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# The Unanimous Decisions of the Supreme Court of Canada as a Test of the Attitudinal Model

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## Explaining the Unanimous Decisions of the Supreme Court of Canada

Most of the empirical work on the decision making of justices on the Supreme Court of Canada has taken as its exclusive focus the divided decisions of the Court. In contrast to this extensive body of research on divided decision, the much more limited knowledge of unanimous decisions is troubling because such decisions constitute a sizeable portion of all of the formal decisions of the Court. As can be seen from Figure 1, over the past third of a century, the proportion of Supreme Court cases decided unanimously has been consistently high.

The analysis reported below provides a first step towards understanding the neglected nature of unanimous decisions. This investigation of the nature and causes of unanimity in the Supreme Court of Canada explores two competing explanations: one drawn from the most widely accepted general explanation of judicial voting and the other from the perspectives of the justices. To determine that perspective, one of the authors interviewed ten of the current or recent justices on the Court.<sup>1</sup>

At this point, the most prominent approach to the explanation of decision making on the supreme courts of both Canada and the United States is the attitudinal model. Certainly, there is little doubt that the political attitudes and ideology of the justices on both courts have a substantial effect on many of the outcomes adopted by the Court and on the

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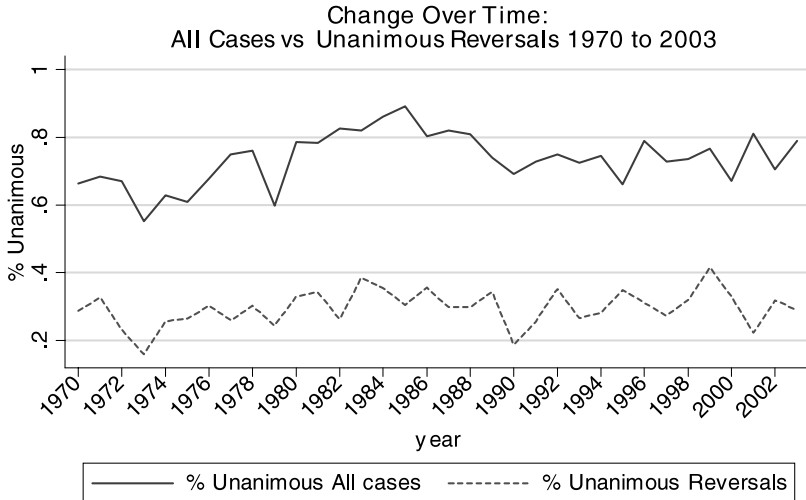
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FIGURE 1  
Unanimous Decisions—Supreme Court of Canada



votes of individual justices (see, for example, Ostberg and Wetstein, 2007; Songer and Johnson, 2007; Schubert, 1965; Segal and Spaeth, 1993, 1996, 2002; Rohde and Spaeth, 1976; Robertson, 1998; Peck, 1969). Instead, the debate (Kritzer et al., 1998) now seems to focus on whether attitudes comprise “a complete and adequate model of Supreme Court’s decisions on the merits.” While not all scholars accept the absolute position asserted by Segal and Spaeth (2002) and Robertson (1998) (that is, that political attitudes provide a complete explanation for *all* votes of the justices) for the primacy of judicial attitudes, prominent support remains for the proposition that the political attitudes of the justices are the most important influence on the votes of the justices in almost all cases. Thus, advocates of the attitudinal model assert or sometimes imply that the attitudinal model should explain unanimous decisions as well.

In sharp contrast, the justices themselves deny the importance of political attitudes as a basis for unanimous decisions and instead stress the nature of the cases litigated and collegiality. In the remainder of this paper we contrast the perspectives on the nature of unanimous decisions held by the advocates of the attitudinal model with those of the justices of the Supreme Court of Canada. From each of these perspectives, we derive specific hypotheses that can be tested empirically. Tests of these hypotheses are then evaluated to determine the extent to which these two contrasting explanations are helpful in understanding the unanimous decisions of the Court.

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**Abstract.** Most of the empirical work on the decision making of justices on the Supreme Court of Canada has taken as its exclusive focus the divided decisions of the Court. In contrast to this extensive body of research on divided decision, the much more limited knowledge of unanimous decisions is troubling because such decisions constitute nearly three-quarters of all of the formal decisions of the Court. The analysis reported below provides a first step towards understanding the neglected nature of unanimous decisions. This investigation of the nature and causes of unanimity in the Supreme Court of Canada explores two competing explanations: one drawn from the most widely accepted general explanation of judicial voting (that is, the attitudinal model) and the other from the perspectives of the justices themselves. To determine that perspective, the author interviewed ten of the current or recent justices on the Court. After describing these two alternative accounts of unanimity, empirical tests are conducted of the implications of each view. We find substantially more support for the perspectives of the justices than for the perspective derived from the attitudinal model on unanimity.

**Résumé.** La majeure partie du travail de recherche empirique portant sur la manière dont les juges de la Cour suprême du Canada prennent leurs décisions se concentre exclusivement sur les décisions divisées de cette institution. En contraste avec cette foison d'études sur les décisions divisées, le corpus beaucoup plus limité de connaissances sur les décisions unanimes pose un problème important, car celles-ci représentent presque les trois quarts de la totalité des décisions formelles de la Cour suprême. L'analyse présentée ci-dessous se veut un premier pas vers une meilleure connaissance de la nature, trop négligée jusqu'à présent, de ces décisions unanimes. Cette investigation sur la nature et les causes de l'unanimité dans les décisions de la Cour suprême du Canada explore deux voies se trouvant en compétition : l'une qui résulte de l'explication la plus largement acceptée du vote judiciaire (soit le modèle attitudinal), et l'autre qui découle de la perspective personnelle des juges. Pour élucider cette perspective propre des juges, les auteurs ont interviewé dix juges actuels et récents de la Cour suprême du Canada. Après avoir décrit ces deux explications alternatives de l'unanimité, ils effectuent des tests empiriques sur les implications respectives du modèle attitudinal et des perspectives propres des juges. L'étude révèle que les perspectives propres des juges ont beaucoup plus de poids que la perspective dérivée du modèle attitudinal en ce qui concerne l'unanimité.

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## **Attitudinal Explanations of Judicial Behaviour**

We first examine attitudinal explanations of judicial decision making in general and how this perspective would explain unanimous decisions. According to the most prominent proponents of the attitudinal model justices on many appellate courts, at least in the common law world, decide cases based solely on their political preferences and ideology. Law and precedent, these advocates say, provide no more than convenient rationalizations (Segal and Spaeth, 1993, 2002; Robertson, 1998).

Schubert (1965) was the first to develop a well-delineated theory of judicial decision making based on a systematic analysis of the divided decisions of the US Supreme Court. His psychometric model provides the essential theoretical undergirding of subsequent claims that judicial policy attitudes provide a complete and unconstrained explanation of decision making by Supreme Court justices. In contrast to this extensive body of research on divided decisions, the much more limited knowledge of unanimous decisions is troubling because such decisions

constitute a sizeable portion of all of the formal decisions of many appellate courts.

