Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991-1995
Author(s): C. L. Ostberg, Matthew E. Wetstein and Craig R. Ducat
Published by: Sage Publications, Inc. on behalf of the University of Utah
Stable URL: http://www.jstor.org/stable/3088073
Accessed: 16/07/2014 13:26

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at http://www.jstor.org/page/info/about/policies/terms.jsp

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.
Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991-1995

C. L. OSTBERG, UNIVERSITY OF THE PACIFIC
MATTHEW E. WETSTEIN, SAN JOAQUIN DELTA COLLEGE
CRAIG R. DUCAT, NORTHERN ILLINOIS UNIVERSITY

This article assesses whether the same attitudinal dimension that dominates judicial decision-making in the United States—liberalism/conservatism—is also prominent in the Canadian context. Specifically, the study examines the voting behavior of Canadian Supreme Court Justices in non-unanimous post-Charter cases decided during the first five terms of the Lamer Court (1991-95). After employing factor analysis, which disclosed three principal dimensions underlying the voting behavior of the justices, we closely examined the cases scoring most positively and most negatively on each of the factors. The principal dimensions underlying the Charter rulings suggest three prominent attitudinal conflicts dominate this Court period: communitarianism versus libertarianism, fair trial and criminal due process disputes, and judicial activism versus judicial self-restraint. These dimensions corroborate the findings of studies that have tracked the development of the Canadian Court in post-Charter years.

Few relationships have been as frequently investigated or reported at greater length in the empirical study of public law than that between political attitudes and judges' decisions. Scholars of judicial behavior have built an entire

NOTE: This is a revised version of a paper presented at the 1999 meeting of the Canadian Political Science Association, Sherbrooke, Quebec. We are grateful for comments from several anonymous reviewers that improved the paper. The research in this study was funded in part by a Scholarly Activity Grant (1996) and Research Fellowship Award (1999) from the University of the Pacific. Data in the study were analyzed using the Factor Analysis command in SPSS-PC. Data for replication purposes are available from the lead author.


235
field of the political science discipline on the thoroughly familiar premises gleaned from the writings of Oliver Wendell Holmes, Jr. (1881, 1897) and other rule skeptics (Fisher, Horowitz, and Reed 1993). The central premise of this body of literature is that rules contained in precedents simply provide cover for the justices' own attitudes and values (Holmes 1897; Frank 1930; Pritchett 1941; Schubert 1974, 1965; Segal and Spaeth 1993, Chap. 2; Epstein and Knight 1998: 25). In essence, the attitudinal model now dominates public law research in the United States.

The attitudinal model so prominent in the literature today can trace its origins to the seminal research of Glendon Schubert (1974, 1965). Schubert's application of psychometric scaling techniques uncovered multiple attitudinal dimensions at work on the U.S. Supreme Court (Schubert 1974, 1965). This groundbreaking work on the U.S. court inspired him to conduct further research on judicial behavior in Switzerland, Australia, and South Africa (Schubert 1969a, 1969b, 1977, 1980). Other researchers who followed in his footsteps also found that attitudinal conflicts were at the crux of the decision making process of courts throughout the world, including the Philippines (Samonte 1969; Flango and Schubert 1969; Tate 1995); Italy (DiFrederico and Guarnieir 1988); Japan (Dator 1969; Kawashima 1969; Danelski 1969); Australia (Blackshield 1972; Galligan and Slater 1995; Fower 1995); and Canada (Fouts 1969; Peck 1967a, 1967b, 1969; Tate and Sittiwong 1989; Morton, Russell, and Withey 1991; Russell 1995; Epp 1996; Weitstein and Ostberg 1999). These studies confirm that the political nature of judicial decision-making is not endemic to any one culture.

Although research has shown that attitudes and values clearly influence the decisionmaking process in a variety of national high courts, the question remains whether the voting patterns that demonstrate attitudinal conflict are structured in a similar fashion across those courts. In the Canadian context, Fouts found in the 1950s and 1960s that the "decisional philosophy" of the Canadian justices was "strikingly similar to that espoused in the U.S. Court a generation earlier" (Fouts 1969: 284). He and Sidney Peck (1969) found the same liberal-conservative ideological conflicts in the U.S. were at work in Canada as well. The methodology used by these scholars presumed that the cases they analyzed could be analyzed using the same liberal-conservative continua on civil liberties, economics, and criminal cases that Schubert and others had used in studying the United States Supreme Court.

Our study begins from a different premise. We start from the assumption that there might be different attitudinal issues at work in the minds of Canadian judges than simply liberalism-conservatism. Since we do not want simply to impose the U.S. ideological structure, we employ exploratory factor analysis as a heuristic device to expose how voting patterns reflect value conflicts at work in the post-Charter decisions of the Canadian Court under Chief Justice Antonio
Lamer's tenure (1991-95). We use this statistical technique in order to leave as much leeway as possible for the facts of the cases and the justices in their opinions to identify the values most closely associated with the patterns of judicial disagreement. This approach has been identified as an especially appropriate technique for judicial behavior research on U.S. and comparative appellate courts (see Tate 1983; Flango and Ducat 1977).

