The Decisions and Ideal Points of British Law Lords

CHRIS HANRETTY*

Policy-sensitive models of judicial behaviour, whether attitudinal or strategic, have largely passed Britain by. This article argues that this neglect has been benign, because explanations of judicial decisions in terms of the positions of individual judges fare poorly in the British case. To support this argument, the non-unanimous opinions of British Law Lords between 1969 and 2009 are analysed. A hierarchical item-response model of individual judges' votes is estimated in order to identify judges' locations along a one-dimensional policy space. Such a model is found to be no better than a null model that predicts that every judge will vote with the majority with the same probability. Locations generated by the model do not represent judges' political attitudes, only their propensity to dissent. Consequently, judges' individual votes should not be used to describe them in political terms.

In November 2001, Home Secretary David Blunkett implied that judges who objected to plans to indefinitely detain foreign nationals suspected of terrorism lived in an 'airy fairy libertarian' world.[1] Those measures had been struck down by the Appellate Committee of the House of Lords (the 'Law Lords') by a majority of eight to one.[2] One interpretation of that decision is that it split eight airy-fairy libertarians from one hard-nosed realist – that is, it separated judges located in a dimension running from libertarianism to conservatism.

Analysing non-unanimous decisions in order to estimate the locations of judges in the political space is commonplace in political science. Scholars have shown that US Supreme Court Justice Ginsburg is more liberal than Justice Scalia,[3] that Australian High Court Justice Kirby is to the left of Justice Callinan[4] and that Canadian Supreme Court Justice L'Heureux-Dubé is to the left of Justice Sopinski.[5] Despite David Robertson's work on judicial discretion in the Lords,[6] it is not clear whether we have comparable grounds for believing, say, that Lord Scarman is to the left of Baron Ackner.

This article argues that we cannot locate Law Lords in the political space on the basis of their individual votes. Whilst we can recover ideal points for judges, an ideal point model

  [1] Hansard, 19 November 2001, col. 29.

  [2] *A & Others v. Secretary of State for the Home Department* [2004 UKHL 56].

  [3] Andrew D. Martin and Kevin M. Quinn, 'Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, 1953–1999', *Political Analysis*, 10 (2002), 134–53.

  [4] Rebecca Wood, 'Dimensions of Decision Making: Determining the Complexity of Politics on the High Court of Australia', paper presented at the Annual Meeting of the Southern Political Science Association, Savannah, Georgia, 2002.

  [5] Benjamin Alarie and Andrew Green, 'The Reasonable Justice: An Empirical Analysis of Justice Frank Iacobuccis Career on the Supreme Court of Canada', *University of Toronto Law Journal*, 47 (2007), 195–226.

  [6] David Robertson, 'Judicial Ideology in the House of Lords: A Jurimetric Analysis', *British Journal of Political Science*, 12 (1982), 1–25; David Robertson, *Judicial Discretion in the House of Lords* (Oxford: Oxford University Press, 1998).

27 is a very poor model of judges' decision making, and should be rejected. Even if the model
28 were accepted, the ideal points do not represent positions in the political space, but rather
29 judges' attitudes towards dissent. Consequently, it is mistaken to call judges 'airy fairy
30 libertarians', ministerial comments notwithstanding.

31 WHY MIGHT JUDGES JUDGE POLITICALLY?

32 There is an extensive literature on the politics of the judiciary. We know that, definitionally,
33 courts are political institutions,[7] that they have important consequences for the rest of the
34 political system[8] and that judges can play important non-judicial roles in public life.[9] My focus
35 is narrower. When I describe judges as being political, or talk of judges judging politically,
36 I mean that they make decisions on the basis of 'political' beliefs: specifically, that when judges
37 decide how to dispose of a case – typically whether to allow or dismiss an appeal – their
38 decisions are a function of the location of that case and that judge in some political space, such
39 that judges who are far apart in that political space will be less likely to agree on the
40 disposition of a case. This definition encompasses both 'attitudinal'[10] and 'strategic'[11]
41 accounts of political judging, but excludes analyses that try to explain the decisions of panels
42 of judges or infer judges' positions from the decisions of panels they have sat on.[12]
43   There are both general and particular reasons for believing that judges are political in
44 this sense. Generally, judges in comparable courts have been shown to be political. Of the
45 seven common law courts of last resort in large, consolidated democracies, analysis of
46 judges' ideal points has been undertaken in four courts: the US and Canadian Supreme
47 Courts, the Australian High Court, and, for a limited period, the Appellate Committee
48 itself.[13] Scholars who have analysed these courts have always provided estimates of
49 judges' political positions – even if, in certain cases, the solutions provided were 'not
50 technically very good'.[14] Consequently, if the Law Lords do not judge politically, they
51 would be an exception to a general pattern amongst similarly located bodies.

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

[8] Mary L. Volcansek, 'Constitutional Courts as Veto Players: Divorce and Decrees in Italy', *European Journal of Political Research*, 39 (2001), 347–72.

[9] Gavin Drewry, 'Judges and Political Inquiries: Harnessing a Myth', *Political Studies*, 23 (1975), 49–61.

[10] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993).

[11] See Cornell W. Clayton and Howard Gillman, *Supreme Court Decision-Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999); Thomas H. Hammond, Chris W. Bonneau and Reginald S. Sheehan, *Strategic Behavior and Policy Choice on the US Supreme Court* (Stanford University Press, 2005); and Cass R. Sunstein, David Schkade, Lisa Ellman and Andres Sawicki, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Washington, DC: Brookings Institution Press, 2006).

