

Policy Preference Change and Appointments to the Supreme Court of Canada

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Canadian prime ministers appoint judges to the Supreme Court of Canada at their own discretion. This practice has been criticized as providing prime ministers with the ability to appoint judges whose policy preferences are regarded as politically congenial. We examine the Court's judgments in the post-*Charter* era to discern the apparent policy preferences of the judges. Our results suggest that the policy preferences of judges are not strongly associated with the political party of the prime minister and that their policy preferences shift over time in seemingly unpredictable ways. We discuss the implications of this analysis for possible reforms of the appointments process.

Les premiers ministres canadiens nomment les juges de la Cour Suprême du Canada à leur seule discrétion. Cette pratique a été critiquée, car elle permet aux premiers ministres de nommer des juges dont les préférences politiques se rapprochent le plus des leurs. Nous analysons les jugements de la Cour durant l'ère post-Charte afin de discerner les préférences des juges en matière de politiques. Nos résultats indiquent que les préférences des juges en matière de politiques ne sont pas étroitement liées à celles du parti du premier ministre, et que ces préférences changent avec le temps d'une manière imprévisible. Nous discutons des conséquences de cette analyse sur les réformes possibles du processus de nomination.

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IS IT PROBLEMATIC THAT APPOINTMENTS to important judicial posts, including appointments to the Supreme Court of Canada, have historically been made entirely at the discretion of the prime minister? On the basis of an empirical analysis of the judgments of the Supreme Court from 1982 to the 2004 term, we argue that, to date, it has not been terribly problematic. We propose that, although the current appointments process for Supreme Court judges may be in need of reform to prevent possible future abuses, any such reform must remain mindful of the famous Hippocratic dictum that, in treating a patient, one should be careful to “do no harm.”¹

Perhaps it should not be too surprising that the evidence shows that the judicial appointments process to the Supreme Court has been satisfactory. For much of Canada’s history, the power to make judicial appointments was not regarded as a particularly important one. However, with the advent of the *Charter of Rights and Freedoms*² in 1982, the role of the judiciary has become more overtly

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1. Hippocrates, *Of the Epidemics*, trans. by Francis Adams (400 BCE), Section II, Second Constitution at para. 5, online: The Internet Classics Archive <<http://classics.mit.edu/Hippocrates/epidemics.1.i.html>>. The precise words are: “[t]he physician must be able to tell the antecedents, know the present, and foretell the future—must mediate these things, and have two special objects in view with regard to disease, namely, to do good or to do no harm. The art consists in three things—the disease, the patient, and the physician. The physician is the servant of the art, and the patient must combat the disease along with the physician.”
 2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

politicized. Some critics of the post-*Charter* era judiciary have objected to the actions of “activist” judges, who they characterize as making social policy for the country on the basis of liberal agendas. The harshest of these criticisms have been reserved for the judges of the Supreme Court.³ Defenders of Canada’s judiciary, on the other hand, argue that the judges did not arrogate to themselves the duty to enforce and interpret constitutionally-entrenched *Charter* rights. Instead, the courts are seen as merely fulfilling their role in ensuring that governments at all levels comply with the Canadian constitution.⁴

Predictably, the greater role that our courts, including the Supreme Court, have taken in reviewing government action has led to a higher public profile for the judiciary. This higher profile has, in turn, led to greater public scrutiny of judicial appointments in general, and appointments to the Supreme Court in particular. Calls for a reformed appointments process have been recurrent.⁵ These calls have resulted in some modest changes, though the power to make appointments (not simply to nominate judges, as in the United States) continues to reside ultimately with the prime minister.⁶ Thus far, calls for an American nomination and formal legislative vetting process have been unsuccessful. However, in the medium- to long-term, it may be, as recent Supreme Court appointee

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3. See e.g. F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000). Morton and Knopff claim that the Supreme Court “sees itself as the authoritative oracle of the constitution” (at 54). Later, they write: “[a] people prepared to treat political opponents as legitimate surely needs to make government by discussion a leading means of settling political differences. To the extent that the Charter represents a flight from this kind of politics, it can be understood as threatening rather than promoting the unity necessary to a sovereign people” (at 150).
 4. “Neo-conservative critics condemn Charter interpretation as the judicial imposition of naked preferences. Yet judicial interpretation is firmly grounded in the Charter’s text and political history and Canada’s institutional structure and postwar social model. The critics reserve their praise for judges who do exactly what they decry—impose their own personal, conservative values not found in the Charter.” Lorraine Weinrib, “The Activist Constitution” (April 1999) *Policy Options* 27 at 27.
 5. See e.g. Allan Hutchinson, “Let’s try democracy when choosing top judges” *The Globe and Mail* (3 March 2004) A19. See generally Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).
 6. See Part II for a discussion of the appointments process. For a detailed treatment of the appointments processes throughout Canada, including both federal and provincial appointments, see Richard Devlin, A. Wayne MacKay & Natasha Kim, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a ‘Triple P’ Judiciary” (2000) 38 *Alta. L. Rev.* 734.

Marshall Rothstein contends, that “the genie is out of the bottle.” He is doubtful, moreover, that we will ever “go back to a less public process for Supreme Court nominations.”⁷

Nevertheless, it seems, at least for the moment, that the genie is back in the bottle. Prime Minister Stephen Harper rushed to nominate Justice Thomas Cromwell of the Nova Scotia Court of Appeal to the Supreme Court on the eve of the announcement that there would be a federal election called for 14 October 2008.⁸ The move bypassed the all-party parliamentary selection committee that Prime Minister Harper himself had established earlier in the year to vet nominees to the Court.⁹ Although the prime minister sidestepped the selection committee, Justice Cromwell was initially expected to face an *ad hoc* all-party committee of parliamentarians for questioning, just as Justice Marshall Rothstein did as a nominee in 2006.¹⁰ However, in the end, the prime minister appointed him without any such hearing.¹¹

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7. Justice Marshall Rothstein was sworn into office as a justice of the Supreme Court on 9 March 2006. Justice Marshall Rothstein, “The Supreme Court Appointment Process” (2006-2007 David B. Goodman Lecture, delivered at the Faculty of Law, University of Toronto, 25 October 2006), at 31:54m of the streaming video, online: Information Commons, University of Toronto <<http://142.150.64.63/20061025GoodmanLaw/index.htm>>. “In a short period of time, we have come some distance from the traditional system in which the prime minister unilaterally chose his nominee with no oversight process at all. ... Our present prime minister and minister of justice indicated quite clearly before they were elected to government their preference for a parliamentary hearing process at which the nominee would be present to answer questions from the committee, and that is what transpired this time around. ... Two things that moderated the process that I went through will never happen again. The first was that I happened to be on the list of nominees of one government and from which the new government selected its candidate. That coincidence will likely never happen again. Second, the usual aggressiveness between the opposition and government had not yet developed. The government was brand new and that coincidence will likely never happen again. So a civil and productive process is not a guarantee for the future. But the genie is out of the bottle. I don't think we will ever go back to a less public process for Supreme Court nominations.”
 8. “Prime Minister Stephen Harper jettisoned his own selection panel made up of five MPs—two Conservatives and one from each opposition party—to make the nomination a day before announcing an election.” Robert Todd, “Nova Scotia's Cromwell Nominated for SCC” *Law Times* (15 September 2008), online: <<http://www.lawtimesnews.com/Headline-News/Nova-Scotias-Cromwell-nominated-for-SCC>>.
 9. *Ibid.* The establishment of the committee followed Justice Michel Bastarache's announcement in early April 2008 that he would be leaving the Court.
 10. *Ibid.*
 11. Peter W. Hogg, “Appointment of Thomas A. Cromwell to the Supreme Court of Canada”

Assuming that we do not permanently revert to a less public process for appointing future judges to the Supreme Court, the question becomes what sort of public process it *should* be. In this article, we argue that several key assumptions underlying the debate surrounding the appointments process remain insufficiently tested to empirically answer this question. Paramount among these is that prime ministers can accurately predict how potential nominees will decide ideologically divisive appeals. A fundamental and outstanding empirical issue for those on both sides of the debate is that no one really knows how predictable judicial attitudes are likely to be at the time of a judge's appointment.

In this article, we address the predictability of judicial voting through an empirical analysis of Supreme Court judgments in the post-*Charter* era. We examine how the policy preferences of the judges have shifted, if at all, between 1982 and 2004, focusing particular attention on the behaviour of judges immediately following their appointment. Our goal is to determine whether prime ministers (or others) can predict how judges will decide future appeals. Predictions may, for example, be inaccurate because preferences are not transparent at the time of appointment, or because judges exhibit a random walk in their voting patterns over time. If it is not possible to predict at the time of appointment how a judge will decide future appeals, then the ideologically-infused debate surrounding appointments to the Court is over-emphasized, if not entirely misplaced.

Part I of this article briefly describes the current appointments process for judges of the Supreme Court and sets out the current debate about appropriate reforms to this process. Part II describes our data set of decisions between 1982 and the end of the 2004 term. We then discuss the two methodologies used to assess preference change among the judges of the Court. The first is a direct methodology based on the observation of judicial votes in various areas of law. The second is an indirect methodology using a Bayesian inference and a Markov Chain Monte Carlo methodology to uncover the latent policy preferences of the judges based on a spatial item-response theory model.¹² Our results are presented in Part III.

We begin by assuming that judges have constant preferences over their tenure on the Court, after which we relax this assumption and assess the conse-

(Paper presented to the 2008 Constitutional Cases Conference, Osgoode Hall Law School, York University, 17 April 2009) [unpublished] [Hogg, "Cromwell"].

12. See Part II.C for a description of the indirect method.

quences. Our results suggest that the policy preferences of judges do indeed shift over time and, as we explain in Part IV, this shifting has significant implications for both sides of the debate about Supreme Court appointments.

I. FRAMING THE JUDICIAL APPOINTMENTS DEBATE IN CANADA

A. THE CURRENT APPOINTMENTS PROCESS IN CANADA

Canadian political scientist Peter McCormick argues that the “modern” process for appointments to the Supreme Court of Canada began in the 1970s.¹³ Before then, appointments emphasized patronage and partisanship. Several judges were politicians, or had strong personal connections to politicians, and most had little or no prior judicial experience.¹⁴ Reforms began with Pierre Elliot Trudeau’s appointment as justice minister in 1967 and continued through his time as prime minister. The Trudeau reforms expanded the process of generating lists of nominees and introduced extensive consultations with legal professionals. These reforms also placed a new emphasis on candidates’ prior judicial experience, familiarity with the academic side of the law, and non-partisan public service.¹⁵

Before 2004, only sketchy details of the federal judicial appointments process were made publicly available.¹⁶ Among others, the minister of justice would consult with the chief justice of the Supreme Court, other Supreme Court judges, provincial chief justices, attorneys general, Canadian Bar Association officials, and law society officials.¹⁷ The prime minister would then choose a nominee from a list resulting from these consultations that was prepared by the minister of justice.

13. Peter McCormick, “Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada” (2005) 7 J. App. Pr. & Pro. 1 [McCormick, “Selecting”].

14. *Ibid.*

15. *Ibid.* at 13-16.

16. Peter W. Hogg, “Appointment of Justice Marshall Rothstein to the Supreme Court of Canada” (2006) 44 Osgoode Hall L.J. 527 at 528 [Hogg, “Rothstein”]. See also Devlin, MacKay & Kim, *supra* note 6 at 763.

17. House of Commons, Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointments Process* (Ottawa: Communication Canada, 2004), cited in McCormick, “Selecting,” *supra* note 13 at 15.

In 2004, then Justice Minister Irwin Cotler answered questions from the Standing Committee on Justice of the House of Commons about the individuals—Rosalie Abella and Louise Charron (both previously judges of the Ontario Court of Appeal)—who had been nominated to the Supreme Court by Prime Minister Paul Martin.¹⁸ The membership of this committee consisted of seven members of Parliament, a Supreme Court judge, and a law society bencher.¹⁹ The committee had no power to veto or even delay appointments.²⁰ This process appears, in retrospect, to have simply been an *ad hoc* attempt to provide the appearance of some public scrutiny of the prime minister's selections for appointment.

In 2005, Prime Minister Martin added an advisory panel to the process. The advisory panel consisted of one member of Parliament (MP) from each political party, a retired judge, the attorney general from the relevant region, an official from the relevant provincial law society, and two laypersons.²¹ Under this new process, the minister of justice would create a list of eight nominees, from which the panel would create a short list of three. The prime minister would then appoint one of those three nominees from the list.²² It appears that once an appointment was made, the minister of justice would again appear before a parliamentary committee to answer questions regarding the prime minister's selection. This process was interrupted by the federal election of 23 January 2006, which was won by Stephen Harper's Conservative Party.

