Lawyers and the Legal Model: Judicial Ideology, Judicial Professionalism and Institutional Strategy Among the Law Lords[1]

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Abstract

Most work on the British judiciary reflects a sense of complacency, based on the assumption—found both in scholarly research and in the reform of British judicial institutions—that the British judiciary is professional and not political, and that the type of factors considered in attitudinal studies of the US Supreme Court are therefore irrelevant to the UK's highest court. Judges in the UK are, in other words, perceived to behave as the so-called 'legal model' predicts. In this paper, we challenge this assumption. We argue that the 'legal model' is most intelligible as a variant of the 'strategic model', where judges' differing approaches to legal doctrine represent 'institutional strategies', i.e. ways of embedding particular ideological attitudes within the informal institutions of the judiciary, so as to shape interactions with fellow judges and other constitutional actors. Even faithful adherence to a 'legal model' does not, therefore, affect the validity of the insights of the strategic model in relation to the role and impact of judges' personal views. We elaborate upon this through an empirical analysis of decisions of the Law Lords on challenges to state bodies since the Human Rights Act 1998, which estimates judges' ideological positions on a scale derived from a key area of doctrinal debate. We find that (a) there are meaningful and measurable differences in judicial positions in key doctrinal controversies (b) these differences have a measurable impact on the outcome on a significant minority of cases (c) both of these coexist with a very high degree of consensus as to outcomes, reflected in the fact that decisions of the Law Lords only rarely contain a dissent. Drawing on Mary Douglas's grid-group cultural theory, we posit an institutional explanation for the apparent paradox contained in these observations, namely that consensus in the UK's highest appellate court is a product of group-bounded as much as norm-bounded behaviour. Such group-bounded behaviour has the tendency to amplify rather than dampen the effect of bench-composition on the outcome of cases. We argue that our findings point to the need for proper consideration to be given the institutional impact of reforms to the judiciary's workload and, ultimately, for a proper institutional theory of the judiciary.

> In the United States, appointments to the Supreme Court are more political, and therefore there is a stronger possibility that the composition of the court might affect the outcome. This is not the case in the United Kingdom.[1]
>
> Everyone knows that the composition of the Court has an impact on the outcome of cases.[2]

Introduction

There is surprisingly little that has been written on the British judiciary from an institutionalist perspective.[3] The result is that little or no thought has been paid to the sort of questions – of institutional design, institutional functions, institutional weaknesses – that one would associate with institutionalist perspectives. This is particularly striking when we consider the very significant reforms that have been made to the British judiciary in the past four decades – ranging from the creation of an entirely new system of judicial review by which judges review government action[4] to the grant to judges of the ability to review laws for their compatibility with human rights (a power the British judiciary, unlike their American counterparts, did not possess until 2000) to the creation of a new Supreme Court as the ultimate court of appeal.[5] In none of these reforms was any consideration given to the potential institutional impact of the jurisdictional changes upon the highest court. Would they affect the way in which the judges saw or discharged their role? Would they affect the institutional relationship between the judicial branch and the other branches? There is little evidence

[1] Department of Constitutional Affairs (2003) *Constitutional Reform: A Supreme Court for the United Kingdom* CP 11/03, London, Department of Constitutional Affairs, para. 52.

[2] Richard Cornes, *Memorandum to the Select Committee on the Constitutional Reform Bill*, 28 April 2003, at para. 7.

[3] There is, for example, no contribution that takes such a perspective in the otherwise comprehensive collection released to mark the end of the Judicial Committee of the House of Lords. Louis Blom-Cooper, Brice Dickson and Gavin Drewry, *The Judicial House of Lords, 1876-2009* (Oxford: Oxford University Press, 2009).

[4] In typically British fashion, these very far-reaching (and not uncontroversial) changes were introduced by a statutory instrument (a type of delegated legislation), rather than legislation. On the background to these reforms, see TT Arvind, 'Restraining the State through tort? The Crown Proceedings Act in retrospect', in: TT Arvind and J Steele, editors, *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart Publishing, 2012).

[5] The Supreme Court of the UK was created in 2009. Until then, the ultimate appellate body was the Judicial Committee of the House of Lords – theoretically a committee of the upper house of the British Parliament, but in practice an operationally independent judicial body. Confusingly, the term "Supreme Court" was until then used to refer collectively to the High Court and Court of Appeal of England and Wales.

that any significant thought was given to these considerations, or that they were even a concern.[6]

This gap reflects an underlying complacency about the British judiciary, which arises out of two particular attitudes to the British judiciary that are endemic in scholarly and popular writing in the UK, namely, that the judiciary in the UK is not political in the sense the US is – an attitude pithily summed up by the Department of Constitutional Affairs in the epigraph quoted at the beginning of this paper[7] – and that the judiciary in the UK is professional. Because the judiciary is professional rather than political, the argument goes, views and differences amongst judges do not reflect any form of political ideology.[8] Those who hold this view also take comfort from the relatively small number of dissents in the House of Lords,[9] and from observations in empirical work that differences in judges' voting records cannot "be tied straightforwardly to differences of political ideology, of the sort that might be plotted say, on a liberal conservative axis."[10] It is

[6]There is, in contrast, some evidence that at least some senior judges were concerned about the potential for radical transformation of the institution. Lord Neuberger, who had been a member of the Judicial Committee of the House of Lords and was slated to become a justice of the Supreme Court, left the Committee just before it transformed into the Supreme Court choosing to return to head the (lower) Court of Appeal. In an interview with the BBC, he said that there was a danger of "judges arrogating to themselves greater power than they have at the moment" and strongly criticised the absence of serious thought as to "what the consequences of any change [to the British Constitution] will be." See Joshua Rozenberg, "Fear over UK Supreme Court impact" BBC News, 8 September 2009, http://news.bbc.co.uk/1/hi/uk/8237855.stm. He subsequently reiterated his concern, that the creation of a Supreme Court might, unintentionally, lead to it having its own *Marbury v Madison* moment, although he accepted that this would seem "far-fetched" to the "great majority of lawyers and constitutional experts" in Britain. See Lord Neuberger, 'The Supreme Court: Is the House of Lords losing part of itself?', Lecture delivered to the Young Legal Group of the British Friends of the Hebrew University, 2 December 2009, pp. 11-12.

[7]The quote is taken from the DCA's consultation paper preceding the establishment of the Supreme Court where, after raising the possibility that bench composition was an important factor affecting appeals to the highest court, the DCA dismissed it as not being relevant to the British context. See Department of Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom (Consultation Paper, CP 11/03)* (Department of Constitutional Affairs, 2003) para. 50-52.

[8]A notable exception was J. A. G. Griffith, who argued that the decisions of the senior judiciary remained overtly political and reflected predominantly conservative leanings, but his view remains a minority position. See J A G Griffith, *The Politics of the Judiciary*, 5th edition (HarperCollins Publishers, September 1997).

[9]In contrast with the US, where dissents are common, around 80% of cases decided by the Law Lords in a typical year are unanimous decisions.

[10]Thomas Poole and Sangeeta Shah, 'The Law Lords and Human Rights' (January 2011) 74, *The Modern Law Review* 79–105 here: p. 104. In an important forthcoming article, Christopher Hanretty finds that a model in which Law Lords' votes are expressions of their location along a single left/right dimension is a poorer model of voting than a null model. Accordingly, he argues that the Law Lords' ideal points cannot be interpreted as representations of their political preferences, rather only as statistical 'noise' or at best as willingness to dissent, given the very low number of dissent in the House of

not denied that judges differ in their views on the law, and that their judgments to some extent reflect views peculiar to them. Journals are filled with articles analysing the jurisprudence developed by particular judges in the course of their career,[11] or discussing at length how leading judges differ in their approach to important legal questions ranging from insolvency law[12] to the proper boundary between private and public law.[13] Judges themselves have been known to make reference in their decisions to these differences and their impact upon cases.[14] But the underlying attitude appears to be that these reflect nothing more significant than the type of relatively minor disagreements that will always be found amongst lawyers. Accordingly, a judge's jurisprudential views play no formal role whatsoever in the constitution of benches in the Court of Appeal or Supreme Court, and whilst many factors *are* taken into account in constituting benches – such as ensuring that one or preferably two Scots judges sit on benches hearing Scottish appeals, or that benches contain at least some judges with subject expertise[15] a bench representing a balance between different views is not amongst them. Nor does there seem to be much of a call for this to change.[16] What matters most is that those with the highest possible levels of professional competence are appointed: once they are on the bench, they are for all practical purposes treated as if any one of them could replace the other, subject only to the constraint of professional expertise. As far as attitudes to the British judiciary is concerned, therefore, the 'legal model' – so strongly criticised in the judicial politics literature – appears to hold unchecked and virtually unchallenged sway.

Our purpose in this paper is to challenge the complacency underlying the British approach. We argue that it is based on a misunderstanding of the nature of the legal model and, more particularly, of what is represented by the terms legal scholars actually use – 'pragmatism', 'policy', 'formalism', and so on – to describe the nature of judicial decision-making. In Part I

Lords.Christopher Hanretty, 'Airy Fairy Libertarians? The Decisions and Ideal Points of the British law Lords' (2012) 42, *British Journal of Political Science* forthcoming. To the best of our knowledge, Hanretty's article is the only existing study to analyse the decisions of the UK judiciary using the attitudinal model.

[11]Michael Fordham, 'Lord Bingham's Legacy' (2009) 14, *Judicial Review* 103–108.

[12]Gerard McCormick, 'Lords Hoffmann and Millett and the Shaping of Credit and Insolvency Law' (2005) 4, *Lloyd's Maritime and Commercial Law Quarterly* 491–514.

[13]See Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford: Oxford University Press, 2004).

[14]See Lord Hoffmann's observations in *White v Chief Constable of South Yorkshire* [1999] AC 455, 502, speculating that a different bench would probably have decided *McLoughlin v O'Brien* [1983] 1 AC 410 differently.

[15]Brice Dickson, 'The Processing of Appeals in the House of Lords' (2007) 123, *Law Quarterly Review* 571–601 here: 589-593.

[16]A notable exception is Brice Dickson, 'Close Calls in the House of Lords', in: James Lee, editor, *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford: Hart Publishing, 2011) 283–302.

of this paper, we argue that on a proper understanding, the legal model is perfectly compatible with the strategic model – and, indeed, the two shed significant light on each other. The concepts legal models use to describe judicial behaviour, we argue, far from being obfuscations represent different types of institutionalised strategies that judges adopt to deal with the wide variety of other actors – ranging from public opinion to the legislature – with which they must deal if they are to contribute in an effective way to governance. Engaging seriously with what legal models tell us can therefore contribute much to our understanding of the origin, nature and thrust of the strategies that judges actually use. Simultaneously, considering these models within the broader framework of the strategic model enables us to more readily link judges' strategies to the social and political context within which they operate and, thus, to understand in a far more nuanced way the factors that influence judges, the impact they have on their decisions, and the reasons and logic underlying the strategies judges use.

In Part II of this paper, we present a Bayesian IRT model of judicial decision-making in one specific area—cases brought against state bodies—where we seek to measure differences between the Law Lords (the British equivalent of the justices of the Supreme Court of the US)[17] not on the traditional liberal/conservative axis, but on they type of axis that legal models discuss. We use our model to show that there are indeed measurable differences on this axis between the Law Lords – that, in other words, Law Lords have measurable 'ideal points' on this more legally oriented axis, and that their ideal points manifest themselves in their decisions fairly consistently. We also show that these differences are significant enough to have made a difference to the outcomes of some cases—that there are, in other words, important cases that have been decided by the House of Lords which on the preponderance of probabilities would have gone the other way for (at the very least) a substantial minority of alternative bench compositions.

What, then, of the much-prized professionalism of the UK judiciary? In Part 4 of this paper, we argue that the Department of Constitutional Affairs, and most constitutionalists in the UK, have misunderstood the institutional nature of professionalism. Through an analysis of the deeper institutional

[17] We use the term 'Law Lords' throughout to denote members of the Judicial Committee of the House of Lords and Supreme Court. The judges were traditionally so called because they were, *ex officio*, Lords by virtue of being members of the House of Lords. The Constitutional Reform Act which created the Supreme Court refers respectively to judges of the Supreme Court, and to the specific offices of President and Deputy President of the Supreme Court, and the Supreme Court itself in its official usage employs the term 'Justice of the Supreme Court'. However, the phrase 'Law Lords' continues to be in common use, and in December 2010 it was announced that a Royal Warrant had been issued declaring that every justice if the Supreme Court "will in future be styled as 'Lord' or 'Lady', to ensure that all Justices of the Court are described and addressed in a similar manner" (UK Supreme Court Press Release 13/2010, 13 December 2010), although they will no longer be life peers, nor will they sit in the House of Lords.

factors involved in professionalism, and with reference to Mary Douglas's account of 'grid' and 'group', we suggest that the primary effect of the professionalised institutional structure of the House of Lords was to create a reluctance to dissent, particularly in highly charged, important cases. It led, in other words, to a situation where certain members of a bench would go along with the position of the majority even if their natural inclination would have been to dissent. Far from diminishing the effect of bench-composition on the outcomes of appeals before the Law Lords, therefore, the professionalised nature of the UK judiciary accentuates it.

Our conclusion is that institutions matter to the way judges decide cases, and not just if or because judges may represent political positions. The institutional characteristics of the upper judiciary have a much broader significance, because they represent a range of different strategies that judges have evolved for negotiating their transactions with other institutions and that, therefore, have fairly significant implications for the constitutional role of the judiciary. As we discuss in the concluding section, the design of judicial institutions does not attract the same level and type of scrutiny as the design of administrative institutions. Our research demonstrates that it is necessary that it do so. More attention must be paid to the design of judicial institutions, particularly in the context of the steady growth in the powers of the judiciary and the changing nature of the questions on which they are now called upon to adjudicate. Whilst these issues could to some extent be swept under the carpet when the bulk of the work of the upper judiciary consisted of private law cases with few wider ramifications beyond the immediate parties, the far more fundamental questions they have now been given the power to adjudicate upon makes this impossible. Against this background, the Constitutional Reform Act 2005 stands out as a missed opportunity notwithstanding its expressions of political commitment to the professionalism of the judiciary, and to the need for representative appointments.

1 'Political' and 'legal' models: Two misunderstandings and a solution

On the face of it, the 'political' model of adjudication – which sees judges' left-wing / right-wing ideological positions as the primary influence upon their decision – and the 'legal' model of adjudication – which sees judges as more or less faithfully attempting to apply rules – represent two diametrically opposed views on what it is judges seek to do, which are different to the point of being incommensurable. In this section, however, we argue that this perception is largely a result of judicial politics scholars and legal scholars talking past each other, and fundamentally misunderstand the nature of each others' claims in relation to how we should approach the study of

courts as governing institutions. As we will see, the political model seeks to explain the same thing as the legal model—the nature of judicial discretion, and the things that influence the manner in which judges exercise it—and the answers they offer are complementary rather than contradictory.

1.1 The 'political' model and legal scholarship

The rejection of the claims of the judicial politics scholarship by legal scholars, including not just formalists but also realists such as Brian Leiter,[18] is for the most part a reaction to the suggestion of the judicial politics school is that judging is 'political', and that the 'political' aspect of judging is best represented on a left-right scale. But, as we show, this is principally because legal scholars have misunderstood both what judicial politics scholars mean by 'political', and why they choose to deploy a left/right scale in certain circumstances.

The US judicial politics literature has been centrally pre-occupied with the task of explaining judicial decisions at least since the work of Pritchett in the 1940s: *why*, in other words, do judges decide the way they do? This orientation owes much to the influence of the behaviouralist tradition, influential in the post-WWII period, which saw the central intellectual task of political science to be that of explaining the behaviour of political actors such as politicians, voters, bureaucrats—and judges. The aspiration towards value-neutral description and explanation of judicial behaviour for a long time placed this tradition apart from the study of the judicial process in law schools, as well as from the earlier study of "public law."[19] This is not to deny the influence of the legal literature on the study of judicial politics, as personal reminiscences of the origins of judicial politics scholarship attest, but rather suggests a conscious programme of 'decentring' the study of law and courts both from its focus on authoritative legal rules, and from the dominance of legal approaches.[20]

Given the focus on explaining judicial behaviour, as well as the relatively undeferential 'decentered' approach to the authoritative sources that

[18] Brian Leiter, 'Naturalizing Jurisprudence: Three Approaches', in: J. Shook and P. Kurtz, editors, *The Future of Naturalism* (Amherst, N.Y.: Prometheus Books, 2009) 197–207.

