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JUDICIAL DECISION-MAKING IN COMPARATIVE PERSPECTIVE: IDEOLOGY, LAW AND ACTIVISM IN CONSTITUTIONAL COURTS

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JUDICIAL DECISION-MAKING IN COMPARATIVE PERSPECTIVE: IDEOLOGY, LAW AND ACTIVISM IN CONSTITUTIONAL COURTS

by

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Dissertation

Presented to the Faculty of the Graduate School of

the University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Philosophy

The University of Texas at Austin

May, 2007

Dedication

This Dissertation is dedicated to the memory of my parents, Lawrence and Ramona, and also to my wife, Marina, and sons, David and Alexander.

Acknowledgments

I would like to thank my dissertation committee for their assistance and guidance, and especially H.W. Perry, for his substantive knowledge and moral support, and Tse-min Lin, for his superb methodological help. I am also grateful to Don Songer for sharing coding materials, and Thad Tecza, for his continual support over the years. Gary Klass gave helpful comments on chart creation. I also give thanks to Michael Berges, Sarah Downing, Matt Odom, and Paola Silveira Orlando. Finally, special thanks are owed to my wife Marina, for enduring my countless late nights and long hours–this project could not have come to fruition without your patience and support.

JUDICIAL DECISION-MAKING IN COMPARATIVE PERSPECTIVE: IDEOLOGY, LAW AND ACTIVISM IN CONSTITUTIONAL COURTS

Publication No. _____

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The University of Texas at Austin, 2007

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This dissertation proposes a new cross-national theory of judicial decision-making. The judicial politicization theory posits that judges on a highly politicized high court will be more likely to decide cases using ideological and attitudinal factors, while judges at less politicized high courts will be more likely to decide cases using legal factors. A new method for calculating judicial politicization is provided, and the theory is tested using generalized-estimating-equation logistic-regression analyses in newly collected data from the supreme courts of the United States, Canada, and Australia. The results show that the American and Australian cases strongly support the theory. That is, the attitudinal model is dominant in the U.S. while the legal model is more influential in Australia. In Canada, both legal and attitudinal factors are significant. In addition, the theory proposes that judicial activism is more likely to occur in highly politicized high courts, and the data also support this hypothesis.

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Chapter One: Introduction

This dissertation examines two related and highly salient issues: judicial decision-making and judicial activism. Judicial decision-making refers to the processes and factors that influence judges to decide cases as they do. In other words, why does a judge vote for one litigant over the other in a particular case? Does the judge base his or her decision on the legal principles governing the dispute, or is he or she affected by ideological, policy, or strategic considerations? For over fifty years, public law scholars have attempted to unravel the mysteries of judicial decision-making, and a variety of theories and models have been propounded and tested. Clearly, understanding the process of judicial decision-making is important for both scholarly and practical considerations. A more comprehensive account of the process of judicial behavior can assist both social scientists and policy analysts.

The other, related topic that is examined in this project is the concept of judicial activism. Judicial activism occurs when a court strikes down or invalidates an act of the legislature or the executive. This simple definition, though, excludes the deeper issues and disagreements surrounding the concept. Critics of judicial activism assert that judges should seldom invalidate legislation or executive actions, while supporters hold that the ability of judges to overturn unconstitutional and unjust laws is a necessary check in any political system. Judicial activism remains controversial, both in the trenches of academia and the battlefields of politics. Nearly every election cycle in the United States finds conservative

politicians decrying "activist judges" who "write laws from the bench," while defenders point out that it is these same judges who protect unpopular minorities from oppression through judicial rulings. Not surprisingly, judges themselves disagree on the topic: J. Clifford Wallace of the United States Ninth Circuit Court of Appeals notes that, "If left entirely unchecked, periodic activist inroads over the years could emasculate fundamental doctrines and undermine the separation of powers" (Wallace 1997, 172-73), while William Wayne Justice of the United States District Court asserts that, "jurisprudential activism is constitutionally mandated and, in and of itself, quite proper" (Justice 1997, 303).

In academe, normative commentators variously describe judicial activism as a form of "creative constitutional development" (Lewis 1999, 3) or as an "unfortunate phenomenon" (Wolfe 1997, x). The issue of judicial activism was elegantly framed by Alexander Bickel, who noted that judicial activism is potentially undemocratic and thus presents a "counter-majoritarian difficulty" in the American political system: "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (Bickel 1962, 16-17).

In the years since Bickel penned his prescient remarks, judicial activism has been recognized as not an exclusively American phenomenon, but, indeed, present in many democracies worldwide, to a greater or lesser degree (Holland 1991, 2000; Tushnet 2003c). The influence of high courts throughout the world of modern democracies increased dramatically in the latter half of the twentieth century. Scholars have noted that there has

been a "global expansion of judicial power" (Tate and Vallinder 1995) as supreme courts have expanded their role beyond dispute resolution to the creation of public policy. Some European and Canadian commentators, much like their American counterparts, have also criticized judicial activism as being fundamentally antithetical to democratic principles (Holland 2000; Knopff 2001; Martin 2003). But, despite evidence that judicial activism has been increasing in many industrialized democracies, there have been few empirical, cross-national studies of the phenomenon, and few scholars have proposed theoretical frameworks to explain and predict judicial activism. Similarly, there has been very little cross-national research into the dynamics of judicial decision-making in comparative perspective.

This dissertation will attempt to remedy that deficiency, at least in part, by examining judicial decision-making and judicial activism in the 1990s in the high courts of the United States, Canada, and Australia. Clearly, the process of judicial decision-making influences the practice of judicial activism, thus these related phenomenon are examined in tandem. However, this project will eschew analysis of the normative dimensions of judicial decision-making and judicial activism, and instead approach these issues from an empirical and positive perspective. By examining judicial activism and judicial behavior in comparative perspective, it is hoped that the relationship between courts and legislatures can be better understood, not only in the U.S., but worldwide. In short, this dissertation hopes to answer the overarching question: Do judicial decision-making and judicial activism vary at the high courts of the United States, Canada, and Australia, and, if so, why?

Competing Theories of Judicial Decision-Making

In Chapter Three, the existing scholarly literature on judicial decision-making and judicial activism is extensively reviewed, with the aim of identifying the questions yet to be answered by empirical research. To briefly review, the dominant theory of judicial decision-making is the attitudinal model, which posits that high court judges make decisions in cases based upon their own ideological preferences or attitudes. The attitudinal model can be contrasted with the opposing theory, the legal model, which holds that judges are most influenced by legal doctrine and precedent in judicial decision-making. The attitudinal and legal models have been extensively tested in the United States, and several recent studies have also tested the attitudinal model in Canada in certain types of cases. However, there has been no study which measures the effects of the attitudinal and legal models cross-nationally, and across a wide variety of case issue areas. Furthermore, there has been virtually no theoretical work conducted on the question of *why* the attitudinal and legal models may vary in different nations' highest courts. Finally, there has been no research analyzing judicial decision-making in unanimous cases in comparative context.

Based on the review of the empirical literature in Chapter Three, there are at least seven specific questions that previous studies have not answered:

1. Of the United States Supreme Court, Supreme Court of Canada, and High Court of Australia, which is the most activist? Put another way, which of these high courts is most likely to defer to the legislature and which high court is least deferential? Which high court

is most likely to invalidate ideologically incongruent statutes?

2. Prior research (Solberg and Lindquist 2006) into federalism issues and judicial behavior has indicated that, at the U.S. Supreme Court, conservative judges will be more likely to strike down national laws while liberal justices are more likely to invalidate state and local laws. Do high court judges in Canada and Australia exhibit the same ideological voting tendencies as American judges when reviewing national and state/local laws?

3. Prior studies have found that attitudinal voting exists at the U.S. Supreme Court in certain issue areas, such as civil liberties cases. However, will the influence of attitudinal voting be observed across issue areas? In other words, can ideological/attitudinal judicial voting be observed at the Supreme Court when different types of cases are aggregated?

4. Related to this, comparative judicial researchers have found that some attitudinal voting occurs at the high court of Canada in certain case issue areas. However, will ideological voting be observed at the Supreme Court of Canada when different types of cases are aggregated?

5. At the High Court of Australia, there has not previously been an analysis of attitudinal voting based upon judicial ideology scores. Previous researchers have only used political party as a crude indicator of judicial ideology. Will attitudinal voting be observed at the

High Court of Australia when these ideological values are utilized?

6. If attitudinal voting is observed at the U.S. Supreme Court, Canadian Supreme Court, and Australian High Court, does the extent of attitudinal judicial voting vary by high court? What explains the difference, if any, in attitudinal voting?

7. Are legal variables influential in judicial decision-making for high court judges in the U.S., Canada and Australia? In other words, does the legal model predict judicial behavior for judges in these courts? If legal variables do influence judicial decision-making at the high courts of the U.S., Australia and Canada, what explains the difference in degree in legal voting?

Methodology of this Study

The methodology for this study required the creation of a set of original databases for each of the three countries in this study. For the time period 1990 to 1999, each case decided by the high courts of the United States, Canada, and Australia was reviewed to see if the court decided the constitutionality of a federal or state/province statute, local ordinance, or state constitutional provision. Those cases were then numerically coded with over 40 separate variables per observation; over 3000 total observations were coded. Two databases for each country were created: one database with the case as the unit of analysis, and one database with the individual judge vote as the unit of analysis. The data were analyzed in

Stata using a generalized estimating equation model and logistic regression analyses, as well as various descriptive analytical techniques.

The Judicial Politicization Theory

This project proposes a new theory for cross-national judicial decision-making: the judicial politicization theory. Briefly, this theory posits that judges at a highly politicized high court in an established democracy are more likely to decide cases according to ideological/attitudinal factors, and will correspondingly be more likely to engage in judicial activism and strike down acts of the legislature. Conversely, judges at a high court that is less politicized will be more likely to decide cases based upon legal factors, and will be less likely to invalidate laws enacted by the political branch. In other words, the attitudinal model of judicial decision-making will predominate in politicized judiciaries, while the legal model will be more likely to prevail in less politicized courts.

The degree of judicial politicization in a high court is determined by the informal norms regarding judicial selection, not the formal processes used for judicial appointments. While there appears to be no question that judicial appointment systems are a highly significant influence on American state court judges, this dissertation argues that, in comparative context, formal selection mechanisms are less important than the "selection culture" inherent in a modern democratic political system. The selection culture refers to whether the appointing executive typically relies upon ideological and partisan factors to choose judges, or whether other factors such as qualifications and merit are the most

important criteria. Stated differently, a country's judiciary is highly politicized if the judges are chosen by the executive based upon partisan grounds, while another nation's judiciary is less politicized if the magistrates are selected on nonpartisan factors. Of the three high courts in this study, the most highly politicized is the U.S. Supreme Court, followed by the High Court of Australia, followed by the Supreme Court of Canada.

Brief Summary of the Results

The results of the analyses herein show that judges at the U.S. Supreme Court in the 1990s were more likely to engage in judicial activism than were judges at the high courts of Canada or Australia. Also, American high court justices were more likely to nullify ideologically incongruent statutes.

Also, judges at the U.S. Supreme Court in the 1990s were much more likely to exhibit voting patterns that are consistent with their attitudes and ideology: conservative judges were more likely to strike down national laws and liberal justices were more likely to nullify state and local laws. The judges at the less politicized high courts of Canada and Australia did not exhibit the same ideological voting tendencies, suggesting that non-ideological factors predominated in federalism issues for judges at the high courts of Canada and Australia.

Next, the influence of judicial attitudes/ideology was found to be significant in each of the high courts and had the greatest effect in the more highly politicized courts. Examining the estimated marginal effect change in probability in the dependent variable

(vote to strike down a law), judicial attitudes had an effect size of -.31 or -31% (standard error of .07) at the U.S. Supreme Court, -.18 or -18% (standard error of .09) at the High Court of Australia, and -.13 or -13% (standard error of .07) at the Supreme Court of Canada.

Also, the legal variables were most significant for the less politicized high courts of Canada and Australia, as predicted, although one coefficient was in the opposite direction than expected for each of these two courts. This suggests that legal variables are relevant in the supreme courts of Canada and Australia, but that additional jurisprudential variables could be added to the model in future studies.

Contributions of this Dissertation

This dissertation makes several original theoretical and methodological contributions to the existing research on comparative judicial behavior and judicial activism.

First, a new theory of cross-national judicial decision-making in established democratic societies-- the judicial politicization thesis--is proposed. This is the first general theory propounded to explain variations in judicial decision-making in comparative and cross-national perspective.

Second, substantial new data in judicial review cases from the high courts of Canada and Australia in the 1990s are collected and analyzed (and existing U.S. Supreme Court data was substantially extended). Previously, data only existed for the U.S. Supreme Court (Spaeth 2001); these new databases significantly extend the ability of the comparative judicial scholar to analyze judicial behavior cross-nationally.

Third, judicial activism in the 1990s in the high courts of the U.S., Canada and Australia is analyzed for the first time, including the influence of ideology in federalism cases. While judicial activism has been analyzed in the American case (see, e.g., Keck 2004) and, to a lesser extent, the Canadian case (see, e.g., Kelly 2005), this is the first study to empirically examine judicial activism at the High Court of Australia and is also the first study to do so cross-nationally.

Fourth, new judicial ideology scores for Australian high court judges, derived from content analysis of Australian newspaper editorials, are presented for the first time. Judicial ideology scores have been available for American high court judges since 1989 (Segal and Cover 1989) and for Canadian justices since 1999 (Ostberg and Wetstein 1999), but this project represents the first compilation of these values for justices at the High Court of Australia.

Fifth, attitudinal voting in the High Court of Australia, Supreme Court of Canada, and United States Supreme Court is examined across multiple issue areas to provide the most rigorous test of the theory. That is, unlike virtually all previous studies (see, e.g., Segal 1986) which only examine the attitudinal model in one particular issue area (such as search-and-seizure cases), this study aggregates all types of cases to provide the most stringent possible test of the theory.

Sixth, the influence of legal and jurisprudential factors in judicial decision-making at the High Court of Australia, Supreme Court of Canada, and U.S. Supreme Court is analyzed. That is, this is the first project to empirically analyze the influence of the legal

model in cross-national perspective, and one of the first to do so at the high courts of Canada and Australia.

Finally, judicial decision-making in unanimous cases–which can present a very different dynamic than nonunanimous cases--is analyzed to test judicial behavior in comparative context. Almost all previous empirical research on judicial decision-making (but see Kritzer, Pickerill, and Richards 1998) has used only nonunanimous court cases for the analyses, on the assumption that unanimous cases do not present an actual legal or factual controversy. This dissertation disaggregates and analyzes unanimous and nonunanimous cases, and is the first study to do so cross-nationally. In other words, no previous research has examined judicial decision-making in solely unanimous cases at the supreme courts of Canada and Australia.

Preview of Chapters

Chapter Two of this dissertation examines in detail the data and methodology of this project, as well as describing more fully the judicial politicization theory. In Chapter Three, the existing literature on judicial decision-making and judicial activism in the United States, Canada, and Australia is examined in depth. Chapter Four tests the judicial politicization theory by examining the phenomenon of judicial activism at the high courts of the United States, Canada and Australia. The chapter analyzes trends in the rate of judicial activism in the U.S., Canada, and Australia in the 1990s, and also examines which topical case issues tend to provoke activism in each nation. Also, judicial activism at the individual judge level

is analyzed in Chapter Four. In Chapter Five, judicial activism and federalism in Canada, Australia, and the United States are examined by analyzing the individual judges' votes to invalidate federal, state/province, and local laws. In Chapter Six, the central premise of the judicial politicization theory–that judicial attitudes tend to strongly influence judicial decision-making in politicized courts while legal factors are more likely to shape decision-making in non-politicized courts–is analyzed by the use of a multivariate logistic regression model, using generalized estimating equations.

Chapter Two: Theory, Data, and Methods

In this chapter, the theory proposed in this project–the judicial politicization thesis–is reviewed and discussed. Also, the research design for the project, data collection procedures, and analytical methods are discussed. In addition, the coding for the dependent and independent variables is described in detail, along with reliability testing.

The Judicial Politicization Theory

The conventional wisdom on judicial selection systems among American public law scholars is that the process used to choose the judges will significantly affect the judicial decision-making by those judges (see, e.g., Brace and Hall 1997; Dubois 1980; Hall 2001; Hanssen 1999; Kritzer 2006; Sheldon and Lovrich 1991). For example, Gates and Johnson (1991, 159) state, "the systems themselves may influence the decision making of judges and their relationship to the political system." Much research has been conducted in the American states to determine whether appointive systems (wherein the executive chooses the judge, sometimes after a commission has produced a short list of names), or elective systems (where the legislature or voters directly choose the judges) have the greatest impact on judicial decision-making (see generally Baum 1998b; Hanssen 2004). In other words, the scholarly consensus suggests that formal selection mechanisms are a predominant influence upon judicial behavior.

However, the theory proposed in this dissertation challenges the conventional wisdom

and asserts that, in cross-national context, informal norms are the dominant factor.[1] While there appears to be no question that judicial appointment systems are a highly significant influence on American state court judges, this dissertation argues that formal selection mechanisms are less important than the "selection culture" inherent in a modern democratic political system. The selection culture refers to whether the appointing executive typically relies upon ideological and partisan factors to choose judges, or whether other factors such as qualifications and merit are the most important criteria. Stated differently, a country's judiciary is highly politicized if the judges are chosen by the executive based upon partisan grounds, while another nation's judiciary is less politicized if the magistrates are selected on nonpartisan factors. The logical extension of this observation is that judges in a highly politicized judiciary will tend to engage in a greater degree of ideological decision-making, and judges in a less politicized judiciary will be less likely to decide cases on ideological or attitudinal grounds. Thus, the judicial selection culture of a country is the critical factor in determining whether its supreme court is highly politicized, and whether its judges will tend to be driven by political and ideological concerns.

Specifically, the core of the judicial politicization theory is the contention that judges on a highly politicized high court in an established democracy are more likely to decide cases according to ideological/attitudinal factors, and will correspondingly be more likely to engage in judicial activism and strike down acts of the legislature. Conversely, judges on a

[1] Sheldon and Lovrich (1991; see also Miller 1998; Richardson and Vines 1970) discuss informal judicial selection norms through their "articulation" model, which posits that there are three crucial stages to judicial appointment in the American states: initiation, screening, and affirmation.

high court that is less politicized will be more likely to decide cases based upon legal factors, and will be less likely to invalidate laws enacted by the political branch. In other words, the attitudinal model of judicial decision-making will predominate in politicized judiciaries, while the legal model will be more likely to prevail in less politicized courts.[2]

Before moving on, a brief word regarding judicial selection systems is necessary. There is no question that, under certain circumstances, the formal judicial selection process could moderate the degree of judicial politicization. For example, transparency (through open hearings) can moderate, to a greater or lesser degree, the influence of ideology in judicial selection. In other words, an open system, with multiple actors/veto points and open hearings, could moderate (though not eliminate) the tendency of the executive to select high court judges based in ideological congruence. The U.S. has a much more open process than Australia or Canada, as Supreme Court nominees receive intense scrutiny by interest groups and the oppositional political party, followed by confirmation hearings in the Senate Judiciary Committee and a full floor vote in the Senate. By contrast, high court judicial selection in Canada and Australia involves little or no scrutiny by interest groups and virtually no transparency. This example, though, serves to illustrate the basic contention of the judicial politicization theory. There are virtually *no* checks on the executive in high court judicial selection in Canada and Australia, yet the process there is consistently less politicized than in the United States. However, if the selection culture in Canada or Australia

[2] It is consistent with the theory to speculate that a highly politicized high court will be more likely to engage in strategic behavior. However, that question is beyond the scope of this project, but does provide an interesting avenue for future research.

should change, then the prime minister would be able to make highly ideological judicial appointments without difficulty.

Quantifying Judicial Politicization

It is difficult to ascertain whether a country's judiciary is politicized or not, because there has been no empirical or quantitative method proposed to measure this concept. So, one method to determine the degree of judicial politicization is to conduct a review of the existing qualitative literature and the thick descriptions that often exist in those studies. This is of course a crucial introductory step (indeed, such a review is found in Chapter Three of this dissertation), but the lack of an empirical measure does not allow a researcher to make definitive conclusions about the level of judicial politicization. Thus, this project proposes and conducts an empirical test of the degree of judicial politicization.

The judicial politicization indicator is operationalized by analyzing partisan and nonpartisan appointments to the high court and simply calculating the percentage of nonpartisan judicial assignments. A nonpartisan appointment is defined as a judicial appointment where the political ideology of the justice differs from that of the executive. To illustrate, imagine that current President Bush had nominated current ACLU legal director Steven Shapiro to serve on the U.S. Supreme Court. This admittedly extreme example would provide an illustration of a nonpartisan appointment to the U.S. high court. Clearly, the highly conservative Bush would not have nominated Shapiro to the Court based on ideological congruence; rather, the appointment would have presumably been made on the

basis of other factors, such as experience, qualifications, merit, or some other nonideological basis.

To quantify nonpartisan appointments, I compared the ideology of the judge with the ideology of the appointing executive. If the two ideological values did not match, this was coded as a nonpartisan appointment. For the judicial ideology scores of the American Supreme Court justices, I used the well-known Segal and Cover (1989) scores. These values were derived through a content analysis of editorials regarding judicial appointments in leading American newspapers. The Segal and Cover scores, updated in 2005 by Epstein and Segal (2005), exist on a scale from most conservative (scores closer to 0) to most liberal (scores closer to 1).

For the Supreme Court of Canada ideology scores, another set of researchers (Songer and Johnson 2002; Ostberg et al. 2004) previously conducted a content analysis of Canadian newspapers to derive individual ideology scores for members of the Canadian Supreme Court. I used these values, with one modification: the original paper containing the scores (Ostberg et al. 2004) separated Justice L'Heureux-Dube's scores into two categories–criminal and civil rights. In order to obtain a single score representing L'Heureux-Dube, these two values were combined. The Ostberg scores were then transformed to match the Segal and Cover scale, which is a scale from 0 to 1.

For the High Court of Australia, I conducted a content analysis of Australian newspaper editorials using the Segal and Cover (1989) procedures and developed an ideology scale for each judge sitting on the High Court in the 1990s. These scores are the

first ideology values to date for the members of the High Court of Australia, and utilize the same scale as the Segal and Cover values. The initial ideology values for the judges on each high court are shown in Table 2.4 below.

Thus, I compared judicial ideology with executive ideology. I inferred executive ideology from party identification. Thus, if the executive was a member of the Republican in the United States, a member of the Liberal party in Australia, or a member of the Progressive Conservatives in Canada, they were coded as having a conservative ideology (value of 0 to .499). Conversely, if the executive was a member of the Democratic party in the United States, Australian Labor Party in Australia, or Liberal party in Canada, he was coded as having a liberal ideology (value of .500 to 1.00).[3] So, if the ideology of the executive and the ideology of the judge did not correspond, this was coded as a nonpartisan appointment. The mean for nonpartisan appointments was calculated, and then subtracted from 1 in order to provide an intuitive measure of judicial politicization.

Note that both associate justice appointments (associate justices are called *puisne* justices in Australia and Canada) and chief justice appointments or promotions are included. However, if only initial appointments to the high court (excluding chief justice promotions) are used in the calculations, the overall judicial politicization scores do not vary

[3] Admittedly, using party as a proxy for ideology is a fairly crude measure. However, this is a very common practice among social scientists when no better measures are available (see, e.g., Smyth 2005). In the United States, the NOMINATE scores (Poole and Rosenthal 1997; Poole 1998) are an excellent indicator of ideology; however, no comparable measures exist for Canada or Australia. Thus, the decision was made to be consistent and use party for all three cases.

significantly.[4]

The details for the U.S. Supreme Court are found in Table 2.1, Australian results are shown in Table 2.2, and Canadian data are shown in Table 2.3. The judicial politicization index for each court is graphically displayed in Figure 2.1. Note that the higher the value for each high court shown in Figure 2.1, the higher the degree of judicial politicization.

Figure 2.1 shows that the U.S. has the most politicized judicial system with an index score of .923, followed by Australia with a score of .714 and Canada with an index score of .529. These scores comport with the scholarly consensus regarding the supreme courts of the U.S., Canada, and Australia. As discussed at length in Chapter Three, researchers have found that the judiciary in the United States has become exceptionally politicized in the last 25 years, while the high courts of Canada and Australia have remained relatively nonpoliticized.

Thus, judicial selection in the U.S. is most likely to be based on ideological congruence, while the selection of judges in Canada and Australia is less likely to be based on this factor. In other words, in the United States, there is a very strong correlation between the ideological preferences of the nominating president and the ideology of the judge, as measured by Segal and Cover (1989) judicial ideology scores, whereas high court judges selected in Canada and Australia in the 1990s sometimes did not share the ideology of the appointing executive. Thus, it appears that these Canadian and Australian judges were

[4] If only initial high court appointments are used, the judicial politicization scores would be: U.S. = .917; Australia = .727; Canada = .571.

Table 2.1

Partisan and Nonpartisan Appointments to the Supreme Court of the United States, All Justices Serving in the 1990s

Sworn in	Justice	Judge Ideology	Executive Ideology	Nonpartisan Appointment
4/16/62	White	.500	Democrat	No
10/2/67	Marshall	1.00	Democrat	No
9/09/70	Blackmun	.115	Republican	No
1/07/72	Rehnquist (assoc.)	.045	Republican	No
9/26/86	Rehnquist (CJ)	.045	Republican	No
12/19/75	Stevens	.250	Republican	No
9/25/81	O'Connor	.415	Republican	No
9/26/86	Scalia	.000	Republican	No
2/18/88	Kennedy	.365	Republican	No
10/09/90	Souter	.325	Republican	No
10/23/91	Thomas	.160	Republican	No
8/10/93	Ginsburg	.680	Democrat	No
8/03/94	Breyer	.475	Democrat	Yes

Judicial ideology scores exist on a 0 to 1 scale. Lower scores indicate conservative ideology, higher scores indicate liberal ideology.

Table 2.2

Partisan and Nonpartisan Appointments to the High Court of Australia, All Justices Serving in the 1990s

Sworn in	Justice	Judge Ideology	Executive Ideology	Nonpartisan Appointment
8/07/72	Mason (puisne)	.500	Liberal	Yes
2/06/87	Mason (CJ)	.500	ALP	No
2/12/81	Brennan (puisne)	.250	Liberal	No
4/21/95	Brennan (CJ)	.250	ALP	Yes
6/25/82	Deane	.500	Liberal	Yes
7/30/82	Dawson	.250	Liberal	No
2/06/87	Toohey	1.00	ALP	No
2/06/87	Gaudron	1.00	ALP	No
2/14/89	McHugh	.500	ALP	No
4/21/95	Gummow	.300	ALP	Yes
2/06/96	Kirby	.800	ALP	No
9/22/97	Hayne	.275	Liberal/Coalition	No
5/22/98	Gleeson (CJ)	.225	Liberal/Coalition	No
2/03/98	Callinan	.000	Liberal/Coalition	No

Note that Gleeson's initial appointment to the High Court was as Chief Justice.

Judicial ideology scores exist on a 0 to 1 scale. Lower scores indicate conservative ideology, higher scores indicate liberal ideology.

Table 2.3

Partisan and Nonpartisan Appointments to the Supreme Court of Canada, All Justices Serving in the 1990s

Sworn in	Justice	Judge Ideology	Executive Ideology	Nonpartisan Appointment
3/26/73	Dickson (puisne)	.500	Liberals	No
4/18/84	Dickson (CJ)	.500	PC	Yes
3/28/80	Lamer (puisne)	.855	Liberals	No
7/01/90	Lamer (CJ)	.855	PC	Yes
3/04/82	Wilson	.905	Liberals	No
1/16/85	La Forest	.875	PC	Yes
4/15/87	L'Heureux-Dube	.330	PC	No
5/24/88	Sopinka	.538	PC	Yes
2/01/89	Cory	.743	PC	Yes
2/01/89	Gonthier	.455	PC	No
3/30/89	McLachlin (puisne)	.668	PC	Yes
1/07/00	McLachlin (CJ)	.668	Liberals	No
9/17/90	Stevenson	.625	PC	Yes
1/07/91	Iacobucci	.500	PC	No
11/13/92	Major	.170	PC	Yes
9/30/97	Bastarache	.833	Liberals	No
1/08/98	Binnie	.553	Liberals	No

Judicial ideology scores exist on a 0 to 1 scale. Lower scores indicate conservative ideology, higher scores indicate liberal ideology.

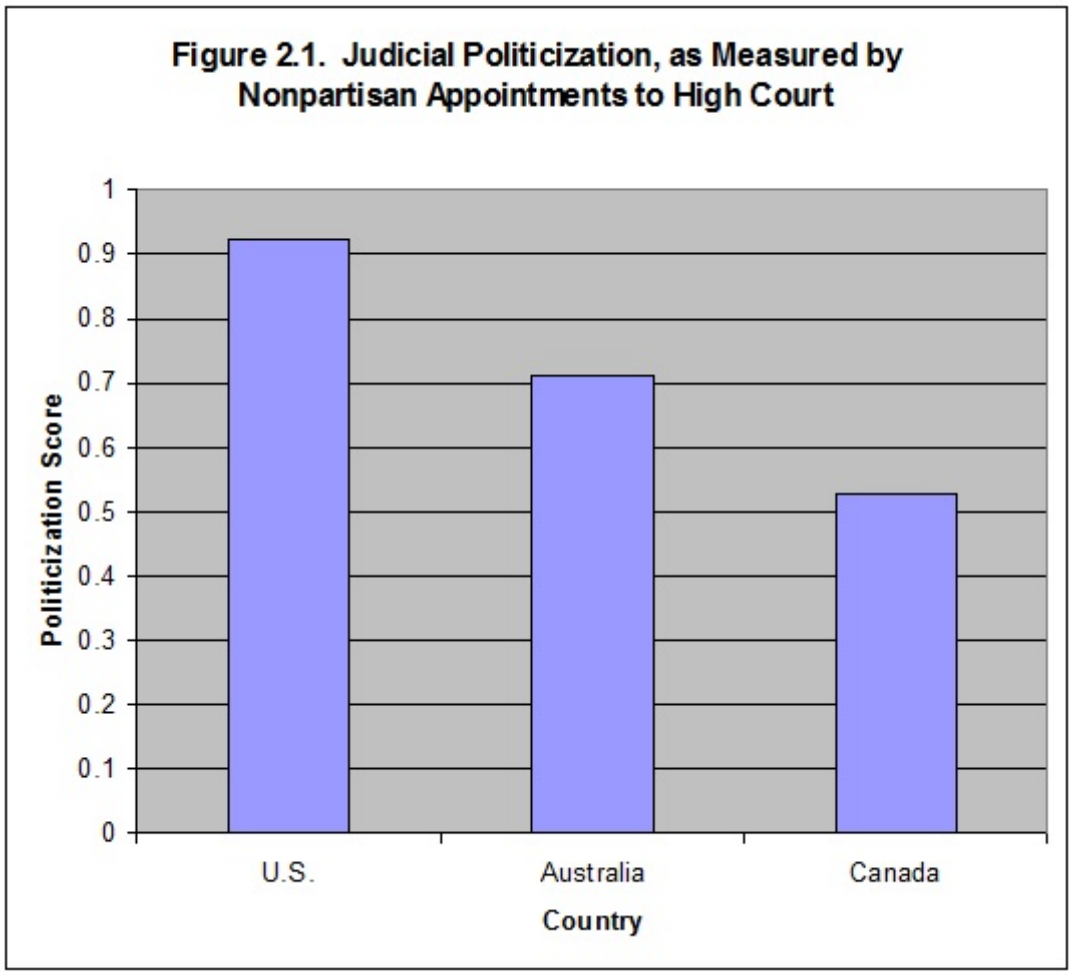
Figure 2.1. Judicial Politicization, as Measured by Nonpartisan Appointments to High Court
Politicization Score
1
0.9
0.8
0.7
0.6
0.5
0.4
0.3
0.2
0.1
0
U.S.
Australia
Canada
Country

selected less on ideology and more on other factors, such as qualifications and experience.

The analysis and quantification of judicial politicization is just the first part of the theory. The theory also posits that a highly politicized court will tend to decide cases based on attitudinal/ideological factors, while legal factors should be more influential in less politicized courts. That proposition is fully analyzed in Chapter Six.

Research Design

Using a most-similar-systems research design, the high courts of the United States, Canada, and Australia were chosen as the primary cases for this study. Each of these courts exist in Anglo-American modern democracies that are based on a common law legal system.[5] Also, the high courts in this dissertation exhibit varying levels of judicial activism, the dependent variable. Thus, the selection of these nations' supreme courts–as most similar systems–allows for generalizations to be made regarding the phenomenon of judicial activism in industrialized Western democracies.

The time period that is examined is 1990 to 1999. This time period is theoretically justified by Tate and Vallinder's (1995) assertion that "judicialization" increased markedly in the world in the 1990s. Indeed, each of the countries in this project experienced significant changes in the 1990s that justify the selection of this time period. In Canada, the adoption of the Charter of Rights and Freedoms in 1982 caused a fundamental transformation

[5] It should be acknowledged that, although these countries are primarily situated in the common law legal tradition, there are significant elements of the civil law tradition in Canada (in the province of Quebec) and the United States (in the state of Louisiana).

of the role of the Supreme Court after the court cases invoking the Charter began reaching the high court in the late 1980s and early 1990s (Kelly 2005). In Australia, the High Court issued a series of landmark cases in the early 1990s which recognized a form of native title for aboriginal peoples and signaled a fundamental shift in the Court's jurisprudence (see generally Pierce 2006). In the United States, the Supreme Court dramatically changed the course of its jurisprudence in a number of cases, including *U.S. v. Lopez* (1995). Some commentators suggested that a significant shift in the Court's jurisprudence occurred in the 1990s (see, e.g., Tushnet 1996).

A set of original databases was created for each of the three countries in this study. For the time period 1990 to 1999, each case decided by the high courts of the United States, Canada, and Australia was reviewed to see if the court decided the constitutionality of a federal or state/province statute, local ordinance, or state constitutional provision. Those cases were then numerically coded with over 40 separate variables per observation; over 3000 total observations were coded. Two databases for each country were created: one database with the case as the unit of analysis, and one database with the individual judge vote as the unit of analysis. The case selection and coding procedures are described in detail below.

Data Collection

The data used in this study consists of selected cases from the United States Supreme Court, Supreme Court of Canada, and High Court of Australia, decided in the period from

1990 to 1999, and coded into numerical format to facilitate statistical analysis. The cases for the U.S. datasets utilized the existing United States Supreme Court Database: 1953-2000 Terms (Spaeth 2001) and the Supreme Court Justice-Centered Judicial Databases: The Warren, Burger, and Rehnquist Courts (1953-2000 Terms) (Benesh and Spaeth 2003) as the starting points for the data collection in this project. The Spaeth databases have been used by many scholars in the past, have been subject to various reliability tests and are widely considered to be exceptionally accurate and reliable. Thus, once the individual cases for the U.S. databases were chosen, they were obtained from the Spaeth and Benesh and Spaeth databases. However, I added dozens of new variables to the databases and also changed the coding in several instances (described below). Thus, the American data in this project are derived largely from the Spaeth (2001a) and Benesh and Spaeth (2003) databases, but are not identical to them because of the extensive modifications and additions that were made to the data. The first U.S. database, the case database, contains exactly 150 court cases while the second database, the justice-centered database, contains 1343 observations, which is comprised of the individual judge votes from the 150 cases in the case database.[6]

The Canadian and Australian datasets required original data collection, and the data used in this dissertation are presented and analyzed for the first time. For the Canadian Supreme Court, the data was obtained from the Web site maintained by the University of Montreal. The site contains the full text of all Canadian high court decisions since 1985; the

[6] Because some justices did not participate in certain cases, there are less than the expected 1350 observations in the justice-centered database.

site's address is http://scc.lexum.umontreal.ca. The Canadian case database contains 166 cases, and the Canadian judge-centered database contains 1306 observations.

For the Australian supreme court data, the site maintained by the Australasian Legal Information Institute was used. That site contains the full text of reported and unreported decisions from the High Court since 1903.[7] The Australian High Court case database contains 68 cases, and the judge-centered database contains 419 observations. Occasionally, the Lexis/Nexis computerized legal research service was used to obtain and verify Canadian and Australian cases.

After the data was collected and coded, a test for reliability and coding accuracy was conducted. A random sample of ten percent of the cases from the Canadian and Australian databases was selected; these cases and the codebook were given to an outside coder.[8] Then, the coding in the random sample of cases was compared with the coding in the databases. The coding in the random sample was found to have a 93.55% accuracy score. That is, the coding in the random sample matched the coding in the databases at a 93.55% rate. This reliability level indicates that the data used in the project can be regarded with a high degree of confidence.

However, further procedures were implemented to ensure the accuracy of the data. An examination was conducted of those values that differed between the sample and original

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[7] The site's address is http://www.austlii.edu.au/au/cases/cth/HCA/.

[8] The data from the U.S. Supreme Court were not included in this reliability check, because the Spaeth data have already been subjected to reliability and accuracy testing.

datasets. I discovered that the variable most likely to coded inaccurately was Issue Area, because the codebook did not give enough guidance on how to choose an issue area if there were several possibilities. Following the reliability testing, I reviewed the data once again to ensure that the issue area for each case was accurate.

Case Selection

Turning to the topic of how individual cases were selected, the first selection rule concerned the timing of cases. As noted above, it was determined that this project would examine judicial review cases in the time period 1990 to 1999. In order to conform to this time period, the decision was made to use the court term, rather than the date the opinion was released, as the method to determine which cases in include in the database. In other words, all cases from the 1990 through 1999 terms, inclusive, were examined for possible inclusion in the databases, even though the cases may not have been released to the public until the following year. For the U.S. Supreme Court, there are a number of cases from the Court's 1999 term that were not released until 2000 that were included in the databases.

The next issue involved which types of proceedings to include. For the Australian and Canadian high courts, this was not problematic, as only decisions on the merits are available at the web sites containing the cases. Both reported and unreported decisions were included, in order to avoid selection bias. Also, all judicial review cases from the High Court of Australia were included, regardless of the number of judges participating in the case.

However, the U.S. Supreme Court renders various types of decisions and documents,

requiring that the researcher decide which of the following should be included in a data set:

-signed opinions that were accompanied by full oral argument;

-signed opinions that were not accompanied by oral argument;

-per curiam decisions: these are opinions that are not signed by an individual member of the Court but are instead attributed to the Court as a whole;

-memorandum cases: these are decisions regarding tangential issues, such as requests to participate as amicus curiae;

-decrees: these rare decisions involve matters involving the Court's original jurisdiction;

-plurality opinions: these are opinions which announce the judgment of the Court but where less than a majority of the participating justices agree with the opinion (Spaeth 2001b; Wiecek 1992).

For the U.S. Supreme Court, signed opinions (whether accompanied by oral argument or not), per curiam decisions, and plurality opinions were included in the databases.[9] All other types of Court decisions were excluded. Also, judicial review cases were included even if a justice had recused himself or herself. Thus, there are a handful of American cases which only comprised a panel of eight judges.