While the largest body of research on the role of judicial attitudes in decision making took the United States Supreme Court as its focus, proponents of the attitudinal model have expanded their analyses to a number of other nations. Using Guttman scale analysis and subsequent refinements, evidence was discovered of attitudinal voting in the top appellate courts in England, Australia, India, Japan, the Philippines and a number of other countries (Robertson, 1998; Samonte, 1969; Gadbois, 1969; Danelski, 1969; Schubert, 1969; Tate, 1972). In contrast, a number of critics of the Segal and Spaeth approach argue that while judicial attitudes are certainly important in many cases, other factors may also be at work. They concede that “empirical scholarship has now firmly established that the ideological values ... of Supreme Court justices have a profound impact on their decisions” but maintain that judicial attitudes do not tell the whole story of judicial decision making—they do not provide a *complete* explanation of voting behaviour in the Supreme Court (Songer and Lindquist, 1996: 1049; see also Richards and Kritzer, 2002).

### **Evidence of Attitudinal Voting in the Divided Decisions of the Supreme Court of Canada**

Given the similarity in the institutional features of the supreme courts of Canada and the United States, it is unsurprising that a number of studies suggest that the attitudes of the justices do in fact influence the votes of Canadian justices to some degree.

Two early studies used Guttman scaling techniques to demonstrate a high degree of consistency in the voting of the justices in nonunanimous cases (Fouts, 1969; Peck, 1969). Attribute models also suggest the impact of attitudes on the votes of judges on the Supreme Court of Canada. The classic study of Tate and Sittiwong (1989) indicated that appointment by a Liberal party prime minister, previous political experience, and adherence to the Roman Catholic religion for justices from outside Quebec were all substantially related to liberal voting trends by the justices. A recent study confirms the results of this classic study (Songer and Johnson, 2007).

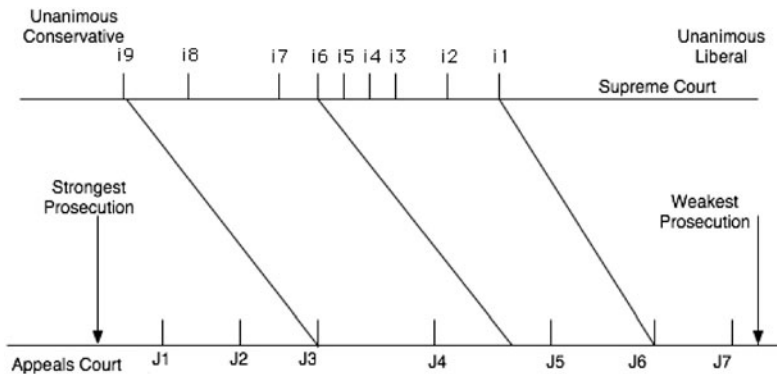
Finally, there is fairly substantial evidence that judicial attitudes as measured by the assessment of newspaper writers is also related to patterns of liberal versus conservative voting (Ostberg and Wetstein, 1998, 2007; Wetstein and Ostberg, 1999). But as in the scholarship on judicial voting in the United States, virtually all of these Canadian studies are limited to the divided decisions of the Supreme Court.

**Attitudinal Explanations of Unanimity**

The most basic perspective of the attitudinal model is that even in unanimous decisions, the votes of the justices are best explained by the justices' political preferences. In Schubert's attitudinal model (see Figure 2), justices have ideal points, the *i*-points, in multidimensional ideological space, which represent their attitudes. Case stimuli are represented by the *j*-points and these are also measured in the same multidimensional space. According to the unconstrained attitudinal model of Supreme Court decision making a decision should be unanimous *only* when the choices presented by the case stimulus (the *j*-points in Schubert's terminology) are extreme relative to the attitudinal preferences (the *i*-points) of all the nine justices. That is, a decision will be unanimous only when the outcome is consistent with the ideological preferences of all nine justices.

This implication of the attitudinal model is particularly dramatic when the Supreme Court unanimously reverses the court below. For example, according to the attitudinal model, the Supreme Court will only unanimously reverse a liberal decision of the court below when the most lib-

FIGURE 2  
Illustration of Supreme Court decision making for variation in 'i' points and 'j' points



i - represents the ideological positions of the Supreme Court justices  
 J- case facts and issues  
 \* each of the 'J' points also represents how liberal you have to be at each of the points to make a liberal decision.

eral justice on the Supreme Court prefers an outcome more conservative than that adopted by the lower court.

The key, then, to understanding unanimous decisions from the perspective of the attitudinal model is that the policy position taken in the decision reviewed is “extreme.”<sup>2</sup> In the analysis below, we conduct multiple tests of the predictions generated by this perspective at the heart of the attitudinal model with decisions of the Supreme Court of Canada since the adoption of the *Charter of Rights* in 1982.<sup>3</sup> First, we use a measure of the *i points* of the justices to test the prediction that the greater the ideological diversity on the Court, the less likely the Court will be to reach unanimous agreement. Next, we consider the political composition of the courts below. Since the attitudinal model suggests that opinions below reversed by a unanimous decision will be extreme one should expect that the political composition of the courts whose decisions are unanimously reversed are also extreme compared to the average panel below. After measuring the political preferences of panels whose decisions are unanimously reversed, we test the prediction of the attitudinal model that these panels will be extreme compared to other panels from the courts of appeal. Finally we test a prediction derived from recent studies in psychology that suggests that extreme decisions are most likely when the group making the decision is composed entirely of “like-minded” individuals. Thus, if decisions reversed unanimously are in fact extreme, one should expect that most of the panels reversed would be composed of like-minded judges.

### **Explanations of Unanimity—The Perspective of the Justices**

For an alternative to the attitudinal explanation for unanimous decisions, we turned to the results of our interviews with the justices for clues about other factors that might produce unanimity. Several themes emerged in almost all of the interviews. First, the justices all agreed that unanimity did not signify that the decision below was ideologically extreme. Similarly, the justices believed that unanimity was the end result of serious discussion and debate about the meaning of law and precedent for a particular decision. In addition, most of the justices suggested that informal norms of collegiality and respect for the opinions of colleagues often resulted in deliberate efforts to find compromise solutions that everyone on the Court could accept. No justice reported that anything like the behaviour predicted by the attitudinal model nor strategic reactions to external actors had a substantial effect on the rate of unanimity on the Court.

All of the justices claimed that law and precedent figured into their decision making. While social scientists might be wary of accepting such

statements at face value, when asked about *process*, all described specific things that they routinely did that are consistent with the proposition that they took law seriously and inconsistent with expectations that one would derive from the unconstrained version of the attitudinal model. For example, every judge, without prompting, emphasized that they spent a great deal of time in preparation for oral argument attempting to master the legal arguments in the factums. Moreover, all justices asked their clerks to do additional research on the primary legal issues raised by the litigants and especially to analyze precedents cited in the factums that the justices were not familiar with. Finally, all justices discussed the legal issues with their clerks prior to oral argument but only occasionally discussed the policy aspects of the case. None of these approaches to preparation appears to make a lot of sense for a justice who plans to make his decision solely on the basis of political considerations. Moreover, no judge indicated that he asked his clerk to prepare legal justifications for a position the justice had already arrived at (which would be the rational way to utilize the talents of law clerks for a judge deciding purely on political grounds) and justices B, C, and G explicitly made the point that they never told their clerks which way they were leaning before the clerks completed their legal research because it was important to them that their clerks approached the legal issues with “a fresh mind.”