[19] In the North American context, "public law" takes on a meaning quite different from its UK connotation. In the US, it principally denotes the study by political scientists of the legal framework of government, and was more or less coextensive (in subject matter, and up to an extent in approach) with the study of constitutional law. In the UK, it also encompasses – and, to some extent, is dominated by – the study of the principles, doctrines and remedies governing judicial review, that is to say, the review by the courts of the actions of the other branches of government.

[20] Stuart A Scheingold, 'The Path of the Law in Political Science: De-Centring Legality From Olden TImes to The Day Before Yesterday', in: Keith E. Whittington, R. Daniel Kelemen and Gregory Caldeira, editors, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008) 737–751 here: 739-41.

dominate legal approaches, researchers following the so-called "attitudinal model" tend to hold, in the words of one of its main advocates, "that judges decide cases in the light of their sincere ideological values juxtaposed against the factual stimuli presented by the case" rather than in accordance with legal doctrine.[21] Since the pioneering work of Glendon Schubert, it has been common practice to interpret judicial differences on a classic left/right (or liberal/conservative) dimension because it fits the data provided by decisions of the US Supreme Court. Judges, on this view, behave like "single-minded seekers of legal policy"[22] who decide cases so as to promote their preferred left/right ideological position, with the text in which a judge explains his or her decision being seen as an *ex post facto* rationalisation.

Critically, however, nothing in the abstract formulation upon which the political model is built suggests *how* differences in judicial attitudes should be represented or that mandates that the differences be modelled as occurring on a classic left/right scale, and not all who use the political model do so. Hodder-Williams, for example, distinguishes six separate ways in which decisions of the U.S. Supreme Court can be described as 'political'. These include (a) a purely definitional sense, arising from the fact that an appellate court of last resort "inevitably authoritatively allocates values"; (b) an empirical sense, which posits that litigants make the Court a part of the political process, by attempting to use it as a means to "achieve their political purposes" (c) an influence-seeking sense, based on the suggestion that "the justices have a natural desire to prevail in arguments within the court"; (d) a prudential or pragmatic sense, based on the suggestion that the justices "frequently consider the probable consequences of their decisions"; (e) a policy-oriented sense, which suggests that justices use the Court to pursue "their own policy and other goals"; and (f) a systemic sense, based on the observation that the Court's decisions often "have consequences for other parts of the American political system."[23] Similarly, in their analysis of death penalty cases, Epstein and George find that both legal and extra-legal model specification have their own (in fact diametrically opposed) explanatory shortcomings, leading them to propose an integrated model that takes into account both legal and extralegal factors.

Clearly, then, not all the claims of the political model are intrinsically alien to the way lawyers think about the judiciary. Part of the reason behind the failure of legal scholars to engage with the political model, as Hodder-Williams pointed out, is that these senses are rarely carefully distinguished

[21] Jeffrey A Segal, 'Judicial Behavior', in: Keith Whittington, R Daniel Keleman and Gregory A Caldeira, editors, *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 19–33.

[22] Tracey E George and Lee Epstein, 'On the Nature of Supreme Court Decision Making' (June 1992) 86, *The American Political Science Review* 323–337 here: 325.

[23] Richard Hodder-Williams, 'Six Notions of 'Political' and the United States Supreme Court' (1992) 22, *British Journal of Political Science* 1–20.

in work about the judiciary. In the context of the UK, this is visible in strikingly visible in the reaction to the work of J.A.G. Griffith on the politics of the judiciary. Griffith makes a definitional claim about the nature of politics, as well as an institutional claim about the relationship between courts and other governing institutions when he suggested that "Judges are part of the machinery of authority within the State and as such cannot avoid the making of political decisions."[24] Yet, because the focus of his work was upon questions concerning controversial social issues which were typically distributional—the preference for collective over private provision of public goods, for example, or the role of trade unions—the focus of the debate around his thesis was on what Hodder-Williams calls "the influencing, pragmatic and partisan notions" of politics, rather than his definitional or institutional claims. As others have pointed out, one reason why the political context of judging has been so often been ignored in the UK (as well as, one might add, why the relatively few works that explicitly address the politics of judging have attracted so much controversy) is the persistence of such a 'political controversy' approach among both lawyers and political scientists.[25] Looking beyond cases and studies involving controversial distributive issues makes these broader aspects of 'political' models—and their relevance to the questions lawyers ask—much clearer.

1.2 The 'legal' model and political scholarship

On the other side of the fence, it is common to find judicial politics scholars criticising the 'legal' model of adjudication, which they identify with the view that judges' adherence to authoritative legal sources, rather than the psychological attitudes or political preferences of judges play the primary role in determining legal outcomes. George and Epstein describe it in the following terms: "At its core, legalism centers around a rather simple assumption about judicial decision making, namely, that legal doctrine, generated by past cases, is the primary determinant of extant case outcomes." Quoting Wasby, they add that the legal model "... views judges as constrained decision makers who 'will base their opinions on precedent and will adhere to the doctrine of *stare decisis*.' " But this is, in important respects, a mischaracterisation. As the examples we cited in the introduction demonstrate, few scholars today (or even in the recent past) would believe that legal factors alone (except perhaps in anomalous circumstances) explain judges' decisions. This is not to say that legal factors do not matter. Certainly, there are numerous examples of judicial insistence that they are declaring

[24] John Aneurin Grey Griffith, *The politics of the judiciary* (Manchester: Manchester University Press, 1977) p. 190.

[25] S Sterett, 'Politics and Jurisprudence in the British Courts' (1988) 1, *Canadian Journal of Law and Jurisprudence* 173.

what the law already is, rather than creating it.[26] But the extreme version of this position—dismissed by Spaeth as "legalistic myth-making"[27]—attributes very little agency to judges *qua* legal decision-makers, insofar as it does not regard judges as 'free to choose' between competing interpretations of a rule, or different understandings of its application to a particular situation. One could certainly imagine cases in which statute or previous cases clearly indicate a doctrinal basis for deciding a case one way rather than another (although why parties to such clear cases would wish to bring them before the senior appellate courts is another matter). But does the claim that the *majority* of cases are explained by such a position correspond, even approximately, to the views of any legal scholars? As we argue in this section, it does not. Instead, legal models are, for the most part, about the same things that political models are, namely, the extent to which a judge has discretion and the factors that influence that discretion.

A useful starting point is the linguistic ambiguity in which legal rules are expressed, captured in H. L. A. Hart's formulation that rules have an *open texture*.[28] Hart famously gives the example of a bylaw that says that "No vehicles should be driven in the park." In this apparently simple example (unlike many real-life disputes of legal interpetation) there is little ambiguity "on its face" as to the meaning of the bylaw. But there is a lack of clarity as to how this rule would apply to particular fact situations. Does a bylaw that says that "No vehicles should be driven in the park" apply to a child's bicycle, or to aeroplanes[29] or roller skates? These examples might (as Hart argues) be interpreted as cases of semantic uncertainty[30] but it is not plausible to regard every legal disagreement that might arise in the application of this rule as being due to linguistic imprecision. There might be an ongoing legal and factual dispute as to the boundaries of the park, upon which the question of which an alleged infringement of the bylaw would depend. Alternatively, a dispute about the application of the rule might be due rather to the absurd results that it produces. If a father teaching his daughter to ride a bike for the first time were to lose his driving license for the infringement, should we understand the judges hearing the appeal to be making a decision about the meaning of of the words of the bylaw, or about the undesirability of such an absurd result? Falling more clearly into the second category (absurd consequences) would be a case concerning the parks department truck transporting a batch of saplings for planting.

[26] See the examples cited by Harold J Spaeth, 'Reflections About Judicial Politics', in: Keith E. Whittington and R Daniel Keleman, editors, *The Oxford Handbook of Judicial Politics* (Oxford: Oxford University Press, 2008) 752–766 here: p. 758

[27] Ibid. pp. 758-760.

[28] HLA Hart, *The Concept of Law*, 1st edition (Oxford: Clarendon Press, 1961), 124

[29] Ibid., 123

[30] Ibid., 123: "...there is a limit, inherent in the nature of language, to the guidance that general language can provide"

Such a factual situation would appear to fall clearly within the words of the enactment; yet to hold this in violation of the rule would greatly impede the efficient re-planting and maintenance of the park.[31]

The position that perhaps comes closest to arguing that legal doctrine determines the result in cases such as these is called 'formalism'. We might follow Schauer in characterising formalism as "the practice... of following ... the plain meaning of the words of the document in the face of plausible arguments for doing otherwise."[32] Accordingly, formalist approach to the hypothetical case of the parks department truck would necessarily ignore the effect of the rule on efforts to re-plant the park, and other practical considerations. Ruling out such a *purposive* interpretation out of bounds might indeed reduce the scope of judges discretion, so that doctrine, in the form of the words in which the rule was enacted have greater controlling force on the judge's disposition of the case. But there are a number of reasons why even formalism does not support the view that George and Epstein characterise as "the legal model".

First, as Grey argues in *The New Formalism*, such a preference for textualism is, like other canons of modern pragmatic formalism "merely presumptive, allowing for a balancing or accommodation in cases of conflict."[33] Nor does modern pragamatic formalism altogether forbid judges from considering the acceptability of particular interpretations.[34] Second, formalists do not contend that their theory is a descriptively accurate account of the adjudicative process: plainly not all judges accord the priority to plain meaning (or to other limiting influences on the scope of the judge's discretion) that formalists would wish. It follows that the question of *whether* to adopt a formalist approach will in many cases be as much the *subject* of judicial discretion as a limit on it. Of course, a commitment to formalism may be so entrenched in legal culture that a non-formalist approach would seem inconceivable. To return to the running example, it may in a particular legal context be regarded as 'heretical' that a judge would subvert the plain meaning of the "no vehicles" rule, in order to facilitiate the work of the parks department. In this sense, it is important to be aware that judicial discretion, like the discretion enjoyed by other constitutional actors, has

[31] A judge wanting to prevent such an outcome would presumably phrase his judgment, "The council, in passing this bylaw, could not have intended..." Yet in holding as he does, the judge is guided not by semantic considerations, nor even (in most cases, *Pepper v Hart* type situations being the exception rather than the rule) the results of some inquiry into what the Council had been trying to achieve, but by considerations as to the desirability of the outcomes produced by a particular interpretation.

[32] Frederick Schauer, 'Formalism: Legal, Constitutional, Judicial', in: Keith Whittington, R. Daniel Kelemen and Gregory A Caldeira, editors, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008) 428–436.

[33] Thomas C Grey, 'The New Formalism' (1999) *Stanford Law School Working Paper No. 4* 27.

[34] Ibid. pp. 26-7.

what Galligan has called an "internal component",[35] comprising the extent to which judges perceive themselves to enjoy, or choose to enjoy, a degree of latitude in their decisions. But in such a case, the elimination of judicial discretion would not be explained solely by the controlling influence of doctrine alone, but by the combination of doctrine and the internal component of the judge's discretion. The significance of formalism, therefore, is not that it denies that judges have discretion, but that it presents an account of how judicial discretion *should* be exercised, which draws its inspiration from the manner in which judges claim to exercise their discretion in certain types of cases, and whose resurgence—as formalist writings make very clear—is in no small part a reaction to the fact that many judges today do *not* exercise their discretion in the way formalist theory says they should. As with all legal models, it seeks to set up a set of rules to restrain and guide the exercise by the judiciary of its discretion.

1.3 Discretion and strategies

There is a more centrist position found in the judicial politics literature, that suggests that judges exercise a constrained policy discretion, which they exercise by reference to their ideological preferences, but only when authoritative legal sources do not give clear direction. This seems to be the view of Robert A. Dahl, a pioneer in judicial politics scholarship, who saw as a crucial question "... the extent to which a court can and does make policy decisions by going outside established 'legal' criteria found in precedent, statute, and constitution." Thus, judges' policy preferences come into play when legal criteria leave the outcome of cases 'underdetermined', leaving a range of options open to them. Dahl thought the U.S. Supreme Court was exceptional because, "... from time to time its members decide cases where legal criteria are not in any realistic sense adequate to the task." There is something to be said for this view. The Supreme Court is not constrained by its own previous decisions, nor of any higher court. Furthermore, the costly manner in which cases come before, so it is argued, screens out any straightforward cases on which existing law provides an unambiguous and settled legal answer. Moreover, empirically-minded scholars working within the attitudinal framework can claim a pretty good fit of their theory to data for decisions of the U.S. Supreme Court.[36] On the other hand, the attitudinal model seems to perform less well when applied to lower courts.[37] It also seems to perform less well as a model of decision-making in the House of Lords. As well as finding difficulty in interpreting IRT estimates of the Law Lords as positions on an ideological space (rather than as indications of

[35] D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1990).

[36] Segal (as in n. 21) pp. 26-7.

[37] Ibid. pp. 27-8.

willingness to dissent), Chris Hanretty finds no straightforward correspondence between the judges in dissenting cases and the party which appointed them. For these reasons, some of the more thoughtful proponents of the attitudinal model (including Jeffrey Segal) propose that the model should not be thought of as having universal application: rather, judges will behave as the model predicts only under certain institutional conditions, notably when authoritative sources not provide clear direction, or in the absence of institutional mechanisms to secure judicial compliance with such direction. This middle ground also appears to have its adherents amongst lawyers in the UK. "At best," argues John Bell, "rules define the limits, rather than the content of the discretion exercised."[38]

But why might judges accept limits upon their policy discretion? Unlike lower courts, whose decisions can be appealed, it is common for final appellate courts to be granted a relatively high degree of flexibility to depart from their own prior decisions. This is the case for the US Supreme Court, and (since the 1966 Practice Statement) for the House of Lords and Supreme Court in the United Kingdom. However, there are many reasons why—even where judges do enjoy a margin of discretion—they might behave in ways that are at variance with the attitudinal account of judicial behaviour. First of all, judges might decide according to what the political science literature terms "non-ideological utilities". This could take a number of forms. Judges could be guided in their decision-making by the prospect of promotion to a higher court so that their decisions reflect the views of those who decide on promotion, rather than their own.[39] Alternatively, the threat of assassination,[40] or corrupt bribes would fall under this heading, where applicable.

Secondly, we might question whether judges—even if guided solely by their own ideological lights—would most effectively promote their preferred

[38]John Bell, 'The Judge as Bureaucrat', in: John Eekelaar and John Bell, editors, *Oxford Essays in Jurisprudence, Third Series* (Oxford: Clarendon Press, 1987) 33–56 here: 42 J. A. G. Griffith also appears to hold this view, but he places himself closer to the sceptical end of the spectrum by arguing that the placement of such limits are themselves the product of interpretative processes in which judges often have a considerable amount of leeway. See also W Murphy and R Rawlings, 'After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980' (November 1981) 44, *The Modern Law Review* 617–657; W Murphy and R Rawlings, 'After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980' (1982) 45, *The Modern Law Review* 34–61.

