

Ideological Consistency and Judicial Behavior on the Post-Charter Canadian Supreme Court

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Introduction

Over the last fifty years the attitudinal model has become one of the most prominent theoretical explanations for how Supreme Court justices arrive at their decisions (see Segal and Spaeth 1993, 2001). Despite the model's prominence in studies of U.S. judicial behavior, its application to the Canadian Supreme Court has been more sporadic. This paper attempts to examine the relevance of the attitudinal model for the post-Charter Canadian Supreme Court by attempting to catalog whether justices of the Court possess ideologically consistent preferences in disparate areas of law. In doing so, we apply concepts from the voting behavior literature and studies that have described differences between political elites and the mass public. The paper is divided into three parts. We first describe the legacy of the attitudinal model of judicial decision-making, and its relevance for the Canadian Court. We then discuss methods for plotting the ideological voting behavior of justices across issue dimensions in a two-dimensional framework. The final part of the paper presents the data plots and draws some conclusions about the particular patterns of attitudinal decision making in the post-Charter era.

Literature Review

The attitudinal model of judicial behavior draws its intellectual origins from rule skeptics who, at the turn of the 20th Century, began questioning the long-held legal claim that justices merely find the law, rather than make it (Holmes 1881, 1897; Frank 1930; Fisher et. al., 1993). In essence, these legal scholars believed that the written opinions of judges, which seem to follow the norms of precedent and the plain meaning of legal texts, simply act as a rationalization for advancing the justice's own beliefs and values in the cases they decide (see Llewellyn 1931, 1237; Segal and Spaeth 1993, 66). Ultimately, these legal realists called on

social scientists to carefully analyze judicial rulings in order to better understand and predict the direction the law would take in the future (see Holmes 1897).

The behavioralist revolution that took hold in the 1940s enabled political scientists to show that judicial policy preferences were critical factors that explained the rulings of individual judges. Pritchett's (1941, 1948) seminal work on the Roosevelt Court in the U.S. stands as a hallmark of this early research, where he demonstrated that political attitudes largely explained the non-unanimous decisions that were handed down by that court. His findings sparked other behavioral pioneers, such as Schubert (1965, 1974), to utilize psychological scaling techniques on judicial votes to identify distinct underlying ideological dimensions at work in the decision-making process operating in two key areas of law. He found that U.S. Supreme Court justices followed a predictable ideological pattern in economic cases that pitted economic underdogs against affluent interests (which he labeled the E-scale), and predictable lines in civil liberties cases that juxtaposed individual liberty claims against government's interest in maintaining traditional norms of social behavior (which he labeled the C-scale, see Schubert 1965, 122-23, 142-43).

Building on this foundation, subsequent attitudinalists, such as Spaeth and Peterson (1971), Rohde and Spaeth (1976), Segal and Spaeth (1993, 2001), developed more comprehensive and coherent theoretical arguments for determining the extent to which political attitudes influence the judicial decision making process. Like their predecessors, they believed that "the primary goals of Supreme Court justices in the decision making process are *policy goals*," and that "when the justices make decisions they want to approximate as nearly as possible [their own] policy preferences" (Rohde and Spaeth 1976, 72). Yet, these scholars subsequently extended attitudinal theory by characterizing judicial outcomes as not only the

product of the ideology of individual justices, but also the result of attitudinal responses to specific case facts that can be triggered in different areas of law (Segal and Spaeth 1993, 73). Their analysis of search and seizure cases from 1962-1989 indicated that measures of ideology and attitudinal responses to case facts could collectively predict 74 percent of the justices' votes in this area of law (Segal and Spaeth 1993, 230). In essence, Segal and Spaeth (1993, 2001) have shown that these two attitudinal components could successfully explain the bulk of the variance in the voting patterns of the U.S. Supreme Court justices (see also Segal 1984, 1986). Clearly, the various behavioral studies discussed above have gone a long way toward debunking the pervasive myth that judges only rely on legal texts, precedents, the intent of the framers, and the tool box of law school training to guide their judgments and written opinions.

The work of scholars like Schubert, Spaeth, and Segal has generated a virtual cottage industry of attitudinal studies exploring the impact ideological leanings of justices can have across different U.S. courts, and appellate courts around the world. Some of the earliest comparative attitudinal court scholarship was conducted by Schubert himself (1969a, 1969b, 1977, and 1980), and in several leading studies he was able to document ideological decision-making in the high courts of Switzerland, Australia, and South Africa. His findings motivated other researchers who have successfully shown that ideological conflict was evident in other court settings as well, including the Philippines (Samonte 1969; Flango and Schubert 1969; Tate 1995); Italy (DiFrederico and Guarnieri 1988); Japan (Dator 1969; Kawashima 1969; Danelski 1969); and Australia (Blackshield 1972; Galligan and Slater 1995; Power 1995). In Canada, Peck (1967a, 1967b, 1969) and Fouts (1969) published the first quantitative attitudinal studies demonstrating that the same kinds of liberal-conservative ideological dimensions at work in the U.S. were prominent on the Canadian high court as well. Subsequent behavioral scholarship by

Tate and Sittiwong (1989) demonstrated that in addition to ideology, there were a host of judicial background characteristics that could explain judicial votes in economic and civil liberties disputes prior to the Charter's adoption.

Not surprisingly, the addition of the Charter has inspired a host of new studies exploring how the document has transformed the Court's institutional role in the Canadian policy process. This post-Charter research has documented an increase in attitudinal conflict between the Canadian justices, and suggests that attitudinal behavior continues to operate unabated on the Court today (Wetstein and Ostberg 1999; Ostberg et al. 2002; Songer and Johnson 2002; Ostberg et al. 2004; McCormick 2000). Collectively, these comparative efforts have provided political scientists with a wealth of data demonstrating that attitudinal decision-making occurs across time and place, and thus has real potential to serve as the core element in the development of a more global theory of judicial decision-making.

Despite the growing body of literature suggesting that ideological factors are at work on appellate courts outside the U.S. context, the evidence has been compiled in a rather sporadic fashion in disparate issue areas across various time periods and cultural contexts. Only a few of these studies in the Canadian context have examined the ideological connections between judicial votes in multiple areas of law (see Tate and Sittiwong 1989; Morton et al. 1994; Songer and Johnson 2002; Ostberg et al. 2004). Fewer still have presented spatial plots to aid in the analysis of attitudinal consistency (see Morton et al. 1994), and none have made an explicit link to the premises of elite political consistency found in voting studies (see Campbell et al. 1960). In the next segment of the paper we provide an explanation of why we believe justices will harbor ideologically consistent attitudes across different issues, and why we believe this consistency can be captured through spatial analysis.

