SCOCA year in review 2022

Overview

In some ways this was a big year for the California Supreme Court, with two retirements and two new justices, which included a chief justice retiring and a new chief justice ascending. It was a small year from another perspective: the court issued the fewest opinions in the past 24 years. In this annual review we move away from past concerns about a Brown-Newsom split. Our past research shows that the appointing governor blocs make little difference on this court, and there is now a plurality: three Browns (Liu, Kruger, Groban), three Newsoms (Guerrero, Jenkins, Evans), and one Schwarzenegger (Corrigan). We focus instead on two present challenges and how they might progress. A new chief justice taking administrative control over the judicial branch is bound to require some adjustments — what will those be? And the debate over quality-versus-quantity in opinions continues. The results will determine whether this year marks an inflection point for the court, or more of the same.

Analysis

Changes in the court's membership

Justice Guerrero was seated in March 2022, filling the vacancy left by Justice Cuèllar's retirement in 2021. Shortly thereafter, on July 27 Chief Justice Cantil-Sakauye announced her retirement, and in January 2023 Justice Guerrero became the new chief justice. Justice Evans then filled the vacancy created by Justice Guerrero taking the chief justice's seat.

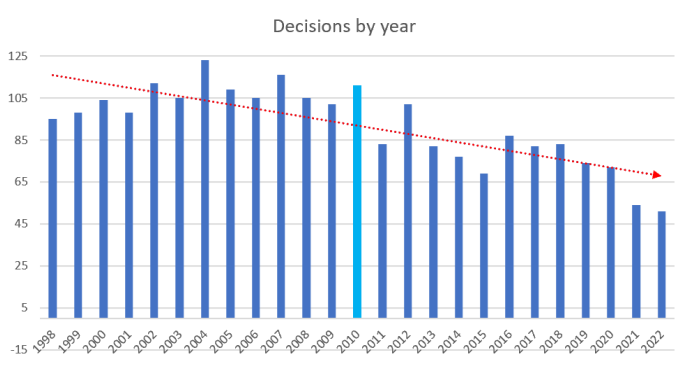
Those are significant but not uncommon changes. As Chief Justice Cantil-Sakauye noted, her decade on the court was marked by frequent turnover, with seats changing almost every year.[1] It's somewhat common in recent history for two new justices to arrive in close order as occurred in 2022. Justices Kruger and Cuèllar were seated together in 2015, Chief Justice Cantil-Sakauye and Justice Liu both arrived in 2011, justices Chin and Brown both arrived in 1996, Justice Baxter and Chief Justice George were both seated in 1991, and three justices (Arguelles,

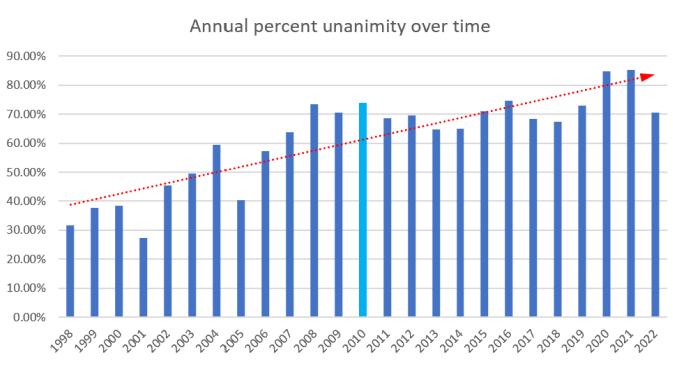
Eagleson, Kaufman) filled empty seats in 1987. Viewed in that context, the 2022 seat changes are unremarkable.

What's more interesting are the potential implications those seat changes may have for judicial-branch governance and the court's opinion output. Those are the primary subjects considered next.

Opinion metrics

The court's opinion output continues to decline year-over-year. Comparing the last decade of Chief George (ending in 2010) with the most recent period shows a remarkable reverse trend in the court's opinion output, with 100 annual opinions as the over/under. The court missed the 100 mark in only one year of the Chief George decade (98 opinions in 2001), and the court exceeded the 100 mark in only one year of the most recent decade (102 opinions in 2012). If we round up the 98 opinions in 2001, the court issued at least 100 opinions every year in the 2000s. Conversely, if we round down the 102 opinions in 2012, the court issued fewer than 100 opinions every year from 2011 to 2022. The highest is 123 opinions in 2004, and the low is 51 opinions in 2022.





