Searching and Seizing After 9/11: Developing and Applying Empirical Methodology to Measure Judicial Output in the Supreme Court's Section 8 Jurisprudence

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Richard Jochelson,* Searching and Seizing After 9/11: Michael Weinrath** and Melanie Janelle Murchison*** Developing and Applying Empirical Methodology to Measure Judicial Output in the Supreme Court's Section 8 Jurisprudence

In 2005, Margit Cohn and Mordechai Kremnitzer created a multidimensional model to measure judicial discourse inherent in the decision making of constitutional courts. Their model set out multiple indicia by which to measure whether the court acted within proper constitutional constraints in order to determine the extent to which a court rendered a decision that was activist or restrained. This study attempts to operationalize that model. We use this model to analyze changes in interpretation of search and seizure law under section 8 after the enactment of the Canadian Charter of Rights and Freedoms at the Supreme Court of Canada. The authors attempt to determine whether or not there were significant changes in the levels of measurable judicial discourse after 9/11. They explain how the model can be adapted into a Canadian context and justify the adapted model. The last part of the paper undertakes the application of the model to all Supreme Court cases since 1982 that explored Charter-based search and seizure issues. Ultimately, the paper finds significant changes in judicial discourse for certain types of judicial output, which indicate a more conservative approach to judicial decision making in the period after 9/11. The adapted model serves as a reminder that courts exercise their decision making through discourse that moves in numerous directions in any given era and that likely does so differently in alternate areas of law. Future research applying the Cohn/Kremnitzer model promises rich, complex analysis that will serve to enrich our understandings of law and society.

En 2005, Margit Cohn et Mordechai Kremnitzer ont créé un modèle multidimensionnel pour mesurer le discours judiciaire inhérent à la prise de décision par les tribunaux constitutionnels. Afin de déterminer dans quelle mesure un tribunal a rendu une décision activiste ou empreinte de retenue, le modèle propose de nombreux indices pour évaluer si le tribunal a agi en respectant les limites constitutionnelles appropriées. La présente étude tente d'opérationnaliser ce modèle. Les auteurs utilisent ce modèle pour analyser les changements dans l'interprétation, par la Cour suprême du Canada, des dispositions de l'article 8 de la Charte canadienne des droits et libertés sur les fouilles, les perquisitions et les saisies. Les auteurs tentent de déterminer s'il y a eu des changements importants et mesurables dans le discours judiciaire à la suite des événements du 11 septembre 2001. Ils expliquent comment le modèle peut être adapté à un contexte canadien et justifient le modèle adapté. La dernière partie de l'article applique le modèle à tous les arrêts de la Cour suprême prononcés depuis 1982 dans lesquels il a été question de la Charte relativement à des fouilles, des perquisitions et des saisies. En conclusion, l'article constate que le discours judiciaire a subi des changements importants pour ce qui est de certains types de décisions, ce qui semble indiquer une méthodologie de prise de décision empreinte d'une plus grande prudence au cours de la période postérieure au 11 septembre 2001. Le modèle adapté rappelle que le discours des tribunaux, lorsqu'ils exercent leur pouvoir décisionnel, prend de nombreuses directions à une époque donnée et qu'il le fait probablement différemment dans d'autres domaines du droit. Les recherches futures sur l'application de la théorie Cohn-Kremnitzer devraient mener à une analyse riche et complexe qui enrichira notre compréhension du droit et de la société.

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Introduction: studying changes in search and seizure law in the “Securitized Society”

In the past ten years, since the terrorist attacks of 11 September 2001, the news, popular media, politicians, activists, and social scientists have all expressed suppositions on the broader effects that these events have had on Canadian society. Certainly, in the context of legal scholarship there are some who have argued that certain cases are illustrative of the increasingly security focused nature of judicial decisions that govern the law of criminal procedure. Indeed the events of 9/11 are recognized in the scholarship as


being a “watershed” moment that, on an international and national scale, “provided the catalyst for the widening of police surveillance and search authority.” This event has manifested in what some have described as a governance strategy of “preventive law enforcement,” under which “police often lack the [person]power and technical expertise to keep pace with global terrorists and criminals.” Thus, they have employed “public safety strategies” that enhance a more “prominent police surveillance and search role” through the modification by the judiciary of “established civil privacy protections.” In the Canadian context, such incursions have been postulated to occur to certain of the legal rights contemplated under the Canadian Charter of Rights and Freedoms, and in particular the protections against unreasonable search and seizure, the rights to counsel and silence, and the right to be free from arbitrary arrest and detention.

Most of the scholarship that focuses on a new “securitized” era of post 9/11 society concentrates on the socio-political conditions of the era. Such scholarship often refers to this new era of security as informed by a risk averse ethic of precaution and as tending to reify certain western democratic values (such as the desire for security) as universal. Critical scholars have postulated that after the events of 9/11, the legal approach to police power constitutes a state of exception—a moment when previously unheard of state incursions are contemplated as normalized and where the

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5. Bloss, supra note 1.
tenets of freedom underpinning liberal democracy are suspended. It has been posited in these critical circles that police powers after 9/11 have resulted in more secure policing strategies; however, most resistance to the notion of the "securitized state" focuses on "grand" events such as the Vancouver riot of 2011 or the G20 police crackdown. Following these events there is a tendency to see incursions of law enforcement into civil society as large scale and terrible tragedies involving massive violation of civil liberties. It is assumed that in this state of exception the latitude provided by the judiciary in the jurisprudence of police powers will "expand both the reach and authority" of police to engage in searches and surveillance.

If indeed the post-9/11 world dictates that we live in a "state of exception," we would expect to see such changes infiltrating the decisions of the Supreme Court of Canada. We would expect to see a Court that is fundamentally changing the means by which we seek protection against the state. In short, we would expect to see some ramifications in the way our Supreme Court has interpreted our constitution. In our study, we seek to ask whether the Supreme Court of Canada has changed its approach to constitutional adjudication in the context of search and seizure law since 9/11. Simply, we ask whether we see discursive changes in the area of s 8 adjudication, in the court's approach prior to and after the events of 9/11. In doing so we recognize that any results we find are correlative and might represent a confluence of post-9/11 shifts and changes to court composition and administration.

Section 8 of the Charter protects the individual from unreasonable search and seizure at the hands of the state. Its most basic protection requires a court to balance the interests of liberty and privacy against the

need for security. In a “securitized society” (regardless of whether that securitization was merely caused by 9/11 or correlated with post-9/11 changes in tandem with other factors) one would expect to see changes in the way the Supreme Court adjudicates and discusses these types of cases. These sorts of changes would be worth studying because the creeping nature of such legal changes could be more insidious than the grander spectacles of violations covered by the media. Indeed, the incremental changes of law inherent in judicial reasoning measured over a period of years could potentially affect more citizens in the explication of our fundamental freedoms than one iteration of a grand event, such as the G20 protests or the Vancouver riots, or the analysis of the adjudication of a single legislative security solution, such as anti-terrorism legislation or security certificate regimes.

