

Equality Cases and the Attitudinal Model in the Supreme Court of Canada

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Introduction

Over the past fifty years U.S. scholars have shown that a myriad of factors influence the judicial decision-making process, yet none have garnered as much attention or support as the attitudinal model, which lies at the center of the public law literature today. Behavioral pioneers, like Pritchett (1941), Schubert (1965, 1974), Rohde and Spaeth (1976), and a host of other scholars have systematically shown that the attitudes and values of individual judges are the most consistent factors for explaining how judges resolve disputes throughout U.S. courts. The question remains: to what extent does the dominant model in the U.S. literature successfully explain the voting behavior of judges on courts in other political systems? While numerous comparative law scholars have intermittently explored this question (see Schubert 1969a, 1969b, 1977, 1980; Samonte 1969; Flango and Schubert 1969; Tate 1995; DiFrederico and Guarnier 1988; Dator 1969; Kawashima 1969; Danelski 1969; Blackshield 1972; Galligan and Slater 1995; Power 1995; Peck 1969; Fouts 1969; Tate and Sittiwong 1989; Wetstein and Ostberg 1999), few have examined whether Segal and Spaeth's (1993, 2002) fact-based attitudinal model has relevance for explaining judicial activity abroad. Specifically, one might question the degree to which justices in high courts of other nations, such as Canada, are influenced by their attitudes, background characteristics, case facts, and institutional norms. This study examines judicial voting after the adoption of the Charter of Rights and Freedoms in 1982 because it gave the Canadian justices a new mandate to actively protect civil rights and liberties. Consequently, justices in the post-Charter era have been confronted with more controversial cases that are likely to foster conflict and spark greater degrees of attitudinal expression. In line with this thinking, the goal of this study is to explore the applicability of the full-scale attitudinal model in post-Charter discrimination cases.

Attitudes, Facts, and Institutional Norms

The attitudinal model, which dominates the public law literature today, is based on the proposition that the legal rationales put forth by justices in their respective opinions are simply masquerades for their underlying personal attitudes and values which are the driving force behind most of the decisions they reach (see Pritchett 1941; Schubert 1965, 1974; Segal and Spaeth 1993, 2002). Scholars have utilized numerous methodologies to marshal an impressive array of evidence showing justices on the U.S. Supreme Court exhibit consistent ideological voting patterns across a wide range of legal issues. In recent years, scholars have also demonstrated that case facts often act as short-hand "cues" that trigger attitudinal responses on the part of justices in the decision making process (Segal 1984, 1986; Segal and Spaeth 1993, 2002). At the heart of this element of the attitudinal model is the belief that since justices face time constraints and must resolve cases in an efficient and effective manner, they necessarily rely on information "short-cuts" to help them determine how to vote. From a practical standpoint, it makes intuitive sense to expect justices might respond differently to a factual scenario involving a warrantless search of an individual's home than to a lawful customs search conducted at an international border (see Segal 1986; Segal and Spaeth 1993, 2002; Wetstein and Ostberg 1999). Even though scholars have shown that case facts serve as important attitudinal triggers for justices on the U.S. Supreme Court, their relevance has only been analyzed in a few discrete areas of law (Segal and Spaeth 1993, 2002, 319-20), and has yet to receive any detailed examination in the discrimination area in the Canadian setting.

Judicial scholars of the Canadian Supreme Court who have employed quantitative techniques have followed a similar path as their U.S. counterparts. Peck (1969) and Fouts (1969)

used "Schubertian" cumulative scaling techniques in the 1950s and 1960s and found that the ideological leanings of Canadian justices helped explain their voting patterns in that period. Subsequent multivariate work by Tate and Sittiwong (1989) indicated that social background characteristics, along with judicial attitudes, influenced the pre-Charter voting patterns of Canadian justices in civil liberties and economic cases. After 1982 there was a renewed interest in assessing whether U.S. models of judicial behavior were becoming more prominent in explaining judicial voting patterns on the post-Charter Canadian Court (for examples, see Songer and Johnson 2002; Flemming and Krutz 2002a, 2002b; Wetstein and Ostberg 1999; Epp 1996, 1998). Despite this renaissance, a full-blown analysis of the attitudinal model has yet to be published outside of the area of search and seizure cases. This study is designed to help fill this gap by testing the relative weight that judicial attitudes, case facts, background characteristics and the norm of judicial deference have on justices deciding equality cases in the post-Charter era. We have chosen these disputes because they are emblematic of important controversies that touch on issues pertaining to human identity, equality, and dignity that have come to occupy center stage in the Canadian political arena.

The contemporary Canadian Supreme Court provides an ideal setting for examining the relevance of the attitudinal model because it possesses many of the same institutional and political features that are found in the U.S. The Canadian court, like its southern neighbor, is the court of last resort, and thus, the justices are the ultimate arbiters of all legal disputes and their decisions are not subject to review by a higher authority.¹ Moreover, Canadian justices are appointed officials who serve the functional equivalent of lifetime tenures and do not aspire to higher political office, and therefore have a substantial degree of political independence from the other branches of government.² This independence, in turn, provides them with the ability to

express their attitudes through their judicial votes in a manner similar to U.S. justice. Likewise, since Canadian justices possess discretionary power over the bulk of their own docket, they are more likely to grant leave to controversial constitutional matters that are apt to trigger a greater degree of attitudinal conflict between the justices. Taken together, these various institutional and political features suggest that the attitudinal model might have particular relevance in the Canadian context.

