

# SHOULD THEY ALL JUST GET ALONG? JUDICIAL IDEOLOGY, COLLEGIALLY, AND APPOINTMENTS TO THE SUPREME COURT OF CANADA

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## INTRODUCTION

Over the past 25 years, the justices of the Supreme Court of Canada have not exhibited the divergent policy views along party lines that have been characteristic of the justices of the United States Supreme Court. This apparent lack of partisan polarization in Canada may at first give rise to smugness about the appointments process in Canada; after all, our process appears to have successfully sidestepped the politicization associated with the U.S. nomination and confirmation system.<sup>1</sup> However, before any claim that the Canadian appointments process is in fact superior can be made or defended, it is necessary to understand what this lower level of politicization implies about the judicial decision-making process and the quality of adjudication by our Court relative to the U.S. Supreme Court. We will argue that whether the relatively nonpartisan nature of the Supreme Court in Canada is advantageous depends on a number of assumptions, such as the nature of the appointments process, the characteristics of the justices who are appointed in each system, and the decision-making processes used by the justices on each Court.

The debate over the most appropriate process for appointing justices to the Supreme Court of Canada rests on a number of empirical assumptions. Key among these is the assumption that the justices decide cases at least partly in accordance with their personal policy preferences. This assumption underlies two conflicting policy prescriptions. The first policy prescription is that it is in the interests of an open and democratically accountable judiciary for the appointments process to gravitate towards U.S.-style nominations, hearings, and confirmation. If justices are going to rely on personal policy preferences to guide their decision-making, then it stands to reason that these policy preferences should be tested and vetted openly and

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<sup>1</sup> For a discussion of the increasing politicization of the judicial appointments process in the U.S. and some of the associated harms and benefits, see David R. Stras, "The New Politics of Judicial Appointments" *Tex. L. Rev.* [forthcoming in 2008].

publicly by the citizens who will be affected by the decisions. The second prescription is nearly the opposite: that the appointments process should be depoliticized by adopting a more neutral, bipartisan (or multi-partisan) committee system. Because personal policy preferences will inevitably guide judicial decision-making, certain safeguards ought to be implemented to prevent partisan allegiance from systematically biasing those policy preferences. The idea is that judging is an activity that ought to be separate and distinct from party politics, and that the justices who are selected ought to be the candidates with the most legal talent and highest levels of professionalism, not the candidates with the views most congenial to the political party in power. After all, for a nation's highest court to be effective in ensuring the government of the day does not abuse its power or infringe upon minority protections, it ought not to be beholden to or aligned with the government. The judiciary, on this view, must be independent, and it can only be independent if appointments are not driven by partisan political considerations.

There is a significant and growing literature addressing the connection between judges' policy preferences and their voting in cases in the U.S.<sup>2</sup> With some well-known exceptions, such as Justice John Paul Stevens, this literature tends to find a clear difference in how justices on the U.S. Supreme Court vote, depending on whether they were appointed by a Republican or Democratic president.<sup>3</sup> In Canada, under a very different appointment process, recent empirical research has found that there is a much weaker connection between how justices vote on divisive cases and the Prime Minister who appointed them. Generally, Canadian Supreme Court justices appear to agree more often than the justices do in the U.S. and, when they disagree, the lines of disagreement are less predictable than in the U.S.<sup>4</sup>

How these general findings are viewed depends on how they are framed. If one takes the position that there is one clear "right" answer to each legal question, one may be tempted to argue that the lack of partisan predictability in Canada is good. Ideally, a well-functioning panel of justices will be better able than any one individual to sort through the strength of the competing arguments and arrive at the best answer possible. A well-constituted and professional panel will draw on the collective experience and combined intelligence of its members to arrive at an answer that is more likely to be correct than the conclusion of any single justice. The observation that justices in Canada do not diverge as greatly in their decisions,

<sup>2</sup> The empirical literature on judging (at the Supreme Court and Federal Court levels) has grown rapidly recently. See, e.g. Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, U.K.: Cambridge University Press, 2002); Cass R. Sunstein, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington, D.C.: Brookings Institution Press, 2006); Andrew D. Martin *et al.*, "Competing Approaches to Predicting Supreme Court Decisionmaking" (2004) 2 *Perspectives on Politics* 761.

<sup>3</sup> Justice John Paul Stevens was appointed by President Ford, a Republican, but is by most estimations among the most liberal (if not the most liberal) justice serving on the Court.

<sup>4</sup> Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (Paper presented at the 2nd Annual Conference on Empirical Legal Studies, New York University Law School, 9 November 2007), online: Social Science Research Network <<http://ssrn.com/abstract=1013560>>. See CLUSTERS AND EXTREMES: VOTING ON THE CANADIAN AND US SUPREME COURTS, below, for a discussion of the literature in this area.

particularly in accordance with some commonly used indicators of judicial ideological bias (such as the appointing Prime Minister's party), may indicate that the Canadian Supreme Court justices are, on the whole, basing their decisions to a greater extent on the merits of each case and to a significantly lesser extent on their personal political views.

Yet this raises a host of questions. Does the weak degree of predictability in the decision-making of the justices of the Supreme Court of Canada indicate that they are able to set aside their personal policy preferences and rationally deliberate to a common understanding? Or, alternatively, do the justices simply happen to have similar policy preferences? How do the policy preferences of our justices relate to the values of the Canadian public and Canadian legislators? Further, if the justices do begin deliberations with divergent views but ultimately tend to converge in voting on the disposition of appeals, is the convergence the result of principled and professional deliberation or is there an element of logrolling present?

This forum contribution begins the examination of these questions in the context of the U.S. and Canadian Supreme Courts. It discusses the relationship between two potential determinants of a justice's votes: personal policy preferences and the extent and nature of cooperation between justices on the Court at a given time.<sup>5</sup> To set the context, Part 2 briefly outlines the main findings of some recent empirical research on judicial voting behaviour at the Supreme Court of Canada and compares it to similar empirical studies of the U.S. Supreme Court. Part 3 sets out a framework for analyzing the difference in voting patterns based on the extent to which a justice votes in accordance with her policy preferences and the extent to which the justices of a multi-member court can be characterized as cooperative or collegial. Part 4 uses this framework to assess the different voting patterns on the Canadian and U.S. Supreme Courts and discusses the important normative tradeoff between deliberation ("positive" cooperation) and logrolling ("negative" cooperation). Finally, Part 5 briefly discusses the connection of this normative tradeoff to the appointments process, and identifies some additional considerations to guide future theoretical and empirical research.