Issue Consistency and Four Ideological Archetypes

According to attitudinal theorists, justices who come to the high court are largely free to vote according to their ideological preferences because of their institutional independence from other branches, their lack of electoral accountability, and the fact that they do not have ambition for higher office (Segal and Spaeth 1993, Rohde and Spaeth 1976, 72-74). Attitudinal theorists envision justices coming to the Supreme Court with well-established beliefs that have been honed through years of scholarship and training, and in most circumstances, through prior judicial rulings. As such, these scholars maintain that their voting behavior will remain ideologically consistent across time and issue area. As Segal and Spaeth (1993, 221) put it: "if attitudes are the proximate cause of the votes of Supreme Court justices, their votes must be relatively stable and consistent." We agree, and in keeping with this theoretical argument, we expect Canadian post-Charter justices to harbor relatively consistent and stable attitudes on political and legal issues. Specifically, we hypothesize that Canadian justices at the two ideological extremes will cast consistently extremist votes across criminal, economic, and civil rights and liberties cases, while those in the middle should maintain their centrist position across these same issue areas. Having said this, there are alternative theoretical explanations for why centrist justices may act differently than their more extreme colleagues. First, if centrist justices are purposely trying to act strategically on the court, instead of ideologically, they may be more likely than their extremist colleagues to alter their policy position in different issue areas simply because it will provide them with a greater opportunity to bargain with their colleagues in an effort to build majority coalitions. In such situations, the apparent inconsistency of a centrist justice would make intuitive sense and might be a hallmark of strategic activity that provides

them considerable leverage over the direction the court may take. Second, to the degree that justices found at the ideological extremes almost always conceptualize issues through a clear ideological prism, a centrist judge's voting behavior may be inconsistent simply because they often approach the issues in a piecemeal, case-by-case practical fashion. If this holds true, then any inconsistency on their part is more likely a byproduct of their attention to the particular legal and factual considerations in a given case rather than an overarching commitment to a certain ideological outcome. Lastly, inconsistent voting activity by centrist judges may simply indicate that they are acting as opinion followers on the court, and thus, are more willing to suppress their own policy preferences in order to go along with the majority coalition. Given these alternate theoretical explanations for attitudinal inconsistencies among the centrists, it is important to examine the voting behavior of individual justices across different issue areas to determine the general contours of a particular justice's ideology and voting consistency.

One of the most effective ways to assess attitudinal consistency across disparate issue areas is to plot each justice in a two-dimensional ideological space. Our decision to analyze the post-Charter justices in this manner fits nicely with the intellectual legacy established in the U.S. by Schubert (1965, 1974) and more recently in the Canadian context by Morton et al. (1994). However, our approach in this study is animated by a contemporary framework of attitudinal research outlined by Janda et al. (2004) in the field of public opinion. According to Janda et al. (2004), attitudinal responses to specific political controversies can fall along two ideological continua, one featuring a tension between the values of freedom and order found along the x-axis, and the other featuring a tension between freedom and equality along the y-axis. For example, members of society must determine how much freedom they are willing to sacrifice in order for government to ensure public safety and traditional modes of behavior. Alternatively,

they must identify how much freedom they are willing to forego in the marketplace in an effort to achieve progress toward economic and social equality for all. Janda et al. (2004, 26) suggest that the balance struck between these conflicting core values by individuals and democratic governments yields four distinct ideological archetypes: Liberals, Conservatives, Communitarians, and Libertarians. Individuals who endorse economic and social equality over freedom, and freedom over social order are categorized as ideological liberals, while those taking the opposite stance constitute their conservative counterparts. While most people think they fall into one of these two classifications, Janda et al. (2004, 26) note that individuals who support equality and order over freedom are properly labeled communitarians, while those who value freedom above all else are libertarians. Collectively, the four ideological archetypes that Janda et al. (2004) use to categorize the beliefs of the public provide a convenient barometer for assessing the ideological proclivities of post-Charter justices as well. We can plot how a justice votes across these two attitudinal continua in a similar manner. In addition, plotting the ideological location of the justices allows us to assess the attitudinal consistency of members of the post-Charter Court across different sets of issue comparisons.

Our effort to spatially plot the post-Charter justices is not a new endeavor in the judicial literature or the Canadian setting.¹ In 1994, Morton et al. engaged in a similar enterprise when they examined the first ten years of Charter rulings. In their analysis, they also plotted the justices' Charter votes in two-dimensional space, with one axis pertaining to legal rights claims in criminal disputes, and the second axis dealing with "court party" cases that addressed a host of equality rights, discrimination claims, privacy interests, and freedom of expression and religious concerns (Morton et al. 1994, 44-45). Their assessment of these decisions led them to conclude that the Canadian Court was "not divided between two (or more) ideological blocs," at that time,

but rather, featured an "amorphous but consistent centrist bloc" (Morton et al. 1994, 49-50). Although their findings were important for understanding early post-Charter behavior, we believe there are several reasons why a more fine-tuned and comprehensive analysis of judicial rulings is in order. First, the analysis by Morton et al. (1994) was Charter-centered, and we are interested in capturing important judicial voting trends in both Charter and non-Charter areas as well. An examination of economic disputes may unmask ideological behavior on the part of some justices that is distinctive from their patterns in the Charter area. Moreover, we believe that Morton et al.'s (1994) two-dimensional analysis conflated issues in civil rights and liberties because they placed cases pertaining to discrimination and aboriginal rights into the same category as cases involving freedom of expression, religion, and abortion. As Janda et al. (2004) would point out, cases in the first category should be placed along the freedom versus equality continuum, rather than the freedom versus order continuum, because they generally trigger value conflicts involving a tension between equality rights and liberty interests. Ultimately, our analysis seeks to evaluate the decisions of the first 20 years of the post-Charter era in the criminal, economic, civil rights and liberties areas of law. In doing so, we apply Janda et al.'s (2004) more refined categorization scheme because it may highlight particular justices who approach civil rights and liberties in a distinctive fashion as well as reveal a more complex and complete understanding of the ideological value conflicts that have emerged between the post-Charter justices.

Before actually plotting each of the Canadian justice's ideological stances in the different legal areas, we need to explain how different types of cases fit along Janda et al.'s (2004) two attitudinal continua that are found along the x and y axis. Following their framework, our study places criminal cases along the freedom-order dimension because these disputes pit the liberty

interest of the accused against government's interest in ensuring public safety and order (the x-axis). Economic cases, in turn, fit nicely with Janda et al.'s (2004) freedom-equality continuum because they create a tension between an individual's interest to be free from governmental regulation versus government's interest in promoting economic equality and providing collective goods for society at large (the y-axis). Unlike criminal and economic disputes, civil rights and liberties issues cannot all be neatly placed along either one of Janda et al.'s (2004) two distinct dimensions. While most disputes in this area set an individual's liberty interests against societal efforts to uphold traditional norms of social behavior, a few of them, namely those relating to discrimination and aboriginal land and treaty claims, fall more readily along the freedom-equality dimension because the litigants seek to obtain greater social and economic equality for various disadvantaged groups. Given the disparate treatment of these two types of civil rights and liberties claims, we chose to split the civil rights and liberties issues between Janda et al.'s two continua by placing discrimination and aboriginal claims along the freedom-equality continuum (on the y-axis), and placing all other civil liberties disputes on the freedom-order dimension (the x-axis). Once we reclassified the civil rights and liberties issues in this manner, we could assess the post-Charter justice's ideological proclivities in a two dimensional space across four distinct sets of issue comparisons because two of the issues in the study deal with freedom-order concerns, while two others deal with freedom-equality tensions.