At the time of the election, the Supreme Court had one vacancy and the advisory panel had generated its short list of three candidates. Instead of recommencing the process, Prime Minister Harper decided to appoint one of the three candidates from the short list. Rather than have the minister of justice appear before a committee, the nominee appeared before a parliamentary committee in a publicly-televised hearing. The committee's membership consisted of twelve MPs, with each party represented in approximate proportion to its number of seats in the House of Commons. The committee members could ask any ques-

18. Hogg, "Cromwell," *supra* note 11.

19. Cristin Schmitz, "New SCC Appointments Praised While Review Process Condemned" *The Lawyers Weekly* 24:17 (10 September 2004).

20. Peter McCormick, "The Serendipitous Solution to the Problem of Supreme Court Appointments" (2006) 44 *Osgoode Hall L.J.* 539 at 543 [McCormick, "Serendipitous"].

21. Jacob Ziegel, "A New Era in the Selection of Supreme Court Judges?" (2006) 44 *Osgoode Hall L.J.* 547 at 553 [Ziegel, "New Era"].

22. *Ibid.*

tions they wished, but the nominee was not obliged to answer them. Committee members were advised ahead of time as to the sorts of questions the nominee would and would not be willing to answer. The committee did not produce a report and could not veto the appointment. The prime minister retained sole discretion over the ultimate appointment and he appointed the nominee—Marshall Rothstein.²³

Thomas Cromwell's appointment in December of 2008 did not follow this script, largely because Prime Minister Harper wanted to restore the Court to its full complement as soon as possible, and because of fears that the fall 2008 election would interfere with the process. The prime minister appointed Cromwell without a hearing. This bypassing of the public process makes it unclear how appointments will be made in the future. In this instance, it appears that Prime Minister Harper was frustrated by the slow-moving selection panel, which was composed of two Conservative Party MPs as well as one MP from each of the opposition parties. According to Justice Minister Rob Nicholson, in the month leading up to Cromwell's nomination, the selection panel "didn't get anything done because the opposition had objections to the composition of the committee," and "this month, a couple days of teleconferences had to be cancelled because no members of the opposition were available."²⁴

The process that will be used for future Supreme Court of Canada appointments, the next of which is not due to happen until 2013,²⁵ is unclear given the shifting procedures that have accompanied the last few appointments. However, the following is a thumbnail sketch that is consistent with what appears to be the current process:

- Following extensive informal consultations, the minister of justice will create a list of eight nominees following extensive informal consultations.
- An all-party parliamentary selection panel will narrow the minister of justice's list to a short list of three candidates.
- The prime minister will nominate one of the three candidates.
- The nominee will appear at a publicly-televised hearing before an all-party parliamentary committee.
- The prime minister will make the final decision whether to appoint the nominee.

23. Hogg, "Rothstein," *supra* note 16 at 529-30.

24. As quoted by John Ward, "Harper nominates Nova Scotian to Supreme Court" *The Globe and Mail* (5 September 2008) [on file with the Osgoode Hall L.J.].

25. Justices of the Supreme Court of Canada must retire at the age of seventy-five. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 9(2).

It should be noted that there is a statutory requirement that at least three of the nine judges on the Supreme Court must be from the province of Quebec.²⁶ Although there is no formal requirement, the convention is that three of the remaining judges will be appointed from Ontario, two will be drawn from the western provinces (British Columbia, Alberta, Saskatchewan, and Manitoba), and one will be selected from the eastern provinces (New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland). The current practice is that, as judges retire, they are replaced with judges from the same geographical area.

B. THE DEBATE OVER THE APPOINTMENTS PROCESS

Academics and newspaper editorialists have debated the merits of public hearings for judicial nominees at length. Opponents fear that the hearings will undermine judicial independence by forcing judges to defend their decisions and ideologies to the members of the legislature.²⁷ Opponents also suggest that the current appointments process, for all its flaws, is non-partisan, and that televised hearings would only politicize it, weakening public confidence in the Court and its judges.²⁸ They also claim that strong candidates may refuse appointments to avoid putting their personal lives before a national audience.²⁹ Finally, opponents argue that problems with the appointments process are better resolved before, not after, nominations are made. For example, an independent commission could generate a short list of nominees, from which the prime minister might be compelled to choose. That way, appointments could be made more transparent and accountable without sacrificing judicial independence.³⁰

Supporters of public hearings, on the other hand, claim that they are an excellent way to make appointments transparent. Democratic values, they argue,

26. *Ibid.*, s. 6. “At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.”

27. See *e.g.* Kent Roach, “Supreme Court of Canada Appointments and Judicial Independence” (2004) 48 *Crim. L.Q.* 397 at 398; Lorne B. Neudorf, “Independence and the Public Process: Evolution or Erosion?” (2007) 70 *Sask. L. Rev.* 53 at 86; and Adam M. Dodek & Lorne Sossin, eds., *The Future of Judicial Independence* (Toronto: University of Toronto Press) [forthcoming].

28. The Honourable Michael J. Bryant, “Judging the Judges: Judicial Independence and Reforms to the Supreme Court of Canada Appointment Process” (2004) 24 *S.C.L.R.* (2d) 29.

29. McCormick, “Selecting,” *supra* note 13 at 33.

30. See *e.g.* Roach, *supra* note 27; Bryant, *supra* note 28; and *ibid.*

demand public scrutiny of nominees in light of the important role played by the judges of the Supreme Court in influencing social policy specifically, and public policy more generally.³¹ Hearings can also help to educate Canadians about the role of the judiciary in our legal system.³² Supporters argue that hearings will not politicize the process, but will only bring the politics of appointments out of backrooms and into the public eye.³³ Supporters also reject the argument that hearings threaten judicial independence. So long as hearings are properly regulated, nominees will not be subject to the types of questions that might compromise their integrity.³⁴ Most fundamentally, they argue, hearings will prevent prime ministers from appointing judges on a purely partisan basis.³⁵

Academics on both sides of the debate seem to agree that the pre-2004 judicial appointments process should be changed. The arguments in favour of change involve, among others, the benefits of transparency, especially given the enormous power of Supreme Court justices to create law and decide policy.³⁶ Political scientist Peter McCormick, for example, argues that the public should know who was consulted in generating nominee lists, what qualities were emphasized in candidates, and what led the prime minister to choose the particular appointee.³⁷ Law professor Jacob Ziegel similarly argues that Canadians

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31. Jacob S. Ziegel, Address (Presented to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 23 March 2004), cited in Neudorf, *supra* note 27 at 71-72 [Ziegel, Address]; Angie Mohr, "Judging Canada's judges; view from the Right: We deserve to know powerful justices better" *The Record [Kitchener-Waterloo]* (25 February 2006) A15.
 32. Mohr, *ibid.*; Ziegel, "New Era," *supra* note 21 at 554.
 33. Ted Morton, Address (Presented to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 1 April 2004), cited in Neudorf, *supra* note 27 at 74; Grant Huscroft, "Judicial reform inevitable" *Toronto Star* (22 February 2006) A17; and Mindelle Jacobs, "Winds of Judicial Change in the Air" *Edmonton Sun* (23 February 2006) 11 (Editorial/Opinion).
 34. Ziegel, "New Era," *supra* note 21 at 553; Hogg, "Rothstein," *supra* note 16 at 528.
 35. Ted Byfield, "Courting Change" *Calgary Sun* (24 February 2006) 14 (Editorial/Opinion); Ted Byfield, "Harper Thinks We're Running a Democracy" *Calgary Sun* (7 September 2003) C3.
 36. This brings to mind the observation made by Louis D. Brandeis (before he became a judge on the US Supreme Court): "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (New York: McClure Publications, 1914) at 92.
 37. McCormick, "Selecting," *supra* note 13 at 16.

are suspicious of closed-door deliberations³⁸ and claims that making Supreme Court appointments behind closed doors is inconsistent with due process and the rule of law.³⁹

A related concern is the possibility of political appointments. Some writers characterize the current system as partisan, arguing that this can be discouraged by a more transparent process.⁴⁰ Others believe that partisan appointments do not occur, but are possible, and Canadians know it. They argue that transparency would improve public confidence in the justice system.⁴¹

Fuelling the debate over the transparency issue in Canada are the perceived shortcomings of the appointments process to the US Supreme Court, which requires the Senate to confirm the president's nominee. Under the US Constitution,⁴² the president "shall nominate, and by and with the advice and consent of the Senate, shall appoint ... judges of the Supreme Court."⁴³ Presidents engage in extensive consultations before nominating a candidate and conduct a thorough investigation of their nominees. Once nominated, a candidate is considered by the Senate Judiciary Committee. The Committee makes its own investigation and conducts a public hearing at which the nominee testifies. The Committee reports its recommendation to the Senate, which debates and votes on the confirmation. If the vote succeeds, the appointment is confirmed.

Supporters of hearings in Canada note that Marshall Rothstein's hearing was calm and civilized, so hearings need not become American-style circuses.⁴⁴ A number of commentators, however, have proposed an independent advisory commission as an alternative to hearings.⁴⁵ The commission would generate a list of nominees from which the prime minister would choose. In some versions, it would be apolitical with no MPs sitting on the commission. Depending on

38. Ziegel, "New Era," *supra* note 21 at 555.

39. Ziegel, Address, *supra* note 31 at 71-72.

40. See *e.g.* Ziegel, "New Era," *supra* note 21 at 551.

41. See *e.g.* Hogg, "Rothstein," *supra* note 16 at 533-34; Roach, *supra* note 27 at 397.

42. U.S. Const. art. II, § 2, cl. 2.

43. *Ibid.* For an overview of the US appointments process, see Denis Steven Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate" (Library of Congress, 2005), online: US Department of State <<http://fpc.state.gov/documents/organization/50146.pdf>>.

44. Ziegel, "New Era," *supra* note 21 at 548-49.

45. See *e.g.* McCormick, "Selecting," *supra* note 13; Roach, *supra* note 27; and Bryant, *supra* note 28.

the openness of the process, proponents argue that such a commission could create a transparent public process for nominations with the appearance of impartiality. By generating nominations, the commission has more power than a committee, which can only accept or reject a chosen candidate. Furthermore, since legislatures would be left out of the process entirely, judicial independence would not be compromised. The main criticism of this proposal is that it might result in “safe” appointments on which the entire committee (or a super-majority of the committee) could agree. Controversial judges would be excluded, even if, like former Chief Justice Bora Laskin, they may have a stronger, positive impact on Canadian law.⁴⁶

Another interesting proposal builds on the appointment of Marshall Rothstein, where the Liberals generated a list of nominees, but the Conservative Prime Minister appointed the judge. The result was a candidate on which both major parties agreed. McCormick proposes a general appointments process in which opposition parties submit nominations from which the prime minister chooses.⁴⁷

Yet another suggestion is for provincial premiers to nominate candidates, from which the prime minister must choose an appointee. Proponents argue that because the Supreme Court decides federalism cases, it seems unfair that only one level of government has the power to appoint judges. This proposal was included in the Meech Lake and Charlottetown Accords, which were never adopted, and has been given diminished attention in recent years.⁴⁸

C. THE UNDERLYING ASSUMPTIONS AND THE ATTITUDINAL MODEL

As can be seen, there has been considerable debate surrounding judicial appointments in Canada. However, much of the debate is discursive, lacking a firm empirical foundation for the assumptions on which it is based. Those in favour of a more political process assume that parliamentary hearings will expose the hidden policy preferences of Supreme Court nominees. Decisions would then be based on a nominee’s legal abilities as well as his or her revealed policy preferences. This transparency is regarded as superior to a process which is closed to public scrutiny and in which an independent commission vets names and provides a short list to the prime minister. One of the key assumptions of those

46. Hogg, “Rothstein,” *supra* note 16 at 535.

47. McCormick, “Serendipitous,” *supra* note 20 at 544-45.

48. McCormick, “Selecting,” *supra* note 13 at 30-32.

in favour of public hearings is, therefore, that such hearings will reliably uncover a candidate's preferences and provide an indication of how a judge will vote in future appeals. Complaints regarding the current process assume that prime ministers have for too long been able to appoint individuals who will systematically pursue justice in a way that is consistent with the prime minister's own political outlook.

Those in favour of a process that is more consciously insulated from overt political pressure, such as one involving an independent commission, worry that a more political process, such as that of the United States, will affect the type of individuals who are selected for the Supreme Court. This, in turn, affects the type of decision making by those who are on the Court. Proponents of this view seek the strongest jurists without regard to their policy preferences. They are concerned about the current Canadian appointments process because they believe it may lead to the appointment of justices based more on the appeal of their policy preferences to prime ministers than on their legal talent and acumen. The assumption underlying this position is that most appeals can be decided on the basis of legal reasoning without recourse to one's policy preferences. Under this view, it would be dangerous to adopt a system of judicial appointments that will yield weak jurists with policy preferences that appear to be politically attractive to a governing party. The best possible system, on this view, would be one that could reliably assess a prospective judge's legal abilities and commitment to deciding cases on the basis of their legal merits, rather than in a results-oriented or "attitudinal" manner.

One of the central assumptions underlying this debate is that it is possible to know the policy preferences of a prospective judge before making an appointment. After all, if prime ministers cannot determine *ex ante* how a particular justice is likely to vote in politically charged appeals, then it would seem that the hopes of those in the first camp of exposing and testing nominees' political preferences are fanciful at best.