## CLUSTERS AND EXTREMES: VOTING ON THE CANADIAN AND U.S. SUPREME COURTS

Various approaches have been taken to assessing the policy preferences of the justices of the Supreme Court of Canada as well as the U.S. Supreme Court. Despite the variety of methodological approaches reported in the literature, there are regularities that emerge in the empirical results. If the justices of the U.S. Supreme Court are positioned on a spectrum from most conservative to most liberal, justices

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<sup>5</sup> There are other potential determinants of judicial voting, including strategic considerations concerning the relationship between the courts and the legislature or the executive. See e.g. Segal & Spaeth, *supra* note 2; Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998). As discussed below, this paper focuses on the attitudinal model and issues pertaining to relationships (strategic and otherwise) between those on the Court at a particular time.

appointed by Democratic presidents tend to be liberal whereas those appointed by Republican presidents tend to be conservative. When the justices of the U.S. Supreme Court disagree on the disposition of an appeal, the Court tends to split in predictable ways. For example, when the Court split 5 to 4 in the late 1990s, it would usually (though not always) be the case that Justices Stevens, Breyer, Ginsburg, and Souter would be on one side of the split, whereas Justices Scalia, Thomas, Rehnquist, and Kennedy would be on the other side of the split. With the positions of the four justices on each side of the median reasonably well-entrenched, the ultimate disposition of the case would frequently be determined by the so-called “swing” justice, Justice O’Connor.<sup>6</sup>

Martin and Quinn provide compelling empirical evidence of the tendency of U.S. Supreme Court justices to split in predictable ways.<sup>7</sup> For example, the figure below depicts the “ideal point” distribution of the justices of the U.S. Supreme Court in the 2000-2001 term. These ideal point distributions represent the ideological predispositions of the justices based on the Bayesian estimation of a one-dimensional item response theory model using a computationally intensive Markov chain Monte Carlo process. From left to right (and correspondingly moving from more liberal to more conservative) are Justices Stevens, Ginsburg, Souter, Breyer, O’Connor, Kennedy, Rehnquist, Scalia, and Thomas. Justices Ginsburg and Breyer were appointed by President Bill Clinton, a Democrat. All the other justices were appointed by Republican Presidents. Interestingly, despite the diversity in policy preferences, the U.S. Supreme Court renders unanimous decisions in approximately 40 per cent of the appeals it hears (see Figure 1).<sup>8</sup>

We have analyzed the decisions of the Supreme Court of Canada using Martin and Quinn’s methodology.<sup>9</sup> The analysis shows that Canadian Supreme Court

<sup>6</sup> This is, of course, a caricature of the dynamics of the U.S. Supreme Court. See Lawrence S. Wrightsman, *The Psychology of the Supreme Court* (Oxford: Oxford University Press, 2006) at ix (“Individual justices are not just stereotyped; they are pigeonholed into conservative or liberal camps. And while these classifications reflect their votes and justifications in certain types of cases, as this book documents, the decisions and votes of each justice are more complexly determined than their simply reacting to their ideological bent. For example, in the 2004-2005 term, 24 decisions were 5 to 4; the conservative majority on the Court held together on only five. In eight of these cases, one of the conservatives formed a majority with the liberals.”).

<sup>7</sup> See Andrew D. Martin & Kevin M. Quinn, “Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999” (2002) 10 *Political Analysis* 134; Martin *et al.*, *supra* note 2; Andrew D. Martin, Kevin M. Quinn & Lee Epstein, “The Median Justice on the U.S. Supreme Court (Locating the Constitutional Center—Centrist Judges and Mainstream Values: A Multidisciplinary Exploration)” (2005) 83 *N.C.L. Rev.* 1275; Andrew D. Martin & Kevin M. Quinn, “Assessing Preference Change on the U.S. Supreme Court” (2007) 23 *J. L. Econ. & Org.* 303. Martin and Quinn maintain a website on which they report updated empirical findings as new decisions are rendered by the U.S. Supreme Court, online: Martin-Quinn Scores <<http://mqscores.wustl.edu/>>.

<sup>8</sup> See Epstein & Knight, *supra* note 5 at 41.

<sup>9</sup> Alarie & Green, *supra* note 4; Benjamin Alarie & Andrew Green, “The Reasonable Justice: An Empirical Analysis of Frank Iacobucci’s Career on the Supreme Court of Canada” (2007) 57 *U.T.L.J.* 195. We also undertook a more “direct” method of analyzing the connection between justices’ votes and their ideology by categorizing votes in particular areas of law as “liberal” and “conservative”. Consistent with the results using Martin and Quinn’s methodology, we found a weak connection between a justice’s voting pattern and the party of the appointing Prime Minister (Alarie & Green, *supra*

Figure 1

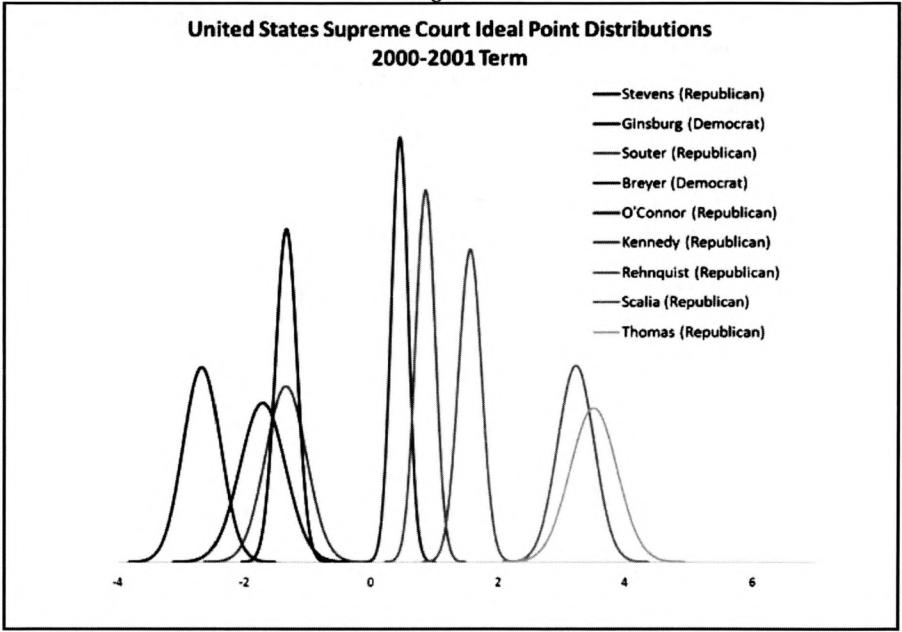
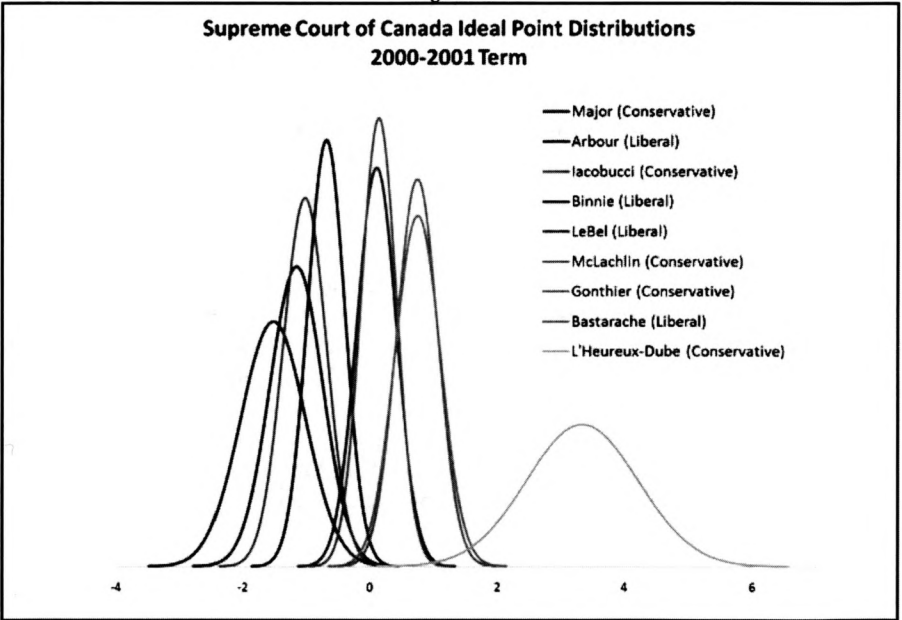