Finally, Justice F said that he was only sure which way he would vote on about half the cases before oral argument and Justice E indicated that he switched the side he favoured “moderately often” after hearing oral argument. While such statements do not provide absolute refutation to the attitudinal model, it is difficult to believe that a judge who was only concerned with whether a decision for the appellant rather than for the respondent was more consistent with his personal political position would ever be in doubt about which way he was going to vote after reading all the factums plus the lower court decision plus a memorandum analyzing the issue from his clerk. In sum, then, the way the justices talk about the process of their decision making suggests that law and precedent do affect their decisions to at least some nontrivial degree.

The comments of the justices on the process of decision making in conference and in the opinion writing stage suggest that a second reason for unanimity may have to do with informal norms related to collegiality. Both justices E and H reported that there was informal pressure to work out differences among the justices that were initially expressed, though Justice E characterized it as “gentle” pressure. Justice F recalled that in conference, the person designated to write the majority opinion will frequently say something like, “If I write the opinion in thus and such a way, would that satisfy the concerns that have been expressed?” Similarly, Justice B indicated that he believed that most of his col-



leagues shared his belief that it was important for the court to “get a blend of individuality and collegiality.” He said that he constantly reminds himself that “we are not just soloists” but a choir. Thus, while he feels free to dissent when his differences on principle are “major,” he “looks first to try to get consensus.” Justice G agreed, saying “Justices have a commitment whenever principle doesn’t require them to divide to give a little and take a little to try to reach agreement.” These sentiments were echoed by Justice F when asked to describe the typical process in the opinion-writing stage. He said that there is frequently a deliberate attempt to increase consensus and that the person originally selected to write the opinion of the Court will frequently moderate his original draft in order to get unanimous support for his opinion. When asked directly about this view expressed by Justice F, Justice A agreed and went on to add that the Chief Justice made it clear that she favoured consensus when it was possible. Justice D indicated that this informal consensus that one should try to reach consensus when there were not major differences on principle meant that the justices were most likely to be unanimous on questions that did not raise major policy issues or extensive controversy in the “political sphere.” Justice F agreed, noting that *Charter of Rights* issues were the types of issues on which members were most likely to have firm “principled” positions that were most difficult to compromise. When this comment was relayed to Justice H, he indicated that he agreed in general but noted that sometimes questions of statutory interpretation were as controversial and principled as *Charter* questions. Significantly, no justice indicated that they ever sought to create only a minimum winning coalition, which would be the rational approach of justices if they were motivated solely by policy preferences.

When asked more generally about how they approached their decision-writing chores, both Justice C and Justice D indicated that the process was characterized often by fairly direct bargaining among the justices. Justice C said that although the justices generally approach each other tactfully, one frequently receives a memo after the initial draft of the opinion has been circulated that says something like “I think that the analysis in section 3 could be strengthened if you approached it in the following way.” And he said that everyone understood that such a memo indicated an implicit bargain could be reached by which the responding justice would drop his initial opposition to the opinion in return for the indicated change in the opinion. Moreover, he said, most of the time such implicit bargains are accepted by the opinion writer unless he has very strong feelings about his original position. Justice D agreed that such implicit bargaining went on but added that sometimes the bargaining was explicit, that is, a justice’s memo explicitly said that unless such and such a change was made he would have to write sepa-

rately. One result of such bargaining, according to several justices, was that the scope of the original opinion is often limited in order to gain unanimous support for an opinion. In the words of justice G, "Opinions are sometimes *fudgier* ... or more limited than the opinion writer initially preferred in order to obtain a unanimous decision." Several other justices agreed that one form of "compromise" was simply to leave out resolution of the specific point that was most contentious if the case could be resolved without it. Thus, consensus was sometimes reached by writing a narrower opinion than the opinion writer initially preferred.

Related to the acceptance of such bargaining, several justices indicated that, especially on complex cases, the give and take in conference and in opinion writing often led justices to change their personal positions, that is, discussion of the legal issues often resulted in the justices eventually sincerely agreeing about the proper outcome even when there was initial disagreement in conference. Justice D said he was more often convinced to change his mind on the meaning of precedent by discussion with his colleagues than from listening to the arguments of counsel. Justice A indicated that even on hard cases, the court often eventually came to a consensus that the lower court should be reversed after they had spent the time carefully working through all the legal issues. And at least two of the justices said that sometimes one realizes that an initial dissenting position "just won't write" and thus accepts the legal reasoning of the majority.

Finally, several justices (J, K, and C) suggested that it was sometimes easier to get consensus when the Court wanted to affirm the decision below than when a majority wanted to reverse. Justice K suggested that this was in part due to the reluctance of anyone to stand out completely alone. Justice C agreed with Justice K's analysis but went on to say that at least on occasion the Court would hear a case in which there was little question about the accuracy of the legal analysis in the court below, but the justices simply felt that the principle announced below was important enough that it should be given the "seal of approval" of the Supreme Court. In such cases, the Chief Justice would usually try to seat the full nine members to hear the case and such decisions were usually unanimous.

In summary, while the justices freely admit that their political attitudes do have some impact on their decision making, there is consensus among the justices that the unconstrained version of the attitudinal model does not describe the behaviour of the Court. In both direct and indirect ways they indicate that law and precedent also matter and that unanimity is sometimes the result of agreement on what the law means. In addition, the justices are often willing to compromise their differences, not just to produce a "minimum winning coalition" but more frequently to achieve a unanimous Court.

### A Research Design for Testing Alternative Explanations of Unanimity

Very often it is difficult or impossible to test theories directly. Confronted with such problems of testing directly the key components of theories, a leading work on research design suggests that the best practical approach is to attempt to falsify a theory by asking, "What evidence would convince us that we are wrong?" (King et al., 1994: 19). To do this, the authors suggest that one generate as many observable implications of the theory as possible and then collect new data to determine whether those predictions are empirically verified. The analysis below takes such an approach, testing key predictions one can derive from the contrasting explanations of unanimity provided by the attitudinal model and the stated views of the justices.

First, we derive several predictions from the attitudinal model that should be true if the attitudinal explanation of unanimity is accurate. As the starting point for this analysis, we use a measure of the *i points* of the justices to test the prediction that the greater the ideological diversity on the Court, the less likely the Court will be to reach unanimous agreement. Since the Court sits with different size panels to decide different cases, we measure the ideological diversity separately for the panel that heard each case. According to the attitudinal model, the Supreme Court should be unanimous only when the *j point* of the case reviewed is extreme compared to the *i points* of all of the justices who decided the case.

Several empirical predictions flow directly from this position. First, the ideological space for a single issue dimension in which judicial policy decisions are made may be represented by a line of finite length. In Figure 2 we represent these practical limits on the range of *j points* that can be considered by any Canadian appellate court in practice as "*j1*" and "*j7*". Thus, the greater the proportion of this finite space (that is, *j1* to *j7*) that is occupied by the range of the *i points* on the Supreme Court, or more specifically on the panel of the Court hearing a given case, the less space is "available" for a case to be extreme. This logic leads to our first hypothesis.

