

# **Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the U.S. and Canadian Supreme Courts**

## **ABSTRACT**

According to attitudinal theorists, justices on the U. S. Supreme Court decide cases largely on political preferences that fall within one dimension of ideology. The focus of this study is to test whether a unidimensional ideological model explains the voting behavior of Canadian Supreme Court justices (1992-1997). The factor analysis results in three areas of law, two of which have never been examined in this way in Canada, provide substantial evidence of ideological voting. Yet, unlike the U.S. Rehnquist Court, the Canadian justices exhibit a much higher degree of ideological complexity. These findings call into question the widely-held assumption of unidimensional decision making that is in vogue in the U.S. literature today, and suggest that attitudinal theorists and comparative law scholars must be cognizant that multiple dimensions of attitudinal voting might occur in high courts that are not as ideologically polarized as the U.S. Supreme Court.

## Introduction

Scholarship on the modern U.S. Supreme Court has persuasively argued that judicial decisions are the product of the justices' own attitudes and values. As advocated most prominently by Segal and Spaeth (1993, 2002), and others such as Schubert (1965, 1974), and Rohde and Spaeth (1976), the Attitudinal Model holds that the political ideology of the justices is a complete explanation of their voting behavior in all cases. Even when the plain meaning of the text of the law, or precedent is clear, "they are easily avoided" (Segal & Spaeth, 1996, p. 973). Judges, it is asserted, "form a view on what result they want, and then employ complex and subtle arguments from precedent ... to provide *ex post facto* 'justifications' for their preferences" (Robertson, 1998, p. 13). Given this premise, these scholars contend that any conflict that emerges within the U.S. Court is necessarily animated by the ideological differences that justices bring with them to the bench.

Recent empirical studies have advanced the attitudinal argument by asserting that U.S. justices decide cases along one overarching liberal-conservative dimension. For instance, a study by Grofman and Brazill (2002, p. 58) suggests a single left-right dimension accounts for roughly 85 percent of the variance in judicial voting behavior between 1953 and 1991. Martin and Quinn (2002), in turn, have used Monte Carlo estimation techniques to conclude that a single liberal-conservative domain structures the voting patterns of U.S. Supreme Court justices over the last 50 years. The Martin-Quinn scores are derived from extensive calculations of votes across all cases that seek to place each justice within a common ideological scale over time. These scores lead them to conclude that while Justice Thomas is the most conservative justice of the U.S. Supreme Court in recent decades, Justice Douglas is at the other, more liberal extreme (see Martin and Quinn, 2002, p. 146; Martin et al., 2005). Many public law scholars have

accepted their interpretation, and current studies in the field of U.S. public law have increasingly relied on “common space” ideological scores drawn from their work to analyze judicial behavior. For example, Epstein et al. (2007) have used the unidimensional framework to assess distinctions between voting scores of U.S. Supreme Court justices and Appellate Court judges. Similarly, Sala and Spriggs (2004) have used the Martin-Quinn scores to compare the ideological positions taken by the Justices with those staked out by members of the House, Senate and the President in separation of powers disputes. Although this literature acknowledges that justices may exhibit some voting fluidity over time, the voting behavior exhibited by U.S. justices is largely unidimensional and characterized by rote ideological decision making (for evidence of ideological fluidity, see Martin and Quinn, 2002, p. 148).<sup>1</sup> However, there is no recent scholarship that has demonstrated that a similar unidimensional framework adequately explains the voting behavior of judges on the high courts of other countries.

For many scholars, the recent literature on the U.S. Supreme Court betrays a continuing fascination with the workings and ideological orientation of justices of the U.S. high court. To a great degree, this U.S.-centric fascination may work to limit the development of more general theories of judicial behavior. The American style of assuming that a left-right ideological dimension drives voting behavior may have little or no relevance for courts in other legal systems. Indeed, the model’s application may be limited by the idiosyncratic nature of the U.S. political system. One of the underlying explanations for the dominance of ideology in the U.S. Supreme Court is that members of the court are free to vote their policy preferences because “they lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction” (Segal & Spaeth, 1993, p. 69). They argue that it is *these* institutional features which set the Supreme Court apart and allow the justices to vote

their policy preferences without regard for legal constraints or precedents (Rohde & Spaeth, 1976; Segal & Spaeth, 1993, 2002). The implication of this argument is that if other high courts possessed similar institutional features, the justices of these courts would base their decisions on their own attitudes and values as well. Yet, this proposition fails to acknowledge that justices on other high courts may exhibit attitudinal voting patterns that are distinct from the unidimensional patterns found among U.S. Supreme Court justices, even though the institutional characteristics of the courts are similar.

One of the main measures of a theory's success is how well it travels across different contexts and countries. Although the Attitudinal Model might not travel well because other political systems utilize judicial appointment processes that are less overtly partisan and ideological, it may still explain important elements of the judicial behavior story that have yet to be explored outside the confines of the U.S. Our research is designed to examine whether the patterns of ideological conflict that dominate the U.S. Court are as important in a similar – yet distinct – institutional setting. We use the Canadian Supreme Court as an obvious test case to assess several important research questions: 1) does a single dimension of ideology serve as a dominant source of conflict in both the U.S. and Canadian Supreme Courts; 2) do justices across both courts exhibit consistent patterns of unidimensional ideological voting across multiple issue areas; and 3) do the unique institutional features of the Canadian legal system work to mitigate the impact of ideological voting in that high court? If the answers to these questions differ across the U.S. and Canadian Supreme Courts, two courts that are so closely aligned, it may raise serious doubts about the presumed unidimensional nature of ideological behavior of high court justices outside the confines of the U.S. In addition, differences between the two courts may suggest that the nature of ideological decision making so prevalent in the U.S. literature today

may be time-bound and relevant in only certain institutional contexts, and that if the U.S. Supreme Court becomes less ideologically polarized in the future, multiple dimensions of ideology may emerge. Evidence of counterfactual results in Canada might force U.S. public law scholars to move away from their American-centric fascination with simplistic left-right ideological models and develop a more global, cross-cultural, and multidimensional understandings of the cognitive and ideological map of judicial decision making. Such findings would represent a major theoretical critique of the Segal-Spaeth canon. However, if justices on both courts exhibit similar patterns of behavior, it may serve as an important validation of the broader applicability of the Attitudinal Model and the unidimensional nature of ideological decision making for common law high courts around the world.

The assessment of the Attitudinal Model has implications for other areas of comparative research as well. For example, it is commonly assumed in studies of the U.S. Congress that voting occurs within a largely unidimensional or two dimensional ideological space (see Clinton, Jackman & Rivers, 2004; Jackman, 2001; Poole & Rosenthal, 1997). In this regard, there is a parallel fascination with left-right voting patterns in both houses of Congress. A similar point can be made about the ideological position-taking of U.S. presidents and bureaucratic actors. Given this understanding, if the unidimensional hypothesis in the judicial literature does not travel well to Canada, it suggests that scholars doing comparative research in other institutional settings will need to validate whether this largely one-dimensional conception of legislative voting and executive behavior travels well to other cultural settings as well. In short, our research serves as a call to other comparative scholars to test widely-held assumptions about U.S. ideological behavior in diverse institutional settings.

## **Literature Review**

We begin by defining judicial ideology as judicial behavior that is animated by a consistent set of beliefs about the scope and purpose of government and its impact on the lives of individuals. It is important to note that a justice's ideology may diverge across different issue domains although he or she may maintain a consistent set of beliefs about the law in a particular issue domain. This recognizes that a judge, then, can have one set of ideological beliefs about federalism concerns, and yet another on matters of economic regulation, or criminal justice, or equal rights, or civil liberties, or tort cases, (to name just a few areas of law). What is typically presumed in the U.S. Court literature is that justices possess a high level of attitudinal consistency across a wide variety of issue domains. We believe that it is important to test the generalizability of this assumption in other court settings in order to develop a more global theory of judicial decision making and that we should not presume U.S. ideological patterns will travel well to other high courts.