Despite the political and institutional similarities between the two Supreme Courts, there are several features that might lead one to believe that the attitudinal model will not have the same degree of applicability in Canada. Even though Prime Ministers, like U.S. presidents, appoint justices to the high court, and thus from a U.S. standpoint might be expected to select nominees on an ideological basis, the appointments made in recent years suggest that Prime Ministers pay attention to a host of other concerns when nominating justices. These concerns include ensuring there is balance on the court in terms of regional, linguistic, and more recently gender representation, along with maintaining a diverse array of legal specialists on the Court (see McCormick 1994, 101-116). Indeed, Canadian scholars have indicated that appointments by recent Prime Ministers have been largely devoid of political or ideological influences (Morton, Russell, and Riddell 1994, 51). This approach to the appointment process stands in stark contrast to the U.S. pattern of selecting individuals based principally on their ideological stances toward salient constitutional and political issues. Given this dramatic difference, it is not surprising to expect that the intense attitudinal stances often found in U.S. Court rulings will be less prevalent in the Canadian context. Another distinctive feature of the Canadian Supreme Court is that its justices seem far more committed to the norms of collegiality, and consensus building. Indeed, data indicate that almost 70 percent of the rulings decided in the post-Charter

era have been unanimous, which is in marked contrast to the approximately 35-40 percent rate found under the Warren, Burger, and Rehnquist tenures (see McCormick 1994, 2000; Epstein et al 1996). Overall, these institutional elements suggest that since Canadian justices are less likely to be found at the ideological extremes, and since they appear more willing to foster consensus on the Court, the ideological factors in the attitudinal model that are so prevalent in the U.S. may not prove statistically significant in the Canadian context.

It is our belief that discrimination cases will provide an ideal testing ground for examining whether a substantial degree of attitudinal conflict has emerged in the post-Charter era because the Court has decided a host of high profile cases pertaining to discrimination in areas such as gay rights, disabilities, and religion to name a few. It is clear that these disputes have garnered widespread public attention and generated some of the most bitter criticism from academic scholars and politicians because the Court seems to have taken a very activist stance in some of its rulings (see Morton and Knopff 2002; Manfredi 2001, 121-35; Hiebert 2002, 162-99). One of the most salient cases that triggered a firestorm of criticism was the case of *Vriend v. Alberta* [1998] 1 SCR 493, where the court ruled that Alberta's human rights statute was unconstitutional because the legislature had not included a provision protecting gays from discrimination in the workplace. The Court's ruling received widespread criticism, both from citizens and from scholars who were upset with the Court's "judicial hubris" and activist posture (see Hiebert 2002, 182; Manfredi 2001, 134-35; Morton and Knopff 2002). Since these cases feature fundamental questions pertaining to high-stakes issues surrounding human dignity and equality, they are likely to engender conflict among members of society and the Court, and thus become useful test cases for examining the applicability of the integrated attitudinal model.

Scholars in the fields of public law and comparative politics can learn much from this research both theoretically and empirically because it not only strives to further document a theory of judicial behavior in a new area of law but also across national borders. It is surprising that no research to date, in the U.S. or Canada, has tested the relevance of case facts in the area of discrimination, since such cases have the potential to generate such a firestorm of controversy and invite attitudinal discord among the justices. As Segal and Spaeth noted as recently as 2002, "outside of search and seizure, only a handful of other subjects have successfully been put to such a test. Whether facts cause the justices to vote as they do in areas such as antitrust litigation, state taxation, national supremacy, First Amendment, and so on has not been determined" (Segal and Spaeth 2002, 319-20). This sentiment highlights the need to empirically document the significance of the fact-based attitudinal model across new legal areas, which may, in turn, further demonstrate its overarching theoretical relevance. In the end, this study seeks to engage the scientific inquiry of assessing the scope and veracity of the attitudinal model in one of the most contentious legal areas in modern Canadian society.

This study is also important as a scientific effort of theory building because there seems to be an underlying presumption among most U.S. scholars that the full-scale attitudinal model necessarily applies in different legal areas, and across national borders. Given this presumption, it is remarkable that a greater effort has not been made to document the theoretical significance of this model in other court settings. Simply stated, the importance of this research lies in its effort to document the validity of the fact-based attitudinal model in an unexamined legal area, and in its effort to determine whether it can stake a claim to providing a more global understanding of judicial behavior in an advanced industrial society like Canada.

Data and Methods

This study assesses the attitudinal model by examining equality claims brought by individuals who allege that they have experienced some form of discrimination by government or private interests. The types of discrimination claims in this analysis include age, sex, disability, gay/lesbian, religious, non-citizenship, and common law marital status.³ The bulk of these disputes involve allegations relating to discrimination in the workforce, in the denial of government benefits, or in the lack of recognition of certain status rights under Canadian law. If the attitudinal model is applicable in the equality realm, we expect ideology to be an important predictor of disagreement between members of the Canadian Supreme Court. If not, then measures of ideology should have no statistical impact in the equation. The model also examines the extent to which fact patterns explain some portion of the disagreement between the justices. Additionally, the model tests the degree to which Canadian justices are prone to defer to human rights tribunals, and whether a salient background characteristic, namely gender, plays a pivotal role in explaining judicial conflict on the Court.