It's unclear what's causing the court's opinion output to decline. As discussed below, it may be related to a recent change in the grant-and-hold procedure. Petitions for review are not slowing; the Judicial Council's statistics for the most recent decade show petition filings holding steady at around 4,000 each year.[2] The most recent fiscal year, for example, saw just under the 10-year average number of petitions filed.

Fiscal year	Total petitions filed	Straight grants	Average	Granted and held	Average
FY21	3,905	41	50.7	542	162
FY20	3,713	50	50.7	251	162
FY19	3,782	14	50.7	68	162
FY18	3,896	27	50.7	145	162
FY17	4,113	76	50.7	368	162
FY16	4,193	55	50.7	34	162
FY15	4,042	61	50.7	48	162
FY14	4,134	59	50.7	47	162
FY13	4,192	61	50.7	46	162
FY12	4,620	63	50.7	71	162
AVERAGES	**4,059**	**50.7**		**162**	

The one obvious change in the Judicial Council graphics from its 2022 Court Statistics Report is that the total number of petitions granted (as a raw number or as a percentage) is trending up significantly — yet filings and dispositions are relatively flat, and both opinions and denials are trending down. How is the court taking in more cases while issuing fewer opinions, all while its filings-and-dispositions numbers track closely?

Figure 17: Petitions for Review [1] Granted

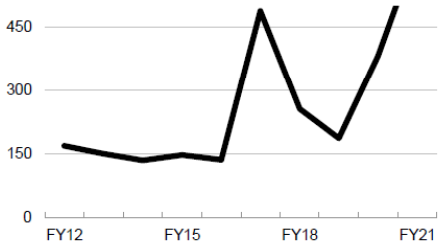


Figure 18: Petitions for Review [1] Denied

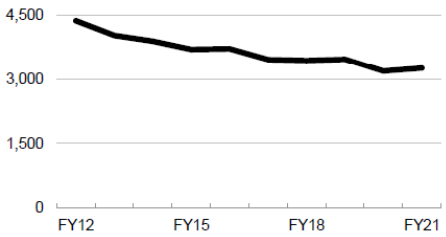


Figure 19: Petitions for Review [1] Percent Granted

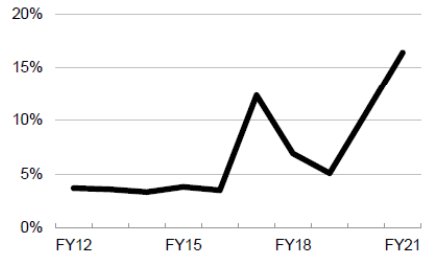
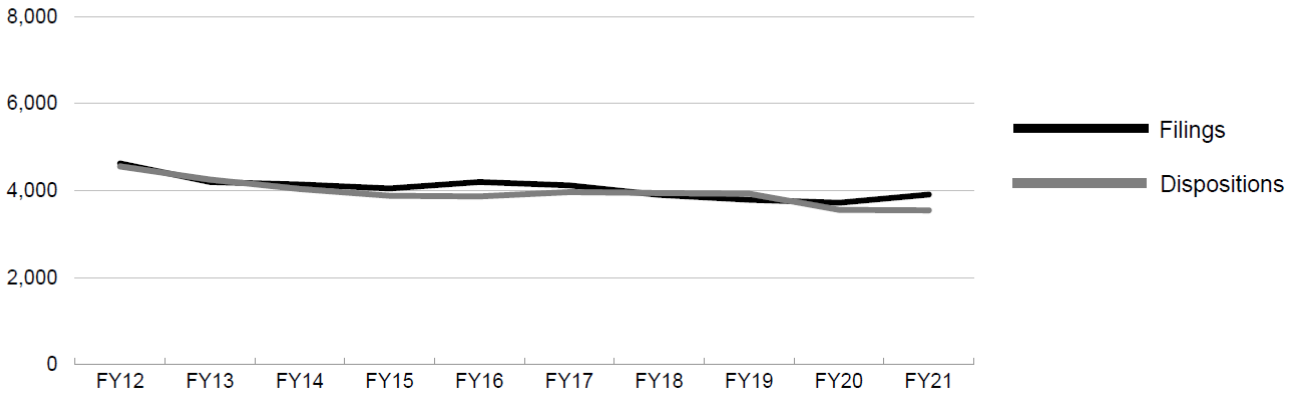


