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Zoe Robinson

Zoe.Robinson@chicagounbound.edu

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# Comparative Judicial Attitudinalism: A Preliminary Study of Judicial Choices in Westminster Legal Systems

Zoë Robinson<sup>†</sup>

## INTRODUCTION

The American preoccupation with explaining judicial decision making with statistics has long been antithetical to Westminster scholars. The notion that decisions can be explained in quantitative terms by an empirical analysis of the statistical patterning of judicial votes is foreign to Westminster sensibilities. Generally for Westminster scholars it is an unmitigated truth, or at the least the presumptive mode of behavior, that judicial decisions are a result of the application of a priori canons, rules, and principles, and that the judicial role is grounded in formal grants of power, whether constitutional, statutory, or precedential (the “legal model”).<sup>1</sup> To put it another way, students of courts in Westminster legal systems tend to assume that the legal model of judicial behavior is the dominant mode of decision making,

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<sup>†</sup> Assistant Professor of Law, DePaul College of Law. Thanks are due to Gerald Rosenberg and Michael Robinson for comments on earlier versions of this Article. Special thanks to Patrick Ferrell, Anindita Guha, and Joanne Moon for their outstanding research assistance.

<sup>1</sup> On the legal model of judicial decision making, see generally Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago 1949). It is difficult to cite any specific Westminster source for the application of the legal model, given that the premise of this paper is that the legal model is presumed in so much of Westminster legal scholarship. Rather, a glance at any leading Australian, English, or New Zealand law journal—for example, the *Federal Law Review*, the *Melbourne University Law Review*, or the *Modern Law Review*—will suffice. It is important to note, however, that to claim Westminster scholars have largely ignored empirical analysis of judicial behavior is not to claim that Westminster scholars have failed to recognize or acknowledge the judicialization of politics more generally. There is a wealth of literature discussing the increased presence and prominence of the courts in Westminster legal systems (and, conversely, the decreasing role of the parliament and parliamentary sovereignty). See generally, for example, Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge 2003); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard 2004); C. Neal Tate and Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in C. Neal Tate and Torbjörn Vallinder, eds, *The Global Expansion of Judicial Power* (NYU 1995).

whereby decisions are reached through an apolitical process.<sup>2</sup> Under this assumption of judicial behavior, the legislative and executive branches are the main players, and courts are relegated to the bench, a subsidiary without power or interest in the main game.

Yet, if Westminster scholars are inclined to take this view of the courts generally, and judicial decision making specifically, they should be aware that the American empiricism that dominates both legal and social-science scholarship on courts was itself a reaction to the legal model, reflecting a scholarly desire to challenge long-held assumptions with empirical fact. Beginning in the 1960s, American scholars have successfully challenged the explanatory power of the legal model and demonstrated that it is the ideological values of individual judges that most consistently explain how judges resolve disputes in US courts, at least in the civil rights context when the law is unclear (the “attitudinal model”).<sup>3</sup>

The purpose of this Article is to provide a first-cut look at whether the implicit scholarly assumption that legalism is the dominant mode of judicial behavior in Westminster legal systems is empirically verifiable. It seems somewhat peculiar that in a post-legal-realist genre, the idea of Westminster formalism persists without any attempt at verification. This Article, then, aims to preliminarily ascertain whether the attitudinal model has any explanatory power in the Westminster context. That is, this Article asks whether, in hard cases,<sup>4</sup> the ideology of Westminster judges predicts their votes, so that conservative judges show sys-

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<sup>2</sup> The exception to this general statement is Canada, where significant empirical work on judicial behavior has been undertaken, largely by C.L. Ostberg. See generally, for example, C.L. Ostberg and Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (UBC 2007); C.L. Ostberg, Matthew E. Wetstein, and Craig R. Ducat, *Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991–1995*, 55 *Polit Res Q* 235 (2002).

<sup>3</sup> On the attitudinal model and its application, see generally Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge 1993); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge 2002); Jeffrey A. Segal and Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 *Am Polit Sci Rev* 557 (1989); Jeffrey A. Segal, et al, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 *J Polit* 812 (1995); Cass R. Sunstein, et al, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Brookings 2006); Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 *Va L Rev* 301 (2004). But see Jack Knight and Lee Epstein, *The Norm of Stare Decisis*, 40 *Am J Polit Sci* 1018, 1032–34 (1996) (a response to Segal and Spaeth’s attitudinal-model research, finding that precedent still shapes a majority of Supreme Court justices’ votes).

<sup>4</sup> A “hard case” is defined as a case without a “best” or “right” answer that is apparent from the text of the Constitution, statute, or common-law precedent.

tematically different votes from those of liberal judges, or whether the legal culture imposes institutional constraints, so that judges vote as neutral or apolitical umpires, rather than ideology-driven individuals.

While there certainly are other theories of judicial behavior that may be helpful in a cross-jurisdictional analysis of decision making, the dominance of the attitudinal paradigm as an explanatory theory of judicial behavior in the United States coupled with the strong similarities in institutional and political norms across non-American Westminster legal systems suggests that attitudinal decision making is as likely in the Westminster context as it is in the United States. Confirming the viability of the attitudinal paradigm in countries with similar common-law heritage, then, may go a long way towards identifying a theoretical paradigm that can potentially facilitate broader cross-jurisdictional and cross-cultural analysis of judicial decision making. It seems evident that if scholars have a better idea of what explains judicial behavior in jurisdictions with a similar common-law heritage, then this might lead to the development and refinement of a theory of decision making that has salience as an explanatory theory of judicial behavior beyond the confines of any particular jurisdiction.<sup>5</sup> With the continued emergence of new democracies across the globe, the increased judicialization of politics, and the dominance of courts as the crucial decision makers in democratic systems, a unified theory of judicial behavior in Westminster common-law jurisdictions could contribute significantly to current theories of constitutionalism and constitution building in new democracies.

In order to assess the initial viability of the attitudinal model as an accurate descriptor of judicial behavior across Westminster legal jurisdictions, this Article employs one specific jurisdiction as a proxy for Westminster legal systems more generally, and, focusing on one specific topic area, examines whether any ideological effect is demonstrated.<sup>6</sup> To this end, the Article examines the voting behavior of judges in Australia in the controversial area of immigration law from 2002–2009 (inclusive). The Article hypothesizes that judges appointed by a conservative-led Australian government will be more conservative than those appointed by a liberal-led Australian government; after all, it

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<sup>5</sup> See Ostberg and Wetstein, 55 *Polit Res Q* at 10–11 (cited in note 2).