A further assumption is that justices come "pre-loaded" with a certain policy orientation and that this policy orientation does not, or is unlikely to, change over time. In other words, there is an assumption that justices will have unwavering, constant policy preferences. This assumption is important because, even if a justice's policy preferences can be known at the time of appointment, this information may be of only short-run relevance if the views of justices are subject to continuous drift, revision, refinement, and change.

These assumptions give rise to a number of empirical questions that we seek to address in this article. Can a prospective justice's policy preferences be known before appointment? Do justices' policy preferences change over time? Is there a predictable pattern as to how the apparent policy preferences of justices change over time?

The next Part describes both the data set we use to address these questions and the two distinct analytical approaches taken in assessing the empirical evidence. Throughout the analysis, and to allow the model to be tractable, we assume that judges decide cases at least partly on the basis of their policy preferences or attitudes. We are not committed to the view that Supreme Court judges *actually* decide cases almost always, usually, or even commonly, on the basis of their policy preferences, but stress instead that our methodological approaches are pragmatic and open-minded. We are aware that the attitudinal model of judicial decision making has been subjected to considerable empirical testing in the US literature. That literature generally supports the attitudinal model, accepting the assumption that judicial decision making is based, in part, on policy preferences, particularly in civil rights and civil liberties cases.⁴⁹ As will be discussed further in Part II, there have been fewer studies of the applicability of the attitudinal model to Canadian courts. The studies that have been done tend to find that attitudinal factors are important to judicial decision making, but policy preferences are (not surprisingly) not the only factor that judges take into account.⁵⁰

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49. See *e.g.* Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993) [Segal & Spaeth, *Supreme Court*]; Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002) [Segal & Spaeth, *Revisited*]; Cass R. Sunstein *et al.*, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington: Brookings Institution Press, 2006); and Andrew D. Martin *et al.*, "Competing Approaches to Predicting Supreme Court Decision Making" (2004) 2 *Persp. on Pol.* 761.
50. "Although a substantial amount of attitudinal decision making appears in diverse areas of law in the post-*Charter* Court, especially in non-unanimous cases, the impact of ideology is not as crystal-clear or as systematic as that found in the US context." C.L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2007) at 226 [Ostberg & Wetstein, *Attitudinal Decision Making*]; C. Neal Tate & Panu Sittiwong, "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations" (1989) 51 *J. Pol.* 900; Donald Songer & Susan Johnson, "Attitudinal Decision Making in the Supreme Court of Canada" (Paper presented to the Midwest Political Science Association Meetings, 2002)

We do not assume that the Supreme Court judges decide cases solely on the basis of policy preferences. However, in order to test the applicability of the attitudinal model of judicial decision making, we formulate our analyses around this assumption to see what conclusions emerge from the data.

There are two other principal models of judicial decision making.⁵¹ First, the “strategic” model assumes that judges do not “sincerely” or directly vote for their preferred policy outcome in each case, but instead take into account how their votes will affect and be affected by other actors (such as other judges on the particular court) and other institutions (such as the legislature).⁵² Second, there is a “legal” model which assumes that judges vote in accordance with legal principles, norms of statutory interpretation, and precedent. In cases where this approach yields ambiguous results, judges attempt to interpret the case law or statute in the manner most consistent with the aims of the statute or case law as a whole.

Although the attitudinal model rejects a rigid, formalistic conception of judging,⁵³ it does not necessarily reject the idea that judicial discretion is constrained to some extent by established statutory law or precedent. In deploying the attitudinal model, we also do not naively assume that strategic considerations (such as how the legislature will react to judicial decisions) are irrelevant. Our

[unpublished]; and Thaddeus Hwong, “A Review of Quantitative Studies of Decision Making in the Supreme Court of Canada” (2004) 30 Man. L.J. 353 [Hwong, “Review”].

51. For a discussion of different models of judging, see Segal & Spaeth, *Revisited*, *supra* note 49. Chapter two discusses models that emphasize the effects of statute and precedent; chapter three introduces models of strategic considerations.
52. See *e.g.* Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington: Congressional Quarterly Press, 1998) (arguing that justices should be viewed as voting strategically); Thomas H. Hammond, Chris W. Bonneau & Reginald S. Sheehan, *Strategic Behavior and Policy Choice on the U.S. Supreme Court* (Stanford: Stanford University Press, 2005) (presenting a formal model of strategic decision making by judges); Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge: Cambridge University Press, 2000) (examining coalition-building on the US Supreme Court); and Segal & Spaeth, *Revisited*, *supra* note 49 (discussing models of judicial decision making).
53. Such a formal approach is variously referred to as an “idealist,” “traditionalist,” or “positivist” view of judicial decision making. See *e.g.* James A. McKenna III, “The Judge as Dramatist” (1982) 5:2 ASLA Forum, online: <<http://tarlton.law.utexas.edu/lpop/etext/lfsf/mckenna5.htm>>. McKenna describes the “positivist judge” as someone who “does not readily abandon precedent or interpret a statute in such a novel way that he then becomes an activist, substituting principles for rules, what ought to be for what is.”

underlying methodological assumption is, however, that judges do exercise some discretion in deciding appeals, and that in doing so they inevitably draw upon and reveal information about their policy preferences and attitudes.

As we will discuss in Part IV, the results of our empirical analysis raise serious questions about the applicability of the attitudinal model of decision making to the Supreme Court. We suggest that a better understanding might come through a new model that draws on the insights of each of the attitudinal, strategic, and legal models.⁵⁴

II. ASSESSING THE EMPIRICAL EVIDENCE

A. DATA

To analyze the issues surrounding the prediction of the voting behaviour of Supreme Court judges, we created a database that accounts for the institutional features of the Court, the voting record of each justice, and the potential differences across different areas of law. The database includes all reported Supreme Court decisions (both appeals and references) heard from the beginning of September 1982 to the end of June 2005.⁵⁵ We coded the cases for a number of basic categories, such as outcome of appeal,⁵⁶ panel size, and the contribution of each justice to the disposition of the appeal.⁵⁷

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54. Another theory of judicial decisions assumes that judges, like other people, seek the esteem and respect of others and therefore decide cases in a manner that appeals to various audiences whose esteem and respect they value. See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006) [Baum, *Audiences*]. Baum argues for the importance of the audiences to which judges are appealing and the lack of a theory of judicial motivation in other approaches to judicial decision making.
55. Motions, applications, and interventions were not included. This information was retrieved from the Supreme Court Reports and the LexUM website, courtesy of the University of Montreal's Faculty of Law. Judgments that result from two appeals were indexed as one case, just as they are published. This data set has been subject to random sampling and no errors have been found to date. However, despite our best efforts, we cannot guarantee that our data set is error free. For more information on the manner of coding the decisions, please contact the authors.
56. The treatment of each case was divided into three categories: (1) appeal allowed, (2) appeal dismissed, and (3) mixed and appeal allowed in part. Where possible, references were sorted into one of these three categories.
57. For the contribution of each justice in each decision, we examined their type of participation: (1) concurring, (2) majority, (3) dissenting and dissenting in part, and (4) unanimous. We

In order to get a sense of whether policy preferences matter or change in accordance with the subject matter of the case, we coded the appeals by area of law.⁵⁸ While all cases were categorized, for the purposes of much of the analysis in this article the relevant case categories are:⁵⁹

- Aboriginal (including fishing, hunting, and land rights, the fiduciary duty of the Crown, the constitutionality of statutes/laws under section 35(1), and *Indian Act*⁶⁰ appeals);
- *Charter of Rights and Freedoms* (encompassing all types of *Charter* challenges);⁶¹
- Criminal (including substantive and procedural issues, as well as *Charter* issues);⁶²

also coded whether the justice delivered or wrote the judgment. Where no single justice has written the judgment, as in a *per curiam* decision, no single justice received credit (there were twenty-four such judgments). Where a justice is part of both the majority and concurring judgment, he or she is marked as a part of the concurring judgment. Where a justice is part of two different concurring or dissenting judgments, he or she is marked as having a judgment of their own. Justices that dissent only in the cross-appeal are considered part of the majority.

58. This categorization was surprisingly challenging. There is no widely recognized way to organize appeals by category and, indeed, appeals frequently and organically raise multiple, loosely related issues. Difficult choices were made based on a careful reading of the decision in each appeal and, where necessary, analysis of the judgments of the court of appeal and trial court in each case.
59. We categorized all decisions, such that the data we used included all decisions during this period, but, in order to allow our statistical analysis, some of the finer categorization could not be used in this paper. The other categories were administrative, constitutional (including such issues as division of powers, but not *Charter* challenges or Aboriginal issues), corporate (including bankruptcy, competition law, pension law, banking, intellectual property, insurance, patents, copyright, and bills of exchange), evidence (including both civil and criminal evidence), immigration (encompassing immigration and refugee issues), municipal (including validity of bylaws and review of municipal action), private (including contracts, torts, property, equity, trust, and family law), procedural (encompassing civil procedure), and public (including human and civil rights other than *Charter*, environmental law, unemployment insurance, maritime law, *Customs Act*, expropriation, and Communication law).
60. R.S.C. 1985, c. I-5.
61. The only time a case is given a secondary classification under the *Charter* category is when it is classified first under criminal or immigration.
62. Since each case was assigned to up to two categories, when appeals are considered to be criminal or *Charter*, it was sufficient for our purposes (unless otherwise specifically noted) that one of the categories assigned corresponded to the category of appeals being considered. Thus, to take the most common example, if an appeal was assigned to both the criminal category and also the *Charter* category, it was included in each separate category in our results (again, unless otherwise stipulated). It would have been reasonable to make those appeals that bring together two different areas of law into distinctive categories (for example, by creating a

- Labour (including appeals concerning employment contracts, unions, interpretation and application of collective agreements, and arbitration); and
- Tax (including income tax, property tax, and the Goods and Services Tax).

In the United States, the party of the appointing president has been used extensively to analyze the decisions of the Supreme Court, with studies finding some connection between the party and voting in civil rights and liberties cases.⁶³ However, Segal and Cover developed an alternative proxy to measure the ideology of the justices based on an analysis of newspaper editorials at the time the justice was appointed (“Segal-Cover scores”).⁶⁴ In the American literature, it has been found that these Segal-Cover scores are correlated with a judge’s votes in civil rights and liberties cases.⁶⁵

Ostberg and Wetstein have developed a similar set of scores for most of the Canadian justices in the post-*Charter* period (“Ostberg-Wetstein scores”).⁶⁶ These scores are reported below, sorted according to the party of the prime minister responsible for each justice’s appointment. The justices were scored on a scale of +2.00 (very liberal) to -2.00 (very conservative). Unlike the Segal-Cover scores, however, Ostberg and Wetstein based their scoring on editorial language about “a given justice’s overall approach to the law in general as well as to specific areas of law.”⁶⁷ Somewhat unfortunately for our purposes, Ostberg-Wetstein scores are not available for all the twenty-seven justices that served on the Court for the twenty-three terms that are included in our analysis. Nevertheless, in the

Charter-only category, a criminal-only category, and a combined *Charter*-criminal category). However, given the limited number of appeals heard over the time period covered by our data set, we concluded that, as a general matter, some double-counting was preferable to mutual exclusion.

63. See *e.g.* Nancy C. Staudt, Lee Epstein & Peter Wiedenbeck, “The Ideological Component of Judging in the Taxation Context” (2006) 84 Wash. U. L. Rev. 1797 at 1799, 1801 (describing a number of methods for estimating political preferences of justices).
64. See *e.g.* Jeffrey A. Segal & Albert D. Cover, “Ideological Values and the Votes of U.S. Supreme Court Justices” (1989) 83 Am. Pol. Sci. Rev. 557. These scores were based on an analysis of the language used in the editorials of four newspapers. The ideology was scored on a scale of +1.00 (liberal) to -1.00 (conservative).
65. See *e.g.* Staudt, Epstein & Wiedenbeck, *supra* note 63 at 1807-09 (discussing some of the studies using Segal-Cover scores).
66. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50 at 55. These scores are based on an analysis of editorials in nine Canadian regional papers.
67. *Ibid.* at 51.

case of judges for whom scores are available, there is an interesting connection between the scores and the party of the appointing prime minister. Conservative party appointees appear to be evenly spread between positive and negative Ostberg-Wetstein scores. Liberal appointees, on the other hand, seem predominantly to have positive (*i.e.*, liberal) scores.⁶⁸

B. THE DIRECT METHOD

The first methodology uses a direct approach to estimate the preferences of Supreme Court judges. The direct approach examines five areas of law where votes can be characterized more readily—though not without some controversy—as “conservative” or “liberal.” The votes of each individual justice in these areas are analyzed under the assumption that these votes are their “revealed preferences.”⁶⁹ For the purposes of the analysis, we will assume that these votes reflect their underlying policy preferences.⁷⁰ This method uses information about the different categories of the appeals to assign “liberal” or “conservative” labels⁷¹ to the votes of justices.⁷²

68. Among the justices appointed by Conservative prime ministers, several scored quite conservatively, such as Justice L’Heureux-Dubé (-2.00 in criminal law), Justice Chouinard (-1.375), and Justice Major (-1.320). Conservative prime ministers also appointed some justices who were scored by Ostberg and Wetstein as liberally-inclined justices, including Justice L’Heureux-Dubé (+1.32 in civil liberties), Justice La Forest (+1.50), and Justice Cory (+0.967). The justices appointed by Liberal prime ministers, on the other hand, attracted more uniformly positive Ostberg-Wetstein scores, with only Justice LeBel (-0.704) being scored as a conservative. Justice Deschamps (0.00) was scored as neither conservative nor liberal.

