Attitudinal Decision Making in the Supreme Court of Canada

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C.L. Ostberg and Matthew E. Wetstein

*Reviewed by Emmett Macfarlane**

This book offers a comprehensive, noteworthy study of Canadian judicial behaviour — one of the first to fully apply a leading American political science model of judicial decision-making to a court outside the United States. C.L. Ostberg and Matthew Wetstein's examination of the Supreme Court of Canada and the attitudinal model stands as a valuable empirical contribution to our understanding of the Court and the sources of judicial decisions, particularly when, in the era of the *Charter of Rights and Freedoms*,[1] academic research is too often preoccupied by normative debates over judicial "activism"[2] and dialogue theory.[3] The authors generally present a careful analysis, allowing them to moderate their conclusions and take account of the many important factors unique to the Canadian Court and the broader political system. In some respects, however, the book suffers from the theoretical and methodological pitfalls of its American progenitors. The problems, explored more fully below, include conceptual and measurement difficulties pertaining to the book's key object of study: the ideology of individual Supreme Court justices.

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7 [*Charter*].

2. For an excellent example of the activism debate, see Christopher P. Manfredi & James B. Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Choudhry and Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada'" (2004) 49 McGill L.J. 741.

3. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

In the 1920s, the legal realist movement first called into question the traditional mode of legal decision-making, which says that judges adjudicate disputes based on relevant precedent, the facts of the case, and the plain meaning of statutes and the constitution. Legal realism advanced the notion that, rather than "discovering" the law, judges created it and, in doing so, were motivated largely by their backgrounds and ideological predilections. Following from this, the attitudinal model was first fully developed in the 1960s by Glendon Schubert, who suggested case stimuli and judicial ideology could be scaled.[4] The modern thesis of the attitudinal model is one that "holds that the justices base their decisions on the merits on the facts of the case juxtaposed against their personal policy preferences."[5]

Attitudinal Decision Making in the Supreme Court of Canada constitutes a notable milestone for comparative judicial research, as it applies the most systematic analysis of the attitudinal model outside of the American system to date. Ostberg and Wetstein take pains to consider the institutional differences between the United States Supreme Court and its northern counterpart, situating the model within the context of the Canadian Court's particular rules, culture and tradition. Their thorough analysis also endeavors to account for fundamental differences in the broader Canadian system, including the tradition of Parliamentary sovereignty, more "collectivist" and "deferential" values and a less ideologically-driven judicial appointments process, all of which, they suggest, might make judges less inclined to pursue ideological preferences. Finally, they contrast the *Charter* with the U.S. *Bill of Rights*, noting in particular that section 1 (the reasonable limitations clause) and section 33 (the notwithstanding clause) might also dissuade judges from making choices rooted in ideology.

Notwithstanding these significant differences, the authors find that the attitudinal model comprises a generally persuasive account of decision-making on the Canadian Supreme Court. They note, however, that the impact of ideology on the Court is less definitive than in the

4. Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963* (Evanston, IL: Northwestern University Press, 1965).

5. Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2003) at 312.

U.S. As a result, Ostberg and Wetstein suggest that while the attitudinal model plays a prominent role in explaining the Court's decisions, they believe that "justices of the post-*Charter* Canadian Supreme Court are bound to be influenced by both the strategic environment in which they work and a conscious desire to write opinions that are consistent with accepted legal doctrines" (10). Having established in the first two chapters the tenets of the attitudinal model and reviewed the institutional, constitutional and political factors that dampen the force of its effects on judicial decisions in Canada, the authors proceed to the heart of their analysis. In chapter 3 of the eight-chapter book, Ostberg and Wetstein outline their methodology, and present an examination of attitudinal influences in the Supreme Court's criminal (chapter 4), civil rights and liberties (chapter 5) and economic (chapter 6) cases.

To establish the attitudinal model, the authors "measure" the justices' ideological positions, labeling them relative to each other as liberal, moderate or conservative. They then analyze judicial votes across the different sets of cases outlined above, and examine the influence of ideology by controlling for other factors, such as different case facts or the justices' gender. In fact, the influence of these control variables turns out to be one of the most novel and important contributions of the book. For example, in the subset of economic cases that deal with union issues, they find that in cases where workers bring forward claims involving the loss of benefits or working conditions, justices are 28% more likely to rule in their favour than in other cases involving unions. According to the authors, "these cases suggest that judicial sympathies extend to individuals who are trying to meet basic economic needs" (171). Similarly, the justices' gender appears to factor into some types of cases and not others. While there is no clear gender split in criminal cases, all five female justices were at the liberal end of the spectrum in civil rights and liberties decisions, "suggesting that female justices . . . may approach fundamental freedoms and equality issues from a different perspective than their male colleagues" (120).

