice Corrigan are Schwarzenegger appointees; Wilson appointed Justice Chin).

And the governor who appointed the pro tem also does not correlate with instances of the Chief Justice in the majority and the pro tem in the minority. Counting those pro tem votes by which governor appointed them:

Deukmejian: 1

Schwarzenegger: 4

Brown: 3 (4 if we count Dato's written concurrence to the majority in *Kim*, 6 Cal.5th 21)

Davis: 1 (2 if we count Perren not joining the Chief Justice's concurrence in *Alvarado*, 4 Cal.5th 542)

Wilson: 0

If anything, these numbers merely correlate with the percentage of pro tem justices appointed by each governor overall. Finally, gubernatorial appointment does not correlate with unanimous votes (again, the Brown and Schwarzenegger appointees match closely).

Brown: 15

Davis: 12

Deukmejian: 6

Schwarzenegger: 14

Wilson: 8

These numbers do not support a conclusion that a Brown pro tem will consistently vote a liberal position or vote with other Brown appointees; nor that a Schwarzenegger pro tem will be reliably conservative or vote with other Schwarzenegger appointees. That the appointing governor has so little observable effect on a pro tem's vote in these opinions speaks well of judicial independence. And it shows that which governor appointed an individual justice is not the only data point one needs to determine that justice's judicial philosophy or attempt to predict their behavior.

Justice Liu Is Winning the Paper Chase

Justice Liu produces by far the most opinions. He wrote more overall than any individual justice; he wrote more total opinions (32) than the Chief Justice and Justice Corrigan combined (28); and he wrote separately (16) more than all other justices combined (13) even if we include the pro tem justices (15). Although Justice Liu has the fewest majority votes, he is not easily categorized as the court's great dissenter — he is in a three-way tie with Justices Chin and Kruger for most majority opinions. Still, he dissented, and wrote more dissents, than all other justices combined. In fact, of the court's other regular members, only one (Cuéllar) authored any dissenting opinions (twice). Justice Liu at least earns the "most prolific" merit badge for this period.

Overall Voting Alignment Does Not Translate to Blocs Commanding Majorities

Despite the Brown appointees tending to vote together, they do not all write a similar number of majority opinions. Nor are they always in the majority together. This lack of correlation extends to the senior justices as well. Justices Liu, Cuéllar, and Kruger voted with the majority less often than the senior justices, either as a group or individually. The Brown justices wrote separately (23 times) far more than the senior bloc (6 times). The Brown appointees dissented more (12 times) than the senior justices (twice). And the Brown justices voted to concur (16 times) more often

than their colleagues (3 times). Yet the majority opinion authors do not group similarly. The senior justices collectively wrote 41 majority opinions, the Brown justices wrote 45 — nearly the same, with the Brown justices collectively writing slightly more majority opinions. Nor do the individual results track the senior/Brown distinction. Justice Chin ties with Justices Liu and Kruger for writing the most majority opinions. And each group has its outlier: the Chief Justice (12 majority opinions, the fewest) and Justice Cuéllar (13).

This disparity is a cautionary note about our empirical analysis. There is not necessarily a clean ideological break between the Brown and the senior justices. The takeaway here is that one cannot bank on pitching an argument to either the senior or the Brown group because their voting patterns are not sufficiently cohesive. And despite these indications that the senior and Brown justices can be grouped for some purposes, bear in mind that the *lowest* justice-to-justice concurrence average is 92% (Chin-Liu). Savvy practitioners may find signals from the Brown justices in their separate opinions about how to approach future cases. But given these results, and because the court is known for its collegiality and consensus, just how persuasive following those signals may be to one bloc (or the whole court) is unclear.

Productivity May Not Have Dropped

Finally, as David Ettinger reported on *At the Lectern*, the court’s chief supervising attorney explained that “there is likely a drop in overall productivity” with only six justices.[5] Our numbers provide weak support for that conclusion. In a previous analysis of the court’s yearly opinion output per fiscal year from 1988 to 2015, we found over that 27-year period the average opinion output is 99.75, and the annual average for 2011-15 is 88.[6] Updating those figures with the most recent Court Statistics Report (FY2015-16) changes them slightly: the 28-year average opinion output is 98.93, and the annual average for 2011-16 is 86.

