

## 2 Review of Quantitative Research on Judicial Decision Making

Five ways of explaining judicial decision making have emerged in past quantitative research. One way to explain judicial decision making is that judges decide cases only based on the law. In this dissertation this precedent-driven explanation of judicial decision making is called the legal model. Other explanations of judicial decision making have emerged from research by American political scientists, and I divide them into four models – the attitudinal model, the personal attributes model, the strategic model and the institutional model.

As a legal realist's challenge to the legal model, the attitudinal model claims that judges make decisions based in part on their personal policy preferences rather than solely according to the law. Building on the attitudinal model, the personal attributes model asserts that judges make decisions under the influences of their personal backgrounds, which influence their personal policy preferences. Framing judicial decision making as a more dynamic process than that implied by the attitudinal and personal attributes models, the strategic model claims that judges make decisions under the influences of the strategic interactions among the judges. Shifting the focus from judges to the institutional environment in which they interact with each other, the institutional model asserts that judges make decisions under the influences of the institutional environmental factors such as policies and procedures of the courts.

The judicial decision making models are used only as an aid to think about prior quantitative research on judicial decision making. That is to say, there is no concrete

division among the five ways of explaining judicial decision making. The five models are not mutually exclusive and collectively exhaustive.

The rest of this section unfolds as follows. Section 2.1 highlights selected quantitative studies on judicial decision making in the U.S. Section 2.2, Section 2.3 and Section 2.4 present an overview of past quantitative analyses of judicial decision making in the Supreme Court of Canada. These quantitative studies can be divided into three groups, identified by the work of three principal investigators. Section 2.2 highlights the work of Sidney Peck, an Osgoode Hall Law School professor, and others who used scalogram analysis to map voting patterns of Supreme Court of Canada justices in terms of their personal policy preferences. Section 2.3 highlights the work of Peter Russell, a University of Toronto political scientist, and others who used descriptive statistics to depict the institutional workings of the Supreme Court of Canada. Section 2.4 highlights the work of Neal Tate and other U.S.-based political scientists who used multiple regressions to explain the voting patterns of Supreme Court of Canada justices with variables including the socio-economic attributes of the justices, the parties involved in the cases and their lawyers. Section 2.5 highlights prior quantitative research on judicial decision making in U.S. and Canadian tax cases.

## **2.1 Five Models of Judicial Decision Making**

Five models of judicial decision making can be constructed based on different explanations of judicial behavior. They are the legal model, the attitudinal model, the

personal attributes model, the strategic model and the institutionalist model. The groundbreaking scholarship of C. Herman Pritchett spurred the development of the models in the United States.<sup>3</sup> Observing that dissents started appearing in U.S. Supreme Court opinions in the 1930s and 1940s, the American political scientist conducted quantitative analysis of dissents and voting blocs in the Court. One of Pritchett's representative studies is *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947*.<sup>4</sup> In the 1948 book, Pritchett argued against the orthodox explanation of judicial decision making under the traditional legal model. Starting with Chapter One entitled “At the Center of the Tornado” with subheadings including “The Nine Old Men” and “Justices Without Halos,” Pritchett argued that the judges decide cases based on their personal policy preferences rather than legal precedents, laying the foundation for the development of the attitudinal model.<sup>5</sup>

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<sup>3</sup> Lee Epstein, Jack Knight, and Andrew Martin argued that the work of Pritchett blazed the trail for quantitative research on judicial decision making in the U.S., even though he is not well known outside political science. See Lee Epstein, Jack Knight, and Andrew D. Martin, “The Political (Science) Context of Judging” (2003) 47 Saint Louis U.L.J. 783 at 786–788 [hereinafter Context of Judging]. For a recent overview of quantitative research on judicial decision making in the U.S., see Michael Heise, “The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism” (2002) U. Ill. L. Rev. 819.

<sup>4</sup> C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947* (New York: Macmillan, 1948).

<sup>5</sup> For recent descriptions of the legal model, see John M. Scheb II and William Lyons, “Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions” (2001) Political Behavior 181 at 182; Frank B. Cross, “Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance” (1997) 92 Nw. U.L.Rev. 251 at 255 and Frank B. Cross, “Decision-making in the U.S. Circuit Courts of Appeals” (2003) 91 Cal. L. Rev. 1457 at 1463. In the 2003

In addition to Pritchett, other American political scientists started testing the legal realists' idea of judicial decision making in the late 1940s. Among them were Glendon Schubert and Harold Spaeth, who did research on the attitudinal model.<sup>6</sup> Schubert advocated for the use of quantitative methods – notably scalogram analysis – in analyzing judicial decision making in his 1959 book *Quantitative Analysis of Judicial Behavior*.<sup>7</sup> Applying the technique to analyze U.S. Supreme Court justices' votes in his 1965 book *The Judicial Mind*, Schubert asked this question about the judges: “To what extent are their public acts influenced by their personal beliefs?”<sup>8</sup> In general, Schubert categorized the attitudes of judges by whether they voted for or against legal outcomes that might

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article, Frank Cross said he found both legal and political factors determined judicial decision making in his quantitative analysis, with the legal factors wielding stronger influences than the political factors.

<sup>6</sup> For profiles of pioneer researchers of judicial behavior, see Nancy Maveety, ed., *The Pioneers of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2003). In addition to Pritchett, Schubert and Spaeth, the book profiles Sidney Ulmer, Joseph Tanenhaus, Beverly Blair Cook, Walter Murphy, Woodward Howard, David Danelski, David Rohde, Edward Corwin, Alpheus Thomas Manson, Robert McCloskey, Robert Dahl and Martin Shapiro.

<sup>7</sup> See Glendon A. Schubert, *Quantitative Analysis of Judicial Behavior* (Glencoe, Ill.: Free Press, 1959) [hereinafter *Quantitative Analysis*]. Neal Tate said: “The most substantial influence on the use of quantitative methods in judicial behavior came initially from *Quantitative Analysis of Judicial Behavior*.” Although Tate said the quantitative techniques proposed by Schubert in the book were not statistical methods in the strictest sense, he said “each does involve the systematic analysis of quantitative data.” See C. Neal Tate, “The Methodology of Judicial Behavior Research: A Review and Critique” (1983) *Political Behavior* 51 at 71 [hereinafter *Methodology*]. Tate said, “Perhaps no method is more closely associated with the development of judicial behavior research than cumulative or Guttman scaling, frequently called scalogram analysis” (at 65).

<sup>8</sup> Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices 1946–1963* (Evanston: Northwestern University Press, 1965) at 15 [hereinafter *Judicial Mind*].

reflect political liberalism and economic liberalism.<sup>9</sup> Based on consistent judicial voting patterns, Schubert characterized some U.S. Supreme Court justices as liberals (Justices Murphy, Black, Douglas, Rutledge, Brennan and Warren); some as pragmatic conservatives who were relatively liberal on political issues but conservative on economic issues (Justices Goldberg, Frankfurter, Jackson and Stewart); some as conservatives (Justices Harlan, Whittaker and Burton); and some as dogmatic conservatives (Justices Clark, White, Minton, Vinson and Reed).<sup>10</sup>

While Schubert was establishing himself as the main proponent of the use of quantitative methods in judicial behavioral analysis, Spaeth was developing an extensive database for quantitative research on judicial decision making. Spaeth's database project has become part of the S. Sidney Ulmer Project for Research in Law and Judicial Politics, now housed in University of Kentucky's Department of Political Science.<sup>11</sup> In the past decade, Spaeth, along with Jeffrey Segal, argued forcefully for their attitudinal explanations of voting patterns of judges in three books.<sup>12</sup> Spaeth and Segal conducted

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<sup>9</sup> Later in his 1974 book *The Judicial Mind Revisited*, Schubert noted that the general question asked in the 1965 book was about "the relationship between political belief systems and political behavior. Indeed, my title for the original book was originally, and remained until the book was in an advanced stage of publication, *The Liberal Mind*." See Glendon Schubert, *The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Analysis* (New York: Oxford University Press, 1974) at 17.

