THE SUPREME COURT OF CANADA AND THE JUDICIAL ROLE: AN HISTORICAL INSTITUTIONALIST ACCOUNT

by

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Abstract

This dissertation describes and analyzes the work of the Supreme Court of Canada, emphasizing its internal environment and processes, while situating the institution in its broader governmental and societal context. In addition, it offers an assessment of the behavioural and rational choice models of judicial decision making, which tend to portray judges as primarily motivated by their ideologically-based policy preferences. The dissertation adopts a historical institutionalist approach to demonstrate that judicial decision making is far more complex than is depicted by the dominant approaches within the political science literature. Drawing extensively on 28 research interviews with current and former justices, former law clerks and other staff members, the analysis traces the development of the Court into a full-fledged policy-making institution, particularly under the Charter of Rights and Freedoms.

This analysis presents new empirical evidence regarding not only the various stages of the Court’s decision-making process but the justices’ views on a host of considerations ranging from questions of collegiality (how the justices should work together) to their involvement in controversial and complex social policy matters and their relationship with the other branches of government. These insights are important because they increase our understanding of how the Court operates as one of the country’s more important policy-making institutions. The findings have significant implications for debates over judicial activism and the relationship between courts and the other branches of government when dealing with the Charter. The project also concludes that the justices’ role perceptions – the ideas, norms and rules that govern their role as judges and that of the institution – both shape and constrain their decision making behaviour. Understanding judicial behaviour with a focus on role perceptions allows for bridge-building between the competing explanations of judicial decision making and for theory-building in the broader judicial politics literature.
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“The Charter means that judges are called upon to answer questions they never dreamed they would have to face.” – Chief Justice Beverley McLachlin.

Chapter 1 - Introduction

This study describes and analyzes one of Canada’s most important governing institutions, the Supreme Court. Created in 1875, the Court has spent most of its history in relative obscurity. Only in the last thirty years has the institution garnered regular media coverage or sustained attention by political scientists. Much of this interest was generated by the advent of the Charter of Rights and Freedoms, which transformed the Court’s role and thrust its work into the national spotlight. The Court has evolved from a largely legal, dispute-resolving body into a policy-making institution whose decisions have far-reaching implications for virtually all areas of Canada’s political, social, cultural and economic life.

A handful of recent cases are illustrative of the scope and importance of the Court’s work. In 2004, amid considerable public debate, the Court rendered a decision declaring same-sex marriage consistent with the Charter while noting that freedom of religion guarantees prevent religious officials from being compelled to perform same-sex marriages.¹ A year later, the justices dealt with potential tension between two of Canada’s most venerated institutions: the universal public health care system and the Charter. A 4-3 majority struck down a Quebec law prohibiting private medical insurance on the basis that it violated Quebec’s own Charter of human rights and freedoms, with the Court split 3-3 on whether the law was unconstitutional under the Canadian Charter.² In 2006, as many Western liberal democracies continue to struggle with the accommodation of ethnic and religious minorities, the Court ruled that a Quebec school board could not prohibit a Sikh student from wearing his kirpan (a ceremonial dagger) to school.³ And a 2007 case pitted due process rights against national security concerns. The Court struck down specific provisions of the federal government’s security certificates regime, holding that secret

hearings to determine the legitimacy of detaining suspects violate the Charter guarantee of *habeas corpus* under section 10(c) and the right to life, liberty and security of the person under section 7.4

These four cases, like many that now come before the Court, involve decisions regarding the fundamental social and cultural values of the country, basic due process rights, religious and cultural accommodation, national security, and important social programs (in the case of *Choulli*, the largest social program in the country in terms of overall expenditure). This reflects the institution’s important role within Canada’s governing system. Further, all of these cases took place within the last five years, suggesting that on a qualitative level, the Court’s “activism” under the Charter remains as significant as ever.5 The term “activism” is often levelled at the Court in a pejorative manner by critics of its overall approach to Charter enforcement. Here I adopt the oft-cited definition of “judicial activism” articulated by Peter Russell as meaning “judicial vigour in enforcing constitutional limitations on the other branches of government and a readiness to veto the policies of those branches of government on constitutional grounds.”6

The nature and degree of the Court’s activism has been the subject of intense and voluminous attention. For quite some time the extant scholarly literature pertaining to the Court or judicial decision making has been preoccupied by largely normative debates about activism7 or

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the role of the other governmental branches in Charter interpretation. Scholars on the right lament incursions into areas of social policy, such as abortion, by judges who “labour to camouflage their discretionary choices as the inescapable commands of the Charter.” Left-wing critics lament pro-business or liberal individualist decisions and complain that the “Charter was not so much ‘an antidote to the frustration and alienation’ of politics, but its grubby and typical continuation by other means.” Defenders of the Charter and the Court’s jurisprudence have responded, arguing that “judicial creativity is not open-ended, but rather constrained and guided by the need for judges to provide a good-faith interpretation of the text of the Charter, precedents, and traditions.”

Although the Court has a considerable impact on a wide array of public policy issues, its policy role is but one part of the reason why a study of the institution is important. Its rulings have implications for Canadian democracy that extend far beyond using its powers of judicial review to invalidate legislative or governmental action. As the central player in determining the meaning of the Charter, courts are the primary avenue for individuals and groups pursuing rights claims. As a result, judicial pronouncements on Charter rights, particularly those by the Supreme Court, play a prominent role in shaping discourse around rights. The positive and negative consequences of a rights-infused political culture and public discourse are the subject of considerable scrutiny. On one hand, scholars hail the empowering effects rights review has on citizens, particularly for historically disadvantaged groups and individuals. On the other hand, some view as problematic

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10 Hutchinson, Waiting for Cora. 23.
11 Roach, The Supreme Court on Trial, 116.
the capacity for rights claiming to harm political discourse by rendering it absolutist, divisive and uncompromising. Writing in the American context, Mary Ann Glendon contends that “rights talk” subjugates other considerations, values, and policy initiatives to the unbending demands of those invoking a right, hardly a straightforward proposition when there is no consensus of what values, interests or needs should be classified as rights. A number of critics have applied Glendon’s concerns to the Canadian context. Rainer Knopff argues that courtroom rights talk “implies permanent winners and losers, painting one side as angelic and the other as satanic.” Empirical study of the impact the Supreme Court’s rulings have on political discourse is limited, but generally supports these assertions.

In this respect, the “judicialization of politics” enacted by the Charter in Canada – and in which the Supreme Court is a central actor – is not only about the transfer of power to the courts but “a general transformation of the nature of political life.” In Canada, the focus of much attention has been on the shift away from Parliamentary sovereignty to constitutional (some would say, judicial) supremacy. Thus a lot of debate has focused on the “countermajoritarian difficulty” consonant with judicial review, as noted above. Yet the shift towards constitutionalism and the emphasis on rights has transformed the legislative process itself. The rights culture shapes not only legislative responses to Court rulings but legislative initiatives from

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their inception. The “vetting” of legislation for consistency with the Charter by governmental lawyers is now a central component of the legislative process.\(^{20}\)

As Janet Hiebert notes, the Supreme Court has a powerful influence on this process. First, the Court’s two-stage approach to Charter analysis, in which it examines whether a particular right has been infringed and then investigates whether the restriction is reasonable under section 1, has meant that bureaucratic risk-assessment occurs largely within a consideration of “reasonable limits.” Second, because the Court has not shied away from exercising its power to invalidate laws under the Charter, its jurisprudence has no doubt “encouraged a more rigorous approach to internal scrutiny than existed under the Bill of Rights.” In effect, the Court “conveyed to departments the message that governments would have the burden of proof for demonstrating the reasonableness of their actions and that, if courts declare legislation invalid or grant other remedies, these judicial decisions could have substantial policy and fiscal implications.”\(^{21}\) While the development of a legislative rights-conscious culture might be viewed in a positive light, the potential downside is the risk that policy objectives are confined “to those which legal advisers can confidently predict legal “success””—i.e., those that will pass muster before the Court—which in turn “may lead to risk-aversion that distorts policy objectives and undermines Parliament’s ability to pursue legislative objectives effectively.”\(^{22}\)

The Supreme Court’s importance can be measured not only by its rulings’ effects on the country’s law and the immediate policy issues that come before it, but for the influence its decisions have on public discourse, political culture and democratic governance. Canada’s judicial hierarchy, with the Supreme Court at its zenith, appears more appropriate to a unitary state than a federal one.\(^{23}\) By comparison, the United States has parallel state and federal court

\(^{20}\) Hiebert, *Charter Conflicts*; Kelly, *Governing with the Charter*.

\(^{21}\) Hiebert, *Charter Conflicts*, 8-10.

\(^{22}\) Hiebert, *Charter Conflicts*, 55.

systems. In this respect, the Canadian Court has even more influence than its American counterpart.

Despite the institution’s significance, there are only a handful of empirical studies examining the Supreme Court’s decision making during the Charter era.\(^{24}\) Most of the scholarship has concentrated on whether the Court ought to be involved in policy-making rather than exploring the character or quality of the policy-making it is performing. This is noteworthy because a better understanding of how the Court actually works would not only clarify the effects the institution has on specific policies or governance more broadly, but it would also inform these normative debates about the Court’s role and how the other branches of government should engage the Charter or respond to the Court’s rulings.

The historic lack of empirical attention on the Court cannot be overstated. As recently as 1987, Peter Russell, arguably the country’s foremost scholar of constitutional politics, writes:

> Judicial institutions are not regarded as an important item in the agenda of political science. The role of the judiciary is perceived as being essentially technical and non-political: it is there to apply the laws made by the political branches of government. Indeed, the most important normative expectations of judges and courts would seem to be a thorough-going impartiality requiring total independence of the political process.\(^{25}\)

As the level of interest in research on judicial politics mushroomed over the last two to three decades, this view has changed considerably. Not long after the Charter’s enactment, studies describing the Court’s decision-making processes took place within the context of monographs on the broader judicial system.\(^{26}\) One recent book inspired by Russell’s earlier work on the “third


branch” of government provides an up-to-date exploration of Canada’s court system. Other recent research explores broader trends in the Court’s jurisprudence by presenting statistical information on judicial voting patterns or examining the written reasons. Historical works and judicial biographies provide details and insights into the Court’s internal environment.

Finally, and perhaps most significantly, new studies draw explicitly on the theoretical and methodological approaches of the American judicial behaviour literature, examining individual voting patterns based on the justices’ ideologies or other characteristics. Canadian judicial politics scholarship, like many of the other subfields in Canadian political science, has for some time been relatively descriptive and atheoretical. Given that the long tradition of judicial review in the United States has resulted in extensive study on the workings of courts and judicial behaviour, it makes sense that scholars looking for more theoretically rich explanations would look to the dominant American theories and methodologies. Much of the new Canadian scholarship is actually the application of American approaches to the Canadian Court by American scholars.

American legal realists as early as the beginning of the twentieth century questioned the notion that judges merely interpret and apply the law in an objective fashion. Fifty years later

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behaviouralism emerged as the dominant approach to the study of judicial politics in the United States, marking the beginning of extensive theoretical and methodological debates between American scholars of courts and the law within political science.\(^{32}\) The behaviouralist “attitudinal model” regards the ideological policy preferences of the individual judge as the main determinant in decision-making. Attitudinal scholars seek to measure the justices’ attitudes (ideology) and, taking account of case facts, examine voting records to determine how consistent the justices’ decisions are with those attitudes.

The attitudinal model has been challenged by two competing “new institutionalist” perspectives on decision making: rational choice and historical institutionalism. Like attitudinalists, adherents of the “strategic model” or rational choice understanding of judicial decision making generally consider judges’ policy preferences as the main consideration in decisions, but believe that judges must make strategic calculations about their choices given the institutional rules of the game and the preferences of other actors and branches of government. To enact the decisions most consonant with their preferences, judges must make compromises to garner support from their colleagues on the bench and to avoid a backlash from legislatures.

Historical institutionalists consider the broader structural and institutional factors that shape judicial decisions. These scholars challenge the instrumentalist view of judicial decisions as merely the aggregate effect of individual behaviour. Historical institutionalism considers norms, values and ideas an integral part of the analysis. In the judicial politics literature this approach views the judges’ conceptions of their proper roles as important ingredients in their decisions. From this perspective, “institutions affect not only strategies and interests, but also patterns of relationships between actors, preferences, objectives, identities, and indeed, the very existence of

\(^{32}\) To a large extent the methodological component of these debates mirror those that take place across the rest of the political science discipline. For example, see: Sanford E. Schram and Brain Caterino, *Making Political Science Matter: Debating Knowledge, Research, and Method*. (New York: New York University Press, 2006); *Perestroika! The Raucous Rebellion in Political Science*. Kristen Renwick Monroe, ed. (New Haven: Yale University, 2005).
actors ... institutions do not simply represent constraints or embody opportunities for action; institutions are central markers in the process of preference formation.”

What binds these competing views is the recognition that judicial decision making, particularly at the appellate level, is an inherently political process. Of course, a sharp divide persists between political scientists and legal scholars, who continue to have fundamentally different perspectives on the sources of judicial decision making and on the autonomy of the law from the broader political context. Scholars in the two disciplines have only recently begun to engage each other in American academic literature. My view is that the US literature has much to offer – and much to warn against – for the empirical study of courts in the Canadian context. In the next chapter, I explore these competing conceptions of decision-making in depth.

**Approach**

The analysis in this dissertation proceeds from the premise that the Supreme Court is a political institution and that its justices are important political actors. This is not to equate the institution with elected legislatures or justices with politicians. Indeed, one of the main objectives of this study is to examine the multitude of ways in which the judges of the Court are bound by their conceptions of their appropriate role and that of the institution in which they work. Nevertheless, the analysis that follows supports the argument put forward by many political scientists that “[c]ourts, especially final courts of appeal, are political institutions. They make policy not as an

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34 Perhaps the key difference between these schools of thought pertains to if and how ‘the law’ plays an important part in judicial decision making.

accidental by-product of performing their adjudicative function but because a majority of their members concludes that one set of legal rules is more socially beneficial than another.”

My approach to this project adopts a historical institutionalist perspective. Historical institutionalism requires an analysis of organizational and institutional configurations, with specific attention to long-term processes and the “critical junctures” that help shape them. As Pierson and Skocpol write, “[r]esearching important issues in this way, historical institutionalists make visible and understandable the overarching contexts and interacting processes that shape and reshape states, politics, and public policymaking.” Drawing on historical institutionalism and American political development scholarship, a recent study by Miriam Smith examines the evolution of lesbian and gay rights and policy differences in Canada and the United States. Smith writes that “historical institutionalists start with state structures, with the field of political institutions and the legacies of previous policies, to explain divergent policy outcomes.” Critical to the approach is that the state is treated “as an independent player” in the analysis.

Where Smith’s work – and much historical institutionalist work generally – centres on a comparative analysis of policy outcomes, this study focuses on understanding and explaining the work of a single institution. Nevertheless, the logic of analysis remains the same. The approach is premised on the belief that studies of the Court that focus solely on broad statistical trends in jurisprudence or those that seek to explain judicial decision making solely by analyzing the votes of individual justices are limited in their ability to further our understanding of the Court because they treat the institution as a “black box.” As chapter 2 explores, the behavioural and rational choice approaches are too often premised on an unconvincing and simplistic account of decision making, where the justices’ personal policy preferences are almost always treated as their

primary, if not only, motivation. Such studies stress the “outputs” of the black box and draw questionable inferences about the “inputs,” while failing to devote attention to the institutional mechanisms or broader structural forces that have implications for the Court’s decisions. As Smith contends, in contrast to the attitudinal and strategic approaches of judicial behaviour, “historical institutionalism … allows us to embed judicial behaviour within the larger structure of political institutions.”

The aim of this study is to open the black box. Even before the Charter, Paul Weiler cautioned against seeing the Court as “just a group of nine” people because “this picture leaves out one important dimension to the social reality of the [C]ourt. The Supreme Court of Canada is an institution, something more than the immediate preferences and actions of its members at any one time.” Only by describing and analyzing the Court’s decision-making processes and gaining an appreciation of how the justices’ conceive of their proper function both within the Court and in the context of the broader political system can we truly understand how the institution works. The objective is therefore to place the justices’ behaviour in the full context necessary for an accurate appreciation of the Court’s work and its impact on the rest of the governing system.

This is not an easy task. Despite a plethora of books devoted to the internal workings of the U.S. Supreme Court, until recently little empirical work has been conducted on the Canadian Court. Some commentators seem to dismiss the prospects of exploring the inner workings of the institution altogether. Heather MacIvor notes that the secret nature of decision-making “makes it impossible to gauge the relative influence of legal principle and personal policy preference on policy outcomes.” Daved Muttart writes that “[w]hatever the decision-making processes a

39 Smith, Political Institutions and Lesbian and Gay Rights in the United States and Canada, 10.
justice employs, they are almost entirely beyond direct study inasmuch as they occur almost exclusively within the private confines of the judicial cranium.\textsuperscript{42}

Despite changes during the “Charter era” to make the Court more transparent with regard to the media and the public,\textsuperscript{43} the institution has, in certain respects, been less open than its American counterpart. Where journalistic and other insider accounts of the U.S. Supreme Court have become commonplace,\textsuperscript{44} no similar works exist in the Canadian context. Based on interviews with the justices and law clerks, these accounts have caused considerable controversy within the American legal profession by revealing bargaining, lobbying and outright political manoeuvring on the part of the U.S. Court’s justices.\textsuperscript{45} The Canadian justices have no doubt been trepidatious at the prospect of similar books about their institution.

Another contributing factor to the lack of studies exploring the Court’s internal operation stems from the historic failure of the Court to preserve its records. Few justices have donated private papers to the National Archives, and those that did so prior to the Charter failed to include substantive documentation about judgments. Charter era justices have been more careful to preserve their records, but the documents remain unavailable to the public for twenty-five years following their donation to the Archives.\textsuperscript{46}

As a result, the assertions of MacIvor, Muttart and others sceptical of scholarly investigation into the Court’s inner workings are likely true to the extent that they refer to direct observation or scientific precision. The approach of this study, however, is grounded in an understanding of decision-making at the Court as inherently complex, with myriad motivating

\textsuperscript{42} Muttart, \textit{The Empirical Gap in Jurisprudence}. 7.
factors and a host of structural conditions that both influence, and are influenced by, the justices’ behaviour. Making sense of this complexity requires the historical institutionalist approach adopted here and involves drawing on several different sources of data, including open-ended research interviews. A recent study by Donald Songer is the first book to incorporate research interviews with former justices of the Court to describe the institution’s internal decision-making processes. Songer’s focus is “on the continuity and change on the Court in terms of its shifting agenda, the litigants appearing before it, and its patterns of decisions.” His analysis thus incorporates broad quantitative trends in the Court’s decision-making, presenting attribute and ideology-based analyses of the decision making of the justices and the Court as a whole, as well as an examination of which types of parties that come before the Court are typically ‘winners’ or ‘losers.’

The historical institutionalist analysis in this study takes a different approach to Songer’s, in that it emphasizes the centrality of the justices’ role conceptions in order to gauge the relative impact of factors like ideology, strategic behaviour and institutionally-derived norms and values at different stages of the Court’s decision-making process. Understanding Court decision making by way of judicial role perceptions places emphasis on:

1) the ideas and norms that shape a justice’s approach to her work.
2) behaviour connected to collegiality (i.e. the working relationships of the justices and the effects of norms, rules, processes and personalities on that relationship).
3) the impact of the broader institutional environment
   a. both within the Court, involving its evolution into a more explicitly policy-making institution (i.e. changing nature of caseload, particularly under the Charter; the full involvement of clerks in research/writing process; changes in the type of evidence involved in decisions; constraints, such as concerns for efficiency), and;
   b. outside the Court (i.e. What conception of inter-institutional “dialogue” do the judges actually have? How much consideration do they give to media coverage or public opinion?)

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48 Songer, The Transformation of the Supreme Court of Canada, 6.
The major argument advanced in adopting this approach is that the judges’ policy preferences, values or “ideologies” do matter, but that judicial behaviour is also governed by what the judges think about how they ought to approach their work. A focus on the various stages of decision-making and institutional processes at work provides insight into when and under what circumstances policy-oriented or strategic behaviour might occur. Moreover, it is about how these role-related constraints come into play.

Twenty-eight research interviews were conducted for this study: five with current and former justices of the Court, twenty-one with former law clerks and two with senior staff members. Research interviews were conducted from July 2007 to April 2008. All interviews were conducted on a not-for-attribution basis. Throughout the dissertation, all interviewees, male and female, are occasionally referred to as “her” or “she” for the purposes of writing and to further protect their identities. Most of the interviews with former law clerks were from thirty minutes to an hour in length. The clerks interviewed served on the Court from 1979 to 2005, for thirteen different judges, providing snapshots of the Court’s working environment throughout its modern history. The interviews with the justices and other staff members ranged from one hour to two-and-a-half hours.

In addition to the interviews, the analysis incorporates the speeches and writings of the justices, many of whom provide insight into their approach to adjudication or their perceptions of their proper role. Other secondary sources provide insight into the operation of the Court. Particularly illuminating among these is a handful of judicial biographies, the authors of which were given rare access to the private papers of the justices. Further, much of my analysis is

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49 Many of the former clerks I interviewed declined to answer questions if they felt that doing so would break confidentiality. Several former law clerks I contacted to request interviews declined on that very basis. I left it to those who accepted my request for an interview to determine what information they were prohibited from sharing.

50 Put another way, dividing the Court into “eras” by chief justice, I interviewed two Laskin-era clerks (Laskin served as chief until 1984); four Dickson-era clerks (1984-1990); six Lamer-era clerks (1990-1999) and nine McLachlin-era clerks (2000-present).
conducted with explicit attention to the quantitative and qualitative findings presented in other studies of the Court.

Finally, any analysis of the Court’s work is incomplete without an examination of its primary product: the case decisions. The most ardent behavioural scholars dismiss written reasons as mere rationalizations of the justices’ preferred policy outcomes. Yet the institution’s legitimacy rests on the justifications for the outcomes it determines. As Russell writes,

The judicial decision is apt to find its strongest basis of public support in its capacity to persuade those whose rights and interests it affects that it is the correct decision – indeed, the legally required decision. In this sense the reasons which judges give for their decisions, although such reasons may be quite different from the psychological process through which they actually reach their conclusion, are, in our society, the prime basis of the judicial decision’s moral authority.

The written decisions also have a genuine impact on the citizenry as they carve out the scope of particular rights, issues or policies at stake and set the guidelines for lower courts to settle the same issues in similar cases.

Moreover, as a product of a distinctly collegial process, the reasons do much more than merely establish winners or losers. The internal procedures of the Court influence the character and quality of the final judgments. Even if the language of reasons distorts or hides political or value-based motivations, because they are a product of deliberation and negotiation among a group of actors, they cannot be seen as mere proxies of individual votes. Indeed, it would make little sense for the justices to expend so much of their time producing careful judgments if that is all they were. At a minimum, even if reasons are nothing more than sites of activity for the justices’ attitudinally-based or strategically-minded behaviour, no study of the Court would be complete absent some inquiry into the content of those decisions.

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Following from this, the dissertation incorporates analysis of cases as part of its investigation of the institution. Cases selected for analysis pertain to particular themes examined throughout the dissertation. For example, chapter 3 includes an exploration of the development of the law of justiciability (which concerns what issues are appropriate for courts of law and in what context those issues should come before the courts), and thus cases referred to in this section are those recognized as the leading authorities for that area of law as cited in the literature. Chapter 6 presents an examination of the Court’s capacity for dealing with complex social policy issues. Selected for analysis are a set of Charter cases involving health policies, which often involve assessment of complex social science evidence and the weighing of highly contested values. Finally, throughout the dissertation, case examples are used to illustrate particular points of analysis.

Nevertheless, this dissertation is not intended to be a comprehensive analysis of legal doctrine or even of Charter jurisprudence. As such, it emphasizes decision making processes rather than wide-ranging case analysis. Cases are used as illustrations of the Court’s approach to particular institutional policies (like those governing justiciability) or those that reflect judicial considerations of the Court’s appropriate role in matters of substantive policy under the Charter. Selection of cases hinge on their applicability to the specific themes examined throughout this dissertation and following a consideration of their relevance as reflected in the existing political science and legal scholarly literature.

*Emphasizing the Charter*

Although Charter cases represent only one part of the Court’s total caseload, much of this analysis focuses on Charter jurisprudence as well as that document’s impact on the institution’s role. There are several reasons for this. First, the Court itself has determined that “Charter values” permeate
decisions in all areas of the law.\textsuperscript{54} Second, the arrival of the Charter is often described in revolutionary terms,\textsuperscript{55} not only in having transformed the judicial and legal system but also in having a significant impact on Canadian political culture.\textsuperscript{56} As Allan Hutchinson writes, “not only has the Charter taken discrete issues out of the political forums of democratic debate and into the legal arenas of judicial pronouncement, but the whole ethos of rights-talk has saturated Canadian politics and society.”\textsuperscript{57} Thus the Charter embodies the most prominent instrument of the “judicialization of politics” in Canada.\textsuperscript{58}

The Court’s justices have themselves acknowledged the Charter’s significance for the judicial role. Several years after the first Charter cases reached the Court, former Chief Justice Lamer notes, “I’ve been a judge for 20 years. And all my professional life I’ve been used to not sitting in judgment of laws. And I’ve been chastised whenever I did. Suddenly we’re told that every law can be measured to the Charter.”\textsuperscript{59} Prior to her appointment to the Supreme Court, current Chief Justice McLachlin writes:

The Charter means that judges are called upon to answer questions they never dreamed they would have to face, such as the right to abortion, the right to work after sixty-five and the right to practice one’s profession as one wishes. To make matters more difficult, the Charter has deprived judges of their traditional methods of answering the questions that are put before them. Rules of construction, stare decisis and the doctrine of precedent are of limited value

\textsuperscript{54} Peter McCormick finds that Charter cases are routinely cited as precedents not just in the context of Charter claims and challenges but in non-Charter cases as well. He concludes that “Charter cases have become very much the centre of gravity of Supreme Court jurisprudence, to an extent that far exceeds their relative share of caseload.” The Charter has become central to the broader “interpretive strategies and role-definitions of the Court.” See: McCormick, “What Supreme Court Cases does the Supreme Court Cite? Follow-up Citations on the Supreme Court of Canada, 1989-1993.” \textit{The Supreme Court Law Review.} 7 (1996) 464.

\textsuperscript{55} See, for example, Morton and Knopff, \textit{The Charter Revolution and the Court Party}; Ignatieff, \textit{The Rights Revolution}.

\textsuperscript{56} Cairns, \textit{Charter versus Federalism}. 4.