The next selection criterion involved the content of the cases. Only cases involving the exercise of judicial review over the constitutionality of an legislative enactment, broadly defined, were included in each data set. More specifically, to be included in the databases,

[9] Decrees were granted inclusion in the databases, but no such cases appeared in the time frame of this study.

the case must have involved judicial review by the high court of a state/province or federal statute, local ordinance or regulation, state/province or federal agency rule, or state constitutional provision (in the U.S. only). If a case did not meet one of the above criteria, it was not included for analysis.

It is important to note which cases were *not* included in the databases for each country's high court. First, any case that did not involve statutory review was excluded. Thus, cases involving review of police actions in criminal procedure cases were not included. Also, cases that involved the reversal of a lower court precedent (without a statutory basis in the case) were not included.. Also, if the case contained justiciability issues (standing, mootness, ripeness), and the high court did not reach the statutory issue, it was excluded. Finally, if the high court did not take a firm position on the constitutionality or unconstitutionality of a statute and remanded the case back to a lower court, the case was not included.[10]

Variable Coding

In this section, the coding procedures for the dependent and independent variables are reviewed.

[10] For example, in *U.S. v. Fordice* (1992), the U.S. Supreme Court opined that the state's college diversity plans were "constitutionally suspect," but only remanded the case to a lower court and did not strike down the plan.

Dependent Variable

In both the case database and justice-centered database for each high court, the dependent variable is whether the statute/regulation in question was ruled to be unconstitutional and overturned. In the case database, the dependent variable is whether or not the majority of the high court overturned the law in question. In the justice-centered databases, the dependent variable is whether the individual judge voted to overturn the disputed statute. Usually, there is no question when a declaration of unconstitutionality has been made by the high court or individual justice. However, it should be noted that if any portion of the statute/regulation was struck down (but not the entire statute/regulation), this was coded as a declaration of unconstitutionality. Therefore, "judicial activism" in this project is defined as the act of striking down, in whole or in part, a statute, regulation, ordinance, or state constitutional provision.

Independent Variables

In this section, the independent variables in both the case and justice-centered databases are briefly described.

Judicial ideology: This variable initially assigns a value to indicate the ideological position of the individual judge in each high court. Then, the individual judge score is multiplied by the value for the direction of the statute in order to adjust for liberal and conservative statutes. The coding procedure is described in detail below.

The first step is to assign a value to represent the ideological position of each high

court judge. The standard practice is to derive these ideological scores by conducting a content analysis of newspaper editorials regarding the individual judge at the time of his or her appointment. Content analysis is used to furnish an independent measure of judicial ideology that is separate from voting records. In other words, it would be a simple matter to analyze each judge's voting record to ascertain how liberal or conservative the judge is (and indeed, judicial researchers have conducted this analysis), but using these measures in this study would present endogeneity problems, because judicial votes would be used to predict judicial votes. Thus, the content analysis scores are used to measure judicial ideology.

As discussed above, the ideology scores used in the model come from several different sources. The American values use the well-known Segal and Cover scores (Segal and Cover 1989; Epstein and Segal 2005). The Canadian scores are largely derived from Ostberg et. al (2004) but have been somewhat modified with regard to Justice L'Heureux-Dube. The Australian scores are the result of original content analysis and are the first attitudinal scores to date for these judges. All of the ideology scores are on a continuum from most conservative (scores closer to 0) to most liberal (scores closer to 1). The initial ideology values for the judges on each high court are shown in Table 2.4.

After the initial judicial ideology scores were obtained, they were again transformed to a scale containing positive and negative integers. In other words, the original scores, which were on a scale from 0 to 1, were transformed to a scale from -.5 to .5. The relative values remained constant, in that the higher negative values indicated a conservative ideology

and high positive values indicated a liberal ideology.

After the ideology scores were transformed to a positive and negative scale, each value was then multiplied (following Lindquist and Klein 2006) by the variable Statute Direction. Statute Direction measures whether the law in question was liberal or conservative, with a value of -1 given for a conservative statute and 1 for a liberal statute. The Spaeth (2001a) coding rules were used to measure whether the law was conservative or liberal. Thus, by multiplying the judicial ideology scores by the direction of the statute, a new variable was created: Adjusted Judicial Ideology. These adjusted judicial ideology scores are constructed so that higher positive values indicate agreement with the law, while higher negative values indicate that there is ideological inconsistency with the challenged statute. Thus, each judicial ideology score reflects the degree of agreement with the law (positive value) or disagreement (negative value). For example, in the American case, Justice Scalia (who is a strong conservative) has a rescaled ideology score of -.501; thus, for a conservative law (-1), his value would be .501, indicating ideological congruity. To summarize, this coding scheme allows both liberal and conservative laws to be analyzed in light of judicial ideology, rather than only focusing on liberal or conservative laws.

Lower court dissent: This independent variable indicates whether there was a split decision in the lower court that reviewed the case under consideration. The variable is given a value of 1 if there was a dissenting opinion, and 0 if there was no dissent and the lower court decision was unanimous.

Table 2.4

Judges' Ideology Scores in the United States, Canada, and Australia

United States		**Canada**		**Australia**	
Judge	Score	Judge	Score	Judge	Score
Marshall	1.00	Wilson	.905	Gaudron	1.00
Ginsburg	.680	La Forest	.875	Toohey	1.00
White	.500	Lamer	.855	Kirby	.800
Breyer	.475	Bastarache	.833	McHugh	.500
O'Connor	.415	Cory	.743	Mason	.500
Kennedy	.365	McLachlin	.668	Deane	.500
Souter	.325	Stevenson	.625	Gummow	.300
Stevens	.250	Binnie	.553	Hayne	.275
Thomas	.160	Sopinka	.538	Brennan	.250
Blackmun	.115	Iacobucci	.500	Dawson	.250
Rehnquist	.045	Dickson	.500	Gleeson	.225
Scalia	.000	Gonthier	.455	Callinan	.000
		L'Heureux	.330		
		Major	.170		

Judicial ideology scores exist on a 0 to 1 scale. Lower scores indicate conservative ideology, higher scores indicate liberal ideology.

Lower court invalidation: This variable measures whether the lower court overturned the challenged law.[11] The variable is given a value of 1 if the lower court struck down the law, 0 if the law was upheld, and 8 if there is no lower court record.

State/local law: This variable indicates if the challenged law was either a state (or province law, in Canada) or local statute. This is a dummy variable, with a value of 1 if a state/province or law was present, and 0 otherwise.

Solicitor General/Attorney General support for invalidation: This variable measures whether the United States Solicitor General, Attorney General of Canada, or Solicitor General of Australia supported the challenged law or regulation. The variable is coded 1 if the Solicitor General/Attorney General supported striking law, 0 if the Solicitor General/Attorney General was not present in the case or took no position, and -1 if the Solicitor General/Attorney General did not support overturning the law in question.

Saliency of case: This independent variable seeks to measure the salience of the case to the judges by providing an indicator of the degree of societal interest in the case's outcome. Thus, a high degree of interest from interveners and amici curiae (groups that volunteer to submit a brief or testimony in a particular case) will signal to the justices that the case in

[11] This refers to the appellate court immediately below, not the lower trial court.

question is highly relevant to the community. The variable was operationalized by counting the total number of interveners or amici in each case and multiplying that number by the total number of nongovernmental interveners/amici. Thus, the variable provided an index of the interest in the case from both governmental groups and private associations. A larger number indicates a greater degree of salience.

Government is party in case: This dummy variable denotes whether the national government of the U.S., Canada or Australia was a direct party in the case. The national government was coded as a party if it appeared as a one of the primary litigants, or (in Canada and Australia) if a Minister was a litigant. Note that the government's presence as an amicus curiae did not qualify as being a party, nor did a state or province's status as a party in the case. A value of 1 was assigned if the government was a party, 0 otherwise.

Party Resource Disparity: This variable measures the differential in resources among the litigants in a case. The coding of this variable involved a two-step process. First, the status of each litigant (such as individual in a civil case, business, state or provincial government, etc.) was assessed and a value was assigned to that status. Higher values indicate parties with more resources at their disposal. The following scale was used to code litigant status:

1 = individual in a civil case

2 = criminal defendant

3 = group; association; churches; Indian tribes; political parties

4 = unions

5 = business; bankruptcy trustee

6 = local or municipal government; school district

7 = state or provincial government

8 = national government or agency

The second step was to subtracting the party (either Petitioner or Respondent) with the lower score from the party with the higher score. For example, a case might involve a petitioner who is an individual in a civil case (value of 1) versus a state government respondent (score of 7). The party resource disparity in this example is 6. Thus, this value indicated the degree of litigant resource differential.

Issue area of the case: This variable indicated the subject matter of the case. The variable was operationalized as a series of dummy variables (1 if the case involved the issue, 0 otherwise) so that the influence, if any, of a particular topic could be assessed comparatively. The Spaeth (2001b) coding was used to classify the cases. The categories are: criminal procedure, civil rights, speech or religion, due process, privacy, attorneys, unions, economic activity, judicial power, federalism, interstate/interprovince relations, taxation, and miscellaneous. Not all of these issues were included in the model because of collinearity issues.

Analytical Techniques

In Chapter Six, inferential statistical techniques are used to analyze the data and test the theory. Because the data is longitudinal, time-series cross-sectional data analysis (also known as panel data or longitudinal data) is appropriate (Beck 2001; Beck et al. 1998; Rabe-Hesketh and Skrondal 2005; Wawro 2006). The generalized estimating equations (GEEs) class of models is used to better account for correlated data. Generalized estimating equations were formulated to extend generalized linear models to correlated binary data (see generally Liang and Zeger 1986; Zeger et al. 1988; Zorn 1998; 2000; 2001). Wawro (2006, 115) notes that "GEEs relax assumptions about the independence of observations," and allow the researcher to "account for unobserved correlation among observations, without including unit-specific effects." Zorn (1998, 12, 14) notes that GEE models are well-suited to the analysis of individual-level judicial behavior, because these models are robust to the misspecification of "interdependencies across cases and justices;" thus, the GEE model can "account for within-case correlation among the justices."

GEE models were designed to allow for analysis of binary outcomes, and thus are suitable for the analysis of the data in this project. Because the dependent variable (vote to strike or uphold) is dichotomous, a GEE logit estimator is used (see generally Aldrich and Nelson 1984; Hosmer and Lemeshow 2000; Menard 2002; Pampel 2000), with the results clustered on each judge and using an exchangeable correlation structure within each cluster.

Chapter Three: Literature Review

In this chapter, the existing social scientific literature regarding judicial decision-making and judicial activism in the United States, Canada, and Australia is critically examined. The goal of this chapter is to indicate where the lacunae or gaps in the comparative courts research exist. First, a brief overview of the supreme courts of the United States, Canada, and Australia is provided. The primary similarities and differences between the high courts of these countries are displayed in Table 3.1. Then, an examination of the two major opposing theories of judicial decision-making--the legal model and the attitudinal model–is furnished, followed by a review of the extant scholarship regarding the attitudinal model in the U.S., Canada and Australia. Next, the phenomenon of judicial activism is discussed, followed by an assessment of the judicial activism literature in comparative perspective. Finally, some of the existing gaps in the comparative courts literature are identified.

Overview of the United States Supreme Court

The United States Supreme Court is the highest court in the judicial hierarchy, and thus possesses the ability to overrule any lower federal court and any state court if a constitutional issue is present. Indeed, through the doctrine of judicial supremacy, the Court has the ultimate power to interpret the Constitution of the United States and overturn any

legislation, executive action, or popular vote if it is determined that the act of the political or executive branches is unconstitutional.[12] Because of judicial supremacy, the Court possesses tremendous power to shape the legal and political landscape of the American system (see generally Baum 1998; Cooper and Ball 1996; Jacob 1996; McCloskey and Levinson 1994; O'Brien 2000; Pacelle 2002; Perry 1991).

The Supreme Court consists of nine justices–one chief justice and eight associate justices. The justices are supported by assistants known as law clerks, young lawyers who serve for one year at the Court and work closely with an individual justice (Ward and Weiden 2006). The justices possess life tenure and leave the bench at their own discretion (although they can be impeached under extraordinary circumstances). Each justice is nominated by the President and approved by the Senate, in what has become a highly politicized process (Abraham 1999; Comiskey 2004; Epstein and Segal 2005; Silverstein 1994; Yalof 1999; see generally Gerhardt 2000). Because of their life tenure, judges on the Supreme Court (and indeed, all federal judges) possess a very high degree of judicial independence. Thus, Supreme Court justices do not fear any retribution from the political branches of government for case outcomes and may thus decide cases without outside interference.

The jurisdiction of the Court derives almost totally from its appellate jurisdiction; in a few rare instances, the Court has original jurisdiction in a matter and the legal action can commence at the Supreme Court rather than be heard first in a lower court. In its appellate

[12] See *Cooper v. Aaron*, 358 U.S. 1 (1958) for the Court's statement on judicial supremacy.

jurisdiction, the Court hears cases from the lower federal power courts and cases from the state supreme courts if they involve a federal issue. Congress defines the appellate jurisdiction of the Court and can change it at any time.

Appellate jurisdiction cases come to the Court in three ways. The first and most common method is through the granting of a writ of certiorari. The certiorari process involves a request by a party for the Court to hear the case; the Court may grant or deny the request. The second method is by mandatory appeal, where the Court is required to grant an appeal in a few special cases. Those rare cases are first heard by a special three-judge federal district court. Finally and most uncommonly, a case can come to the Court through certification. A congressional statute provides that an appellate judge may request that the Court clarify a point of federal law, but this is rarely granted. In general, almost all cases arrive at the Court through the certiorari process, but it must be noted that it is quite rare for a writ of certiorari to be granted. In recent years, the Court has received about 9,000 or more requests for certiorari but only grants around 80 or so. Thus, case selection through the certiorari procedure is a very important part of the Court's process (see Perry 1991).

The Court decides cases after oral arguments and written briefs are submitted by the litigants. After the justices vote during conference, one justice is selected to author the majority opinion (which is the opinion of the Court and has the force of law). Selection of the majority opinion author is made by the chief justice, if he is in the winning coalition. If the chief justice votes with the losing faction, then the justice in the victorious coalition with the most seniority on the Court makes the selection. The selecting justice may assign the

writing of the Court's opinion to himself or herself.

In the United States, the Supreme Court in the 1990s became more conservative in its rulings although not necessarily less activist than in past decades. According to several commentators, the Court became the "regulator of the welfare state" (McCloskey and Levinson 1994) as well as reexamining settled legal doctrine in a series of controversial cases. For example, in the case of *United States v. Lopez* (1995), the Court overturned Commerce Clause doctrine that had not been challenged in over seventy years. Indeed, some commentators have speculated whether the Court has undergone a "constitutional moment" on the scale of the New Deal shift of the 1930s (Choudry 2005; see generally Ackerman 1991, 1998; but see Simon 1995). Thus, the U.S. Supreme Court experienced its own quiet constitutional revolution in the 1990s–one that is not as dramatic as the changes observed in Canada and Australia, but a revolution that is nonetheless significant.

Overview of the Supreme Court of Canada

Like the U.S. Supreme Court, the Supreme Court of Canada is the final court of appeal in Canada,[13] and its decisions are binding on all lower courts, because the Court possesses judicial supremacy and the power of full judicial review over federal, provincial,

[13] This change occurred in 1949; prior to that date, litigants (theoretically) had the option of appealing to the Privy Council in England following a decision by the Court.

and local laws[14] (see generally Bushnell 1992; Flemming 2002, 2003, 2004; Greene et al. 1998; Kelly 2005; Martin 2003; McCormick 1994, 2000; Morton 2002; Roach 2001). The Court is located in Ottawa, and nine justices serve on the Court: the Chief Justice and eight puisne (associate) justices. Canadian law requires that three of the justices must come from the province of Quebec, and prime ministers have generally followed the custom of appointing three justices from Ontario, two from the western provinces, and one judge from the Atlantic provinces (Flemming 2002, 256).

The justices are appointed by the Prime Minister of Canada. At this time, there are no mandatory parliamentary or confirmation hearings required; thus, the Prime Minister possesses almost total autonomy in the appoint of high court judges (Miller 1998; Morton 2006; Ziegel 1999). However, the process of high court judicial appointments has been criticized (Johnson 2004; LeRoy 2004) and there have been some recent minor changes. In 2004, Prime Minister Paul Martin created a parliamentary committee to screen high court nominees and provide a report to Parliament (Morton 2006). However, members of the opposition party objected to the process, and the selection process was refined in 2005 by adding additional members to the committee. However, it must be noted that the committee acts only in an advisory capacity and the prime minister retains full control over the choice of nominee. In any case, the modest changes to the high court appointment system in Canada

[14] However, the Court's judicial supremacy is limited by section 33 of the Charter, the "notwithstanding" clause, which allows for legislative override of the Court in certain circumstances. Section 33 is discussed further in Chapter Eight.

do not coincide with the time period of this study.

The justices possess a very high degree of judicial independence, as they have full judicial tenure until mandatory retirement at age 75. Additionally, the justices are assisted by short-term law clerks (Sossin 1996; Weiden 2002) as are American high court justices; however, each justice uses three clerks, not four, as in the American case.

The Court has extensive control over its docket, as decisions from lower courts are typically heard at the Court only if the justices grant leave. The Court usually receives about 550-650 requests for leaves of appeal, and grants approximately 15-20 percent of those (Flemming 2002, 256). Applications for leave to appeal are decided by a three-judge panel by majority vote (Hausegger and Haynie 2003, 640). However, the Court is still required to hear any criminal appeal where the lower appellate court overturned an appeal or was divided (Epp 1998, 166).

As in the U.S. and Australia, decisions on the merit of a case need not be unanimous–a majority vote is sufficient to decide the outcome of a case. Majority opinions are written by one judge, but justices in the losing coalition are free to write dissenting opinions. Ostberg, Wetstein, and Ducat (2003) report that, in regards to opinion authorship, individual justices often volunteer to write the majority opinion based upon their interest or expertise in a certain policy area. However, if there are no volunteers in a particular case, the Chief Justice will assign the authorship to a member of the majority coalition.

It is important to note that, in Canada, the justices of the Court do not always sit *en banc* (full court); rather, the judges may sit as a panel of five or seven judges to decide the

merits of a case, although a full court of all nine justices is also common. According to Hausegger and Haynie (2003), the Chief Justice assigns the panels, giving him or her more power than the U.S. Supreme Court chief justice.

One unique feature of the Canadian Supreme Court is the ability of the Court to issue advisory opinions in what are known as reference questions. In these cases, there is no actual case or controversy, but the Court is asked to provide advice about a looming legal issue (Epp 1998; Fleming 2002). For example, the Court gave an advisory opinion in 1998 on the issue of whether Quebec could legally secede from the nation.

Clearly, the most momentous constitutional change in recent Canadian constitutional history was the adoption of the Charter of Rights and Freedoms in 1982. The Charter transformed the Canadian constitution, and guaranteed certain rights, similar to the Bill of Rights in America (Epp 1998; Howe & Russell 2001; Lebel-Grenier 2001; Morton & Knopff 2000; Smithey 1994). However, the Charter even goes beyond the Bill of Rights in the rights that it secures. For example, the Charter grants fundamental language rights for French speakers. Furthermore, the Charter authorizes the judicial review of legislative acts by the court to ensure that such acts are accordance with it.

Another unique feature of the Charter is Section 33, the "notwithstanding" clause, which allows for legislative override of the Charter in certain circumstances. More specifically, this section allows either a provincial legislature or the national Parliament by majority vote to override, for a period no longer than five years, any provision contained in sections 2, and 7 through 15 of the Charter (Flemming 2002; Goldsworthy 2003; Roach

2001; Tushnet 2003c). Essentially, the notwithstanding clause allows a Canadian legislature to reenact a statute that has been nullified by the Court based upon the law's inconsistency with the Charter. However, this provision has only been invoked several times, and thus the efficacy of the clause has been called into question (Leeson 2001).

Overview of the High Court of Australia

The High Court of Australia, located in Canberra, is the highest court in the judicial hierarchy of Australia, and has full judicial review over laws passed by Parliament and the state legislatures (see generally Blackshield, Coper, and Williams 2001; Crawford and Opeskin 2004; Galligan 1987; Gani and Barclay 2002; Patapan 2000; Pierce 2006; Solomon 1992). Furthermore, after the abolition of appeals to the Privy Council, the High Court is now the final court of appeal for Australia (Gani and Barclay 2002).

There are seven justices sitting on the Court, including the Chief Justice. The judges are appointed by the Governor-General of Australia with the advice of the federal Attorney-General (Campbell and Lee 2001; Davis and Williams 2003; Donegan 2003; Evans 2001; Handsley 2006). The judges have significant judicial independence, based on their judicial tenure. Until 1977, the justices held life tenure, but they are now required to retire at age 70. Each justice is assisted by two law clerks, known in Australia as associates (Leigh 2001).[15]

[15] Interestingly, at the origination of the High Court, each judge was not only assigned an associate, but also a "tipstaff." A tipstaff is an assistant who retrieves legal materials as well as helping with the justice's personal needs and errands. The position of the tipstaff has now been largely eliminated at the High Court (Craske and Jones 2001).

Almost all cases come to the High Court on appeal, although there is original jurisdiction for a few matters. There is no automatic right to have a case heard by the High Court. Thus, the Court controls its docket almost completely. As in Canada, the High Court does not always sit *en banc*. Cases which involve interpretation of the Australian Constitution, or cases that the Court considers to be one of major public importance, are usually determined by a full bench of all seven justices. Other cases are heard by a panel of not less than two justices. Also, there are certain matters which may be heard and determined by a single Justice (Crawford and Opeskin 2004; Galligan 1987).

One of the unique features of the High Court (and one of the most frustrating for the empirical legal researcher) is the presence of *seriatim* opinions, also known as separate judgments (Coper 2001). Rather than issuing a consolidated, majority opinion as does the high courts of America and Canada, the Australian High Court utilizes the practice of joint and separate judgments. So, for many if not most cases, each justice on the Court will issue his or her own statement on the case, thus requiring the reader to carefully read each opinion in order to determine the ruling of the Court.

Another difference between the Australian, Canadian, and American constitutional systems is the lack of a formal bill of rights in the Australian constitution. However, the Constitution itself does guarantee some civil rights and liberties, including free exercise of religion and protection against unjust actions by the Parliament and executive (Gani and Barclay 2002).

In the 1980s and 1990s, the High Court also underwent significant changes (Galligan

1987; Pierce 2006). While there was no structural constitutional change as significant as the adoption of Canada's Charter, the High Court did develop into a different body than it had been in the past. First, in 1987, appeals to the Privy Council were ended, and thus the High Court became the sole judge of all legal controversies (Galligan 1987). In addition, the High Court adopted more of a policy-making role and began developing a rights-based jurisprudence (Galligan 1991; see generally Pierce 2006). While it is unclear if this transformation has grown or abated in the 2000s, it seems clear that the High Court's decisions and impact began to resemble the supreme courts of Canada and the United States, starting in the 1990s.

Table 3.1

Comparison of the High Courts of the United States, Canada, and Australia

	United States Supreme Court	Supreme Court of Canada	High Court of Australia
Number of Justices	9	9	7
Appointment	By president; confirmation by Senate	By prime minister; no legislative approval	By governor-general on necessary advice of Executive Council
Judicial Tenure	Lifetime	Mandatory retirement at age 75	Mandatory retirement at age 70
Judicial Review Powers	Full	Full	Full
Docket Control	Discretionary jurisdiction with certain exceptions	Discretionary jurisdiction with certain exceptions	Discretionary jurisdiction with certain exceptions
Dissenting Opinions	Yes	Yes	Yes
Advisory Opinions	No	Yes (reference questions)	No
Protection of human rights	Bill of Rights	Charter of Rights and Freedoms	Few explicit constitutional provisions
Panels	No	Yes	Yes

The Great Debate: Law Professors Versus Political Scientists

Discussions of the causes of judicial behavior have traditionally been the domain of legal academics while social scientists have been comparative latecomers to the debate. Law professors have traditionally espoused the legal model of judicial decision-making, while behavioral political scientists have challenged this view by positing an contrary theory: the attitudinal model (see generally Clayton 1999). Indeed, Feldman (2005, 91) observes that legal academics and political scientists each have a vested interest in defending these antithetical models, because the legal model of judicial behavior comports with the doctrinal training that law professors receive, while the attitudinal model reflects the empirical and analytical education that social scientists undergo. In this section, these opposing theories of judicial decision-making are examined and the leading scholarship incorporating these frameworks is examined.

The Legal Model

The legal model of judicial decision-making is the traditional understanding of how judges in common law legal systems decide cases. Feldman (2005) notes that the legal model, which he terms the "internal view," is the view espoused by almost all law professors and dates back to the first Dean of Harvard Law School, Christopher Columbus Langdell. In its simplest form, the legal model holds that judges make decisions on the merits of a particular case by interpreting the facts of a case by referring to the plain meaning of the relevant statute or constitutional provision, precedent in prior cases, and the legislative and

Framers' intent of those who drafted the law or Constitution (Segal and Spaeth 2002). That is, the legal model posits that judges will not utilize personal political or partisan values when deciding cases, only legal factors. In other words, according to the theory, judges in common law systems will carefully weigh and balance prior precedents (known as *stare decisis*), statutes, and constitutional provisions when deciding the outcomes of cases. When there is no clearly determinative precedent or statute, judges are expected to defer to the legislative branch and use neutral principles of interpretation (Wechsler 1959). Again, the individual political philosophy of a particular judge is not expected to influence the decision on a case, because judges will focus exclusively upon the legal factors of a case. It is important to note that judges themselves also maintain that they only decide cases according to legal factors, and almost always deny allowing personal policy preferences to drive their voting (Spaeth 1995, 306).

To be sure, the legal model is not monolithic in the legal academy. The legal realist school has been influential in opposition to the conventional wisdom; it holds that law is indeterminate and that judges are more influenced by the facts in a particular case than established precedent. See, e.g., Frank (1930); Green (2005); Llewellyn (1930). However, Feldman (2005, 90) notes that legal realism had fallen out of favor among legal scholars by the end of World War II. It is clear that, notwithstanding the legal realists, the conventional wisdom regarding judicial decision-making among legal scholars is that legal, not ideological, factors are the determinative elements in the calculus of judicial behavior–a view that most political scientists reject.

In their influential book, *The Supreme Court and the Attitudinal Model Revisited*, Segal and Spaeth (2002; see also Segal and Spaeth 1993) deconstruct the simple form of the legal model and argue that it does not accurately portray the reality of judicial decision-making. First, Segal and Spaeth contend that the "plain meaning" of statutes and constitutions cannot control judicial behavior because of the inherent imprecision of the English language. Indeed, Segal and Spaeth note that legislators often purposely leave statutes vague, in order to win legislative approval.[16] Furthermore, one particular statutory provision may conflict with another provision in the same statute, thus rendering the plain meaning of a law impossible to decipher (Segal and Spaeth 2002).

Next, Segal and Spaeth contend that legislative intent also does not act as a significant influence upon judicial decision-making. This is because the intent of politicians engaged in the legislative process may be difficult to find in some cases, and, even if the legislative record can be found, there is no guarantee that the remarks found therein accurately reflect the nature of the actual proceedings. The authors note that, for decades, members of Congress were allowed to edit any and all remarks that they made on the floor of the House or Senate, thus casting doubt on the veracity of the Congressional Record (Segal and Spaeth 2002, 71). Segal and Spaeth further note that discerning the intent of the Framers of the U.S. Constitution is the most problematic of all, because there is no way to calculate a single viewpoint on any particular constitutional provision from the collectivity

[16] Of course, the Framers of the United States Constitution also left various provisions vague as well.

that drafted the document. The authors observe that there is no commonly accepted definition of "Framers": the alternatives are the 55 men who attended the Constitutional Convention, the 39 who signed it, or the delegates who attended the state ratification conventions. (Segal and Spaeth 2002, 68). And of course, problems with linguistic precision exist with legislative or Framers' intent as well.

Finally, Segal and Spaeth (2002) argue that legal precedent does not act to constrain the voting behavior of judges in any way. To review, the common law legal tradition provides that judges must follow any prior legal decision in the same area of law. While this is a long-held practice in the United Kingdom, America, Canada and Australia, Segal and Spaeth maintain that it is a fiction. The reason this practice is an illusion, according to the authors, is that, in modern law, judges can always find a case precedent to support either party in a case and any conclusion that they wish to make. That is, with the large number of prior cases and legal precedents existing in every area of law, a judge is not bound by precedent, because there is never one single controlling precedent. Furthermore, in the rare case that there is a truly controlling precedent, judges have the option of "distinguishing" the legal precedent, which means that judges can avoid adhering to a precedent by proclaiming that the facts in the precedential case are too different from the extant case, and therefore the precedent need not be followed (Segal and Spaeth 2002, 82; see also Brenner and Spaeth 1995; Hansford and Spriggs 2006; Spaeth and Segal 1999). Finally, judges (especially judges in high courts) have the option of limiting the range of a precedent or outright overruling the precedential case. That is, judges in common law systems have the option of

striking down a prior case, even if it came from the same court. Segal and Spaeth (2002, 83) note that the U.S. Supreme Court overruled its own precedents 128 times from 1953 to 2000.

Thus, Segal and Spaeth provide a compelling argument detailing why the model of judicial decision-making adopted by legal academics–the legal model–is not an accurate depiction of reality. However, the Segal and Spaeth critique has been criticized by some (Feldman 2005; Gillman 2001; Rosenberg 1994; Smith 1994). These critics maintain that Segal and Spaeth's depiction of the legal model is far too simplistic, and that law does play an important role in judicial decision-making. These scholars have sought to incorporate *both* attitudinal and legal variables in models of judicial decision-making, and have asserted that judges usually consider legal factors as well as personal ideological values when deciding the outcome of a case. However, these integrated studies (which are discussed below) remain the minority in social science research on judicial decision-making. By far the dominant model of judicial decision-making among political scientists is known as the attitudinal model.

The Attitudinal Model

Perhaps not surprisingly, most political scientists have rejected the legal model of judicial decision-making and instead embraced an alternative explanation: the attitudinal model. The attitudinal model received its most thorough exposition in Segal and Spaeth's 1993 book, *The Supreme Court and the Attitudinal Model*, and their follow-up volume, *The Supreme Court and the Attitudinal Model Revisited* (2002). Earlier versions of the attitudinal

model are found in Ulmer (1960), Schubert (1963); Schubert (1965), Rohde and Spaeth (1976), Kobylka (1989), Segal (1984, 1986), Segal and Cover (1989), and Spaeth (1972).[17] Segal and Spaeth assert that the attitudinal model "represents a melding together of key concepts from legal realism, political science, psychology, and economics" (2002, 86).

Stated most simply, the theory posits that judges tend to vote according to their political preferences, attitudes, and ideologies, and not according to the relevant doctrine, legislative intent, or legal precedent of a particular case. Spaeth contends that, "the justices vote as they do because they want their decisions to reflect their individual policy preferences" (Spaeth 1995, 305). Segal and Spaeth note that a number of factors present at the U.S. Supreme Court encourage attitudinal voting by judges.[18]

First, Supreme Court justices have no ambition for higher judicial office, so the judges do not have to consider the consequences of their decisions on the merits of a case (Segal and Spaeth 2002). In other words, because the U.S. Supreme Court is the highest tribunal in the system, the judges do not have to worry about having their record scrutinized and possibly being denied a promotion to a higher court in the future. Nor do Supreme Court judges typically seek political office, so there is no fear of political accountability there

[17] Of course, the earliest precursor to the modern theory of judicial attitudinalism is Herman Pritchett's (1948) landmark book, *The Roosevelt Court.*

[18] Although Segal and Spaeth (2002) only consider the U.S. Supreme Court, their criteria for maximum attitudinal voting also apply to the high courts of Canada and Australia, as discussed below.

either.[19] Segal and Spaeth also note that Supreme Court justices are immune from electoral accountability. Although many states employ periodic judicial elections, federal judges enjoy life tenure, and thus there is no fear of losing their office in an election due to the justice's voting record.

Finally, Segal and Spaeth (2002) observe that the U.S. Supreme Court is a court of last resort that has complete control of its docket. That is, the members of the Court have total discretion as to which cases will be accepted for judicial review. This ensures that cases which are completely without merit or are totally one-sided will be screened out. Thus, only those cases which present a genuine dispute between two (more or less) legally defensible positions will be accepted by the Court. So, the fact that the Court controls its caseload ensures that only cases with solid legal justification for both litigants will usually be accepted, which encourages attitudinal voting. Furthermore, because the Supreme Court is at the top of the judicial pyramid in the United States, there is no possibility of a higher court reversing the Court's decision on a particular case.[20]

Because of all of these institutional arrangements–life tenure for high court judges, control of the Court's caseload, lack of political or electoral sanctions, court of last resort–the judges at the United States Supreme Court are completely free to decide cases based upon

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[19] The last Supreme Court justice to seek higher political office was Charles Evans Hughes, who left the Court in 1916 in order to attempt to be elected President (Segal and Spaeth 2002, 96).

[20] Of course, it is possible that Congress will enact legislation to attempt to overrule the Court after a decision. While this has happened in the past, it is fairly rare. Even rarer is the possibility that the Constitution will be amended to overturn a Supreme Court decision. Segal and Spaeth (2002, 95) state that there have been only five constitutional amendments that overrule a Court ruling in American history.

personal attitudes, values and ideologies, not the law. Segal and Spaeth (2002) note that while attitudinal factors may play a role in Court decisions such as voting on certiorari, it is the decision on the merits of the case where the attitudinal model is likely to be strongest.[21]

Spaeth (1995) does note that there are some potential limitations on the attitudinal model. First, it is unclear if the attitudinal model of judicial decision-making will apply to lower appellate courts, because of the restrictions that these judges operate under. Specifically, the possibility for judicial (or political) promotion could limit the tendency of these judges to vote their true preferences, as could the possibility for reversal by a higher court. Furthermore, most lower appellate courts do not have complete control over their docket, which means that many cases lacking a true legal conflict must be accepted in these courts. Although these considerations may limit the effect of attitudinal voting in lower appellate courts, some research has indeed found that attitudinal voting is present in lower courts (see, e.g., Segal et al. 1995). In any case, this limitation does not apply to this study,

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[21] A recent variant of the attitudinal model is the strategic model. The strategic model borrows some of its central assumptions from rational choice theory. Stated most simply, the strategic model accepts that judges will vote according to their attitudes and policy preferences, but, in order to maximize those preferences, judges will take into account the voting of the other members of the court (see generally Epstein and Knight 1998; Maltzmann, Spriggs, and Wahlbeck 2000; Murphy 1964; Segal and Spaeth 2002; Spriggs 2003). In other words, strategic judges are not unconstrained actors, but must weigh the preferences of other actors when making decisions. Most attempts (see, e.g., Wahlbeck, Spriggs, and Maltzmann 1998) to model strategic decision-making on the Supreme Court rely upon game-theoretical accounts and equilibrium models to demonstrate that some element of judicial decision-making was "sophisticated" (taking into account the preferences of other judges) rather than "sincere" (a pure example of voting for a judge's policy preferences, without regard for other judges' actions). But, Segal (1997) found that judges almost always in engage in sincere behavior, thus casting doubt on the strategic model.

The debate over the utility of the strategic model in public law and rational choice theory overall (see generally Green and Shapiro 1996) continues unabated. An examination of the strategic model in comparative perspective is beyond the scope of this project, but it seems reasonable to assume that, if indeed strategic behavior exists for American high court judges, judges in Canada and Australia may also act strategically at times.

because only high courts are utilized herein.

The attitudinal model has been criticized by some commentators, who assert that more attention to the institutional arrangements should be incorporated into models of judicial decision-making (Gillman and Clayton 1999; Clayton 1999; Gillman 2001, 2003; see also Kritzer 2003; Spriggs 2003; Wilson 2006). Specifically, Gillman and Clayton (1999, 5) argue that "justices' behavior might be motivated not only by a calculation about prevailing opportunities and risks but also by a sense of duty or obligation about their responsibilities to the law and the Constitution and by a commitment to act as judges rather than as legislators or executives." In other words, Gillman and Clayton contend that institutional arrangements and relationships structure and constitute the goals and values that judges bring to the decisional calculus. Thus, according to this analysis, one institutional value present among high court judges may be a self-imposed obligation to consider legal factors when making a decision on the merits of a case.

Other critics (Brisbin 1996; Rosenburg 1994; Smith 1994) have criticized Segal and Spaeth's (1993) characterization of the legal model as being too simplistic and a straw man. Rather, these critics assert, the law and legal factors operate in a sophisticated manner (along with political factors) to shape the interpretive philosophies of Supreme Court justices. This understanding of the legal model accepts that politics will play a large role in judicial decision-making, but in a more indirect manner than Segal and Spaeth (1993) acknowledge. Clayton (1999, 26) states, "the distinction is between a 'principled' rather than a 'result-based' process of judicial decision-making, not between political and apolitical models." Put

another way, these critics of the attitudinal model assert that legal factors still play a large role–albeit a more complex and nuanced one than usually acknowledged–in judicial decision-making at the U.S. Supreme Court.

Integrating Law and Politics in Judicial Decision-Making

A number of political scientists have sought to incorporate both attitudinal and legal variables in models of judicial decision-making in the American case and have asserted that judges usually consider legal factors as well as personal ideological values when deciding the outcome of a case.

George and Epstein (1992) examined death penalty cases and found that an integrated model of judicial decision-making–which incorporated legal, political, and environmental factors–offered the most accurate explanation of judicial outcomes.[22] Brace and Hall (1997) also analyzed death penalty cases, not at the federal level, but in eight state courts, and used an integrated model which incorporated social background, institutional, contextual, and legal variables. They also found that an integrated model was effective in predicting judicial behavior. Epstein and Kobylka (1992) in their book, *The Supreme Court and Legal Change*, sought to explain doctrinal change and examined the areas of abortion and the death penalty. They found that the law and the way litigants framed legal arguments has at least as much impact on judicial decision-making as did public opinion, personnel change or judicial

[22] It should be noted that George and Epstein (1992) do not include an ideological variable which measures judicial preferences, but they do include a variable which measures the political environment.

attitudes. Also, H.W. Perry (1991) in *Deciding to Decide: Agenda Setting in the United States Supreme Court* found that Supreme Court justices do utilize jurisprudential considerations when deciding which cases to accept for review.

There is also a series of studies by political scientists that tests the influence of precedent and *stare decisis* on judicial decision-making. Segal and Spaeth (1996) and Brenner and Spaeth (1995) found that, according to their analysis, precedent plays virtually no role in judicial behavior and justices' decisions on the merits of cases. In contrast, Songer and Lindquist (1996) found that, by using a slightly different methodology, precedent does appear to play a significant role in judicial behavior at the U.S. Supreme Court.