<sup>6</sup> This Article represents the first (and very small) slice of a larger comparative project that aims to undertake a broad-scale comparative analysis of judicial behavior in Westminster legal systems, across a number of topic areas.

seems reasonable that a conservative prime minister would seek to appoint judges of the same persuasion in order to ensure legal interpretation most consistent with her political ideology.<sup>7</sup> The question, then, is whether this hypothesis holds true and, if so, to what degree.<sup>8</sup>

The choice of Australia is deliberate: Australia represents the Westminster jurisdiction with the least possibility of an ideological effect. This is because Australia remains the only Westminster (and indeed only Western) jurisdiction without a bill of rights (either constitutional or statutory) at the federal level. The Australian public and federal courts, then, have less of an entrenched culture of “rights talk” than other common-law jurisdictions, and the presumption that dominates US legal culture—that courts are the primary arbiter of individual rights—does not hold in Australia. Evidence of an attitudinal effect in Australia, then, indicates that ideological judging does occur in Westminster legal jurisdictions, and provides impetus for a more complete study of comparative judicial behavior across Westminster jurisdictions more generally.

The study finds that the hypothesis is confirmed by the aggregate data, albeit with significantly less differentiation between conservative and liberal appointees than in the United States.<sup>9</sup> That is, while conservative-Coalition appointees are more likely to vote in favor of the government than their liberal-Labor appointed counterparts, the association between politics and judicial voting is weaker than might be anticipated. This suggests that it would be interesting to know much more about the relationship between politics and judicial ideology in Australia specifically, and Westminster systems more generally. In other words, this limited preliminary study should be seen as a successful first-cut investigation of ideological judging in Westmin-

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<sup>7</sup> Australia is a constitutional monarchy with three branches of government at the federal level: the legislative branch, the executive branch, and the judicial branch. The legislative branch in Australia is the Parliament, which comprises a lower house (the House of Representatives) in which the prime minister (the leader of the party controlling the lower house and the head of the executive branch) sits, and an upper house (the Senate). Australia functionally operates with a two-party system, similar to the United States. The two parties are the ideologically conservative Coalition Party (a political partnership party of the Australian Liberal Party and the Australian National Party) and the ideologically liberal Australian Labor Party.

<sup>8</sup> Of course, it is incredibly difficult to make overarching and generalized conclusions about ideological decision making on the basis of one legal genre in one Westminster jurisdiction. This study, then, represents a first effort at bringing empirical analysis of judges and judging to bear on Australian and Westminster judicial behavior.

<sup>9</sup> See notes 71–74 and accompanying text.

ster legal systems and an indication that much more work needs to be done in order to fully assess the role of politics in judging.

This Article will proceed in five Parts. Part I briefly outlines the US literature on the attitudinal model that animates this Article. This section also describes the current literature on the courts in Australia. Part II outlines the hypotheses of the study, as well as justifying the choice of forum (Federal Court of Australia) and decisional topic (immigration). Part III offers the basic data, testing the hypotheses and outlining the methodology of the study. Part IV discusses the results and speculates about various reasons for the findings, and Part V outlines further research. Finally, Part VI provides a brief conclusion.

But first a note: this Article does not purport to claim that ideology is the primary goal of judicial decision making. Rather, the Article simply endeavors to uncover any subjective, nonrational, and value-charged aspects of judicial decision making that are not *prima facie* ascertainable from the decisions themselves. By bringing the capacities of quantitative analysis to bear on judicial decisions in Australia specifically, and in Westminster jurisdictions more generally, new perspectives and insights on the judicial process can be highlighted. Westminster scholarship on the courts, then, can move from its current theoretical institutional presumptions to descriptive institutional realities, whatever the results may demonstrate.

## I. THE ATTITUDINAL MODEL

### A. The Study of Courts and the Attitudinal Model in the United States

The hypothesis that politics and values could explain a judge's voting behavior, proposed by legal realists,<sup>10</sup> was first empirically examined by C. Herman Pritchett in his 1948 study *The Roosevelt Court*.<sup>11</sup> Focusing on the Supreme Court, Pritchett

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<sup>10</sup> See generally, for example, O.W. Holmes, Jr., *The Common Law* (Little, Brown 1881); O.W. Holmes, *The Path of the Law*, 10 Harv L Rev 457 (1897); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum L Rev 431 (1930); Jerome Frank, *Law and the Modern Mind* (Brentano's 1930); William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds, *American Legal Realism* (Oxford 1993). See also L.L. Fuller, *American Legal Realism*, 82 U Pa L Rev 429, 431 (1934) (offering a critique of Llewellyn and realism as a whole).

<sup>11</sup> C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947* (Macmillan 1948). See also C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 Am Polit Sci Rev 890, 890–91, 898 (1941).

studied the decisions of the justices from 1937 to 1947 and concluded that the justices were “motivated by their own preferences.”<sup>12</sup> Most exhaustively, and recently, Jeffrey Segal and Harold Spaeth argued that the legal justifications for decisions posited by US Supreme Court justices are simply pretexts for the real driving force behind the decisions—ideology.<sup>13</sup> After systematically analyzing decisions of US Supreme Court justices, Segal and Spaeth concluded that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the judges. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he [was] extremely liberal.”<sup>14</sup>

Attitudinalists have employed various methodologies to demonstrate that judicial voting is ideologically driven. The early work of both Pritchett and Glendon Schubert used the actual votes of judges to infer judicial ideology.<sup>15</sup> Specifically, this early work identified “judicial ideal points” (*i*-points) within a multidimensional ideological space, which represented each justice’s ideological preferences. Schubert, for example, found that “the decision of the Court in any case will depend upon whether . . . the case dominates, or is dominated by, a majority of *i*-points.”<sup>16</sup> Similarly, David Rohde and Spaeth developed a multidimensional model that assumed justices had ideological preferences, again measuring ideology by the nature of the votes cast by the justices, finding that a combination of ideological goals, rules, and situations influence judicial voting.<sup>17</sup> This early methodology was subject to intense criticism because of the circularity of the reasoning. That is, the measurement of judicial ideology was the votes of the judges, which, in turn, was said to be the driving force behind the voting outcomes.<sup>18</sup>

Building on this early work, attitudinal scholars of the 1980s and onward attempted to operationalize judicial attitudes. How-

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<sup>12</sup> Pritchett, *Roosevelt Court* at xiii (cited in note 11).

<sup>13</sup> Segal and Spaeth, *Attitudinal Model* (cited in note 3); Segal and Spaeth, *Attitudinal Model Revisited* (cited in note 3). See also Pritchett, *Roosevelt Court* (cited in note 11); Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946–1963* (Northwestern 1965); Glendon Schubert, *The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Ideology* (Oxford 1974).

<sup>14</sup> Segal and Spaeth, *Attitudinal Model* at 65 (cited in note 3).