*Attitudinal model hypothesis 1: The greater the range of ideological space occupied by the justices on the Supreme Court who heard a given case, the less likely a given case will be to be decided unanimously.*

The second prediction derived from the attitudinal model focuses just on unanimous reversals. Attitudinal models of judicial behaviour suggest that the Supreme Court will only reverse unanimously a decision of the court of appeal when the policy position announced in the decision below is extreme relative to the policy preferences of all members of the Supreme Court. A policy position adopted in the decision of a court of

appeal is likely to be extreme relative to the preferences of the justices of the Supreme Court only if the political preferences of the judges on the court of appeal are extreme.<sup>4</sup>

Of course, the decision of the court of appeal may not be driven completely by the political preferences of those judges; even the most ardent advocates of the attitudinal model admit that lower court judges are frequently influenced by their understanding of law and precedent and that they may act strategically at times, sacrificing their own political preferences to avoid reversal by the Supreme Court. Nevertheless, neither following precedent nor wishing to avoid reversal is likely to produce a lower court decision that is extreme relative to the preferences of all Supreme Court justices. To the extent that legal constraints or strategic calculation affect the decision, they will make the appeals court decision less extreme than a decision produced solely in accordance with the attitudes of the judges. It is reasonable to expect instead that an extreme lower court decision will only be adopted by judges whose personal policy preferences are extreme relative to the position of either the current Supreme Court justices or the positions of other lower court judges. The logic above leads to the prediction from the attitudinal model that:

*Attitudinal model hypothesis 2: When the Court reverses a decision below unanimously, the median judge of the court of appeal reversed will be ideologically extreme compared to most judges on the court of appeal.*

The third prediction derived from the attitudinal model comes from attitudinal research in social psychology. Sunstein and colleagues argue that “one of the most striking findings in modern social science [is that] *deliberating groups of like-minded people tend to go to extremes*” (2006, 71; emphasis in the original). Even with majority vote rules (such as those that govern appeals court decision making), three like-minded people are more likely to make an extreme decision than two of those same people will make if grouped with one group member who does not share their preferences.

Following this logic, appeals court panels that make extreme decisions can be expected to be usually composed of three judges with similar policy preferences. The implication of these social psychological findings is that three liberal judges are more likely to make an extremely liberal decision than even a panel composed of the two most liberal members of that panel combined with one moderate or conservative. More formally, our third prediction from the attitudinal model is:

*Attitudinal model hypothesis 3: When the Court reverses a decision below unanimously, all three judges on the panel of the court of appeals*

*reversed will have ideologically similar attitudes that are opposite to the ideological direction of the Supreme Court decision.*

After running our specific tests of the attitudinal model, we turn our attention to predictions about unanimity derived from the perspectives of the justices and test those against the predictions of the attitudinal model. Unfortunately, some of the suggestions offered in the interviews cannot be easily tested with empirical data derived from case outcomes. However, a few implications of the perspective offered by the justices can be tested. To test some of the implications of the justices' perspective, a logistic regression model was created in which the independent variables consisted of those things that the justices said should make unanimity more likely and other factors the justices thought would make unanimity less likely. The model thus represents an attempt to provide such a partial test of the perspective of the justices on unanimity.

The dependent variable is whether the decision is unanimous or divided. Since this dependent variable is dichotomous, logistic regression is more appropriate than OLS regression.

One of the consistent themes that came through the interviews was that collegiality on the Court and the mutual respect for the views of colleagues encouraged justices to work towards a compromise opinion, but that willingness to compromise was usually qualified (for example, they would go along or work towards mutual accommodation "when they could" or when such a compromise "did not go against strongly held principles"). This suggests that unanimous decisions were most likely when the perceived stakes were not as high. Thus, the first independent variable in the model was simply whether or not a constitutional issue was discussed in the opinion.

At least one justice suggested that cases involving the construction of a national statute might also be perceived as having higher stakes than cases without such an issue. To test this possibility, a dichotomous variable noting the presence or absence of an issue of statutory construction was added to the model. An alternative way of assessing the political stakes in a case is whether or not non-parties (for example, interest groups or other governments) appear as interveners. The model includes simply the number of interveners listed as appearing before the Court.

The justices also indicated that one of the ways in which they would strive to achieve unanimity was to narrow the scope of the opinion, deleting issues that some justices wanted to address in the opinion but which the justices decided, after some give and take, were not essential for the resolution of the appeal. To assess this possibility the tag lines of the opinion were used to identify the number of paragraphs raising separate legal issues.<sup>5</sup>

Finding reliable empirical indicators for the influence of precedent and other legal factors to use in the analysis of judicial voting has been a stumbling block for years. While no completely satisfactory indicator is available, one partial indicator may be the agreement between different levels of the courts. This may be more likely in the case of a court that controls its own docket, since the decision to grant leave to appeal is often based in part on a first impression of the justices that the case was decided wrongly below. When that initial presumption is overcome after further consideration and deliberation on the case, it may indicate that justices concluded that the law constrained their ability to overturn. Thus, the model includes a dichotomous variable indicating whether or not the Court affirmed the decision below. Alternatively, the interviews with the justices indicate that panel size may also be an indicator of both the legal complexity and the political salience of a case. The justices agreed that five judge panels were usually set to hear a case when the initial perception of the justices was from a legal perspective the case was relatively straightforward. On the other hand, the Chief Justice was expected to have the whole Court sit when a particularly important or controversial issue was considered. Moreover, even with random behaviour, agreement should be more frequent in smaller panels. To test these observations, panel size was also included as a variable in the model.

Finally, the variable used in the initial test of the impact of attitudes on unanimity (that is, the ideological diversity on the panel) is included in the model as a control. In summary, the perspective of the justices leads to the expectation that:

*Judicial perspective hypotheses: The following factors should increase the probability that a decision of the Court will be unanimous: a) a decision that affirms the lower court; b) a narrow opinion; and c) the smaller the size of the panel the more likely a decision will be unanimous. The following factors should decrease the probability of a unanimous decision: d) the presence of a constitutional issue; e) the presence of an issue related to statutory construction; and f) the presence of one or more interveners. The justices' perspective suggests further that variables tapping predictions derived from the attitudinal model (that is., the ideological range of the preferences of members of the panel, the ideological extremeness of the panel below and whether or not the panel below is "like-minded") should have no effect on the likelihood of a unanimous decision.*

## Data and Measures

The period studied is 1982–2002, after the passage of the *Charter of Rights and Freedoms*. For the first hypothesis derived from the attitudinal model, the data come from the Comparative Courts High Court Data-

base.<sup>6</sup> The data include the universe of published Supreme Court decisions from 1982–2002. To test the second attitudinal hypothesis, the authors used this same database to identify all published Supreme Court decisions in criminal and constitutional cases, appealed from the Court of Appeal of the provinces of Quebec, Ontario, and British Columbia for the period 1982–2000. The authors then coded the decision of the court of appeal in each of these cases, following the coding conventions of the Comparative Courts High Court Database.

In order to assess the ideology of judges on the courts of appeal, we coded an additional sample. This was a random sample of all cases decided by the appellate courts of the three provinces used in this analysis that were not reviewed by the Supreme Court. We selected our sample from the cases available through the electronic database maintained by Quicklaw, which is regarded as having the most complete set of Canadian appellate decisions. Two categories of cases were coded. Specifically, we coded the universe of decisions from the three appellate courts between 1982 and 2000 that involved *Charter of Rights* issues (both criminal appeals and other civil liberties issues). In addition, we coded a random sample of 30 decisions per province per year for the same years that involved criminal cases that did not raise any *Charter of Rights* issues.