Yet, developing a model to study such adjudicative changes at the hands of the judiciary would be complex. It is difficult enough to assess changes in legal precedent over multiple years, and certainly that is a study in which legal researchers regularly engage. Measuring changes in legal discourse over a period of years would be more difficult still. How would one measure the political changes of a supreme court? This is a matter exacerbated in a judicial context where the court often publishes non-unanimous decisions replete with concurring and dissenting opinions.

If it seems obvious that measuring the Supreme Court’s approach to search and seizure law would be one interesting metric which could elucidate socio-legal change after the time period demarcated by 9/11, the means by which one sets out to engage in this study seems less than clear. If the first part of our study is the question of whether changes in search and seizure law after 9/11 indicate results which align with notions of the


11. For excellent studies of anti-terrorism legislation and security certificates see Bell, Freedom of Security, supra note 8.
“securitized state” (due to a post-9/11 effect, court composition changes, or a confluence of factors), our second question must be methodological: what research instrument could provide a useful metric by which to answer the research question posed?

In 2005 Margit Cohn and Mordechai Kremnitzer developed what they have described as a “multidimensional model” of judicial activism and analysis to analyze the decision-making of constitutional courts using seventeen specific parameters which they divided into three broader categories. The model (which we refer to as the Cohn/Kremnitzer model) was not without controversy, however, as the term “judicial activism” remains highly contested even though the area is the site of numerous studies in socio-legal scholarship.

The term “judicial activism,” according to Russell is subject to multiple meanings, is often used as a means of critiquing a particular decision, and suggests, when lobbed at the judiciary, that they have somehow abused their constitutional or legislative role. Charges of judicial activism are usually meant to suggest that the court has adopted a political stance and, worse, that this stance has resulted in judicial decision-making beyond the “proper limits” of the judiciary.

The purpose of this study is to determine if the Cohn/Kremnitzer model of analysis can be used to examine changes over definitive time periods in judicial discourse, specifically as it relates to search and seizure legislation. The Cohn/Kremnitzer method is more comprehensive than previously articulated models and allows for an examination of a “fuller spectrum of activism indicia.” Its comprehensive nature allows the possibility that a researcher who attempts to measure the indicia may be doing more than developing a political critique of the court, but might instead be elucidating the analytics of judicial decision making by recording the judicial tools of

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reasoning employed in the case law. The model, however, as developed by Cohn and Kremnitzer is still “value laden” in that the researcher will invariably make value judgments to determine whether the court has behaved in an “activist” fashion. We argue that steps can be taken on a methodological level to reduce this value judgment, at least at the outset of the process, by developing a coding method that focuses the analysis on quantifying the discourse of the court. What the court says about its own reasoning can be measured along an activist scale (in place of measuring the analyst’s belief about the activist orientations of a court).

This paper consists of three parts. In Part I we develop a means of operationalizing our metric. Our goal here is to discuss the development of the Cohn/Kremnitzer model and to develop the instrument as a means of measuring changes in Supreme Court discourse in the post-Charter era and in particular as a means of comparing the discourse-based analytics of the court before and after the events of 9/11. It is important to note that 9/11 marks a temporal point by which to compare two sets of data. The finding of any statistical significance here would not necessarily demonstrate that 9/11 caused changes in discourse, but that after 9/11 the court used different discourses which could be due to a number of factors, including the effect of 9/11 itself on court analyses.

In Part II we explain the methodology that we have developed and how we deployed the instrument. Here we also explain how we obtained our findings and what we sought to measure. In Part III we describe our findings along with a discussion of our results. Lastly we conclude with some final observations and some conception of the utility of the model in assessing other research questions in the future. Ultimately we conclude that the model helps to reveal some clear changes in the discourse of the Court after the events of 9/11, but admit that the results do not demonstrate a clear causal effect. The results demonstrate a court that generally measures as more restrained in terms of judicial output along the Cohn/Kremnitzer scale, which suggests a more conservative approach to judicial decision making in the period of time we measured following 9/11. At best, the changes indicate a correlative effect in judicial discourse that coincided with the events of 9/11, which provides interesting data for analysis and for the formulation of further research questions. At the least, the model inspires a new language of legal empiricism that creates new possibilities for thinking about changes in judicial decision making.
I. Developing a model of era-based judicial analysis

1. Cohn and Kremnitzer locate their model of judicial activism

In this section we provide the reader with a working knowledge of the judicial activism theory that underpinned the development of the Cohn/Kremnitzer multidimensional model of judicial activism. A further review of the extant literature of judicial activism is, unfortunately, beyond the scope of this paper. This brief background to the Cohn/Kremnitzer model and the debate it addresses is a starting point from which, we hope, further study using the model can expand.

A defined understanding of the term “judicial activism” remains a challenge in the literature; this is not surprising because the term is often used as a species of critique about the political leanings of court decisions. Most often scholars use the term “judicial activism” to question the content of judicial decision making or to question the broader theoretical place of a court’s conduct. Thus, charges of judicial activism have been made by both left-leaning and right-leaning scholars depending on the politics of a court’s decision. This motivated Cohn and Kremnitzer to develop a more complex model in an attempt to empiricize the study of judicial activism.

One common political strategy has been to use judicial activism as a charge that a court has somehow flouted democracy in its decision by contradicting or altering the intent of the legislature. These charges often lead to claims that the activism of the court has upset the balance of powers contemplated in originating constitutional documents. Oftentimes, impetus for such charges stems from a scholar’s interpretation of the original meaning of the constitutional document or the legislation at issue.

Even in this context of textual interpretation, scholars are able to contest the meaning of judicial activism. These scholars point out the elasticity of technical legal interpretation and point out that the notion of determining original intention contained in legislative documents is an

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18. Ibid.
20. Ibid.
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elusive exercise. These concerns about elasticity are rebutted by scholars who argue that the activism of the court can be adjudicated by placing original texts in a "natural" or "moral" context. Here scholars speak of the universality of certain norms of the constitution and use this foundation as a means of assessing unbounded judicial action as activist.

Regardless of moral or norm-based foundations, judicial activism has been described as a type of unbounded discretion—a court may behave in an activist fashion when it exceeds the scope of its bounded functioning. Often this boundedness is described as the limits of a court’s expertise. A court is portrayed as a specialist in evidence, but as a generalist when it comes to broad policy decisions. Thus, a court may be held to be activist when it relies on untraditional, limited, or unsubstantiated social science evidence. Yet even this definition of judicial activism is contested. Critiques emerge of this account of activism because it assumes that the judicial decision is somehow the terminus point of decision making. In response to the so-called myth of judicial finality, dialogue theorists point out that the court is merely one adjudicator in a larger complex of constitutional dialogue and that legislatures always have the opportunity to respond to court decisions, even if that response needs to evoke constitutional override provisions.