<sup>10</sup> See *Judicial Mind*, *supra* note 8 at 270, Table 41.

<sup>11</sup> See <http://www.as.uky.edu/polisci/ulmerproject/UlmerProject/index.htm>.

<sup>12</sup> See Harold J. Spaeth and Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedence on the U.S. Supreme Court* (Cambridge; New York: Cambridge University Press, 1999). Also, see Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge; New York: Cambridge University Press, 1993); and Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the*

quantitative analysis of judicial votes to test the legal model with the use of data on dissents in the U.S. Supreme Court. They used the patterns of dissents to approximate violations of *stare decisis* based on the rationale that judges who had dissented in cases that became precedents will not agree with such precedents used in later cases if the attitudinal model correctly depicts judicial decision making.<sup>13</sup> Spaeth and Segal found support for the attitudinal model in the U.S. Supreme Court data.

A spin-off from the attitudinal model is the personal attributes model. According to the explanations of judicial decision making under the personal attributes model, judges are influenced by their socio-economic backgrounds including regional ties and political affiliations in deciding cases.<sup>14</sup> Among researchers who tested the personal attributes model with U.S. data was Tracey George. She found that former law professors who were appointed to the U.S. appellate bench exhibited stronger propensities than other judges to write opinions and to reverse lower court opinions in order to advance new

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*Attitudinal Model Revisited* (Cambridge; New York: Cambridge University Press, 2002). For a recent critical analysis of the attitudinal model, see Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 1997).

<sup>13</sup> For a recent comment on the Spaeth-Segal approach, see Howard Gillman, “What’s Law Got to Do With It? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making,” review essay of *Majority Rule or Minority Will* by Harold J. Spaeth and Jeffrey A. Segal, in (2001) *Law & Soc. Inq.* 465 at 477–479.

<sup>14</sup> The list of personal attributes that might influence judicial decision making include age, gender, race, religion, education, prior judicial experience, prior prosecutorial experience, prior public/elected office, appointing president and political party affiliation. See Tracey E. George, “Court Fixing” (2001) 43 *Ariz. L.Rev.* 9 [hereinafter *Court Fixing*]. Neal Tate explained the use of variables such as appointing presidents and regional affiliation in building personal attributes model in Neal Tate and Roger Handberg, “Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior” (1991) 35 *Am. J. Political Science* 460.

legal ideas.<sup>15</sup> In addition, she found that former law professors who were appointed to the U.S. appellate bench because of their ideological leanings exhibited strong propensities to act consistently with their prior scholarly positions.<sup>16</sup> James Brudney, Sara Schiavoni, and Deborah Merritt also tested the personal attributes model on U.S. data, and they found that Democratic judges tended to vote for unions more than Republican judges, while female Republican judges tended to vote for unions more than male Republican judges.<sup>17</sup>

In addition to his attitudinal insight, Pritchett realized that judges may agree to support their brethren on rulings that are close to but not exactly in line with their personal policy preferences in order to advance at least part of their personal policy agenda. Such judicial actions constitute the basis of the strategic model, which had not been fully developed until Pritchett's student Walter Murphy produced a seminal analysis of strategic judicial behavior.<sup>18</sup> A recent authoritative work on strategic judicial behavior was written by Lee Epstein and Jack Knight. In *The Choices Justices Make*, Epstein and Knight analyzed two sets of U.S. Supreme Court case data to show how law evolves from

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<sup>15</sup> See Court Fixing, *ibid.* at 53.

<sup>16</sup> *Ibid.* at 59.

<sup>17</sup> James J. Brudney, Sara Schiavoni, and Deborah J. Merritt, "Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern" (1999) 60 Ohio St. L.J. 1675.

<sup>18</sup> Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964). For recent descriptions of the strategic model, see H.W. Perry, "Taking Political Science Seriously" (2003) 47 Saint Louis U.L.J. 889 at 894; Lee Epstein, Nancy Staudt, and Peter Wiedenbeck, "Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code" (2003) 13 Wash. U.J.L. & Pol'y 305 at 314–315; and Context of Judging, *supra* note 3 at 798.

judicial action.<sup>19</sup> The two datasets were (1) cases in Justice Brennan's register in the 1983 term and (2) landmark cases decided under the Burger Court from 1969 to 1985. Using the data, Epstein and Knight argued that U.S. Supreme Court justices such as Brennan advanced their personal policy goals by voting strategically to determine whether certiorari was granted and building majority coalitions after certiorari was granted. As the justices acted strategically in the institutional process of judging, Epstein and Knight also referred to the institutional context of judicial decision making in their book.

The institutionalist model is closely tied to the strategic model. Under the institutionalist model, routine policies and standard procedures concerning the operation of the court influence judicial decision making. They include policies and procedures for the selection of cases to be heard and the assignment of opinion writing responsibilities by the Chief Justice.<sup>20</sup> Although the institutionalist and strategic models can be seen as cousins if not siblings, one can adopt the institutionalist model but reject the strategic model. Judge Harry Edwards, who has propounded on the importance of institutional influences on judicial decision making, doubts the usefulness of quantitative analysis of judicial decision making and dismisses both the strategic model as well as the attitudinal model.<sup>21</sup> Under his own theory of collegiality, judges work together in a collegial

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<sup>19</sup> Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998).

<sup>20</sup> For a recent description of the institutionalist model, see Kevin T. McGuire, "The Institutionalization of the U.S. Supreme Court" (2004) 12 *Political Analysis* 128 at 129.

<sup>21</sup> Harry T. Edwards, "The Effects of Collegiality on Judicial Decision Making" (2003) 151 *U. Pa. L. Rev.* 1639 at 1662—1664 [hereinafter *Collegiality*]. He is a Circuit Judge at the United States Court of Appeals for the D.C. Circuit. He served as Chief Judge of the D.C. Circuit from October 1994 to July 2001. For his

environment, which institutionalizes them to work for the common interest in getting the law right by pursuing principled agreement with uncensored expression and sincere consideration of different views in the judicial decision making process.<sup>22</sup>

In sum, the five models of judicial decision making represent a broad range of explanations of judicial behavior. Offering an alternative to the legal model, the attitudinal model focuses on judges instead of the law in explaining judicial decision making. Building on the attitudinal model, the personal attributes model expands the list of decision-influencing factors from personal policy preferences of judges to include social backgrounds of judges. As judges decide cases amidst their brethren in the institutional setting of courts, the strategic model captures the effects of strategic interactions among judges, and the institutionalist model highlights the impact of policies and procedures of the courts.

## 2.2 Mapping Voting Patterns of Supreme Court of Canada Justices

Sidney Peck is the first Canadian legal scholar to use a quantitative technique to map Canadian judicial voting patterns in accordance with the attitudinal model. Influenced by U.S. attitudinal pioneers such as Schubert, Peck adapted scalogram analysis, also called cumulative scaling, to analyze judicial decision making in the

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challenge of the usefulness of quantitative analysis of judicial decision making, see *infra* note 247.

<sup>22</sup> See Collegiality. *ibid.* at 1644–1645.

Supreme Court of Canada.<sup>23</sup> The objective of scalogram analysis is to explore whether judges voted consistently in terms of their personal policy preferences. The way scalogram works can be illustrated by the use of a simple hypothetical example.<sup>24</sup>

In this hypothetical example, five nonunanimous cases involving the Canadian federal government and a nuclear energy company are used to construct a scale. In all five cases the legal dispute is whether the government should allow a nuclear plant to be built near densely populated areas. In Case A the location in dispute was Yellowknife, in Case B it was Regina, in Case C it was Winnipeg, in Case D it was Vancouver, while in Case E it was Toronto. The research question is whether Judge X or Judge Y tended to give the nuclear company more freedom in placing its nuclear plant.