\textsuperscript{57} Hutchinson, \textit{Waiting for CORAF}, 24.

\textsuperscript{58} C. Neal Tate and Torbjorn Vallinder define the judicialization of politics into two core meanings: “1. The process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives, and 2. the process by which nonjudicial negotiating and decision-making forums come to be dominated by quasi-judicial (legalistic) rules and procedures.” C. Neal Tate, “Why the Expansion of Judicial Power?” in Tate and Vallinder eds. \textit{The Global Expansion of Judicial Power}. (New York: New York University Press, 1995). 28.

when one is not only confronted by new issues, but required to make fundamental value choices in deciding them.\textsuperscript{60}

In a very real sense, particularly among members of the Canadian legal community, this understanding of the subjective or value-laden nature of judicial decision-making was not fully appreciated until after the Charter.\textsuperscript{61} In fact, Lamer and McLachlin ascribe it directly to the Charter itself.

The Supreme Court has always had the power of judicial review in its adjudication of federalism disputes. Yet as Robert Sharpe and Kent Roach point out, issues under the Charter “are not only more open-ended and apparently less constrained by strict legal principles, but also of greater significance to the average citizen than those relating to federalism.”\textsuperscript{62} Further, although the 1960 statutory Bill of Rights gave the Court the authority to review federal legislation inconsistent with its provisions, the success of pre-Charter rights litigation was extremely limited.\textsuperscript{63} For these reasons, the Charter period serves as an appropriate scope for an examination of the contemporary Court.\textsuperscript{64}

\textit{Chapter Outline}

The dissertation consists of seven chapters. In chapter 2, it examines the theoretical and methodological debates in the American legal and political science literatures on judicial decision-making. An appreciation for studies of the U.S. Supreme Court is imperative not just because of their abundance but also due to important similarities between the respective roles of the American and Canadian Courts. Indeed, the American Court’s jurisprudence has been highly influential for the Supreme Court of Canada, which relied heavily on key elements of the


\textsuperscript{61} This conservative outlook within the Canadian legal profession was not without its critics. Paul Weiler criticized judges for their “outmoded and unduly narrow conception of the role of law in courts.” \textit{In the Last Resort: A Critical Study of the Supreme Court of Canada}. (Toronto: Carswell Company Limited, 1974). 4.


\textsuperscript{63} Sharpe and Roach, \textit{The Charter of Rights and Freedoms}. 11.

\textsuperscript{64} Chapter 3 briefly explores the historical development of the Court since its creation.
American understanding of judicial review when it first developed its scope of power under the Charter. More significantly, the application of American theories and approaches to the study of the Canadian Court necessitates an understanding of the potential benefits and pitfalls associated with their use. Proceeding from that understanding, chapter 2 briefly explores existing empirical studies on the Canadian Court. From there, the approach the dissertation takes to exploring the institution is articulated in a more comprehensive manner.

Chapter 3 provides a brief overview of the Supreme Court’s history as an institution mired in relative obscurity. It then describes the evolution of the Court into a prominent policymaking institution. Two aspects are considered in depth. First, the chapter explores important changes in the Court’s policies towards participation of third party interveners and the type of evidence it is willing to consider. Included here are developments in the law of justiciability, which concerns whether a matter is suitable for determination by a court. Second, it examines the role of the judge in the contemporary period, with an emphasis on judicial conceptions of the law and ideology. This section includes a brief analysis of individual-level factors that are often said to influence decision-making, including gender and professional background.

The fourth chapter examines the contemporary Supreme Court’s administrative environment, including the role of the chief justice, staff members and law clerks. It demonstrates the significance of institutional efficiency as a constraint on decision making resulting from judicial concern for quality and the legitimacy of the institution. The chapter then presents an analysis of the stages of the Court’s process that comprise the “inputs” for its decision making. These include the leave to appeal process (which determines whether or not the Court accepts a case), the parties’ written submissions, the research process, and the oral hearing. This process-driven approach permits a consideration of the various factors that come into play and, more

importantly, under what conditions and at what times certain processes might act as “sites of activity” for particular types of behaviour.

The judicial conference and the process of debate, compromise and deliberation that generates the written reasons are explored in chapter 5. This chapter examines the decision of a justice to join the majority reasons, to write concurring reasons or to dissent. It explores the practices, rules and conventions that shape interactions among the Court’s nine justices, including negotiations via written memoranda, informal lobbying, the use of the law clerks in the research and writing process, and whether there is pressure for the justices to obtain unanimity in important cases. Within these processes, the chapter explores whether and how sites of activity for attitudinal or strategic behaviour are developed. Chapter 5 also emphasizes the collegial nature of the Court’s working environment and the effect norms of consensus have on decision making.

Chapter 6 examines the Court in the context of the broader governing system and Canadian society as a whole. It explores the Court’s relationship with the elected branches of government, with a particular emphasis on the “dialogic” conception of Charter review, which represents the leading theoretical understanding of the institutional relationships in question. Related to the question of institutional boundaries is whether the justices feel they have the capacity to make judgments pertaining to complex social issues or evaluate conflicting scientific or social scientific evidence. This chapter explores Charter cases implicating health policies to evaluate the Court’s approach to these issues, and questions whether the Court has developed a coherent method to deal with such cases. Finally, chapter 6 explores judicial consideration of public opinion and the Court’s relationship with the media, with a specific eye to how these external forces may serve as further constraints on decision making.

The seventh and final chapter presents an analysis of the implications of the preceding chapters for our understanding of the Court as a political institution and its role in Canadian governance.
“Judges’ decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they think is feasible to do.” – James Gibson.

Chapter 2

This chapter examines four approaches, theories or “models” of judicial decision making at debate in the American political science literature and, in recent years, applied to the Supreme Court of Canada. These are the legal model, the attitudinal model, the strategic model, and the historical institutionalist approach. Each approach is marked by particular assumptions about the law. The most fundamental divide in this respect is, for the most part, between legal scholars and political scientists. The former tend to view law as autonomous from politics and consider judges as generally capable of being impartial or objective arbiters, while the latter generally see law and legal interpretation as inherently political. Within political science, however, there is a considerable range of views as to what motivates judges, the extent to which legal rules and processes are considered influential, and the nature of judging more broadly.

Political scientists have studied judicial behaviour with respect to the United States Supreme Court since the early twentieth century. Until then, perceptions of the decision-making process at the Court were shaped almost entirely by a formalist conception of the legal model, which envisions judging as a mechanical process in which the law is applied in an objective fashion. The emergence of legal realism in the 1920s called into question this perception of judicial decision making. Legal realism advanced the notion that rather than ‘discovering’ or

1 The terms models, theories and approaches are used interchangeably in the literature, particularly as it applies to the attitudinal, strategic and legal “models” of decision-making. The attitudinal model of decision-making rests almost exclusively on statistical regression analysis to test the underlying theory. Studies drawing on the strategic or legal approaches may or may not utilize statistical modelling to evaluate their respective theories. Where ‘modelling’ of behaviour emphasizes simplicity and a focus on only the most crucial aspects of reality to explain a high percentage of behaviour, other conceptions of judicial behaviour, particularly historical institutionalism, might best be labelled as “approaches” to studying decision-making, as they focus expressly on the complexity of the real world.

merely interpreting the law, judges create it and are influenced by their personal backgrounds and ideological predilections.\(^3\)

Although the pre-realist, formalist conception of legal decision making has long been cast in doubt, a modern formulation of the “legal model” persists, not surprisingly within the law profession, legal academic community and, of course, among most judges. The contemporary legal model acknowledges that judges (especially at the appellate level) have considerable discretion, but maintains that their decisions remain bound by precedent, the text of the constitution and various statutes, and a host of long-held rules (like those that dictate the admissibility of evidence). Put simply, legalists argue that “the law” remains an important and independent factor in judicial decision making, even if it does not preordain the outcome of all cases in the absolute fashion the pre-realist conception of legal theory once asserted.

Building on legal realism, the “attitudinal model” emerged as an approach that views judicial decisions as the by-product of judges’ ideologically-based policy preferences. Judges at the Supreme Court level are seen as particularly free to draw on their personal predilections because tenure, independence, and their position at the top of the judicial hierarchy limit any constraints on their decisions. The behaviouralist attitudinal model uses measures of individual judge’s ideological positions and then predicts votes in a set of cases based on those measures and the facts of the cases at hand. The attitudinal model was for a long period of time the leading conception of judicial decision making in the political science literature, but has been recently challenged by legal scholars and the two “new institutionalist”\(^4\) perspectives (the strategic and historical institutionalist approaches).


\(^{4}\) New institutionalism, also referred to in the literature as “neo-institutionalism,” emerged as a response to the behaviouralist “revolution” in political science. Behaviouralism generally envisions the study of political science as the objective, usually quantitative study of individual behaviour to explain and predict that behaviour within a political system. New institutionalism re-emphasizes the relative autonomy and effect of institutions on political decision making. See: James G. March and Johan P. Olsen, “The New Institutionalism: Organizational Factors in Political Life,” *The American Political Science Review.* Vol. 78(3) (1984) 734-749.
The “strategic model” is closely related to the attitudinal conception in that it also contends that judges pursue their policy preferences. Yet this approach draws on rational choice theory and argues that in order to secure the majority decision on a multi-member court, judges must make strategic choices. Thus judges may not vote according to their “sincere preferences” if they are not convinced the outcome of a case will be decided in their favour. In making decisions, they must consider the likely votes of their colleagues on the bench and the potential reaction of other actors in the system, such as the legislative or executive branches of government, and modulate their choices accordingly.

Finally, the historical institutionalist approach seeks to examine judging in light of the full institutional, cultural and political contexts in which it takes place. Like the strategic model, the historical institutionalist perspective argues there are significant constraints on the ability of judges to pursue personal policy preferences. However, the latter approach goes beyond a consideration of institutional rules and the actions of other political actors to incorporate into the analysis the norms, values and ideas that infuse the judicial process. In other words, judicial “role perceptions” help to shape behaviour in complex ways that intersect with ideological, strategic and legal considerations.

This chapter explores these competing conceptions and presents an analysis of the theoretical and methodological debates in American judicial politics scholarship. The chapter then examines the Canadian literature on judicial decision making and the extent to which these theories have been applied to the Supreme Court of Canada. The final section articulates and justifies more fully the historical institutionalist approach adopted in the dissertation. The chapter concludes by outlining how such an analysis can provide us with insight into how the myriad factors – from the judges’ backgrounds and values to the institution’s unique structural conditions – interrelate to inform, constrain and constitute judicial decisions.
The Attitudinal Model

C. Herman Pritchett is often credited as one of the first political scientists to draw on legal realism to examine Supreme Court decision-making. Pritchett’s work questions why judges, “working with an identical set of facts, and with roughly comparable training in the law,” often come to different conclusions. He examines dissents, concurrences, voting blocs and the ideological configurations of the Court’s nonunanimous decisions to conclude that “these divisions of opinion grow out of the conscious or unconscious preferences and prejudices of the justices.”

Building on such work, and influenced by the “behavioural revolution” in political science, other scholars developed a full attitudinal model of judicial decision-making. Glendon Schubert, credited as the founder of the model, was the first to assume that case stimuli and the justices’ values could be ideologically scaled. Under Schubert, the attitudinal model was a general model of political decision-making which essentially assumes that justices vote according to their ideological policy preferences.

The leading proponents of the modern attitudinal model are Jeffrey Segal and Harold Spaeth. With lifelong judicial tenure and significant control of the docket, attitudinalists see Supreme Court judges as particularly free to decide cases based on their personal ideological preferences. Segal and Spaeth write,

The attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics. This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.

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10 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 86.
They argue that legal explanations of judicial reasoning, such as the use of precedent, textual analysis of statutes or the Constitution, or framers’ intent, “serve only to rationalize the Court’s decisions and to cloak the reality of the Court’s decision-making process.”

The model uses measures of the justices’ ideological positions and, controlling for case facts, predicts judicial votes in a given set of cases. In the past, the justices’ votes were themselves used as measures of ideology, which created obvious circularity problems: if votes are explained by ideology then using those votes to obtain the initial measure of ideology renders the findings of the model meaningless. Segal and Spaeth claim that one solution to this circularity issue was to use the justices’ past votes to obtain the measure, and then predict a latter set of votes. They note, however, that this “nevertheless begs the question as to what explains the justices’ past votes.”

To obtain “exogenous” measures of the justices’ ideological positions, the authors perform a content analysis of newspaper editorials that label Supreme Court nominees prior to confirmation as liberal or conservative (at least as it pertains to civil rights and liberties issues). They claim that while this measure might be less precise than relying on votes, it prevents circularity issues. Examining all of the Court’s search or seizure cases from 1962 to 1998, Segal and Spaeth’s model is able to correctly predict 71 percent of the individual justices’ votes. According to the authors, this “demonstrates the overall validity of the attitudinal model.”

The most fundamental criticism of the attitudinal model is that it paints an extremely reductionist and instrumentalist portrait of decision making. For decades, this view prompted many legal scholars to ignore or dismiss the assertions of political scientists and their evidence. Yet for proponents of the attitudinal model, its simplicity is a virtue. Modeling is not meant to

11 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 53.
12 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 320-1.
13 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*. 325-6.
provide a comprehensive depiction of the real world; rather, by focusing on crucial aspects of reality, a model is said to “explain” a high percentage of behaviour through prediction.\(^\text{14}\)

For critics, the attitudinal model’s focus on a narrow conception of ideology leaves too much out to give an accurate representation of the forces at play in judicial decision-making. That the model predicts less than three out of every four judicial votes means a significant portion of the justices’ decisions are left unexplained by mere reference to attitudes. Segal and Spaeth suggest that potential errors in their model, such as incomplete specification of relevant case stimuli or the lack of precision in the newspaper ideology measures, mean that, if anything, the attitudinal model is likely even stronger than their empirical evidence demonstrates.\(^\text{15}\)

Critics like Frank Cross argue that serious conceptual and methodological difficulties call into question exactly what the attitudinal model predicts and whether it truly helps us understand judicial decision making. Attitudinalists expend little effort theorizing and describing how they conceptualize concepts like ideology or attitudes. To Cross, this presents serious problems for attempts to statistically model decision making by using ideology as quantifiable variable:

This taxonomical problem with the attitudinal model is a result of its methodology. The researchers take a legal issue, such as defendants’ rights, and characterize prostate positions as politically conservative and the opposite as liberal. When the researchers find some judges consistently liberal or conservative in decisions on defendants’ rights, they conclude that politics must explain the consistency of the outcomes. Typically, they ignore the possibility that some legal factor might explain the same consistency of result. In statistical terms, a legal issue might be highly collinear with a political issue. In such a circumstance, what may appear to be a statistically significant correlation with politics might actually be attributable to a legal variable.\(^\text{16}\)

In effect, “it is at least equally likely that [attitudinalists] discovered areas in which the legal model works in explaining judicial behavior.”\(^\text{17}\) If a judge confronts a particular issue of law in a consistent way given his or her views about what some legal factor indicates is the proper way to

\(^{14}\)Segal and Spaeth, *The Supreme Court and the Attitudinal Model*, 32.

\(^{15}\)Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 326, note 44.


\(^{17}\)Cross, “Political Science and the New Legal Realism,” 287.
decide, then it is entirely conceivable that such a judge’s legal consistency could produce results that attitudinalists interpret as political consistency.

Significantly, because the attitudinal model is predicated on ideological differences of the justices accounting for how they vote, it cannot account for unanimous cases. Cross also points out that the attitudinal model fails to find statistically significant evidence in many areas of the law. The model does not appear applicable to areas of the law that have less political salience or that are not conducive to outcomes that fall on a liberal-conservative scale. The model has also been unsuccessful in predicting case outcomes in areas of law where one would expect it to be strong.

Further, the attitudinal perspective cannot explain the effort justices put into writing dissents and concurrences. As Cross writes, “a concurrence is exclusively a legal model activity, because the ideologically favored result is reached, yet the judge expends her resources to write an additional opinion. The pure attitudinal model fails to explain why a judge would prefer any particular legal rationale for a given result.”

Another criticism stems from the fact that the attitudinal model cannot account for instances when justices change their minds about the outcome of a particular case. This critique was introduced early on in the development of the attitudinal model by J. Woodford Howard, who asserted that evidence of voting “fluidity” – the fact that judges sometimes change their minds between their vote at the Court’s conference and the final vote – presents a serious problem for an approach premised on the notion that ideology was the driving factor in judicial decisions. As he writes, “if a vote or an opinion has changed in response to a multiplicity of intra-court influences

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19 Cross, “Political Science and the New Legal Realism,” 303-4.
20 One example is judicial review of government agency actions, where Segal and Spaeth’s model predicted thirteen cases correctly and twenty-seven incorrectly. Cross, “Political Science and the New Legal Realism,” 303-4, citing Segal and Spaeth, The Supreme Court and the Attitudinal Model, 259.
before its public exposure, how reliable is that vote or opinion as an indicator of attitude, ideology, or, if one pleases, predilection?"\(^{22}\)

Empirical work on voting fluidity finds that judges on the “Vinson Court” (1946 to 1953) voted the same way at the original conference votes and final votes on the merits in 88 percent of the cases.\(^{23}\) Later work by Timothy Hagle and Spaeth interprets the patterns of vote shifts to be consistent with the attitudinal model, as in a high proportion of instances the judge switching from the majority to the minority is “ideologically closer” to one of the justices in dissent.\(^{24}\) Both of these studies rely on a very narrow set of cases, and thus do not substantially refute Howard’s basic contention: group interaction is likely to have an effect on ideological decision making.\(^{25}\) Further, because documentary evidence of the justices’ vote intentions is only available for the conference stage, the incidence of vote fluidity is likely much higher, as justices are likely to change their minds at the initial research and oral hearing stages as well.\(^{26}\)

**The Legal Model**

This section explores how the legal model has evolved in the face of legal realism and, in particular, in regards to the relatively recent debate legal scholars have engaged in with political scientists regarding the attitudinal model.\(^{27}\) The modern legal model evolved from the pre-realist legal conception of judging. As noted above, that “formalist” understanding of the law viewed judges as discovering or interpreting the law in an objective, almost scientific manner through a reading of the text of the constitution and statutes, and through adherence to rules like precedent.

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\(^{26}\) This is explored in relation to the Canadian Court in Chapter 4.

\(^{27}\) As noted in chapter 1, the two disciplines failed to engage each other in a substantial manner until the last two decades. See: Cross, “Political Science and the New Legal Realism.”
Contemporary adherents of the legal model usually acknowledge that judging often involves values and that judges, especially at the appellate level, have discretion in making decisions. The modern legal model maintains, however, that judicial decisions remain considerably constrained by rules of precedent and by the text of the constitution and various statutes. Although precedent does not predetermine the outcome of cases in an absolute manner, the law remains an important and independent factor in judicial decision making.

Critics of this view contend that legal rules provide little to no real constraint on judicial discretion. Segal and Spaeth argue, for example, that there is no evidence to support the legal model’s influence – i.e. the impact of precedent, textual analysis, or legal rules – because it has not been (and for the large part cannot be) subject to empirical falsification. Because justices on both sides of a given decision can cite precedents in their favour, it is not possible to gauge the impact of precedent in any systematic or meaningful way. In making this assertion, the attitudinalists discount important, albeit qualitative, case study research that purports to demonstrate the influence of legal variables – particularly the arguments put forward by the parties to cases – on Supreme Court decision making.

Segal has stated more recently that his and Spaeth’s argument that legal influence could not be empirically modeled resulted from a lack of “imagination.” Indeed, in their 1999 book *Majority Rule or Minority Will*, Spaeth and Segal themselves attempt to examine the effect of *stare decisis* (precedent) on the Supreme Court, although they operationalize their testing in a very narrow way. By examining a large set of judicial votes in the ‘progeny’ cases of important precedents, the authors find that Supreme Court justices rarely adhere to precedents to which they previously disagreed. Legal scholars are unlikely to be persuaded by this study, however,

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28 Segal and Spaeth, *The Supreme Court and the Attitudinal Model*, 33.
primarily because Spaeth and Segal limit their analysis to the justices who voted in dissent in the precedent-setting case (i.e., they include only justices voting in a later case who were on the Court when the precedent was established, and they do not include justices who voted in the majority in the precedent-setting case because that vote coincided with their “revealed preferences”).

More importantly, the modern legal model does not necessarily call for adherence to *stare decisis* in this rather mechanical manner. Unlike lower court judges, Supreme Court justices are not required to adhere to a precedent case in which they have already articulated a dissent. In fact, legal scholars find it entirely unsurprising that justices would maintain opposition to a precedent when they have already articulated that opposition. As Howard Gillman explains, this is not to say *stare decisis* is irrelevant, only that the narrow research design employed by Spaeth and Segal here does not really capture it:

We are left, then, with something of a paradox. Behavioralists want to force legalists into offering testable hypotheses, so that beliefs about law’s influence can be verified by a kind of scientific knowledge that behavioralists consider more authoritative; however, legalists believe that doing such tests has the effects of changing the concept of legal influence so that it no longer represents what they believe.

In some ways, then, Spaeth and Segal’s testing of the legal model only reinforces for legal scholars that the attitudinal perspective treats the legal approach as a “straw man.”

As Cross notes, most contemporary legal scholars no longer adhere to the “strict determinate variant” (i.e. the pre-realist, formalist) legal model that Spaeth and Segal critique. Indeed, while critical of the attitudinal model, Cross recognizes that it and other work by political scientists demonstrate that judges have significant discretion, particularly at the Supreme Court level. As a result, he and other legal scholars seek to integrate political science perspectives (i.e. those that view judicial decision making as at least in part a political process) into the normative

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35 Cross, “Political Science and the New Legal Realism,” 255.
legal literature.\footnote{Cross, “Political Science and the New Legal Realism,” 312; Whittington, “Once More Unto the Breach”; Barry Friedman, “The Politics of Judicial Review,” \textit{Texas Law Review}. Vol. 84(2) (2005) 257-337.} This is not to say that legal scholars have completely abandoned formalism. Rather, the modern legal model has been reconceptualized to incorporate the legal realist perspective. Textual analysis and precedent remain central to its vision, and the practice of giving judicial reasons is said to provide a very real “disciplining function” that constrains arbitrary or personal judicial decision making.\footnote{Cross, “Political Science and the New Legal Realism,” 262.}

Although Cross, like Gillman and others, suggests this contemporary understanding of the legal model is not something that can be empirically tested, recent efforts to do so are arguably effective. Mark Richards and Herbert Kritzer look for the influence of what they call “jurisprudential regimes”: the confluence of balancing rules and case factors that the Court establishes in precedent-setting cases and which later structure future pertinent cases in the same area of law.\footnote{Mark J. Richards and Herbert M. Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making,” \textit{American Political Science Review}. Vol. 96(2) (2002) 305-320.} The authors note that legal scholars – unlike Segal and Spaeth – “do not talk about the Court creating precedents that define or predict outcomes of future Supreme Court cases. Rather [they] focus on how the decision structures created by the justices will affect future decisions.”\footnote{Richards and Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making,” 306.} Instead of determining future outcomes, the regimes established in precedent-setting cases guide future decision making by outlining categories and rules for balancing, such as “compelling interest,” “incitement of imminent illegal action,” or “undue burden.” Following these guidelines is not a mechanical process of obeying rules like “if X, then decide Y”; instead jurisprudential regimes involve reflection on various factors and determining if these factors exceed a particular threshold.\footnote{Richards and Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making,” 307.}

Richards and Kritzer test a regime established by the Court in freedom of expression cases which mandates stronger scrutiny if the regulation in question is aimed at the content of the expression than if the regulation is content-neutral. Through a series of regression models, the
authors code variables including justices’ attitudes, the identity of the speakers in the case and jurisprudential factors (such as whether or not the regulated expression was content-neutral). They find that the legal considerations, in addition to the justices’ attitudinally-derived policy goals, have a significant impact on case outcomes.\textsuperscript{41} In another study they make similar findings with respect to cases involving the Establishment Clause.\textsuperscript{42} Segal sees some potential with the ‘regimes’ approach, but is unconvinced by Kritzer and Richard’s work thus far. He argues, “[t]hat a case fact had a greater impact on the Court’s decision after 1972 than before 1972 does not indicate that the change occurred in 1972, and indeed, it does not indicate that there was a discrete change at any time point. The impact of these case stimuli could be changing steadily over time, rather than abruptly, as required by their theory.”\textsuperscript{43} This critique notwithstanding, the development of ‘models’ of legal decision-making utilizing regression analysis may encourage refinements and new tests of the attitudinal approach.

Legal commentators acknowledge that ‘the law’ is not the only determining factor in decision making, but are nonetheless critical of political scientists’ emphasis on policy preferences or ideology. Noting that policy goals are not the only inspiration for judges’ decisions, Richard Posner has posited other factors which could motivate judicial decisions. Adopting an economic analysis, he suggests that judicial goals aside from policy making might include seeking prestige or popularity, or seeking more leisure time. Posner, himself a judge on the Seventh Circuit of the U.S. Court of Appeals, maintains that “judges are rational, and they pursue instrumental and consumption goals of the same general kind and in the same general way that private persons do.”\textsuperscript{44}

As will be examined below, the contemporary political science literature on judicial behaviour has developed alternative approaches to studying courts that call explicit attention to

\textsuperscript{41} Richards and Kritzer, “Jurisprudential Regimes in Supreme Court Decision Making,” 311-5.
\textsuperscript{43} Segal, “Judicial Behavior.” 23.
collegiality and the institutional context more broadly. These political scientists share many of the legalists’ concerns regarding the limitations of the attitudinal model. As the field of judicial behaviour developed in the United States, attitudinalism’s two main rivals – the strategic choice approach and the historical institutionalist approach – have grown out of the “new institutionalism” movement that formed in the broader political science literature.45

The Strategic Model

The strategic model presents judges as rational actors “who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act.”46 Advocates of the model consider not just the effect of actors internal to the Court (i.e. the other justices), but external institutional actors, such as Congress, the President, the media and the public. Walter F. Murphy postulated that if justices truly wanted to see their policy preferences enacted in the law they would be willing to modulate their views and decisions to garner the support of colleagues on the bench and to avoid extreme reactions from external actors.47 Through analysis of Court cases, congressional hearings and using interview data, Murphy shows that as single-minded seekers of policy, judges care about the ultimate state of the law, broadly defined:

Murphy, in other words, tells a tale of shrewd justices who anticipate the reactions of the other institutions and take those reactions into account in making decisions … Under Murphy’s framework, strategic interaction exists not only between the Court and the other branches of government, but also among the justices.48

With his preeminent work, *Elements of Judicial Strategy*,49 Murphy is credited with bringing the strategic account of judicial decision-making to prominence.50

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45 March and Olsen, “The New Institutionalism.”
50 Epstein, *Courts and Judges*, xvi.
Attitudinalists are not insensitive to this early strategic work. Segal and Spaeth acknowledge that opinion writers “frequently have to move beyond their sincere preferences if they hope to obtain a majority opinion, especially in closely divided cases.” They still expect that attitudes will play the crucial role in shaping decisions, but recognize they are not always the only factor. Thus in more recent scholarship, “judicial scholars have carefully limited the attitudinal model in its pure form to the one area where it most plausibly applies: the decision on the merits.” Ideology is most likely to influence a justice’s final vote, but may not be as strong a factor, for example, in the justice’s decision to grant or deny leave to hear a case.