The data for this paper are taken from all nonunanimous equality decisions published in the *Supreme Court Reports* after the Charter of Rights and Freedoms was added to the Canadian Constitution (1984-2002). Cases were included in the analysis if they featured discrimination claims emanating from Section 15 of the Charter or discrimination claims under federal or provincial statutory law. The analysis highlights 230 judicial votes drawn from a total of 29 nonunanimous equality cases handed down during this period (see the appendix for a listing of the cases). The dependent variable is a dichotomous indicator identifying whether a justice supported an individual's equality claim (coded as a 1) or rejected the equality argument in favor of the party alleged to have engaged in the discriminatory behavior (coded as a zero).

There are three independent variables that are included in the model that pertain to the characteristics of the justices, namely attitudinal liberalism, political party affiliation, and gender. The attitudinal liberalism measure is derived from newspaper reports in the Toronto *Globe and Mail* of the ideological proclivities of a justice at the time of his/her appointment to the high court. This measure is based on U.S. scholarship that has utilized newspaper editorial commentary as a viable surrogate to forecast the judicial liberalism of U.S. Supreme Court nominees, particularly in relation to civil rights and liberties disputes (Segal and Cover 1989; Cameron, Cover and Segal 1990; Segal and Spaeth 1993, 2002). The indicator is also drawn from prior work done by Ostberg and Wetstein (1998, Wetstein and Ostberg 1999) that scored the Canadian justices along a five-point scale ranging from -2 to +2. Obviously, justices who scored a -2 or +2 reflect nominees found at the extreme ends of the ideological spectrum. Justices scoring a -1 or +1 reflected moderate conservatives and liberals respectively, while justices scoring a 0 were either depicted as moderates in the newspaper commentary, or were justices whose ideological leanings were not mentioned at all.⁴ It is hypothesized that justices who score more positively on the liberalism scale (+2 and +1) will be more likely to favor individuals who bring forth discrimination claims than their conservative counterparts. Naturally, it is expected that justices who are labeled moderates will tend to fall in between the two ideological extremes when judging equality claims.

The second measure of ideology is derived from the political party of the appointing Prime Minister (+1 = Liberal appointee, 0 = Conservative appointee). Numerous studies have shown party affiliation to be a powerful predictor of ideological voting behavior of justices on the U.S. Supreme Court (see Tate and Handberg 1991; Wasby 1993). Since Canadian Supreme Court justices possess similar political and institutional powers as their southern counterparts,

such as judicial independence, lack of ambition for higher office, and the functional equivalent of life tenure, it is not surprising that recent scholarship has tried to assess the impact that partisanship has on the voting behavior of Canadian justices (Tate and Sittiwong 1989; Songer and Johnson 2002; Wetstein and Ostberg 1999, Ostberg and Wetstein 2004). In keeping with these earlier studies, it is hypothesized that justices appointed by Liberal Prime Ministers are more likely to favor the equality claims brought by individuals than their cohorts appointed by Conservative heads of government.

The third individual level variable pertains to gender, with female justices coded as a 1, and male justices receiving a code of zero. This variable was included in the analysis because scholarship suggests that men and women may well perceive equality claims from starkly different perspectives. Feminist scholar Carol Gilligan (1982) has argued that men and women approach moral and ethical dilemmas from different vantage points, with women much more interested in strengthening social relationships between individuals, and maintaining ties to others beyond one's self (see Gilligan 1982, 1987; Lyons 1988; West 1991; MacKinnon 1993). As Gilligan suggests (1987, 24) women maintain a commitment to an ethic of care that is "grounded in the assumption that [the] self and others are interdependent," and the need to respect others on their own terms (see also Lyons 1988, 4). At the heart of their approach is the promotion of the welfare of others or the effort to relieve the suffering of others, whether it is physical or psychological (Lyons 1988, 35; Ostberg, Wetstein, and Ducat 2002). Moreover, Canadian Justice Bertha Wilson (1990 as cited in Morton 1992, 96) has argued that "there is merit in Gilligan's analysis," and anyone familiar with the voting patterns of female justices in the Canadian civil rights and liberties area would agree that they have approached these disputes with a "different voice." As a result, it is critical to include gender as an important variable in

any attitudinal model of decision making on the contemporary Canadian Supreme Court. While Canadian scholarship at the appellate court level has failed to find any differences in decision-making patterns between male and female judges (McCormick 1994, 114), recent scholarship on the Canadian Supreme Court has indicated there are significant gender differences in civil rights and liberties disputes (Songer and Johnson 2002). In line with this finding and feminist theory, we believe that gender might have particular relevance in the equality area, and that female justices on the post-Charter Court will be more likely than their male counterparts to rule in favor of individuals who have endured unequal treatment under the law.

There are a number of facts that are included in our analysis of voting behavior in equality cases. The salient variables that typically appeared in the post-Charter cases include the type of discrimination suffered, whether the federal or provincial government is charged with discrimination, the particular injury or harm suffered by an individual, and whether Charter issues appeared in the case. Specifically, seven different forms of discrimination were included in the analysis as dichotomous variables based on whether that type of inequality appeared in the case or not (1 = yes 0 = no). In short, these dichotomous variables tap whether there was discrimination on the basis of age, sex, religion, disability, non-citizenship, sexual orientation, and marital status. Since the first five types of discrimination are constitutionally protected in section 15 of the Charter, it is expected that justices will treat these forms of discrimination in a similar fashion. As such, we expect that the coefficients for these variables will not be statistically significant in the model. To assess this hypothesis, we analyzed each kind of discrimination in separate logistic regression equations to determine if the justices treated it differently from all others.