Figure 2



note 4). This methodology has also found a connection in the U.S. between a justice's votes and the party of the appointing President, particularly in the area of civil rights and liberties (see Nancy C. Staudt, Lee Epstein & Peter J. Wiedenbeck, "The Ideological Component of Judging in the Taxation Context" Wash. L. Rev. [forthcoming in 2008]).

justices may approach the decision-making process quite differently from U.S. Supreme Court justices. More specifically, with the exception of Justice L'Heureux-Dubé, the justices seem to be closely clustered with each other, with considerable overlap in the distributions of their ideal points. The following figure presents the ideal point distributions for Justices Major, Arbour, Iacobucci, Binnie, LeBel, McLachlin, Gonthier, Bastarache, and L'Heureux-Dubé. Four of the justices—Arbour, Binnie, LeBel, and Bastarache—were appointed by Liberal Prime Ministers. The five remaining justices were appointed by Progressive Conservative Prime Ministers. The results demonstrate not only how clustered our justices are (with the obvious exception of Justice L'Heureux-Dubé), but also how ineffective the appointing Prime Minister's party is likely to be as a proxy for the Justice's policy preferences (see Figure 2).

Whereas the U.S. Supreme Court renders unanimous judgments about 40 per cent of the time, the Supreme Court of Canada renders unanimous decisions approximately 60 per cent of the time.<sup>10</sup> This higher rate of unanimity suggests that the Canadian Supreme Court is more oriented towards consensus in decision-making, although it is also consistent with other possible explanations, such as higher levels of logrolling (i.e. only apparent, not real, consensus), dispositional similarities among justices, and a less ideologically divisive docket (i.e. cases that are easier "on the merits"). One reason to suspect that the Supreme Court of Canada may face a less ideologically divisive docket would be that in certain criminal cases (where, for example, there is a dissent at the appellate court) accused persons may appeal as of right.<sup>11</sup> Another factor affecting the higher rate of unanimity on the Supreme Court of Canada may be the Court's frequent practice of sitting in panel sizes of seven or five instead of as a full panel of nine justices. The effect of smaller panel sizes may be mitigated to some extent, however, by the Court's tendency to assign fewer justices to appeals that are considered to be less controversial or divisive. Most important *Charter* appeals, for example, will be heard by all nine justices.

There are a number of other possible explanations for the differences observed between decision-making at the Supreme Court of Canada and the U.S. Supreme Court that have not yet been organized around any type of theory of decision-making or difference in approach to judging. However, in light of the empirical evidence, it is clear that the Supreme Court of Canada can be characterized as one on which there is a higher degree of consensus generally and, where disagreements do arise, there is less divisiveness along partisan lines than at the U.S. Supreme Court. We now turn to a discussion of how one might make sense of these observed differences.

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<sup>10</sup> See e.g. Peter McCormick, "'With Respect...'—Levels of Disagreement on the Lamer Court, 1990-2000" (2003) 48 McGill L.J. 89 at 97. According to McCormick, of the 959 appeals heard by the Lamer court from 1990-2000, 58.4 per cent were decided unanimously.

<sup>11</sup> Over the period beginning with the start of the 2000 term to the end of the 2006 term, the Supreme Court of Canada heard on average 14.6 appeals per term as of right, comprising 16 per cent of the Court's docket. See Supreme Court of Canada, "Statistics 1997 to 2007", online: S.C.C. <[http://www.scc-csc.gc.ca/information/statistics/HTML/cat3\\_e.asp](http://www.scc-csc.gc.ca/information/statistics/HTML/cat3_e.asp)>.

## IDEOLOGY AND COOPERATION

Courts such as the U.K. House of Lords, the Australian High Court, the Supreme Court of Canada, and the U.S. Supreme Court, vary across at least two important dimensions. The first dimension relates to the degree to which ideological views or policy preferences influence justices' decisions. This influence could arise consciously (where justices directly consider and vote in accordance with their ideological views) or unconsciously (where the views act indirectly on justices' votes, such as through unconsidered assumptions).<sup>12</sup> At one extreme of this dimension, the justices of a court would be described as being ideologically "committed" or "interested". At the other end of the spectrum, justices of a court would be described as being ideologically "disinterested" or "uncommitted." Of course, it will sometimes and perhaps even usually be that the justices of the court vary significantly in the strength and nature of their ideological commitments.

The second dimension along which courts vary is the collegiality or cooperativeness of the decision-making process in which the justices engage. At one end of the spectrum will be courts in which there is little or no give-and-take, where justices regard it as their duty to independently and without interference from colleagues formulate an opinion as to the appropriate disposition of each appeal. These courts could be described as uncooperative, not necessarily pejoratively, but simply in the sense that each justice is independent and provides, in some sense, an "independent draw" as to the merits (whether this is appropriately regarded as having an ideological valence or not) of each appeal. Such courts may value independence of mind in the belief that the best way to ensure coherence and consistency in reasoning is to leave each justice to express her own unadulterated private judgment as clearly as possible. Alternatively, personal or ideological differences may themselves serve to limit effective cooperation. One would expect such a court to regularly issue plurality opinions.