One important limitation to utilizing Janda et al.'s (2004) framework is that the plot of each of the justices is necessarily an artifact of the two issue areas under comparison. As such, the ideological placement of a particular justice within the two-dimensional framework may change as the issue areas being compared are changed. Despite this limitation, it is precisely through making such comparisons that one can gauge the relative ideological consistency of a

given justice across different sets of issues. Utilizing Janda et al.'s (2004) framework in this way is also viable because we are assessing relationships across broad areas of law that account for more than 80 percent of the post-Charter docket. Analyzing voting records across criminal, economic, and civil rights and liberties issues not only allows us to identify justices who are ideologically consistent across issue areas, but also to highlight the ones who are not, and to determine whether the fickle are found at the ideological extreme or center of the court.

Findings

Our analysis of voting patterns utilizing Janda et al.'s (2004) two-dimensional framework is featured in Figures 1 through 4. These figures plot the justices' votes on two issue dimensions in the following sequence: criminal versus economic cases (Figure 1); criminal versus discrimination cases (Figure 2); civil liberties versus discrimination cases (Figure 3); and civil liberties versus economic cases (Figure 4). Judicial scores along a particular continuum were calculated based on the percentage of times a justice supported the values of equality, freedom, or order depending on the legal issues under comparison. For example, when judicial votes in the criminal area were compared with economic cases, voting behavior along the x-axis was scored based on the percentage of times a justice supported the government in criminal prosecutions, while the y-axis featured scores based on the percentage of times a justice supported an economic underdog, or government efforts to raise taxes for public goods (see Figure 1). Using this scoring method, each justice would necessarily have an x and y coordinate reflecting their support for order and equality over freedom, or vice versa. This same scoring technique was utilized for all four figures.

INSERT FIGURE 1 HERE

Figure 1 compares judicial votes in criminal cases along the x-axis with economic cases along the y-axis. Overall, the plot reveals that the post-Charter justices are widely dispersed in their support for order in criminal cases, but that they are narrowly dispersed and relatively moderate in their support for equality in economic cases. This distinction can be seen in the wide gap that spans between Justices Deschamps and L'Heureux-Dubé on the criminal dimension, while the distance between the most extreme justices is much smaller on the economic dimension. Given the lack of variance in economic voting behavior, we are not surprised that the line of best fit for this specific set of data is relatively flat. If both issue dimensions reflected a particularly strong ideological chasm between the justices, the data points would cluster along a diagonal slope running at or near a 45 degree angle in either the positive or negative direction. Since the regression line is relatively flat in Figure 1, we know that economic cases do not generate a great deal of ideological conflict among the post-Charter justices, while criminal cases do. This finding is significant because it suggests that even though Morton et al.'s (1994) study focused exclusively on Charter voting patterns, they did not miss any important evidence of distinct ideological voting behavior between the justices in the economic area.

Turning to the data points for individual members of the court along these two dimensions, it is clear that Justice L'Heureux-Dubé stands out as an outlier in her voting behavior, fitting squarely into Janda et al.'s (2004) communitarian box (see Figure 1). Although Justices Gonthier and Bastarache also exhibit high levels of support for upholding the conviction of criminals along the freedom-order continuum, their moderate support for economic equality along the y-axis places them well below Justice L'Heureux-Dubé and has them straddling the communitarian-conservative quadrants when these two issues are compared. In contrast, Justice

Deschamps anchors the liberal end of the criminal continuum, supporting the rights of the criminally accused in 68 percent of the cases she heard during her first two years on the Court (see Figure 1). Turning to economic equality cases, Justices Wilson and L'Heureux-Dubé stand out, if at all, as only weak outliers, with both supporting the equality position more than 61 percent of the time. However, since Justice Wilson's voting behavior is far more moderate in criminal cases than Justice L'Heureux-Dubé, she falls into Janda et al.'s (2004) liberal camp when comparing these two areas of law (see Figure 1). Aside from this, most of the justices on the Court take a relatively centrist position on these two issues, although there is a slight tendency for the Court as a whole to fall on the communitarian-conservative side of the ideological divide in their approach toward criminal cases.

A comparison of the aggregate patterns of case outcomes across the Dickson, Lamer, and McLachlin Courts (denoted by the squares on the scatterplot) indicates that mean levels of support for both criminal convictions and economic equality claims have remained relatively stable over the first 20 years under the Charter. This fact is reflected in the tight clustering of the means for the three courts in Figure 1, two of which happen to fall directly on the regression line. The tendency to side with government convictions in criminal cases across all three courts suggests that despite some movement in the direction of the due process model after the introduction of the Charter (see Manfredi 1993, 2001), the Canadian Court for much its post-Charter history has been remarkably consistent in the way it strikes a balance between the crime control model and due process concerns (see Packer 1968).

Figure 2 assesses the relationship between voting in criminal cases along the x-axis and discrimination cases along the y-axis. One is immediately struck by the similarity between the overall patterns found in Figures 2 and 1. Like its predecessor, Figure 2 displays only a slight

communitarian-libertarian trend appearing among the post-Charter justices in these two areas of law, and again, many of the justices fall fairly close to the regression line. The overall findings in the first two figures suggests that many of the post-Charter justices like to strike a consistent moderate balance when weighing values along the freedom-equality dimension, regardless of whether they are dealing with discrimination or economic concerns. While the voting dispersion in the criminal area, found along the x-axis, remains identical in the two figures, the greater dispersion of a few of the justices' approach to discrimination suits in Figures 2 makes it easier to identify judicial outliers and moderates in the second plot.

INSERT FIGURE 2 HERE

One of the most striking features of Figure 2 is that it highlights the distinctive pro-equality character of the female justices who decided more than ten discrimination cases in the post-Charter era. Three of the four female justices included in the figure (Justices Wilson, McLachlin, and L'Heureux-Dubé) exhibit distinctive outlier activity in support of civil rights claimants, and their behavior is in stark contrast to the relatively moderate record of most of the male counterparts in such cases. Indeed, these three justices sided with the equality claims advanced by minority interests over 63 percent of the time (See Figure 2). While Justices McLachlin and L'Heureux-Dubé fall squarely into Janda et al.'s (2004) communitarian archetype because of their more conservative stance in criminal cases, not surprisingly, Justice Wilson falls into the liberal archetype because of her more liberal stance in such disputes. Although Justice Arbour is more moderate than her three female colleagues in her support of discrimination claims, she stands alone as the most liberal outlier on the criminal dimension because she is willing to support the defendant 59 percent of the time (see Figure 2). In contrast to Justice

Arbour, Justices Bastarache and Gonthier are found at the opposite end of the criminal spectrum along with Justice L'Heureux-Dubé (see Figure 2). However, unlike the communitarian-minded L'Heureux-Dubé, they again straddle the communitarian-conservative divide. Thus, regardless of whether one is comparing criminal cases on the x-axis with either economic or discrimination disputes along the y-axis, both Justices Bastarache and Gonthier demonstrate remarkably consistent patterns of ideological voting behavior. When looking holistically at the case outcomes in the three post-Charter Courts (denoted as squares in the scatterplot), it is remarkable how similar the aggregate data is for the Dickson, Lamer, and McLachlin Courts across the two plots (Figure 2 and Figure 1). These data suggest that a strong pattern of ideological consistency plays out within each court across two different sets of issue comparisons. Moreover, the aggregate data also indicate that there is a substantial degree of attitudinal stability over time because all three court values are found in close proximity to each other. Collectively, these two features provide strong evidence that theories of attitudinal consistency and stability are germane for explaining post-Charter voting behavior across these two graphs.