<sup>15</sup> See generally Pritchett, *Roosevelt Court* (cited in note 11); Schubert, *Judicial Mind* (cited in note 13); Schubert, *Judicial Mind Revisited* (cited in note 13).

<sup>16</sup> Schubert, *Judicial Mind* at 38 (cited in note 13).

<sup>17</sup> David W. Rohde and Harold J. Spaeth, *Supreme Court Decision Making* 134–57 (W.H. Freeman 1976).

<sup>18</sup> See, for example, Segal and Cover, *Ideological Values* at 558 (cited in note 3).

ever, because so few judges publically specify their preferred ideological outcome across all issues, political scientists have been forced to identify a proxy for judicial ideology. Some studies attempted to estimate an ideological measure based on observable attributes of judges, such as gender, age, race, religion, and ethnic background; however, these studies have had limited success.<sup>19</sup> Relatedly, and more successfully, Segal and Albert Cover developed an independent measure of the ideology of US Supreme Court nominees based on a content analysis of newspaper editorials in four major newspapers that were written about the nominees at the time of their nomination.<sup>20</sup> However, the measure has been shown to have limited predictive value outside the civil liberties context.<sup>21</sup>

The most obvious and widely used a priori measure of judicial ideology has been the party affiliation of the appointing president.<sup>22</sup> The rationale for this method is that, assuming presidents are rational actors who seek to maximize their policy outcomes, and given that federal courts make determinative decisions regarding the legal manifestations of any given policy agenda, presidents will seek to appoint like-minded justices. At least in the US context, this measure has generally proved to be a good proxy for judicial attitudes, although there have been a number of missteps by appointing presidents, the most notable being conservative President Eisenhower's appointment of Earl Warren as chief justice of the US Supreme Court, because Warren turned out to be one of the most liberal justices to ever serve on the Court.<sup>23</sup>

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<sup>19</sup> See, for example, Beverly Blair Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U Cin L Rev 597, 600 (1973) (examining whether age, military service, offspring, or party identification, among other factors, explained the severity of sentences given to draft offenders). See also Sue Davis, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 *Judicature* 129, 131–33 (1994). For a criticism of using the social background of judges as a proxy for ideology, see Sheldon Goldman and Austin Sarat, eds, *American Court Systems: Readings in Judicial Process and Behavior* 374 (W.H. Freeman 1978); S. Sidney Ulmer, *Are Social Background Models Time-Bound?*, 80 *Am Polit Sci Rev* 957, 964–66 (1986).

<sup>20</sup> Segal and Cover, *Ideological Values* at 559 (cited in note 3).

<sup>21</sup> See generally Segal, et al, *Ideological Values Revisited* (cited in note 3).

<sup>22</sup> See, for example, Sunstein, Schkade, and Ellman, 90 *Va L Rev* at 303 (cited in note 3); Sunstein, et al, *Are Judges Political?* at 3–7 (cited in note 3). See generally S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947–1956 Terms*, 17 *Am J Polit Sci* 622 (1973); C. Neal Tate and Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88*, 35 *Am J Polit Sci* 460, 464–67 (1991); Stephen L. Wasby, *The Supreme Court in the Federal Judicial System* (Nelson-Hall 4th ed 1993).

<sup>23</sup> President Eisenhower reportedly stated that the appointment of Earl Warren as Chief Justice of the United States Supreme Court was one of the “biggest damn-fooled



While the vast majority of US scholarship on the courts has focused on the Supreme Court, an increasing number of scholars have begun to focus on the lower federal courts. As a result of the increasing case selectivity of the Supreme Court,<sup>24</sup> the US Courts of Appeals have become the de facto courts of final appeal.<sup>25</sup> Recognizing this shift, scholars have more recently begun to examine adjudication at the lower federal court level. Unfortunately, however, this scholarship has been largely normative, focusing on the appropriate function of the lower federal courts, the theories of constitutional interpretation at the lower federal court level, and the appropriate function of the intermediate appellate court structure. Few legal scholars have undertaken empirical testing of their normative theories at the lower court level, and the majority of political scientists continue to focus their efforts at the Supreme Court level.

There are, of course, a number of exceptions. Most notably, Segal, along with Donald Songer and Charles Cameron, recently considered the veracity of the legal, attitudinal, and hierarchical models of decision making in the US Courts of Appeals, finding that both the attitudes of the judges and Supreme Court doctrine matter for decision making.<sup>26</sup> Relatedly, there is a strong emerging literature on the effects of panels on circuit court decision making. Most recently, a University of Chicago project, led by Cass Sunstein, examined both whether judges on federal courts of appeals vote in accordance with their political ideology and, more subtly, whether the political ideology of a circuit court

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mistake[s]" he had made during his presidency. David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 93 (W.W. Norton 4th ed 1996).

<sup>24</sup> Following the enactment of the discretionary writ of certiorari in the Judiciary Act of 1925, the Supreme Court has almost complete discretion over which cases to accept for decision. See Judiciary Act of 1925, Pub L No 68-415, 43 Stat 936. The justices grant certiorari selectively: in the 2006 Term, for example, there were 8,922 petitions for certiorari filed, with only 77 (or 0.9 percent) being granted review. See *The Supreme Court, 2006 Term—The Statistics*, 121 Harv L Rev 436, 444 (2007).

<sup>25</sup> Virginia A. Hettinger, Stefanie A. Lindquist, and Wendy L. Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision Making* 89 (Virginia 2006); Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* 2 (Stanford 2007); Sunstein, et al, *Are Judges Political?* at 3 (cited in note 3).

<sup>26</sup> Jeffrey A. Segal, Donald R. Songer, and Charles M. Cameron, *Decision Making on the U.S. Courts of Appeals*, in Lee Epstein, ed, *Contemplating Courts* 227, 238–44 (CQ 1995). See also Donald R. Songer, Jeffrey A. Segal, and Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 Am J Polit Sci 673, 692–94 (1994); J. Woodford Howard, *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* 161–66 (Princeton 1981); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 Cal L Rev 1457, 1462–71 (2003).

judge's panel colleagues affects that judge's vote.<sup>27</sup> The authors found that, generally, judges appointed by Democratic presidents and judges appointed by Republican presidents vote differently, and that, in many significant areas, a judge's ideological tendencies are dampened when sitting with two judges of another political party and amplified when sitting with two judges of the same political party.<sup>28</sup>

## B. The Study of Courts in Australia

In contrast to the US literature on the judiciary, the Australian academy, both legal and political science, has for the most part ignored the scholarship on the attitudinal model, as well as quantitative techniques more generally. While legal scholars do arguably appreciate both the politically-charged environment in which many judicial decisions are reached, as well as the potential for the courts to serve as forums for political contests, the focus of legal academics is on the end result, that is, the resulting decisions and emanating doctrine, thereby treating judicial decisions as "atomized outputs."<sup>29</sup> Australian political scientists have historically left the study of courts to legal scholars. Instead, political science in Australia has been primarily concerned with the political branches of government and related functions such as elections, voting, and interest groups.<sup>30</sup> This historical dearth of social-sciences research on the judiciary (both federal and state) is evident upon review of Australia's leading political science journal, the *Australian Journal of Political Science*. A search of the journal yields only ten articles and three book reviews on the Australian judiciary, all relating to the High Court of Australia,<sup>31</sup> all published after 1992, with four by a single author.<sup>32</sup> None of

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<sup>27</sup> See Sunstein, Schkade, and Ellman, 90 Va L Rev at 303, 319–27 (cited in note 3); Sunstein, et al, *Are Judges Political?* at 8–9 (cited in note 3).