Other recent studies (see, e.g., Bartels 2006; Benesh and Czarnezki 2006; Collins 2006; Pacelle et al. 2006; Wahlbeck 1997) have examined the influence of legal and attitudinal factors on judicial decision-making. In a related series of articles, Kritzer et al. (1998); Richards and Kritzer (2002); and Kritzer and Richards (2003; 2003b; 2005) found that Supreme Court decisions can be separated into "judicial regimes," defined as a landmark case or precedent that dramatically changes the way that the justices view subsequent cases in that area of the law. Kritzer and Richards (2005; see also Kritzer 2003) found that, in the area of search and seizure cases, the judicial regime framework predicted how the justices would vote in these cases, thus providing some evidence that landmark legal precedents–in the form of judicial regimes--do play a part in judicial decision-making. Most recently, Lindquist and Klein (2006) examined attitudinal and jurisprudential factors in cases involving intercircuit conflicts at the U.S. Supreme Court. They found that both legal and

attitudinal variables affected the justices' decision-making in these cases.

To summarize, the legal model represents the traditional understanding of judicial decision-making by law professors; while it is not the dominant framework among social scientists, some political scientists have incorporated law and legal variables into their analyses. However, the attitudinal model of judicial behavior remains the generally accepted theory among behavioral political scientists. The debate between these competing models is far from resolved.

Judicial Decision-Making in Australia and Canada

In this section, the existing research on judicial decision-making at the High Court of Australia and the Supreme Court of Canada is discussed.[23]

Australia

The empirical literature on judicial decision-making and the attitudinal model in Australia is, in a word, scant. There are several books on the High Court (Blackshield, Cooper, and Williams 2001; Crawford and Opeskin 2004; Galligan 1987; Patapan 2000; Solomon 1992; see also Campbell and Lee 2001; Gani and Barclay 2002) that provide a historical and doctrinal overview, but research on judicial behavior is rare. The Australian economist Russell Smyth has been the most prolific scholar in this area, producing a number

[23] See Robertson (1998) for a suggestive analysis of ideological voting at the English House of Lords.

of articles generally related to judicial behavior on the High Court of Australia (Smyth 2003, 2004, 2005; Smyth and Narayan 2004). Smyth (2003, 2004, 2005) and Smyth and Narayan (2004) all deal with explaining variations in the rate of dissenting opinions issued at the High Court. Smyth (2003) uses demographic and social background factors of High Court judges to predict these dissent rates at the High Court between 1903 and 1975, and finds that certain social background characteristics predict a greater likelihood to dissent from the majority. Smyth (2004) uses different independent variables--institutional and external political factors--to predict the dissent rate at the High Court, and finds that the caseload of the court in a particular year was most influential in predicting dissent rates, as well as the enactment of the *Australia Acts*, which removed all appeals from the High Court to the British Privy Council. Smyth and Narayan (2004) found that leadership on the High Court was an important factor in predicting consensus and dissensus.

Most relevant for the purposes of this project is Smyth (2005), "The Role of Attitudinal, Institutional and Environmental Factors in Explaining Variations in the Dissent Rate on the High Court of Australia." In this study, Smyth uses an integrated model and combines the independent variables used in the earlier articles–caseload, leadership, social background–and adds an attitudinal variable. Judicial attitudes are measured by using a proxy measure: whether the judge was a Conservative or Labour appointee. Smyth (2005) finds that a combination of attitudinal and institutional variables are most significant in predicting variations in the dissent rate of the High Court. This is an important finding, but it must be noted that the method used to measure judicial attitudes–political party of

appointing executive used as a proxy of attitudes–is a fairly crude measure. Thus, Smyth (2005) is an important starting point for judicial behavior research on the High Court, but further refinement may be necessary to adequately assess the role of judicial attitudes at the High Court.

Wood (2001) also examines dissenting votes on the High Court, and examines legal and attitudinal models of decision-making for cases in the period 1996 to 1998. Wood (2001) suggests that judicial attitudes do influence judicial behavior on the High Court, but her analysis also uses, as does Smyth, a party-proxy method of assigning judicial attitudes.[24] Wood (2001) and Smyth's (2005) papers are both important first steps to a full examination of judicial decision-making at the High Court of Australia, but they both lack an external measure of judicial ideology that would allow better confidence in their results.

A recent analysis of legal change at the High Court in the last fifteen years is Pierce (2006). This volume examines the jurisprudential evolution of the High Court during the leadership of Chief Justice Anthony Mason and the period immediately thereafter. Pierce utilizes judicial interviews and doctrinal analysis to examine the controversial decisions regarding indigenous peoples' rights--*Mabo v. Queensland* (1992); *Wik Peoples v. Queensland* (1996)--issued by the High Court during this period. Pierce (2006) does not empirically test attitudinal, legal, or political variables in his analysis, but does consider the impact of these factors in the volume. Pierce (2006) asserts that the "Mason Court

[24] Wood (2001) uses the number of Liberal-appointed judges minus the number of Labour-appointed justices to assign the level of ideological disparity.

Revolution" can be explained by a combination of factors: the election of a Labor Government, the elevation of Mason to Chief Justice by the Labor government as well as the appointment of other justices, and the change in the High Court's agenda-setting function caused by the removal of Privy Council appeals. Pierce's volume is an important study of the Mason Court, in that the book skillfully examines historical, political and legal change at the High Court during the 1980s and 1990s. Although Pierce somewhat discounts the role of judicial attitudes as an explanation for judicial change at the High Court, his analysis suggests that judicial ideology may have played an important role in judicial decision-making during the Mason Court.

Canada

Compared to Australia, the literature on the Supreme Court of Canada is considerably more extensive. There are a number of books that provide a general overview of the Court and also the role of the Charter of Rights and Freedoms (Bushnell 1992; Greene et al. 1998; Hiebert 2002; Howe and Russsell 2001; James, Abelson, and Lusztig 2002; Kelly 2005; Knopff and Morton 2002; Manfredi 2001; Martin 2003; McCormick 1994, 2000; Morton and Knopff 2000; Roach 2001; see also Cardinal and Headon 2002; Flemming 2002, 2003, 2004; Morton 2002; Newman 2004; Peacock 1996). The literature on judicial decision-making at the Supreme Court is less sizable, but some important advancements have been made.

One of the earliest studies of judicial decision-making in Canada is Tate and Sittiwong (1989). Tate and Sittiwong (1989) utilize a social background model to analyze

decision-making at the Court in economics and civil rights and liberties cases in the period from 1949 to 1985. They find that these personal attributes predicted a liberal vote: being Catholic, non-Quebec origin, judicial and political experience; also, Liberal party affiliation also was significant. Thus, while this study did not explicitly test judicial attitudes by using an ideological scale, the results do suggest that certain background characteristics associated with ideology predicted a liberal vote in economics and civil rights and liberties cases. Songer and Johnson (2002) sought to update the Tate and Sittiwong (1989) study and replicated their research design but extended the time period being studied to 2000. They find that not all of the significant variables in the Tate and Sittiwong (1989) article are significant in the updated research, and they suggest that attitudinal voting may be present at the Supreme Court, although Songer and Johnson (2002) do not use an external attitudinal scale to measure individual justice ideology.

The most extensive work on judicial decision-making in Canada has been conducted by Ostberg and Wetstein, both in tandem and in conjunction with other authors. Ostberg and Wetstein (1998) was the first study to develop an external scale of attitudinal values for individual justices, derived from content analysis of newspaper editorials, of the Canadian Supreme Court. The study used factor analysis and logistic regression to analyze the judges' votes in search and seizure cases, and found that judicial attitudes are significant for predicting outcomes in these cases. Wetstein and Ostberg (1999) also examined search and seizure cases at the Canadian high court, and explicitly replicated Segal's (1984; 1986) studies of attitudinal voting in search and seizure cases. Wetstein and Ostberg (1999, 771)

utilize logistic regression analysis and again find judicial ideology plays a significant role in judicial behavior for search and seizure cases in Canada: "ideology proved to be a statistically significant variable in the search and seizure model. Since ideology is not critical to the nomination process in Canada, and the Court is not divided by ideological extremists, we were surprised that this variable proved to be an important factor in the study." Thus, the critical finding in this work is that attitudinal voting is also found in Canada judicial politics, and is not limited to the American case. Ostberg, Wetstein and Ducat (2002) used factor analysis to analyze nonunanimous decisions at the Canadian Supreme Court in the period 1991-1995, and suggested that three attitudinal conflicts divide the Court: communitarianism versus libertarianism, criminal procedure disputes, and judicial activism versus judicial restraint. Ostberg and Wetstein (2004) examined attitudinal voting in nonunanimous economic cases, and found that judicial ideology is a strong predictor in tax cases, but not in union cases. Ostberg and Wetstein (2004b) similarly analyzed attitudinal voting at the Court in nonunanimous equality cases; they found that judicial ideology is also a significant variable in these cases. Finally, Ostberg and Wetstein (2005) examined judicial behavior in criminal, economic, and civil rights and liberties cases to determine if post-Charter judges displayed consistency in their voting patterns. The authors find that a majority of the justices do indeed demonstrate ideologically consistent voting behavior in these issue areas. Thus, a high degree of attitudinal and ideological stability exists at the Supreme Court of Canada after the adoption of the Charter of Rights and Freedoms.

The most significant work on attitudinal voting at the Canadian Supreme Court to date is Ostberg et al. (2004). This study examines criminal, economic, and civil rights and liberties in nonunanimous cases in the period from 1984 to 2002, and utilizes factor analysis and logistic regression to analyze the data. Most interestingly, the ideology scores--which are derived from content analysis of newspaper editorial, following Segal and Cover (1989)–are expanded to include additional newspaper editorials and then a cumulative score is derived.[25] As discussed in Chapter Two, these ideology scores are used (with one modification) to analyze the data in this project. The results in Ostberg et al. (2004) show that judicial attitudes are a highly significant predictor of judicial behavior in these types of cases. Ostberg et al. (2004) provides the strongest evidence yet that judicial ideology is an important factor in judicial decision-making at the Supreme Court of Canada. The limitations of the study are that only nonunanimous cases are used, and only criminal, economic, and civil rights and liberties decisions are analyzed. It remains to be seen if attitudinal voting will remain significant when other types of cases are included in the analysis, and when both unanimous and nonunanimous cases are used. Nonetheless, Ostberg et al. (2004) is clearly the most important work yet on judicial decision-making at the Canadian high court.

[25] The *Globe & Mail*, *Ottawa Citizen*, and six regional newspaper are used to derive the ideology scores (Ostberg et al. 2004, 45).

Party Capability Theory and Judicial Decision-Making

A continuing debate in public law scholarship has been whether litigants with more resources (the "haves") will be more likely to prevail than those that do not possess such resources (the "have-nots"). This debate was first framed by Galanter's (1974) classic article which examined this question in American appellate courts and found that parties that are "repeat-players" (as opposed to "one-shotters") and have greater resources are more likely to prevail in appellate litigation. See also Kritzer and Silbey 2003; Songer and Sheehan (1992); Songer et al. (1999); Wheeler et al. (1987).

In comparative context, McCormick (1993) extended Galanter's (1974) thesis into the Canadian context. McCormick (1993; see also Brodie 2002) examined whether governmental litigants are more successful than private litigants in litigation, and found that "repeat players" are more likely to experience success at the Supreme Court of Canada. In Australia, Smyth (2000) finds that there is little evidence to support the conclusion that litigants with greater resources are more successful at the High Court of Australia. The most comprehensive comparative examination of Galanter's (1974) thesis, though, is Haynie et al. (2001). These authors examined party capability theory in the high courts of Australia, Canada, England, India, Philippines, South Africa, and Tanzania. They find that the party capability thesis was strongly supported in the high courts of Canada, Great Britain and Tanzania, but less so in the other cases in the study. Thus, the question as to whether the party capability thesis is generalizable across nations and courts remains open.

Overview of Judicial Activism

In this section, the concept of judicial activism is examined, followed by a discussion of the existing empirical research on judicial activism at the high courts of the United States, Canada, and Australia. First, an overview of the phenomenon is helpful to place the debate over judicial activism in context.

One of the difficulties in examining the concept of judicial activism is that there are competing definitions of the concept. Indeed, some of the debates over judicial activism, especially among political actors and commentators, have stemmed from a misunderstanding or misuse of the term. Politicians of all ideological stripes frequently denounce judges as "activist" whenever there is disagreement with a particular court decision, thus creating considerable confusion among the public as to the nature of the term. This confusion extends to scholars, some of whom have had difficulty in assessing judicial activism because of the lack of a generally accepted definition (see, e.g., Kerr 2003).

This section of the chapter will remedy this confusion by defining the different understandings of judicial activism. I would suggest that there are two basic conceptions of judicial activism: strict and political.

Strict Judicial Activism

What I have termed "strict judicial activism" refers to the most limited sense of the concept. Strict activism refers to the frequency that a court strikes down or invalidates decisions made by the other political branches. For example, the classic example occurs

when the Supreme Court rules that a congressional statute is unconstitutional, and therefore a nullity. Other examples include a court striking down an act of the President or a state governor, or the invalidation by a court of a state law or municipal ordinance. Yet another example of strict judicial activism is when the Supreme Court strikes down a provision of a state's constitution (illustrated by the 1996 U.S. Supreme Court case of *Romer v. Evans*). All of these example illustrate strict judicial activism because they involve judicial review (and invalidation) of the actions of democratically elected political actors. Typically, if a judge strikes down a statute, that behavior is termed "activist," while the action of upholding a statute is termed "restraintist" (see, e.g., Wallace 1997).

Thus, this conception of judicial activism is completely descriptive and mechanical, and avoids the value judgments inherent in "political judicial activism," described below. In other words, this definition of activism is essentially neutral, because it looks only to the incidence of political acts struck down by a court, and does not seek to condone or condemn those judicial invalidations. For example, using this definition, one can tabulate the number of times that the Supreme Court struck down acts of Congress in a given year to generate a sense of strict judicial activism--while the Court may have been justified in striking down some of those laws, this conception of judicial activism does not implement those judgments.

Of course, this definition of activism can be criticized because of the fact that it does *not* make a judgment on the merits of the judicial action. For example, Sowell (1989) asserts that no judicial activism occurs when a court strikes down a statute that was passed by a legislature that failed to abide by the original intention of the Framers. However, making a

judgment as to the constitutional propriety or impropriety of a particular statute necessarily involves making a value assessment, and strict judicial activism eschews these types of determinations. Again, strict judicial activism looks only to the sheer frequency of a court invalidating the decisions of legislative or executive branches. Because this conception of judicial activism does not require the analyst to determine the "correctness" of a statute or executive action, it is the best suited for scholarly analysis, and, indeed, most social scientific researchers utilize this understanding (see, e.g., Caldeira and McCrone 1982; Keck 2004).

Political Judicial Activism

The alternative to strict judicial activism is "political judicial activism." Political judicial activism refers to the action of a court improperly invalidating a law based upon ideological or policy reasons. Thus, if a judge strikes down a law for "proper" reasons (most conservative critics hold that a law can be struck down if it exceeds the proper boundaries of constitutional interpretation), then that nullification would not be considered to be an exercise of judicial activism. But, if a judge strikes down a statute that was "properly" enacted, then that invalidation would be considered to be judicial activism. Obviously, the difficulty with political judicial activism is that liberals and conservatives will frequently have diametrically opposed definitions as to what constitutes a validly enacted law, and whether or not the invalidation of that law was appropriate or inappropriate.

Political judicial activism is almost always portrayed in a negative light; for example, conservative commentators frequently make the charge that liberal judges have overstepped

their appropriate duties as interpreters of the law by engaging in judicial activism (see, e.g., Berger 1977; Bork 2003). Indeed, the well-known case of *Roe v. Wade* (1973) typifies the form of political judicial activism found to be most objectionable by some commentators. In that case, the Court struck down state laws forbidding the practice of abortion based upon a "right of privacy" thought to be implied in several sections of the Constitution. The critics of *Roe* charged that these laws were best left to the discretion of elected state legislators and not judges. However, it is important to note that political judicial activism is practiced by both conservative and liberal judges (Keck 2004; Marshall 2002; McDowell 1992; Shane 2000; Schwartz 2002). That is, judges of all ideological stripes have (and will continue to) strike down laws based on policy reasons.

Clearly, the very ambiguity of political judicial activism renders it difficult to operationalize and therefore unsuitable for empirical analysis. Thus, virtually all empirical studies of judicial activism (including this project) have used the more objective strict judicial activism standard.

The Literature on Judicial Activism

There is a fairly large literature which examines judicial activism normatively and descriptively (Barber 1997; Bork 2003; Canon 1982; Carrese 2003; Devins 2004; Franck 1996; Graglia 2003; Justice 1997; Kerr 2003; Kozlowski 2003; Lamb 1982; Leishman 2006; Lewis 1999; McDowell 1992; McKeever 1995; Miller 1982; Powers and Rothman 2002; Provine 2005; Raskin 2003; Roach 2001; Roosevelt 2006; Schick 1982; Sowell 1989;

Wallace 1997; Wolfe 1997).[26] However, this section will seek to summarize the empirical research on judicial activism in comparative perspective, with special emphasis on studies in the United States, Canada, and Australia.

Cross-National Studies of Judicial Activism

A relevant volume on judicial activism in comparative perspective is Holland (1991; see also Holland 2000; Waltman and Holland 1988). Although somewhat dated, this book contains a series of essays, each containing a descriptive analysis of judicial activism in a different country, including the U.S., Australia and Canada. The "Introduction" (Holland 1991b) in that volume is quite useful, as it suggests several conditions which may encourage judicial activism, although these conditions are not subjected to any empirical testing. These conditions are: a federal system, a written constitution including a bill of rights, an independent judiciary, differing party affiliations between judiciary and legislators, easy and cheap access to the courts, the common law legal tradition, public confidence in the courts, and collective societal consensus on fundamental political values.

Although not a study focusing on judicial activism, Ginsburg (2003) provides an excellent cross-national study of the formation of constitutional review in new democracies, and how judicial review serves the interests of political actors during regime change. Similarly, Hirschl (2004) offers a cross-national theory of constitutionalization that he calls

[26] A very useful article summarizing judicial review in comparative context is Tushnet (2003c).

"hegemonic preservation." That is, the growth of judicial power is explained by interplay of the self-interest of threatened political actors, economic elites, and judicial notables–all of whom work to create constitutional reform in a manner that serves their own agenda.

A more recent study of judicial activism in comparative perspective is Herron and Randazzo (2003), who study seven post-communist countries' high courts and rates of judicial activism. They find that formal declarations of judicial power expressed in constitutions do not predict invalidations of legislation; rather, it is economic conditions, executive power, litigant characteristics and case issue type that predicts judicial activism. A similar cross-national study is conducted by Smithey and Ishiyama (2002), who studied judicial activism in the Czech Republic, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, and Slovakia for a three-year period. They found that rates of activism varied widely, with Latvia and Estonia having the highest percentage of laws invalidated. The authors used the following independent variables to predict their dependent variable, rate of activism: judicial power/independence, degree of party competition, popular attitudes towards the court, presence of Bills of Rights, and presence of federal political system. Using logistic regression analysis, Smithey and Ishiyaman (2002) found that the number of effective political parties and popular trust in the courts were statistically significant variables, and thus these factors predicted the rate of judicial activism in these countries. So, the degree of formal judicial power did not predict judicial activism, nor did the presence of a federal system. Smithey and Ishiyama (2002, 738) note, "Our findings support an understanding of judicial activism based more on political behavior than on institutional design."

Empirical Studies of Judicial Activism in the U.S.

An early normative argument against judicial activism in the American case was made by Bickel (1962). He asserts that the Court is a "countermajoritarian force" in our system of government--one that acts against the will of the majority. Dahl (1957), in contrast to Bickel (1962), contends that the countermajoritarian problem is illusory by empirically demonstrating that the Court is largely unwilling to invalidate the laws enacted by the ruling coalition. Dahl came to his conclusion by analyzing those Court cases where acts of Congress were held to be unconstitutional. Only 86 provisions of federal law had been struck down by the Court in 167 years and in only 10 of 40 cases did the Court declare legislation invalid based on the Bill of Rights. Thus, rather than a countermajoritarian institution, the Court is strongly majoritarian and its role is to confer legitimacy on the policies of the successful regime. The Court will only rarely take a leading role in policymaking during situations of instability, according to Dahl (1957).

However, other scholars have disagreed with Dahl's (1957) conclusion and asserted that the Supreme Court is both more activist than Dahl claimed and that the Court's influence is far greater than Dahl found. Casper (1976) criticized Dahl's methodology because cases in which state statutes were invalidated by the Court were left out of the analysis. Casper argues that state laws often involve important national issues, and not just narrow regional ones. For example, Casper cites *Miranda v. Arizona* (1966) and *Gideon v. Wainwright* (1963) as examples of state cases that had national implications. Certainly, it is difficult to think of any cases, state or federal, that had greater national impact than these--Casper's

criticism appears to be justified on this point. Perhaps equally importantly, Casper contends that Dahl (1957) overlooks the importance of the Court's policymaking role by ignoring the component of statutory interpretation and also by portraying the judicial process as a simple zero-sum game. Casper (1976) also found that the Court had become more activist in the period 1958-1974. In sum, Casper's analysis showed that the Court is more activist and influential in policymaking than Dahl found.

Gates (1992) continued the work analyzing Dahl's (1957) thesis. In *The Supreme Court and Partisan Realignment: A Macro- and Microlevel Perspective*, Gates examines 743 cases, both state and federal, in which national and state laws were struck down as unconstitutional between 1837 and 1964. Gates finds that the state cases analyzed provide support for Casper's critique of Dahl's findings. Gates (1992) finds that many of the cases invalidating state policies raised salient political and legal issues that disrupted the party system at the time, thus disconfirming Dahl's hypothesis. It appears that Dahl's (1957) thesis that the Court merely upholds the prevailing party's policies and is rarely activist cannot withstand the results of the above analysis.

Caldeira and McCrone (1982) operationalized the concept of judicial activism by examining the number of state or federal laws that the Supreme Court invalidated from 1800-1973. They used a time-series analysis and found that the Court's activism seemed to run in irregular cycles. Interestingly, they concluded that the Court's activism in regard to state legislatures and the national legislature was independent–that is, there was no correlation between the two (Caldeira and McCrone 1982, 122).

There is a line of studies which approach judicial activism in the American state supreme courts. Wenzel et al. (1997; see also Scheb et al. 1989; Scheb et al. 1991) analyzed judicial activism in state high courts and found that the greatest degree of judicial activism occurred in states where the judges achieved their office through district-based electoral systems. Lopeman (1999) examines judicial activism and policy-making in six state supreme courts and concludes that the highest degree of judicial activism and policy-making can be explained the presence on the bench of what he terms an "activist advocate." This is a judge who has been trained at a nationally-ranked law school and a role conception as an ambitious and entrepreneurial jurist. While the generalizability of Lopeman's (1999) conclusions is uncertain, the findings are intriguing.

Judicial activism has also been examined through the lens of the attitudinal model. Segal and Spaeth (1993, 2002; see also Spaeth and Teger 1982) analyzed U.S. Supreme Court justices' tendency to invalidate statutes at the federal, state and local level, and concluded that, almost without exception, these judges tend to nullify or uphold laws based upon their ideological preferences. Howard and Segal (2004) examined the briefs filed by petitioners and respondents in constitutional cases before the Supreme Court from 1985 to 1994 to determine how often these litigants make a request to strike litigation. They found that, in those cases where a request to invalidate legislation was made, the legislation was struck down at a 21% frequency. Also, Howard and Segal (2004) found strong evidence that judicial attitudes were highly significant in the decision to strike legislation, and also that the influence of the Solicitor General varied according to whether the Solicitor General was

appointed by a Republican or Democratic president. That is, the conservative justices showed considerable deference to requests to strike by Republican Solicitors General, but only the more liberal justices were likely to grant a request to invalidate a law made by a Clinton-appointed Solicitor General. Solberg and Lindquist (2006) analyzed judicial review cases at the Court from 1986 to 2000, and using a slightly different methodology than Howard and Segal (2004), found that there was a 46% rate of judicial activism–in other words, the Court nullified a law at a 46% rate. Also, Solberg and Lindquist (2006) discovered that the liberal justices were more activist in general than the conservative justices, and that the liberal judges (Marshall, Brennan, Stevens, Souter) were more likely to strike down state legislation than the Court as a whole. Overall, the authors found that the ideological direction of the statute interacted with the individual justices' ideological preferences in the predicted manner: "Conservative justices may be less likely to strike down state laws in general, but they are perfectly willing to do so when the underlying state statute fails to conform to their policy preferences. So much for the notion that a principled federalism always guides their decision making" (Solberg and Lindquist 2006, 258-59). Thus, the above-noted studies provide strong empirical support for the proposition that judicial attitudes play a significant role in judicial behavior in judicial activism cases.

Finally, a recent volume on judicial activism at the Court is Keck (2004). This book uses a descriptive approach to trace the historical development of judicial activism as well as the use of judicial activism by the members of the Rehnquist Court. Keck's (2004) main points are that, first, the Rehnquist Court has nullified more federal statutes than any other

natural court, and, second, that many of these judicial invalidations have been in a conservative direction. So, the critique of judicial activism by conservative critics is misguided. While these observations are not novel, Keck does an excellent job of delineating the areas of law where conservative judicial activism is most likely to occur, and discussing the relevant doctrinal and political developments at the Court.

Empirical Studies of Judicial Activism in Canada

There is a surprisingly substantial literature on judicial activism at the Canadian Supreme Court. Many of these studies (Bazowski 2004; Hiebert 2002; Hogg and Bushell 1997; Kelly 2005; Lebel-Grenier 2001; L'Heureux-Dube 2002; Leishman 2006; Manfredi 2001; Martin 2003; Morton 2001; Morton and Knopff 2000; Roach 2001; Weinrib 2001) take a normative approach to judicial activism in Canada. Nearly all of these studies point out that, after the adoption of the Charter in 1982, the political and judicial environment has changed radically, encouraging the development of judicial activism. However, these normative scholars debate whether this increase in judicial power is beneficial or detrimental for the Canadian society as a whole.

A good starting point for the empirical literature is Baar (1991; see also Miller 1998, 1999; Russell 1995), who provides an excellent historical overview of judicial activism in Canada before the adoption of the Charter of Rights and Freedoms in 1982, as well as a description of the first wave of judicial review cases arising under the Charter. A much-cited and influential descriptive analysis of the first ten years of cases arising under the Charter is

Morton, Russell and Riddell (1994). The authors found that, from 1982 to 1992, 41 statutes were overturned by the Court based upon the Charter out of 119 total cases (Morton, Russell, and Riddell 1994, 19). The work done by Morton, Russell, and Riddell (1994) is an excellent overview of the early work of the Court after the adoption of the Charter. Epp (1998; see also Epp 1996) does not examine judicial activism specifically, but his influential "support structure" thesis holds that creation of new civil rights occurs when there is a structure in place for rights advocates to engage in legal mobilization. Epp (1998) examines the creation of new civil rights at the Supreme Court of Canada and concludes that the support structure for civil rights advocates contributed to the increasing number of rights cases on the Court's docket.

The early empirical characterization of judicial activism at the high court of Canada has been significantly revised, though, by the preeminent scholar of judicial activism in Canada, James B. Kelly. Throughout a series of articles (Kelly 1999, 2001, 2003, 2004; Kelly and Murphy 2001), a book chapter (Kelly 2002), and a book (Kelly 2005), Kelly has mixed empirical, interpretive, and normative analyses to provide a more nuanced characterization of judicial activism at the Supreme Court.

Kelly (2002) contends that the adoption of the Charter and the growing number of Charter cases at the Court have not led to unbounded judicial supremacy. Kelly (2002) finds through empirical analysis that the impact of judicial activism varies according to the state actor involved in the case. For example, judicial review of police conduct actually strengthens liberal constitutionalism, because of the check upon these unelected actors,

according to Kelly (2002). Another observation made by Kelly is that the impact of judicial activism has been tempered by the emergence of "Charter dialogue," or the tendency of legislators to enact revised laws after Charter-based statutes have been overturned. The concept of Charter dialogue between legislators and judges is not new (see Hogg and Bushell 1997), but Kelly references the concept to make the important point that judicial activism is considerably more complicated than is usually asserted.

In his magisterial book, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (2005), Kelly's primary thesis is that normative criticisms of judicial activism of the Canadian high court are misplaced, because the Court is not the dominant actor in Canada's post-Charter political system. Indeed, Kelly contends that coordinate constitutionalism, wherein each political branch interprets the Charter on its own, has become the principal model of Canadian constitutional politics. According to Kelly (2005), coordinate constitutionalism serves to strengthen, not weaken, Canadian democracy, as multiple forms of rights protection exist. Thus, the judiciary, executive and parliament each govern with the Charter by exercising scrutiny of legislation and ensuring that the Framers' intentions are protected. So, judicial activism coexists with legislative activism and bureaucratic activism in the modern Canadian political system.

In addition to the interpretive arguments advanced in the book, Kelly (2005) also engages in some empirical analysis of judicial activism at the Canadian Supreme Court. Regarding civil cases, Kelly (2005) contends that the Court's activism is not problematic because the statutes invalidated were primarily those that were enacted or amended before

the adoption of the Charter. Kelly's argument rests upon the claim that the Court generally only strikes down statutes that were enacted or last amended before the introduction of the Charter; thus, the Court is not making a discretionary policy decision but only nullifying legislation that was introduced during a different constitutional regime. The difficulty with this argument is that Kelly (2005) does not provide enough information to fully evaluate the claim. Kelly notes that 64 statutes have been invalidated by the Court in the period from 1982 to 2003, and that 31% of those statutes were enacted between 1970 and 1982. Furthermore, Kelly states that only 12 statutes enacted after 1990 have been struck down by the Court. However, Kelly (2005) only provides a table which lists the 64 activist cases and another table showing simple percentages for statutes ruled constitutional and unconstitutional in the period 1982-2003. A table disaggregating the constitutional and unconstitutional statutes into two time periods–1982 to 1990 and 1991 to 2003–and providing percentages for each of those periods would have allowed readers to evaluate the argument. In addition, the use of inferential, rather than descriptive, statistical techniques would have allowed greater confidence in the claim that the Court generally invalidates only statutes enacted in the pre-Charter regime.

The final set of empirical articles regarding judicial activism in Canada contains, once again, a debate between law professors and political scientists. Choudhry and Hunter (2003) criticize the empirical work on judicial activism that has been conducted by Canadian political scientists as containing insufficient evidence to confirm the findings that have been offered. Specifically, they deny that the rate of judicial activism at the Court is high, and also

deny that it has been increasing over time. To support their claims, they collect their own data and conduct their own analyses. They operationalize judicial activism as the governmental win rate in a judicial review case; also, they exclude non-Charter cases from the data set. Put another way, Choudhry and Hunter define judicial activism not as whether a law was explicitly overturned, but rather as when the Court rules that there has been no violation of civil rights. Thus, Choudhry and Hunter (2003) find that the governmental win rate in the period from 1982 to 2002 was 62.4%–conversely, the governmental loss rate (or activism rate) was 37.6%. They state that this rate of activism "does not seem as high as some would lead us to believe" (Choudhry and Hunter 2003, 556). In addition, based on this data, the authors dispute that judicial activism at the Canadian Supreme Court is increasing over time. Thus, Choudhry and Hunter (2003, 557) dispute the empirical claims regarding judicial activism by political scientists.

In response, Manfredi and Kelly (2003) question Choudhry and Hunter's (2003) definition and operationalization of judicial activism, and also assert that Choudhry and Hunter have misrepresented the relevant political science literature. Specifically, Manfredi and Kelly (2003) assert that by excluding non-Charter cases, Choudhry and Hunter are omitting a significant source of judicial review cases, and thus their analyses are flawed. In rebuttal to Manfredi and Kelly (2003), Choudhry and Hunter (2004) defend their methodological choices and presentation of the previous literature. They conclude, "Unfortunately, we clearly have a long way to go before [law professors and political scientists] engage each other directly" (Choudhry and Hunter 2004, 778).

Empirical Studies of Judicial Activism in Australia

Empirical research on judicial activism in Australia is virtually nonexistent. Galligan (1991) provides a descriptive account of judicial review in Australia as well as a discussion of several cases wherein the High Court struck down legislation. However, because the article was published in 1991, it does not discuss the dramatic changes at the High Court that occurred in the mid-1990s. Williams (2000; see also Sackville 2001) supplies a much more current descriptive and interpretive account of the changes at the High Court; he notes that the High Court has, in a relatively short period of time and despite lacking a Bill of Rights, developed several areas of constitutional protections, including aboriginal rights and freedom of political communication. Kirby (2004) offers a sitting High Court judge's point of view on judicial activism and offers a defense of the practice. Opposing arguments are found in Heydon (2003), Craven (1999), and Campbell (2003).

Thus, this short review of the empirical literature on judicial activism in Australia shows that much work remains to be done. Almost all of the work that has been conducted is normative or descriptive. Only Pierce (2006) empirically examines the changes at the High Court in the 1990s, and that work does not exclusively focus on judicial activism, but rather is an institutional analysis.

The Gaps in the Literature

The above review of the existing literature reveals that, while large advances in comparative judicial research have been made, many questions remain to be answered. This

section will delineate some of those gaps.

1. Prior research has shown that attitudinal voting exists at the U.S. Supreme Court in certain issue areas, such as civil liberties cases. However, does attitudinal voting exist across issue areas? In other words, can ideological voting be observed when different types of cases are aggregated?

2. Similarly, comparative judicial researchers have found that some attitudinal voting occurs in Canada in certain case issue areas. However, will ideological voting be observed at the Supreme Court of Canada when different types of cases are aggregated?

3. In Australia, there has not previously been an analysis of attitudinal voting based upon judicial ideology scores derived from content analysis of newspaper editorials. Previous research has only used political party as a crude indicator of judicial ideology. Will attitudinal voting be evident at the High Court of Australia when more sophisticated measures of judicial ideology are utilized?

4. If attitudinal voting exists at the U.S. Supreme Court, Canadian Supreme Court, and Australian High Court, does the extent of attitudinal judicial voting vary by high court? What explains the difference, if any, in attitudinal voting?

5. Are legal variables influential for high court judges in the U.S., Canada and Australia? In other words, does the legal model explain judicial behavior for judges in these courts?

6. If legal variables do influence judicial decision-making at the high courts of the U.S., Australia and Canada, what explains the difference in degree in legal voting, if any?

7. Virtually all research in judicial decision-making has excluded unanimous cases from the analyses, based upon the premise that unanimous cases present no significant legal or factual conflict. Does judicial decision-making differ in the high courts of the U.S., Canada and Australia when only unanimous cases are analyzed?

8. Of the United States Supreme Court, Supreme Court of Canada, and High Court of Australia, which is the most activist? Stated another way, which of these high courts is most likely to defer to the legislature and which high court is least deferential? Which high court is most likely to invalidate ideologically incongruent statutes?

9. Past research into federalism issues and judicial behavior has indicated that, at the U.S. Supreme Court, conservative judges will be more likely to strike down national laws while liberal justices are more likely to invalidate state and local laws. Do high court judges in Canada and Australia exhibit the same ideological voting tendencies as American judges when reviewing national and state/local laws?

Chapter Four: Judicial Activism and Judicial Politicization

In this chapter, the judicial politicization theory is tested by examining the phenomenon of judicial activism in the United States, Canada and Australia in the 1990s. The theory predicts that judges on a highly politicized high court will be less likely to defer to the political branches and instead have a greater tendency to strike down statutes and regulations. Conversely, judges on a less politicized court–such as the high court of Canada or Australia–should be less likely to engage in judicial activism. A corollary to the theory posits that judges in highly politicized high courts are more likely to strike down ideologically incongruent laws. Additionally, this chapter will examine the trends in judicial activism in the U.S., Canada, and Australia in the 1990s, as well as examine which topical case issues tend to provoke activism in each nation. Finally, judicial activism at the individual judge level is analyzed to better explore the theory. Thus, this chapter deals with the judicial politicization thesis and how it relates to judicial activism. In Chapter Six, the second aspect of the judicial politicization theory is examined: the contention that a highly politicized judiciary will tend to decide cases based on attitudinal factors, while legal factors will be influential in nonpoliticized high courts. First, a review of the general theory of this project is provided.

Review of the Judicial Politicization Theory

The judicial politicization theory posits that judges at a highly politicized high court

in an established democracy are more likely to decide cases according to ideological/attitudinal factors, and will correspondingly be more likely to engage in judicial activism and strike down acts of the legislature. Conversely, judges at a high court that is less politicized will be more likely to decide cases based upon legal factors, and will be less likely to invalidate laws enacted by the political branch. In other words, the attitudinal model of judicial decision-making will predominate in politicized judiciaries, while the legal model will be more likely to prevail in less politicized courts.

The degree of judicial politicization in a high court is determined by the informal norms regarding judicial selection, not the formal processes used for judicial appointments. While there appears to be no question that judicial appointment systems are a highly significant influence on American state court judges, this dissertation argues that, in comparative context, formal selection mechanisms are less important than the "selection culture" inherent in a modern democratic political system. The selection culture refers to whether the appointing executive typically relies upon ideological and partisan factors to choose judges, or whether other factors such as qualifications and merit are the most important criteria. Stated differently, a country's judiciary is highly politicized if the judges are chosen by the executive based upon partisan grounds, while another nation's judiciary is less politicized if the magistrates are selected on nonpartisan factors. Of the three high courts in this study, the most highly politicized is the U.S. Supreme Court, followed by the High Court of Australia, followed by the Supreme Court of Canada.

In this chapter, a corollary to the main theory is examined: that highly politicized

courts will be more likely to engage in judicial activism and strike down acts of the legislature. Having established that the United States Supreme Court is highly politicized while the high courts of Canada and Australia are much less so, the theory posits that a highly politicized supreme court will be more likely to strike down acts of the legislature. So, the theory predicts that the U.S. Supreme Court will be more likely to engage in activism, both in terms of raw numbers of invalidated laws and percentage of activist cases. Thus, the first hypothesis can be stated:

> H_1: *The rate of judicial activism will tend to be greater in highly politicized judicial systems. Thus, the U.S. Supreme Court will be more likely to invalidate laws than the high courts of Canada or Australia.*

Related to this, the theory predicts that judges on a highly politicized high court will be more likely to support laws that are ideologically congruent with their own political preferences and strike down laws that are not congruent with their own ideology. In other words, on a highly politicized court, conservative judges will be more likely to strike down liberal laws, and liberal judges will be more likely to strike down laws that are conservative in direction. On less politicized high courts, this tendency should be less evident or nonexistent. Thus, at the U.S. Supreme Court in the 1990s, there should be a greater tendency for judges to strike down ideologically incongruent laws, while this phenomenon should be far less pronounced in Canada and Australia. So, the second hypothesis states:

> H_2: *Judges on a highly politicized high court will be more likely to strike down ideologically incongruent laws. Thus, conservative judges on the U.S. Supreme Court will be more likely to invalidate liberal laws while liberal judges will be more likely to nullify conservative laws, but judges at the high*

courts of Canada and Australia will be less likely to nullify incongruent statutes.

In the following sections, these hypotheses are tested.

Examining Judicial Activism in Comparative Perspective

Again, the theory of judicial politicization predicts that highly politicized courts will be more likely to engage in judicial activism. Thus, the rate of invalidated laws should be higher at the U.S. Supreme Court then at the Canadian or Australian high courts. As discussed in Chapter Two, this project measures judicial activism both in terms of raw numbers and percentages. To create the data set, all cases in the U.S., Canada, and Australia in the 1990s were read, and those cases that involved a challenge to a national, state/province or local law or regulation, state constitutional provision, or state referendum were coded.