The scatterplot in Figure 3 assesses the patterns of voting in civil liberties cases along the x-axis and discrimination cases along the y-axis. The overall pattern in this graph suggests that the scores for the justices are widely dispersed on both dimensions, which is not surprising given the contentious nature of the issues raised in both civil liberties and discrimination suits. Unlike the first two figures, the line of best fit portrays a marginal ideological trend in a liberal-conservative rather than communitarian-libertarian direction (see Figure 3). However, the change in the direction of the regression line featured in Figure 3 should not be taken too seriously since it is an artifact of the two dimensions being compared, and like its predecessors,

shows only a slight linear trend of ideological conflict among the justices across these two issue areas.

INSERT FIGURE 3 HERE

An examination of the individual justices indicates that the same three female justices who appeared as outliers in the criminal and discrimination graph (Figure 2) also occupy extreme positions when civil liberties are compared to discrimination suits (see Justices L'Heureux-Dubé, Wilson, and McLachlin at the top of Figure 3). This finding is not surprising since these three women have taken strong equality stances in the discrimination area. However, one notable change between Figures 2 and 3 is that Justice McLachlin, unlike the more ideologically consistent Justices Wilson and L'Heureux-Dubé, has moved from a communitarian stance in the criminal area to a liberal stance in civil liberties cases. This dramatic shift in her ideological location is indicative of someone harboring conservative values in the area of criminal law, while promoting more libertarian values in cases that raise free speech, press, religion, and privacy concerns. However, the extreme libertarian behavior of Justice McLachlin is outstripped by Justice Binnie, who is the most supportive of individual freedom in civil liberties cases (supporting the individual 78 percent of the time). Yet, unlike Justice McLachlin, his ideological position is found directly on the regression line because of his more moderate treatment of discrimination suits (See Figure 3). Justices LaForest and McIntyre, on the other hand, are found at the most conservative end of the civil liberties spectrum, taking the position held by Justices Bastarache and Gonthier in the two earlier criminal scatterplots. Finally, the greater degree of overall dispersion reflected in the judicial voting records in Figure 3 illustrates that the ideological center of the Court is more fluid and less compact than in the two earlier scatterplots.

The results in Figure 3 illustrate the importance of placing discrimination and aboriginal land and treaty claims on the y-axis and comparing them with civil liberties disputes on the x-axis. Ultimately, if all the justices approached the two types of civil rights and liberties issues through the same ideological prism, the line of best fit would be at a 45-degree angle running from the liberal to conservative corners of the plot. The fact that the line is relatively flat, and some of the justices are located in each of the four ideological quadrants, demonstrates the validity of separating how justices broach some civil rights conflicts from civil liberties disputes. Consider Justice L'Heureux-Dubé, for example, whose behavior is indicative of a communitarian when comparing these two issue areas because she strongly supports equality interests, but is not highly supportive of civil liberties claims. Since Morton et al. (1994) conflated these two issue areas, they understandably misclassified her as a liberal because of her progressive record in Charter discrimination suits. Yet when one places discrimination and civil liberties claims on two distinct axes, one realizes that she has exhibited more moderate behavior in civil liberties disputes than they might have anticipated. In addition to Justice L'Heureux-Dubé, we believe our classification of Justices Cory and Dickson as communitarians (whose locations are not identified on the scatterplot), and Justice McLachlin as a liberal, provides a more accurate description of the long-term ideological behavior of these justices when these two issue areas are compared. Needless to say, Janda et al.'s (2004) refined classification scheme provides scholars with a more nuanced understanding of the ideological orientation of the justices in these complex and overarching areas of law.

There is one other significant element to note in Figure 3 that becomes apparent when looking at the aggregate comparisons for the Dickson, Lamer, and McLachlin Courts. One may be surprised to find such a dramatic libertarian shift taking place on the McLachlin Court in the

civil rights and liberties area relative to criminal cases. However, the dramatic change that is taking place on her court in civil liberties disputes is in keeping with regression results we have found in some of our other work (see Ostberg and Wetstein 2005, chapter 5). In that study, we found that controlling for a host of case factors, the McLachlin Court was 25 percent more liberal than the Dickson Court and nearly eight percent more liberal than the Lamer Court in nonunanimous civil liberties cases. While Justices Binnie and McLachlin are key players in the McLachlin Court's dramatic shift in this issue area, the regression results from our other research (Ostberg and Wetstein 2005) and the plot of justices in Figure 3 confirm that this transformation is more endemic to the McLachlin Court as a whole. This recent ideological shift under Chief Justice McLachlin's tutelage should send a strong signal to civil liberties litigants that their claims will be taken seriously by a court whose attitudinal alignment is more receptive to their arguments.

The last plot in Figure 4 compares civil liberties votes along the x-axis with economic disputes on the y-axis, and the subsequent regression line mirrors the slight communitarian-libertarian trends found in Figures 1 and 2. From a holistic perspective, given the more moderate approach taken by the post-Charter justices in economic cases, it is not surprising that the plot of justices in Figure 4 is more tightly clustered around the regression line than in Figure 3. Overall, the outliers found in Figure 4 are virtually identical to the ones found when comparing civil liberties and discrimination claims in Figure 3. As in the prior figure, Justices Binnie and LaForest naturally occupy the two extremes in civil liberties cases (see the x-axis in Figure 4). While Justices Wilson and L'Heureux-Dubé anchor the equality end of the economic continuum (see the y-axis in Figure 4), the remaining justices on the Court seem to fall relatively close to

the regression line, with no real extremists found on the freedom side of the economic continuum.

INSERT FIGURE 4 HERE

Looking at all four scatterplots collectively, one is struck by the relative flatness of all four regression lines, and the fact that there are no consistently strong ideological tensions dominating the post-Charter Court in these issue areas. Although three of the four plots identify a slight communitarian-libertarian trend at work on the Court, the institution as a whole has been relatively moderate and centrist in its aggregate ideological orientation, despite the increased contentiousness of post-Charter disputes. This finding may surprise U.S. scholars, yet it is in line with Morton et al.'s (1994, 49-50) depiction of the first ten years of Charter jurisprudence. Moreover, although judicial outliers do appear within the four scatterplots, the moderate behavior that is exhibited by the bulk of the justices across the four graphs makes theoretical sense in light of some of the unique institutional features of the Canadian Supreme Court. For example, given the low profile of ideological considerations in the judicial selection process, and the institutional norms of deference and collegiality that operate within the court, it is not surprising that the justices of the Canadian Court have engaged in more moderate voting activity. Having said this, the scatterplots confirm that when the justices do disagree, they are acting in concert with attitudinal theory and possess relatively consistent issue stances across disparate areas of law.