<sup>28</sup> See Sunstein, Schkade, and Ellman, 90 Va L Rev at 302–10 (cited in note 3); Sunstein, et al, *Are Judges Political?* at 1–16 (cited in note 3).

<sup>29</sup> Jason L. Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* 15 (Carolina Academic 2006).

<sup>30</sup> Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* 3 (Queensland 1987).

<sup>31</sup> Note that the High Court sits at the apex of the Australian judicial system. On the High Court in the Australian system of government, see L.F. Crisp, *Australian National Government* 75–78 (Longman 5th ed 1983).

<sup>32</sup> The ten substantive articles are Katharine Gelber, *High Court Review 2005: The Manifestation of Separation of Powers in Australia*, 41 Austl J Polit Sci 437 (2006); Katharine Gelber, *High Court Review 2004: Limits on the Judicial Protection of Rights*, 40 Austl J Polit Sci 307 (2005); Haig Patapan, *High Court Review 2002: The Least Dangerous Branch*, 38 Austl J Polit Sci 299 (2003); Haig Patapan, *High Court Review 2001:*

these articles are empirical. Further, there exist only five monographs on the Australian courts as political institutions, again all examining the High Court.

The first monograph on the Court as a political body was Brian Galligan's 1987 book, *The Politics of the High Court*, in which Galligan explores the development of the Court's judicial review power in a broader political context.<sup>33</sup> Conversely, David Solomon's 1992 book, *The Political Impact of the High Court*, and 1999 follow-up, *The Political High Court*, attempt to demonstrate not the political nature of judicial behavior, but the impact that judicial decisions have on political decision making and politics more generally.<sup>34</sup> Haig Patapan's 2000 volume, *Judging Democracy: The New Politics of the High Court of Australia*, overviews several significant judicial developments of the 1980s and 1990s and concludes that the post-1980s High Court has a tendency to judge Australian democracy—that is, Patapan claims that the High Court was prepared to impose its own vision of democracy on the state.<sup>35</sup> Again, all of the forgoing volumes are normative, with none undertaking any form of empirical analysis. The final, and most recent, volume on the political Australian judiciary is Jason Pierce's 2006 monograph *Inside the Mason Court Revolution*, in which Pierce attempts to demonstrate that the High Court of the mid-1980s to the mid-1990s shifted from a Court that conceived its role as one of orthodox judicial decision making to one that conceived of itself as a normatively preferable institution for the decisions concerning deep political issues.<sup>36</sup> Basing

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*Politics, Legalism and the Gleeson Court*, 37 *Austl J Polit Sci* 241 (2002); Russell Smyth, *Historical Consensual Norms in the High Court*, 37 *Austl J Polit Sci* 255 (2002); Jason L. Pierce, *Interviewing Australia's Senior Judiciary*, 37 *Austl J Polit Sci* 131 (2002); Russell Smyth, *The 'Haves' and the 'Have Nots': An Empirical Study of the Rational Actor and Party Capability Hypothesis in the High Court 1948–99*, 35 *Austl J Polit Sci* 255 (2000); Haig Patapan, *Separation of Powers in Australia*, 34 *Austl J Polit Sci* 391 (1999); Haig Patapan, *Rewriting Australian Liberalism: The High Court's Jurisprudence of Rights*, 31 *Austl J Polit Sci* 225 (1996); James Warden, *Federalism and the Design of the Australian Constitution*, 27 *Austl J Polit Sci* (Special Issue) 143 (1992). The three book reviews are: Tom Round, *Book Review*, 38 *Austl J Polit Sci* 153 (2003) (reviewing Brian R. Opeskin and Fiona Wheeler, eds, *The Australian Federal Judicial System* (Melbourne 2000)); John Doyle, *Book Review*, 36 *Austl J Polit Sci* 389 (2001) (reviewing Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge 2000)); Peter H. Russell, *Book Review*, 35 *Austl J Polit Sci* 542 (2000) (reviewing David Solomon, *The Political High Court: How the High Court Shapes Politics* (Allen & Unwin 1999)).

<sup>33</sup> See generally Galligan, *Politics of the High Court* (cited in note 30).

<sup>34</sup> David Solomon, *The Political High Court: How the High Court Shapes Politics* 241–46 (Allen and Unwin 1999).

<sup>35</sup> Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia*, 178–79, 191–93 (Cambridge 2000).

<sup>36</sup> Pierce, *Mason Court Revolution* at 4 (cited in note 29).

his findings on extensive interviews with Australian federal judges, Pierce's volume is the only book on the Australian courts that employs empirical research to investigate what motivated the judges of the High Court at that time.<sup>37</sup>

While Pierce's book is the only monograph to undertake an empirical analysis of the High Court, a small handful of articles have done so. From 1966 through 1969, in an attempt to demonstrate the broader applicability of his theory of judicial behavior, US scholar Schubert undertook an empirical analysis of the voting behavior of High Court justices.<sup>38</sup> Using the same methodology as applied in attitudinal analyses of US Supreme Court justices,<sup>39</sup> Schubert analyzes decisions of the Dixon High Court, from 1951 to 1961, examining three key variables—background of the justices, participation in decisions, and voting behavior—in an attempt to determine whether personal attitudes and/or institutional aspects of the Australian judiciary motivated the votes of the various justices. In addition, in the early 1970s Australian constitutional lawyer Tony Blackshield drew on Schubert's work to undertake an empirical analysis of High Court decisions from 1964–1969 in an effort to bring to bear new perspectives on judicial decisions in Australia.<sup>40</sup> However, similar to Schubert's work on the US courts, the methodology employed by both Schubert and Blackshield is subject to criticism, and there have been no subsequent studies updating their methodology or building on

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<sup>37</sup> See Andrew Lynch, *The Once and Future Court?*, 35 Fed L Rev 145, 147 (2007) (book review).