Although several studies exist that examine the attitudinal decision-making of justices on the Canadian Supreme Court, few have examined these patterns across a broad range of legal areas simultaneously, and most have approached their analysis by imposing a predetermined ideological dimension on the court. Early studies by Peck (1969) and Fouts (1969) used scaling techniques to demonstrate that different ideological voting blocs existed on the Court even prior to the expansion of judicial review under the Charter. A study by Russell (1969) also found substantial evidence of attitudinal voting by justices in this early court period. Another study by Tate and Sittiwong (1989) found that judicial attributes could be used to successfully predict ideological voting patterns in criminal/civil liberties and economic cases. In an update of this social attribute model, Songer and Johnson (2007) found that judicial attributes could be used to

successfully predict ideological voting patterns in the 1985-2000 period in three issue areas: criminal, civil rights and liberties, and economic cases. McCormick and Greene (1990) also found social class background to be reliable predictors of pro-Charter rulings by the justices of the Canadian Supreme Court. Taken together, these recent studies have shown that social attribute models using characteristics such as party, gender, region, and religion provide strong evidence that ideological decision-making is prominent on the Canadian Supreme Court, both before and after the adoption of the Charter of Rights and Freedoms.

Scholarship by Ostberg and Wetstein (1998; Wetstein & Ostberg, 1999) has taken a different approach to exploring attitudinal decision making in the Canadian Supreme Court. They created ideology scores prior to a justice's appointment based on journalistic impressions of a nominee's liberalism by reporters and editorial writers covering the Court for the *Toronto Globe and Mail*. They used this newspaper measure in conjunction with case facts to show that existing ideological orientations influenced the voting patterns of justices in search and seizure cases in the post-Charter era. In a subsequent book-length study, they explored attitudinal decision making in six discrete areas of law, yet this work relied on logistic regression techniques that presumed one liberal conservative dimension was at work in the Canadian setting (Ostberg & Wetstein 2007). These same scholars also employed factor analysis on the Charter decision of the early Lamer Court (1991-95), and identified two ideological dimensions of conflict, namely a communitarian-libertarian dimension, and one centered on fair trial and due process concerns (Ostberg et al. 2002). What made this study different was its explicit effort to avoid imposing a predetermined ideological component on the Canadian Court. However, their study was limited because it failed to take into consideration judicial behavior outside Charter disputes, and did not assess them with comparable rulings handed down by the U.S. Court.

A recent replication of the Martin and Quinn (2002) approach has been applied to the modern Canadian Court Supreme Court. Starting from the assumption that judicial votes can be characterized as falling along one ideological continuum, Alarie and Green (2007) used Markov Chain Monte Carlo analyses to calculate the ideal ideological positions of each Canadian justice based on their votes in all nonunanimous cases decided between 1990 and 2004. Their efforts turned up disquieting results – at least for those who assume that the U.S. pattern of one dimensional behavior necessarily characterizes judicial voting behavior outside the U.S. They found low correlations between the ideological ideal point estimates for the Canadian justices and their actual liberal and conservative voting records ( $r = .38$ ). They were led to conclude that “decisions made by the justices are not driven by an underlying attitude distributed unidimensionally” (Alarie & Green, 2007, p. 211, emphasis added). Their findings, as well as others, suggest that more than one ideological dimension must be prominent in the minds of modern Canadian Supreme Court justices.

Overall, a review of past research suggests that justices on the Canadian Court do make attitudinally-based decisions, although Canadian scholars are quick to point out that other factors, such as legal specialization, gender, and regional identification play a prominent role in the Canadian setting as well (see McCormick & Job, 1993; White, 1998; McCormick, 2000). However, one underlying flaw with the bulk of quantitative studies on the Canadian Court to date is that scholars have tended to either predetermine that political ideology will animate attitudinal conflicts that exist on the Canadian Court, or that the ideological cleavages that emerge will mirror the same ideological dimension that is found in the U.S. context. The one study to date that has taken a different tack by using factor analysis to identify the attitudinal dimensions dividing the justices suffers from the limitation of solely focusing on Charter cases in

the early Lamer Court, and thus remains inconclusive on whether the same ideological cleavage divides the justices outside Charter disputes. The current study fills a significant gap in the literature by examining whether a single left-right ideological dimension or multiple dimensions drive attitudinal conflict in different areas of law during the Lamer Court tenure (1992-97). Moreover, the study introduces a significant comparative element that explores how patterns of attitudinal conflict in Canada compare with those found on the Rehnquist Court during a similar timeframe (1994-2000). This has yet to be explored in the literature. Since we are examining attitudinal behavior outside the confines of the U.S., we do not begin with the fundamental assumption that judicial behavior on the Canadian Court is necessarily structured along one ideological domain. Instead, we posit that judicial ideology can manifest itself in multiple ways, and that researchers should not presuppose that a liberal-conservative conflict dominates judicial behavior. The research is animated by a methodological strategy that rejects the “newest tool in the toolbox” and instead draws its guidance from earlier factor analytic techniques recommended by Flango and Ducat (1977) and Tate (1983). Ultimately, the findings from this research will provide attitudinal and comparative law scholars with important evidence regarding the applicability of the Attitudinal Model beyond the confines of the U.S.

Our study tests two significant hypotheses derived from the Attitudinal Model:

*Hypothesis 1: A liberal-conservative dimension of conflict divides the justices on both the U.S. and Canadian Supreme Courts.*

*Hypothesis 2: Justices of both the U.S. and Canadian Supreme Courts exhibit consistent patterns of ideological voting across economic, criminal, and civil rights and liberties disputes.*

Assessing the applicability of the attitudinal framework in the Canadian context makes intuitive sense given the fact that the U.S. and Canadian courts share many of the same institutional features. Both courts serve as the highest court of the land, control the bulk of their own docket and possess the same institutional features of political independence that Segal and Spaeth suggest will advance the justices' ability to engage in ideological voting. Yet, there are significant political and institutional differences between the two courts that suggest that ideology's impact may be less prominent in Canada. First, it is widely recognized that notions of liberalism play a less significant role in the appointment process in Canada. To the extent that liberalism is less prominent in the mind of Prime Ministers when they make appointments to the Canadian Supreme Court, it is unlikely that justices will come to the Court with the well-established beliefs that seem to permeate the U.S. appointments (at least since the Warren Court period). In short, the less partisan appointment process in Canada may mitigate the degree to which ideology drives the voting patterns of Canadian Supreme Court justices once they are on the high court. Second, interviews conducted by the authors with eleven current and recent members of the Court suggest that there is a high degree of collegiality on the Court and at least mild support for an informal norm that justices should be willing to compromise when such agreement does not violate any strongly held principles. Finally, unlike the U.S. system, the Canadian Chief Justice has the ability to create decision panels that number five or seven justices. This unique institutional characteristic might suppress levels of attitudinal conflict because it is logically easier to generate consensus among a group of five or seven individuals than a full complement of nine justices. As a result, levels of ideological conflict in Canada's high court may be less pronounced than in the U.S. Moreover, ideological voting fluidity may be more apparent in the Canadian high court because of the ever-changing make-up of decision

panels. These political and institutional characteristics might mitigate the prevalence of left-right ideological decision making in the Canadian Supreme Court.

### **Data and Methods**

Since we are interested in examining the appearance of attitudinal conflict, data for this study are derived from nonunanimous economic, criminal and civil rights and liberties cases argued before the Supreme Court of Canada and published in the *Supreme Court Reports*, and from U.S. Supreme Court cases in the same areas of law. There are several data qualifications that need to be highlighted before turning to the analysis in the three areas of law in Canada. First, factor analysis requires the examination of voting during a period of uninterrupted court membership because it is based on an analysis of variance in voting alignments that appear within a given court. As such, we chose to factor analyze Canadian Supreme Court decisions between November 13, 1992 and September 30, 1997 because they were handed down during the longest time span of stable court membership in the post-Charter era. Throughout this study, we identify this period as the "Lamer Natural Court," or the "Lamer Court," which began with the arrival of Justice John Major in November of 1992, and closed with the retirement of Justice LaForest in September of 1997, a period in which there were no changes in the membership of the Court.<sup>2</sup> Second, we focused our attention on nonunanimous cases in three distinct areas of law because they constitute a substantial portion of the Court's docket and represent arguably the most significant decisions of the court during this period. We further limited our analysis to cases having written reasons for judgment because they highlight the rationale for attitudinal conflict on the court. Collectively, there were a total of 42 economic, 75 criminal and 26 civil rights and liberties cases featured in our analysis.