In a dialogic model, courts are charged with responding to legislatures who legislate with an eye to governing through policy and with efficiency. Courts assume a role of guardianship of the constitution in such models and it is derogation from that guardianship that would establish an act of judicial activism by courts. The courts and legislatures are construed as agonistic players in a larger constitutional formula, which by definition must be apprised of some political tension. Cohn and Kremnitzer, in

23. Kelly & Murphy, ibid at 10-11; FL Morton & R Knopff, “Permanence and Change in a Written Constitution: The ‘Living Tree’ Doctrine and the Charter of Rights” (1990) 1 Sup Ct L Rev 533 at 545-546.
24. Ibid.
The notion that a court may be behaving in an activist fashion when it abandons its role as guardian of the constitution is even more contentious in this complex of socio-political tensions. Some might argue that a court which strikes down legislation while emboldening constitutional values is behaving in a non-activist manner.\textsuperscript{30} Still others would argue that a court’s legitimacy in striking down such legislation ought to be compared with the populist will of the times in order to assess whether the court has behaved in an activist fashion.\textsuperscript{31} Others might see less activism in situations where courts strike legislation down, but do so in the furtherance of protection of vulnerable populations in the face of populist dissent.\textsuperscript{32}

Cohn and Kremnitzer recognise these complexities and difficulties of interpretation. They argue that the only way to account for these complexities is to build on a multidimensional analysis of judicial activism. Here they rely on the work of Canon.\textsuperscript{33} Cohn and Kremnitzer are arguing for a “justificatory” account of judicial activism—an account that sees courts as agents of liberal political theory.\textsuperscript{34} This approach requires thinking about judicial analytics rather than universalizing one’s political values and then assessing a court as having engaged in activist

\textsuperscript{28} Cohn & Kremnitzer, supra note 15 at 340.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid at 339; Dyzenhaus, supra note 3.
\textsuperscript{33} Cohn, supra note 17 at 115; BC Canon, “A Framework for the Analysis of Judicial Activism” in SC Halpern & CM Lamb, eds, Supreme Court Activism and Restraint (Lexington, MA: Lexington Books 1982) at 386. Canon developed six species of activism: majoritarianism (the usurpation of the legislative role by courts), interpretive stability (deviation from earlier doctrine), interpretive fidelity (degree of deviation from original intent), substantive-democratic process distinction (substantive policy making rather than democratic preservation), specificity of policy (the making of policy at the expense of the discretion of other institutions), and alternate policy makers (the availability of other institutions to properly exercise the requisite discretion).
\textsuperscript{34} Cohn, supra note 17 at 96.
or restrained behaviour. The Cohn/Kremnitzer approach requires thinking about activism from numerous vantage points and relaying those findings rather than embarking pre-emptively on a political judgement of the court based on left-leaning or right-leaning predilections of the scholar.

2. **The Cohn/Kremnitzer model of judicial activism**

In an attempt to analyze the complexities of judicial activism, Cohn and Kremnitzer outline seventeen indicia of activism in their original work.\(^{35}\) The indicia are further organized into three broad dimensions of activism.\(^{36}\) The dimensions are “traditional visions” of activism, “socio-legal deviation” activism, and “core value” activism.\(^ {37}\) The dimensions are organized to account for the theories of judicial activism that Cohn and Kremnitzer argue have been most prominent in the literature.\(^ {38}\)

“Traditional visions” of activism is the dimension of activism that attempts to measure a court’s decision making against established legal values, rules, and understandings. The more a court moves from these established norms, the more activist it will be considered. Here Cohn and Kremnitzer outline twelve separate but interrelated indicia. The first indicia, “Judicial stability” asks whether a court has, in its decision, deviated from its past decisions or decisions of lower courts. “Interpretation” asks whether the decision of a court interprets legal text as apprised of the original meaning of constitutional text (by ascertaining the intent of the drafters or using the plain wording of the constitutional document). “Majoritarianism and autonomy” solicits whether the court’s decision upsets the policies established by the legislature and its democratic functions. “Judicial reasoning” examines a court’s decision and seeks to determine whether the court is aligning itself with the usual legal procedure or whether a court instead uses reasonableness-based tests to explain the scope of its decision making; for instance, an appeal to reasonableness-based standards to enhance a legal category would be considered activist in this context. “Threshold activism” asks whether courts adhere to rules of legal threshold, such as the expectation of privacy as a gateway issue in the context of unreasonable search and seizure protections, or standing rules in the context of constitutional applications by relatively disinterested parties. A court that exempts threshold limitations of litigants behaves in a more activist manner. “Judicial remit” asks whether courts have expanded their own jurisdiction beyond previous understandings; for example, a

\(^{35}\) Cohn & Kremnitzer, *supra* note 15 at 341, 343, 346, 347, 352.

\(^{36}\) *Ibid.*


\(^{38}\) *Ibid.*
decision to decide a matter held previously to not be justiciable would be activist according to this factor. "Rhetoric" asks whether a court's decisions use prose that considers values or politics beyond what is needed to solve a legal problem—a rhetorical decision would be more activist on this account. "Obiter dicta" measures whether a court's decision extends beyond what is technically required to solve the matter; for instance, a court that pronounces on legal issues not currently before it might be behaving in a more activist fashion. "Comparative source reliance" examines that decision of a court to see the extent to which the court uses international or extra-jurisdictional sources to make a decision—the more extra-jurisdictional a court's reasoning the more activist the court is being. "Judicial voices" postulates that the more dissenting or alternate decisions that are made in a particular court case, the more activist the entire decision. "Extent of decision" asks how wide reaching the court's decision will be; a far reaching decision would be construed as more activist, while a well tailored, more myopic, and bounded decision would be considered more restrained. Lastly, "legal background" suggests that when courts use creative reasoning to circumvent previously established clear legal tests they are behaving in a more activist fashion.39

The indicia in the first dimension rely on relatively well established legal and political theories that have developed in the scholarship of judicial activism. Cohn and Kremnitzer, however, argue that there is a socio-political dimension to judicial activism that exceeds these traditional bounds. They argue that a second dimension, "socio-legal deviation," accounts for judicial analytics that occur beyond the words of the judicial decision. This dimension is mainly concerned with post-decision effects of judicial cases.40 Here Cohn and Kremnitzer seek to measure the decision as it is received in subsequent realms. Do other entities reject or accept the judicial decision? Cohn and Kremnitzer posit that these reactions can be measured at the level of the legislature, administrative entities, other courts, and the general public.41 The purpose of this dimension of analysis is to assess whether a court is perceived by external players as reflective or deflective of emerging societal consensus.

