Title: Common law systems and COVID-19 policy response: protective public health policy in the United States, Canada, New Zealand, and Australia

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Abstract:

The Covid-19 pandemic affected the United States, Canada, New Zealand, and Australia in 2020 all pretty similarly. Knowing that that these four countries produce similar types of policies, and all follow the common law judicial system, it was necessary to analyze how the highest court of each land influenced political actors when responding to the first Covid-19 outbreak. More specifically, we determine the party affiliation of each Justice/judge, calculated the composition of the Courts and proceeded with determining how each of the four Courts ruled on protective public health policy responses. While this is new data during the beginning of the pandemic, we see similarities between 2020 Court opinions and come to conclude that more research on years following 2020 is significant to finding stronger correlations.

1. **Introduction**

Covid-19 continues to serve challenges worldwide as year three of the pandemic presents more novel infections. Countries struggle with managing repeat infections, excessive deaths, economic disturbances, educational hindrances, and further political discord around policy responses. This chapter focuses primarily on those political disagreements and how the composition of the highest courts in the United States of America, Canada, New Zealand, and Australia has an influence on how protective public health policy responses are considered in the

court of law.[1] This chapter makes this comparative analysis of these four countries, all operating a similar legal system – a common law system. These countries comparably express isolation type policies and rely on the common law judicial system where law is derived on precedent.

With this foundation, when political actors of these respective countries make Covid-19 protective public health policies, the courts play a significant role in the policy-making process and calculus. Typically challenges to COVID-19 response policies mean the courts have opportunities to rule on the legality of the policies. This means high courts have an ex post veto. Beyond that, with their ability to establish policy through binding precedent, high courts in common law systems can alter policy created by other actors to bring those policies closer to the ideal point of the courts.

In this chapter, we focus on six specific COVID-19 policy responses. Specifically, we consider policies including travel restrictions, stay-at-home orders, if wearing of PPE and following social distancing rules were mandatory, limitations on social gatherings, school closures, and restrictions on restaurants, non-essential businesses, and other venues (bars and gyms).

Ultimately, we aim to answer the question – how does the composition of the courts effect protective public health policy responses? This chapter answers by starting with an individualized examination of each country and members of their high courts. Important details noted will include the sitting members of the judiciary in the first several months of the COVID-19 pandemic, actors responsible for each member of the judiciary's selection to the high court, and party affiliation of appointing entities and the members of the judiciary, if known. We use

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[1] Though courts exist among these countries at the national and subnational levels, the Supreme Court of the United States, Supreme Court of Canada, the Supreme Court of New Zealand, and High Court of Australia will be the only courts discussed.

partisanship as a proxy for ideology. Following that, cases regarding Covid-19 responses will be analyzed and critically examined to determine if the demographic of the court (ideology in this case) impacts how restrictive decisions might be. To this end, only focused on the 2020 term year, the objective is to determine what impact, if any, a court's "affiliation" has on Covid-19 policymaking.

2. Court Demographic of United States, Canada, New Zealand, and Australia

In this portion of the paper, Tables 1-4 represent the sitting Justices of the highest court of the United States, Canada, New Zealand, and Australia in 2020-2021, respectively. While the emphasis is in 2020 in this paper, the judges/Justices that were new to the Courts in 2021 is useful information for further research. The findings for 2021 can be compared to the findings in this paper and stronger correlations can be formed. Each table display the members of the respective court, the person who nominated/appointed them, the nominator's political affiliation, and the justices' political affiliation. This demonstrates the composition of each court and helps define ideology to better understand whether a court is considered more liberal, conservative, or perhaps neutral where party affiliation is equally divided among the court.

Table 1: Ideology Identification of the Supreme Court of the United States for 2020-2021

Justice's Name	Nominator's Name	Political Affiliation of Nominator	Political Affiliation of Justice
John G. Roberts, Jr	George W. Bush	Republican Party	Republican Party
Clarence Thomas	George H. W. Bush	Republican Party	Republican Party
Ruth Bader Ginsburg*	Bill Clinton	Democratic Party	Democratic Party
Stephen G. Breyer	Bill Clinton	Democratic Party	Democratic Party
Samuel A. Alito, Jr	George W. Bush	Republican Party	Republican Party
Sonia Sotomayor	Barack Obama	Democratic Party	Democratic Party
Elena Kagan	Barack Obama	Democratic Party	Democratic Party
Neil M. Gorsuch	Donald Trump	Republican Party	Republican Party
Brett M. Kavanaugh	Donald Trump	Republican Party	Republican Party
Amy Coney Barrett+	Donald Trump	Republican Party	Republican Party

Note: this table represents the members of the U.S. Supreme Court for 2020-21, their nominators, and each person's political affiliation.