Rates of Judicial Activism

In this section, the rates of judicial activism in the supreme courts of the United States, Canada, and Australia will be examined, thus allowing for the first hypothesis to be tested. Again, Hypothesis One states:

> H_1: *The rate of judicial activism will tend to be greater in politicized judicial systems. Thus, the U.S. Supreme Court will be more likely to invalidate laws than the high courts of Canada or Australia.*

In Figure 4.1, the raw numbers for the rate of judicial activism in the 1990s for the U.S., Canada, and Australia are presented. For this figure, the number of activist cases refers to the action of the high courts *as a whole* to overturn an act of the national, state or local legislature, administrative agency, or state constitutional provision. In other words, Figure 4.1 does not use the individual judge vote as the unit of analysis; rather, the case is used and indicates how many laws were invalidated by each country's high court from 1990 to 1999. The chart shows that 80 laws were invalidated by the United Supreme Court, 56 by the Canadian Supreme Court, and 24 by the High Court of Australia. Again, this includes all national, state, and local laws that were challenged from 1990 to 1999. As predicted, the U.S. Supreme Court nullified many more laws than the high courts of Australia and Canada. However, it should be noted that these are raw, not percentage, numbers and do not control for the differences in case load between the different systems. In other words, without examining percentages, it is difficult to make a definitive statement and confirm the first hypothesis that the U.S. Supreme Court is more likely to strike down laws and thus engage in activist behavior.

Figure 4.2 presents the same data in percentage form. That is, the data in Figure 4.2 represent the number of cases where the high court invalidated a law divided by the total number of judicial review cases. Thus, the data in Figure 4.2 allow for a true comparison of the degree of judicial activism between the United States, Canada and Australia. The data reveal that the U.S. Supreme Court struck down a challenged law in 53.33% of judicial review cases, whereas the Canadian Supreme Court nullified a challenged law in 33.73% of

judicial review cases, and the High Court of Australia invalidated laws in 35.29% of judicial review cases. Analysis of the activism means for each country using a t-test (equal variances not assumed) reveals a highly significant difference in means between the U.S. Supreme Court and the Supreme Court of Canada ($p = .0002$) as well as between the U.S. and Australian high courts ($p = .0063$). The difference in means for activism between the Canadian and Australian high courts was not significant ($p = .5892$).

Based upon the percentage data and the analysis of means, it is clear that the U.S. Supreme Court is substantially more likely to engage in judicial activism than are the high courts of Canada and Australia, and the first hypothesis can be confirmed. So, in the 1990s, the U.S. Supreme Court struck down a challenged law or regulation in more than half of the cases where a constitutional challenge was raised, whereas the supreme courts of Canada and Australia invalidated the law in question in slightly more than a third of judicial review cases.

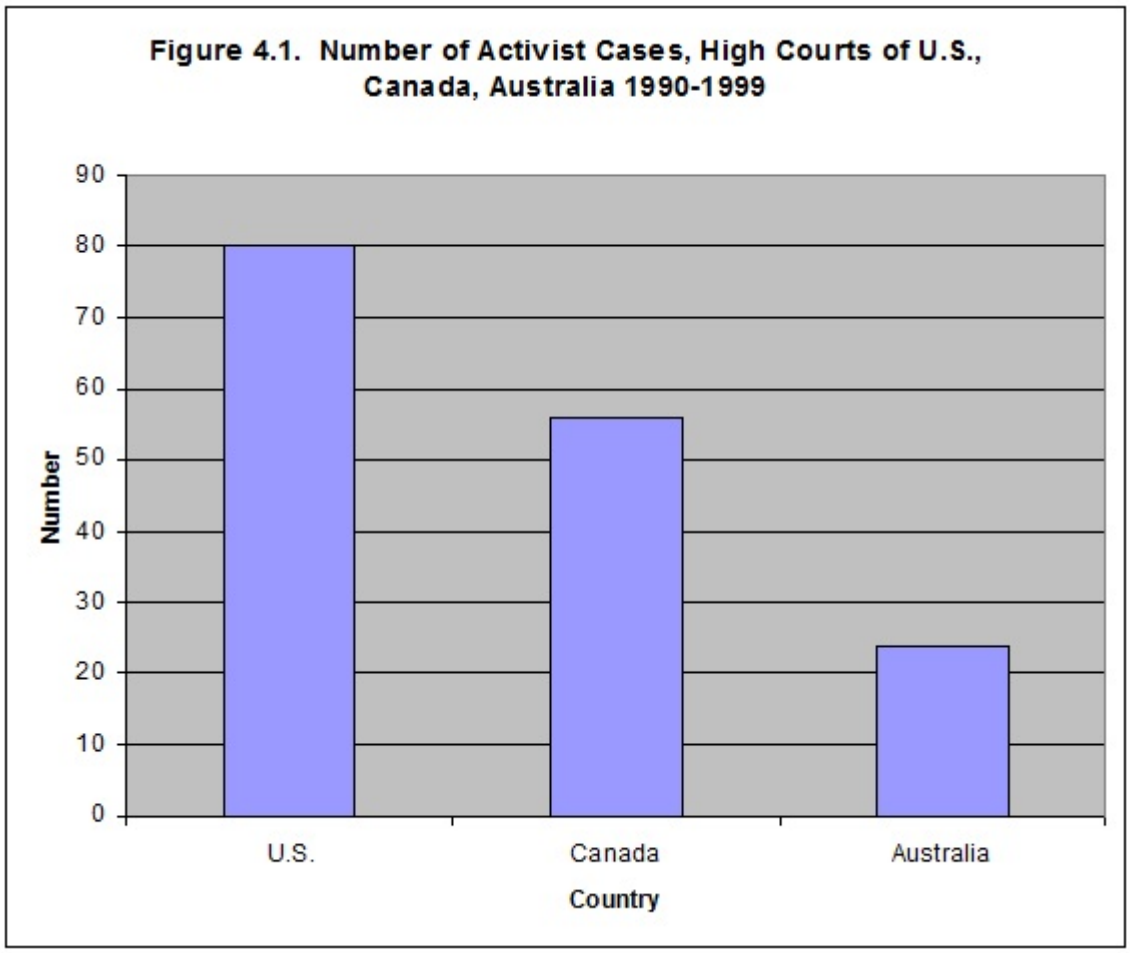


Figure 4.1. Number of Activist Cases, High Courts of U.S., Canada, Australia 1990-1999
90
80
70
60
50
40
30
20
10
0
Number
U.S.
Canada
Australia
Country

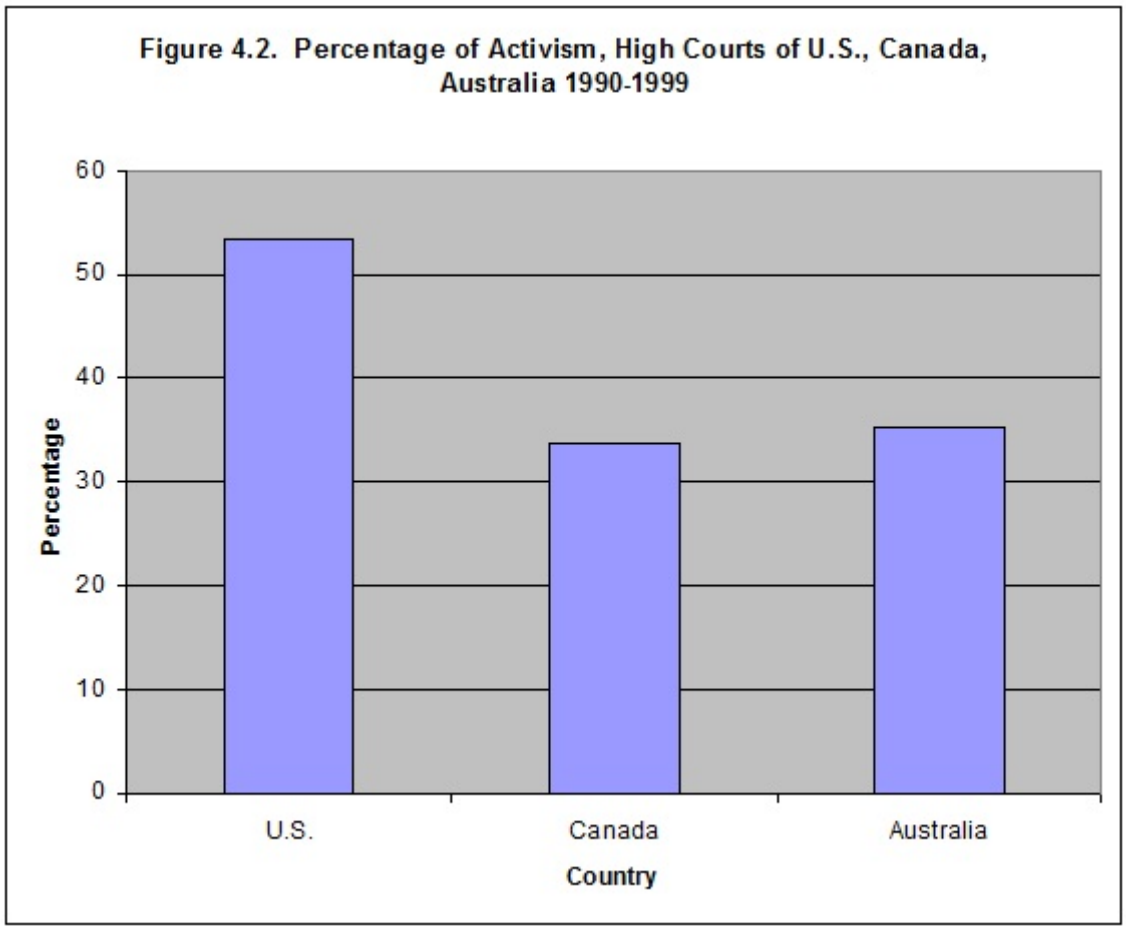


Figure 4.2. Percentage of Activism, High Courts of U.S., Canada, Australia 1990-1999
60
50
40
30
20
10
0
Percentage
U.S.
Canada
Australia
Country

It should be noted that the judicial activism percentage for the U.S. Supreme Court is considerably higher than is usually reported. For example, Keck (2004) reports that the average for invalidated federal statutes in the period 1995-2003 is 3.67%, while the percentage for nullified state and local laws in the same period is 4.78%. The primary reason that the percentages reported in this project are so much higher is because Keck and others calculate judicial activism by dividing the number of cases where the Court has struck down a law by the total number of cases for the year at the Court.[27] This project uses a different formula: dividing the number of activist cases by the number of cases where a constitutional challenge was made. I submit that this measure is a more accurate representation of the rate of judicial activism in each high court. By using the standard measurement reported by Keck and others, a reader would conclude that judicial activism was not especially prevalent at the U.S. Supreme Court, in terms of overall percentage. However, this is clearly not the case, as the Court was highly activist during the 1990s.

Judicial Activism by Year

Next, it is instructive to examine the trends in judicial activism in the 1990s for the high courts in this study. Figure 4.3 graphically illustrates the trend in judicial activism in

[27] Another minor reason why the percentage of activism for the U.S. high court is higher in this study than in other works is because I did not follow the coding used in the Spaeth (2001a) and Benesh and Spaeth (2003) databases in several instances. As discussed in Chapter Two, if any portion of the statute/regulation was struck down by the Court (but not the entire statute/regulation), this was coded as a declaration of unconstitutionality. Also, a vote to reverse an agency decision was coded as an activist decision, even though the Spaeth databases do not code in this manner.

the 1990s for the high courts of the U.S., Canada, and Australia using raw numbers. The chart shows that the American high court had a higher number of activist cases in six of the ten years during the 1990s. The only year where another country's high court invalidated more laws was in 1990, where the Canadian Supreme Court struck down eight laws, compared to three invalidations by the American and Australian courts. Again, these data demonstrate the tendency for the U.S. Supreme Court to be more likely to invalidate laws in judicial review cases than the high courts of Australia and Canada.

However, a comparison of rates of activism using percentages rather than raw numbers may allow for a more accurate comparison between these nations. Figure 4.4 presents that comparison. The chart reveals that the U.S. Supreme Court usually, but not always, had a higher percentage rate of striking down laws in judicial review cases. In the early years of the decade, the High Court of Australia had an very high activism rate of 50% in 1990, 66.67% in 1992, and 80% in 1993. However, Australia's percentage of activism declined in the later years of the decade; this result comports with the conclusions of Pierce (2006) and others who have noted that there were some substantial changes in the High Court's jurisprudence in the early 1990s. Indeed, the High Court of Australia had the largest fluctuations in activism rates; the supreme courts of the U.S. and Canada did not display the variance shown by the Australian court.

Figure 4.3. Number of Activist Cases: U.S., Canada, Australia 1990-1999

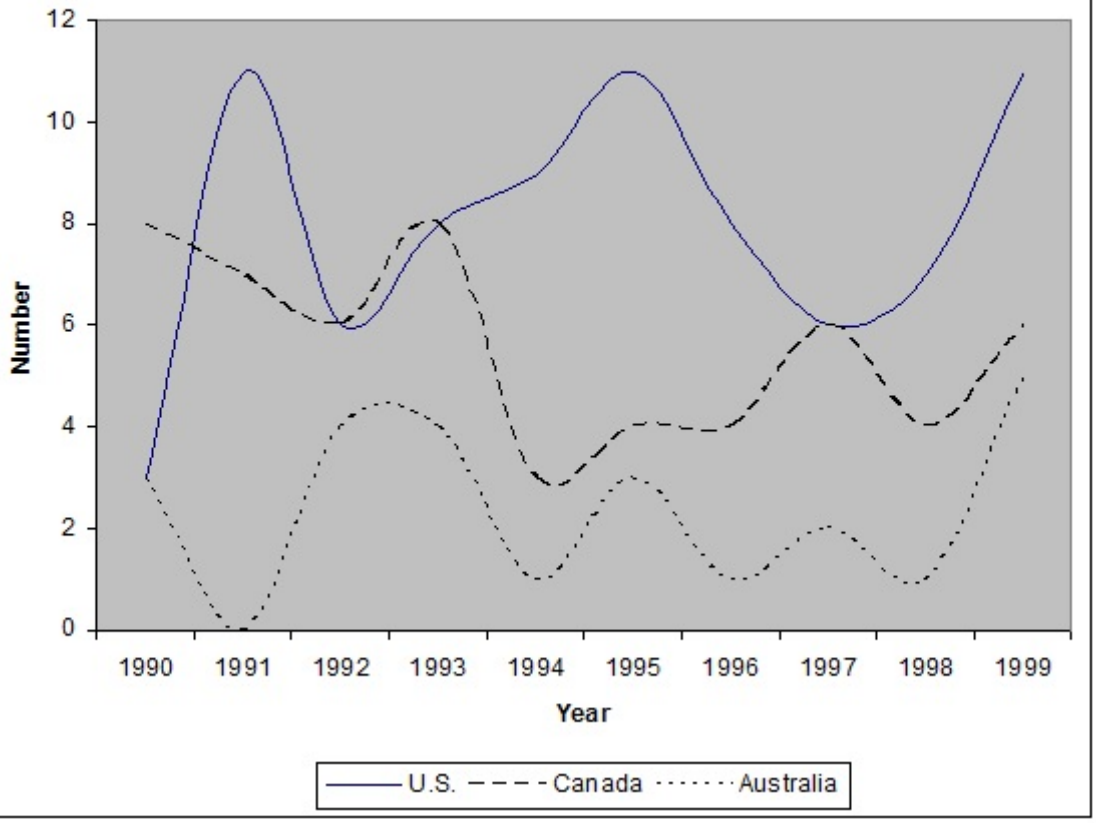
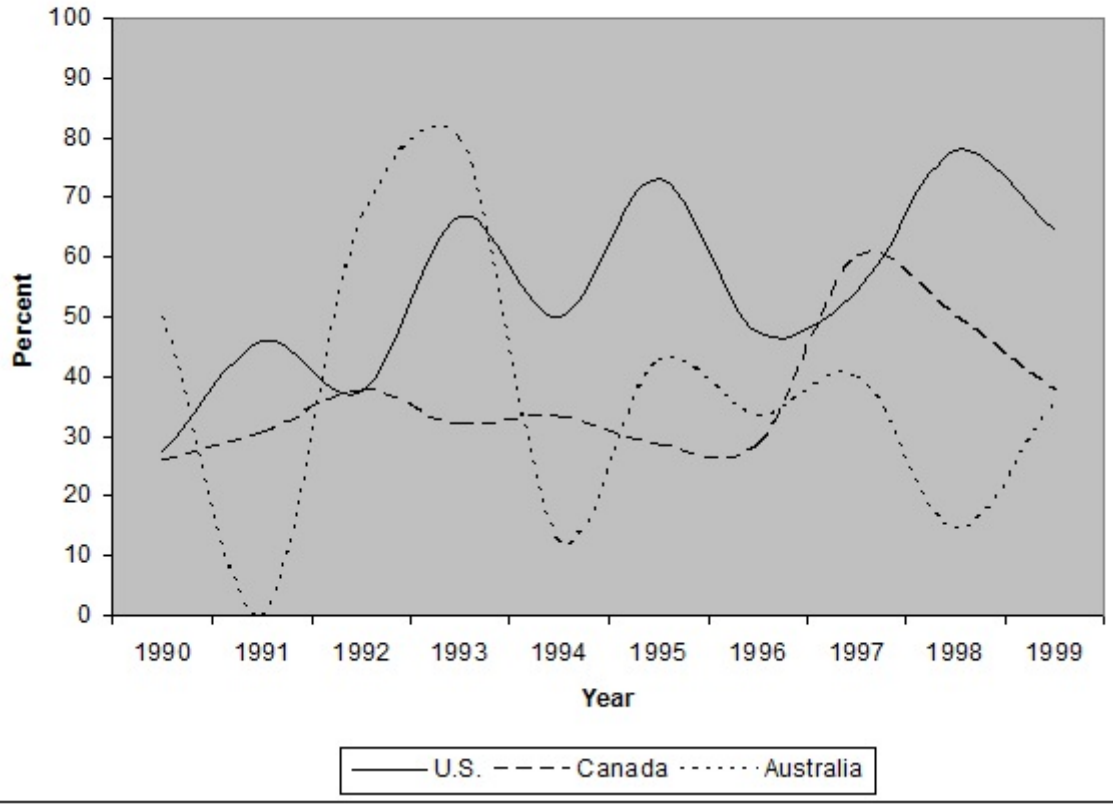


Figure 4.4. Percentage of Activist Cases: U.S., Canada, Australia 1990-1999



Judicial Activism by Issue of Case

In this section, judicial activism in Canada, Australia, and the U.S. is descriptively analyzed by examining the subject matter of the cases where a high court has struck down a challenged law. This project follows the Spaeth database (2001a) coding for case issue area. The Spaeth coding divides legal topics into the following areas: criminal, civil rights, First Amendment (here renamed speech and religion), due process, privacy, attorneys, unions, economic, judicial power, federalism, tax, and miscellaneous. While there are certainly other ways in which legal topics could be divided, the Spaeth format is the standard and is easily adapted to Canada and Australia. Figure 4.5 shows the total number of cases where the high court of the U.S., Canada, and Australia nullified a law. Again, because this chart shows raw numbers only, a true comparison between countries cannot be made. The chart shows that the greatest number of activist cases involved a speech or religion issue in the United States, with 25 laws invalidated in the 1990s in this issue area. Somewhat surprisingly, the second highest issue area was civil rights (19 total invalidations), at the Canadian Supreme Court, followed by Canadian criminal cases (14 total). For the United States, the areas of speech and religion, civil rights, and economic cases involved the most nullifications. In Canada, civil rights, criminal, and speech and religion cases were the most prevalent issue areas. At the High Court of Australia, economic, federalism, and civil rights cases invoked the most invalidations. Thus, Figure 4.5 provides a snapshot of the issues that evoked an activist response from the respective high courts.

Figure 4.6 provides the percentage rate of activist cases in each of the three countries

by case issue area. That is, the chart shows the number of cases where the court struck down the challenged law divided by the total number of cases in that issue area. Again, by reporting percentages, a better comparison of the tendency for each court to invalidate a law in a particular subject area can be made. Figure 4.6 shows that, in nearly every issue area, the U.S. Supreme Court had the highest percentage activism rate. The most striking result is that the American court struck down 90% of all federalism cases, compared with 50% for Canada and 45.45% for Australia. (Canada struck down 100% of all cases involving a privacy statute. However, there were only two of these cases, so these results should be viewed with caution.) The exceptionally high activism rate for federalism cases at the U.S. Supreme Court in the 1990s comports with other scholarly research, which has noted that the Rehnquist Court has made federalism an area of particular concern (see, e.g., Keck 2004).

Also striking is the American court's willingness to nullify cases involving economic and taxation issues. For tax and economic issues, the High Court of Australia nearly matched the activism percentage rate of the United States. This suggests that, in high courts dominated by conservatives (as are both the U.S. and Australian high courts), economic issues may be particularly salient. Also somewhat surprising is the low salience of criminal procedure cases in terms of activism percentage. No country had an activism rate above 29%. Put another way, each of the high courts in this study was fairly reluctant to overturn a criminal statute. Contrast this with federalism and civil rights, where each court had an activism rate of at least 40%. Overall, Figure 4.6 allows for an interesting comparison of the issues that are most likely to invoke an activist response from the high courts of the U.S.,

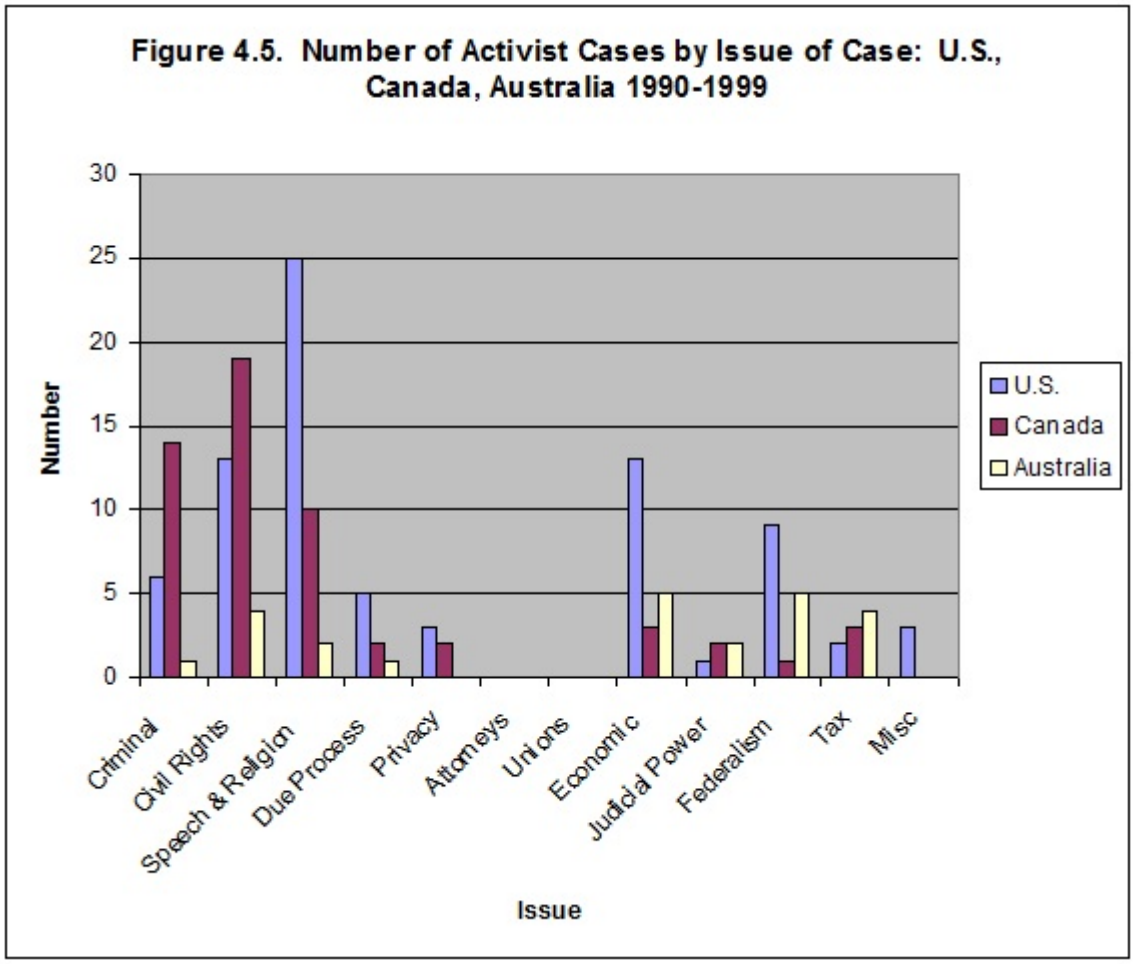
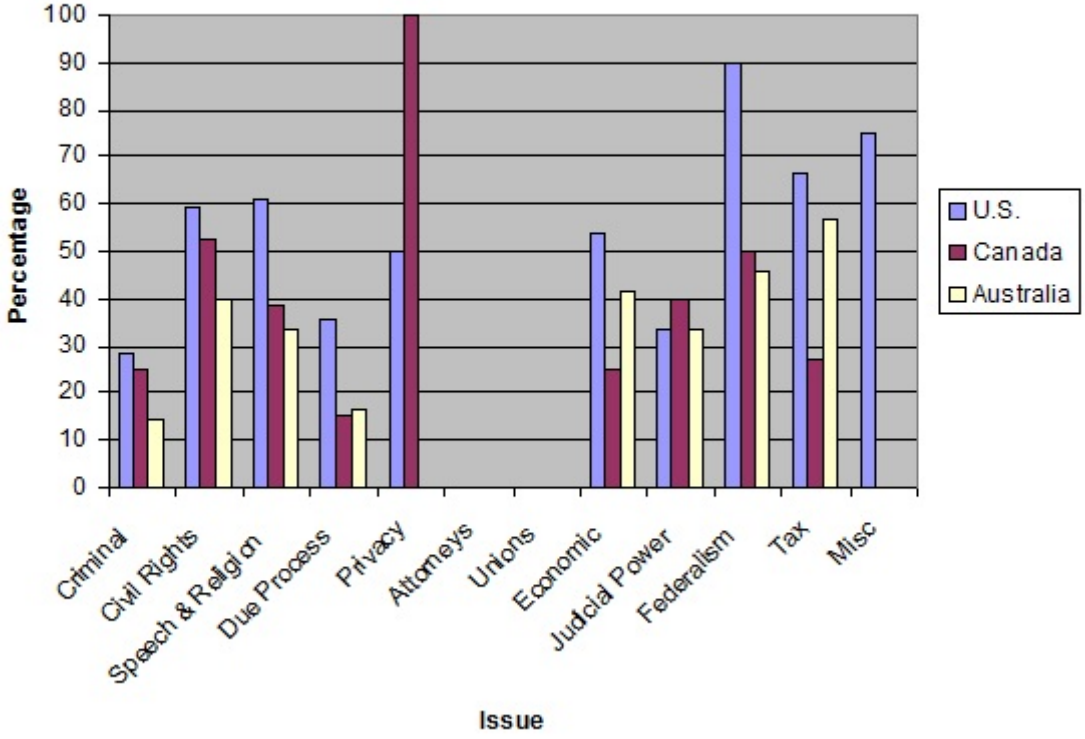


Figure 4.5. Number of Activist Cases by Issue of Case: U.S., Canada, Australia 1990-1999
Number
30
25
20
15
10
5
0
Criminal
Civil Rights
Speech & Religion
Due Process
Privacy
Attorneys
Unions
Economic
Judicial Power
Federalism
Tax
Misc
Issue
U.S.
Canada
Australia

Figure 4.6. Percentage of Activist Cases by Issue of Case: U.S., Canada, Australia 1990-1999



Canada and Australia.

Except for privacy and judicial power, the U.S. high court is more likely to strike down laws in every issue area. However, the U.S. Supreme Court is most likely to invalidate laws in the areas of federalism, taxation, speech and religion, and civil rights.[28] Of course, it should be noted that Figures 4.5 and 4.6 do not denote the ideological direction of the statutes in question, so it is not possible to determine if each high court voted in a liberal or conservative direction. This analysis is provided in the following section.

Judicial Activism and Statute Direction

In this section, the tendency of each high court to overturn liberal or conservative laws is analyzed.[29] Figure 4.7 presents the raw numbers of liberal and conservative laws that were invalidated by the high courts of the U.S., Canada and Australia. Note that the unit of analysis here is the case, not the individual judge vote. Somewhat surprisingly, the U.S. Supreme Court nullified 41 conservative statutes and 39 liberal laws–a fairly equivalent number. The High Court of Australia achieved an exact balance: 12 conservative and 12 liberal laws struck down. However, the most startling result is seen for the Supreme Court of Canada. There, the Court invalidated 49 conservative laws but only 7 liberal statutes.

[28] The miscellaneous category is not included because there were only three cases in this issue area.

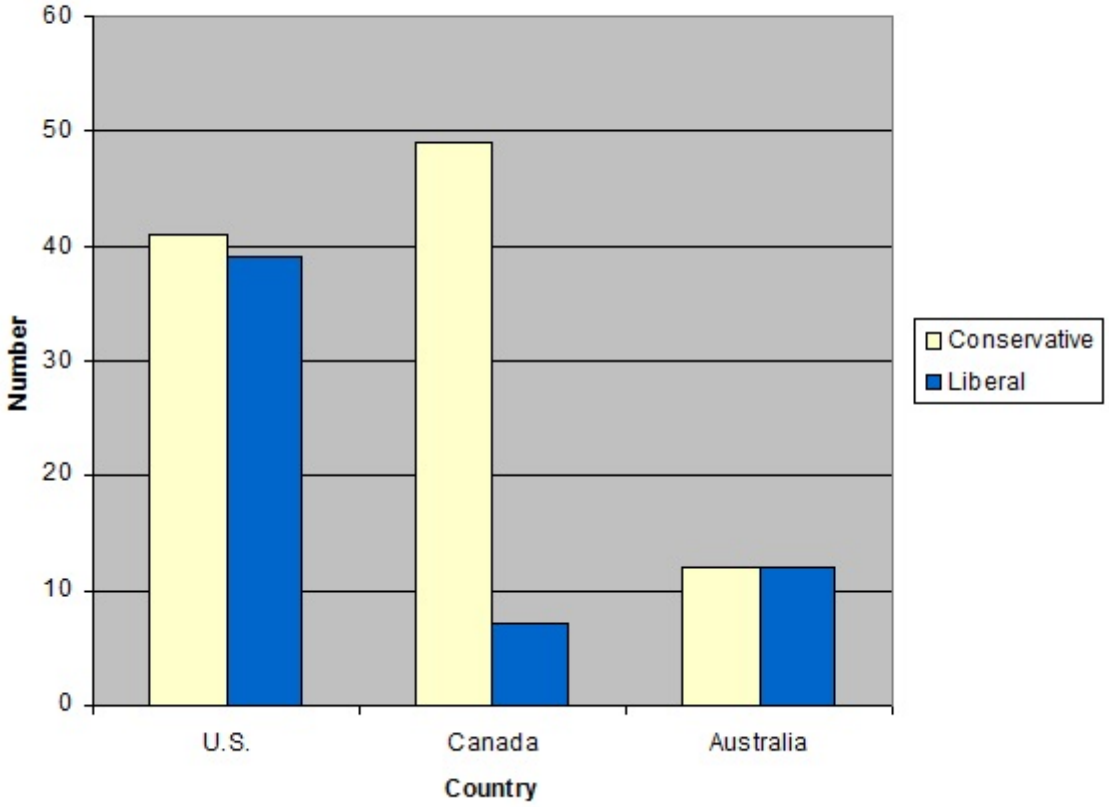
[29] Naturally, not every statute can easily be categorized according to a liberal/conservative dichotomy. To resolve any ambiguity, the coding system for statute direction found in Spaeth (2001b) was used.

While these are raw numbers, not percentages, it appears that the Canadian Supreme Court operated in a significant liberal direction during the 1990s.

Figure 4.8 presents the percentages for liberal and conservative laws and judicial activism; that is, the number of liberal/conservative laws invalidated divided by the number of judicial review cases in each country. Once again, the unit of analysis is the case, not the individual judge vote. Here, the U.S. Supreme Court is shown to have invalidated a far greater percentage of liberal, rather than conservative, laws. The American high court nullified 68.42% of all liberal laws that were considered by the Court, but only 44.09% of conservative laws.

The results for the Canadian Supreme Court still exhibit a greater tendency to invalidate conservative laws, as 37.98% of conservative statutes were struck down, but only 18.92% of liberal laws. The smallest disparity is seen for the Australian high court, which nullified 42.86% of liberal laws and 30% of conservative laws. Thus, the greatest disparity between liberal and conservative statutory invalidations occurs at the U.S. Supreme Court, which struck down 24.33% more liberal than conservative laws. While the total number of invalidated conservative statutes may have been higher than the total number of nullified liberal laws, these data show that there was a significantly greater tendency for the Court as a whole to strike down liberal statutes.

Figure 4.7. Number of Activist Cases by Liberal/Conservative Law: U.S., Canada, Australia 1990-1999



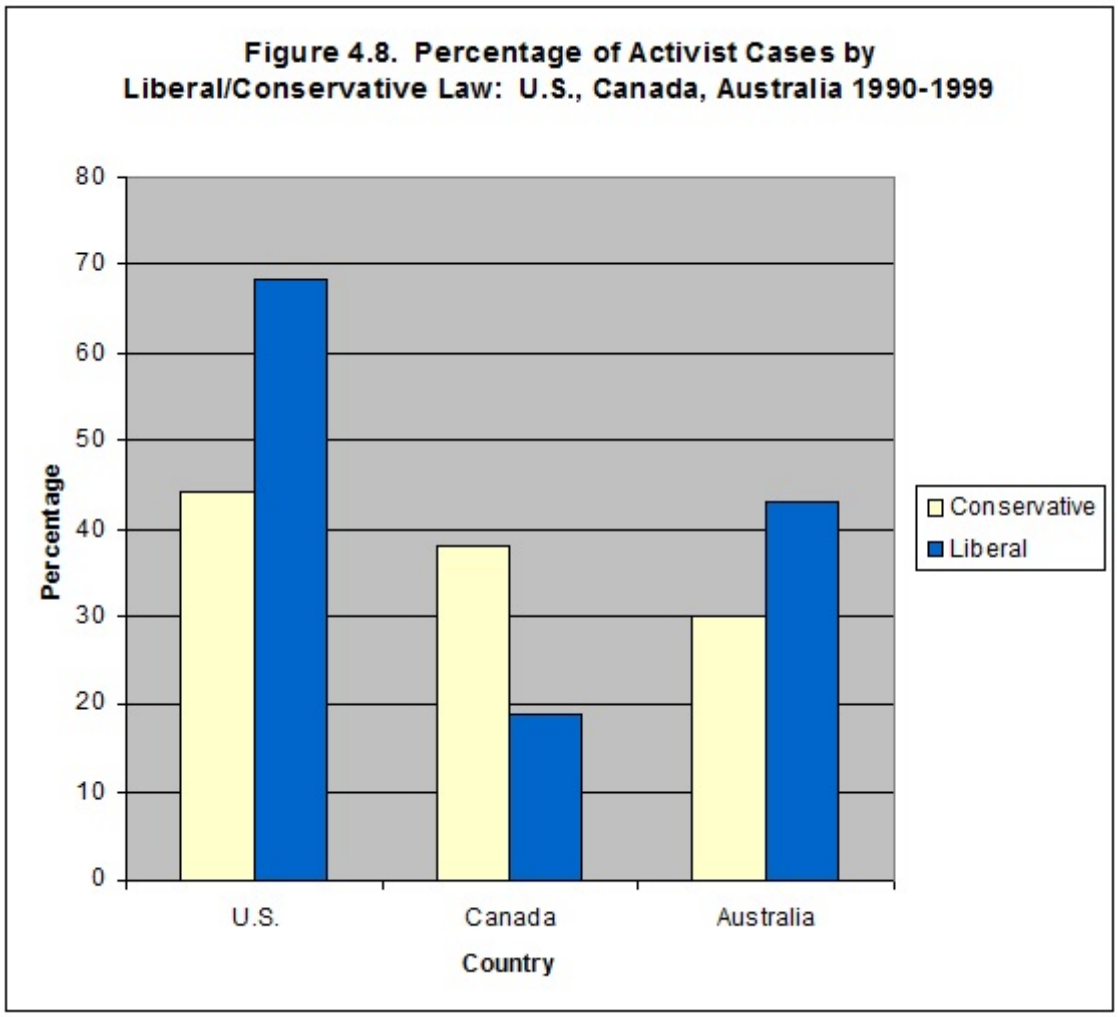


Figure 4.8. Percentage of Activist Cases by Liberal/Conservative Law: U.S., Canada, Australia 1990-1999
80
70
60
50
40
30
20
10
0
Percentage
U.S.
Canada
Australia
Country
Conservative
Liberal

However, Figures 4.7 and 4.8 utilize the court case as the unit of analysis, which does not measure the likelihood of invalidating a liberal or conservative law at the individual justice level. Put another way, a 5-4 decision at the U.S. Supreme Court to strike down a liberal statute is coded as an activist case in Figure 4.8, even though there were four votes to sustain the liberal law. Thus, an examination of the data with the individual judge vote as the unit of analysis gives a better analysis of judicial activism and statute direction. Figure 4.9 presents this data. The trends for the United States and Canada remain largely the same, with liberal statutes receiving a greater percentage of votes to strike in the U.S., and conservative laws receiving a higher percentage of votes to strike in Canada. In Australia, however, the percentages are nearly identical for conservative (40.43%) and liberal (39.15%) laws. To get an even better sense of the likelihood of striking down a statute based on ideological direction, an analysis of activism by individual justice is helpful.