69. Andrew D. Martin & Kevin M. Quinn, “Assessing Preference Change on the US Supreme Court” (2007) 23 *J.L. Econ. & Org.* 365 at 366, 368

70. See Part IV, below, for a discussion of the limitations of this assumption.

71. The terms “liberal” and “conservative” are apt to be somewhat misleading and to raise associations that we do not necessarily want to evoke. Nevertheless, we are following convention in using these labels.

72. One of the limitations with the data set used in this article is that it encompasses only appeals heard and decided by the Court. In fact, most appeals require the leave of the Court in order for the appeal to be heard. Panels of Supreme Court justices decide whether or not to grant leave to appeal except for the few cases which are granted leave to appeal as of right. This process for deciding the docket of the Court provides the opportunity for a biased sample of decisions to be heard by the Court—that is, it is possible that the decision on leave to appeal could result in cases before the Court that are more or less likely to give rise to liberal or conservative votes by justices. For a discussion of this limitation on studies of the Court, see Sujit Choudhry & Claire E. Hunter, “Measuring Judicial Activism on the

Our coding is based on an approach used in recent studies of judicial attitudes in the United States.⁷³ We coded judicial votes in the following five areas:

- (i) *Charter* appeals (where a vote in favour of the claimant is considered to be liberal, and a vote in favour of the government is considered to be conservative);
- (ii) criminal appeals (where a vote in favour of the defendant is considered to be liberal, and a vote in favour of the prosecution is considered to be conservative);
- (iii) labour appeals (where a vote in favour of a union, labour organization, or worker is considered to be liberal, and a vote in favour of an employer or business interest is considered to be conservative);
- (iv) tax appeals (where a vote in favour of the government is considered to be liberal, and a vote in favour of the taxpayer is considered to be conservative); and
- (v) Aboriginal rights appeals (where a vote in favour of an Aboriginal group or individual is considered to be liberal, and a vote in favour of the government is considered to be conservative).⁷⁴

The analysis in this article builds on prior empirical studies of the Supreme Court and the voting records of justices, with some notable differences.⁷⁵ First,

Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 McGill L.J. 525 at 556. Further, there may be bias in voting records because the Chief Justice decides the size (five, seven, or nine justices) and the composition of the panel hearing a particular case. See e.g. Lori Hausegger & Stacia Haynie, "Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division" (2003) 37 Law & Soc'y Rev. 635 (discussing the potential bias in the selection of the composition of the panel by the Chief Justice). We cannot test for such selection issues in this article, but leave these questions for future research.

- 73. See e.g. Sunstein *et al.*, *supra* note 49. Sunstein and his colleagues code as liberal any vote to grant a defendant relief in a criminal appeal (at 48), to uphold an environmental regulation, a decision in favour of a union against a challenge by industry, or in favour of an individual bringing a claim of discrimination (at 19). For Canadian analysis, see e.g. Tate & Sittiwong, *supra* note 50; Songer & Johnson, *supra* note 50; and Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50.
- 74. These categorizations are necessarily rough. Some finer classifications may permit more tailored results. See e.g. Staudt, Epstein & Wiedenbeck, *supra* note 63.
- 75. See e.g. Tate & Sittiwong, *supra* note 50; Songer & Johnson, *supra* note 50; Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50; Hwong, "Review," *supra* note 50; C.L. Ostberg *et al.*, "The Nature and Extent of Attitudinal Decision Making in the Supreme Court of Canada" (Paper presented to the Annual Meeting of the American Political Science Association, 2 September 2004) [unpublished]; and C.L. Ostberg & Matthew Wetstein,

we use actual votes as the dependent variable. Most studies (other than those by Ostberg and Wetstein, and Hwong⁷⁶) have looked at the percentage of appeals in which the justice voted in a liberal manner over the course of their career.⁷⁷ The use of actual votes makes analyzing the interaction between particular justices and the context of the case more precise as compared with aggregate career voting patterns in an area of law. Second, unlike prior studies, we reverse the usual coding of a vote as liberal which upholds a government action in the face of a *Charter* challenge by a business. Third, we analyze both unanimous and non-unanimous decisions, not merely non-unanimous decisions.⁷⁸ Unanimous decisions contain considerable information about the willingness of justices to vote in certain ways, especially because the Supreme Court can overrule its prior decisions both directly and indirectly.⁷⁹

There is one other important difference. Most prior studies use broad categorizations of areas of law (civil rights, criminal, and economic). As explained in Part II.A, above, we based our analysis on more detailed categorizations. These categorizations should allow for a closer examination of whether or not there is a tie between attitudes and particular areas of law. However, even our initial categorizations may be too broad to capture some relevant differences between political parties in Canada.⁸⁰

“Dimensions of Attitudes Underlying Search and Seizure Decisions of the Supreme Court of Canada” (1998) 31 Can. J. Pol. Sci. 767.

76. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50; Thaddeus Hwong, *A Quantitative Exploration of Judicial Decision Making in Canadian Income Tax Cases* (PhD Dissertation, Osgoode Hall Law School, 2006), online: <http://www.yorku.ca/fodden/hwong/hwong_whole.pdf> [Hwong, “Quantitative Exploration”].
77. See *e.g.* Tate & Sittiwong, *supra* note 50; Songer & Johnson, *supra* note 50 at 13.
78. Ostberg & Wetstein also use both unanimous and non-unanimous decisions in some of their analysis. *Attitudinal Decision Making*, *supra* note 50.
79. See Songer & Johnson, *supra* note 50. The authors argue that non-unanimous decisions are a good proxy for appeals in which justices had no prior restraint on voting their preferences in a particular instance. See also Tate & Sittiwong, *supra* note 50. These authors argue that unanimous appeals add no helpful information for explaining judicial decision making (at 902). However, unanimous decisions are not a good proxy for when justices have a choice, as the Supreme Court of Canada can overrule its own prior decisions. Omitting unanimous decisions excludes a considerable amount of information on voting patterns given the high proportion of appeals in each term that are unanimous.
80. See Part IV for a discussion of some of the implications and limitations of our analysis.

C. THE INDIRECT METHOD: MARTIN-QUINN

The second empirical methodology we bring to bear on the data is based on the approach developed by American political scientists Andrew Martin and Kevin Quinn in analyzing the US Supreme Court.⁸¹ It brings together Bayesian statistical methods (in our case, with neutral priors—that is, no prior assumptions about where a particular judge lies in the policy space), Gibbs sampling,⁸² and a Markov Chain Monte Carlo process, culminating in a computationally intensive and quite flexible method of estimating indirectly the posterior distributions of the ideal points of the justices of the Supreme Court using an item-response theory model.⁸³

A number of assumptions are made in setting up the model of judicial decision making that underlies this indirect method. First, it is assumed that the relevant attitudinal or policy space is either (i) one-dimensional (*i.e.*, a line or spectrum) or (ii) two-dimensional (*i.e.*, a plane). In their study of the US Supreme Court, Martin and Quinn have shown that a one-dimensional policy space does an excellent job of capturing the differences in decision making among justices; however, for the reasons alluded to above, we are not as convinced that a one-dimensional policy space properly characterizes decision making on the Supreme Court of Canada. For this reason, it would be ideal to also estimate a two-dimensional item-response theory model for the Supreme Court of Canada. Unfortunately, from this perspective, a two-dimensional item-response theory model is not estimable for the twenty-three terms of our study. We are able, however, to estimate a two-dimensional model for a period of the 1990s, during which the composition of the Court remained unchanged.

Second, the indirect methodology implicitly assumes that judges vote their simple policy preferences in accordance with an attitudinal model of decision

81. See Andrew D. Martin & Kevin M. Quinn, “Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999” (2002) 10 *Pol. Analysis* 134 [Martin & Quinn, “Dynamic Ideal”].

82. For an excellent and relatively accessible introduction to the Gibbs sampling method, see George Casella & Edward I. George, “Explaining the Gibbs Sampler” (1992) 46 *The American Statistician* 167.

83. The C++ source code used by Martin and Quinn in the generation of their results in the *Political Analysis* article is available online. See Andrew D. Martin & Kevin M. Quinn, online: Martin-Quinn Scores Replication <<http://mqscores.wustl.edu/replication.php>>. We used this source code with appropriate modifications to generate the results reported below.

making.⁸⁴ We do not model any strategic interactions between the votes of different justices and ignore any potential “panel effects” that may arise from certain justices being affected by the presence of other justices on the same panel.⁸⁵ Thus, a vote to affirm indicates that, given their ideal policy point, affirming gives a particular justice a greater individual payoff—in other words, provides a better ideological fit for that judge—than would reversing the appeal. The model treats each judge’s “attitude” or “ideal point” as a latent, unobserved, random variable.

The methodology draws on information inherent in the observation that justices of the Court split in their disposition of appeals that they hear. When justices split in their disposition, it follows from the above assumptions that the reason for this is that their attitudes differ regarding the case. Moreover, the attitudes of the judges differ systematically, with the justices affirming the appeal collectively having ideal points on one side of the policy spectrum, and the justices voting to reverse having ideal points on the other.

Importantly, the Martin-Quinn method does not assume that a vote to affirm or reverse in any given case is conservative or liberal. Instead, it automatically converges on the most appropriate posterior distribution of the unobserved ideal points through the Markov Chain Monte Carlo simulation. We use two main variations of the Martin-Quinn approach. The first assumes constant judicial preferences.⁸⁶ The second variation assumes that judicial preferences are dynamic and may shift from term to term. The dynamic Martin-

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84. This assumption can be supported on the basis that the Martin-Quinn method uses only non-unanimous cases, and these are cases in which justices truly do have the discretion to go either way in their disposition of the appeal.
85. This is an oversimplification. Research by Cass Sunstein in the United States has shown that panel effects can be significant on Circuit Courts of Appeal. See Sunstein *et al.*, *supra* note 49.
86. The constant Martin-Quinn approach assumes that the ideal policy point distribution of a particular justice is static over his or her entire career. This assumption is consistent with most of the literature covering the Supreme Court of Canada. Early empirical work used scalogram analysis, which implicitly assumed that judicial preferences remained constant throughout a justice’s career. See *e.g.* Sidney R. Peck, “The Supreme Court of Canada, 1958-1966: A Search for Policy Through Scalogram Analysis” (1967) 45 *Can. Bar Rev.* 666; Sidney R. Peck, “A Scalogram Analysis of the Supreme Court of Canada, 1958-1967” in Glendon Schubert & David J. Danelski, eds., *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West* (New York: Oxford University Press, 1969) 293; and Donald E. Fouts, “Policy-Making in the Supreme Court of Canada, 1950-1960” in Schubert & Danelski, 257.

Quinn approach is more flexible and assumes that the preferences of judges can and indeed do change over time. The statistical techniques underlying the methodology are well-known and have been described elsewhere in the literature in considerable detail.⁸⁷

III. PREDICTING JUDICIAL POLICY PREFERENCES

In order to test the assumptions underlying the debate about judicial appointments, this section asks and attempts to answer three discrete questions.

87. A quick description of the underlying technology is as follows. The Gibbs sampler used in the Martin-Quinn approach is typically used when there are known joint distributions of variables x and y_1, y_2, \dots, y_n , but the marginal distributions are unknown. Mathematically, the most straightforward way to uncover the marginal distributions is to integrate the joint distribution over y_1, y_2, \dots, y_n . However, the technical wherewithal required to compute the integration can, in many cases, be unattainable (it may also be mathematically impossible). The Gibbs sampler provides an alternative way to find the marginal distribution of x . The technique assumes that all conditional probabilities are known. The researcher must specify a starting value for y . Since we know conditional probabilities, we know the distribution of x given the starting value of y . The Gibbs sampling technique simulates a value of x from that distribution. It chooses that value randomly, based on the likelihood of each value occurring, as determined by the conditional probability distribution. Next, since the conditional probability distribution of $(y | x)$ is known, we can calculate the probability distribution of y given our simulated value of x . By simulating that distribution, we come up with a new value for y . We can then determine the distribution of x given our new value of y , simulate a value of x from that distribution, and so on. As the iterations of the sampler approach infinity, the distribution it finds for x approaches the actual marginal distribution of x . Hence, the simulated samples taken from the sampler's distribution are equivalent to samples from the marginal distribution. Normally, the sampler is run many thousands (and sometimes millions) of times, with the expectation that ultimately it will converge on an equilibrium distribution. When it has converged, we know that the distributions it generates are independent of the starting values of y and, hence, are more likely to approximate the true marginal distribution of x . The dynamic approach works similarly to the constant approach by performing the above steps in each term of the Court and then comparing how the ideal point changes over time. The method does not look at each term independently or in isolation. Instead, the dynamic variant of the Martin-Quinn method assumes a random walk in judicial attitudes from term to term. There is a variable that represents how much smoothing takes place from one term to the next. This allows the method to "borrow strength" across terms for each justice. The dynamic linear model begins with an uninformative prior about the posterior distribution of each justice's ideal point but, as the analysis proceeds, uses as a prior for each term the justice's ideal point for the foregoing term. For more detail on the Martin-Quinn methodology we deploy in our empirical analysis, see Martin & Quinn, "Dynamic Ideal," *supra* note 81 at 137-45.