Using the sample of appeals court decisions *not* reviewed by the Supreme Court, we first computed the percentage of decisions of each appeals court judge in support of the liberal position in each of the two issue areas.<sup>7</sup> “Liberal” was defined in the conventional manner, following the practice of previous analyses of judicial voting in the United States (for example, Schubert, 1965; Goldman, 1975; Carp and Rowland, 1983). Specifically, a vote in a criminal appeal was coded as liberal if it supported the position of the criminal defendant. In other civil liberties cases, a vote was considered liberal if it supported the position of the litigant asking for expanded protection of civil liberties.

We next computed the ideology of the median judge for each appeals court panel whose decision was reviewed by the Supreme Court. We took the median score of the judges on the panel as our measure of the panel’s ideology because, from the perspective of the attitudinal model, the median judge controls the court’s disposition of a case.

To test the prediction from the attitudinal model contained in hypothesis 3 it was first necessary to define “like-minded” judges. We constructed three alternative measures of “like-minded.” Sunstein and colleagues suggest that the party identification of the appointing president is the appropriate measure (2006). Following their lead, we first examined the proportion of unanimous decisions that reversed panels composed of three judges all appointed by a Liberal party prime minister and panels with three judges appointed by a Conservative party prime

minister rather than panels containing at least one judge from each party. Next, since previous analyses of judicial decision making on the Supreme Court of Canada suggest that gender is a strong predictor of votes on criminal cases, we compared panels with either three female or three male judges to those with mixed gender panels. Finally we used our measure of the ideology of appeals court judges determined from the prior voting in other cases and defined judges who were all on the same side of the mean position for all judges (that is, all three judges were in the liberal half of the universe of appeals court judges or all were in the conservative half of all judges) as being “like-minded.”<sup>8</sup>

To test the predictions derived from the interviews with the justices, two samples of Supreme Court cases were used. First, we used the universe of published Supreme Court cases from 1982 to 2002 as reported in the *Comparative Courts High Court* to run the logit model of unanimity. We then re-ran our logit model on the smaller sample of cases containing information about the court of appeals panel reviewed used to test hypotheses two and three from the attitudinal model’s predictions. This second logit model allowed us to add some of the attitudinal variables derived from the attitudinal model to the variables derived from the perspectives of the justices.

## **Results and Discussion of the Empirical Analysis of Unanimous Decisions**

The test of the first prediction derived from the attitudinal model is straightforward. We tested the basic idea that as the ideological space occupied by the range of positions on the Supreme Court increased, thus reducing the space available for an extreme decision below, the likelihood of a unanimous decision by the Court would decrease. We added a control for the size of the Supreme Court panel since the smaller the size of the panel the greater the likelihood of a unanimous decision (all other things being equal) and since our interviews with the justices indicated that five-judge panels are often used for issues viewed as less important and less controversial. For the measure of the ideological range we used the measure of Supreme Court ideology devised by Ostberg and Wetstein (1998). Ostberg and Wetstein adapted the measure developed by Segal and Cover (1989) which has become the most widely used measure of US Supreme Court ideology. Content analysis of editorials and articles at the time of appointment for each justice in the nine leading national and regional newspapers of Canada produced a cumulative measure of the frequency that new justices were referred to as “liberal” or “conservative” resulting in a scale running from most liberal (+1) to most conservative (−1). To construct our measure of the ideological range on



the panel deciding each case we simply subtracted the value of the most conservative member from the value for the most liberal member.

The analysis presented in Table 1 provides little support for the first hypothesis derived from the attitudinal model.<sup>9</sup> When the model is run for the total sample of cases, the coefficient for panel size is negative and statistically significant as predicted, indicating that smaller panels are more likely to be unanimous than larger panels. However, once panel size is taken into account, the ideological diversity of the panel has no effect on the likelihood that a decision will be unanimous. In fact, the sign of the coefficient (+0.200) is even in the opposite direction from the prediction of the attitudinal model.

We also provided an analogous test for all cases in four specific issue areas (criminal, civil liberties, economic regulation and labour relations, and private economic disputes). Instead of using the overall measure of ideology from Table 1 we measured the ideology of each justice by the percentage of liberal votes they cast in nonunanimous decisions in the issue area. Distance was again computed by subtracting the score of the most conservative justice from the score of the most liberal justice on the panel. In criminal cases the results were consistent with the attitudinal model, that is, as the ideological range on the panel increased the likelihood of a unanimous decision increased. But there was no support for the attitudinal prediction in any of the other three areas.<sup>10</sup>

To further explore the effect of the ideological diversity on the Supreme Court on the likelihood of a unanimous decision, we re-ran the analysis shown in Table 1 separately for panel sizes of five, seven, and nine. The relationship between ideological spread on the Court and the likelihood of a unanimous decision was not significant for any of the three most common panel sizes.<sup>11</sup>

TABLE 1  
Logistic Regression Model of the Likelihood of  
a Unanimous Decision by the Supreme Court of  
Canada, 1982–2000

| Using Ostberg/Wetstein Measure of Supreme Court Ideology |              |       |
|--|--------------|-------|
| Variable   | MLE          | SE    |
| Ideological Range  | 0.200        | 0.115 |
| Panel Size   | -0.317***    | 0.045 |
| Intercept  | 2.905        | 0.305 |
| N = 1,639  | * P < .05    |       |
| -2Log L = 1,776.34                                       | ** P < .01   |       |
| Chi Sq = 52.98***  | *** P < .001 |       |

The test of the second attitudinal hypothesis is presented in Table 2. The basic test of hypothesis 2 is to run simple difference of means tests to compare the mean ideology of panels whose decisions are overturned by unanimous liberal versus unanimous conservative decisions. To test this prediction (that when an appeals court panel is unanimously reversed the median judge on the reversed panel will have an extreme ideology), we first computed the ideology of the median judge on each appeals court panel that was unanimously reversed by a liberal Supreme Court decision in a criminal case (median judge = 0.352). We then compared that ideology to the ideology of the median judge on panels that were reversed by unanimous conservative decisions.

The most general prediction from hypothesis 2 is that the panels whose decisions are reversed by a unanimous liberal decision should be extremely conservative and panels reversed by a unanimous conservative decision should be extremely liberal. Thus, one would predict that the ideological composition of *all* appeals court panels whose decisions were reversed by a unanimous conservative decision would be substantially more liberal than the ideological median of all appeals court panels reversed by a unanimous liberal decision. There should be no overlap.