* Ruth Bader Ginsburg served on the Supreme Court of the United States until her death on September 18, 2020. She had been active in deliberations and decisions up until her death. + Amy Coney Barrett succeeded Ruth Bader Ginsburg on October 27, 2020, and began hearing and deciding on cases at that time.

From the onset of the pandemic, the Supreme Court of the United States has heard and decided on cases involving COVID-19 policy responses from national- and state-level policy-makers. Table 1 displays each member, their nominators, and party affiliation. During this time, Republican-appointed Justices comprised a majority of the Court. The conservative-leaning majority had been skeptical of government intervention and would eventually loosen some regulations around COVID-19 after the first year of the pandemic.

The Supreme Court of Canada had a majority of justices appointed by the Liberal Party. Table 2 displays ten members because Rosalie S Abella was on the Court until July 1st, 2021. She was succeeded by Mahmud Jamal and represents the remaining time of 2021 where he took the responsibilities of judge of the Canadian Supreme Court. This doesn't quite effect any of the data because Jamal and Abella have the same ideology and were nominated by prime ministers of the same party. Members of the Liberal Party treated COVID-19 policy responses more favorable compared to members of the Conservative Party, though there was bipartisan support

for COVID-19 policy response in the early months of the pandemic in Canada (Merkley et al. 2020, Pickup et al. 2020).

Table 2: Ideology Identification of the Supreme Court of Canada for 2020-2021

Justice's Name	Nominator's Name	Political Affiliation of Nominator	Political Affiliation of Justice
Rosalie S. Abella*	Paul Martin	Liberal Party	Liberal Party
Mahmud Jamal*	Justin Trudeau	Liberal Party	Liberal Party
Richard Wagner	Justin Trudeau	Liberal Party	Liberal Party
Michael J. Moldaver	Stephen Harper	Conservative Party	Conservative Party
Andromache Karakatsanis	Stephen Harper	Conservative Party	Conservative Party
Suzanne Côté	Stephen Harper	Conservative Party	Conservative Party
Russell Brown	Stephen Harper	Conservative Party	Conservative Party
Malcolm Rowe	Justin Trudeau	Liberal Party	Liberal Party
Sheilah L. Martin	Justin Trudeau	Liberal Party	Liberal Party
Nicholas Kasirer	Justin Trudeau	Liberal Party	Liberal Party

Note: this table represents the members of the Canadian Supreme Court for 2020-21, their nominator, and each person's political affiliation.

* Rosalie Abella retired on July 1, 2021 and was immediately succeeded by Mahmud Jamal.

The current iteration of the Supreme Court of New Zealand was established in 2004. While New Zealand operated a common law system before 2004, the selection methods for their supreme court has changed since 2004. As such, defining the ideology of the court of last resort in New Zealand presents challenges that do not exist in the other three countries of this study. For many, there is not just one nominator or appointer which simultaneously makes it difficult to identify exact party affiliation. Due to not being appointed by an individual politician where their party affiliation is clear, it was especially difficult determining Glazebrook's exact party affiliation. By continuing with this dataset in addition to the assumption that Glazebrook is associated with one of the center-right leaning parties, New Zealand's Court can be considered

as either neutral or slightly liberal leaning. This ambiguity will be more specifically discussed when cases/theory are discussed.

Table 3: Ideology Identification of The Supreme Court of New Zealand for 2020-2021

Justice's Name	Nominator's Name	Political Affiliation of Nominator	Political Affiliation of Justice
Helen Winkelmann	Jacinda Ardern	Labour Party	Labour Party
Susan Glazebrook	n/a	n/a	n/a
Mark O'Regan	National led government	National Party	National Party
Ellen France	National led government	National Party	National Party
Joe Williams	Labor led government	Labour Party	Labour Party
William Young	Chris Finlayson	National Party	National Party

Note: this table represents the members of the New Zealand Supreme Court for 2020-2021, their nominators, and each person's political affiliation.