The final dimension of analysis is rooted in the theories of those who view constitutional guardianship as a pivotal role of courts. "Core value activism" measures a court's decision with its alignment or obfuscation of core constitutional values. Cohn and Kremnitzer posit that the single

39. Ibid at 342.
40. Ibid at para 40.
41. Ibid.
factor of “intervention and value content” will help in assessing whether a court has met its constitutional allegiance obligations. A court which makes a decision which accords with its constitutional stewardship would, thus, be less activist than a court which abandoned its constitutional post in the rendering of the decision. Cohn and Kremnitzer recognize that the determination of constitutional values is complex. Cohn and Kremnitzer argue that when the values in question are “high” content (for instance they effect important human rights issues) and when the values are “thin” (subject to change but firmly entrenched in the constitution—for example equality has had changing meanings depending on legal decisions, but its place in the Charter is entrenched), courts that appear to pay heed to these values in decision making are acting in a less activist fashion.42

3. **Trying to apply Cohn and Kemnitzer**

Attempts to empiricize the study of judicial activism are apparent in the recent scholarship, but thus far few academics have attempted to do so with the Cohn/Kremnitzer model.43 Those who have attempted to apply the Cohn/Kremnitzer model have done so, qualitatively, in single case studies, rather than attempting to apply the model to a number of cases or to a court era more broadly.44

The reluctance to apply the model stems from methodological concerns. First, it has been posited that it is relatively difficult to weight each indicium given that the first dimension contains by far the most indicia whereas the third dimension contains only one indicium.45 Second, it has been argued that the second dimension of analysis is unduly controversial because it delineates a participatory role for the judiciary in the social sphere. For instance, Canada is one of the few jurisdictions where dialogue theory has been debated and considered legitimate as a means of describing a court’s constitutional role.46 Third, the Cohn/Kremnitzer model has been

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42. *Ibid*; “Our third vision of activism considers the protection of core values as a relatively non-activist exercise, as it is a constitutional role of the judiciary. We join those who accept that judicial output is inherently value-based, and normatively argue that in a constitutionalist climate, the judiciary is an active participant in a broad social effort to promote and maintain ‘core’ or ‘thin’ constitutional principles. The utilities of this participation outweigh the potential dangers—dangers that are essentially tempered, in constitutional democratic frameworks, by an effective power of the legislature over the judiciary and other societal restraining mechanisms embedded in the constitutional network. We thus adhere to the argument that purely value free judicial decision-making is not only impossible, but also untenable”; also, Jochelson, “Sniffer Dogs”, *supra* note 1 at 244.


45. *Ibid*.

46. *Ibid*.
described as unwieldy because it has too many indicia to measure; this is a matter which some scholars have deemed to be an empirical challenge.\textsuperscript{47} The wide ambit of analysis has caused some to suggest that what Cohn and Kremnitzer may be measuring is not judicial activism at all, but some other new species of judicial analytic.\textsuperscript{48}

The first issue pertaining to weight is not difficult to answer and it is a matter closely related to the concerns of the third issue: the unwieldy number of variables measured in the Cohn/Kremnitzer model. As we will demonstrate below, ascribing meanings and weight to numerous indicia is possible given precise enough statistical extrapolation. The second critique, pertaining to the contested nature of judicial function as unduly participatory, is more challenging. Certainly, the development of a socio-political dimension of analysis disrupts the “traditional visions” of activism normally encountered in the literature. More troublesome is the fact that in order to assess the degree of socio-political deviation from societal consensus, a researcher would be required to make a judgment call about the extent to which a court deviated from societal consensus. A similar methodological pitfall exists for the third dimension, where a researcher would be required to determine the content and form of constitutional values and measure a court’s output against a researcher’s judgment call. Certainly scholars who situate their work in the “traditional visions” camp would dispute these judgment calls, but we suggest that these same researchers are required to make similar judgment calls in determining whether activism has occurred in the first dimension. For example, under “traditional visions” in the assessment of judicial stability, would a researcher not be required to determine what they believed to be precedent and to then posit the degree to which a court deviated from that precedent? The amount of judgment to be exercised in this type of activism analysis, regardless of the dimension, is open to influence (at the conscious or subconscious level) by the researcher.

Thus, we see the broad challenge in operationalizing any judicial activism model as a challenge in minimizing the judgment calls to be made by the researcher. Here we suggest reorienting the Cohn/Kremnitzer model to a discourse-based analysis of court decision-making. If the researcher is tasked with determining the content of what a court said about its own decision-making, then the judgment call of the researcher is reduced to an exercise of coding rather than a decision about activism. The coding exercise of the researcher is then an attempt to record the voice of the court

\textsuperscript{47} Muttart, “One Step Forward,” supra note 13 at 13.
\textsuperscript{48} Ibid.
itself and the text of the decision becomes the empirical source of primary research. Reimagining the Cohn/Kremnitzer model as an empirical study of court decisions would require use of the second dimension be forestalled for a different project. The socio-legal reaction to court decisions is not a matter than can be coded in a content-based empirical project (an "in their own words" methodology of the court prohibits examining the words of other entities such as media representations of court cases).

We are aware of critiques from those who study judicial activism that would problematize the coding project of a discourse-based project. For instance, by relying on a court’s own justifications and use of analysis, how can the researcher make an informed decision about whether the court was behaving in an activist or restrained fashion? Ultimately, the development of the Cohn/Kremnitzer model was a response to the dissatisfaction with political accounts of courts behaving as activist or restrained. The determination of restraint or activism is largely a qualitative response to a qualitative question. Discourse analysis provides a means for assessing larger quantities of cases and providing an empirical basis for qualitative conclusions about activism or restraint in terms of a court’s own language. Rather than begin the discussion with a political question (i.e., activist or not?), the discourse approach we outline below seeks to measure a number of parameters and to hold off discussion of a court’s analysis until the primary research is gathered.

Some scholars have openly called for more quantitative studies of judicial activism and have questioned the statistical value of assessing activism one case at a time\(^4\); we intend to take up this challenge as we operationalize the Cohn/Kremnitzer model. Previous quantitative assessments have largely relied on the judgment of the researchers to label a court as activist or restrained, while others have tried to describe other political factors involved in judicial decision making.\(^5\) For example, Osterberg and Wetstein studied the pre-appointment political affiliations of judges as predictive of their attitudes on issues when appointed.\(^6\) Certainly such studies provide fascinating results; however, we wish to contribute a different empiricism to the discussion. In our study, we seek to simply measure the Cohn and Kremnitzer criteria to elucidate discussion about court analytics and to discuss the trends that emerge. This study of

\(4\) Ibid at 66.


\(6\) Ostberg & Wetstein, supra note 43.
judicial discourse, along the lines of an adapted Cohn/Kremnitzer model, will add to an empirical understanding of judicial reasoning and provide further data for theorizing judicial decision-making. An adapted Cohn/Kremnitzer discourse scale would remove its “justificatory” predilections, take the court’s own words more seriously, and provide rich possibilities in assessing judicial analytics apart from measuring precedential effects.52

Reorienting the Cohn/Kremnitzer model towards discourse and away from activism also reveals other advantages. Most research in this area takes place in response to judicial consideration of the constitutionality of legislation; however, many court decisions involving constitutional principles occur in the absence of legislation save for the constitution itself, which may lead traditional activist researchers to decide against analysis (since they may be interested in the court upholding legislative intent in impugned legislation). For example, improper police conduct in Canada is analyzed in many circumstances quite apart from legislation, in part because wide-ranging police powers legislation has not been enacted in Canada.53 In such cases, a court may be left analyzing the constitutional propriety of police misconduct against constitutional law alone. Our model would allow analysis of the Court’s decision in this context, even in the absence of legislation, because we seek to measure the discourse of the court rather than understanding whether a decision is activist or restrained. We are measuring whether the words of the court are phrased in terms of activism or restraint—this is quite a different assessment than previously undertaken in the literature.