Our research question boils down to the following: do the same types of attitudes and values found in the United States appear in a factor analytic examination of the Canadian Court's rulings in the post Charter period? One might think the same ideological dimensions will appear because the Charter of Rights and Freedoms, entrenched in 1982, is similar to the U.S. Bill of Rights. This document, like its U.S. counterpart, protects a broad range of individual rights and liberties. For example, it ensures Canadians the freedoms of religion, speech, press, and assembly (s. 2). Additionally, it provides a host of criminal due process rights including the right to counsel (s. 10), a protection against unreasonable searches and seizures (s. 8), a right to a speedy trial (s. 11b) by a fair, independent and impartial tribunal (s. 11d). Other similar protections include the legal right to life, liberty, and security (s. 7), and equality rights that prohibit discrimination on the basis of a number of grounds, including race, ethnic origin, sex and religion (s. 15). Since these constitutional protections bear a striking similarity to those found in federal and state statutes, and the U.S. Bill of Rights, Canada becomes an obvious theoretical test case for examining whether the same attitudinal conflicts in U.S. cases are at work in Canada's high court.

Despite the similarities in the two constitutions' provisions, there are various institutional and cultural features that may foster different attitudinal conflicts on the Canadian high court. One institutional difference worth highlighting is that the Canadian Supreme Court, unlike the U.S. Court, sits in panels of five, seven, or nine justices when deciding cases. This feature can have a profound impact on case outcomes and decision making because the Chief Justice's inclusion or omission of a specific justice on a given panel may elevate (or suppress) a particular attitudinal conflict on the court, which in turn could be the pivotal feature driving the outcome of the case (see Heard 1991). Having said this, Greene et al. (1998: 115) have pointed out that during the Lamer Court, the number of nine-member corams has increased substantially from 8 percent in 1991-92 to roughly 50 percent of cases in 1995-96. Obviously, where nine member panels exist, the

---

1 We chose to analyze the post-Charter Lamer Court from the 1991-95 period because it features the most stable membership in the Court's post-Charter time frame under the leadership of one Chief Justice.

2 To demonstrate the importance of panel composition in Canada, U.S. scholars should contemplate the possible impact on the rationale and outcome of a discrimination case if Justices Scalia and Thomas were omitted from the panel of participants hearing the dispute.
Chief Justice has no opportunity to “taint” the outcome through his panel striking power, and as Chief Justice Lamer pointed out in 1998 “if there is a possibility that the outcome of a case might be different with fewer than nine judges, I'll do my best to strike a panel of nine justices” (Greene et al. 1998: 115). Clearly the Chief Justice is less likely to influence the outcome of highly contentious cases because all nine justices are involved. Despite the Chief Justice's sensitivity to this issue, the fact that he had the power to construct five and seven-member panels is an institutional feature of Canada's high court that can influence the overall patterns of voting disagreement that emerge from the factor analysis.

Aside from this institutional feature, there are important cultural differences between the U.S. and Canada that would lead one to expect different ideological attitudes and values to be at play in the Canadian context (for a discussion of cultural differences and similarities see Manfredi 1993; Lipset 1990; Neal and Paris 1990; Monahan 1987; Sniderman et al. 1996). Some leading scholars in this area have argued that there are separate organizing values that underlie the two societies (Glendon 1991; Lipset 1990). In short, Canada has been described as “a more class aware, elitist, law-abiding, statist, collectively-oriented, and particularistic (group oriented) society than the United States” (Lipset 1990: 8). The cultural distinctions between the two nations are clearly reflected in the types of legal systems they have developed. In contrast to American society, Canadians remain much more respectful of law and order, which reinforces their deference to authority and their greater orientation toward communitarian values in the legal culture (Lipset 1990; MacNeil 1991). While Americans' fears of government authority have led to an emphasis on individual rights in the legal realm, Canadians' desires to maintain law and order have fostered a greater emphasis on protecting the community and the collective good. Taken together, the value differences articulated by many scholars imply that the underlying attitudes and values animating judicial decisions in Canada might well be different from the overriding liberal-conservative dimension that dominates U.S. legal decisions.

The communitarian-individualism strains found in Canada's culture are further amplified in the text of the Charter of Rights and Freedoms itself. Although the Charter contains critical protections of individual freedoms, unlike its U.S. counterpart, it also contains strong communitarian strands that sanction government infringement of rights and liberties when they are “justified in a free and democratic society” (s. 1). Another important communitarian element appears in s. 24 (2) of the Charter, which essentially allows the inclusion of unlawfully

---

3 One must keep in mind that there is scholarship countering the Canadian communitarian orientation articulated by these scholars, on both a theoretical and methodological level. For a discussion of this debate, see Bell and Teperman (1991); Tiryakian (1991); Ajzenstat and Smith (1995); Mishler (1991); Crawford and Curtis (1979); Arnold and Tigert (1974); Presthus (1975); Sniderman et al. (1996); Horowitz (1966); McRae (1964).
obtained evidence in court if its admission "would [not] bring the administration of justice into disrepute." The practical application of these two clauses has meant that the Canadian Court in the post-Charter era has frequently resolved disputes in favor of the government and community, despite various infringements of individual rights and freedoms. In other words, the s. 1 and 24 (2) clauses allow the court as a political institution to justify an infringement of Charter rights in the name of community interests. In the particular setting of an individual case, this institutional feature can generate disagreement among the justices over how to resolve the case.