TABLE 2  
Median Ideology of Court of Appeal Panels Whose Decisions Were Reversed Unanimously by Liberal vs Conservative Decisions of the Supreme Court of Canada

| A. <i>Criminal Decisions</i>                   |                            |         |            |    |
|--|----------------------------|---------|------------|----|
|  | Mean<br>App Ct<br>Ideology | Std Dev | Difference | P  |
| Panels with Unan<br>Liberal Sup Ct<br>Reversal | 0.352                      | 0.072   | 0.041      | NS |
| Panels with Unan<br>Conserv Sup Ct<br>Reversal | 0.393                      | 0.084   |            |    |
| B. <i>Charter of Rights Decisions</i>          |                            |         |            |    |
|  | Mean<br>App Ct<br>Ideology | Std Dev | Difference | P  |
| Panels with Unan<br>Liberal Sup Ct<br>Reversal | 0.360                      | 0.056   | 0.100      | NS |
| Panels with Unan<br>Conserv Sup Ct<br>Reversal | 0.370                      | 0.079   |            |    |

However, the results are dramatically different from what would be predicted from the attitudinal model. In both criminal and *Charter* cases, there is virtually no difference at all between the mean ideology of panels reversed by a unanimous liberal decision and the mean ideology of those reversed by a unanimous conservative decision. Instead, panels whose decisions are unanimously reversed look very much like normal rather than extreme panels in terms of ideology.<sup>12</sup>

The data in Table 2 show that the ideologies of the panels are very similar. Panels reversed by unanimous conservative decisions are only slightly more liberal (39 per cent versus 35 per cent) than panels reversed by unanimous liberal decisions, a difference that is not statistically significant. Since the range of the ideology on all of the appeals court panels included in our analysis runs the full gamut from those with median members supporting liberal outcomes in 100 per cent of their decisions to panels where the median judge never supported a liberal outcome (that is, 0 per cent), the failure to find any substantial differences in the ideology of panels unanimously reversed in a liberal versus a conservative direction strongly contradicts the prediction of the attitudinal model.

Hypothesis 2 was then tested separately for *Charter of Rights* cases. The same procedures were followed and again the predictions of the attitudinal model received no support. In fact the ideology of the mean appeals court panel reversed by a unanimous liberal decision was essentially identical to the ideology of mean panel reversed by a unanimous conservative decision (36 per cent liberal versus 37 per cent liberal).

The third attitudinal hypothesis suggested that appeals court decisions would only be reversed by unanimous decisions when the decisions were extreme and that extreme decisions were most likely to be made by panels composed of three like-minded judges at one of the two ends of the policy spectrum (that is, either three very conservative or three very liberal judges). We proposed three alternative operational definitions of "like-minded" judges and tested the hypothesis separately for each definition. The results of these tests are presented in Table 3.

First we used party of the appointing prime minister. Using this definition it was expected that unanimous liberal decisions of the Supreme Court would reverse panels with three judges appointed by Conservative party prime ministers. Similarly one would expect decisions reversed by a unanimous conservative Supreme Court to have been made by a panel of three judges appointed by Liberal party prime ministers. The results provide no support for the prediction of the attitudinal model. Unanimous conservative Supreme Court decisions are nearly as likely to overturn panels of three Conservative party appointees as to overturn a panel with three Liberal party appointees (18.5 per cent versus 20.6 per cent). Similarly, unanimous liberal decisions reverse panels of three Liberal party

TABLE 3  
 Testing the Prediction that Appeals Court Decisions Unanimously Reversed by the Supreme Court Will be Made by Like-Minded Judges

A1. Criminal Cases. Defining Like-Minded as a Three-Judge Panel Composed Entirely of Judges Appointed by Prime Ministers of the Same Party

|                            | Composition of Appeals Court Panel Unanimously Reversed |                 |            | Total |
|----------------------------|---|-----------------|------------|-------|
|                            | Panel Party   |                 |            |       |
|                            | CCC (N)   | Mixed Party (N) | LLL (N)    |       |
| Supreme Court Conservative | 18.5% (27)  | 61.0% (89)      | 20.6% (30) | 146   |
| Liberal                    | 18.9 (10)   | 64.2 (75)       | 17.0 (9)   | 53    |

Chi Sq = 0.32, df = 2, P = 0.85

A2. Charter of Rights Cases. Defining Like-Minded as a Three-Judge Panel Composed Entirely of Judges Appointed by Prime Ministers of the Same Party

|                            | Composition of Appeals Court Panel Unanimously Reversed |                 |           | Total |
|----------------------------|---|-----------------|-----------|-------|
|                            | Panel Party   |                 |           |       |
|                            | CCC (N)   | Mixed Party (N) | LLL (N)   |       |
| Supreme Court Conservative | 11.4% (4)   | 74.3% (26)      | 14.3% (5) | 35    |
| Liberal                    | 26.3 (5)  | 52.6 (10)       | 21.0 (4)  | 19    |

Chi Sq = 2.84, df = 2, P = 0.24

B1. Criminal Cases. Defining Like-Minded as a Three-Judge Panel Composed Entirely of Judges of Same Gender

|                            | Composition of Appeals Court Panel Unanimously Reversed |                  |           | Total |
|----------------------------|---|------------------|-----------|-------|
|                            | Panel Gender  |                  |           |       |
|                            | MMM (N)   | Mixed Gender (N) | FFF (N)   |       |
| Supreme Court Conservative | 63.3% (93)  | 35.4% (52)       | 01.4% (2) | 147   |
| Liberal                    | 73.6 (39)   | 24.5 (13)        | 01.9 (1)  | 53    |

Chi Sq = 2.11, df = 2, P = 0.35

(continued)

TABLE 3  
(Continued)

B2. *Charter of Rights* Cases. Defining Like-Minded as a Three-Judge Panel Composed Entirely of Judges of Same Gender

|               | Composition of Appeals Court Panel<br>Unanimously Reversed |                     |            | Total |
|---------------|--|---------------------|------------|-------|
|               | Panel Gender   |                     |            |       |
|               | MMM<br>(N)   | Mixed Gender<br>(N) | FFF<br>(N) |       |
| Supreme Court |  |                     |            |       |
| Conservative  | 60.0%<br>(21)  | 40.0%<br>(14)       | 00%<br>(0) | 35    |
| Liberal       | 63.2<br>(12)   | 36.8<br>(7)         | 00<br>(0)  | 19    |

Chi Sq = 0.05, df = 2, P = 0.82

C1. Criminal Cases. Defining Like-Minded as a Three-Judge Panel Composed Entirely of Judges Whose Career Liberalism Score is on the Same Side of the Mean Score of All Appeals Court Judges

|                        | Composition of Appeals Court Panel<br>Unanimously Reversed |                    |                                     | Total<br>(N) |
|------------------------|--|--------------------|-------------------------------------|--------------|
|                        | Career Score   |                    |                                     |              |
|                        | Three Liberal<br>Judges<br>(N)                             | Mixed Panel<br>(N) | Three Conservative<br>Judges<br>(N) |              |
| Supreme Court Decision |  |                    |                                     |              |
| Conservative           | 28.9%<br>(43)  | 53.0%<br>(79)      | 18.1%<br>(27)                       | 149          |
| Liberal                | 29.6<br>(16)   | 53.7<br>(29)       | 16.7<br>(9)                         | 54           |

Chi Sq = 0.17, df = 2, NS

C2. *Charter of Rights* Cases. Defining Like-Minded as a Three-Judge Panel Composed Entirely of Judges Whose Career Liberalism Score is on the Same Side of the Mean Score of All Appeals Court Judges

|               | Composition of Appeals Court Panel<br>Unanimously Reversed |                    |                                     | Total<br>(N) |
|---------------|--|--------------------|-------------------------------------|--------------|
|               | Career Score   |                    |                                     |              |
|               | Three Liberal<br>Judges<br>(N)                             | Mixed Panel<br>(N) | Three Conservative<br>Judges<br>(N) |              |
| Supreme Court |  |                    |                                     |              |
| Conservative  | 06.9%<br>(4)   | 62.1%<br>(36)      | 31.0%<br>(18)                       | 58           |
| Liberal       | 03.9<br>(1)  | 65.4<br>(17)       | 30.8<br>(8)                         | 26           |

Chi Sq = 1.50 df = 2, NS

appeals court judges (18.9 per cent) about as often as they reverse panels composed entirely of Conservative party appointees (17.0 per cent). And in both types of cases, most unanimously reversed cases come from appeals court panels with mixed party membership rather than from panels composed entirely of like-minded judges. The results are essentially the same for both criminal appeals and *Charter of Rights* cases.