[39]J. A. G. Griffith took the view, in the UK context, that this was a factor in judicial decision-making, arguing of English judges that, "In financial terms, such promotion is not of much significance. But life in the Court of Appeal and, even more, in the House of Lords is not so strenuous in the High Court (or below), personal prestige and status are higher among the fewer, with life peerage at the top. These are not inconsiderable rewards for promotion, and the question is whether there are pressures on, particularly, High Court judges to act and speak in court in certain ways than in others." Griffith (as in n. 24) pp 29-30

[40]G Helmke, 'The logic of strategic defection: Court-executive relations in Argentina under dictatorship and democracy' (2002) 96, *American Political Science Review* 291–303.

ideological position by consistently deciding cases sincerely according to their ideological beliefs. This insight is at the root of the "strategic model" which in the political science literature is one of two principal rivals to the attitudinal model. The model is so-called because judges are assumed to act *strategically* in the game theoretic sense of anticipating other actors' responses and giving their *best response* to other agents decisions).[41] The core of the strategic approach is that overall outcomes within the political system depend on the interaction of actors with independent preferences - including the other judges on a court, but also including legislators, regulatory bodies, lobbyists, industry associations and the general public, amongst others. Judges act rationally when they recognise that they must work with other actors within the political and judicial system, and take account of others' preferences to issue the decision that ensures the best outcome given how these others are likely to react. In all but the simplest situations, this will be different from choosing the outcome they most want.

The insight that judges might decide cases *strategically* has been most fully developed in the context of separation of powers accounts, which assume that judges take into account the anticipated reaction of other legal and constitutional actors. They will therefore give a decision that is as close as possible to their preferred ideological position, without provoking action by other decisions to overturn their decision. In one well-known application of the strategic model to judging on the US Supreme Court, Epstein, Knight and Martin predict that Justices anticipate the policy positions of Congressional committees, Congress and the President, taking account of the institutional rules for reversal by legislation and constitutional amendment respectively.[42] One implication of this attempt to model the interaction between the Supreme Court and Congress is that the Court will generally prefer to use 'ordinary' approaches to interpreting legislation over 'constitutional' interpretation, if there is any chance at all that their decision will provoke a constitutional amendment. The same basic insight has been applied comparatively, to explain differences in the judicial role across countries. Spiller's work on regulation suggests that where constitutional arrangements make

[41] In fact, it would be more correct to speak of strategic models (in the plural) because there are various ways by which one might relax the assumption that judges decisions are a sincere reflection of their ideological positions, and thereby to develop the model in different ways. It is not even necessary, on the strategic account that judges pursue policy goals primarily. As Epstein, Knight and Martin put it, "Under the strategic account, *it is up to the researcher to specify* a priori *the actors' goals; the researcher may select any motivation(s) she believes that the particular actors hold.*"L. Epstein, J. Knight and A.D. Martin, 'The Political (Science) Context of Judging' (2003) 47, . *Louis ULJ* 783 here: p. 798 In practice, most strategic accounts of judicial decision-making assume that judges pursue policy goals, taking on board various institutional constraints on policy-seeking, as well as the interaction between judicial and other actors.

[42] L. Epstein, J. Knight and A.D. Martin, 'The Supreme Court as a Strategic National Policymaker' (2001) 50, *Emory LJ* 583.

it easy for legislatures to overturn adverse judicial decisions, the doctrine of judicial independence (by which he really means judicial supremacy) will remain under-developed. In the 'Westminster system', in which the executive dominates the legislature, bicameralism is relatively weak, and there are no substantive restraints on the powers of the legislature (at least in areas outside the EU's competences) the model would predict that judges act essentially as the agents of government.[43]

Another way in which the strategic approach has been applied is in looking at "strategy in the chambers".[44] To what extent to judges take account of the ideological preferences of their bretheren, and the institutional rules of the court on which they sit in deciding cases? In a seminal study, Maltzman and Wahlbeck look at 'voting fluidity' (*i.e.* the incidence of justices changing their decision between the conference vote, at which a preliminary vote on the outcome of the case is taken, and the final decision on the case).[45] One of their key findings is that the Chief Justice is reliably more likely than Associate Justices (other things being equal) to switch votes. This empirical finding makes a lot of sense in the context of the rules of opinion assignment on the US Supreme Court, according to which the writing of the lead judgment falls to the Chief Justice (or his nominee) if the Chief Justice is in the majority, or if he is in the minority to the senior Associate Justice in the majority. The Chief Justice can thus choose to decide with the majority (and thus write the lead judgment), and if he chooses, to give judgment on a very narrow basis, limiting the effect of a decision with which he disagrees.[46]

The ways in which this intra-court dynamic could affect the "strategy in the chambers" are multifarious. Would it be better for a judge, finding him- or herself in disagreement with the majority to giving a dissenting judgment? Or would it be better to decide with the majority, but doing so on a very narrow basis. The former course would make the disagreement clear, but an inferior court in a future case would be obligated to follow the majority, insofar as the decision is 'in point' The latter would afford a later,

[43]P.T. Spiller and M.L. Spitzer, 'Judicial choice of legal doctrines' (1992) 8, *Journal of Law, Economics, and Organization* 8–46

[44]Pablo Spiller and Rafael Gely, 'Strategic Judicial Decision-Making', in: Keith E. Whittington, R Daniel Keleman and Gregory A Caldeira, editors, *The Oxford Handbook of Law and Politics* (Oxford: Oxford Univeristy Press, 2008) 34–45 here: 41.

[45]Forrest Maltzman and Paul J. Wahlbeck, 'Strategic policy considerations and voting fluidity on the Burger Court' (1996) 90, *American Political Science Review* 581–592.

[46]It is interesting to note, in this context that when Roberts became Chief Justice, he said in his confirmation hearing that he would bring unity to the Supreme Court. In fact, there has been a major increase in the number of unanimous decisions, but many of these have been so narrowly construed to have almost no precedental or normative value whatsoever. An alternative interpretation of the same facts—in line with the Maltzman-Wahlberg hypothesis—could be that when Roberts CJ chooses to join (and thus narrow the decision of) Breyer, Ginsburg, Sotomeyer and Kagan and Kennedy, who are a majority anyway, Alito, Thomas and Scalia sometimes join them).

inferior court greater opportunity to read the decision narrowly. The U.S. case of *NAMUDNO v Holder*[47] is a case in point. This was an 8-1 decision of the US Supreme Court, with Thomas J agreeing with the majority in part and dissenting in part. The majority of the U.S. Supreme Court held that a Texas municipality—indeed all voting districts covered by the section—should be eligible to "bail out" of the requirement for "pre-clearance", but declined to decide the broader question about the constitutional validity of Section 5.

1.4 Judicial Approaches as Institutional Strategies?

The idea that judges accept limits upon their discretion for strategic reasons has very important implications for how we view the relationship between the legal and political models of judicial behaviour. We have so far talked about different approaches to judicial decision-making either: (a) as if they were contending, purely descriptive accounts of how judges decide; or (b) as 'personal judicial philosophies' which individual judges have a more or less unconstrained decision whether to accept or reject. We have hinted at, but not elaborated a third approach, namely: (c) that such choices may, to a greater or lesser extent be 'institutionalised', meaning that they become an identifiable part of legal and/or judicial culture. Such a view would fall some way between (a) and (b), but goes beyond either because it suggests some further potentially fruitful lines of enquiry. To describe a judicial approach as 'institutionalised' does not mean that individuals have no choice over whether to follow it. But it does suggest that failure to adopt it may be a ground for criticism, or for some formal or informal sanction—ranging from formal censure to ostracism to mild rebukes from colleagues. Nor does it suggest that the extent to which particular judicial approaches are institutionalised is completely outwith the control of the judges to whom such institutional expectations apply. In particular, judges are well placed to contribute to the development of judicial institutions, strengthening expectations of which they approve, or breaking down those they regard as unhelpful. In other words, judges (like other institutional actors) can engage in *institutional entrepreneurship*.

T. B. Lawrence captures the strategic element to such institutional entrepreneurship in the phrase 'institutional strategy'.[48] An institutional strategy is one in which a conscious effort is made to transform or preserve institutions so as to establish or preserve some strategic advantage.[49]

[47] 557 U.S. 193, 129 S.Ct. 2504 (2009).

[48] Thomas B Lawrence, 'Institutional Strategy' (1999) 25, *Journal of Management* 161–188.

[49] It is important to note that it is the effort that is conscious rather than the strategy. Certainly, Lawrence qualifies this by saying that "institutional strategies can develop both deliberately as intended strategies, and unintentionally as emergent strategies [reference omitted]." Ibid. p. 167

Institutional entrepreneurs engage in institutional strategy by articulating and defending particular institutional practices (and criticizing others) so as to shape institutional change. This goes to the very heart of the judicial role, and can be readily identified from the law reports as well as from extra-judicial writing.[50]

Our argument is that the things legal models discuss—'formalism', 'rights-based approaches', 'policy-based approaches', 'pragmatism' and so on—represent institutionalised strategies, which serve the purposes the strategic model suggests, namely, providing judges with ways of charting a course towards developing the law in the direction that best accords with their views and is not likely to provoke an adverse reaction that would render their development of the law nugatory. This, we argue, follows from four observations. Firstly, judges take on the role they do because they value the work they do in developing the law. This point emerges very strongly from academic literature based on interviews with judges and other judicial officials, in particular the work of Alan Paterson.[51] But even if we set that strand of the literature to one side, the point remains. In the UK, at least, the judiciary is drawn almost exclusively from the upper tier of legal practitioners, typically (but not exclusively) barristers. Consequently, becoming a judge typically involves a very significant pay cut, which suggests that a full-time judicial role, and the power it brings to develop the law, by itself holds value for them.[52] Secondly, developing the law requires them to work with other constitutional actors—whether lawmakers, who can overturn their judgments (as happens in the UK and, indeed, is sometimes invited and encouraged by the judiciary) or administrative officials and the general public, who can subvert their judgments by finding ways around them. And, in point of fact, if we look to the broader role judges play in the polity, it becomes evident that senior judges are not only aware of the existence of these other actors, but actively engage with them when not wearing their judicial robes with a view to participating in and influencing their output.[53] Thirdly, even

[50] John Bell, similarly, argues that the judicial role (in common law) is much broader than resolving disputes authoritatively. Bell, 'The Judge as Bureaucrat' (as in n. 38).

[51] Alan Paterson, *The Law Lords* (Basingstoke: Palgrave Macmillan, 1983); Alan Paterson, *Lawyers and the Public Good: Democracy in Action?* (Cambridge: Cambridge University Press, 2011).

[52] It is possible for practitioners to become 'Deputy Judges' of the High Court, in essence taking on a part-time judicial role which lets them hear certain types of cases in the High Court, which suggests that the decision to take on a full-time judicial role cannot be explained as a preference for deciding cases or for the surface trappings of judicial office. Whilst becoming a Deputy High Court Judge is usually a necessary first step towards becoming a fully-fledged Puisne Judge, not all who become Deputy High Court Judges plan to or go on to become full-time judges.

[53] See the discussion in TT Arvind and J Steele, *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart Publishing, 2012) as to the role played by English judges in actively playing a role in supporting attempts to reform the law, even as they continued to issue judgments upholding the existing law and, in

identifying the plethora of actors that could, potentially, be interested in a decision, to say nothing of devising strategies to deal with their preferences, imposes exceptionally high transaction costs – both cognitive and in relation to time – to the extent that it would require heroic assumptions as to judges' individual rationality, their foresight, and their ability to calculate others' preferences and devise strategies to double-guess their actions, as it were. These are the precise types of problems which institutions are devised to deal with. Fourthly, and most strikingly, the idea of institutionalised strategies flows directly from the theoretical basis of the strategic model. The interaction between the judiciary and other political actors is an almost canonical example of a multi-level repeated transaction game, which is why we see the emergence of co-operative and competitive strategies, including coalition-building, that actors use to further the achievement of the ends they seek to achieve.[54] This interaction, however, is an exceptionally long-lived one, which began centuries ago in the political conflicts of early modern England and has steadily evolved into its present form, and where the interaction is not just between individual actors, but between *groups* of actors,[55] whose composition changes only slowly and incrementally.[56] Under these circumstances, we would ordinarily expect to see strategies being learned by new entrants from the existing actors whom they join, as long as the existing actors' views on the ends that they ought to pursue overlap with their own.[57] This, again, is an almost perfect recipe for the emergence of institutional strategies. Put together, these four factors suggest very strongly that the conditions in which judges must deal with strategy are ideal for institutionalised strategies to emerge, and if successful, to become entrenched and subject to the same pressures in relation to institutional change as any other institution.

Does it make sense to speak of models of judicial decision-making as

particular, the example of Lord Simon, who sponsored legislation to overturn one of his own judgments even as he continued to uphold that judgment in his judicial role.

[54]Compare this with strategies in international relations, which are regularly discussed in terms of multi-level games (e.g. Robert D Putnam, 'Diplomacy and domestic politics: the logic of two-level games' (May 2009) 42, *International Organization* 427), and which display a number of similarities with the types of interaction we discuss here.

[55]In that, even if not all judges will not have identical values or interests, or seek the same ends, there will always be within the body of the judiciary multiple *sets* of judges who will come close, and there will be certain matters (for example, judicial independence as reflected through security of tenure) on which the vast majority could reasonably be expected to have common interests.

[56]In that there has always a substantial overlap between the composition of the group at any two adjacent points of time.

[57]This finds some support in the work of Maltzman and Wahlbeck, that new Supreme Court justices initially attach themselves to a senior judge, voting and switching with them, and gradually becoming less dependent as they gathered experience (i.e., 'learned' the strategic aspects of judicial interaction with other institutions). Maltzman and Wahlbeck (as in n. 45).

institutional strategies? As a first step towards understanding the strategic value of institutionalising particular legal models, consider first the role they might play in setting boundaries for legal intervention—and thus in conflict avoidance more generally. Take first the example of formalism. One of the most distinctive features of formalism is that it sets clear boundaries beyond which judges will not stray. In a polity where certain types of social issues are contentious, a formalist approach will therefore play a very useful function, in that it will set off issues where a judge will leave any changes to other branches of government. By avoiding the attendant conflict, they would be freer to deal with questions in other areas of law. Equally, a formalist approach could help judges advance a range of other goals. Consider the example of the 'no vehicles in the park' rule discussed in a previous section. The fact formalists would seem to argue for an interpretation of this bye-law that prevents frustrates such an obviously beneficial activity as using park trucks in re-planting the park would seem to cast formalism in an unattractive light. But this is in no small part a result of the artificial nature of the example—bye-laws on the proper use of parks are rarely phrased in such simplistic terms. If such a bye-law actually were to be drafted, there is nothing to prevent the council from re-writing the bye-law to include an explicit exception, and indeed deliberating more broadly on the sort of exceptions they want to accommodate. From this point of view, a relentlessly formalist approach on the part of judges may provide an incentive to legislators to think more carefully about the laws they are passing (almost certainly an unqualified good)[58] by giving them both negative and positive incentives: negative because they have to live with the consequences of badly drafted rules, and positive because they know that their efforts to get the rules 'right' as they intend will be respected by judges. Here, then, the resort to formalism serves a strategic goal in terms of shaping their relationship with another arm of the government. A pragmatist approach would on the other hand almost certainly seek to correct the perceived defect in the rule, interpreting it 'sensibly' in the light of judges' assessment of the kinds of activities which the rule is (and is not) trying to prevent. Thus, the pragmatist strategy is to a greater extent one of 'partnership' with the legislature (and indeed other constitutional actors, including ultimately public opinion), correcting flawed rules and directly ensuring that individual decisions are in the public interest.