Judicial Activism at the Individual Judge Level at the U.S. Supreme Court

In this section, judicial activism at the individual judge level at the U.S. high court is examined, in order to get a sense of the judges most and least likely to engage in activism. Figure 4.10 presents the percentage of activism by individual judge at the U.S. Supreme Court. Note that the justices are arrayed from most conservative to most liberal, according to the Martin and Quinn (2002) ideal point scores. The data in this figure show that the three justices with the highest activism percentage were Marshall (54.5%), Blackmun (52.4%) and Stevens (52%). However, the results for Justice Marshall should be viewed with caution,

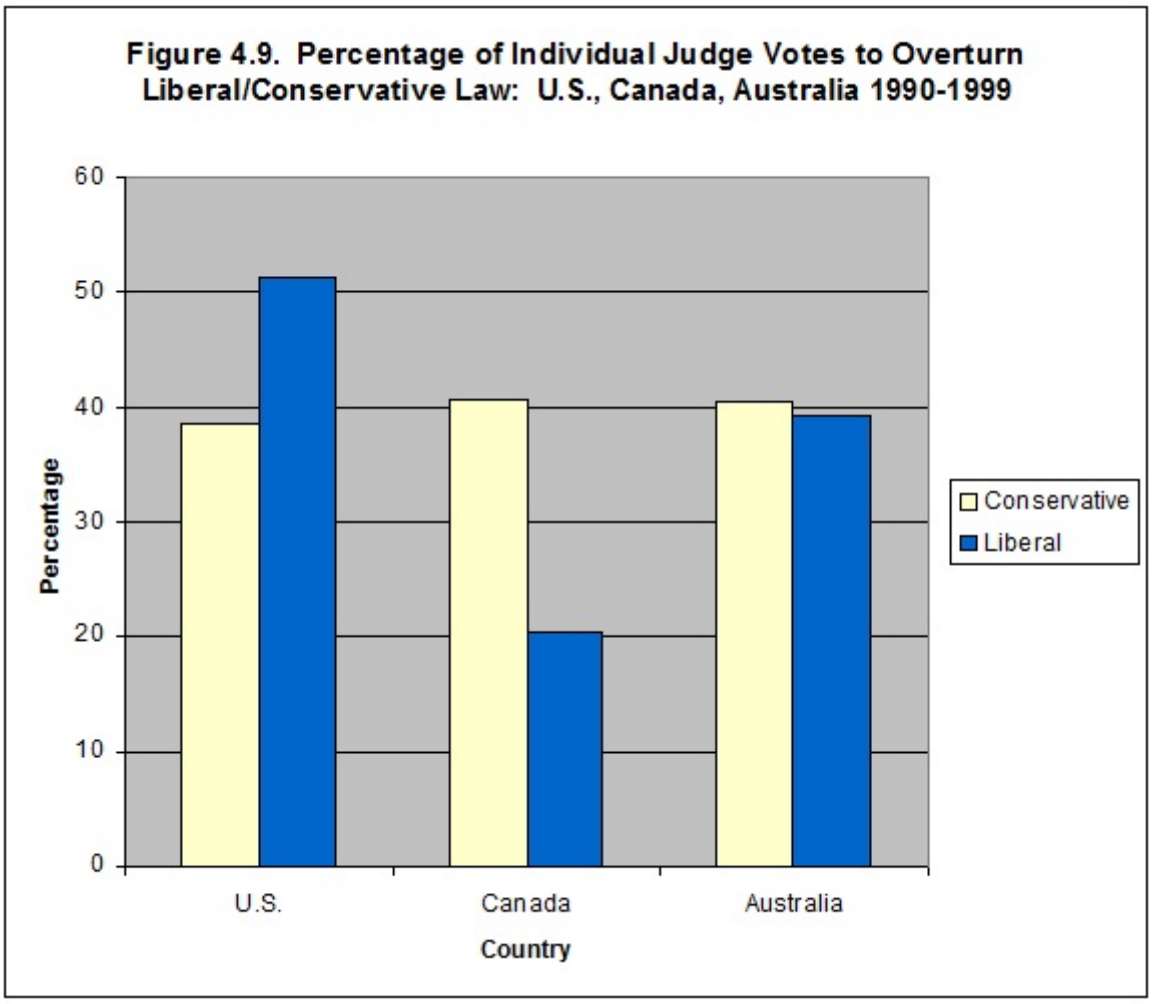


Figure 4.9. Percentage of Individual Judge Votes to Overturn Liberal/Conservative Law: U.S., Canada, Australia 1990-1999
60
50
40
30
20
10
0
Percentage
U.S.
Canada
Australia
Country
Conservative
Liberal

because they are based on only 11 total cases. The justices with the lowest activism percentage were White (27.5%), Rehnquist (30.7%) and Scalia (38%). White's percentage should also be viewed with some degree of caution as it is based on 51 cases only. The results in Figure 4.10 show that the conservative judges–Thomas, Scalia, Rehnquist, White, O'Connor, and Kennedy–have lower overall rates of activism than the liberal justices (Marshall, Stevens, Breyer, Blackmun, Souter, and Ginsburg). However, this data does not control for statute direction or other factors.

Table 4.1 shows the differences in activism rates between the liberal and conservative judges for specific case issue areas. The largest disparity occurs in criminal cases, where the conservative justices were quite unlikely to overturn a criminal statute (activism rates ranging from 10-18.8%), and the liberal judges were much more likely to overturn these laws (activism rates ranging from 30-66.7%). For cases involving federalism issues, the liberal and conservative judges present a mirror image of each other, as the liberal justices were less likely to overturn laws (activism rates ranging from 0-22.2%) and the conservative judges presenting a greater tendency to strike down federalism laws (activism rates ranging from 0-80%). There was also a marked disparity in activism rates in due process cases between the liberal and conservative justices.

The data in Figure 4.11 show that the rate of activism by justice for conservative statutes varies considerably according to the ideological leaning of the judge. Justice Marshall has the highest percentage rate of striking down conservative laws (71.4%), although that rate is based on just 12 cases. All of the liberal justices have activism rates for

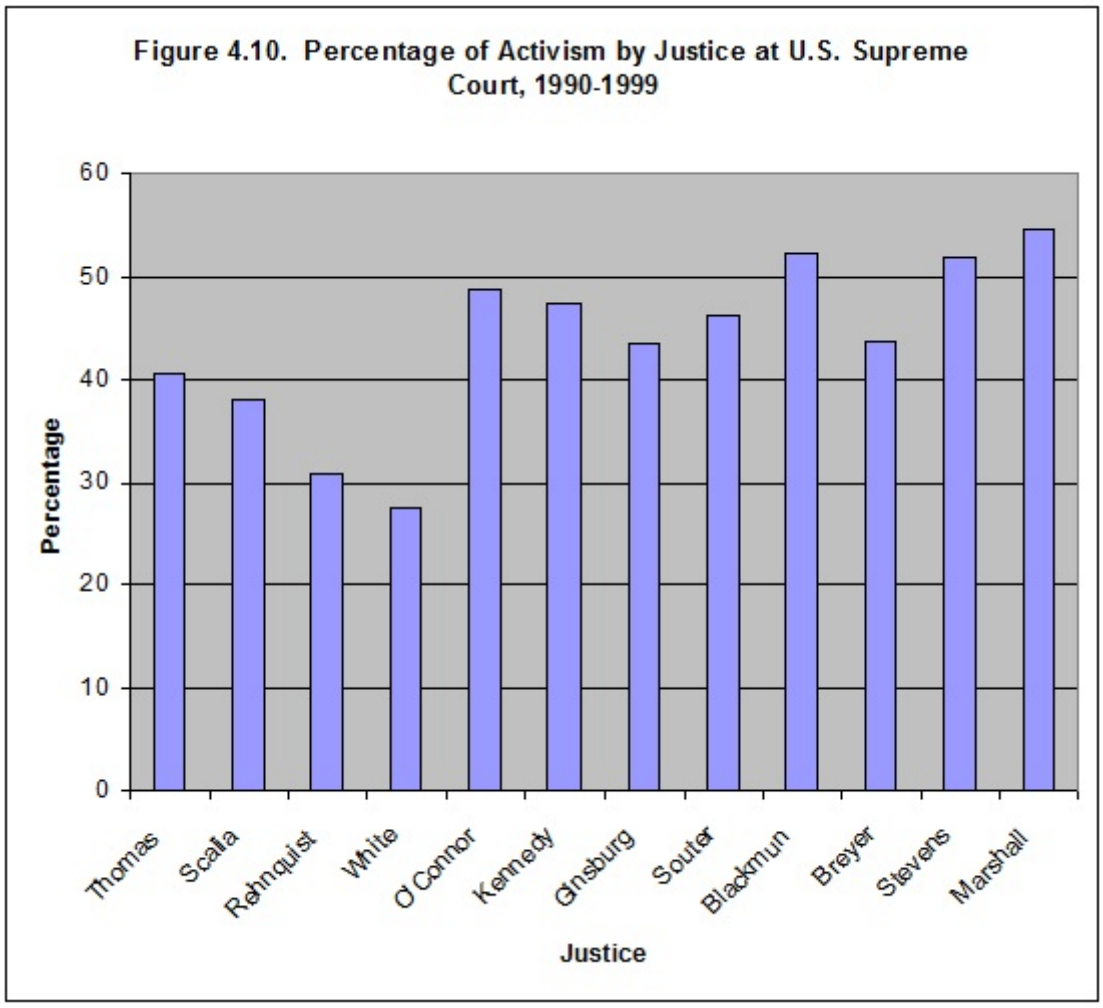


Figure 4.10. Percentage of Activism by Justice at U.S. Supreme Court, 1990-1999
60
50
40
30
20
10
0
Percentage
Thomas
Scalia
Rehnquist
White
O'Connor
Kennedy
Ginsburg
Souter
Blackmun
Breyer
Stevens
Marshall
Justice

Table 4.1

Rate of Activism by Judge for Selected Issue Areas, U.S. Supreme Court 1990-1999

Judge	Speech/Rel.	Criminal	Due Process	Federalism	Economic
Marshall	100% (3)	66.7% (2)	0% (0)	N/A	0% (0)
Stevens	63.4% (26)	52.6% (10)	46.2% (6)	20% (2)	66.7% (16)
Breyer	38.1% (8)	37.5% (3)	50% (5)	22.2% (2)	87.5% (7)
Blackmun	84.2% (16)	50% (5)	60% (3)	0% (0)	25% (4)
Souter	61.5% (24)	30% (6)	50% (7)	20% (2)	52.2% (12)
Ginsburg	54.2% (13)	40% (4)	40% (4)	22.2% (2)	57.1% (8)
Kennedy	58.5% (24)	15.8% (3)	28.6% (4)	80% (8)	50% (12)
O'Connor	53.8% (21)	15% (3)	53.8% (21)	70% (7)	62.5% (15)
White	43.8% (7)	10% (1)	25% (1)	0% (0)	20% (2)
Rehnquist	37.5% (15)	10% (2)	21.4% (3)	70% (7)	20.8% (5)
Scalia	45% (18)	10% (2)	21.4% (3)	70% (7)	50% (12)
Thomas	48.6% (17)	18.8% (3)	21.4% (3)	60% (6)	56.5% (13)

Number of cases where a law was invalidated in parentheses.

Table 4.1, Continued

Rate of Activism by Judge for Selected Issue Areas, U.S. Supreme Court 1990-1999

Justice	Privacy	Civil Rights
Marshall	N/A	100% (1)
Stevens	50% (4)	50% (11)
Breyer	42.9% (3)	43.8% (7)
Blackmun	100% (1)	50% (3)
Souter	50% (4)	45.5% (10)
Ginsburg	42.9% (3)	47.1% (8)
Kennedy	50% (4)	61.9% (13)
O'Connor	50% (4)	57.1% (12)
White	0% (0)	40% (2)
Rehnquist	25% (2)	40.9% (9)
Scalia	37.5% (3)	45% (9)
Thomas	37.5% (3)	38.9% (7)

Number of cases where a law was invalidated in parentheses.

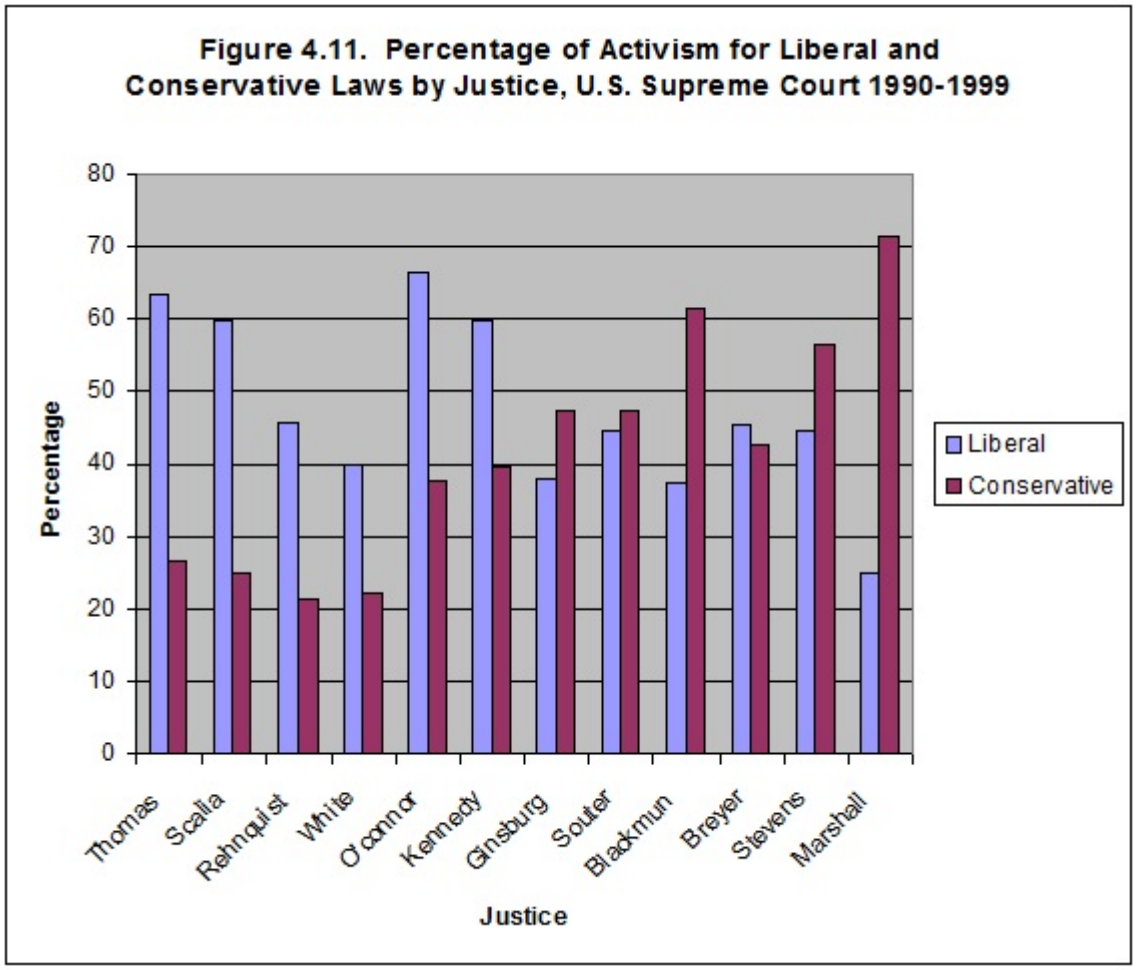


Figure 4.11. Percentage of Activism for Liberal and Conservative Laws by Justice, U.S. Supreme Court 1990-1999
Percentage
80
70
60
50
40
30
20
10
0
Thomas
Scalia
Rehnquist
White
O'connor
Kennedy
Ginsburg
Souter
Blackmun
Breyer
Stevens
Marshall
Justice
Liberal
Conservative

conservative federal and state laws above forty percent, while the conservative judges all have activism rates below forty percent.

Unsurprisingly, the two judges considered to be moderate conservatives–O'Connor and Kennedy–have the highest rates for nullifying conservative laws, while the four justices thought to be strongly conservative–White, Rehnquist, Scalia and Thomas–all have activism rates in the twenty-percent range for conservative laws. These descriptive data show a marked reluctance for the most ideologically conservative justices to strike down conservative laws.

Examining the activism rates for liberal laws shows that the disparity between the liberal and conservative judges is not as great as it is for conservative statutes. Intriguingly, the highest percentage for striking down liberal laws in the 1990s belongs to Justice O'Connor, one of moderate conservatives. Justices White and Rehnquist have activism rates in the forty percent range, which is comparable to the percentage rate for several of the liberal judges. While the general pattern of ideological voting remains for liberal statutes, there appears to be more variance among the justices. Overall, the descriptive analyses have shown that there appears to be distinct patterns of attitudinal voting among the U.S. Supreme Court justices, depending on whether the challenged law is ideologically liberal or conservative. Below, the means for invalidation of incongruent statutes in each country will be compared, allowing for Hypothesis Two to be tested.

Judicial Activism at the Individual Judge Level at the Supreme Court of Canada

In this section, judicial activism at the high court of Canada is analyzed at the judge

level. Figure 4.12 presents the percentage of activism by individual judge at the Supreme Court of Canada. The justices are arrayed from most conservative to most liberal, with the most conservative on the far left and the most liberal on the far right. The data show that the judges with the highest activism percentage are Wilson (48.65%), Binnie (42.11%), and Lamer (41.01%), while the justices with the lowest percentage are Gonthier (26.85%), Bastarache (28.57%), and Dickson (30.77%). What is interesting about this analysis is that the disparity in activism rates between liberal and conservative judges is not as large as in the American case. If the outliers of Gonthier and Wilson are removed, the range is less than fourteen percent. So, while the Canadian liberal judges do have a slightly higher rate of activism than the conservative justices, the difference is not large.

Table 4.2 shows the differences in activism rates between the liberal and conservative judges in Canada for specific case issue areas.[30] What is striking about these data is that there are only two issue areas–criminal procedure and speech and religion--where the liberal and conservative judges differ significantly in activism percentage rates. In criminal cases, the three strongest conservative judges (Major, L'Heureux-Dube, Gonthier) all had activism rates below twenty percent, while the liberal justices (with the exception of Bastarache, who did not vote to nullify a criminal law in all six criminal cases he heard) all had a much greater willingness to strike down criminal statutes. In speech and religion cases, the liberal judges

[30] In this table, privacy is not included because the Canadian high court only heard two privacy cases, and each judge sitting on those cases struck down the statutes.

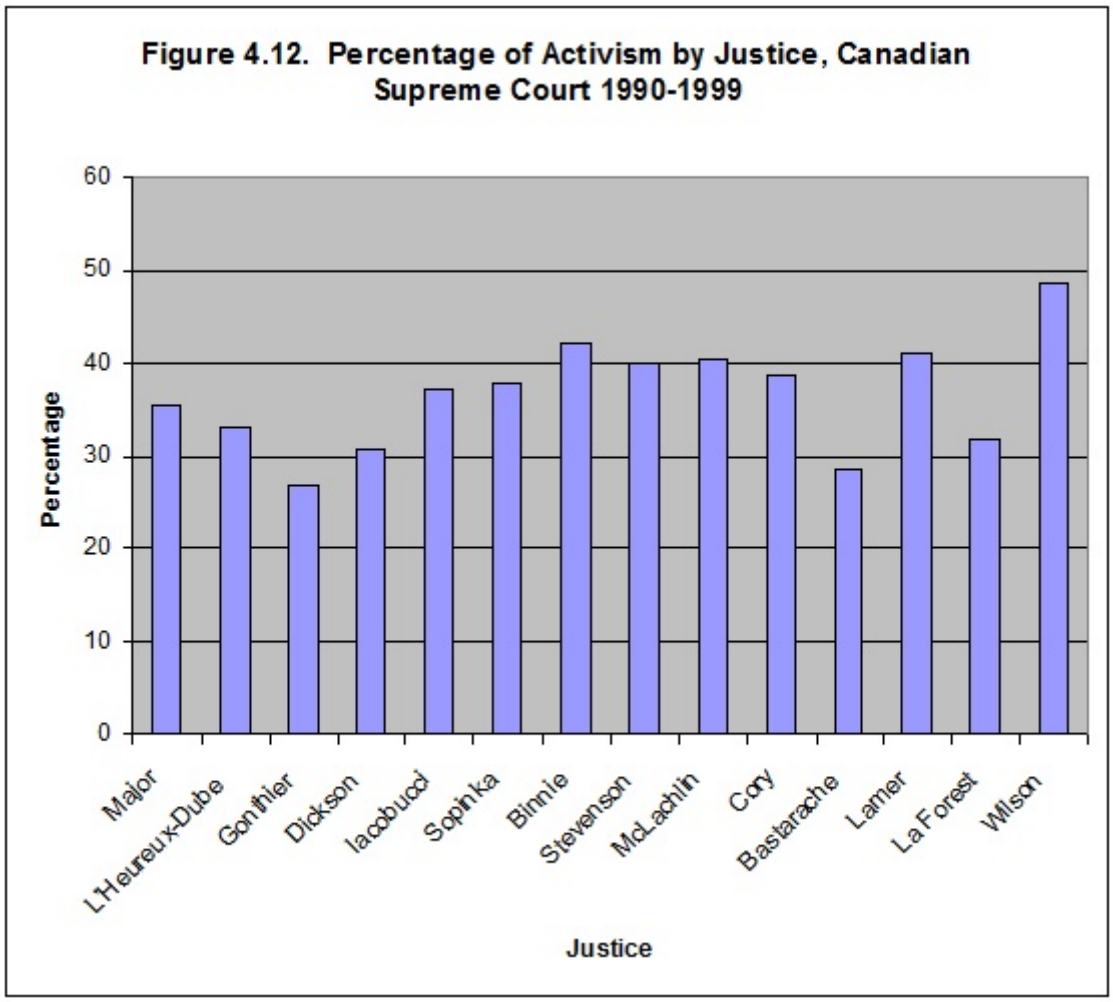


Figure 4.12. Percentage of Activism by Justice, Canadian Supreme Court 1990-1999
Percentage
60
50
40
30
20
10
0
Major
L'Heureux-Dube
Gonthier
Dickson
Iacobucci
Sopinka
Binnie
Stevenson
McLachlin
Cory
Bastarache
Lamer
La Forest
Wilson
Justice

Table 4.2

Rate of Activism by Judge for Selected Issue Areas, Supreme Court of Canada 1990-1999

Judge	Speech/Rel.	Criminal	Due Process	Economic	Civil Rights
Wilson	55.56% (5)	45% (9)	N/A	0% (0)	66.67% (4)
La Forest	40.91% (9)	25% (11)	18.18% (2)	20% (2)	46.15% (12)
Lamer	41.18% (7)	33.33% (17)	25% (3)	36.36% (4)	66.67% (20)
Bastarache	66.67% (2)	0% (0)	0% (0)	50% (1)	60% (3)
Cory	42.86% (9)	26.09% (12)	20% (2)	18.18% (2)	66.67% (24)
McLachlin	61.90% (13)	25% (11)	15.38% (2)	40% (4)	60.00% (18)
Stevenson	0% (0)	62.50% (5)	100% (2)	0% (0)	33.33% (1)
Binnie	0% (0)	20% (1)	0% (0)	50% (1)	83.33% (5)
Sopinka	45.45% (10)	39.13% (18)	18.18% (2)	30% (3)	44% (11)
Iacobucci	37.50% (6)	26.67% (8)	16.67% (2)	37.5% (3)	65.38% (17)
Dickson	28.57% (2)	33.33% (4)	N/A	0% (0)	33.33% (2)
Gonthier	30.43% (7)	19.15% (9)	15.38% (2)	20% (2)	42.90% (15)
L'Heureux	36% (9)	13.73% (7)	0% (0)	9.09% (1)	72.22% (26)
Major	41.67% (5)	17.65 (3)	0% (0)	57.14% (4)	54.55% (12)

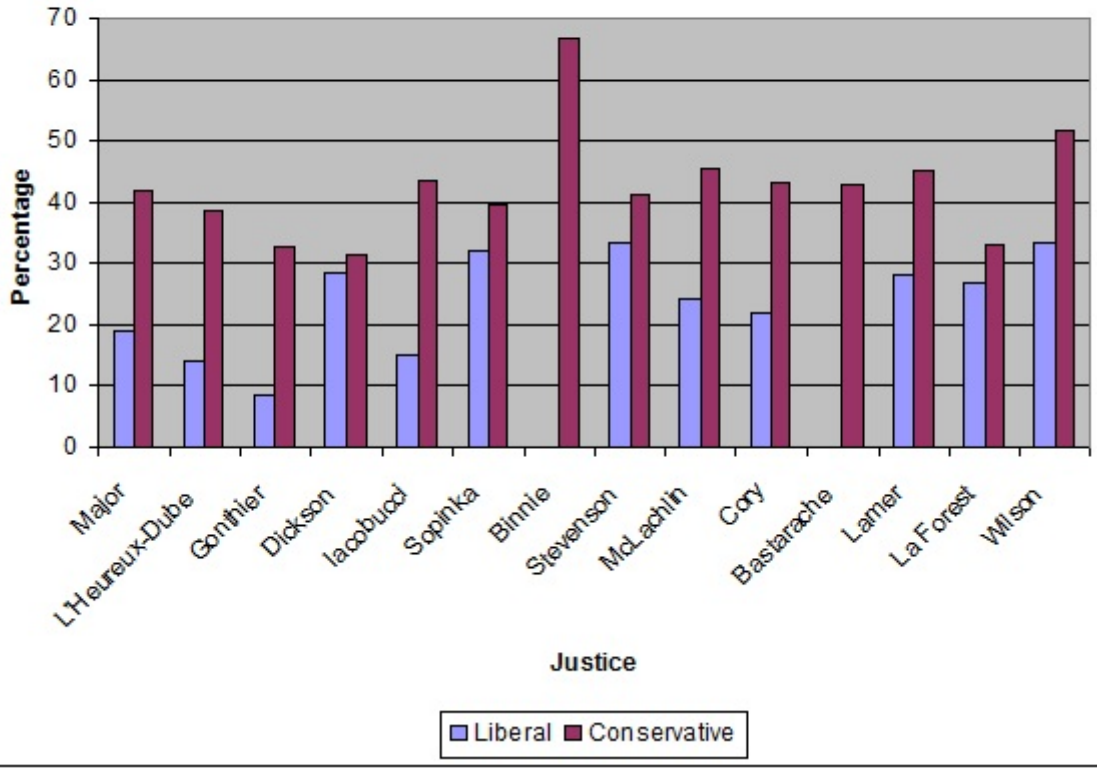
Number of cases where a law was invalidated in parentheses.

were generally more likely to invalidate these statutes than were the conservative justices.[31] Although these two issue areas displayed some differences in voting between the liberal and conservative judges, in general the data did not show the marked distinctions that were evident in the American case. This tendency is even more apparent in Figure 4.13.

Figure 4.13 presents the percentage activism rates for each judge according to the direction of the statute. The results support the judicial politicization theory, which posits that in a less politicized high court, such as Canada, judges will be less likely to vote attitudinally. Recall that in Figure 4.11, the voting pattern for the justices of the U.S. Supreme Court showed a very strong tendency towards ideological voting: the liberal justices were much more likely to strike down conservative laws, while the conservative judges were more likely to invalidate liberal statutes. At the Canadian Supreme Court, no such pattern can be seen. Indeed, the data show that the most conservative justices–Major, L'Heureux-Dube, and Gonthier–were the *least* likely to strike down liberal laws (with the exception of Justice Binnie, who joined the Court in 1998 and did not strike down a liberal law in his first two years). The only tendency towards attitudinal voting is seen in the activism rate for Major, L'Heureux-Dube, Gonthier, and Dickson, who have the lowest invalidation rates for conservative laws along with Justice La Forest. However, this pattern is not very strong, as the variation is not high for the activism rate for conservative statutes (again excepting judge Binnie, who invalidated 66.67% of conservative laws in his first two

[31] Justices Stevenson and Binnie had an activism rate of 0% for speech and religion cases, but these judges only heard two and one speech/religion cases, respectively.

Figure 4.13. Percentage of Activism for Liberal and Conservative Statutes by Justice, Supreme Court of Canada 1990-1999



years on the Court).

Thus, from these data, it does not appear that attitudinal voting is strongly seen at the Supreme Court of Canada. However, these are descriptive data only. In the following chapter, inferential analyses will reveal that, when controlling for other variables, attitudinal voting is indeed significant at the Canadian high court, contrary to prediction of the judicial politicization theory.

Judicial Activism at the Individual Judge Level at the High Court of Australia

Here, judicial activism at the judge level at the High Court of Australia is examined. Figure 4.14 shows the percentage of activism for each judge at the Australian high court. The judges are arrayed according to ideology, with the most conservative justices on the left and the most liberal on the right. Although the voting blocs are not absolute, the most consistently liberal judges are Gaudron, Toohey and Kirby, while the most conservative judges are Callinan, Hayne, and Dawson. The data in Figure 4.14 reveal that two judges on the liberal bloc on the Court–Gaudron and Kirby–have a higher activism rate, while two of the conservatives–Dawson and Callinan–have a lower activism percentage rate than the remainder of the Court. Indeed, the highest activism rate is held by Kirby (52.17%) while the lowest is held by Dawson (28.89%). So, there is some variance in the activism rate between the liberal and conservative judges, but that variance is not large or consistent across judges.

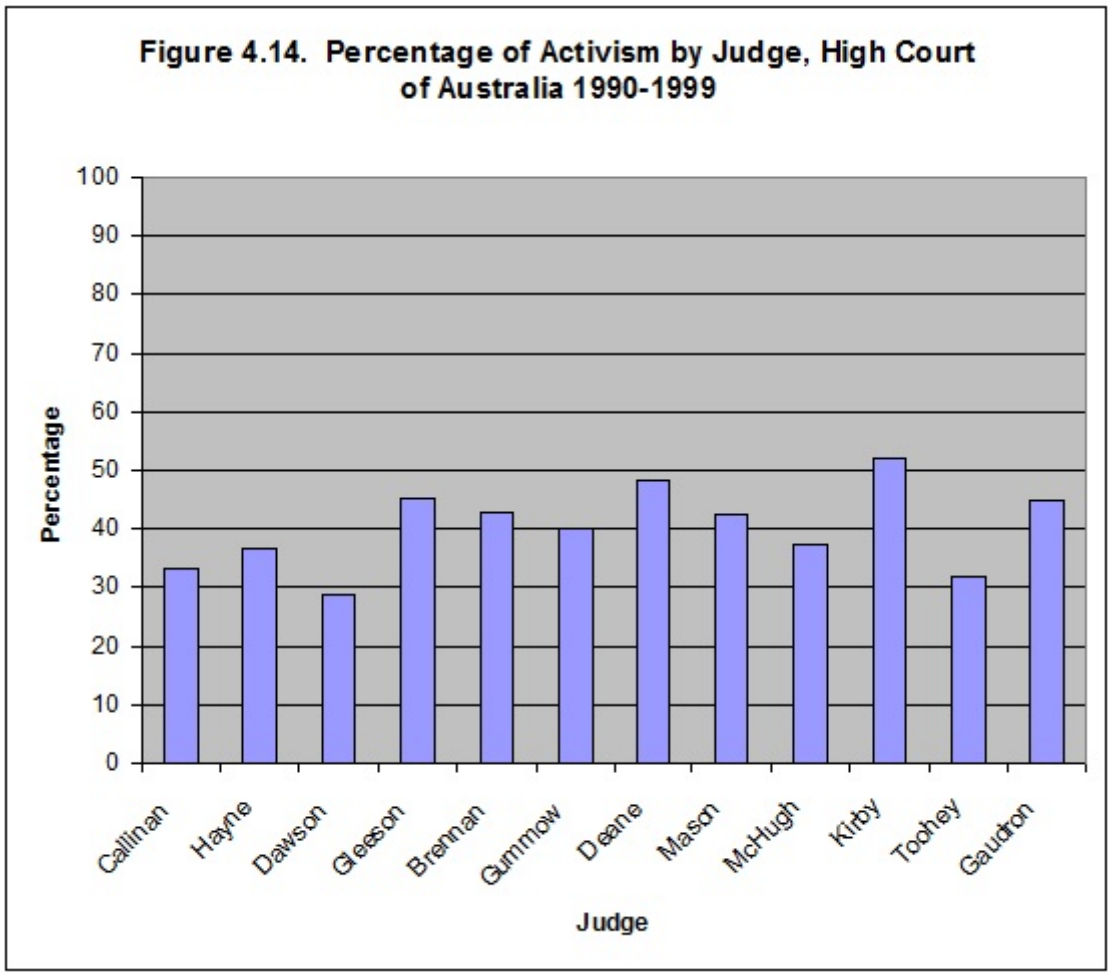


Figure 4.14. Percentage of Activism by Judge, High Court of Australia 1990-1999
Percentage
100
90
80
70
60
50
40
30
20
10
0
Callinan
Hayne
Dawson
Gleeson
Brennan
Gummow
Deane
Mason
McHugh
Kirby
Toohey
Gaudron
Judge

Table 4.3

Rate of Activism by Judge for Selected Issue Areas, High Court of Australia 1990-1999

Judge	Speech/Rel.	Criminal	Due Process	Federalism	Economic
Gaudron	50% (3)	40% (2)	50% (3)	54.55% (6)	40% (4)
Toohey	33.33% (2)	33.33% (2)	33.33% (1)	40% (2)	22.22% (2)
Kirby	0% (0)	100% (1)	20% (1)	85.71% (6)	50% (1)
McHugh	33.33% (2)	50% (2)	16.67% (1)	45.45% (5)	30% (3)
Mason	100% (3)	16.67% (1)	0% (0)	50% (1)	44.44% (4)
Deane	100% (3)	50% (2)	100% (1)	50% (1)	33.33% (3)
Gummow	0% (0)	0% (0)	40% (2)	50% (4)	33.33% (1)
Brennan	33.33% (2)	33.33% (2)	0% (0)	60% (3)	50% (5)
Gleeson	N/A	N/A	0% (0)	60% (3)	0% (0)
Dawson	33.33% (2)	20% (1)	0% (0)	40% (2)	22.22% (2)
Hayne	N/A	0% (0)	33.33% (1)	60% (3)	50% (1)
Callinan	N/A	N/A	33.33% (1)	33.33% (2)	N/A

Number of cases where a law was invalidated in parentheses.

Table 4.3, Continued

Rate of Activism by Judge for Selected Issue Areas, High Court of Australia 1990-1999

Justice	Civil Rights
Gaudron	62.50% (5)
Toohey	50% (3)
Kirby	100% (2)
McHugh	25% (2)
Mason	33.33% (1)
Deane	66.67% (2)
Gummow	40% (2)
Brennan	42.86% (3)
Gleeson	100% (1)
Dawson	50% (3)
Hayne	25% (1)
Callinan	0% (0)

Number of cases where a law was invalidated in parentheses.

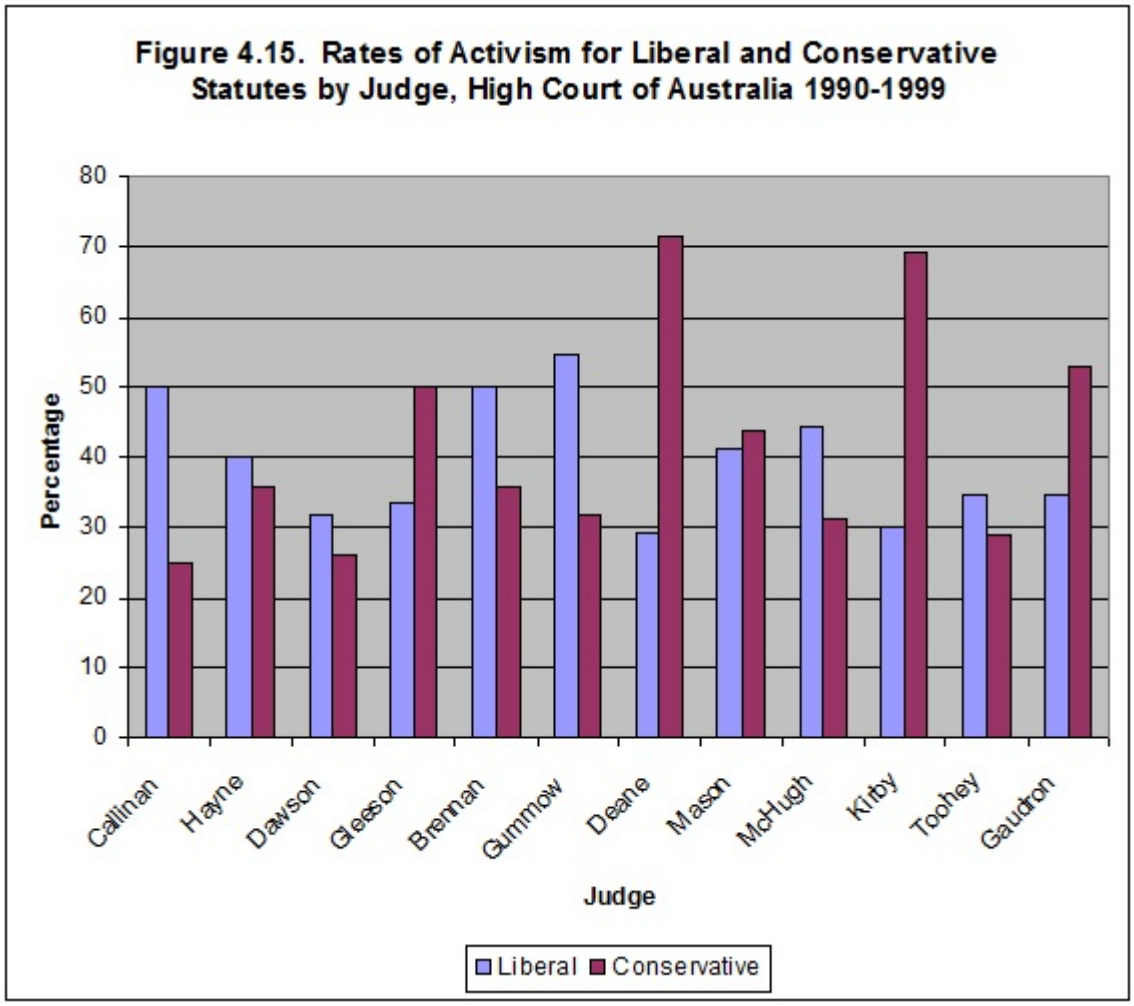


Figure 4.15. Rates of Activism for Liberal and Conservative Statutes by Judge, High Court of Australia 1990-1999
Percentage
80
70
60
50
40
30
20
10
0
Callinan
Hayne
Dawson
Gleeson
Brennan
Gummow
Deane
Mason
McHugh
Kirby
Toohey
Gaudron
Judge
Liberal
Conservative

Table 4.3 presents the activism percentage rates for the Australian judges across case issue areas.[32] Hayne and Callinan did not join the Court until 1997 and 1998, respectively, and so did not participate in a large number of cases, which makes comparison of the liberal and conservative blocs difficult. However, examining the activism rates for federalism and civil rights cases (two areas where there are a sufficient number of cases to make a valid comparison) shows that there is not a significant difference in voting behavior between liberal and conservative justices. Again, the judicial politicization thesis posits that significant ideological voting behavior should be less apparent at the Australian high court, and so this descriptive data supports the theory.

Figure 4.15 shows the activism rates for each judge according to the direction of the law. The charts reveals that the most conservative judges, Callinan, Hayne, and Dawson, did have a slightly greater tendency to invalidate liberal rather than conservative laws. Of the most liberal judges, Kirby had a far greater likelihood of striking down conservative laws: 69.23% for conservative laws compared to 30% for liberal statutes. Gaudron also had a somewhat greater tendency to nullify conservative laws: 52.94% for conservative and 34.62% for liberal laws. However, Justice Toohey was slightly more likely to invalidate liberal rather than conservative laws–a pattern that indicates nonideological voting behavior. Overall, the data in Figure 4.15 do not reveal highly ideological voting based on statutory direction. Again, this comports with the prediction of the judicial politicization theory;

[32] The privacy category is not included because of the low number of cases in this area.

however, further analysis using inferential statistics will allow greater confidence in the conclusion that attitudinal voting is not significant at the High Court of Australia.