The decision to isolate cases into three different areas of law for factor analysis deserves some justification given the recent scholarship suggesting that a single ideological dimension helps explain the vast majority of votes in the U.S. Supreme Court (see Grofman & Brazill, 2002; Martin & Quinn, 2002). This research might lead some to believe that all of the nonunanimous cases should be factor analyzed together to assess whether a unidimensional framework is at work on both the Canadian and U.S. Courts. We are wary of such an approach because it assumes that justices do not take different ideological positions in different issue areas. We prefer to remain agnostic on such matters, and to discover whether factors other than liberalism-conservatism might shape the conflicts between the justices in different areas of law. Moreover, if there really is a single dimension that explains judicial voting across multiple issue domains, then separate analyses of these different issue areas will reveal the same alignment for the justices across the different legal fields, and the scores of the justices in the areas will correlate highly. In other words, analysis of separate subsets of votes does not risk coming to an empirically incorrect result as to whether a single ideological dimension explains voting in all cases, but rather, allows one to assess whether differences in the discrete areas of law do emerge.

Since factor analysis involves an examination of correlations between the justices' voting patterns across a particular set of cases, it is ideally based on full case participation. However, since the Canadian Court often sits with fewer than nine justices, it was necessary to introduce non-participation scores for justices who did not take part in the hearing for a given case. Consequently, the factor analysis was based on the votes of the justices, which were scored as +1 for a majority vote, 0 for non-participation, and -1 for a dissenting vote. Our coding scheme does not presuppose certain ideological considerations drive the justices' voting patterns (Ducat & Dudley, 1987; Tate 1983). Instead, we code the votes on the basis of whether or not a justice

voted in the majority coalition. Some readers might be concerned that some systematic bias is entered into the analysis by assigning a zero score for non-participating justices. Assigning such a score arbitrarily places a justice halfway between a majority and dissenting vote in cases they did not hear (i.e., in cases with fewer than nine votes). This will have a tendency to weaken the degree of ideological conflict that appears to divide the justices in such cases. As a result, the coding scheme has the effect of making it more difficult to discern the nature of ideological conflict in those cases. When one uses other coding approaches, the possibility of ideological bias moves in the other direction. For example, some scholars might assign a mean “liberalism” score for non-participating justices based on those who do participate, or they might suggest assigning the same score as ideologically like-minded justices (see McIver, 1976). The pitfall of these approaches is that they simply amplify the pattern already presented in the cases, or they fall into the trap of seeing all votes as aligned along a liberal-conservative continuum. We chose the former approach over the latter two because it does not presuppose a liberal-conservative continuum. We recognize that no easy solution exists for non-participating justices, but believe we have taken the most prudent course.

A two-stage strategy was applied to the factor analysis process that was similar to that used by Flango and Ducat (1977), Dudley and Ducat (1986), Ducat and Dudley (1987) and Ostberg et al. (2002). In the first stage, we used mathematical techniques to analyze the justices' votes, and produce factor scores for the cases in the three areas of law (see Kim & Mueller 1978a, 1978b). The second stage involved conducting a detailed reading of the handful of cases scoring most positively and negatively on each of the factors generated in order to identify the underlying dimensions that fostered disagreement on the court. One should realize that the cases scoring most extremely on the factors were also compared with those at the center of the

distribution to ensure that our identification of the features that bound the extremely scoring cases was distinct from those found in the center. Our factor analytic approach departs somewhat from prior studies that have utilized this technique because we limited our analysis to the top two factors in each area of law for consistency purposes, and because we wanted to identify the two most salient dimensions that divided the justices.<sup>3</sup> For each area of law, the two principal factors accounted for roughly 50 percent of the voting variance in the Lamer Natural Court (46, 50, and 47 percent in economic, criminal, and civil rights cases respectively). Our goal throughout this process was to determine whether liberal-conservative understandings of ideology were one of the top two sources of voting disagreement.

We classified cases into the three areas of law based on the information provided in the head notes of the disputes. This classification system ensures that the data analysis is based on the court's own data categorization, and not the author's discretionary grouping of the cases. Ten of the cases appear in more than one legal area because they addressed two different legal issues. For example, *Symes v. Canada* [1993] 4 S.C.R. 695 appeared in both the economic and civil rights analysis because it addressed whether the denial of childcare tax deductions as a business expense violated equality provisions in the Charter. Readers should be aware that cases were categorized into the three areas in the following ways: the civil liberties category included civil rights, both constitutional and statutory (such as those relating to minority and gender discrimination), and the standard set of civil liberties claims (for example those relating to freedom of expression, religion, privacy, language education, and aboriginal rights). The economic category included labor-management relations, government regulation of the economy, tax cases, and private economic disputes. Criminal cases, in turn, involved disputes where criminal charges were filed. Collectively, the cases that were analyzed in these three legal

areas represented 133 of the 135 nonunanimous cases featuring written reasons for judgment handed down by the Lamer Court. As such, our analysis provides a robust attempt to account for the sources of conflict that divided Lamer Court justices.

For each of the three areas of law, we engaged in the same form of analysis in order to identify the two principal dimensions of conflict in the Rehnquist Court terms running from October 1994 to June 2000. We relied on the Supreme Court database gathered by Harold Spaeth (1999) to separate the cases into issue areas and generate the factor scores for nonunanimous cases that fell into the economic, criminal, and civil rights and liberties areas. This 1994-2000 time span was chosen because it featured a period of stable court membership that mirrored our Canadian analysis. The U.S. period begins with the arrival of Justice Breyer on the Supreme Court, and included four years of cases that were heard at the same time the Lamer Natural Court was handing down its rulings. The analysis of the Canadian and U.S. Court decisions from these parallel time periods allows for a test of our hypotheses about attitudinal conflict and consistency on two courts that operate in established constitutional democracies.

### **Ideological Conflict and Consistency in the Lamer and Rehnquist Courts**

Space considerations do not allow for an extended discussion of the specific voting patterns and cases that led us to our decision to label each of the various dimensions of conflict across the two courts. However, we do present a brief account of our analysis in each issue area in order to provide some background for our description of the key factors that shaped attitudinal disagreements on the high courts. Readers seeking a more detailed description of the factor analysis results and case analysis can request data from the lead author.

#### ***The Dimensions of Conflict in Economic Disputes***

After an in-depth reading of the Canadian cases scoring most extremely on the first economic factor, it was clear that the disagreement on the Lamer Court turned on different conceptions of economic liberalism in private law and business regulation cases. The issues in the cases pertained to a constellation of private law concerns, namely tort, contracts, union-management and bankruptcy claims, with seven of the ten cases scoring most extremely on this factor drawn from these areas of law. This factor featured a clear liberal-conservative cleavage, with economic underdogs winning all five of the highest scoring disputes on the positive side of the factor, while economic elites won victories in four of the five lowest scoring cases on the factor. Thus, degrees of liberalism seem to be the principal element animating conflict in the Lamer Court in economic cases.<sup>4</sup>

The second factor in the nonunanimous economic cases in Canada featured the voting patterns of Justice McLachlin juxtaposed against those of Justice Iacobucci. Unlike the first dimension, no clear liberal-conservative pattern emerged on the second factor because the most extremely scoring cases on both sides featured predominantly conservative rulings (9 out of 10 decisions). However, since fully eight of the ten disputes dealt with questions of deference to policy and regulatory decisions of government agencies, it was clear that ideological deference was the thread that tied these cases together. The principal dispute on this factor is demonstrated by Justice Iacobucci's tendency to defer to federal government and agency regulatory power in six of the eight cases on which he participated. In the majority of these cases, his stance is juxtaposed against a less deferential position taken by Justice McLachlin. Taken together, these cases suggest that the underlying dimension of conflict on this second economic factor pivots on differing ideological notions of deference to agency rulings, especially pertaining to the

interpretation of tax provisions. We see this second dimension as one reflecting attitudinal disagreement over deference to agency power.

We applied the same factor analytic techniques to the nonunanimous economic decisions of the Rehnquist Court from the October 1994 to June 2000 period. In line with our analysis of the Canadian cases, we were interested in identifying the two most prominent sources of division on the Rehnquist Court in the economic area. Not surprisingly, the first economic factor driving conflict on the Rehnquist Court highlighted issues pertaining to federalism and state power. While the most negative scoring cases principally involved state sovereignty or other related federalism concerns, the majority of cases on the positive side dealt with taxing power of the national or state governments. The first factor was not rooted in traditional notions of liberalism-conservatism because virtually all of the judgments were conservative in nature. However, the rulings on the negative side feature the five-to-four split that is so typical of many of the Rehnquist Court rulings in the federalism area (Justices Rehnquist, Thomas, Scalia, Kennedy, and O'Connor versus Justices Stevens, Souter, Ginsburg, and Breyer). The second economic factor, in turn, featured a liberal-conservative split over whether to support economic underdogs in cases pertaining to tort, labor, pension, and workers compensation benefits, with the negative side featuring conservative outcomes, and the positive side featuring liberal rulings. Thus, while the first factor of the Rehnquist Court featured a divide over federalism concerns, the second factor featured a traditional liberal-conservative split in a variety of economic disputes.