Nevertheless, the model's ability to convincingly assess ideology's influence presents major theoretical and methodological challenges. Ostberg and Wetstein admit that obtaining the initial measure of each

justice's ideology is not a simple task, pointing to early quantitative research in the U.S. that used judicial votes to infer ideology:

> subsequent critics have indicated that such techniques ultimately suffered from circular reasoning problems. Scholars argued that this approach was flawed because it utilized the final vote outcomes by the justices themselves to infer their ideological predispositions, which, in turn, were then said to act as the driving force behind these same vote outcomes (45).

The authors explore alternative methods of obtaining an ideology measure. One option is to look at a justice's voting record while on lower courts, but the authors reject this in part because "there are key institutional constraints that set lower court justices apart from their high court colleagues" (47). Another possibility includes distilling ideology from the judges' public speeches or published articles, but few justices had extensive collections of these. The authors ultimately settle on scoring the justices' ideologies based on articles and editorials in nine Canadian newspapers at the time they were selected for the Court. This, they claim, is the best measure because it is "independent" and derived from multiple sources. Ostberg and Wetstein note they believe the newspaper measure "will serve as a stronger predictor of voting behaviour" than the alternatives (60). Nonetheless, for comparison purposes, the party affiliation of the appointing prime minister is also included in their analysis.[6]

Measuring something as elusive and complex as "ideology" exposes one of the key problems of relying too heavily on quantitative methodology to study judicial decision-making. This is not to say quantitative approaches are not helpful or important; indeed, several invaluable quantitative studies have exposed significant trends in the Supreme Court's jurisprudence.[7] Yet in this case, it is difficult to see how the newspaper measure of ideology fully resolves the circularity problems associated with using past performance to predict future results. Ostberg and Wetstein assert it is an "independent" measure

6. They ultimately find that the newspaper measure serves as a much stronger indicator than the party of the appointing prime minister.

7. See Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company, 2000).

because it involves multiple journalists relying on a host of different experts to describe each justice's ideological position. However, any experts consulted by journalists to describe the ideological predilections of judicial nominees are no doubt relying, at least in some instances, on a judge's past voting record. While the authors admit this measure is "less than perfect," they resign themselves to it because "no scholar to date has developed a fully satisfactory measure of a priori judicial attitudes" (58).

It may simply be the case that an individual's *ideology* is not something conducive to quantitative measurement. Ideology is a complex concept, which, as discussed further below, simultaneously shapes and is shaped by other important factors that come into play in human decision-making. That one can isolate and accurately gauge such an intangible characteristic is a dubious prospect. This is not to contend that ideology is irrelevant to judicial decision-making or that it should be ignored in academic research; rather, it is to say that situating a concept like ideology in a statistical, scientific model may be an untenable way of ascertaining its impact, particularly when it is insufficiently theorized.[8]

The attitudinal model establishes itself by "begging the question," or using circular logic. It begins with the assumption that what drives judicial decisions is largely determined by the ideology of the Court's justices, obtains a questionable 'measure' of that ideology (which in many cases, however indirectly, is based upon past votes), and then in

8. While Ostberg and Wetstein do examine whether the justices are generally "consistent" in ideological terms across different types of cases, as well as outline and apply the four archetypes of political ideology (liberal, conservative, communitarian and libertarian) to each justice in chapter 7, the book contains virtually no discussion on the factors that are connected to and have reciprocal effects on ideology. By suggesting attitudinal scholars do not fully theorize ideology as a concept, I assert that the thin, descriptive notion of ideology as a position on a uni-dimensional left-right axis or a two-dimensional freedom-equality/freedom-order axis is insufficient. It does little to account for a justice's perception of their proper role (discussed below) or the degree to which they are sensitive to their various audiences. To be fair, Ostberg and Wetstein do attempt to qualitatively account for institutional factors such as collegiality and cultural factors like deference to authority, but the quantitative modeling they employ cannot account for these *independent* from ideology, because ideology and these other factors condition each other.

turn uses that measure to predict votes so long as they control for other factors. For example, Ostberg and Wetstein examine two subsets of civil rights and liberties cases — equality and freedom of expression — to demonstrate the influence of ideology on the vote outcomes. They control for different case characteristics in each subset of cases they examine as part of their analysis (such as whether certain freedom of expression cases involved political speech, corporate advertising or obscenity). The model's predictive capacity is what permits attitudinal scholars in the U.S. to promote the model as a full-fledged theory of judicial behaviour.