Examining Ideological Voting and Judicial Activism in Comparative Perspective

Having examined the aggregate judicial activism rates, trends in activism, and rate of activism for each judge by issue area in each country, it is now possible to begin to test Hypothesis Two, which states:

> H_2: *Judges on a highly politicized high court will be more likely to strike down ideologically incongruent laws. Thus, conservative judges on the U.S. Supreme Court will be more likely to invalidate liberal laws while liberal judges will be more likely to nullify conservative laws.*

If this hypothesis is correct, then there should be a highly significant difference in the means for invalidating incongruent laws in the United States, but not in Australia or Canada. Put another way, if this hypothesis is correct, the mean for striking down liberal laws should be significantly higher for the conservative judges at the U.S. Supreme Court than for the liberals, but the same effect should not be as evident at the Canadian or Australian high courts. Conversely, the mean for invalidating conservative laws should be significantly higher for liberal rather than conservative justices at the U.S. Supreme Court, but this tendency should not be as apparent in a nonpoliticized court such as the high court of Canada or Australia. The results of these analyses are shown in Tables 4.4 and 4.5.

Table 4.4 aggregates the liberal and conservative judges at each high court and

averages the rate of nullifying a liberal statute.[33] The results in Table 4.4 indicate that, as predicted, conservative judges at the U.S. Supreme Court are far more likely than the liberal justices to strike down a liberal statute. Indeed, the mean for invalidating a liberal law for the conservative magistrates is 55.84%, compared to 39.22% for the liberal judges, for a difference of 16.62%.. A two-sample t-test reveals that this difference in means is highly significant. Thus, at the U.S. Supreme Court, the conservative judges are far more likely to strike down a liberal law than the liberal justices, as predicted by the judicial politicization thesis.

The results for Canada and Australia present a different picture, though. At the Canadian Supreme Court, not only was the difference in means not significant, the liberal judges were actually *more* likely to strike down liberal laws than the conservative judges. This provides suggestive evidence that ideological voting at the Canadian Supreme Court is restrained. In Australia, the conservative justices were more likely to nullify a liberal law than the liberal judges, and the difference in means (7.54%) was moderately significant.

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[33] It should be noted that the grouping of liberal and conservative judges in each country is based on voting records, and not attitudinal scores. The reason for this is that the Segal & Cover (1989) attitudinal scores and equivalent scores for Canada and Australia are derived from newspaper commentary at the time of the judge's appointment to the high court. Thus, these attitudinal scores measure the perceived ideology of the judge at the time of his or her appointment. However, it is clear that these scores are not exact and that high court judges may shift in their ideology over time. For example, in the American case, Justice Stevens was appointed by a Republican president and has an attitudinal score placing him among the most conservative judges on the Court. But, as any observer of the U.S. Supreme Court know, Stevens is actually one of the most (if not the most) liberal members of the Court. Thus, the decision was made to group the judges in Tables 4.4 and 4.5 by voting record, not attitudinal scores. This allows for a more accurate analysis to be conducted. However, voting record is not used in the inferential statistical analyses found in Chapter Five, because this would be a tautology: using votes to predict votes. Thus, the exogenous attitudinal scores are used in the analyses in the following chapter.

Thus, when analyzing the invalidation of liberal laws in the United States, Canada, and Australia, the data support the judicial politicization theory, in that there is a far stronger tendency for judges in a highly politicized court (such as the U.S.) to strike down ideologically incongruent laws.

Similar results appear when examining statutes that are conservative in direction. Table 4.5 shows that, at the U.S. Supreme Court, the liberal judges are far more likely to invalidate conservative statutes than the conservative justices. The mean for invalidating conservative laws is 54.46% for the liberal justices and 28.73% for the conservatives, a difference of -25.73%, which is again highly significant at 99% confidence interval. In Canada, the liberal judges are in fact more likely to strike down conservative laws than are the conservative justices, but the difference of -7.22% is only moderately significant at a 95% confidence interval. The same result occurs in Australia, where the liberal judges are more likely to nullify a conservative law than are the conservative justices; the difference in means of -15.56% is moderately significant only at a 90% confidence interval.

After examining the activism rates for individual judges by statute direction and also the aggregated means found in Tables 4.4 and 4.5, it is now possible to confirm Hypothesis Two. Judges at the U.S. Supreme Court are far more likely to strike down ideologically incongruent laws than are high court judges from Australia or Canada. Although attitudinal voting is present in the less politicized high court of Canada, the analysis shows that it is much less significant.

Table 4.4

Comparison of Liberal and Conservative Judges' Means for Invalidating Liberal Laws: United States, Canada, Australia 1990-1999

	Means-Conservative Judges	Means-Liberal Judges	Difference
U.S.	55.84	39.22	16.62***
	(4.32)	(3.18)	(5.37)
Canada	17.24	22.13	-4.89
	(5.88)	(3.59)	(6.89)
Australia	43.28	35.74	7.54*
	(3.91)	(2.45)	(4.61)

Standard errors in parentheses.
Two-sample t-test without equal variances performed.
*** p<0.01, ** p<0.05, * p<0.1

Conservative judges:
U.S.: White, Rehnquist, O'Connor, Scalia, Kennedy, Thomas
Canada: LaForest, Major, Gonthier, Sopinka, Bastarache
Australia: Callinan, Hayne, Dawson, Gleeson, Gummow, Brennan

Liberal judges:
U.S.: Marshall, Blackmun, Stevens, Souter, Breyer, Ginsburg
Canada: L'Heureux-Dube, Wilson, Cory, Dickson, Lamer, McLachlin, Stevenson, Iacobucci, Binnie
Australia: Mason, Deane, McHugh, Kirby, Toohey, Gaudron

Table 4.5

Comparison of Liberal and Conservative Judges' Means for Invalidating Conservative Laws: United States, Canada, Australia 1990-1999

	Means-Conservative Judges	Means-Liberal Judges	Difference
U.S.	28.73	54.46	-25.73***
	(3.25)	(4.41)	(5.48)
Canada	37.97	45.19	-7.22**
	(2.15)	(3.24)	(3.89)
Australia	34.06	49.63	-15.56*
	(3.71)	(7.44)	

Standard errors in parentheses.
Two-sample t-test without equal variances performed.
*** p<0.01, ** p<0.05, * p<0.1

Conservative judges:
U.S.: White, Rehnquist, O'Connor, Scalia, Kennedy, Thomas
Canada: LaForest, Major, Gonthier, Sopinka, Bastarache
Australia: Callinan, Hayne, Dawson, Gleeson, Gummow, Brennan

Liberal judges:
U.S.: Marshall, Blackmun, Stevens, Souter, Breyer, Ginsburg
Canada: L'Heureux-Dube, Wilson, Cory, Dickson, Lamer, McLachlin, Stevenson, Iacobucci, Binnie
Australia: Mason, Deane, McHugh, Kirby, Toohey, Gaudron

Conclusion

As noted above, the results from the analyses herein provided support for the judicial activism hypotheses: that judges at the U.S. Supreme Court are more likely to engage in judicial activism than are judges at the high courts of Canada or Australia, and also that American supreme court justices are more likely to nullify ideologically incongruent statutes. The confirmation of these hypotheses provides a first step towards assessing the totality of the judicial politicization theory.

However, an interesting ancillary issue also merits a brief discussion. The question is whether certain subject matter issues will be more salient in different countries. Phrased another way, a reasonable prediction would be that the high courts of Canada and Australia would find the same case issues salient and would approach the adjudication of those issues in the same manner. Canada and Australia are both parliamentary democracies, affiliated with the United Kingdom, and modern industrial societies. Thus, it would appear likely that a "parliamentary judicial model" might appear, when comparing these countries' high court records. Yet, no such model appears to exist. The Canadian Supreme Court is more consistently activist than the High Court of Australia, and criminal and civil rights issues are the most salient at the Canadian court, while economic and taxation issues appear to be most prominent in Australia. Indeed, at least in the 1990s, the high courts of Canada and Australia may be moving in opposite directions: the Canadian court is establishing itself, after the adoption of the Charter of Rights and Freedoms, as a tribunal that is concerned with human rights issues, broadly defined, while the High Court of Australia is becoming a court more

concerned with economic and federalism issues. Of course, the Australian High Court issued several significant and highly controversial decisions regarding the rights of indigenous peoples in the mid-1990s (*Mabo v. Queensland*; *Wik Peoples v. Queensland*), but these decisions may have been unusual for the Court, and in any case, it appears that the High Court has moved away from this exceptional jurisprudence.

Overall, it is clear from Chapter Four that the United States Supreme Court is exceptional, in that it is far and away the most activist and ideologically-driven high court in this study. But, it remains to be seen if attitudinal or legal factors predominate in judicial decision-making at the high courts of Canada and Australia. In Chapter Six, this question will be addressed, as additional hypotheses testing the judicial politicization theory are proposed, and the data is tested using multivariate analyses. In the next chapter, judicial activism and issues of federalism are analyzed.

Chapter Five: Judicial Activism and Federalism in Comparative Perspective

In this chapter, judicial activism and federalism in Canada, Australia, and the United States is examined by analyzing the individual judges' votes to invalidate federal, state/province, and local laws. Each of the three countries in this study is organized as a federation, and significant questions have arisen in each nation regarding the proper role of the high court in determining the proper balance of national and state/province powers. In the United States, one interpretation of federalism, generally espoused by conservatives, holds that the national government should be limited in its powers, state governments should be allowed to legislate freely in their domains, and the Supreme Court should strike down congressional legislation that attempts to limit state authority (see generally Keck 2004; Scheiber 1992; Whittington 2001). Canadian commentators have raised similar concerns about federalism in Canada; for example, one author recently opined, "In other words, while under the Canadian federal system the primary jurisdiction in social policy-making rests with the provincial legislatures, federally-appointed judges have used the Charter as the basis for imposing their own social policy choices on the provinces" (Martin 2003, 73). In Australia, there has also been a call among political conservatives for the High Court to defer to the state legislatures (see, e.g., Craven 2005).

Given that the modern conception of conservative federalism has gained currency in

each of these nations, the analysis herein will seek to empirically determine if high court judges in the U.S., Canada and Australia defer to state/provincial legislatures in accordance with these ideals. The judicial politicization theory suggests that more highly politicized judges will be more likely to vote in judicial review cases according to their political philosophy. Thus, at the United States Supreme Court, we would expect to observe conservative judges voting in a restraintist manner when considering state laws, while liberal judges should exhibit less deference to state laws, and the converse when the Court considers national laws. However, in Canada and Australia, the theory would predict a much less pronounced dichotomy in regards to the nullification of national and state/province statutes. In other words, because Canadian and Australian justices are less likely to vote ideologically, there should be less of a tendency for the conservative judges to strike down national laws and uphold state/province laws, and less of a tendency for the liberal judges to nullify state and provincial statutes and uphold national laws. Stated formally,

> H_3. *Judges on a highly politicized high court will be more likely to vote in federalism cases according to ideological factors. Thus, conservative judges on the U.S. Supreme Court will be more likely to invalidate federal laws while liberal judges will be more likely to nullify state laws. Because judges at the high courts of Canada and Australia are less likely to vote according to attitudinal factors, conservative judges will not tend to vote to strike down federal laws and liberal judges will not tend to vote to invalidate state/province laws.*

Activism and Federalism at the United States Supreme Court

In this section, the votes of the judges at the U.S. Supreme Court are analyzed to determine if ideology is determinative in regards to federalism issues. First, descriptive data

showing the activism rate for each judge for state/local and federal laws are presented in Table 5.1. The judges are arrayed from most liberal at the top to the most conservative at the bottom of the table; the Martin and Quinn (2002) voting record scores are used to rank the justices by ideology in this table. The data in Table 5.1 show that, generally, the liberal judges are more likely to be deferential to federal laws but more likely to strike state and local laws, while the conservative judges are more deferential to state/local laws and more likely to strike national laws. The highest percentage activism rate for cases involving a federal law is held by Justice Thomas (44.2%), while the highest activism rate for state/local cases is held by Justice Marshall (75%). Interestingly, Justice Breyer, who is considered to be one of the more liberal members of the Court, had an activism rate for federal laws above the Court mean and an activism rate for state/local laws slightly below the Court mean.

Figure 5.1 displays these data and incorporates the Segal and Cover judicial ideology scores.[34] The data show that, as predicted, the more conservative the judge, the more likely he or she will vote to strike national laws and the less likely that he or she will vote to strike state and local laws. Conversely, the more liberal the judge, the greater the tendency to vote to nullify state laws and vote to uphold federal laws. These findings comport with the conclusions made by Solberg and Lindquist (2006), who found an even stronger relationship

[34] Obviously, Justice Marshall's results in this chapter should be viewed with caution, given that he only decided three cases involving a congressional statute and eight cases involving a state or local law. Removing Marshall from Figure 5.1 shows that the predicted relationships are still present, although the slope of the lines are less steep. A bivariate regression excluding Marshall for federal cases shows that ideology is still highly significant ($p < .000$); the regression for state/local cases excluding Marshall shows that ideology is highly significant as well ($p < .000$).

Table 5.1

Percentage of Activism for Federal and State/Local Laws by Judge, U.S. Supreme Court 1990-1999

Judge	Federal	State/Local
Marshall	0% (0-3)	75% (6-8)
Stevens	22.7% (10-44)	64.4% (67-104)
Breyer	40.6% (13-32)	45.5% (25-55)
Blackmun	7.7% (1-13)	64% (32-50)
Souter	33.3 % (15-45)	51.9% (54-104)
Ginsburg	35.3% (12-34)	47.7% (31-65)
Kennedy	40% (18-45)	50.5% (53-105)
O'Connor	42.2% (19-45)	51.4% (54-105)
White	0% (0-11)	35% (14-40)
Rehnquist	40% (18-45)	26.7% (28-105)
Scalia	42.2% (19-45)	36.2% (38-105)
Thomas	44.2% (19-43)	39.1% (36-92)
Court mean	35.6% (144-405)	46.7% (438-938)

First number in parentheses is number of votes to strike, second number is total number of judicial review cases.

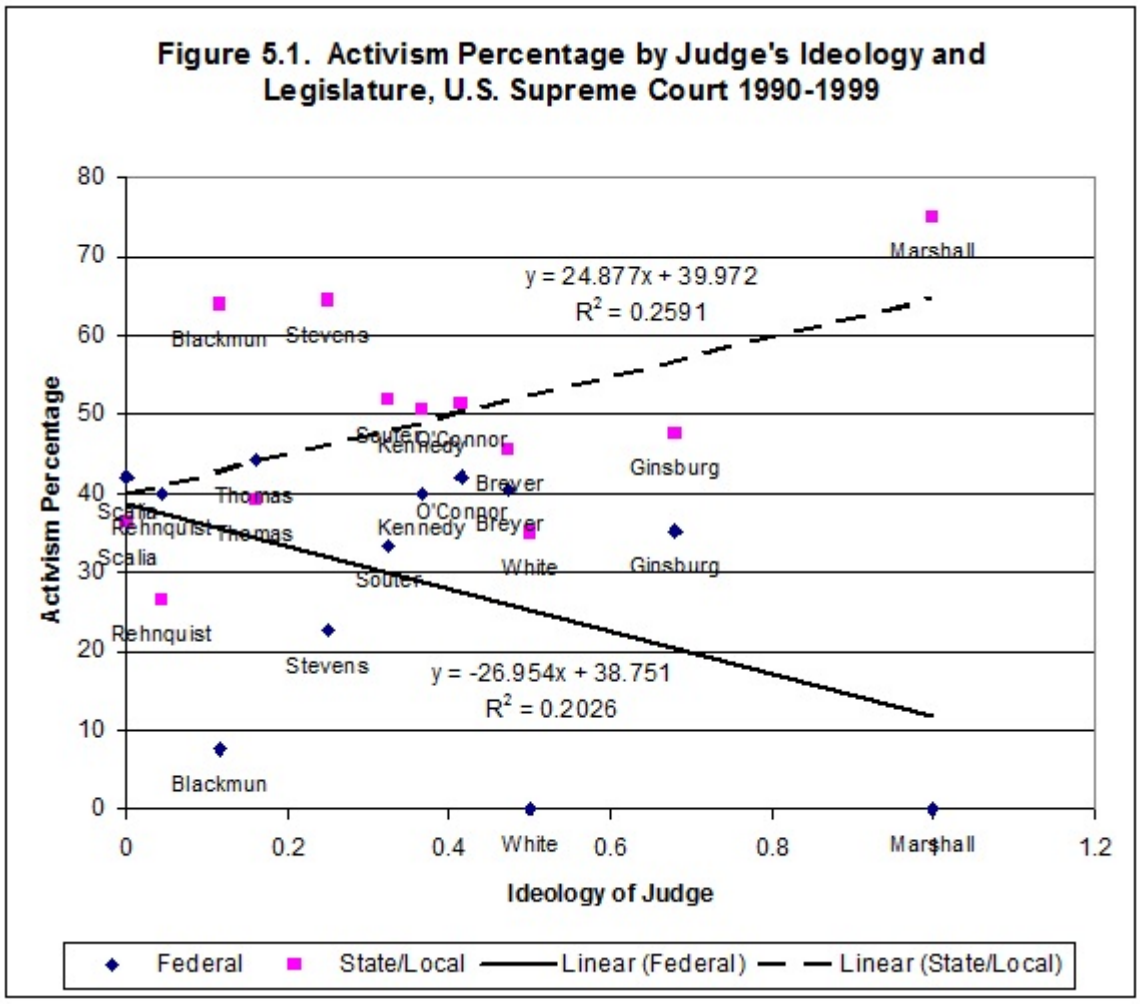
Figure 5.1. Activism Percentage by Judge's Ideology and Legislature, U.S. Supreme Court 1990-1999
Activism Percentage
Ideology of Judge
y = 24.877x + 39.972
R2 = 0.2591
y = -26.954x + 38.751
R2 = 0.2026
Marshall
Blackmun
Stevens
Souter
O'Connor
Kennedy
Ginsburg
Breyer
Thomas
Scalia
Rehnquist
White
Federal
State/Local
Linear (Federal)
Linear (State/Local)

between judicial attitudes and voting in federalism cases in the period 1986-2000. This difference is most likely due to the fact that Solberg and Lindquist use the Martin and Quinn (2002) scores to represent the judges' ideology, while this study uses the Segal and Cover (1989) rankings.[35] Because the Martin and Quinn scores are derived from the justices' votes, they are certainly a better indicator of the current ideology of the individual judges and thus likely explain the stronger relationship found in the Solberg and Lindquist (2006) study.

The data in Figure 5.1 show a moderately strong relationship between the rate of activism and the ideology of the judge, with the ideological variable accounting for 25.91% of the variance in state/local cases and 20.26% in federal law cases. Of course, these are simple bivariate regressions that do not incorporate other variables; in the full model found in Chapter Six, ideology is found to have an estimated effect size of 31% at the U.S. high court. However, it is clear that the data for American high court judges do support the judicial politicization theory in that ideology is found to significantly effect voting in judicial review cases based on the source of the law.

Activism and Federalism at the Supreme Court of Canada

In Canada, a very different picture emerges in regards to ideology and federalism in judicial review cases. Table 5.2 presents the activism rate for each judge for province/local and federal laws. The judges are arrayed in the table from most liberal at the top to the most

[35] As discussed in Chapter Two, the Martin and Quinn scores are not used in the models in this study due to endogeneity concerns.

conservative at the bottom. The data show that there is a very slight trend for liberal judges to have a greater likelihood to strike province and local laws; however, the results for province/local laws should be viewed with caution as Bastarache, Stevenson and Binnie all decided less than five province/local cases. The activism rates for federal laws reveal that, contrary to the pattern observed in the American case, liberal judges are somewhat more likely to vote to strike national statutes. Figure 5.2 presents these data and incorporates ideology scores to graphically present these relationships.

Figure 5.2 shows that there is a slight relationship between ideology and votes to strike national laws; however, this relationship is in the opposite direction of what would be expected in a highly politicized judiciary.[36] The trend line is relatively flat, and in the opposite direction than the American case. Thus, the data show that the likelihood of voting to invalidate a federal law actually increases with the degree of ideological liberalism, which is contrary to the expectations of a judiciary that is motivated by federalism concerns.

As for province and local laws, there is very little relationship between ideology and the tendency to vote to strike these statutes. The trend line for the bivariate regression reveals a fairly flat slope, and the r-square statistic indicates that only 1.75% of the variance is accounted for by ideology.

[36] The bivariate regression shows that ideology accounts for 12.32% of the variance.

Table 5.2

Percentage of Activism for Federal and Province/Local Laws by Judge, Supreme Court of Canada 1990-1999

Judge	Federal	Province/Local
Wilson	48.15% (13-27)	50% (5-10)
La Forest	32.22% (29-90)	30.23% (13-43)
Lamer	37.76% (37-98)	48.78% (20-41)
Bastarache	22.22% (4-18)	66.67% (2-3)
Cory	36.73% (36-98)	42.55% (20-47)
McLachlin	37% (37-100)	48.72% (19-39)
Stevenson	43.75% (7-16)	25% (1-4)
Binnie	33.33% (5-15)	75% (3-4)
Sopinka	40.22% (37-92)	32.5% (13-40)
Iacobucci	35.9% (28-78)	40% (14-35)
Dickson	26.32% (5-19)	42.86% (3-7)
Gonthier	22.55% (23-102)	36.17% (17-47)
L'Heureux-Dube	26.36% (29-110)	48.94% (23-47)
Major	32.65% (16-49)	40.74% (11-27)
Court mean	33.55% (306-912)	41.62% (164-394)

First number in parentheses is number of votes to strike, second number is total number of judicial review cases.

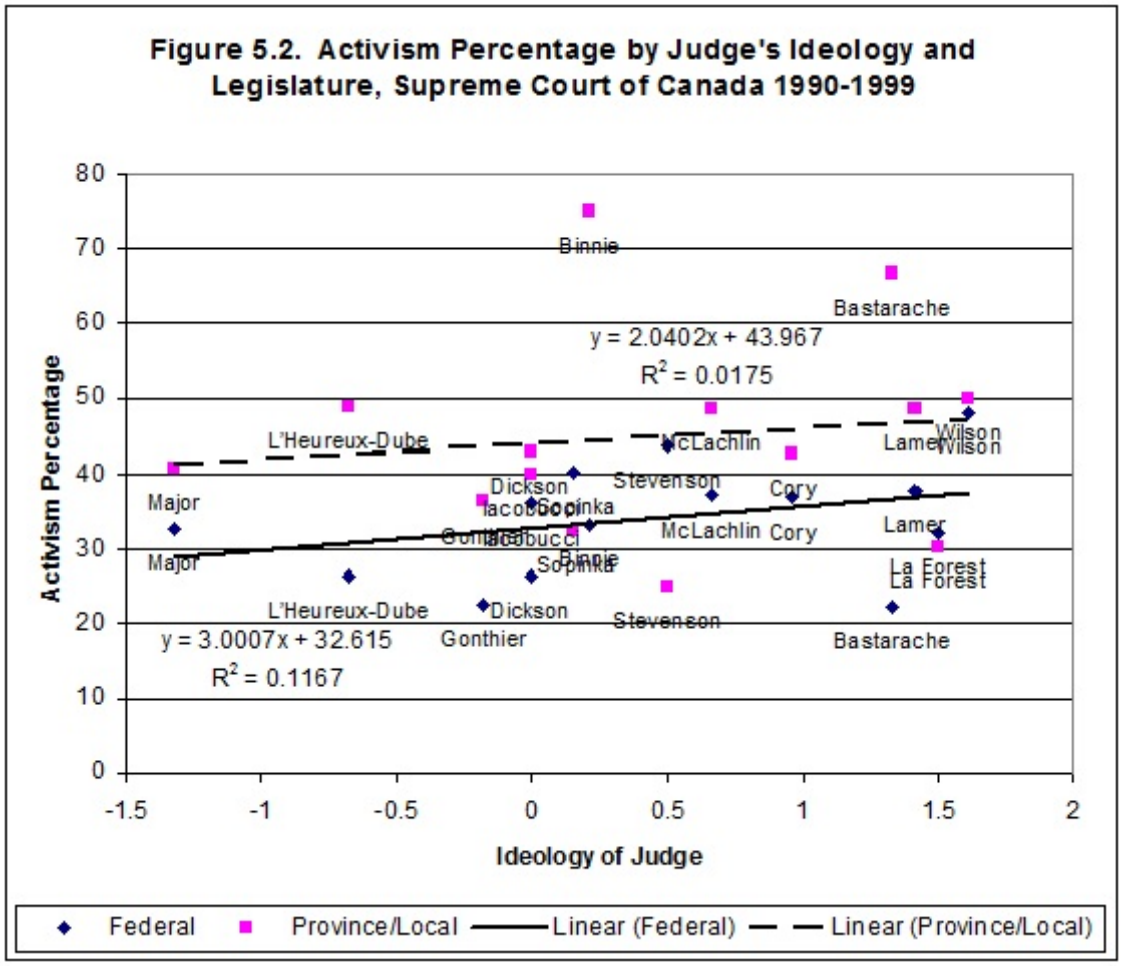
Figure 5.2. Activism Percentage by Judge's Ideology and Legislature, Supreme Court of Canada 1990-1999
Activism Percentage
Ideology of Judge
y = 2.0402x + 43.967
R2 = 0.0175
y = 3.0007x + 32.615
R2 = 0.1167
Binnie
Bastarache
L'Heureux-Dube
McLachlin
Lamer
Wilson
Major
Dickson
Stevenson
Cory
Sopinka
Gonthier
La Forest
Federal
Province/Local
Linear (Federal)
Linear (Province/Local)

In summary, the data for the Canadian Supreme Court in the 1990s show that ideology plays a small role in terms of federalism and judicial activism. This is consistent with the judicial politicization theory, which posits that less politicized high courts will be less likely to diverge in the nullification of state/province and national laws. Contrasting the steep trend line for state laws in the American case with the relatively flat line in the Canadian case demonstrates this. Furthermore, the invalidation of national laws in the Canadian high court does not appear to be strongly connected to judicial ideology as demonstrated by the fact that the trend line for these cases is in the opposite direction of the American analysis. Thus, the data provide support for the thesis that judicial attitudes play a smaller role in federalism cases at the Supreme Court of Canada.

Activism and Federalism at the High Court of Australia

The data for the High Court of Australia reveal a pattern similar to the Canadian Supreme Court. Table 5.3 presents the percentage of votes to strike for each judge during the 1990s for state/local and federal laws. Once again, the judges are arrayed in the table from most liberal at the top to most conservative at the bottom. Justices Gaudron and Callinan have the highest rates of activism for federal statutes, while Justices Kirby and Gleeson have the highest percentage activism rates for state laws.[37] Figure 5.3 incorporates attitudinal scores with federal and state activism rates.

[37] Because Justices Callinan and Gleeson were both appointed to the Court in 1998, they did not hear a large number of cases in the 1990s and so their results should accordingly be viewed with caution.

Figure 5.3 reveals that there is virtually no relationship between judicial ideology and activism for federal laws, and only a very small relationship between attitudes and judicial activism for state statutes in Australia. The trend line for federal laws possesses almost no slope, and judicial ideology accounts for only 0.33% of the variance among the voting patterns of the judges in these cases. For state and local statutes, there is a very modest relationship between ideology and activism, as the liberal judges are somewhat more likely to overturn these laws than are the conservative justices. However, judicial ideology explains just 3.16% of the variance in voting in state/local cases.

Thus, it does not appear that judges at the High Court of Australia are driven by ideological considerations when considering federalism issues. This result is consonant with the judicial politicization theory.

Table 5.3

Percentage of Activism for Federal and State /Local Laws by Judge, High Court of Australia 1990-1999

Judge	Federal	State/Local
Gaudron	50% (17-34)	38.46% (10-26)
Toohey	34.48% (10-29)	27.78% (5-18)
Kirby	36.36% (4-11)	66.67% (8-12)
McHugh	34.29% (12-35)	41.67% (10-24)
Mason	40.9% (9-22)	45.45% (5-11)
Deane	45.45% (10-22)	55.56% (5-9)
Gummow	42.86% (6-14)	37.5% (6-16)
Brennan	45.16% (14-31)	38.89% (7-18)
Gleeson	25% (1-4)	57.14% (4-7)
Dawson	37.04% (10-27)	16.67% (3-18)
Hayne	27.27% (3-11)	50% (4-8)
Callinan	50% (2-4)	25% (2-8)
Court mean	40.16% (98-244)	39.43% (69-175)

First number in parentheses is number of votes to strike, second number is total number of judicial review cases.

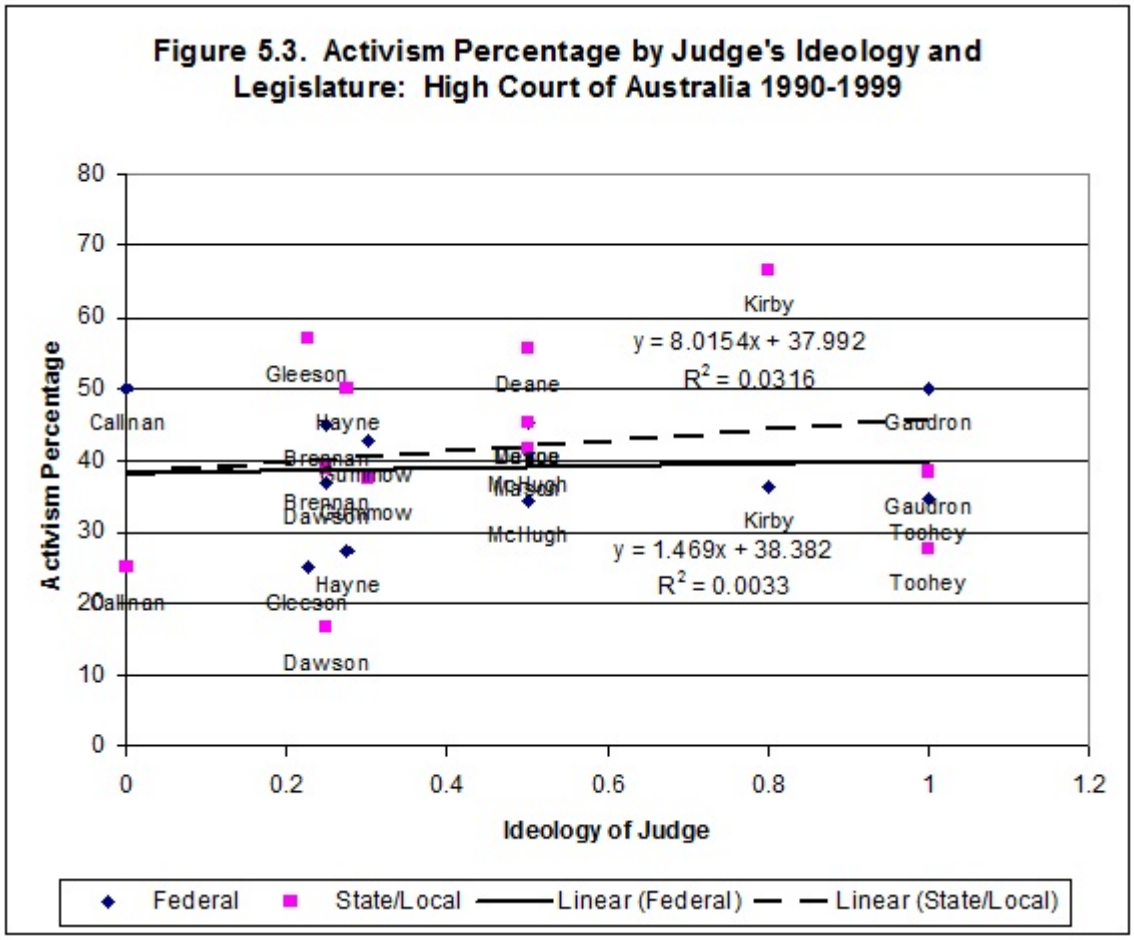
Figure 5.3. Activism Percentage by Judge's Ideology and Legislature: High Court of Australia 1990-1999
Activism Percentage
Ideology of Judge
y = 8.0154x + 37.992
R2 = 0.0316
y = 1.469x + 38.382
R2 = 0.0033
Kirby
Gleeson
Deane
Callinan
Hayne
Gaudron
Brennan
Dawson
McHugh
Toohey
Federal
State/Local
Linear (Federal)
Linear (State/Local)

Conclusion

The analysis of ideology and judicial activism suggests that ideological considerations play a far larger role at the United States Supreme Court than at the high courts of Canada and Australia. As predicted by the judicial politicization theory, the judges at the U.S. Supreme Court are much more likely to exhibit voting patterns that are consistent with their attitudes and ideology: conservative judges are more likely to strike down national laws and liberal justices are more likely to nullify state and local laws. The steep slopes and r-squared statistics in the scatterplot reveal the degree that ideological considerations play in judicial decision-making at the highly politicized Supreme Court. However, the judges at the far less politicized high courts of Canada and Australia do not exhibit the same ideological voting tendencies, as predicted by the theory propounded in this project. The scatterplots for the Canadian and Australian high courts present relatively flat slopes and r-squared statistics that are quite low. Indeed, the slope for invalidation of federal laws in Canada is in the opposite direction that would be expected by a conventional understanding of judicial politics. That is, the likelihood of invalidating national laws increases with judicial liberalism, which is the reverse of the pattern at the U.S. court. This suggests that non-ideological factors predominate at the supreme courts of Canada and Australia. Thus, Hypothesis Three can be confirmed.

So, these simple scatterplots and bivariate linear regressions have provided support for the main premise of the judicial politicization theory: that highly politicized high courts will be more likely to vote attitudinally. In the next chapter, a more sophisticated

multivariate logistic regression model will be introduced that will allow more finely detailed analysis of the influence of ideological and legal factors in judicial decision-making in the United States, Canada, and Australia.

Chapter Six: Judicial Decision-Making in Comparative Perspective

In Chapter Four, the judicial politicization theory was tested in regards to the likelihood of judicial activism in the high courts of the United States, Canada, and Australia. The theory predicts that a highly politicized high court, such as the U.S., will be less likely to defer to the political branches and instead have a greater tendency to strike down statutes and regulations. Conversely, a less politicized court–such as the high court of Canada or Australia–should be less likely to engage in judicial activism. Related to this, the theory posits that judges in highly politicized high courts are more likely to strike down ideologically incongruent laws. Both of these hypotheses were tested and confirmed.

In Chapter Five, the theory was tested as it applies to federalism issues: the rate of judicial activism was analyzed by disaggregating national and state/province laws and incorporating judicial attitudes into the analysis. The results indicated that, as predicted, the judges at the U.S. Supreme Court are much more likely to exhibit voting patterns that are consistent with their ideology: conservative judges are more likely to strike down national laws and liberal justices are more likely to nullify state and local laws. However, again as predicted, the justices at the less politicized high courts of Canada and Australia do not exhibit the same ideological voting tendencies in regards to federalism, as there was no significant difference between the rate of activism for national and state/province laws in these courts.

In this chapter, the central premise of the judicial politicization theory–that judicial attitudes tend to strongly influence judicial decision-making in politicized courts while legal factors are more likely to shape decision-making in non-politicized courts–is analyzed by the use of a multivariate logistic regression model. Again, judicial review cases are used to test the theory because of the inherent significance of these cases: the decision to overturn an act of the political branch is an important one, and one that can be assumed to be taken very seriously by the judges. The theory is tested by analyzing combined nonunanimous and unanimous cases, in contrast to most studies of judicial decision-making, which typically only examine nonunanimous cases. The decision was made to combine nonunanimous and unanimous cases so as to provide the most rigorous test of the theory. For comparison's sake, the results for solely nonunanimous cases are also presented.

However, this study will also examine judicial decision-making in each country by using unanimous cases exclusively (the "reduced database"). Examining the theory by using only unanimous cases will allow consideration of whether judges differ in their decision-making when no substantial controversy may exist in a case–that is, a unanimous decision. This facet of judicial behavior is seldom examined in the American case and virtually never in comparative context. Before the model is presented and the results are discussed, a brief overview of the theory is provided.

Review of the Judicial Politicization Theory

The primary element of the judicial politicization theory is the contention that judges

on a highly politicized high court in an established democracy are more likely to decide cases according to ideological/attitudinal factors, and will correspondingly be more likely to engage in judicial activism and strike down acts of the legislature. Conversely, judges on a high court that is less politicized will be more likely to decide cases based upon legal factors, and will be less likely to invalidate laws enacted by the political branch. In other words, the attitudinal model of judicial decision-making will predominate in politicized judiciaries, while the legal model will be more likely to prevail in less politicized courts.

As discussed in Chapter Two, the degree of judicial politicization in a high court is determined by the informal judicial selection culture, not the formal processes used for judicial appointments. The selection culture refers to whether the appointing executive typically relies upon ideological and partisan factors to choose judges, or whether other factors such as qualifications and merit are the most important criteria. Of the three high courts in this study, the most highly politicized is the U.S. Supreme Court, with an index score of .923, followed by Australia with a score of .714 and Canada with an index score of .529.

The analysis and quantification of judicial politicization is just the first part of the theory. The theory also posits that, in established democracies, judges on a highly politicized high court will be more likely to decide cases based on attitudinal/ideological factors, while legal factors should be more influential in less politicized courts. The theory also proposes that judges on a highly politicized supreme court will be more likely to strike down acts of the legislature. Related to this, the theory predicts that judges on a highly politicized high

court will be more likely to support laws that are ideologically congruent with their own political preferences and strike down laws that are not congruent with their own ideology. In other words, on a highly politicized court, conservative judges will be more likely to strike down liberal laws, and liberal judges will be more likely to strike down laws that are conservative in direction. On less politicized high courts, this tendency should be less evident. Finally, the judicial politicization theory posits that ideological voting should be more pronounced in politicized high courts when examining state/province and national laws. That is, on a highly politicized high court, conservative judges (consistent with their ideology) are more likely to strike down national laws and liberal justices are more likely to nullify state and local laws, while justices on less politicized supreme courts will be less likely to follow these patterns.

Overview of the Model

In this section, the full model incorporating attitudinal, legal, and control variables for voting in judicial activism cases in the 1990s in the high courts of the United States, Canada, and Australia is presented. As discussed in Chapter Two, a GEE logistic regression is used to estimate the model because the dependent variable–a judge's vote to strike down a law–is dichotomous. The judges' ideology is measured by using ideological scores derived from content analysis of newspaper editorials (existing values were used in the American and Canadian cases; newly derived scores for Australian judges are presented here for the first

time).[38] These individual judicial ideology scores are then adjusted (following Lindquist and Klein 2006) for statute direction so that higher positive values indicate agreement with the law, while higher negative values indicate that there is ideological inconsistency with the challenged statute.[39] Therefore, it is expected that this variable will have a negative coefficient, because the greater the degree of ideological disagreement with a statute, the greater the likelihood of a vote to strike. The size of the effect for this coefficient will indicate how strongly judicial ideology influences judicial decision-making.

The legal variables seek to measure whether individual judges are influenced by the jurisprudential factors of a lower court dissent, and the nullification of the challenged law by the immediate lower court. As discussed more fully in Chapter One, the legal variables seek to measure non-ideological factors that may influence a judge when considering the constitutionality of a statute. The presence of dissenting opinions in the lower court should signal to the judges that there are multiple interpretations of the constitutionality of a statute, or, alternatively, that there may be a problem with the majority opinion's legal reasoning.