Overall, the findings from the Rehnquist Court mesh well with prior studies by Ducat and Dudley (1987) that suggested that federalism and a left-right ideological dimension were prominent sources of conflict in the economic cases of the late Burger Court (see also Hagle & Spaeth, 1992, 1993).<sup>5</sup> From a broader cross-cultural perspective, it is clear that while a left-right

ideological division sparks conflict on both high courts in the economic area, it constitutes the principal issue of conflict on the Lamer Court but takes a backseat to federalism issues in the U.S. context. This result is not surprising since federalism became a defining fulcrum of Chief Justice Rehnquist's tenure. Moreover, it is clear that the federalism battles of the Rehnquist Court parallel nicely with some of the Canadian judicial disputes over the degree of deference owed to provincial and national agency rulings in the economic arena. Thus, concerns about federal and state regulatory power occupy an important position in the minds of the justices in both modern courts. The parallel nature of these concerns makes intuitive sense in high courts that are situated in advanced industrial democracies that face similar economic challenges and regulatory environments. Questions of agency power and government treatment of business interests are bound to remain significant in both Canada and the U.S. in the years to come, even if the New Deal era understandings of economic liberalism and conservatism have shifted to a more nuanced web of interpretations (see Ducat & Dudley, 1987).

### ***The Dimensions of Conflict in Criminal Disputes***

It was clear that a liberal-conservative struggle between two opposing blocs of the Lamer Natural Court characterized the first dimension of conflict in the criminal area. Central to this conflict was an obvious dispute over the treatment of the criminally accused which is illustrated by the fact that the majority ruled in favor of the accused in nine of the ten most positively scoring cases, yet sided with the Crown in four of the five scoring most negatively. In most of the cases scoring most extremely on this factor, the court seemed to be grappling with how to balance defendants' due process rights with the community's interest in protecting the public from some of the most heinous criminal elements of society, such as rapists, murderers, and

pedophiles. Anyone reading the cases would immediately equate the ideological divide on the court as one in concert with Packer's (1968) crime control and due process models of criminal procedure. Yet, as Kent Roach (2001, p. 29) has argued, in many ways the post-Charter criminal justice system has recast the tension in the criminal area as one between the defendant's right to due process and the rights of victims and potential victims to security and equal status under the law, and thus, a new punitive model of victim's rights has emerged in the criminal justice system. In line with Roach's new conceptualization, many of the cases scoring most extremely on factor one prominently reflect the liberal-conservative struggle on the court to balance the rights of victims against the due process rights of the most heinous sexual offenders in society.

The bulk of the rulings on the second factor in the criminal area featured an ideological conflict over fair trial/due process concerns, particularly in relation to the treatment of evidence. Remarkably, errors pertaining to the admission of evidence dominated over half of the cases scoring on the second factor (6 of 10), while other due process errors appeared in two additional cases. Extreme cases on this factor featured Justice McLachlin at odds with Justices Iacobucci and Cory in a series of disputes involving the admissibility of evidence, the credibility of testimony by witnesses and the accused, the sufficiency of jury instructions on evidence, and the possibility of drawing erroneous inferences from evidence. Although these issues have important ramifications for procedural due process and the conduct of a fair trial, what distinguishes this factor from the first is that it was not driven by opposing liberal and conservative camps on the Lamer Natural Court, but rather seemed more narrowly focused on the technicalities of trial procedure and whether to defer to a trial judge's ruling.

Our comparison of criminal disputes handed down by the Rehnquist Court over a relatively similar period of analysis revealed two distinct factors, both related to distinctive

liberal-conservative splits within the court. While the first factor highlighted an ideological division over fairness and criminal due process concerns, the second factor featured a more narrow ideological confrontation over prisoner's rights issues. However, readers should note that these two ideological factors are distinctive in nature because one captures a particular justice's ideological vision of due process (factor one), while the other pertains to a dispute between two blocs of the Court over a unique set of prisoner appeals and habeas corpus petitions (factor two). What makes the cases scoring most extremely on the first factor stand out is the maverick behavior of Justice Stevens, who authored solo dissents against a conservative majority in all 16 cases found on the negative side of the factor, while the positive cases feature him marshalling a liberal majority of five votes. The distinctive aspect of factor two is that over half of the cases on both sides of the dimension deal with habeas corpus, prisoner's rights, and various cruel and unusual punishment claims filed by prisoners. While 17 of the 18 cases on the positive side resulted in conservative outcomes, nine of the ten cases on the negative side were in the opposite direction. Overall, it is clear that the dimensions of conflict in the Rehnquist criminal cases featured two crosscutting battles that are juxtaposed to each other on the two factors. While a liberal five-member majority dominated the cases on the positive side of factor one, the conservative wing of the court dominated the positive side of factor two.

When the data are viewed through a cross-cultural prism, it is clear that the first dimension of conflict dividing both courts in the criminal area fits with traditional understandings of a liberal-conservative split. This is not surprising since justices in all democracies are forced to grapple with the competing interests of extending due process rights to the criminally accused and ensuring the safety and security needs of victims and the community at large. Ideological differences are bound to emerge when addressing such issues. Yet, the first

factor in the Canadian context is more narrowly centered on whether to extend due process rights to heinous criminals, which places the communitarian-due process tension in even starker relief. As some scholars have suggested, the fact that such issues dominate the Canadian criminal landscape makes intuitive sense for two reasons: 1) the recent adoption of the *Charter of Rights and Freedoms* in 1982, which enshrined due process guarantees for the criminally accused in the constitution, and 2) the Court's willingness to move from a staunch crime control position to one that more readily balances the rights of victims and societal interests in security against the due process rights of the criminally accused (see Packer, 1968; Manfredi, 1993, 2001; Wetstein & Ostberg, 1999; Ostberg & Wetstein, 1998; Roach, 2001). It is not surprising in the criminal area to find a second dimension of conflict more narrowly focused on ideological disputes pertaining to the technicalities of trial court decision-making, which is the case in the Canadian setting. However, what is surprising is that the second factor on the Rehnquist Court, like the first factor, fits along a liberal-conservative continuum. The pervasive presence of a liberal-conservative divide speaks to the unique degree of political polarization found on the current U.S. Supreme Court and suggests that the left-right leanings of the justices are more overtly on display in the U.S. context. This is especially true in a legal area where liberal-conservative battle lines are easily drawn over the last-ditch appeals of prisoners already convicted of a crime.

### ***The Dimensions of Conflict in Civil Rights and Liberties Disputes***

The first dimension of conflict in Lamer Court civil rights and liberties cases featured a Justices LaForest and Gonthier in opposition to Justice McLachlin regarding the degree of support that should be given to disadvantaged groups exercising their constitutional freedoms or pursuing equal protection under the law. The most extremely scoring cases on the first factor

indicate that there was a consistent liberal-conservative divide over discrimination and liberty claims in the Lamer Natural Court. Meanwhile, the second factor highlighted an ideological debate between Justice L'Heureux-Dubé and two of her male colleagues, namely Justices Iacobucci and Sopinka, over whether the justices should defer to the rulings of administrative agencies. The most extreme scoring cases on the second factor principally involved questions of the extent to which Canadian justices should defer to agency power. Nine of the thirteen cases highlighted in this area pertained to deference to governmental agencies such as the Department of Fisheries and Oceans, Minister of National Revenue, the Yukon Human Rights Commission, Ontario Labour Board, and Matsqui Indian Band Tax Assessment Board. We did not believe that the second factor was driven by liberal-conservative concerns because the two male justices did not exhibit a consistent pattern of liberal voting across the two sides of the factor. Additionally, Justice L'Heureux-Dubé exhibited strong liberal voting patterns on both sides of factor two, providing further evidence that the cases were on opposite poles of a liberal-conservative divide.