[12] This second strategy is employed by Robertson, *Judicial Discretion in the House of Lords*.

[13] For the US: Martin and Quinn, 'Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, 1953–1999'; for Canada: Alarie and Green, 'The Reasonable Justice: An Empirical Analysis of Justice Frank Iacobuccis Career on the Supreme Court of Canada'; for Australia: Wood, 'Dimensions of Decision Making: Determining the Complexity of Politics on the High Court of Australia'; and Tony Blackshield, 'X/Y/Z/N Scales: The High Court of Australia, 1972–1976', in Roman Tomasic, ed., *Understanding Lawyers: Perspectives on the Legal Profession in Australia* (Sydney: Law Foundation of New South Wales, 1978).

[14] Robertson, 'Judicial Ideology in the House of Lords', p. 10.

The particular reason for believing that we can locate judges in the political space is that British politicians and commentators have often described judges as holding certain political values, and implied or stated that these values influence their decisions. Judges have been variously – and contradictorily – described as pursuing 'the protection of property rights, and… political views normally associated with the Conservative party'[15]; having 'the ideology of old-middle class men… [and] the ethos of those who run an administrative state'[16], and as being 'airy fairy libertarians'. Often, these values have been ascribed to the judiciary as a whole. This characterization might mean that judges who share the same values always reach the same decision, and that analysing dissenting opinions is useless. However, this view has always been rather difficult to square with the brute fact of dissent. As Lee asks:[17]

How can it be so simple when there is a 3-2 split in the House of Lords, overturning a 0-3 decision in the Court of Appeal, which was itself overturning the High Court?

Consequently, the attribution to judges *en masse* of certain political values gives us reason to believe that individual judges judge politically in the sense described above.

Existing quantitative studies of Appellate Committee decision making also suggest that judges judge politically. Early work by David Robertson[18] used multidimensional scaling (MDS) to analyse non-unanimous Appellate Committee decisions between 1965 and 1978. He found that three dimensions characterized judicial behaviour. The first dimension concerned criminal law, with high scores associated with finding for the prosecution. The second dimension concerned public law, with high scores associated with finding for the state. The third dimension was left uninterpreted. Even with three dimensions, the fit of the MDS solution was poor, with high stress values.

Later work by Robertson abandoned MDS, and with it the analysis of (dis)agreement between judges. *Judicial Discretion in the House of Lords* exploited the fact that cases are heard by panels of the Appellate Committee, and that consequently judges may hear some cases but not others. Robertson conducted multiple discriminant analysis on cases heard between 1986 and 1995, asking, for a number of particular outcomes of interest – findings for the Revenue in tax cases, for the state in public law cases, for plaintiffs in constitutional law and civil liberties cases, and for the defendant in criminal cases – whether the (assumed random) presence of judge X on the panel made such an outcome more or less likely. In order to combine insights from different types of cases, factor analysis was performed on judges' scores on the linear discriminant analysis.

Although a number of factor analytic solutions were possible, Robertson's preferred solution involved dropping criminal cases and presenting two dimensions: egalitarianism (associated with finding for the state in public law and for the plaintiff in civil liberties cases) and constitutionalism (finding for the plaintiff in constitutional cases). Because this method of analysis can use unanimous decisions, Robertson was able to make inferences on the basis of far more cases than would have been possible including only cases with dissent – though at the cost of specifying, *ex ante*, the components of judicial ideology.

At the same time, there are considerable grounds for doubting that British judges judge politically. The first is that levels of dissent are limited in comparative perspective, and

[15] J.A.G. Griffith, *The Politics of the Judiciary*, 3rd edn. (London: Fontana, 1985), p. 199.
[16] Robertson, *Judicial Discretion in the House of Lords*, p. 401, fn. 1.
[17] Simon Lee, *Judging Judges* (London: Faber and Faber, 1988), pp. 4–5.
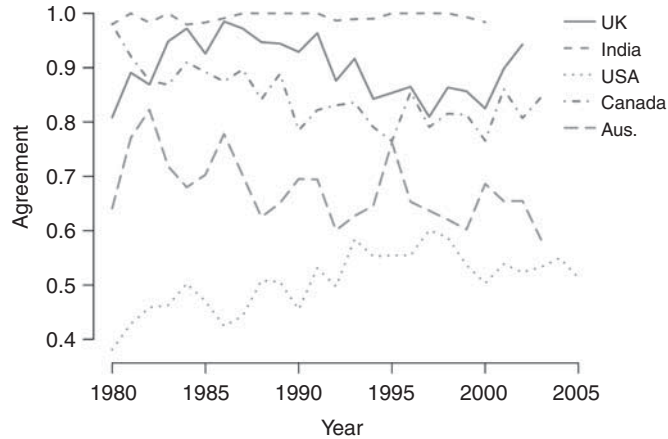[18] Robertson, 'Judicial Ideology in the House of Lords'.

Fig. 1. Agreement rates across five courts

whilst unanimity may point to the homogeneity of judicial preferences or the absence of
Dworkinesque 'tough cases', it may also indicate that judges do not decide on the basis
of their political positions, but rather on the basis of shared views of what the law
requires. That is, agreement may indicate that judges are not political. Figure 1 shows that
agreement in the House of Lords is higher than agreement in all those common law courts
of last resort in which analysis of dissenting opinions has been successfully applied.[19] Only
judges on the Indian Supreme Court agree more, and they face a much higher caseload.