In an effort to organize the data found in the four scatterplots, we present summary data in Table 1 highlighting the ideological orientation of the justices across two different sets of issues (see columns 1 and 2), followed by an assessment of whether the justices exhibit

consistent voting behavior in these issue comparisons (column 3), while the last column distinguishes extreme justices from their more centrist colleagues. We provide ideological classifications based on only two of the four scatterplots (Figures 2 and 3) because of the lack of dispersion found in economic cases in Figures 1 and 4. As a result, we chose to assess whether the justices exhibit ideologically consistent behavior by comparing the two plots that are likely to present the greatest opportunities for judicial inconsistencies to emerge across the three legal areas. We believe this represents the most rigorous test for assessing stable voting patterns among these political elites while at the same time providing meaningful ideological labels for the voting activity of particular justices.

INSERT TABLE 1 HERE

Table 1 indicates that the bulk of the justices of the post-Charter era display relatively consistent attitudinal voting patterns, with 11 of the 17 justices garnering the same ideological label across the two sets of issue comparisons (see column three in Table 1).² Of the eleven justices demonstrating consistent voting behavior across these two scatterplots, only Justices Arbour and Wilson fall decisively into Janda et al.'s (2004) liberal quadrant on both sets of issues, while Justices Beetz, Gonthier, LaForest, Lamer, and McIntyre fall into the conservative camp on both plots. While Justices Cory, Dickson, L'Heureux-Dubé earn the communitarian label across both sets of issues, Justice Iacobucci is found squarely on the communitarian-conservative divide in both graphs. Overall, we believe these ideological classifications comport well with how political science and legal scholars would categorize the justices. It is interesting to note that five of the six justices that exhibit ideologically inconsistent voting patterns across these two sets of cases are members of the McLachlin Court, which is captured nicely by the

change in labels that appear for these justices in the first two columns of Table 1. One should note that Justices McLachlin, Bastarache, and Binnie register the most dramatic ideological shifts from a pro-government stance to a pro-litigant stance when civil liberties claims are substituted for criminal cases on the freedom-order continuum. Although Justices Major and LeBel also move in a libertarian direction, their inconsistency is far less dramatic since they move from a weak conservative stance in criminal cases to a weak libertarian position in civil liberties cases. Justice Sopinka, unlike the other five inconsistent justices, moves in the opposite ideological direction, shifting from a weak libertarian stance in the criminal area to a solid conservative position in the area of civil liberties. Even though some of the justices are ideologically inconsistent, a majority of them take issue stands that validate the theoretical contention in the public opinion literature that political elites think about issues in an ideological manner, possess stable attitudes over time, and cast relatively consistent votes across different issue domains (see Campbell et al. 1960).

The last column in Table 1 reveals that roughly half of the post-Charter justices exhibit some form of extreme behavior in one of the three areas of law (9 of 17 justices). Clearly, six of these nine are engaging in attitudinal behavior because they are found in the same ideological quadrant in both sets of issue comparisons (see the entries for Justices Arbour, Gonthier, LaForest, L'Heureux-Dubé, McIntyre, and Wilson in the last two columns of Table 1). The three extremists that do not fall into the same ideological quadrant across these two issue comparisons include Justices Bastarache, Binnie, and McLachlin. Since they stake out different strong ideological positions in both the criminal and civil liberties areas, we believe they are also engaging in attitudinal decision-making, but simply hold different ideological stances across these two distinct issue domains. Five of the remaining eight justices who are found in the

relative center of the court exhibit consistent ideological voting patterns across both sets of issue comparisons (see the entries for Justices Beetz, Cory, Dickson, Iacobucci, and Lamer). The fact that they appear as consistent centrists, not only in this table but across all four scatterplots, strongly suggests that they are acting in line with the attitudinal theory of judicial decision-making and simply harbor moderate attitudes across all of the issue areas in the study. However, we cannot rule out the possibility that these justices may also be engaging in strategic activity from the center, especially the two chief justices (Dickson and Lamer), who might choose to join majority coalitions in order to secure the opportunity to become opinion leaders and guide the legal direction of the court that bears their own name.³ However, it is much more difficult to label the three remaining centrists because they exhibit inconsistent behavior in these two issue comparisons (Justices LeBel, Major, and Sopinka). Given their inconsistent tendencies, one is tempted to label them as strategic actors. However, since we know from earlier studies that Justice LeBel was an opinion leader in civil rights and liberties cases, and Justice Sopinka was one in criminal disputes (see Ostberg and Wetstein 2005), we believe that they are more likely driven by attitudinal motivations than strategic interests, at least in the legal area where they author large numbers of opinions. Having said this, these three justices, along with some of the other centrists, may be ultimately engaging in both strategic and attitudinal behavior.

Alternatively, it may also be the case that they approach cases in more of a piecemeal, practical fashion, paying greater attention to the particular facts and legal precedents at hand than overarching ideological concerns. Unfortunately, we are unable to definitively label these justices as attitudinalists, strategists, or legal pragmatists until more research is done that sheds light on the inner workings of the Canadian court. Overall, the data demonstrate that the bulk of the justices engage consistent ideological behavior whether from the extreme or moderate

position, with a few defying clear-cut classification given their inconsistent moderate tendencies. Moreover, we believe that this consistency, in turn, offers further evidence that attitudinal decision-making is prominent in the first 20 years of the post-Charter Court.

Conclusion

One of the main goals of this study was to determine whether the post-Charter justices exhibited consistent attitudinal behavior across three prominent issue areas, namely criminal, economic, and civil rights and liberties cases. In line with the attitudinal theory of judicial behavior, our findings reveal that in the first 20 years of post-Charter rulings, a majority of the justices do exhibit ideologically consistent voting patterns in these fields of law. Moreover, aggregate voting patterns across the post-Charter Courts led by Justices Dickson, Lamer, and first four years McLachlin Court demonstrate remarkably similar outcomes across criminal, economic, and discrimination cases. This finding suggests that there is a high degree of ideological stability across the first three post-Charter Courts in these three issue areas. However, rulings in the civil liberties area plot a different course. Although the Dickson and Lamer Courts remained consistent in their pro-order rulings in civil liberties disputes, the current McLachlin Court has taken a libertarian stance on these issues. Ultimately, only time will tell if this dramatic shift on the McLachlin Court remains consistent over time, or is just an aberration of a new leader acclimating to the helm of the court during a time of changing membership.

From a holistic perspective, the four scatterplots reveal that in the first 20 years of the post-Charter era, the Canadian Supreme Court has staked out a relatively moderate-conservative stance on criminal, economic, and discrimination cases. This is particularly true for economic decisions, where post-Charter justices are tightly clustered within a moderate ideological space.

Although these findings lend credence to attitudinal decision-making, they suggest that the decisional patterns of Canadian justices are substantially different from those found on the more polarized contemporary U.S. Supreme Court. While more substantive comparative analysis needs to be conducted, for present purposes, it is sufficient to say that moderate attitudinal patterns do appear in a large swath of the rulings handed down by the post-Charter Canadian Court, and many of the justices clearly behave in ideologically consistent ways across disparate issue areas.