As in the two other areas of law, we were interested in comparing the Lamer Court patterns of conflict with those found on the Rehnquist Court during a similar time frame. The principal factor in the civil rights and liberties area highlights a telltale hallmark of the Rehnquist led Court, namely an ideological dispute over the proper exercise of judicial review in First Amendment and political rights cases. The second Rehnquist Court factor in the civil rights and liberties area presents a clear liberal-conservative division over how to treat various minority groups such as Native Americans, aliens, women, handicapped, students, and drug addicts to name a few. While all five cases on the positive side of the dimension feature conservative outcomes that go against the various minority groups, six of the seven on the negative side can

be classified as decisive liberal outcomes. What is unique about the second factor is that it captures a rift in the ideological center of the Court, with Justices O'Connor and Souter staking out liberal positions against Justice Kennedy's conservative stance in the cases scoring most extremely on this factor.

When the Lamer Natural Court's civil rights and liberties record is compared to the Rehnquist Court over a similar time span, some interesting parallels emerge. Both courts feature a liberal-conservative ideological divide toward the treatment of minority rights claims and vulnerable interests in society. The fact that this type of ideological divide constitutes the primary dimension of conflict in the Canadian setting, and is only secondary in the U.S. context will surprise some scholars given the heightened polarization of the U.S. Court and American society on a host of social and moral rights controversies. Although Canadian citizens do not seem as exercised over such issues, one must recognize that the enactment of the Charter itself and increasing rights-based litigation by interest groups has catapulted a host of new civil rights concerns to the forefront of Canadian politics and jurisprudence (see Epp, 1998; Brodie, 2002). In short, we believe the relative novelty of the Charter ensured that Charter liberalism would become the primary fulcrum of conflict on the Canadian high court in civil rights and liberties cases. The similarities between the other two factors on the two courts are not as intuitive, although parallels can be seen. While the primary dimension of conflict in the U.S. setting pertained to the degree of ideological deference that the Court should give to legislative enactments, the second factor in the Lamer Court featured disputes over deference to executive agency power. Although the focus of attention is different across the two courts, both institutions were grappling with the same kinds of civil rights and liberties questions, namely whether to defer to policy decisions made by other branches of government.

Our overall results indicate that three of the six principal dimensions of conflict in the Canadian context were consistent with left-right ideological tensions, while four of the six factors in the U.S. setting featured a liberal-conservative divide. One of the most significant findings of the study is that all three of the primary factors on the Lamer Natural Court demonstrated such an obvious liberal-conservative divide, while left-right notions of ideology played second fiddle to other forms of attitudinal conflict in two of the three areas of the Rehnquist Court (see Table 1). As a result, our examination of attitudinal conflict in the Lamer and Rehnquist Courts lead us to the following conclusion regarding our first hypothesis: liberal-conservative tensions appear to be as strong a force for explaining conflict within the Canadian Supreme Court as in the U.S. setting, and thus lends credence to the Attitudinal Model. Indeed, it might be said that when Canadian justices disagree, degrees of liberalism are more pivotal to their disputes than in the U.S. Court. Having said this, liberal-conservative disputes were central to both factors of the Rehnquist Court in the criminal area, perhaps because the conservative wing of the Rehnquist Court has made a concerted effort to cut back on various due process protections recognized by the Warren Court and on the extent of prisoner appeal rights. Overall, conflicts based on liberal-conservative differences remain a central feature of the decision-making patterns of the justices in these two high courts. Thus, elite decision makers in these two advanced industrial democracies continue to grapple with political and legal controversies in economic, criminal, and civil rights and liberties cases through a similar liberal-conservative prism as posited by attitudinal theory.

**INSERT TABLE 1 HERE**

Our second hypothesis presumed that justices on both courts would engage in consistent patterns of liberal-conservative voting across different issue areas. In order to address this hypothesis, we constructed scatterplots of the justices' loading scores on each of the obvious left-right factors in the three areas of law and compared them with each other.<sup>6</sup> The scatterplots in Figure 1 indicate that a justice's score can range from a high of 1.0 (extreme liberalism) to a low of -1.0 (extreme conservatism). If the justices demonstrate consistent ideological voting patterns across the two areas of law compared in a scatterplot, one would find a one-to-one correlation along the major diagonal in the positive direction. The justices' liberalism scores across the two areas would run from the bottom left to the top right of each scatterplot demonstrating a perfect positive one to one correlation in their attitudes across the two areas. Such a pattern would fit the presumption made by many American judicial scholars that ideological considerations are largely animated by just one left-right dimension (i.e., in line with Martin & Quinn, 2002). A diagonal relationship running from top left to bottom right would show a perfect inverse relationship in judicial attitudes across the two areas, indicating that justices who are liberal in one area are conservative in the other. Such a pattern would fit with the assumption that ideology can take on multiple and complex dimensions, depending on the issue areas under consideration.

The scatterplot results found in Figure 1 suggest that the justices on the Rehnquist Court illustrated a somewhat consistent pattern of voting when the three different ideological dimensions are compared against each other. Having said this, there are significant problems that emerge for the unidimensional argument. The fact that the voting scores of the U.S. justices in economic cases are not highly correlated with votes in the area of civil rights ( $r = .42$ ) or criminal liberalism ( $r = .50$ ) indicates that the unidimensional argument, so prevalent in the U.S.

literature, may be overstated. The unidimensional argument would carry much greater weight if these correlations matched the .98 correlation found between civil rights and criminal case patterns found on the Rehnquist Court. The fairly wide dispersion of data points around the regression line in two of the three U.S. scatterplots provide evidence that undermines the widespread assumption that one consistent dimension of ideology drives voting decisions and conflicts on the U.S. Court across these three issue areas. About all that can be said for the U.S. justices is that they tend to exhibit voting patterns that come close to approximating consistent left-right stances across issue areas.

The scatterplots comparing the liberalism of the Lamer Court justices reveal a different and much more complex pattern of ideological decision-making. For example, the Lamer Court justices demonstrated a strong inverse relationship in one ideological issue comparison, namely criminal and economic liberalism (see Figure 1, column 2). This suggests that justices who were economic liberals on the Lamer Natural Court tended to be more conservative in criminal cases. While some American readers may be puzzled by such a finding, it fits nicely with the literature that describes Canadian political culture as more collectivist and communitarian in its orientation toward crime and state intervention in the economy which contrasts with the values found in the U.S. political system (see Lipset, 1990). The unique patterns in the criminal-economic plot reflect a Court that adheres with communitarian principles: taking a tough stance on criminal punishment, while simultaneously supporting government intervention in the economy to produce a better commonwealth. Moreover, the pattern of voting is more ideologically muddled in the other two Canadian issue comparisons as well, which is illustrated by the fact that the regression lines are remarkably flat. These findings suggest that justices who take conservative stances in criminal and economic cases may or may not take conservative stances in civil rights

and liberties disputes. Indeed, the data suggest that voting in civil rights and liberties cases do not align at all with the voting that takes place in the two other issue dimensions. Overall, these nuanced, complex ideological findings regarding the voting patterns of Canadian justices stand in stark contrast to the more consistent liberal-conservative decision making that is commonplace on the modern U.S. Supreme Court and suggest that a more sophisticated, generalizable model needs to be developed in the judicial area in order to accurately capture decision making patterns in high courts around the world.

### **INSERT FIGURE 1 HERE**

We believe that the lack of predictable liberal-conservative consistency in the Canadian Lamer Court is due, in some part, to the unique institutional features that drive the appointment process and the panel assignments of the justices. Perhaps Canadian justices are not as ideologically predictable because their nomination to the Court is not as likely to be based on liberal-conservative litmus tests (as in the U.S.). Perhaps Canadian justices are not as ideologically consistent because the voting coalitions are in a greater state of flux when justices are uncertain who will be assigned to hear a case on a week-to-week basis. Thus, our conjecture suggests that the institutional and political dynamics of a court can have a direct influence on the levels of ideological consistency that are exhibited by justices in their votes. The evidence from the Canadian context suggests that the overwhelming presence of a liberal-conservative dimension in the U.S. judicial system may be quite idiosyncratic.