First, if we assume that each justice has a stable set of policy preferences on which he or she bases his or her votes in particular cases, can these preferences be predicted *ex ante*? We seek to answer this question by comparing the judge's voting pattern over his or her whole career with (i) the policy preferences of the appointing prime minister, and (ii) the Ostberg-Wetstein scores assigned to the justices based on newspaper accounts at the time of their appointments.

Second, even if there is little apparent relationship between a judge's voting pattern over his or her career and the appointing prime minister or the Ostberg-Wetstein scores, is this relationship present at least at the beginning of his or her time on the Court? The assumption is that even if preferences do change over time, the prime minister or newspaper editorialists may be able to predict, at least in the short-term, how justices will vote upon their appointment to the Court.

Finally, even if there is little ostensible relationship between even the first few years and the preferences of the prime minister, can we say anything about how a judge's votes change over time? Is there, for example, a systematic way in which judicial policy preferences appear to change? Do differences appear in how policy preferences shift over time between judges appointed by Conservative prime ministers and those appointed by Liberal prime ministers?

A. CAN JUDGES' PREFERENCES BE PREDICTED *EX ANTE*?

Most of the literature that uses an attitudinal approach to judicial decision making assumes that judges have a certain, unbending set of policy preferences.⁸⁸ It is important, therefore, to start with this assumption and see if it holds true for the decisions of the Supreme Court of Canada for the 1982 to 2004 terms. This assumption will subsequently be relaxed when we consider how the policy preferences of different judges change over their time on the Court. Assuming first that judges have constant preferences, we ask two questions.

First, how strong is the relationship between the political parties of the prime ministers who appointed the justices who were on the Court from 1982 to 2004 and the justices' voting patterns? Second, how strong is the relationship between

88. Lee Epstein *et al.*, "Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices" (1998) 60 J. Pol. 801 at 801-02 [Epstein *et al.*, "Political Preferences"]; Lee Epstein *et al.*, "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" (2007) 101 Nw. U.L. Rev. 1483 at 5-7, online: <<http://mqscores.wustl.edu/media/PrefChange.pdf>> [Epstein *et al.*, "Ideological Drift"].

contemporaneous accounts from newspapers at the times that the judges were appointed—*i.e.*, their Ostberg-Wetstein scores—and the subsequent voting patterns of the judges?

Using the indirect Martin-Quinn approach, separate analyses were done for three different sets of cases. The first analysis considered all cases between 1982 and 2004. During these twenty-three terms, there were a total of 502 split decisions. The second set of cases—all of the non-criminal appeals—were analyzed together. There were 246 non-criminal appeals. The third set of cases included only the 256 criminal appeals. We examined criminal cases separately, as there were a large number of criminal cases in the complete data set and some judges—at least qualitatively—appear to take different approaches to criminal appeals than to other types of appeals.⁸⁹ We feared that the approach of some of the judges (most notably Justice L’Heureux-Dubé) to criminal appeals were unduly driving the overall results. The separate results, along with relative rank, are reported in Table 1 for (i) all cases, (ii) non-criminal cases, and (iii) criminal cases. This was done in order to assess, in a qualitative way, how robust the assumption of a single-dimensional policy space was across various, different types of cases. The short answer is that it is relatively robust.⁹⁰

Table 1 reports the mean of the ideal point (IP) posterior distributions of the twenty-seven judges who served on the Court from 1982 to 2004. A glance at the results reported in Table 1, below, suggests that the assumption of a one-dimensional policy space (that is, just left and right) across case types is somewhat problematic. The correlation between the “all cases” ideal points and the “non-criminal” ideal points is +0.87, and between “all cases” and “criminal,” it is +0.75.⁹¹ While these correlations are high, there is an overlap in these categories (that is, between “all cases” and “non-criminal,” and between “all cases” and

89. Ideally, we would have preferred a finer categorization than “non-criminal,” as this large grouping includes many different types of cases, such as *Charter*, tax, and business. However, any finer categorization would affect convergence with the indirect method because the number of cases in these categories would be too small. We do, however, use a somewhat finer categorization in the direct analysis.

90. All of these results were obtained by using the one-dimensional item-response theory function in the MCMCpack plug-in for the open source statistical package R, with 220,000 iterations, of which the first 20,000 were for burn-in. The standard diagnostic functions programmed in MCMCpack showed that the posterior distributions had converged.

91. The correlation shows the relationship between the ideal points for each judge when using all cases and when using non-criminal cases. A higher correlation means that they are more similar.

**TABLE 1: MARTIN-QUINN CONSTANT MODEL
RESULTS BY JUSTICE (RANKED BY ALL CASES)**

Justice	Appointing Party	All Cases		Non-Criminal		Criminal	
		IP	Rank	IP	Rank	IP	Rank
Stevenson	CON	1.464	1	1.472	2	0.847	6
Estey	LIB	1.237	2	1.965	1	0.447	9
Sopinka	CON	1.113	3	1.13	3	1.229	3
Major	CON	1.034	4	0.907	5	1.303	2
Charron	LIB	0.792	5	0.180	16	0.866	5
Laskin	LIB	0.755	6	0.577	7	0.649	7
McIntyre	LIB	0.731	7	0.520	8	-0.926	26
Arbour	LIB	0.666	8	0.079	17	2.107	1
Beetz	LIB	0.595	9	0.796	6	-0.189	20
Lamer	LIB	0.583	10	0.477	9	0.962	4
Le Dain	LIB	0.452	11	0.327	12	-0.243	21
Chouinard	CON	0.411	12	1.126	4	-0.397	23
Iacobucci	CON	0.408	13	0.457	10	0.396	10
Abella	LIB	0.397	14	0.296	13	0.313	13
Binnie	LIB	0.306	15	0.345	11	0.358	11
Cory	CON	0.239	16	0.180	15	0.341	12
Fish	LIB	0.035	17	0.231	14	0.064	16
La Forest	CON	-0.062	18	0.012	19	-0.131	19
Dickson	LIB	-0.099	19	-0.197	21	0.108	15
McLachlin	CON	-0.102	20	0.014	18	-0.244	22
LeBel	LIB	-0.145	21	-0.210	22	-0.098	18
Ritchie	CON	-0.264	22	-0.290	24	0.502	8
Gonthier	CON	-0.276	23	-0.043	20	-0.512	24
Bastarache	LIB	-0.353	24	-0.211	23	-0.523	25
Deschamps	LIB	-0.698	25	-1.015	25	-0.053	17
Wilson	LIB	-0.853	26	-1.867	27	0.193	14
L'Heureux-Dubé	CON	-2.864	27	-1.649	26	-3.024	27

“criminal”). On the other hand, the correlation between “non-criminal” and “criminal”—based on two data sets that share no decisions—is much lower (+0.45).

Further, some of the results are surprising. For example, Justice McIntyre shows up as a liberal judge with an ideal point of +0.731 on all cases, whereas his voting record (as is shown below in the direct results) is more consistent with his having been a conservative judge. Troublingly, too, Justice Wilson ap-

pears to be the second-most conservative judge, which is inconsistent with our expectations and appears to be anomalous given the results of the direct method. Before moving on to probe these anomalies further, however, we make some more observations about the results reported in Table 1, specifically with regard to whether there is a relationship between how judges were sorted according to the Martin-Quinn indirect methodology and (i) the party of the appointing prime minister, and (ii) the judges' Ostberg-Wetstein scores.

Curiously, it appears that there is not at all a strong relationship between the party of the prime minister who appointed the judges and their subsequent voting preferences as revealed through their voting patterns. Notably, in Table 1, the highest and the lowest scoring judges were both appointed by the same prime minister—Brian Mulroney, who led the Progressive Conservative Party. This is not entirely an idiosyncratic finding. The second-highest and the second-lowest scoring judges were appointed by the same prime minister as well—Pierre Trudeau, a Liberal. Indeed, of the four most “liberal” judges (Stevenson, Estey, Sopinka, and Major), three were appointed by Mulroney. Of the four most “conservative” judges (Bastarache, Deschamps, Wilson, and L’Heureux Dubé), three were appointed by Liberals: two by Jean Chrétien and one by Trudeau.⁹²

There is, however, a small effect overall. In the “all cases” results, the average ideal point for Conservative appointees is +0.100 versus +0.275 for Liberal appointees. This is reversed, however, for “non-criminal” appeals, where the average ideal point for Conservative appointees is +0.302 versus +0.143 for Liberal appointees. Finally, for criminal appeals, the average ideal point for Conservative appointees is +0.028 versus +0.252 for Liberal appointees. These results appear to support the idea that Conservative appointees are slightly more conservative on average than Liberal appointees. However, it is worth noting that the conclusion of this slight difference overall with the expected sign is entirely driven by Justice L’Heureux-Dubé, who is an extreme outlier in terms of her ideal points in “all cases” and “criminal” appeals. Indeed, she is such an extreme outlier that we became concerned that her inclusion may be making the results of the Martin-Quinn method unreliable.

92. We use the terms “conservative” and “liberal” here cautiously because it is not obvious that it is appropriate to describe the two ends of the ideal point spectrum in this way. However, as will be seen in the comparison between the Martin-Quinn results and the direct method results, this is a reasonable characterization, so long as one bears in mind the necessary caveats.

With regard to the relationship between the ideal points and Ostberg-Wetstein scores, it appears that there is a modest relationship between the two. If one uses as an Ostberg-Wetstein score for Justice L’Heureux-Dubé of -2.00 (*i.e.*, very conservative), the score they assign her for criminal cases, then the correlation between the Ostberg-Wetstein scores and “all cases” is +0.300. This result is not statistically significant. On the other hand, if one uses the score Justice L’Heureux-Dubé is assigned for civil liberties cases as the Ostberg-Wetstein score, the correlation disappears—and is actually negative—at -0.275. If one omits the Ostberg-Wetstein score for Justice L’Heureux-Dubé, there is no clear relationship at all between ideal points and Ostberg-Wetstein scores for the remaining judges (the correlation is -0.028).

Our concerns regarding Justice L’Heureux-Dubé led us to question the way in which the Martin-Quinn method is sorting the other judges. In particular, as mentioned above, the ideal point estimates for judges such as Bertha Wilson and William McIntyre do not seem to accord with our expectations, given what we know about their voting behaviour from the direct results and from more qualitative accounts of their judicial decision making. More specifically, the direct results show that Justice McIntyre voted liberally in just 36.5 per cent of appeals in the five areas considered (ranking him 24th of 27 justices), but the mean of his ideal point estimate overall is +0.731 (ranking him 7th of 27 justices). With respect to Justice Wilson, the direct method shows that she voted liberally in 46.5 per cent of appeals in the five areas considered (ranking her 6th of 27 justices), but the mean of her ideal point estimate overall is -0.853 (ranking 26th of 27 justices). As these results were startling, we decided to see what would happen without Justice L’Heureux-Dubé. In other words, her votes on all cases were removed from the data set, and the analysis was rerun. The results are reported in Table 2.

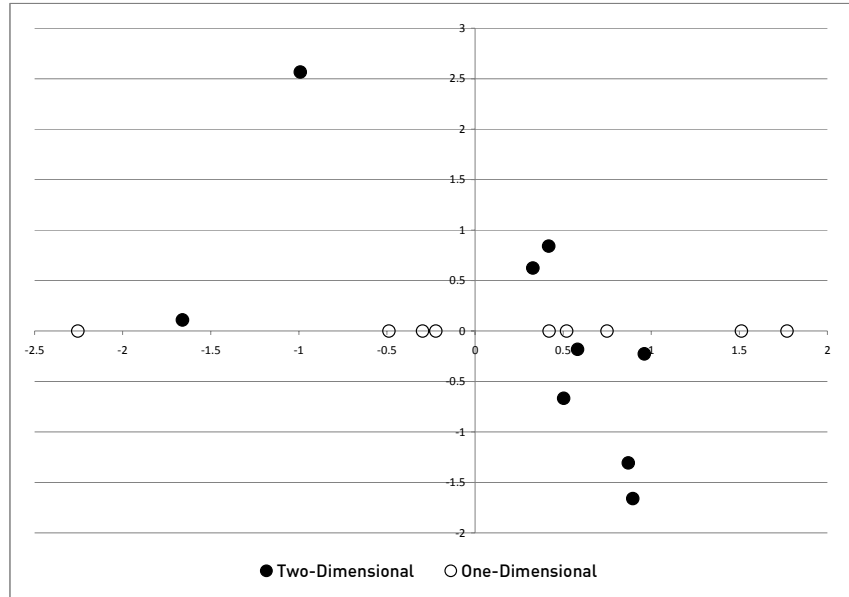
Oddly, omitting Justice L’Heureux-Dubé (LHD) causes a “flipping” of the ideal points of the justices who were appointed well before her, but no such flipping for justices who were appointed to the Court after 1985. The correlation of the ideal points “with LHD” and “without LHD” for Justices Ritchie through to Le Dain (those appointed pre-1985) is -0.794. The correlation of the ideal points “with LHD” and “without LHD” for Justices La Forest through to Charron (those appointed from 1985 to 2004) gives a correlation of +0.833. This is strong evidence that Justice L’Heureux-Dubé’s votes affected the reliability of the results.