In the remaining pages of this article we unveil a test analysis of our adapted Cohn/Kremnitzer judicial discourse test. Rather than unveiling the test over the entire course of Supreme Court decision making as some studies have done, we employ a different strategy.54 The problems with measuring parameters over the life of an entire court is that all legal subjects are canvassed, many socio-legal changes are sublimated (for instance, changes in attitudes and norms are diluted over large and diverse swaths of cases), and precise questions can not be asked and answered. Asking, for instance, how the Supreme Court’s approach to police powers has changed after the attacks of 11 September 2001 would be ineffective if we studied every area of the court’s jurisprudence. What would a case about torts tell us about the court’s jurisprudential approach to state power wielded through the police? Trying to determine the sample cases of where to delineate the

discourse approach is, to some extent, a discretionary exercise. We have determined that beginning the study narrowly and subsequently expanding the examination to other areas of study is the approach that will yield the most precise information.

As a starting point, an interesting site of investigation of Supreme Court discourse analysis is the jurisprudence involving section 8 of the Charter. The guarantee to be free from unreasonable search and seizure is obviously a source of great debate since the events of 9/11. The issue involves debates about balancing security versus liberty and the proper role of the state in our lives since the pivotal events of that day. If the study of an adapted Cohn/Kremnitzer discourse model revealed any interesting data in this context it would then be worthwhile to apply the model to other salient police powers. For instance, the study of the law of arrest, detention, and the right to silence and counsel, would all be appropriate projects following our analysis below.

We attempt to operationalize the adapted Cohn/Kremnitzer model in the context of search and seizure law because of its relevance to the security responses to the events of 9/11 and because the area has provided us with enough case law at the Supreme Court level to generate relatively statistically significant results in a quantitative analysis. Below we outline the methodology of the study and our results. We then engage in a discussion of the results, followed by a conclusion about the results and the possibilities of an adapted Cohn/Kremnitzer discourse analysis for future studies.

II. Articulating a discourse based methodology

1. Sampling

The sample for our data consisted of all Supreme Court of Canada search and seizure cases dealing with section 8 since 1982. All of the cases were found on the legal databases Westlaw, QuickLaw, CanLii, and LexisNexis and the databases were cross referenced with each other to ensure all cases that contained the search terms “section 8, s 8, Charter, Search, Seizure, Privacy” were included. This created an original sample size of 154 cases spanning 27 years, with the first case in 1984 through to our final measured case in June 2011 (these cases are listed in Appendix 1). Each case was printed and then individually read through at least twice, being analyzed for both content and relevance. For example, cases that only made a passing reference to section 8 (such as Cloutier v Langlois55) or to illustrate the explication of another section of the Charter as a comparison

were excluded due to their lack of analysis of section 8. Cases that were less than ten paragraphs long were also excluded from the sample due to insufficient analysis and explanation upon which we could make an assessment. After this examination, a total of 85 cases remained for analysis. To determine whether or not a change had taken place in judicial discourse, we divided our sample into two groups. The first comprised all cases which occurred prior to 11 September 2001 and the second was all cases that occurred after 11 September 2001. There were 54 cases in the first group and 31 cases in the second group.

2. Operationalization of the multidimensional model
Each of the seventeen variables Cohn and Kremnitzer created were operationalized as ordinal variables in order that differences could be ranked and meaningful comparisons made. A 1-10 Likert scale was used, with a 1 indicating the lowest level of judicial activism, while a 10 represented the most activist type of behavior along the lines postulated by Cohn and Kremnitzer. During initial data collection it became apparent that in our study only two of the three dimensions, “traditional vision activism” and “core values activism,” should be measured. The second dimension of “socio-legal deviation” (“legislative reaction,” “administrative reaction,” or “public reaction”) is not germane to our study. This left thirteen of the seventeen variables to be analyzed, in large part because the goal of this specific project was to measure judicial discourse, not socio-political reaction to judicial decision making.

A content analysis approach was taken to the data collection, with criteria established to rank the presence and intensity of a certain attribute. In order to determine how each case should be scored on this ranking system, criteria were identified on which to base the 1-10 ranking system for each of the thirteen variables. Each case was assessed each time against the content analysis criteria for ranking. We provide a basic outline of our ranking criteria for each variable below, listing extreme ends of the ordinal continuums. A much more detailed description is available on request from the first author.

3. Variables: traditional visions of activism

Judicial stability—Here we measure how the court has behaved with regard to its own and other relevant precedents. When the court affirms the decisions of all lower courts we score the case as a 1. When the court overturns a previous decision and overturns legislation and creates new law, we score the case as a 10.
**Interpretation**—Does a court interpret a legal text in possible contradiction with the assumed original intent of the constitution or its plain linguistic meaning? Where the court interprets section 8 in light of an original intent or plain meaning approach we score the case as a 1. Where the court interprets the section in a way that is unremittingly interpretive, we score the case as a 10.

**Majoritarianism and autonomy**—Here we measure whether the court interferes with policies set by democratic processes and if the court is willing to supply its own solution and/or policy. When the court does not interfere with policies set by democratic processes or leaves all legislation unimpeached we scored the case with a 1. Where the court struck down legislation and applied its own policy or solution we scored the case as a 10.

**Judicial reasoning: process/substance**—With this factor we measured how heavily the court relied, in its decision, on strict legal and procedural grounds. Where the court relied entirely on strict legal or procedural grounds in making a decision we scored a 1. Where the court relied on open-ended legal tests, such as reasonableness-based assessments we scored a 10.

**Threshold activism**—Here we measured the extent to which the court was willing to forgive threshold hurdles. In this context a rigorous application of threshold issues, such as the reasonable expectation of privacy as a gateway to accessing s 8 of the Charter for a party, would score a 1 (the reasonable expectation of privacy is the main threshold issue in s 8 cases). Where the court found reasons to allow for reasonable expectation of privacy where previous cases had not we scored the case as a 10.

**Judicial remit**—This factor asks whether the court’s decision expands or redefines the jurisdiction of the court. When the decision did not expand or redefine the jurisdiction of the court we scored the case as a 1. A decision that expanded the judiciary’s remit into areas previously immune from intervention was scored as a 10.

**Rhetoric**—This factor asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted in the court’s explication of legal principles? We scored the absence of legal rhetoric (usually correlating with shorter decisions) as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.
Obiter dicta—This factor asks how far does the court expand its opinion beyond the legal requirements of the specific case? When the court did not delineate any obiter we scored the case as a 1. When the Court used extensive amounts of obiter and discussed issues not relevant to the case we recorded a 10.

Reliance on comparative sources—Here we examined how extensively the court relied on foreign sources that are not legally binding in the domestic sphere. Where the court used domestic law exclusively we scored a 1. When the court used comparative sources to create new legal conceptions with extensive comparative referencing we scored a 10.

Judicial voices—Here we examined the extent of other judicial decisions besides the majority decision. A unanimous decision scored a 1. On occasions where we saw two concurring and two dissenting judgments (the most judicial voices we saw) we scored a 10.