Given the various institutional and cultural differences between the U.S. and Canada, along with the textual differences between the two constitutional documents, one must question the degree to which the same ideological dimension of liberalism-conservatism will be pertinent in the Canadian context. Factor analysis provides an opportunity to move empirical studies of voting behavior of other high courts, such as Canada, beyond the familiar ideological polarization found on the U.S. Supreme Court. In short, we postulate that the institutional and cultural features found in Canada will generate patterns of attitudinal conflict on the Canadian Supreme Court that are—in part—distinctive from that found in the United States.

**Data and Methods**

Data for this article are derived from published opinions of the Canadian Supreme Court in all of the non-unanimous Charter cases decided between 1991 and 1995 (N = 58). The Chief Justice throughout this time was Antonio Lamer and we selected this period because the membership of the Court remained relatively stable. Moreover, this time frame was selected because it is one of the most stable periods of court membership in the post-Charter era, and exhibits the features of a natural court with the exception of one member who was on the Court for only two years (1991-92). We restricted our focus to non-unanimous Charter cases because they highlight patterns of disagreement among the justices in the most controversial and politically salient cases in recent years. Votes of the justices were classified as to whether they were in the majority or dissent. Since members of the Canadian Supreme Court sit in panels ranging between five and nine justices, a confounding problem exists over what to do with justices who

---

4 We would expect that an analysis of all nonunanimous decisions during the 1991-95 period would identify more attitudinal dimensions at work on the court than the three we identified in the Charter cases. However, we believe the task of identifying the factors would become more difficult because the analysis would combine a whole constellation of non-Charter issues in with the more politically relevant criminal and civil liberties issues that predominate in the Charter disputes. In short, we were uncomfortable with idea of "mixing apples with oranges" in the factor analysis, and we leave for another day a factor analytic examination of non-Charter disputes.
did not participate in a given case. Consequently, we created a score in the data set for non-participation. Justices who voted in the majority in a case were given a vote score of +1; justices in the dissent received a score of −1; and justices not participating on a panel received a score of 0.5

Once the justices' votes were coded, the methodology pursued a three-stage process similar to that used by Ducat and Dudley (1987) in their factor analysis of U.S. Supreme Court economic decisions. First, the justices' votes were subjected to a principal components analysis (see Kim and Mueller 1978a, 1978b; SPSS 1988). Although some scholars might question the appropriateness of factor analysis on a non-interval variable, we are simply using the factor analysis results for "purely heuristic purposes" which Kim and Mueller indicate are appropriate in a limited context (1978b: 73). The factor analysis results provided what are commonly called "factor scores" for each of the 58 cases. The creation of those factor scores for each case represented the second stage of the methodology. In the third stage, we carefully read the cases scoring most positively and most negatively on each factor (typically, eight or nine that were found above +1.0 or below −1.0). Reading the cases is critical to our analysis because the opinions of the justices in the cases scoring most extremely on the factors provide the clues essential to identifying the attitudinal dimension underlying a given factor. In essence, our approach blends the quantitative tool of factor analysis with a qualitative detailed reading of the cases in order to understand the underlying attitudinal dimensions of judicial behavior on the Canadian Supreme Court.

**Analysis and Decisions**

Our factor analysis produced three principal dimensions underlying the justices' voting in the non-unanimous Charter cases decided by the Lamer Court during the first half of the 1990s.6 These three factors explained 57 percent of

---

5 We decided to employ a zero score for non-participation because it was an intuitively conservative way of dealing with the problem of missing data for non-participation. Another approach might have inserted an average score of support for Charter claims by each justice who did not participate in a given panel based on their voting scores in all Charter cases they participated in. We ran the analysis using this technique and found hardly any systematic difference in the factor loadings of the cases, and only marginally different rankings of cases on the factors. We chose not to use a technique proposed by McIver (1976) because his approach began with the assumption that all justices could be located on one liberal-conservative dimension for all cases examined. This approach is contrary to the underlying presumption of our methodology—that multiple dimensions might be at work that may be distinctly different from the ideological perspective identified as salient in the United States.

6 Our factor analysis focused on the votes of nine justices on the Canadian Court during this period: Justice Lamer, LaForest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, and Major. We omitted Justice Stevenson from the factor analysis because he participated in so few cases during his brief tenure on the Court. The principal components analysis produced four
the total variance in voting. Of this total, the first factor accounted for 49 percent of the explained variance (Eigen value 2.52), the second factor 27 percent (Eigen value 1.35), and the third factor 24 percent (Eigen value 1.25, see Table 1). The voting variable for each justice, and its loading on each principal component are presented in Table 1. We also provide the factor loadings for the rotated factor matrix generated by the data (the right side of Table 1). On the first factor, Justice L’Heureux-Dubé anchored one end of the continuum while Justices Sopinka, Major, and Lamer occupied the other end. The second factor pitted Justices LaForest and Gonthier at its positive end against Justices Cory and Lamer at its most negative. The third factor appeared to highlight the distinctive voting pattern of Justice McLachlin, with only a modest factor loading for Justice Cory, and minimal factor loadings for the rest of the Court.

While these factor loadings draw one’s interest, our task was to discern the identity of the factors from reading the cases. Strong factor scores for cases (above +1.0 or below –1.0) provided the best cue to help identify a given dimension. We analyzed the eight or nine highest and lowest scoring cases on each factor to identify commonalities among them. Our analysis focused on the issue content and characteristics of the cases, which included the vote split on the cases (liberal or conservative outcome), who won (Charter claimant or the government), whether a law was declared unconstitutional, whether the majority found a violation of a Charter right, and whether the majority engaged in “Charter 2-step” analysis to justify the violation (see Knopff and Morton 1992). These indicators were used because they help identify patterns of attitudinal conflict that underlie the manifest characteristics of a set of cases. For example, if a set of strongly loading positive cases all turn out to be criminal rulings in favor of the government, while the opposite is found on the negative side of the factor (pro-defendant), one is bound to conclude that the attitudinal conflict at work in those cases centers around criminal due process issues (pro-criminal vs. pro-government).