One reason the strategic model was not initially as influential as the attitudinal model is that evidence of strategic behaviour was largely anecdotal. In 1979 journalists Bob Woodward and Scott Armstrong published *The Brethren*, which at the time was an unprecedented account of the internal workings of the Supreme Court during the first seven years of Chief Justice Warren E. Burger’s tenure on the bench. The book is based on confidential interviews with several justices, more than 170 former law clerks and dozens of former Court employees, as well as internal memoranda, letters, notes taken at conference and other documents belonging to several justices. It provides a detailed description of how the interaction between justices – specifically, instances of behind-the-scenes lobbying for votes and negotiated compromises over the language of decisions – directly affected the outcome of cases and, as a result, the nation’s laws and the rights of its citizens. Several more recent “insider” accounts have been published along similar lines.

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51 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 97.
52 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 96.
54 For example, the book offers details on cases dealing with abortion (*Roe v. Wade*) 271-84, and desegregation (*Swann v. Charlotte-Mecklenburg Board of Education*), 180-2.
Assessed in relation to the standards of academic scholarship, the narratives presented in such works might be criticized as amounting to little more than storytelling. Indeed, conversations between justices and detailed accounts of their supposed motivations offered as fact in *The Brethren* and other historical or journalistic works are often based on one-sided accounts. Yet such studies are frequently cited as providing empirical support for the strategic conception of Supreme Court decision-making.

A key problem for scholars who adopt the strategic approach to the study of Supreme Court decision-making has been that ever since Murphy’s original analysis of the thesis that judges act strategically to achieve policy goals, researchers have generally relied upon case studies rather than “systemic studies [that explore] the patterns underlying such interdependent behavior.” According to Lee Epstein and Jack Knight, because work like Murphy’s early strategic analysis arose in the context of the behavioural revolution, with its emphasis on statistically-derived evidence, it is little wonder that scholars ultimately spurned the approach. Work like Murphy’s and others’ relied on qualitative evidence from Court records and justices’ private papers, rather than readily quantifiable data like votes. Yet with the rise of new institutionalism in political science, scholars began to take advantage of such records again.

In *The Choices Justices Make*, Lee Epstein and Jack Knight analyze Court records and the justices’ private papers and uncover systematic evidence of strategic behaviour on the Court. At the certiorari stage, where the judges decide which case to hear, the authors find examples of

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56 Woodward and Armstrong readily admit to having received no cooperation from Chief Justice Burger during the course of their research. See *The Brethren*, xiv. Nevertheless, his actions, alleged conversations in conference and behind-the-scenes lobbying are central to the book’s account of the Court’s work.


both aggressive grants (taking a case that may not warrant review because its characteristics make it particularly good for developing a doctrine in a certain way and it is perceived as likely to win on the merits) and defensive denials (refusing to hear a case they would like to hear but fear will lose on the merits).\textsuperscript{62} They uncover additional evidence of “dispute avoidance” by the Court, including instances where justices have chosen not to grant certworthy petitions “at least in part because it wanted to avoid collisions with Congress and the president.”\textsuperscript{63} The authors find that in more than half the cases they examined at least one justice explicitly stated her beliefs about the likely actions or preferences of other government actors.\textsuperscript{64}

Epstein and Knight recount bargaining among justices in more than two-thirds of the cases they examine. The bulk of these negotiations occurs through private memoranda between justices.\textsuperscript{65} Such instances of strategic bargaining and other tactical decisions by justices take place “within a complex institutional framework.”\textsuperscript{66} A justice must consider her decisions in the context of the rules governing the relationship she has with her colleagues, as well as the relationship between the Court and other institutions of government. This does not result in certainty with respect to the strategic decisions made by justices. The authors point out, for example, that “ambiguous votes and multiple strategies complicate the task justices face in using the information they obtain from the certiorari vote to formulate expectations.”\textsuperscript{67}

Finally, Epstein and Knight note the Court’s general adherence to precedent. The principle of \textit{stare decisis} is a “legitimacy norm” that is viewed as constraining the Court and its justices not only in terms of internal institutional rules, but from the perspective of maintaining the judiciary’s legitimacy as a branch of government – one that is specifically distinct from the popularly elected branches in the eyes of American citizens.\textsuperscript{68} The authors find that precedent is

\textsuperscript{62} Epstein and Knight, \textit{The Choices Justices Make}, 80.
\textsuperscript{63} Epstein and Knight, \textit{The Choices Justices Make}, 83.
\textsuperscript{64} Epstein and Knight, \textit{The Choices Justices Make}, 149.
\textsuperscript{65} Epstein and Knight, \textit{The Choices Justices Make}, 73.
\textsuperscript{66} Epstein and Knight, \textit{The Choices Justices Make}, 112.
\textsuperscript{67} Epstein and Knight, \textit{The Choices Justices Make}, 125.
\textsuperscript{68} Epstein and Knight, \textit{The Choices Justices Make}, 165.
cited in virtually all cases. Furthermore, the number of cases in which precedent was overturned in any given decade since 1810 never exceeded .002 percent of the total cases ever heard by the Court. Put in the terms of another study, the Court only overturns approximately 2.5 cases per year. It is important to note that Epstein and Knight treat the Court’s adherence to precedent as a constraint on their decision-making, rather than merely another indicator of strategic behaviour.

In *Crafting Law on the Supreme Court*, Maltzman, Spriggs and Wahlbeck give credit to Epstein and Knight for advancing the strategic model by documenting these patterns of interdependent behaviour, but they note that no one has “systematically tested a multivariate model of strategic interaction.” The authors thus set out to do just that by using original data from the U.S. Supreme Court’s opinion assignment sheets, docket sheets and circulation records, as well as data from the judicial databases assembled by Harold Spaeth and others through the Inter-University Consortium for Political and Social Research.

Their analysis of 1,891 cases in which Chief Justice Burger assigned decisions finds that, consistent with their expectations, the degree to which the chief justice responds to the effect of ideology is conditioned upon the contextual situation: when politically salient cases are under review, he is more likely to assign opinions to a justice with whom he is ideologically allied; when salience is low, he is more likely to assign to a justice ideologically removed from his position. Further, the expertise of particular justices and time constraints with respect to workload also affect opinion assignment.


Epstein and Knight, *The Choices Justices Make*, 176.


The authors measure political salience based on the number of amicus briefs (intervener petitions) filed in a given case. Maltzman, Spriggs and Wahlbeck, *Crafting Law on the Supreme Court*, 45-6.

Maltzman, Spriggs and Wahlbeck, *Crafting Law on the Supreme Court*, 51. Ideology is calculated based on each justice’s votes on past cases (for example, only Justice Rehnquist was more consistently
Using a multivariate logit model, the authors find that while ideology plays a discernable role on an individual justice’s decision to join a majority opinion, a variety of other factors have a statistically significant impact. These include whether the opinion author has been uncooperative with a particular justice in the past (i.e. whether they have joined that justice’s opinion), whether the majority coalition is smaller and therefore more likely to succumb to bargaining, whether the case has a higher degree of political salience, whether the particular judge has greater experience, and when there is more time left in the Court’s term.\textsuperscript{77}

Maltzmann, Spriggs and Wahlbeck offer the supposition that the patterns of “justices’ decisions to adopt some tactic and later join the majority reflect the process of authors’ accommodating their colleagues.”\textsuperscript{78} They argue their results show that the legal reasoning in written opinions, rather than just the disposition votes on the case, is important and that justices prefer legal rules that reflect their policy preferences:

Supreme Court opinions are crafted in a collaborative environment among the justices, and thus justices act strategically in order to get opinions that as closely as possible mirror their policy orientations. Our findings that justices spend the time and energy trying to influence the shape of the final opinion is consistent with these postulates. Justices care about more than just the disposition of a particular case. Although case outcomes are important, the strategic model also suggests that justices – as rational actors – put considerable care into their choice of tactics for shaping the Court’s final opinions.\textsuperscript{79}

The evidence, the authors contend, illustrates that rational actors rarely act solely on their preferences.

For attitudinalists, the patterns of behaviour uncovered by Epstein and Knight and the type of evidence presented in the multivariate analysis by Maltzmann, Spriggs and Wahlbeck do not persuasively show that factors other than policy preferences serve as significant forces behind judicial behaviour. In \textit{The Supreme Court and the Attitudinal Model Revisited}, Segal and Spaeth
write that they consider these two books the leaders among contemporary rational choice studies of the Supreme Court. Despite this, they contend that the strategic model fails as a ‘model’ because no rational choice study of the Supreme Court has taken advantage of equilibrium analysis, the tool the authors feel makes rational choice explanation powerful:

Similar to Murphy’s work, the most prominent of the recent rational choice works on the Supreme Court do not derive or adapt equilibrium solutions, for example, they do not demonstrate that interactions among the justices constitute a best response to a best response.82

For the behaviouralists, the central problem with these studies is their lack of predictive value, something which Segal and Spaeth argue makes the attitudinal model so compelling. Further, the leading strategic works are generally consistent with, or at least not inconsistent with, earlier attitudinal works given that they find ideology plays a key role in decision making.83

Strategic scholars acknowledge their approach is complementary with attitudinal theory, but argue that because their model takes a more comprehensive view by accounting for the various processes and structures that shape decision behaviour in addition to attitudes, their approach is more complete. More fundamentally, the strategic approach moves beyond the narrow focus on vote outcomes. For example:

When institutional analysis is placed within the logic of rational choice, not only can theoretically sound hypotheses be generated, positing relationships which explain a significant amount of variance in judicial dissent behavior, but the rather disparate finding in the judicial literature on dissent behavior can be comprehensively integrated. Quite simply, the neo-institutional perspective

80 Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited, 100.
81 In rational choice theory, the search for equilibria allows for the development of predictive, law-like statements. The term is borrowed from the natural sciences, where physical equilibria occur when forces balance each other out so that a process repeats itself (like orbits) or comes to rest (as in completed reactions). In politics, equilibria are the result of the purposive behaviour of individuals, and occur when each actor adopts a strategy that constitutes the best reply given the circumstances. In such an instance, an equilibrium point is reached. If a single equilibrium point exists under a given configuration of actors’ preferences and set of institutional rules, then it becomes possible to derive predictive hypotheses. The search for equilibria in rational choice theory is intended to replace journalistic interpretations of events or the search for statistical correlations between independent and dependent variables. Interestingly, according to Donald Green and Ian Shapiro, the dominant view among rational choice theorists is that in politics unique equilibria can rarely be identified. See: Green and Shapiro, Pathologies of Rational Choice Theory: A Critique of Applications in Political Science. (New Haven: Yale University Press, 1994). 24-6.
82 Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited, 102.
83 Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited, 103.
bridges the gap between traditional institutional analysis and attitudinal theory.\textsuperscript{84}

The strategic approach treats institutions as “players in their own right, and the primary unit of analysis is institutions that empower some actors and define sanctions.”\textsuperscript{85}

For this reason, the strategic model has forced even the most ardent attitudinalists to acknowledge that institutional constraints exist and influence justices’ choices at multiple stages of the Court’s decision making process (if not at the final voting stage). Strategic scholars focus on more than the mere voting outcome, and are thus able to capture substantially more of the complexity at play to provide a more realistic conception of judging. As a result, a strategic understanding “is now the closest thing to a conventional wisdom about judicial behavior.”\textsuperscript{86}

Despite the “sea change”\textsuperscript{87} that led to the predominance of the strategic model, historical institutionalists argue it remains susceptible to the same critiques as the attitudinal approach. The rational choice perspective, like the behaviouralist approach, holds instrumentalist and reductionist assumptions about judicial decision making, largely because the strategic scholars’ conception of institutions is generally limited to viewing institutions merely as a set of rules within which the game of maximizing self-interest takes place.\textsuperscript{88} These critics also suggest that rational choice models recognize “at best a narrow subset of possible human standards.”\textsuperscript{89} While any number of goals could conceivably be examined under a rational choice model, most strategic scholars see implementing policy preferences as the goal of judges.\textsuperscript{90} As a result, the strategic

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\textsuperscript{85} Whittington, “Once More Unto the Breach,” 612.
\textsuperscript{87} Epstein and Knight, “Toward a Strategic Revolution in Judicial Politics,” 625.
\textsuperscript{90} Epstein and Knight, “Walter F. Murphy,” 201.
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approach “leaves unexplored a full range of other institutional effects on judicial decision-making.”91

**Historical Institutionalism**

Historical institutionalists view institutions as much more than rules and procedures. The norms to which actors adhere and their very preferences are, in part, constituted by the institutions themselves. The choices and behaviour of actors in turn shape the institutional context in a reciprocal fashion. Central to this approach is the concept of the judicial role, where the institutional actors’ sense of duty, obligation or recognition that their actions are “inherently meaningful” inform their behaviour, as opposed to being guided primarily by their self-interested or ideological preferences.92 As Howard Gillman and Cornell Clayton write, institutional actors “come to believe that their position imposes upon them an obligation to act in accordance with particular expectations and responsibilities.”93

The study of the judicial role is hardly new. Early in the development of the judicial politics field, Pritchett identified what he felt were the two principal factors in judicial decisions in civil liberties cases: a judge’s ideology and his or her role obligations.94 From the 1960s through the 1980s various scholars examined a thin notion of the judicial role, often by using interview or questionnaire data to identify and analyze appellate or trial court judges’ self-ascribed views of the propriety of their involvement in lawmaking.95 Most of these studies

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defined judicial role perception or orientation as a dichotomy between “activists” versus “restraintists” or “law-interpreters” versus “lawmakers.” One of the most compelling examples of this research, relying on 26 judges’ answers to questionnaires from the five Florida district courts of appeal, examines the interaction of the role variables with attitudinal measures to demonstrate that both liberal and conservative judges with more “activist” orientations permit their political attitudes more influence in their decisions than their “restraintist” counterparts.96

This small body of research leads James Gibson to provide an oft-cited definition of how judges decide: “judges’ decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.”97 Nonetheless, the application of role theory using this particular approach seems to have fallen out of use. Attitudinal purists dismiss the influence of such role concepts for two reasons. First, there is no data available to input the role concept as a variable into models at the Supreme Court level. Second, and more fundamentally, these scholars view notions of “restraint” as little more than rationalizations used by justices to further their substantive policy preferences.98

Yet just as the historical institutionalists are guided by a much broader, more porous conception of institutions, they are also guided by a more expansive notion of the judicial role. While these earlier studies allow scholars to input their narrow role orientations as simple variables into statistical models, an interpretivist, institutionally-grounded vision of the judicial role would necessarily account for institutional culture, collegiality and a broader perspective a judge would have on her – and her institution’s – place in the rest of the political system and


96 Scheb et al., “Judicial Role Orientations, Attitudes and Decision Making,” 434.
98 Segal and Spaeth, The Supreme Court and the Attitudinal Model, 235-6.
wider society. This sense of an actor’s role perception requires an historical and interpretivist account of the institution:

Counting votes and other positivist methodologies can describe a particular action or behavior, but not the motive, purpose, or meaning of that action or behavior. This is because the same action has different meanings in different contexts … Thus, the assumption that similar votes in similar cases have similar motives and meanings cannot hold unless the cases are placed in similar historical and contextual space.99

What the attitudinal and strategic models appear to have difficulty accounting for is the simple fact that two judges taking the same action might have completely different motivations. It is unrealistic to assume strategic considerations for every instance in which a judge augmented his or her views or altered initial language or reasoning. For example, they may do so in the interest of clarity or consensus.100 An historical institutional analysis would account not only for how formal structures and rules affect individual justices but how informal norms influence, constrain and shape their decision making, as well as the very motivations for those decisions.

This particular pattern of analysis is what distinguishes neo-institutionalism from traditional pre-behaviouralist political science (i.e., it is what is said to put the “new” in “new institutionalism”). Rather than simply describing the institutional structure and the patterns of behaviour therein, the goal is to assess the reciprocal effects the institution and its actors have on each other. As Smith writes,

If neither accounts of rationally self-interested behavior nor the leading deterministic sociologies seem adequate to describe political life, it indeed seems wise to identify other relatively lasting structures or patterns of behavior, institutions of various kinds, that shape and constrain political choices and conflicts. The alternative would be to fall into a simple recitation of events, an approach favored by some journalists and historical purists, but one that cannot shed much light on deeper regularities or causes in human affairs.101

A historical institutional account can capture much more of the actual forces at play in judicial decision making because the approach explicitly seeks to accommodate as full a picture as

realistically possible of the context, both in terms of the institution’s internal environment and its external political setting.

Yet critics of historical institutionalism do not see it as providing sufficient analytic clarity or evidentiary rigor to do what its proponents claim. Referring to the approach as ‘postpositivist,’ Segal and Spaeth complain that by relying on justices’ sense of obligation, postpositivist scholars reduce the legal approach to something that could never be proven because virtually any decision can be consistent with it if all that is required is for justices to convince themselves that their decisions are legally appropriate. The authors claim that “by accepted standards of scientific research” the postpositivist brand of neo-institutionalism simply cannot generate a valid explanation of judicial decision making because it is not falsifiable.102

Upon first glance, this complaint may seem compelling. As it seems so dependent on a contextualist understanding of the institution, historical institutionalism can not lead to law-like explanations of behaviour. Yet the critique becomes less of a concern when we take into account the pitfalls of the attitudinal model described in the preceding sections. Indeed, the ontological assumptions of many historical institutionalists are incompatible with the rigid and unrealistic scientific method advocated by the behaviouralists. Further, the conclusions drawn by behaviouralists both about the concepts they attempt to operationalize and the results they draw from their modeling are themselves very much part of an interpretive process.103 There is little reason to be persuaded that the manner in which attitudinalists conceptualize a variable like ideology or assess the results of their statistical correlations are any more correct or legitimate than a careful, albeit qualitative, examination of the deeper institutional context.

Segal and Spaeth claim, however, that the postpositivist account also fails to understand the psychological process as it pertains to ideology. They contend that “motivated reasoning” allows actors to convince themselves of the propriety of what they prefer to believe, a process

102 Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited, 432-3.
which “psychologically approximates the human reflex.” Yet psychologist Lawrence Wrightsman argues that it is in fact the attitudinalists who expound “an outmoded conception of the power of attitudes.” Cognitive psychology now views attitudes not as one-to-one determinants of behaviour, but as “information filters” that shape how actors process information. Wrightman’s approach emphasizes how process shapes a justice’s deliberation. As Baum writes,

> Even the relatively simple conceptions of decision making that dominate Supreme Court research imply an intricate set of cognitive processes. If justices act sincerely on their policy preferences, they must organize those preferences into a coherent system and analyze the content of cases to see how the available alternatives fit into that system of preferences. If justices act strategically on their preferences, they must also calculate and take into account the possible impact of alternative courses of action on the behavior of other people. If justices seek to make both good law and good policy, their task is even more complicated.

As this “intricate set of cognitive processes” is not directly observable, the narrowly behaviouralist method forces scholars to simplify the concept of attitudes to such an extent that what they attempt to quantify fails to even remotely resemble what many critics reasonably contend is the actual deliberative process.

Historical institutionalists are aware of the potential problems implicit in their approach, particularly the threat of raising a structure versus agency debate. If scholars blur the distinction between the institutional context and the actors’ motives or ideas too far, then it becomes impossible to develop a reasonable picture of the influences on decision making. As Cornell Clayton writes, “if ideas and institutions are inseparable, if everything is connected to everything else, then it is unclear where new institutional analysis leads.” This challenge also makes it difficult for scholars to engage in prescriptive or normative analysis. Indeed, critics argue that historical institutional studies are idiographic (i.e. their usefulness is generally limited to

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104 Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, 433.
describing behaviour in particular contexts, rather than deriving generalizable conclusions).\textsuperscript{108}

Nancy Maveety points out, “ironically, of course, it is from such descriptively intensive, single-context studies of the U.S. Supreme Court that judicial behavioralism constituted its generalizable theory of judging as ideology-driven political action.”\textsuperscript{109}

Historical institutionalism clearly stands as more of an ‘approach’ than a full-fledged theory of judicial decision making. The utility of its premises, however, is that rather than attempting to explain decisions through prediction, the approach seeks to impart a more comprehensive understanding of the complex processes at play. As a result, historical institutionalists can take a diverse, cosmopolitan path to examining judicial behaviour, one which draws on, and builds bridges between, legal, attitudinal and strategic theory.

The contemporary judicial politics literature offers many avenues through which these types of linkages are open for exploration. For example, recent work that has serious implications for the attitudinal model uncovers systematic evidence that justices’ preferences change, even over short periods of time, after they are on the bench.\textsuperscript{110} These studies, in which attitudinalist scholars Segal and Spaeth take part, are careful to note that nothing in attitudinal theory presumes attitudinal consistency, although they admit that this very assumption is embedded in empirical testing of the model, particularly because the “measures” of judicial ideologies are based on newspaper scores at the time of nomination and are treated as independent variables. The authors fail to elaborate on the potential implications for the attitudinal model or offer an explanation as to what causes such preference changes.

Historical institutionalists would argue the source of such change is obvious: the institutional rules and environment, in addition to the actors’ role obligations, serve to shape and

\textsuperscript{108} Maveety, \textit{The Pioneers of Judicial Behavior}, 24.
\textsuperscript{109} Maveety, \textit{The Pioneers of Judicial Behavior}, 25.
constrain the exogenous variables, like ideology, that also comprise a justices’ preferences. Upon
coming to the Court, judges may give more or less weight to their role perceptions in decision
making. The approach would also envision preferences oscillating as a result of changes in the
Court’s external political environment. Historical institutionalism has the flexibility to incorporate
strategic logic into this type of analysis, given that strategic scholars have demonstrated that in
some instances “political actors will attempt strategically to influence preferences.”

The historical institutionalist account can also seek to accommodate a more realistic
understanding of the justices’ motivations. Lawrence Baum suggests that in many ways the
strategic approach looks unrealistic, given that individual justices have little capacity to affect
outcomes, nor do they gain much in the way of tangible benefits from advancing favoured
policies. He argues that the evidence amassed by behaviourists and rational choice scholars
tells us very little about the motivations at play, as they really only demonstrate that the
differences among judges in their positions accord to differences in policy preferences. By setting
aside complexities – like attempting to account for various motivations on the part of judges – and
seeking prediction rather than “deep explanation,” these models limit our understanding of
judicial behaviour.

By examining judges’ “audiences,” Baum contends we can understand the “motivational
basis for patterns of judgments that are incorporated into the dominant models,” as well as those
patterns that go beyond them. The author’s basic point is that, as human beings, judges care
about what people think about them. For this reason, the esteem of their colleagues, the wider
legal community, and even the media and the public at large matter. Attention to the reaction of
these various audiences can consciously or unconsciously rein in attitudinal or strategic
behaviour.

111 Epstein and Knight, “Toward a Strategic Revolution in Judicial Politics,” 643.
112 Baum, Judges and their Audiences, 15-9.
113 Baum, Judges and their Audiences, 20-1.
114 Baum, Judges and their Audiences, 22. [emphasis mine].
These linkages, and the broader theoretical and methodological debates in the American judicial politics field as described above, are important for scholars of judicial decision making in Canada, particularly as the behaviouralist and rational choice approaches have recently been applied to the Canadian Supreme Court. The following section explores that segment of the Canadian literature.

Canadian Scholarship

The Attitudinal Model and the Supreme Court of Canada

Early efforts to apply the attitudinal approach to the Supreme Court of Canada were sparse, producing limited results.\textsuperscript{115} As C. Neil Tate notes, “the burgeoning empirical study of Canadian judicial politics and behavior fizzled” until the 1990s.\textsuperscript{116} One of the earliest Charter era studies attributed to the attitudinal school of thought mirrors the work of attitudinal pioneers in the United States: it examines the personal attributes of Supreme Court of Canada justices serving from 1949 to 1985.\textsuperscript{117} By examining variables such as the justices’ region of origin, the party of the appointing prime minister, and judicial and political experience, the authors find that the “attributes model” is able to predict how the justices vote in civil rights and economics cases. Justices were found to be most “conservative” when they were non-Catholic, Québécois, politically inexperienced and an appointee of a Conservative prime minister. They were most “liberal” when they were non-Québécois, Catholic, politically experienced and appointed by a Liberal prime minister other than Mackenzie King. This study was recently found to be time bound. A study extending and revising the attribute model through the year 2000 finds that, in part due to the Court’s heavier emphasis on civil liberties cases in the Charter era, gender and


regional characteristics have come to be more important than partisan affiliations relating to appointment.\textsuperscript{118}

The leading scholars of the modern attitudinal model as applied to the Canadian Court are C.L. Ostberg and Matthew Wetstein. Like their earlier efforts,\textsuperscript{119} their 2007 book applying the model to the Court finds that ideology plays a significant role in the justices’ decisions. They explain that the role of these attitudes, however, is less definitive and more subtle than in the U.S. context.\textsuperscript{120} Ostberg and Wetstein’s attitudinal model is subject to many of the same theoretical and methodological critiques described above. Further, the way the authors classify certain case outcomes is problematic. For example, in their examination of freedom of expression cases, judicial votes supporting Charter claims are considered liberal, and those rejecting such claims are regarded as conservative. Yet it is questionable whether the Court’s decisions to view tobacco advertising and other forms of commercial expression as warranting constitutional protection should be considered “liberal” decisions, or rulings that uphold election campaign spending limits should be considered “conservative.” In some areas, it appears as though these classification problems actually undercut the theory Ostberg and Wetstein are testing.\textsuperscript{121}

Nevertheless, Ostberg and Wetstein appear less rigid than attitudinalists like Segal and Spaeth in terms of their willingness to account for the potential impact of the institutional environment. The authors note that the justices “are bound to be influenced by both the strategic environment in which they work and a conscious desire to write opinions that are consistent with


\textsuperscript{120} Ostberg and Wetstein, \textit{Attitudinal Decision-Making in the Supreme Court of Canada}. 11.

accepted legal doctrines.\textsuperscript{122} They also acknowledge “that other factors, such as the cultural and historical legacy of parliamentary supremacy, the institutional norm of collegiality, and recent criticism of activist rulings, to name a few, help suppress attitudinal decision making by the post-Charter justices.”\textsuperscript{123} Finally, despite confirming the major premise of the attitudinal model, Ostberg and Wetstein note that not all judges could be labelled attitudinalists, strategists, or legal pragmatists, adding that more research is needed “that sheds light on the inner workings of the Canadian Supreme Court.”\textsuperscript{124}

\textit{The Strategic Approach and the Supreme Court of Canada}

Only a handful of studies have examined strategic decision making on the Supreme Court of Canada. Early in the Charter era, Andrew Heard examined the voting records of 16 judges in 121 Charter cases from 1983 to 1989 and found that the composition of panels (i.e. which justices hear an appeal) matters, in that certain judges are more regularly sympathetic to Charter claims than others.\textsuperscript{125} Picking up where Heard left off, Lori Hausegger and Stacia Haynie examine the use of panels to see whether chief justices took advantage of the power to assign them for the strategic purpose of pursuing their own policy goals.\textsuperscript{126} The authors find that for cases involving salient civil rights and liberties issues the chief justice is more likely to assign judges with close policy preferences. They suggest that institutional constraints, such as workload and the desire to have Quebec judges assigned to panels for cases coming out of that province, may inhibit some strategic behaviour.