However, despite its unfailing adherence to the "scientific model,"[9] a serious dilemma for the attitudinal model is posed by the underlying assumption that it is indeed *ideology* being measured. For attitudinal scholars do not — and perhaps *cannot* — control for the individual judge's *role perceptions*, which I would assert are certainly related to, but conceptually distinct from, ideology.[10] For example, former Supreme Court Justice William McIntyre is known for being a "quintessential" conservative (20). He is also well known for his strongly held views on the role of a judge, particularly as an advocate of judicial restraint, incrementalism and deference towards elected legislatures.[11] There is little doubt that this type of "judicial philosophy" on the one hand, and ideology on the other, are related; yet that does not mean they are the same thing: deference in one case may be conservative, but in another it may be liberal.

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9. Attitudinal researchers dismiss other theories as lacking explanatory value because they do not adhere to "accepted standards of scientific research.": Segal & Spaeth, *supra* note 5 at 433.

10. Leading attitudinal scholars Jeffrey Segal and Harold Spaeth make reference to this fact, but in the context of critiquing the 'postpositivist' approach, which, in its contemporary formulation, contends that all that can be expected of judges is that they *believe* that they are following legal principles when deciding cases. Under the postpositivist approach, almost any decision could be consistent with the traditional legal model. Segal and Spaeth reject this approach, in part because it is not falsifiable, but admit that "to the extent the justices' ideological values determine their legal views, then there may be some unexpected overlap between the attitudinal model and the postpositivist position": Segal & Spaeth, *ibid.* at 434.

11. W.H. McConnell, *William R. McIntyre: Paladin of the Common Law* (Montreal: Carleton University Press, 2000) at 64.

Unfortunately, Ostberg and Wetstein are not quite consistent in recognizing and accounting for this fact. To execute the attitudinal model, the authors analyze each justice's vote across different sets of cases. In the criminal cases, judicial votes were considered liberal if the justice voted in support of the liberty and due process rights of the criminally accused, and conservative if they voted against. This would appear to be an accurate, or at least generally acceptable, categorization in the context of the right to counsel cases and search and seizure cases the authors examine. They find that the most liberal justices are 40% more likely to side with the accused than their most conservative colleagues in right to counsel cases and 25% more likely to do so in search and seizure cases (85-109). This difference is even more pronounced when analyzing only non-unanimous cases, which is consistent with attitudinal theory's assertion that the force of ideology is even more powerful when judges are divided over a case (112).

Yet this classification of case votes becomes much more problematic in the context of civil rights and liberties cases. The authors categorize individual votes in the same "relatively straightforward" (61) way as they did in criminal cases: judicial votes are considered liberal if they supported a freedom of expression or equality claim, and conservative if they rejected such claims. Here, I respectfully assert, the authors commit a fundamental flaw in measurement. Put simply, not all votes in favour of rights claims are liberal, just as not all votes against them conservative. There are several freedom of expression cases that illustrate this perfectly. In *RJR-MacDonald v. Canada (A.G.)*, the Supreme Court struck down broad federal prohibitions on the advertising of tobacco products as unconstitutional under the *Charter* by a 5-4 margin.[12] Justice L'Heureux-Dubé, who the authors describe as liberal in civil rights and liberties cases, rejected the tobacco companies' claim and joined her more conservative colleagues in dissent. In *Irwin Toy v. Quebec (A.G.)*, a majority of the Court held that Quebec legislation prohibiting advertising directed at children under the age of thirteen infringed expression guarantees under the *Charter*, but upheld the legislation 3-2 as constituting a reasonable limitation under section 1.[13] Notably, two of the most conservative justices on the panel, Jean Beetz

12. [1995] 3 S.C.R. 199.
13. [1989] 1 S.C.R. 927.

and William McIntyre, were those in favour of upholding the rights claim and striking down the legislation.

No doubt as a result of cases like these, Ostberg and Wetstein find that, counter to their expectations, the liberal justices on the post-*Charter* Court were "slightly *more likely* than their conservative counterparts to rule *against* the rights claimant" in freedom of expression cases (144, emphasis added). In fact, they find that ideology is not a statistically significant factor in this subset of cases. Yet had the authors categorized the cases more carefully, it is possible they would have reached a different conclusion. For some time, scholars on the left have criticized the Court's propensity to rule in favour of corporations in *Charter* cases.[14] A central tenet of the attitudinal model is that judges will draw on their political ideology to rule in pursuit of their policy preferences (5). There is thus no reason to suspect "liberal" (that is, "progressive") judges would necessarily oppose restrictions on commercial advertising in these cases. Perhaps an even better example is freedom of expression cases that involve rights claimants seeking to strike down legislation that imposes election campaign spending limits, such as in *Libman v. Quebec (A.G.)*[15] and *Harper v. Canada (A.G.)*,[16] Liberal-minded judges are unlikely to oppose the egalitarian aims behind such legislation, and under attitudinal theory, would thus be expected to uphold the legislation rather than strike it down. It is evident that by not taking a more nuanced approach to classifying case outcomes with respect to civil rights and liberties cases, the authors actually undercut the theory they are testing![17]

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14. See Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 198-202.