A brief survey of the rulings indicates that the strongly loading cases on the factors did not align simply in a one-to-one fashion with a particular Charter provision as might have been anticipated (for similar results on the U.S. Supreme Court, see Dudley and Ducat 1986; Ducat and Dudley 1987). Yet, Factor 1 does feature a constellation of cases dealing with civil liberties and civil rights issues pitting individual claims against community interests in maintaining social order. With Factor 2, issues arising in criminal due process cases tend to dominate. Since Factor 3 does not appear to align with any given issue area, or set of issue areas, we think that this factor emphasizes judicial activism and self-restraint. We turn now to review the evidence that, in our judgment, supports each of our conclusions.

Factors with Eigen values in excess of 1.0, but we framed our analysis around the first three factors because the fourth factor barely exceeded 1.0 and added only 12 percent of explained variance to our factor matrix.

241
Table 1. Principal Components and Varimax Rotated Factor Matrices for Charter Cases Decided by the Lamer Court (1991-1995)

<table>
<thead>
<tr>
<th>Justice</th>
<th>Principal Components Factor Matrix</th>
<th>Varimax Rotated Factor Matrix</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Factor 1</td>
<td>Factor 2</td>
</tr>
<tr>
<td>Lamer</td>
<td>.777</td>
<td>-.034</td>
</tr>
<tr>
<td>LaForest</td>
<td>-.291</td>
<td>.585</td>
</tr>
<tr>
<td>L'Heureux-Dubé</td>
<td>-.720</td>
<td>-.420</td>
</tr>
<tr>
<td>Sopinka</td>
<td>.618</td>
<td>.297</td>
</tr>
<tr>
<td>Gonthier</td>
<td>-.497</td>
<td>-.058</td>
</tr>
<tr>
<td>Cory</td>
<td>.461</td>
<td>-.324</td>
</tr>
<tr>
<td>McLachlin</td>
<td>-.297</td>
<td>.601</td>
</tr>
<tr>
<td>Iacobucci</td>
<td>.218</td>
<td>.496</td>
</tr>
<tr>
<td>Major</td>
<td>.579</td>
<td>-.171</td>
</tr>
<tr>
<td>Eigen Value</td>
<td>2.52</td>
<td>1.35</td>
</tr>
<tr>
<td>Pct. of Variance</td>
<td>28.0</td>
<td>15.0</td>
</tr>
</tbody>
</table>

The First Factor

A reading of Table 2 indicates that no single Charter policy area stands out as the identifying feature for Factor 1, nor do outcomes in favor of the individual or government help to identify the underlying dimension. Additionally, there seems to be no real pattern to the Factor 1 cases regarding whether a violation of the Charter occurred, or whether Charter 2-Step analysis was applied. Regarding the latter, the Court did not systematically differentiate between a Charter violation that was not justified, as opposed to one that was. However, the cases loading on Factor 1 feature a small set of Charter law areas, drawn from fundamental freedoms, criminal justice rights, and discrimination (see the last column of Table 2). Note also that the cases loading most positively on Factor 1 show an even split between rulings for the individual and for the government. On the negative side, a clearer pattern emerges, with the Charter claimant winning only two victories. Factor 1 prominently features Justice L'Heureux-Dubé dissenting in all ten of the cases scoring most positively, while Justice Sopinka dissents in eight of the nine cases on the negative side of the factor. Because dissenting opinions often speak with a clarity and forthrightness not achievable in opinions on the majority side, these dissenting opinions provide a clear basis for understanding the first factor. That dimension reflects a debate between the justices over a communitarian or libertarian orientation toward a set of Charter rights. What is striking is the extent to which virtually all of Justice L'Heureux-Dubé's opinions
### Table 2.

**Characteristics of Cases Loading Most Positively on Factor 1**

<table>
<thead>
<tr>
<th>Factor Score &amp; Case</th>
<th>Vote Split</th>
<th>Law</th>
<th>No Viol</th>
<th>Charter 2-Step</th>
<th>Brief Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>+1.54 Egan v. Canada [1995]</td>
<td>4-5</td>
<td>X</td>
<td></td>
<td></td>
<td>Age discrim.</td>
</tr>
<tr>
<td>+1.31 RJR-MacD. v. Canada [1995]</td>
<td>5-4</td>
<td>X</td>
<td>s. 1</td>
<td></td>
<td>Free expression</td>
</tr>
<tr>
<td>+1.28 R v. Pozniak [1994]</td>
<td>7-2</td>
<td></td>
<td></td>
<td></td>
<td>Right to counsel</td>
</tr>
<tr>
<td>+1.28 R v. Bartle [1994]</td>
<td>7-2</td>
<td></td>
<td>s. 24(2)</td>
<td></td>
<td>Right to counsel</td>
</tr>
<tr>
<td>+1.28 R v. Naglik [1993]</td>
<td>7-2</td>
<td></td>
<td></td>
<td></td>
<td>Fair trial</td>
</tr>
<tr>
<td>+1.21 B (R) v. Children's Aid [1995]</td>
<td>1-8</td>
<td>X</td>
<td>s. 1</td>
<td></td>
<td>Liberty, free religion</td>
</tr>
<tr>
<td>+1.20 Symes v. Canada [1993]</td>
<td>2-7</td>
<td>X</td>
<td></td>
<td></td>
<td>Sex discrim.</td>
</tr>
<tr>
<td>+1.08 R v. Durette [1994]</td>
<td>4-3</td>
<td></td>
<td></td>
<td></td>
<td>Fair trial</td>
</tr>
</tbody>
</table>