Since marital status and sexual orientation are not found in the text of the Charter, one might hypothesize that the justices will treat these types of equality cases differently from other disputes that explicitly protected in the text of the Charter. Turning to the marital status variable, we believe the justices will be less prone to favor individuals in discrimination cases involving marital status not only because it lacks a constitutional profile, but also because it is not typically viewed as a hallmark of discriminatory treatment under the law. In short, we expect this logistic model to generate a negative coefficient in the equation in regard to this variable. Although sexual orientation is also not protected in Section 15 of the Charter, we expect that justices will treat these types of cases much differently than marital status cases because gay rights disputes represent a new frontier of equality litigation that has been catapulted into the limelight of contemporary Canadian society. This is illustrated by the fact that there is an increasing volume of gay rights disputes that are on court dockets, and there is a greater degree of media attention and political discourse devoted to the topic over the last two decades. In recent years, gays and lesbians have been turning to political institutions in record numbers seeking equal treatment in areas such as marriage, child custody and adoption, unfettered participation in the military, and retirement benefits. Given the elevated profile of gay rights issues in modern society, and a growing level of intolerance toward this kind of discrimination, we expect justices to have a heightened sensitivity to these types of struggles, and a greater willingness to treat gay rights claimants even more favorably than other Charter litigants. In short, the heightened profile that gay rights conflicts have taken on in recent years leads us to believe that justices will treat these claims in a "quasi-constitutional" manner.

A second factual variable in the logistic regression model deals with whether the federal or provincial government was a party in the dispute (1 = yes, 0 = no). It is hypothesized that the

Canadian justices are more likely to favor individuals that allege governmental discrimination than when claims are brought against a private entity because societal norms dictate that all individuals will be treated fairly by government agencies in a democratic system. Clearly, notions of equality lie at the crux of all non-discrimination statutes, and remain central to the constitutional foundations of a democratic society like Canada. In contrast, since democracies place a high value on individual freedom and liberty in the *private* sector, members of society seem to be far more tolerant of discriminatory treatment by private entities than by government agencies. As such, it is expected that justices will be more supportive of individual claims against governmental unfairness than private acts of discrimination, and thus we anticipate a positive coefficient for this variable in the regression model.

Another set of factual variables used in the analysis involved the type of harm or injury suffered by the individual claimant. One type of injury that the Canadian Court addressed during this post-Charter period pertained to the denial of various benefits, which were classified into a three-tiered hierarchy featuring government benefits (scored as 2), private benefits, such as insurance (scored as 1), and no benefits at all (0). Given this denial of benefits hierarchy, it is expected that justices will be most favorable toward individuals seeking equal access to governmental benefits; less supportive of individual claims against private entities; and least supportive in cases where there is no denial of benefits. The rationale for this hypothesis is similar to the one mentioned above, namely that members of society will be more tolerant when benefits are denied in the private marketplace than in the governmental sphere because governmental discrimination is anathema to a democratic society. Yet, given Canada's traditional emphasis on equality, we also expect that justices will be more prone to protect individuals from the denial of benefits by private entities than when benefits are not at issue in

the case. A second dichotomous variable in this category measures discrimination that results in a job loss or early retirement (1 = job loss, 0 = all other cases). It is expected that justices will be more likely to favor individuals facing discrimination that results in a job loss or early retirement than in other types of cases because of the fundamental importance of maintaining a job to ensure one's economic survival and human dignity. As such, when a case features a loss of a job or forced retirement, we anticipate the justices will hand down more favorable rulings for the individual being harmed.

A third factual variable included in the model pertains to whether the dispute featured equality issues in the area of family law (such as alimony payments, tax deductions for child support, and division of property). Family law cases were scored as a 1, while all other cases received a zero score. Since family law is not traditionally perceived as an area that provokes hotly contested discrimination claims, we believe justices will be less likely to flag these disputes as needing more protective treatment. As such, one could argue that tax and alimony claims will be less prominent in the minds of the justices than discriminatory claims surrounding job loss, retirement income, or the denial of government benefits to an individual. Consequently, it is hypothesized that the justices will be less prone to favor individuals in these cases than in other types of discriminatory suits.

Since many equality claims potentially feature other Charter infringements, a variable was created to assess whether justices will treat cases featuring multiple Charter infringements differently from cases involving simply a section 15 breach. These two sets of cases, in turn, were set apart from non-Charter discrimination disputes that are based on federal or provincial statutes. This resulted in a trichotomous variable with cases featuring multiple Charter issues coded a 2, Section 15 cases code a 1, and all other non-Charter equality disputes coded a zero.

Given the expectation that justices will view a Charter breach with a more critical eye, it is expected that they will be most likely to rule in favor of an individual in cases raising multiple Charter issues, followed by those involving a Section 15 infringement, and be least supportive of equality claims grounded only in Parliamentary or provincial statutory law.