<sup>38</sup> See generally Glendon Schubert, *The High Court and the Supreme Court: Two Styles of Judicial Hierocracy* (paper presented to annual meeting of the American Political Science Association, Sept 10, 1966), noted in A.R. Blackshield, *Quantitative Analysis: The High Court of Australia, 1964–1969*, 3 Lawasia 1, 9 n 18 (1972); Glendon Schubert, *Judicial Attitudes and Policy-Making in the Dixon Court*, 7 Osgoode Hall L J 1 (1969); Glendon Schubert, *Judges and Political Leadership*, in Lewis J. Edinger, ed, *Political Leadership in Industrialized Societies: Studies in Comparative Analysis* 220 (Wiley 1967) (comparing judicial behavior in the United States, Australia, the Philippines, and Japan); Glendon Schubert and David J. Danelski, eds, *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West* (Oxford 1969); Glendon Schubert, *Opinion Agreement Among High Court Justices in Australia*, 4 Austl & NZ J Socio 2 (1968) (making statistical observations about judicial behavior, including justices' references to each other in opinions).

<sup>39</sup> See notes 10–18 and accompanying text.

<sup>40</sup> See, for example, Blackshield, 3 Lawasia at 1 (cited in note 38). See generally A.R. Blackshield, *X/Y/Z/N Scales: The High Court of Australia, 1972–1976*, in Roman Tomasic, ed, *Understanding Lawyers: Perspectives on the Legal Profession in Australia* 133 (Allen and Unwin 1978) (the follow-up work to Blackshield's first work cited in this note). Interestingly, Blackshield notes in the first footnote in his 1972 article that the article is a small part of a larger work; however, this larger work was not subsequently published. Additionally, neither of Blackshield's articles was published in Australian journals, perhaps indicating a suspicion of empirical scholarship concerning courts in Australia.

their conclusions.<sup>41</sup> The only empirical scholarship on the Australian judiciary since the 1970s, apart from Pierce's book, has been a handful of papers analyzing various aspects of High Court decision making by economist Russell Smyth. Smyth has published three papers on the High Court: one examining the effect of internal institutional norms within the High Court on judicial behavior;<sup>42</sup> another, drawing on the seminal work of Marc Galanter, examining the effect of litigant experience and resources on outcomes in the High Court;<sup>43</sup> and a third, with Paresh Narayan, attempting to explain what causes dissent on the High Court.<sup>44</sup>

Smyth has also undertaken the only empirical assessments of the Federal Court of Australia. In two papers, Smyth, with Mita Bhattacharya, examines judicial citations in the Federal Court to analyze the determinants of judicial prestige in the Federal Court,<sup>45</sup> and in another, examines whether the outputs of Federal Court judges decrease with the increasing age of the judge.<sup>46</sup> Neither paper attempts to contextualize the Federal Court of Australia as a political institution. Indeed, there exists no literature on the Federal Court that places it in a broader political context, nor any examining or attempting to explain the nature of judicial decision making on the court.

## II. HYPOTHESIS

The puzzle that arises from the above overview of the Australian literature on the Australian federal courts is *why* more scholarship does not exist on Australian courts as political institutions. One possibility was suggested above: that political scientists tend to leave the study of courts to constitutional scholars. Perhaps because political scientists find the study of democratic institutions more compelling, they consider courts part of the lawyers' domain, or the Australian courts only recently became

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<sup>41</sup> See note 12 and accompanying text.

<sup>42</sup> Smyth, 37 *Austl J Polit Sci* (cited in note 32).

<sup>43</sup> Smyth, 35 *Austl J Polit Sci* (cited in note 32).

<sup>44</sup> Paresh Kumar Narayan and Russell Smyth, *What Explains Dissent on the High Court of Australia? An Empirical Assessment Using a Cointegration and Error Correction Approach*, 4 *J Empirical Legal Stud* 401, 420–22 (2007).

<sup>45</sup> See Russell Smyth and Mita Bhattacharya, *What Determines Judicial Prestige? An Empirical Analysis for Judges of the Federal Court of Australia*, 5 *Am L & Econ Rev* 233, 234–35 (2003).

<sup>46</sup> Russell Smyth and Mita Bhattacharya, *How Fast Do Old Judges Slow Down? A Life Cycle Study of Aging and Productivity in the Federal Court of Australia*, 23 *Intl Rev L & Econ* 141, 142 (2003).

involved in matters of public policy. With the study of courts left to lawyers, it is unsurprising that they have not been examined in a broader political context. In the first instance, in contrast to the publically-available datasets on the courts in the United States, there are no comprehensive datasets on decisions, voting patterns, outcomes, or judicial backgrounds available for Australian courts, perhaps explaining why only very few articles have taken a behavioral approach to Australian courts.<sup>47</sup> More likely, however, the explanation lies in the fact that the legal intellectual milieu in Australia remarkably remains pre-legal-realist and pre-behavioralist.<sup>48</sup> Australian legal scholars seemingly remain wedded to the legal model of judicial behavior, unquestionably accepting the theory that judges decide cases through a systematic application of externally determined law. For Australian legal scholars, judicial behavior is not contingent on attitudes, but on the application of the law to the facts as presented, and where there is a gap in the law, the relevant law serves as an objective constraint on judicial discretion.<sup>49</sup>

The problem, then, is not only the dearth of empirical scholarship on judicial behavior in Australia, but also that much of the existing scholarship on courts in Australia simply assumes the veracity of the legal model.<sup>50</sup> Even if Australian judges do differ markedly from their American counterparts in their decisional behavior and are in fact constrained by the legal model of decision making, this has yet to be extensively tested and empirically verified. Indeed, the scholarship that does examine attitudinal voting in Australian courts is arguably out of date (that is, employs methodologies long since rejected in the US scholarship), and its focus on the High Court does not, to a large degree, reflect the current primary locus of decisional authority in the Australian federal judiciary, which arguably rests with the Federal Court, not the High Court.

#### A. Grounding the Hypothesis

Before proceeding to the hypothesis proper, it is necessary to specify a number of choices made in this Article, specifically the choice of forum and case type, as well as the proxy selected for identifying judicial ideology.

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<sup>47</sup> See Pierce, *Mason Court Revolution* at 16–17 (cited in note 29).

<sup>48</sup> *Id.* at 16.

<sup>49</sup> See generally *id.*

<sup>50</sup> Excluding, of course, the scholarship outlined in Part I above.

### 1. Choice of forum.

This Article examines the applicability of the attitudinal model of judicial behavior by analyzing the votes of the justices of the Federal Court of Australia. The reason for this choice of forum is reflective of both institutional and political shifts in Australia that have affected the nature of litigation in the federal courts.