**Characteristics of Cases Loading Most Negatively on Factor 1**

<table>
<thead>
<tr>
<th>Vote Split</th>
<th>Law</th>
<th>No Viol</th>
<th>Charter 2-Step</th>
<th>Brief Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>-2.08 R v. Wholesale Travel [1991]</td>
<td>4-5</td>
<td>X</td>
<td>s. 1</td>
<td>Burden of proof</td>
</tr>
<tr>
<td>-1.98 R v. Jones [1994]</td>
<td>4-5</td>
<td>X</td>
<td></td>
<td>Self incrimination</td>
</tr>
<tr>
<td>-1.77 R v. Daviault [1994]</td>
<td>6-3</td>
<td></td>
<td>s. 1</td>
<td>Burden of proof</td>
</tr>
<tr>
<td>-1.69 Miron v. Trudel [1995]</td>
<td>5-4</td>
<td>X</td>
<td>s. 1</td>
<td>Marriage discrim.</td>
</tr>
<tr>
<td>-1.48 Ruffo v. Conseil de ... [1995]</td>
<td>1-6</td>
<td>X</td>
<td>X</td>
<td>Fair trial</td>
</tr>
<tr>
<td>-1.48 P (D.) v. S. (C.) [1993]</td>
<td>2-5</td>
<td>**</td>
<td>X</td>
<td>Religion, expression</td>
</tr>
<tr>
<td>-1.37 Kindler v. Canada [1991]</td>
<td>2-5</td>
<td>X</td>
<td></td>
<td>Liberty, cruel punish</td>
</tr>
<tr>
<td>-1.37 Ref: Ng Extradition [1991]</td>
<td>3-4</td>
<td>X</td>
<td></td>
<td>Liberty, cruel punish</td>
</tr>
</tbody>
</table>

---

**Vote Split**—The voting split on the case (liberal-conservative).

**Govt**—Government wins the case.

**Law Uncon**—The law in question was declared unconstitutional.

**No Viol**—The majority held there was no violation of a Charter right.

**Charter 2-Step**—The case involved use of s. 1 or s. 24(2) of the Charter by the majority.

***(D.) v. S. (C.)* involved a family law dispute with the outcome going against the Charter claimant. Tables 3 and 4 include the same categories, but the legend is omitted from those tables for space considerations.
on Factor 1 cases emphasize communitarian values. In her dissenting votes on the most positively scoring cases, her communitarian orientation features two broad themes: (1) a communitarian approach that emphasizes the protection of society from criminal offenders; and (2) an approach that stresses an ethic of care for groups facing discriminatory treatment or harm. On the negative side of the factor, Justice Sopinka’s dissenting votes consistently sound a libertarian message.

Focusing on the issue content of the Factor 1 cases, they all tend to revolve around a libertarian-communitarian conflict. It is interesting to note that a mirror image of pro-government versus pro-Charter claimant does appear in the subset of discrimination cases. The positive loading discrimination cases deal with issues that include a gay couple’s challenge to the denial of old age government benefits, a female attorney’s effort to claim tax deductions for child care expenses, a store owner’s challenge to Sunday closing laws on religious grounds, and a challenge of a law banning assisted suicide for the terminally ill (Egan v. Canada [1995] 2 S.C.R. 513; Symes v. Canada [1993] 4 S.C.R. 695; Hy and Zel’s Inc. v. Ontario (A.G.) [1993] 3 S.C.R. 675; and Rodriguez v. British Columbia (A.G.) [1993] 3 S.C.R. 519). In these four most positively loading discrimination cases, the majority of the court ruled against the Charter claimant and in favor of government interests to maintain traditional notions of social order. This is in direct contrast to the single discrimination case on the negative side of Factor 1, which overturned a denial of auto insurance benefits to an unmarried common law spouse (Miron v. Trudel [1995] 2 S.C.R. 418).


---

7 There is an intriguing undercurrent that runs through the opinions of dissenting justices on Factor 1 cases. Although one could criticize an overemphasis on doctrinal analysis because it is somewhat subjective, one would be hard pressed not to be struck by the consistent running commentary in the cases on Factor 1 that centers on an “ethic of care” theme most evident in Justice L’Heureux-Dube’s opinions, and an “ethic of justice” theme, most staunchly supported by Justice Sopinka. Justice L’Heureux-Dube’s dissenting votes clearly reflect a communitarian perspective that echoes themes drawn from feminist scholars that stress the importance of fostering relationships between
THE SECOND FACTOR

A survey of the cases that score most positively and negatively on the second factor suggests that the underlying dimension should be labeled due process or fairness in the criminal procedure area (see Table 3). This conclusion is supported by the fact that fifteen of the seventeen cases scoring most positively and negatively focus on a set of criminal procedural and liberty issues under the Charter. These cases run the gamut of fairness concerns in the criminal process: the right to liberty, principles of fundamental justice, search and seizure, arbitrary detention, right to counsel, trial within a reasonable time, fair trial, double jeopardy, and cruel and unusual punishment. As Table 3 shows, in eight of the nine cases loading most positively on Factor 2, the government wins, with no violation of the Charter noted by the Court; while in seven of the eight negative loading cases, the individual prevails. Thus, the strongest negatively scoring cases present a mirror image of the positive Factor 2 cases. The cases on this factor reflect a familiar liberal-conservative criminal justice conflict, with pro-defendant rulings dominating the negative side while “crime control” rulings dominate the positive cases.