In the scalogram analysis, the cases might be ranked in an ascending order by the size of the population of the locations in dispute. Therefore, Case A is ranked first, Case B second, Case C third, Case D fourth and Case E fifth. A judicial voting pattern would be deemed consistent if a judge who voted in favor of the nuclear energy company in Case C also voted in favor of it in Cases A and B while a judge who voted against the

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<sup>23</sup> Peck referred to Schubert extensively in his three articles on judicial decision making in the Supreme Court of Canada. See Sidney Raymond Peck, "A Behavioural Approach to the Judicial Process: Scalogram Analysis" (1967) 5(1) Osgoode Hall L.J. 1 [hereinafter Behavioural Approach]; S. R. Peck, "The Supreme Court of Canada, 1958–1966: A Search for Policy through Scalogram Analysis" (1967) 45 Can. Bar. Rev. 666 [hereinafter Supreme Court of Canada]; and Sidney R. Peck, "A Scalogram Analysis of the Supreme Court of Canada, 1958–1967" in Glendon Schubert and 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), 314–316 [hereinafter Scalogram].

<sup>24</sup> Peck used an example of attitudes toward foreigners to illustrate how scalogram analysis works. See Behavioural Approach, *supra* note 23 at 5.

nuclear energy company in Case C also voted against it in Cases D and E. A nuclear energy company win in Case C means that the company is allowed to build a nuclear plant in Winnipeg. As Winnipeg has a larger population than Regina (Case B) and Yellowknife (Case A), a nuclear energy company win in Case C means that the company should be allowed to build a nuclear plant in the two less densely populated cities too. A nuclear energy company loss in Case C means that the company is not allowed to build a nuclear plant in Winnipeg. As Winnipeg has a smaller population than Vancouver (Case D) and Toronto (Case E), the nuclear energy company should not be allowed to build a nuclear plant in the two more densely populated cities too.

One objective of ordering the cases is to map visually identifiable voting patterns of judges. In the current example, the voting patterns of Judge X and Judge Y would be presented in a five-by-two matrix with cases as row headings and the judges as column headings. A vote in favor of the nuclear energy company is recorded as a plus sign, while a vote against it is recorded as a minus sign. Assuming that Judge X voted in favor of the nuclear energy company in Cases A and B, while Judge Y voted in favor of it in Cases A, B, C and D, the scale would show clearly that Judge Y recorded more plus signs near the top of her column. Therefore, Judge Y can be viewed as having given the nuclear energy company more freedom in placing its nuclear plant.

In scalogram analysis, only nonunanimous cases are used because they suggest that the answers to the legal questions raised in the cases were uncertain and thus personal policy preferences of judges might have influenced judicial decision making. Scalogram analysis is based on the assumption that judges decide a certain category of

cases with legal uncertainty based on one dominant attitude. Peck realized from the outset that judges do not make decisions based on only one dominant attitude even in similar cases.<sup>25</sup> Moreover, Peck knew that simply ordering the cases according to the researchers' subjective rankings does not prove anything objectively. According to Schubert, Peck accepted "the method of cumulative scaling while rejecting its theory."<sup>26</sup> Still, Peck saw the usefulness of scalogram analysis as a descriptive device of the factors that influence judicial decision making in nonunanimous cases but not as an explanatory tool of judicial behavior.<sup>27</sup>

As ordering cases is of such importance in scaling, and whether an order fits the requirement of scaling is more subjective than objective, Peck avoided the uncertainty by devising a classification system of voting tendencies to turn scalogram analysis into descriptive statistics of judicial votes in terms of judicial preferences.<sup>28</sup> For example, assuming that the research question is whether judges tended to vote for "big" business, a scale is constructed to rank a number of cases about disputes between government and corporations based on the valuation of the corporations. As valuation could be performed in many different ways, a corporation that is ranked first in terms of valuation based on free cash flow may not be ranked first in terms of valuation based on earnings. Under

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<sup>25</sup> See Behavioural Approach, *supra* note 23 at 19–20.

<sup>26</sup> See 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) at 14.

<sup>27</sup> See "Supreme Court of Canada", *supra* note 23 at 679.

<sup>28</sup> *Ibid.*

Peck's classification system, judges who voted for big business in 80% or more of all nonunanimous cases they decided are classified as "strongly in favour of" big business, those who voted for big business in 60%–79% of all nonunanimous cases are classified as "in favour of" big business, those who voted for big business in 41%–59% of the cases are classified as "neutral", those who voted for big business in 21%–40% of the cases are classified as against big business, while those who voted for big business in 20% or less cases are classified as strongly against big business.

Adapting Schubert's approach, Peck used data from nonunanimous Supreme Court of Canada cases from 1958 to 1966 to construct scales for taxation, negligence and criminal law cases.<sup>29</sup> He divided judicial votes into two groups – voting for or against one party (e.g. voting for the government or voting against the government). Based on the scales, Peck found that Justice Cartwright sided with individuals most of the time because he voted in favor of taxpayers in tax appeals, in favor of plaintiffs in negligence appeals and strongly in favor of the accused in criminal appeals.<sup>30</sup> Casting Justice Abbott as the mirror image of Cartwright, Peck found that he voted in favor of the government in tax appeals, in favor of defendants in negligence appeals and in favor of the Crown in criminal law appeals. With respect to Justices Ritchie and Martland, Peck found that they were the neutral justices.<sup>31</sup> Ritchie was neutral on all three scales, while Martland was neutral in tax and negligence appeals but in favor of the Crown in criminal law appeals.

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<sup>29</sup> *Ibid.* at 682.

<sup>30</sup> *Ibid.* at 723.

<sup>31</sup> *Ibid.* at 725.

Donald Fouts, a Northern Illinois University political scientist, supported Peck's general finding on the existence of consistent judicial voting patterns.<sup>32</sup> Like Schubert, Fouts divided the nonunanimous Supreme Court of Canada cases from 1950 to 1960 into cases about civil liberties and economic liberalism. He defined civil liberties cases as those with conflicts between (1) personal rights and liberty claims and (2) governmental authority.<sup>33</sup> In addition, he defined economic liberalism cases as those with conflicts between (a) "underprivileged economic interests" such as the general public and (b) "those of affluence and monopoly power" such as private corporations.<sup>34</sup> Fouts found that Justice Rand exhibited strong support for civil liberties and economic regulation, and he labeled him a liberal and equated him to the likes of Justices Douglas, Black, Warren and Brennan in the 1960–1962 term of the U.S. Supreme Court.<sup>35</sup> Furthermore, Fouts found that highly consistent voting records of Quebec justices as a group – Abbott, Rinfret, Fauteux and Taschereau – infused the Supreme Court of Canada in the 1950s with "a pro-economic liberalism orientation and slight anti-civil liberties tendencies."<sup>36</sup> In general, Fouts found that Supreme Court of Canada justices were twice as likely to

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<sup>32</sup> Donald E. Fouts, "Policy-Making in the Supreme Court of Canada, 1950–1960" 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) 257. Fouts may be the only U.S. political scientist who has published scalogram analysis of judicial decision making in the Supreme Court of Canada.

<sup>33</sup> *Ibid.* at 268.

<sup>34</sup> *Ibid.* at 273.

<sup>35</sup> *Ibid.* at 279.