Figure 8: Total Petitions for Review



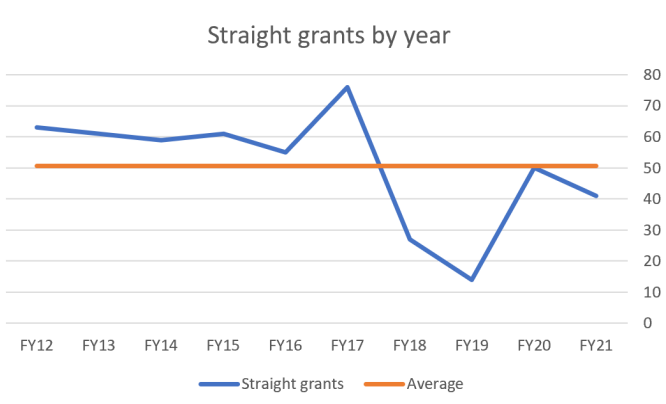
The answer may lie in the difference between a “straight grant” that results in an opinion and a “grant and hold” that almost never results in an opinion. As explained

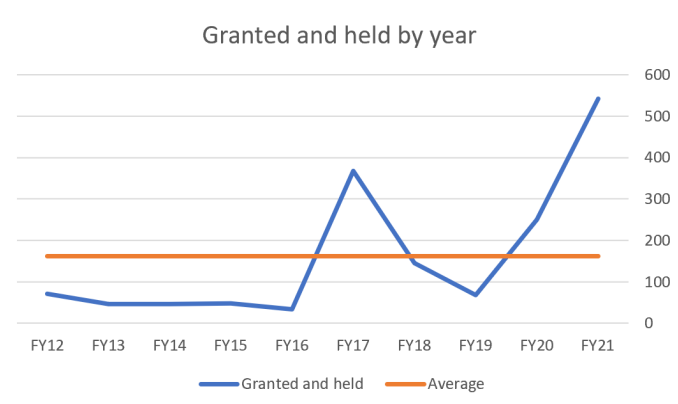
in the next section, increased use of grant-and-hold under a new procedure from 2015 is our best suspect.

The 2015 grant-and-hold policy change may explain the falling opinion numbers

In 2015 the court changed its grant and hold policy.[3] In this procedure all cases (regardless of their publication status) in a group of related petitions are granted, one lead case is decided by opinion, and that one opinion applies to the related cases. The old procedure was to deny petitions for review of unpublished cases that raised the same issue as a lead case. The new procedure is to instead grant review to all related cases and hold them for action after the lead case is decided by opinion. The result: total petition grants trend up after 2015, and grant-and-holds are up significantly since 2015 — for example, 251 in 2020 and 542 in 2021, far above the 10-year average of 162.

The Judicial Council graphics above only show total petitions granted, and they show total grants rising significantly (raw and percentage) and denials falling. We parsed straight grants from grant-and-holds, which reveals that straight grants are below average while the grant-and-holds are driving up the total petitions granted:





Straight grants that would result in an opinion are trending down. Conversely, the rising grant-and-hold trend is largely unrelated to the court's opinion output because granted-and-held cases almost never result in an opinion. Instead, rising grant-and-holds and their eventual disposition are likely crowding out the hours the court spends on generating opinions. Why that's so wasn't immediately obvious: how is the administrative burden of granting-and-holding more cases crowding out more court

time than denying those same cases outright?

In fact, at first we thought increased grant-and-holds might make the court *more* efficient because a single decision can resolve a group of cases, permitting it to write more decisions in the same time while resolving proportionally more matters. But David Ettinger predicted instead that "it might add a bit to the Supreme Court's workload because the court will need to evaluate the appropriate disposition for more grant-and-hold cases."

Ettinger was right. After the 2015 policy change the court's grant-and-hold docket exploded. For example, one lead case (*People v. Lewis*) had a tail of 327 grant-and-hold cases.[4] This likely increased the work required to unravel all the held cases after the lead case is resolved by opinion. Even after the lead case opinion is final, each held case still needs some degree of individual consideration and a remittitur — even if it's just rote paperwork, doing that 327 times or so per lead case is a lot of paperwork.[5] Increased use of grant-and-hold may be driving opinion output down by creating more work (not reflected in opinions) in the form of more internal memos to process the multiple held cases associated with a lead case. On a court where the number of judges and staff attorneys remains static, more work equals slower and reduced output.