Extent of decision—Here we examined whether the court’s ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the court simply applied the legal rules we typically scored a 1. Where the court created a new standard that affected broader populations we scored a 10.

Legal background—Here we examined whether the legal framework on the basis of which the court made its decision was inclusive and clear or whether the rules concerned were vague, complex, self-contradictory, or incomplete. Where the court applied clear rules that did not extend beyond the prior case law we scored a 1. Where the framework was murky and when the court generated a new framework for analysis we scored a 10.

4. Variables: core values activism

Intervention and value content—Here we examined if the subject matter under examination was highly value laden in that it had bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the court appeared to assert its guardianship of the constitution, we scored a 1. Where the court declined to discuss the constitutional values at stake we scored a 10.

5. Data analysis
After the data was collected and coded, it was loaded into Statistical Package for the Social Sciences (SPSS) for analysis. In this, our initial study, we were most interested in the univariate descriptive outcomes for each multidimensional indicator. How consistently did we find strong
evidence of any of Cohn and Kremnitzer’s thirteen measures of judicial discourse? Then we compared all of the thirteen domain variable means for the periods 1984–2001 (pre-9/11) and from 2002–2011 (post-9/11), estimating mean differences and t-statistics (higher t-statistics generally mean the variable tested has a reliable impact on the matter being investigated) to determine if judicial decision making had been impacted in the aftermath of the 9/11 attacks. Our sample size is not large, making it more difficult to achieve highly reliable outcomes. Indeed, it is definitely not a random sample and represents the entire population of cases that meet our criteria, making significance testing somewhat moot. Indeed, we will use statistical significance as a way of grounding those interested in the comparative features of our analysis. As such, we decided to relax the typical standard of statistical significance, which is \( \alpha = 0.05 \) for a two-tailed t-test and will report levels at \( \alpha = 0.10 \) one tailed, which is still a desirable measure of significance.

We encourage the reader to not be overly concerned about statistical significance and instead focus on the size of the differences between the two post-Charter eras. An overemphasis on statistical significance instead of effect size is not a new issue.\(^56\) To assist the reader in assessing the magnitude of differences we will express the means in the more easily interpretable metric of percentages by multiplying the Likert scale means by 10.

III. What were the findings of the instrument in the context of section 8 jurisprudence?

1. Descriptives

Indicator mean scores were generally low: “core values” (5.09) was the only judicial discourse variable to attain a mean of 5 (Table 1). Closer to a mean score of 4 were “judicial voices” (4.24), “extent of decision” (4.22), “activism threshold” (4.08), “rhetoric” (4.01), and “legal background” (3.95). “Judicial stability” and “judicial reasoning” were around 3.8, while “interpretation” and “comparative sources” scored close to 3. Less frequently found present to a high degree in our case reviews were “obiter” (2.26), “majoritarianism” (2.13), and “judicial remittance.” The standard deviation and range scores show considerable variability in the level of involvement by the Court in any of the judicial discourse variables. A standard deviation tells us how close most scores in a distribution are to

the average. In statistics it is preferable that a standard deviation is small relative to the mean, because this indicates there is similarity in a group or consistency in a certain task. For example, if a football team averaged 30 points a game with a standard deviation of 5, this means they could be counted on to score 25-35 points a game, a good steady performance. If, on the other hand, the standard deviation was 20, then the team might be in trouble; their scores could run from a low of 10 to a high of 50 points a game and it is likely they would not be very consistent. In the case of judicial activism we can observe that the standard deviations are quite high, as are the ranges between the minimum and maximum scores reported for each indicator. This makes sense, however, because the variables that the court considers in a given case are highly contextual and vary from case to case to a larger degree than more simplistic events (like a football game). Almost all indicia ranked as high as 10 and as low as 1. This means that in several instances the presence of the indicia in court cases were quite intense, while in others, were almost non-existent. Given the complexity of court cases, we were not surprised that the indicators did not score highly on activism in every instance.

2. Pre- and post-9/11 mean scores
The amount of judicial activism present declined on almost all indicators from pre-9/11 to post-9/11. It is also worth noting that the entire decade of jurisprudence following 9/11 occurred after the ascendance of Chief Justice McLachlin. One possible interpretation of virtually all the changes that have occurred in our data in this project is that the changes are attributable to the chiefship of the latest chief justice.

Similarly, the Court also experienced other significant changes, such as the court’s composition and the absence of several of the pre-9/11 judges may alter the discourse that we are able to empiricize. Many of these justices had left the court and their prose was to no longer have a discursive effect on decisions; Justice L’Heureux-Dubé, for example, retired in 2003 and was renowned as a dissenter on the court. This may speak to less measurable activism after her retirement. In future studies we plan on running the data to cross-compare judicial era as a function of changes in discourse. For now, we offer these alternate explanations as a caveat to our findings. When we speak of measurements of indicia pre- and post-9/11 below we are not suggesting that 9/11 caused any changes, but rather that measurable changes were found in some instances in the

57. Chief Justice McLachlin was appointed on 7 January 2000 to the position of Chief Justice of Canada.
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period following 9/11. We urge the reader to understand this terminology as indicative of a temporal period rather than speaking to the causal effect of 9/11 on our findings.

The only increase was in the “activism threshold” (a small increase of 6.9%), that might be attributable to the recent expansion of the test for reasonable expectation of privacy in the last decade. The test is one which is the threshold determinant of a party’s access to section 8 based Charter defences. Effects stable enough to achieve statistical significance are generally in the small to modest range (6.6%-12.9%), indicative of the conservative nature of our courts and their resistance to dramatic changes.

3. Most significant shifts

The most significant shifts downwards were in the areas of “comparative sources” (-12.9%), “judicial voices” (-10.8%), and “legal background” (-9.5%). According to its own written decisions, the Court was, after 9/11, less likely to cite or be influenced by other nation’s legal systems. In the first seventeen years after the Charter’s inception, the Court often looked to different jurisdictions to inform and place in context the Charter rights it adjudicated. Following 9/11, the Court was less likely to do so. There are various interpretations explaining this tendency. The most pertinent is that after 9/11 we were already nineteen years into the Charter era. The need for extra-jurisdictional information this many years after patriation may have been less pronounced. An alternative explanation might postulate that a court in a post-9/11 era might be more insular, focused on national affairs and less likely to be influenced by international jurisprudence. We also found that since 9/11, the Court has tended to agree more amongst themselves with respect to their own decisions, with fewer dissenting and concurring decisions, and more unanimous decisions. Certainly, this is a factor which is easily attributable to the leadership of the chief justice. One could also make a case for the importance that a court might place on unanimity in a post-9/11 atmosphere. One could conceive that a court adjudicating on search and seizure law after 9/11 might be less likely to quibble on the record over the legal minutiae of law and save such disputes for a less “securitized” era.

58. The Court has, since 9/11, reconsidered the threshold adjudication of s 8 of the Charter in the form of the reasonable expectation of privacy analysis on several occasions. This might result in an increased activism measurement in this context. For examples see R v Patrick, [2009] 1 SCR 579; R v Kang-Brown, [2008] 1 SCR 456; R v AM, [2008] 1 SCR 569; and others.