Viewing different legal approaches as *institutional* strategies suggests that they may be far more complex and layered than strategies devised and pursued by judges as a matter of individual entrepreneurship would be. Perhaps the most straightforward way of explaining the strategy behind the

[58]On the impact that lawyers and courts have on the preparation of legislation, see the comments of Sir Christopher Foster in Christopher Foster, 'The encroachment of the Law on Politics' (2000) 53, *Parliamentary Affairs* 328–346; Christopher D Foster, *British Government in Crisis, or, The third English Revolution* (Oxford: Hart Publishing, 2005).

advancement of a particular judicial philosophy would be to argue that—to the extent that the institutional entrepreneurship is successful—particular choices become 'locked in'. To the extent that particular judicial approaches becomes part of judicial culture, we can expect that all judges will (with limited individual variation) decide cases according to the criteria of that particular approach. At the same time, contending approaches may have (limited) degrees of *embeddedness*, and this may at times become a source of conflict, rather than as a way of minimising it. Viewing them as *informal* institutions thus lets us provide for the fact that there may, at any time, be a number of different institutional strategies co-existing within the judicial system, to which different judges will buy into in different ways. Following on from this, viewing them as institutions lets us account for the fact that there are both surprising continuities and surprising changes in the strategies themselves and the manner in which they are used.[59]

How, then, should we understand the *strategic* component to such judicial entrepreneurship? Why would some judges apparently promote one institutionalised strategy (a pragmatist approach, say) when others adopt contending approaches (such as embracing formalism)? Formalism embraces interpretative approaches that render the law relatively determinate. Other judges and other constitutional actors are *ex hypothesi* therefore better able to predict how a judge will decide. This might have the effect of enhancing the legitimacy of judicial involvement in a particular field (if it is seen that they are "only applying the law"), or otherwise serve some institutional goal. A pragmatist strategy thus promotes the interests of the judiciary through *coalition-building*. Thus a commitment to formalism might serve to minimise conflict with other constitutional actors—and would therefore be most desirable when the need to avoid such conflict is at its greatest. A commitment to pragmatism would on the other hand be more desirable when there is a correspondence of views between the judiciary and other constitutional actors, and where the advancement of such views is best achieved through working in partnership with those other actors.

As well as minimising conflict, different institutional strategies also play a role in strengthening the judicial hand where such conflicts cannot be avoided (including conflicts between judges and their bretheren, and between judges and other constitutional actors). To what extent could judicial 'investment' in particular judicial approaches be a 'best response' either to their bretheren or to other constitutional actors in non-cooperative settings? According to this way of thinking, a commitment to formalism or to pragmatism could be seen as a form of 'signalling', indicating to others not only the approach that a particular judge is likely to take, but also the

[59]The speeches of Parke B and Pollock LCB to the House of Lords in *Egerton v Brownlow* (1853) 4 HLC 1, for instance, predate the formalism / realism debate in contract by several generations, but bear a striking resemblance to the positions that would be taken in that debate by judges and jurists.

limits on judicial willingness to resile from a particular position and reach an accommodation. Formalism in particular thus provides a form of *credible commitment* to others that a particular judge (or—to the extent that formalism is institutionalised—the judiciary as a whole) will follow a particular course consistently. It would also presumably have the effect of increasing the influence of current holders of judicial office on future decisions: if a particular decision can be solidly grounded in legal text, it is difficult— in the absence of a change to the textual provisions—for judges to reach contrary interpretations in future cases. This might have the effect of strengthening a particular coalition on the bench, by preventing particular members being 'picked off' to form the majority on the other side. It might also have similar effects on other constitutional actors.[60]

We might find in such an explanation a more systematic explanation for why embracing and arguing for formalism might confer a greater strategic advantage on some judges than on others. First, some substantive judicial positions might invite conflict with other constitutional actors to a greater extent than others. We would therefore expect those more 'out-of-step' with other actors to have a greater interest in (and therefore a greater willingness to engage in institutional entrepreneurship to advance) the view that—properly interpreted—the formal sources of law require a particular substantive position. Institutional entrepreneurship to promote pragmatism would on the other hand be justified where judges might want to 'throw off' the constraints placed on them by previous holders of judicial office, in order to bring legal doctrine in particular areas—and to work in partnership with the legislature and executive to reform the law. Railing against hide-bound formalism – and appealing to the common sense of the public – is a way to do this. Formalism, pragmatism and policy-oriented approaches, then, become three different ways for judges to align or position themselves in the overall context of the political system — formalism with the founding ideals of the polity, pragmatism with the common sense of the public, and policy with the dominant faction in the legislature.[61] When used within the framework of the strategic model, therefore, 'legal' models can give us a significant amount of information in relation to the nature of the broader institutional strategies that exist within a legal system, and the reasons why some of them are adopted by judges. As we show in the next section, modelling judicial attitudes using scales derived from these 'legal' models gives us important information in relation to the factors that actually influence

[60]In the separation of powers games, it is usually the Court that acts first—but in reality, Congress may act first by passing legislation, in which case a clear and credible signal about the court's likely response may influence Congress by signalling clear limits to how far the Court might allow Congress to go, preventing constitutionally contentious legislation from being passed in the first place.

[61]Compare Grey's argument that only formalism can really provide a justification for judicial independence (in the U.S. sense of 'judicial supremacy'). Grey (as in n. 33).

the exercise of judicial discretion.

2 An example: attitudes to reviewing state action

2.1 Red lights and green lights

Before proceeding to describe our model, we first explain the scale we chose and why we chose it.

As discussed in the previous section, the US literature on the attitudinal model of judicial decision-making has focused almost exclusively on identifying where individual judges lie on a liberal/conservative scale. There has been little appetite for similar analyses in the UK, doubtless reflecting the generally held view that British judges do not decide their cases based on their political views—and that such analyses are therefore of limited value in the UK.[62] And, in point of fact, in an extremely important forthcoming article, Christopher Hanretty finds that a model in which Law Lords' votes are expressions of their location along a single left/right dimension is a poorer model of voting than a null model. Accordingly, he argues that the Law Lords' ideal points cannot be interpreted as representations of their political preferences, rather only as statistical 'noise' or at best as willingness to dissent, given the very low number of dissent in the House of Lords.[63]

This ought not to come as a surprise, given the very different workloads of the two Supreme Courts. The absence of a federal common law in the US and the limited powers of the federal government over private law mean that the US Supreme Court's workload involves few cases on core areas of private law, the issues raised in which do not always have obvious links to liberal or conservative positions. At the same time, the UK Supreme Court's inability to judicially review primary legislation leads to fewer challenges to statutes than in the US, which *would* have raised issues that more strongly link to liberal or conservative positions. This would, therefore, mean that political influences will for the most part be irrelevant to the typical case that comes before the Supreme Court of the UK, but will be a significant influence in the typical case that comes before the Supreme Court of the US.[64]

But even if we reject attempts to portray judicial differences in terms of an all-encompassing liberal/conservative scale as overly-crude, this ought not

[62] See Poole and Shah (as in n. 10), discussed above.

[63] Hanretty (as in n. 10). To the best of our knowledge, Hanretty's article is the only existing study to analyse the decisions of the UK judiciary using the attitudinal model.

[64] Thus, for example, as studies in the US have shown, even differences that on their face appear to be purely legal—such as differences as to the constitutional powers of Federal government and state governments—turn out on closer examination to be closely related to the judges' positions on the liberal/conservative scale. See e.g. R Colker, 'Dissing States? Invalidation of State Action During the Rehnquist Era' (2002) 88, *Virginia Law Review* 1301–1386.

to lead also to a rejection of any attempt to use the power of modern quantitative social science to model judicial attitudes. Attitudinal differences do not have to be seen as 'political' for them to matter—if judges' decisions are consistently influenced by their personal attitudes, the consequences remain just as troubling regardless of whether those attitudes are characterised as 'political' or 'legal'. And, in point of fact, neither the specific modelling technique used in the US literature nor the theory on which it is based—item-response theory (IRT)—are restricted to purely political differences, nor do they have to be employed at such a high level of abstraction. IRT models were originally developed in the context of educational testing. The pupil's answers to a series of test questions are modelled as a reflection of the pupil's ability in a particular subject (the latent variable) and the parameters include at a minimum (in the so-called 'Rasch model') the difficulty of the question, judged in terms of how many pupils got the correct answer.[65] In the judicial context, the latent variable is understood not as a measure of the judge's ability—we can safely assume that differences in appellate court judges' ability is not the reason why they sometimes reach different decisions—but as an estimate of their position, or 'ideal point', on a scale which captures some type of difference between judges which, theoretically, could affect how judges decide cases. As their origin shows, IRT models are capable of shedding light on a wide range of differences. Differences on the political left/right dimension are one of these, but the technique is capable of more legally relevant application, and at a lower level of abstraction than the one-size-fits-all approach that dominates the US literature.

Legal theory suggests further reasons why framing our understanding of judicial attitudes in the UK judiciary in terms of a liberal/conservative scale seems unhelpful. The questions that come before the highest court in the UK are not as politically charged as those that come before the US Supreme Court, reflecting their different jurisdictions, but they are nevertheless complex, and if personal views and attitudes do influence the decisions of judges hearing them, then these too are likely to be complex—involving such factors as the sort of social outcomes the judge believes the law in question is intended to promote[66] as well as his or her belief about the extent to which it is intended to control the conduct of the people to whom it applies, the amount of individual freedom inherent in the law, the balance between taking responsibility for oneself and expecting others to take responsibility for you,[67] the proper role of judges vis-a-vis other branches of government,[68]

[65]For a detailed introduction to Bayesian IRT, see Jean-Paul Fox, *Bayesian Item Response Modeling: Theory and Applications (Statistics for Social and Behavioral Sciences)* (New York: Springer, 2010)

[66]John Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983).

[67]See, *e.g.* Lord Phillips' comments regarding compensation culture: "Compensation Culture Harms British Way of Life, Says Judge", *The Independent*, 21 June 2004.

[68]Lord Hoffmann, 'The COMBAR Lecture 2001: Separation of Powers' (2002) 7, *Judi-*

and many others far too numerous to list. Relying on any one of these dimensions to the exclusion of others, in the context of a professionalized judicial system where judges' views are as likely to be shaped by considerations of legal consistency as by a simple political preference for one outcome over another, will present a picture of judicial decision-making that is at best grossly simplified and at worst grossly inaccurate.[69]

From a legal perspective, then, there are good theoretical and methodological reasons to focus *not* on individual factors, but on the pattern according to which in which they, in aggregate, affect judicial decisions, and on whether they do so consistently—to focus, in other words, on a scale that measures the *institutionalised strategy* judges adopt, rather than the factors or goals they may seek to pursue through that strategy. That is the approach we have adopted here.

The question that is of substantive interest to us is seeing how judicial attitudes affect the way judges decide cases brought against the state: are some judges identifiably more 'pro-state' than others? Does whether a claimant wins or loses therefore depend at least in part on the bench before whom his or her case happens to come? Harlow and Rawlings have suggested that judicial attitudes in administrative law can be usefully categorised as 'red light' and 'green light', according to whether they see the proper role of the courts as taking respectively a restrictive or a permissive attitude towards government discretion.[70] More recent literature, particularly in the context of the Human Rights Act, expresses this dimension in terms of the degree of 'deference' due to decision-makers on whom a discretion has been conferred.

Harlow and Rawlings formulated their theory in the context of administrative law, but there is nothing about their red light/green light dimension that necessitates such a narrow approach. Their approach can, in principle, be extended to *all* cases against the state. In Hohfeldian terms, actions

cial Review 137–145; Lord Irvine, 'Judges and decision makers: the theory and practice of Wednesbury review' (1996)*Public Law* 59–78.

[69]Indeed, a sophisticated understanding of political science would seem to compel the same result. According to the spatial theory of politics, ideology is understood primarily as a means of reducing the amount of information voters need to acquire. As Anthony Downs, one of the pioneers of the spatial theory, put it, "When voters can expertly judge every detail of every stand taken in relate it directly to their own views of the good society, they are interested only in issues, not in philosophies." However, under conditions of uncertainty and incomplete information, party ideologies, "... remove the necessity of his relating every issue to his own philosophy." Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957), p. 98. Since judges neither require the sort of reduction in the costs of acquiring information that voters do, nor do they need to signal their ideological position to voters in simple terms as political parties do, we should not therefore be surprised to find that their approach to particular issues cannot altogether be reduced to a single, encompassing, ideological dimension.

[70]Carol Harlow and Richard Rawlings, *Law and Administration*, 3rd edition (Cambridge University Press, September 2009)

against the state involve the assertion of a claim against the state (and a correlative duty upon the state), regardless of whether they are brought on administrative law, private law or human rights grounds. In administrative law, the duty and the correlative claim relate to the manner in which an administrative power is exercised. In private law, the claims that are asserted are correlative to duties imposed under a contract, or to duties of care, or to statutory duties (in the private law sense), or to duties to make restitution, or other similar duties. The core principle, however, remains the same—the action involves an assertion that the state body in question does not enjoy an unfettered Hohfeldian privilege to act or decide as it chooses; instead, it is subject to a claim (and has a correlative duty) that restricts the manner in which it may act or decide. This parallel is clearest in tort cases – for example, cases where it is alleged that the police owed a duty of care to a person who came to be the victim of a crime.[71] But it also quite clearly applies to cases raising questions of, for example, a public body's obligations under a PFI contract or in relation to making restitution of tax paid pursuant to an unlawful demand.[72] In either case, therefore, we can see the judge as taking a position on the extent of juridical regulation of the state .[73] For brevity, we refer throughout this paper to a *scale of permissiveness* towards the conduct of state actors.

To what extent does it make sense to regard the adoption of a particular stance—red light, or green light, or a particular point in between—as the advancement of an institutional strategy, rather than as simply an individual attitude? Most straightforwardly, the adoption of a particular position could be seen to signal to other constitutional actors, notably the executive, the degree of leeway that it will be afforded to it, but also the extent to which the executive (and Parliament, to which it is accountable) will be left to find its own solutions to the various governance issues with which it is faced. The adoption of a distinctly red light position will signal a willingness of the courts to set limits to executive discretion in reaching its own solutions. A green light position, on the other hand, not only leaves government with broad discretion to find its own particular accommodations, but also the responsibility for informing itself on the issues and reaching a decision in the light of the evidence.[74] In both cases, such strategies will have an influence on the executive (beyond the ruling in a particular case) to the extent that they are credibly locked in. Thus it is not at all surprising to see in the higher courts (as Harlow and Rawlings do in administrative law and we argue also

[71]See e.g. *Smith v Chief Constable of Sussex Policy* [2008] UKHL 50.

[72]See e.g. *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

[73]This is an expression of Mary Douglas's 'grid' dimension, discussed more fully in Section 3.2.

[74]Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60, *University of Toronto Law Journal* 1–22 here: pp. 5-6.

more broadly) a lively contestation of views in terms of red light and green light (and points in between) for the approach of the law—and for individual judges to seek to interpret the law to embed their own particular views. At the same time, this particular dimension also cuts across other legal approaches, though not necessarily in straightforward ways. For example, since a red light approach necessarily sets the judges against the executive to some extent, one would hypothesise that judges adopting a strongly red light approach would also be formalist.[75] On the other hand, a green light stance might be compatible with a number of interpretive approaches, both formalist and pragmatist.

3 Individual Attitudes and case outcomes

Figure 1 overleaf shows one presentation of the findings of our model: point estimates for the ideal points for each of the 21 Law Lords on a scale of permissiveness towards state bodies, together with 50 % and 95 % *highest posterior density* (HPD) regions.[76] Judges positioned further towards the right can be understood as adopting a relatively more permissive approach towards the state, or (equivalently) as extending a greater degree of latitude to state actors, while judges further towards the left can be seen as adopting a more restrictive approach.[77] At the high-permissiveness end of the

[75]For the benefit of American readers, it is perhaps necessary to clarify that the implications of formalism in the UK are peculiar to the constitutional structure of the British state, and the position of the judiciary within it. The theoretical foundation of the British constitution, in the most orthodox readings (of the sort to which formalists typically align themselves), is the supremacy of the legislature over the executive. There is, consequently, a long jurisprudential tradition in the UK, tracing itself back at least to Dicey and perhaps beyond, that sees the judiciary as having an important role in safeguarding the position of the legislature by checking the executive from encroaching upon its domain, and striking down executive action when it does. Reviewing the validity of executive action constitutes the bulk of all judicial review cases in the British courts. Their power to review legislative action is both very limited and very recent. They have no power to invalidate legislation, and are restricted to making orders declaring legislation 'incompatible' with the rights contained in the Human Rights Act, an order that does not affect the validity of the legislation and is merely indicatory as far as Parliament is concerned. A 'red-light' position in the UK, therefore, would unlike in the US reflect rather than challenge the supremacy of the legislature, and would hence be almost canonically formalist, thus carrying with it – in terms of institutional strategy – strategic advantages very similar to formalism. One of us has elsewhere analysed how the formalist–pragmatist dichotomy plays up in constitutional litigation in the UK. See TT Arvind, '"Though it shocks one very much": Formalism and Pragmatism in the Zong and Bancoult' (2012) 32, *Oxford Journal of Legal Studies* 113–151.

