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Judicial Decision Making In the Supreme Court of Canada: Updating the Personal Attribute Model

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Introduction

In 1975, Parliament granted the Supreme Court of Canada almost complete control over its docket in response to the Court's increasing workload (Epp, 1996). Clearly, Parliament understood that granting docket control to the Supreme Court would be a matter of decreasing the workload rather than extending power to the Court. However, Chief Justice Laskin felt that the jurisdiction confirmed the court as "Canada's ultimate appellate court" (Bushnell, 1992: 405). Bushnell writes that "for Laskin, the new jurisdiction was a symbol that the Court had finally achieved its true nature as a final court of appeal, which for him meant that it had unquestionably a law-making role" (405).

In 1982 another major institutional change in Canada increased the policy-making opportunities of the Court. The passage of the *Charter of Rights and Freedoms* expanded the Court's power of judicial review and guaranteed a major role for the Court in constitutional policy making. Public law cases, especially criminal and constitutional, now clearly predominate over private law disputes on the Supreme Court docket. With the potential for judicial policy making now firmly established, the political preferences and attitudes of the justices are becoming increasingly relevant. As Justice Sopinka said in an address at the University of Windsor, following passage of the *Charter*, "Public trust in the impartiality of judges should not and cannot be based upon the naive assumption that

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judges upon appointment abandon their former political beliefs and cease having an interest in political issues" (quoted in Bushnell, 1992).

The present study adds to the growing literature on judicial policy making by exploring the contribution of the political preferences of the justices of the Supreme Court of Canada to their decision making in controversial cases from 1949 to 2000. In particular, we follow-up the seminal study of Tate and Sittiwong (1989) to examine the continuing relevance of the personal attributes of the justices to their decision making and to assess whether the personal attribute model developed by those scholars has become time bound as the agenda of the court and the nature of the justices appointed to the Court have changed over the past quarter century.

Policy Making and the Judicialization of Politics

"The phenomenon of judges making public policies that previously had been made or ... ought to be made by legislative and executive officials appears to be on the increase" throughout much of the world (Tate and Vallinder, 1995: 2). Jackson and Tate show that the increasing use of judicial review in various countries has led to dramatic public policy change. They note that European courts in practice are more likely to use judicial review than US courts (1992). Judicial review is also substantial in Japan, Italy, Canada and most of Western Europe and extends to nations outside Europe and the industrialized world to the Philippines, and India (Gadbois, 1987; Holland, 1988; Stone, 1992). With so much evidence of the use of judicial review in making substantial public policy, it becomes increasingly relevant to understand the characteristics of judges that influence their policy choices in judging.

The judicialization of politics that is growing in much of the world has also been quite evident in Canada, especially in the past two decades. Baar found that since the adoption of the *Charter of Rights and Freedoms* in 1982, the Supreme Court justices had been even more activist in their interpretations of it than was originally expected (1991). Critics of the process refer to the "charter revolution" and note that "a long tradition of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy" (Morton and Knopff, 2000: 13). And even skeptics who question whether there has been a major transfer of power to the courts still believe that the courts may have a long-term impact on policy by the manner in which they shape the way the public thinks about political values (Russell, 1995).

If judges and courts around the world are activist in interpreting their nations' laws and in shaping public policy, then it becomes important to ask whether the personal ideology or policy preferences of the judges

Abstract. This study seeks to add to the current understanding of the political nature of the Supreme Court of Canada. We analyze a data set consisting of all nonunanimous published Supreme Court decisions for the period 1949 to 2000. A prior study by Tate and Sittiwong (1989) suggested a model of judge attributes for the period 1949 to 1985. We build on that analysis by extending the time period to 2000, which allows the impact of gender also to be assessed. We find that since the Court gained substantial docket control, the types of cases the Court hears has changed from the period studied by Tate and Sittiwong. In the more recent period, civil rights and liberties cases are much more substantial in number. We conclude some of the variables in the Tate and Sittiwong study may be time bound and we suggest a new model of attitudinal voting.

Résumé. Cet étude cherche de augmenter le savoir courant du le nature politique du Cour suprême du Canada. Nous analysons un ensemble de données non unanime compose de tout décisions publié du Cour suprême entre les années 1949 à 1985. Une enquête précède fait par Tate et Sittiwong (1989) a proposé un modèle des attributs des juges pour la période entre 1949 à 1985. Nous poursuivons laquelle analyse pour prolonger la période du temps jusqu'à 2000, ce que on permettre évalue l'effet du sexe aussi. Nous trouvons que comme le Cour a conquis considérable control du registre, les gendres dossier entendre par le Cour ont changé depuis le période de enquête de Tate y Sittiwong. Pendant le période plus récent les dossiers concernant les droits civiles et libertés sont beaucoup plus nombreux. Nous concluons que possiblement, quelques variables de l'enquête de Tate et Sittiwong soient liées par le temp et nous proposent un modèle neuf des votes attitudinal.

may play a role in shaping judicial decisions. The view that the political preferences of the justices have a strong impact on their decisions is now the dominant view of decision making on the United States Supreme Court (Schubert, 1965; Segal and Spaeth, 1993). A series of studies applying Schubert's methods has found similar results in a number of other countries. For instance, scalogram analyses of the supreme courts of India, the Philippines and Japan found systematic ordering of the justices that indicated attitudinal patterns in decision making (Becker, 1970; Flango, 1970; Gadbois, 1969). And even in the face of a strong tradition of parliamentary supremacy and non-political courts, Robertson found evidence of attitudinal voting in the judicial decisions of the British House of Lords (Robertson, 1998). These studies from multiple areas of the world suggest that attitudinal voting by the courts often goes hand in hand with judicial policy making.