\textsuperscript{122} Ostberg and Wetstein, \textit{Attitudinal Decision-Making in the Supreme Court of Canada}, 10.
\textsuperscript{123} Ostberg and Wetstein, \textit{Attitudinal Decision-Making in the Supreme Court of Canada}, 14.
\textsuperscript{124} Ostberg and Wetstein, \textit{Attitudinal Decision-Making in the Supreme Court of Canada}, 209.
In *Tournament of Appeals*, Roy Flemming provides the only systematic investigation into how the Supreme Court of Canada selects appeals for judicial review. Among the theories he examines, which include the litigant-centred and jurisprudential accounts, is the strategic account. As examined above, the strategic account suggests that agenda-setting and judicial review processes are intertwined. Yet Flemming finds that “the absence of an *en banc* tradition and the use of panels at both stages in Canada” complicates and adds uncertainty to justices’ ability to act strategically:

Canadian justices, despite the ideological differences that divide them, vote unanimously almost all the time on the leave panels as they decide to decide. It may also be the case that the institutionally induced unanimity fostered by this process incorporates a bias toward granting judicial review to leave to appeal applications that fall between obvious grants and obvious denials.

Flemming instead finds the jurisprudential account (the impact of legal rules) more persuasive, but does not provide an authoritative conclusion because the use of leave panels “makes the evolution of a stable set of agenda-setting norms problematic.” Perhaps, then, if the Court’s justices are being strategic in their decisions to grant leave, the institutional processes obscure the behaviour from study.

Christopher Manfredi uses strategic thinking to explain differences between the Court’s willingness to impose future policy constraints on legislatures in two prominent cases, relating to abortion in *Morgentaler* in 1988 and Charter protection for sexual orientation in *Vriend* a decade later. The Court’s remedy in *Vriend* was to “read in” sexual orientation, which Manfredi describes as “a rarely used and relatively intrusive remedy that imposes specific policy choices on legislatures.” Manfredi views the remedy as particularly strong because the omission of sexual orientation was a conscious choice, rather than mere oversight, of the Alberta legislature. The

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128 Flemming, *Tournament of Appeals*, 100.
129 Flemming, *Tournament of Appeals*, 100.
strategic approach suggests that one explanation for different levels of remedial activism in the two cases “is the judicial assessment of the potential for successful legislative resistance to the Supreme Court’s judgments.” Manfredi argues that the existence of a politically viable notwithstanding clause during the Morgentaler deliberations meant the risk of legislative response was high. By the time the Court was deciding Vriend, the notwithstanding clause had fallen into political disrepute by Quebec’s pre-emptive imposition of section 33 in the 1988 sign law case. The lack of any systematic account of strategic interaction on the Court makes it difficult for Manfredi to draw on other sources for further evidence. Such systematic work may not be possible until researchers have access to justices’ private papers, currently restricted from access in the National Archives.

More recently, Wetstein and Ostberg examine strategic leadership on the Court, finding that the voting behaviour of each of the three most recent chief justices’ changed significantly upon becoming chief, leading them to write more majority opinions and fewer dissenting opinions. They find that Chief Justices Brian Dickson and Antonio Lamer emerged as “task leaders” who were able to guide the Court through control of majority coalitions, whereas in her first few years as chief justice, Beverley McLachlin has been a preeminent “social leader” through an effort to increase the level of consensus on the Court. The ability of the chief justice to strike panels and assign decisions is an important institutional feature in the Canadian context. The authors note that researchers “need to be sensitive to the possibility that other novel intra-Court characteristics might augment or hinder strategic choice behaviour on the part of justices.”

135 Wetstein and Ostberg, “Strategic Leadership and Political Change on the Canadian Supreme Court,” 670.
Institutional Scholarship – Old and New

Scholarship with a decidedly institutional focus has always been at the heart of Canadian political science.\textsuperscript{136} The judicial politics subfield is no exception, even though it could not realistically be described as a stand-alone subfield until after the Charter. Peter Russell’s important book on the judicial system, published in 1987 stands as a landmark.\textsuperscript{137} It paved the way for several other similar monographs that describe the decision-making processes at all levels of the judicial system.\textsuperscript{138}

Scholarly histories of the Supreme Court have provided important insight into its evolution. James G. Snell and Frederick Vaughan published \textit{The Supreme Court of Canada: History of the Institution} just as the first few Charter cases were being handed down.\textsuperscript{139} The book provides an excellent analysis of the Court’s development from its early days as an institution overshadowed by the Judicial Committee of the Privy Council in Britain up until the enactment of the Charter. Ian Bushnell similarly traces the evolution of the Court from 1949 to 1990 in \textit{The Captive Court: A Study of the Supreme Court of Canada}. Relying almost entirely on careful analysis of case decisions, the author examines the extent to which the judges of the Court have allowed it to remain “captive” – lacking an independent legal tradition and creative thought.\textsuperscript{140} He argues that only with the establishment of the Charter has the personal inclination of judges become of increasing concern among the public and academics.\textsuperscript{141} Another work, Katherine

\textsuperscript{136} Robert Vipond, “Introduction: The Comparative Turn in Canadian Political Science,” in \textit{The Comparative Turn in Canadian Political Science}.
\textsuperscript{139} James G. Snell and Frederick Vaughan, \textit{The Supreme Court of Canada: History of the Institution}. (Toronto: The Osgoode Society, 1985).
\textsuperscript{141} Bushnell, \textit{The Captive Court}, 482.
Swinton’s *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*, also relies on decisions for its analysis of federalism cases from the early 1970s to 1990.\(^\text{142}\) Swinton also includes case studies of three important members of the Court – Bora Laskin, Jean Beetz and Brian Dickson – and shows areas of agreement and disagreement with respect to their constitutional interpretation. Such works illustrate the value of careful attention to the justices’ written opinions. However, they are also limited to the degree that they do not delve deeply into the institutional constraints and the interaction between the justices.

A more recent work by McCormick sets forth a comprehensive statistical overview of the Court, detailing trends and patterns under the tenure of various chief justices since 1949.\(^\text{143}\) Where Snell and Vaughan provide a qualitative examination of the significance of Bora Laskin’s tenure as chief justice, McCormick identifies important trends quantitatively: larger panel sizes, particularly for important cases, and greater unanimity.\(^\text{144}\) Yet McCormick himself indicates that statistics can only explain so much. He notes that although much is known about the “basic features” of the Court’s decision-making process, justices are “frustratingly cryptic” about certain aspects of the process, such as the way panels are set up and the way decision-writing is assigned. He writes that “on these important questions, much ink has been spilled in the United States, but we are still very much in the dark in Canada.”\(^\text{145}\) Indeed, there are no ‘insider accounts’ or journalistic works on the Canadian Supreme Court in the vein of Woodward and Armstrong’s *The Brethren*,\(^\text{146}\) although several judicial biographies provide insight into the institution’s internal

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\(^{142}\) Katherine Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*. (Toronto: Carswell, 1990).


\(^{144}\) McCormick, *Supreme at Last*, 88.

\(^{145}\) McCormick, *Supreme at Last*, 111.

\(^{146}\) Only one journalistic work, Jack Batten’s *Judges*, comes close. Batten spent a few days at the Supreme Court of Canada for a chapter in the book which does offer a few interesting anecdotes: for example, Laskin instituted a lunchroom for the justices to improve the institution’s collegiality. Yet most of the book focuses on the justice’s individual backgrounds and relies substantively on their case decisions rather than interviews or other primary research. See: Jack Batten, *Judges*. (Toronto: Macmillan of Canada, 1986).
Edited volumes and other books that focus on the careers and jurisprudence of particular justices are important contributions to understanding the Court as well.

Much of this research arguably falls under the traditional institutional approach that characterized political science prior to behaviouralism. That is, these works are largely descriptive and focus primarily on formal institutional structures, rules and processes. Moreover, they do not tend to draw from particular theoretical or methodological foundations, such as those found in the American literature. This does not take away from their contribution to our understanding of the Court or the broader judicial system; in fact, quite obviously, this dissertation would not be possible without the previous work of these leaders in the literature. That said, more explicitly theory-oriented research in the area of judicial politics would only strengthen our understanding of how the Court operates, as well as the underlying patterns of its most important and politically-charged decisions.

Other scholars of the Court or the Charter are explicit about their underlying assumptions about judicial review and have taken account of factors fully consistent with the new institutionalism paradigm. Christopher Manfredi shuns both traditional legal analysis and behavioural method in examining the importance of legal arguments by the Legal Education and Action Fund’s (LEAF) mobilization in the Supreme Court. His work draws explicitly on strategic behaviour and interest group theories to help explain LEAF’s success in effecting legal and political change through litigation. Janet Hiebert’s analysis of judicial review and the

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149 Ran Hirschl argues, for example, that the “underexplored and undertheorized” study of Canadian constitutional jurisprudence would benefit greatly from “taking on the strategic approach to judicial behaviour.” Hirschl, “Canada’s Contribution to the Comparative Study of Rights and Judicial Review,” *The Comparative Turn in Canadian Political Science.*

150 Manfredi, *Feminist Activism in the Supreme Court.* xix.
Charter’s limitation clause takes an institutional perspective to demonstrate how the very design of the Charter implicates the Court in policy evaluation and from the outset framed the very nature of that policymaking. Although Hiebert does not label her work as such, her analysis of the development of section 1 during the process of negotiation leading to entrenchment and subsequent examination of the clause’s impact on the Court’s jurisprudence is representative of historical institutional analysis. And as Miriam Smith points out, much of Alan Cairns’ work is neo-institutional in every aspect but name. His landmark article on the Judicial Committee of the Privy Council, in which he defends the Committee’s federalism jurisprudence against criticism by arguing that it was in fact “harmonious with the underlying pluralism of Canada,” stands as a strong example of historical institutional analysis. His later description of the Charter as a “citizens’ constitution” and his analysis of its impact on civil society, political culture and rights discourse serves as a further case in point. As Smith argues, Cairns’ body of work is representative of the idea that institutions have reciprocal effects on the society in which they are embedded.

A Neo-Institutional Approach

The new institutionalist literature developed in large part as a response to the dominance of behaviouralism in American political science. Behaviouralism failed to develop into the main paradigm of the Canadian discipline, where an emphasis on descriptive and normative work relating to institutions remained strong. So it should not be surprising to find elements consistent with new institutionalism implicit in some Canadian scholarship, as in the exemplar works of Manfredi, Hiebert and Cairns. As André Lecours writes, “Canadian political science may be,

generally speaking, too close to new institutionalism to view it as something different than current practice. The flip side of this coin is that Canadian political scientists are in a unique position to contribute to the theoretical debate on the place of institutions in political science or, in other words, to discuss new institutionalism and to think of novel ways of using the approach."156 Miriam Smith’s recent work on lesbian and gay rights, as noted in chapter 1, demonstrates Lecours point about the value an explicitly historical institutionalist perspective can offer.157

The historical institutionalist approach outlined here differs from Smith’s in that the focus is on understanding and explaining the work of a single institution. By integrating role theory, the approach seeks to capture how a myriad of factors shape or constitute the institution’s work, in contrast to those methods that make justices’ personal attributes or ideologies the focal point of analysis. While the central focus is the justices’ perceptions of their role, the aim is also to demonstrate that forces both endogenous and exogenous to the Court influence those perceptions in ways that micro-level behavioural analysis or theories based on single-variable assumptions about the justices’ motivations cannot capture. Because this study evolves, in part, from a critique of the competing theories and approaches of judicial behaviour, it is important to be explicit about the theoretical assumptions and overall approach involved.

This chapter has made the case that the political scientists’ predominant approaches to the understanding of judicial behaviour are insufficient. The attitudinal model is representative of the central problem of behaviouralist methodology: the assumption that human behaviour is reducible to simplistic variables or that something as complex as judicial decision making can be understood by adopting methods used in the natural sciences simply does not provide a convincing explanation of how people reason, or how judges operate and what motivates their decisions. The theoretical problems inherent in the model – particularly how individual attitudes or ideology are conceptualized – are inextricably tied to the unsuitability of the methodology.

Many legal scholars now acknowledge that judicial attitudes play some part in Supreme Court decisions. In fact, if they completely discount the role of judges’ values in decision making then they risk adopting for themselves the straw man conception of the legal model erected by the attitudinalists. Yet a reliance on the attitudinal model leaves us with an impoverished view of judicial decision making, no matter how reasonable its foundation. In part, this is because the basis for the model – that the overriding, if not only, goal of justices is to pursue their personal policy objectives – means the model begins by “begging the question.”\(^{158}\) In other words, the model is circular: it confirms its premise because the measures it derives for ideology are based on the very outcomes it seeks to demonstrate are influenced by ideology in the first place. Even ideological measures based on newspaper editorials about judicial nominees are not, contrary to the attitudinalists’ claim, fully “exogenous” or independent, as they are no doubt often based on the judge’s past voting records or views that journalists may label conservative or liberal but which could be premised on legal or other considerations of the nominee. Thus, the attitudinal model’s thin theoretical basis is compounded by the problematic methodological approach adopted by its advocates.

This contention might also be applied in terms of James Johnson’s critique of empirical research that does not adequately address conceptual issues. He writes that progress in political science is made “not just to the extent that our theories survive empirical tests but also to the extent that our theories are ‘well-founded’ in the sense that we specify more clearly the mechanisms that animate them.”\(^{159}\) In his critique of the literature surrounding the study of political culture, Johnson contends that many of the leading scholars “define political culture in such a way that it is susceptible to analysis via survey methods,” ignoring conceptual


developments in other fields, such as anthropology. Further, political culture scholars “offer no plausible account – causal, functional or otherwise – of how political culture ‘works’, or how it motivates individual action or generates persistence or change in aggregate political or economic behavior.”

This criticism applies equally, if not even more forcefully, to the problematic treatment attitudinal scholars give the concept of ideology. The manner in which ideology is measured makes it impossible for scholars to specify the mechanisms at work between ideology and decisions. Much as Johnson asserts about the political culture researchers’ unwillingness to account for conceptual developments in other fields, so too do attitudinal scholars fail to account for developments in the field of psychology relating to cognition, as noted above. Judicial attitudes are treated simplistically, as one-to-one determinants of behaviour. To the extent that the strategic approach focuses largely on ideology, it suffers from the same difficulties.

Virtually the entire judicial politics literature uses terms like “ideology,” “values” and “policy preferences” interchangeably (as I have above), even though when scholars operationalize the concept as a variable in a statistical model, they tend to do so in a way that pertains only to the two-dimensional liberal-conservative understanding of ideology. Though they often find strong correlations between judicial votes and purported ideological measures, it remains unclear what, if anything, the results ultimately mean. As Johnson argues elsewhere about positivistic political science more generally, “even when they are statistically well established, regularities … do not so much provide an explanation as stand in need of one.”

The preceding discussion raises the following important question: How can a historical institutionalist approach avoid such difficulties? The approach advanced here makes no attempt to establish the definitive understanding of ideology; not only is such an effort beyond the scope of

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this dissertation, it could easily consume an entire career in philosophy or political theory.\textsuperscript{163} The behaviouralists’ insistence that definitive proof of the causes of judicial behaviour can only come from falsifiable ‘models’\textsuperscript{164} belies the fact that ideology or values are unobservable, and that without a sufficiently plausible idea of how such attitudes manifest or act to inform decisions, treating them as independent variables in the process becomes futile.

A historical institutional approach does not treat ideology as the primary means to explain judicial decision making. Rather, by treating the judges’ role perceptions as the fulcrum through which to understand how they operate, one can develop a picture of the environment through which norms, rules, processes, and collegial interaction (strategic or otherwise) interrelate to inform behaviour. Ideology, values or “policy preferences” become one part of the intricate mixture through which decisions are made. One can better understand the influence of these various factors not by generating questionable statistical correlations that rely on counting votes, but through a contextualist understanding of the different stages of the institutional process juxtaposed against the broader political circumstances of particular issues or cases at hand. Different stages of the process or particular circumstances act as “sites of activity” through which particular motivations or actions become possible, such as strategic or attitudinally-inspired behaviour.

The primary critique that scholars from the other traditions might make is that a historical institutional perspective is insufficiently explanatory. This criticism might be applied to my approach, which considers judges’ role perceptions an important factor in decision making. Harold Spaeth argues that such a postpositivist conception is not falsifiable and thus “not scientific and can provide no valid explanation of judges’ actions.”\textsuperscript{165} Models of behaviour, susceptible to testing, are thus presented as the keystone to the “credibility” of present-day work

\textsuperscript{164} Segal, “Judicial Behavior.” 20-1.
in political science. Simplification through such models is necessary because human behaviour and the institutions in which actors operate are extraordinarily complex.166

Given the preceding analysis of the behaviouralist approach, it should be apparent that I find such criticism unpersuasive. Historical institutionalists respond that behaviouralists “are prepared to assume that very general variables operating independently of one another come together to account for the patterns of behaviour they are trying to explain. Historical institutionalists, by contrast, assume that operative variables may not be independent of each other at all … [and] tend to suspect from the get-go that causal variables of interest will be strongly influenced by overarching cultural, institutional, or epochal contexts. This is not a matter of getting mired in thick description.”167 In other words, the simplification demanded by “scientific” models comes at a cost, one that goes beyond the simple ‘explanation’ versus ‘understanding’ dichotomy frequently elaborated in epistemological debates: “If decontextualization is merely the removal of excess detail, then it’s a fine thing, scientifically. If, on the other hand, it is the removal of defining locational information, it is a scientific disaster.”168

The historical institutionalist approach adopted here goes beyond describing each of the important stages of the Court’s decision making process. It also provides an analysis of the institutional forces at play that may be independent from, or otherwise constrain or shape, attitudinal, strategic or legal motivations. There can be little doubt that a justice’s background, ideology, personal values, or life and educational experiences influence their decision making. Some of the justices themselves have acknowledged as much in speeches or writing.169 Yet there can also be little doubt that different justices allow those values to come into play to varying

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166 Spaeth, “Reflections about Judicial Politics,” 754.
degrees and in varying ways. It is in this regard that a broadly constructed concept of the justices’ role perceptions becomes useful.

The approach I undertake in the chapters that follow assumes a justice’s understanding of her proper role means much more than the simplistic ‘activist’ versus ‘restraintist’ dichotomy, and informs their behaviour in innumerable ways, at all stages of the Court’s decision making process. Individual justices’ role perceptions, conceived of in this way, might be broadly understood as the judge’s ‘world view,’ overlapping with but extending beyond mere political ideology. As the remainder of the dissertation will illustrate, a judge’s view of what she ought to do extends past legal processes and rules, and includes institutional norms, conventions and issues of collegiality. In this sense then, and consistent with a historical institutionalist approach, role perceptions both shape and are shaped by the institutional context.

This approach is also conducive to building bridges between the competing theories of judicial behaviour, as it can incorporate legal, attitudinal and strategic influences. The historical institutional perspective permits a consideration of not only how particular stages of the Court’s decision making processes permit certain types of activity, but how changes to these processes, norms and conventions broaden or restrict the level of influence certain factors may have over time.
“Judges are all divas.” – Supreme Court Judge.

Chapter 3

This chapter sets the stage for an analysis of the contemporary Supreme Court of Canada by exploring the institution’s evolution from relative obscurity to one of the country’s most important governing bodies. For most of its history, the Court has been subject to, and shaped by, external political forces. To a significant degree the institution was thrust into its current position of prominence. Yet decisions on the part of the justices have further consolidated the Court’s power, including those that loosened the rules governing justiciability (the set of legal doctrines that govern whether it is suitable to decide a matter in the courts), increased the role of third party interveners and expanded the type of evidence considered in adjudicating cases. As will be explored below, these factors make judicial decision-making at the Supreme Court level a distinctly more political process.

The policy-driven nature of the modern Supreme Court has placed a substantial amount of attention on its legitimacy. Debate and criticism about the Court’s appropriate role in governance under the Charter has compelled some contemporary justices to state publicly their views on their role, the law and the question of impartiality. An analysis of these views reveals how role perceptions might govern issues like deference to the legislative or executive branches of government in a manner that the extant judicial behaviour literature, with its emphasis on ideology, cannot capture.

Another integral component of these developments has been a concurrent change in the type of justice appointed to the Court. The Charter era Court is relatively gender-balanced and has a significant number of justices with academic backgrounds. These characteristics are often said to have an important impact on the style and general approach to judicial decision making. As is suggested below, the reform-minded, ‘academic’ justices first appointed during the 1970s and 1980s have had a considerable impact on the changes in rules noted above. Just as significantly,
an analysis of judicial backgrounds and personal characteristics is important because these factors contribute to the development of an individual’s worldview. Put another way, ideology, background and other factors should not be treated simply as independent variables, but as interdependent ones. The final section of this chapter will briefly examine the relationship between them.

A Brief History of the Court

Given the prominence of the contemporary Supreme Court, it is easy to forget that for most of its history, the institution endured an inauspicious reputation. From its inception, the Court was mired in a position that afforded it little prestige or influence within the broader system of government. Where the United States Supreme Court was established as the head of one of the three branches of government under Article 3 of the U.S. Constitution, the role of the judiciary at Canada’s founding was viewed in light of the new country’s colonial status. The Fathers of Confederation gave Parliament the power to establish a general court of appeal under section 101 of the Constitution Act, 1867. The Canadian Supreme Court was thus created eight years later by ordinary statute.1

Significantly, the Judicial Committee of the Privy Council (JCPC) in Britain remained Canada’s court of last resort until 1949.2 This context meant that the Court’s justices adhered to a conservative formalism; in effect, they quickly recognized their “subservience to the Privy Council” and followed the lead set by the British law lords.3 Worse still, per saltum (“by a leap”) appeals allowed litigants to bypass the Supreme Court altogether – a course taken quite often4 –

1 The Supreme Court was first referred to constitutionally in the amendment formula in the Constitution Act, 1982 and the first reference to judicial independence was made in section 11(d) of the Charter of Rights. There is no consensus about the Court’s constitutional status. Peter Russell, The Judiciary in Canada: The Third Branch of Government. (Toronto: McGraw-Hill Ryerson Limited, 1987) 67.
2 Though criminal appeals to the JCPC were abolished in 1933.
4 Seventy-seven out of 159 of the JCPC’s cases on the Canadian Constitution were per saltum appeals. Russell et al., The Court and the Constitution, 4.
by appealing cases from the provincial appellate courts directly to the JCPC. As Snell and Vaughan explain,

The Court in Ottawa was thus in a weaker position than an intermediate appellate court; it was bound by decisions which inferior Canadian courts had helped to produce but which all too often lacked the influence of the justices of the Supreme Court of Canada. The ambiguity of this process, as seen from the point of view of the Ottawa justices, undermined their stature and reinforced the tendency to judicial strict construction.\(^5\)

This practice, coupled with the justices’ strict adherence to JCPC precedents, stifled any opportunity for the Court to create its own imprint on the formation of Canadian law. Writing in 1951, Bora Laskin, who would later become the Court’s chief justice, explains, “[i]t has for too long been a captive court so that it is difficult, indeed, to ascribe any body of doctrine to it which is distinctively its own, save, perhaps, in the field of criminal law.”\(^6\)

Other practical difficulties only further contributed to the sense that the institution was of scant importance. In part because of the Court’s poor reputation, the federal government had constant trouble appointing highly regarded judges to its bench. The justices of the pre-World War Two period were appointed almost solely on the basis of previous political service. The difficulty of finding quality jurists was compounded by the fact that many candidates did not like the thought of living in Ottawa.\(^7\)

Worse still, the Court apparently lacked an institutionalized decision-making process. An untitled article in a 1902 issue of the *Canada Law Journal* reports that “it is the practice for the judges to deliver their judgments without any previous consultation, or even without the members having any knowledge of what conclusions their brethren have come to.”\(^8\) As late as the 1950s there were no regular conferences held by the judges.\(^9\) Certain conditions were ameliorated over time. For the first several decades the six-member Court would sit in panels of five justices. In


\(^7\) Snell and Vaughan, *The Supreme Court of Canada.* 24.

\(^8\) “The Supreme Court,” *Canada Law Journal.* 38(3) (February 1, 1902).

\(^9\) Laskin, “The Supreme Court of Canada.” 1047.
1927 the number of justices was increased to seven and a mandatory retirement age of 75 was introduced.\(^\text{10}\) Better pay for the judges and a new building, which opened in 1946, helped improve conditions and attract quality jurists to the Court. The Court’s membership was expanded to its current number of nine justices in 1949, when appeals to the JCPC were abolished entirely.

Peter Russell writes that the Statute of Westminster (1931) was the key factor in facilitating the move to end appeals to the Privy Council, as it removed potential legal obstacles to the reform. The major impetus for ending appeals, however, was a series of constitutional decisions by the Privy Council in the 1930s invalidating legislation enacted by the Canadian government to combat the Great Depression.\(^\text{11}\) Despite expectations, abolition of appeals to the JCPC did not elevate the Court’s status to one of prominence, either as a trailblazer in the law or in terms of garnering attention from the public or press.\(^\text{12}\) Having developed a substantial body of jurisprudence on Canadian constitutional issues, the Privy Council’s decisions remained influential with justices who, for the most part, remained conservative and deferential in their approach to the law. Moreover, the judges were “aware of provincial anxieties that the Court might turn out to be dangerously centralist” and thus approached federalism cases with an abundance of caution.\(^\text{13}\)

There was some flirtation with judicial creativity in the 1950s, when the Court upheld challenges to Quebec laws that impaired the religious and expressive freedoms of minorities, relying in part on the notion of an “implied bill of rights” in the British North America Act.\(^\text{14}\) This “activism” on the Court’s part was short-lived, however, as the implied bill of rights never garnered the acceptance of a majority of the justices. More significantly, the Court’s timid track record under the statutory Bill of Rights, enacted in 1960, contributed to strong criticism for its

\(^{10}\) Snell and Vaughan note that at the time, Justice John Idington was 86 and considered senile by Prime Minister Mackenzie King. *The Supreme Court of Canada.* 125-6.