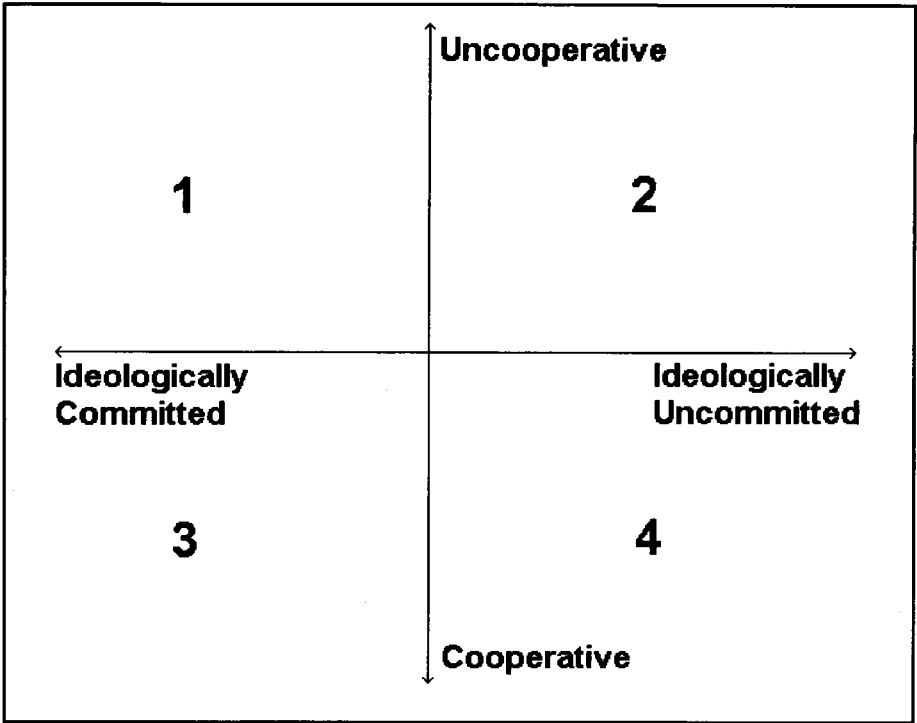
At the other end of this spectrum, courts could be described as being collegial, open to teamwork, and cooperative. Justices on these courts may value the exchange and testing of ideas and reasons in decision-making. In such cases, the justices' goal would be, where possible, to speak with a fully-formed and well-tested united voice. The interest in speaking with a single voice might be premised on a number of beliefs, such as the value of clarifying the law and consolidating the possibly differing approaches taken to discrete legal issues by lower courts.<sup>13</sup> Alternatively, as

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<sup>12</sup> See Eric A. Posner, "Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform" University of Chicago Law and Economics, Olin Working Paper No. 377 (2008), online: Social Science Research Network <[http://ssrn.com/abstract\\_id=1082055](http://ssrn.com/abstract_id=1082055)> at 6 (distinguishing between judges who allow their political biases to impact their decisions and those who do not as well as between explicit or implicit bias).

<sup>13</sup> Some courts, including the Supreme Court of Canada, have a practice of from time to time of issuing *per curiam* judgments that are not identified as having been authored by any particular justice. The Supreme Court of Canada has done this a number of times, including *Blaikie v. Quebec (Attorney General)*, [1979] 2 S.C.R. 1016; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

discussed below, the cooperation may arise not from deliberation on the particular case (even in accordance with precedent), but from justices trading off votes across cases or areas of law in a judicial version of legislative logrolling.



Recognizing that courts could vary along these two dimensions—degree of ideological commitment and degree of cooperativeness—suggests a four-quadrant framework for analyzing the decision-making processes of multi-member courts or panels. Quadrant one courts are ideologically committed and uncooperative. Quadrant two courts are ideologically uncommitted and uncooperative. Quadrant three courts are ideologically committed and cooperative. Finally, quadrant four courts are ideologically uncommitted and cooperative. The following descriptions attempt to define the extremes in each quadrant (i.e. the corners), although any particular court likely lies inside these extremes.

### **Quadrant One: Ideologically Committed and Uncooperative**

This first quadrant is associated with the attitudinal model of judicial decision-making, where justices are assumed to decide cases principally in a way that satisfies their own policy preferences without regard to the strategic possibilities that might arise by cooperating with other justices in any given case.<sup>14</sup> Courts that are situated

<sup>14</sup> The attitudinal model of decision-making has for decades been popular among political scientists and is probably the most well-known and most frequently deployed model in the political science literature. See, e.g. David W. Rhode & Harold J. Spaeth, *Supreme Court Decision-Making* (San Francisco: W.H.



in quadrant one—that is, courts whose justices are ideologically committed and whose justices are uncooperative—will have certain predictable features. One of these features is a multiplicity of opinions with an overall higher rate of concurring opinions and dissents than the courts in other quadrants, all else the same. The number of opinions and the rate of dissent will be higher for two reasons. First, the lack of cooperation means that individual justices will place little or no independent value (aside, perhaps, from the value associated with shirking) on joining an opinion authored by a colleague. A justice will sign on to another’s opinion only where she has a high degree of ideological consonance with the other justice in the particular appeal. Each justice will have reached the opinion on her own. If there is disagreement, a justice will prefer to author her own opinion rather than try (likely fruitlessly) to persuade her colleague to modify the reasons given for a certain outcome.<sup>15</sup> This first reason—uncooperativeness—suggests that justices will experience little or no gravitational pull towards other justices along the ideological spectrum based on a stand-alone interest in agreement.

Second, the tendency towards a proliferation of opinions will be reinforced by the presence of certain preexisting ideological commitments. These commitments will mean that justices, or at least coalitions of ideologically similar justices, will less frequently agree on the merits of a particular decision and the reasons justifying that decision than in circumstances where justices lack these ideological commitments. This second reason relates to the stickiness of justices to a certain position they have reached on an appeal. An ideologically committed court will have little interest in agreeing for agreement’s sake and disagreement will arise where sharply defined ideological interests incline the justices towards a different disposition of an appeal.

### **Quadrant Two: Ideologically Uncommitted and Uncooperative**

Courts that are in quadrant two—that is, courts that are ideologically uncommitted and uncooperative—will also exhibit certain predictable features. Provided that the range of ideologies of justices on quadrant one courts is broader than the likely range of ideologically uncommitted independent opinions of legal merit, a quadrant two court will tend to exhibit higher levels of agreement than quadrant one courts. As in quadrant one courts, justices on quadrant two courts will place little or no value on agreeing for agreement’s sake, but each justice will engage in a determined exercise

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Freeman, 1976) at 134-157; Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge, U.K.: Cambridge University Press, 1993); Frank B. Cross, “Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance” (1997) 92 Nw. U.L. Rev. 251 at 265-279.