### **Conclusion**

This study set out to examine the relevance of the Attitudinal Model in the Canadian Supreme Court, at least vis-à-vis the U.S. Court. We examined the two most prominent

dimensions of conflict animating the nonunanimous rulings of the Lamer Court and the Rehnquist Court in economic, criminal, and civil rights and liberties cases. The research was guided by the belief that justices of the Canadian Court, like their U.S. counterparts, possess some of the same institutional reasons for casting votes in line with their own policy preferences. Since they occupy powerful positions on the highest court of the land and are not interested in seeking higher office, they are not beholden to others in the government structure to rule a certain way. At the onset of this study, we rejected a common presumption made by modern scholars about Supreme Court decision making: that one ideological dimension can be used to understand the votes of the justices. Instead, factor analytic techniques, along with a detailed reading of the cases, were utilized to determine the underlying dimensions of attitudinal conflict within the Lamer Court. We employed factor analysis because it does not presuppose any ideological dimensions on the Canadian Court, but rather, allows the justices' votes and the content of the cases to guide our identification of the cleavages that divided the justices. We compared these findings with results from the U.S. Rehnquist Court decisions from 1994-2000.

Our results suggest that traditional notions of left-right ideology do foster attitudinal conflict in the Lamer Court in particular areas of law, lending credence to the notion that attitudinal decision making influences justices outside the confines of the U.S. This also indicates that attitudinal research can provide important insights into the judicial puzzle in high courts abroad. Having said this, our study also demonstrates that the Canadian justices do not exhibit consistent one-dimensional patterns of voting along a liberal-conservative divide. Instead, their patterns of voting in contested cases are more complex and nuanced than the U.S. justices. The fact that the Lamer Court justices are less ideologically predictable across disparate issue areas than their U.S. colleagues may be explained in part by the differences in the way that

justices are appointed to the bench in the two societies. Since the appointment process in the U.S. requires Senate confirmation, it has become a politically charged process where two political parties and interest groups often pressure the President to select the most partisan nominee as possible. As such, it is not surprising that more ideologically extreme candidates are nominated to the U.S. Court, and their subsequent voting behavior across different issue areas is more ideologically consistent. But, even here, we find some evidence that undermines the widely-held assumption that U.S. voting behavior is simply one-dimensional. Meanwhile, our findings of a more complex structure of ideological voting in the Lamer Court is reflective of a judicial appointment process where Prime Ministers have typically downplayed political considerations, and do not face parliamentary review of their appointments. Unlike the partisan focus of U.S. Presidents, recent Prime Ministers have paid considerable attention to such issues as bilingualism, regional balance, gender, and legal specialization in the selection process.

A cross-cultural comparison of the two courts does reveal important similarities between the dimensions of conflict that are not liberal-conservative in nature. We think that the underlying tie that binds the remaining factors across the two courts ultimately deals with some element of judicial deference. In short, the common theme across the three dimensions of conflict is characterized by a court's exercise of either lateral deference to other branches of government or hierarchical deference to the procedural rulings of lower court judges. Not surprisingly, the primary judicial tension within the Rehnquist Court in civil rights and liberties cases pertained to the degree of deference owed to legislative enactments, while deference to state authority was most significant in the realm of economic regulation. The secondary factor in each of the three areas of law in Canada also raise issues of judicial deference, although each seems much narrower in scope than the ones found in the U.S. context. In the Canadian setting,

judicial conflicts over deference revolved around considerations of agency and regulatory power in both the economic and civil liberties areas, while criminal cases turned on the intricate analysis of trial court evidentiary rulings. Ultimately, since both courts are situated in federal systems, it is not surprising that both continue to act as umpires between different levels and branches of government that contest for power and authority. These findings may be emblematic of a larger cross-cultural pattern that comparative scholars might discover when studying high courts in a diverse array of federal systems.

The more nuanced voting behavior of the Lamer Court also has important implications for the current debate in the Canadian system over proposed reforms to the judicial appointment process. Some politicians, judicial scholars, and journalists have demanded that Parliament should play a critical role in reviewing Supreme Court nominations by the Prime Minister, in part because of the perceived "activist liberalism" of the modern Canadian Supreme Court (see Morton & Knopff, 2000; Ziegel, 2001). We believe that our findings work to counter this call for reforms because it suggests that if a Parliamentary oversight process is added to the mix, it is likely that the Canadian selection process might become subject to the same ideological wrangling that is so prominent in the U.S. system. Parliamentary scrutiny of judicial nominees may simply add political fuel to the fire, resulting in more partisan appointees and greater degrees of rote liberal-conservative decision making on the part of the Canadian justices.

Our results also have implications for comparative attitudinal research in courts around the world, because they suggest that attitudinal consistency on the U.S. Court might be the exception and not the norm. Thus, the assumption of unidimensional ideological decision-making of the U.S. Court might not travel well to other cultural settings. This suggests that

researchers should be sensitive to the possibility that ideological complexity and “inconsistency” might be the norm in other high courts around the world.

Finally, our findings provide a cautionary note to researchers who stress the partisan nature of legislative, executive, and bureaucratic behavior. In our view, there tends to be an American fascination with simplistic notions of liberal-conservative voting and position taking, especially when explaining U.S. political behavior. Our methodology and findings suggest that comparative scholars should be wary of adopting such assumptions of unidimensional ideology. Indeed, our approach calls for a much greater degree of skepticism on the part of researchers, and for a much greater degree of testing unidimensional assumptions in other cultural, legal, and political settings. If our Canadian findings from the high court illustrate a broader indictment of the unidimensional hypothesis, we believe comparative legislative, executive, and bureaucratic scholars, in addition to public law researchers, will find a much higher level of ideological complexity in the decisions of non-U.S. policy makers. Factor analytic techniques that do not start from preconceived notions of ideological unidimensionality represent one method for avoiding the trap of imposing a simple left-right continuum on the choices made by political actors. Instead, such an approach provides a foundation for building a more generalizable model of ideological complexity in future comparative research that can be applied across a myriad of institutional settings.

**Table 1 – Principal Dimensions of Attitudinal Conflict in Nonunanimous Cases Decided by the Lamer Court and Rehnquist Court**

<b>Canadian Supreme Court</b>	<b>Factor 1</b>	<b>Factor 2</b>
Economic cases	Liberalism-Conservatism	Judicial Deference
Criminal cases	Liberalism-Conservatism	Deference – Evidence
Civil Rights/Liberties	Liberalism-Conservatism	Judicial Deference

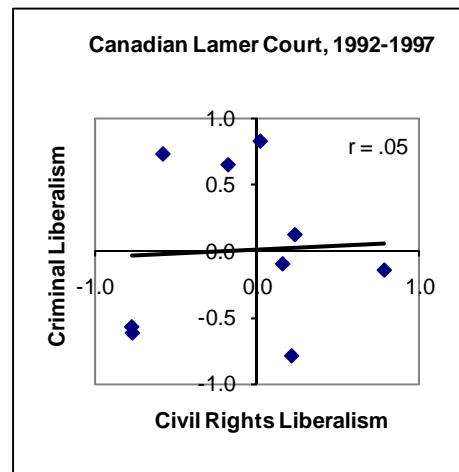
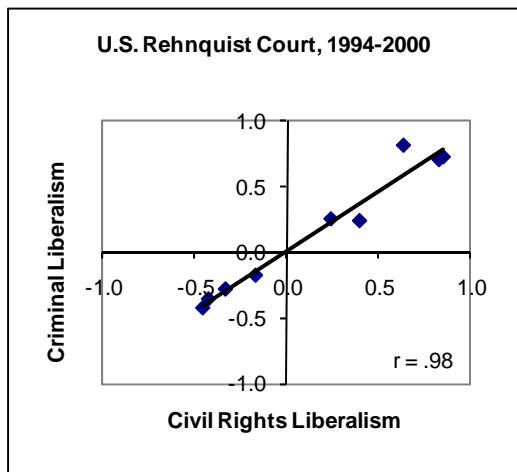
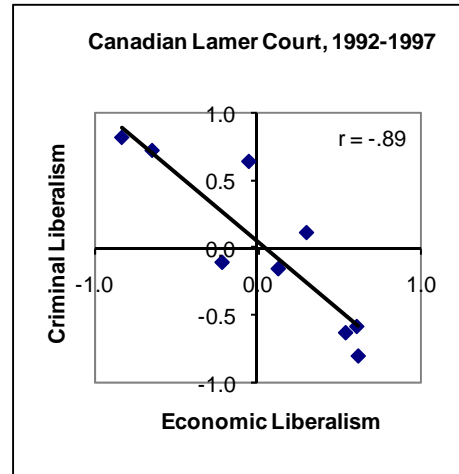
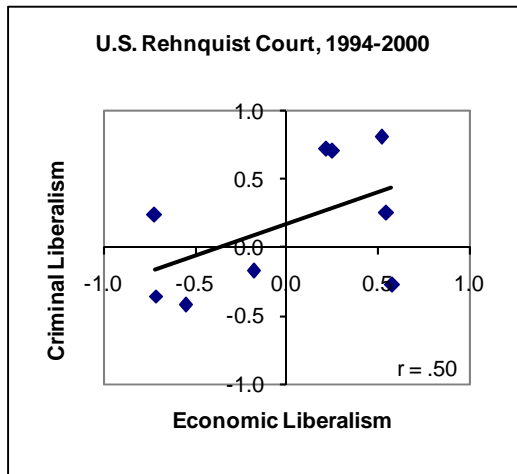
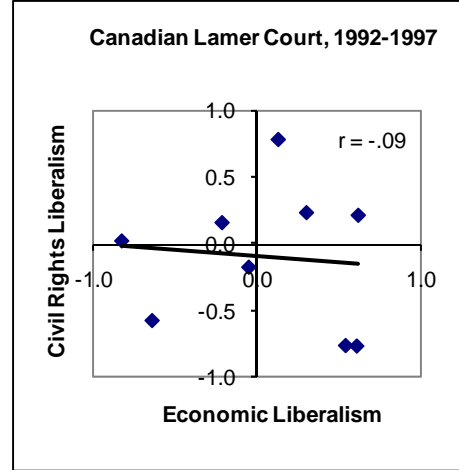
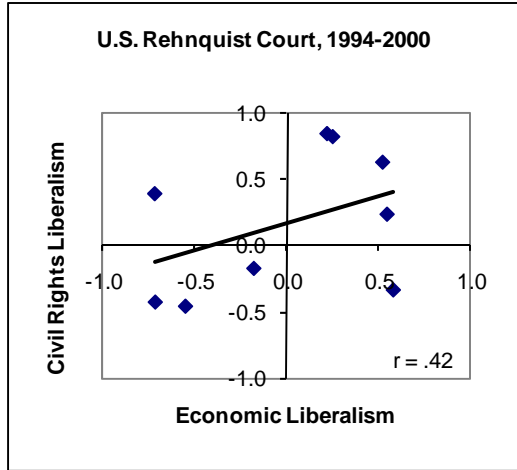
  