Evidence of Ideological Judicial Behaviour in Canada

While it is thus plausible to suspect that judicial decision making in Canada is also driven at least in part by the political attitudes of the justices, there are few studies of the Supreme Court of Canada that directly test such a supposition, and those that do exist are not in full agreement as to whether or not political attitudes, especially those originating in the partisan selection system, affect judicial decision-making. Early studies focusing mainly on judicial decision making on the Supreme Court of Canada

in the 1950s and 1960s found evidence of substantial attitudinal voting (Fouts, 1969; Peck, 1969). In a 1990s study, McCormick found voting blocs to exist on the court of Chief Justice Lamer but did not attempt to link voting blocs to ideological factors (1998). Several analyses of *Charter* decisions in the 1980s and 1990s have reinforced the view that there is substantial ideological diversity among the judges, but the prevailing view is that the attitudinal differences among judges are not linked to ideological selection criteria, party politics, or judge gender (Heard, 1991; McCormick and Greene, 1990; Ostberg and Wetstein, 1998).

Several studies explicitly deny any connection between ideology and judicial appointment. Morton, Russell, and Withey argue emphatically that the Supreme Court is not divided between two ideological camps; instead, they see the majority of judges as political centrists (1992). Moreover, they maintain that there is little evidence that the government relies on ideological criteria to guide their appointment of judges. Further, the judges themselves deny a connection between their appointments and political criteria. A leading recent study based on interviews with Supreme Court judges found that justices do not believe that politics largely plays a role in the appointment process (Greene et al., 1998).

However, because appointing officials can assess the philosophy of prior appellate judges through their writings, Bzdera suggests that since appointments in Canada, Germany and the US high courts usually follows service on a lower appellate court, this allows appointing officials to make appointments more in tune with their own ideological leanings (1993). Thus, while it is not certain that the appointment process leads inevitably either to partisan political appointments or to ideologically motivated appointments, it is certainly possible for that to occur given the nature of the appointment process.

A paradox thus exists in the prior literature. Tate and Sittiwong suggest that partisan-based ideological differences were evident in the voting behaviour of judges in the period 1949–1985 (1989). Since that time, the Canadian Supreme Court is believed by nearly all observers to have begun to play a substantially larger role in the policy-making process. But in spite of its increased role in policy making, a number of observers believe that the role of the policy preferences of potential judicial appointees plays a much smaller role than such preferences appear to play in the selection of state and federal appellate judges in the United States.

The Judge Attribute Model

A problem that has continually plagued attempts to determine whether judicial attitudes influence their voting decisions is the difficulty in obtain-

ing both valid and reliable *measures* of the political preferences and attitudes of the judges. Most of the time, it is impossible to directly measure the attitudes of judges. For example, most scholars assume that judges will be unwilling to discuss, openly and honestly, their private political views in an interview. In addition, while a number of judges have written on questions of legal interpretation in law reviews and other contexts, few have published articles that advocate overtly political points of views so the writings of judges infrequently provide good measures of the political attitudes of judges. Faced with this problem of measurement, most of the studies cited above have *inferred* the attitudes of the judges from the strong consistency in the patterns of judicial votes and found that they are consistent with the patterns that one would expect from ideological voting. But there are often no direct measures of judicial attitudes independent of judicial votes that can be used to verify the inferences. Thus, the evidence that attitudes influence judicial votes is often circular.

One attempt to avoid this circularity problem that is inherent in most scaling analyses has been the development of personal attribute models. The judge attribute model uses the judge's personal attributes or social background characteristics as rough measures or indicators of the judge's ideology on particular issues (Tate, 1981; Tate and Handberg, 1991; Ulmer, 1973). The judge brings an ideology to the bench that is the result of his or her "birth, upbringing, socialization, career and partisan affiliation" (Tate and Handberg, 1991: 461). In turn, that ideology may determine how the judge votes in the case (Peck, 1969; Robertson, 1998; Schubert, 1965; Segal and Spaeth, 1993), subject to judicial restraints that may exist. The central insight is that "pre-court life experiences play a prominent role in shaping the personal values and policy preferences of judges, and that such biographical factors can be useful in predicting judicial decisions" (Brudney et al., 1999: 1682). Use of judicial attributes as measures of, or surrogates for, judicial attitudes has the advantage that the attributes exist independently of judicial votes, thus avoiding the problem of circularity. Attributes have the further advantage that their existence is clearly prior in time to judicial votes. This time sequence increases the reasonableness of inferring that if attitudes (as measured by attributes) are found to be correlated with judicial votes, the attitudes may be inferred to have a causal effect on the votes. Finally, judicial attributes have the useful characteristics that they frequently are readily available and can be observed and recorded with relatively low cost and that most can be measured in a highly reliable manner because their values can be determined in a fairly straightforward and "objective" manner. Unfortunately, it is conceded by even the most fervent advocates of personal attribute theory that such indicators often provide only rough measures of judicial attitudes. Nevertheless, judicial attribute theory has been successfully used

to demonstrate the existence of attitudinal voting on a number of courts including the Philippines Supreme Court, United States Supreme Court and its courts of appeals (Goldman, 1975; Tate, 1972, 1981).