Second, the British constitution offers few opportunities for policy-seeking judges.
Attitudinal models of judicial decision making, in which judges' political attitudes are the
exclusive determinants of judicial behaviour, have been assumed to apply best where
courts are at the top of their respective judicial hierarchy, and are not subject to overrule.
Yet for most of the period discussed here, British courts have been at risk of legislative
overrule by simple majorities. Whilst strategic decision making – that is, decision making
in anticipation of legislative overrule – has not been thought severe enough to entirely
preclude the estimation of judges' political locations, the constraint implied by legislative
overrule by simple majority is so extensive, and the policy 'core' so reduced, that a
strategic desire to avoid overrule may cause British judges to become political mutes,
reducing them to redundant veto points. Consequently, 'political' judges in the British
system would have to act with casual disregard for the possibility of overrule – and, one
might reason, be unlikely to reach the higher rungs of the judiciary in the first place.

DATA AND MODEL

I use data from the High Courts Judicial Database,[20] which includes data on all decisions
that were heard between 1969 and 2003 by the Appellate Committee of the House

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[19] The measure is from Philip L. Dubois and Paul F. Dubois, 'Measuring Dissent Behavior on State
Courts: An Application and an Adaptation of Known Measurement Techniques', *Polity*, 13 (1980),
147–58. The data is from the High Courts Judicial Database (fn 20), http://sitemason.vanderbilt.edu/site/
d5YnT2/data_sets.)
[20] Stacie L. Haynie, Reginald S. Sheehan, Donald R. Songer and C. Neal Tate, 'High Courts Judicial
Database: Version 1.1', 2007, downloaded December 2009.

of Lords (or by the Privy Council acting in its judicial capacity) and reported in the
All England Law Reports. I have supplemented this data with my own data on all
non-unanimous cases decided by the Appellate Committee between 2004 and 2009.

I consider only non-unanimous cases – those in which there was at least one dissenting
opinion – in this article.[21] By a dissenting opinion, I mean an opinion that disagreed
with the majority of the court over how to dispose of the case: typically, though not
exclusively, whether to allow or to dismiss the appeal. I do not, therefore, consider
opinions that disagree with the majority of the court over the *ratio decidendi* of the case.[22]

The data matrix is therefore made up of 1,592 individual decisions taken by fifty-nine
judges in 318 cases. Decisions by a small number of judges who heard very few cases[23]
were excluded. My data also contain information on the outcome of each case. These
outcomes have, in certain areas of the law, been coded as 'liberal' or 'conservative',
following established usage.[24] Table 1 shows this information, and the number of cases in
seven broad areas of the law. Information about case outcomes is used in the model that
I now describe.

To explain judicial decisions I use a hierarchical item response model estimated using
Bayesian methods. Item response models have become increasingly popular in political
science, and can be considered to directly operationalize the attitudinal model of judicial
decision making. They improve on previous methods of analysing judicial behaviour,
in particular multidimensional scaling of agreement between judges, by relaxing the
assumption that every instance of (dis)agreement between judges is related to the latent
trait under investigation. Bayesian methods – in particular the Markov Chain Monte
Carlo (MCMC) method – allow otherwise intractable or computationally expensive
models to be estimated.[25]

The response I wish to model is the 'vote' y of each judge j in a given case i. By
convention, $y_{ij} = 1$ if the judge voted with the majority, and $y_{ij} = 0$ if the judge dissented.
The probability of voting with the majority can be modelled as a function of three
variables: the judge's location and the location and discrimination of the case. The judge's
location (θ_j) is his/her location in an n-dimensional political space. In this note, the policy
space is one-dimensional, and the presumption is that the dimension will run from left to
right, or from liberal to conservative.

The case discrimination parameter (β_i) represents the degree to which the case
discriminates with respect to the recovered dimension: cases with higher absolute values
of β_i are very good at separating judges along the recovered dimension. This parameter

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[21] In the model of judicial decision making that I use, unanimous decisions provide no information
about the relative or absolute positions of the judges. While it is true that panels of judges may
unanimously give decisions that seem to be particularly left wing or right wing, it does not necessarily
follow that the judges who decided those cases were particularly left wing or right wing. Non-unanimous
cases, by contrast, allow us to identify differences between justices that may reflect attitudes towards
public policy.

[22] Disagreements over *rationes* may be informative about judges' politics, but are not relevant to the
analysis I present here.

[23] Lords Emslie, Irvine of Lairg, Taylor of Gosforth, Havers, Wheatley, Avonside and Parker of
Waddington.

[24] This (North American-influenced) coding of cases may seem strange to British lawyers, who might
expect left-leaning judges to find against the state in public law, particularly in immigration and
deportation disputes.

[25] Simon Jackman, 'Bayesian Analysis for Political Research', *Annual Review of Political Science*, 7
(2004), 483–505.