The High Court of Australia held a majority of Liberal Party-appointed members through the 2020-21 timeline. Table 4 displays nine because Justices Steward and Gleeson succeeded Justices Nettle and Bell in November 2020 and February 2021, respectively. Nominators in Australia is more clear than New Zealand and party affiliation is more transparent. Justice Steward succeeded Justice Nettle and Justice Gleeson succeeded Justice Bell which enabled the opportunity for Morrison to nominate Justice Gleeson and eventually fill Bell's seat which "turned the seat." Until the latter months of 2020, the Court held a four to three liberal advantage; with the replacement of Gleeson, the Court had a stronger liberal ideology of five to two.

Table 4: Ideology Identification of the High Court of Australia for 2020-2021

Justice's Name	Nominator's Name	Political Affiliation of Nominator	Political Affiliation of Justice
Michelle Gordon	Tony Abbott	Liberal Party	Liberal Party
Stephen Gageler	Julia Gillard	Labor Party	Labor Party
Patrick Keane	Julia Gillard	Labor Party	Labor Party
Simon Steward*	Scott Morrison	Liberal Party	Liberal Party
Jacqueline Gleeson*	Scott Morrison	Liberal Party	Liberal Party
Susan Kiefel	Malcolm Turnbull	Liberal Party	Liberal Party
James Edelman	Malcolm Turnbull	Liberal Party	Liberal Party
Virginia Bell*	Kevin Rudd	Labor Party	Labor Party
Geoffrey Nettle*	Tony Abbott	Liberal Party	Liberal Party

Note: this table represents the members of the Australian High Court for 2020-2021, their nominators, and each person's political affiliation.

* Justices Steward and Gleeson succeeded Justices Nettle and Bell in November 2020 and February 2021, respectively.

3. Cases involving Covid-19 Policy Responses Heard and Decided in High Courts

United States of America

Public health policy responses to Covid-19 brought conflict between and among national- and state-level policy-makers. The federal nature of the United States created informational and authority redundancies that allowed multiple levels of policy-makers to issue responses to the COVID-19 pandemic (Shvetsova et al. 2020). The variation in who decides how to respond to health crises created differences in health outcomes and public opinion (Shvetsova et al. 2022, VanDusky-Allen, Utych, and Catalano 2022).

The disparate policy responses and contexts of response also resulted in challenges to policy in state and federal courts. Policies related to travel restrictions, stay-at-home orders, if wearing of PPE and following social distancing rules were mandatory, limitations on social gatherings, school closures, and restrictions on restaurants, non-essential businesses, and other venues all tested limits to executive and legislative powers in dealing with an unprecedented health crisis.

However, during much of 2020, courts tended to take a "wait and see" attitude toward COVID-19 policy due to the high amount of uncertainty around the trajectory of the pandemic. That said, there were two cases in 2020 that the Supreme Court of the United States considered listened to regarding the specific Covid-19 responses for this purpose: *South Bay United Pentecostal Church v. Newsom* (2020) and *Calvary Chapel Dayton Valley v. Sisolak* (2020).

In *South Bay United Pentecostal Church v. Newsom* (2020), the Supreme Court of the United States delivered its opinion on May 29, 2020. The Court declined to block a California executive order that placed temporary numerical restrictions on public gatherings. It also blocked part of the executive order where it restricted any gathering that surpassed 25 percent capacity or up to 100 people in places of worship. This order attempted to limit gathering sizes, especially those that were indoors and consistent with meetings such as churches. The disagreement in this case was that the First Amendment right of religious free exercise was infringed upon. Yet, with a five to four vote, the Court denied the attempt to block the California executive order. The dissenting Justices were Thomas, Alito, Gorsuch, and Kavanaugh.

Less than two months later, on July 24, 2020, the Supreme Court delivered the majority opinion *Calvary Chapel Dayton Valley v. Sisolak* (2020). The Court again declined to block a Nevada executive order that limited attendance at religious services. The order refused more than 50 persons to any one religious service despite other venues including casinos were permitted to have up to 50 percent capacity. This case was sought as an attack on the First Amendment's religious free exercise rights. Like the previously discussed case, the vote was 5-4 with the dissenting Justices being Thomas, Alito, Gorsuch, and Kavanaugh.

As many would agree, two cases are a small sample size, but keep in mind, the timespan of investigation (2020) is relatively brief and while policies were allowed to play out for a bit. In

2020 we only start to see cases of our response types of interest reach the Court. Still, this collection of information tells significant discoveries. In general, it elucidates that in terms of Covid-19 protective public health policies, the Justices party affiliation or party pressure appears to influence the overall decision-making process. All four dissents were by the same Justices, all "affiliated" with the Republican Party.