The use of judicial attributes as measures of judicial attitudes raises a problem that plagues much social science research. Many concepts that social scientists are interested in (for example, attitudes, power, prejudices, fear) cannot be measured directly. In such cases, scholars are forced to look for indirect measures or indicators of the key concepts that can be observed and measured in straightforward and relatively objective ways, but, like judicial attributes, many of these indicators provide only rough approximations of the core concepts. The roughness of the measurement presents several problems. First, and probably most frequently, the use of such rough measures introduces substantial amounts of random error into the subsequent analyses. Such random error makes it difficult to achieve standard levels of statistical significance even when a relationship may in fact exist among the variables in the model. However, the flip side of this problem is important to note. If one is able to discover statistically significant relationships among variables in spite of substantial amounts of random error in the measurement of the variables, one may have increased confidence that there is actually a relationship among key concepts (that is, using variables with substantial random error stacks the deck against confirming theoretically derived hypotheses). Thus, one may generally have confidence that the discovery of positive relationships between measures of attitudes and outcomes reflects a "real" relationship between the attitudinal concept and the observed behaviour. However, one must be cautious about a conclusion that attitudes are not related to behaviour when there is no statistically significant relationship between one's rough measure of attitude and the behaviour. A second potential threat to the validity of a study using such variables is that one may discover spurious relationships. But the danger that empirically discovered correlations are spurious is a danger faced by studies employing precisely measured variables as well as studies employing very rough measures.

The success of several past studies employing judicial attribute theory has gone a considerable distance towards generating confidence that the results are not spurious. For example, a series of studies (Brudney et al., 1999; Tate and Handberg, 1991; Tate and Sittiwong, 1989) have produced models whose theoretically grounded, single-tailed hypotheses have explained impressive amounts of the variance in judicial outcomes. It should be noted that in each of these three studies, the authors are able to describe the mechanisms that are thought to produce the observed relationships between the specific attributes and behaviour in specific issue areas. Moreover, in these models, judicial attributes have predicted outcomes successfully in a number of different courts, including the supreme

courts of Canada and the United States and the courts of appeals in the US. While the possibility inevitably remains that some of the relationships are spurious, there have been no published studies that have provided plausible alternatives to the interpretations of the authors that these relationships between attributes and outcomes suggest the influence of judicial attitudes on their votes. Finally, in each of these three models (that is, Brudney et al., 1999; Tate and Handberg, 1991; Tate and Sittiwong, 1989) the authors found that a set of multiple indicators of attitudes provide a better prediction of judicial votes than that provided by a single attribute.

Some scholars (for example, Ulmer, 1986) have criticized some earlier judicial attribute models (including Tate, 1981) for being "time bound." While some attribute models are undoubtedly time bound, this is a problem that is inherent in virtually all social science research. Social scientists typically investigate a world that is constantly changing. Therefore, generalizations using any methodology or approach to measurement that provide completely satisfactory explanations of behaviour for any given time or place may prove to be inadequate in different temporal or geographic contexts. As Tate and Handberg put it, "theorists should *expect* social attribute models to be time bound ... because they reflect politically relevant social structures and society-wide processes of social and political change" (1991: 461). This problem is exacerbated by the possibility that political actors may change their behaviour in response to scholarly studies and thus produce future behaviour that is deliberately contrary to accepted social scientific findings. Studies that discover that past studies are time bound do not demonstrate that the past studies were invalid but instead help the scholarly community to produce a revised theory that may explain how and why relationships vary across time, national and cultural boundaries and changing institutional contexts.

In their study of the Supreme Court of Canada, Tate and Sittiwong apply the judge attribute theory (1989). They suggest that several factors, including regionalism, religion, partisanship and career experience will together influence how judges reach decisions. Focusing on all non-unanimous cases during the period from 1949 to 1985, they find that these judge traits do, in fact, impact judicial decisions. Focusing on two policy areas, civil rights and liberties and economic cases, they found that Quebec/non-Quebec regional origins, religious affiliation, political party, and being appointed by Prime Minister King to have been significant influences on behaviour, as well as whether the judge had prior judicial and political experience (1989). Specifically, they found that the political culture of Quebec causes justices from that region to vote more conservatively (1989: 911). Religion was divided into two categories: Catholic and non-Catholic, with Catholic judges expected to be more liberal than their counterparts (1989: 911). These measures of regional cul-

ture and religion were combined into a "non-Quebec/Catholic index" that was found to be strongly related to liberal judicial voting patterns. They also found that justices appointed by a Liberal party prime minister and those with political experience in elective or party politics prior to appointment were linked to liberal decision making (1989: 907). Additionally, judges with more judicial experience prior to appointment were more liberal than those with little or none (1989: 906). Justices appointed by King were more conservative than justices appointed by other prime ministers (1989: 911).

While these findings seem convincing for the time period, as noted above, judicial attribute theory carries an inherent risk that any specific findings may be time bound (Ulmer, 1986). Studies of judicial attributes often involve three potential limitations that may make the results time bound. First, there is often a "small n" problem. Most studies of national top courts typically involve a small number of justices and an even smaller number of justices possessing a given attribute. Consequently, the addition of even one or two new justices who share that attribute but who display different behavioural tendencies may substantially affect the significance level of a given variable.

A second potential limitation of judicial attribute studies is that the social or political significance of a given attribute may change over time. Finally, the agenda of a given court may change dramatically over time. If the nature of the issues before the court changes, then the way in which attitudes (as reflected in personal attributes) are translated into votes may also change. Consequently, the relationship between a given judge's attribute, or any other measure of attitudes, and judicial votes will also change.