\(^{11}\) Peter Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution.* (Ottawa: Queen’ Printer for Canada, 1969), 33.

\(^{12}\) Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution,* 43.

\(^{13}\) Russell et al., *The Court and the Constitution,* 4.

\(^{14}\) For a more thorough discussion, see Russell et al., *The Court and the Constitution,* 167-9.
over overall conservative nature. Only once did the Court strike down a federal statute that was in conflict with the Bill. Russell explains that the judges were accused of excessive adherence to precedent and an overly narrow conception of legislative supremacy. Writing in 1969, he notes that the Court’s actual procedures “have been found by some to reduce seriously the Court’s capacity for providing Canada with effective judicial leadership,” as the judges continued to lack meaningful consultative processes in arriving at decisions. Put simply, the Court too closely resembled nine individual law firms instead of a collaborative institution.

The period leading up to the entrenchment of the Charter of Rights dramatically altered this reality. Two important developments occurred during this time. First, Pierre Trudeau, first as justice minister and then as prime minister, made a distinctive mark on the type of appointments to the Court. Trudeau made the academic credentials of candidates to the Court important and placed a strong emphasis on selecting reform-minded justices more amenable to exercising stronger powers of judicial review. The appointment of Bora Laskin in 1970 was remarkable in several respects. Laskin was the first non-Christian selected for the Court. After spending virtually his entire career in academia, Laskin had not practiced law. One historian of the Court writes that with Laskin’s appointment the institution “acquired a definite public image for the first time in its history; it would never be the same again.” Laskin’s elevation to chief justice just three years later caused considerable controversy within the legal profession, some members of

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17 Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution, 55-7.


19 Bushnell, The Captive Court, 343.
whom described him as an ‘academic lawyer.’ That Trudeau sidestepped the traditional convention of appointing the most senior justice to be chief only further illustrates his designs for the Court.

Second, through a series of amendments to the Supreme Court Act which were finalized in 1975, the Court gained near complete control over its docket. This considerably reduced the number of private law cases, and placed “public importance” as the primary criterion for case selection. Even after appeals to the Privy Council ended, the justices lacked substantive influence over the cases and issues that came before them. The Court dealt with few cases each year that raised legal issues of any fundamental importance to the country. Through the 1950s and 1960s, no less than half of the Court’s caseload dealt with automatic appeals (appeals by right) in civil cases involving more than $10,000. Prior to 1975, eighty-five per cent of cases were appeals by right and fifteen per cent were by leave; after the reforms these percentages were almost completely reversed.

The new emphasis on cases specifically geared towards setting national standards in important areas of the law, coupled with the appointment of reform-minded judges, set the stage for a more visible and active Court. With the entrenchment of the Charter in 1982, the institution was provided an explicit mandate to delve into areas of social, moral and political concern. In addition to the Charter itself, s. 52(1) of the Constitution Act, 1982, enshrines the power of judicial review in Canadian constitutional law. Aboriginal rights cases, established under s. 35

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21 In fact, at the time of Laskin’s elevation there were five justices who had served longer.
22 *Supreme Court Act* (R.S., 1985, c. S-26).
23 Appeals by right were limited to criminal appeals where a provincial court of appeal judge dissents on a question of law or whenever acquittals were overturned on appeal.
24 Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, 58.
26 The section reads: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
of the Constitution, have also become an important part of the Court’s docket, beginning with
Sparrow\textsuperscript{27} in 1990.\textsuperscript{28}

Despite the fact that the Court’s new mandate was to a large extent imposed on it by external political actors and new constitutional duties, this chapter will demonstrate that the depth, style and intensity with which the Court proceeded into this new era were very much dependent on choices made by the justices. The next section examines the Court’s evolution as a policymaking institution as it pertains to three areas of concern: the relaxation of the rules governing justiciability; the liberalization of the policy governing third party or interest group intervention; and the acceptance of new kinds of evidence in the research process.

Towards a More Expansive Policy Making Role

Justiciability

One of the most sweeping changes relating to the role of the contemporary Supreme Court is the nature and scope of issues in which it is now involved. Courts have traditionally limited themselves to taking cases only when the subject matter involved is “justiciable.” Lorne Sossin defines justiciability as the “set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life.”\textsuperscript{29} Critics argue that the Court has altered the rules of justiciability in a manner that increases its policy-making power. This section explores the evolving treatment of justiciability and attempts to account for these important changes.

Justiciability is comprised of several components or doctrines. “Ripeness” mandates that courts will adjudicate a matter only when there is a live controversy, sufficient facts at hand and other possible procedural avenues to settle an issue have been exhausted before it goes to a court. “Mootness” occurs where a dispute no longer has a concrete effect on the parties bringing a case.

\textsuperscript{28} Russell et al., The Court and the Constitution. 11.
before a court because circumstances or the law itself has changed in the intervening time. The “political questions” doctrine suggests that there are issues that are “purely” political that should be resolved through a political process and are therefore non-justiciable.

Another legal concept, “standing,” is related to but distinct from justiciability. As Sossin notes, while justiciability concerns what issues come before a court, standing pertains to who is entitled to bring proceedings forward.30 Sossin explains the important connection between these two concepts:

Because justiciability so often is raised in public interest standing challenges, much of the case-law relating to justiciability has emerged from the case-law on standing. Furthermore, these analyses are related as both the doctrines of standing and justiciability call upon a court to consider, as Le Dain J. observed in Finlay v. Canada, “the proper role of the courts and their constitutional relationship to the other branches of government.” In this sense, both the law of standing and justiciability may be said to define the legal limits of judicial review.31

As Kent Roach and Robert J. Sharpe write, rules of standing are justified on several important grounds, particularly “to avoid a flood of litigation, to conserve judicial resources and limit judicial power, and to ensure that constitutional disputes arise in the usual adversarial setting where only interested parties motivated to present strong arguments are represented.”32

Beginning in the 1970s the Supreme Court changed its criteria for granting standing. In a series of cases known as the “standing trilogy,”33 the Court mandated that to gain standing “a person need only to show that he is affected by [the legislation] directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.”34

30 Sossin, Boundaries of Judicial Review. 5-6.
34 Minister of Justice (Can.) v. Borowski. 598.
Critics contend that the Supreme Court has expedited interest group litigation and its own policy-making role by “all but eliminating” the rules of standing and mootness. \(^{35}\) Ian Brodie writes that prior to the standing trilogy potential litigants had to show that they were “exceptionally prejudiced” by legislation to challenge its constitutionality. \(^{36}\) The standing trilogy, according to Brodie, “gave Canada one of the common law world’s most lax laws of standing.” \(^{37}\) The Court acknowledged as much when it affirmed the standing trilogy in the 1992 case *Canadian Council of Churches*. \(^{38}\) Justice Peter Cory, writing for a unanimous Court, began his analysis of the law of standing with a comparative examination of the United Kingdom, United States and Australia, finding that all three common law countries take a much more restrictive approach. In the period following the Charter’s enactment, the Court further relaxed the rules of standing. \(^{39}\)

Despite this, the Court will not allow any interested party to pursue a case in which it has no personal stake. In 2007, the Court issued rare written reasons denying leave to appeal to the Alliance for Marriage and Family, a third party that sought to appeal an Ontario Court of Appeal ruling permitting three-parent families. \(^{40}\) Neither the parties to the case or the Attorney General of Ontario sought to appeal the ruling. The Alliance had been a third party intervener in the case. In denying leave to appeal to the Supreme Court, Justice Louis LeBel writes that the Alliance failed to establish that it had standing, noting that no third party has ever been permitted to “revive litigation in which it had no personal interest.” \(^{41}\)

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37 Brodie, *Friends of the Court*. 27.
39 *Finlay v. Canada (Minister of Finance)* extended public interest standing to challenge an exercise of administrative authority in addition to legislation.
40 *A.A. v. B.B.*, 2007 ONCA 2. The case involved a lesbian couple who, with the assistance of a male friend, decided to start a family. The partner of the child’s biological mother sought a declaration that she was the child’s parent, in addition to the child’s biological parent. The appeal court ruled in her favour.
The Court has also relaxed its approach to deciding issues that are moot. In the 1989 *Borowski* case, the Court declined to decide the issue put forward by pro-life activist Joseph Borowski, whose action sought a declaration that the abortion provisions in the Criminal Code violated the foetus’s right to life under section 7 of the Charter, because the Court had already struck down the provisions the year prior in *Morgentaler*. In *Borowski*, Justice Sopinka set out a framework for mootness which establishes three factors for exercising discretion to hear a moot case: whether the parties retain an adversarial stake in the issues; whether the issues are important enough to justify the judicial resources needed to hear the case; and whether the Court would be departing from its traditional adjudication role if it decided the case. Despite these guidelines, the Court routinely allows cases to proceed “notwithstanding that the issue is academic.” Sossin notes that “it remains surprisingly rare for a case not to be heard on the grounds of mootness,” adding that “[t]he carefully laid out principles in *Borowski* serve most often as a cafeteria at which judges pick and choose the aspects which suit them without troubling about the rest.”

The other elements of justiciability have received less attention in the Canadian setting. Although no Canadian case has set out the criteria for determining “ripeness,” Sossin argues that the Charter has “required that the Supreme Court address speculative issues with greater frequency and in unfamiliar circumstances.” The Court spent considerable attention on the “political questions” issue, and justiciability more broadly, in the 1985 case *Operation Dismantle v. The Queen*. The case concerned whether the government of Canada’s decision to allow the United States to test cruise missiles within Canada violates the right to security of the person of

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44 Crane and Brown, *Supreme Court of Canada Practice*. 24. One notable case, *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, concerned an injunction sought by the former boyfriend of the respondent, Chantal Daigle, preventing her from having an abortion, was allowed to proceed after the Court was told during recess that Daigle had the abortion prior to the hearing. For a list of other examples, see Crane and Brown, *Supreme Court of Canada Practice*, 24-5.
Canadian citizens under section 7 of the Charter. Chief Justice Brian Dickson, writing for the majority, rested his reasoning in dismissing the appeal on one of causation: he wrote the claims should be dismissed because they were speculative, hypothetical and not capable of proof. While the majority judgment was not one based on justiciability, Dickson endorsed the discussion of justiciability found in Justice Bertha Wilson’s concurring judgment.49

Wilson’s judgment explores the “political questions” doctrine as enunciated in the United States and concludes that the doctrine has not been particularly helpful in delineating which issues are appropriate for judicial review. Wilson connects questions of justiciability to the proper role of the courts. She writes:

I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to “second guess” the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so.50

In the context of Charter cases, Wilson writes that the proper avenue for exploring this question is through the reasonable limits analysis under section 1 of the Charter:

Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a “political questions” doctrine and permits the Court to deal with what might be termed “prudential” considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.51

Operation Dismantle is thus regarded as an explicit rejection of the “political questions” doctrine in Canada.

Sossin argues that this conclusion merits reconsideration. He contends that Operation Dismantle paradoxically rejects the “political questions” doctrine while acknowledging that

49 At para. 38.
50 At para. 64.
51 At para. 104.
certain types of political questions are not appropriate for judicial determination.\textsuperscript{52} He also points out that in certain instances the Court has distinguished between legal and political aspects of questions. For example, in the Quebec secession reference,\textsuperscript{53} the Court articulated “something approaching a political questions test” by noting that matters should be dismissed if there is no legal question posed or if there is a significant extralegal component to the question that the Court should sever it or refuse to answer the question.\textsuperscript{54} Finally, Sossin is critical of the distinction Wilson makes when she argues that section 1 of the Charter is about whether government action violates rights \textit{as opposed to} the Court questioning the wisdom of government legislation. He writes that the determination of governmental objectives and the impact of legislation that comprise the Court’s section 1 analysis may not be identical to evaluating the wisdom of that legislation, but argues “it would be inaccurate to describe such a judgment as other than “political”.”\textsuperscript{55}

Nevertheless, justices on the Court have more recently reiterated the rejection of the political questions concept in Canadian law. In the 2005 \textit{Chaoulli} case,\textsuperscript{56} in which a Quebec law prohibiting private medical insurance was challenged, the Attorneys General of Canada and Quebec argued the claims were not justiciable because they involved inherently political decisions. Interestingly, while the justices in the majority who struck down the impugned provisions did not bother to address this argument, the minority did take the time to note that “[t]here is nothing in our constitutional arrangement to exclude “political questions” from judicial review where the Constitution itself is alleged to be violated.”\textsuperscript{57}

The discussion thus far begs the question: what explains the Canadian Court’s liberal stance towards the various doctrines relating to justiciability? As noted, some commentators

\textsuperscript{52} Sossin, \textit{Boundaries of Judicial Review}. 149.


\textsuperscript{54} Sossin, \textit{Boundaries of Judicial Review}. 155.


\textsuperscript{57} \textit{Chaoulli v. Quebec (Attorney General)}, at para. 183.
assert that the justices’ approach to the law of justiciability is but one part of a move over the last few decades to accumulate policy-making power.\textsuperscript{58} It is impossible to confirm whether this is the primary motivation; nevertheless, if power is at least one plausible factor, there is no compelling rationale to explain why Canadian judges would be more prone to a desire to increase their power than their counterparts in other common law countries.

There are, however, historical and structural reasons that account for the differences. Unlike its American counterpart, the Canadian Constitution does not provide for a formal separation of powers. The American Constitution explicitly limits judicial power to dealing with “cases” and “controversies.” As a result, American law has developed significantly more comprehensive doctrines of justiciability than Canadian law. The lack of a strict separation of powers in Canada also explains, at least in part, the historical acceptance of the Court rendering advisory opinions, something rejected in these other countries.\textsuperscript{59} The reference cases themselves have helped to make the justices comfortable in dealing with issues more hypothetical and abstract than in regular disputes.

Aside from the United States, the other countries referred to above – Australia and the United Kingdom – lack a constitutionally-entrenched bill of rights.\textsuperscript{60} Sossin’s analysis suggests that much of the liberalization of justiciability rules occurred in the context of the Charter. Indeed, as former Justice Frank Iacobucci writes, “[o]ne of the most important consequences of the Charter is that the line of demarcation between justiciable and non-justiciable has shifted toward the political end of the decision-making process.”\textsuperscript{61}

The lack of a strict separation of powers and the existence of the Charter do not account for all of the changes, however. The law of standing does not hinge on the separation of powers

\textsuperscript{58} Morton and Knopff, \textit{The Charter Revolution and the Court Party}. 54; Brodie, \textit{Friends of the Court}. 27.

\textsuperscript{59} The Court acknowledged as much in justifying its decision to tackle the issues in the Quebec secession reference. \textit{Reference re Secession of Quebec}, at para. 15.

\textsuperscript{60} The U.K.’s Human Rights Act is an Act of Parliament, which came into effect in 2000. It is possible that over time the U.K. courts may see fit to loosen the rules of justiciability.

doctrine, and the trilogy of cases that liberalized standing occurred before the Charter’s enactment. Nevertheless, those cases did coincide with a change in the type of justices appointed to the Court. Pierre Trudeau’s appointments reflected his vision for the country. As noted above, Trudeau made the academic credentials of candidates to the Court important and placed a strong emphasis on selecting reform-minded justices more amenable to exercising stronger powers of judicial review. This was exemplified by his appointment of Laskin in 1970, who wrote the majority and unanimous judgments in the first two cases of the standing trilogy, respectively. Six of the justices who heard the third case, *Borowski I* in 1981, were Trudeau appointees. This is not to suggest that appointments reflect a direct one-to-one explanation of how judicial votes are cast. In fact, Laskin dissented in *Borowski I*. Yet a disposition among the Trudeau appointees towards a more open stance on issues like justiciability is one important element that should not be disregarded.

Sossin notes that two central principles underlie the law of justiciability: “first, that courts not adjudicate cases beyond their institutional capacity; and second, that courts not adjudicate cases beyond their legitimacy to resolve disputes.” Sossin’s analysis makes clear that the justices of the Canadian Court view the decision to adjudicate certain matters as having less to do with the various doctrines of justiciability and more to do with their conception of the Court’s proper function. Iacobucci contends that the shift in the law of justiciability “does not mean that courts are considering issues that are not justiciable, but rather that issues that once were not justiciable are now properly cognizable by the court.”

The justices interviewed for this study view the Court’s role to address political questions, particularly under the Charter, not just as a mandate but as a duty. Further, they agree that questions of capacity and legitimacy are paramount when dealing with issues that have obvious

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62 *Borowski I*. Ian Brodie writes: “Laskin has been lionized for his work in broadening the Court’s approach to interest groups, but he became less enthusiastic about intervention and standing later in his career.” *Friends of the Court*, 27.
political ramifications. The 1993 *Rodriguez* case – in which a sharply divided Court upheld criminal prohibition of assisted suicide – is illustrative.\(^{65}\) All of the justices I interviewed who took part in the decision described the case as one of the most difficult they have faced, with a couple describing great personal anguish on their part.\(^{66}\) One of these justices states that “I believe you’re stressing the limits of the judicial function in that case to in effect say that a prohibition against assisted suicide was unconstitutional.” In part this is because the decision is not rooted solely in the law: “Is this just a legal question? What’s the input coming [from] philosophers, medical science, care-givers, social workers?” Put simply, “[the Court] can’t come to a legal resolution of this problem that ends up in unconstitutionality because [it is] not as well equipped to handle that.”\(^{67}\)

This statement has implications that go to the root of judging in the Charter era, far beyond a consideration of the doctrines of justiciability described here.\(^{68}\) Nevertheless, the liberalization of the law of justiciability and the ‘blurring’ of the boundaries around judicial review, particularly those “political questions” that stress “the limits of the judicial function,” has contributed to critics’ concerns about the Court exceeding its role. I asked this justice whether, following this reasoning, a declaration that the law at issue in *Rodriguez* as it stood was constitutional was better than simply not accepting the case. Indeed, a majority of the justices on the British Columbia Court of Appeal felt the issue should be left to Parliament. The justice’s response was direct: “We should never start ducking cases.”\(^{69}\) The hope of this justice was that Parliament would attempt to address the issue and fashion some type of resolution. Further, former Justice Claire L’Heureux-Dubé, who was part of the minority in favour of striking down the law, has publicly stated she was glad in hindsight that the majority prevailed and that the


\(^{66}\) Interviews.

\(^{67}\) Interview.

\(^{68}\) The issue of the Court’s capacity or the justices’ competence in dealing with such issues is explored in chapter 5.

\(^{69}\) The justice did note, however, that there were reasons to not take certain cases – such as those that lack a factual basis.
matter was left to Parliament.70 These expressions suggest that while the justices feel compelled to adjudicate such matters, certain issues may make them more deferential to Parliament in the course of rendering decisions.

As will be explored more fully in Chapter 6, the justices’ respect for the respective roles of the legislatures and the courts are now most commonly understood as a “dialogue” between the institutions. This dialogue is said to be rooted principally in the structure of the Charter itself, with dialogue operating through the reasonable limits clause – which Wilson identified as the site for justiciability analysis – and the notwithstanding clause, which allows legislatures to temporarily suspend judicial decisions on particular sections of the Charter. These structural features of the Constitution may be one more component of the array of factors that have influenced the Canadian justices in their approach to the issues of justiciability by making them more confident in taking on matters because of a perception that legislatures retain wide latitude to act independent of the Court’s determination.

Third Party Interveners

The Court has also liberalized its acceptance of third party interveners during the Charter era. The movement towards an American-style intervener mechanism was gradual, starting in the mid-1970s with two cases that Brodie writes “sent a signal to the legal community.”71 The generous culture of granting intervener status in the contemporary period did not begin until several years after the Charter, following significant public pressure from interest groups and an intense behind-the-scenes debate between the justices.

Despite the “activist” stance the Court took during the first few years of Charter cases, it frequently refused to grant access to third parties. In 1983, the Court changed the rules on

70 Cristin Schmitz, “Leaving After 15 Years on the Bench, Justice L’Heureux-Dubé says she’s ‘Extremely Serene’,” The Lawyers Weekly. 22(2) (2002). At the same time, L’Heureux-Dubé noted she did not regret her position in dissent.
intervention for the first time since 1907. The new rules gave attorneys general the right to intervene in constitutional cases and interveners who had intervened at the lower court level the right to do so at the Supreme Court. The justices quickly reversed this latter policy. Brodie writes,

The first hint that the Court was rethinking its new approach came in November 1983. Justice Ritchie refused to allow the Ontario Medical Association for the Mentally Retarded to intervene in the appeal of R v Ogg-Moss, a criminal case regarding the disciplining of children. ... A few weeks later, less than a year after the new rules came into effect, the Court rescinded the automatic right of interveners at lower courts to intervene at the Supreme Court altogether.72

The Court’s reluctance to open up intervener access sparked what commentators suggest was an unprecedented public campaign by interest groups to pressure the justices to liberalize the policy.73 The Canadian Civil Liberties Association (CCLA) was particularly active. In addition to an open letter from its general counsel, Alan Borovoy, Chief Justice Brian Dickson received a letter from his former clerk, Katherine Swinton, who sat on the CCLA’s Board of Directors.74 Swinton later wrote that the intervener policy seemed erratic and arbitrary during the early years of the Charter, as it was not clear why certain parties were granted or denied leave to intervene.75

Brodie argues that the restrictive approach to intervention was because of how the justices perceived their proper role under the Charter.76 Internal memoranda between the justices at that time reveal that some were wary of the notion of regularly opening up cases to interveners. According to Sharpe and Roach, these justices “insisted that cases had to be decided on strictly legal principles. Allowing non-parties to participate, particularly self-styled public-interest groups, could threaten this formal model of judging."77 One justice circulated a memo complaining that the process threatened to become akin to “an ancient jousting contest, with each side gathering up as many spear bearers as

73 Ellen Anderson writes that the “original neutral ‘friend of the court’ concept was rapidly evolving into a strategic litigation movement paralleling the political lobbying by interest groups pressure for substantive legislative change.” Judging Bertha Wilson, 295; Brodie, Friends of the Court, 33.
74 Sharpe and Roach, Brian Dickson, 384.
76 Brodie, Friends of the Court, xviii-xix.
77 Sharpe and Roach, Brian Dickson, 384.
they can” where the private litigant is “hopelessly lost in the suds frothed up by the intervention.”

Justice Willard Estey was concerned the Court could become a “non-elected mini-legislature” and reportedly viewed interveners as “nothing more than publicity-seeking pressure groups.”

The justices who favoured granting leave to more interveners felt that the potential benefits outweighed the risks of politicization. Wilson, writing in 1986, contends that liberalizing intervention would help diversify the points of view offered about cases and legitimize the Court’s new role under the Charter by making the adjudication process more open and accessible. Dickson, concerned about the public criticism, circulated to his colleagues a *Globe and Mail* article critical of the Court’s interveners policy in the hopes of pressing the issue. Later that year, the Court asked the Canadian Bar Association’s Supreme Court Liaison Committee to investigate the issue of interest group intervention and recommend a new policy. Brodie writes that while such a consultation process is normal for government departments, agencies and political parties, it was “an innovation for the Court, which was unaccustomed to having stakeholders.”

The Court released a new set of rules in 1987, and although they appeared just as stringent as the old rules, the justices significantly changed the way they handled applications in practice, granting more than 90 percent of applications for leave to intervene since the new rules were put in place. The rules mandate that a would-be intervener must demonstrate an interest in the case in question and had to show that its position would be different from the parties in the case and would be useful to the Court. According to Brodie, a rare series of written reasons explaining decisions to grant or deny leave to intervene by Justice Sopinka shortly after the new rules came into effect accomplished two things. First, Sopinka effectively eliminated the “interest” requirement by not

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82 The Court received open letters or submissions from the CCLA, the Women’s Legal Education and Action Fund, the British Columbia Civil Liberties Association and the Ontario Public Advocacy Centre
83 Brodie, *Friends of the Court*, 34.
84 Brodie, *Friends of the Court*, 42.
placing any restrictions on the type of interest a potential intervener would have to demonstrate. 

Second, by requiring that interveners demonstrate they have a history of involvement in an issue, the Court automatically privileges “repeat players” – those groups that had been placing public pressure on the Court to liberalize its approach to intervention – in getting leave to intervene over private individuals and other groups. A few years later, the Court for the first time allowed interveners to add new legal issues to a case.

The movement towards an open intervener policy has not been completely without limits. One justice explains that the Court eventually became concerned about redundant interventions. In the first few years following the 1987 changes the Court’s decision to grant leave to interveners automatically meant they submitted a written factum and were given time for an oral presentation at the hearing. The Court eventually adopted a policy of dealing first with allowing the intervener to intervene via the factum and then at a later stage determining whether they would receive permission to address the Court and for how long. Sometimes this meant allowing the various interveners to sort out who would present at hearing, but often the Court would just grant permission to specific applicants.

The Court has also moved to change the tenor of interventions. Throughout the 1980s and 1990s, interveners “strongly, indeed aggressively, supported one side or another in appeals.” Brodie contends that the Court treats certain interveners more favourably for reasons that “are hard to

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85 Although Lamer held in dismissing an application by the National Metis Council in Dumont v. Canada (Attorney General) [1989] that there must be a specific interest not represented by the existing parties. Crane and Brown, Supreme Court of Canada Practice, 343.
87 In M.(K.) v. M.(H.), [1992] 3 S.C.R. 3 and Norberg v. Wynrib, [1992] 2 S.C.R. 224, the Court has also allowed the admission of fresh evidence by interveners: “Generally speaking, interveners are expected to take the case as they find it and cannot introduce new evidence. However, in public law cases where the evidence may be in the nature of “legislative facts” the Court is more generous.” Crane and Brown, Supreme Court of Canada Practice. 353.
88 Interview.
89 Crane and Brown, Supreme Court of Canada Practice. 343.
Some of the justices have been concerned with the potential perception that the Court plays favourites. Writing in 1999, Justice Jack Major states that interveners should be more objective in their approach:

The value of an intervener’s brief is in direct proportion to its objectivity. Those interventions that argue the merits of the appeal and align their argument to support one party or the other with respect to the specific outcome of the appeal are, on this basis, of no value. That approach is simply piling on, and incompatible with a proper intervention. The anticipation of the Court is that the intervener remains neutral in the result but introduces points different from the parties and helpful to the Court.

A year later, Major, McLachlin and Bastarache were quoted as saying that the door had been opened too widely to intervener groups and that it may be time to restrict access.

