

WHAT THE NUMBERS TELL US  
ABOUT THE CALIFORNIA AND  
ILLINOIS SUPREME COURTS

# LITIGATION ANALYTICS AND APPELLATE LAW

KIRK C. JENKINS  
SEDGWICK LLP



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# A BRIEF HISTORY OF DATA ANALYTIC RESEARCH INTO APPELLATE DECISION MAKING

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Charles Grove Haines, “General Observations on the Effects of Personal, Political, and Economic Influences on the Decisions of Judges,” 17 Ill. L. Rev. 96 (1922)

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C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*

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The Supreme Court Database (<http://scdb.wustl.edu/>) –  
Originated by Professor Harold Spaeth. 247 variables for every SCOTUS decision since 1791

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Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical & Empirical Study of Rational Choice* (2013)

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SCOTUS (case selection, opinion assignment, constitutional law, interest groups’ effect, appointments); Courts of Appeals (voting behavior, inter-circuit comparisons); State Supreme Courts

# THE BOTTOM LINE

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- Approaching litigation like business-people: by quantifying risk
- Replacing decision making by anecdote and experience with data-driven decision-making
- “The better that judges are understood, the more effective lawyers will be both in litigating cases and, as important, in predicting the outcome of cases, thus enabling litigation to be avoided or cases settled at an early stage.”
  - Lee Epstein, William M. Landes & Judge Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, (Cambridge: Harvard Univ. Press, 2013).

- “Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation,” by Cass R. Sunstein, David Schkade, Lis Michelle Ellman (2003)
  - 4,488 published decisions and 13,464 separate judge votes
  - Democratic judge – 60% liberal; Republican judge – 46% liberal
  - DDD panel – 66% liberal; RDD panel – R is 54%
  - DRR panel – D is 53% liberal; RDD – R is 34% liberal

## PANEL EFFECTS – THE EMPIRICAL LITERATURE

# IDEOLOGICAL AMPLIFICATION & DAMPENING

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- Affirmative action – RRR upholds program 37%; DDD upholds 82%
- Sexual Harassment – DDD for plaintiffs 76%; RRR for plaintiffs 32%
- Corporate veil-piercing – DDD for plaintiffs – 67%; RRR for plaintiffs – 23%; RDD – R for plaintiffs 37%; DRR – D for plaintiffs 29%
- Environmental regulation – voting against the industry challenger
  - RRR – 27%; RRD – 50%; RDD – 63%

# IDEOLOGICAL AMPLIFICATION & DAMPENING II

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- Campaign finance – percentage voting to uphold regulation

RDD	RRD	RRR	DRR	DDR	DDD
35%	30%	23%	40%	38%	73%

## PANEL EFFECTS, PART III

- Robert Steinbuch, “An Empirical Analysis of Conservative, Liberal and other ‘Biases’ in the United States Courts of Appeals for the Eighth and Ninth Circuits”
  - Variables: political party & gender of trial judge; number of appeals taken in past year from judge’s decisions; types of cases appealed; interaction of factors
  - Eighth Circuit: statistically significant correlation for 2008 data between district judge’s political affiliation and rate of reversal
  - Eight Circuit 2011 data – reverses Democrats 15% more than Republicans
  - Ninth Circuit data – 2610 cases, no party effect

- Adam B. Cox & Thomas J. Miles, “Judging the Voting Rights Act,” *Columbia Law Review* 108(1): 1-54 (2008)
  - Every published Federal case under Section 2 of the Voting Rights Act since 1982
  - Votes to find liability – Democratic appointees 36.2%; Republican appointees 21.2%
  - Cases decided 1982-1994 – Democratic appointees +17%; cases decided 1995-2008 – Democratic appointees +9%

## PANEL EFFECTS, PART IV



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PANEL EFFECTS  
IN VOTING  
RIGHTS ACT  
CASES

Democratic Judge  
voting to find liability –  
3 Democrats 40.7%; 2  
Democrats 32.8%; 1  
Democrat 27.8%

Republican Judge  
voting to find liability –  
3 Republicans 11.1%; 2  
Republicans 21.3%; 1  
Republican 23.9%

# THE PHENOMENON OF DISSENT AVERSION

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- Richard Posner, Lee Epstein & William Landes, “The Economics of Dissent Aversion: A Theoretical and Empirical Analysis”
  - Dissent rate is strongly correlated with ideologically diverse panels
  - Is dissent more likely in a reversal?
  - Raising the importance of the majority opinion?
  - What are the costs of the dissent to the dissenter?
  - Does a dissent impose costs on the rest of the Court?

# DISSENT AVERSION II

- Jeffrey Segal, Lee Epstein, Chad Westerland, Charles Cameron & Scott Comparato, “Strategic Defiance and Compliance in the U.S. Courts of Appeals,” *American Journal of Political Science* 54: 891-905 (2010)
  - Random sample of 500 Supreme Court cases, yielding 10,198 subsequent treatments in the Circuits
  - Does it matter if a lower Court believes that the current Supreme Court has shifted from the enacting Supreme Court?
  - Does it matter what earlier decisions of the lower Court did with a Supreme Court precedent?

- Robert S. Erickson, “Treating Appellate Court Assignments as a Natural Experiment: Gender Induced Panel Effects in Sex Discrimination Cases”
  - 435 Federal gender discrimination cases, 1995-2002
  - Female judges about 15% more likely to vote for liability in gender discrimination cases than male counterparts – significant at .01 level. Male judges nearly as likely to find liability with at least one woman on the panel

DO MEN  
AND WOMEN  
APPROACH  
APPELLATE  
JUDGING  
DIFFERENTLY?

# GENDER AND APPELLATE JUDGING II

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- Christina L. Boyd, Lee Epstein & Andrew D. Martin, “Untangling the Causal Effects of Sex on Judging,” *American Journal of Political Science*, 54: 389-411.
  - Thousands of Circuit decisions in sex discrimination cases, 1995-2002
  - Non-parametric matching to analyze similar cases
  - Likelihood of male judge voting for plaintiff ten points less than female judge, holding ideology constant
  - Men significantly more likely to vote for plaintiff when at least one woman on the panel

# GENDER AND APPELLATE JUDGING III

- Renee Nicole Souris, “The Impact of Panel Composition on Sex Discrimination Case Outcomes at the U.S. Circuit Courts”
  - Examined 415 Federal cases – Sunstein database, as modified by Prof. Epstein
  - Logistic regressions for a wide range of gender-based causes of action
  - With at least one female judge and all female plaintiffs, odds of plaintiff prevailed increases 285%

# GENDER AND APPELLATE JUDGING IV

- Jennifer L. Peresie, “Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts,” 114 Yale L.J. 1759 (2005)
  - 556 Federal appellate decisions, 1999-2001 – Title VII gender discrimination & harassment
  - Controlling for other factors, gender increased probability of plaintiff vote from 22% to 41% in harassment, 17% to 28% in gender discrimination
  - For harassment, gender a more significant predictor than Democratic appointment, and equally significant for discrimination
  - Sitting with a female judge (controlling for ideology) increased likelihood of male judge voting for plaintiff from 16% to 35% harassment, 11% to 30% discrimination. Far more significant predictor than appointment by a Democratic president

# EMPATHY AND PANEL EFFECTS?

- Adam N. Glynn & Maya Sen, “Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women’s Issues,” *American Journal of Political Science*, Vol. 59, No. 1, January 2015
  - Matching data on judges’ families to nearly 1,000 gender-related cases
  - Controlling for ideology, having daughters causes a male judge to vote for plaintiff 9% more often
  - Largely driven by Republican judges – 7% increase in plaintiff votes, statistically significant
  - Effect for Democratic judges is 4% and not statistically significant



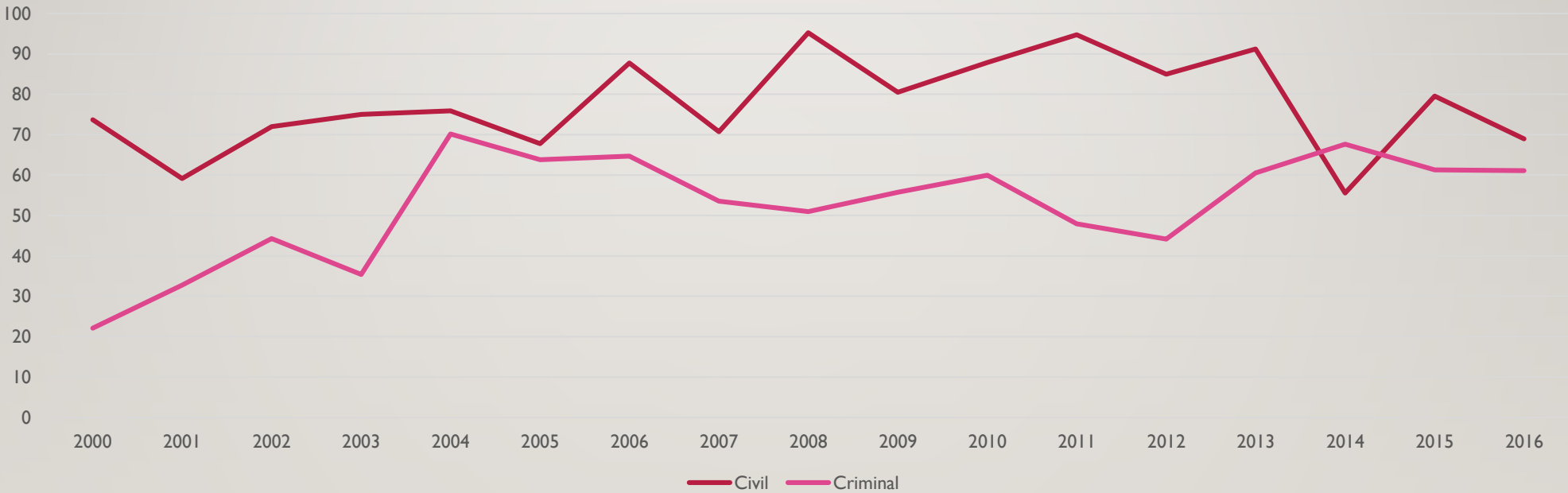
# MYTHS ABOUT CASE SELECTION

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- “The Supreme Court doesn’t review unpublished decisions.”
  - Illinois: For most of the years 2000-2016, only 75-85% of the Court’s civil docket has consisted of decisions which were published below.
  - California – Unpublished decisions frequently account for 25-40% of the Court’s civil docket, and in some years have been nearly half of the cases which resulted in non-unanimous decisions at the Supreme Court