[76]HPD region, a Bayesian estimate of uncertainty of our estimate—hence a 50 % HPD region represents the region containing 50 % of the posterior probability density of the unknown parameter.

[77]For present purposes, we make no distinction between the central, local and devolved levels of government, or between executive and judicial authority. This is a topic we intend to explore in future work.

scale, we have the estimated ideal points of Lords Brown, Carswell, Hoffmann, Rodger and Walker; Lord Phillips and Lady Hale can most clearly be identified at the opposite, low-deference end. Although our model gives more extreme point estimates for Lords Kerr, Scott and Hutton, the greater uncertainty associated with these positions should make us reluctant to identify these judges too strongly with a low-permissiveness position. Similarly, Lord Clarke, appointed to the House of Lords in June 2009 and subsequently a founding bencher of the Supreme Court, has only two decisions in our dataset; his ideal point is—as would be expected from so few observations—estimated with a large degree of associated uncertainty. This can be seen by the atypically wide highest posterior density intervals.[78]

Figure 1 shows clearly that judicial attitudes matter, in the sense that there are measurable differences between estimated ideal points. In other words, judges are not 'blank slates'; nor are they 'uniformly grey slates' whose attitudes towards the latitude to be given to state bodies are indistinguishable from one another. Even given our relatively small dataset, a clear separation between the positions of the twenty-one Law Lords emerges from these results. There is almost no overlap between the 95 % highest posterior density regions of Lord Brown, on the one hand, and Lords Hale and Phillips on the other. Another relevant comparison is between Lord Brown, the most 'permissive' judge (by point estimate), and Lord Hope, the most 'centrist' of the Law Lords covered by our dataset (again, by point estimate). Here, the relevant measure of difference is that Lord Hope's point estimate lies to the left *(i.e.* is less permissive) of the 95 % highest posterior density interval of Lord Brown. In other words, even taking account of the measurement uncertainty of our model, we have a high degree of confidence that the observed spread of judges' ideal points are real.

Observed differences in judicial attitudes are one thing; the extent to which these impact on case outcomes quite another. One goal of our analysis is to assess the extent to which the determination of appeals depended as much on the composition of the panel than on anything else. Such a finding might suggest that the outcomes of cases before the Law Lords are capricious, in the sense that it could be said that the composition of panels was a determining factor in the decision handed down to appellants. As the two contrasting statements in epigraph to this article show, the conventional wisdom among academic lawyers about the effect of bench composition is at odds with the 'official line' on this issue. Despite the apparent consensus

[78] Given our use of 'fit' as a mode of assessing the strengths and weaknesses of our model (and with the aim of learning from both its strengths and its weaknesses), we deliberately eschew the notions of 'statistical significance', 'null hypothesis significance testing' and related notions in assessing the statistical reliability of our ideal point estimates. For a forceful statement of the reasons why such ideas are inappropriate to the social sciences, see J Gill, 'The Insignificance of Null Hypothesis Significance Testing' (1999) 52, *Political Research Quarterly* 647–674.

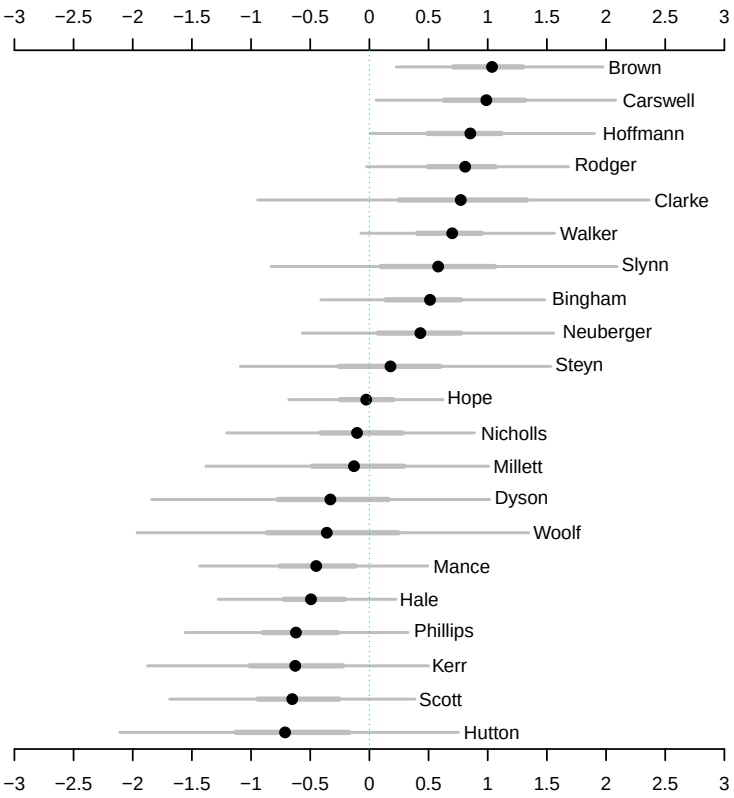

Figure 1: *Posterior means and credible intervals for ideal points of 21 Law Lords, using 77 cases between since the commencement of the Human Rights Act involving a state actor and a non-state body. The thick and thin grey lines represent the 50 % and 95 % highest posterial density regions respectively.*

invoked by Richard Cornes (see epigraph), few academic researchers, with the exception of Dickson[79] and Robertson,[80] have systematically examined the effect of the bench composition. Moreover, the overwhelming number of unanimous decisions of the Law Lords would seem at first sight to make any such academic consensus absurd. In fact, Robertson claims that "... there is little difficulty in demonstrating crudely but robustly that the mere presence of a particular judge can shift the probability of a particular outcome from

[79]Dickson, 'Close Calls in the House of Lords' (as in n. 16).

[80]David Robertson, *Judicial Discretion in the House of Lords* (Oxford: Clarendon Press).

what it would be in his absence."[81] Using classical multivariate methods, he shows, for example, that the presence of Lord Templeman in tax cases was rarely good news for those wishing to challenge a revenue decision.[82]

The case of *Bancoult*[83] provides a useful example to explore this issue in more detail. In this case, a 3-2 decision of the House of Lords, the majority (Lords Bingham and Mance dissenting) allowed an appeal by the Foreign and Commonwealth Office, dismissing Bancoult's application for judicial review. Bancoult had challenged Orders in Council preventing the Chagos Islanders from entering the British Indian Ocean Territory, also known as Diego Garcia. The Chagossians had been expelled from their island homeland, which had been leased by the UK to the US government, to use as an air base, during the Cold War. In spite of their evident sympathy at the treatment of the Chagossians, the majority argued that the law compelled a decision that such expulsion by executive fiat was lawful. Executive discretion was, the majority held, neither constrained by common law or the European Convention on Human Rights. Only the ordinary principles of judicial review applied to colonial law, and by the standards of these principles, the Orders in Council were neither irrational, nor were they a breach of the legitimate expectations of the Chagossians. The decision has been termed "difficult to square with a meaningful concept of the rule of law",[84] and has attracted a significant amount of critical commentary, including a recent piece in this journal arguing that there is simply no sound basis to argue that existing principle or precedent compelled such an unfortunate result.[85] Here, our concern is to ask whether Bancoult was simply 'unlucky', in the sense that a different bench would have likely produced a different decision.

As noted, Figure 1 already starts to give some sense of the effect of of bench composition in *Bancoult*. The three judges who made up the majority in that case, Lords Brown, Carswell and Rodger, were (by point estimate) three out of the four most permissive judges then sitting in the House of Lords. A number of questions naturally arise: how likely is it that a different

[81] Robertson, *Judicial Discretion in the House of Lords* (as in n. 80), p. 36.

[82] A potential weakness of Robertson's approach, it can be argued, is that it does not take account of possible effects of differences in case difficulty on bench composition, relying (with difficulty, in our view) on the law of large numbers to average out such effects. By incorporating a difficulty parameter explicitly, our model addresses this difficulty head-on. As we shall demonstrate in this sub-section, using an IRT modelling approach, and by manipulation of MCMC output we can go further than Robertson, so as to predict the outcome of *any* panel of judges on *any* case.

[83] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453.

[84] Brice Dickson, 'Close Calls in the House of Lords', in: Louis Blom-Cooper, Brice Dickson and Gavin Drewry, editors, *The Judicial House of Lords, 1876-2009* (Oxford: Oxford University Press, 2009) 255, p. 268.

[85] Arvind, '"Though it shocks one very much": Formalism and Pragmatism in the Zong and Bancoult' (as in n. 75).

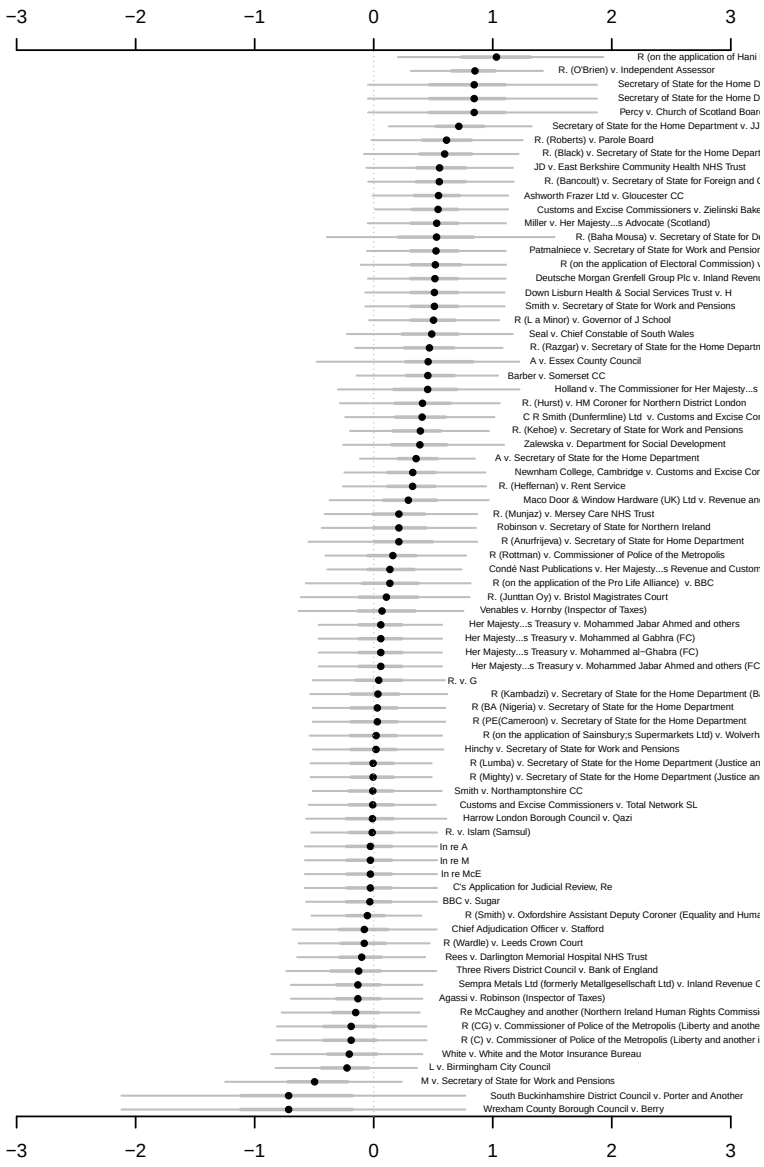

Figure 2: *Posterior means and credible intervals for estimated ideal points of the median voter in 77 non-unanimous cases. As before, the thick and thin grey lines represent the 50 % and 95 % highest posterial density regions respectively.*

panel in *Bancoult* would have reached a different outcome? How many other cases may have been affected in this way?

A political scientist approaching this question might typically appeal to the the median voter theorem.[86] It is straightforward to estimate the median voter ideal point when working with MCMC simulations since *the estimate of the median ideal point, is the median of the estimated ideal points.* Figure 2 presents the results of this transformation. As with the estimate of individual judges ideal points in 1, there is a clear separation between cases with respectively the most and least permissive median judge. As can be seen from Figure 2, *Bancoult* was (again, by point estimate) the tenth most extreme case in terms of the pro-permissiveness of the median Law Lord. More generally, our results show 34 out of the 77 cases have a 50 per cent HPD region entirely to the right of, i.e. take a position more permissive than, the estimated central point among all the Law Lords in our dataset. By contrast, only four out of our 77 cases show a 50 per cent HPD region entirely to the left, less permissive side of the central point (with the remainder having a 50 percent HPD region that encompasses the central point). It is not possible to draw strong conclusions from this observation, but it does offer some tentative evidence that the process of allocating panels in the House of Lords and Supreme Court does have some kind of systematic effect.

A more direct answer can be obtained using MCMC simulation. It is relatively straightforward to transform MCMC output to obtain probablistic estimates of how non-sitting Law Lords would have decided in any case, had they been sitting, in addition to the estimated probabilities for those who sat. We can ask, for example, how many of the 462 possible constitutions of the House in *Bancoult* would have decided as they did?[87] Figure 3 shows estimates of the proportion of the total number of possible panels

[86]The median voter theorem holds that—under certain conditions—where a decision is made by the majority decision of a committee—the preferred outcome of the committee member whose preference occupies the median position will dominate all other positions, including the preferred positions of all other committee members. For details, see Melvin J Hinich and Michael C Munger, *Analytical Politics* (Cambridge: Cambridge University Press, 1997), Chapter 2. Although the theorem should, in principle, apply to any decision by any panel, the discussion in Section 3 of this paper suggests there are reasons to believe that decision-making amongst the Law Lords has special features that this theorem does not capture.

[87]Our estimates rely on some simplifying assumptions, and some basic combinatorics. The simplifying assumptions are that: (1) any bench would have had five judges and (2) any bench would have been composed of only the eleven 'regular' Law Lords available at the the time: Bingham, Brown, Carswell, (Lady) Hale, Hoffmann, Hope, Mance, Neuberger, Rodger, Scott, Walker (the twelfth, Lord Saville, was busy with the Bloody Sunday inquiry and was not being assigned judicial work). In order to calculate the proportion of possible benches voting each way, we use the formula for the number of unique combinations, ${}^{n}C_{k} = \frac{{}^{n}P_{k}}{k!} = \frac{n!}{(n-k)!k!}$. Using this formula shows that there are $\frac{11!}{(11-5)!5!} = 462$ unique combinations of these 11 judges (on the assumptions stated above. In a situation where all twelve law lords are available, the total number of unique combinations will be

that our model predicts would produce zero, one, two, three, four or five judges in favour of each possible outcome. This figure gives a sense of just how contingent the House of Lords decision in *Bancoult* actually was. While just around two-thirds of possible bench compositions give an estimated prediction of three or more judges (*i.e.* a majority) deciding in favour of the FCO, we estimate that around a third of possible bench compositions would have produced three or more judges wholly or partially favouring Bancoult. Napoleon reputedly asked the question "Is he lucky?" before promoting a general.[88] In the same spirit, we can say that Bancoult's greatest shortcoming may have been not the strength of his legal case, nor the skill with which his arguments put by counsel, but that he was not particularly lucky in the judges he got. And as Figure 2 shows, *Bancoult* is (by point estimate) only the tenth most extreme bench composition among the cases in our analysis in the pro-permissiveness direction. It is likely, therefore, that there are other cases in which the proportion of alternative bench compositions giving a different result would be even higher.

Other cases show a similar pattern. Consider the case of *Sempra Metals v Commissioners of Inland Revenue*[89] which, in the name of applying the law of restitution to claims relating to overpaid tax, substantially rewrote the rules governing the award of interest in English law. Our model suggests that the final result – an award of compound interest to the claimant – would have only issued from just over half of all benches. Nearly 40% would have produced a more mixed result – as the minority in that case did – and almost 10% would have come out in favour of the revenue.