15. [1997] 3 S.C.R. 569 [*Libman*].

16. 2004 SCC 33, [2004] 1 S.C.R. 827 [*Harper*]. (Note that *Harper*, decided in 2004, was not included in Ostberg and Wetstein's analysis, which included forty-four free speech cases from 1984-2003.)

17. Ostberg and Wetstein do account for the *type* of speech implicated in freedom of expression cases, such as political, commercial or obscenity, but this was to account for the varying levels of importance judges might be expected to accord each type, rather than to associate protection of particular types of speech to particular ideological inclinations.

This error in measurement is particularly surprising given that Ostberg and Wetstein are more sophisticated in their approach to labeling votes in economic cases. The authors point out: "it is more difficult to determine what constitutes a liberal vote in the economic area because there is an ever-shifting set of interests that are pitted against each other" (62). They thus determine who constituted the "economic underdog" in each case, and code judicial votes favouring those parties as liberal, while those voting on the side of the "elites" are coded as conservative. The authors include in their models analyzing union cases and tax cases a judge-level variable indicating whether a justice came to the bench from private practice, based on the "hypothesis that justices coming to the court from a privileged legal background will remain more closely affiliated with the corporate interests that they had predominately represented" (170). Although they find that ideology does not have a statistically significant effect on the outcome of all union cases, they note the high degree of collinearity between ideology and whether or not a justice was appointed out of private practice. They conclude the latter variable "serves as a useful surrogate for explaining ideological conflict" (170). Further, the ideology variable does prove significant in non-unanimous union cases, with liberal justices being 24% more likely to vote in favour of the economic underdogs (this is, the union side). Similar results are achieved with respect to the ideology variable in tax cases. Ideology is found to have no significant impact across all tax cases, but it becomes the most significant factor in non-unanimous cases, where "the most liberal justices are 50% more likely to rule in favour of the government's authority to tax than their most conservative counterparts" (186).

In chapter 7, Ostberg and Wetstein investigate the extent to which judges are ideologically consistent across these three sets of cases. They find that ideologues (those judges at either end of the liberal-conservative spectrum) are most likely to exhibit consistency, while moderates are less likely to do so. Nevertheless, that some judges cast "ideologically disparate votes across different issue dimensions paints a more subtle portrait of attitudinal voting behaviour in the Canadian context" (209). They cite as an example Chief Justice McLachlin, who appears conservative in criminal cases but liberal in civil liberties cases. It is possible that the classification problems with respect to some civil

liberties cases, which I explored above, may have led the authors to a potentially erroneous conclusion.

The authors also have difficulty explaining the lack of ideological consistency in some centrist judges, suggesting that these judges may be acting strategically as swing voters on the Court, may be acting as opinion followers or may simply approach the issues in a piecemeal, case-by-case fashion. To their credit, the authors readily admit the attitudinal model cannot explain every aspect of judicial behaviour, pointing out that "[u]nfortunately, we are unable to definitively label these justices as attitudinalists, strategists, or legal pragmatists until more research is done that sheds light on the inner workings of the Canadian Supreme Court" (209).

Yet for all of its shortcomings, Ostberg and Wetstein's book serves as an important empirical verification of what many would contend we should intuitively know to be true: the backgrounds, values and ideologies of the Supreme Court of Canada's justices are an important source of their decisions.[18] Even if arriving at a quantitative measure of ideology is an exercise fraught with difficulty, there is value in attempting to gauge the impact of the personal values and political preferences on judicial decision-making. While the attitudinal model cannot disentangle its simplistic notion of ideology from related characteristics, such as the justices' perceptions of what the role of the judge entails, Ostberg and Wetstein's work still has significant implications for the ongoing debate over the judicial appointments process. Their work also sheds light on the way in which certain factual circumstances trigger different reactions to judges at opposite ends of the liberal-conservative spectrum. As the authors point out, this information could provide potential litigants with valuable insights into how to approach legal arguments, or whether to pursue a given case at all. *Attitudinal Decision Making in the Supreme Court of Canada* constitutes a worthwhile read for scholars of the Supreme Court or

18. Indeed, the justices themselves have acknowledged as much. See Beverly McLachlin, "On Impartiality" (Address at University of Waikato, Hamilton, New Zealand, 23 April, 2003) [unpublished]; and Rosalie Silberman Abella, "The Dynamic Nature of Equality" in Sheilah L. Martin & Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Agincourt, ON: Carswell, 1987) at 3.

readers interested in judicial decision-making in the *Charter* era. In spite of its methodological limitations, the book furthers our understanding of one of the most prominent and powerful institutions in the country, and enlarges the foundation of empirical research in order to help cultivate much needed theory-building in the field of Canadian judicial behaviour.