TABLE 1   *Areas of the Law and Outcomes*

	Area	Issues	'Liberal' outcomes	# (%) 'Liberal'	# (%) Conservative
1.	Civil liberties [29]	Equal treatment & discrimination; civil rights claims by prisoners; rights of speech, press, assembly, etc.	Victory for those alleging infringement of their civil liberties	7 (24.1%)	13 (44.8%)
2.	Commercial law [67]	Landlord-tenant disputes, contract disputes, creditor-debtor disputes, insurance disputes, etc.	Victory for the economic underdog	10 (14.9%)	14 (20.9%)
3.	Criminal law [54]	Murder, serious property crime, crimes against morality, etc.	Victory for the defendant	19 (35.2%)	27 (50%)
4.	Family law [10]	Marriage and divorce disputes, inheritance and succession disputes	Not applicable	N/A	N/A
5.	Other cases [3]	Regulation of bar & judiciary	Not applicable	N/A	N/A
6.	Public law [102]	Taxation; benefits; immigration, deportation, & citizenship; public employment, etc.	Victory for the state	44 (43.1%)	38 (37.3%)
7.	Tort [53]	Injured workers, medical or legal malpractice, libel, other tort	Victory for the injured party	24 (45%)	21 (39.6%)

Note: Percentages in 'liberal' and 'conservative' columns do not sum to 100% because not all cases had a clear direction.

also tells us which end of the policy space is more likely to vote with the majority. If the space is indeed a left-right policy space, a case with a positive discrimination parameter requires 'more' of the latent trait (positions further along the real number line to the right) to vote with the majority – and therefore has a right-leaning outcome. Conversely, a case with a negative discrimination parameter implies a left-leaning outcome. The case location parameter (α_i) represents how *much* of the latent trait is needed to vote with the majority – that is, how far along the recovered dimension the case discriminates.

I link these variables to each judge's vote as follows:[26]

$$Pr(Y_{ij} = 1) = \phi(\beta_i\theta_j - \alpha_i), \qquad (1)$$

where $\phi(\cdot)$ is the cumulative normal distribution.

I innovate in my treatment of the case discrimination parameter. There are three broad approaches to dealing with discrimination parameters.[27] One approach is to set the value of the discrimination parameter to one for all cases. This is the simplest operationalization of the spatial voting model. Models with fixed discrimination parameters are common in the educational testing literature, where they are referred to as Rasch models.[28] Constraining the discrimination parameter in this way makes sense in educational testing, since investigators may reasonably presume that standardized test items tap an underlying dimension to the same degree and in a similar way. The same is not true of legislative roll calls or court cases, which may discriminate with respect to the recovered dimension to various degrees, with some strongly discriminating, others weakly discriminating and others not discriminating at all.

A second approach is to sample the discrimination parameters from an uninformative prior distribution. Where investigators have reason to believe that items differ in discriminating between positions on the recovered dimension, and where no auxiliary information concerning the contents of the items is available, this is the best approach. The downside of this approach is that it does not employ auxiliary information concerning the substantive content of the items, therefore model parameters may be highly uncertain.

A third approach is to sample some or all of the discrimination parameters from an informative prior distribution. In most instances, this method has involved constraining some discrimination parameters to take on theoretically informed values. Bafumi *et al.* consider, but ultimately reject, constraining the discrimination parameters for a model of US Supreme Court voting in which '1' indicates 'liberal' outcomes: such an approach 'relies too strongly on the precoding, which, even if it is generally reasonable, is not perfect'.[29] Jackman sets two roll calls that are mirror images of each other to discriminate, with equal and opposite strength, with respect to the second recovered dimension in a multidimensional item response model.[30]

[26] Joshua Clinton, Simon Jackman and Douglas Rivers, 'The Statistical Analysis of Roll Call Data', *American Political Science Review*, 98 (2004), 355–70.

[27] Online supplementary information shows that my findings are not sensitive to the choice of approach to modelling the discrimination parameter.

[28] Georg Rasch, *Probabilistic Models for Some Intelligence and Attainment Tests* (Copenhagen: Danish Institute for Educational Research, 1960).

[29] Joseph Bafumi, Andrew Gelman, David K. Park and Noah Kaplan, 'Practical Issues in Implementing and Understanding Bayesian Ideal Point Estimation', *Political Analysis*, 13 (2005), p. 171.

[30] Simon Jackman, 'Multidimensional Analysis of Roll Call Data via Bayesian Simulation: Identification, Estimation, Inference, and Model Checking', *Political Analysis*, 9 (2001), p. 227.

188 Both of these strategies use auxiliary information to estimate item response models with
189 genuinely informative parameter estimates. They rely, however, on the choice of the
190 discrimination parameters to constrain.
191 A more forgiving strategy is to model the discrimination parameters as a function of other
192 variables. Here, I model the discrimination parameters as a function of the broad area of law
193 and of the direction of the outcome, considered either as a 'liberal' or 'conservative'
194 outcome. The discrimination parameters are drawn from normal distributions, the means of
195 which are modelled as a linear function of these area-specific intercepts and the direction of
196 the case outcome. Thus, if $x_i = 1$ denotes a 'liberal' outcome in case i, and k indexes the seven
197 areas of law shown in Table 1, the discrimination parameters can be modelled as follows:

$$\beta_i \sim N((\gamma_{0k} + \gamma_{1k} x_i), \sigma), \tag{2}$$

198 where γ_{0k} and γ_{1k} are area-specific intercepts and coefficients, respectively.[31] Cases without
200 directionality are drawn from an uninformative prior distribution.
201 This strategy allows us to plausibly exploit information about the area and the
202 outcome. Suppose, as Robertson claimed, that tax cases discriminate between judges very
203 well, with some judges favouring the Inland Revenue and others favouring taxpayers.
204 In that case, the area-specific intercept will be close to zero and the parameter attached to
205 the case outcome will not only be very large, but if the recovered dimension runs from
206 'left' to 'right', will also be strongly negative. If, by contrast, family law cases do not on
207 average discriminate with respect to the recovered dimension, the parameter attached to
208 the case outcome will not be different from zero.
209 I estimated this model using the JAGS MCMC sampler. The model was identified by
210 post-processing the MCMC output so that (1) ideal points had mean zero and unit
211 standard deviation and (2) Bridge of Harwich was to the right of Griffiths.[32] The code
212 used is shown in the online appendix. The model was run for two million iterations,
213 discarding the first 750,000 iterations as burn-in and thinning the remaining samples by a
214 factor of 250. A standard convergence diagnostic (Geweke's diagnostic) and inspection of
215 the trace plots showed no problems with convergence.[33]