Because a single opinion can resolve a whole group of petitions, increased use of grant-and-hold explains why total petitions granted are up, "straight" grants (distinguished from all grants and grant-and-holds) are down, and total dispositions continue to track petitions granted. Thus, more grant-and-holds will drive up the number of petitions granted without necessarily increasing the number of opinions. Straight grants are down and therefore the number of opinions is down: fewer straight grants in, fewer opinions out. This is our best suspect for the court's falling opinion output, but further empirical analysis is necessary to validate this theory. And a counterpoint is that the opinions-down / unanimity-up dynamic predates the 2015 rule change.

Other theories dismissed

We considered and rejected several other theories. The simplest explanation is that

the rising unanimity rate (annual 7–0 decisions) and the declining opinion output rate are linked. Indeed, they appear to be inversely related: over the same period, as the annual unanimity percent rises the annual opinion count drops. But other than that apparent correlation we have no basis for assigning causation. And although one assumes that refining drafts to secure seven votes takes longer, it easily could take just as long to produce a 4–3 decision with an array of separate opinions.

The court could be spending more time on its internal drafting process. Longer lead times to oral argument as the court devotes more effort to critiquing its work-in-progress draft majority opinion could drive down opinion output. As noted above, this requires an empirical study to determine whether it's taking longer to produce opinion drafts.

We considered whether turmoil on the court could be a factor. The court did see more seat changes in the most recent decade than in the previous decade.[6] And the most recent decade saw the longest-ever seat vacancy. But the court made effective use of pro tem justices during the long wait for Justice Werdegar's replacement, and during that time the court held steady at around 70–80 opinions annually. The most recent two years are the only years since 1998 in which the court issued under 60 opinions, and the two seat changes (Jenkins for Chin, Guerrero for Cuèllar) in those years were not lengthy vacancies. Although the pandemic should be a decreasing factor, the court issued more opinions in 2020 (during lockdown) than in the next two years as the pandemic waned. It's difficult to blame these short-term factors for the long-term trend.

Capital cases as a proportion of the total docket is another possible explanation. Automatic appeals are large files, weighty matters, and often require laborious opinions to resolve. If the court were being overwhelmed by its capital docket, that could explain overall smaller opinion numbers. But that's not so: filings (the black line) trend down over the past decade for both direct appeals and collateral attacks in capital cases. Indeed, new direct capital appeals are approaching zero. In the 2022 Judicial Council figures there were 14 automatic capital appeal decisions, which is 27% of the total opinions number.[7] So the rule-of-thumb that capital cases are 20–30% of the court's output in a given year holds true, but with the declining

number of new capital cases one expects that percentage to decline slowly as the court processes its already-pending capital cases. That proportion isn't declining because the total number of yearly decisions is also falling.

Figure 5: Automatic Appeals (Death Penalty Cases)

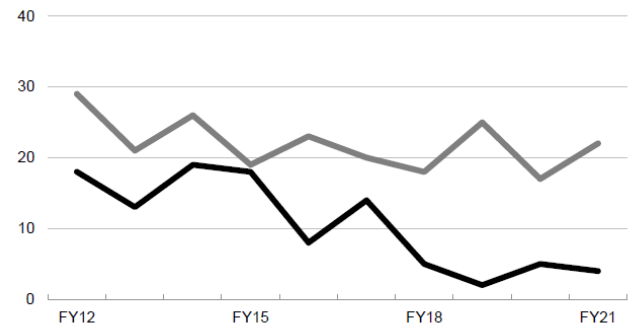
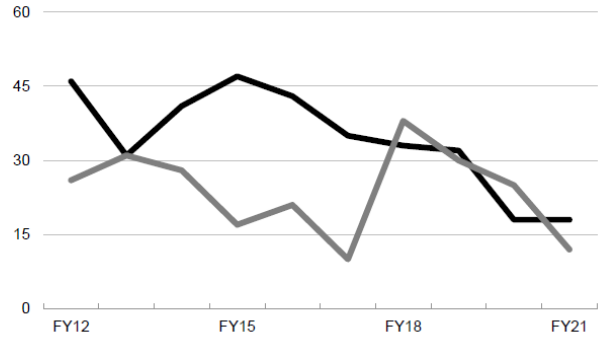


Figure 6: Habeas Corpus Related To Automatic Appeals [3]



Finally, a combination of factors could be at work here: the pandemic's delayed effect, a backlog from seat vacancies, repeated gearing-up time for new justices, and the harder task of getting to seven votes in more cases. There are fewer capital appeals, new petition filings are down slightly, and depublication is trending up. Combined, these factors could suggest that there are fewer cases the court needs to resolve. But that depends heavily on intuiting the relationship among several distinct trends, and it ignores new petition filings holding steady. The clearest connection is the inverted relationship between increasing use of grant-and-holds since 2015 and decreasing opinion output. This suggests a dual and interrelated effect: the court is resolving more cases overall with fewer opinions, and the court's internal workload is increasing.