<sup>36</sup> *Ibid.* at 283.

disagree on public policy cases as in private law cases from 1950 to 1960, suggesting the presence of an attitudinal variable in judicial decision making for such cases.<sup>37</sup>

Peck's findings of consistent judicial voting patterns were also supported by the scalogram analysis of judicial decision making in the Supreme Court of Canada in an earlier period performed by two of his students at Osgoode Hall Law School. Mapping voting patterns in Chief Justice Strong's court from 1892 to 1902, Michael Bader and Edward Burstein scaled voting patterns in five types of cases: negligence, petition of right (compensation claims for injuries made by government acting in a quasi-private capacity), railways, insurance and jurisdiction (whether the Supreme Court of Canada in its early days had jurisdiction to decide a case).<sup>38</sup> Bader and Burstein found that Justice Fournier, who was a member of the federal Liberal Party that sought to distinguish itself from MacDonald's Conservatives by attacking influences of railways and business in the government and standing by farming interests, voted in favor of individuals most of the time.<sup>39</sup> They also found that Chief Justice Strong exhibited similar voting patterns.<sup>40</sup> Moreover, Bader and Burstein found that Justice Gwynne, who was a successful businessman, voted in favor of railway and insurance companies as well as the government but did not vote in favor of individuals.<sup>41</sup> Justice King, who once was the

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<sup>37</sup> *Ibid.* at 267.

<sup>38</sup> Michael Bader and Edward Burstein, "The Supreme Court of Canada 1892–1902: A Study of the Men and the Times" (1970) Osgoode Hall L.J. 503.

<sup>39</sup> *Ibid.* at 540–541.

<sup>40</sup> *Ibid.* at 542.

<sup>41</sup> *Ibid.* at 542–544.

leader of the Conservative Party and prime minister of New Brunswick, along with Justices Taschereau, Sedegwick and Girouard recorded mixed voting patterns that could not be interpreted to be clearly for or against individuals or the government most of the time.<sup>42</sup>

In sum, the studies by Peck and Fouts, as well as Bader and Burstein, contributed to the empirical testing of the attitudinal model in Canada. They took the first collective step to empirically test the idea that Canadian judges voted consistently in terms of their personal policy preferences and confirmed the existence of consistent judicial voting patterns. Also, Peck and others paved the way for future studies by collecting the data, which were used in the multiple regression studies by Panu Sittiwong as outlined later in Section 2.4.<sup>43</sup>

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<sup>42</sup> *Ibid.* at 544–545.

<sup>43</sup> See *infra* note 73. One notable study at the time of Peck that did not involve scalogram was conducted by George Adams and Paul Cavalluzzo. The two Osgoode students of Peck produced a classification system of social backgrounds of judges, and the variables they produced look similar to those used in regression analysis of judicial decision making in Canada years later as depicted in Section 2.4. Adams and Cavalluzzo divided the years from 1867 to 1963 into seven periods and further broke down the make-up of the court by regional representation (Quebec, Ontario, Maritimes, West); ethnicity (French, English, Scottish, Irish, bi-cultural); religion (Roman Catholic, Anglican, Presbyterian, Methodist, Huguenot, Baptist, Protestant, unknown); political party affiliation (Liberal, Conservative, unknown); prior office (prior political office, prior public office, no public office, unknown); prior judicial office (justices with prior judicial experience and their years of experience, justices with no prior judicial office); and father's occupation (clergyman, politician, lawyer, judge, doctor, landowner-farmer, ship captain, shipbuilder, druggist, merchant, architect, unknown). See George Adams and Paul J. Cavalluzzo, "The Supreme Court of Canada A Biographical Study" (1969) 7(1) Osgoode Hall L.J. 61.

### 2.3 Describing Judicial Decision Making in the Supreme Court of Canada

Peter Russell, one of Canada's premier political scientists, did not focus only on the relationships between judicial votes and personal policy preferences; instead, Russell described the workings of the Supreme Court of Canada, of which judicial decision making is an integral part. His work can be seen as part of institutionalist/strategic studies. In the quantitative portion of his work Russell relied on descriptive statistics. One way to highlight the quantitative work of Russell is to review two of his studies on the Supreme Court of Canada together; one was done before and one was done after the introduction of the *Charter*.<sup>44</sup> In both studies, Russell found, among other things, tension between justices from Quebec and justices from other parts of Canada as reflected in their voting patterns. In Russell's 1969 study of the Supreme Court of Canada, in which he analyzed 1,031 reported cases from 1950 to 1964, he found that, among other things, "there was a greater tendency for the Supreme Court to reverse Quebec appellate court" in cases "when common-law judges constituted a majority or wrote the Court's judgment."<sup>45</sup> Analyzing 100 *Charter* cases from 1984 to 1989, Russell, F. L. Morton and

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<sup>44</sup> Russell has also produced a lot of non-quantitative work on the Supreme Court of Canada. See e.g. Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987). For Russell's scholarly contributions in law and political science, see Joseph F. Fletcher, ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) [hereinafter *Ideas*].

<sup>45</sup> Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969) at 216. Russell listed his research questions as follows: "What is the nature of the Court's work? How often is it concerned with provincial law or Civil Code cases? Are there significant

Michael J. Withey found in their 1992 study that, among other things, 11 of 19 appeals from Quebec were reversed, while 17 of 19 appeals from British Columbia and 25 of 31 appeals from Ontario were upheld.<sup>46</sup> They found that the *Charter* “was promoted as an instrument of national unity” but it has become “a source of disunity with respect to Quebec”.<sup>47</sup> Russell and company also found increased conflicts among Supreme Court of Canada justices. Based on their data, the percentage of unanimously decided *Charter* cases per year dropped from 100% (4 of 4) in 1984 to slightly over 60% in 1989 (16 of 26).<sup>48</sup> Russell and his colleagues attributed the rise of dissents to the schism in the Court between Justices Wilson and Lamer on one side and Justices McIntyre and L’Heureux-Dubé on another side since 1986.<sup>49</sup> According to Russell, Morton and Withey, “such division was more or less inevitable given the inescapably contentious character of modern judicial review.”<sup>50</sup>

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differences in its disposition of appeals from different sources? Is there any evidence of cultural alliances of judges on different issues? To what extent have common-law judges participated in Quebec appeals dealing with civil law?” See page 114. Joseph Fletcher pointed out that Russell first used quantitative analysis in his preparation of the report. “In preparing his report for the B & B Commission, he virtually lived at the court for more than a year, making his first use of quantitative methods to describe the court’s decision-making procedure.” See Ideas, *supra* note 44 at 171.

<sup>46</sup> F. L. Morton, Peter H. Russell, and Michael J. Withey, “The Supreme Court’s First One Hundred Charter of Rights Decisions: A Statistical Analysis” (1992) 30(2) Osgoode Hall L.J. 1. at 17.

<sup>47</sup> *Ibid.* at 48.

<sup>48</sup> *Ibid.* at 37. Russell and company also found that *Charter* claimants won a total of 35 of the 100 cases in 1984–1989, with the winning percentage of *Charter* claimants per year falling from 75% in 1984 (3 of 4) to 31% in 1989 (8 of 26). *Ibid.* at 9.

<sup>49</sup> *Ibid.* at 48.

<sup>50</sup> *Ibid.*

Russell's quantitative approach is best summarized in a description of the strengths and weaknesses of descriptive statistics as an analytical tool in his joint 1992 paper with Morton and Withey. Descriptive statistics, they said, can be used to construct a narrative of the patterns of the Supreme Court of Canada's work flow, nature of the work of the court, sources of its cases, distribution of cases among the justices and their relationships with each other.<sup>51</sup> Using *Charter* cases as examples, they said that "by identifying patterns not discernible through the study of leading *Charter* cases, quantitative analysis can generate empirically supported generalizations – that is, new understandings – of how the *Charter* is affecting the Supreme Court and how the Court is shaping the *Charter*."<sup>52</sup> However, Russell and company cautioned that the use of descriptive statistics cannot replace the study of individual cases because descriptive statistics only captures the bottom-line outcomes of the cases but not their subtleties.<sup>53</sup> They said: "A decision that upholds a *Charter* claim might do so through opinions that actually narrow the meaning of the *Charter* right involved."<sup>54</sup>

Ian Greene, who was a doctoral student of Russell, and Peter McCormick followed Russell's quantitative approach and found more empirical support for Russell's finding of a divided Supreme Court of Canada.<sup>55</sup> In the 1998 book *Final Appeal*:

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<sup>51</sup> *Ibid.* at 3.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* at 3–4.