216 RESULTS

217 Whilst the model does produce estimates of judges' locations, which show differences between
218 judges (see Figure 2), this article argues that the model that produces these estimates should
219 not be accepted – and that these estimates do not, in any case, represent a substantive
220 dimension of politics. I base this argument on three points: first, the fit of the model is
221 extremely poor, and does not represent an improvement over a null model; secondly, the
222 parameters relating to case discrimination do not make sense; and thirdly, whilst the locations
223 might seem at first glance to indicate strong partisan differences between judges, these
224 locations do not reflect judges' political attitudes, but rather their attitudes to dissent.

[31] This model in no way constrains cases of a certain directionality to discriminate with respect to the
recovered dimension: the credible intervals surrounding the coefficients γ_{1k} are extremely large and
encompass zero.
[32] Bridge and Griffiths were chosen because they lay at opposite ends of Robertson's 1998
'constitutionalism' dimension, with Bridge more likely to find in favour of appellants alleging
infringement of their civil rights.
[33] Values of Geweke's diagnostic were within the range ±1.96 for all but two judges. Trace plots are
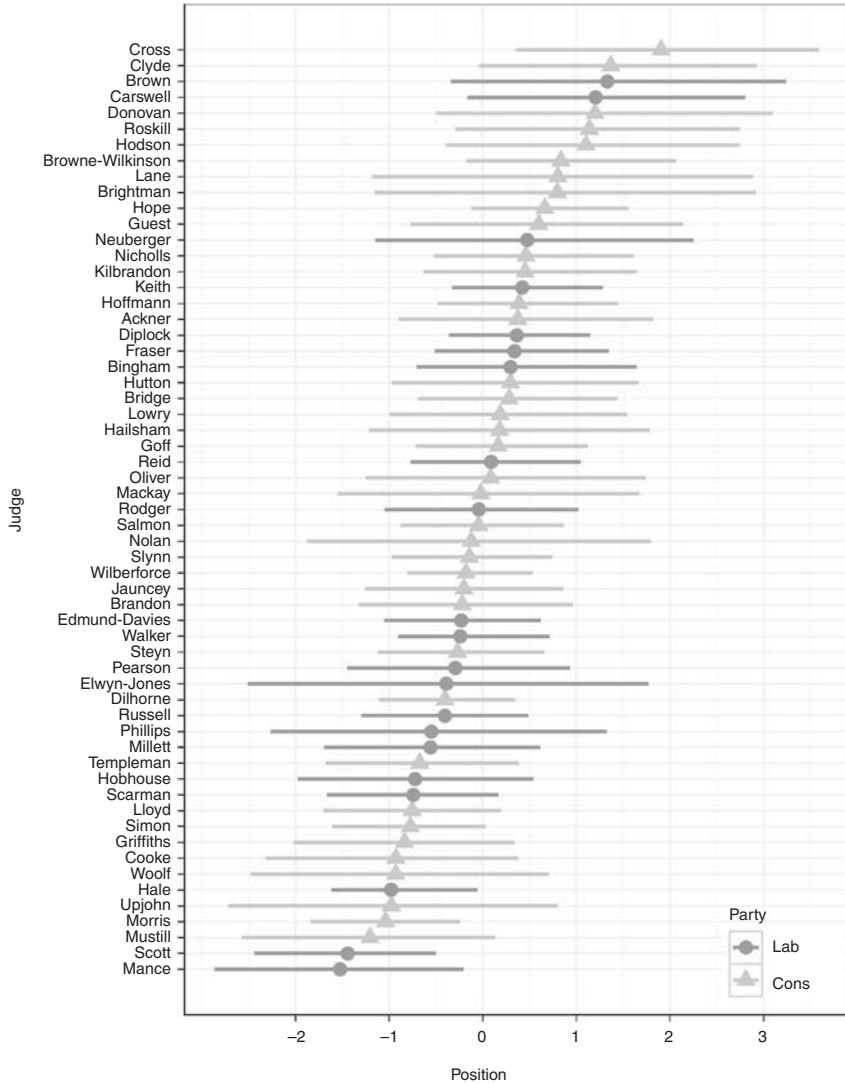available on request.

Fig. 2. Judge locations

First, I discuss model fit. I take as my comparison a null model in which every judge votes with the majority with $p = 0.695$, equal to the percentage of concurring opinions in the dataset. Table 2 presents a number of indicators of fit for both the null model and the item response model.

It is clear from the table that the item response model scarcely improves on the null model. Considering the four different measures of model fit – the percentage of decisions predicted correctly, the log-likelihood, the average percentage reduction in error (APRE)[34] and the

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[34] The percentage reduction in error (PRE) for each vote is the number of votes in the minority, minus the number of incorrect predictions, divided by the number of votes in the minority. A perfectly predicted vote has an PRE of 1. The APRE is simply the PRE averaged over all votes.