These three potential limitations of judicial attribute models are potentially relevant to the findings of the Tate and Sittiwong analysis of the Supreme Court of Canada (1989). That study was based on the votes of only 25 justices in the civil liberties area and 22 justices voting on economic cases; thus there is a potential small n problem. Moreover, some of the categories of the key independent variables have very few judges in them. For example, only six judges had any political experience prior to appointment to the Court and five of those were members of the Liberal party. Similarly, only two members of the Conservative party had more than three years of judicial experience, and there was only one judge in the first category of the non-Quebec/Catholic index. While the extent to which the social or political significance of the attributes used by Tate and Sittiwong has changed over time is unclear, there have been some dramatic changes in the agenda of the Court. As noted above, for a large majority of the period studied by Tate and Sittiwong, the Canadian Supreme Court lacked docket control and as a result had many fewer public law questions on its agenda than is characteristic of post-1975

courts (Dyck, 2000). Moreover, the adoption of the *Charter of Rights and Freedoms* just three years before the end of the period studied by Tate and Sittiwong dramatically increased the number of civil liberties cases on the Court docket. In the analysis below, we utilize an extended time period to investigate the extent to which the original findings of Tate and Sittiwong (1989) may have become time bound and to explore whether a different set of judicial attributes may now be more useful predictors of judicial behaviour.

Data and Methods

The analysis proceeds in three stages. First, we replicate the Tate and Sittiwong analysis, extending the time period used in that analysis. The original time frame, from 1949 to 1985, is extended through the year 2000. By extending the time period, we are able to examine whether or not the change in the Court's agenda brought about by the passage of the *Charter of Rights and Freedoms* in 1982 and gaining greater control over its own agenda in 1975 changes the prior findings. Second, we conduct a separate analysis of the 1978 to 2000 period using the original Tate and Sittiwong model to analyze the behaviour of judges serving since the two important structural changes noted above. Finally, we modify the original model Tate and Sittiwong used to create a judicial attribute model that more accurately predicts judicial behaviour for the 1978–2000 period.

To extend the analysis of the effects of judicial attributes on voting in the Canadian Supreme Court, we coded all the nonunanimous decisions of the Canadian Supreme Court from 1978 through 2000.¹ In the first set of analyses described below, these data were combined with the data used by Tate and Sittiwong in their analysis of voting on the Canadian Supreme Court for the years 1949–1985 (1989).² Data on the attributes of judges not included in the original Tate and Sittiwong data were coded from the *Canadian Who's Who*, biographies on the official web page of the Supreme Court of Canada, and from *The Supreme Court of Canada and Its Justices, 1875–2000* (2000). Data on some of the personal attributes of current members of the Court were obtained through interviews conducted by the senior author with members of the Supreme Court during the summer of 2002.

Each nonunanimous decision was classified according to the major substantive issue decided by the Court. Like Tate and Sittiwong (1989), we restricted our analysis to cases raising either civil rights and liberties or economic issues. More specifically, like Tate and Sittiwong, we included all case categories included in the “C Scale” and “E Scale” of Schubert's landmark analysis of voting on the United States Supreme Court (1965). This categorization includes criminal procedure and rights issues, civil

rights (including those relating to minority and gender discrimination), the standard set of civil liberties claims (including those relating to freedom of expression, religion, privacy, education, etc), labour-management relations, government regulation of the economy and private economic disputes in which a clear economic underdog can be identified. Following the coding of Schubert, as well as Tate and Sittiwong, we classified a vote as liberal if it supported the party asserting the denial of a civil right or liberty, the defendant in a criminal case, the government in an economic regulation case, unions or workers in a labour case or the economic underdog in a private economic dispute.

The dependent variable in each table is the career liberalism score of each judge in the indicated policy area. This score is simply the percentage of decisions supporting the liberal position cast by the judge in nonunanimous decisions in the period studied for the indicated policy area. Since the classic analysis of Pritchett (1948), scholars have frequently used the presence of dissent on appellate courts as an "objective" indicator that judges were *relatively* free to vote their preferences without external constraint from legal or political forces (see Goldman, 1975). That is, the presence of dissent is an objective, easily accessible indicator that legitimate decisional alternatives were open to the judges. Such a measure is almost certainly under-inclusive; a very high percentage of the nonunanimous cases can be expected to be among those in which judges were relatively free to vote their policy preferences, but it will not capture all cases in which judges had legitimate decisional alternatives (see Atkins and Greene, 1976). Unfortunately, no one has yet proposed a reliable way to identify which of the unanimous decisions present judges with a choice situation in which they are relatively free to vote their preferences. However, since a major objective of the present study is to determine which judicial attributes are most closely related to the voting of judges when they do have a legitimate chance to vote their preferences, it is more important that we identify a non-trivial number of cases in which one can reasonably assume such an absence of restraint than we identify the universe of such cases.

Several sets of scores were computed for each judge. First, we classified the cases into the two policy areas used by Tate and Sittiwong (1989) and combined our data for 1986–2000 with the votes of judges collected by Tate and Sittiwong to construct career liberalism scores for the 1949–2000 period. Next we constructed career scores for our judges using our data for all nonunanimous decisions from 1978–2000, using the same two issue areas and the same definitions of liberal and conservative votes.

For the third phase of the analysis, we constructed career scores for our judges using our data for all nonunanimous decisions from 1978–2000 for three separate issue areas. We suspected that the agenda of the court for the 1978–2000 period would be substantially different from the

agenda of the court for the period studied by Tate and Sittiwong because of two major structural changes that have occurred. First, in 1975, the Supreme Court's discretionary control over its docket was dramatically increased. Thus, it may be anticipated that the proportion of cases raising significant policy issues has substantially increased since 1975. In addition, since the adoption of the *Charter of Rights and Freedoms* in 1982, the number of cases raising civil liberties issues has increased dramatically, and it is reasonable to assume that the nature of the issues has also changed substantially since 1982. As a result, there is reason to suspect that even using the same coding rules, the nature of the cases comprising the two issue areas examined by Tate and Sittiwong may have changed dramatically since the period comprising the bulk of their study. Consequently, career scores (especially the civil liberties scores) based on votes before and after 1985 may not be comparable. A quick check of our career scores lends credence to these concerns. Specifically, when the correlation coefficient between the pre- and post-1985 civil liberties scores of judges serving in both periods is examined, there is no statistically significant relationship. The same is true for economic scores from the two periods, although the relationship is positive ($r = .32$).