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[38] As noted in Chapter Two, the ideology scores used in the model come from several different sources. The American values use the well-known Segal and Cover scores (Segal and Cover 1989; Epstein and Segal 2005). The Canadian scores are largely derived from Ostberg et. al (2004) but have been somewhat modified with regard to Justice L'Heureux-Dube. The Australian scores are the result of original content analysis and are the first attitudinal scores to date for these judges. All of the ideology scores are on a continuum from most conservative (scores closer to 0) to most liberal (scores closer to 1).

[39] As discussed in Chapter Two, the judicial attitude variable was constructed as follows. Liberal or conservative statute direction was coded as 1 for liberal laws and -1 for conservative laws. Then, the judges' ideology scores were transformed into a scale with positive and negative values. Then, the judge's score was multiplied by the statute direction. Thus, each judicial ideology score reflects the degree of agreement with the law (positive value) or disagreement (negative value). For example, in the American case, Justice Scalia (who is a strong conservative) has a rescaled score of -.501; thus, for a conservative law (-1), his value would be .501, indicating ideological congruity.

Therefore, in nonpoliticized high courts where legal factors are more influential, it would be expected that the presence of a lower court dissent would increase the likelihood of a vote for judicial activism.

The second legal variable deals with a lower court invalidation of the challenged law. Here, it is expected that, in nonpoliticized supreme courts, the fact of a lower court nullification should increase the likelihood of a judge to vote to strike down a law, because of the tendency to agree with the lower court's legal reasoning supporting the invalidation of the challenged statute. In other words, the fact that a lower court has reviewed the constitutionality of a law and found a basis for nullification should be persuasive for those judges who are influenced by jurisprudential considerations.

Finally, there are a number of control variables, including the presence of a state/province or local law, and whether the Solicitor General (in the United States and Australia) or Attorney General (in Canada) supports striking or retaining the law. Another control variable is the saliency of the individual court case to the judges, measured by the total number of interveners/amici curiae multiplied by the total number of nongovernmental interveners. The fourth control variable measures whether the federal government is a direct party in the case. The fifth control variable is the amount of disparity in resources between the litigants–the coding for this variable is discussed in Chapter Two. The final control variable is the issue of the case, operationalized as a series of dummy variables.

The full model (using both nonunanimous and unanimous court cases) is estimated for each country, and presented in Table 6.1. Table 6.1 shows that each of the models is

highly significant. Because the coefficients for logistic regression models are not easily interpretable, Table 6.2 shows the marginal effect for each independent variable for the likelihood of a vote in favor of judicial activism. For the dichotomous independent variables, the marginal effect indicates the result of changing the variable from 0 to 1. Thus, the values shown in Table 6.2 allow the effect size of each independent variable to be seen. Those independent variables that were significant at a 90% confidence interval or greater are indicated by boldface.

The decision was made to combine all nonunanimous and unanimous cases in the full database, because this provides a more realistic and rigorous examination of judicial behavior. Put another way, a genuine theory of judicial decision-making must be tested under real-world conditions. In the real world of judging, the final vote on the merits on a particular case may be unanimous or divided. However, the "industry standard" in empirical legal research is to remove all unanimous cases from the analyses. I suggest that this practice can sometimes provide a distorted picture of judicial decision-making because it deletes a large number of relevant decisions. By analogy, the practice of excluding unanimous decisions would be akin to a medical researcher testing a new vaccine only on healthy people: valuable information can be gained, but the ultimate efficacy of a new vaccine (or theory of judicial decision-making) can best be tested by including all relevant subjects. Thus, the analyses in Tables 6.1 and 6.2, containing both nonunanimous and unanimous

cases from a variety of issue areas, can be viewed with confidence.[40]

Results of the Full Model Analyses

Again, the central prediction of the judicial politicization theory is that the more highly politicized the high court, the more likely the judges will decide judicial review cases on the basis of their attitudes and ideological preferences. Hypothesis Four states:

> H_4. *Attitudinal voting in judicial review cases is likely to be more significant in politicized judicial systems. Thus, high court judges in the U.S. are more likely to vote according to attitudinal preferences in judicial review cases than are Canadian or Australian judges.*

As shown in Chapter One, the United States is by far the most highly politicized high court, while Australia is the second most politicized, and Canada is the least politicized of all three courts. Thus, if the theory is correct, we would expect to see that the independent variable Judicial Ideology has negative coefficients that are significant for each of the three high courts, and that the effect size is largest for the U.S. Supreme Court, followed by smaller effect sizes for the Australian and Canadian high courts. Again, it is expected that this variable will have a negative coefficient, because the greater the degree of ideological disagreement with a statute, the greater the likelihood of a vote to strike.

Examining Tables 6.1 and 6.2 reveals just that. For U.S. Supreme Court judges, judicial ideology is significant at the 99% level. For Australian high court judges, ideology

[40] Another common practice in empirical courts research is to disaggregate cases by single issue area; i.e., use only search and seizure cases. While this methodological choice often reveals empirical patterns in that particular area of law, the generalizability of these results is not always certain.

is significant at the 95% level, and ideology is significant at the 90% level for Canadian justices. Table 6.2 provides estimates of the marginal effects of the independent variables on the dependent variable (vote to strike) for each court. The data in Table 6.2 show that American high court judges are more influenced by ideology than either Canadian or Australian justices–just as the theory predicted. The marginal effect of judicial attitudes for American judges is -.31 (standard error of .07) or -31%. For Australian justices, the marginal effect is -.18 (s.e.: .09) or -18%. For judges at the Supreme Court of Canada, the marginal effect size is -.13 (s.e.: .07) or -13%. These results show that, in judicial review cases, judicial ideology is more than twice as influential for American than Canadian judges. Australian high court judges are situated between the U.S. and Canada: judicial attitudes account for an estimated -18% effect size. Thus, because of the significance of the attitudinal variables in each case as well as the effect sizes, Hypothesis Four can be confirmed: attitudinal voting is more likely to be observed in judicial review cases in highly politicized high courts in modern democracies.

Having established that attitudinal voting is more likely to be influential in highly politicized judiciaries, the influence of legal variables can be examined. Again, the theory posits that legal factors are more likely to influence judicial decision-making in less politicized high courts. The first legal variable is the presence of a lower court dissenting opinion, which can signal to the high court judges that there are multiple interpretations of the constitutionality of a statute or that there may be a problem with the majority opinion's legal reasoning. So, it is expected that, in less politicized courts such as Canada and

Australia, the presence of a lower court dissent would increase the likelihood of a vote for judicial activism and a positive coefficient will be observed. Hypothesis Five states more formally,

> H_5. *In less politicized high courts, the presence of a lower court dissent will increase the likelihood of a vote for the invalidation of a law. In highly politicized high courts, the presence of a lower court dissent will not result in a greater tendency to vote for the nullification of a statute.*

The data from Tables 6.1 and 6.2 partially confirm Hypothesis Five. As predicted, a lower court dissent was not significant in the American case, but was highly significant in both Australia and Canada. The data from Table 6.2 indicates that, in Australia, the presence of a lower court dissent accounts for a .34 (s.e.: .10) or 34% marginal effect change in the dependent variable. This is a quite large effect size, and suggests that this legal factor is very influential for judges at the High Court of Australia. At the Canadian Supreme Court, lower court dissent is significant, but the coefficient is in the opposite direction than predicted and the effect size is small: -.04 (s.e.: .01). In other words, the presence of a lower court dissent in Canada slightly decreases the likelihood of a vote to nullify a statute, contrary to the judicial politicization thesis.

The second jurisprudential variable is whether the lower court struck down the law in question. Again, it is expected that, in nonpoliticized high courts, a lower court invalidation should increase the tendency to vote to strike down a challenged law, because the fact that a lower court has reviewed the constitutionality of a statute and found a basis for nullification should be persuasive for those judges who are influenced by jurisprudential

considerations. Stated more formally,

> H_6. *In less politicized high courts, the fact that the lower court struck down the challenged law will increase the likelihood of a vote for the invalidation of the law. In highly politicized high courts, the fact that the lower court invalidated the challenged law will not result in a greater tendency to vote to strike the law.*

The data in Tables 6.1 and 6.2 partially confirm Hypothesis Six. As predicted, this variable is not significant for the U.S. high court but is highly significant for the Canadian and Australia supreme courts. In Canada, the presence of a lower court invalidation accounts for a marginal effect size of .03 (s.e.: .01) or 3% change in the dependent variable. So, this is a fairly small effect but is in the predicted direction. However, in Australia, the coefficient is in the opposite direction than predicted and the effect size is large. The presence of a lower court nullification accounts for a -.27 (s.e.: .06) or -27% change in probability in the dependent variable at the High Court of Australia.

Overall, the two legal variables provide mixed support for the proposition that less politicized high courts will have a greater likelihood to be influenced by legal factors in judicial decision-making. As predicted by the theory, neither legal variable was significant for the U.S. Supreme Court. Lower court dissent was highly significant in Australia and lower court invalidation was significant in Canada. But, lower court dissent had the opposite effect in Canada (albeit with a small effect size) than predicted, while lower court invalidation had the opposite effect at the Australian high court (and a large effect size). Therefore, only qualified support for Hypotheses Five and Six can be given. These data provide suggestive (but not definitive) evidence that legal factors predominate in judicial

Table 6.1

Support for Vote to Invalidate Law, All Cases: High Courts of United States, Canada, Australia 1990-1999

	U.S.	CANADA	AUSTRALIA
Attitudinal Variable			
Judicial Ideology	-1.254*** (0.28)	-0.567* (0.31)	-0.761** (0.39)
Legal Variables			
Lower Court Dissent	-0.0610 (0.08)	-0.173*** (0.042)	1.419*** (0.45)
Lower Court Invalidation	-0.106 (0.17)	0.145** (0.057)	-1.370*** (0.39)
Control Variables			
State/Province Law	0.803*** (0.26)	0.252** (0.11)	-1.367*** (0.25)
SG/AG Supports Invalidation	0.155** (0.073)	-0.0833 (0.11)	0.504*** (0.16)
Saliency of Case	-0.00589** (0.0027)	0.00438 (0.011)	-0.0276 (0.034)
Government is Party	0.429** (0.18)	0.231* (0.12)	-0.460*** (0.12)
Party Resource Disparity	0.0454 (0.029)	0.261*** (0.029)	-0.206*** (0.043)
Criminal Case	-0.395* (0.24)	-0.903*** (0.13)	0.834*** (0.26)
Civil Rights Case	0.529*** (0.11)	0.553*** (0.16)	1.129*** (0.32)
Speech or Religion Case	1.032*** (0.11)	-0.0662 (0.11)	0.738** (0.34)
Due Process Case	0.177 (0.12)	-1.454*** (0.25)	-0.393 (0.47)

Table 6.1, Continued

Support for Vote to Invalidate Law, All Cases: High Courts of United States, Canada, Australia 1990-1999

	U.S.	CANADA	AUSTRALIA
Economic Case	0.260	-0.133**	0.461**
	(0.25)	(0.057)	(0.20)
Federalism Case	0.847***	0.345	1.041***
	(0.28)	(0.50)	(0.31)
Constant	-1.234***	-1.909***	0.963***
	(0.18)	(0.16)	(0.32)
Predicted probability of activism:	.426	.337	.381
Observations:	1343	1306	419
Number of groups:	12	14	12
p <	.0000	.0000	.0000

*** p<0.01, ** p<0.05, * p<0.1
Semi-robust standard errors in parentheses

Table 6.2

Marginal Effects, Support for Vote to Invalidate Law, All Cases: High Courts of United States, Canada, Australia 1990-1999

	U.S.	CANADA	AUSTRALIA
Attitudinal Variable			
Judicial Ideology	**-.31**	**-.13**	**-.18**
	(0.07)	**(0.07)**	**(0.09)**
Legal Variables			
Lower Court Dissent	-.01	**-.04**	**.34**
	(0.02)	**(0.01)**	**(0.10)**
Lower Court Invalidation	-.03	**.03**	**-.27**
	(0.04)	**(0.01)**	**(0.06)**
Control Variables			
State/Province Law	**.19**	**.06**	**-.30**
	(0.06)	**(0.02)**	**(0.05)**
SG/AG Supports Invalidation	**.04**	-.02	**.12**
	(0.02)	(0.03)	**(0.04)**
Saliency of Case	**-.00**	.00	-.01
	(0.00)	(0.00)	(0.01)
Government is Party	**.11**	**.05**	**-.11**
	(0.04)	**(0.03)**	**(0.03)**
Party Resource Disparity	.01	**.06**	**-.05**
	(0.01)	**(0.01)**	**(0.01)**
Criminal Case	**-.09**	**-.19**	**.20**
	(0.05)	**(0.02)**	**(0.06)**
Civil Rights Case	**.13**	**.13**	**.27**
	(0.03)	**(0.04)**	**(0.07)**
Speech or Religion Case	**.25**	-.01	**.18**
	(0.03)	(0.03)	**(0.08)**
Due Process Case	.04	**-.32**	-.09
	(0.03)	**(0.05)**	(0.10)

Table 6.2, Continued

Marginal Effects, Support for Vote to Invalidate Law, All Cases: High Courts of United States, Canada, Australia 1990-1999

	U.S.	**CANADA**	**AUSTRALIA**
Economic Case	.06	**-.03**	**.11**
	(0.06)	**(0.01)**	**(0.05)**
Federalism Case	**.21**	.08	**.25**
	(0.06)	(0.12)	**(0.07)**

Significant variables in **bold**
Standard errors in parentheses

decision-making in the Canadian and Australian high courts.

Control Variables

The model also includes six control variables; some of these yielded interesting results. First, the variable measuring case salience was not significant for the Canadian or Australian high courts, but was significant at the 95% level for the American court. However, the marginal effect for this variable was .00 for the U.S. Supreme Court; thus, the effect of case salience on the decision to strike a law appears to be very low or nonexistent. To review, case salience was operationalized by counting the total number of interveners/amici in each case and multiplying that number by the total number of nongovernmental interveners/amici. So, this variable sought to measure cases containing legal and political issues that would attract both governmental interveners (such as a state/province attorney-general) and also private groups. The assumption is that individual cases attracting a significant amount of governmental and nongovernmental interveners/amici (and corresponding legal briefs or appearances from these parties) will signal the importance of the case to the justices. Somewhat surprisingly, highly salient cases were not influential in the decision to vote to strike down a law in any of the high courts.

Also somewhat surprising were the results for the variable measuring whether the Solicitor General/Attorney General supports invalidation of the challenged law. As discussed in Chapter Three, there is a wealth of research indicating the U.S. Supreme Court is strongly influenced by the position that the Solicitor General takes in a particular case. It

would be expected in all three countries that, when the Solicitor General (or Attorney General in Canada) takes a position that a law should be overturned, the judges on the high court would be more likely to vote to strike that statute. This expectation was confirmed at the U.S. and Australian high courts, but not the Canadian Supreme Court. In Australia, the fact that the Solicitor General supports legal nullification accounts for a marginal effect size of .12 (s.e.: .04) or 12% increase in the probability of a vote to strike a law. At the U.S. Supreme Court, the marginal effect for the influence of the Solicitor General was only .04 (s.e.: .02), much lower than in Australia. In Canada, the influence of the Attorney General was not significant. Thus, it appears that justices at the High Court of Australia and Supreme Court of the United States are moderately influenced by the positions taken by the Solicitor General; it is less clear why Canadian high court judges are not influenced by their Attorney General in judicial review cases.

Next, the presence of a state/province or local law was included in each model as a control variable. In Chapter Five, the rates of activism for federal and state/province laws were analyzed by use of a scatterplot and bivariate regression. Here, the presence of a state/province or local law is included in the multivariate model. The data reveal that the presence of a state/province or local law is highly significant in the United States and Australia, and moderately significant in Canada. However, the data show that the direction for this variable differs for the high courts of Australia and the United States. At the U.S. Supreme Court, the presence of a state or local law increases the likelihood of a vote to strike by an estimated .19 (s.e.: .06) or 19%. But, at the High Court of Australia, the presence of

a state or local law decreases the likelihood of a vote in favor of invalidation by an estimated -.30 (s.e.: .05) or -30%. Canada sits within these extremes, and a challenge to a province or local law increases the marginal effect of a likelihood of a vote to strike by .06 (s.e.: .02). These data indicate that, controlling for other variables, judges at the United States court are far more likely to nullify state laws than justices at the High Court of Australia. The results for the U.S. high court are consistent with prior research, which has indicated that the Court is far more likely to defer to the Congress than to state legislatures. However, the data for the Australian court reveal the opposite: that the justices of that court are willing to give a substantial amount of deference to state legislatures.

The next control variable is whether the national government is a direct party in the case. Across all systems it would be expected that a high court, acting strategically, would be less likely to strike down a statute when the government is a party. This variable is highly significant for Australian court, moderately significant for the U.S. high court, and significant at the 90% level for the Canadian judges. However, the coefficients are in opposite directions for the American and Australian cases. At the High Court of Australia, the presence of a governmental party decreases the likelihood of a vote to strike by a marginal effect of -.11 or -11% (s.e.: .03). But, at the U.S. Supreme Court, the presence of a governmental party increases the tendency for a vote to strike by 11% (.11, s.e.: .04).

A related control variable is party resource disparity. This variable measures the status of each litigant (such as individual in a civil case, business, state or provincial government, etc.) and assigns a value to that status. Higher values indicate parties with more

resources at their disposal. Then, the lower value is subtracted from the higher value to indicate the disparity (if one exists) in resources between the parties. For example, a case pitting an individual in a civil case (value of 1) versus a state government (value of 7) would yield a resource disparity score of 6. So, higher numbers indicate larger litigant resource disparities.

The party resource disparity variable is highly significant for the high courts of Canada and Australia, although the coefficients are in different directions. In Canada, the greater the disparity between the parties, the greater the likelihood of a vote to strike a law (estimated marginal effect of .06, standard error of .01). In Australia, litigant resource disparity has the opposite effect: a change in probability in the dependent variable of -.05 (s.e.: .01) or -05%. Clearly, there is a different dynamic in the high courts of Canada and Australia regarding party resource differential.

Finally, the issue of the individual court case was included as a control variable. This variable was operationalized as a series of dummy variables so that the influence, if any, of a particular case issue could be assessed comparatively.[41] There was only one issue area which was significant for each court and in the same direction: civil rights. A challenge to a civil rights law tended to increase the likelihood of a vote to strike in each high court: 13% (s.e.: .04) in Canada, 13% in the United States (s.e.: .03), and 27% (s.e.: .07) in Australia.

[41] Following the Spaeth (2001) coding, there were thirteen different issues areas: criminal procedure, civil rights, speech or religion, due process, privacy, attorneys, unions, economic activity, judicial power, federalism, interstate/interprovince relations, taxation, miscellaneous. However, not all of these issues were included in the model because of collinearity issues.

This suggests that laws restricting civil rights are particularly salient to judges in each system, and are particularly likely to be nullified.

Similarities between the supreme courts of the U.S. and Australia are also present for federalism and speech/religion cases. Cases involving federalism issues were highly significant for the high courts of the U.S. and Australia, and tended to increase the likelihood of a vote to strike by an estimated 21% (s.e.: .06) and 25% (s.e.: .07), respectively. Speech and religion statutes were highly significant at the U.S. Supreme Court, but only moderately significant at the High Court of Australia. A speech or religion law tended to increase the tendency to invalidate by an estimated marginal effect of 25% (s.e.: .03) in the U.S. high court, and 18% (s.e.: .08) at the Australian court.

Economic laws were significant for the Canadian and Australian high court judges, although in the opposite directions. The marginal effect of an economic law was -.03 (s.e.: .01) for the Canadian court, and .11 (s.e.: .05) for the Australian high court. Due process statutes were only significant at the Canadian Supreme Court. Laws restricting due process rights were highly significant in Canada, and decreased the likelihood of a vote to strike by 32% (s.e.: .05). This result is surprising, given that the Canadian high court is dominated by liberal justices. However, this result is consistent with the criminal law issue variable, which was also highly significant in Canada, and resulted in an estimated 19% decrease in the likelihood of a vote to overturn the challenged law (s.e.: .02).

Taken together, the due process and criminal law issue variables suggest that the Supreme Court of Canada, although dominated by liberal judges, is highly deferential to

legislators when it comes to public order laws. Conversely, the high courts of the United States and Australia, both dominated by conservative judges, tend to be particularly concerned by laws involving speech, religion, or federalism. For the American case, this analysis supports the interpretive work of Keck (2004).

Comparing the Results in the Full and Reduced Datasets

The results in Tables 6.1 and 6.2 utilized the full database: all nonunanimous and unanimous judicial review cases are included. As discussed above, the decision to aggregate unanimous and nonunanimous decisions was made in order to provide the most rigorous test of the theory, as well as provide the most accurate representation of real-world judicial decision-making. In other words, judges do not make decisions in a vacuum, and deleting unanimous cases from a particular database may distort reality. However, in order to provide a basis for comparison, Tables 6.3 through 6.8 analyze the model for each country in both the full database (which combines all decisions, nonunanimous and unanimous) and the reduced database (which includes only nonunanimous court cases). Thus, the first column in Tables 6.3 through 6.8 present the results of the analyses using only those cases where the judges were split. The logical extension of the judicial politicization theory would be that the effect of judicial attitudes in highly politicized courts (such as the high courts of the U.S. and Australia) should be even more pronounced when only nonunanimous cases are used in the analyses. The theoretical justification for this expectation is that unanimous cases often do not present legal issues that are highly contentious or disputed. Nonunanimous cases by

Table 6.3

Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: United States Supreme Court 1990-1999

	Nonunanimous Cases	Combined Unanimous and Nonunanimous Cases
Attitudinal Variable		
Judicial Ideology	-1.940*** (0.49)	-1.254*** (0.28)
Legal Variables		
Lower Court Dissent	0.0457 (0.13)	-0.0610 (0.08)
Lower Court Invalidation	0.0804 (0.20)	-0.106 (0.17)
Control Variables		
State Law	0.455 (0.30)	0.803*** (0.26)
SG Supports Invalidation	-0.0303 (0.099)	0.155** (0.073)
Saliency of Case	0.00368 (0.004)	-0.00589** (0.0027)
Government is Party	0.878*** (0.12)	0.429** (0.18)
Party Resource Disparity	-0.0239 (0.035)	0.0454 (0.29)
Criminal Case	-0.711** (0.28)	-0.395* (0.24)
Civil Rights Case	0.550*** (0.14)	0.529*** (0.11)
Speech or Religion Case	0.353** (0.17)	1.032*** (0.11)
Due Process Case	-0.0291 (0.12)	0.177 (0.12)

Table 6.3, Continued

Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: United States Supreme Court 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Economic Case	-0.284	0.260
	(0.40)	(0.25)
Federalism Case	0.185	0.847***
	(0.38)	(0.28)
Constant	-0.729***	-1.234***
	(0.25)	(0.18)
Predicted probability of activism:	.406	.426
Observations:	953	1343
Number of groups:	12	12
p <	.0000	.0000

*** p<0.01, ** p<0.05, * p<0.1
Semi-robust standard errors in parentheses

Table 6.4

Marginal Effects, Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: United States Supreme Court 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Attitudinal Variable		
Judicial Ideology	**-.47**	**-.31**
	(0.11)	**(0.07)**
Legal Variables		
Lower Court Dissent	.01	-.01
	(0.03)	(0.02)
Lower Court Invalidation	.02	-.03
	(0.05)	(0.04)
Control Variables		
State Law	.11	**.19**
	(0.07)	**(0.06)**
SG Supports Invalidation	-.01	**.04**
	(0.02)	**(0.02)**
Saliency of Case	.00	**-.00**
	(0.00)	**(0.00)**
Government is Party	**.22**	**.11**
	(0.03)	**(0.04)**
Party Resource Disparity	-.01	.01
	(0.01)	(0.01)
Criminal Case	**-.16**	**-.09**
	(0.05)	**(0.05)**
Civil Rights Case	**.14**	**.13**
	(0.03)	**(0.03)**
Speech or Religion Case	**.09**	**.25**
	(0.04)	**(0.03)**
Due Process Case	-.01	.04
	(0.03)	(0.03)

Table 6.4, Continued

Marginal Effects, Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: United States Supreme Court 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Economic Case	-.07 (0.1)	.06 (0.06)
Federalism Case	.05 (0.1)	**.21** **(0.06)**

Significant variables in **bold**
Standard errors in parentheses

Table 6.5

Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: High Court of Australia 1990-1999

	Nonunanimous Cases	Combined Unanimous and Nonunanimous Cases
Attitudinal Variable		
Judicial Ideology	-1.387**	-0.761**
	(0.62)	(0.39)
Legal Variables		
Lower Court Dissent	-0.265	1.419***
	(1.19)	(0.45)
Lower Court Invalidation	-1.661*	-1.370***
	(1.00)	(0.39)
Control Variables		
State Law	0.165	-1.367***
	(1.14)	(0.25)
SG Supports Invalidation	0.384	0.504***
	(0.50)	(0.16)
Saliency of Case	-0.306**	-0.0276
	(0.15)	(0.034)
Government is Party	1.319***	-0.460***
	(0.44)	(0.12)
Party Resource Disparity	-0.115	-0.206***
	(0.1)	(0.043)
Criminal Case	-1.772***	0.834***
	(0.65)	(0.26)
Civil Rights Case	-0.304	1.129***
	(0.46)	(0.32)
Speech or Religion Case	-0.795	0.738**
	(0.69)	(0.34)
Due Process Case	-0.170	-0.393
	(0.69)	(0.47)

Table 6.5, Continued

Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: High Court of Australia 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Economic Case	0.226	0.461**
	(0.67)	(0.20)
Federalism Case	-1.076	1.041***
	(0.81)	(0.31)
Constant	0.568	0.963***
	(0.53)	(0.32)
Predicted probability of activism:	.458	.381
Observations:	210	419
Number of groups:	12	12
p <	.0000	.0000

*** p<0.01, ** p<0.05, * p<0.1
Semi-robust standard errors in parentheses

Table 6.6

Marginal Effects, Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: High Court of Australia 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Attitudinal Variable		
Judicial Ideology	**-.34**	**-.18**
	(0.16)	**(0.09)**
Legal Variables		
Lower Court Dissent	-.06	**.34**
	(0.29)	**(0.1)**
Lower Court Invalidation	**-.33**	**-.27**
	(0.14)	**(0.06)**
Control Variables		
State Law	.04	**-.30**
	(0.28)	**(0.05)**
SG Supports Invalidation	.10	**.12**
	(0.13)	**(0.04)**
Saliency of Case	**-.08**	-.01
	(0.04)	(0.01)
Government is Party	**.32**	**-.11**
	(0.1)	**(0.03)**
Party Resource Disparity	-.03	**-.05**
	(0.02)	**(0.01)**
Criminal Case	**-.36**	**.20**
	(0.09)	**(0.06)**
Civil Rights Case	-.07	**.27**
	(0.11)	**(0.07)**
Speech or Religion Case	-.19	**.18**
	(0.14)	**(0.08)**
Due Process Case	-.04	-.09
	(0.17)	(0.10)

Table 6.6, Continued

Marginal Effects, Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: High Court of Australia 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Economic Case	.06 (0.17)	**.11** **(0.05)**
Federalism Case	-.25 (0.16)	**.25** **(0.07)**

Significant variables in **bold**
Standard errors in parentheses

Table 6.7

Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: Supreme Court of Canada 1990-1999

	Nonunanimous Cases	Combined Unanimous and Nonunanimous Cases
Attitudinal Variable		
Judicial Ideology	-0.230 (0.53)	-0.567* (0.31)
Legal Variables		
Lower Court Dissent	-0.138 (0.16)	-0.173*** (0.042)
Lower Court Invalidation	0.0856 (0.084)	0.145** (0.057)
Control Variables		
Province Law	0.0373 (0.19)	0.252** (0.11)
AG Supports Invalidation	0.0834 (0.18)	-0.0833 (0.11)
Saliency of Case	-0.00863 (0.013)	0.00438 (0.011)
Government is Party	0.487* (0.25)	0.231* (0.12)
Party Resource Disparity	0.0558 (0.041)	0.261*** (0.029)
Criminal Case	-0.255 (0.25)	-0.903*** (0.13)
Civil Rights Case	0.0898 (0.25)	0.553*** (0.16)
Speech or Religion Case	-0.438** (0.19)	-0.0662 (0.11)
Due Process Case	-0.381 (0.4)	-1.454*** (0.25)

Table 6.7, Continued

Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: Supreme Court of Canada 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Economic Case	-0.702*	-0.133**
	(0.42)	(0.057)
Federalism Case	0.0667	0.345
	(0.74)	(0.50)
Constant	-0.521	-1.909***
	(0.34)	(0.16)
Predicted probability of activism:	.448	.337
Observations:	566	1306
Number of groups:	14	14
p <	.0000	.0000

*** p<0.01, ** p<0.05, * p<0.1
Semi-robust standard errors in parentheses

Table 6.8

Marginal Effects, Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: Supreme Court of Canada 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Attitudinal Variable		
Judicial Ideology	-.06 (0.13)	**-.13** **(0.07)**
Legal Variables		
Lower Court Dissent	-.03 (0.04)	**-.04** **(0.01)**
Lower Court Invalidation	.02 (0.02)	**.03** **(0.01)**
Control Variables		
Province Law	.01 (0.05)	**.06** **(0.02)**
AG Supports Invalidation	.02 (0.04)	-.02 (0.03)
Saliency of Case	-.00 (0.00)	.00 (0.00)
Government is Party	**.12** **(0.06)**	**.05** **(0.03)**
Party Resource Disparity	.01 (0.01)	**.06** **(0.01)**
Criminal Case	-.06 (0.06)	**-.19** **(0.02)**
Civil Rights Case	.02 (0.06)	**.13** **(0.04)**
Speech or Religion Case	**-.11** **(0.05)**	-.01 (0.03)
Due Process Case	-.09 (0.09)	**-.32** **(0.05)**

Table 6.8, Continued

Marginal Effects, Support for Vote to Invalidate Law, Comparing Nonunanimous Cases and Combined Unanimous and Nonunanimous Cases: Supreme Court of Canada 1990-1999

	Nonunanimous Cases	**Combined Unanimous and Nonunanimous Cases**
Economic Case	**-.16**	**-.03**
	(0.09)	**(0.01)**
Federalism Case	.02	.08
	(0.19)	(0.12)

Significant variables in **bold**
Standard errors in parentheses

definition are a result of dissensus, and therefore the influence of judicial ideology should be more apparent in a highly politicized court, where judicial attitudes are more likely to be critical.

Comparing the Results in the Full and Reduced Databases for the U.S. Supreme Court

The expectation that, in the reduced database containing nonunanimous cases only, judicial attitudes will have greater influence on the dependent variable is clearly evident at the U.S. Supreme Court. Judicial ideology remains highly significant in both the full and reduced databases; however, the difference in the marginal effect (shown in Table 6.4) is striking. In the combined database, the marginal effect of judicial attitudes is -.31 (or -31%) with a standard error of .07; when only nonunanimous cases are included in the analysis, the marginal effect increases to -.47 (or -47%) with a standard error of .11. Put another way, for nonunanimous cases, the influence of judicial ideology in the decision to nullify a law can account for nearly half of the variance, controlling for all other factors. Thus, the results of the analysis using only nonunanimous cases at the American high court provides strong support for the judicial politicization theory.

The influence of the legal variables (presence of a lower court split and lower court invalidation of the challenged law) did not differ when only nonunanimous cases were analyzed–both variables failed to reach statistical significance in both the reduced and full models. Again, this result is logically consistent with the judicial politicization thesis, as the influence of jurisprudential factors is expected to be less substantial in highly politicized high

courts.

Interestingly, the data in Tables 6.3 and 6.4 show that several of the control variables in the American case did change in significance when only nonunanimous cases were analyzed. Most dramatically, cases involving a federalism issue did not reach statistically significant levels when only nonunanimous cases are used to estimate the model. For the full database, the marginal effect for federalism cases had been fairly high (.21, s.e. of .06), but decreases to .05 (s.e.: .1) when the reduced data set is utilized. This result is puzzling, because federalism issues have comprised some of the most contentious cases in the Rehnquist Court (Keck 2004). Thus, it would be expected that this variable's estimated marginal effect size would increase when the reduced database is used.

These (previously significant) independent variables also failed to reach significance levels when the reduced database was used: presence of a challenged state or local law; support by the Solicitor General for nullification; and saliency of the case. Of these, state/local law had the most sizable change. Using the full database, the marginal effect for this variable had been .19 (s.e.: .06); when only nonunanimous cases are used, the variable fails to reach significance and the marginal effect lowers to .11 (s.e.: .07). Again, it is difficult to explain why the presence of a state or local law would not achieve statistically significant levels when only nonunanimous cases are used. State laws provided some of the most controversial legal issues in the 1990s in the U.S., thus it would be expected that this variable would have a fairly large marginal effect for nonunanimous case analysis.

The marginal effect for the variable representing Solicitor General support for

invalidation reduced to -.01 (s.e.: .02) in the reduced model from .04 (s.e.: .02), and the marginal effect for case saliency did not change at all, although its significance level did shift.

Although the influence of some independent control variables did change when the reduced database was used for the analysis for the U.S. high court, the jurisprudential and attitudinal variables did not vary in such a way so as to cast doubt on the primary conclusions of the judicial politicization theory. Indeed, the influence of judicial ideology increased in the reduced model, providing greater support for the theory. In the sections below, the results for the reduced and full databases are compared for the high courts of Australia and Canada.

Comparing the Results in the Full and Reduced Databases for the High Court of Australia

Comparing the full and reduced databases for the Australian High Court reveals that, like the U.S. Supreme Court, the influence of judicial attitudes substantially increases when only nonunanimous cases are used in the analysis. The variable remains significant at the 95% level, but the marginal effect of judicial ideology increases from -.18 or -18% (s.e.: .09) to -.34 or -34% (s.e.: .16). In other words, the influence of judicial ideology on the decision whether or not to strike a law nearly doubles in nonunanimous cases. This increase is consistent with the judicial politicization theory, which holds that the effect of judicial attitudes should be more influential in nonunanimous cases, which typically present divisive legal issues.

Examining the jurisprudential variables in the full and reduced databases shows a substantial shift for the variable indicating the presence of a lower court dissenting vote. This variable, which is highly significant in the full database, fails to reach statistical significance in the reduced database, and the sign of the coefficient goes from positive to negative. Furthermore, the marginal effect of the variable changes from .34 (s.e.: .1) to -.06 (s.e.: .29). The judicial politicization thesis predicts that, in less politicized high courts, the presence of a lower court dissent should increase the likelihood of a vote to invalidate a law. In the full database for the Australia court, this prediction is borne out. However, when only nonunanimous cases are included in the analysis, the data do not support the theoretical expectation. This result may suggest that jurisprudential effects are more likely to be observed in unanimous cases. This expectation is discussed in more detail below.

Many of the control variables also displayed appreciable changes when the reduced database was utilized. The largest change involved the variable indicating whether a state or local law was challenged. This variable was highly significant when the full database was used; however, it failed to reach significance levels when only nonunanimous cases were analyzed. Similarly, the previously significant variables for Solicitor General support for nullification and party resource disparity also failed to reach significant levels. However, of these three variables, the state/local law variable exhibited the largest shift in marginal effect: for the full database, the variable possessed an estimated marginal effect of -.30 (s.e.: .05) but only a marginal effect of .04 (s.e.: .28) for the reduced database. Thus, not only did the state/local case variable exhibit a large change in marginal effect, but the sign of the

coefficient also changed. These changes seem to indicate that, in less contentious unanimous cases, the High Court justices are far less likely to strike down state laws. However, when deciding the more controversial nonunanimous cases, the judges lose their deference to state legislators and are more willing to nullify state and local laws.

The variable noting whether the national government is a party also displayed a large increase in estimated marginal effect (although the variable remains significant for both databases). When the full database is used, the marginal effect for this variable is -.11 (s.e.: .03). But, when only nonunanimous cases are used, the marginal effect size increases to .32 or 32% (s.e.: .1). Again, this seems to indicate that, in less controversial unanimous cases, the justices are less likely to strike down a statute when the government is a litigant. However, in more controversial nonunanimous cases, the judges lose their reticence about invalidating a law when the federal government is a party.

Finally, there was a substantial change in the control variables that denote the legal issue under consideration. Four issue variables (civil rights, speech or religion, economic, federalism) displayed a loss of statistical significance in the reduced database, and the criminal case variable exhibited a change in the sign of the coefficient and a large shift in the marginal effect. The changes in the legal issue variables suggests that there is a different dynamic in judicial decision-making when unanimous and nonunanimous cases are adjudicated at the High Court.

Comparing the Results in the Full and Reduced Databases for the Supreme Court of Canada

The results for the full and reduced databases for the Canadian high court differed substantially, suggesting that judicial decision-making at a less politicized high court may vary depending upon the type of case being decided by the court. The variable measuring judicial ideology was significant at the 90% level with a marginal effect of -.13 or -13% (s.e.: .07) when unanimous and nonunanimous cases are combined. However, the variable fails to reach statistical significance and the marginal effect drops to -.06 or -6% (s.e.: .13) when only unanimous cases are analyzed. This result reinforces the conclusion that judicial attitudes are less influential in judicial decision-making in less politicized high courts.

The two legal variables (lower court dissent and lower court nullification), both significant in the full database, are not significant when the reduced database is used. However, the marginal effect for each variable declines only slightly when only nonunanimous cases are analyzed. Also, the variable denoting whether a provincial or local law is being challenged also loses significance, as does the party resource disparity variable. In addition, the marginal effect for the variable indicating a governmental litigant increases from .05 (s.e.: .03) to .12 (s.e.: .06).

Finally, nearly all of the dummy variables representing the issue area of the case significantly varied when the reduced database was used to estimate the model. The (previously significant) variables indicating a criminal case, civil rights case, or due process case all failed to reach statistically significant levels when nonunanimous cases are used. However, the variable indicating a speech or religion case gained significance, and had a

marginal effect size of -.11 (s.e.: .05). Also, the variable for an economic case was slightly less significant in the reduced database, but the estimated marginal effect increased to -.16 (s.e.: .09).

Overall, the results for the Supreme Court of Canada when only nonunanimous cases are used underscore the differences in judicial decision-making between a highly politicized court and a less politicized one. The results of the reduced database analysis both support and undermine the judicial politicization thesis advanced in this project. The influence of judicial attitudes in nonunanimous cases is far less than in the U.S. and Australian high courts, as predicted; paradoxically, the legal variables also lose significance in the reduced database.