The clarity of this factor can be seen in the eight criminal cases that load positively on Factor 2. The cases include two rulings where the court upheld the extradition of capital defendants; two others where the court determined that lengthy trial delays did not infringe the right to a speedy trial; and a case where a contempt charge against a striking union did not violate principles of fundamental justice (Ref Re: Ng Extradition [1991] 2 S.C.R. 858; Kindler v. Canada [1991] 2 S.C.R. 779; R v. Morin [1992] 1 S.C.R. 771; R v. Sharma [1992] 1 S.C.R. 814; United Nurses v. Alberta [1992] 1 S.C.R. 901). In two self-incrimination cases the court ruled that the right to silence was not infringed by the use of a recorded conversation by an undercover policeman, and that psychiatric tests could be used to establish whether a defendant is a dangerous offender (R v. Brown [1993] 2 S.C.R. 918; and R v. Jones [1994] 2 S.C.R. 229). Moreover, the court ruled that a criminal prohibition against assisted suicide did not discriminate against the terminally ill (Rodriguez v. British Columbia [1993] 3 S.C.R. 519). Again, across all of these cases, the majority struck a pro-government ruling and rejected the Charter claim.

The seven criminal cases on the negative side of Factor 2 paint a similar picture, although the court overwhelmingly favored the individual instead of the government. These cases include a right to counsel case where the court held a breath test inadmissible; a fair trial case where the court ruled a nation-wide media ban on a criminal proceeding was too broad; a dispute where the court determined

individuals and groups, and the maintenance of commitments to others beyond one's self (see Gilligan 1982, 1987; Lyons 1988; West 1991; MacKinnon 1993).
that depriving an individual of the defense of extreme intoxication violated the Charter; and a fundamental justice case where the court held that further litigation against the accused would be unfair, even though he lost on the merits (R v. Prosper [1994] 3 S.C.R. 236; Dagenais v. CBC [1994] 3 S.C.R. 835; R v. Daviault [1994] 3 S.C.R. 63; R v. Pontes [1995] 3 S.C.R. 44). Lastly, in two presumption of innocence cases, the court struck down a vagrancy law used to convict child molesters and called for a new trial in a case where errors were made on cross-examination, even though the majority ruled the defendant's Charter rights were not violated (R v. Heywood [1994] 3 S.C.R. 761; R v. Osolin [1993] 4 S.C.R. 595).

246
 Taken as a whole, these cases reflect the mirror image of the pro-government rulings on positive side of Factor 2, and demonstrate the dominance of a criminal justice conflict on the Canadian Court in the early Lamer Court years.

Six of the cases scoring most extremely on Factor 2 also register strong loadings on Factor 1. These cases include Rodriguez v. British Columbia [1993] 3 S.C.R. 519, R v. Jones [1994] 2 S.C.R. 229, Kindler v. Canada [1991] 2 S.C.R. 779, Ref. Re: Ng Extradition [1991] 2 S.C.R. 858, Miron v. Trudel [1995] 2 S.C.R. 418, and R v. Daviault [1994] 3 S.C.R. 63. One of the strengths of factor analysis is that it can identify the coalescing of attitudinal dimensions across cases. The Rodriguez case is illustrative, where a majority of the Court, speaking through Justice Sopinka, concluded that the statutory ban on assisted suicide was justified by a long-recognized governmental interest in protecting human life. This, he reasoned, was especially important where vulnerable individuals might be deprived of life without their consent. Although respect for human dignity was conceded an important societal value for Canadians, he pointed out that it was not a legal principle falling within the ambit of fundamental justice.

The dissenters offered at least two different grounds for their view that the ban on assisted suicide unconstitutionally deprived the terminally ill of the choice to end their lives that was available to others. Justice Cory argued that making assisted suicide unlawful and therefore unavailable to the terminally ill, discriminated against them by forcing them to end their lives in pain and without dignity. Justice McLachlin, joined by Justice L'Heureux-Dubé, concluded, on the other hand, that it was not the discrimination per se that violated the terminally ill patients' right to security of the person. Instead, it was the arbitrariness of denying the choice, which was available to others, solely on the asserted state interest of preventing possible future harm, which the dissenters saw as adequately addressed elsewhere in the law. Rodriguez, then, can be seen as implicating the closely-related but nonetheless separable dimensions of Factor 1 and Factor 2: the individual liberty versus community values implicated by Factor 1, and procedural fairness versus arbitrariness, long recognized as the antithesis of due process (Shklar 1964, 15).