**Figure 1 -- Ideological Support for Order and Equality in Criminal and Economic Cases
Decided by the Canadian Supreme Court, 1984-2003**

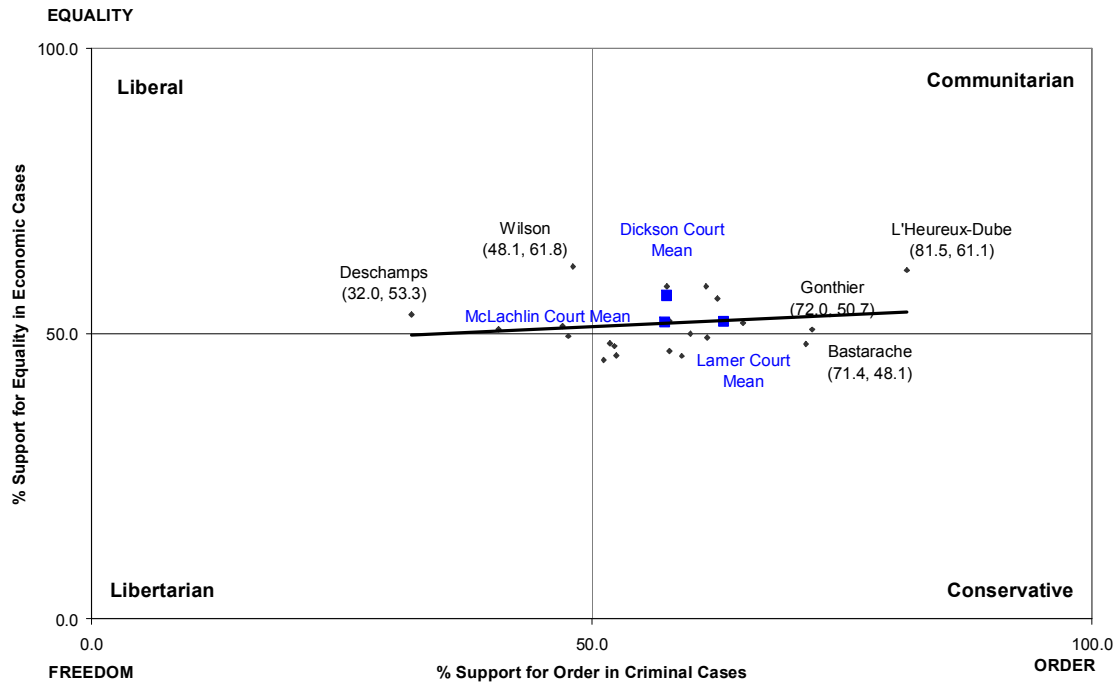


Figure 2 -- Ideological Support for Order and Equality in Criminal and Discrimination Cases Decided by the Canadian Supreme Court, 1984-2003

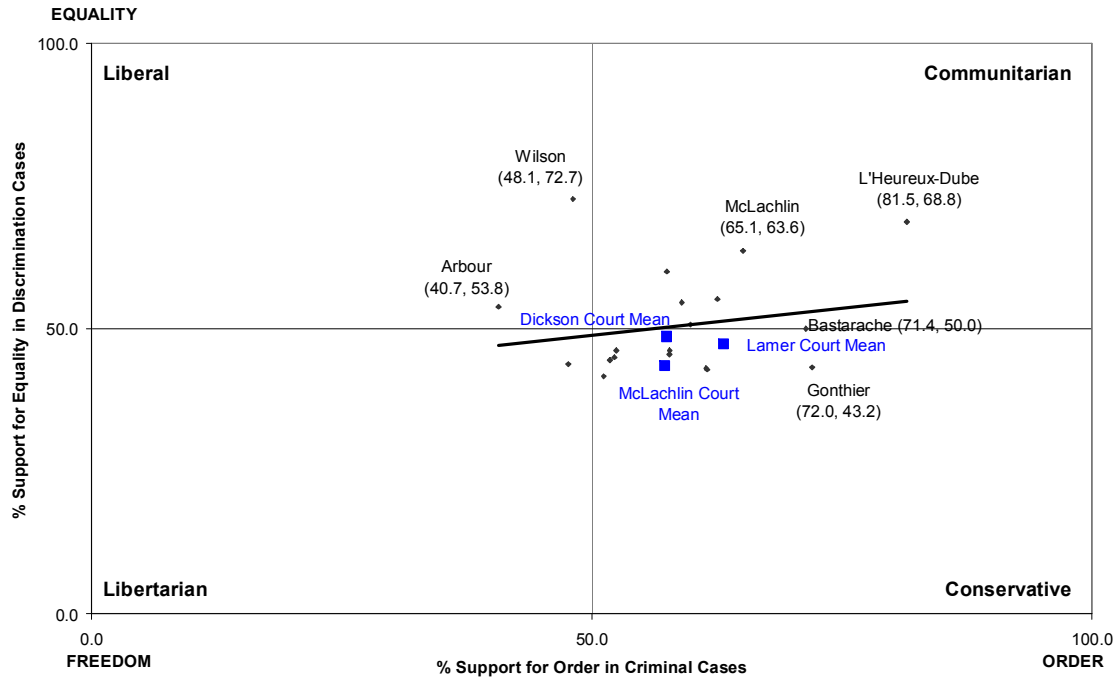


Figure 3 -- Ideological Support for Order and Equality in Civil Liberties and Discrimination Cases Decided by the Canadian Supreme Court, 1984-2003

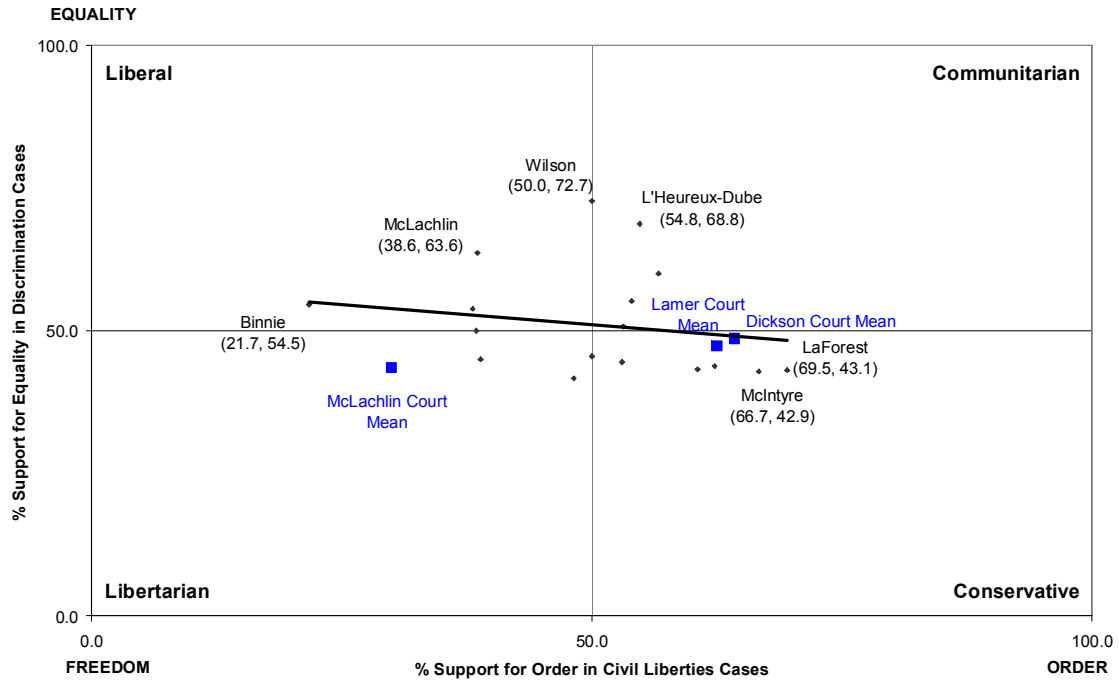


Figure 4 -- Ideological Support for Order and Equality in Civil Liberties and Economic Cases Decided by the Canadian Supreme Court, 1984-2003