<b>U.S. Supreme Court</b>	<b>Factor 1</b>	<b>Factor 2</b>
Economic cases	Federalism	Liberalism-Conservatism
Criminal cases	Ideology (Stevens)	Liberalism-Conservatism
Civil Rights & Liberties	Judicial Deference	Liberalism-Conservatism

Factors are identified from two-factor solutions using principal components analysis (varimax rotation) on voting patterns of the Lamer Court (1992-97) and Rehnquist Court (1994-2000).

Complete data from the statistical analysis are available in the appendix to this article.

**Figure 1 -- Comparative Plots of Judicial Liberalism in U.S. and Canadian Nonunanimous Cases Decided by the Rehnquist and Lamer Courts**



## References

- Alarie, B., & Green, A. (2007). The reasonable justice: an empirical analysis of Frank Iacobucci's career on the Supreme Court. *University of Toronto Law Journal*, 57, 195-226.
- Baum, L. (1988). Measuring policy change in the U.S. Supreme Court. *American Political Science Review*, 82 (3), 905-912.
- Brodie, I. (2002). *Friends of the court: the privileging of interest group litigants in Canada*. Albany, NY: SUNY Press.
- Clinton, J., Jackman, S., & Rivers, D. (2004). The statistical analysis of roll call data. *American Political Science Review*, 98 (2), 355-70.
- Ducat, C. R., & Dudley, R. L. (1987). Dimensions underlying economic policymaking in the early and later Burger Courts. *Journal of Politics*, 49, 521-39.
- Dudley, R. L., & Ducat, C. R. (1986). The Burger Court and economic liberalism. *Western Political Quarterly*, 39, 236-49.
- Epp, C. R. (1998). *The rights revolution: lawyers, activists, and Supreme Courts in comparative perspective*. Chicago: University of Chicago Press.
- Epstein, L., Martin, A. D., Segal, J. A., & Westerland, C. (2007). The judicial common space. *Journal of Law, Economics and Organization*, (forthcoming), 1-23. Available online at: <http://epstein.law.northwestern.edu/research/JCS.pdf> (26 June 2007).
- Flango, V. E., & Ducat, C. R. (1977). Toward an integration of public law and judicial behavior. *Journal of Politics*, 39, 41-72.
- Fouts, D. E. (1969). Policy making in the Supreme Court of Canada, 1950-1960. In G. Schubert & D. J. Danelski, (Eds.), *Comparative judicial behavior* (pp. 257-91). New York: Oxford

University Press.

- Grofman, B., & Brazill, T. J. (2002). Identifying the median justice on the Supreme Court through multidimensional scaling: analysis of natural courts. *Public Choice, 112*, 55-79.
- Hagle, T., & Spaeth, H. J. (1992). The emergence of a new ideology: the business decisions of the Burger Court. *Journal of Politics, 54*, 120-34.
- \_\_\_\_\_. (1993). Ideological patterns in the justices' voting in the Burger Court business cases. *Journal of Politics, 55*, 492-505.
- Hensley, T. R., & Smith, C. E. (1995). Membership change and voting change: an analysis of the Rehnquist Court's 1986-1991 terms. *Political Research Quarterly, 48* (4), 837-56.
- Jackman, S. (2001). Multidimensional analysis of roll call data via Bayesian simulation: identification, estimation, inference, and model checking. *Political Analysis, 9* (3), 227-41.
- Kim, J. O., & Mueller, C. W. (1978a). *Introduction to factor analysis*. Sage University Paper Series on Quantitative Applications in the Social Sciences, 07-013. Beverly Hills, CA: Sage Publications.
- \_\_\_\_\_. (1978b). *Factor analysis: statistical methods and practical issues*. Sage University Paper Series on Quantitative Applications in the Social Sciences, 07-014. Beverly Hills, CA: Sage Publications.
- Lipset, S. M. (1990). *Continental divide: the values and institutions of the United States and Canada*. New York: Routledge.
- Manfredi, C. 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). New York: Oxford University Press.
- Martin, A. D., & Quinn, K. M. (2002). Dynamic ideal point estimation via Markov chain Monte Carlo for the U.S. Supreme Court, 1953-1999. *Political Analysis*, 10 (2), 134-53.
- Martin, A. D., Quinn, K. M., & Epstein, L. (2005). The median justice on United States Supreme Court. *North Carolina Law Review*, 83, 1275.
- McCormick, P. (2000). *Supreme at last: the evolution of the Supreme Court of Canada*. Toronto: James Lorimer.
- McCormick, P., & Greene, I. (1990). *Inside the Canadian judicial system: judges and judging*. Toronto: James Lorimer.
- McCormick, P., & Job, T. (1993). Do women judges make a difference? *Canadian Journal of Law and Society*, 8, 135-47.
- McIver, J. (1976). Scaling judicial decisions: the panel decision making of the U.S. courts of appeal. *American Journal of Political Science*, 20, 749-61.
- Morton, F.L. & Knopff, R. (2000). *The charter revolution and the court party*. Peterborough, Ontario: Broadview Press.
- Ostberg, C. L., & Wetstein, M. E. (1998). Dimensions of attitudes underlying search and seizure decisions of the Supreme Court of Canada. *Canadian Journal of Political Science* 31, 767-87.
- \_\_\_\_\_. (2007). *Attitudinal decision making in the Supreme Court of Canada*. Vancouver: UBC Press.
- Ostberg, C. L., Wetstein, M. E., & Ducat, C. R. (2002). Attitudinal dimensions of Supreme Court decision making in Canada: the Lamer Court, 1991-1995. *Political Research Quarterly*, 55, 235-56.