**TABLE 2: MARTIN-QUINN CONSTANT MODEL
RESULTS WITH AND WITHOUT JUSTICE L'HEUREUX-DUBÉ (LHD)**

Year Ap- pointed	Justice	With LHD		Without LHD		Diff	Rank Change
		IP	Rank	IP	Rank		
1959	Ritchie	0.264	22	0.146	14	0.118	8
1970	Laskin	-0.755	6	0.465	22	-1.220	-16
1973	Dickson	0.099	19	-0.319	7	0.418	12
1974	Beetz	-0.595	9	0.445	21	-1.040	-12
1977	Estey	-1.237	2	0.426	20	-1.664	-18
1979	McIntyre	-0.731	7	0.864	26	-1.595	-19
1979	Chouinard	-0.411	12	0.329	18	-0.740	-6
1980	Lamer	-0.583	10	-0.277	9	-0.305	1
1982	Wilson	0.853	26	-2.658	1	3.511	25
1984	Le Dain	-0.452	11	0.290	17	-0.742	-6
1985	La Forest	0.062	18	0.365	19	-0.303	-1
1987	LHD	2.864	27	-	-	-	-
1988	Sopinka	-1.113	3	-0.602	5	-0.511	-2
1989	Gonthier	0.276	23	0.486	24	-0.210	-1
1989	Cory	-0.239	16	-0.136	12	-0.103	4
1989	McLachlin	0.102	20	0.466	24	-0.210	-1
1990	Stevenson	-1.464	1	-0.844	3	-0.620	-2
1991	Iacobucci	-0.408	13	-0.255	10	-0.152	3
1992	Major	-1.034	4	-0.662	4	-0.372	0
1997	Bastarache	0.353	24	0.911	27	-0.558	-3
1998	Binnie	-0.306	15	-0.139	11	-0.168	4
1999	Arbour	-0.666	8	-1.210	2	0.544	6
2000	LeBel	0.145	21	0.284	1	-0.139	5
2002	Deschamps	0.698	25	0.581	25	0.116	0
2003	Fish	-0.035	17	-0.536	6	0.501	11
2004	Abella	-0.397	14	-0.038	13	-0.359	1
2004	Charron	-0.792	5	-0.301	8	-0.491	-3

One way to determine how Justice L'Heureux-Dubé influences the results of the indirect method is to introduce a second dimension to the item-response theory model. This is something that has not, to our knowledge, been done in analyses of the US Supreme Court, probably in large part because the one-dimensional item-response theory model seems to do such a good job of characterizing the policy preferences of the US justices. Here, however, given Justice L'Heureux-Dubé's confounding effect on the estimates from the indirect method, a stronger case might be made to consider adding in a second dimension.

GRAPH: NATIONAL COURT IDEAL POINT ESTIMATES, 1992–1997



Adding a second dimension to the item-response theory model makes it much more difficult to achieve convergence in the estimates of the posterior distributions of the justices' ideal points. We were able to achieve convergence over the almost five-year period from 13 November 1992, when Justice Major joined the Court, to 30 September 1997, when Justice La Forest retired from the Court. Over this period the same nine judges were on the Court. During this period, there were 136 appeals in which the judges voted differently on appeals. The results of the two-dimensional item-response theory model for the 1992 to 1997 Court appear above.⁹³ One-dimensional estimates were made for the same natural court period so that the results could be compared. There is

93. The two-dimensional item-response theory model was most recently estimated using Martin and Quinn's indirect method. This method used version 0.95 of MCMCpack by Andrew D. Martin, Kevin M. Quinn & Jong Hee Park in the R statistical package, released 4 December 2008. For more on the MCMCpack plug-in for R, and its implementation of the Markov Chain Monte Carlo estimation method, see Andrew D. Martin & Kevin M. Quinn, online: MCMCpack <http://mcmcpack.wustl.edu/wiki/index.php/Main_Page>.

considerable correspondence between the two-dimensional estimates and the one-dimensional estimates. It does seem, however, that the added dimension is picking up on something distinctive about the decision making of Justices McLachlin and L'Heureux-Dubé. This is also apparent from the one-dimensional estimate for Justice L'Heureux-Dubé, but it is not noticeable in the one-dimensional result for Justice McLachlin.

What the two-dimensional Martin-Quinn method is picking up with respect to Justice McLachlin's decision making in this period is difficult to gauge. The estimation procedure is concerned with converging on the most appropriate posterior distributions of the justices' ideal points given their votes in the 136 divided appeals decided by the Court in this five year period.

Table 3 reports the results of the direct method and is analogous to Table 1 for the indirect method. Recall that the direct method assigns a direction to voting in cases in five different types of appeals. Votes are coded as liberal when they are in favour of (i) the accused in criminal appeals, (ii) rights claimants in *Charter* cases, (iii) Aboriginal groups or individuals in Aboriginal rights cases, (iv) labour unions in labour cases, and (v) the government in tax appeals. In the following table, the justices are arranged from the highest percentage of liberal votes over their career to the lowest (for the five areas of law considered in the direct method). The Ostberg-Wetstein scores are also reported in the table, as are the correlations of liberal voting proportions with the Ostberg-Wetstein scores (in the final row).

The mean Liberal appointee had a liberal voting percentage of 43 per cent while the mean Conservative appointee had a liberal voting percentage of 38 per cent. This difference of 5 per cent is statistically significant ($p < 0.01$). At first glance, it is difficult to see any significant relationship between the Ostberg-Wetstein scores and the percentage of liberal votes. This is borne out by the correlations reported in the last row of Table 3. The correlations are low (and in some cases negative). None are statistically significant.

The analysis was also conducted on subcategories of cases, as there may be more or less of a connection between the political party of the prime minister and voting, depending on the area of law. For example, US studies have found a correlation between a judge's policy preferences and voting in civil rights and liberties cases, but have generally not found a correlation in economic cases.⁹⁴

94. Staudt, Epstein & Wiedenbeck, *supra* note 63 at 1799.

TABLE 3: IDEOLOGY AND LIBERAL VOTES⁹⁵

Justice	Appointing Party	Liberal Voting (Proportion of Votes)						O-W Score
		All Groups	Crim	Char	Abor	Lab	Tax	
Fish	LIB	0.55	0.59	0.30	0.50	0.43	0.75	1.11
Arbour	LIB	0.54	0.53	0.60	0.33	0.59	0.29	0.73
Deschamps	LIB	0.51	0.51	0.38	0.60	0.39	0.83	0.00
Charron	LIB	0.49	0.48	0.30	0.50	0.20	0.80	-
Laskin	LIB	0.48	0.59	n/a	0.00	0.29	0.50	-
Wilson	LIB	0.46	0.46	0.56	0.40	0.58	0.47	1.62
Chouinard	CON	0.45	0.48	0.50	0.50	0.46	0.36	-1.38
LeBel	LIB	0.44	0.44	0.44	0.40	0.41	0.43	-0.70
Binnie	LIB	0.44	0.42	0.42	0.54	0.54	0.38	0.21
Lamer	LIB	0.43	0.42	0.45	0.38	0.52	0.24	1.42
Major	CON	0.42	0.44	0.37	0.28	0.45	0.29	-1.32
Estey	LIB	0.42	0.43	0.49	0.38	0.52	0.33	1.27
Dickson	LIB	0.42	0.42	0.39	0.47	0.49	0.42	-
Abella	LIB	0.42	0.41	0.27	0.50	0.25	0.50	-
Sopinka	CON	0.42	0.41	0.41	0.45	0.49	0.31	0.15
Ritchie	CON	0.41	0.44	0.00	0.33	0.50	0.33	-
Le Dain	LIB	0.40	0.39	0.35	0.75	0.62	0.25	0.73
Iacobucci	CON	0.40	0.37	0.39	0.36	0.54	0.29	0.00
Stevenson	CON	0.39	0.35	0.47	0.33	0.50	n/a	0.50
Betz	LIB	0.38	0.40	0.31	0.33	0.47	0.36	-
La Forest	CON	0.38	0.35	0.41	0.36	0.51	0.36	1.50
Cory	CON	0.38	0.33	0.41	0.44	0.61	0.44	0.97
McIntyre	LIB	0.37	0.36	0.28	0.50	0.48	0.31	0.44
McLachlin	CON	0.37	0.33	0.37	0.44	0.58	0.24	0.67
Bastarache	LIB	0.35	0.31	0.31	0.33	0.52	0.41	1.33
Gonthier	CON	0.32	0.27	0.33	0.36	0.56	0.28	-0.18
L'Heureux-Dubé	CON	0.31	0.21	0.32	0.50	0.66	0.24	-2.00
Correlation with O-W Scores		0.19	0.19	0.18	-0.09	0.10	0.17	

95. The correlations with Ostberg-Wetstein scores in each area of law are taken over justices for whom both mean liberal voting proportions and Ostberg-Wetstein scores exist (that is, the tax correlation does not include Stevenson, Charron, Laskin, Dickson, Abella, Ritchie, or Betz). None of the correlations are significant at the 90% level. This table uses the Ostberg-Wetstein score of -2.00 for Justice L'Heureux-Dubé. Ostberg and Wetstein assigned Justice L'Heureux-Dubé a score of -2.00 on criminal cases and a score of +1.32 on civil liberties cases (Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50 at 55). The correlations with the +1.32 score were criminal (-0.194), *Charter* (+0.005), Aboriginal (+0.011), labour

Interestingly, Ostberg and Wetstein's study of the Supreme Court of Canada found a different pattern—that ideology was significant in two areas of criminal law (search and seizure, and right to counsel), less significant in economic areas (tax and union cases), and least significant in the two civil rights and liberties areas they studied (equality and free expression).⁹⁶

In order to test the relationship between the party of the appointing prime minister or the Ostberg-Wetstein scores and judicial votes, we ran a set of regressions using the votes coded under the direct method as the dependent variables.⁹⁷ We first used dummy variables for each justice (omitting a dummy for Justice Estey, as he was the median justice in the direct voting overall) in order to determine whether there was any connection between particular judges and patterns of decisions. The results showed that four judges had votes that were significantly different from those of Justice Estey.⁹⁸ Justice Estey had a mean liberal voting percentage of 41.6, while the four justices that were significantly different from Estey were Justices L'Heureux-Dubé (30.6%), Gonthier (32.6%), Arbour (53.6%), and Fish (55%). When case type and number of years on the Court at the time of the decision are controlled, the same four justices continue to have statistically significant differences in liberal voting records.⁹⁹

Given that there were some statistical differences in the voting records of some justices, we then substituted time-invariant, judge-specific variables for the judge dummy variables (keeping in the controls for case type and years of

(+0.488), tax (+0.02), and all appeals (-0.10). Only the labour correlation is significant (at the 95% level). The correlation between Ostberg-Wetstein scores and *Charter*-only cases (that is, *Charter* cases that do not involve criminal matters) with an Ostberg-Wetstein score of +1.32 for Justice L'Heureux-Dubé is +0.125 and is not statistically significant.

96. Ostberg & Wetstein, *ibid.* at 214-16.

97. As the variables appear well-behaved, we ran ordinary least squares (OLS) regressions, which should provide a good indication of the underlying relationship.

98. The coefficients for the four judges (L'Heureux-Dubé, Gonthier, Arbour, and Fish) were significantly different at the 95% level. For these regressions, $F(26, 10090)=4.35$, $p<0.001$, and $R\text{-squared}=0.01$.

99. We ran an OLS regression with judge dummies (omitting Estey), dummy variables for Aboriginal cases, labour cases, *Charter* cases, and tax cases (omitting criminal cases), as well as a variable reflecting the number of years the particular justice had been on the Court at the time of the decision. For this regression, $F(31, 10085)=5.89$ and $R\text{-squared}=0.02$. The statistically significant coefficients were labour (0.14, $p<0.001$), tax (-0.039, $p<0.01$), and Justices L'Heureux-Dubé (-0.107, $p<0.01$), Gonthier (-0.09, $p<0.05$), Arbour (0.118, $p<0.05$), and Fish (0.137, $p<0.05$). The constant was 0.399 ($p<0.001$).

service on the Court). These new variables were gender, whether the judge was from Quebec, a set of dummy variables for experience prior to appointment on the Court (such as whether the judge was on the bench, in academia, or in practice prior to appointment), and one of the predictors of ideology (*i.e.*, either the party of the appointing prime minister or the newspaper scores, with Justice L'Heureux-Dubé scored at either -2.00 or +1.32).