Challenges ahead

We see two principal challenges ahead: one more administrative, the other more judicial. On the administrative side, the role of managing a large-scale bureaucracy is new to the incoming chief justice so a learning curve is expected there — compounded by the need to replace the Judicial Council's head of staff. On the judicial side, the debate over quality-versus-quantity continues, and the new chief justice must decide whether that's a problem and what (if anything) she can do about it. Otherwise, the outgoing chief justice has left the judicial branch in good order and handed her successor no hot potatoes.

One factor here is that California's chief justice has either significant-and-sole power or little-and-distributed power, depending on the context. In the administrative context, as leader of the state judicial branch, the chief justice position is arguably the most powerful single official in California government: there are nine executive offices, and 120 legislators, but only one head of the Judicial Council. Conversely, as first-among-equals in a group of seven, as chief of the court's justices she wields only soft sway over her colleagues. Outside her task of assigning opinions and managing the court's business, as a justice the chief functions much as the others do in drafting calendar memos and opinions, and in soliciting input and concurrences from her colleagues. The difference in a chief justice's power over administrative versus judicial matters will affect both the scale of the solutions she can attempt and the likelihood of success.

The administrative role will be new to the incoming chief justice in a way that differs from the outgoing chief justice's experience. Chief Justice Cantil-Sakauye held positions with significant administrative and managerial responsibilities before becoming the judicial branch leader: she held high-level staff roles for Governor George Deukmejian, and she sat on the Judicial Council when she was a Court of Appeal justice. By contrast, with all her substantive experience and in all her noteworthy professional roles the one thing Chief Justice Guerrero has not done is oversee a large bureaucracy. And the Judicial Council's chief administrator Martin Hoshino recently retired, which deprives the new chief justice of a ready-made lieutenant. Those factors are hardly good predictors of future success or failure, but they may make the learning curve steeper.

The judicial role will change for the incoming chief justice in two major ways. As a Court of Appeal justice for many years, she likely became well-used to the patterns of opinion-drafting with two colleagues where all three participants were for many purposes equals. In her short time as an associate justice of California's high court, she transitioned to the junior seat on a seven-member body with a clear leader — and now she will be that leader. But as discussed next, whether that leadership position will matter much in the quality-versus-quantity context is an open question.

Quality versus quantity

There are several questions here. Should a state high court be producing many opinions, or fewer opinions of higher quality? Is that a false choice, and are many high-quality opinions desirable and achievable? Is it a false assumption that a state high court *should* be producing many opinions? Or that many opinions will be of lesser quality? These interrogate whether the court's declining opinion output is a problem, and what (if anything) the new chief justice can do about that. The first is a matter for legitimate debate; on the second it seems unlikely a chief justice can do much by fiat.

As the graphics above show, the court's annual opinion output has decreased as its unanimity rate increased. Assuming causation not correlation, this might suggest that opinion numbers are down because unanimous decisions are harder to produce. Better decisions must be harder to write, and gathering seven votes must take longer, so that could justify the court's declining output.

But are unanimous decisions necessarily better? It's possible to have strong consensus on bad ideas — invading Russia in winter is always a terrible plan even if everyone agrees. Some major U.S. Supreme Court and California Supreme Court decisions have been unanimous.[8] Yet many other big decisions have been nonunanimous.[9] So although some big cases do get decided unanimously the point remains that *not all* big decisions are unanimous. Instead, the takeaway here is that unanimity is unnecessary to making major decisions — indeed, common sense suggests that the most consequential cases will be the hardest to decide and produce the most diverse opinions. We think it erroneous to, without more, conflate unanimity or longer drafting times with higher quality. Using higher unanimity plus lower output to suggest that the court's recent output is of substantially higher quality compared with past decades is not merely wrong, it's insulting to the court's prior members.