<sup>54</sup> *Ibid.*

<sup>55</sup> Greene is a political scientist at York University. McCormick is a political scientist at University of Lethbridge and was a colleague of Greene while he was teaching there in the 1980s.

*Decision-Making in Canadian Courts of Appeal*, Greene, McCormick and their collaborators found, among other things, differences in the patterns of dissents between Justices Iacobucci and Cory as a group and Justices L’Heureux-Dubé and McLachlin as another in nonunanimous cases.<sup>56</sup> For example, based on data on voting patterns of Supreme Court justices from 1990–1997, Greene, McCormick and others found that Iacobucci and Cory dissented 10% of the time in all cases they presided over while L’Heureux-Dubé dissented 29% of the time and McLachlin dissented 24% of the time.

McCormick, one of the more prolific researchers who use descriptive statistics to examine judicial decision making in Canada, provided more examples of such institutional/strategic knowledge on dissents and voting coalitions in his work on the Supreme Court of Canada.<sup>57</sup> In further exploring the topic of dissents, McCormick found that the practice has grown in the past 25 years, rising from an average of about seven per year before 1970 to an average of over 40 per year since 1980.<sup>58</sup> Since the end of World

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<sup>56</sup> Ian Greene, Carl Baar, Peter McCormick, George Szablowski, and Martin Thomas, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Co., 1998). The Supreme Court of Canada is only one of the appellate courts analyzed in the book. The total vote counts for the Supreme Court of Canada justices in reported cases from 1990 to 1997 were: Iacobucci (612), Cory (648), L’Heureux-Dubé (588) and McLachlin (640). Calculations are based on data in Table 10.1 at page 208. Another Greene-McCormick project is Peter McCormick and Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lormier & Co., 1990).

<sup>57</sup> Since the 1980s, McCormick has written dozens of articles and books on various aspects of courts in Canada. Selected publications of McCormick are cited in note 56-62 and note 89-90.

<sup>58</sup> Peter McCormick, “Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949–1999” (2002) 81 Can Bar. Rev. 369 at 393–394 [hereinafter Second Thoughts]. He did other work on citations including Peter McCormick and Tammy Praskach, “Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba” (1996) 24 Man. L.J.

War II the justice who cited minority opinions the most was Lamer, who recorded 137 citations of minority opinions, of which 36 were his own minority decisions or a self-citation rate of about 26%. L'Heureux-Dubé topped the list of those who cited one's own minority opinions, with 67 out of 103 times or a self-citation rate of about 65%.<sup>59</sup>

In terms of voting blocs, McCormick found that Justices Iacobucci and Major were committed to the Lamer voting bloc, but Justice McLachlin was not, so the post-Lamer stability in the McLachlin Court partly hinges on the actions of newer justices.<sup>60</sup> On the Lamer Court, McCormick found that Justices Lamer, Sopinka and Major formed the trio who voted as a bloc and also appeared in many differently configured voting coalitions of four and five judges. Therefore, the three justices can be seen to have had more power than others because of their coalition-building capability.<sup>61</sup> On the Laskin Court, McCormick found that Chief Justice Laskin did not exert greater influence on the Supreme Court of Canada until his later years because he was first opposed by a coalition of Justices Martland, Judson, Ritchie, Pigeon and de Grandpre and then a coalition of

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335; Peter McCormick, "Judicial Citation, the Supreme Court of Canada, and the Lower Courts: the Case of Alberta" (1996) 34 *Alta. L. Rev.* 870; and Peter McCormick, "The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989–1993" (1995) 33 *Osgoode Hall L.J.* 453.

<sup>59</sup> See *Second Thoughts*, *ibid.* at 388–389.

<sup>60</sup> Peter McCormick, "'With Respect ...'—Levels of Disagreement on the Lamer Court 1990–2000" (2003) 48 *McGill Law Journal* 89 at 115. See also Peter McCormick, "Birds of a Feather: Alliances and Influences on the Lamer Court 1990–1997" (1998) 36 *Osgoode Hall L.J.* 339. Four years after Lamer's retirement, Iacobucci retired from the Supreme Court of Canada at the end of June 2004.

<sup>61</sup> Peter McCormick, "The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court 1991–1997" (1999) 22 *Dal. L.J.* 93.

Justices Martland, Pigeon and Ritchie.<sup>62</sup>

In sum, the collective work of Russell, Greene and McCormick contributed to the empirical testing of the institutionalist/strategic models in Canada. In addition to gathering more evidence in support of the Peck group's general finding that judges voted differently on a consistent basis, they used the data to paint a detailed portrait of the workings of the Court as a policy-making institution. In highlighting the different voting patterns exhibited by Quebec and non-Quebec justices as well as the various patterns of dissents and different configurations of voting coalitions, they advanced the institutionalist/strategic knowledge of decision making in a divided Supreme Court of Canada in the post-World War II era.

## **2.4 Explaining Judicial Voting Patterns of Supreme Court of Canada**

Neal Tate, who had conducted his personal attributes studies at the University of North Texas before moving to Vanderbilt University, and other U.S.-based political scientists used multiple regressions to explain rather than describe voting patterns of Supreme Court of Canada justices. The use of personal attributes variables in multiple regression analyses could solve one methodological problem – the lack of reliable external evidence of personal policy preferences of Supreme Court of Canada justices – with scalogram and descriptive statistics analyses. Personal attributes can be used as

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<sup>62</sup> Peter McCormick, "Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973–1984" (1998) 24 *Queen's L.J.* 237.

proxies for personal policy preferences of judges as all people are shaped by their social backgrounds to a certain degree. Personal attributes are the most accessible external evidence of personal policy preferences of judges on which researchers can rely, unless the judges publicly and openly declare their personal policy preferences.<sup>63</sup> In the late 1980s and early 1990s, Tate and Panu Sittiwong, his graduate student, used multiple regressions to test the personal attributes model in three studies.

The first of the Tate-Sittiwong trilogy of studies was Sittiwong's 1985 master's thesis.<sup>64</sup> Adopting Schubert's categorization of cases, Sittiwong classified justices' votes in three ways. First, those who voted for civil rights claimants in civil liberties cases were counted as casting liberal votes. Second, those who voted for what he called "underdogs" – unions or governments in his study – instead of business monopolies in economics cases were counted as casting liberal votes. Third, those who voted for business instead of government in fiscal claims cases were counted as casting liberal votes.<sup>65</sup>

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<sup>63</sup> Spaeth and Segal used newspaper reporting of U.S. Supreme Court justices to construct an indicator of personal policy preferences of the justices in their attitudinal analyses. For details see the three books by Spaeth and Segal, *supra* note 12.

<sup>64</sup> Panu Sittiwong, "Canadian Supreme Court Decision-Making: The Personal Attribute Model in Explaining Justices' Patterns of Decision-Making, 1949–1980" (M.A. Thesis, North Texas State University, Department of Political Science, 1985). He used ordinary least squares in the study.

<sup>65</sup> *Ibid.* at 28–29. The fiscal claims cases Sittiwong referred to were about monetary conflicts between individuals and government. The classification of voting for business such as corporate taxpayers in fiscal claims cases as a "liberal" vote could be problematic, as the social background reasons for siding with civil rights claimants and corporate taxpayers might not be of the same type. For example, a working-class upbringing might have steered a justice to vote for civil rights claimants, while a private school education might have steered a justice to vote for corporate taxpayers. Constructing a dependent variable by such a classification of "liberal" votes could run the danger of distorting the regression results.