TABLE 2   *Model Fit Statistics*

	Item response model	Null model
Decisions predicted correctly	71.7%	69.5%
Best, by judge	Brightman (100%)	Donovan, Lane, Phillips (100%)
Worst, by judge	Lloyd (48.1%)	Mustill (28.6%)
Log-likelihood	−960.7	−908.4
GMP	0.547	0.541
APRE	0.04	0
Discriminating cases	68.5%	N/A

Note: 'Discriminating cases' are those cases that had a discrimination parameter whose 95 per cent credible interval did not encompass zero.

geometric mean probability (GMP)[35] – the item response model outperforms the null model only by very small amounts. This extremely limited improvement, when coupled with the considerable cost in terms of the number of model parameters compared to the null model, ought to discourage us from adopting the model.

Secondly, the discrimination parameters, and the coefficients that predict them, do not make sense if the recovered dimension is to run from left to right. We should expect cases with a liberal outcome to have negative discrimination parameters, and cases with a conservative outcome to have positive ones. Yet all 'liberal' cases had a positive discrimination parameter – as did all 'conservative' cases. Only a handful of cases (fifteen) had a negative discrimination parameter, and they were all cases that lacked a clear direction. Whether our recovered dimension runs from left to right or right to left, this finding implies that one side of the court was permanently in the majority, whilst the other side was permanently condemned to fruitless dissent. Such an interpretation is difficult to sustain, given the rough parity between 'liberal' and 'conservative' outcomes shown in Table 1.

The coefficients predicting these discrimination parameters also performed poorly. Although four out of five coefficients had the right sign, the coefficient was significantly different from zero at the 95 per cent level in only one case (public law). In one issue area – criminal law – the coefficient had the wrong sign, though again it was not readily distinguishable from zero.[36]

Thirdly, the judges' positions, whilst superficially related to their politics, are not related to their positions in judging, but rather to their propensity to dissent. From Figure 2 it might seem that there is a powerful partisan division between the judges, with justices such as Lords Bingham and Scarman to the left of the median justice (Lord Hutton), and justices like Lords Ackner and Roskill to the right. There is a large cluster of Conservative appointees at the right end of the scale, and we can be confident that the median Labour appointee lies to the left of the median Conservative appointee ($P[\tilde{\theta}_{Lab} < \tilde{\theta}_{Cons}] = 0.82$).[37]

This interpretation is strengthened by considering the known politics of these judges. Suppose we describe a judge as 'conservative' if he has contested a seat for the

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[35] The GMP is the exponential of the average log-likelihood.

[36] These coefficients are not reported here, but are available on request.

[37] Note that, though Viscount Dilhorne was appointed a Lord of Appeal in Ordinary by the Wilson government, he is considered a Conservative appointee, as he previously served as Lord Chancellor under Macmillan and Douglas-Home.

Conservative party, held a government post under a Conservative administration or been described by reliable commentators as a 'conservative' judge. Of the fourteen judges who qualify as 'conservative' based on these criteria (Ackner, Brightman, Diplock, Hobhouse, Millett and Roskill as conservative judges,[38] and Clyde, Dilhorne, Fraser, Guest, Hailsham, Reid, Simon and Wilberforce as former Conservative or Unionist office holders or candidates[39], nine lie to the right of the median justice, Rodger of Earlsferry. Of the five remaining judges, one (Wilberforce) was an unsuccessful Conservative candidate before starting on the bench, two (Dilhorne and Simon of Glaisdale) were legal officers in Conservative governments and two (Lords Hobhouse and Millet) were perhaps only described as conservative in contrast to expectations about the Blair government's likely judicial appointments.

Conversely, suppose we describe as 'progressive' all those judges who have contested a seat for the Labour party or the Liberal party prior to World War II, held government posts under a Labour administration or been described by reliable commentators as 'progressive' or 'liberal'. Of the five judges who can be described as progressive (Donovan, Salmon, Elwyn-Jones, Scarman and Morris of Borth-y-Gest),[40] all but one – Lord Donovan – lie to the left of the median justice.

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[38] Ackner: 'unashamedly conservative' (Michael Beloff, 'Ackner, Desmond James Conrad, Baron Ackner (1920–2006), *Oxford Dictionary of National Biography*, 2010); Brightman: '[s]een as conservative and relatively pro-Executive' (obituary, *Daily Telegraph*, 8 February 2006); Diplock: 'a hard man' in capital cases (Stephen Sedley and Godfray Le Quesne, 'Diplock (William John) Kenneth, Baron Diplock (1907–1985)', *Oxford Dictionary of National Biography*, 2010); Hobhouse, Millett: 'strongly conservative' (Kate Malleson, 'Appointments to the House of Lords: Who Goes Upstairs', in Lewis Blom-Cooper, Brice Dickson and Gavin Drewry, eds, *The Judicial House of Lords 1876–2009* (Oxford: Oxford University Press, 2009), p. 119); Roskill: Templeman describes Roskill as being 'saved … from pomposity and ultra-conservatism' by his sympathy for his fellow man, suggesting at least some degree of conservatism (Sydney Templeman, 'Roskill, Eustace Wentworth, Baron Roskill (1911–1996)', *Oxford Dictionary of National Biography*, 2010).