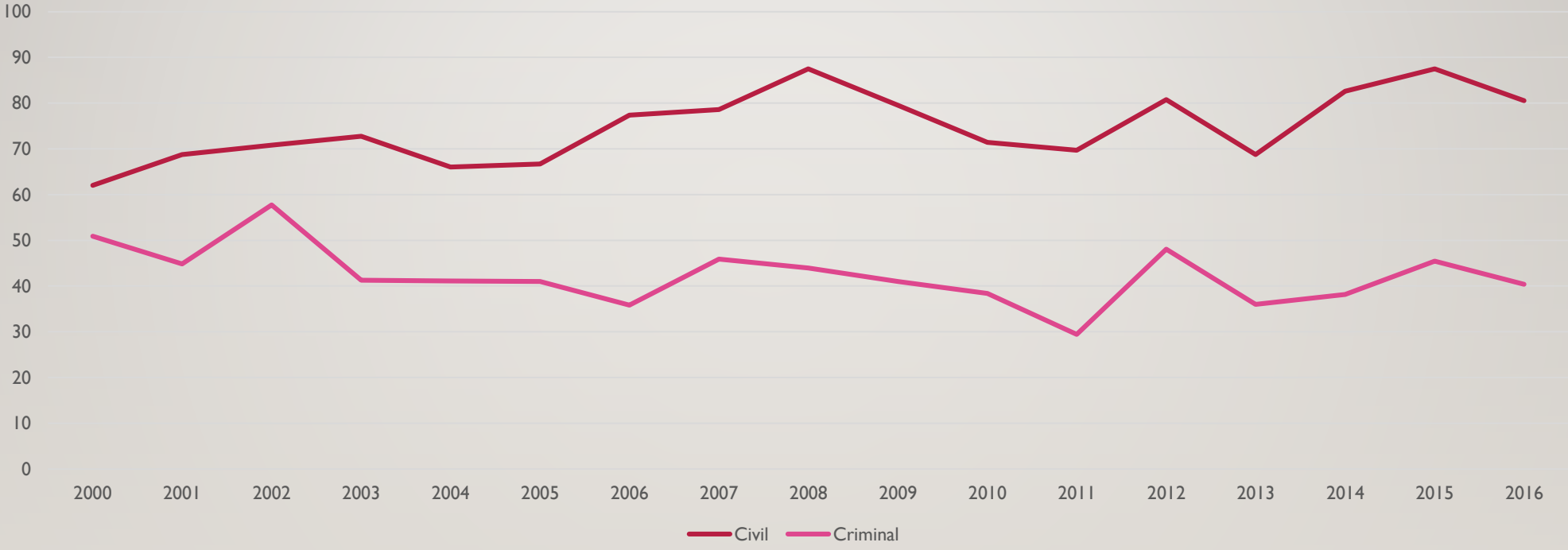
# ILLINOIS SUPREME COURT: PERCENTAGE OF DOCKET PUBLISHED BELOW

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# CALIFORNIA SUPREME COURT: PERCENTAGE OF DOCKET PUBLISHED BELOW

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# SO DO THE INTERMEDIATE APPELLATE COURTS UNDER-PUBLISH?

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- *Snow & Ice, Inc. v. MPR Management, Inc.*, 2017 II App (1<sup>st</sup>) 151706-U (Hyman, P.J., dissenting in part)
  - The failure to publish affects our supreme court as well. The Illinois Supreme Court
  - regularly accepts petitions for leave to appeal from Rule 23 orders, which indicates that the court
  - thinks some Rule 23 decisions involve more far-reaching matters than a panel thought. In 2014,
  - over 40% of the supreme court's civil docket stemmed from Rule 23 orders. See *Kirk Jenkins*,
  - *How Often Does the Illinois Supreme Court Review Unpublished Decisions (Part II)*, found at
  - <http://www.illinoisupremecourtreview.com/2015/03/how-often-does-the-illinois-supreme-court-review-unpublished-decisions-part-ii/>. In other words, our application of Rule 23 is unreliable.
  - One would think that if a case is important enough to be taken by the supreme court, something
  - about it was compelling enough to have been made an opinion

# MYTHS ABOUT CASE SELECTION II

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- “The Supreme Court doesn’t review unanimous decisions.”
  - California: In a typical year, 10-20% of unanimous decisions and 20-33% of non-unanimous decisions in civil cases had a dissenter below
  - Illinois: Cases with a dissent below tend to comprise 15-30% of the Court’s civil docket

# ILLINOIS SUPREME COURT – SHARE OF THE CIVIL DOCKET WITH DISSENTS BELOW, 2000-2016

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# CALIFORNIA SUPREME COURT – SHARE OF THE CIVIL DOCKET WITH DISSENTS BELOW, 2000-2016



# MYTHS ABOUT CASE SELECTION III

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- “The time of year your petition is filed doesn’t matter.”
  - United States Supreme Court – the “long conference”
  - Illinois Supreme Court – Studied PLA order lists 2007-2016 – Grant rates are several percentage points higher in the first several months of the year – the “long conference” is the most difficult time of the year to bring a PLA



# ILLINOIS SUPREME COURT: PERCENTAGE OF CIVIL PLAS GRANTED BY MONTH

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# ILLINOIS SUPREME COURT: PERCENTAGE OF CRIMINAL PLAS GRANTED BY MONTH

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# ILLINOIS SUPREME COURT: PERCENTAGE OF CIVIL PLAS RESOLVED BY SUPERVISORY ORDER

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# ILLINOIS SUPREME COURT: PERCENTAGE OF CRIMINAL PLAS RESOLVED BY SUPERVISORY ORDER

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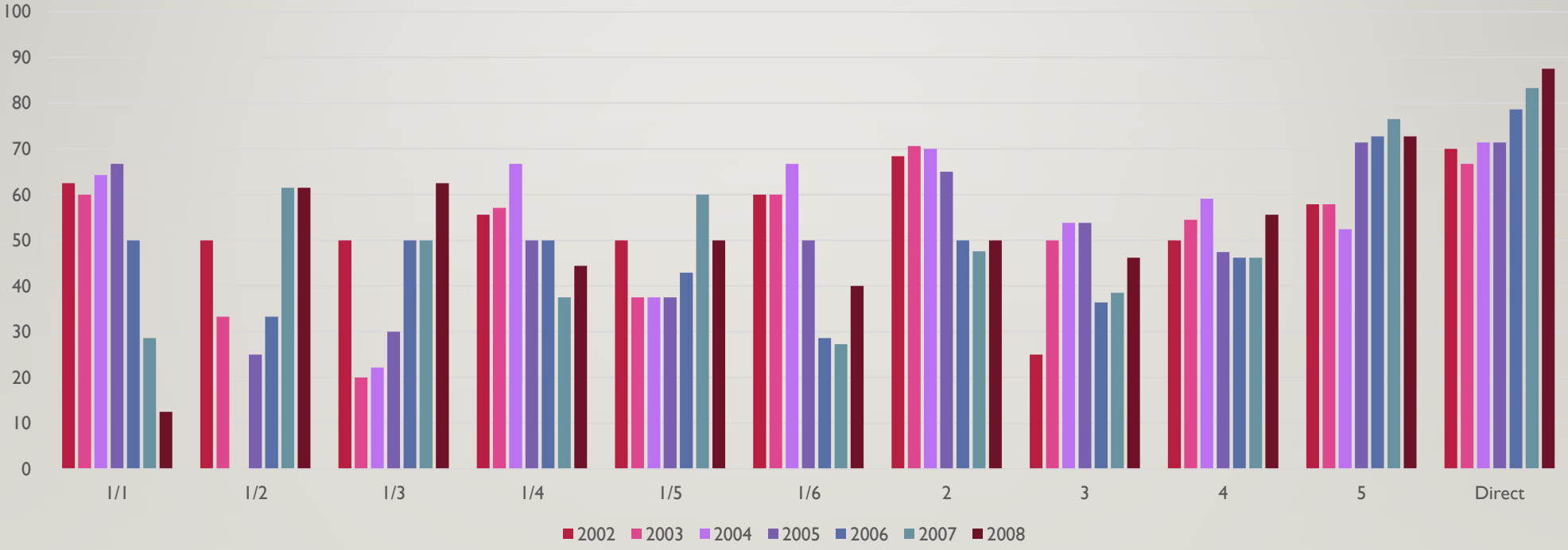