It is hard to overemphasise the significance of these findings. At one level, they ought not to tell us anything new. We are, so cognitive science tells us, strongly influenced by our prior beliefs and leanings in processing or evaluating any new information or situation.[90] There is no reason at all in

$\frac{12!}{(12-5)!5!} = 792$). Of these, the number of benches predicted to have decided a particular way (for Bancoult, for example) is the number of unique decisions with a 3-2 majority for Bancoult (i.e. the number of unique combinations three pro-Bancoult judges × the number of unique combinations of two judges predicted not to have voted for Bancoult), plus the number of predicted 4-1 decisions plus the number of predicted unanimous decisions for Bancoult. Thus if, for a single given MCMC simulation, we get 5 judges deciding for Bancoult, and 6 who would have decided partly or wholly against Bancoult, then the number of decisions for Bancoult is given by:

$$\left(\frac{5!}{(5-3)!3!} \times \frac{6!}{(6-2)!2!}\right) + \left(\frac{5!}{(5-4)!4!} \times \frac{6!}{(6-1)!1!}\right) + \left(\frac{5!}{(5-5)!5!} \times \frac{6!}{(6-0)!0!}\right).$$

By convention, $0! = 1$. Figure 3 was constructed after performing the equivalent calculation for each of 10,000 MCMC simulations.

[88] While we cannot find any confirmation of this, it is widely known that Napoleon was quite superstitious, so the story seems plausible. See Frank McLynn, *Napoleon: A biography* (London: Jonathan Cape, 1997).

[89] [2007] UKHL 34.

[90] For an overview of application of cognitive science to law, see the collection in Sunstein,

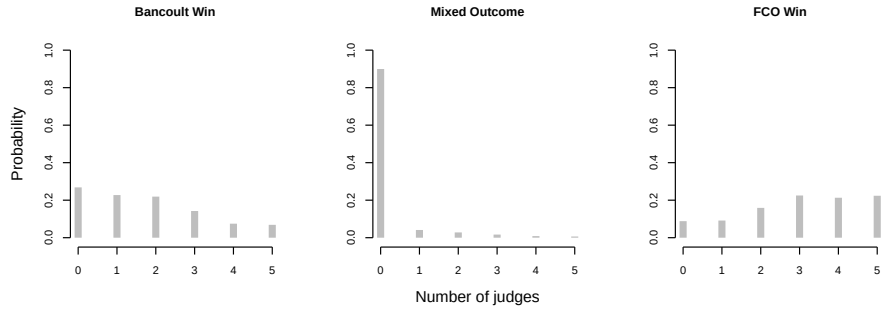

Figure 3: *The histograms show the proportion of uniquely constituted benches predicted to produce zero, one, two, three, four or five judges deciding in favour of (a) Bancoult, (b) a mixed outcome, (c) for the Secretary of State for Foreign and Commonwealth Affairs. Based on 10,000 MCMC simulations.*

cognitive theory to suppose that judges would be an exception to this general rule of human behaviour. And, as we have shown in this section, judges' beliefs and attitudes do matter, and indeed make a significant difference to the way cases are decided. The result is capricious: if the Chagos Islanders lost their appeal to be restored to their homeland simply because their cases came up before the panel they did, or if the Revenue in *Sempra Metals* would actually have succeeded in their claim had a slightly different bench heard the appeal, then the judicial system falls seriously short of fulfilling the societal role it is commonly taken to have. Nor is it just individual cases that are affected. The entire direction of the develoment of the common law in certain areas could quite conceivably be determined by the circumstances of the selection of a constitution of the House of Lords or a panel of the Supreme Court. *Sempra Metals* is a leading case in the law of restitution, and the law would look different if the minority view – emphasising the role of judicial discretion and equitable principles in restitutionary remedies – had prevailed, rather than the more rigid common law approach, which held the remedy to be available as a matter of right, that we see in the actual decision. Nor is there any reason to think that things are different at a lower level.

Moreover, permissiveness towards the state is just one important dimension important dimension of judicial disagreement. Legal theory suggests several other such dimensions, and on which judges' positions may equally affect the way they decide appellate cases. To give one example, Adams and Brownsword have suggested that judges in contract disputes in the higher courts are guided (to varying degrees) by the competing ideologies of mar-

Cass, editor, *Behavioral Law and Economics* (Cambridge: Cambridge University PRess, 2000)

ket individualism' and 'consumer welfarism', and that, so they maintain, cut across traditional judicial ideologies of formalism and realism.[91] Another example, applicable to the field of constitutional law, is judges' views on the relative weight which ought to be given to different mechanisms for regulating government—in particular, the balance between what Tomkins calls legal constitutionalism and political constitutionalism, a dimension which in his view divided the majority from the dissenting views in the *Fire Brigades Union* case.[92] There is no *a priori* reason to suppose that they are any less pronounced than in the dimension we have studied here, nor that the composition of benches makes any less of a difference where these dimensions are most salient.

Against the background of our findings about the effect of bench composition, the structure and functioning of our judicial system—which has continued to assume that who hears a case does not matter—is hard to justify. It is hard to reconcile what our results tell us about how the impact of benches upon outcomes with what the role of the court system is supposed to be, or with the values of impartiality and equal justice that are almost universally believed to underlie the judicial system. We stress that our findings do not in any way impugn the personalities or motives of the judges – as we have sought to emphasise, it is inevitable that people are influenced by their prior beliefs. The problem, rather, is one of institutional design. Public administration scholarship has for centuries given serious thought to how executive government institutions should be structured so that the attitudes and preferences of those who staffed them should work towards and not against the demands we make of them. Debates between Bentham and Mill over whether executive authority and responsibility should be vested in committees or in 'single seated functionaries',[93] through Donald Kingsley's characterisation of the British civil service as a 'representative bureaucracy',[94] to Vincent Ostrom's[95] contrast between the competing paradigms of 'bureaucratic administration' and 'democratic administration' form part of the background to discussion of administrative reform and design of regulatory institutions. In the modern literature, these classical ideas have been formalised within a powerful body of theory on institutional design.[96]

[91] J.N. Adams and R Brownsword, 'The Ideologies of Contract' (1987) 7, *Legal Studies* 205–223.

[92] *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513. For Tomkins's analysis, see Adam Tomkins, *Public law* (Oxford: Clarendon Press, 2003) 18-30.

[93] Bernard Schaffer, 'The Idea of the Ministerial Department: Bentham, Mill and Bagehot' (1957) 3, *Australian Journal of Politics & History* 60–78.

[94] see Donald Kingsley, *Representative Bureaucracy: An Interpretation of the British Civil Service* (Yellow Springs OH: Antioch Press, 1944).

[95] Vincent Ostrom, *The Intellectual Crisis in American Public Administration*, Second Edition edition (Birmingham, AL: University Alabama Press, 1989).

[96] In the US context, a seminal contribution is the the work of 'McNollgast': Matthew

Unfortunately, similar efforts have not been made to articulate a theoretical perspective on the design of judicial institutions, nor has law reform in practice grappled with these issues to the same extent. In this respect, the Constitutional Reform Act 2005, while containing some welcome elements, stands out as a serious missed opportunity, a point also made by Keith Ewing.[97] The most obvious question is whether, given the effect of bench composition we have demonstrated, the Supreme Court should sit *en banc*.[98] While this might address the immediate issue of bench selection, the questions of 'who decides?' and 'how does it make a difference?' remain in terms of judicial selection. Part IV of the Constitutional Reform Act 2005 gives an important and over-riding symbolic commitment to a professionalised judiciary[99] and to the continuing "need to encourage diversity in the range of persons available for selection for appointments."[100] Without making specific recommendations here, our findings underscore the need to think systematically about how the design of judicial institutions, and how these can ensure the 'right' attitudes (or balance of attitudes), however that may be defined. In this respect the lack of such thinking in deliberations surrounding the Constitutional Reform Act is disappointing. The public administration scholarship listed above provides inspiration as to how these questions might be addressed. We return to this topic in our concluding section. Before that, we first address the question of why, if judges' personal views do matter as much as our model suggests they do, dissents are so rare a phenomenon in the upper judiciary. As we will see in the next section, our suggested explanation implies that our model if anything understates the extent to which bench composition affects case outcomes.

McCubbins, Roger Noll and Barry Weingast, 'Administrative Procedures as Instruments of Political Control' (1987) 3, *Journal of Law, Economics and Organisation* 243–277;Matthew McCubbins, Roger Noll and Barry Weingast, 'Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies' (1989) 75, *Virginia Law Review* 431–482. Murray Horn applies these ideas within the context of 'Westminster' style Democracies. See Murray J Horn, *The Political Economy of Public Administration: Institutional Choice in the Public Sector* (Cambridge: Cambridge Univ Pessr, 1995).

[97] Keith Ewing, 'Judiciary', in: Matthew Flinders et al., editors, *The Oxford Handbook of British Politics* (Oxford: Oxford University Press, 2009) 262–282 here: 271ff..

[98] This issue was dealt with only perfunctorily by the Deparatment of Constitutional Affairs' consultation paper (at paras 50-52). However, the issue was given a more substantial airing after the exceptional decision by the House of Lords to create a Select Committee to examine the Constitutional Reform Bill. See Select Committee on the Constitutional Reform Bill [HL] (2004) *Constitutional Reform Bill [HL] Volume 1: Report, HL Paper 125-1,* London, The Stationery Office, 2 July 2004.

[99] S. 62.

[100] S. 63.

4 Professionalism and the missing dimension

4.1 The effect of professionalisation

We have seen in the previous section that there are measurable differences between the Law Lords in terms of their latent attitudes in cases involving the state. Equally, we have seen that these appear with high probability to have actually affected the outcomes of a significant minority of cases. Yet these differences only appear to manifest themselves in a small proportion of the cases which the Law Lords hear. The majority of decisions are unanimous – only in a relatively small minority of cases do we see any dissents at all. The findings of the last section suggest that this apparent paradox needs to be explained *institutionally*, that is, by the relatively permanent and enduring factors which shape and structure and individual human beings' thoughts and behaviour. The closed nature of judicial decision-making—post-hearing conferences and discussions between judges are private, and no records tend to be kept of them—means that informal institutions in the judiciary are far more opaque than they are in relation to, for instance, the bureaucracy or independent regulators. Nevertheless, prior qualitative and quantitative work on the Law Lords,[101] as well as historical work on the judiciary,[102] have gone a long way towards identifying some of the most important institutional characteristics of the modern judiciary.

The key institutional feature of the modern House of Lords, and its successor, the Supreme Court, is that its judges act like *professionals*,[103] and the position adopted by the Constitutional Reform Act 2005 suggest that a lot of implicit confidence may have been placed in institutional professionalism to mitigate the effects of bench selection and personal views upon the outcomes of cases.

It is relatively straightforward to explain why the institutional features of the House of Lords and Supreme Court encourage a norm of professional behaviour. A major contributor to institutionalising professionalism is the apolitical, professionalised process by which judges are appointed to the UK Supreme Court. The meritocratic thrust of the process in the UK – a call for applications, followed by interviews with shortlisted candidates –

[101] In particular, the work of Paterson and Robertson. See Paterson, *The Law Lords* (as in n. 51); David Robertson, 'Judicial Ideology in the House of Lords: A Jurimetric Analysis' (January 1982) 12, *British Journal of Political Science* 1–25; Paterson, *Lawyers and the Public Good* (as in n. 51).

[102] In particular, the work of Robert A. Stevens. See Robert A. Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (London: Weidenfeld and Nicolson, 1979); Robert A. Stevens, *The English Judges: Their Role in the Changing Constitution* (Oxford: Hart Publishing, 2002).

[103] As legal historians have pointed out, this is a relatively new phenomenon. The professional ideal did not begin to take serious hold in the House of Lords until the early 20th century, and did not assume its modern form until after the 1950s. See generally Stevens, *Law and Politics* (as in n. 102), 185–321.

contrasts sharply with the politicised process in the US – nomination by the President (a politician), followed by a confirmation process in the Senate involving hearings and questioning that typically has a strongly political thrust.[104] The result—a process which focuses principally on merit and competence—taken together with the security of tenure that judges enjoy produces institutional conditions not dissimilar from those prevailing in the civil service, generally taken to be an almost paradigmatic example of a professionalised arm of the State.

Professionalism, however, has two components, and the focus in studies of a professionalised judiciary has been only on the first—that appoined judges, in a contrast drawn by Choi *et al.* with elected judges, "care about their reputation among a national community of like-minded professionals" and act accordingly.[105] Yet professionalism also has second component, namely, a high degree of institutional loyalty to the institutions of one's profession. As we show in this section, this loyalty can and does operate as a significant constraint on decision-making in the UK Supreme Court. The result, we argue, is that the confidence placed in the ability of professionalism to mitigate the effects of bench composition is misplaced. What evidence there is suggests that it in actuality has the opposite effect – that is, it only decreases the *apparent* manifestation of judicial differences by reducing dissents without actually affecting the underlying attitudes, and it does so in a manner that amplifies rather than dampens the effect of bench composition.

4.2 Rules and constraints

Legal theorists argue about how effective rules of law are in constraining judges. Extreme realists take the view that they are mostly ineffective, whereas modern positivists in the analytical tradition tend to take the view that they are mostly effective, except in cases at the boundary—the "penumbra", as H L A Hart called it. Theorists also argue about what rules of law seek to do—formalists take the view that rules of law work by embodying an intrinsic morality, whereas pragmatists argue that rules of law work by giving a judge guidance as to the factors and interests she should seek to balance when deciding a case. The necessary implication of these theories, however, is that if judges agree, it is because they share a broadly reconcilable views of the law, which are close enough for them to agree or to influence each other to a common view, and that if they disagree, it is be-

[104]On the Supreme Court appointments process in the US, see Lee Epstein and Jeffrey Segal, 'Advice and Consent: The Politics of High Judicial Appointments', Oxford University Press (New York, 2007).

[105]Stephen J Choi, G Mitu Gulati and Eric A Posner, 'Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary' (2010) 26, *Journal of Law, Economics and Organisation* 290–336 here: 292.

cause they have different views of the law that are too far apart to arrive at a common view.

This position is hard to reconcile with the paucity of dissents in the House of Lords despite the existence of appreciable differences between the Law Lords. In fact, this position is misleading because the factors it studies are only a part of the story. It is built on a focus on one dimension alone—the restraints that the social environment in which judges operate place on them through the creation of rules of law, and through the fostering of a judicial culture of decision according to rules of law, expressed for example in frequent appeals to the rule of law or the principle of "legality". But these are not the only constraints that influence the way judges decide cases. Qualitative work on the Law Lords suggests that the way they work together is also an important influence upon their final decisions, quite separately from their independently formed views as to the formal sources of law. Thus, for example, Law Lords frequently circulate draft opinions, and are influenced by the views of their fellow judges. The results are sometimes seen explicitly—for instance, where an opinion indicates disagreement with the majority position, but nonetheless goes along with it[106]—but even where they are not, there is evidence that such influence occurs.[107]

To reformulate the argument in institutional terms, virtually everything mainstream legal theory tells us is important belongs to what is called—in the terminology popularised by Mary Douglas—the "grid" dimension, measuring "the extent of regulation" of how an individual acts, which runs from "maximum regulation to maximum freedom."[108] Yet, as Mary Douglas pointed out, of equal importance is what she called the "group dimension"—the extent to which individuals "owe allegiance to a group" and are influenced in their behaviour by this allegiance or commitment.[109] This existence of group-based constraints is important because, as we will see in the next section, the grid and group dimensions affect judicial decision-making in very different ways, and there is considerable reason to believe that the group dimension is particularly strong in relation to the Law Lords.

[106]See for example the speech of Lord Bingham in *Secretary of State for the Home Department v MB* [2007] UKHL 46, para. 44: "I therefore see force in the argument that a declaration of incompatibility should be made and the orders quashed. Having, however, read the opinions of my noble and learned friends Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood, I see great force in the contrary argument, and would not wish to press my opinion to the point of dissent."