Over the past three decades, the Australian federal judiciary has witnessed significant institutional changes. In 1976, the Federal Government passed the Federal Court of Australia Act, creating the Federal Court of Australia.<sup>51</sup> The Federal Court is an intermediate federal court, designed to hear first instance matters arising from federal statutes and the Australian Constitution,<sup>52</sup> as well as appeals from decisions of single judges of the Federal Court, decisions of the Supreme Courts of the Australian Capital Territory and Norfolk Island, and certain decisions of Australian state supreme courts exercising federal jurisdiction.<sup>53</sup>

Further, in 1986 the Federal Government enacted the Judiciary Act, which required litigants to apply for leave to appeal to the High Court, thereby enabling the High Court to control its own docket.<sup>54</sup> As a consequence, appeals to the High Court have decreased significantly,<sup>55</sup> resulting in the Federal Court effectively becoming the court of last resort for the majority of litigants and, therefore, the majority of contested legal issues at the federal level. Indeed, in response to this growth in litigation at the Federal Court level, the number of sitting justices has increased from twenty-two in 1977 to forty-nine in 2008.<sup>56</sup> The Federal Court, then, is a core political institution that functions not only as an enforcer of societal norms, but also as a creator of public

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<sup>51</sup> Federal Court of Australia Act 1976 (Cth). Note that hearings before the Federal Court commenced on Feb 1, 1977.

<sup>52</sup> The exception to the Federal Court's constitutional jurisdiction is where the Constitution specifies that the High Court will have original jurisdiction. See Austl Const § 75.

<sup>53</sup> For detailed information about the Federal Court, see generally Federal Court of Australia Homepage, online at <http://www.fedcourt.gov.au> (visited Sept 9, 2011).

<sup>54</sup> Following the enactment of the Judiciary Act 1984, no appeal may proceed to the High Court without the Court granting leave to appeal. See Judiciary Amendment Act (No 2) 1984 (Cth). As with certiorari in the US Supreme Court, leave to appeal enables the High Court to control which cases it reviews. See Judiciary Act of 1925, 43 Stat 936 (cited in note 24).

<sup>55</sup> See Pierce, *Mason Court Revolution* at 38–40 (cited in note 29).

<sup>56</sup> See Federal Court of Australia "Judges," online at <http://www.fedcourt.gov.au/aboutct/fj.html> (visited Sept 9, 2011).

policy and in a number of key areas, it is the Federal Court that defines and develops principles of law and policy that directly affect a majority of Australians.

In addition to these significant institutional changes, over the past three decades there have been considerable political developments in Australia that have resulted in legal challenges of a more politically charged nature being brought before the courts. Generally, individual rights have been slowly developing in Australian legal culture, and since the early 1980s, many statutory regimes have been developed or amended to include provisions by which affected persons can challenge governmental action in the federal courts.<sup>57</sup> These rights-grounded claims, coupled with an increasingly charged racial milieu that grew out of hard-line policies on Indigenous affairs and immigration, has meant that the nature of the matters brought before the courts are, more than ever before, ideologically charged—that is, matters on which ideologies, as well as reasonable minds, may diverge. The responsibility for these statutory challenges typically rests with the Federal Court, with statutes enshrining the right of litigants to be heard before a single-justice Federal Court and, if the litigants do not prevail, a right of appeal to the court's appellate division. While there may be a theoretical right to appeal to the High Court, the probability of a litigant succeeding on an application for leave to appeal is small, meaning that more often than not, the appellate division of the Federal Court is the court of last resort.<sup>58</sup>

## 2. Choice of case type.

This paper examines the voting behavior in cases involving appeals to the appellate division of the Federal Court from adverse refugee and asylum claims pursuant to the Migration Act 1958 (immigration cases).<sup>59</sup> There are three key reasons for focusing on immigration.

First, immigration in Australia is animated by racial issues and is therefore a politically polarizing topic. During the late

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<sup>57</sup> See, for example, Administrative Appeals Tribunal Act 1976 (Cth), § 44.

<sup>58</sup> In the year 2006–07, there were approximately 800 applications for leave to appeal to the High Court, with 65 applications granted. See High Court of Australia, Annual Report 2006–07, 87–88 (2007).

<sup>59</sup> Migration Act 1958 (Cth) §§ 476, 476A, 476B, as amended by Migration Legislation Amendment Act 2001 (Cth). For the history of immigration legislation in Australia, see generally Kim Rubenstein, *Citizenship, Sovereignty and Migration: Australia's Exclusive Approach to Membership of the Community*, 13 Pub L Rev 102 (2002).



1990s and early twenty-first century, the Federal Government, under the leadership of the conservative-leaning Coalition Party, openly pushed an anti-immigration policy. Particularly given the context of the Iraq War, the issue divided the nation and resulted in violence and riots.<sup>60</sup> Immigration, then, is an issue over which people, including justices, can divide according to preferred policy.

Second, under the Migration Act, as amended in 2001, appeals from adverse decisions of the relevant government tribunal involving refugee and asylum claims must be filed in the Federal Court rather than the High Court.<sup>61</sup> As with any other matter, an appeal from a decision of the appellate division of the Federal Court can be filed with the High Court; however, leave to appeal is rarely given. This restricted access to the High Court means that the Federal Court's immigration docket is both significant in size and in its finality.

Third, amendments to the Migration Act in 2001 resulted in an extremely restrictive statutory regime. Under the current statutory scheme, judges have limited discretion and, therefore, limited scope to impose any personal ideology. If the data evidences attitudinal voting under such a rigid statutory regime, it is arguable that attitudinal voting is likely more widespread. That is, because immigration is such an ideologically charged topic, it would be expected that, whenever a hard case arises,<sup>62</sup> judicial political preferences may be determinative. Conversely, if no difference between liberal and conservative judges is evi-

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<sup>60</sup> On Dec 11, 2005 a group of five thousand mostly white Australians gathered at Bondi Beach in Sydney, an Australian landmark, to protest perceived bullying in the area by gangs composed primarily of youths of Middle Eastern descent. Violence broke out after a group of the protesters chased ten men of Middle Eastern descent and assaulted a young Muslim family. The following days saw retaliatory violence across the eastern and western suburbs of Sydney, the subsequent unprecedented shutdown of all Sydney beaches, and the imposition of a curfew. For newspaper coverage of the incident, see *Retaliatory Violence in Sydney's South*, *The Age* (Dec 12, 2005), online at <http://www.theage.com.au/news/national/retaliatory-violence-in-sydneys-south/2005/12/12/1134235956260.html> (visited Sept 9, 2011); Yvonne Abraham, *On the Beach: Why the Recent Riots in Australia Should Surprise No One*, *Boston Globe K1* (Dec 25, 2005). For an interesting discussion of the divisive nature of former Prime Minister John Howard's anti-immigration stance, see Ross Gittins, *Back-Scratching at a National Level*, *Sydney Morning Herald* (June 13, 2007), online at <http://www.smh.com.au/news/opinion/back-scratching-at-a-national-level/2007/06/12/1181414298095.html> (visited Sept 9, 2011).