# ILLINOIS – APPELLATE COURT REVERSAL RATES

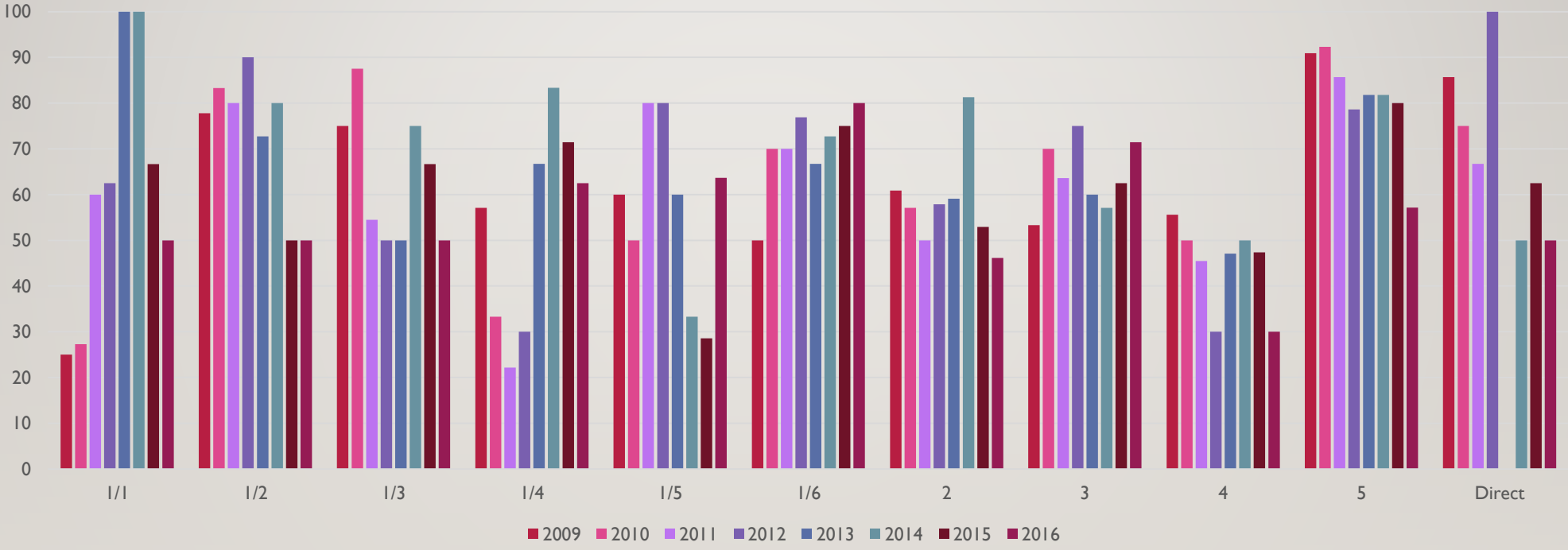
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- Why you shouldn't pay *that* much attention to year-by-year reversal rates
- Aggregate statistics are frequently misleading
- A Hypothetical:
  - Lawyer A – Has won 6 of 10 jury trials in the past two years
  - Lawyer B – Has won 6 of 10 jury trials in the past two years

# ILLINOIS SUPREME COURT CIVIL REVERSAL RATES – 2002-2008 (THREE YEAR FLOATING AVERAGES)



# ILLINOIS SUPREME COURT CIVIL REVERSAL RATES – 2009-2016 (THREE YEAR FLOATING AVERAGES)

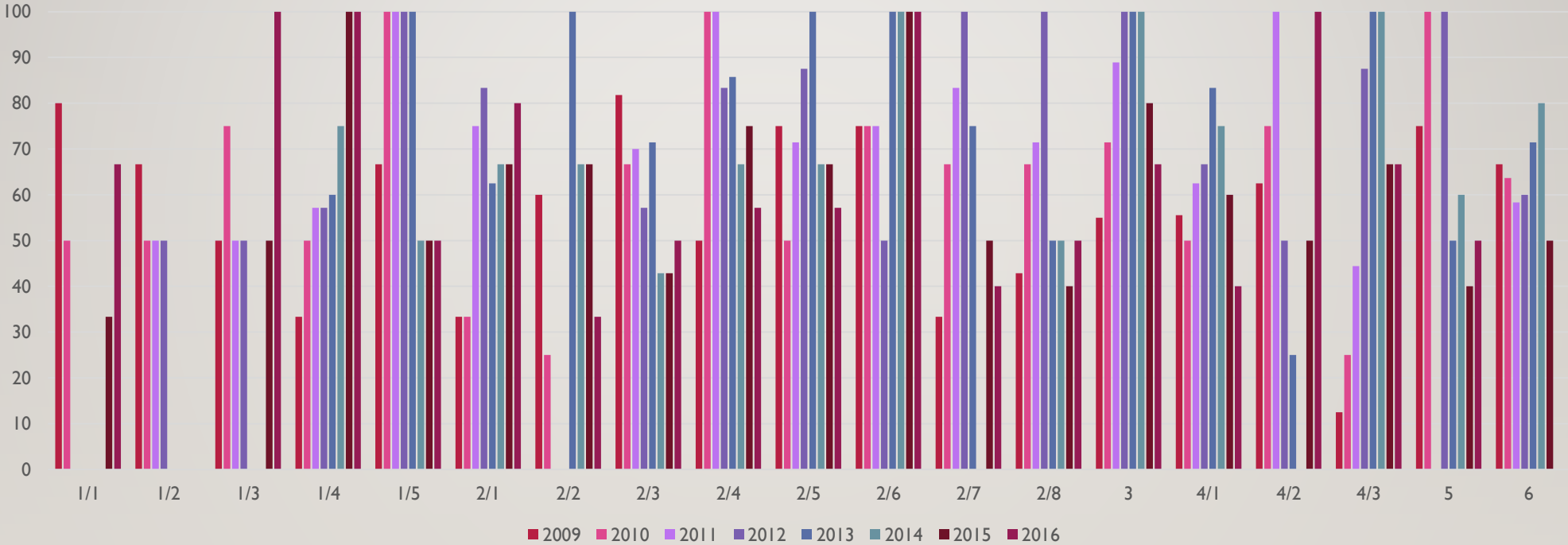


# CALIFORNIA SUPREME COURT CIVIL REVERSAL RATES – 2002-2008 (THREE YEAR FLOATING AVERAGES)



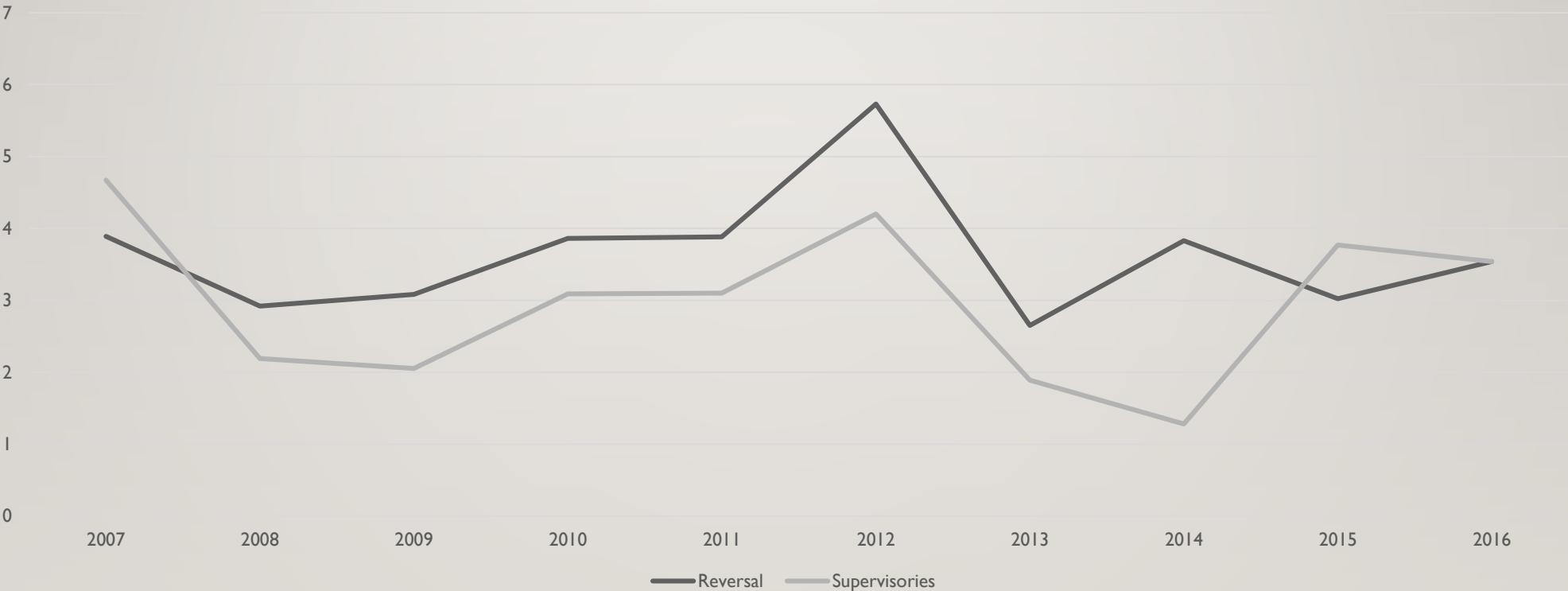


# CALIFORNIA SUPREME COURT CIVIL REVERSAL RATES – 2009-2016 (THREE YEAR FLOATING AVERAGES)



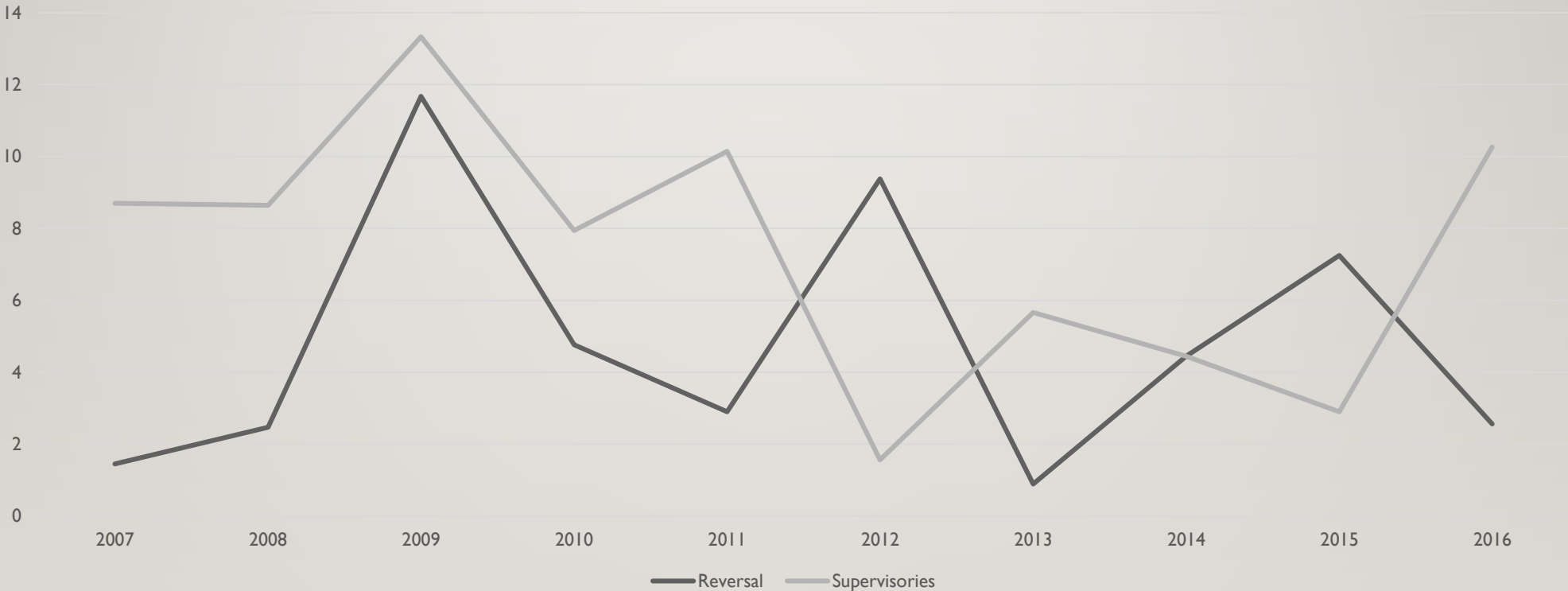
# TRUE REVERSAL RATES – ILLINOIS FIRST DISTRICT, CIVIL (2007-2016)