- Packer, H. L. (1968). *The limits of the criminal sanction*. Palo Alto: Stanford Univ. Press.
- Peck, S. (1969). A scalogram analysis of the Supreme Court of Canada, 1958-1967. In G. Schubert & D. J. Danelski, (Eds.), *Comparative judicial behavior* (pp. 293-334). New York: Oxford University Press.
- Poole, K. T., & Rosenthal, H. (1997). *Congress: a political-economic history of roll call voting*. Oxford: Oxford University Press.
- Roach, K. (2001). *The Supreme Court on trial: judicial activism or democratic dialogue*. Toronto: Irwin Law.
- Robertson, D. (1998). *Judicial discretion in the House of Lords*. Oxford: Clarendon Press.
- Rohde, D. W., & Spaeth, H. J. (1976). *Supreme Court decision making*. San Francisco: W. H. Freeman.
- Russell, P. H. (1969). *The Supreme Court of Canada as a bilingual and bicultural institution*. Ottawa: Queen's Printer.
- Sala, B. R., & Spriggs, J. F. II. (2004). Designing tests of the Supreme Court and the separation of powers. *Political Research Quarterly*, 57 (2), 197-208.
- Schubert, G. (1965). *The judicial mind: attitudes and ideologies of Supreme Court justices, 1946-1963*. Evanston, IL: Northwestern University Press.
- \_\_\_\_\_. (1974). *The judicial mind revisited: psychometric analysis of Supreme Court ideology*. New York: Oxford University Press.
- Segal, J. A., & Spaeth, H. J. (1993). *The Supreme Court and the attitudinal model*. Cambridge: Cambridge University Press.
- \_\_\_\_\_. (1996). The influence of stare decisis on the votes of United States Supreme Court justices. *American Journal of Political Science*, 40, 971-1003.

- \_\_\_\_\_. (2002). *The Supreme Court and the attitudinal model revisited*. New York: Cambridge University Press.
- Songer, D. R., & Johnson, S. W. (2007). Judicial decision making in the Supreme Court of Canada: updating the personal attribute model. *Canadian Journal of Political Science*, 39 (forthcoming).
- Spaeth, H. J. (1999). *United States Supreme Court judicial database, 1953-1999 terms* (Computer file). 9th ICPSR Version. East Lansing, MI: Michigan State University, Department of Political Science (producer). Ann Arbor, MI: Inter-University Consortium for Political and Social Research (distributor).
- Tate, C. N. (1983). The methodology of judicial behavior research: a review and critique. *Political Behavior*, 5 (1), 51-82.
- Tate, C. N., & Sittiwong, P. (1989). Decision making in the Canadian Supreme Court: extending a personal attributes model across nations. *Journal of Politics*, 51, 900-16.
- Wetstein, M. E., & Ostberg, C. L. (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.
- White, C. C. (1998). Gender differences in the Supreme Court. In F. L. Morton (Ed.), *Law, politics and the judicial process in Canada*, (85-90, 3rd ed.). Calgary: University of Calgary Press.
- Ziegel, J. S. (2001). Merit selection and democratization of appointments to the Supreme Court of Canada. In P. H. Howe & P. H. Russell (Eds.), *Judicial power and Canadian democracy* (131-64). Montreal: McGill-Queen's University Press.

**Appendix**

**Part 1 – Factor Analysis Results for the Lamer Court (1992-97) and Rehnquist Court (1994-1999 Terms) in Three Areas of Law**

<b>LAMER COURT</b>						
<b>Justice</b>	<b>ECONOMIC</b>		<b>CRIMINAL</b>		<b>CIVIL RIGHTS &amp; LIBERTIES</b>	
	<b>Factor 1 Lib-Cons</b>	<b>Factor 2 Agency Def.</b>	<b>Factor 1 Lib-Cons</b>	<b>Factor 2 Evidence</b>	<b>Factor 1 Lib-Cons</b>	<b>Factor 2 Agency Def.</b>
LHD	.610	-.347	-.796	-.060	.213	.614
LAF	.601	.055	-.578	-.010	-.767	-.158
GON	.533	.438	-.624	-.186	-.763	-.010
COR	.295	.421	.116	.654	.233	-.234
MCL	.123	-.782	-.151	-.615	.781	.314
LAM	-.056	.536	.642	-.100	-.176	-.472
IAC	-.219	.654	-.104	.781	.158	-.805
MAJ	-.645	.065	.723	.241	-.576	.096
SOP	-.830	.212	.819	.081	.021	-.731
Eigen Value	2.28	1.87	3.01	1.53	2.27	1.97
% of Variance	25.3	20.7	33.4	17.0	25.2	21.9

<b>REHNQUIST COURT</b>						
<b>Justice</b>	<b>ECONOMIC</b>		<b>CRIMINAL</b>		<b>CIVIL RIGHTS &amp; LIBERTIES</b>	
	<b>Factor 1 Fed/State</b>	<b>Factor 2 Lib-Cons</b>	<b>Factor 1 STV Ideology</b>	<b>Factor 2 Lib-Cons</b>	<b>Factor 1 Jud. Power</b>	<b>Factor 2 Lib-Cons</b>
REN	.723	-.178	.783	-.175	.750	-.173
THO	.619	-.549	.675	-.423	.740	.236
KEN	.610	.579	.379	-.280	.340	-.336
SCA	.364	-.713	.646	-.355	.738	-.423
OCO	.144	-.716	.619	.240	.561	.391
GIN	-.252	.521	-.172	.814	-.331	.629
SOU	-.601	.250	-.139	.705	-.187	.822
BRY	-.640	.219	-.122	.726	-.088	.845
STV	-.647	.545	-.856	.254	-.863	.236
Eigen Value	2.68	2.37	2.81	2.22	2.98	2.53
% of Variance	29.8	26.3	31.2	24.7	33.1	28.1

## Notes

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<sup>1</sup> One of the flaws with presuming a one-dimensional ideological issue space in Supreme Court decision making is that it necessarily oversimplifies the complexity of cases. Many of the disputes come to the court featuring cross-pressured issues that could essentially challenge the pre-conceived ideological beliefs of a justice. Take, for example, a union case that raises First Amendment claims by a dissident employee, or a challenged law that prevents publication of material in a case related to spousal abuse. How exactly is a quintessential “liberal” supposed to consider those disputes in one ideological domain? Should the liberal judge side with the union or free speech claims? Should the liberal judge advance the interests of a free press or the societal interests of female victims of abuse? In reality, these cases cut across two different attitudinal structures of ideology, forcing some justices into potentially uncomfortable territory that might reveal ideological complexity rather than singularity. Just as Harold Spaeth’s (1999) dataset envisions multiple issue dimensions within a single case, scholars should be wary of imputing one ideological map onto the minds of justices.

<sup>2</sup> There are theoretical reasons for confining the analysis to natural court periods. The logic of such an approach is that court membership changes can alter the attitudinal dynamics of a court. Courts can be seen as small group decision making bodies, and any membership change necessarily alters the characteristic patterns of the group dynamic and ideological alliances that preceded the membership change. Thus, any effort to factor analyze voting patterns across different natural courts may tend to distort ideological behavior across two distinct social groups, which necessarily introduces an element of error into the subsequent analysis. The analysis of natural courts is a common technique utilized in the judicial literature (for examples see Shubert, 1974; Ducat and Dudley, 1987; Baum, 1988; Hensley & Smith, 1995; Grofman & Brazill, 2002).

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<sup>3</sup> Our factor analysis in each area forced a two-factor solution using varimax rotation techniques (see Kim and Mueller, 1978a, 1978b). The two-factor results from our data align well with the two dimensional approach presented by Grofman and Brazill (2002). In a replication of their methodology on the Lamer Natural Court, we found that a one-dimension solution for all nonunanimous cases accounted for 84 percent of the variance in voting, while a two-factor solution returned an R Square value of .95. These results inspired confidence in our decision to limit the discussion to the two strongest factors in our analysis of the sub-fields of law.

<sup>4</sup> Labeling the first factor as a left-right dimension was reinforced by the fact that cases found in the middle of the distribution featured no clear left-right pattern in the case outcomes. Indeed, three of the five cases in the center featured conservative rulings, while the other two were liberal. A relatively similar contrasting pattern also emerged for cases found at the center and those at the extreme in the first factor for criminal and civil rights and liberties cases, which also turned on a liberal-conservative divide. As in the economic area, the center scoring cases on the first factor in these other two areas presented a more mixed pattern of liberal outcomes.

<sup>5</sup> Hagle and Spaeth's (1992, 131) analysis of the entire Burger Court period found that the following dimensions of conflict were prominent: economic libertarianism, the exercise of judicial power, federalism, and agency action.

<sup>6</sup> The liberal-conservative factor loadings for the Canadian justices were taken from the first factor in each of the three areas, while the U.S. factor loadings derive from the second factor in each area. We chose to analyze the second factor in the criminal area of the U.S. Court for consistency purposes and because the second factor addressed a liberal-conservative split between two wings of the Court, while the first factor was partially driven by the unique voting patterns of Justice Stevens.

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