There is no evidence that the Court has since tightened intervention. All of the justices I interviewed continue to find interveners very useful, and they connect this usefulness directly to the Court’s distinctive function in the judicial hierarchy. As one justice explains,

[Intervention] alleviates, somewhat, a certain distance that exists between the basics of the trial and the role of the Court in pronouncing upon values, which may be very much at stake and at the heart of the case you’re hearing, but in their application are of much broader effect. The reason to have interveners and for the Court to be fairly open in allowing interventions is to provide means of bringing into focus in the case aspects of which the parties perhaps were less aware or less interested in, but which were very pertinent to determining the values at stake and the achievement of a proper conciliation of these values. It’s a way of allaying this discrepancy between the judicial function of a court of law, which is to decide a conflict between two parties, and what the Court is called upon to do, particularly under the Charter, and that is pronounce upon a better definition, both in concept and the application, of values.

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90 In *R. v. Zundel*, [1992] 2 S.C.R. 731 the Canadian Civil Liberties Association, the Canadian Jewish Congress and the League for Human Rights of the B’Nai Brith were allowed to intervene, while the Canadian Holocaust Remembrance Association and Simon Weisenthal were not. In *R. v. Morgentaler*, [1993] 3 S.C.R. 463 Sopinka refused to allow the Canadian Abortion Rights Action League to add a new ground to the list of constitutional challenges already raised in the case, after allowing LEAF to do so in the *M(K) and Norberg* cases (see: *R. v. Morgentaler*, [1993] 1 S.C.R. 462). And in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, the Court forced the National Citizens Coalition to pay the costs of four trade union federations that intervened to defend the law being challenged. On this latter case Brodies writes that “it is hard to avoid concluding that the Court will let LEAF push the envelope on intervention but penalize the NCC for challenging the power of Canada’s trade unions.” *Friends of the Court*, 69-71.


93 Interview.
Former Justice Iacobucci states that the Court came to view interveners as necessary because of its increased policy-making role under the Charter and the criticism of this role as well. In his view, interveners enhance both the quality and legitimacy of the Court in this regard.94

The evolution of the Court’s policy on third party interveners has been shaped by the justices’ understanding of the institution’s role under the Charter. Simultaneously, the decision to give interveners generous access has indelibly affected that role, as it has made the decision-making process a less purely adjudicative or ‘legal’ affair and a more political and explicitly policy-oriented one. The changes in the intervener policy and the justices’ explanations of the value of third party involvement demonstrate their concerns about the legitimacy of the Court’s decision-making under the Charter. The Court requires the acceptance and support of the general public as well as particular interest groups and social movements in order to exercise its authority (this is explored more fully in Chapter 6).95 Further, the schism among the justices regarding interveners no longer exists. While on occasion the justices have acknowledged potential problems associated with third party involvement in cases, such as when Justice Major cautioned interveners to be more “objective” in their approach, the justices now appear to unanimously support intervener participation.

Evidence

Almost hand-in-hand with increased third party participation at the Supreme Court is an evolution of the type of evidence considered by the justices. Prior to the Charter, the Court was traditionally reluctant to consider anything beyond “adjudicative facts,” which are facts specific to a given case. “Legislative facts,” which might include social science data or Parliamentary reports, were generally deemed inadmissible. This was despite the fact that the U.S. Supreme Court began to consider such

95 Brodie, for example, argues that the Court’s acceptance of third party interveners and the political nature of judicial review makes the “legalistic” justifications for judicial review problematic. Friends of the Court, 73-4.
extrinsic evidence early in the twentieth century. The Court is widely held to have broken with this tradition in 1975, when it gave the parties leave to file extrinsic material on the seriousness of inflation levels in the *Anti-Inflation* reference. Yet the use of extrinsic evidence did not become commonplace until after the Charter. As Iacobucci explains, “the advent of the Charter has had an impact not only upon who may participate in a hearing, but also upon the factors that courts tend to take into consideration.” He notes, “[a]s the attention that courts must pay to the operation and effect of broad social policies has increased, so too has the necessity of eliciting and paying attention to social science data that provide a greater understanding of the context in which legislation is enacted.”

As is explored more fully in chapter 5, this analysis usually occurs under section 1 of the Charter, the “reasonable limits” clause. In *R. v. Oakes*, the Court indicated that governments would be required to present evidence that supports justifying infringements on rights. As Sharpe and Roach explain, “[t]he result has been a significant expansion in the kind of materials coming before the courts. Historical, philosophical, and economic data, as well as government reports (both domestic and international), are presented, sometimes through expert witnesses, sometimes by way of judicial notice.”

Law clerks who served at the Court in the 1970s and 1980s note they were rarely confronted with these “extra-legal” materials during the research process. Clerks serving more recently, however, explain that examination of journal articles and sociological data is a fairly regular practice. These more recent clerks differ, however, on the breadth of their research. While some emphasize that they never did research beyond the materials submitted by the parties, others state that

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102 Interviews.

103 Interviews.
they occasionally examined new issues because they could be addressed at oral hearings. The clerks’ approach to this aspect of the research process depends on the preferences of their justice.¹⁰⁴

Scholarly writing, government reports and research studies are often part of the parties’ submissions in cases that pertain to public policy issues, particularly Charter cases. The Court’s liberalization of its third-party intervener policy only exacerbated this trend; indeed, interveners have been granted regular access to the Court for the express purpose of shedding an ‘independent’ light on the latest research in particular issue areas and on the impact of potential policies. Some justices have also taken to considering political and philosophical theory. Iacobucci notes that such inquiry can be important because the Charter often involves abstract questions.¹⁰⁵ He writes that “the increased consideration of academic commentary enhances the quality of constitutional adjudication by ensuring that courts are aware of the various theoretical justifications for the protection of certain rights and freedoms.”¹⁰⁶

The level of attention paid and the weight given to extra-legal evidence varies from justice to justice. One former clerk suggests that older justices are less inclined to look at extra-judicial sources. The Court’s decisions reflect some flexibility, or stated in more critical terms, a lack of consistency, with respect to how strictly it demands supporting evidence. For example, Sharpe and Roach point to *RJR-MacDonald*, a case in which the Court struck down as unconstitutional a ban on tobacco advertising, as an instance where the justices in the majority were quite strict with the requirements for evidence.¹⁰⁷ Alternatively, they note that in *Edwards Books* the Court relied on outdated and imprecise data to uphold Sunday closing legislation.¹⁰⁸ This is explored more fully in chapter 6. For the purposes of the present analysis, however, it is worth briefly exploring the views the law clerks have on incorporating non-legal subject matter in their case research.

¹⁰⁴ Interviews.
¹⁰⁵ Jaffey, “Charter has ‘Enhanced Democracy’ Iacobucci tells Toronto Audience.”
Most of the clerks agree that non-legal evidence might be given less weight in analysis because it is less determinative than the “adjudicative facts” to which justices are more accustomed. One clerk expressed the difference in this way: “In cases where social policy is involved, the main question is often not what did the legislators mean by these words, for example, or did the court of appeal make an error in applying this law to this set of facts. It’s more that there are two competing issues in society, such as expression versus religion.” According to this clerk, while non-judicial sources are not clear-cut in determining such issues, they are a legitimate tool to draw on because they can aid the Court in understanding the societal context. The clerk noted that statistical evidence on the impact of legislation on disadvantaged social groups, for example, might help the Court in reasonable limits analysis under the Charter.

Another clerk acknowledges that it was difficult to marshal extra-legal evidence in this way, particularly when an argument pertains to the systemic effect of legislation in Charter cases dealing with discrimination, for example. This clerk argues that such evidence was never a substitute for the finding of record at the trial level. A third clerk agrees with this sentiment but admits that there is sometimes a temptation to ignore what the trial judge said three years earlier and draw one’s own conclusions. This same clerk notes never feeling that the evidence was beyond the grasp of lawyers, justices or clerks. Several other clerks, however, explain that dealing with such evidence was “difficult,” “tricky,” or “problematic.” One clerk went further, noting “I didn’t always feel I was competent to do it. I don’t think clerks had a lot of time to deal with such issues.” This clerk notes that experts in particular social science fields are often critical of the Court’s judgments “and for good reason.”

109 Interviews.
110 Interview.
111 Interview.
112 Interviews.
113 The clerk also suggested the Court might better be equipped to evaluate social science evidence if it had an institutionalized mechanism, such as a committee of different experts it could consult. The clerk admitted, however, that this solution would possibly present problems related to judicial independence.
The capacity of the justices – or the judicial process itself – to evaluate the policy implications of complex legislative objectives is explored in chapter 6. The policy-laden or “contextualist” sources now considered by the Court significantly lessen the force and constraint of legal rules and precedents in judicial decisions. For the present purposes, it is important to underscore that the range of evidence considered by the Court has expanded, particularly under the Charter. That several clerks serving within the last decade acknowledge the problematic nature of dealing with such evidence is testament to the broader discretion inherent in cases that stress a focus on social context. Discussion of this in chapter 6 reveals strong divisions within the Court about the weight that should be accorded to such evidence and that these differences stem from the justices’ consideration of their proper role.

Diving into the Deep End?

With important changes regarding leave to appeal and the introduction of the Charter, the Court’s responsibilities relating to judicial review were at least in part imposed on it as the direct result of political decisions by elected representatives. Indeed, it is a fact of which justices often remind critics in defending their role as arbiters of the Charter. Yet if the justices were ordered to go swimming, they have made important choices along the way that have led them into the deep end of the policymaking pool. First and foremost among these decisions is the relaxation of the rules of justiciability. Restrictions pertaining to mootness, ripeness and the law of standing are now considerably lenient.

Perhaps most significantly, because section 1 of the Charter has become the de facto site for determination of “political questions” – i.e. whether an issue ought to be left to legislatures – the Court has bound itself to explicit analysis and evaluation of policies and their effects. As this calls into question the competence or capacity of the Court to perform such work, the justices have taken the presumably necessary step of liberalizing third party intervener access and their

acceptance and consideration of “legislative facts” (decisions at least partly geared towards legitimating the expansive policymaking role).

As explored in chapter 6, cases involving complex social policy issues are particular areas where judicial discretion comes into play. Despite their involvement in these questions, contemporary justices continue to assert their ability to remain impartial adjudicators. The next section explores the modern day Supreme Court justice. First it considers justices’ views on the law, their role and impartiality, and turns to an analysis of how ideology has thus far been conceptualized in the political science literature on judicial behaviour. This analysis suggests that current scholarship might do a better job of incorporating judicial role perceptions to generate a more sophisticated understanding of the part ideology plays in decision making. It then turns to two other oft-discussed features relating to justices on the contemporary Court. First, the composition of the bench now includes women and is, in fact, one of the most gender-balanced in the world. Second, the justices are now more likely to have backgrounds in academia. The effects of each of these fairly new characteristics are briefly examined.

The Judges of the Contemporary Era

This section examines both how the justices view the law and the sources of their decision-making, as well as how factors like their backgrounds and gender may influence their approach to judging. Political scientists, journalists and other commentators often ascribe differences between judges in terms of their personal characteristics, such as ideology or gender. By contrast, legal scholars often root these differences in the varying perceptions judges have of how the law should be developed or of the purposes of documents like the Charter. Thus judges are often classified as “incrementalists” who see the law in narrow terms or “contextualists” who prefer to develop the law or particular Charter rights in broader terms. One interesting factor that marks the contemporary period is that the justices themselves are more likely to write or speak about their
personal characteristics and values in the context of their role. In part, this new openness stems from a desire to defend the Court and themselves from criticism or allegations of politicization.

Somewhat surprisingly, the Court’s justices readily acknowledge that certain characteristics – including background and gender – may influence their decision-making, but they frequently articulate increasingly sophisticated arguments about how the influence of their individual ideologies can be pushed to the side. Despite the criticism presented in chapter 2 regarding the particular methodologies some political scientists have used to “prove” the effect of ideology on the Court’s decision-making, the position taken in this dissertation is that ideology has a significant impact on the justices’ work. Because the claim here is that the justices’ discretion to enact their personal policy preferences is constrained and structured by institutional role perceptions, it is important to understand the arguments and perspectives articulated by the judges when they confront such claims.

The Judicial Role, the Law, and Ideology

How the judges view their role can be seen as distinct from, albeit fundamentally connected to, their understanding of the law. The distinction is an important one, because important assumptions about the supposedly principled nature of legal decision making are embedded in their view of the Court’s proper function. Understanding how judges comprehend the law and their capacity to adjudicate issues in a sufficiently impartial manner can help us to understand their conception of their role, which in turn, I argue, helps constrain or shape the actual decisions they ultimately make.

As explored in chapter 2, for some time judges and those in the legal profession denied that judicial decision making had a significant policy component. Katherine Swinton writes, “in contrast to many who sat in the early 1970s, those who make up the Court today do not deny their important policy role – although they continue to insist their function is a legal one (admittedly
with policy considerations relevant to it), and not a political one.”

What is said to shield the Court from politics is the temperament of judicial decision making. The nature of appointment to the Court, secure tenure until age seventy-five, and a strong culture of judicial independence in the contemporary period are all said to prevent the corrupting influence of majoritarian politics from infecting judicial sensibilities.

Yet many justices of the Charter era have long abandoned the notion that they can make legal decisions in a wholly objective, scientific manner. In fact, many of them have made rather strong pronouncements on the value-laden elements of adjudication. Years prior to her appointment to the Supreme Court, Rosalie Abella writes,

> What one really hopes for in a judge is a judicial polymath whose creative intelligence translates into practical judgments replete with empathetic objectivity. One hopes, but is it realistic? Every decision maker who walks into a courtroom to hear a case is armed not only with relevant legal texts, but with a set of values, experiences and assumptions that are thoroughly embedded.

Former Justice Michel Bastarache writes,

> The days when judges and lawyers could credibly claim to be discovering an immutable truth in the law are now gone forever. The cataclysmic events of this century, combined with an onslaught in academic circles on the idea of “objective” truth have led judges and lawyers to the awareness that subjective views will always be a part of the adjudicative process.

Upon retirement in 1988, Estey noted in an interview that it worried him that Canadians still did not realize that the Court’s decisions are dependant on the personality of each judge. That these statements apparently needed articulating after the Charter’s enactment, many decades after legal realism rendered them common sense, only illustrates the persistence of a conservative legal culture in Canada.

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While modern era justices acknowledge that truth and objectivity cannot be found through the law, most still cling to the arguably conflicting view that despite the presence of personal values, they are still capable of adjudicating issues in an impartial, apolitical manner. Bastarache writes that acknowledging that subjective views are embedded in the process “does not mean that judges throw up their hands when faced with a difficult problem and go with their “gut instinct.” Rather, it means that in the process of searching for the missing piece of the jurisprudential puzzle which any novel case represents, judges should and must be conscious of their own biases and moral inclinations.”\(^{119}\) Appearing before a parliamentary committee in 2004, former Justice Claire L’Heureux-Dubé states, “Judges, as I see it, don’t have a philosophy, and make no mistake about that. They’re not there for their own opinion. If you ask me what my position on abortion is, I might have an opinion, but it’s not relevant to the case I’m dealing with.” She adds, “we may have an opinion, but we have sworn on the Bible – generally, at least – that we will rule in accordance with our mission, which is to render justice.”\(^{120}\)

One of the first Canadian justices to articulate this general position was Laskin, who found the nineteenth-century understanding of law unsatisfactory and viewed the central tenet of “legal modernism” as meaning that the law must be responsive to society.\(^ {121}\) Despite this, Laskin was unwilling to follow some American thinkers, like Jerome Franks, who felt that through the vagueness of constitutional language and the finding of ‘fact’ judges could make decisions primarily through their psychological make-up.\(^ {122}\) Laskin believed judges could be made to “behave” even contrary to their personal inclinations.\(^ {123}\) So while Laskin’s general understanding of law and legal interpretation meant rethinking the Supreme Court’s “traditional role as a simple

forum for settling disputes and urging it to play a more important role in developing the law,”¹²⁴ it did not imply the Court could be viewed as a political institution.

But how can judges claim to set aside their personal values and preferences? Perhaps no Canadian justice has written or spoken more about law and impartiality than Chief Justice Beverley McLachlin.¹²⁵ She too argues that “the true nature of judging seems to me to lie somewhere between the myths of the declaratory theory and the model of decision-making as the idiosyncratic application of personal preferences.”¹²⁶ Over the course of her judicial career, McLachlin has developed and articulated her conception of “conscious objectivity”:

The judge, by an act of imagination, places herself first in the shoes of one party, then in the shoes of the other. This practice enables the judge to see all the ramifications of complex conflicts and arrive at accurate and fair characterizations of the issues. The judge approaches the legal principles bearing on the question with the same objectivity. This process enables the judge to rise above personal views and acknowledged and unacknowledged prejudices and stereotypes to give a wise decision that takes into account (although not necessarily accepting) the parties’ conflicting views on the fact, the law, and the interplay between them.¹²⁷

In McLachlin’s view, a distinction between neutrality and impartiality is important. She states that “impartiality does not, like neutrality, require judges to rise above all values and perspectives. Rather, it requires judges to try, as far they can, to open themselves to all perspectives.”¹²⁸

According to McLachlin, “impartiality does not require that we adopt a “view from nowhere.” On the contrary, it relies on the judge’s close connection to the community in which she judges and its core values.” A judge can accomplish this, she explains, by examining

¹²⁴ Girard, Bora Laskin, 366.
¹²⁶ McLachlin, “On Impartiality.”
¹²⁷ McLachlin, “The Supreme Court and the Public Interest.” 316.
¹²⁸ McLachlin, “On Impartiality.”
historical and current context and using recognized methods of logical reasoning. She explains that “values and principles entrenched in our legal system, like equality or the presumption of innocence, do not prevent a judge from being impartial. A “bias against bias,” for example, is not a judicial bane but a boon.”

Unfortunately, McLachlin’s explanation does little to help us understand how judges can accomplish this mental task in difficult or controversial cases. She presents easy examples of positive preconceptions like “bias against bias” and negative ones like racism or sexism. It is harder to identify and discard preconceptions that implicate complex policy issues, such as those relating to questions of redistribution. The contemporary Court is often confronted with just such matters, particularly in the Charter context. McLachlin’s reliance on context, the notion that judges need simply to ascertain the core values embodied in Canadian society to render justice, thus suffers from a fatal flaw: with regard to the resolution of complex policy disputes or controversial moral issues, there is no single, hegemonic value system that can guide judges. In other words, where society is fundamentally divided on such questions, judges are left with little to draw on. All that is left at that point is for judges to choose between competing principles or conceptions of justice.

Even those cases that present justices with the greatest amount of discretion in this regard are bound up by institutional factors like rules, processes and norms of collegiality. As the previous chapter makes clear, however, political scientists have tended to focus on the obvious role played by ideology and values, and most of the existing scholarship has done so to an extent that the individual justice’s ideology has become the focus point for analysis of courts and judicial behaviour. This is true whether from the behaviouralist perspective that treats it as the primary

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130 Though McLachlin admits that in such instances “the weight one assigns to different factors often depends, at least in part, on one’s own values, and on which other individuals’ or groups’ perspectives one is acquainted with.”
explanatory variable or the rational choice perspective that understands it as the primary motivation for behaviour within the context of the rules of the game.

I argue that a shift in focus is required in order to better understand how the Supreme Court of Canada operates and how justices arrive at decisions. By making judicial role perceptions the central focus of analysis we can better gauge when and how particular factors have stronger or weaker influence in decision-making. This approach does not discount the effect of ideology; in fact, given the relatively thin conception of ideology in the dominant approaches to the study of judicial behaviour, an emphasis on judicial role perceptions offers a more realistic and complex appraisal of the interplay between ideology and other significant variables. In order to elaborate, I will provide a brief examination of how the leading attitudinal scholarship conceptualizes ideology and the problems it confronts in doing so.

It is commonly asserted by attitudinal and other scholars that “justices are not forthright about their ideological tendencies.” Yet many justices have spoken openly about their approach to the Charter, with some even using ideological labels to do so. In a 2001 interview, Bastarache notes that “in criminal law, I am more conservative than the majority of the court of the last few years.” Former Justice William McIntyre, while disliking labels, would not reject descriptions of him as conservative, according to his biographer. Former Chief Justice Antonio Lamer describes himself as a post-modernist in his approach to the Charter. Nevertheless, it is more common for justices to describe decision-making under the Charter as former Justice Jack Major does: “you fall into one of two camps – or in between – incremental change or broader brush strokes.” Former Justice L’Heureux-Dubé puts it this way: “Some colleagues read the Charter

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131 Ostberg and Wetstein, Attitudinal Decision Making in the Supreme Court of Canada. 45.
134 Cristin Schmitz, “Former Chief Justice Offers a View from the Top,” The Lawyer’s Weekly. 21(44) (March 29, 2002).
135 Cristin Schmitz, “Justice Jack Major Reflects on Dealing with Life, Death as a Supreme Court Judge,” The Lawyer’s Weekly. 22(34) (January 17, 2003).
as a civil liberties document, which is individual rights-predominant, whereas some others read it like a human rights document, which is a balance between the rights of society with the rights of the individual.”

All of the justices I interviewed respond to attempts to label them in ideological terms in dismissive or amused tones. Generally, they say they understand the rationale behind attempts to classify their voting records, but see ideological labels as simplistic at best. In part this is because they tend to acknowledge that within certain areas of law, they may render decisions that might be viewed as consistently “liberal” or “conservative,” but that across different areas of law no one “worldview” along this uni-dimensional spectrum necessarily predominates.

As noted in the previous chapter, attitudinalists have traditionally spent little time elaborating on the concept of ideology. In their book, Ostberg and Wetstein’s analysis of ideology’s influence is examined with respect to three broad areas of law: criminal, civil rights and liberties, and economic cases. In this respect, they acknowledge that the impact of ideology does not necessarily translate across all issues or areas of decision making. Only with respect to L’Heureux-Dubé, however, do Ostberg and Wetstein code two separate ideological scores, depending on the area of law. So in the criminal context, L’Heureux-Dubé is marked as a conservative, and with regard to civil liberties cases, a liberal.

The case of L’Heureux-Dubé is worth briefly commenting on here, because the attitudinal model is not conducive to explaining, in the first instance, why she might make such seemingly contradictory decisions across these two categories of cases. One explanation of her conservative decisions in criminal cases may be that in many instances they are perfectly consistent with the source of her liberal views in equality cases: her strong feminist sensibilities. This is particularly apparent when we consider the subject matter of some criminal cases, such as sexual assault.

136 Cristin Schmitz, “Our One-on-One with Justice Claire L’Heureux-Dubé,” The Lawyer’s Weekly. 22(3) (May 17, 2002).
137 Interviews.
138 L’Heureux-Dubé was the only justice for whom the newspaper reports Ostberg and Wetstein relied on to score judicial ideologies made this distinction.
cases, where L’Heureux-Dubé’s sympathies lie with the victims as opposed to the accused. In some respects, this explanation is not particularly sophisticated because feminism is in some respect just another ideological label. Giving consideration to L’Heureux-Dubé’s feminist outlook, however, avoids the limits inherent in a conception of values or ideology reduced to crude, dichotomous liberalism versus conservatism. It also highlights some of the measurement problems associated with Ostberg and Wetstein’s approach explored in chapter 2, where their model claims to explain votes within particular areas of law, but in a case like L’Heureux-Dubé, cannot explain differences across areas of law.

Similar variances also exist in other justices’ voting behaviour – even within particular areas of law, such as equality cases – but the explanations are not necessarily rooted in ideological terms. Some of these differences pertain directly to a justice’s conception of the Court’s proper role or capacities. For example, McLachlin writes that “the courts should show great deference to legislative determinations of where and how public money should be spent.”139 The position she articulates may help explain differences in her voting patterns across certain equality cases, such as support for claimants in cases implicating gay rights140 versus her opposition to equality claimants in cases implicating substantial government spending.141

A similar distinction articulated by Dickson relates to the Court’s approach when dealing with cases that involve claims between competing groups in society and the decision may rest on assessments of conflicting social science research and demands on scarce resources. Dickson states that “democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative

function.” 142 In other cases, however, “the government is best described as the singular antagonist of the individual whose right has been infringed.” In these instances the Court is in a much better position to assess the reasonableness of the government’s policy under section 1.

The distinction Dickson draws stems from two related concerns. The first regards the legitimacy of the Court’s role. Dickson has little problem with the Court exerting its constitutional authority to protect the rights and freedoms of individuals or groups against government action, but has difficulty from a normative perspective in leaving it entirely to the Court to balance the competing interests of different groups, particularly in instances where legislative choices concern the protection of vulnerable groups. The second issue pertains to the Court’s capacity to make policy determinations where conflicting evidence exists. The Court lacks the time and resources to examine social science data, while the resources of the bureaucracy and legislative committees permit the elected representative to thoroughly debate and investigate policy proposals and their potential effects. As a result, in such instances deference to legislative choices is appropriate.143

A recent study by attitudinal scholars examines the notion of “ideological complexity” across different areas of law. Noting that it is typically assumed that the U.S Supreme Court judges have “a high level of consistency across a variety of issue domains,” the authors investigate voting patterns on the Canadian and American Supreme Courts across three issues areas (economic cases, criminal cases, and civil rights and liberties cases).144 Drawing on nonunanimous cases from a five-year period of no personnel turnover on the Canadian Court (1992 to 1997), the authors use factor analysis to examine voting patterns and alignments, and a detailed reading of those cases scoring most positively and negatively on each factor generated, in order “to identify the underlying dimensions that fostered disagreement on the court.”145 In all three areas, the authors find that a liberal-conservative divide was the primary source of

143 The question of institutional capacity is explored more fully in chapter 6.
145 Wetstein et al., “Ideological Consistency and Attitudinal Conflict,” 772.
disagreement, while the second factors pertained to the question of deference to government agencies in economic and civil rights and liberties cases or to evidence in criminal cases.

These findings prompt the authors to spell out their first conclusion: “Liberal-conservative tensions appear to be as strong a force for explaining conflict within the Canadian Supreme Court as in the U.S. setting, thus lending credence to the attitudinal model.” It is worth revisiting critiques of this perspective explored in chapter 2. What the results actually demonstrate is that voting patterns reflect simplistic liberal-conservative ideological divisions, not that ideological considerations are the basis for them. Indeed, unlike explicit testing of the attitudinal model, the factor analysis undertaken in this study does not rely on exogenous ‘measures’ of the justice’s attitudes. Rather, the focus is solely on vote patterns across specific sets of cases. As a result, despite the fact that the authors included analysis of the written reasons, there is no way to be sure that the voting patterns are not the result of legal or other considerations.