In the regression based on the party of the appointing prime minister, the coefficient on that variable was significant ($p < 0.001$), with the predicted sign, positive, indicating that a justice appointed by a Liberal prime minister was more likely to have a higher liberal voting record. This factor did have an appreciable effect. The coefficient was +0.053, indicating that the party of the appointing prime minister made on average a 5 per cent difference in liberal voting record.¹⁰⁰

The same held true when the regression included the newspaper scores with Justice L'Heureux-Dubé scored at -2.00. The coefficient on the newspaper scores was statistically significant ($p < 0.01$) and with the predicted positive sign, meaning that a more positive, liberal, newspaper score was related to a more liberal voting record. The coefficient on the Ostberg-Wetstein scores was +0.015, indicating that a justice with the most extreme liberal Ostberg-Wetstein score of -2.00 is 6 per cent more likely to vote liberally across all cases than a justice with the most extreme conservative Ostberg-Wetstein score of +2.00.¹⁰¹ This effect seems moderate. A 6 per cent difference in voting is significant, but it requires the most extreme ideological difference possible among justices to generate such a difference. When the newspaper scores were used with Justice L'Heureux-Dubé scored at +1.32, the coefficient on the newspaper score had the predicted sign, but was no longer statistically significant.¹⁰²

These results imply that the political party of the appointing prime minister and the Ostberg-Wetstein scores are somewhat stronger predictors of the resulting overall career voting patterns of the justices than the indirect analysis.

100. For this regression, $F(10, 10106) = 11.54$ and $R\text{-squared} = 0.01$. The other statistically significant coefficients were labour (0.143, $p < 0.001$) and Quebec (-0.031, $p < 0.01$), with a constant of 0.434 ($p < 0.001$).

101. For this regression, $F(10, 10106) = 9.80$ and $R\text{-squared} = 0.01$. The constant was 0.481 ($p < 0.001$) and the other statistically significant variables were labour (0.144, $p < 0.001$), bench (-0.034, $p < 0.05$), and practice (-0.059, $p < 0.05$).

102. For this regression, $F(10, 10106) = 9.03$ and $R\text{-squared} = 0.01$. The constant was 0.48 ($p < 0.001$) and the other statistically significant variables were labour (0.144, $p < 0.001$), practice (-0.06, $p < 0.05$), and Quebec (-0.024, $p < 0.05$).

One last point to note about the direct method is that Justice L'Heureux-Dubé is an outlier, just as she was in the constant version of the indirect method. Considering together all of the five areas that are coded and analyzed under the direct method, Justice L'Heureux-Dubé has the lowest proportion of liberal votes. This is true even though she has the *highest* proportion of votes in favour of labour unions (which we code as liberal). The fact that she can exhibit such a strong reversal from one area of law to another suggests that, despite the *prima facie* evidence that ideal points are correlated in different areas of the law, there are some significant issues with the application of a one-dimensional attitudinal model to the Supreme Court of Canada.

B. CAN JUDGES' FIRST YEAR VOTES BE PREDICTED?

Epstein, Martin, Quinn, and Segal argue that, while an American president may not be able to predict the voting pattern over a judge's whole career, it may be possible to predict a judge's voting during his or her first term in office.¹⁰³ Even though the analysis above, assuming that policy preferences were constant over their careers, showed that there is only a weak relationship between the party of the appointing prime minister and subsequent voting, this may mask the predictability of votes early in a justice's career. After all, it seems reasonable to think that votes would become more predictable the closer in time they are made to the prediction. Like predicting the weather, it may be easier to forecast the inclinations of a judge in the short-term, with longer-term predictions rendered considerably more dubious.

One way to examine whether a prime minister can predict how a justice will vote, at least at the beginning of her time on the Court, is to determine the relationship between her voting in the first year and either the party of the appointing prime minister or the Ostberg-Wetstein scores. As it turns out, there is a positive correlation between the party of the prime minister and the mean liberal voting in the justice's first term. The correlation for all cases is +0.361, for criminal cases it is +0.405, and for non-criminal *Charter* cases it is +0.283. These correlations include those judges whose first term on the Court fell within the 1982–2004 period. The correlation for criminal cases is significant at the 90 per cent confidence level, while for all cases it is not statistically significant.¹⁰⁴

103. Epstein *et al.*, "Political Preferences," *supra* note 88 at 3.

104. These correlations include all judges whose first term on the Court was within the 1982 to

The relationship between the Ostberg-Wetstein scores and the liberal voting percentage over all cases decided by a judge in their first year on the Court is moderately positive, with a correlation of +0.217.¹⁰⁵ The relationship between the Ostberg-Wetstein scores and liberal voting in criminal cases is even more positive, with a correlation of +0.41.¹⁰⁶ These correlations imply that the Ostberg-Wetstein scores are able to provide some information on how a judge will vote in her first year on the Court overall, and even more so in criminal cases during the first year. A prime minister with such information could have a moderate ability to predict those votes.

However, the predictive ability that appears in the criminal context during the first year breaks down for non-criminal *Charter* cases. This is interesting, since such cases are the ones that are most likely to attract criticism from those who complain of judicial law-making, judicial activism, and judicial imposition of counter-majoritarian social policy.¹⁰⁷ The relationship between the Ostberg-Wetstein scores and liberal voting appears to be negative in these cases. As it turns out, the correlation between *Charter* votes and the Ostberg-Wetstein scores is -0.337. This finding accords with the Ostberg and Wetstein analysis, which did not find a statistically significant relationship between these newspaper measures of ideology and liberal voting in equality and free speech cases.¹⁰⁸

The indirect method yields results for voting in a judge's first year that are not statistically significant and have the wrong sign—that is, a negative instead of

2004 terms. We also ran OLS regressions with the dependent variable being votes in the first two years of a justice's time on the Court and the independent variables being the case type dummies (*Charter* appeals, criminal appeals, labour appeals, tax appeals and Aboriginal rights appeals), years on the Court, experience prior to appointment, gender, whether the judge was from Quebec, and one of the predictors of ideology. In these regressions, the party of the appointing prime minister was not significant and nor was the Ostberg-Wetstein score (with Justice L'Heureux-Dubé scored at +1.32). The only ideology predictor that was significant was the Ostberg-Wetstein score with Justice L'Heureux-Dubé scored at -2.00, but, again, the effect was not large (0.03, $p < 0.05$).

105. This correlation uses an Ostberg-Wetstein score of -2.00 for Justice L'Heureux-Dubé. If a score of +1.32 is used, the correlation is -0.19518, and if a score of 0 is used, the correlation is -0.01218.

106. The correlation uses an Ostberg-Wetstein score of -2.00 for Justice L'Heureux-Dubé and disregards Justice Sopinka, who only decided one criminal case in his first term.

107. See *e.g.* Morton & Knopff, *supra* note 3.

108. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50 at 132 (equality cases), 144 (free speech cases).

a positive correlation. One explanation may be that the method borrows strength over time by forward and backward smoothing, so that a judge's subsequent votes are affecting the ideal point predicted for a judge's first year (though it is unclear why this would result in *negative* correlations). Whatever the reason, the correlation between Ostberg-Wetstein scores and first year ideal points (using the dynamic Martin-Quinn results reported in Part II.C, above) for all cases is -0.207, for just criminal appeals is -0.141, and for non-criminal appeals is -0.226. None of the correlations is statistically significant and, again, all three signs are negative.

C. HOW DO JUDGES' PREFERENCES CHANGE?

As noted in Part III.A, one of the dominant assumptions of the attitudinal model (as well as the strategic models) is that the preferences of judges do not change over the course of their careers.¹⁰⁹ The validity of this assumption is important to the debate surrounding the appointments process. The debaters frequently assume that prime ministers attempt to appoint justices who support their views and that a set of appointments by a single prime minister (or ideologically similar prime ministers) can solidify or "entrench" a particular set of preferences in the Court. If the political preferences of justices change over time in unpredictable ways, prime ministers attempting to control the Court in this way would be deluded even if they could have some comfort about the initial preferences of the judges they appoint to the Court. As Epstein, Martin, Quinn, and Segal note in the US context, "would Nixon or any other President deem Supreme Court appointments their 'most important' if ideological drift, even among seemingly rock-solid conservatives (liberals) were the norm and not the exception?"¹¹⁰ They argue that presidents would not, unless there was some connection to the identity of the individual providing electoral, rather than ideological, support.¹¹¹

There have been only a few attempts to examine whether the preferences of individual justices change over time. Two studies in the United States found that the policy preferences of justices do change, often significantly, over time. Epstein, Hoekstra, Segal, and Spaeth analyzed the voting in civil liberties cases by

109. Epstein *et al.*, "Political Preferences," *supra* note 88 at 802-04; Epstein *et al.*, "Ideological Drift," *supra* note 88 at 1489.

110. Epstein *et al.*, "Ideological Drift," *ibid.* at 1499.

111. *Ibid.* at 1499 (pointing to a moderate Republican, Eisenhower, appointing a Catholic Democrat, Brennan, to the Court in an attempt to gain Catholic votes).

the sixteen justices who served ten or more terms between 1937 and 1993 (they examine only justices who began and ended their tenure on the Supreme Court within this period).¹¹² They found that many judges experienced significant preference change during their tenure on the bench, although seven exhibited no significant change. Similarly, Epstein, Martin, Quinn, and Segal examined twenty-six judges who sat on the US Supreme Court for ten or more terms, also beginning in 1937, using the indirect method developed by Quinn and Martin.¹¹³ They found that four judges did not exhibit “ideological drift,” but, of the rest, twelve shifted to the left, seven to the right, and three had unique patterns.

Ostberg and Wetstein undertook the only study to examine the issue of preference change in the Supreme Court of Canada.¹¹⁴ They found that there is some change in judicial preferences, but that, overall, judges tend to be ideologically consistent. They compared each judge’s proportion of liberal votes in his or her first two years on the bench with the proportion of liberal votes in the fifth and sixth years and measured the judge’s percentage change. They then compared that percentage change with the percentage change of other judges who were also present in both periods. They assumed that when a judge’s voting pattern changed relative to that of his or her colleagues, that indicated an ideological shift. In their study, an ideological shift occurs when a judge’s percentage change in liberal votes differs from that of his or her peers by more than one standard deviation. As relatively few judges experienced these shifts, they concluded that judges’ ideologies are relatively stable over time. One concern with this approach is that it takes two discrete time periods as indicative of change without examining what happened in other periods to see, for example, whether the change was part of a trend or an anomaly.

To determine how judicial policy preferences have changed over time at the Supreme Court, it would be necessary to examine the votes in each term for each judge’s time on the Court. The difficulty is how to separate changes in a justice’s preferences over time from other changes, such as changes in the mix of cases from term to term.¹¹⁵ In the United States, Epstein, Hoekstra, Segal,

112. Epstein *et al.*, “Political Preferences,” *supra* note 88.

113. *Ibid.* See also Martin & Quinn, “Dynamic Ideal,” *supra* note 81 (using the more limited set of justices examined by Epstein *et al.*, “Ideological Drift,” *supra* note 88).

114. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50.

115. This difficulty was noted in the American context by Epstein *et al.*, “Political Preferences,” *supra* note 88 at 810, and by Epstein *et al.*, “Ideological Drift,” *supra* note 88 at 1495-96.

and Spaeth adjusted each justice's votes using a method adapted from a study by Baum, resulting in "Baum-adjusted" votes.¹¹⁶ These adjustments were made by calculating the percentage change in liberal votes for each continuing justice (often this is all nine justices serving on the Court in any given term) for consecutive terms (*e.g.*, 1985 and 1986) and obtaining the median value of these percentage changes. They used this median value to obtain the "Baum-adjusted" votes of each justice by subtracting this median change from the justice's percentage of liberal voting in the latter period (1986–1987). They argue that this adjustment corrects for the issue change—that is, the implicit "liberalness" or "conservativeness" of the legal issues faced by the Court in any given term.

We used this adjustment to determine the change in voting by justices who served for eight or more terms between 1982 and 2004.¹¹⁷ Our findings from the Baum-adjusted voting for these justices for each year on the Court indicate that some justices' voting patterns have changed considerably. Of the eleven justices, three remained relatively stable (Justices Gonthier, La Forest, and Sopinka), while three drifted towards more liberal voting (Justices Cory, Iacobucci, and Bastarache); two moved towards more conservative voting (Justices L'Heureux-Dubé and Major); and three exhibited mixed changes (Justices Lamer, McLachlin, and Binnie).