The purpose of this chapter is not to dive into each case in-depth, but to find a general theme for both denials of injunctive relief. In both cases, restrictions on attendance at religious services "appear[ed] consistent with the Free Exercise Clause of the First Amendment" (*Calvary Chapel Dayton Valley v. Sisolak* (2020)). The court reasoned that "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." The US Constitution allows for state and federal governments to provide for the safety and health of the public." While this majority-conservative court did not overturn any public health responses regarding Covid-19 and did not set precedent to limit politicians from creating response in 2020, it would do so in 2021 and 2022.

Canada

In Canada, the Supreme Court acts as the court of last resort, where it has jurisdiction over arguments in constitutional, administrative, criminal, and civil law. The Canadian Supreme Court does not hold trials, but instead listens to appeals from other appeal courts. In 2020, the Supreme Court of Canada did not receive any cases disputing any Covid-19 public policy responses in any province or at the national level. There were some provincial cases, however it never advanced to the Court.

This does not necessarily mean that the Court did not care to listen to any cases regarding Covid-19 responses, it just means none had reached the Court. Other appellate courts did settle disputes. However, no challenge to policy found its way to the supreme court docket, testing the constitutionality in 2020. And while there are no cases to analyze and reflect on opinions, we can still theorize how cases may have gone in the first several months of the pandemic in Canada's court of last resort.

Unlike the conservative bench of the Supreme Court of the United States, the majority of Canada's Court is liberal leaning. A more left-leaning court would likely result in more restrictive Covid-19 protective public health responses being upheld in court. However, given the support for pandemic policy response across the political spectrum in Canada, political elite may have determined that challenge policy, at least early on in the pandemic, would not provide political benefits for their party. With challenges less likely due to widespread public and elite support, this enabled policy-makers to craft responses and tackle Covid relatively free of political pushback from the judiciary or public.

New Zealand

Similar to Canada, New Zealand had no Covid-19 policy challenge that reached their supreme court. The Supreme Court of New Zealand only hears cases the judges grant leave to appeal, and none that matched the six types of responses focused on this chapter reached the court in 2020. Most of disputes regarding Covid-19 were settled in lower appeal courts which resulted in all of the policies implemented by the provinces and federal government to be upheld.

As New Zealand has become more progressively liberal over the years, the court appears to be pretty neutral, perhaps even conservative leaning. Due to Susan Glazebrook's records, it's

difficult to determine her party alignment although it is believed that she has center-right political beliefs. However, for the accuracy, it remains undetermined and nonetheless interesting information. The fact that cases were all settled at lower appeal courts, it doesn't really give us a chance to determine patterns or actions by this bench composition. That said, in a neutral court or slightly conservative leaning court, we expect party affiliation does have some impact. Labour Party aligning Justices would prioritize public health and well-being while National Party aligning Justices would push for individual freedoms and less restrictive public health policies. In the event of tie votes and that this bench is neutral, the decision from the lower court would stand. That being the case, that lower court decision would impact voting where all conservative leaning Justices would push to overturn the decision. The case that the Court is conservative leaning, it would have no issues overturning a decision and attempt to take aggressive action to question policies. However, as it also seems here, lower courts were upholding policies and the Supreme Court was not asked to further question anything. This enabled New Zealand to mitigate Covid-19 within communities throughout the country without any political obstacles. It's fair to say that this judicial support made handling Covid-19 primarily science based and that lines up to records on how New Zealand handled the first Covid wave.

Australia

The High Court of Australia strongly aligns with a center-right-leaning ideology and the two cases that reached Australia's highest court seems to have matched the previously discussed theory. Liberal Party ideology promotes more socially holistic viewpoints, especially regarding public health. When the first wave hit Australia, both the states and federal government jumped in, implemented protective public health policies to best mitigate the outbreak. This inherently

limits individual liberties by telling citizens to quarantine, instilling a curfew, telling people to wear face masks, and even if they can travel or not.

In November of 2020, the Court heard *Palmer v. Western Australia.* The plaintiff was a Western Australian who claims that the quarantine and travel ban during 2020 violated his right of "interstate commerce, trade, and intercourse." In other words, he felt his right to travel and choose what to do during travel was violated. The Court easily shut down Palmer's argument with a unanimous vote claiming that the 'state of emergency' which prevented Palmer from traveling and conducting his business was within Constitution bound. His freedoms were taken from him due to the state of emergency which ultimately overrides personal desires. Again, this is an example of how well-being and public safety is priority to this Court.