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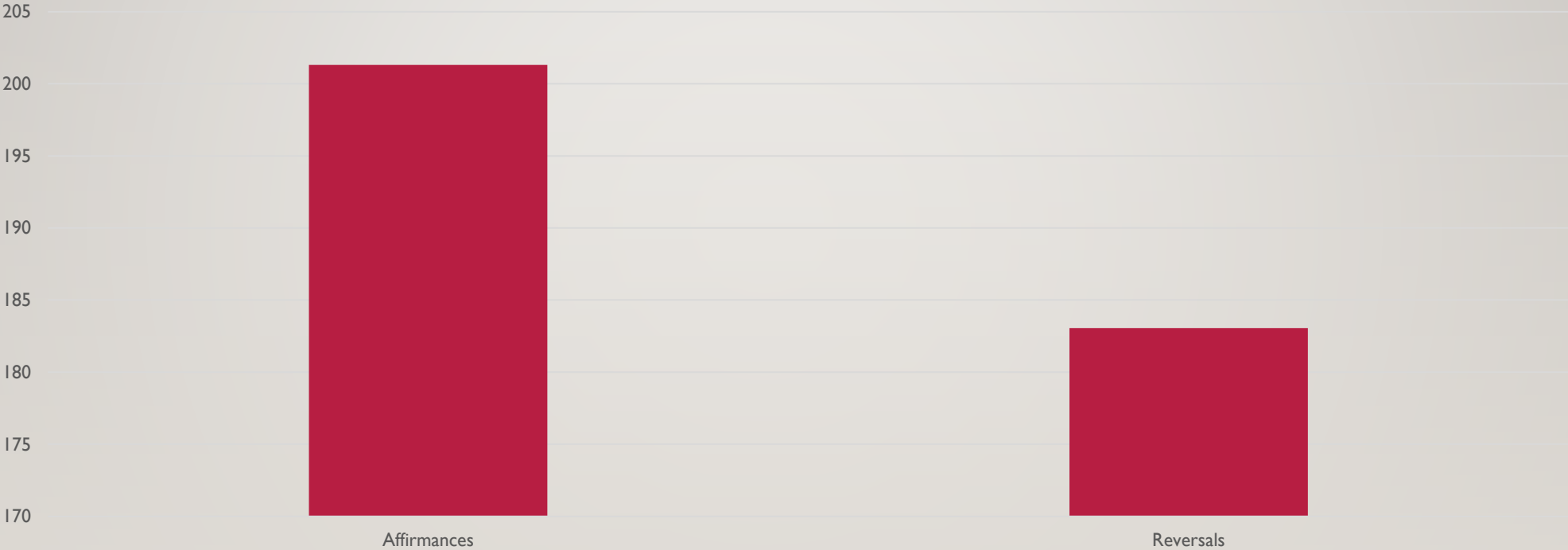
# TRUE REVERSAL RATES – ILLINOIS FIFTH DISTRICT, CIVIL (2007-2016)

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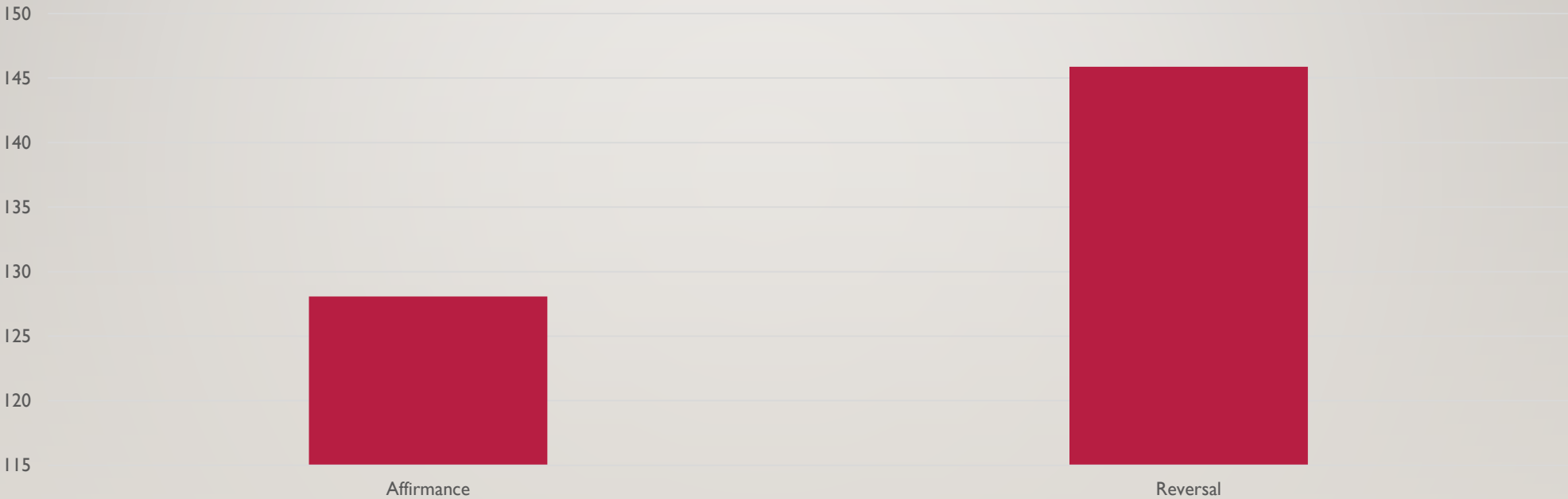
# DOES LAG TIME PREDICT RESULT? ILLINOIS SUPREME COURT – CIVIL GRANT TO ARGUMENT, 2008-2016

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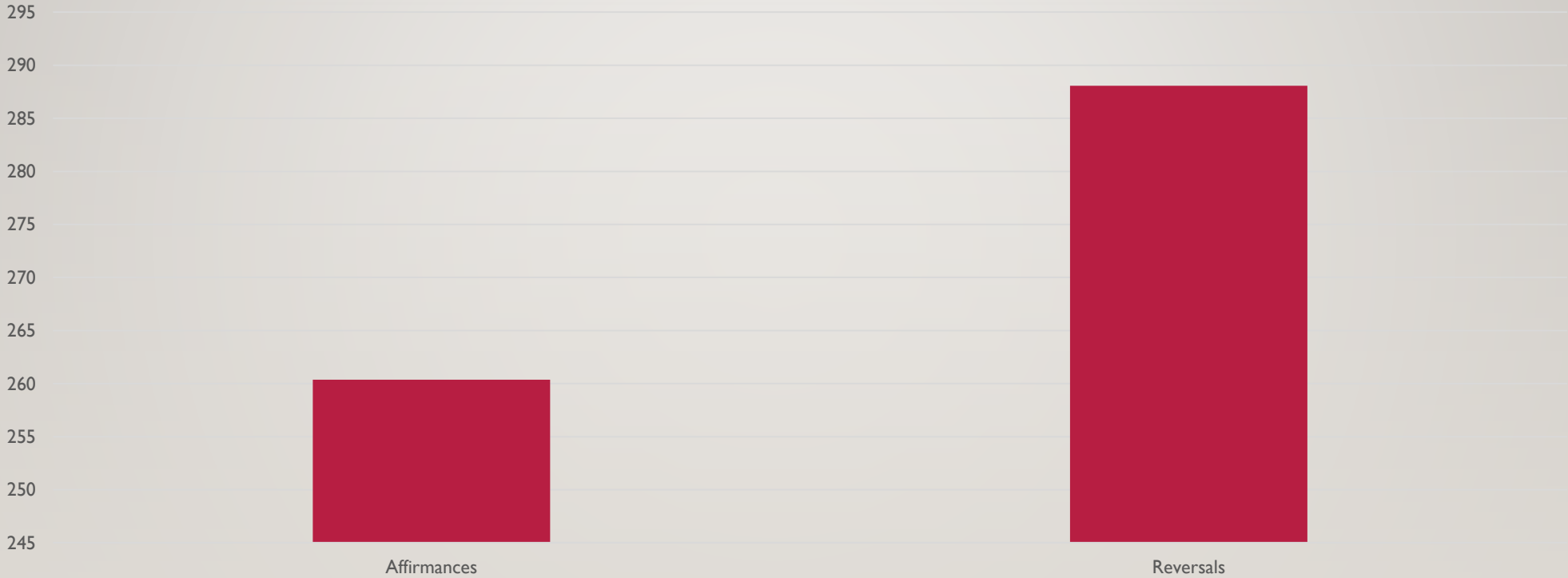
# ILLINOIS SUPREME COURT – ARGUMENT TO DECISION, CIVIL CASES, 2008-2016

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# ILLINOIS SUPREME COURT – LAG TIME IN CRIMINAL CASES FROM GRANT TO ARGUMENT, 2008-2016