And is unanimity important for smaller matters? One assumes that all California high court cases involve big issues; indeed, the court views its function as presiding over "the orderly and consistent development of California case law," and its primary criterion for granting a petition is "if review is necessary to secure uniformity of decision among the appellate courts or to settle an important question of law."[10] Yet

not every California high court case will reshape the law. Using this past year as an example, several decisions do not concern major issues of statewide importance.[11] And these days the automatic capital appeals rarely raise novel matters. So if not all cases present big issues, there is a legitimate question whether those more mundane matters merit the investment in getting to seven votes.

The counterargument for more decisions posits that there's value in the state high court making more decisions, of whatever supposed quality and any vote split, because at least then everyone has an answer. More erroneous Court of Appeal decisions reversed, more appellate splits resolved, more questions answered: whether the opinion be short or long, unanimous or 4–3, "Just give us a result!" goes this refrain. The problem with this view is that it forgoes any quality considerations and accepts that even a bad answer is better than no answer at all. This view also assumes both that there are more issues percolating that are suited to high court resolution and that the state's high court could easily accept more petitions for review. There are always more Court of Appeal errors to correct — but a high court is not an error-correction court. It is instead focused on Court of Appeal splits and issues of statewide importance. And the court's membership is fixed at seven, which caps the amount of work it realistically can do.[12]

We think the best view is that quality versus quantity is a false choice. As the law disfavors absolutes, a choice between more opinions and better opinions requires balancing the two imperatives. Those are not mutually exclusive: to some extent the number and quality of the court's opinions lies within the power of the seven justices. For example, a justice could labor over an opinion draft past diminishing returns — or call it "good enough" at 90% and send it along. Justices could reject the "no unexpressed thoughts" approach to memo critiques and speed up the process by writing fewer critiques and forgoing separate opinions. There's a balance to strike here between the court's workflow and the law's needs, and the court's historically higher opinion numbers could suggest that the current compromise needs reexamining.

In his recent confirmation hearing, Justice Daniel H. Bromberg talked about the need for a judge to strike a balance between humility and courage: "On the one hand

it’s important for a judge to be humble and to realize that it’s not always appropriate to say everything you’re thinking in an opinion. . . . On the other hand, it is important that when those thoughts are crystalized and when you see an injustice that you have the courage to act.”[13] Perhaps this encapsulates the optimal view on a court’s output: as many opinions as justice requires, and no more.

Finally, there are substantial doubts about whether the new chief justice can do much about this issue even if she wants to. We have argued that the x-factor in getting the court’s unanimity rate up was the soft-power influence of Chief Justice Cantil-Sakauye.[14] And it may be that the court’s higher opinion output in the past was due to Chief Justice George pressuring his colleagues about productivity. But persuading colleagues to reach for consensus is a different and arguably easier task than pushing them to work faster and harder. It’s in the nature of an appellate body to be collegial and seek compromise — yet those same justices are all captains of their own chambers and are not subject to a commodore’s orders and discipline. With the court operating more by carrot than stick, it’s difficult for a chief justice to gain much traction by cracking the whip. So even if Chief Justice Guerrero felt that the court’s opinion numbers should start trending up, making that happen would require at least three of her colleagues to agree to a faster opinion-writing pace.

Conclusion

Changes in the court’s membership in the past decade have coincided with observable trends continuing; this suggests that rather than changing the court’s direction the new members are contributing to existing trends. This also supports previous predictions that new appointments to the court are unlikely to substantially change the court’s dynamics between now and the next open gubernatorial election in 2026. This year we will look to how the new chief justice begins to make her mark on the court and the judiciary and be alert for any signs of change from the court’s now-well-established trends.

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Senior research fellows Stephen M. Duvernay, David A. Kaiser, and Brandon V. Stracener contributed to this article.

1. Carrillo, *Chief Justice Cantil-Sakauye's Mission to Bring Order from Chaos*, California Supreme Court Historical Society Review, Fall/Winter 2022. ↑

2. These (and other "Figure X" graphics here) are from the most recent 2022 annual Court Statistics Report published by the Judicial Council. Note that the JCC statistics are always 18 months out of date, so they may not reflect the most current trend. The Judicial Council's figures sometimes have errors; for example, the unusually low figures for straight grants and grant-and-holds in FY18 and FY19 may be undercounts. The court issues its own year-in-review, which for 2022 lists 49 majority opinions and counts 3,294 petitions for review. We reference the not-so-current Judicial Council analysis because it is more detailed than the court's own review. Note that the Judicial Council uses a fiscal year starting in July, the court's is based on a September-to-August year, and we use the calendar year. ↑