<sup>61</sup> Migration Act 1958 (Cth) §§ 476, 476A, 476B, as amended by Migration Legislation Amendment Act 2001 (Cth). For the development of the system of immigration appeals in Australia generally, see, for example, John Power, *The Executive, the Judiciary, and Immigration Appeals in Australia*, in C. Neal Tate and Torbjörn Vallinder, eds, *The Global Expansion of Judicial Power* 101 (NYU 1995).

<sup>62</sup> See note 4.

dent in such an ideologically fraught area, then it could be that the legal model dominates judicial decision making in the Australian Federal Court.<sup>63</sup> In this sense, then, immigration is a particularly good test for the traditional scholarly presumption that Australian judges follow the legal model.

### 3. Choice of proxy.

In order to determine the ideology of each Federal Court justice who heard immigration appeals between 2002 and 2009, it is necessary to identify a proxy by which to determine that ideology. The chosen proxy is party affiliation of the appointing prime minister.<sup>64</sup> All eighty-six judges in the dataset were scored as either Coalition (taken to be conservative) or Labor (taken to be liberal).<sup>65</sup> For the years 2002–2009, there were forty-seven judges identified as Labor (that is, ideologically-liberal appointees) and thirty-nine as Coalition appointees (that is, ideologically-conservative appointees).

The underlying assumption is that prime ministers appoint judges with similar ideological tendencies. It is difficult to support this assumption except by logic because so little is known about the appointment process. What is known is that the constitutional power to appoint federal judges rests with the governor-general in council, which, in effect, means that the prime minister in conjunction with the federal attorney general recommends to the cabinet any appointees.<sup>66</sup> Apart from federal legislation governing the qualifications of any appointees—relevantly that any appointee to the Federal Court must have five years of legal experience—there is no further guidance on the appointment process.<sup>67</sup>

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<sup>63</sup> It could also mean that this particular statute is particularly constraining given the very little discretion afforded judges under the statutory immigration regime more generally.

<sup>64</sup> Similar to the United States, Australia effectively has a two-party system, with the Labor Party and the Coalition Party (a long-standing alliance between the Liberal Party and the National Party) dominating in the polls and Parliament. See note 7.

<sup>65</sup> This is a particularly crude measure of political ideology since it is unlikely that all Labor appointees will be liberal in their political preferences, and all Coalition appointees will be conservative in their political preferences. Therefore, it is likely that any relationship between voting in immigration cases and ideology identified in this study understates the true impact of ideology on voting behavior. Thanks are due to Gerald Rosenberg for this helpful point.

<sup>66</sup> George Winterton, *Appointment of Federal Judges in Australia*, 16 *Melb U L Rev* 185, 185–88 (1987).

<sup>67</sup> See Federal Court of Australia Act 1976 (Cth) § 6. See also Winterton, 16 *Melb U L Rev* at 186 (cited in note 66).

It is difficult to conclusively state, then, that appointments are necessarily political. However, what can be said is that, if the appointing prime minister is presumed to be a rational actor who seeks to have his policy preferences upheld in any judicial decision, he will seek to appoint judges who are of similar ideological tendencies in order to secure, so far as possible, this outcome.<sup>68</sup>

#### 4. Choice of time.

Finally, a brief note on why the years 2002 to 2009 were selected for the preliminary analysis of Federal Court voting. The year 2002 represents the first year that the 2001 amendments to the Migration Act were operational; therefore, judges were operating under an extremely restrictive statutory regime, meaning that any results found are likely to hold more generally (given that the immigration regime represents one of the most, if not the most, discretion-bound statutory schemes in Australia).

#### B. Hypothesis

The central hypothesis of this Article examines the central question of whether Australian judges vote according to their personal political ideology. The hypothesis can be stated thus:<sup>69</sup>

H1: In ideologically contested cases, a judge's voting behavior can be predicted by the party of the appointing prime minister. Coalition appointees vote in favor of the Government (that is, ideologically conservative), and Labor appointees vote in favor of the individual (that is, ideologically liberal) in the area of immigration.

### III. DATA AND RESULTS

For the purposes of this study, every federal court immigration case decided between 2002 and 2009 was collected. The cases were drawn from the Federal Court of Australia database by searching for "immigration" and "migration." Notably, each judge's associate (law clerk) effectively codes all published decisions by inserting relevant "catchwords" into the header of the

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<sup>68</sup> The notion of the politician as a rational actor is strongly supported in the social science literature. See generally David R. Mayhew, *Congress: The Electoral Connection* (Yale 2d ed 2004).

<sup>69</sup> This hypothesis was drawn from Sunstein, Schkade, and Ellman, 90 Va L Rev at 304 (cited in note 3); Sunstein, et al, *Are Judges Political?* at 8 (cited in note 3).

judgment, making searching the decision database relatively straightforward.<sup>70</sup> Although the method for finding the cases is relatively simple, there is room for error. For example, an associate may have coded the case incorrectly. However, it can be confidently stated that the basic pattern of the results is sound. Additionally, this method has the benefit of including all immigration decisions of the appellate division of the Federal Court.

At the end of the culling process, a dataset of 873 published three-panel immigration decisions of the Federal Court of Australia, and the associated votes of 2,619 individual judges, was compiled. Each case was then coded as either conservative (stereotypically Coalition) or liberal (stereotypically Labor), with a stereotypical Coalition vote taken to mean voting to uphold government policy over granting asylum or refugee status, and a stereotypical Labor vote taken to be liberal, meaning voting to uphold the claim of the asylum seeker or refugee status seeker or at least enabling a lower court to reconsider asylum or refugee status.

The results of the study are as follows:

TABLE 1: SUMMARY OF VOTES BY INDIVIDUAL JUDGES

(percentage of judges voting in a stereotypically conservative manner in immigration cases)

Individual Judges' Votes		
Appointing Party		Difference
Coalition	Labor	C-L
84.6	82.1	2.51

Table 1 shows the percentage of stereotypically conservative votes by individual judges in immigration cases. The results show that Coalition appointees vote conservatively (that is, in favor of the government) in 84.6 percent of cases, while Labor appointees vote conservatively in 82.1 percent of cases. This suggests that ideological voting (in the sense that Coalition appointees are more likely to vote in the stereotypically conservative fashion, that is, for the government, than are Labor appointees)

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<sup>70</sup> The author is a former Federal Court of Australia associate, and while there is no formal source specifying that associates undertake the task, the author affirms the convention.

occurs on the Federal Court, at least in immigration cases. Ideological voting is measured by subtracting the percentage of conservative Labor votes from the percentage of conservative Coalition votes; the larger the resulting number, the larger the party effect. The overall difference is 2.51 percentage points. That is, Coalition appointees are more likely to vote in a stereotypically conservative manner than Labor appointees, a statistically significant difference at the 0.9 level and in the expected direction. This finding indicates that the attitudinal model may have some explanatory power in the Australian context.