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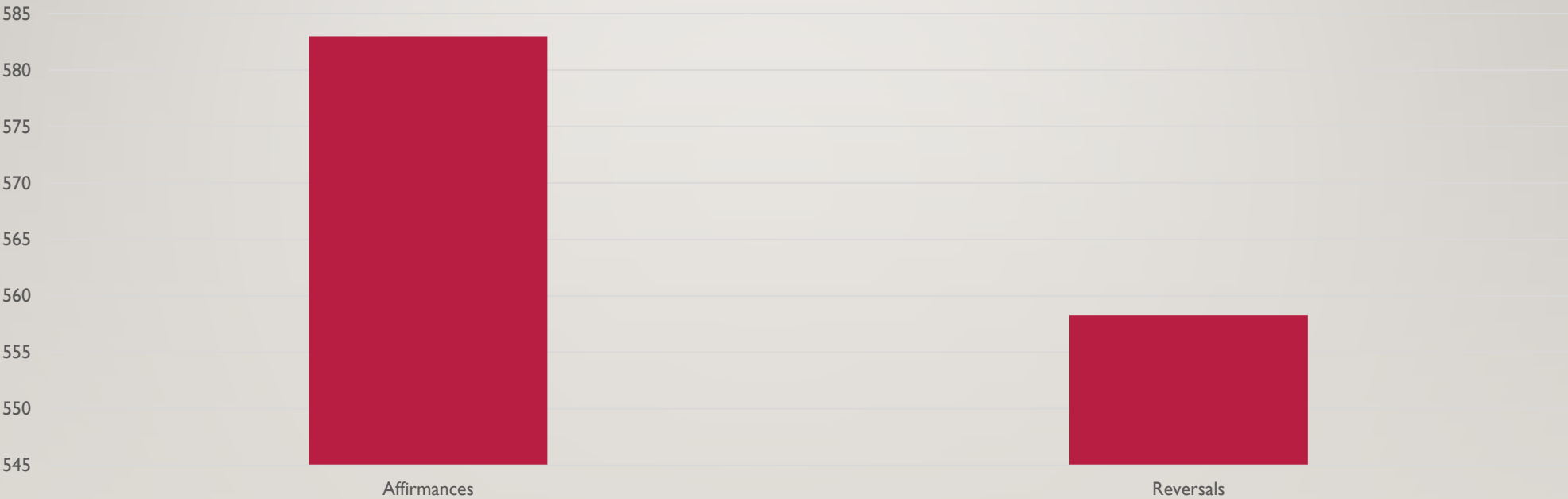
# ILLINOIS SUPREME COURT – LAG TIME IN CRIMINAL CASES FROM ARGUMENT TO DECISION, 2008-2016

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# CALIFORNIA SUPREME COURT – LAG TIME FROM GRANT TO ARGUMENT, CIVIL CASES, 2000-2007

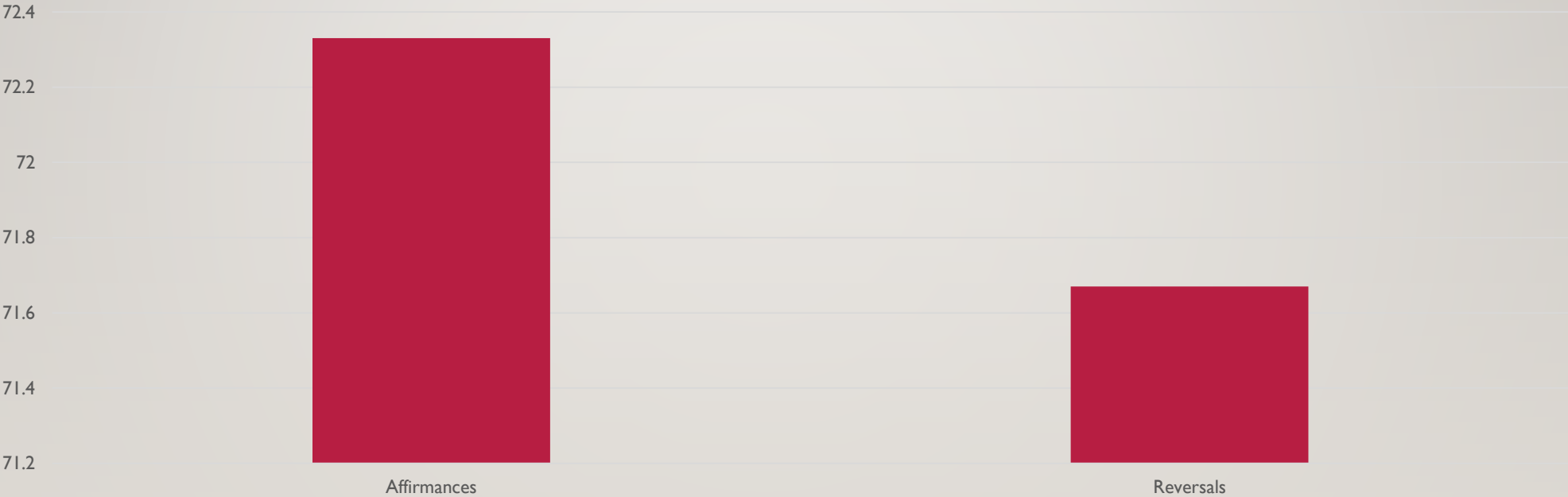
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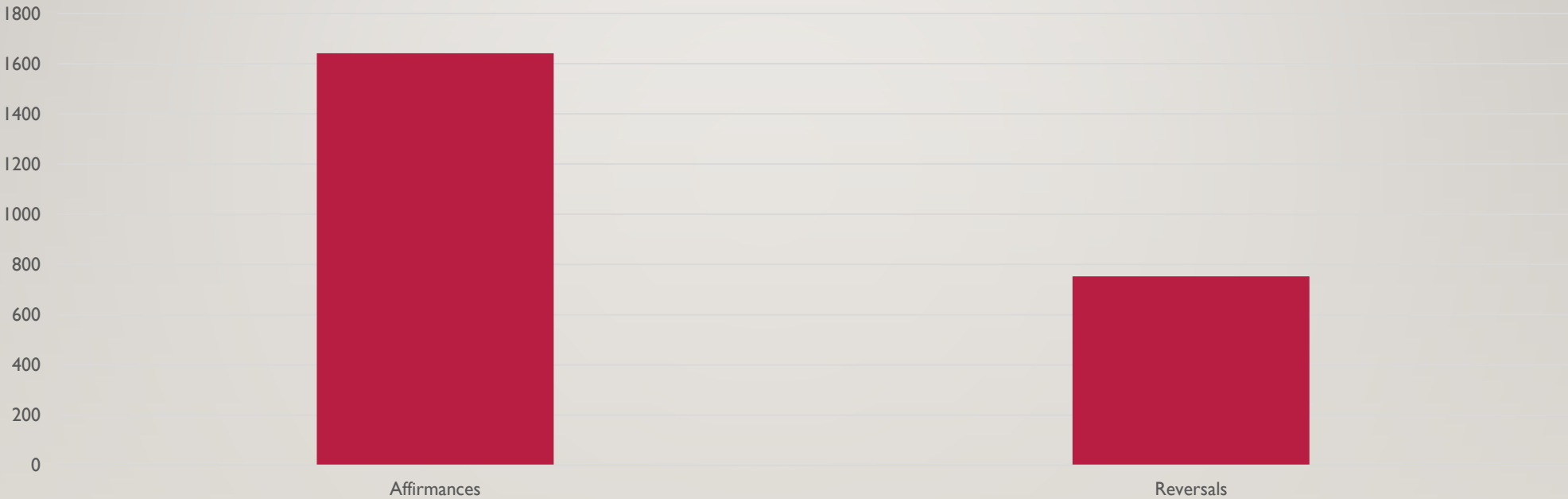
# CALIFORNIA SUPREME COURT – LAG TIME FROM ARGUMENT TO DECISION, CIVIL CASES, 2000-2007

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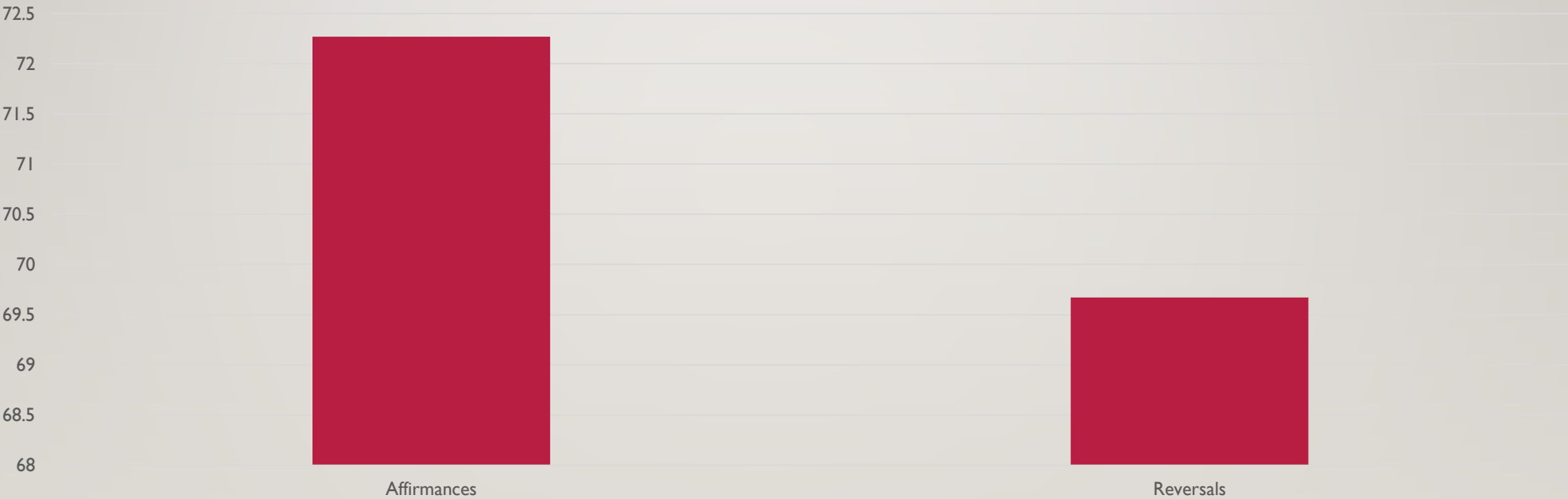
# CALIFORNIA SUPREME COURT – LAG TIME FROM GRANT TO ARGUMENT, CRIMINAL CASES, 2008-2016