When like-minded judges are defined as judges of the same gender, the analysis produces similar results. Since a large percentage of all appeals court judges are males, most unanimous decisions reverse panels of three male appeals court judges. But that tendency holds for both unanimous liberal and unanimous conservative decisions of the Court and for both *Charter of Rights* cases and criminal cases. The low chi square coefficients (2.11 versus 0.05) show that differences in the patterns of panels overturned by unanimous liberal versus unanimous conservative Supreme Court decisions are not statistically significant and are substantively very similar (for example., 60.0 per cent of the panels overturned by unanimous conservative decisions have three males while a similar 63.2 per cent of panels overturned by unanimous liberal decisions have three males in Charter cases).

Finally the analysis was re-run (see Table 3–C) defining like-minded judges as those who had ideological scores based on their overall voting records on the courts of appeal that were either all on the liberal side of the median ideology of all appeals court judges or all on the conservative side of the median. Using this definition, there was again almost no difference in the propensity of the Supreme Court to overturn like-minded panels when unanimously reversing the decision below. Consistent results were obtained for both criminal cases and *Charter of Rights* cases.

In summary, the analyses of the unanimous reversals of the Supreme Court of Canada provide no support for the unconstrained version of the attitudinal model. Three predictions were derived from the attitudinal model and those predictions were tested using multiple measures of the key concepts. Yet none of the tests support the predictions of the attitudinal model. Judicial attitudes do not appear to provide a useful explanation for unanimous decisions.

### **Testing the Predictions of the Perspectives of the Justices**

As noted above, we created a logistic regression model to test the perspectives of the justices on the conditions that were thought to make unanimous decisions more or less likely. Our model was first run using all published decisions of the Supreme Court from 1982 through 2002. The results of this first analysis of the justices' predictions are presented in Table 4.

TABLE 4  
 Logistic Regression Models of the  
 Likelihood of a Unanimous Decision by  
 the Supreme Court of Canada, for  
 Post-*Charter* Period

| Variable               | MLE       | SE    |
|------------------------|-----------|-------|
| Constitutional issue   | -0.259*   | 0.144 |
| Statute interpretation | -0.260*   | 0.135 |
| # of interveners       | -0.258*   | 0.153 |
| Narrow opinion         | 0.214*    | 0.129 |
| Affirm                 | 0.221*    | 0.120 |
| Panel size             | -0.253*** | 0.047 |
| Ideological range      | 1.070     | 1.360 |
| Intercept              | 2.550     | 0.406 |

N = 1,599

-2Log L = 1,706.76

Chi Sq = 76.26\*\*\*

\*P < .05

\*\*P < .01

\*\*\*P < .001

#.05 < P < .10

The results provide strong support for the perspectives of the justices. All three indicators of the salience of the issue are strongly and negatively related to the likelihood of a unanimous decision. The coefficients for constitutional issue (-0.259), statutory interpretation (-0.260), and the presence of interveners (-0.258) are all statistically significant and in the direction predicted by the justices. Unanimous decisions are less likely if either a constitutional or a statutory interpretation issue is involved. Moreover, the more interest the case attracts from interest groups and other interveners, the less likely the judges are to reach a unanimous resolution of the dispute.

In addition, both of the factors predicted to make unanimous decisions more likely also were consistent with the justices' predictions. The positive and statistically significant coefficient for a narrow opinion (+0.214) supports the suggestion of the justices that initial conflicts among the justices are sometimes resolved by finding a narrower resolution that all can accept. Similarly, the positive and statistically significant coefficient for decisions that affirm the outcome below (+0.221) supports the predictions of the justices. The coefficient for panel size (-0.253) indicates that as the size of the panel increases from five to nine justices, the likelihood of a unanimous decision declines.

In addition to providing support for the perspective of the justices as to the factors that do influence the likelihood of a unanimous deci-

sion, the statistically non-significant coefficient for the ideological range on the panel supports their assertions that ideological preferences have little to do with whether or not a decision is unanimous.

We next ran a similar logistic regression model on the smaller sample of cases for which we had the characteristics of the appeals court panel reviewed in addition to the characteristics of the Supreme Court decision. These results are presented in Table 5.

This second model allows us to test more directly the effects of the factors that the justices assert influence the likelihood of a unanimous decision compared to several of the factors that the attitudinal model predicts should affect the likelihood of a unanimous decision. Specifically we added a measure for whether or not the median member of the appeals court panel had an extreme ideology and whether or not the appeals court panel was composed of three like-minded judges.

Four of the factors that the justices predicted would affect the likelihood of a unanimous decision remain statistically significant and in the direction predicted by the justices. Large panel sizes and the presence of a constitutional issue continue to make unanimous decisions less likely while a narrow opinion and the affirmation of the decision below make unanimity more likely. The coefficients for statutory interpreta-

TABLE 5  
 Logistic Regression Models of the  
 Likelihood of a Unanimous Decision by  
 the Supreme Court of Canada, for  
 Post-*Charter* Period

| Variable                | MLE       | SE    |
|-------------------------|-----------|-------|
| Constitutional issue    | -0.591*   | 0.337 |
| Statute interpretation  | -0.539#   | 0.342 |
| # of interveners        | -0.093#   | 0.064 |
| Narrow opinion          | 0.565*    | 0.307 |
| Affirm                  | 0.649*    | 0.287 |
| Panel size              | -0.442*** | 0.126 |
| Ideological range       | 0.287     | 0.303 |
| App court panel extreme | 0.787     | 0.858 |
| Like minded panel       | -0.438    | 0.371 |
| Intercept               | 3.015     | 0.750 |

N = 322  
 -2Log L = 338.18  
 Chi Sq = 62.38\*\*\*  
 \*P < .05  
 \*\*P < .01  
 \*\*\*P < .001  
 #.05 < P < .10



tion ( $-0.539$ ) and the number of interveners ( $-0.093$ ) remain in the direction predicted by the justices (that is, they both make unanimity less likely) but in the revised model achieve only the 0.10 level of statistical significance. This decline in statistical significance is presumably due to the substantially smaller sample size.

In contrast, none of the three variables derived from the attitudinal model reaches statistical significance. In fact the coefficients for two of the variables, ideological range ( $+0.287$ ) and likeminded panel ( $-0.438$ ) are actually in the opposite direction from the predictions of the attitudinal model. The result of pitting these attitudinal variables against the variables derived from the justices' perspective provides additional strong evidence that the attitudinal model does not provide an adequate explanation for unanimity on the Supreme Court of Canada.