To further investigate the effect of the changing agenda, we divided the Tate and Sittiwong civil rights cases into two categories: criminal cases and all other civil liberties cases. The criminal case scores of judges in the later period were strongly related to the overall civil liberties scores of judges in the pre-1985 period ($r = .91$), while the correlation between the civil liberties scores (minus criminal) in the later period and Tate and Sittiwong's civil liberties scores was strongly negative ($r = -.51$). Moreover, for the recent period, the criminal rights career scores of judges were not related to their civil liberties scores ($r = .06$).³ Given these disparities, for our analyses of the 1978–2000 period, we created separate career scores for criminal cases and for the remaining civil liberties cases. We continued to use the original category of economic cases.

Since the dependent variable in each model, career scores for the judges in a given policy area, is a continuous variable, we estimated the effects of each judicial attribute on the career scores, as did Tate and Sittiwong, with weighted least squares regression (weighting by the number of votes that comprised each career score).

We began our analysis of the bases of voting cleavages on the Canadian Supreme Court by coding all of the judicial attributes employed by Tate and Sittiwong (1989). Specifically, we coded the party of the prime minister who appointed each justice (Liberal party = 2, Conservative party = 1), the home province of the justice (Quebec = 2, other = 1), the religion of the justice (Catholic = 2, other = 1), the number of years of judicial experience before appointment to the Supreme Court, and whether

or not the justice had significant political experience in elective or party office before appointment to the Supreme Court (those with experience = 2, others = 1). In their analysis, Tate and Sittiwong combine the region and religion of each justice into a non-Quebec/Catholic index taking the value "1" for Quebec Protestants, "2" for Quebec Catholics, "3" for non-Quebec Protestants, and "4" for non-Quebec Catholics. We replicated this coding for our justices.

Extending the Tate-Sittiwong Attribute Model

The original analysis presented by Tate and Sittiwong (1989: 911) found that all five attributes were related to the judicial career scores of the justices to a statistically significant extent in both civil liberties and economic cases. In both issue areas, judges scoring high on the non-Quebec/Catholic index had more liberal records than justices scoring low on the index. In addition, justices appointed by a Liberal party prime minister and those having substantial political and judicial experience had more liberal records than those from different backgrounds. Finally, when the effects of party were controlled, justices appointed by Prime Minister King were more conservative.

Our preliminary re-analysis of the Tate and Sittiwong data indicated that dropping the variable denoting appointment by King did not significantly reduce the explanatory power of the model and did not substantially affect the relative impact of the other variables in the model. Therefore, because of the highly skewed distribution of this variable in the extended time period, we dropped it from our first model. The results of our modified replication of the Tate and Sittiwong model for the extended period, 1949–2000, are presented in Table 1.

There is a dramatic difference between the results in Table 1 and the Tate and Sittiwong model. While the Tate and Sittiwong model was quite robust for the period they studied, for the extended period neither model explains even a quarter of the variance and neither the civil liberties nor the economic model is statistically significant overall. The effects of the individual variables are also quite different. In the civil liberties model, only the non-Quebec/Catholic index reaches a level of statistical significance and even its effect is substantially reduced from its impact in the 1949–1985 period. Neither political party nor political experience nor judicial experience appears to be related to judicial liberalism. The results for the economic case model are more similar across time periods, though the overall effects for the extended time period are greatly reduced. Judicial experience and the non-Quebec/Catholic index remain related to judicial economic liberalism to a statistically significant, though quite modest, degree for the entire 1949–2000 period. Party is marginally significant

TABLE 1
 Personal Attribute Model
 Canadian Supreme Court Justice Liberalism 1949–2000

Civil Rights and Liberties			Economics		
Independent variable	β	SE	Independent variable	β	SE
Party	0.064	0.0063	Party	0.067#	0.044
Non-Quebec/Catholic	0.063*	0.034	Quebec-Protestant	0.050*	0.025
Political experience	0.032	0.079	Political experience	−0.036	0.054
Judicial experience	0.004	0.006	Judicial experience	0.007*	0.004
(Intercept)	0.209	0.159	(Intercept)	−0.007	0.157
$R^2 = 0.102$; Adj RSq = 0.015			$R^2 = 0.226$; Adj RSq = 0.195		
$F = 1.02$; $p(F) = 0.40$			$F = 2.63$; $p(F) = 0.05$		
Degrees of freedom = 4			Degrees of freedom = 4		
$N = 40$			$N = 40$		

*Significant at the .05 level

**Significant at the .01 level

Significant at the .10 level

and political experience does not show the predicted relationship to judicial liberalism at all.

Thus, the Tate and Sittiwong model (1989: 906) appears to be substantially time bound. Overall, the model does a relatively poor job of predicting judicial behaviour for the entire 1949–2000 period and there is only modest consistency between the effects of the individual variables when the original and extended time periods are compared.

Judge Attributes and Judicial Liberalism at the End of the Twentieth Century

The next phase of our analysis is to examine the voting behaviour of the justices of the Supreme Court of Canada in the data we collected for the period 1978–2000. Our analyses are based on the career scores of the justices in three separate policy areas: criminal appeals, civil rights and liberties excluding criminal procedure, and economic cases. As noted above, judicial decisions in the criminal and civil liberties areas appear to reflect different attitudinal dimensions since there is essentially no correlation between the positions of the justices in the two areas.

The first step was to examine in each of these areas the effect of the attributes used by Tate and Sittiwong in their earlier analysis. The models in Table 2 thus have the same four independent variables: party of the prime minister, the non-Quebec/Catholic index, prior political experience and the length of prior judicial experience.