[107]Robertson's jurimetric study of the Law Lords suggested, for example that the presence of Lords Goff and Ackner in a particular case made a win for the state much more likely (as did the presence of Lords Lowry and Keith) even though none of these judges individually was found in his study to have made much of a difference to the outcome. See Robertson, *Judicial Discretion in the House of Lords* (as in n. 80) pp. 47-49.

[108]Mary Douglas, 'Introduction to Grid/Group Analysis', in: *Essays in the Sociology of Perception* (Boston, MA: Routledge and Kegan Paul) 1–8, p. 3.

[109]Ibid., p. 3.

4.3 Group allegiance as a constraint

Let us start by considering a hypothetical judicial environment characterised by strong grid-based constraints, and few or no group-based constraints. In such an environment, we will see little or no difference between Law Lords in terms of exactly what it is the law requires. The completeness, precision and certainty of the received understanding of the law and the control it exercises over judges will lead to a relative paucity of dissents. Where they do occur, they are likely to be (and be seen as) aberrations, chance departures from consensual processes. Such a high-grid, low-group judicial environment is a far cry from the image of strategic decision-making that characterises much of the US judicial politics literature. The received understanding of the law and the system of categories and classification it creates is so strong and complete that it overpowers and overwhelms the personal system of categories that individual judges may create in systems with greater interstices or a less comprehensive grid.

In a hypothetical environment characterised predominantly by group-based constraints and weaker grid-based constraints, in contrast, the categories and classifications created by the law are not as certain or precise. They leave significant room for judges to develop their own personal set of categories and classes, with the result that judges can and will differ in their views on what the law requires of state actors. The actual expression of these differences will, however, be muted by the expression of group-based constraints: in effect, judges whose latent disposition or whose personal view of the law might otherwise lead them to favour a view different from that that the majority appear to be reaching will be pulled in the direction of the majority view by the existence of group-based factors – what, in the sociologically oriented literature, is often called group commitment or group allegiance.

Group commitment or allegiance is, in essence, a commitment to the *institution* represented by the group—to its institutional purposes, its institutional methods and its institutional structure. It is, to that extent, distinct from what is often called 'collegiality' in the US literature on judicial decision-making.[110] Collegiality is a measure of the extent to which judges 'discuss each other's views seriously and respectfully... and listen with open minds.'[111] It is, to that extent, a measure of commitment and mutual respect for the other *individuals* who form part of the group, rather than to

[110]Most notably, in the work of Harry Edwards, a judge of the Federal Court of Appeals for the DC Circuit. It is relevant to note that Judge Edwards' work has been, for the most part, a critical response to the judicial politics literature which, he argues, treats judges too much as individuals, and pays too little attention to discussions between judges. See esp. Harry Edwards, 'Collegiality and Decision Making on the D. C. Circuit' (1998) 84 *Virginia Law Review* 1335; Harry Edwards, 'The Effects of Collegiality on Judicial Decision-Making' (2003) 151 *University of Pennsylvania Law Review* 1639.

[111]ibid., p. 1361.

the group as institution. As a result, whilst environments characterised by strong group commitments will typically display a good deal of collegiality, commitment to the group as institution can produce effects that transcend those that would be produced by collegiate individualists. In particular, as we discuss below, collegiality will not necessarily mute willingness to dissent in the way a 'groupist' allegiance will.

4.4 Group allegiance and the Law Lords

Do group-based factors affect the House of Lords? Are they a strong influence? Because of their nature, group-based factors are relatively more difficult than grid-based ones to identify in relation to legal decision-making, and indeed this may account for their neglect in most of the existing literature on judicial decision-making. There is however considerable circumstantial evidence to believe that they do exist—and, indeed that group-based factors are relatively strong in the House of Lords. As with any other social system, these include social factors such as collegiality and the fact that most Law Lords come from relatively similar backgrounds – specifically, as practitioners at the bar. As Alan Paterson has shown, the Law Lords are an extremely collegial body, working and lunching together and constantly interacting as a "tightly-knit group."[112] These factors are precisely those that tend to create group allegiances. Alan Paterson's more recent work also provides much more direct evidence that a group dimension actually operates upon the Law Lords. As he discussed in his third Hamlyn Lecture, the Law Lords frequently do go to great lengths to attempt to ensure that they speak with a single voice. Equally, as he has also pointed out, several Law Lords appear to dislike 'finely balanced cases' on the basis that they could be seen as evidence that a different panel would have decided differently.[113] These points go far beyond mere collegiality, or a willingness to listen to the points of view of one's fellow judges because of the regard one has for those individuals. They suggest, instead, that the Law Lords are influenced by their allegiance to the institution itself.

There is also support in the wider literature on the Law Lords. Thus, for instance, Brice Dickson's study, cited earlier has pointed to the lack of stable coalitions in the House of Lords.[114] This is exactly what we would expect to see in an institution characterised by a strong group dimension, because the strength of the group will tend to militate against the formation of long-term internal sub-groups (ordinarily a sign of the fragmentation of the wider group). Similarly, our model also produced rather wide confidence intervals for the ideal points of the Law Lords we studied. If our model is reliable – and the tests we carried out suggest it is – this points to something that leaves

[112]Paterson, *The Law Lords* (as in n. 51).
[113]Paterson, *Lawyers and the Public Good* (as in n. 51).
[114]Dickson, 'Close Calls in the House of Lords' (as in n. 16).

judges open to a broader range of views that they find acceptable. That is exactly what a strong group dimension, with an emphasis on consensus, would do.

The constraints imposed by the group dimension are of particular relevance to the upper judiciary. Taken as a whole, the judiciary is characteristically hierarchist. In consequence, the freedom of the highest courts to overrule themselves – a power lower courts lack – means that the grid dimension necessarily imposes weaker constraints on the members of the highest court than it does upon members of the lower courts. At the highest level, precedent – a key source of 'grid'-based influences – is always only persuasive, and never binding. A highest court where judges owe relatively weaker allegiance to their judicial office when compared with their allegiance to other social groups or ideologies will, therefore, be markedly different in its operation from one where the judges' strongest allegiance is to their judicial office.

Applying group-grid theory, the presence of what the qualitative literature suggests is relatively strong group allegiance to the Law Lords as an institution, and the concomitant concern for its institutional reputation, is likely to affect the decisions of Law Lords in two ways. The first, and more obvious, of these is the influence of the long English legal tradition in relation to legal certainty. The Law Lords, as the ultimate court of appeal, play a vital role in creating legal certainty, by providing guidance to the lower courts as to what the law is and how it is to be applied. In an environment where allegiances to the institution of the Law Lords are strong, the perceived importance of this function will operate to mute differences that would have come to the fore had judges been deciding cases based predominantly on their legal ideology. In effect, the bar to dissent is raised. Except in cases about which judges feel strongly, they are far likelier to to strive for consensus or to attempt to produce decisions that are stated in broadly similar terms. Indeed, in comparison with other jurisdictions, the decisions of the Law Lords are characterised by the prevalence of concurring judgments which build upon the decision of another judge, expressing broad agreement with the decision and adding a few points – even entirely separate concurring judgments are relatively rare in the UK, although not entirely absent.

The second, and more subtle, point is the reluctance to openly engage in judicial policy-making. It becomes easier to maintain that judges are 'just applying the law' or 'giving effect to what Parliament has decided' if decisions are unanimous. The argument that judges are making policy becomes harder to counter if judges obviously and repeatedly differ on judgments that have a policy dimension. This is not to suggest that judges are engaging in an elaborate deception. Rather, their desire, born from their institutional commitment to the House of Lords / Supreme Court, to avoid a situation where the Law Lords as an institution begin to be seen as making policy

based on their arbitrarily held views – to avoid, in other words, transgressing the limits of what they see as their proper domain, and to avoid doing things that they believe are properly the role of other organs of state – leads them to seek consensus as to policies that are inherent in the legal system and that it is geared to promoting, rather than policies they think it should promote. A consequence of such a quest for consensus will necessarily be fewer dissents.[115]

There will, needless to say, be differences between the Law Lords in terms of their group-orientation. Not all will share the same extent of commitment, and not all will see commitment as entailing the same things. Thus, for example, as Paterson has argued in his third Hamlyn Lecture, some Law Lords went to greater lengths to attempt to bring others around to their point of view – whilst others (such as Lord Bingham) took the view that judicial independence also meant that individual Law Lords should form their views independently of each other. Similarly, some Law Lords saw the process of forming a judgment as a collective one, whereas others (such as Lord Hoffmann) saw the process in more tactical terms.[116] But this is to be expected. In any institution, 'groupist' influences will affect its individual members differently, and individuals will therefore differ in the extent to which they exhibit particular manifestations – such as collegiality – of the broader 'groupist' allegiance to the institution.

This last point also explains one of the more puzzling features of the results produced by our item response model. As we saw, the accuracy with which it predicted how judges would decide cases differed quite a bit. A greater measure of inaccuracy for a judge is, in effect, a finding that that judge does not stick strongly to the position signified by their ideal point – they are willing to adopt positions beyond the range that their ideal point would normally lead them to. In this context, it is significant that the two judges – by a good margin – who were most willing to adopt wider positions were the two senior Law Lords in the period we studied. This is perfectly consistent with our theory that the group dimension is a genuine influence upon the Law Lords – in a genuinely egalitarian system with a strong group dimension, the 'leaders' of the group, the 'first amongst equals' as it were, would be expected to be more groupist, as Lords Bingham and Philips were.

There are many advantages to a highest court with a strong group dimension. There is, however, also one potential undesirable side-effect – namely, that to the extent that some judges are more groupist than others, there will be cases where the former go along with the latter rather than dissent. There is certainly evidence that this happens in some cases – Law Lords

[115]In a functionalist sense, an institution characterised by a strong group dimension will in general tend to avoid potentially divisive questions such as developing policy on their own, since doing so risks making latent disagreements manifest and threatens the prevailing high-group culture.

[116]Paterson, *Lawyers and the Public Good* (as in n. 51).

have been known to expressly state that they do not wish to push their disagreement to the point of dissent, as in the dictum of Lord Bingham cited above. But the effect of this would be, in such cases, to potentially amplify the effects of bench-composition on the outcomes of appeals before the Law Lords, and make these even more dependent on the specific bench before whom it is heard.

5 Conclusion

Although the judiciary has long been acknowledged to be the third branch of government, its functioning as branch of government remains understudied and under-theorised in the UK when compared with the other branches, and it has remained shrouded in what is almost an air of mystique. In relation to members of the other two branches—the legislature and executive—much attention has been devoted to how ideological and other similar factors affect their behaviour in their official roles, and how this in turn affects the effective discharge by these bodies of their role. This has produced a rich literature on institutional design and governance, of which account is taken by policymakers when designing new administrative institutions or regulatory bodies. But very little attention has been paid to the impact these could have on the functioning of the judicial branch of government in the UK and, as the process of creating the Supreme Court evidences, little account is taken of the literature that does explore these questions.

Our aim in this paper has been to point out that this is problematic. The Law Lords are people—talented and committed people, certainly, but people for that. The institutional effectiveness of our highest court is, therefore, subject to the same type of pressures and constraints as any other group. The failure to study these is problematic not just because it leaves a vital branch of government unstudied and relatively poorly understood. The expansion of the British state in the past hundred years has arguably changed the nature of the relationship between the judiciary and the other branches of government. The growth of regulation has vastly expanded the judiciary's public law role in reviewing the actions of executive and administrative authorities. The growth of the welfare state, and the consequent increase in the services provided by the state to citizens, has also brought about a significant rise in private law actions against the state—for example, alleging negligence in the discharge of statutory or regulatory functions. Finally, and most recently, the Human Rights Act has given the judiciary considerable new powers to review the actions and policies of the other branches of government. These are fundamental changes in politically and ideologically charged areas, and they make it imperative that we ask the questions in relation to the judiciary that we have long asked in relation to other branches of government.

The United Kingdom has been fortunate in that the institutions of the uppermost tier of the judiciary have during the course of the twentieth century evolved institutional strategies that have had the effect of mitigating the effect of differences of views as between its members. The result is valuable – a highest court that is neither politicised nor appears to be systematically influenced by political ideologies in the way the US Supreme Court is commonly said to be. This is a feature that is worth preserving. Yet, as we have shown here, these institutions are far from perfect. The evidence strongly suggests that they have not eliminated or even seriously reduced the diversity of institutional strategies that prevail within the judicial branch, nor have they mitigated the impact this diversity of strategies has upon the outcomes of cases. On the contrary, there is a clear minority of cases where the outcomes of individual cases continue to be determined not by the merits, but also by the composition of the panel that happened to hear them.

Even worse, key reform initiatives, such as the Constitutional Reform Act have tended not only to take these institutions for granted, rather than systematically strengthening them, but also to implicitly assume that institutional strategies will remain unaffected, notwithstanding the constant and far-reaching tinkering with the jurisdiction, functioning and workload of the judiciary that has characterised the past decades. Yet there is no rational basis for this assumption. To the contrary, it flies in the face of everything theories of institutions and strategy tell us about the impact of changing environments upon institutional change and upon the strategies of actors seeking to work within the institutional framework. The result has been an over-confidence in informal institutions to mitigate the potentially capricious effects of judicial attitudes and panel selection on case outcomes, and the utter absence of any attempt to assess the impact of these changes upon the institutional structure and environment in which the Law Lords operate.[117]

What, then, is the way forward? There is a clear need for more academic or policy consideration to be given to the methods used to allocate casework amongst judges, the transparency of the judicial decision-making

[117]This confidence, and the absence of any real attempt to verify its validity, presents a particularly stark contrast with an ongoing debate over reforming the upper chamber of the British Parliament, by turning it from being a chamber consisting entirely of unelected members (as it currently does), to being a chamber consisting mostly or entirely of elected members. The debate here has focused in great depth on the question of how such a reform might affect the institutional relationship between the two houses of Parliament, and on the impact it may have on the (currently) acknowledged supremacy of the lower house. This suggests that the failure to consider the institutional impact of reforms is not intrinsic to politics. Rather, it reflects the limitations of the way the structure and operation of the judiciary are understood and theorised. The question is not just one of jurisdiction. What impact will removing the judges from the political chamber have on their decisions, by foreclosing options such as that taken by Lord Simon, adverted to in section 1.4?

process, the mechanics of bench-constitution, or even the criteria used to appoint and promote judges and whether these are fit for purpose. But, as we have argued here, doing so will require us to study the judiciary in institutional terms. Our aim in this paper has been to point the way towards must be our ultimate goal if we are to be effective in studying the judiciary—namely, the creation of a proper institutionalist account of the judicial branch of government which *studies* the norms, conventions, aims, purposes and strategies that underlie the functioning of the judiciary, and the institutional processes by which these evolve, change, are adapted to new uses, and disappear,[118] rather than simply starting with assumptions as to what these are. Such a model, which we have taken steps towards outlining, not only parallels the standard models that are used to study, for example, the behaviour of members of bureaucracies, but also has the useful advantage of being closer to reality. Not least, it avoids the reductionist simplifications that plague existing models of the judiciary, whether 'legal' or 'political', while also obviating the need to make assumptions that appear to fly in the face of observed reality, such as the attitudinal assumption that judges lie with an inventive mendacity that rivals Munchausen's, or the formalist assertion that effective judges must achieve a level of detachment from their socio-political context and beliefs that would have challenged Milarepa of Tibet. We have sought to show that formulating such a model will require taking the claims of lawyers about the judiciary seriously, by accommodating them within the framework of the strategic model of judicial decision-making. This, as we have shown, not only gives us a good bit of insight into how the judiciary functions, but also suggests a manner in which we can link legal and institutional norms about judicial decision-making, with the role of the judiciary as one of the branches of the state, and of judges as actors who have a definite institutional role within the overall framework of the state as a governing body. One of the strong points of the UK judiciary, in comparison with the US, is that it has not been as strongly drawn into party political positions, despite its growing powers. It is, rightly, considered desirable that this be preserved. This does not, however, have to mean preserving the status quo—and, indeed, it should not. We now have significant experience in designing administrative institutions which do *not* suffer from the vulnerabilities that we have identified above, but which at the same time have successfully avoided becoming mere reflections of party politics. It should be possible to do this for the judiciary, as long as we ask the right questions.