The last variable in the logistic regression model taps whether the Supreme Court justices had a tendency to defer to rulings handed down by Human Rights Commissions that are typically the first point of deliberation for equality disputes at the provincial or federal level. We anticipate that justices on the Court will be more likely to defer to such rulings because of the specialized expertise such commissions have developed for investigating the facts surrounding discrimination complaints. Consequently, it is expected that the justices will vote liberally if a Human Rights Commission (HRC) issued a ruling in favor of the individual, and conservatively if the commission rejected the discrimination complaint. Although one might argue that justices on the highest court in the country may not be willing to defer to the rulings of a "quasi-judicial" agency, we believe that since such agencies were established as unique fact finding bodies to investigate these particular kinds of cases, justices will be more prone to follow their rulings than trial court judges in other areas of law. The coding for this variable is a +1 for liberal HRC rulings, 0 if there was no HRC decision, and -1 for conservative HRC rulings. If the hypothesis is correct then a positive coefficient will appear in the equation for this variable.

Results

Logistic regression analysis was conducted in this study because the dependent variable is a dichotomous measure of judicial voting behavior (1 for a liberal vote, 0 for a conservative vote, see Aldrich and Nelson 1984). Table 1 provides maximum likelihood estimates for three

judge-level variables and seven case level characteristics across seven different areas of discrimination. Specifically, the logistic equations assess whether justices treat a particular type of discrimination, such as sex or religious discrimination, differently from all other types of discrimination claims. For example, the first column in Table 1 examines whether justices treat age discrimination in a significantly different manner from all other forms of discrimination, while controlling for other factors in the equation. Since we are assessing seven different logistic regression results, generalizations will be made that highlight consistent patterns in the data that are found across the equations.

INSERT TABLE 1 HERE

The model fit statistics at the bottom of Table 1 suggest that each of the seven equations provide a robust explanation of judicial voting behavior in equality cases on the Canadian Supreme Court. If one were to employ a guessing strategy expecting justices to always vote conservatively across all equality cases, one would predict 60 percent of the votes accurately. When the ten independent variables were subsequently included in the equations, all seven models were able to predict correctly the voting decisions of the justices between 75 and 77 percent of the time, which represents an improvement over the modal guessing strategy of 37 to 43 percent. Overall, the data suggest that the judicial ideology and background variables, along with case-level characteristics, help to explain a significant degree of variance in contested equality cases decided by the Canadian Supreme Court in the post-Charter era.

Turning to the measures of judicial ideology in the equations, the newspaper score of judicial liberalism at the time of appointment proved to be a statistically significant predictor of

vote outcomes in equality cases. The coefficients for this variable ranged between .26 and .31, and were consistently significant at the $p = .05$ level (see Table 1, row 1). The party of Prime Minister variable, on the other hand, was not statistically significant in any of the equations, although its impact was in the expected direction. While scholars familiar with the U.S. literature will not be surprised to find ideology is a prominent predictor of vote outcomes, the fact that it is the newspaper scores (not party of Prime Minister) that are statistically significant is a noteworthy and might be a potentially surprising finding to many judicial scholars. One explanation for these seemingly counterintuitive results is that Party of Prime Minister and newspaper ideology, although modestly correlated at .331 (at the judge-vote level), might in fact be tapping two different but related factors, namely judicial ideology and party of Prime Minister.⁵ In essence, party of the appointing head of state, one of the most reliable measures of ideology in the U.S. literature, does not seem to transport well to the Canadian context as a viable measure of judicial ideology in equality cases. One might question, what exactly does party of the Prime Minister measure if not the ideological leanings of the judicial nominee? We believe that in a country where court appointments are not as politically motivated as in the U.S., the party of the Prime Minister simply taps the attitudes of the appointing Prime Minister, and not necessarily the ideological proclivities of the appointed justice. The data clearly suggest that in the Canadian equality area, newspaper scores are better surrogates for judicial ideology.

Perhaps the most remarkable finding in the data is the powerful impact that the gender of the justice has on voting behavior in nonunanimous equality cases. Indeed, when controlling for all other variables in the equations, gender is the single most powerful predictor of judicial decisions in these cases, with coefficients of approximately 2.2 that are unrivaled in any of the equations ($p = .000$). These findings demonstrate that in cases involving various types of

discrimination, the gender of the justice matters in a profound way, and women on the Canadian Supreme Court do indeed speak "in a different voice." Even when controlling for their ideological differences, the four female justices that have served on the high court in the period of the study have consistently voted more liberally in the equality area than their male brethren. This is a remarkable finding, because it runs contrary to some prior scholarship suggesting that there are no dramatic differences in the voting behavior of male and female justices.

The most consistently significant independent variable at the case level involved whether Charter issues were prominent in a discrimination dispute. The three-tiered measure of Charter issues proved to be significant in six of the seven different types of discrimination models at the $p = .05$ level, with coefficients ranging from a low of .49 to a high of .63 (see Table 1, row 4). These data suggest that the existence of one or more Charter breaches in a case does influence the justices to vote more liberally than when Charter violations are not in play on the judicial stage. The only kind of discrimination claim where Charter issues were not statistically significant dealt with gay rights cases, and might be explained by the fact that discrimination in this area was itself such a powerful predictor of liberal vote outcomes in the model that it drowned out any possible impact that the Charter variable might have had in this area. Two of the most prominent and widely criticized cases in this area of law, namely *Vriend v. Alberta (Attorney General)* [1998] 1 SCR 493 and *M. v. H.* [1999] 2 SCR 3, illustrate this point because they both contain instances of gay discrimination and Charter violations. In the first case, the Court struck down an Alberta law because the legislature had failed to prohibit job discrimination on the basis of sexual orientation, while in the second case the Court invalidated a family support law that denied benefits to gay couples. Although Charter violations clearly occurred in both cases, the data suggest, and we believe, that the existence of Charter issues took

a backseat in the minds of the justices to the fundamental need to eradicate gay discrimination in Canadian society, and that these types of cases were singular in influencing their judicial voting behavior. Our argument here suggests that it is the existence of gay discrimination, more so than the existence of a Section 15 argument, which appears to drive the justices toward a more liberal ruling.