TABLE 2
 Personal Attribute Model
 Canadian Supreme Court Justice Liberalism 1978–2000

Civil Rights and Liberties			Economic			Criminal		
Independent variable	β	SE	Independent Variable	β	SE	Independent variable	β	SE
Party	−0.027	0.076	Party	0.057	0.046	Party	0.081	0.097
Non-Quebec Catholic	0.021	0.034	Non-Quebec Catholic	0.005	0.024	Non-Quebec Catholic	0.008	0.046
Political	−0.065	0.101	Political	−0.001	0.070	Political	0.051	0.135
Judicial	−0.001	0.007	Judicial	0.007#	0.004	Judicial	−0.008	0.009
(Intercept)	0.458	0.159	(Intercept)	0.450	0.103	(Intercept)	0.442	0.211
$R^2 = 0.033$; Adj RSq = −0.160			$R^2 = 0.189$; Adj RSq = 0.027			$R^2 = 0.099$; Adj RSq = −0.080		
F = 0.17; p(F) = 0.94			F = 1.17; p(F) = 0.35			F = 0.55; p(F) = 0.69		
Degrees of freedom = 4			Degrees of freedom = 4			Degrees of freedom = 4		
N = 24			N = 24			N = 24		

*Significant at the .05 level

**Significant at the .01 level

#Significant at the .10 level

The findings stand in dramatic opposition to the findings of Tate and Sittiwong (1989). The models for both civil liberties (minus criminal cases) and criminal cases are particularly striking. Neither model explains even 10 per cent of the overall variance, and neither model is statistically significant overall. Turning to the coefficients for the individual variables, one can see from Table 2 that none is close to statistical significance and four of the eight coefficients actually have signs in the opposite direction from the signs of the comparable variables in the original Tate and Sittiwong model. Only the model for economic decisions even approximates either of the original Tate and Sittiwong models. For economic decisions from 1978–2000, the model explains 19 per cent of the variance and the effect of prior judicial experience is close to conventional standards of statistical significance. The coefficients for political party of the appointing prime minister and the non-Quebec/Catholic index are positively signed as predicted, but are not statistically significant. These findings are in marked contrast to the strong relationships between judicial liberalism and all four independent variables in the earlier period.

Overall then, the Tate and Sittiwong judicial attributes appear to provide a very poor explanation of judicial voting in any of the three issue areas examined for the 1978–2000 period. Therefore, we conclude that the lack of significant relationships for the 1978–2000 period between judicial career scores with party, religion, regional origins, judicial experience and political experience is due to the time bound nature of the Tate and Sittiwong model. Given the failure of this earlier model to remain robust over time, we attempted to create a modified model that would provide a better explanation of judicial voting at the end of the twentieth century.

A Revised Attribute Model of Voting on the Canadian Supreme Court

One of the most obvious changes on the Supreme Court of Canada is that in recent years women have begun to win appointment. Only one female was on the Court during the Tate and Sittiwong time period. By the end of the year 2000, three of the nine justices were female and since 1978, a total of four women have served. While the evidence is mixed, there is at least some evidence that women on other appellate courts vote differently than their brethren on some issues. For example, females judges on the United States Courts of Appeals more frequently take liberal positions than their male colleagues in civil rights cases (Songer, Davis, and Haire, 1994; but see Walker and Barrow, 1985, for somewhat contradictory results) and in some areas of civil liberties women judges on American state supreme courts have been found to provide greater support for liberal outcomes (Allen and Wall, 1993; Songer and Crews-

Meyer, 2000). Thus, we hypothesize that there may be gender differences in judicial voting on the Canadian court, at least in civil liberties cases. To test for these potential effects, we added a variable for judge gender (female = 1, male = 0) to our model.

We also speculate that given the increasing importance of language and cultural issues among the mix of civil rights issues, and the generally high salience of issues related to Quebec separatism, there may be an interaction between party and region in Canada (Dion, 1992). The fact that Quebec separatism has endured as a major cleavage in Canada (Irvine and Gold, 1980) also leads us to speculate that regional effects on judicial behaviour will persist in the later time period. This is especially significant given that the Canadian party system differs from the US party system in that partisan affiliation takes on different meanings in various provincial settings (Gaines, 1999; Johnston et al., 1992). Further, the passage of the *Charter of Rights and Freedoms* and its subsequent interpretative meaning has been perceived differently in Quebec than in other regions of the country (Taylor, 1993). In fact, Quebec is the only province who failed to sign the *Charter* after the failure of the Meech Lake Accord, which may have furthered Quebec separatism to an even greater extent (Russell, 1991). This speculation takes on added significance when it is noted that partisan representation on the court has a regional dimension. In particular, nearly half of the Liberal party justices who have served since 1980 have been from Quebec. In contrast, only three of the 12 Conservative party justices since 1980 have their origins in Quebec. Thus, the failure to find any partisan effects in the analysis in Table 2 may be due, at least in part, to a political culture or a political selection system in Quebec that results in an interaction of party identification with the communal and conservative values of their province's political and social system. Thus, Quebec conservatives or liberals may not completely identify with the mainstream values of their party in the rest of Canada. To test this idea, we added to our model of judicial voting a multiplicative term between party of the appointing prime minister and Quebec origins.

In addition, the attempt by Tate and Sittiwong to capture regional effects solely through the use of a dummy variable to reflect Quebec versus non-Quebec origins may miss some of the complexities of Canadian regionalism. By law, three of the nine members of the Canadian Supreme Court must be from Quebec and by tradition, three of the remaining justices come from Ontario, the province with the greatest population, and the one most frequently associated with a pro-national government orientation. Our modified model thus contains three regional dummies, one for Quebec, one for Ontario origins and one for the provinces west of Ontario, with the default category being judges from the east.