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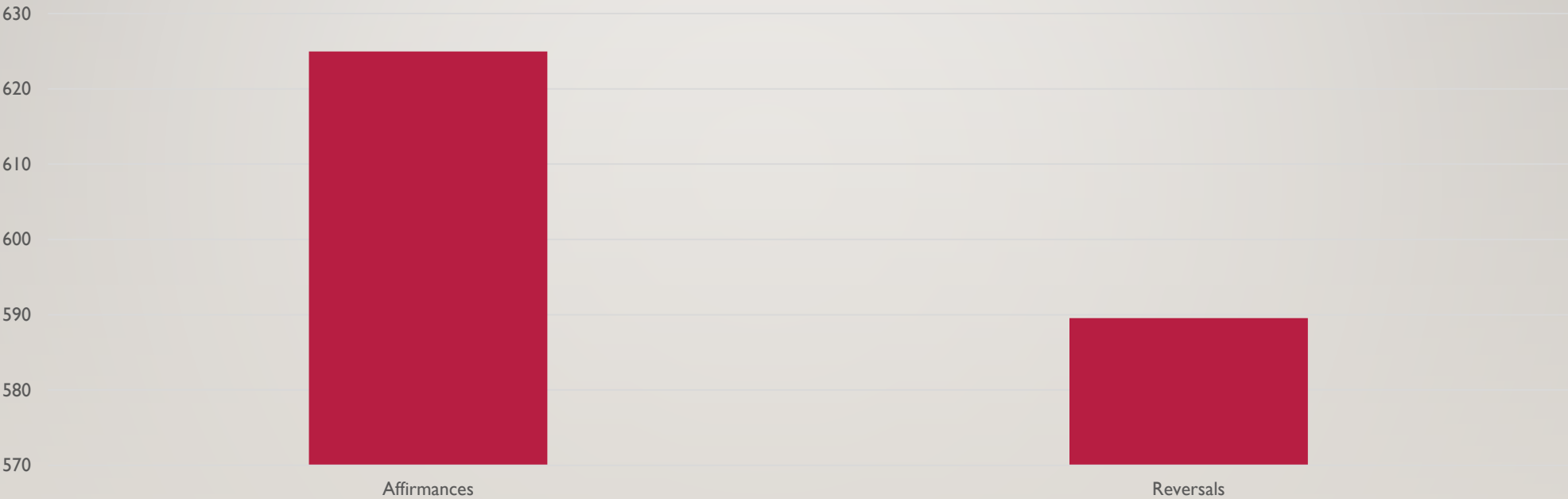
# CALIFORNIA SUPREME COURT – LAG TIME FROM ARGUMENT TO DECISION, CRIMINAL CASES, 2008-2016

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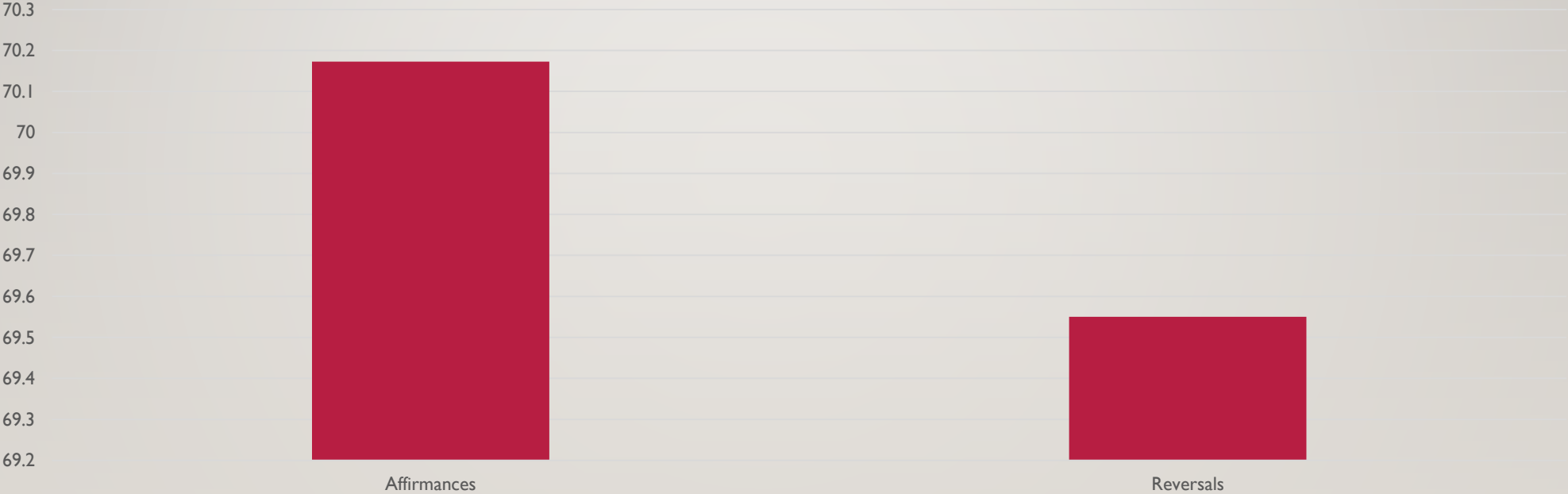
# CALIFORNIA SUPREME COURT – LAG TIME FROM GRANT TO DECISION, CIVIL CASES, 2008-2016

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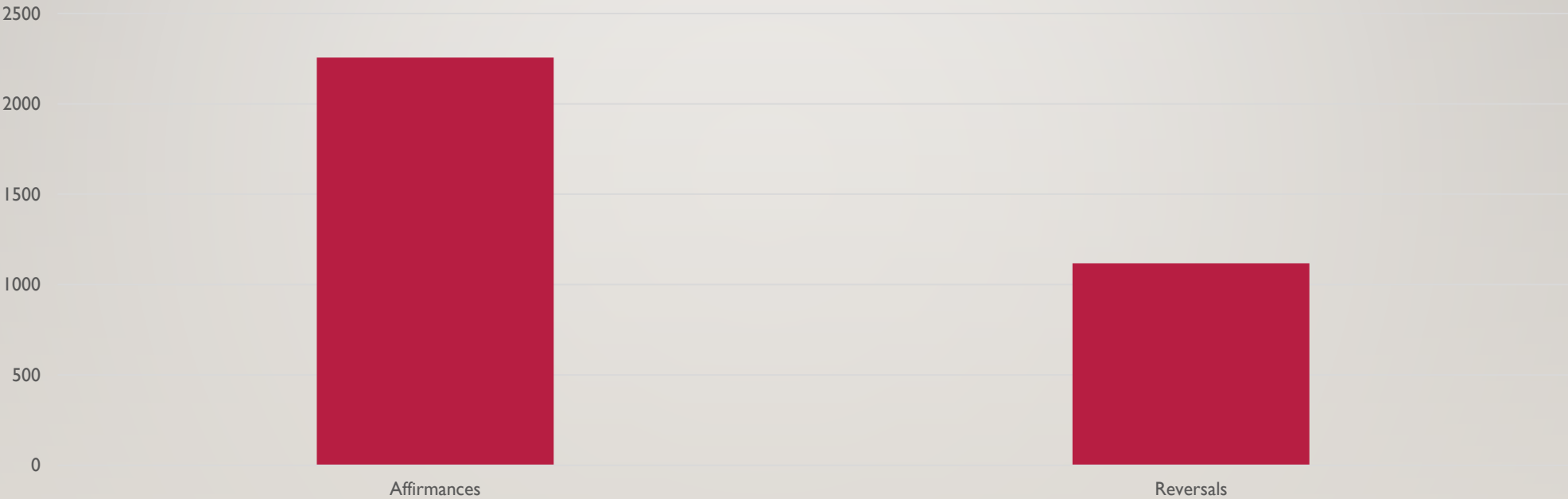
# CALIFORNIA SUPREME COURT – LAG TIME FROM ARGUMENT TO DECISION, CIVIL CASES, 2008-2016

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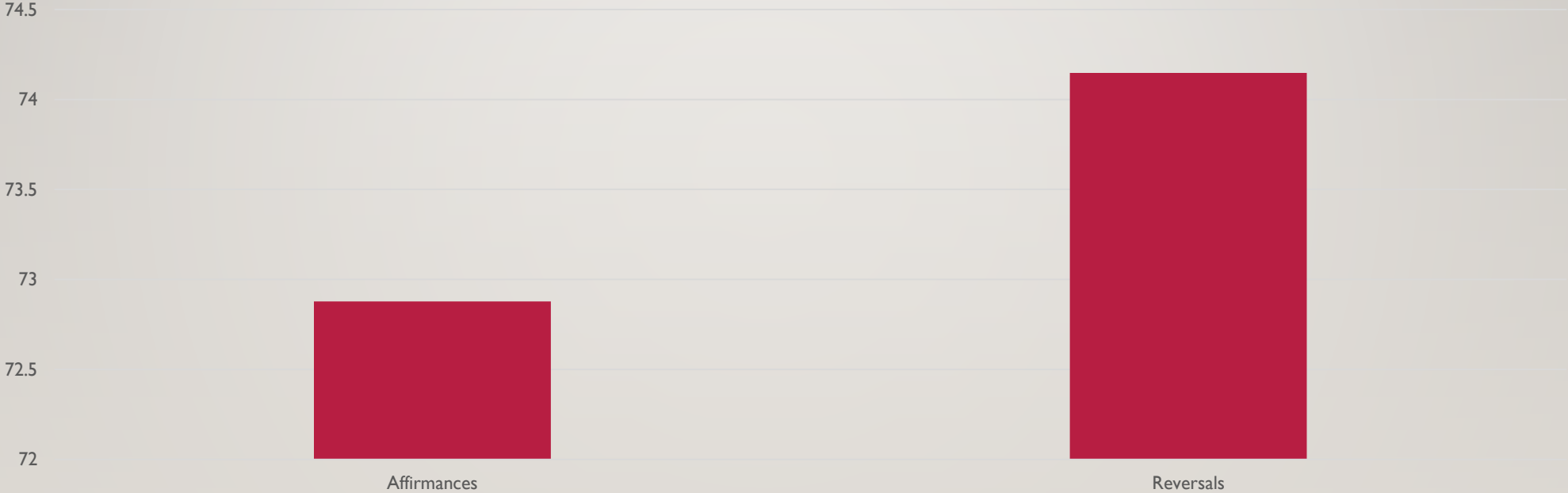
# CALIFORNIA SUPREME COURT – LAG TIME FROM GRANT TO ARGUMENT, CRIMINAL CASES, 2008-2016