<sup>15</sup> This increase in the number of opinions holds all else constant such as, for example, workload. Justices may consider whether the (ideological) benefits of writing a separate opinion are greater than the opportunity cost (due to the time-cost of writing a decision), which may increase as the workload increases. For example, for the implications of workload in the context of decisions of Chief Justices of different courts, see Tracey George & Albert Yoon, “Chief Justices: The Limits of Attitudinal Theory and the Possible Paradox of Managerial Judging” Vanderbilt Law and Economics Research Paper No. 07-24 (2007), online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1001247](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001247)> (discussing the impact of workload on judicial decision-making).

to evaluate the case on its legal merits rather than on the basis of personal policy preferences. The second quadrant is associated with what legal theorists might call legal positivism and formalism—the idea that each case has a most valid or most defensible legal outcome, and that an ideologically uncommitted justice will strive to uncover the true legal merits of each case and decide on that basis. Justices of a quadrant two court may regard cooperation as suspicious, because it would suggest the possibility that a justice is open to compromising her own view of the underlying legal merits of an appeal in order to achieve some extraneous, distinctly non-legal or policy goal. On such courts, suspicion and distrust of cooperation would influence the rate of dissenting or concurring opinions. However, because the legal authorities relevant to each appeal would be common to each justice, one would expect there to be less room for difference on ideologically uncommitted and uncooperative courts (quadrant two) than ideologically committed uncooperative courts (quadrant one).<sup>16</sup>

### Quadrant Three: Ideologically Committed and Cooperative

An ideologically committed court that is cooperative would be in quadrant three. Its justices would be open to deciding cases on the basis of policy preferences and, like the legal realists, would probably question the possibility of judging neutrally or objectively on the legal merits. Unlike their counterparts on quadrant one courts, the justices of a quadrant three court would see the value in selectively cooperating in order to achieve a better overall match between their own personal policy preferences and the outcomes produced by the court as a whole. Cooperation could play out in one of two ways. The more attractive way would be for justices to understand and acknowledge each other's ideological commitments and use those commitments as mutually beneficial foils to produce well-reasoned and sharply divided opinions.<sup>17</sup> The less attractive way for cooperation to play out would be for the court's output to more closely resemble the output of a legislature, where members are willing to trade votes in order to promote their own individual agendas. Thus, in this less attractive case, quadrant three courts would not be naïvely attitudinal, but would instead be strategically sophisticated and more likely to engage in episodic logrolling with other justices.<sup>18</sup> Because of the possibility of negative cooperation, it would be a mistake to conclude from a justice's decision in any given case that the justice had a genuine belief in the appropriateness of the outcome reached. A quadrant three court would tend to exhibit more agreement and less

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<sup>16</sup> This will be the case so long as the variation in ideologically uncommitted assessments of legal merits varies less than the range of ideological commitments on quadrant one courts. This seems likely, though it will not necessarily be the case and would depend on the particular appointments process used for a given court and the composition of the court's docket.

<sup>17</sup> There is a case to be made that such a court would appropriately belong in quadrant one rather than quadrant three if the votes of the justices are not affected by deliberation. Moreover, to the extent that the justices are willing to revisit their judgments, such courts will begin to look like quadrant four courts.

<sup>18</sup> This is consistent with the literature surrounding the "strategic" model of adjudication. For treatments of the strategic model, see Melinda Gann Hall & Paul Brace, "Order in the Courts: A Neo-Institutional Approach to Judicial Consensus" (1989) 42 *Western Political Quarterly* 391; Epstein & Knight, *supra* note 5 at 1-18; Forrest Maltzman, James F. Spriggs & Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge, U.K.: Cambridge University Press, 2000).

concurring or dissenting opinions than a quadrant one court. It is unclear whether a quadrant three court would exhibit more or less consensus than a quadrant two court, however, and the result would probably depend on the variety and intensity of the policy preferences of the justices of a quadrant three court, which would influence the mix of sharply divided opinions versus logrolling outcomes that would prevail.

#### **Quadrant Four: Ideologically Uncommitted and Cooperative**

On an ideologically uncommitted and cooperative court, justices would tend not to steadfastly adhere to certain positions without taking a close look at the legal merits of the case and taking the existing law seriously. Further, the cooperative aspect means that the justices would be open to learning from and influencing each other in a good faith attempt at understanding the legal merits of the appeal, and forging the reasoning that is most compelling. In the best cases, quadrant four courts will produce judgments that exhibit higher levels of consensus and a higher quality of reasoning and decision-making than any of the other three types of courts. The public good function of its decisions in the sense of more clearly settled case law may increase as a result of higher levels of consensus and quality of judgment. Open judicial minds, abundant legal talent, mutual respect, diverse personal experiences and backgrounds, and effective communication would characterize an ideal quadrant four court.

#### **IDEOLOGY AND COOPERATION ON THE SUPREME COURT OF CANADA**

Depending on the variety and intensity of policy preferences of justices of any particular court, it is difficult and perhaps impossible to determine conclusively in which quadrant a court is situated simply by quantitatively analyzing the votes of the justices in the appeals heard over a particular period of time. Qualitative measures would also be necessary to make a compelling diagnosis. Nevertheless, there are some quantitative measures that flow from the descriptions of the four quadrants that will suggest in which quadrant a given court is operating. All else the same, the lowest rates of observed consensus will be associated with quadrant one courts and the highest rates of observed consensus will be associated with quadrant four courts. The relative rates of consensus for quadrant two and quadrant three courts is unclear, and would depend on such factors as the legal talent of the justices in quadrant two (for example, greater legal ability may lead to more consensus) and the range and intensity of policy preferences of justices in quadrant three (for example, broader scope for logrolling may lead to more observed consensus).<sup>19</sup> As noted in Part 2, the observed rate of unanimity on the Supreme Court of Canada (about 60 *per cent*) has been higher than the rate of unanimity on the U.S. Supreme Court (about 40 *per cent*) in recent years. However, a higher rate of consensus alone does not necessarily mean that the Supreme Court of Canada has been outperforming the U.S. Supreme

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<sup>19</sup> It is possible theoretically, too, that a quadrant three court could exhibit even more consensus than a quadrant four court, depending on the mix of judicial policy preferences and by relieving some constraints on bargaining (for example, by allowing for side-payments rather than in-kind, vote-for-vote, trades).

Court. To move towards understanding the implications of these differences, it is necessary to determine: (a) as a positive matter, which quadrant each Court appears to be located in; and (b) the normative implications of the location.

### 1. In Which Quadrant is each Court Located?

The U.S. Supreme Court appears to be in quadrant one. The systematic and predictable dispersion of the voting behaviour of the justices seems to indicate a lack of cooperation on the Court (that is, it appears that the U.S. Supreme Court is either in quadrant one or two). Evidence of ideologically interested voting (that is, either quadrant one or three) is apparent in the strong connection of voting in many areas of law with the appointing President's party or other indicators of ideology. While individual justices may be in different quadrants and the location may vary by area of law, the Court seems best characterized overall as being in quadrant one. The hallmark of quadrant one courts is a tendency for each justice to vote in accordance with her own personal policy preferences, which is consistent with the attitudinal model of decision-making.