While we have no reason to quarrel with the reasons originally advanced by Tate and Sittiwong on the importance of religion in Cana-

dian politics, the results displayed in Table 2 indicate that their index combining religion with Quebec versus non-Quebec origins is no longer viable. Thus, to capture any potential effects of religion, we add a dummy variable for religion taking the value "one" if the justice is a Catholic and the value "zero" for all other justices.

The modified model thus contains seven variables: party of the appointing prime minister, Quebec origins, the multiplicative term for the interaction between party and Quebec origins, Ontario origins, western origins, gender and religion.⁴ The results of the analysis are displayed in Table 3.

The most obvious observation from the findings in Table 3 is that the revised models in all three issue areas substantially outperform the models in Table 2. All three explain more than half of the variance and all are statistically significant.

Turning first to civil liberties decisions, we note that the model performs least well in this area. While overall, 54 per cent of the variance in judicial liberalism is explained, most of the variables have rather modest effects. Neither political party nor its interaction with regional origins is statistically significant (for the interaction, $p = .12$). However, regionalism appears to be relatively important. Ontario justices are more liberal and Quebec judges are more conservative than their colleagues from the east. The difference between Ontario and Quebec and justices is significant at the .05 level. Next we note that the impact of gender appears to parallel the findings from American appellate courts. Female judges have significantly more liberal records than their male colleagues on civil liberties cases and the differences are statistically significant.

The expansion of the representation of regional cleavages was also important for the explanation of judicial voting in criminal cases. Judges from both Ontario and the west had significantly more liberal records than judges from the east, while Quebec judges were substantially more conservative than judges from any of the other three regions. Perhaps the most interesting results from Table 3 are the findings that there is a significant interaction effect between party and Quebec origins. For criminal cases Quebec Liberals have more liberal voting records than their same party colleagues from other provinces. For the justices appointed by Conservative party prime ministers, Quebec justices have more conservative records than their party colleagues from other provinces. Thus, both party and region appear to be crucial to understanding the voting of justices in criminal cases. For religion, the results support the original predictions of Tate and Sittiwong that Catholic judges will be more liberal than their Protestant peers (1989).

For economic cases, the results overall are also quite strong, with over 62 per cent of the variance explained. Regional differences and political

TABLE 3
Alternative Model
Canadian Supreme Court Justice Liberalism 1978–2000

Civil Rights and Liberties			Criminal			Economic		
Independent variable	β	SE	Independent Variable	β	SE	Independent variable	β	SE
Party	-0.070	0.078	Party	-0.031	0.091	Party	0.157**	0.047
Quebec Liberal	0.152	0.123	Quebec Liberal	0.350*	0.144	Quebec Liberal	-0.331**	0.077
Quebec	-0.063	0.098	Quebec	-0.214#	0.127	Quebec	0.160*	0.070
Ontario	0.214#	0.132	Ontario	0.466**	0.143	Ontario	0.003	0.072
West	0.044	0.113	West	0.293*	0.121	West	-0.027	0.061
Catholic	-0.056	0.093	Catholic	0.256*	0.098	Catholic	-0.023	0.055
Gender	0.130*	0.066	Gender	-0.075	0.085	Gender	0.021	0.048
(Intercept)	0.335	0.363	(Intercept)	-0.008	0.244	(Intercept)	0.493	0.121
$R^2 = 0.539$; Adj RSq = 0.337			$R^2 = 0.637$; Adj R Sq = 0.447			$R^2 = 0.621$; Adj RSq = 0.379		
F = 2.67; p(F) = 0.04			F = 4.01; p(F) = 0.01			F = 3.76; p(F) = 0.01		
Degrees of freedom = 7			Degrees of freedom = 7			Degrees of freedom = 7		
N = 23			N = 23			N = 23		

*Significant at the .05 level

**Significant at the .01 level

#Significant at the .10 level

party are again important predictors of voting, but the interaction between the two in economic cases is substantially different from what was found in criminal cases. Outside of Quebec, Liberal party justices are substantially more liberal than their Conservative party colleagues. But within Quebec, Liberal party justices are less likely to support liberal economic outcomes than their Conservative party counterparts. This reversal of the “normal” party differences within Quebec appears to be due largely to differences within the Conservative party: Conservatives within Quebec are significantly more liberal than their same party colleagues in other provinces on economic issues.

For economic cases, neither religion nor gender appears to be important. The magnitude of the effects of both variables is small and statistically insignificant.

Perhaps the most interesting revelation of the combined results from Table 3 is the findings that there is a significant interaction effect between party and Quebec origins in all three issue areas. Surprisingly, however, the nature of the interaction varies across issue areas. For both civil liberties and criminal cases Quebec Liberals have more liberal voting records than their same party colleagues from other provinces. For the justices appointed by Conservative party prime ministers, Quebec justices have more conservative records than their party colleagues from other provinces. However, for economic cases, the relationships are reversed. Quebec Liberal party appointees are more conservative than their Conservative party colleagues from the same region, due in large part to the liberalism of Quebec Conservative party judges compared to Conservative party judges from other regions.

Thus, both region and party continue to be associated with judicial voting in the Canadian Supreme Court. The preliminary findings in Table 2, which suggested no regional or party effects, were misleading because they failed to account for important interaction effects between region and party. That is, party has a different relationship to judicial recruitment in Quebec at least since the 1980s than it does in the rest of the country.

The other interesting comparison across the three issue areas involves the effect of judge gender. The results parallel those discovered in appellate courts below the level of the Supreme Court in the United States. In both Canada and the United States, female judges appear to be more likely to support liberal outcomes in civil liberties cases, but do not support measurably different outcomes in other issue areas.