[39] Clyde: stood for Parliament as a Conservative candidate in 1974 (obituary, *Daily Telegraph*, 14 March 2009); Dilhorne: as Reginald Manningham-Buller, served as Attorney-General under Churchill, Eden and Macmillan; Fraser: stood for Parliament as a Unionist candidate in 1955 (George Emslie, 'Fraser, (Walter) Ian Reid, Baron Fraser of Tullybelton (1911–1989)', *Oxford Dictionary of National Biography*, 2010); Guest: stood for Parliament as a Unionist candidate in 1945 (Jauncey of Tullichettle, 'Guest, Christopher William Graham, Baron Guest (1901–1984)', *Oxford Dictionary of National Biography*, 2010). Hailsham: served as Lord Chancellor under Thatcher; Mackay of Clashfern: served as Lord Chancellor under Thatcher and Major; Reid: elected to Parliament as a Conservative member for Stirling and Falkirk (Thomas Broun Smith, 'Reid, James Scott Cumberland, Baron Reid (1890–1975)', *Oxford Dictionary of National Biography*, 2010). Simon: elected to Parliament as Conservative member for Middlesborough West (Stephen Cretney, 'Simon, Jocelyn Edward Salis, Baron Simon of Glaisdale (1911–2006)', *Oxford Dictionary of National Biography*, 2010). Wilberforce: stood for Parliament as Conservative candidate for Central Hull (Patrick Neill, 'Wilberforce, Richard Orme, Baron Wilberforce (1907–2003)', *Oxford Dictionary of National Biography*, 2010).

[40] Donovan: elected to Parliament as Labour member for East Leicester, subsequently North East Leicester (Bob Hepple, 'Donovan, Terence Norbert, Baron Donovan (1898–1971)', *Oxford Dictionary of National Biography*, 2010); Salmon: known for his 'sometimes outspoken and fearless defence of liberal values and of the rights of the individual against intrusion by the state or by fellow citizens who failed to respect what became known as his, or her, human rights' (Anthony Evans, 'Salmon, Cyril Barnet, Baron Salmon (1903–1991)', *Oxford Dictionary of National Biography*, 2010). Elwyn-Jones: served as Attorney-General under Wilson, and as Lord Chancellor under Wilson and Callaghan; Scarman: viewed by the 'hard core' of the Bar as a 'bleeding heart' (obituary, *Guardian*, 10 December 2004); Morris of Borth-y-Gest: stood for Parliament as Liberal candidate for Ilford (Herbert Edmund-Davies, 'Morris, John William, Baron Morris of Borth-y-Gest (1896–1979)', *Oxford Dictionary of National Biography*, 2010).
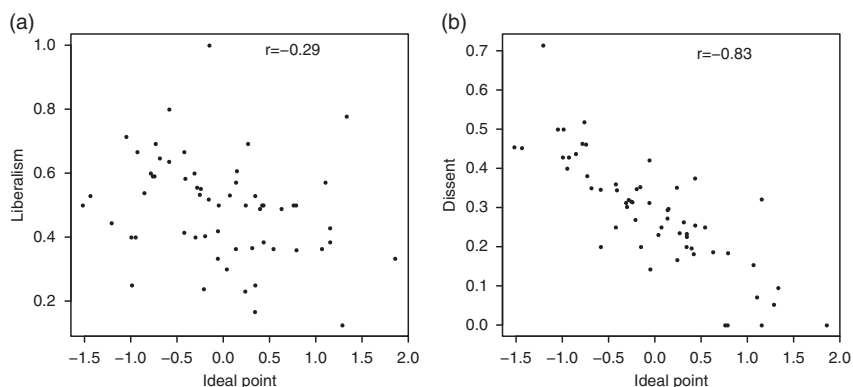
Fig. 3. Ideal points and judges' voting. (a) Ideal points by liberalism; (b) Ideal points by dissent

277   However, this interpretation of the recovered dimension as a conservative-liberal
278 dimension is not borne out by more basic statistics on case outcomes. For each issue area,
279 we can calculate a judge's raw 'liberalism score' – the percentage of times s/he voted in
280 a notionally liberal direction, as described in Table 1. Although the correlation between a
281 judge's location and his/her raw liberalism score is negative, as expected, the correlation is
282 very weak ($r = -0.29$) (see Figure 3a).
283   Only one judge characteristic is reliably associated with their location. The correlation
284 between judges' rate of dissent and his/her location is highly significant ($p < 0.001$) and
285 strong ($r = -0.83$) (see Figure 3b). This relationship suggests that the recovered
286 dimension is not measuring differences between judges' political attitudes, but rather
287 their views about the usefulness of dissent, with justices to the left of the recovered
288 dimension – Hale, Mustill, Morris and Hobhouse – more inclined to dissent than justices
289 such as Hope of Craighead, Browne-Wilkinson or Roskill. This is the only explanation
290 for why almost all of the discrimination parameters were positive – because judges who
291 are favourably inclined to dissent are, tautologically, often in the minority.
292   If the recovered dimension does indicate judges' propensity to dissent, how can we
293 explain the moderate-to-strong relationship between their locations and the party that
294 appointed them? Previous US research has shown that female judges[41] and judges from
295 non-traditional backgrounds[42] are more likely to author dissenting opinions. Labour
296 nominated the only female Law Lord (Baroness Hale), as well as six of the eleven judges
297 who were not educated at fee-paying schools, despite nominating far fewer judges
298 (twenty-five to the Conservative party's thirty-nine). Whilst attending a state school may
299 only be considered a 'non-traditional' background in the rarified atmosphere of the
300 Lords, Labour appointees do differ in their background characteristics.
301   Conversely, the Conservative party nominated bare majorities of the Scottish (five to
302 four) and Northern Irish (two to one) judges shown in Figure 2; they are clustered
303 towards the right end of the recovered dimension. Of the nine judges who have practised