Only two other types of discrimination, namely age and common law marital status, had a statistically significant impact on the voting behavior of the justices, and the coefficient for age discrimination was in the unexpected direction ($b = -1.07$, $p = .05$). The value for this coefficient suggests that the justices tended to vote more conservatively in cases involving age discrimination than in all other equality disputes. For example, in a trilogy of cases handed down in 1990 (*McKinney v. University of Guelph* [1990] 3 SCR 229; *Harrison v. University of British Columbia* [1990] 3 SCR 451; *Stoffman v. Vancouver General Hospital* [1990] 3 SCR 483) the Court ruled that mandatory retirements at the age of 65 in university and hospital settings did not constitute discrimination under the Charter and ruled in favor of the employers. Although this coefficient runs contrary to our hypothesis, one explanation for this finding might be due to the fact that justices on the high court themselves face the prospect of mandatory retirement at the age of 75. Consequently, it is not too surprising that Supreme Court justices have little sympathy for individuals arguing against mandatory retirement in Canadian society.

Given our hypothesis that marital status will not garner the attention of the justices in any significant way, it is intriguing that this type of discrimination proved to be a statistically significant factor in predicting more liberal vote outcomes ($b = .99$, $p = .05$). It seems that the justices on the contemporary Canadian Court might view common law marital status claims as a new frontier of discrimination that merits a greater degree of scrutiny on the part of the justices,

especially in cases involving homosexual couples. Once again, the Court's ruling in *M. v. H.* [1999] 2 SCR 3 illustrates this point well. In that case, the Court determined that Ontario's family law statute defining marriage as between a man and a woman violated Section 15 of the Charter because it discriminates against individuals who happen to be in same-sex relationships. Although the Supreme Court ultimately ruled against the gay litigants in *Canada (Attorney General) v. Mossop* [1993] 1 SCR 554 and *Egan v. Canada* [1995] 2 SCR 513, the fact that these were close rulings (4-3 and 5-4 respectively) indicate that the members of the high court are far more receptive to gay rights claims in marital status disputes than in marital disputes brought by heterosexual litigants. The other four types of discrimination, namely sex, religion, disability and citizenship, do not seem to invite differential treatment by members of the Court when compared to other types of equality cases, which itself is noteworthy because, as expected, it points to the fact that the justices are treating these equality claims in a similar manner.

The job loss variable is the only other case level characteristic that is statistically significant in the logistic models, and it only works as a significant predictor in cases when controlling for age discrimination ($b = .90$, $p = .05$). In other words, when age discrimination is held constant, justices are more likely to cast a liberal vote if an individual has suffered a job loss. However, since most of the cases involving job loss also feature age discrimination characteristics (five of seven disputes), the results in this area should be interpreted with some caution.⁶

None of the four remaining variables at the case level were statistically significant in the logistic regression models, and many of them had a minimal impact in the unexpected direction. For example, in six of the seven regression equations the benefit coefficients suggest that the justices tend to vote more conservatively in cases involving the denial of government benefits

than in cases involving private benefits or no benefits at all. One possible explanation for this anomaly is that in the equality area justices are less concerned with whether a denial of benefits has occurred, or who is responsible for such a denial, than with whether a Charter breach has occurred in the case at hand. Similarly, the coefficients were in the unexpected direction for all of the equations involving government as a party and five of the seven equations featuring the dichotomous family law variable. The findings regarding the government variable might be surprising to some judicial scholars, given the fact that scholarship in the U.S. literature has shown not only that when the government is a party in the suit the court is more likely to grant writ of certiorari, but also that government tends to win more frequently on the merits at the Supreme Court level because they are repeat players in the system (see McCormick 1993, 1994, 156-57; Flemming and Krutz 2002a, 2002b). Still, the findings demonstrate that Canadian justices are not significantly influenced by the existence of these variables in the equality area, and their presence or absence in a dispute seems to be overshadowed by the impact of Charter issues and judge-level characteristics, like judicial ideology and gender.

Conclusion

Although the attitudinal model has dominated the U.S. judicial landscape for the past four decades, few scholars examining courts either within or outside of the U.S. have assessed the relevance of the fact-based attitudinal model beyond a few meager areas of law. This study has successfully demonstrated the applicability of this theoretical paradigm in a new area of law, and beyond the narrow confines of the U.S. judicial system. Our findings provide overwhelming evidence that Canadian Supreme Court justices are indeed influenced by their own attitudes and values when approaching salient controversial discrimination claims. Although a layman might

not be surprised by this finding, the fact that there are various political features of the Canadian appointment process and institutional norms of the Court that mitigate against attitudinal expression makes this finding all the more impressive. Moreover, one major finding of this study is that it is the newspaper measure of ideological liberalism, not party of the appointing Prime Minister, which proved to be the best ideological predictor of voting behavior in the equation. This is important because many U.S. scholars have been wedded to the belief that party affiliation is a particularly useful crude indicator of judicial liberalism. In fact, this study has found that party of Prime Minister is not an effective predictor of voting behavior in a multivariate model of decision-making in post-Charter equality cases.