Conclusions

The most important implication of our findings is that personal attribute models of judicial voting on the Canadian Supreme court appear to be time bound. Attributes that provided a robust prediction of judicial out-

comes in the 1950s, 1960s and 1970s have lost most of their predictive power in the past quarter century. This is not to suggest that we have discovered a “better” model of judicial behaviour than that employed by Tate and Sittiwong. Our model displayed in Table 3 does not perform well for the entire 1949–2000 period.⁵ Instead, it appears that since the mid- to late 1970s, the changing agenda of the Court has produced a modification in the relevance of several attributes that previously appear to have been useful indicators of relevant judicial attitudes. While the precise mechanisms by which a changing issue agenda interacts with the effects of judicial attributes cannot be determined from the data available for this study, we speculate that the mix of prior judicial versus political experience (which Tate and Sittiwong found to be quite important) may be more relevant for an agenda that does not have as many politically charged issues as those faced by the current court. Moreover, there is no way of knowing whether gender may have been relevant for judicial voting during much of the period studied by Tate and Sittiwong for the simple reason that there were no female justices during much of that time.

There is an important corollary to the finding that the judicial attribute model employed by Tate and Sittiwong is time bound. It is possible to construct a judicial attribute model in each time period that explains a large proportion of the voting behaviour of the justices in non-unanimous decisions. As Brudney and his associates point out, “analyses like ours identify composite trends; they do not pigeonhole particular judges” (1999: 1760). To the extent to which these personal attributes are at least rough indicators of judicial values, it provides evidence that is consistent with the conclusion that for at least an important minority subset of all the decisions of the Supreme Court, the political preferences of the justices matter. The analysis above examined only the divided decisions of the Supreme Court, and these have been a minority of all the Court’s decisions in every year during the past half-century, but this dataset still appears to include many of the most politically divisive issues tackled by the Court. And on these important issues, who appointed the justices and what their political preferences are may determine the outcome of the decision.

In the United States, regionalism is on the wane and ideological differences increasingly correspond to partisan differences. Voting by US Supreme Court justices and by the judges on other appellate courts is largely related to partisan ideology. Liberal and conservative judges in the United States fall into camps that divide to a large degree along party lines. However, in Canada, it appears that partisanship alone is not as good a predictor of judge voting. Regionalism appears to play a much greater role in the degree to which judges are liberal in their decisions. Judges from Quebec are more conservative in personal rights areas, while

more liberal than others in economic areas. Justices from Ontario appear to be more liberal in civil rights and liberties areas than other judges. Moreover, partisan differences cannot be fully explained without examining the interaction between party and region. These differences are not surprising given the distinct ethnic subculture of Quebec from the rest of Canada. Before the 1960s, Quebec, largely French-speaking, was quite conservative in attitudes and values and heavily influenced by Catholicism. Even since the Quiet Revolution that brought cultural change in Quebec, Quebecers have remained a distinct subculture from the rest of Canada (Dyck, 2000).

At the same time, gender also seems to predict some judicial behaviour fairly well in the Canadian context. Female judges are more liberal in civil rights areas and possibly more conservative in criminal rights areas than their male colleagues. The impact of gender on the Court should not be surprising given the speeches of a few of the female justices. Madame Justice Bertha Wilson stated that she believed there was merit to the point that there were differences in the way males and females think (Bushnell, 1992). Comments by Madame Justice Claire L'Heureux-Dube indicate that she thought that the Court ought to have an enhanced role where the law is reflective of changing society through the use of creative jurisprudence (Bushnell, 1992). It is clear that these female justices bring a unique element to the Court that may not have existed prior to their appointments.

While some studies previously have denied an attitudinal element to exist in voting by Canadian Supreme Court justices, it appears that this is not the case. At least in the nonunanimous decisions examined in the present analysis, the justices' votes appear to reflect ideological leanings. However, in contrast to the US, it appears that factors other than partisanship are important in trying to approximate judicial attitudes. The regional and gender traits appear to have a greater role in shaping liberal attitudes than partisanship alone. Whether the political preferences of potential nominees or their attitudinally relevant attributes are of direct concern to those involved in judicial selection cannot be determined without further study. However, the finding that judicial attributes and, by implication attitudes, are related to judicial outcomes suggests the need for future studies that examine more closely the factors relied upon by appointing prime ministers and their advisors when making a judicial selection.

Notes

- 1 We initially coded the universe of decisions published in the *Canadian Supreme Court Reports* which provides the opinions of all decisions of the court. From this universe we selected all cases decided with one or more dissents. 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 Behaviour: 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.
- 2 The authors wish to thank Professor Tate for sharing his data from his earlier study and for describing the coding conventions he used. In the combined analysis for the period 1949–2000 we added our data from 1986 through 2000 to the Tate data covering the years 1949 through 1985.
 - 3 We tried subdividing the economic scores, breaking out just the cases involving government regulation of the economy or those cases plus labour cases. However, both of these subcomponents were strongly correlated to the overall economic scores that contained private economic scores.
 - 4 In results not displayed, we re-ran this model with the addition of variables for political experience, and judicial experience. Neither of these two additional variables reached conventional levels of statistical significance in any of the three issue areas. We also re-ran the models in Table 3 with two alternative ways to operationalize judicial experience. First, we substituted the log of the years of prior judicial experience to determine if added years of experience had diminishing effects. Next, we created a dichotomous variable taking the value "1" for judges with any prior judicial experience and "0" for those with no experience. Neither of these alternative measures produced significant results.
 - 5 We re-ran our model for the entire 1949–2000 period, results not displayed, and discovered that the explanatory power of the model decreased substantially compared to the results displayed in Table 3.

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