[41] Monica Teets Farris, 'Why Judges "respectfully dissent": An Analysis of Dissent on the US Courts
of Appeals', Annual Meeting of the Midwest Political Science Association, Chicago, 2001.
[42] Virginia A. Hettinger, Stefanie A. Lindquist and Wendy L. Martinek, 'Comparing Attitudinal and
Strategic Accounts of Dissenting Behavior on the US Courts of Appeals', *American Journal of Political
Science*, 48 (2004), 123–37.

at the Scottish bar or heard Scottish cases, only one – Jauncey of Tullichettle – is to the left of the median justice (Lord Rodger of Earlsferry, also Scottish). Indeed, we can be far more confident about differences between Scottish/non-Scottish judges than we can be about party differences: $P[\tilde{\theta}_{Scot} > \tilde{\theta}_{\neg Scot}] = 0.96$.

This finding suggests that propensity to dissent is based on particular personal characteristics, rather than the idiosyncrasies of individual judges, and that appointees of different parties differ in those personal characteristics. Judges who specialize in English law (rather than Scots law or the law of Northern Ireland) and who come from non-traditional backgrounds, such as state schools or countries other than England (thus including both Welsh judges and judges such as Cooke, Pearson, Hoffmann and Steyn), are less likely to act deferentially towards English law in general and precedent in particular. Judges who specialize in Scots or Northern Irish law, whether from non-traditional backgrounds or not, act with greater deference in all cases, the majority of which involve English law. These personal characteristics may translate into differences in jurisprudence – 'Scots judges have tended towards a… black-letter interpretative approach to the law'[43] – but there is insufficient evidence of this. Only if we had a coding of the *style* of judicial opinions in terms of narrow, conservative holdings or broad, liberal holdings – in a fashion analogous to that given in Table 1 for case outcomes – could we demonstrate this.

DISCUSSION

Thus far, I have shown that a particular model of decision making on the House of Lords Appellate Committee, where judges' votes are expressions of their location along a single dimension, is a poorer model of voting than a simple null model, which predicts that each judge has the same probability of voting with the majority. Therefore, the judge locations plotted in Figure 2 should not be interpreted as positions in the political space.

This conclusion does not mean that judges' decisions do not 'reflect' their attitudes in some other way. First, it is possible that a majority decision of a panel of judges is affected by the attitudes of the judges who comprise it, even if the individual decisions of panel members are not.[44] This might be the case if judges seek consensus. Judges decide in part based on the draft opinions of their colleagues,[45] and will 'acquiesce or give a *dubitante* opinion' in order to preserve unanimity.[46] Judges are also less likely to reverse colleagues with whom they will have to work in the near future.[47] Such behaviour violates the assumption of conditional independence that is found both in attitudinal models of judging and in the item response framework. Methods that treat the majority outcome as the explanandum, such as linear discriminant analysis[48] or ecological item response theory,[49] may therefore yield intelligible judge and case locations.

[43] Aidan ONeill, 'Judging Democracy: The Devolutionary Settlement and the Scottish Constitution', *Edinburgh Law Review*, 8 (2004), p. 186.

[44] Sunstein *et al.*, *Are Judges Political?* (in particular, Table 2.1 and pp. 38–39).

[45] Robin Jacob, 'Intellectual Property', in Blom-Cooper, Dickson and Drewry, *The Judicial House of Lords 1876–2009*, pp. 716–17.

[46] Alan Paterson, *The Law Lords* (London: Macmillan, 1982), p. 102, quoting Lord MacDermott.

[47] Jordi Blanes i Vidal and Clare Leaver, 'Using Group Transitions to Estimate the Effect of Social Interactions on Judicial Decisions', unpublished working paper, 2010.

[48] Robertson, *Judicial Discretion in the House of Lords*.

[49] Michael Malecki, 'Judicial Behavior Behind Mask and Shield: Modeling the European Court of Justice', paper presented at the Annual Meeting of the American Political Science Association, 2009.

Secondly, the fact that the attitudinal model has been shown not to work in the Appellate Committee of the House of Lords does not necessarily mean that it will also fail for the new UK Supreme Court. Institutional features of the new court make it more conducive to dissent; more cases are heard by nine-judge panels, which were a rarity in the Lords; more cases result in a single majority opinion; and more cases deal with human rights claims.[50] These innovations, respectively, increase the likelihood that a judge will disagree with the majority, and decrease the likelihood that a judge who disagrees will be able to finesse his or her disagreement by giving a doubtful concurrence. Consequently, whilst we ought not describe the 'Law Lords' as political, we may wish to reserve judgement on future members of the Supreme Court. We may find that the UK Supreme Court is at the same historical juncture as the US Supreme Court in the 1940s – on the brink of a collapse in the norm of consensus.[51]

[50] Note that this is an area in which some scholars do believe there are differences between judges. See T.T. Arvind and Lindsay Stirton, 'Judicial Decision-Making in the House of Lords: A Preliminary Analysis', paper presented at the Annual Meeting of the Political Studies Association, London, 2011.

[51] Thomas G. Walker, Lee Epstein and William J. Dixon, 'On the Mysterious Demise of Consensual Norms in the United States Supreme Court', *The Journal of Politics*, 50 (1988), 361–89.