Using a dataset of 737 nonunanimous cases from 1949 to 1980, Sittiwong regressed voting records of Supreme Court justices as the dependent variable against four social background independent variables – region (from Quebec or not), political party of appointing Prime Minister (Liberal Party or Conservative Party), previous judicial experience (number of years) and tenure on the Supreme Court of Canada (number of years).

Sittiwong found that justices who tended to cast liberal votes were those who were not from Quebec, who were judges before serving on the Court, who were on the Court for a relatively short period and who were appointed by Liberal Prime Ministers.<sup>66</sup>

In 1989, Tate and Sittiwong extended Sittiwong's work in the first published article that used multiple regressions to test for linkages between voting records of Supreme Court of Canada justices and their social backgrounds.<sup>67</sup> Like Schubert, Tate and Sittiwong divided cases into civil rights and liberties cases as one type and cases concerning economics issues as another type.

Using a dataset of 606 nonunanimous decisions from 1949 to 1985, Tate and Sittiwong regressed the dependent variable of justices' voting percentages for liberal case outcomes against five independent variables – indicators of region and religion

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<sup>66</sup> *Ibid.* at 81–82. The regression model generated an adjusted R-square of 0.52, meaning that the model explained more than half of the variations of the voting patterns of the justices. The region variable was significant at a one-percent level, while the tenure variable was significant at a five-percent level. The remaining two variables were not statistically significant.

<sup>67</sup> C. Neal Tate and Panu Sittiwong, "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model across Nations" (1989) 51(4) *The Journal of Politics* 900. At that time Sittiwong was a doctoral student of Tate.

affiliations of justices (using an index of non-Quebec/Catholic attributes), political party of Prime Ministers who appointed the justices (Liberal Party or not), the prime ministers who appointed the justices (Liberal Party Prime Minister Mackenzie King on one hand and others on another), political experience of justices (some political experience or none) and judicial experience of justices (number of years as a judge).<sup>68</sup>

For civil rights and liberties cases as well as economics cases, Tate and Sittiwong found that the region-religion variable influenced justices' voting percentages positively, suggesting that justices who were not from Quebec and not Catholics tended to cast liberal votes.<sup>69</sup> In addition, Tate and Sittiwong found that the variable of whether the political party of prime ministers who appointed the justice was the Liberal Party influenced the casting of liberal votes positively in both types of decisions, while the variable of whether the Prime Minister was Mackenzie King influenced the casting of such votes negatively.<sup>70</sup>

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<sup>68</sup> The voting percentages of justices were based on the number of decisions they decided. Weighted least squares regression was used. A case outcome was regarded as "liberal" when (1) the claimants of a right or liberty won in civil rights and liberty cases or (2) the "less economically privileged" party won in conflicts of economic interests between non-government parties or (3) the government won in cases pitting the government against business on regulations of business. Almost half of the outcomes of the cases in the study were "liberal" (*ibid.* at 908-909). The dependent variable was logged because the distribution of individual justice's voting percentages was positively skewed (*ibid.* at 902-903).

<sup>69</sup> *Ibid.* at 911. Both models – one for civil liberties cases and another for economics cases – reported an adjusted R-square of over 60%. The region-religion variable and the political party variable were significant at the one-percent level, while the King appointee variable was significant at the five-percent level. The prior political experience variable was significant at the one-percent level for the civil rights and liberties cases only.

<sup>70</sup> *Ibid.* Tate and Sittiwong also found that political experience was a variable that had positive influence

Together the two findings suggested that justices who were appointed by Liberal Prime Ministers except Mackenzie King tended to cast liberal votes in both types of decisions. Tate and Sittiwong pointed out: “The conservatizing effect of the Quebec political and legal culture comes through clearly for Canadian justices.”<sup>71</sup> Based on their findings, Tate and Sittiwong concluded that “decision making in the Canadian Supreme Court reflects the same influences that shape Canadian politics outside that court.”<sup>72</sup>

To continue his work on the personal attributes model, Sittiwong embarked on an ambitious data collection project for his doctoral dissertation.<sup>73</sup> For his analysis of Supreme Court of Canada cases from 1875 to 1990, Sittiwong compiled a dataset using data from Peck, Russell, Tate, his 1985 M.A. thesis and his 1989 joint article with Tate.<sup>74</sup> Compiling the longitudinal dataset from various datasets was not easy, as Sittiwong said that “the original data for 1875–1969 collected by Peck and Russell were still in the form of computer punch cards, and it turned out that numerous cards were missing.”<sup>75</sup>

Using the data, Sittiwong built regression models for nonunanimous individual claims cases (individual v. government) and economic claims cases (such as individual v.

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on the casting of liberal votes in civil and liberties cases, suggesting judges who were politicians tended to cast liberal votes in such decisions.

<sup>71</sup> *Ibid.* at 913.

<sup>72</sup> *Ibid.* at 914.

<sup>73</sup> Panu Sittiwong, “Canadian Supreme Court decision-making, 1875–1990: Institutional, group, and Individual level perspectives” (Ph.D Dissertation, University of North Texas, Department of Political Science, 1994).

<sup>74</sup> *Ibid.* at 31-33.

<sup>75</sup> *Ibid.* at 32.

corporations and labor v. management). To analyze the two types of cases, Sittiwong tried a new approach by dividing the study period from 1875 to 1990 into three segments – from 1875 to 1949, from 1949 to 1990 and from 1875 to 1990.<sup>76</sup> He used similar dependent and independent variables that he had used in his M.A. thesis. The dependent variable was a liberal score.<sup>77</sup> The independent variables were religion and region (Quebec non-Catholic, Quebec Catholic, non-Quebec non-Catholic or non-Quebec Catholic), prior political experience (some political experience or none), party of appointing Prime Minister (Liberal or Conservative), prior judicial experience (number of years), prior private practice experience (number of years) and Prime Minister Mackenzie King appointee (yes or no).<sup>78</sup>

Even though the regression models did not exhibit strong explanatory power, they did not provide strong statistical evidence to contradict the prior findings that judges who were Catholic but not from Quebec and judges who were Liberal appointees tended to cast liberal votes. Therefore, Sittiwong argued that region and religion as well as political party of appointing Prime Minister were “consistent predictors in explaining the justice’s voting behavior.”<sup>79</sup>

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<sup>76</sup> For each type of cases, Sittiwong ran multiple regressions in ordinary least squares on the three time segments.

<sup>77</sup> *Supra* note 73 at 76. Sittiwong coded a government win in fiscal claims cases as a liberal vote. The coding is different from what he did in his M.A. thesis (*supra* note 65).

<sup>78</sup> *Ibid.* at 158, 160, 162 and 163.

<sup>79</sup> *Ibid.* at 168. For six of the regression models, only the models for individual claims cases and economic claims from 1949 to 1990 generated an adjusted R-square of about 50%, with most of the variables statistically significant at a five-percent level in a one-tailed test. The region-religion variable and the

In recent years, some American political scientists have produced quantitative tests of findings of previous studies on judicial decision making in the Supreme Court of Canada. Testing the 1989 Tate-Sittiwong personal attributes model, Donald Songer and Susan Johnson divided Supreme Court of Canada nonunanimous decisions from 1949 to 2000 into three types of cases: civil rights and liberties cases; criminal cases (a subset of civil rights and liberties cases); and economic cases.<sup>80</sup> They classified a vote as liberal when the vote was cast for “the party asserting the denial of a civil right or liberty, the defendant in a criminal case, the government in [an] economic regulation case, unions or workers in a labor case, or the economic underdog in a private economic dispute.”<sup>81</sup>

Songer and Johnson confirmed some of the findings by Tate and Sittiwong but cast doubts on others. Two groups of justices – those from Quebec and those who were Liberal appointees – tended to cast conservative votes in criminal cases but liberal votes in economic cases. This is partly in line with the Tate-and-Sittiwong finding that Quebec judges tended to cast conservative votes but raised questions on the finding that judges appointed by Liberal Party tended to cast liberal votes. In addition, Songer and Johnson found that Quebec justices who were Liberal appointees tended to cast liberal votes in

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variable of the political party of appointing Prime Minister were at a five-percent level in a one-tailed test in three out of the six models.