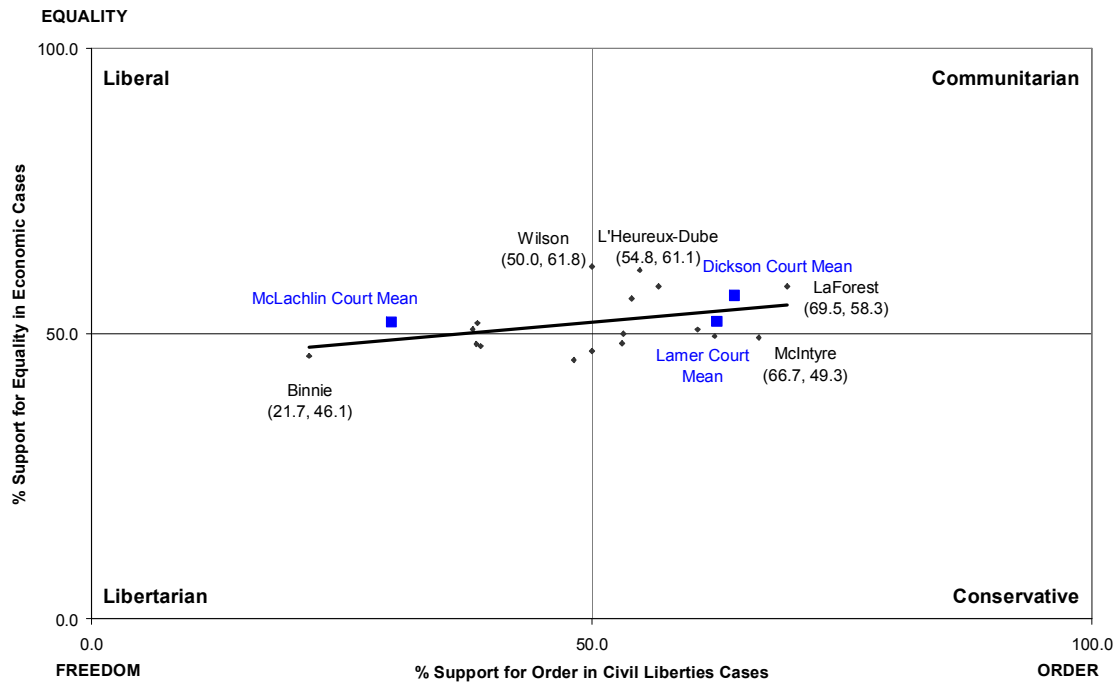


TABLE 1 -- Ideological Orientation and Attitudinal Consistency of Post-Charter Justices, 1984-2003

Justice	Ideological Category When Comparing Criminal and Discrimination Votes	Ideological Category When Comparing Civil Liberties and Discrimination Votes	Ideological Consistency?	Extreme or Centrist?
Arbour	Liberal	Liberal	Yes	Extreme Crim.
Bastarache	Conservative (on line)	Libertarian (on line)	No	Extreme Crim.
Beetz	Conservative	Conservative (on line)	Yes	Centrist
Binnie	Communitarian	Liberal	No	Extreme Civ. Lib.
Cory	Communitarian	Communitarian	Yes	Centrist
Dickson	Communitarian	Communitarian	Yes	Centrist
Gonthier	Conservative	Conservative	Yes	Extreme Crim.
Iacobucci	Communitarian (on line)	Communitarian (on line)	Yes	Centrist
LaForest	Conservative	Conservative	Yes	Extreme Civ. Lib.
Lamer	Conservative	Conservative	Yes	Centrist
LeBel	Conservative	Libertarian	No	Centrist
L'H-Dubé	Communitarian	Communitarian	Yes	Extreme Crim, Discr.

TABLE 1 Continued-- Ideological Orientation and Attitudinal Consistency of Post-Charter Justices, 1984-2003

Justice	Ideological Category	Ideological Category	Ideological Consistency?	Extreme or Centrist?
	When Comparing Criminal and Discrimination Votes	When Comparing Civil Liberties and Discrimination Votes		
Major	Conservative	Libertarian	No	Centrist
McIntyre	Conservative	Conservative	Yes	Extreme Civ. Lib.
McLachlin	Communitarian	Liberal	No	Extreme Discr.
Sopinka	Libertarian	Conservative	No	Centrist
Wilson	Liberal	Liberal (on line)	Yes	Extreme Discr.

References

- Blackshield, A. R. 1972. Quantitative Analysis: The High Court of Australia, 1964-1969. *Lawasia* 3 (April): 1-66.
- Campbell, Angus, Philip E. Converse, Warren E. Miller, and Donald E. Stokes. 1960. *The American Voter*. Chicago: University of Chicago, Midway Reprint edition.
- Danelski, David J. 1969. The Supreme Court of Japan: An Exploratory Study. In Glendon Schubert and David Danelski, eds., *Comparative Judicial Behavior*, New York: Oxford University Press, 121-156.
- Dator, James A. 1969. Measuring Attitudes Across Cultures: A Factor Analysis of the Replies of Japanese Judges to Eysenck's Inventory of Conservative-Progressive Ideology. In Glendon Schubert and David Danelski, eds., *Comparative Judicial Behavior*, New York: Oxford University Press, 71-102.
- DiFrederico, Giuseppe, and Carlo Guarnieri. 1988. The Courts in Italy. In J. Waltman, and K. Holland, eds., *The Political Role of Law Courts in Modern Democracies*, 153-180.
- Fisher, William W., Morton J. Horowitz, and Thomas A Reed, eds. 1993. *American Legal Realism*. New York: Oxford University Press.
- Flango, Victor E., and Glendon Schubert. 1969. Two Surveys of Simulated Judicial Decision-Making: Hawaii and the Philippines. In Glendon Schubert and David Danelski, eds., *Comparative Judicial Behavior*, New York: Oxford University Press, 197-220.
- Fouts, Donald E. 1969. Policy Making in the Supreme Court of Canada, 1950-1960, in Glendon Schubert and David Danelski, eds., *Comparative Judicial Behavior*. New York: Oxford University Press, 257-92.
- Frank, Jerome. 1930. *Law and the Modern Mind*. New York: Coward-McCann.
- Galligan, Brian, and David R. Slater. 1995. Judicial Intrusion into the Australian Cabinet. In Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power*, New York: New York University Press, 81-100.
- Holmes, Oliver Wendell, Jr. 1881. *The Common Law*. Boston: Little Brown.
- _____. 1897. The Path of the Law. *Harvard Law Review* 10: 457-78.
- Janda, Kenneth, Jeffrey Berry, and Jerry Goldman. 2004. *The Challenge of Democracy*, 8th edition. Boston: Houghton-Mifflin.