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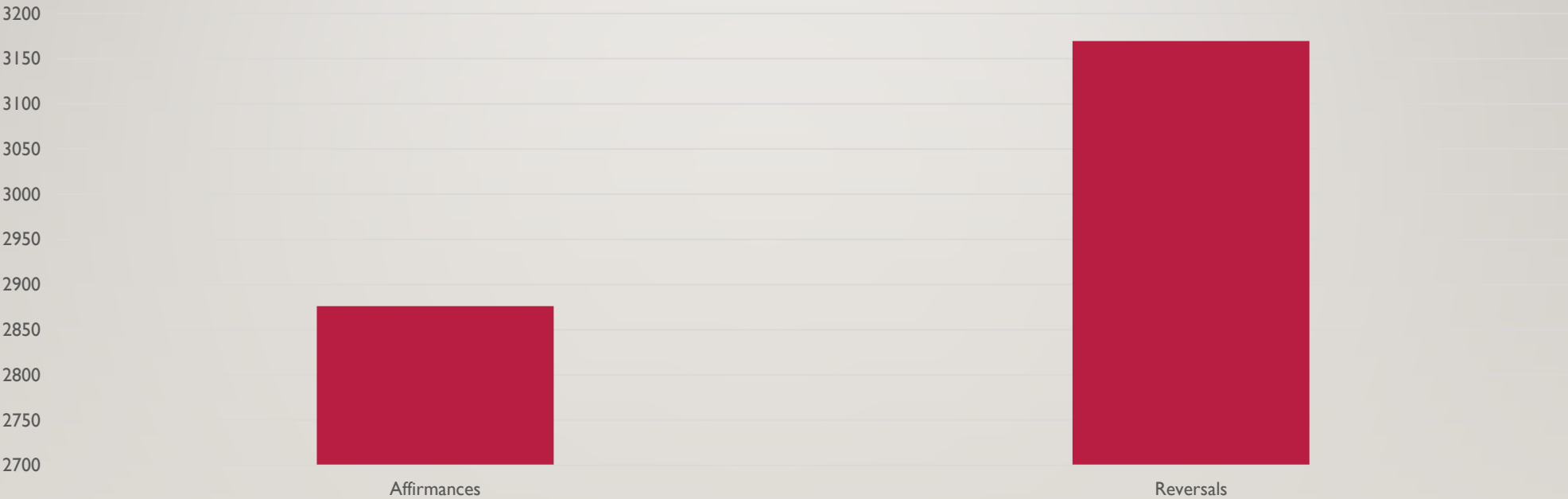
# CALIFORNIA SUPREME COURT – LAG TIME FROM ARGUMENT TO DECISION, CRIMINAL CASES, 2008-2016

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# CALIFORNIA SUPREME COURT – LAG TIME FROM APPOINTMENT TO ARGUMENT IN DEATH PENALTY APPEALS, 2000-2007

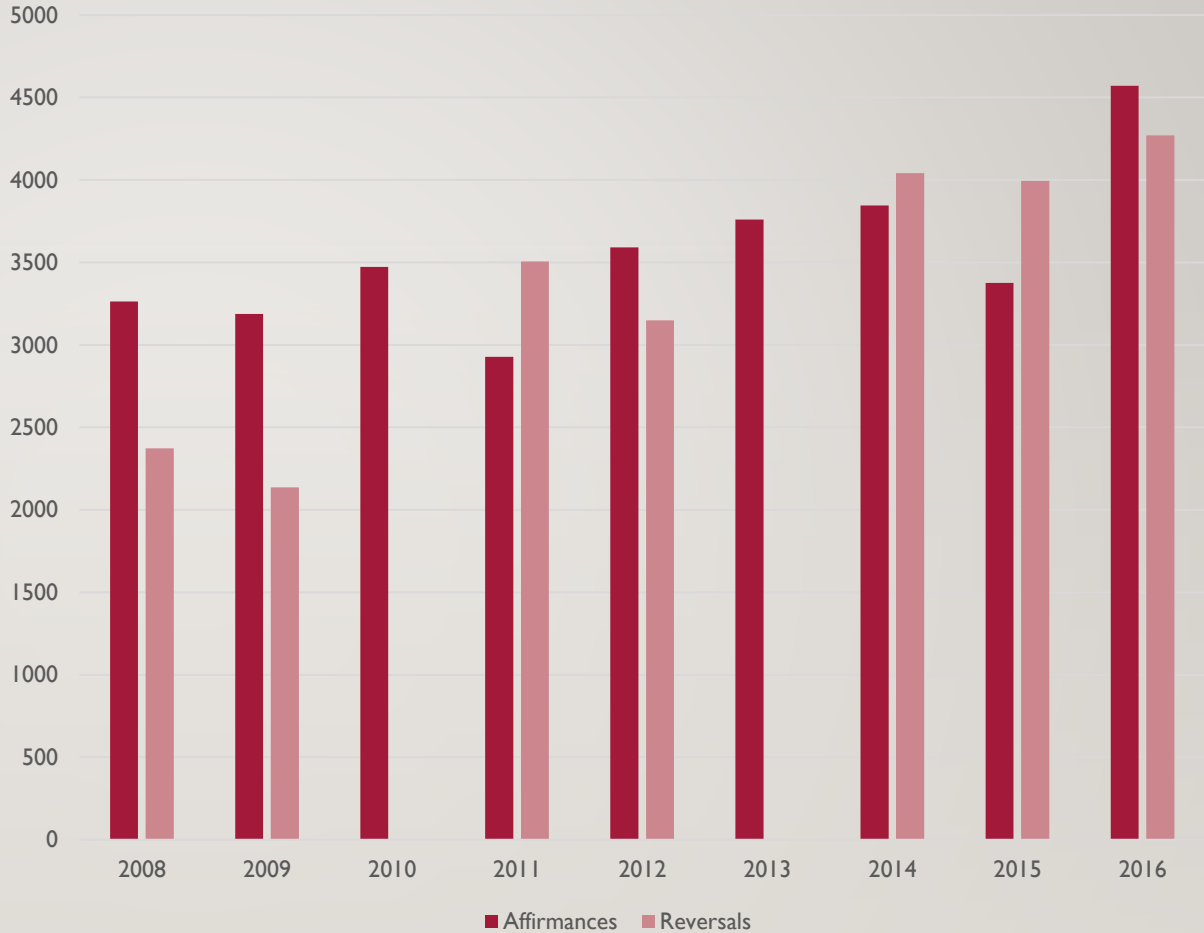
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**CALIFORNIA  
SUPREME COURT –  
LAG TIME FROM  
APPOINTMENT TO  
ARGUMENT IN  
DEATH PENALTY  
CASES, 2008-2016**



# VOTING PATTERNS – THE CENTER IN CIVIL CASES (GARMAN, THOMAS & KARMEIER)

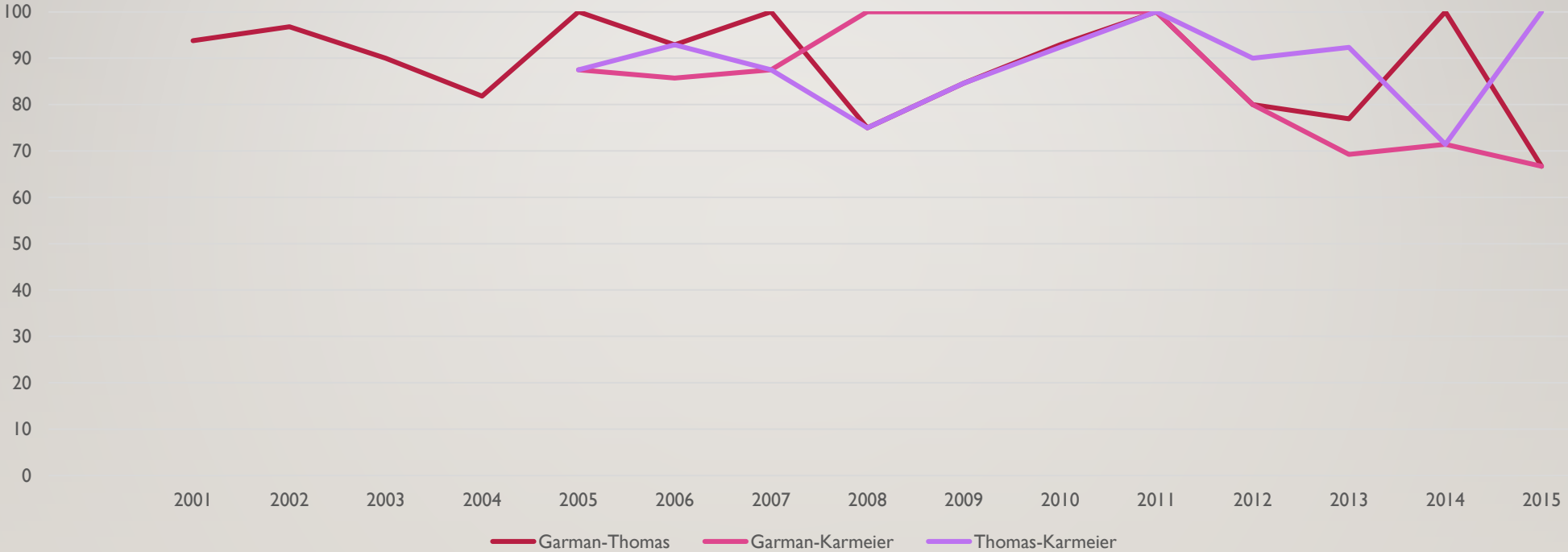
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# THE DEMOCRATIC VOTES (CIVIL CASES) – FREEMAN, KILBRIDE, BURKE & THEIS