Additionally, in December of 2020, the Court reviewed *Gerner v. Victoria.* According to the official transcript of the case, the unanimous opinion claimed, "The High Court rejected a Melbourne business owner's claim that Victoria's lockdown directions infringed an implied freedom of movement from the *Constitution*. The Court's decision upheld the settled approach to constitutional interpretation, confirming the Constitution provides no basis for an implication of freedom of movement that limits legislative or executive power." Essentially, the Court decided that there was no basis to suggest "freedom of movement" from the Constitution. The Court rejected the plaintiff's argument stating, "that given the Constitution expressly preserved the States' powers by s106 of the Constitution it would be 'surprising' if States had to conform to the limitation as suggested by the plaintiff."

These results clearly show that Australia's political agents targeted the Covid outbreak with science; they could confidently use scientists' recommendations to lay out policy and mitigate the disease. Data claims that Covid-19 response was effective in Australia and its results

stem from policymakers listening to recommendations from experts without having the fear of being questioned by the judiciary. Knowing that abiding by the loosest interpretation of the Australian Constitution, the liberal Court would support and uphold policies, making it that much easier to focus on mitigating Covid and not political differences.

4. Conclusion

Ultimately, whether or not political actors that make policies were impacted by the Courts, we see patterns in Covid-19 responses and how the Courts managed novel cases with pandemic responses. Inevitably, political actors need to think about the courts; as 2020 passes, there starts to exist further questioning of policies and restrictions that have different patterns we analyzed in 2020. The hypothesis was tested – more left-leaning Courts uphold implemented policies and listen to cases under no pressure of time to announce an opinion, while more conservative aligning Courts perhaps take more aggressive action to listen to more cases and overturn policies that limit individual freedoms. While this paper does preliminary work, it is crucial to continue this analysis with 2021 and 2022 to really determine correlations. At this point, we see that the Courts may not follow this initial thesis because the pandemic struck the world by surprise; Courts did not want to make forever impacting opinions that could set precedent on public health and crises in general. All four countries analyzed did not have an overturned policy despite composition and while some conservative Justices dissented Court majorities, there are also some Justices that did not dissent which is surprising.

However, all of this said, there are many variables not tested and can further be examined to continue this research. Gender on the Court, age, even race hold significant weight to what goes into a public health court decision. Following Constitutions is one thing, but individual

preferences always have part in an opinion. All these factors including, but not limited to are interesting to think about; women can be more nurturing and care for well-being more than men, one's racial identity could affiliate a connection with a group that is hit harshest under crises, and age as Covid was most damaging to older groups all play an instrumental role in judicial calculus and how it effects policies and ultimately political actors.

References

AnnaFordyce. (2021, April 29). *High Court of Australia rejects challenge of covid-19 lockdown restrictions*. Human Rights Law Centre. Retrieved May 16, 2022, from https://www.hrlc.org.au/human-rights-case-summaries/2020/12/10/high-court-of-australia-rejects-challenge-of-covid-19-lockdown-restrictions

Merkley, E., Bridgman, A., Loewen, P., Owen, T., Ruths, D., & Zhilin, O. (2020). A Rare Moment of Cross-Partisan Consensus: Elite and Public Response to the COVID-19 Pandemic in Canada. Canadian Journal of Political Science, 53(2), 311-318. doi:10.1017/S0008423920000311

Pickup, M., Stecula, D., & Van der Linden, C. (2020). Novel Coronavirus, Old Partisanship: COVID-19 Attitudes and Behaviours in the United States and Canada. *Canadian Journal of Political Science*, 53(2), 357-364. doi:10.1017/S0008423920000463

Shvetsova, Olga, Andrei Zhirnov, Julie VanDusky-Allen, Abdul Basit Adeel, Michael Catalano, Olivia Catalano, Frank Giannelli, Ezgi Muftuoglu, Tara Riggs, Mehmet Halit Sezgin, Naveed Tahir and Tianyi Zhao (2020), "Institutional Origins of Protective COVID-19 Public Health Policy Responses: Informational and Authority Redundancies and Policy Stringency", Journal of Political Institutions and Political Economy: Vol. 1: No. 4, pp 585-613. http://dx.doi.org/10.1561/113.00000023

VanDusky-Allen JA, Utych SM, Catalano M. Partisanship, Policy, and Americans' Evaluations of State-Level COVID-19 Policies Prior to the 2020 Election. Political Research Quarterly. 2022;75(2):479-496. doi:10.1177/10659129211056374