## Conclusions

We began by noting that there has been little investigation of the unanimous decisions of the Supreme Court of Canada and that the only general theory of unanimity that has wide currency is the perspective of the attitudinal model. That perspective, that even in unanimous decisions, the justices are voting their political preferences, has received little empirical investigation. In a search for an alternative theory of unanimity, we interviewed ten of the current or recent justices of the Court and asked them to describe the process of decision making and the factors that influenced whether the final decision was unanimous. We then conducted quantitative, empirical tests of the implications of both the attitudinal explanation of unanimity and the alternative perspective of the justices.

The results of the multiple tests above indicate that on the Supreme Court of Canada there is little evidence that justices' votes in unanimous decisions are ideologically driven. In contrast, the empirical tests provided strong support for the perspectives of the justices about the nature and causes of unanimity. While unanimity may play some role even in unanimous decisions, other factors appear to be more important in determining when a decision will be unanimous.

These results fall short of providing clear "proof" that the perspectives of the justices provide a general theory to explain when the Court will reach a unanimous decision. The interviews with the justices suggest that the some unanimous decisions are the result of the perception by the justices of legal constraints that lead them all to support the same outcome regardless of their political preferences. Other justices suggest that unanimity may have to do with informal norms related to collegiality. These notions of collegiality and perceptions of legal constraint are

very difficult to test with quantitative methods. Nevertheless, a substantial part of what the justices suggested was tested and those tests were consistent with the justices' perspectives. The results suggested that unanimity is more difficult to reach on the substantively most important political issues and on those issues that attract the most widespread interest from the broader political community. The finding that narrow opinions are more likely to be unanimous is consistent with the contentions of the justices that they sometimes are willing to compromise and accept an opinion that is more narrowly drawn than what they would ideally prefer in order to achieve unanimity. And finally, while the finding that five-judge panels are the most likely to be unanimous does not directly prove that the extent of legal constraint influences unanimity, it provides indirect evidence for that view since it is generally believed by the justices that when the applicable legal constraints appear especially clear and unambiguous at the time that the leave petition is granted, the Chief Justice is most likely to appoint a five-justice panel to hear the case.

Nevertheless, the findings that each of the perspectives of the justices that could be tested empirically turned out to receive empirical support provides some added measure of confidence in the accuracy of the justices' perspectives that could not be directly tested. Thus, in the absence of any empirical evidence to the contrary, it is reasonable to give substantial credence to the untested conclusions of the justices that norms of collegiality and gentle pressure to compromise when possible along with the notion that reasonable people who respect their colleagues can often (though certainly not always) reach agreement about the meaning of law and precedent all play a part in the high level of unanimity on the Supreme Court of Canada.

## Notes

- 1 The author interviewed ten of the current or recent justices of the Supreme Court and four former law clerks to the justices. All of the interviews with the justices were held in the offices of the justices in the Supreme Court building in Ottawa on one of several trips the author made to Ottawa between 2001 and 2007. All interviews were conducted under ground rules that the comments of the justices would not be attributed to any justice, nor would any descriptive information about the justices be linked to the comments that would allow anyone familiar with the justices to make such attributions. Thus, accounts of the interviews refer to the justices only as "Justice A," "Justice B," and so forth. All justices are referred to using a male pronoun regardless of the gender of the justice. The interviews were opened ended and the justices were encouraged to elaborate on their answers to all questions. Most interviews lasted between an hour and an hour and fifteen minutes.
- 2 By extreme, we mean politically extreme compared to the political preferences of the justices on the Supreme Court. This can take either of two forms. If the policy adopted in the lower court decision is either more liberal or more conservative than the policy preferred by every member of the Supreme Court, then the attitudinal model sug-

gests that decision will be unanimously reversed. Alternatively, if the policy position advocated by one of the litigants is to either the left or the right of the political preferences of every member of the Supreme Court and the lower court rejects that position and adopts a more moderate position, then the prediction of the attitudinal model is that the Supreme Court will unanimously affirm the lower court that rejected the extreme alternative.

- 3 It is conceivable that a liberal panel would make a conservative decision to follow a very old precedent that reflected the median ideology on the Supreme Court many years in the past. Such a decision could be unanimously reversed by the current Supreme Court, consistent with the attitudinal model, only if the median justice on the Court that established the precedent was more conservative than the most conservative justice on the current Supreme Court. It is implausible that this scenario could account for more than a very small percentage of the unanimous decisions handed down by the Court each year.
- 4 That is, only if the preferences of at least two of the three judges on the court of appeal are either more liberal or more conservative than the preferences of every member of the Supreme Court.
- 5 “Tag lines” which are roughly analogous to West’s categories of “topics” and “key numbers” displayed at the top of decisions of US appellate courts are produced by the professional staff of the Supreme Court of Canada to provide a quick overview of the primary legal issues addressed in each opinion.
- 6 This data collection is part of a larger project funded by two grants by the National Science Foundation, “Collaborative Research: Fitting More Pieces into the Puzzle of Judicial Behavior: a Multi-Country Database and Program of Research” (C. Neal Tate, Donald R. Songer, Stacia Haynie, and Reginald S. Sheehan, Principal Investigators, SES-9975323); and “Collaborative Research: Extending a Multi-Country Database and Program of Research” (C. Neal Tate, Donald R. Songer, Stacia Haynie, and Reginald S. Sheehan, Principal Investigators, SES-0137349). Additional support was provided by the Canadian Embassy in the US, Canadian Studies Grant program, “Decision Making in the Supreme Courts and Courts of Appeals in Canada and the United States.”
- 7 The votes of 151 court of appeal judges were used in the analysis. The median number of votes used to compute the position of court of appeal judges was 93. The positions of 89.4 per cent of the judges were based on their votes in 10 or more cases.
- 8 The choice of how far from the mean judges’ attitudes should be before being considered like-minded is somewhat arbitrary. We initially ran several models using different definitions of like-minded. First, like minded was defined as all those two standard deviations from the mean, then all those one standard deviation from the mean, and finally all those one-half standard deviation from the mean. There were no substantive differences in the results using these different definitions. We present the findings for our analysis using all judges on the same side of the mean because this definition provides the most conservative test of the idea that like-minded judges will make extreme decisions. This choice has the practical effect of making it more difficult to reject the attitudinal model.
- 9 We also ran the same analysis with an alternative measure of ideological range. For this analysis we used a measure of the voting behaviour of the justices in non-unanimous votes. For each justice we used all votes that could be categorized as either unambiguously liberal or conservative over their career on the bench and computed the percentage of those votes that were liberal. Then, to construct our measure of the ideological range on the panel deciding each case, we simply subtracted the value of the most conservative member from the value for the most liberal member on each panel. The results were essentially the same as those reported in Table 1. We

- also ran the same model using only reversals. These alternative tables are available on the author's web page.
- 10 The specific logit models displaying these results are available on the author's web site.
  - 11 These alternative tables are also available from the author's web site. There were too few Supreme Court decisions with panel sizes of four, six or eight to make separate analyses for these panels feasible.
  - 12 We re-ran the analysis in Table 2 using two separate measures of lower court ideology. The first alternate measure defined panel ideology as a dichotomous variable which took the value 1 (liberal) if a majority of the judges on the panel were appointed by a Liberal party prime minister and took the value 0 (conservative) if a majority of the members were appointed by a Conservative party prime minister. The second alternative measure simply used the number of judges appointed by a Liberal party prime minister as the measure of panel ideology. Using each of these alternative measures, the results were essentially identical to those provided in Table 2. These detailed tables are available on the author's web page.

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