Beyond the contours of ideology, one of the most critical findings of this study is that the gender of a justice plays a dramatic role in influencing vote outcomes on the Canadian Court in equality cases. Put simply, female justices speak to the victims of discrimination in a profoundly different -- and more liberal -- voice than their male brethren. This influence is discernible at the highest level of statistical significance across all types of discrimination claims, and persists even in the face of numerous controls relating to case facts and judicial ideology. The most critical case fact that triggered attitudinal responses by the justices pertained to whether one or more Charter issues were central to the equality dispute. Although this is predictable, it demonstrates that Charter breaches remain as salient in the minds of the current Supreme Court justices as when the Charter was adopted over 20 years ago. Even though most of the case facts in our models did not prove to be statistically significant, this finding in and of itself is important, because it demonstrates that in the equality area of law, case facts are trumped by ideology and the gender of the justices deciding the disputes.⁷

Finally, and perhaps most importantly, this study provides more evidence demonstrating that the Segal and Spaeth (1993, 2002) attitudinal model offers a more in-depth understanding of judicial decision making in a high court outside the borders of the U.S. This is critical because it provides further confirmation that this framework may have genuine relevance for comparative scholars interested in developing a more global model for explaining judicial behavior in advanced industrial societies.

TABLE 1

Logistic Regression Estimates for Nonunanimous Discrimination Cases in the Canadian Supreme Court, 1984-2002

Variable	Age	Gay/Lesbian	Sex	Religion
Judge Level Variables				
Newspaper Ideology (+)	.291 *	.307 *	.270 *	.276 *
Party of Prime Minister (+)	.118	.170	.165	.157
Female Justice (+)	2.255 ***	2.371 ***	2.213 ***	2.177 ***
Case Level Variables				
Charter Issues (+)	.540 *	.491	.626 *	.504 *
Type of Discrimination	-1.074 *	1.933 ***	.442	-.834
Job Loss (+)	.897 *	.011	.489	.430
Benefits (+)	.022	-.300	-.172	-.007
Family Law (-)	.085	-.497	.037	.199
Government a Party (+)	-.469	-.681	-.178	-.203
Deference to HR Comm. (+)	-.102	-.250	.129	.103
Constant	-1.295	-1.349	-1.764	-1.499
Model Chi-Square	62.342	78.467	59.057	59.517
Nagelkerke R-Square	.321	.391	.307	.309
% Correctly Classified	74.8%	77.4%	76.5%	76.1%
Prop. Reduction in Error	37.4%	42.9%	40.7%	39.6%

* p <= .05; ** p <= .01; *** p <= .001

TABLE 1 CONTINUED
Logistic Regression Estimates for Nonunanimous Discrimination Cases in the Canadian Supreme Court, 1984-2002

Variable	Disability	Citizen	Marital
Judge Level Variables			
Newspaper Ideology (+)	.288 *	.279 *	.263 *
Party of Prime Minister (+)	.101	.122	.176
Female Justice (+)	2.173 ***	2.176 ***	2.239 ***
Case Level Variables			
Charter Issues (+)	.549 *	.488 *	.616 *
Type of Discrimination	-.803	.321	.986 *
Job Loss (+)	.126	.325	.424
Benefits (+)	-.226	-.099	-.361
Family Law (-)	.029	.221	-.740
Government a Party (+)	-.330	-.282	-.215
Deference to HR Comm. (+)	.045	.006	-.056
Constant	-1.319	-1.468	-1.652
Model Chi-Square	59.593	58.480	61.278
Nagelkerke R-Square	.309	.304	.317
% Correctly Classified	75.2%	75.7%	75.2%
Prop. Reduction in Error	37.3%	38.6%	37.3%

* p <= .05; ** p <= .01; *** p <= .001

Appendix -- List of Cases in the Study

Bhinder v. Canadian National Railway [1985] 2 SCR 561
Scowby v. Glendinning [1986] 2 SCR 226
Andrews v. Law Society of British Columbia [1989] 1 SCR 143
SEPQA v. Canada [1989] 2 SCR 879
McKinney v. University of Guelph [1990] 3 SCR 229
Harrison v. University of British Columbia [1990] 3 SCR 451
Stoffman v. Vancouver General Hospital [1990] 3 SCR 483
Zurich Insurance Company v. Ontario (Human Rights Commission) [1992] 2 SCR 321
Dickason v. University of Alberta [1992] 2 SCR 1103
Canada (Attorney General) v. Mossop [1993] 1 SCR 554
University of British Columbia v. Berg [1993] 2 SCR 353
Rodriguez v. British Columbia [1993] 3 SCR 519
Symes v. Canada [1993] 4 SCR 695
Miron v. Trudel [1995] 2 SCR 418
Egan v. Canada [1995] 2 SCR 513
Thibaudeau v. Canada [1995] 2 SCR 627
Gould v. Yukon Order of Pioneers [1996] 1 SCR 571
Beliveau St-Jacques v. FEESP [1996] 2 SCR 345
Adler v. Ontario [1996] 3 SCR 609
Cooper v. Canada [1996] 3 SCR 854
Vriend v. Alberta (Attorney General) [1998] 1 SCR 493
Vancouver Society of Immigrants & Visible Minority Women v. Minister of National Revenue [1999] 1 SCR 10
M. v. H. [1999] 2 SCR 3
DeLisle v. Canada (Attorney General) [1999] 2 SCR 989
Little Sisters Book and Art Emporium v. Canada [2000] 2 SCR 1120
Lavoie v. Canada [2002] 1 SCR 769
Sauve v. Canada (Chief Electoral Officer) [2002] 3 SCR 519
Nova Scotia (Attorney General) v. Walsh [2002] 4 SCR 325
Gosselin v. Quebec [2002] 4 SCR 429