<sup>80</sup> Donald R. Songer and Susan W. Johnson, “Attitudinal Decision Making in the Supreme Court of Canada” (University of South Carolina, U.S., 2002), in 2002 meeting of the Midwest Political Science Association of Chicago (available on the web at [www.cla.sc.edu/poli/faculty/songer/Songer-Johnson.pdf](http://www.cla.sc.edu/poli/faculty/songer/Songer-Johnson.pdf)). The authors did not disclose the exact size of their dataset. The unit of analysis for the dependent variable is Supreme Court justices, ranging from 23 to 33 in their models. They used ordinary least squares.

<sup>81</sup> *Ibid.* at 13.

criminal cases but conservative votes in economic cases. The voting behavior of Quebec justices who were Liberal appointees was the opposite of the behavior of judges who were from Quebec as an individual group and judges who were Liberal appointees as an individual group.<sup>82</sup> The combined group behaved differently than the two groups that made up the combination.

C. L. Ostberg, Matthew Wetstein and Craig Ducat tested two sets of components of prior modeling on judicial decision making in the Supreme Court of Canada and found that ideological variables reflecting the dichotomy of liberalism and conservatism can capture the attitudes of Supreme Court of Canada justices in *Charter* cases but regional and political party variables had no impact on the justices' voting patterns in search and seizure cases.

Examining 58 nonunanimous Charter cases in the first half of the Lamer years of the Supreme Court of Canada from 1991 to 1995, they found 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.”<sup>83</sup> Analyzing a dataset of

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<sup>82</sup> *Ibid.* at 22, Table 3. The models on the three types of cases reported an R-square of over 50%. But the region variable, political party variable and the interaction variable of region and party were only significant at the five-percent level in the criminal case model and economic case model.

<sup>83</sup> See C. L. Ostberg, Matthew E. Wetstein and Craig R. Ducat, “Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991–1995” (2002) 55(1) *Political Research Quarterly* 235. Factor analysis was used to slot factors considered to be influential in judicial decision making in groupings such as liberalism and conservatism. C. L. Ostberg is a political scientist at University of the Pacific, while Matthew E. Wetstein is a political scientist at San Joaquin Delta College. Craig R. Ducat is a political scientist at Northern Illinois University.

279 observations generated from 41 search and seizure cases from 1984 to 1994, Ostberg and Wetstein found that personal attributes such as prior judicial experience (years), region (Quebec or not), gender, political party of appointing Prime Ministers (Liberal or Conservative) and personal ideology of the justices were not the main explanatory variables for case outcomes. Ostberg and Wetstein said: “In deciding search and seizure cases in Canada in the post-Charter years, the dimensions of prime importance are judicial attitudes toward factual circumstances rather than the personal ideology and values of justices.”<sup>84</sup>

In recent years, U.S.-based political scientists have also used multiple regressions to test the Canadian applicability of theories related to judicial decision making that were previously tested in the U.S. One of the theories tested was Marc Galanter’s theory that the haves will come out ahead.<sup>85</sup> Testing the applicability of Galanter’s theory to the Supreme Court of Canada, Roy Flemming and Glen Krutz investigated whether lawyers who argued repeatedly before the Supreme Court of Canada tended to win more than other lawyers.<sup>86</sup>

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<sup>84</sup> See C. L. Ostberg and Matthew Wetstein, “Dimensions of Attitudes Underlying Search and Seizure Decisions of the Supreme Court of Canada” (1998) 31(4) *Canadian Journal of Political Science* 767. They performed logistic regression analysis.

<sup>85</sup> Marc Galanter, “Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 *Law & Soc. Rev.* 160. The theory states that the rich and the powerful will more likely win in courts than the poor and the weak.

<sup>86</sup> Roy B. Flemming and Glen S. Krutz, “Repeat Litigators and Agenda Setting on the Supreme Court of Canada” (2002) 35(4) *Can. Jl. of Pol. Sci.* 811. Flemming is a political scientist at Texas A&M University, while Krutz is a political scientist at University of Oklahoma. They performed multivariate analysis in

Analyzing data derived from a total of 1,265 applications from 1993 to 1995, they found that the repeat players did not necessarily come out ahead in the Supreme Court of Canada. They offered two reasons to explain their findings based on the institutional environment at the Supreme Court of Canada. The first one is about the procedure dealing with applications: “The amount of attention an application receives in Canada may well dilute the value of a well-known name as a shortcut to identifying a worthy application; alternatively, this attention increases the chances that a solid case made by a lesser-known name will be recognized.”<sup>87</sup> The second reason is about law clerks: “Another reason why the experience or reputation of repeat players may be discounted in the Canadian Court is that the law clerks lack the knowledge about repeat players that their American counterparts have. Law clerks in Canada are recruited during their senior year in law school to serve the justices. Law clerks in the US Supreme Court typically have clerked for a year or two in the lower courts, where they are likely to see and learn more about lawyers through observation and through the grapevine that winds through the legal system.”<sup>88</sup>

The Flemming-and-Krutz findings seem to contradict the findings by McCormick on repeat players almost a decade ago. In a 1993 study of almost 4,000 Supreme Court of Canada decisions from 1949 to 1992, McCormick found that the government won more often than businesses, which won more often than unions, and unions won more often

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logistic regressions and bivariate analysis in cross-tabulations.

<sup>87</sup> *Ibid.* at 832.

<sup>88</sup> *Ibid.*

than individuals.<sup>89</sup> He said: “The reported decisions of the Supreme Court of Canada since 1949 show a persistent pattern of advantage between various categories of litigants, patterns so strong and so internally consistent that we can statistically ‘predict’ the probability of appellate success from a knowledge of the relative status of the two parties.”<sup>90</sup> However, as Flemming and Krutz examined the propensity to win of repeat players who are lawyers rather than the parties represented by the lawyers as specified by McCormick, more studies are needed to clarify the applicability of Galanter’s theory to explain judicial decision making in Supreme Court of Canada.

Lori Hausegger and Stacia Haynie tested a theory about the use of panel assignments by chief justices to further their personal policy preferences in a comparative study of Canadian and South African courts.<sup>91</sup> The importance of panel assignments was tested on U.S. data before, but the study by Hausegger and Haynie is the first multiple

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<sup>89</sup> Peter McCormick, “Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992” (1993) 26(3) *Can. Jl. of Pol. Sci.* 523. McCormick said his theory does not mean to downplay “the independence or the impartiality of judges by predicting in advance the general direction of their decisions.” Instead, he said he merely pointed out the winning attributes of parties in cases. He said that such examination is like “suggesting that the taller basketball team will usually win” and the referees will not take that as an insult.

<sup>90</sup> *Ibid.* at 540. McCormick regressed the dependent variable of winning percentage of the parties against an independent variable of what he called “advantage differential,” which represents the advantage of certain parties over others. He said he found a “perfect fit” in his regression based on an unlabelled number of 0.7971. On the assumptions that he ran an ordinary least squares regression and the number was either an  $R^2$  or adjusted  $R^2$ , the one-variable regression result produced the explanatory power he claimed.

<sup>91</sup> Lori Hausegger and Stacia Haynie, “Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division” (2003) 37(3) *Law & Soc. Rev.* 635. Both authors are political science professors at Louisiana State University. They conducted conditional logit regression analysis.

regression analysis of panel assignments in the Supreme Court of Canada.