# THE REPUBLICAN JUSTICES' AGREEMENT RATES IN CRIMINAL CASES



# THE DEMOCRATIC JUSTICES' AGREEMENT RATES IN CRIMINAL CASES



# WHAT DOES ORAL ARGUMENT TELL US ABOUT CASE OUTCOMES?

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- Sarah Levien Shullman, “The Illusion of Devil’s Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument,” *The Journal of Appellate Practice and Process*, Vol. 6, No. 2 (Fall 2004), pp. 271-293
  - Ten oral arguments at SCOTUS – 1-5 score (helpful/hostile) – Party asked the most questions generally lost
- John G. Roberts, Jr., “Oral Advocacy and Re-Emergence of a Supreme Court Bar,” 30 *Journal of Supreme Court History* 68 (2005)
  - Number of questions in first & last cases of each session 1980 term, and each session, 2003 term
  - Side asked more questions far more likely to lose
  - So apparently “the secret to successful advocacy is simply to get the Court to ask your opponent more questions.”

# ORAL ARGUMENT SCHOLARSHIP II

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- Timothy R. Johnson, Ryan C. Black, Jerry Goldman, Sarah A. Treul, “Inquiring Minds Want to Know: Do Justices Tip Their Hands With Questions in the U.S. Supreme Court?” 29 Wash. U. L. & Policy 241 (2009)
  - Transcripts for 2,000 cases between 1979 and 1995 terms – nearly 340,000 questions
  - More questions to petitioner means far less likely to reverse – equal questions means 64%; 50+ more questions means 39%; 94+ more questions means 18%
  - Both number and verbosity of questions increasing

# ORAL ARGUMENTS III

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- Richard Posner, Lee Epstein and William Landes, “Inferring the Winning Party in the Supreme Court From the Pattern of Questioning at Oral Argument”
  - Reviewed all SCOTUS transcripts from 1979 to 2007
  - Counting words, not just questions
  - Petitioners won 62% of all cases; where respondent’s questions involved more words, 72% for petitioners; where petitioner’s questions involved more words, petitioner wins 50%
  - Where respondent asked average number of questions (56), if petitioner gets 125 or more, likelihood of winning falls to 33%
  - Roberts, Stevens, Scalia, Souter and Ginsburg all more heavily question side they’re voting against – Alito & Breyer more equivocal



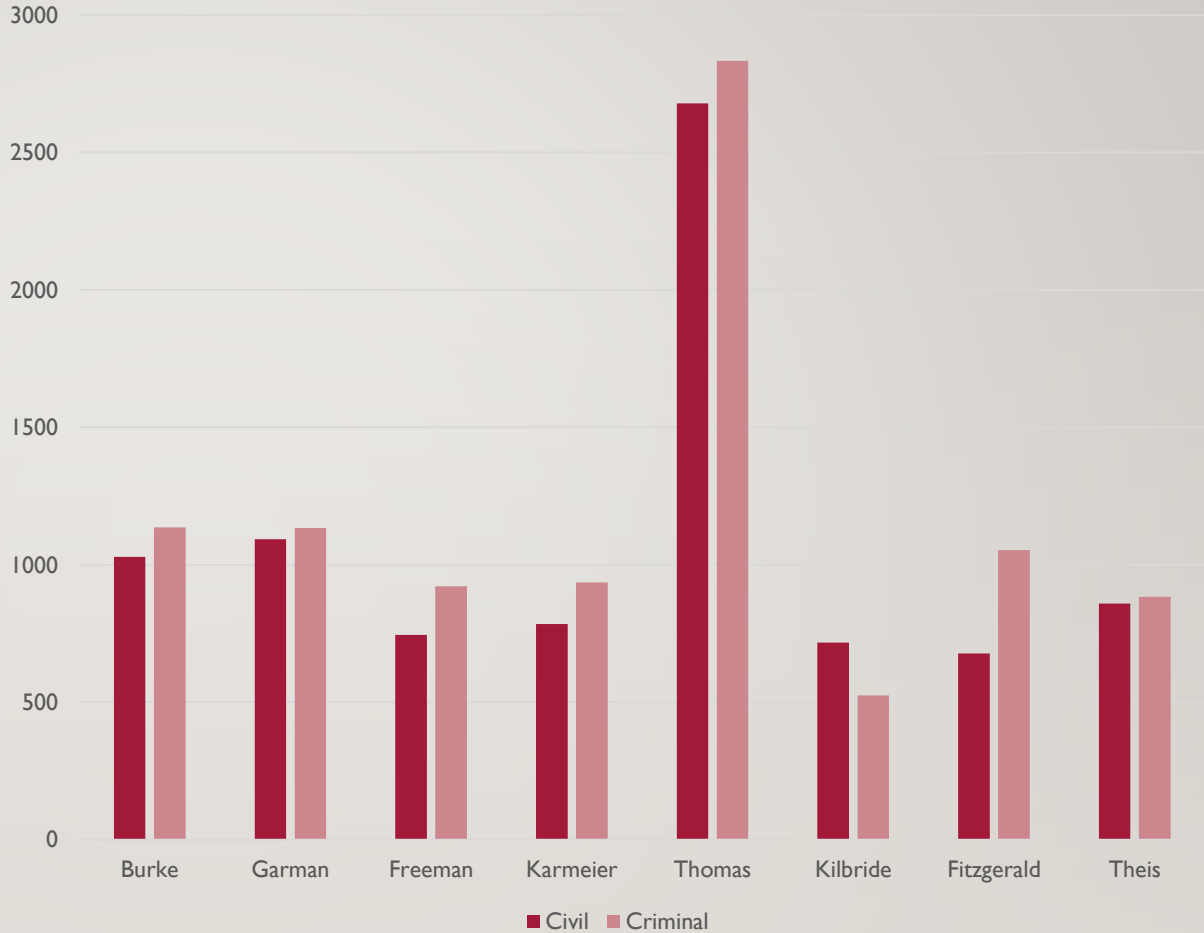
# ORAL ARGUMENTS – TOTAL QUESTIONS, ILLINOIS SUPREME COURT, CIVIL & CRIMINAL 2008-2016

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# ILLINOIS – WHO IS THE MOST ACTIVE QUESTIONER ON THE COURT?



# THE PARADOX OF THE “HOT BENCH” – ODDS OF WINNING, CIVIL CASES, 2008-2016

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# ODDS OF WINNING, CRIMINAL CASES, 2008-2016

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# ARGUMENTS IN ILLINOIS - CONCLUSIONS

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- It's likely that the first questioner is writing an opinion (30-50% chance, least for Justices Thomas, Kilbride & Freeman)
- Justice Burke tends to ask more questions of appellants in civil cases, but the effect is lessened in a reversal.
- Justice Garman tends to question the losing party more heavily when in the majority in a civil case, but tends to question the party she's voting against more heavily when in the minority
- Justice Freeman tends to more heavily question the party he's voting against, whether in the majority or minority in a civil case – unlike Justices Burke & Garman, writing the majority opinion does not as a rule prompt heavier questioning

# CONCLUSIONS II

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- Justice Kilbride's question patterns do not typically vary substantially according to his vote and whether or not he's writing
- Both Justice Thomas and Chief Justice Karmeier tend to question the party they are voting against more heavily, and will be more active when they are writing an opinion, both in civil and criminal cases
- Justice Theis tends to more heavily question the losing party when she is in a civil majority, but more heavily questions the party she is voting against when in the minority. Generally questions the appellant more heavily in criminal cases (except when in the minority of an affirmance)

# TRIAL COURT ANALYTICS

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- Lex Machina
- Bloomberg Legal Analytics
- Ravel Law
- Premonition

# RESEARCHING THE TRIAL JUDGE

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- Ravel Law – Every federal judge and magistrate; every state appellate judge
- Premonition Analytics – state court library bigger than Lexis, Westlaw and Bloomberg combined
- How often is your judge cited by other courts?
- Recent results before your trial judge
- Premonition's Vigil court alert system
- Lex Machina – antitrust, employment, copyright, commercial litigation, patent, securities



# RESEARCHING YOUR OPPONENT

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- Bloomberg Analytics – more than 7,000 law firms; focus by clients, date, jurisdiction
- Lex Machina - Law Firms Comparator
- Ravel Law – Firm Analytics – how often does your opponent handle cases in this subject area, or appear before the trial judge

# MOTION PRACTICE

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- Ravel Law – how likely is your judge to grant a motion (90+ different types of motions)
- Visualizations for how different passages of a case cited, and by which judges
- What does your judge most often cite for particular principles?
- Lex Machina – the motion kickstarter – the “motion chain”

# AT TRIAL AND AFTER

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- Survey results of recent trials by your trial judge
- Judge's handling of jury instructions
- How likely to disturb a jury verdict – Lex Machina, Ravel Law and Bloomberg

# WHAT'S NEXT FOR LITIGATION ANALYTICS & THE LAW?

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- “Datafication” of the law will accelerate
- More dockets partially or entirely online; data-scraping programs will improve
- More analytics vendors
- More awareness and facility among members of the bar
- New frontiers
  - Logistic regression modeling
  - Sentiment analysis
  - Game theory

# QUESTIONS?

- Kirk C. Jenkins
  - Sedgwick LLP
  - One N. Wacker Drive, #4200
  - Chicago, Illinois 60606
  - 312-641-9050
  - Illinois Supreme Court Review –  
<http://www.illinoissupremecourtreview.com>
  - California Supreme Court Review –  
<http://www.californiasupremecourtreview.com>
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