The prominence of a factor reflecting fairness concerns in the criminal due process area is not surprising given the fact that these types of issues have dominated the Canadian Supreme Court's docket in the post-Charter era. Indeed, during the 1991-95 period, roughly 65 percent of non-unanimous Charter cases could be classified as containing some element of criminal law. Since such issues have been so dominant, it is understandable that one of the critical factors in our analysis should revolve around issues of fairness in the minds of the justices.

**The Third Factor**

We identify the third factor as a judicial activism-self-restraintist dimension because in all of the most positively loading cases the Court ruled against the
Charter claimant, and in seven of the nine decisions it determined that a Charter violation had not occurred (see Table 4). In our view, the positive cases reflect a majority stance that is self-restraintist in the sense that legislative schemes or executive actions were generally seen as not violating the Charter. On the negative side, the Court showed a greater propensity to apply what has been labeled the "Charter 2-Step," and ruled in favor of the Charter claimant in six of the eight cases (Knopff and Morton 1992). We believe this dimension reflects a debate on the Court over the breadth of Charter principles and the extent to which statutes can be salvaged under s. 1 or 24 (2) analysis. The fact that our reading of the cases identified activism and restraint as an important dimension underlying Charter cases shows the salience of this issue for current members of the Court and is illustrative of the debates over whether the Charter has triggered a new era of activism on the part of the Court (for example see Epp 1996; Morton, Russell, and Riddell 1994; Morton 1987, 1992; Manfredi 1993; Knopff and Morton 1992; Morton, Russell, and Withey 1991; Slattery 1987; MacKay 1983; Bender 1983; Russell 1982, 1992).

The cases loading on Factor 3 feature a broad range of issues that include free expression, religion, discrimination, criminal due process, and voting rights. The issue areas covered here are even more varied than those found on Factor 1. However, unlike the first factor, there is a clear distinction between the positive and negative cases in regard to whether a violation of the Charter has occurred (in the view of the majority). Thus, Factor 3 cases seem to highlight a debate on the court about the extent of charter protections, and whether those protections can be violated in the name of community values. The seven most positively loading cases in which the Court ruled that no Charter violation had occurred include R v. Finta, [1994], 1 S.C.R. 701, R v. Matheson, [1994], 3 S.C.R. 328, Symes v. Canada, [1993], 4 S.C.R. 695, Hy and Ze's Inc. v. Ontario, [1993], 3 S.C.R. 675, P (D.) v. S. (C.), [1993], 4 S.C.R. 141, CBC v. Lessard [1991] 3 S.C.R. 421; and CBC v. New Brunswick [1991] 3 S.C.R. 459. The two other positively loading cases, where the Court at least recognized a Charter breach, include R v. Wholesale Travel Group, [1991], 3 S.C.R. 157, and R v. Downey, [1992], 2 S.C.R. 10. In the interest of brevity, we will comment on the latter two cases rather than the former six.

In Wholesale Travel the Court ruled that a reverse onus provision violated the accused company's s. 11d right, but went on to determine that this provision was justified under s. 1 because of the harmful affect of misleading advertising, and the difficulty of proving the guilt of the accused in such an offense. Similarly, in Downey, the Court held that an evidentiary burden placed on an individual charged with living "on the avails of prostitution" violated this same Charter provision. Yet, the Court went on to rule that this burden was justified given the difficulty of proving that pimps exploit prostitutes for their own monetary gain. In general, the cases on the positive side of Factor 3 highlight instances in which members of the Court were unwilling to use the Charter to strike down legislation.
### Table 4. Characteristics of Cases Loading Most Positively on Factor 3

<table>
<thead>
<tr>
<th>Factor Score &amp; Case</th>
<th>Vote Split</th>
<th>Law</th>
<th>No</th>
<th>Charter 2-Step</th>
<th>Brief Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>+1.75 R v. Finta [1994]</td>
<td>3-4</td>
<td>X</td>
<td>X</td>
<td>s. 1</td>
<td>Speedy trial</td>
</tr>
<tr>
<td>+1.67 R v. Wholesale Travel [1991]</td>
<td>4-5</td>
<td>X</td>
<td>X</td>
<td>s. 1</td>
<td>Burden of proof</td>
</tr>
<tr>
<td>+1.55 R v. Matheson [1994]</td>
<td>1-8</td>
<td>X</td>
<td>X</td>
<td>s. 1</td>
<td>Right to counsel</td>
</tr>
<tr>
<td>+1.53 R v. Downey [1992]</td>
<td>3-4</td>
<td>X</td>
<td>X</td>
<td>s. 1</td>
<td>Presumed innocence</td>
</tr>
<tr>
<td>+1.37 Symes v. Canada [1993]</td>
<td>2-7</td>
<td>X</td>
<td>X</td>
<td></td>
<td>Sex discrimination</td>
</tr>
</tbody>
</table>

Since the Charter claimant won six of the eight cases loading most highly on the negative side of Factor 3, one could argue that these cases reflect the logical reverse of the positive scoring cases. In both R v. Zundel [1992] 2 S.C.R. 731 and R.J.R.-MacDonald v. Canada [1995] 3 S.C.R. 199 the Court struck down laws placing restrictions on free expression, and went on to rule that such restrictions could not be justified under s. 1 analysis because the provisions were overbroad. In R v. Prosper [1994] 3 S.C.R. 236 the Court determined that the admission of an unlawfully obtained breathalyzer test would bring the administration of
justice into disrepute. The focus here is on the activist stance by the Court in a case where the police appear to have met the spirit of the right to counsel protection. Three other cases loading highly on the negative side of the factor also dealt with procedural fairness issues, and in all three, the Court sided with the individual criminal defendants who were alleging a Charter violation (see R. v. Seaboyer, [1991] 2 S.C.R. 577; R v. Daviault, [1994] 3 S.C.R. 63; and R v. Collins; R v. Pelfrey, [1995] 2 S.C.R. 1104).