Analyzing data from published Supreme Court of Canada decisions from 1986 to 1997, Hausegger and Haynie found that “[w]hile ideologically distant judges may be assigned to more cases, those closer to the chief justice may be assigned disproportionately to the more salient cases.”<sup>92</sup> They explained the moves by Canadian Chief Justices Dickson and Lamer at least partly as a strategy to maintain a balance of perspectives on panels: “The Canadian chief justices have larger panel sizes and may appoint both extremely conservative and extremely liberal judges to the panels alongside members who are more closely aligned with the chief justice. The ideologues will then be marginalized, and the panel median will remain closer to the chief justice.”<sup>93</sup>

In the same study on panel assignments, Hausegger and Haynie also found evidence for freshman effects in the Supreme Court of Canada. They found that “while both countries assign freshman judges less frequently to panels, Canadian chief justices do so significantly less than their South African counterparts” so “it appears that a judge’s first year on the bench in Canada is regarded very differently than are subsequent years.”<sup>94</sup>

The finding seems to contradict an earlier finding by Ostberg, Wetstein and Ducat of the absence of freshman effect in the Supreme Court of Canada.<sup>95</sup> Ostberg and her

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<sup>92</sup> *Ibid.* at 651.

<sup>93</sup> *Ibid.* at 655.

<sup>94</sup> *Ibid.* at 653.

<sup>95</sup> C. L. Ostberg, Matthew E. Wetstein and Craig R. Ducat, “Acclimation Effects on the Supreme Court of

colleagues used data derived from Supreme Court of Canada cases from 1973 to 1999 to examine the workload of the first 12 months of 15 new justices appointed to courts under Chief Justices Laskin, Dickson and Lamer. The three researchers found no discernible freshmen effects overall, but they said that Canadian chief justices helped ease the transition of newly appointed judges by assigning them fewer cases: “If a justice is eased on the Court in the way we suggest, freshman justices are necessarily afforded more time to establish their voting and opinion voice earlier in their careers than their U.S. counterparts .... As such, they exhibit fewer signs of uncertainty and unease, and establish consistent patterns of judicial behavior early on.”<sup>96</sup> As Hausegger and Haynie and Ostberg, Wetstein and Ducat used different multivariate techniques to analyze different datasets, more studies are needed to determine whether freshmen effects exist in the Supreme Court of Canada.<sup>97</sup>

In sum, the collective work of Tate, Sittiwong, Songer, Johnson, Ostberg, Wetstein, Ducat, Flemming, Krutz, Hausegger and Haynie contributed to the empirical testing of the personal attributes and the institutionalist/strategic models. The use of

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Canada: A Cross-Cultural Examination of Judicial Folklore” (2003) 84(3) *Social Science Quarterly* 704. Variance analysis was used in the study. Basically, the analysis of variance in this case focuses on whether the means of the variables representing the behavior of freshman justices are different from those of other justices in a statistically significant way. The results are by and large negative.

<sup>96</sup> *Ibid.* at 719. The reasoning fits what McCormick offered in 1994. See Peter McCormick, “Judicial Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada, 1949-1993” (1994) 5 *Sup. Ct. L. Rev.* 499 at 520-521.

<sup>97</sup> Hausegger and Haynie conducted conditional logit regression analysis, while Ostberg and company conducted variance analysis, which is described in note 95.

multiple regressions enabled the researchers to test causal relationships between judicial votes and personal attributes of judges as well as the institutional process of judging. These multivariate analyses showed that repeated tests are required to advance knowledge. For example, the Tate-and-Sittiwong findings about Quebec judges and judges appointed by Liberal prime ministers were tested by Songer and Johnson, while the explanatory power of personal attributes was tested by Ostberg, Wetstein and Ducat. Some of these findings are the same but some are different, so more quantitative tests are required to clarify the findings on the explanatory power of these two personal attributes.

## **2.5 Explaining Judicial Decision Making in U.S. and Canadian Tax Cases**

Not many Canadian and American researchers have published quantitative research that examined whether personal backgrounds of judges influenced their decision making in U.S. and Canadian tax cases. Among the researchers who published such research, American researchers make up the majority. Among the American researchers, Daniel Schneider, a U.S. tax law professor, has done more in examining the correlations between socio-demographic characteristics of U.S. judges and their voting records in U.S. tax cases than anyone else. Therefore, Section 2.5 highlights the work done by Schneider. One way to have a sense of the contributions of Schneider's work is to take a look at the work of others on tax cases first and then take a look at Schneider's work. The other researchers are Sydney Peck; Mark Altieri and his collaborators; and Cindy Ostberg and Matthew Wetstein.

### **2.5.1 Peck on Consistent Patterns in Judicial Decision Making in Supreme Court of Canada Tax Cases**

Sydney Peck, a law professor in Canada introduced earlier in Section 2, is the first to publish quantitative research on judicial decision making in Canadian tax cases. As reviewed in Section 2.2, he conducted scalogram analysis on judicial decision making in the late 1960s. As a part of his bigger project on judicial decision making of the Court, he scaled 28 nonunanimous Supreme Court of Canada tax decisions in 1958-1966.<sup>98</sup> In his scalogram analysis, Peck showed that some Supreme Court of Canada justices voted for taxpayers more often than others in tax cases. In particular, he found that Cartwright was pro-taxpayer, while Taschereau, Ritchie, Spence, Martland and Hall were neutral, but Abbott, Fauteux and Judson were pro-government (or against taxpayers). But the Peck research did not show that the voting outcomes were caused by personal backgrounds or personal policy preferences of the justices because the scalogram analysis can only describe the voting records.

### **2.5.2 Altieri and Company on Ideology and Personal Backgrounds in Judicial Decision Making in U.S. Tax Cases**

Mark Altieri, Jerome Apple, Penny Marquette and Charles Moore, all accounting professors in the U.S., raised the possibility that personal backgrounds may be decision-

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<sup>98</sup> See Supreme Court of Canada, *supra* note 23.

influencing variables in U.S. tax cases. In a short 2001 article, they presented the findings in their chi-square analysis of the voting records of 29 judges in 902 U.S. Tax Court cases in 1993-1996.<sup>99</sup> The accounting professors found that judges appointed by Republican Presidents would more likely rule for taxpayers than those appointed by Democratic Presidents.<sup>100</sup> Although they found that judges with different ideological outlooks would likely vote differently, they cautioned that “[i]t is unclear, however, whether this difference is an ideological one or one based on the different populations from which Republican and Democratic administrations select Tax Court appointees.”

### **2.5.3 Ostberg and Wetstein’s Recent Attempt in Analyzing Judicial Decision Making in Supreme Court of Canada Tax Cases**

In a 2004 working paper, Cindy Ostberg and Matthew Wetstein, both political scientists in the U.S., conducted logistic regression analyses on 134 judicial votes cast in Supreme Court of Canada nonunanimous tax cases in 1984-2002 to determine whether ideology of the Supreme Court of Canada justices and other variables influenced their choice of winners.<sup>101</sup> As part of their 2004 working paper on Canadian union-related

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<sup>99</sup> Mark P. Altieri, Jerome E. Apple, Penny Marquette, and Charles K. Moore, “Political Affiliation of Appointing President and the Outcome of Tax Court Cases” (2001) 84 *Judicature* 310.

<sup>100</sup> *Ibid.* at 313. They conducted a Chi-square difference of means test.

<sup>101</sup> C. L. Ostberg and Matthew E. Wetstein, “Economic Cases and the Attitudinal Model in the Canadian Supreme Court” (Annual Meeting, Midwest Political Science Association, April 15-18, 2004) <<http://www.deltacollege.edu/emp/mwetstein/ostbergwetsteinecon2004.pdf>> (date accessed: 14 February 2005). Both Ostberg and Wetstein are political scientists. Ostberg is a professor at University of the Pacific,