3. Roemer, *New justices seen in court's subtle changes*, Los Angeles Daily Journal (Jul. 10, 2015). ↑

4. *People v. Lewis* (2021) 11 Cal.5th 952. ↑

5. David Ettinger explains this process in *Please Continue to Hold,* At the Lectern (Sept. 26, 2011). ↑

6. Carrillo, *Chief Justice Cantil-Sakauye's Mission to Bring Order from Chaos*, California Supreme Court Historical Society Review, Fall/Winter 2022. ↑

7. *People v. Johnson* (2022) 12 Cal.5th 544; *People v. Holmes, McClain and Newborn* (2022) 12 Cal.5th 719; *People v. Bracamontes* (2022) 12 Cal.5th 977; *People v. Bloom* (2022) 12 Cal.5th 1008; *People v. Parker* (2022) 13 Cal.5th 1; *People v. Poore* (2022) 13 Cal.5th 266; *People v. Pineda* (2022) 13 Cal.5th 186; *People v. Mataele* (2022) 13 Cal.5th 372; *People v. Ng* (2022) 13 Cal.5th 448; *People v. Morelos* (2022) 13 Cal.5th 722; *People v. Ramirez* (2022) 13 Cal.5th 997; *People v. Tran* (2022) 13 Cal.5th 1169; *People v. Miranda-Guerrero* (2022) 14 Cal.5th 1; *People v. Camacho* (2022) 14 Cal.5th 77. ↑

8. *See, e.g., Brown v. Board of Ed. of Topeka, Shawnee County, Kan.* (1954) 347 U.S. 483; *U.S. v. Nixon* (1974) 418 U.S. 683, 716; *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 64; *In re Chang* (2015) 60 Cal.4th 1169; *In re Garcia* (2014) 58 Cal.4th 440, 467. ↑

9. Justice Harlan dissented in *Plessy v. Ferguson* (1896) 163 U.S. 537. Justices McLean and Curtis dissented in *Dred Scott v. Sandford* (1857) 60 U.S. 393, 564, superseded (1868). Justices Roberts, Murphy, and Jackson dissented in *Korematsu v. U.S.* (1944) 323 U.S. 214. *Miranda v. Arizona* (1966) 384 U.S. 436 was a 5–4 decision. *Roe v. Wade* (1973) 410 U.S. 113, *Buckley v. Valeo* (1976) 424 U.S. 1, and *Hamdan v. Rumsfeld* (2006) 548 U.S. 557 all produced six total opinions each, and *Nixon v. Administrator of General Services* (1977) 433 U.S. 425 generated seven total opinions. In California, one justice dissented in *People v. Anderson* (1972) 6 Cal.3d 628, two justices wrote separately in *Bixby v. Pierno* (1971) 4 Cal.3d 130, three wrote separately in *In re Marriage Cases* (2008) 43 Cal.4th 757 and in *Strauss v. Horton* (2009) 46 Cal.4th 364. *Perez v. Sharp* (1948) 32 Cal.2d 711 was a 4–3 decision. ↑

10. California Supreme Court, *Frequently asked questions: How does the [California] Supreme Court decide whether to grant a petition for review?* (Feb. 9, 2023). ↑

11. Several decisions involved sufficiency of evidence or pleading. For example, *People v. Tacardon* (2022) 14 Cal.5th 235 decided that defendant, who was in the driver's seat of a legally parked vehicle, was not "detained" when a sheriff's deputy parked behind the vehicle, shined a spotlight on it, and began to approach on foot. *People v. Ramirez* (2022) 14 Cal.5th 176 held that the evidence was sufficient to support finding that defendant, who ingested illicit drugs on night before trial and then went to hospital, was voluntarily absent from trial and trial could continue in his absence. *People v. Ware* (2022) 14 Cal.5th 151 found that the evidence was insufficient to support verdict that defendant had intent to participate in a conspiracy to commit murder. *Zolly v. City of Oakland* (2022) 13 Cal.5th 780 reviewed the sufficiency of a complaint's allegations on a demurrer. ↑

12. Carrillo & Chou, California Constitutional Law (West Academic 2021) at 385. ↑

13. Commission on Judicial Appointments hearing on January 13, 2023 (link to video) at 31:07. ↑

14. Carrillo and Duvernay, *The secret to SCOCA's consensus*, Los Angeles Daily Journal (Jun. 20, 2022). ↑