Factor 3 seems to tap an underlying struggle on the part of the justices over activism and restraint, which potentially lies at the heart of all Charter disputes. As indicated earlier, Canadians, unlike Americans, have institutionalized within their constitution communitarian values through sections 1 and 24 (2) which enable the court to recognize Charter violations, but uphold those infringements if they are “justified in a free and democratic society” or allow the admission of evidence in criminal trials if it does not “bring the administration of justice into disrepute.” This distinctive Canadian language should jar the thinking of U.S. readers, because it provides institutional support for the choices that justices make in upholding community values, and it has generated a kind of attitudinal conflict that is subtly different from that found in the United States. The difference lies in the distinction between telling an individual that her rights were not violated, and telling an individual her rights were violated, but that the constitution itself allows for such violations in particular circumstances. What Canadians have made explicit in the Charter is only implied in the American Constitution, which has important ramifications for how laws are interpreted in the two countries. The fact that Canadians have written an interest-balancing provision into the text of the Charter means that the court has a built-in mechanism for limiting individual rights on a case-by-case basis. The third factor highlights the fact that the institutional feature of the Charter itself fosters an activist-restraintist debate that pits communitarian values and individual rights against each other in a unique Canadian manner. This conflict is understandable on the Canadian Court given the relatively recent judicial review power that the Court obtained in 1982. This institutional feature plays a distinctive role in shaping the contours of the underlying attitudinal conflict that is evident on the court during this Lamer Court period.

CONCLUSION

When the scaling of Canadian Supreme Court decisions was first discussed by Sidney Peck over three decades ago, he rejected the notion that “the judges vote as they do because they base their votes on their attitude to policy [.]” (1967a: 21). Peck went on to characterize the scalogram as merely “an informative descriptive device” (1967a: 21). His unease perhaps led him to excessive modesty when he later reported the voting patterns of Canadian Supreme Court justices (Peck 1967b, 1969).
We have proceeded on the awareness, in part borrowed from him, that judicial researchers are likely to understand more about the political attitudes that animate judicial decisions in nonunanimous cases if they spent more time looking at the clues provided in the judges’ opinions and the manifest issue content of the cases. This is not a matter of accepting the discredited proposition that the logic of judicial opinions explains how the decision was reached. As Richard Wasserstrom (1961: Chap. 1) effectively pointed out nearly four decades ago, the logic of explanation in judicial decisions is not necessarily by any means the same as the logic of justification, although the ability to justify one’s decision surely can constrain what can be decided. Instead of imposing ideological constructs to explain judicial votes, we have attempted to uncover the values the judges themselves identify in the cases. We think the techniques employed in this approach enhance the possibility that the relevant attitudinal dimensions can be more accurately identified. In short, we believe the use of factor analysis followed by a careful reading of justices’ opinions and examination of the issues in the cases are likely to provide a truer mapping of how the judges think in those cases where they disagree.

Our mapping of the decisions of the Lamer Court through factor analysis has identified three principal dimensions that help to explain a large portion of the variance in the voting behavior among the justices. As mentioned earlier, an analysis of the cases loading most extremely on each of the dimensions indicated that the first factor is a communitarian-libertarian dimension, while the second and third factors address trial fairness and due process concerns, and judicial activism and self-restraint. Upon further reflection, the identification of these three factors makes intuitive sense, particularly when one reads the cases. The fair trial-due process dimension is understandable because of the large volume of criminal disputes the Court has addressed in the post-Charter era. We believe that when the court faces criminal law issues, the justices will generally approach the cases from an attitudinal framework centered on fairness concerns. Similarly, when the Court deals with the set of issues relating to fundamental freedoms, liberty and equality, our factor analysis suggests that the justices will tend to grapple with these disputes through the attitudinal prism of individual rights versus communitarian norms. This is an attitudinal approach very familiar to scholars of U.S. courts, and very much in line with the findings of earlier scholarship on the Canadian Court (Peck 1967a, 1967b, 1969; Fouts 1969; Tate and Sittiwong 1989; Wetstein and Ostberg 1999). Finally, given the continuing debate by justices and scholars alike over activist-restraintist interpretations of the Charter, it is not surprising that this dimension emerged in the factor analysis as well.

Ultimately, the research suggests at a fundamental level that traditional notions of liberalism and conservatism probably go a long way to explain attitudinal differences between Canadian justices in the post-Charter Lamer Court. If we accept the argument that Factor 1 touches on libertarian-communitarian differences, and
that Factor 2 features a kind of liberal-conservative difference on fairness issues in criminal cases, the justices of the Lamer Court closely resemble the justices of the U.S. Supreme Court. Thus, our findings echo those of Fouts (1969, 284) over 30 years ago, when he said that the Canadian justices employ a “decisional philosophy” that is “strikingly similar to that espoused in the U.S. Court.”

REFERENCES


Attitudinal Dimensions of Supreme Court Decision Making


Received: July 14, 2000
Accepted for Publication: May 4, 2001
costberg@uop.edu