- Kawashima, Takeyosji. 1969. Individualism in Decision-Making in the Supreme Court of Canada. In Glendon Schubert and David J. Danelski, eds., *Comparative Judicial Behavior*, New York: Oxford University Press, 103-120.
- Llewellyn, Karl. 1931. Some Realism about Realism: Responding to Dean Pound. *Harvard Law Review* 44: 1237.
- Manfredi, Christopher P. 1993. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. Norman, OK: University of Oklahoma Press.
- _____. 2001. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. Oxford: Oxford University Press.
- McCormick, Peter. 2000. *Supreme At Last: The Evolution of the Supreme Court of Canada*. Toronto: James Lorimer.
- Morton, F. L., Peter H. Russell, and Troy Riddell. 1994. The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade. *National Journal of Constitutional Law* 5: 1-58.
- Ostberg, C. L., Susan Johnson, Donald R. Songer, and Matthew E. Wetstein. 2004. The Nature and Extent of Attitudinal Decision Making in Canada. Paper presented at the annual meeting of the American Political Science Association, Chicago, September 2, 2004.
- Ostberg, C. L. and Matthew E. Wetstein. 2005. *Attitudinal Conflict in the Post-Charter Canadian Supreme Court*. unpublished manuscript.
- Ostberg, C. L., Matthew E. Wetstein, and Craig R. Ducat. 2002. Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991-1995. *Political Research Quarterly* 55 (1): 237-58.
- Packer, Herbert L.. 1968. *The Limits of the Criminal Sanction*. Palo Alto: Stanford University Press.
- Peck, Sidney R. 1967a. A Behavioural Approach to the Judicial Process: Scalogram Analysis. *Osgoode Hall Law Journal* 5: 1-28.
- _____. 1967b. The Supreme Court of Canada, 1958-1966: A Search for Policy through Scalogram Analysis. *Canadian Bar Review* 45: 666-725.
- _____. 1969. A Scalogram Analysis of the Supreme Court of Canada, 1958-1967. In Glendon Schubert and David Danelski, eds., *Comparative Judicial Behavior*, New York: Oxford University Press, 293-334.

- Power, John. 1995. The Executive, the Judiciary, and Immigration Appeals in Australia. In Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power*, New York: New York University Press, 101-114.
- Pritchett, C. Hermann. 1941. Division of Opinion Among Justices of the Supreme Court. *American Political Science Review* 35: 890-98.
- _____. 1948. *The Roosevelt Court*. New York: MacMillan.
- Rohde, David W., and Harold J. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: Freeman.
- Samonte, Abelrado G. 1969. The Philippine Supreme Court: A Study of Judicial Background Characteristics, Attitudes, and Decision-Making. In Glendon Schubert and David Danelski, eds., *Comparative Judicial Behavior*, New York: Oxford University Press, 157-195.
- Schubert, Glendon. 1965. *The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices, 1946-1963*. Evanston, IL: Northwestern University Press.
- _____. 1969a. The Dimensions of Decisional Response: Opinion and Voting Behavior of the Australian High Court. In Joel B. Grossman and Joseph Tannenhaus, eds., *Frontiers of Judicial Research*. New York: John Wiley & Sons, 163-195.
- _____. 1969b. Two Causal Models of Decision-Making by the High Court of Australia. In Glendon Schubert and David Danelski, eds., *Comparative Judicial Behavior*, New York: Oxford University Press, 335-366.
- _____. 1974. *The Judicial Mind Revisited*. New York: Oxford University Press.
- _____. 1977. Political Culture and Judicial Ideology: Some Cross-Cultural and Subcultural Comparisons. *Comparative Political Studies* 9 (January): 363-408.
- _____. 1980. Subcultural Effects on Judicial Behavior: A Comparative Analysis. *Journal of Politics* 42: 951-992.
- Segal, Jeffrey A. 1984. Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981. *American Political Science Review* 78: 891-900.
- _____. 1986. Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases. *Journal of Politics* 48: 938-55.
- Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University Press.

- _____. 2001. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.
- Songer, Donald R., and Susan W. Johnson. 2002. Attitudinal Decision Making in the Supreme Court of Canada. Paper presented at the annual meeting of the Midwest Political Science Association, Chicago, April 2002.
- Spaeth, Harold J., and David J. Peterson. 1971. The Analysis and Interpretation of Dimensionality: The Case of Civil Liberties Decision Making. *American Journal of Political Science* 15: 415-41.
- Tate, C. Neal. 1995. The Philippines and Southeast Asia. In Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power*, New York: New York University Press, 463-484.
- Tate, C. Neal, and Panu Sittiwong. 1989. Decision Making in the Canadian Supreme Court: Extending a Personal Attributes Model Across Nations. *Journal of Politics* 51: 900-16.
- Wetstein, Matthew E., and C. L. Ostberg. 1999. Search and Seizure Decisions in the Supreme Court of Canada: Extending an American Model of Judicial Decision Making Across Countries. *Social Science Quarterly* 80: 757-74.
- Woodward, Bob, and Scott Armstrong. 1979. *The Brethren: Inside the Supreme Court*. New York: Avon Books.

Notes

¹ There is a striking parallel between Janda et al.'s (2004) two-dimensional ideological framework for assessing public opinion and Schubert's (1965) early assessment of judicial liberalism on the U.S. Supreme Court in the 1940s to 60s. In his pioneering research, Schubert (1965, 199-202) concluded that three dominant ideological dimensions could be found underlying his scales of political and economic liberalism: 1) collectivism versus individualism, 2) libertarianism versus authoritarianism, and 3) equalitarianism versus traditionalism. Schubert's first ideological dimension squares nicely with Janda et al.'s (2004) continuum reflecting the tension between freedom and equality, particularly as it relates to economic issues. We believe that the other two continua identified by Schubert assess ideological conflicts within Janda et al.'s framework, although Schubert's choice of language and labels skews the comparative dimensions somewhat. Ultimately, the four ideological archetypes drawn from the public opinion literature are not far removed from the pioneering attitudinal work that Schubert applied to the judicial decision making patterns of the U.S. Supreme Court in the 1950s and 60s. As such, we believe these archetypes are not only useful constructs for understanding how U.S. justices approach criminal, economic, and civil rights and liberties disputes, but also how Canadian justices have done so in the post-Charter era.

² Six of the justices are excluded from the analysis because they participated in 10 or fewer cases in the civil liberties or discrimination areas. The justices omitted include: Justices Deschamps, Fish, Stevenson, LeDain, Chouinard, and Estey.

³ This behavior, though uncommon, is not unheard of. For example, Woodward and Armstrong (1979, 70-73) provide several classic illustrations of Chief Justice Burger switching his votes in order to control opinion assignment, and often to take the case as his own.