This finding is important because it highlights the possibility of attitudinal decision making more broadly in both Australia and Westminster legal jurisdictions. However, it also suggests the possibility that ideology plays a significantly less important role in judging in Westminster legal systems than in the United States. In their 2006 study on attitudinalism in the United States Courts of Appeals, Cass Sunstein, David Schkade, Lisa Ellman, and Andres Sawicki found that, across an aggregate dataset of twenty-three substantive legal topics (including abortion, gay and lesbian rights, sex discrimination, and campaign finance), the overall difference was 12 percentage points.<sup>71</sup> That is, across all topic areas, Republican appointees (stereotypically conservative appointees) are 12 percentage points more likely to vote in a stereotypically conservative way than Democratic appointees (stereotypically liberal appointees).<sup>72</sup> However, when the data was disaggregated, the extent of the effect was highly variable across the topic areas.<sup>73</sup> A difference of 2.51 percentage points, then, is significantly less than the 12 percentage points present in the United States. Two important questions remain: why the effects are not larger in Australian immigration cases, and whether this limited, albeit statistically significant, effect might traverse both topic areas and jurisdictions.

One possibility is that, in the topic area of immigration, the law is far more clear and binding than anticipated and therefore ideological disagreement is often implausible. Indeed, it is possible to hypothesize that, in a tightly written statutory regime such as Australia's migration statute, the clear language of the statute, as well as established precedent on any provision in question, might dampen any ideological differences between con-

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<sup>71</sup> Sunstein, et al, *Are Judges Political?* at 22 (cited in note 3).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 24-57.

servative and liberal appointees. Consequently, judicial professionalism may trump ideology, with precedent and statutory language acting as a dampener on ideological preference. Relatedly, it could be that the number of truly hard cases is minimal in the Australian immigration context and that disagreement can only really manifest itself in these visible, but numerically small, instances.

Another possibility is that in the case of immigration appeals, even if there is room for differing statutory interpretation, conservative and liberal appointees do not actually disagree on the appropriate principles that should be applied in determining statutory meaning and intent. Empirical work in the criminal context in the United States suggests that Republican and Clinton appointees do not actually differ in their decision outcomes.<sup>74</sup> The criminal cases provide a neat comparison for immigration cases in Australia: in both the criminal context and immigration context, individuals will appeal even where no uncertainty in the law exists because they are not paying for the appeal (which is true in most cases in US criminal appeals and Australian immigration appeals). (Indeed, faced with either incarceration or detention and deportation, individuals in both situations have nothing to lose and everything to gain by continuing to progress their claims up through the appellate system.) Consequently, many immigration appeals lack merit under the statute and precedent and the opportunity for ideological differentiation is limited. Relatedly, if a strong claim is presented by an individual appellant, conservative appointees will likely agree with her, even if there is some scope in the statutory scheme for ideological differentiation. Legal professionalism, then, could be constraining judicial culture in a number of ways to dampen ideological effect in the area of immigration appeals in Australia.

A third possibility is that the attitudinal model has less explanatory power than other models of behavior in the Australian and Westminster contexts. Judicial behavior might be better explained and predicted in Westminster legal systems by, for example, which party is in power; that is, judicial decision making might be constrained by, and thus responsive to, the controlling majority party in the legislature. At least in the context of constitutional challenges to federal legislation, a recent study has demonstrated that the probability of the US Supreme Court

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<sup>74</sup> Nancy Scherer, *Are Clinton's Judges "Old" Democrats or "New" Democrats?*, 84 *Judicature* 151, 154 (2000).

striking down a liberal law was constrained by whether the Democratic Party or the Republican Party held Congress.<sup>75</sup> While this possibility is certainly worth further investigation in subsequent studies, in light of the above alternate possibilities, it is difficult to make any definitive conclusion without exploring the applicability of the attitudinal model across a wider range of topic areas in both Australia and other Westminster legal jurisdictions more generally.

#### V. IMPLICATIONS FOR FUTURE RESEARCH

This preliminary investigation suggests that the hypothesis—that attitudinal judging exists in Westminster legal systems despite the continued contrary assumption—should be tentatively accepted. Although these findings are preliminary and a significant amount of study and analysis needs to be done before the hypothesis is fully accepted, the preliminary study suggests that attitudinal voting is not implausible in a Westminster jurisdiction, and highlights an issue worthy of further investigation.

The next step, then, involves the design and formulation of a complete dataset in Australia that includes a significant number of topic areas against which to test the original hypothesis. Possible case types include sex discrimination, racial discrimination, disability discrimination, corporations cases where appellants sought to pierce the corporate veil, and income taxation appeals. Each of these case types represents policy areas where reasonable minds may differ, and there is a clear policy divergence between the liberal and conservative parties in Australia. Importantly, each of these statutory regimes affords judges far more discretion than under the Migration Act, presumably allowing more scope or opportunity for ideological voting.

In designing a large and diverse dataset for testing the hypothesis in Australia, it is important to keep in mind what this preliminary study is designed to test. Given that the goal of the study and project is to determine whether judicial behavior in Westminster legal systems is attitudinalist in nature, and to formulate a more universal theory of judicial decision making, it is important that at least some of the topic areas selected for analysis in the Australian proxy study can be analyzed in other Westminster jurisdictions.

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<sup>75</sup> See Anna Harvey and Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 *Leg Stud Q* 533, 555–56 (2006).

Further, in addition to examining the voting behavior of individual judges, future research should incorporate more subtle measures of judicial behavior, namely panel effects. That is, future studies should ask whether a federal judge votes differently depending on the political ideology of her panel colleagues. Studying conformity and polarization will only increase our understanding of judicial behavior and enhance the likelihood of a more universal theory of judicial behavior.

#### VI. CONCLUSION

The standard assumption about the voting behavior of Westminster judges is that their decisions are a result of the application of a priori formal rules. The purpose of this Article was to ascertain the veracity of this long-held assumption by asking whether, instead, Westminster judges are animated, at least to some degree, by personal political ideology. Using as a proxy immigration decisions in the Federal Court of Australia, the Article finds that ideology is evident in the voting behavior of Australian judges. While not denying the constraining effect of the law more generally, this finding indicates that ideology does in fact matter. This result is both surprising and exciting, and, if the results hold once the scope of the study is broadened, arguably has the potential to enliven new and interesting debates over both the descriptive and normative institutional role of the judiciary in Westminster legal systems.