The Court was also less likely to adopt new rules in making their final determinations. The statistics reveal a court that, post-9/11, was less likely to create wholesale changes to legal frameworks and deviate from the clarity of legal rules that preceded them in comparison to the pre-9/11 era. Certainly this observation correlates with a precedent-based assessment of search and seizure law. The last ten years have seen novel developments in the law of search and seizure (for instance the use of ancillary powers to create new species of searches), but it is also the case that most of the major changes had occurred in the first years after the Charter’s advent. Thus it is difficult to say with certainty whether the reluctance to deviate from old tests is simply a matter of a settling effect in comparison to the early years of the Charter or a broader tendency, post-9/11, to adhere more strictly to doctrinal constraints.

4. Moderate significant shifts
Smaller negative effects (about -8%) were observed for “rhetoric,” “extent of decision,” and “judicial stability.” Supreme Court justices were less overtly political in the tone of their case reasoning. This might surprise those who postulate that a court would ratchet up conservative rhetoric in a post-9/11 world. The reasons for diminished rhetoric are less clear. It might be that less rhetorical debate is required nineteen years after the Charter’s inception. Perhaps rhetoric more aptly correlates with the crystallization of the content of rights in the formative years of constitutional interpretation. It could just as easily be postulated that the Court is so attuned to the security climate in a post-9/11 era that it would purposefully mute its rhetorical prose so as to avoid provocation of the reader or to insulate itself from the more critical consumers of its decisions.

The Court also saw a decrease in the tendency for its decisions to have a larger sweep than necessary. The discourse of the Court suggested a court that was interested in tailoring and limiting its decisions to the context it was adjudicating. It is difficult to read this narrowing effect as a post-9/11 effect. Certainly the early years of Charter adjudication emphasized purposiveness and liberal interpretation of rights, but it is just as accurate that subsequently the Court began to emphasize the importance of context as a limiting factor in the extrapolation of Charter protections. Is the use of context to narrow the reach of decision making a natural evolution of the Charter or a purposeful narrowing of rights delineation in a securitized era? The question is difficult to reconcile apart from the observation that

60. Jochelson, “Rubicon,” supra note 1; R v Kang-Brown, supra note 58; R v AM, supra note 58.
61. McLachlin, supra note 32.
statistically the decisions in the context of search and seizure indicate a court tailoring the reach of its decisions to limited contexts.

The Court also demonstrated a reduction in its willingness to overturn both itself and lower courts (in aggregate). Again, this reduction may be because in more “securitized eras,” a court may be more likely to steadfastly maintain precedent and respect the jurisdiction of lower courts. Once again, however, this could simply be reflective of a maturing phase in Charter jurisprudence where less uncertainty pervades the lower courts and previous Supreme Court decisions, rendering deviation from these decisions less likely.

Finally, fairly similar reductions (~7%) were recorded for “majoritarian/autonomy” and “core values.” The drop in “majoritarian/autonomy” evidence indicates that the Court was more reluctant to strike down legislation after 9/11. This willingness to steadfastly stand by the legislative impetus might be construed as a court reacting to the events of 9/11 by circling its jurisprudential wagons and standing by the state. One could also postulate that in the first nineteen years of the Charter era legislatures have grown more astute in the task of Charter-proofing legislation, making the laws more difficult to be struck down by the judiciary. In either case, it seems clear that legislation was more likely to withstand judicial examination in the realm of search and seizure law after 9/11.

Our third judicial activist domain, protection of “core values,” saw a move downwards, indicating that the Court’s lip service to its constitutional guardianship was relatively strong after 9/11. The Court’s delineation of Charter values in the post-9/11 era suggests that the Court was more willing to speak of constitutional values after the attacks. This is not surprising. After 9/11, the cases that would have to grapple with security versus privacy would be more exacting in this scrutiny. For example, the cases of *R v AM* and *R v Kang-Brown* were cases dealing with the privacy interests of an accused in the context of public search environments such as school gymnasiums and bus depots. It is not entirely surprising that the value-laden discussions that ensued in such cases would loom large in an empirical instrument such as the adapted Cohn/Kremnitzer model. This was the first era where these interests were as heightened post-Charter. The attacks of 9/11 certainly were not the only security events to occur post-Charter, but they clearly received more attention than previous post-Charter security-based events. The decrease in the “core value” factor indicates further allegiance of the Court to the discussion of constitutional values, but does little to tell us which values (between security and privacy) the Court ultimately chooses.
5. **Insignificant effects**

While the changes in "interpretation," "obiter dicta," and "judicial remittance" were in the negative direction, we observe that the effects are almost negligible (1.4%-3.0%) and not reliable enough to achieve statistical significance, even with our relaxed standard. It is most likely that these negligible differences from pre- to post-9/11 are due to chance fluctuation.

**Conclusions and possibilities**

Our study of judicial analytics reveals some statistical variations in the Court's adjudication of section 8 of the *Charter* in the search and seizure jurisprudence in seven of the thirteen areas measured. Six of the areas reveal a decrease in the use of activism-related discourse. Notably, the Court seems to be acting in a prudent and measured fashion in reversing fewer previous cases ("judicial stability"), in stating that it is respecting legislative intention more frequently ("majoritarianism/autonomy"), in limiting the Court's jurisdiction and the scope of the application of its decisions by using bounded legal tests in place of open-ended reasonableness-based calculations, tailoring the scope of its decision to specific contexts rather than creating legal decisions with broad and sweeping effect, and in limiting its creation of new rules as a wholesale mechanism of dealing with legal problems ("judicial reasoning," "judicial remit," "extent of decision," and "legal background"). The Court also seems to be curbing its previous tendency to use international sources to buttress its decision making ("comparative sources"), and seems further committed to diminishing dissenting or concurring voices on the court ("judicial voices"). The Court has engaged in less overtly rhetorical posturing as compared to the pre-9/11 period ("rhetoric"), while simultaneously justifying its decision making in accordance with principles delineated as foundational in the discussion of constitutional values ("core values"). While the Court appears to have allowed more parties to have access to making a section 8 claim (as evidenced by the increase in "activism threshold"), the threshold entry into the legal debate by the party seems to be muted by the other discourse-based indicia measured.

The results seem to indicate a Supreme Court that is applying a guarded interpretation of legal rights and law in the adjudication of s 8 of the *Charter* after the period beginning with 9/11. The Court is one that takes precedent, legislative intention, and its limited role in the legislative dialogue more seriously than the pre-9/11 Court. The post-9/11 Court is less likely to use large amounts of its adjudication to pontificate on the political debates inherent in the adjudication of search and seizure, and is
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geared towards creating more unified and limited decisions in this context. These empirical findings suggest that the Court has adopted a more guarded approach towards constitutional interpretation in the post-9/11 era. It is a Court that, in its own words, is cautiously navigating the terrain of police powers. The Court is, on its own account, behaving in a more restrained fashion under "traditional visions" of activism, while at the same time paying more heed to its guardianship role ("core values"). Certainly, this last point suggests that while the Court is behaving in a more restrained manner along the "traditional visions" of judicial activism indicia, it is also paying attention to its role as guardian of the constitution and protector of liberties. This may seem at first blush to be a contradiction, but one could easily surmise that a court that is less likely to offer constitutional protections is at least likely to couch its abandonment of that protection in the language of constitutional values. Thus, the Court is able to present itself as fluent in the philosophy of core constitutional values, while at the same time placing itself in a more conservative place vis-à-vis the role of the legislature, previous courts, and the socio-legal effects of its decision making.