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Notes

¹ We acknowledge that Parliament is supreme in Canada and can pass legislation to override a court ruling, and that the Constitution has afforded legislatures in the Canadian system with the power to invoke the "Notwithstanding Clause" to circumvent Supreme Court rulings. Yet, both of these measures have been rarely utilized.

² Unlike their U.S. counterparts, justices in the Canadian system are required to retire at the age of 75, yet it is unlikely that they will pursue any employment, much less political office, after their departure from the court.

³ We omit cases from the analysis that involved aboriginal rights and language rights. We excluded these cases because they featured different types of legal and constitutional claims than those grounded in Section 15 of the Charter and/or provincial human rights legislation.

⁴ There were five justices who were scored as moderates because there was no ideological commentary in the *Globe and Mail* articles. These justices include Justice Iacobucci, Stevenson, Gonthier, Cory, and Estey. Three other justices fell into this category on the basis of commentary suggesting their ideologically "moderate" stance on the law (Justices McIntyre, Arbour, and Binnie). Justices scoring most conservatively (-2) included Justices Major and Chouinard. Justice Sopinka was the only justice labeled a moderate conservative (-1). Justices who were most liberal (+2) included Justices LaForest, L'Heureux-Dube, Lamer, Wilson, Bastarache, and Beetz, while Justices Dickson, McLachlin, LeDain, and LeBel were identified as moderate liberals (+1). The coding scheme for the most recent justices appointed by Prime Minister Jean Chretien parallels the work of Charles Smith (2000).

⁵ We factor analyzed three distinct measure of ideology in our data set: 1) newspaper ideology, 2) party of Prime Minister, and 3) ideological motivation of Prime Ministers in their

appointments (see Tate and Handberg 1981). A two-factor solution resulted in strong loadings for the newspaper ideology on to one factor (.826), and the two party measures on another factor (.961 and .969). The party variable loadings on the "ideology" factor were -.257 and -.226. These results confirm our suspicion that the measures really tap two distinct but related concepts: party of Prime Minister and ideology.

⁶ The five job loss cases that also involved age discrimination were: *Cooper v. Canada* [1996] 3 SCR 854; *McKinney v. University of Guelph* [1990] 3 SCR 229; *Harrison v. University of British Columbia* [1990] 3 SCR 451; *Stoffman v. Vancouver General Hospital* [1990] 3 SCR 483; and *Dickason v. University of Alberta* [1992] 2 SCR 1103. The two other cases involving job loss were *Bhinder v. Canadian National Railway* [1985] 2 SCR 561; and *Vriend v. Alberta (Attorney General)* [1998] 1 SCR 493.

⁷ It is important to note that this is not the case in other areas of law. For example, Wetstein and Ostberg (1999) found that in search and seizure disputes, case facts did prove to be viable predictors of judicial voting behavior in the Canadian Supreme Court.

How did "Superior Court" become "Supreme Court" in all of the posts?!? This was made possible by countless people forwarding it WITHOUT READING A SINGLE PAGE of the claim. That's the bad news. Reiner Fuellmich clarified that he has never filed any papers with the courts in Canada. It is misinformation to suggest he has; the papers are manufactured and fraudulent. Reply. Robin says: 13 July 2021 at 07:22. I heard Reiner Fuellmich say to a guy, I think, in Netherlands that he was filing in Canada at the end of June 2021. That this could free a Continent. I watched the interview. Two theoretical models were studied: the attitudinal model, according to which justices decide disputes consistent with their ideological positions; and the neo-institutional approach, according to which the roles and norms of the court as an institution affect the justices' decisions. Conclusions indicate that justices' attitudes in Israel have a very strong influence on their votes on the merit. This article analyzes an important discretionary power of the Supreme Court of Canada, the ability to award costs. With the use of an original data set, we explore trends in costs awarding in public interest litigation at the Supreme Court from 1970 to 2012. The contemporary Canadian Supreme Court provides an ideal setting for examining the relevance of the attitudinal model because it possesses many of the same institutional and political features that are found in the U.S. The Canadian court, like its southern neighbor, is the court of last resort, and thus, the justices are the ultimate arbiters of all legal disputes and their decisions. The data for this paper are taken from all nonunanimous equality decisions published in the Supreme Court Reports after the Charter of Rights and Freedoms was added to the Canadian Constitution (1984-2002). Cases were included in the analysis if they featured discrimination claims emanating from Section 15 of the Charter or discrimination claims under federal or provincial statutory law.