Perhaps more significantly, the authors find that issues of deference were important, though secondary, factors in the voting patterns. In the criminal field, for example, the division stemmed from a debate over the degree of deference that should be accorded the trial judge’s finding with regards to evidence. The authors label conflict over deference as “ideological,” but note it is generally not driven by opposing liberal-conservative groups on the Court. This is left largely unexplained.

Further, the authors create and compare scatterplots taken from the liberal-conservative factor results in each of the three areas. They find a “complex” pattern of ideological decision making on the Canadian Court. For example, the authors’ findings suggest that justices who voted liberally in economic cases voted more conservatively in criminal cases and that voting patterns in civil rights cases do not align at all to the voting in the other two issue dimensions. In contrast, voting patterns on the U.S. Court were more consistent. The authors suggest that perhaps the less

146 Wetstein et al., “Ideological Consistency and Attitudinal Conflict,” 780.
ideological appointments process, panel assignments or broader Canadian political culture may explain these results. They conclude that their “conjecture suggests that the institutional and political dynamics of a court can have a direct influence on the levels of ideological consistency exhibited by justices in their votes.”

It is impossible to disagree with this conclusion. Their suggestion that “a more sophisticated, generalizable model needs to be developed in the judicial area to accurately capture decision-making patterns in high courts around the world” is an important conclusion as well. Attitudinalists could conceivably integrate these institutional or cultural considerations as ‘case facts’ or additional variables in their models. I would argue, however, that while such an approach would no doubt improve the efficacy of the attitudinal model, the fundamental problems of the approach as already explored would largely remain, especially the measurement difficulties inherent in the approach.

Further, the centrality of ideology to the modelling of behaviour continues to leave too many of the broader structural and norm-related factors unattended, particularly those views which may resemble ideological consistency while in fact being premised on judicial role perceptions (for example, the specific factors that may call for deference, as noted above). This is an important distinction from a normative perspective because if the basis for decisions stems from a conception of the Court’s proper role and capacities rather than mere ideological considerations, then those decisions arguably have a greater air of legitimacy. From the researcher’s standpoint, attending to this distinction by focusing on those role-related views may make it easier to identify those stages of the decision-making process or particular contexts under which personal values supersede the rules and norms that are generally thought to govern the Court’s work.

This type of analysis is the guiding framework for the chapters that follow. The remainder of this chapter, however, briefly explores two other factors drawn from the justice’s personal

characteristics. Gender has been identified as a very important variable in several empirical studies of the Canadian Court, while less explicit attention has been paid to judicial backgrounds.

**Gender**

The first female justice, Bertha Wilson, was appointed to the Supreme Court in 1982. Since then, six other women have been appointed. The current bench has four women, making the Canadian Court the most gender-balanced court of its kind in the world. Wilson herself made one of the leading analyses of the impact women judges might have on judicial decision making. Drawing on the psychological analysis of Carol Gilligan, in a 1990 speech she notes that there are entire areas of law in which there is no uniquely female perspective and that “in some areas of the law, however, a distinctly male perspective is discernable.” She states “if women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.”

The speech created controversy, even instigating a complaint to the Canadian Judicial Council from a conservative women’s group.

A couple of recent, comprehensive studies on Supreme Court voting appear to confirm Wilson’s views. Donald Songer finds that divisions on the Court are strongly structured by gender. Female justices are nineteen percent more likely to support the prosecution in criminal cases, twelve percent more likely to support rights claimants in civil liberties cases, and twelve percent more likely to support the underdog in economic cases. The differences are all statistically

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significant when controlling for a variety of other factors, including region, religion and party of appointing prime minister.\textsuperscript{152}

Ostberg and Wetstein’s analysis suggests that in certain areas of law, female justices have exhibited distinct behaviour, “blazing their own legal trail in civil rights and liberties disputes, suggesting that female justices on the Canadian Supreme Court may approach fundamental freedoms and equality issues from a different perspective than their male colleagues.”\textsuperscript{153} All of the female justices are at the liberal end of the spectrum in these cases. According to Ostberg and Wetstein, female justices are 27 percent more likely to rule in favour of discrimination claimants in equality cases than their male colleagues, and are 54 percent more likely to do so in non-unanimous cases.\textsuperscript{154} However, the authors find no significant gender-based differences in free expression cases or economic cases.\textsuperscript{155}

These apparent gender disparities are consistent with Wilson’s perspective. A female justice’s differing perspective and life experiences are more likely to come into play in areas of the law where those distinct viewpoints are more relevant. Important areas of jurisprudence have developed from an almost entirely male perspective. For example, the \textit{Lavallee}\textsuperscript{156} case involved the acquittal of a woman who shot and killed her abusive husband in the back of the head as he left the room after an argument. Drawing on expert evidence regarding the nature of the abuse, “battered women’s syndrome” and the reasonable belief that her husband would kill her, the Court upheld the acquittal. Wilson, writing for the Court, “recognized that the interpretation of s.34 of the Criminal Code of Canada, dealing with self-defence, evolved from a male model, from

\textsuperscript{153} Ostberg and Wetstein, \textit{Attitudinal Decision Making in the Supreme Court of Canada,} 120.
\textsuperscript{154} Ostberg and Wetstein, \textit{Attitudinal Decision Making in the Supreme Court of Canada,} 134-9.
\textsuperscript{155} Ostberg and Wetstein, \textit{Attitudinal Decision Making in the Supreme Court of Canada,} at 144 and 157.
the point of view of a one time bar room brawl encounter between strangers of equal size and ability.”157

Gender differences are also significant in terms of the impact female justices have on the day-to-day operation of the Court. McLachlin has been quoted as saying female justices could make for “happier courts.”158 In chapter 5, I explore the impact women judges are said to have on the decision-making conventions and norms of collegiality within the institution.

**Private Practice versus Academic Experience**

One of the most overlooked potential factors of influence in the Canadian judicial behaviour literature is the justices’ career paths. While attention is devoted to ideology and gender, a consideration of the justices’ post-law school, pre-Court experience has been limited to largely impressionistic inferences, based largely on the controversy surrounding the initial appointments of judges with academic backgrounds by Trudeau in the 1970s. In their 1990 book on the country’s judicial system, Peter McCormick and Ian Greene write,

> There has been a certain amount of friction on the Supreme Court between judges who have spent many years in private practice, and judges whose major background is in the academic world. The judges who come from private practice sometimes saw the academic judges as wasting time over trivial philosophical issues, while the academic judges saw the judges from private practice as not giving serious enough consideration to important legal and philosophical issues.159

In his recent study on the Court’s jurisprudence Daved Muttart writes,

> I attempted to measure whether Judges with academic training are more willing to overrule past decisions. Although this seemed to be the case, I was unable to quantify it with any degree of specificity. Rather, it was clear only that the trend towards appointing Judges with academic training coincided with the trend towards more overrulings.160

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Interestingly, while most justices typically brush aside ideological labelling as either irrelevant or limited to academic interest, many of them agree that differences in career backgrounds are significant.

One justice paints the differences as stark: “Academics tend to complicate the law. I always say for fun ‘they know too much to be judges.’ Academics on the bench who have never had any practice are a problem in many ways. Judge Beetz, who was probably one of the most brilliant judges on the Supreme Court of Canada, could not decide. He took two years, three years to write judgments, which is not acceptable. ... The academics and the judges who have been picked up from the bar to the Supreme Court have been terrible.”

Another justice points to other important differences, but notes that, over time, experience on the Court can diminish certain tendencies:

I think [academics] approach cases differently. They don’t have the experience that you get with thirty years of practice. They have experience that they get from thirty years of writing and lecturing, and seeing a body of young people got through every year with their own ideas. So they have formed useful ideas, but they’re not formed on the same background that the ‘man on the street’ has. And I think in some ways they may tend to be less practical or would not see as readily the ‘unintended consequences.’ I think if you come from practice you can see if you decide [a case] this way, the police are really going to grab hold of it and run, so you’d better put some kind of qualification on what you’re saying, otherwise it’s too broad. ... On the other hand, after each has been a judge for say five years, that gap sort of closes. ... The academic may have become over the years very conservative and vice versa, but at the beginning I think their life experience plays a part in their judgment, just as their life experience apart from their working life plays a part in the way they see things. You can’t change who you are.

A third justice argues that academics have a stereotypical “ivory tower experience,” while an individual coming from practice deals with everyday life issues. A fourth justice notes that academics can be very practical as well, but stresses that a majority of the Court should be people who have experience in practice. This justice also emphasizes the need for the Court to have a

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161 Interview.
162 Interview.
163 Interview.
diverse composition. A fifth justice, however, has difficulty with some of these conclusions, noting that many of the Court’s justices have experience in both academics and private practice.

Table 3.1 - Ideological Scores and Professional Background of Supreme Court Appointees, 1977-2008

<table>
<thead>
<tr>
<th>JUSTICE (YR APP.)</th>
<th>IDEOLOGICAL SCORE</th>
<th>BACKGROUND</th>
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<tbody>
<tr>
<td>La Forest (1985)</td>
<td>Liberal</td>
<td>Academic</td>
</tr>
<tr>
<td>McLachlin (1989)</td>
<td>Moderate Liberal</td>
<td>Academic</td>
</tr>
<tr>
<td>Iacobucci (1991)</td>
<td>Moderate</td>
<td>Academic</td>
</tr>
<tr>
<td>Bastarache (1997)</td>
<td>Liberal</td>
<td>Academic</td>
</tr>
<tr>
<td>Arbour (1999)</td>
<td>Liberal</td>
<td>Academic</td>
</tr>
<tr>
<td>Abella (2004)</td>
<td>Liberal</td>
<td>Academic</td>
</tr>
<tr>
<td>Chouinard (1979)</td>
<td>Conservative</td>
<td>Mix</td>
</tr>
<tr>
<td>Lamer (1980)</td>
<td>Liberal</td>
<td>Mix</td>
</tr>
<tr>
<td>Le Dain (1984)</td>
<td>Moderate Liberal</td>
<td>Mix</td>
</tr>
<tr>
<td></td>
<td>Liberal (civil)</td>
<td>Mix</td>
</tr>
<tr>
<td>Sopinka (1988)</td>
<td>Moderate</td>
<td>Mix</td>
</tr>
<tr>
<td>Stevenson (1990)</td>
<td>Moderate Liberal</td>
<td>Mix</td>
</tr>
<tr>
<td>Fish (2003)</td>
<td>Liberal</td>
<td>Mix</td>
</tr>
<tr>
<td>Charron (2004)</td>
<td>Moderate</td>
<td>Mix</td>
</tr>
<tr>
<td>Cromwell</td>
<td>Moderate Conservative</td>
<td>Mix</td>
</tr>
<tr>
<td>Estey (1977)</td>
<td>Liberal</td>
<td>Practice</td>
</tr>
<tr>
<td>McIntyre (1979)</td>
<td>Moderate</td>
<td>Practice</td>
</tr>
<tr>
<td>Wilson (1982)</td>
<td>Liberal</td>
<td>Practice</td>
</tr>
<tr>
<td>Gonthier (1989)</td>
<td>Moderate</td>
<td>Practice</td>
</tr>
<tr>
<td>Cory (1989)</td>
<td>Liberal</td>
<td>Practice</td>
</tr>
<tr>
<td>Major (1992)</td>
<td>Conservative</td>
<td>Practice</td>
</tr>
<tr>
<td>Binnie (1998)</td>
<td>Moderate</td>
<td>Practice</td>
</tr>
<tr>
<td>LeBel (2000)</td>
<td>Moderate Conservative</td>
<td>Practice</td>
</tr>
<tr>
<td>Rothstein (2006)</td>
<td>Moderate Conservative</td>
<td>Practice</td>
</tr>
</tbody>
</table>

With most of the justices seeing strong differences between the approaches of judges with particular backgrounds, it is surprising that this characteristic has not received much scholarly attention. If the experiential knowledge judges bring with them is important, it becomes all the more difficult to untangle socialization, education, ideology and personal characteristics. Using Ostberg and Wetstein’s newspaper scores for the Supreme Court justices’ ideological positions as

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164 Interview.
165 Interview.
the prime indicator, I compare the background of judges from the mid-1970s to the present in Table 3.1.\textsuperscript{166}

Though there are only six justices who have primarily academic backgrounds, all but one – Iacobucci, who is scored as a moderate – are classified as liberal. The ideological classification of the justices who had mixed backgrounds or were primarily private practitioners is decidedly more mixed. The correlation between justices perceived as liberals and those with academic backgrounds is not necessarily surprising, but it should give some pause to a simplistic view of the relationship between ideology and decision making. It is impossible to say, for example, whether a judge’s ideological leanings led them to academic pursuits or whether that career path fostered a more liberal outlook.

\textbf{Conclusion}

This chapter provides the context for what follows. The Supreme Court evolved from its obscure, second-class status over a period of many decades. Even after becoming Canada’s final court of appeal in 1949, it was not until the last thirty years that the Court emerged as one of the country’s most important governing institutions. Two events in particular were responsible for this critical juncture in the Court’s history. First, changes to the Supreme Court Act that came into effect in 1975 gave the justices wide discretion to choose which cases to hear on the basis of their national importance. The second empowered the Court to determine the constitutionality of government action or legislation with regard to the broadly worded provisions in the newly entrenched Charter of Rights.

That these significant developments thrust the Court into a new role is beyond question, but to assume that the external imposition of a new mandate and changes in particular processes are all that accounts for how the Court developed is far too simplistic an explanation. The Court’s justices responded to the new incentives and pressures in a host of ways that were in no way

\textsuperscript{166} Dickson is not included in the table, as there were no ideological commentary in the newspapers.
preordained by external political actors. Changes in the institution’s policies relating to justiciability, third party intervention and evidence are connected in large part to the Charter, but there was strong disagreement among the justices about how far to go in altering the Court’s traditional approaches to each issue. Reform-minded judges clearly won out in regards to reshaping the law of justiciability, to the extent that there is perhaps no issue the Court would now shy away from considering. Debate over third party intervention was particularly sharp among the justices during the 1980s; ultimately, the deciding factor was a concern about the legitimacy of the Court’s process. Among the contemporary justices, a strongly held consensus exists about the propriety and necessity of the interveners in salient Charter cases. Varying more widely from judge to judge is the level of willingness to draw from extra-legal evidence in the course of deciding cases. The move towards more liberal use of such extrinsic data runs parallel to these other reforms, all of which has meant that the Court has become a fundamentally more policy-oriented, and therefore political, institution.

The second section of this chapter examined the justices’ views of their role, the law and the influence of their own values in decision making. Although judges now acknowledge the potential influence of personal values and that truly objective decision making is impossible, their assertions that full impartiality remains possible – such as through the psychological exercise of ‘conscious objectivity’ and an appeal to widely held societal values – ring a bit hollow. Nevertheless, an appeal to the justices’ consideration of their role suggests an awareness of the potential limitations of their institutional capacities and recognition of the responsibilities of the other branches of government, all of which may curb tendencies to impose value-laden decisions about the balancing of particular interests or about government spending.

Finally, this section explored how certain characteristics, particularly gender and experience, may influence individuals’ overall approach to judging. The intersection or overlap between background experience and ideology has received scant attention in the judicial behaviour literature. The brief examination of these characteristics further cautions against the
attribution of simple labels like “liberal” or “conservative” to explain complex psychological and
cognitive decision making processes. As the composition of the Court continues to grow more
diverse, such personal characteristics are only likely to grow in relevance to the institution’s
decisions.
“We know the law, and immediately when we see [a case] we know if it’s not for us.”
– Supreme Court Justice.

Chapter 4

The first part of this chapter briefly describes the contemporary Supreme Court, presenting an overview of the role of the chief justice, as well as the institution’s staff, including the registrar, executive legal officer and law clerks. This sets the stage for an analysis of an aspect of the Court that has received scant attention in the scholarly literature: its efficiency and administration. As will be shown, consideration for institutional efficiency is related to the integrity of the judicial process, and thus serves as an important constraint on the justices in terms of the number of cases they can hear in a given year and as a reflection of their concern for the quality of the Court’s decisions.

The second section explores the front-end of the Court’s decision-making process, from applications for leave to appeal to the oral hearings of the cases themselves. Examined below are changes in rules and institutional procedure that govern the leave to appeal applications process, as well as those that help to shape the ‘inputs’ for the Court’s decisions: written arguments put forward by the parties to the case (factums); the law clerks and the research and administrative support they offer; and the oral hearing. Placed in this institutional context, this chapter will draw on interviews with current and former justices, staff and law clerks as well as secondary material to assess how these various features and stages of the decision-making process might be susceptible to attitudinal or strategic behaviour on the part of the justices.

This process-driven approach allows for an appraisal of which factors are significant at a given stage of decision-making. As the analysis below demonstrates, many of the stages at the front end of the Court process – particularly at the leave to appeal stage – are dictated largely by

1 The first comprehensive description of the Court’s administration in the scholarly literature was published drawing on research conducted for this dissertation. See: Emmett Macfarlane, “Administration at the Supreme Court of Canada: Challenges and Change in the Charter Era,” Canadian Public Administration. 52(1) (2009).
norms of collegiality, consensus and legal rules. More significantly, this approach helps to identify “sites of activity” for particular types of behaviour, as it can uncover when and under what contexts particular factors are more or less relevant. Legal rules and institutional norms do not eliminate opportunities for justices to engage in attitudinal or strategic behaviour, but discovering how they may operate to minimize such behaviour at specific stages of the decision making process is one of the central objectives of the approach.

The Contemporary Court

The Chief Justice

The chief justice’s role vis-à-vis the puisne judges is one of “first among equals” rather than a hierarchical relationship. The chief has a number of powers that places her in a position of leadership on the Court, such as selecting panels to hear appeals and assigning writing duties, but, as will be explained, even these decisions are conditioned by conventions and norms of collegiality. For the most part, the other eight justices are completely autonomous in their decisions. The ability of a chief justice to exert leadership is accomplished through her ability to persuade her colleagues. This is accomplished in part through taking the lead in writing: every chief justice since John Cartwright (who became chief in 1967) has led the Court in the delivery of decisions. The chief can also lead by example to increase consensus on the Court. As McCormick writes:

A Chief Justice who frequently distances himself from the opinions of the majority encourages colleagues openly to express any doubts they may have about the decision, while a Chief Justice who frequently joins the majority despite some minor reservations about its details similarly encourages colleagues to close ranks.

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2 For the purposes of this dissertation, collegiality refers to the nature and degree of cooperation among working colleagues. In the next two chapters, collegiality is assessed in terms of how the justices believe they ought to behave in their interactions with each other. Collegiality may be assessed in terms of the degree of consensus achieved or the efficiency of the process itself. It may also be influenced by whether interpersonal relations on the Court at any given time are viewed in a positive or negative light.

3 This, despite the fact the “puisne” is derived from the Old French term for “junior” or “inferior in rank.”


McCormick correctly notes that taken to an extreme, such behaviour might represent the antithesis of leadership.\(^6\)

Responsible for the day-to-day management of the Court, successive chief justices have introduced innovations designed to increase collegiality or improve institutional efficiency. For example, it was Cartwright who entrenched the system of regular judicial conferences. Even relatively minor decisions, such as Bora Laskin’s introduction of a judges’ lunchroom to the Court building, can have a positive impact on collegiality.\(^7\)

As the Court’s figurehead, the chief justice also has enormous responsibilities external to her institutional duties. As Chief Justice of Canada, she is also the Deputy Governor General of Canada, meaning she can fill in for the Governor General to meet foreign dignitaries or give royal assent to bills of Parliament.\(^8\) The chief justice also chairs the Canadian Judicial Council (CJC), which has authority over all federally appointed judges in the country. The CJC has the power to investigate complaints against judges and hold inquiries that result in recommendations which, if necessary, may include removing a judge from office. The chief justice is also the chair of the Board of Governors of the National Judicial Institute, an independent body that promotes judicial education through seminars and various programs. She also is a member of the advisory board of the Order of Canada, which awards the country’s highest civilian honour.

As the Supreme Court has grown in public stature, the chief justice’s role as primary representative of the Court has also grown more prominent. Former Chief Justice Brian Dickson was the first chief to give regular public speeches and media interviews, something his successors Antonio Lamer and Beverley McLachlin have continued. Dickson, with Former Prime Minister Brian Mulroney, also regularized the convention of consultation that surrounds new appointments to

\(^6\) McCormick, “Assessing Leadership on the Supreme Court of Canada,” 421.
\(^8\) The puisne judges of the Court can also perform this latter function, if necessary.
the Court. The chief justice’s external duties are so significant it has been said that Dickson, for example, spent no more than fifty percent of his time on law and cases.9

The various styles of the different chief justices can have a discernable impact on the efficiency and collegiality of the Court. According to his biographer, Laskin displayed a “top-down management” style with regard to the organization of the purely judicial work of the Court and with respect to important events, such as the Court’s centenary. The other justices often felt his approach was disrespectful, particularly given the controversial nature of his promotion to chief. Laskin was much less attentive or controlling with respect to the day-to-day management of the Court.10

As described below, Dickson’s tenure as chief came at a time of considerable backlog and division on the Court. Despite implementing important procedural changes in response to the backlog, administrative work was secondary to Dickson. Dickson’s former colleagues describe him as congenial.11 His efforts to achieve consensus on the Court’s approach to the new Charter, though initially successful, ultimately did not produce a higher degree of unanimity. Nevertheless, his style, personality, and willingness to listen to his colleagues as opposed to dictate the Court’s jurisprudential direction were met with appreciation from the other justices.

Lamer spent considerable time on the Court’s efficiency and administration.12 His general approach was professional, but, as is detailed in chapter 5, divisions on the Court during his time as chief occasionally resulted in near-animosity with particular colleagues. Finally, McLachlin, the current chief justice, has generally sought to build consensus on the Court. She is described by colleagues as exceptionally amiable13 and, as explored in the next chapter, her approach has been quite successful.

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9 James MacPherson, “Working within the Dickson Court,” The Dickson Legacy, Roland Penner ed. (Winnipeg: Legal Research Institute of the University of Manitoba, 1992) 271.
11 Interviews.
12 Interviews.
13 Interviews.
The Registrar and Other Court Staff

In the late 1970s the Court had approximately 50 to 60 employees; they now number nearly 200. Integral to the operation of the institution, staff members are responsible for both legal and administrative work. The Court’s administrative procedures place practical boundaries on how many cases the justices can take on in a given year, something that, as is explored below, has important implications for the quality of judgments and relations between justices.

As chief justice, Laskin helped the Court gain administrative independence when its Office of the Registrar was given the same status as other Federal Administrative Agencies in 1977. The Judges Act created the position of Commissioner for Federal Judicial Affairs, which has administrative responsibility for all federally appointed judges and federally constituted courts. According to James Snell, “because of the paramount position of the Supreme Court of Canada,” it was decided that its Registrar be given parallel administrative responsibilities and the status of a deputy head. Snell writes that one motivation for the change stemmed from “a desire to remove the anomaly of the Department of Justice being both the administrator of the Supreme Court and the chief litigant before the Court.”

Although less visible than other important changes that occurred around the same time period, this move was fundamental to the Court’s administrative autonomy. Prior to this change, the Registrar was effectively a “manager” of the Court, subordinate to the Minister of Justice.

Now under the sole supervision of the Chief Justice, the Registrar is ultimately responsible for all administrative activities at the Court (see Figure 4.1). Those functions include: servicing and providing operational support for the nine justices and the Court staff, such as security, financial management, procurement, human resources management, telecommunications, and strategic planning (through the Corporate Services Sector); management support for the judges’ chambers and dining room, the Law Clerk Program, and visits by

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dignitaries (through the Executive Services Branch); and information management to support the Court’s judicial functions and maintenance of the Court’s 350,000 volume library, which also services the Federal Court of Appeal, the Federal Court, lawyers appearing before the Court and members of the Canadian Bar (through the Library and Information Services Sector).

The Deputy Registrar heads the Court Operations Sector, which includes the Registry Branch and the Law Branch. The Registry is the “hub of all procedural and documentary activities at the Court,” responsible for registering and scheduling cases, filing and recording documentation, assisting in courtroom operation, maintaining Court records and registers, and facilitating the Registrar’s case-related correspondence.16 The Law Branch provides legal support to the judges of the Court, and publishes the Court’s judgments in both official languages.

Figure 4.1 – Organization of the Supreme Court of Canada

* Adapted from the Court’s Planning and Performance documents (Supreme Court of Canada 2007b: 17).

The Office of the Registrar is also responsible for planning and reviewing budgets; overseeing the production of various reports (particularly planning documents and performance reports) to central agencies of the federal government, such as the Treasury Board and Public Service Commission; organizing conferences; managing special projects; maintaining Court statistics; and the preparation of the rules of practice. The Registrar, who can act as Judge in chambers under the Supreme Court Act, also has some judicial duties, such as hearing motions concerning late filing. In addition, she is a member of the Group of Heads of Federal Agencies, which meets to exchange ideas and raise awareness of new trends and issues among those supervising small agencies. Most of the Registrar’s time, however, is absorbed by the day-to-day management of the Court and its staff.

Executive Legal Officer

The position of Executive Legal Officer (ELO) was created by Chief Justice Brian Dickson in 1985. The ELO was originally envisioned as another clerk for the chief justice, but Dickson decided it was preferential to have someone with more experience and a broader job description. The position typically lasts three years, and never more than five. The ELO serves as the chief of staff to the chief justice; sits as a member of the board of governors of the National Judicial Institute (which is chaired by the chief justice); and provides a support role for the chief justice’s work with the Canadian Judicial Council. The ELO is also responsible for the coordination of the law clerk program. A great deal of the ELO’s work, however, is as the Court’s media relations officer. In that capacity, the ELO provides not-for-attribution briefings to the press on judgments of the Court.17

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17 The Court’s relationship with the media and the role of the ELO in this regard is discussed in more detail in Chapter 6.
Law clerks

Each judge has a judicial assistant, a court attendant, and three law clerks attached to their chambers. The law clerk program, which began in 1968, initially allowed the justices to each hire a single clerk for a one-year term. The program was expanded to two clerks per judge in 1983 and to three clerks per judge in 1989. Law clerks are hired immediately out of law school and paid $48,000 annually. The program has grown increasingly competitive over the years.

As is explored below, one of the clerks’ main duties is to provide the justices with bench memoranda, which synthesize the facts of the case, the decisions of the lower courts and the litigants’ factums (legal arguments). Bench memos typically include the clerk’s assessment of the case and an analysis of the arguments on both sides. The judges freely acknowledge that although they review all of the material relevant to each case, the clerks’ research function is fundamental to their ability to perform their duties in a timely manner; the Court’s overall caseload makes it impossible for them to check all of the counsel’s citations or go to the Court’s library to research all of the pertinent case law. As is explored in the next chapter, most of the justices also have their clerks work on the drafting or editing of written reasons. The writing practice and the clerks’ influence on the overall decision making process are explored in depth in the next chapter.