There is, however, a difficulty with this approach to examining preference change, as well as with the approach taken by Ostberg and Wetstein. The Baum method makes assumptions in order to permit measurement of preference change over time. In particular, it assumes that while justices' preferences may change from term to term, these changes "net out" on average, such that the median change is an accurate measure of the change in case mix rather than itself reflecting a change in judicial preferences from one term to the next.¹¹⁸ Ostberg and

There may be other reasons why justices' votes may change over time, including changes in the composition of the bench. See Lawrence Baum, "Membership Change and Collective Voting Change in the United States Supreme Court" (1992) 54 J. Pol. 3 at 5. See Epstein *et al.*, "Ideological Drift," *supra* note 88 at 816 (changes in public opinion on issues).

116. See Lawrence Baum, "Measuring Policy Change in the U.S. Supreme Court" (1988) 82 Am. Pol. Sci. Rev. 905; Lawrence Baum, "Measuring Policy Change in the Rehnquist Court" (1995) 23 Am. Pol. Q. 373.

117. Any justice who voted on ten or fewer cases in a given term was omitted.

118. Martin & Quinn, "Dynamic Ideal," *supra* note 81 at 136 (discussing weaknesses of the Baum-adjusted measures of preference change).

TABLE 4: QUALITATIVE RESULTS OF THE DYNAMIC MARTIN-QUINN

	No Trend	Trending More “Liberal”	Trending More “Conservative”
All Cases (n=502)	8	10	9
Criminal Only (n=256)	9	6	12
Non-Criminal (n=246)	10	9	8

Wetstein make the even stronger assumption that these preferences do not change over five or six years on the Court.

Following the Martin-Quinn approach, we also used the indirect method to estimate changes in judicial preferences over time.¹¹⁹ We calculated the ideal points for the justices of the Court for the 1982 to 2004 terms in all 502 appeals where the Court split. The analysis was also done for the 246 non-criminal appeals in which the Court was divided and for the 256 criminal appeals in which the Court was divided. The results were not so materially different from those depicted for all cases.

Table 4 suggests that, on a court-wide basis, it is very difficult to see any systematic pattern of change in judicial preferences over time. Indeed, of the eighty-one observations, twenty-seven indicate no trend, twenty-five a more liberal trend, and twenty-nine, a more conservative trend. This is not the stuff from which strong conclusions can be drawn.

The results do not change much if we separate the Conservative appointees from the Liberal appointees. Among the Conservative appointees, we have sixteen observations of appointees trending in a conservative direction, six observations of no trend, and eleven observations of a liberal trend. Among Liberal appointees, we have thirteen observations of appointees trending in a conservative direction, twenty-one observations of no trend, and fourteen observations of a liberal trend. There is no clear story to be told here of appointees of either party responding to tenure on the Court in a systematically different way.

The clear story to be told, however, is that justices *do* in fact shift in their preferences over the course of their careers, and that it is extremely difficult to predict the manner in which the justices will shift. Coupled with the results in

119. In each case, the results were obtained using the C++ source code made available for replication. See Martin & Quinn, “Dynamic Ideal,” *supra* note 88. We used 5,100,000 iterations for the Gibbs sampler, the first 100,000 of which were for burn-in.

Part III.B, the dynamic results suggest that justices may behave in unexpected ways in their first term and will then shift in unpredictable ways from the initial voting behaviour.

IV. REFORMING THE APPOINTMENTS PROCESS

There are two main implications of the foregoing analyses. The first is that the judicial appointments process to the Supreme Court of Canada has not yet become the ideologically politicized and polarizing process that many of its critics make it out to be. In fact, the results are somewhat surprising, in that prime ministers from both parties have appointed individuals to the Court who have gone on to become notable champions of attitudinal positions that are unlikely to have been shared by the appointing prime minister. This result may have been reached *despite* efforts by prime ministers to do otherwise (by appointing ideologically compatible judges to the Court). There is some empirical support for this, as there is a statistically significant difference overall between voting records of judges appointed by Conservative prime ministers and justices appointed by Liberal prime ministers.

This being the case, it is not so much that the current appointments process is in shambles and needs to be rebuilt from the ground up, but rather that the current appointments process should be strengthened in a manner that will avoid any potential abuses of the more or less open-ended discretion vested with the minister of justice and the prime minister to appoint freely any person of their choosing. Care must be taken not to adopt safeguards that will engender a more politicized process. Such safeguards may well result in what we ought to be consciously attempting to avoid—a politicized, polarized, and acrimonious appointments process such as that which prevails in the United States.¹²⁰

120. On this point, Justice Rothstein remarked: “[h]opefully the demeanor of the proceedings I went through will be maintained in the future. But I think we have more to go on than just hope. We all know the criticism of the United States Senate confirmation process, and I don’t think Canadians want to go there. ... The objective is accountability, and accounting to the public through a public hearing is useful. I suppose though, that the elephant in the room is polarization. If in the future our society becomes more polarized than it is today, might we inexorably end up with a process that was not intended? The main criticism of the United States Senate Judiciary Committee hearings is that the process may sometimes have less to do with screening a nominee for his or her suitability for the job and more to do with seeking commitments about how the nominee will decide cases in the future. And this can

We return here to the Hippocratic exhortation “to do good, or do no harm.”¹²¹

The second main implication of the analyses is that the attitudinal model of decision making does not apply straightforwardly to the Supreme Court of Canada. The direct method of analysis points to some connection between predictors of attitudes and judicial voting, but the connection is, at most, moderate. Further, in a range of areas, the indirect method yields results that are either clearly wrong or at least suspicious. Most striking of all is the reversal in the ordinal ranking of the ideal points of justices who joined the Court before 1985 (and the maintenance of the ranking of those who are appointed after 1985) when Justice L’Heureux-Dubé is removed from the data set.

These results suggest that something more complex is going on at the Court that is not being adequately captured in the attitudinal model, particularly as specified by a one-dimensional item-response theory model. In their recent analysis of the applicability of the attitudinal model to the Supreme Court of Canada, Ostberg and Wetstein reach a similar conclusion, arguing that while “a substantial amount of attitudinal decision making appears in diverse areas of law in the post-*Charter* Court, ... the impact of ideology is not as crystal-clear or as systematic as that found in the US context.”¹²²

The conclusion that the attitudinal model does not apply directly to the Supreme Court of Canada ought not to be regarded as a failure.¹²³ In fact, it

lead to questions that are sometimes personally invasive, irrelevant, and inappropriate. I do not claim that Canadians are necessarily above this fray. Indeed, our judicial appointment process has a political overtone. A government can be expected to want to appoint judges it believes will reflect its ideology, but that does not mean that we will end up with the negative aspects of the United States’ process.” *Supra* note 7.

121. *Supra* note 1.

122. Ostberg and Wetstein argue that the differences between Canada and the United States are related, in part, to “different institutional structures and norms.” See Ostberg & Weinstein, *Attitudinal Decision Making*, *supra* note 50 at 226.

123. Interestingly, former British Prime Minister Tony Blair recently observed that: “[l]aw and order matters in a way that is more profound than most commentary suggests. It used to be that progressives were people who wanted an end to prejudice and discrimination and took the view that, in crime, social causes were paramount. Conservatives thought crime was a matter of individual responsibility and that campaigns against discrimination were so much political correctness. Today the public distinguishes clearly between personal lifestyle issues, where they are liberal, and crime, where they are definitely not. It is what I call the pro-gay-rights, tough-on-crime position. It confounds traditional left/right views.” Tony Blair, “What I’ve Learned” *The Economist* (31 May 2007), online: <http://www.economist.com/opinion/displaystory.cfm?story_id=9257593>. Justice L’Heureux-Dubé fits that description quite nicely.

points to the need to unravel the differences in attitudinal and non-attitudinal factors underlying judicial decision making on the highest courts in Canada and the United States. There are a number of possible ways to account for the differences in results between the US Supreme Court and its Canadian counterpart.

First, judges may be just as likely to vote in accordance with their political preferences or attitudes in Canada as the United States, but, as Ostberg and Wetstein argue, “historical patterns of judicial selection in Canada have ensured that justices with diverse characteristics, largely unrelated to their ideological leanings, have been elevated to the Court.”¹²⁴ There could be a number of reasons for such a historical pattern. For example, the principal political parties in Canada may be less ideologically different than in the United States. The “brokerage” model has been the dominant model to describe Canadian politics in the 1980s and early 1990s.¹²⁵ The principal Canadian political parties were not seen as dividing clearly along ideological lines on most issues. Instead, each party attempted to appeal to the same broad cross-section of voters, brokering policies across groups to win elections, rather than advance a particular ideological agenda. Parties, therefore, are not seen as differing significantly ideologically, at least in the first half of our study.

The principal differences between the political parties, to the extent that they have been present, have been in the areas of federalism (with Liberals desiring stronger federal powers), bilingualism, and crime (with Conservatives more supportive of reintroduction of capital punishment).¹²⁶ This “brokerage” model may not, however, be applicable to Canadian politics following the rise of the Reform/Alliance party in the 1990s, which had its base in more conservative voters. Reform/Alliance voters were significantly different from Liberal voters in areas of crime, Quebec, immigration, and a range of social issues (such as gay marriage, abortion, feminism, and bilingualism).¹²⁷ They differed most strongly

124. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50 at 226.

125. See *e.g.* Harold D. Clarke *et al.*, “Absent Mandate: Canadian Electoral Politics in an Era of Restructuring” in Hugh G. Thorburn & Alan Whitehorn, eds., *Party Politics in Canada*, 8th ed. (Toronto: Prentice Hall, 2001) 398.

126. See *e.g.* Keith Archer & Alan Whitehorn, “Opinion Structure Among Party Activists: A Comparison of New Democrats, Liberals and Conservatives” in Thorburn & Whitehorn, *ibid.* 107.

127. Michael Lusztig & J. Matthew Wilson, “A New Right? Moral Issues and Partisan Change in

from Progressive Conservative voters on social issues.¹²⁸ The effect of the recent merger of the Reform and Progressive Conservative parties on an ideological split between parties is not yet clear.

The murkier ideological differences across parties in Canada as compared to the United States makes it less likely that broad differences will appear in judicial appointments, particularly prior to the mid-1990s, though possible also in the period following the mid-1990s. The categorizations of areas of law used in the United States and in our study may be too broad to capture the differences between the parties. It may be that prime ministers appoint Supreme Court justices who they hope will vote predictably in a narrow, politically salient area (such as language rights), rather than because a particular judge will vote in a predictable direction in all cases. Further, the appointments process in Canada may result in less information about judicial ideology, in which case prime ministers may wish to appoint judges sympathetic to their policy positions, but make greater errors than in the United States.

Second, judges in Canada and the United States may vote at least partially strategically (that is, aim to meet their policy preferences but take into account interactions with others on the Court or in other institutions), but face a different set of strategic considerations.¹²⁹ For example, US studies have found that judicial voting is influenced by who is on the panel.¹³⁰ The panel effect may be different in Canada and the United States if there is a difference in the extent of ideological difference among justices. Further, these strategic considerations may be different where, as Ostberg and Wetstein argue, a “pervasive norm of consensus” exists on the Court in Canada, or the Chief Justices in Canada have the ability to foster unanimity through panel selection.¹³¹

Canada” (2005) 86 Soc. Sci. Q. 109 (finding that Reform/Alliance voters were significantly different from Liberals in the areas of taxation, Quebec, crime, immigration, and “moral traditionalism”); William Cross & Lisa Young, “Policy Attitudes of Party Members in Canada: Evidence of Ideological Politics” (2002) 35 Can. J. Pol. Sci. 859 (finding that Alliance members were significantly less supportive of strong federal powers and “social tolerance” issues such as equal rights, feminism, and bilingualism).

128. Lusztig & Wilson, *ibid.*

129. See *e.g.* Epstein & Knight, *supra* note 52 (arguing that judicial voting should be viewed through a model of strategic decision making); Hammond, Bonneau & Sheehan, *supra* note 52 (presenting a formal model of strategic decision making by judges).

130. Sunstein *et al.*, *supra* note 49.

131. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50 at 226.

Third, justices on the Supreme Court of Canada and the US Supreme Court may face, or feel they face, different legal constraints on their decisions. The legal model of decision making assumes that the “law” acts as an independent factor influencing how judges vote. It may be that, for example, judges in Canada and the United States treat precedents differently.¹³² This connection to prior decisions may influence the path of voting over time by the Court and by particular justices.

In light of the acrimonious, but not factually well-supported, debate surrounding the appointments process to the Supreme Court of Canada, this article has attempted to contribute to the empirical analysis of the appointments process. It has, at the same time, illustrated the need for a better theory of judicial decision making.¹³³ Each of the attitudinal, legal, and strategic models of judicial behaviour likely has some element of truth, as do other potential theories, such as Baum’s theory that justices are influenced by the desire for approval from various “audiences.”¹³⁴ The difficulty will be in developing models that capture these different factors *and* remain empirically testable.

132. For a discussion of the role of precedent and how precedents are treated by judges, see Thomas G. Hansford & James F. Spriggs II, *The Politics of Precedent on the U.S. Supreme Court* (Princeton: Princeton University Press, 2006).

133. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 50 at 227.

134. Baum, *Audiences*, *supra* note 54.