It is considerably less clear which quadrant best characterizes the justices of the Supreme Court of Canada over the post-*Charter* period. As in the U.S., different justices may be best characterized as being in different quadrants, depending on their own personal philosophy regarding the role of the justices on the Court. The clearest example is the difference between Justice L'Heureux-Dubé, who exhibits marked tendencies towards attitudinal voting, and Justices Iacobucci and Cory, who appear to be best characterized as quadrant four justices. Given the observed voting patterns, however, the Court as a whole could be in any one of the four quadrants.

The evidence from the Supreme Court of Canada is weakly consistent with ideologically committed justices—that is, the Court could be in either quadrant one or three. If the range of the justices' actual policy preferences happens to be narrower than in the U.S., then the Canadian Court could be in quadrant one. Given the "brokerage" model of politics in Canada in the past and the lack of significant differences in policy preferences in most areas across parties (particularly in the 1980s and 1990s), the appointees to the Court may have been largely similar ideologically.<sup>20</sup> The resulting voting behaviour would appear to be convergent, with small differences in voting patterns between justices appointed by Prime Ministers of each party corresponding to the small differences in ideology between the parties and appointees. Alternatively, the justices may be voting in accordance with their policy preferences in a strategic way through logrolling. That would place the Court in quadrant three. The apparent similarity in voting would merely reflect the fact that the votes that each justice cares about in connection with her ideological preference have been traded off in some other area where she appears to be voting against her interest.

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<sup>20</sup> See e.g. Harold D. Clarke *et al.*, "Absent Mandate: Canadian Electoral Politics in an Era of Restructuring" in Hugh G. Thorburn & Alan Whitehorn, eds., *Party Politics in Canada*, 8th ed. (Toronto: Prentice-Hall, 2001).

More empirical work is needed to assess whether there are particular types of cases (such as federalism or criminal law) that are particularly divisive along party lines in Canada. If there are such types of cases, then analyzing the voting patterns in these areas should reveal whether there are partisan differences in voting, at least in these areas. If so, the Court may well be in quadrant one. The higher rate of agreement of the justices in the majority of areas of law may dominate the differences in the divisive areas when considering the Court's decisions quantitatively as a whole. Quadrant three would also be a possibility.<sup>21</sup> There is some evidence that the initial differences between justices (as opposed to particular issues) do not vary significantly. Ostberg and Wetstein have ranked justices on a scale of -2 (very conservative) to +2 (very liberal) based on an analysis of newspaper editorials on the justices at the time of their appointment.<sup>22</sup> Justices appointed by the conservative Prime Ministers have had mixed rankings, with four justices considered to be conservative or very conservative, five considered liberal or moderately liberal, and one essentially neutral (Justice Iacobucci). Those appointed by Liberal Prime Ministers, on the other hand, were predominantly liberal, with nine justices considered to be liberal or moderately liberal, one conservative (Justice LeBel), and one neutral (Justice Deschamps). Interestingly, these assessments of personal policy preferences do not appear to correspond in more than a weak way with the voting differences of justices upon appointment.

The pattern of judging by the Court may also be consistent with non-ideological voting. The Court, for example, could be in quadrant four. The appointment process may have resulted in justices who do not vote in any particular ideological pattern but who deliberate together to reach decisions. The resulting narrow distribution of voting patterns would then reflect the outcome of deliberation rather than the influence of initial policy preferences. Alternatively, the Court could be in quadrant two—where the justices do not vote according to personal policy preferences and do not cooperate—so long as the justices tend to independently arrive at the same conclusion. This result is possible but it seems more likely that the high level of agreement on the Court in this period is not associated with independent voting, but rather with cooperation. Regardless, if the Court is in either quadrant two or quadrant four, it is not at an extreme of ideological disinterestedness, since the empirical evidence does reveal a weak connection between votes and two indicators of political ideology (appointing Prime Minister's party and newspaper editorials).<sup>23</sup>

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<sup>21</sup> See Alarie & Green, *supra* note 4 (discussing the differences in preferences by parties in particular areas).

<sup>22</sup> See C.L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2007) at 55. These scores, which were set (for most but not all of the justices) in the period 1982 to 2004, are based on an analysis of editorials in nine Canadian regional papers. The methodology was originally developed for the U.S. Supreme Court. See Jeffrey A. Segal & Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices" (1989) 83 *American Political Science Review* 557.

<sup>23</sup> See Alarie & Green, *supra* note 4.

## 2. In Which Quadrant *Should* the Court be Located?

What are we to make of these observations? Clearly, more empirical work is needed to determine the quadrant that best characterizes the Supreme Court of Canada in the post-*Charter* period. Cooperation and collegiality are terms that seem universally good; after all, who would want to be described as uncooperative or uncollegial? However, there are both positive and negative dimensions to cooperation and collegiality that underlie this discussion. These positive and negative dimensions have important implications for the optimal location of the Court within the four quadrant framework. The positive dimension of cooperation manifests itself in the form of active deliberation. Justices examine the facts and arguments and discuss the optimal decision and all the various alternatives in an open and forthright manner. The result is, at best, more than a sum of independent preferences. It is a better decision reached through reasoned debate and collective and thorough testing of ideas and proposals.

Given that cooperation can lead to stronger decisions, the question that naturally follows is whether reasoned debate is best fostered through disinterested justices or interested justices. Disinterested justices may have the benefit of not starting from a particular position but may not be able to advance each argument in the strongest possible form or may not have significantly different personal experiences than justices of similar backgrounds. The clash of ideas may be greater with justices that are initially polarized ideologically and yet open to debate, reason, and persuasion. As Cox and Miles note, diversity on the bench may lead to greater accuracy of decision-making.<sup>24</sup> Alternatively, even if justices do not converge on a unanimous decision, diversity on the court may at least allow different voices to be expressed in the most forceful way possible.<sup>25</sup> The worst case on this view would be a court with ideologically similar justices. Not only would they not start from a neutral position, but either may not have a sufficient divergence to generate vigorously reasoned debate or, perhaps worse still, exhibit ideological polarization—that is, the similarity of the views in one direction reinforces voting in that direction in absence of significant opposition. Recent empirical studies in the U.S., for example, have found that there is a significant difference in voting if a panel of justices is all Democrats, all Republicans, or mixed. Uniformly Democratic or Republican panels tend to have more extreme voting patterns (in the liberal and conservative directions, respectively).<sup>26</sup>

Another issue that arises from cooperation is the counterpoint to the benefits of active deliberation. More specifically, the appointment of ideologically interested

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<sup>24</sup> See Adam B. Cox & Thomas Miles, “Judging the Voting Rights Act” Colum. L. Rev. [forthcoming in 2008] (discussing the value of diversity in decision-making and, in particular, diversity in race). As noted below, it could be argued that the strong form arguments could come from the lawyers of the parties but this depends on the nature of the market for legal services. See e.g. Gillian Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System” (2000) 98 Mich. L. Rev. 953.