[118] This paper forms part of a broader project, where we seek to do precisely this.

Appendix: The model

This appendix provides further details of our methodology, both in regards to data collection and modelling. We begin by outlining the coding scheme we adopted for decisions of the House of Lords and Supreme Court, and explain its relevance to our research questions. We then offer a description, including a formal presentation, of the model discussed in the main part of this paper, together with two alternative models for comparison. We finally discuss model fit and reliability, and the way this was assessed.

Law and Bayesian modelling

The primary difficulty to be overcome in measuring judicial attitudes is that—like many other constructs of interest to academic lawyers—they are not directly observable: in statistical terms they are *latent variables*. Being unobservable does *not*, however, mean that they are not measurable. We can, and do, observe manifestations or indicators of these latent properties. In the case of judicial attitudes, these might include (as in the present analysis) the outcome favoured by the judge in a particular case. Alternatively, the words in which judges express themselves in their decisions or writing extra-judicially might be used as indicators of judicial attitudes, as might data obtained from elite interviews or other ethnographic data on judges.

Bayesian approaches to statistical inference offer a theoretically appealing and intuitive epistemological framework within which such inferences can be made based on observed outcomes—albeit at the cost of considerable technical complexity in their implementation. A Bayesian approach poses the question in the following way: starting from our prior beliefs, what can we learn about the latent variable ξ from the observed indicators $\mathbf{y}$, and with what degree of epistemic uncertainty?[119] The resultant models are analytically complex but the use of modern computational techniques – specifically, a technique called Markov Chain Monte Carlo (MCMC) – gives simulation-based numerical approximations to analytical solutions where the latter may be difficult or even impossible to obtain.[120] As we seek to demonstrate in

[119] See Simon Jackman, 'Measurement', in: Janet Box-Steffensmeier, Henry Brady and David Collier, editors, *The Oxford Handbook of Political Methodology* (Oxford: Oxford University Press, 2008) 119–151, p. 138. Following the unified theory of general measurement modelling sketched by Jackman, if we wish to measure latent variables ξ, which is related to observable indicators $\mathbf{y}$ by model parameters β, then applying Bayes' Rule we have $p(\xi, \beta|\mathbf{y}) \propto p(\mathbf{y}|\xi, \beta)p(\xi, \beta)$. In the foregoing expression $p(\xi, \beta|\mathbf{y})$ is the posterior probability density and $p(\mathbf{y}|\xi, \beta)$ is the likelihood function. The Bayesian joint prior density, $p(\xi, \beta)$, simplifies to $p(\xi)p(\beta)$ on the assumption that the assumption that ξ, the latent variables, are independent of the model parameters β.

[120] For most of the Twentieth Century, academic statistics departments were riven by a 'holy war' between the Bayesians and the so-called 'frequentists'. While Bayesians have always had the advantage of an intuitive and philosophically appealing understanding of statistical inference, the Bayesian approach was for a long time practically limited due

this paper, phrasing the question in this way and answering it using the associated computational techniques permits researchers to answer questions of substantive legal interest that cannot be systematically studied using more common quantitative or qualitative techniques.

Data

Careful construction of a dataset is crucial to all latent variable modelling, and to IRT models in particular. Two key decisions concern: (1) the choice of cases to be included in the analysis, so as to capture the dimension of theoretical interest and (2) the design of a valid and reliable scheme for coding case outcomes, so that the model can validly and reliably map case outcomes onto the dimension of interest. As discussed in Section 2.1, the aim of the analysis is to capture judges' attitudes on a scale of permissiveness towards the state. In planning the current research, we rejected the use of a classic left/right dimension since there is little within existing legal scholarship on judicial decision-making to suggest that appellate judges decide cases in such bald ideological terms.[121] In a static IRT model, such as the one we have used here, a further concern is to select a time period within which it is reasonable to ignore temporal change.

Our data consists of all appeals, to which the state was a party, decided by the UK's final appellate court since the commencement of the Human Rights Act 1998 at the beginning of the Michaelmas Term 2000, until the end of the Trinity term 2011. The final appellate court was the Appellate Committee of the House of Lords until the end of the Trinity term 2009, when Law Lords were removed from the House of Lords, and became the founding bench of the UK Supreme Court.[122] For the analysis in this paper, we dropped all unanimous decisions. In fact, due to the high degree of consensus among the Law Lords, this leaves only 77 cases involving at least one dissenting judgment.

We adopt a three-fold coding for each case: (1) a decision wholly in favour of the non-state body; (2) a decision partly favouring a the non-state body and partly favouring the state body; (3) a decision wholly in favour of the state. In adopting such a three-fold categorisation, our intention is to

to the absence of tractable analytical solutions for all but the simplest statistical models. Bayesians finally gained the upper hand with the acquisition—quite literally—of nuclear weapons technology in the form of MCMC (on which see Francis Harlow and N Metropolis, 'Weapons Simulation Leads to the Computer Era' (1983) 7, *Los Alamos Science* 132–141). For a popular account of the history of Bayesian statistics, see Sharon Bertsch McGrayne, *The Theory That Would Not Die: How Bayes' Rule Cracked the Enigma Code, Hunted Down Russian Submarines, and Emerged Triumphant from Two Centuries of Controversy* (Yale Univ Pr, April 2011).

[121] This initial decision seems far-sighted in the light of Hanretty's finding that an ideal-point model using such a scale performs no better than a null model.

[122] Constitutional Reform Act 2005, Section 23 and Section 24.

uncover a greater degree of differentiation in the cases themselves, compared to the binary win/lose classification more common in the US judicial politics literature. It is not uncommon for appellate judges to grant some relief to one side, but while refusing part of what is requested. In a judicial review case, for example, a judge might uphold the lower court's decision overturning a decision of a minister, say, while reversing an award of damages for loss arising from the decision held to be unlawful. Our coding scheme captures subtleties that might be lost by collapsing these differences onto a binary coding, and potentially allows this information to improve the estimation of the Law Lords' ideal points.

The desirability of such a three-fold coding scheme led us to create our own dataset, rather than using one of the commonly used datasets,[123] both because of our use of a three-fold coding and because of our coding the outcome of the cases according to criteria rooted in legal theory, rather than the politically liberal / politically conservative coding that most such databases use. Texts of the cases were read by a team of research assistants (undergraduate and postgraduate law students) over the summer of 2010 and 2011 working under our direction, and coded according to our scheme. We analysed the data in the summer of 2011.

Model description

The ideal point model

Unlike the binary-outcome ideal point model commonly used in the judicial politics literature, we use an ordered model specification to capture the three-fold coding of the data, described above. The decision of each judge in each case is modelled as a response to both the case difficulty thresholds κ_{k1} and κ_{k2}, (as in the cases only model) and to the jth judge's ideal point, θ_j which taps into each case k according to a discrimination parameter α_k.`JAGS` code for the model was adapted from the graded response model presented by McKay Curtis in the *Journal of Statistical Stoftware*.[124] The decision Y_{jki} of judge j in case k takes a value from the set $i = \{1, 2, 3\}$. Cumulative probabilities of the categorical outcomes are thus given according to:

$$P_{jki} = P(Y_{jk} \leq i|\theta_j) = \text{logit}^{-1}(\kappa_{ki} - \alpha_k\theta_j).$$

In the ideal-point model, θ_j is the ideal point for each judge on a scale of permissiveness towards state bodies, while α_i is a discrimination parameter which taps each case i according to its ability to discriminate between judges on the requisite dimension. Two case-difficulty thresholds κ_{j1} and

[123]Such as the IPSA's High Courts Judicial Database, available at `<http://sitemason.vanderbilt.edu/page/exnakE>`.

[124]S. McKay Curtis, 'BUGS Code for Item Response Theory' (2010) 36, *Journal of Statistical Software* 1–34.

κ_{j2}, satisfy the order constraints $\kappa_{j1} < \kappa_{j2}$ representing the difficulty in holding respectively partly and fully for the state body. Probabilities for each outcome category are obtained similarly to the cases-only model, p_{ijk}, the of each Law Lord's decision in each case is as follows:

$$\begin{aligned} p_{ij1} &= P_{ij1} \\ p_{ij2} &= P_{ij2} - P_{ij1} \\ p_{ij3} &= 1 - P_{ij2}. \end{aligned}$$

Two problems of identification arise in IRT models: first, there is a problem of *rotational invariance*, in that a reflection of the ideal point scale around the origin does not affect the probabilities of the position; second, there is a problem of *scale invariance*, in that multiplying each of the parameters by an arbitrary constant does not affect their probabilities. In each case, we have dealt with these identification issues via our choice of priors. The prior on α is set at $N(1, 1)$ and is constrained to be positive, ensuring that the ideal points load positively onto the case outcomes—thus a judge who consistently decides in favour of a state body will have a more positive estimated ideal point than one who more often decides an appeal against the state.[125] We placed the following (vague) priors on $\kappa : \kappa_{k1} = \kappa^*_{k,[1]}$ and $\kappa_{k2} = \kappa^*_{k,[2]}$, where $\kappa*_{jk} \sim N(0,\ 5)$.

The case-based model

The main model against which we compared our ideal model is a case-based model, in which all judge-based parameters are dropped from the model. Each decision in case k takes a value from the set $i = \{1, 2, 3\}$ according to whether the decision is for the non-state body, a mixed outcome, or in favour of the state actor, as before. The threshold parameters κ_{i1} and κ_{i2} are as in the cases-only model. We thus have a model specification for the cumulative probabilities:

$$P_{ki} = P(Y_k \leq i) = \text{logit}^{-1}(\kappa_{ki}).$$

Priors for κ are as in the cases only model.

From the estimated cumulative probabilities, we can the following following estimated probabilities, p_{ik}, of each Law Lord's decision in each case:

$$\begin{aligned} p_{i1} &= P_{i1} \\ p_{i2} &= P_{i2} - P_{i1} \\ p_{i3} &= 1 - P_{i2}. \end{aligned}$$

[125]Some experts suggest a further identification strategy of centring and scaling θ by substracting the mean and dividing by the standard deviation, and making corresponding adjustments to α and κ. We experimented with such a strategy, by post-processing the MCMC simulations in `R` but found it to be unnecesary.

Model assessment

We assessed the 'fit' of our ideal-point model by examining the extent to which the actual outcomes of the decisions that formed part of our dataset were consistent with the model's predictions. The main model for comparison, as noted, was the cases-only model described above. Since there are no judge-based parameters in the null model, the prediction for every judge in case k will be identical; that is, it will (falsely) predict every case to be decided unanimously. Nonetheless, such a model is a natural reference point for our analysis: if case-based factors were the only influence on judicial decision-making, then dissents are simply random departures from the 'correct' decision, in which case a cases-only model should still be the best way of modelling even dissenting decisions of the Law Lords. In other words, a cases-only model should outperform an ideal-point model, unless the assumption of the latter—that judicial attitudes actually do matter—is in fact correct.

Theoretically, the cases-only model might be justified theoretically in different ways. First, we might imagine that judges are 'blank slates', deciding each case based only on the submissions put to them by counsel (without regard to their own preconceptions, particular values and attitudes), and considering these submissions in a uniform way. Second, even if judges' attitudes matter, to the extent that judges have similar attitudes (that they are 'uniformly grey slates', as it were), a cases-only model would be expected to perform as well as a model which took account of judge-based differences.[126] Comparison of the two models thus provides a way of assessing whether either of these two theoretical assumptions is warranted. In fact, our ideal-point model *does* perform better than the cases-only model, as can be seen from Table 1. The third and fourth columns show the percentage of correct predictions (out of 10,000 MCMC samples) for the ideal-point model and for the cases-only model respectively. In terms of predictive accuracy, the ideal-point model made a correct prediction of each Law Lord's decision in each case on an average of 68 per cent of our simulations (averaged across each Law Lord), compared with 64 per cent for the cases-only model. The decisions of just four judges, Lords Nicholls, Steyn, Millett, and Dyson were predicted more poorly by the ideal-point model, compared with the cases-only model. Since, for all of these four Law Lords, the number of decisions was fewer than the average in our dataset (15, 9, 9, and 5 decisions respectively), this may be due to small numbers leading to poor estimates of the ideal points.

It is sometimes argued that the poor predictive accuracy of ideal-point

[126] A central argument of J. A. G. Griffith was that the decisions of the senior judiciary for the most part reflect their highly similar (and in Griffith's view highly conservative) attitudes, which in turn are the product of their mostly highly similar class, educational and professional backgrounds. See Griffith (as in n. 8)

Table 1: Predictive Accuracy (Based on 10,000 MCMC Samples)

Law Lord	Number of Decisions	Correct Predictions (%)	
		Ideal-Point Model	Cases-Only Model
Bingham	20	58	54
Phillips	18	58	54
Scott	24	61	56
Slynn	6	62	56
Walker	33	63	61
Nicholls	15	63	65
Neuberger	14	64	63
Hale	37	65	60
Woolf	3	66	62
Mance	17	68	62
Hope	44	70	70
Rodger	29	70	64
Hutton	6	70	67
Steyn	9	71	72
Brown	30	71	65
Millett	9	72	76
Hoffmann	20	76	71
Kerr	9	76	69
Carswell	18	79	74
Dyson	5	81	82
Clarke	2	86	79
Overall	77	68	64

models of judicial decision-making, which tend to be in the neighbourhood of 70% "is not the stuff of which scientific credibility is made."[127] This argument misses the point—at least when directed against the way we have used ideal-point modelling here. These results are substantially better than those would expect of a true 'null' model—one where there is no plausible causal link at all between the observed outcomes and the unobserved indicator, and whose predictions are therefore indistinguishable from a coin-flip. To demonstrate, we ran a further model in which we posited a link between each judge's disposition and whether the the ASCII value of the case name is divisible by three. That model achieved overall predictive accuracy of around 50%. The fact that an ideal-point model achieves significantly higher consistency with the data suggests that it is picking up something other than

[127]Leiter (as in n. 18).

Table 2: Deviance-Based Model Comparison

	Ideal-Point Model	Cases Only-Model
pD	667.4	679.4
DIC	1208	1259.6

random noise. That it does not achieve complete consistency with the data suggests that their are other factors at play, other than a judge's individual position on a scale of permissiveness. But we do not claim that no other factors are at play – such a claim would be profoundly at odds with everything we know about the process of judging, which quite clearly cannot be reduced to any single factor. The claim we seek to substantiate through our model – and which is borne out by the significant increase in predictive accuracy over a null model – is simply that differences in judges' attitude can be meaningfully understood in terms of differences in on a scale of permisiveness, and that their position on this scale has a material impact on their decisions. While the flexibility of the Bayesian modelling framework presented here would easily have allowed us to add more predictors, and thus achieve a better model fit, this would have scarcely improved our understanding of our substantive questions of interest. Christopher Achen has argued that such an approach is "profoundly atheoretical", recommending instead the approach that we have tried to follow here, of careful theoretical justification of the terms included in a simple model, and then testing it rigorously on smaller but more carefully constructed datasets.[128]

Deviance-based model assessment—an approach often favoured by Bayesians—also suggests that the ideal-point model performs better than the cases-only model. Two common deviance-based measures of model fit are penalised deviance (pD) and deviance information criterion (DIC). Both of these measures add a penalty for the number of parameters in the model, and for the information incorporated via the Bayesian prior. As shown in Table 2 below, both of these measures are lower for the ideal point model, suggesting not only that our ideal-point model is a better fit to the data than the cases-only model, but that (at least by these two commonly-used heuristics) the improvement in model fit is sufficient to justify the additional complexity of our ideal-point model.[129]

[128]C.H. Achen, 'Toward a new political methodology: Microfoundations and ART' (2002) 5, *Annual Review of Political Science* 423–450.

[129]For further details on these Bayesian measures of model fit, see Jeff Gill, *Bayesian Methods: A Social and Behavioural Sciences Approach*, 2nd edition (Boca Raton, FL: Chapman & Hall, 2008), pp. 260-265.