Fiscal year	Written opinions	Petitions for review					Percentage Granted
		Grants	Grant and hold	Grant and transfer	Total grants	Denied	
FY16	76	55	34	46	135	3725	3.62
FY15	76	61	48	38	147	3711	3.96
FY14	85	59	47	28	134	3896	3.43

FY13	94	61	46	43	150	4,032	3.72
FY12	87	63	71	34	168	4,378	3.83
FY11	98	71	69	36	176	4,769	3.69
FY10	96	86	44	43	173	4,911	3.52
FY09	116	39	33	36	108	4,896	2.21
FY08	116	82	210	51	343	5,406	6.34
FY07	113	92	252	38	382	4,609	8.29
FY06	125	85	60	42	187	5,226	3.58
FY05	125	101	133	33	267	4,847	5.50
FY04	108	95	48	23	166	4,750	3.49
FY03	123	118	66	35	219	4,878	4.49
FY02	101	136	74	24	234	5,064	4.62
FY01	103	83	63	38	184	5,257	3.50
FY00	124	84	92	32	208	5,248	3.96
FY99	88	98	98	25	221	5,197	4.25
FY98	97	97	89	25	211	5,444	3.88
FY97	82	111	76	35	222	4,854	4.57
FY96	102	77	94	42	213	4,318	4.93
FY95	97	97	51	31	179	4,014	4.46
FY94	99	97	109	25	231	4,401	5.25
FY93	102	84	80	52	216	3,814	5.66
FY92	89	99	56	24	179	3,467	5.16
FY91	127	58	65	70	193	3,314	5.82
FY90	100	61	44	45	150	3,252	4.61
FY89	120	41	38	61	140	3,052	4.59
AVERAGE	98.93	81.82	78.21	37.68	197.71	4,454.64	4.46

This decrease in the averages shows (consistent with our previous analysis) the trend line for annual opinion output is down. The total opinion output in the period we reviewed for this article is 89, well below the historical annual average (98.93). But output in this twelve-month period (89) is slightly above the more-recent fiscal year average (86). And it easily outpaces the output (76) in the two most recent reported fiscal years.[7] This suggests that the court is managing its docket despite the obvious problems with using pro tem justices over a long period.

CONCLUSION

Leaving aside the output figures, the above-average dissent rate by pro tem justices

highlights how the court's empty seat fosters some instability in developing the law. We are confident that everyone who cares about the orderly administration of justice in California will (as we do) see this analysis as confirmation of what they already suspected: the state's high court suffers from the epic delay in filling its empty seat. As the court suffers, so do we all.

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[1] We discarded *People v. Powell* (2018) 6 Cal.5th 136, where a pro tem justice sat for the Chief Justice, and the August 29, 2018 order (S234969M) modifying the previous opinion in *Troester v. Starbucks Corporation* (2018) 5 Cal.5th 829.

[2] We did not count *Alvarado v. Dart Container* (2018) 4 Cal.5th 542, in which the Chief Justice wrote a concurring opinion and pro tem Justice Perren voted with the majority. This is fair because it is technically a unanimous opinion (all seven voted for the judgment) despite four justices also casting concurring votes. If we count *Alvarado* because the pro tem justice did not sign the Chief Justice's concurring opinion, the pro tem-to-Chief disagreement number becomes nine, tied for most with Justice Kruger, and the percent disagreement goes to 10%.

[3] (2017) 4 Cal.5th 145.

[4] (2017) 4 Cal.5th 145, 202 (citation omitted); *see also id.* at 192.

[5] David Ettinger, *Supreme Court Cases in an Empty Chambers*, At the Lectern (Sep. 11, 2018).

[6] California Constitution Center, *SCOCA Year in Review 2017: (Almost the) Brown Court*, SCOCABlog (Sep. 23, 2017).

[7] Note that the Court Statistics Reports tabulate a fiscal year, while here we reviewed an August-to-August twelve-month period. And there may be variation

between what the court counts as an opinion and our count.