<sup>25</sup> Cox & Miles, *supra* note 24.

<sup>26</sup> See Sunstein *et al.*, *supra* note 2 and Cox & Miles, *supra* note 24 on panel effects.

justices may give rise to the risk of logrolling rather than deliberation. Logrolling will typically involve unprincipled trade-offs between outcomes in different areas of law. While that may be problematic in the legislative context, it is likely to be much more problematic for justices whose role is to decide individual appeals involving particular parties in specific areas of law. Justices who trade votes across different areas of law in order to satisfy their preferred policy outcome in a particular area at the expense of voting against their sincere judgment in another appeal risk distorting the law in inappropriate ways. Logrolling would allow a court to escape the ordinary constraints imposed by genuine voting. Genuine voting in each case would result in the median voter's preferences prevailing in each and every appeal, whereas the median voter's preference would not necessarily prevail in the presence of logrolling. The risks associated with logrolling will vary with the composition of the court. The worst risks will arise in an ideologically interested court that is widely split. If there is logrolling, the shifts in voting are likely to be significant. Logrolling may still exist if the justices are ideologically interested but have similar initial preferences (as could be the case in Canada). However, the significance may be less as they are trading across relatively similar initial starting points. Finally, there is little or no risk of logrolling if the court is composed of ideologically disinterested justices.

All else the same, and subject to caveats regarding logrolling and the possibly countervailing benefits of ideological commitments, some tentative observations can be made based on the foregoing analysis. First, on the whole, cooperation is likely to be superior to uncooperativeness, since justices can learn from each other's perspectives, personal experiences, and thoughts. Second, a lack of explicit ideological commitment is likely to be preferable to known explicit ideological commitment, since it is not necessary that each justice actually vote in a manner reflecting her policy preferences to realize the benefits of cooperation. Finally, diversity of personal experience on the court is likely to be superior to homogeneity. It tentatively follows that the highest functioning courts are likely to be cooperative courts with ideologically uncommitted justices from diverse backgrounds (quadrant four courts). If justices are ideologically interested, it is less clear whether it would be better to try to foster cooperation (quadrant three) or uncooperative decision-making (quadrant one). Ideologically committed justices that decide cases cooperatively may reach polarized decisions (as shown in the U.S. literature on unmixed panel effects). Worse still, they may engage in harmful cooperation in the form of logrolling. On the other hand, a quadrant three court that engages in positive cooperation in a subset of cases may deliberate and bring out the strength in the opposing positions in a way that may approach the efficacy of a quadrant four court staffed with ideologically uncommitted justices from diverse backgrounds.

#### **IMPLICATIONS FOR THE APPOINTMENTS DEBATE**

As explained above, it is unclear from the available empirical evidence exactly where the post-*Charter* Supreme Court of Canada is located in the framework we have developed. What is clear, however, is that the location matters significantly for the appointments process. If the Court is regarded as being an institution that ought to neutrally apply the "law" in an area, the policy prescription, to the extent possible,

would be to steer the Court towards quadrants two or four through the appointments process. If, as seems more reasonable, the Court is viewed as having a normatively desirable or at least irreducible policymaking function, the optimal location is less clear. The appropriate appointments process will depend on a number of factors such as the perceived costs of judicial logrolling, the desirability of sharing information and trading personal experiences among justices, the value of active deliberation, and the desire to calibrate the policymaking preferences of the Court in accordance to changing public opinion.

If the primary desire of the appointments process is to reduce the connection between voting and ideological preferences, a neutral committee system would appear to be preferable. The focus would be on choosing a justice who is able to understand and make the best “neutral” policy decision, rather than one connected to a particular ideological position.<sup>27</sup> However, the risk would be a loss of connection to public opinion. Further, as Hogg notes, there is a potential for such a committee system to result in a “safe” but uninspired appointment that does not lead to any significant changes in the law or add to the collective wisdom of the justices.<sup>28</sup> If the Court does deal with irreducibly political questions, it may be preferable to promote a diversity of political commitments on the Court.<sup>29</sup> Although it could be argued that a strong presentation of competing views is best brought about by the lawyers for each side, the effectiveness of that assumes a neutral market for representation and receptive justices.<sup>30</sup> The neutral committee system, on the other hand, has a corresponding gain of a lower risk of significant harms from logrolling (since logrolling may occur but would be relatively less dangerous or costly).

Indeed, there may be merit in an appointments process such as that in the U.S. which results in a more politically polarized court. The risk would be the enhanced possibility of both logrolling and less predictability in decisions over time. The gain would be the potential for a greater connection to the prevailing norms of society. If there was vigorous political competition for forming the government, the composition of the court could and likely would be changed with new appointments to reflect these views. Of course, it may be that vigorous competition would be insufficient to create a divergence of opinions on the court. For example, the post-*Charter* convergence of voting may already reflect keen competition for political power but reveal the largely similar policy positions of the parties. The result is a court that is harder to change—because in the event of a significant change in public opinion on an issue, the bulk of existing justices vote in a similar fashion, but does

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<sup>27</sup> Posner, *supra* note 12 at 16, discusses the difference between legal competence (writing clear, consistent judgments for example) versus legislative competence (being able to understand the implications of the decision). He argues that if there is a “right” (most efficient, in his model) answer, the best option would be to appoint qualified, unbiased justices. However, if there is not, there is a concern about whether “ideological extremism ‘crowds out’ judicial competence” (that is, whether the pool of competent, ideologically extreme justices is big enough).

<sup>28</sup> Peter Hogg, “Appointment of Justice Marshall Rothstein to the Supreme Court of Canada” (2006) 44 *Osgoode Hall L.J.* 527.

<sup>29</sup> See Posner, *supra* note 12.

<sup>30</sup> Hadfield, *supra* note 24.



not necessarily point to a need for change the appointments process. The Canadian appointments process may therefore already respond to public opinion, it is just that public opinion itself is not polarized.

These choices across interest and cooperation, of course, may not be independent. To the extent that the system fosters or leads to more ideologically interested justices, it may be connected to a less cooperative court. The personalities may be less willing to compromise and the degree of cooperation will depend on the options for logrolling (such as the degree to which votes in different areas are seen as commensurable). On the other hand, less ideologically interested justices may be, though not necessarily are, more cooperative, as they have less of a strong initial position on any particular issue. Further, it should be noted that the level of explanation of voting by ideological factors in the empirical literature is not particularly high. There is a range of other factors which could explain voting patterns, including the precedents in the particular area or the context of particular cases. Altering the appointments process around ideological concerns may be much less important than ensuring that justices are maximally competent to undertake the necessary legal analysis.<sup>31</sup>

The ideological interests or commitments (or lack thereof) of justices on a court and the type of appointments process used to select justices raises the issue of the strength of the connection between the justice's opinions and prevailing public opinion. The U.S. appointments process combined with the underlying divergence in political opinions appears to be connected to split voting on the Court.<sup>32</sup> The result of this split is the importance of the median justice. The justices on the extremes can be expected to vote in a more or less predictable fashion on each case, and therefore the ostensible goal of the appointments process is to influence the voter in the middle. This focus on a single or small set of justices makes the identity of the leavers and joiners on the Court important given the Court's role in a range of important social issues.<sup>33</sup> Replacing a left-leaning justice with a right-leaning justice can make a considerable difference. In the U.S., Republican Presidents may attempt

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<sup>31</sup> See Posner, *supra* note 12.