These statistically significant results suggest a court that is adjudicating in the "securitized society" described in the introduction to this article. The conservatism of this course, as measured by its own discourse, correlates conceptually with the paramountcy and universality of security post-9/11 as a societal value and with the precaution-based logic that critical scholars suggest permeates law and society after the 9/11 attacks. It is not surprising that a high court would reflect some of the tensions persisting in the society it adjudicates, especially after an event like 9/11. It is interesting to postulate that such anxieties pervade the discourse of the Court in the context of search and seizure law, yet we must be cautious when making such claims.

It is of paramount importance to note that while the Court's discourse has undergone some significant changes that align with theories of securitization, as we have found, a more conservative and securitizing discourse is not dispositive of the notion that 9/11 caused these changes. We have, throughout this paper, explained that any suggestions that 9/11 played a role in these changes are correlative, and as we have made clear, court composition and administrative shifts are likely interacting with a post-9/11 effect resulting in the findings we have uncovered. These caveats still render interesting findings; the most intriguing being that the Court has shifted in its use of discourse in a way that seems more restrained, conservative, and in alignment with securitization postulations.
The results also merit some further discussion about the adapted Cohn/Kremnitzer metric. Our results correspond with previous case law based studies, which have discussed the potential liberty-diminishing effects of Supreme Court jurisprudence in the last ten years.\textsuperscript{62} It is, however, important to note that the results are a snapshot of Supreme Court discourse in two distinct eras. The differences between the two eras could indicate the event of 9/11 as a natural comparison point. In future studies it would also be interesting to examine the effects on Supreme Court discourse on a per decade basis since the \textit{Charter}’s inception, or by Court composition. Certainly these would be interesting explorations, but just as interesting would be the measurement of these discourse effects in the realm of other jurisprudential areas of police powers. The study of discourse, as we have developed it, is a labour intensive project and the measurement of multiple legal areas and eras would take many years of (relatively thankless) analysis. The results would, however, provide an alternative narrative to Supreme Court decision making beyond the precedent-based effects that legal scholars prefer to assess.

The adapted Cohn/Kremnitzer discourse-based approach thus provides a new language for assessing judicial output. With the model we can assess broad changes in the discourse that a court uses in adjudicating complex constitutional cases, and we can assess these results over numerous court cases instead of the usual manner of assessing the incremental legal changes that accrue in the development of the common law. Thus, the model leaves us with an ability to empiricize broad structural changes in decision making over various eras and, potentially, across numerous jurisprudential areas of study. Like any empirical exercise we are limited by noting that the changes are correlated with the events of 9/11 and there is no model that could state with certainty that the events of 9/11 caused a change in judicial discourse. Being aware of shifts in judicial discourse over time periods might further support broader socio-legal claims being made in the social sciences, might add a dose of empiricism to a usually value-laden debate, or might provide a point of departure for disagreeing with empirical methods in an area of study that is traditionally suspicious of quantitative study. Whatever the utility of the instrument developed, it is a useful complex of discourse measurements, which adds more nuance to the usual bipolar arguments about a court being activist or restrained. The

Court clearly exercises its discourse in numerous directions in any given era and likely does so differently in alternate areas of law. The degree of potential complexity is astounding and can only enrich our understandings of law and society as we embark on future research projects.
### Table 1: Descriptives of multidimensional indicia

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<thead>
<tr>
<th></th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Median</th>
<th>Range</th>
<th>Minimum</th>
<th>Maximum</th>
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<tr>
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<td>9</td>
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<td>1</td>
<td>10</td>
<td>85</td>
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<td>Majoritarian/ Autonomy</td>
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<td>2.14</td>
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<td>9</td>
<td>1</td>
<td>10</td>
<td>85</td>
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<td>Judicial Reasoning</td>
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<td>3.00</td>
<td>9</td>
<td>1</td>
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<td>1.00</td>
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<td>Rhetoric</td>
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Table 2: Comparison of means pre-9/11 and post-9/11 in Supreme Court decisions

<table>
<thead>
<tr>
<th>Variables</th>
<th>Pre-9/11</th>
<th>Post-9/11</th>
<th>Mean Difference As %</th>
<th>t statistic</th>
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*p<.10, **p<.05, ***p<.01, all tests one-tailed. Standard deviations are in parentheses.
Appendix 1

Sample Cases

Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc, [1984] 2 SCR 145.
Canada Inc v Quebec (Attorney General); Tabah v Quebec (Attorney General), [1994] 2 SCR 339.
Canadian Broadcasting Corp v Lessard, [1991] 3 SCR 421.
CanadianOxyChemicals Ltd v Canada (Attorney General), [1999] 1 SCR 743.
Cloutier v Langlois, [1990] 1 SCR 158.
Dagg v Canada (Minister of Finance), [1997] 2 SCR 403.
Dehghani v Canada (Minister of Employment and Immigration), [1993] 1 SCR 1053.
Hill v Hamilton-Wentworth Regional Police Services Board, [2007] 3 SCR 129.
Kourtessis v Canada (Minister of National Revenue - MNR), [1993] 2 SCR 5.
Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink, [2002] 3 SCR 209.
Little Sisters Book and Art Emporium v Canada (Minister of Justice), [2000] 2 SCR 1120.
Quebec Inc v Quebec (Régie des permis d'alcool), [1996] 3 SCR 919.
R v AM, [2008] 1 SCR 569.
R v Beare; R v Higgins, [1987] 2 SCR 387.
R v Dersch, [1993] 3 SCR 768.
R v Erickson, [1993] 2 SCR 649.
R v Gomboc, [2010] 3 SCR 211.
R v Grant, [1993] 3 SCR 223.
R v Grant, [2009] 2 SCR 353.
R v Hamill, [1987] 1 SCR 301.
R v Macooh, [1993] 2 SCR 802.
R v Mann, [2004] 3 SCR 59.
R v McKarris, [1996] 2 SCR 287.
R v Mills, [1999] 3 SCR 668.
R v Patriquen, [1995] 4 SCR 42.
R v Pires; R v Lising, [2005] 3 SCR 343.
Searching and Seizing After 9/11

R v Rodgers, [2006] 1 SCR 554.
R v Scott, [1990] 3 SCR 979.
R v Simmons, [1988] 2 SCR 495.
R v Thompson, [1990] 2 SCR 1111.
R v Wilson, [1990] 1 SCR 1291.
R v Wong, [1990] 3 SCR 36.
R v Yorke [1993] 3 SCR 647.
Ruby v Canada (Solicitor General), [2002] 4 SCR 3.
Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 SCR 425.
Vancouver (City) v Ward, [2010] SCC 27.