Table 6.9

Support for Vote to Invalidate Law, Unanimous Cases Only, Pooled Model: 1990-1999

Interacted Legal Variables	
US*Lower Court Dissent	0.536** (0.24)
Canada*Lower Court Dissent	-0.168 (0.11)
Australia*Lower Court Dissent	2.365*** (0.88)
US*Lower Court Invalidation	-0.944*** (0.12)
Canada*Lower Court Invalidation	0.0234 (0.076)
Australia*Lower Court Invalidation	-0.388* (0.24)
Pooled Control Variables	
State/Province Law	0.432 (0.36)
SG/AG Supports Invalidation	0.701** (0.28)
Saliency of Case	0.000616 (0.014)
Government is Party	-0.0821 (0.34)
Party Resource Disparity	0.177 (0.21)
Criminal Case	-0.549 (0.48)
Civil Rights Case	1.140*** (0.18)

Table 6.9, Continued

Support for Vote to Invalidate Law, Unanimous Cases Only, Pooled Model: 1990-1999

Speech or Religion Case	1.241**
	(0.5)
Due Process Case	-2.041
	(1.87)
Economic Case	0.0279
	(0.11)
Federalism Case	1.668***
	(0.042)
Constant	-1.600
	(0.99)
Predicted probability of activism:	.307
Observations:	174
Number of groups:	3
p <	.276

*** p<0.01, ** p<0.05, * p<0.1
Standard errors in parentheses
Unit of analysis is the case, not individual judge vote

Table 6.10

Marginal Effects, Support for Vote to Invalidate Law, Unanimous Cases Only, Pooled Model: 1990-1999

Interacted Legal Variables	
US*Lower Court Dissent	**0.12** **(0.05)**
Canada*Lower Court Dissent	-0.04 (0.03)
Australia*Lower Court Dissent	**0.52** **(0.15)**
US*Lower Court Invalidation	**-0.17** (0.04)
Canada*Lower Court Invalidation	0.00 (0.02)
Australia*Lower Court Invalidation	**-0.08** **(0.05)**
Pooled Control Variables	
State/Province Law	0.09 (0.09)
SG/AG Supports Invalidation	**0.15** **(0.07)**
Saliency of Case	0.00 (0.00)
Government is Party	-0.02 (0.07)
Party Resource Disparity	0.04 (0.05)
Criminal Case	-0.11 (0.09)
Civil Rights Case	**0.27** **(0.03)**

Table 6.10, Continued

Marginal Effects, Support for Vote to Invalidate Law, Unanimous Cases Only, Pooled Model: 1990-1999

Speech or Religion Case	**0.29**
	(0.13)
Due Process Case	-0.43
	(0.35)
Economic Case	0.01
	(0.02)
Federalism Case	**0.39**
	(0.01)

Significant variables in **bold**
Standard errors in parentheses
Unit of analysis is the case, not individual judge vote

Examining the Influence of the Law in Unanimous Cases

In this section, the influence of the legal variables is analyzed for each high court by using unanimous cases only. By analyzing unanimous cases exclusively, the influence of the law on the decision-making process in comparative perspective may be examined in greater detail. However, the full model–incorporating both judicial ideology and legal variables–cannot be tested using only unanimous cases. Because the dependent variable–the vote to strike or uphold a statute–does not vary in a unanimous case, individual-judge-level variables cannot be used, because the unit of analysis for unanimous cases is the individual court case, not the individual judge vote. Therefore, judicial attitudes are not used in this analysis: only case-level independent variables are included in the model for unanimous cases.[42]

While it is common to empirically analyze exclusively nonunanimous cases, it is quite rare to analyze judicial decision-making using only unanimous cases. Indeed, only a handful of scholars have examined judicial decision-making by analyzing unanimous cases exclusively (see, e.g., Kaminski and Shaffer 2005; Nicoll 2006). The justification usually provided for excluding unanimous decisions is that some court cases are so overwhelmingly slanted to a particular result that there is nothing to be gained by analyzing these unanimous decisions. I submit that this rationale is not always correct, because a case that is accepted

[42] Because the unit of analysis is the court case, it was necessary to pool each country's cases in order to gain a large enough sample to analyze. To discern the influence of the law in each supreme court, a dummy variable for each high court was created and then interaction variables were created for each court and each of the two legal variables.

by a high court possessing discretionary jurisdiction (as do each of the courts in this study) almost certainly is contestable on various levels. It is highly likely that a particular case that truly is not subject to multiple outcomes would be screened out at a lower court level and fail to be accepted by the high court. Thus, there is a theoretical justification to study judicial decision-making in unanimous cases.

There are several objectives and expectations for the analyses below. By examining a variant of the model using unanimous cases only, the influence of the legal model in each high court may be better observed. The theory propounded in this project holds that less politicized courts (such as the Canadian high court) are more likely to be influenced by legal and jurisprudential variables. However, legal factors also play a role (albeit smaller) in highly politicized courts. Unanimous cases may indicate that no significant ideological clash is present between the factions of the high court, as evidenced by the complete consensus on the decision on the merits. If indeed legal factors play a role in highly politicized courts, then the effect of these legal variables should be better detected by analyzing judicial decision-making in unanimous cases. Stated another way, if the legal model plays a role at the United States Supreme Court, the most highly politicized court in this project, then that influence should be observed in the analysis of unanimous decisions.

Results of the Unanimous Case Analysis

The results of the pooled unanimous case analysis suggest that, even in highly politicized supreme courts, legal factors retain significant importance in judicial decision-

making under certain circumstances. Indeed, the results in Tables 6.9 and 6.10 provide some support for the proposition that Kritzer, Pickerill, and Richards (1998) proffered: that the legal model remains influential at the U.S. Supreme Court in certain cases.

The two interacted legal variables were both significant for the U.S. Supreme Court, although only lower court dissent is in the expected direction. The fact of a lower court dissent is moderately significant and has an estimated marginal effect size of .12 or 12% (s.e.: .05). The presence of a lower court invalidation is highly significant and has an estimated marginal effect of -.17 or -17% (s.e.: .04). It is important to reiterate that neither of the legal variables were significant in either the full or reduced database analyses above; it is only in the unanimous case database that these variables achieve significance and influence judicial decision-making. Thus, the implication of these results is that jurisprudential factors are apparently relevant in judicial decision-making in unanimous cases, which presumably present less controversial issues than those court cases triggering dissensus.

Turning to the data for Australia, the presence of a lower court dissent is highly significant and has a very large marginal effect size of .52 or 52% (s.e.: .15), indicating that the high court judges are significantly influenced by the presence of lower court legal dissensus. The fact that the lower court struck down the challenged law is significant at the 90% level, and is again in the opposite direction than predicted. Here, the estimated effect size is-.08 or -8% (s.e.: .05). Thus, just as in the American case, judicial decision-making in unanimous cases indicates that legal model has an appreciable effect upon the judges in

certain circumstances.

Analyzing the data for unanimous cases in Canada shows that a very different dynamic is at work as compared with the high courts of the United States and Australia. In the full database, the legal variables were highly significant for the Canadian high court judges. However, disaggregating the nonunanimous and unanimous cases completely reduces the significance of both of the legal variables. These puzzling results are difficult to interpret. The best explanation may be that, as a relatively nonpoliticized court, case-based legal and jurisprudential factors that are not specified in the model are strongly influencing judicial decision-making. Thus, a more highly specified model containing additional fact-based variables may yield more definitive results.

Overall, the results for unanimous case analysis in the pooled analysis yields suggestive evidence that, even in a highly politicized high court, the law can influence judicial decision-making in certain cases. For the U.S. Supreme Court, the two variables measuring the influence of the law were not significant when either the full (unanimous and nonunanimous cases combined) database or reduced (nonunanimous cases only) were used, but these variables were highly significant and had a sizable effect size when only unanimous cases were analyzed. Thus, these findings confirm previous research suggesting that both the attitudinal and legal model are relevant at the U.S. Supreme Court.

Conclusion

The strongest finding from this study as a whole is that attitudinal voting is present

in the high courts of the United States, Australia, and Canada. Furthermore, recall that the analyses herein utilized all judicial review cases from 1990 to 1999–there was no attempt to delete certain cases based upon the issue of the case nor were unanimous cases deleted from the analyses. In other words, rather than just examine the effect of attitudinal voting in, say, civil rights cases, this study combined cases from a variety of issue areas and included both nonunanimous and unanimous cases in the analysis. Thus, the fact that attitudinal voting was found to be present in each court despite the rigorous analytical conditions is a significant finding.

Although the presence of attitudinal voting has been well documented at the U.S. Supreme Court, other scholars have found that attitudinal voting is only likely to be observed in certain issue areas, such as civil liberties cases (Epstein and Mershon 1996) and in nonunanimous cases. So, the strong presence of ideological voting at the U.S. Supreme Court in a variety of issue areas and in combined unanimous and nonunanimous cases is a significant addition to the literature regarding the American high court.

The finding of attitudinal voting at the High Court of Australia is the first result of this kind. To date, there has been only one attempt to measure attitudinal voting at the High Court (Smyth 2005),[43] and that study used political party as a proxy for judicial preferences, rather than develop a set of judicial attitudes in the manner of the Segal and Cover standard (1989). The present study is the first to introduce original judicial ideology scores, test those

[43] Additionally, the Smyth (2005) article varied from the present study in that Smyth sought to explain dissent rates, not decisions on the merits.

scores, and observe that ideological voting plays a significant role at the High Court of Australia in judicial review cases.

This study is also the first to test attitudinal voting in exclusively judicial review cases at the Supreme Court of Canada. There have been several previous studies that tested the attitudinal model in specific types of cases at the Canadian high court: Ostberg and Wetstein (2004b) found that there is a strong tendency towards ideological voting in equality cases, Ostberg and Wetstein (2004) found strong attitudinal voting in economic cases, and Songer and Johnson (2002) and Ostberg et al. (2002) found a significant likelihood for judges to vote their attitudes in nonunanimous cases. In contrast, this study finds a significantly weaker influence for attitudinal voting at the Canadian Supreme Court when all cases–varying issue areas and unanimous and nonunanimous results–are examined. So, the results from this study indicate that the conventional wisdom on attitudinal voting at the Canadian high court may have to be somewhat revised. Based on the results herein, the judges at the Canadian Supreme Court do not appear to be as driven by ideology as the high court judges from Australia or the United States, at least in judicial review cases.

The comparative analyses of attitudinal voting for judges at the supreme courts in this study reveals that ideology plays the largest role at the U.S. high court, with an estimated marginal effect size of -31%, followed by the Australian supreme court, with an effect size of -18%, and then the Canadian high court, with an estimated effect size of -13%. Taken by themselves, the Canadian and Australian results are surprising, because most comparative courts researchers would likely have predicted that the Supreme Court of Canada would be

most similar to the American high court. However, these results strongly support the central contention of the judicial politicization thesis, which posits that the greater the politicization of the court, the more likely those judges will tend to vote ideologically. Thus, the core element of the theory proposed in this study is strongly supported by the data from the high courts of the U.S., Canada and Australia. Further research into additional high courts in established democracies will reveal whether the theory can be extended even further. As it stands, the judicial politicization thesis has hopefully extended our knowledge of judicial decision-making in comparative context. This project is one of the first attempts to provide both theoretical and empirical analysis of the questions as yet ignored by comparative courts researchers: does attitudinal voting vary between high courts of different countries, and if so, why? Certainly, more research should follow, but it is hoped that the foundation for a general theory of judicial decision-making across nations has been laid.

The second element of the judicial politicization theory–that legal factors will tend to be more influential for judges in less politicized courts–received mixed support. As predicted, the legal variables were not significant at the U.S. high court but did reach significant levels in the Canadian and Australian cases. However, the lower court dissent variable was in the opposite direction than expected in Canada, and the lower court invalidation variable in Australia was in the opposite direction than predicted. Thus, full confirmation of the second component of the judicial politicization theory awaits further research. It appears that the legal model is influential in the less politicized high courts in this study; however, it may be that the model is under-specified and requires further fact-

based legal variables to be developed and operationalized. So, the research in this dissertation has hopefully indicated a direction for future scholars to explore.

Finally, the control variables included in the model provide a number of interesting insights into comparative judicial decision-making and suggest additional avenues for further research. The data show that the influence of the national Solicitor General or Attorney General in judicial review cases was not significant at the high court of Canada. These results are somewhat surprising in light of the extensive research indicating the influence of the Solicitor General in the United States. Similarly, the fact that the litigant resource differential variable was significant only in the high courts of Canada and Australia (and in opposite directions for those courts) is surprising in light of the body of research exploring Galanter's (1974) thesis regarding the likelihood of repeat players to prevail in litigation. Case salience was only significant at the U.S. court, indicating that the influence of amici may not be as important outside of the American context. Also, the variable indicating whether the national government was a litigant was significant at each high court, but the coefficient was in a negative direction (as expected) only at the Australian supreme court. As noted above, it would be expected that judges acting strategically would be less likely to invalidate a law when the national government is a party; it is surprising that only Australian high court judges were influenced in this manner. Finally, it is interesting that, among all of the case issues areas included in the model, only civil rights cases were highly significant and in the same direction across all three courts. Apparently, only this issue unifies high court judges across systems.

In summary, the results for the full model herein can be viewed with confidence because of the rigorous design of the model. All cases issues were included in each court's analysis, as well as nonunanimous and unanimous case decisions. In other words, the judicial politicization thesis was tested cross-nationally in the most stringent conditions possible, and the results have strongly supported the primary element of the theory and partially supported the secondary contention. The limitations of the theory and the possibility of alternative explanations for the data are explored in the Conclusion.

However, the analysis is extended in the second section of this chapter by analyzing the data for each high court by nonunanimous and unanimous cases. As expected, when only nonunanimous decisions on the merits are included in the analysis, the marginal effect size for attitudinal voting significantly increases for the U.S. and Australian high courts. Puzzlingly, at the Canadian high court, the effect size for the attitudinal variable does not increase and loses significance when only nonunanimous cases are analyzed.

Analyzing the reduced model (using the court case as the unit of analysis) in each of the high courts using only unanimous cases reveals that, for the U.S. and Australian high court judges, the legal variables reach significant levels in these courts, suggesting that the law remains highly relevant in judicial decision-making in certain circumstances in these courts. Thus, the results for the analyses of these legal variables illustrate the principle that, even in highly politicized supreme courts, legal factors can retain significant importance in judicial decision-making for some issues and in some cases. This analysis reinforces the views of those scholars who have argued that the law is an important factor in judicial

decision-making, and that judicial attitudes and preferences are not always determinative.

To be sure, there is more to this story, as the data for the Supreme Court of Canada reveal the exact opposite effect for legal variables when only unanimous cases are analyzed. This suggests that judicial behavior in less politicized courts may be governed by a different dynamic; therefore, further research is called for to untangle the combined effect of legal and ideological variables in less politicized high courts.

In conclusion, the results in this chapter have presented striking (and sometimes surprising) evidence supporting the judicial politicization theory. The implications of the theory are explored in greater detail in the Conclusion.

Chapter Seven: Conclusion

This concluding chapter will provide a brief overview of the project, including a review of the theory and findings of this dissertation. Next, the limitations of the project are discussed, as well as avenues for future research. Finally, the relevance and broader implications of this research are considered.

Summary of the Project

In the last decade, scholarly interest in comparative judicial systems has dramatically increased. A number of single-country studies have appeared, but cross-national empirical judicial research remains rare. This dissertation has sought to partially remedy that deficiency by analyzing two important and related concepts cross-nationally: judicial decision-making and judicial activism. A new general theory of cross-national judicial decision-making in established democracies–the judicial politicization thesis--was introduced and tested in newly collected data from the supreme courts of the United States, Canada, and Australia.

In Chapter Three, the existing research on judicial decision-making and judicial activism was extensively reviewed, with the aim of identifying the questions yet to be answered. To briefly review, the prevalent theory of judicial decision-making is the attitudinal model, which posits that high court judges make decisions in cases based upon their own ideological preferences. The attitudinal model can be contrasted with the opposing

theory, the legal model, which holds that judges are most influenced by legal doctrine and precedent in judicial decision-making. The attitudinal and legal models have been extensively tested in the United States, and several recent studies have also tested the attitudinal model in Canada in certain types of cases. However, there has been no study which measures the effects of the attitudinal and legal models cross-nationally, and across a wide variety of case issue areas. Furthermore, there has been virtually no theoretical work conducted on the question of *why* the attitudinal and legal models may vary in different nations' highest courts. Finally, there has been no research analyzing judicial decision-making in unanimous cases in comparative context.

The theoretical framework introduced in this study–the judicial politicization theory--posits that judges at a highly politicized high court in an established democracy are more likely to decide cases according to ideological/attitudinal factors, and will correspondingly be more likely to engage in judicial activism and strike down acts of the legislature. Conversely, judges at a high court that is less politicized will be more likely to decide cases based upon legal factors, and will be less likely to invalidate laws enacted by the political branch. In other words, the attitudinal model of judicial decision-making will predominate in politicized judiciaries, while the legal model will be more likely to prevail in less politicized courts.

Based on this theory, six testable hypotheses, listed below, were proposed. Each hypothesis was confirmed, with the exception of Hypotheses Five and Six, which were only partially confirmed.

H_1: *The rate of judicial activism will tend to be greater in highly politicized judicial systems. Thus, the U.S. Supreme Court will be more likely to invalidate laws than the high courts of Canada or Australia.*

H_2: *Judges on a highly politicized high court will be more likely to strike down ideologically incongruent laws. Thus, conservative judges on the U.S. Supreme Court will be more likely to invalidate liberal laws while liberal judges will be more likely to nullify conservative laws, but judges at the high courts of Canada and Australia will be less likely to nullify incongruent statutes.*

H_3. *Judges on a highly politicized high court will be more likely to vote in federalism cases according to ideological factors. Thus, conservative judges on the U.S. Supreme Court will be more likely to invalidate federal laws while liberal judges will be more likely to nullify state laws. Because judges at the high courts of Canada and Australia are less likely to vote according to attitudinal factors, conservative judges will not tend to vote to strike down federal laws and liberal judges will not tend to vote to invalidate state/province laws.*

H_4. *Attitudinal voting in judicial review cases is likely to be more significant in politicized judicial systems. Thus, high court judges in the U.S. are more likely to vote according to attitudinal preferences in judicial review cases than are Canadian or Australian judges.*

H_5. *In less politicized high courts, the presence of a lower court dissent will increase the likelihood of a vote for the invalidation of a law. In highly politicized high courts, the presence of a lower court dissent will not result in a greater tendency to vote for the*

nullification of a statute.

H_6. *In less politicized high courts, the fact that the lower court struck down the challenged law will increase the likelihood of a vote for the invalidation of the law. In highly politicized high courts, the fact that the lower court invalidated the challenged law will not result in a greater tendency to vote to strike the law.*

Assessing Judicial Activism in Comparative Perspective

The first finding of this project is that, as predicted, judges at the U.S. Supreme Court in the 1990s were more likely to engage in judicial activism than were judges at the high courts of Canada or Australia. From a descriptive level alone, this is a significant result, because there has not been any comparative examination of these three courts and their respective rates of judicial activism. We now know that the U.S. Supreme Court is by far the most activist court of the three courts in this study. Intriguingly, when measured on a percentage basis, the high courts of Canada and Australia have very nearly the same activism rate. Related to this, the trend rate for judicial activism, measured in percentage, shows that the High Court of Australia experienced a steep increase in activism in the early 1990s, but then the activism rate declined. This result comports with the analysis of Pierce (2006). By contrast, the Supreme Court of Canada had a fairly even rate of activism early in the decade, but then experienced an increase near the end of the decade. The U.S. Supreme Court experienced some fluctuations in the activism rate throughout the decade, but overall the rate of judicial activism increased.

Examining judicial activism at the level of the individual judge reveals that American high court justices were more likely to strike down ideologically incongruent statutes. That is, at the U.S. Supreme Court in the 1990s (which is, again, the most politicized court in this study), the conservative judges were more likely to strike down liberal laws, and liberal judges were more likely to strike down laws that are conservative in direction. However, the pattern was not fully replicated at the Supreme Court of Canada (the least politicized high court): the liberal justices were indeed more likely to strike down conservative laws, but the conservative judges were not more likely to invalidate liberal laws. At the High Court of Australia (a moderately politicized court), the American pattern was observed, but it was not as pronounced. Thus, the most conservative Australian justices were more likely to nullify liberal laws, while the more liberal judges (with several exceptions) were generally more likely to strike down conservative laws.

Thus, both Hypothesis One and Hypothesis Two are confirmed, and the results provide strong support for the judicial politicization theory. The judges at the highly politicized U.S. Supreme Court were more likely to engage in judicial activism in the 1990s than were judges at the high courts of Canada or Australia; additionally, American supreme court justices were more likely to nullify ideologically incongruent statutes.

Turning to judicial activism and federalism, the results in Chapter Five showed that, as predicted by the judicial politicization theory, the judges at the U.S. Supreme Court were much more likely to exhibit voting patterns that are consistent with their attitudes and ideology: in the 1990s, conservative judges were more likely to strike down national laws

and liberal justices were more likely to nullify state and local laws. Thus, this research confirmed the results in the recent study by Solberg and Lindquist (2006).

However, the judges at the far less politicized high courts of Canada and Australia did not exhibit the same ideological voting tendencies. The scatterplots for the Canadian and Australian high courts indicated relatively flat slopes and r-squared statistics that were quite low. Indeed, the slope for invalidation of federal laws in Canada was in the opposite direction that would be expected by a conventional understanding of judicial politics. That is, at the Canadian Supreme Court, the likelihood of invalidating national laws *increases* with judicial liberalism, which is the reverse of the pattern at the American high court. This suggests that non-ideological factors are influential at the supreme courts of Canada and Australia. Thus, Hypothesis Three was confirmed.

Assessing Judicial Decision-Making in Comparative Perspective

In Chapter Six, generalized estimating equation models and multivariate logistic regression analyses were used to examine judicial decision-making at each high court. Specifically, both attitudinal and jurisprudential variables were used to analyze judicial behavior.

As predicted by Hypothesis Four, the effect of judicial attitudes/ideology on judicial decision-making was found to be most significant at the U.S. Supreme Court, less significant at the Australian High Court, and least influential at the Canadian Supreme Court in the 1990s. The results for the U.S. Supreme Court confirm a large body of research (see, e.g.,

Segal and Spaeth 2002) asserting that American high court justices make their decisions on the merits of cases primarily based upon their policy preferences, and not the applicable legal precedents. However, this study does extend this line of research in one way: this is one of the first studies to aggregate all types of cases used in the analysis, rather than just use one type of case, such as civil rights cases. Also, both unanimous and nonunanimous cases were aggregated, providing further confirmation of the attitudinal model.

In the Canadian and Australian cases, the findings in this dissertation show that attitudinal voting exists at these high courts, although judicial ideology is less significant in both of these courts than in the U.S. Supreme Court. These findings thus provide confirmation of the recent studies conducted by Ostberg and Wetstein (1998, 1999, 2004, 2004b, 2005) and Ostberg et al. (2004). For the Australian High Court, this is the first study to test attitudinal decision-making based upon external ideology measures, and thus it is a significant finding to discover that attitudinal judicial voting in this high court, which has been asserted by many legal scholars to be completely dominated by legalist decision-making.

Turning to the analysis of jurisprudential variables, the results were striking, though mixed. That is, the results obtained for the analysis of the legal model were not always as predicted by the judicial politicization theory. As predicted, the legal variables were not significant at the U.S. Supreme Court, but did reach significant levels in the Canadian and Australian cases. However, the lower court dissent variable was in the opposite direction than expected in Canada, and the lower court invalidation variable in Australia was in the

opposite direction than predicted. Thus, full confirmation of Hypotheses Five and Six awaits further research. It does appear that the legal model is somewhat influential in the less politicized high courts–Canada and Australia--in this study; however, it may be that the model is under-specified and requires further legal variables to be developed and operationalized.

However, the legal model was tested in a second way by disaggregating the unanimous cases for each court, pooling the data, and then estimating a reduced version of the model using the court case as the unit of analysis. The legal variables did reach significant levels in the high courts of the U.S. and Australia (albeit in the opposite direction than predicted in two instances), indicating that the law remains relevant in judicial decision-making in unanimous cases. While these results are tentative and await replication, they do support the research conducted by scholars (see, e.g., Kritzer and Richards 2005) who assert that the law does indeed play a role in judicial decision-making in certain circumstances.

Thus, this analysis of both the attitudinal and legal models in cross-national perspective has supplied intriguing results that both confirm and challenge the conventional wisdom regarding judicial decision-making. Additionally, a new theoretical framework has been proposed to explain the variations in judicial behavior between courts of differing nations. The results of the testing of the theory comport with some of the conjectures regarding selection systems raised by Miller (1998). While the judicial politicization thesis must await substantial additional testing before it can be fully accepted, it does provide a suggestive blueprint for future research.

Limitations of this Study

This study is the first to examine the attitudinal and legal models and judicial decision-making cross-nationally; therefore, as with any new area of social scientific research, the findings in this project should be viewed cautiously until additional researchers can replicate and verify the results. In this section, the specific limitations of this dissertation are noted and discussed, and areas for further research are suggested.

The first potential limitation of this study is the possibility that the results are time-bound. This project selected the time period of 1990 to 1999 for each of the high courts studied. As noted in Chapter Two, the rationale for this choice is that each of the supreme courts under consideration in this study experienced significant changes in the 1980s and 1990s that warranted an in-depth analysis. However, the possibility exists that the results in this dissertation are time-bound, and significantly different results could be obtained if a different, earlier time period was selected for analysis. The possibility of results that are time-bound is always a limitation in most social scientific research, of course. However, the response to this potential limitation is that this analysis was meant to be a study of fairly current trends in judicial decision-making at the high courts of the U.S., Australia and Canada. Indeed, analysis of an earlier time period would not be feasible, because of significant changes that occurred in these high courts (e.g., the adoption of the Charter in Canada). The only realistic possibility would be to analyze judicial decision-making in these courts in the period from 2000 to 2006. While it is possible that the dynamics of judicial decision-making may have changed significantly in the last seven years, it appears unlikely.

However, this would present an intriguing research question, and the replication of this study in the time period of 2000 to 2006 would be a very promising area for future research.

The second limitation on this project is the fact that only two legal variables (lower court dissent and lower court invalidation) were included in the model used to analyze judicial decision-making. Because this study examined cases across multiple case issue areas, specific fact-bound legal variables could not be incorporated into the model. For example, Kritzer, Pickerill and Richards (1998) examined only search-and-seizure cases and freedom-of-speech cases, so the authors were able to include a number of independent variables that measured whether certain factual elements were present in each case in their data set. There is no question that this approach allows for greater precision in testing the influence of fact-bound legal variables, but the tradeoff is generalizability is reduced, because only one or two areas of the law can be incorporated into the model and analyzed. This project aggregated and analyzed cases from multiple issue areas, so as to provide the most rigorous test of the theory and also increase reliability and generalizability. However, it is clear that replication of this study–but using only one issue area and incorporating case-specific variables–would increase the specificity of the legal model analysis.

The final limitation on this research is the question of generalizability. This study analyzed three high courts, and it is certainly possible that empirical analysis of judicial decision-making at the high courts of other modern democracies–say, France or Germany–could yield very different results. So, it may be that the judicial politicization thesis is not generalizable to other countries' high courts. The possibility that different

results might be obtained in other cases and the potential lack of generalizability is always a limitation in comparative research. While it is hoped that this theory proposed in this project is generalizable to other high courts, even if it is not, the findings herein still hopefully shed some light on judicial decision-making in the U.S., Canada, and Australia. Additional research testing the theory in other high courts will answer the issue of generalizability. More specifically, future research replicating this study in emerging as well as established democracies would be invaluable in assessing the generalizability and robustness of the theory.

Relevance and Implications of this Project

This results of this project are relevant for both policymakers and scholars of comparative politics and law. For scholars of public law, this project has served to further understand the judicial decision-making process in cross-national perspective. Although judicial decision-making has been extensively researched in the American case, only a handful of empirical studies have been conducted in Canada and Australia. At the very least, we now know that judicial attitudes and ideology are significant at the high courts of Canada and Australia, as well as the U.S. Supreme Court. We also know that jurisprudential factors play a role in judicial behavior in these courts, as well. In addition, the judicial politicization theory proposed in this dissertation provides a starting point to answer the question that has not yet been addressed by comparative courts scholars: why does the attitudinal and legal model vary between high courts? Finally, this project has hopefully served to dispel some

misconceptions about judicial activism in each of these countries. For example, Miller (1998) has argued that there is a lack of judicial activism in Canada. Although the Canadian Supreme Court is certainly much less activist than the U.S. Supreme Court, the analysis in Chapter Four demonstrates that significant levels of judicial activism exist at the Canadian high court. Thus, this project has provided a first step towards a more comprehensive scholarly understanding of the judicial process in comparative perspective.

However, a fuller account of the judicial process should be relevant to policymakers as well as scholars. It is clear that the influence of high courts throughout the world increased dramatically in the latter half of the twentieth century. Indeed, it has been noted that there has been a "global expansion of judicial power" (Tate and Vallinder 1995) as supreme courts have expanded their role beyond simple dispute resolution to the creation of public policy. Especially in Europe, constitutional courts possessing the power of abstract judicial review have recently transformed the political landscape. In some polities, legislators and executives must anticipate the rulings of constitutional courts and frequently alter their policies in advance of adoption to avoid having a law invalidated by the court (Tate and Vallinder 1995). There is a consensus, then, that many high courts have become increasingly activist; indeed, in many countries, the nature of democratic governance has been altered as increasingly politicized judges assume new policymaking roles (Haynie and Tate 1998, 10). Thus, judicial activism has played a fundamental role in the "quiet revolution" of modern democratic politics (Weiler 1994). So, a more comprehensive account of the dynamics of judicial decision-making and judicial activism in modern democracies can

help provide a better understanding of the ongoing process of judicialization across the globe.

Having noted the relevance of this study, it is appropriate to consider some of the implications of the findings herein. First, the findings of this project raise important questions about the judicial appointment process in Canada and Australia, and to a lesser degree, the United States. To be sure, I have argued in this project that, contrary to the conventional scholarly wisdom, the method of judicial appointment is not the dominant variable in the judicial decision-making process. Rather, I have contended that the informal norm of the judicial selection culture is the most important influence in judicial politicization and judicial behavior. However, I did note in Chapter Two that formal selection systems in Canada and Australia have the potential to become significant if the informal selection norms should change. Thus, this study does raise significant questions about whether Canada, Australia (and possibly the United States) may wish to alter their judicial selection systems.

To review, Canada and Australia entrust the executive with virtually total control over the appointment of judges to their high courts, whereas the appointment system in the U.S. mandates a collaborative process between the president and Senate. Because this study has demonstrated that high court justices in Canada, Australia, and the United States are each motivated, to a greater or lesser degree, by political ideologies and attitudinal preferences, the myth (still heavily propounded in Canada and Australia) that judges only consider legal factors when deciding cases should be finally discarded. Thus, the acknowledgment that the legal model is not wholly dominant and that political and ideological preferences play a large

role in the judicial process suggests that Canada and Australia, especially, may want to limit the power of the prime minister in judicial appointments. It appears that, especially in Canada, ideology has played less of a role in the selection and appointment of high court judges; however, there is certainly no guarantee that this phenomenon will continue. That is, it is conceivable that, when a future high court vacancy should occur, a highly strategic prime minister in Canada or Australia could select a less qualified, but politically extremist judge.[44] Because there are no effective checks in the appointment system in Canada or Australia, there would be no method for the political opposition to prevent this from happening.

As has been noted by various commentators (Kritzer 2006; see generally Malleson and Russell 2006), it is impossible to completely remove politics from the judicial appointment process; however, it is certainly feasible to design a system that reduces political factors and balances accountability, merit, and independence. For example, greater transparency can serve to reduce overtly political considerations in the appointment process. The lack of transparency in the Canadian appointment process has not gone unnoticed by Canadian critics (Canadian Bar Association 2004; Johnson 2004; McCormick 2000b; Ziegel 1999, 2003) and indeed, there have been some minor changes in the process. In 2004, Prime Minister Martin created a parliamentary committee to screen supreme court nominees and provide a report to Parliament (Morton 2006). However, members of the opposition party

[44] Of course, I acknowledge that certain commentators, of various political stripes, would assert that this has already happened in Australia, and perhaps, Canada. This is certainly arguable, but my qualitative review of these high courts' jurisprudence in the last decade does not support that contention.

objected to the changes, and the process was refined in 2005 by adding additional members to the committee. However, it appears that these changes are largely cosmetic, as the committee acts only in an advisory capacity and the prime minister retains full control over the choice of the nominee.

One possibility for increasing the transparency of the appointment process in Canada and Australia would be the establishment of formal confirmation hearings, similar to the process in the United States. Some Canadian commentators (see, e.g., Ratushny 2002) have strenuously objected to this, arguing that these hearings would lead to a much greater degree of politicization in the judicial selection process. On the other hand, Ziegel (1999, 10) argues that parliamentary confirmation procedures and/or a nominating system are urgently needed, because without the "restraining force" that such procedures would provide, "appointees would be selected on the basis of their . . . political and social philosophies."

There are, of course, a plethora of judicial selection systems used in various countries as well as in the American states (see Epstein, Knight, and Shvetsova 2002; Malleson and Russell 2006 for a general discussion of selection systems). Some of the possibilities are: a merit plan (this involves a screening committee which selects a number of candidates, followed by selection of the appointee by the executive), selection of judges by the legislature; judicial elections (either partisan or nonpartisan); divided executive-legislative appointment (the American federal system); and the current system used in Canada and Australia, exclusive executive appointment. Again, an exhaustive examination of these alternatives is beyond the scope of this project, but the central point remains: placing near-

total authority to appoint high court judges in the executive may not be optimal. The Canadian and Australian judicial appointment systems appear to be something of an anachronism in the twenty-first century.[45] All commentators agree that an equitable judicial appointment system increases public confidence in the high court and increases the court's legitimacy. In light of the findings of this dissertation, all possibilities for reform of the appointment process in Canada and Australia should be considered.

The focus on Australia and Canada above does not imply that the American system of high court selection is optimally designed or without problems. Indeed, there is a vast literature which examines the judicial nomination and confirmation process and outlines some of the difficulties with the system (see, e.g., Abraham 1999; Comiskey 2004; Epstein and Segal 2005; Gerhardt 2000; Goldman 1997; Silverstein 1994; Yalof 1999). One suggestion for reform of the American judicial selection system is to require, by constitutional amendment, a supermajority vote (say, a two-thirds vote) in the Senate for confirmation of high court judges (Ackerman 1998; Gerhardt 2000).[46] The rationale for the proposal is that a supermajority vote would require presidents to confer with the political

[45] It is worth noting that the Canadian and Australian high courts differ significantly in one dimension: gender diversity. The High Court of Australia has had only one woman in the history of the Court, while the current Canadian Supreme Court is probably the most diverse in the world in terms of female representation. As of this writing, the Court is led by Chief Justice Beverley McLachlin, and three women serve as associate justices: Marie Deschamps, Rosalie Abella, and Louise Charron.

[46] Of course, some would assert that we already have a supermajority system in place: the filibuster, which requires 60 votes to end. There is some question as to whether the minority party in the Senate could successfully filibuster a Supreme Court or lower federal court nominee. In 2003, the question was raised, and Republicans threatened to invoke the "nuclear option" and eliminate the filibuster on judicial nominees. This was avoided by a last-minute political compromise, and the possibility of judicial filibusters remains an open question.

opposition on the candidate selection, and also require a president to choose a more moderate, well-qualified, consensus candidate (Carter 1994). While it seems highly unlikely that such a reform will be instituted at this time, the idea is thought-provoking, and worthy of serious consideration.

Yet another class of potential reforms in the American judicial system involves the removal of life tenure for federal judges so as to increase accountability and reduce political influence (see generally Gerhardt 2000). This reform, which would require a constitutional amendment, seems especially problematic, because of the ingrained tradition of judicial life tenure and also because its elimination could reduce judicial independence. A variant of this idea, which might present less of a constitutional difficulty, would be for Congress to create a series of financial incentives (or penalties) for the justices to retire once they reach a certain age (Resnik 2005).

Beyond reform of judicial appointment systems, there is a second major implication resulting from the findings of this study. This study has shown that judicial activism exists at the high courts of Canada and Australia, as well as at the U.S. Supreme Court. As discussed in Chapter Three, many commentators consider judicial activism to be undemocratic, "counter-majoritarian," and deleterious to the proper functioning of a polity. If these charges are true, then one implication of this project is that serious consideration should be given to methods of limiting the effects of judicial activism. One way of accomplishing this is through what Tushnet (2003c) terms "weak-form" judicial review. Weak-form judicial review allows for the legislature and/or executive to respond when the

high court invalidates a statute.

One variant of weak-form judicial review already exists in Canada: the "notwithstanding" clause, section 33, of the Charter of Rights and Freedoms, which allows for legislative override of the Court. The notwithstanding clause allows either a provincial legislature or the national Parliament by majority vote to override, for a period no longer than five years, any provision contained in sections 2, and 7 through 15 of the Charter (Flemming 2002; Goldsworthy 2003; Roach 2001; Tushnet 2003c). Essentially, the notwithstanding clause allows a Canadian legislature to reenact a statute that has been nullified by the Court based upon the law's inconsistency with the Charter.[47] However, Parliament and provincial legislatures have been exceptionally reluctant to utilize section 33, and it has been termed a "paper tiger" (Leeson 2000, 20).

The notwithstanding clause has been described as a "uniquely Canadian compromise" between the strong-form judicial review system used in the United States and the English parliamentary supremacy model (Goldsworthy 2003, 452). Roach (2001) makes a persuasive argument that the notwithstanding clause alleviates any constitutional or democratic concerns about judicial activism, because section 33 acts as a check and a balance on the Supreme Court. The notwithstanding clause thus serves to foster a dialogue between legislators and the Court, which further strengthens the democratic process (Hogg and Bushell 1997).

Weak form judicial review exists in various permutations in other political systems

[47] The notwithstanding clause presumably also allows for a legislature to override a particular judicial interpretation of a statute, not just a judicial invalidation of a law.

as well. For example, the British Human Rights Act (1998), taking effect on October 2, 2000, incorporated the European Convention on Human Rights and Fundamental Freedoms (ECHR) into United Kingdom law, so that ECHR rights were enforceable in UK courts. The Human Rights Act required that all public authorities in the United Kingdom must adhere to the norms established by the ECHR, unless an Act of Parliament dictates otherwise. If an Act of Parliament is deemed by a judge to conflict with the ECHR, then the judge may issue a "declaration of incompatibility." The incompatible legislation continues to apply, but it is expected that the Parliament will amend the law to bring it into conformity (Tushnet 2003c; Weiden 2006).

The British Human Rights Act and the Canadian notwithstanding clause are just two examples of weak-form judicial review, a practice that is asserted to ameliorate the purported undemocratic nature of strong-form judicial review. Indeed, some commentators have argued that the weak form judicial review could also be optimal in other political systems (Roach 2001; see also Goldsworthy 2003). Given that the findings of this study have demonstrated that high court judges in Canada (as well as Australia and the U.S.) are influenced by ideological factors in judicial decision-making and that judicial activism is a very real phenomenon in these courts, then it follows that a reexamination of the seldom-used notwithstanding clause may be in order in Canada. Indeed, the advent of weak-form judicial review, accomplished through constitutional or statutory means, may be a desirable method for both emerging and established democracies to balance judicial autonomy with judicial accountability.

This dissertation has sought to provide empirical data on the little-studied concepts of judicial decision-making and judicial activism in cross-national context. If these findings contribute in any small way to a better understanding of the judicial process in comparative perspective or considerations of judicial reform, the project will have accomplished its task.

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