<sup>32</sup> Some political scientists have attributed the sharp rise in disagreement on the U.S. Supreme Court to the role of different Chief Justices, and not to the appointments process. This may also be an important mechanism of influence. Since, however, the Chief Justice is usually selected in manner similar to the ordinary appointments process in the U.S., the same arguments apply to the Chief Justice and this mechanism of influence.

<sup>33</sup> This importance assumes that a justice's voting is stable or predictable over time or, at very least, in the short run. See e.g. Lee Epstein & Valerie Hoekstra, "Do Political Preferences Change: A Longitudinal Study of U.S. Supreme Court Justices" (1998) 60 *Journal of Politics* 801, and Lee Epstein *et al.*, "Ideological Drift Among Supreme Court Justices: Who, When and How Important?" *Nw. U.L. Rev.* [forthcoming in 2008]. There has been no clear pattern of change in voting patterns by justices over time on the Supreme Court of Canada (Alarie & Green, *supra* note 4). The implications of changes, however, will depend on the initial starting points. Even if justices' votes may change in either direction (more liberal or more conservative), if the change is relatively small it may not make a difference in the ultimate outcome on a heavily split court if the change occurs in the justices at either extreme. It will be the shifts in the justices towards the middle that will matter most.

to add justices to the right of the median justice, and Democratic Presidents to the left of the median.<sup>34</sup> Under the Canadian appointments process, the individual policy preferences of any given justice appear to make less of a difference to the outcomes of appeals.<sup>35</sup>

The difference between the importance of a single vote in Canada and the U.S. may in part result from the lower degree of politicization in the Canadian process (both in terms of the political battles for appointments and the identity of the individuals appointed). Which is preferable? Stability has the virtue of certainty for potential parties in cases before the Court. It means parties may be better able to predict how the Court will vote over time.<sup>36</sup> Such stability and predictability may mean that parties may make more efficient decisions in arranging their affairs (such as in designing contracts or taking precautionary measures) to avoid litigation. It may also mean that where disputes do arise, parties will be better able to predict the outcome of litigation, thereby leading to more efficient decisions as to whether to bring, settle, or contest a lawsuit.<sup>37</sup>

What does this mean for the Supreme Court of Canada? The justices may have less divergence of opinion because they were ideologically similar at the time of appointment. In this case, the Court's median will be hard to influence through new appointments. However, this may merely reflect a greater correspondence in society's underlying political views. Changing the direction of the Court would be difficult, although seemingly unnecessary. If, in the future, significant schisms develop in the underlying political opinion, the appointments process will reflect this adjustment (albeit with a considerable lag). If, on the other hand, Canada is in

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<sup>34</sup> For a discussion of appointments and changing attitudes, see e.g., Epstein *et al.*, *supra* note 33.

<sup>35</sup> If all or most of the justices have centrist policy preferences, then it would be harder to shift or change the direction of voting, regardless of whether the justices are uncooperative (as appears to be the case in the U.S.) or cooperative (in the sense of logrolling). The ultimate voting outcomes will therefore tend to be more stable over time (although the coalitions may change). The same result holds if the justices are all competent and ideologically uncommitted. However, there could be changes in particular areas of law where there is a significant difference in ideological views. This difference (such as over criminal or minority rights issues) could be hidden within the apparent overall agreement. If so, a Prime Minister may be able to change the voting in a particular area but this may not be reflected in the more global measures of how justices vote and their implied policy preferences.

<sup>36</sup> See Posner, *supra* note 12 at 8.

<sup>37</sup> There is perhaps a more difficult issue relating to what this stability means for the connection of the decisions of a court to the values of the public in its jurisdiction. It could be argued, for example, that there are virtues to stability such as when interpreting the Constitution. Public opinion may be in favour of imposing a cost on parties without political power and the stability of the Court in sober oversight over the bending of politicians to such views could be seen as valuable. In such instances, the desire may be for a system which limits the possibility of an ideologically split Court. On the other hand, the Court may lag behind public opinion where we may wish for legal rules and interpretations to change. Posner, *supra* note 12, uses the example of the *Lochner* decision in the U.S. where public opinion moved sharply to the left but the U.S. Supreme Court remained to the right. In such cases, there may be arguments in favour of being able to shift the composition of the Court in a relatively short period of time. Further, it may be that attempting to appoint an ideologically disinterested court is impossible—that the ideology will merely depend on the ideological make-up of the appointing committee. In such a case, the resulting justices may be “safe”, resulting in a lack of connection to important changes in public opinion.

quadrant four (disinterested, cooperative justices), shifting towards a closer connection to public opinion, if felt desirable, might require a change in the appointments process.

Finally, there is another connection outside the Court that may be important here—although not strictly within the factors we are considering. The nature of appointments is, of course, not exogenous. The political parties may desire a particular make-up of the Court and appointments process. If the powerful political parties view the Court as more easily swung in one direction than another, they may be inclined to want to change the nature of the appointments when they are riding a wave of popularity. Alternatively, if there is vigorous political competition and the parties are sufficiently antagonistic to dramatic shifts away from their preferred ideological outcomes, they may wish to have a Court that is relatively independent. While the parties would lose at times when they are in power (as the Court may strike down legislation favourable to their political base), they experience less of a potential downside at times when they are out of power.<sup>38</sup>

This forum contribution is intended as the beginning of a discussion about the nature of the differences in decision-making on the Supreme Court of Canada and the U.S. Supreme Court. As Canadians, we should not be smug about our appointments process simply because we have a history of less partisan voting on the Supreme Court of Canada than on the U.S. Supreme Court. Nor should we necessarily change our system merely on the basis of a fear that a Prime Minister could at some point in the future make a string of ideologically motivated appointments. In order to choose the optimal appointment process, more work, both empirical and theoretical, is needed to understand the connection between the appointment process and the characteristics of the justices chosen and between those characteristics and voting behaviour. Given the high quality of decision-making on the Court in the post-*Charter* era, changes to the appointments process should be made carefully and on a solid foundation, rather than on unexamined empirical assumptions.

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<sup>38</sup> See e.g. Matthew Stephenson, "'When the Devil Turns': The Political Foundations of Independent Judicial Review" (2003) 32 *J. Legal Stud.* 59 and Posner, *supra* note 12.