There is large variation among the justices with regard to how they select their clerks. According to several former clerks, it is clear to them that some justices hire clerks who appear to think very much like they do (or “clones of themselves” as one clerk put it), some justices purposively select clerks who will challenge their way of thinking, while other justices end up with a mix of the two because they rely more heavily on the application material and select

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20 McInnes et al describe the actual process after interviews are conducted: “By right of position, the Chief Justice is entitled to hire three clerks immediately. Among the puisne judges, the remaining process very much resembles a draft in a sports league. Each judge is permitted to select one candidate at a time, in descending order of seniority with the Court. Thus, once the most junior judge has announced his or her first pick, the most senior judge is permitted a second selection, and so on until all positions have been filled.” 64.
candidates based on transcripts, letters of recommendation and resumes.\textsuperscript{21} One justice acknowledges choosing clerks who have a “social conscience,” suggesting that clerks’ social perceptions can be important and, indeed, that such perceptions are important to this justice in decision making.\textsuperscript{22} The variation in the justices’ selection of clerks is as wide as the variation in how they utilize their clerks. Some justices treat their clerks principally as research assistants, while on the other extreme some justices encourage active debate and deliberation from their clerks. Though it is impossible to correlate the method of selection to how clerks are used, there is some obvious overlap: those justices who select clerks who will challenge them tend to be those who have the clerks more actively involved in all areas of the decision making process.\textsuperscript{23}

\textit{Efficiency and Administration}

Efficiency and effective administration are important to the justices and reflects their concern for quality and the Court’s general reputation. Over time, this concern has mandated important changes in procedure. One major impetus of the 1975 changes to the Court’s leave system was the overwhelming workload that hit the Court in the early 1970s. After appeals by right were severely restricted, the judges managed to reduce the number of cases heard between 1975 and 1980 by thirty percent. By the mid-1980s, however, the judges were struggling with “an alarming backlog of reserve judgments just when the Court was meeting the onslaught of difficult Charter cases.”\textsuperscript{24}

One significant cause of the backlog was a sharp increase in the number of leave applications following the 1975 reforms: the number of applications grew from 101 in 1969\textsuperscript{25} to 419 in 1982.\textsuperscript{26} The public importance criterion also means the justices are dealing with ‘harder’ or more complex cases. As former Justice Claire L’Heureux-Dubé writes, the judicial decision-making process compels the justices to elaborate on their reasoning in such cases: “when a

\begin{footnotes}
\item[21] Interviews.
\item[22] Interview.
\item[23] Interviews.
\item[25] Crane and Brown, \textit{The Supreme Court of Canada Practice}, 5.
\item[26] Snell and Vaughan, \textit{The Supreme Court of Canada}, 240, note 17.
\end{footnotes}
particular case presents the Court with an opportunity to give definite direction on a particular point of law, the natural inclination is to explore each facet of the particular legal problem, recount history and account for each theory or precedent.\textsuperscript{27} In particularly important cases there is some degree of pressure on the justices to speak with one voice, a consensus-building process that further extends the length of time it takes to produce a decision.

With the bulk of cases suddenly carrying more weight, it is little wonder that the Court was confronted with a backlog not long after it gained substantial control of the docket. The influx of Charter cases that hit the Court beginning in 1984 only compounded this difficulty. With less case law to draw on, fewer legal rules and a more “contextual” and policy-oriented approach to Charter rulings, Charter cases are often more difficult to decide than other types of cases, something confirmed by recent studies.\textsuperscript{28} Expansion of the law clerk program through the 1980s seems to have been essential for the justices to cope with the intensified demands on the research and drafting that went into most cases. Yet some commentators speculate that one effect of the clerks’ involvement in the drafting phase since the 1970s has been to increase the use of citations to scholarly sources in the Court’s decisions.\textsuperscript{29} The clerks’ involvement, then, has likely contributed to longer and more wide-ranging decisions. Nevertheless, the justices’ ability to delegate so much of their research and writing responsibilities to a dedicated staff has been beneficial to the Court’s efficiency. The clerks’ influence and the implications of their involvement in decision-making are explored more thoroughly in chapter 5.

The escalating difficulty of the cases was not the only cause of the backlog, however, nor was increasing the number of law clerks the only change made to address it. Diverging attitudes


\textsuperscript{28} Daved Muttart, \textit{The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada}. (Toronto: University of Toronto Press, 2007). 102; Donald Songer finds that the length of the Court’s opinions increased dramatically after the Charter, across all areas of law. \textit{The Transformation of the Supreme Court of Canada: An Empirical Analysis}. (Toronto: University of Toronto Press, 2008). 153.

and work habits among the judges created tensions over the speed with which comments on drafts were returned to colleagues. Justices Jean Beetz and Gerald Le Dain, described by Dickson’s biographers rather generously as “perfectionists,” took exceptionally long to complete their work during this time period. The differences produced such a strain that former Justice Bertha Wilson implicitly threatened in a memo to Dickson that she might resign if the delays continued. Illnesses among some judges further worsened the problem.\(^{30}\)

Beyond careful attempts at persuasion, the chief justice has little authority over her colleagues in these matters. Justice Gérard La Forest worried that a push to expedite matters might lessen the quality of the Court’s work. He suggested one remedy might be to take on fewer cases, but that idea was rejected by his colleagues.\(^{31}\) Turnover among the judges helped alleviate some of the personnel issues that played a part in the backlog. Nonetheless, Dickson initiated several important procedural reforms to address the structural factors he felt also contributed to delays. The 1980s witnessed the computerization of the Court’s scheduling procedures to facilitate docketing and case tracking. Computerization also allowed the Court to publish judgments and headnotes in both official languages at the same time.\(^{32}\) The Court altered the rules for oral argument in 1987, going from holding fairly open-ended oral hearings to imposing time limits; each side now normally receives one hour for arguments (fifteen to twenty minutes for interveners). These changes allowed the Court to transition from scheduling one case for argument each day to two.\(^{33}\)

As a result of turnover among the judges and these procedural changes, the backlog the Court struggled with in the mid-1980s was eliminated by the end of 1990. In 1988, the average time it took a case to work its way through the Court – from the filing of an application for leave to the rendering of judgement on the appeal – was well over thirty-three months; in 1991, this

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average timeframe had been cut to almost twenty-two months. Table 1 provides the number of reported judgments and the average case time lapses for the years 1987-2008.

Table 4.1 - Average Case Lapse Times, 1987-2008

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of reported judgments</th>
<th>Notices of appeals as of right</th>
<th>Total applications for leave submitted</th>
<th>Months for decision on leave application</th>
<th>Months between leave application and hearing decision</th>
<th>Months from hearing to judgment</th>
<th>Total months from application to judgment</th>
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<td>90</td>
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<td>21</td>
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<td>n.a.</td>
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<td>7.2</td>
<td>-</td>
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<td>4.0</td>
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Since that time period, other efficiency problems have cropped up, but they have generally been less severe. In 2001 McLachlin publicly declared that the Court’s resources were “stretched to the limit,” and felt two changes could help prevent a newly developed backlog from

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34 Data was compiled using the Court’s statistics (Supreme Court of Canada 1991, 2008).
First, she advocated the total abolishment of appeals by right. To date, the move to give the Court absolute control of its docket has not been made. The second concern McLachlin addressed pertains to severe space limitations at the Supreme Court building. This constraint makes it difficult to hire more editors and translators, contributing to delays in the rendering of decisions. This is in spite of the fact that Supreme Court staff have taken over much of the space that used to be for the Federal Court. The Federal Court and Federal Court of Appeal still retain space at the Supreme Court building, as plans for a new federal court building – announced in 2003, named in honour of former Prime Minister Pierre Elliott Trudeau, and intended to house those courts as well as the Court Martial Appeal Court of Canada, the Tax Court of Canada and the Courts Administration Service – have been cancelled.

With the cancellation of a new federal court building and no movement on the part of the federal government to eliminate the final category of appeals by right, these two issues are essentially out of the hands of the registrar or chief justice. Despite this, McLachlin managed not only to eliminate the slight backlog that developed at the turn of the century, but also to helm the Court to its fastest productivity level in a decade. She is credited as having been “innovative”

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36 In 1997, changes to the Supreme Court Act eliminated appeals as of right in criminal cases where acquittals were overturned on appeal, cutting the number of appeals by right by about half. See the next chapter for more details.
40 Interview.
and “aggressive” in setting dates for appeals, and for ‘cracking the whip’ on counsel and stimulating the Court staff.\textsuperscript{42}

The Supreme Court has engaged an increasingly complex mandate in the contemporary era, and the multifaceted pressures on its administrative efficiency have been met with considerable versatility during the last twenty-five years. It is evident that the most perilous state of affairs for the institution’s effectiveness came as the judges dealt with the first wave of Charter cases in the mid-1980s. Nevertheless, as the Court’s bureaucratic environment has grown and the judges have gained increasing control over the docket, continual adaptation in administrative procedure and bureaucratic structure has been necessary. This evolution has witnessed the expansion of staff and resources, reorganization and simplification of rules and process, and modernization of programs and equipment.\textsuperscript{43}

The Court’s output in the last decade has also seen a notable drop in the number of cases heard. For most of the 1990s, the Court heard well over 100 appeals. Since then, it more typically hears 80 to 100 cases a year. The 58 reported judgments in 2007 appears to be a short-term anomaly, largely due to a sharp drop in the number of applications for leave to appeal in 2006 (which rebounded the following year). However, the Court’s 2007 Performance Report to the Treasury Board also asserts that “in general, cases have become more complex”.\textsuperscript{44} Given that case complexity is unlikely to diminish in the near future, it is probable the Court’s output will remain near 80 judgements per year. Whether or not the Court made the decision consciously, La Forest’s preference in the 1980s for a reduction in caseload seems to have won out twenty years later.

Efficiency has an important impact on the substance of the Court’s work. According to former Justice Wilson, the tendency for judges struggling under a heavy caseload will be to focus on the cases assigned to them and spend less time carefully scrutinizing cases being prepared by

\textsuperscript{42} Cristin Schmitz, “‘McLachlin Court’ Sets Record Time for Rendering Judgment in 2004.” \textit{The Lawyer’s Weekly}, 24(41) (11 March 2005).
\textsuperscript{43} For more details, see Macfarlane, “Administration at the Supreme Court of Canada.”
\textsuperscript{44} Supreme Court of Canada, \textit{Performance Report}, 5.
their colleagues. When backlogs develop, she argues, there becomes an institutional preference by judges to support the majority result. Wilson writes, “under the pressure of a heavy caseload the delicate balance which should exist between judicial independence and collegiality may be displaced and collegiality may give way to expediency. This is an extremely serious matter for an appellate tribunal because the integrity of the process itself is threatened.”

The initiatives made to ensure efficiency represent more than the pursuit of a simple bureaucratic virtue. Efficiency has a direct effect on the effectiveness of the institution and the quality of its judgments. To an extent, as Wilson’s comments imply, the legitimacy of the Court process is also at stake when significant backlogs develop. Efforts towards strong administration are left unconsidered in attitudinal and strategic conceptions of decision-making. As an important component of the justices’ responsibilities, and given the critical effects on the Court’s work, it is essential to reflect on this aspect of the judicial process.

**Getting Cases to the Supreme Court**

*The Leave to Appeal Process*

Whatever policy-making power the Court possesses, its ability to set its own agenda is limited by the cases that parties apply to bring before it. The bulk of the Court’s annual caseload consists of those cases that have worked their way up through the court system and are appealed to the Supreme Court on the basis that the issues involved constitute matters of public importance. Within this context, however, the Court has unfettered discretion to determine what constitutes public importance and rarely explains its decisions on leave. For critics who see the Court as beholden to particular interests, this discretion only serves to enhance the political nature of the institution. Similarly, attitudinal and strategic scholars envision case selection as just another

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46 The issue of court delays is one that permeates the entire judicial system, as the events surrounding *R. v. Askov*, [1990] 2 S.C.R. 1199, demonstrate. See below, and chapter 6, for details.
47 The remaining cases are certain criminal appeals as of right and government references, explored below.
site for policy-motivated behaviour on the part of the justices. This section makes clear, however, that role-related norms have a powerful constraining effect on judicial choices regarding leave.

Until 1956, leave could be granted by a single judge in chambers. Even then, it took a rare public controversy for amendments that year to the Criminal Code and Supreme Court Act mandating that hearings for leave be held in panels.49 The Court now decides leave applications in panels of three. One of the most crucial changes as it pertains to the leave application process was an amendment to the Supreme Court Act in 1987 that allowed the Court to consider leave applications through written submissions rather than oral hearings.50 Until then, bench applications were made before panels of three justices (three justices sat in the main courtroom, and three in each of the two Federal Court rooms in the Supreme Court building). Lawyers had fifteen minutes per side. Oral hearings for leave applications are now rare. The contemporary Court routinely receives over 500 applications per year (sometimes over 600) and in the last decade usually grants leave to approximately 80 cases (an acceptance rate of about 15 percent).

Once submitted, applications for leave are certified by the Process Clerk of the Registrar’s Office to ensure they conform to Court rules and forwarded to the Law Branch, where staff attorneys prepare “objective summaries” of each application. Since 1995, the staff attorneys also prepare recommendations on whether to grant leave (as will be discussed below, this was previously a task of the law clerks). While the summaries are part of the public record and available upon request, the recommendations are not.51 The Court also has a data retrieval programme under which potentially related leave applications are cross referenced. Appeals raising similar issues may be grouped by the Court. If an application urgently requires a timely


50 Crane and Brown, *The Supreme Court of Canada Practice*, 6.

51 Crane and Brown, *The Supreme Court of Canada Practice*. 96.
decision, counsel are requested to inform the Court or make a motion to expedite the decision. Beyond that, leave applications in criminal and family law cases generally receive priority.52

The three-judge panels usually vote by written memorandum rather than meeting face-to-face to make their decisions. The composition of the panels is relatively fluid, although applications from Quebec are normally sent to justices from Quebec, given their familiarity with the province’s Civil Code. Further, those raising special issues are sometimes forwarded to a justice with expertise in a particular area.53 The list of cases granted is discussed at a conference of the full Court, giving the Court as a whole some control over the number and kind of cases that are heard from the set of applications granted at any one time.54 Any justice may also bring any case rejected by a panel up for discussion. Despite this, the tradition has been for the panels of three to retain the final word on whether a case will be heard.

Applications for leave to appeal are distributed by the panels from a main list to three different lists (designated simply as the B, C, and D lists). In a 1997 speech, former Justice John Sopinka outlined the process as follows:

If the panel or majority votes to grant, the application goes on the “B” list. If the majority votes to dismiss, the dissenting member may place the application on the “D” list. If there is no dissent, or the dissenting member does not place the application on the “D” list, the panel must advise the other members of the Court of their intention to dismiss unless any member of the Court wishes to place the application on the “D” list.

As a result of this process, applications are either placed on the “B” or “D” list for discussion at the Conference. All others are dismissed. After discussion at the Conference, the panel makes its final decision. This discussion can get quite spirited.55

About thirty to forty applications per year are placed on the “D” list.56

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52 Crane and Brown, The Supreme Court of Canada Practice. 30.
54 Crane and Brown, The Supreme Court of Canada Practice. 96.
Additions to the Supreme Court Act in 1994 gave the Court the power to remand cases to the trial court or relevant appellate court when those courts have been unable to address issues dealt with by the Supreme Court after the judgment in the court of appeal was made. Virtually all of these cases are first placed on the “C” list. The “C” list was previously used for cases raising issues similar or identical to those in cases already before the Court. The cases remained on this “deferred” list until the outcome in the pending case was decided, and then the application granted or dismissed. The “C” list rarely consists of more than a handful of cases per term.

In *Tournament of Appeals*, Roy Flemming provides the first comprehensive exploration of the Supreme Court’s leave to appeal process. Flemming draws on three major accounts developed in the American literature relating to granting judicial review (referred to as the granting of *certiorari* in the United States) at the U.S. Supreme Court, each of which purports to explain how the justices determine leave. The “litigant-centred” account is the most developed. It suggests that the justices’ behaviour in granting cert is influenced by the type of litigant: “upperdogs”, or higher-status litigants, are more likely to gain access to the Court than litigants with lesser status. Those parties backed by organized interest groups also have more success, as do those represented by lawyers who are “repeat players” with significant experience before the U.S. Court.

The second account is the “jurisprudential” account, in which the justices’ main consideration is to apply legal rules and standards to certiorari applications. As Flemming notes, this does not necessarily mean a mechanical or rigid process: “Instead, legal factors prompt justices to give certiorari applications a second look in a process otherwise strongly governed by the presumption that few requests for review warrant approval.” Finally, the “strategic” account envisions the justices as anticipating the outcome of a potential case and deciding to grant leave based on whether the likely outcome coincides with their personal policy preferences.

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57 Crane and Brown, *The Supreme Court of Canada Practice*. 96-7.
Flemming draws on a dataset of judicial votes on leave applications from the first three years of the “longest natural court” of the Charter era, January 1993 to December 1995 (a “natural court” being a period of no turnover among the nine justices sitting on the Court). He finds that, as it pertains to the Supreme Court of Canada, the jurisprudential account is the most persuasive. The “litigant-centred” approach does not seem to apply in the Canadian context. With the exception of government litigants, particularly the federal government, asymmetries in the status of Canadian litigants or their resources do not appear to make a significant difference in the Court’s decision to grant or deny leave. This is in contrast to a number of studies that find that certain types of litigants or specific interest groups do have a comparative advantage over others at the actual merits stage. One key distinction of the leave to appeal stage, as Flemming points out, is that the Court discourages third-party interveners from participating. Also unlike the United States, the experience of the lawyers appearing before the Court does not seem to matter; where a small, elite group of lawyers in Washington funnel applications to the U.S. Court, no similar group exists in Ottawa.

Flemming also contends that the institutional context makes strategic behaviour less likely – or at least less evident – than in the American case. He contends that “the absence of an en banc tradition and the use of panels at both stages in Canada” complicates and adds uncertainty to the justices’ ability to act strategically. Because appeals can be heard in panels of five, seven or nine, a strategically-minded justice cannot be sure which justices will hear an appeal. More significantly, out of the 3,600 individual votes on leave applications for the period of Flemming’s study, there were only 30 dissenting votes: panel decisions on leave applications are virtually

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60 Flemming, Tournament of Appeals. 57.
62 Flemming, Tournament of Appeals. 58.
63 Flemming, Tournament of Appeals. 40.
64 Flemming, Tournament of Appeals. 100.
always unanimous.\textsuperscript{65} This unanimity did not reflect “homogenous preference on the panels” because the judges who sat together on leave to appeal panels did not vote together once the case was actually heard.\textsuperscript{66} At least in the most direct sense, then, voting on leave applications at the Canadian Court does not reflect the type of strategic behaviour frequently documented in the United States.

The guidelines governing the Court’s leave to appeal decisions were unknown until recently. The Court has traditionally refused to publish written reasons for grants or denials of leave. In 1995, Lamer explained that this was “[i]n order to ensure that this Court enjoyed complete flexibility in allocating its scarce judicial resources towards cases of true public importance.”\textsuperscript{67} Two years later, Sopinka elaborated on the “guidelines” and broad principles that the justices employ to identify cases that involve matters of public importance:

(1) the presence of a constitutional issue in the form of a challenge to a statute, common law rule or a government practice is usually a strong indication of public importance;

(2) a conflict between courts of appeal of different provinces on issues that should be dealt with uniformly as between provinces;

(3) a novel point of law:

Examples:

- reversing the burden of proof of causation;
- extending liability for economic loss;
- reconsidering the test for informed consent in medical malpractice;

(4) interpretation of an important federal statute or provincial statute that exists in several provinces.

(5) defining Aboriginal rights.\textsuperscript{68}

Flemming’s analysis reveals that several “jurisprudential” indicators have a significant influence in determining leave: cases with issues reflecting conflicting lower court decisions are more likely to be granted leave, as are cases where there are dissenting votes in the lower appellate court decision; applications that urge the Court to revisit previous decisions are more likely to be granted leave; and arguments that demonstrate how lower court decisions affect the interests of

\textsuperscript{65} Flemming, \textit{Tournament of Appeals}. 83.

\textsuperscript{66} Flemming, \textit{Tournament of Appeals}. 95.


\textsuperscript{68} Sopinka, “The Supreme Court of Canada.” 482.
the provincial governments or the federal government also improve an application’s chances. On
the other hand, arguments that were fact-specific or stress the need to correct procedural or
interpretative errors without connecting them to larger questions of public importance are more
likely to fail.69

The justices interviewed for this dissertation acknowledge that there is an intuitive aspect
of granting leave, although one justice preferred to view the discretionary element of deciding
leave to appeal as an “internalized expertise,” noting that “we know the law, and immediately
when we see it we know if it’s not for us.”70 Another justice explains that “the intuition is more at
the level of balancing the various elements that come into play.” There tends to be a set of
obviously worthy applications and a set of clearly frivolous ones. For those falling in the
continuum between those two groups of applications, the threshold of worthiness is not set in
stone. Generally speaking, this justice views the leave process as reflecting the Court’s role “to
state the law and give guidance to the other courts ... A case should lend itself to that.”71

Most of the justices and law clerks stress that the Court is not a court of error: the fact that
a lower court reached the wrong result in a case is not by itself sufficient for the Supreme Court to
grant leave.72 This is true even in instances where an appellate court misapplies or fails to follow a
judgment of the Supreme Court. Where the Court has recently pronounced on an issue, the
justices prefer to allow the lower courts to deal with subsidiary issues before agreeing to hear a
similar case again. Only in instances where the lower courts’ failure to properly apply a Supreme
Court precedent becomes an “epidemic” do justices choose to set the record straight.73 That said,
the justices will sometimes grant leave to a case for the sole purpose of affirming the judgment of

69 Flemming, Tournament of Appeals. 68-70.
70 Interview.
71 Interview.
72 Interviews.
73 Sopinka, “The Supreme Court of Canada.” 481. One example was the issue of unreasonable delay in trial
proceedings in R. v. Askov [1990] 2 S.C.R. 1199 in which the Court’s ruling prompted the lower courts to
Baar, “Court Delay Data as Social Science Evidence: The Supreme Court of Canada and “Trial Within a
a lower appellate court in order to ‘nationalize’ a precedent and give direction on the point of law to all of the courts in the country.74

Despite what most justices appear to understand as a cardinal rule – that the Court is not a Court of error – on rare occasions a justice will push to have the Court rectify a perceived injustice (this occurrence is so rare one justice describes it as a once-in-a-year event).75 Wilson, writing in 1983, notes that after nine months on the Court she had still not come to understand how the Court exercises its discretion in leave to appeal.76 On the question of error correction, she wrote:

Leave cannot be granted to some and denied to others except on some rational basis of selection if people’s respect for the institution is to be maintained. I have been struck since I went on the court by the absurdity of telling an unsuccessful litigant in person that the decision in the court below may well be wrong ... but his case raises no issue of public importance as to merit the further time and consideration of the court! There is no way the layman can be persuaded that doing justice in a particular case is not the proper function of the courts and that, if the courts are falling down in the performance of this function, it is not a matter of the utmost public importance?77

More recently, although there has been a lot of disagreement about departing from the norm and accepting cases that only involve correcting an error of a lower court, one justice notes at times being insistent about taking such cases: “I said I would write it, I know [the case as decided] is wrong and we have to take it.”78 That the other justices relent reflects a norm of collegiality and consensus that Flemming identifies in his speculation about how the leave to appeal process inhibits obvious forms of strategic behaviour and tends to result in unanimous voting, even on those applications that are more difficult to determine:

75 Interview.
77 Wilson, “Leave to Appeal to the Supreme Court of Canada.” 3. Wilson appears to be in the minority in this thinking. Writing in 1993, Sopinka contends that “[o]n a fundamental level, whether or not the Court of Appeal was “wrong” has little if anything to do with whether the case is one of public importance.” Sopinka and Gelowitz, The Conduct of an Appeal. 166-7.
78 Interview.
If a norm of reciprocity infuses the relationship between the justices, it may explain why panel votes tend to be consensual in marginal cases that are neither obvious grants nor obvious denials. If a justice feels particularly strongly about a case, the other justices evidently accommodate the justice, which produces unanimous votes. At the same time, the uncertainty and costs of dissenting reinforce the attractiveness of this norm.79

One important consequence of this collegial norm is that some cases which fall into the “grey area” are granted leave by the Court when under different institutional arrangements, or in a less consensual environment, they would be rejected.80

This behaviour confirms Lawrence Baum’s contention, explored in Chapter 2, that judges care about what their colleagues think. Indeed, with regard to granting leave to cases solely on the basis of error correction, the motivation of most of the justices appears to have been to keep their insistent colleague satisfied. But as it pertains to “grey area” cases, could the decision to yield to a justice who “feels particularly strongly” itself be strategic? That is, could a norm of reciprocity be at work to create an understanding that judge x votes for judge y when judge y feels strongly and thus can expect the same in return later on? While this explanation seems plausible, it fails to amount to a regularized pattern of behaviour. Based on the above analysis and Flemming’s examination of the process, these instances are relatively infrequent.81 The majority of leave to appeal decisions are fairly ‘easy’ cases. Thus, most of the time, legal rules dominate the process. Further, even if it is the case that the majority of justices acquiesce to what amounts to purely policy-driven or “attitudinal” behaviour from a colleague in such instances, it only confirms that most of the time the majority of justices are responding to attitudinal behaviour as opposed to being motivated by their own attitudes. This distinction is an important one because it appears that even when attitudinal behaviour comes into play, collegial norms rather than attitudes can dictate the response among other justices.

79 Flemming, Tournament of Appeals, 91.
80 Flemming, Tournament of Appeals, 97.
81 According to his biographer, Bora Laskin “often” insisted on granting leave to cases out of personal interest, something which bothered his colleagues. There is no evidence, anecdotal or otherwise, that any justices serving more recently took a similar approach. Philip Girard, Bora Laskin: Bringing Law to Life. (Toronto: The Osgoode Society, 2005), 428.
Although Flemming’s account of the leave to appeal process is persuasive, it is important to acknowledge that his study is temporally bound, relying on votes on leave applications from 1993 to 1995. Several important factors can influence the broader pattern of decisions to grant leave to appeal over relatively lengthy periods of time. The introduction of the Charter was one event that, not surprisingly, had a significant impact on selecting cases for leave. Several former law clerks who served in the early to mid-1980s note they feel that it was easy for Charter cases to get leave.\textsuperscript{82} One clerk explains, “the fact that it was a Charter case that had [made] its way up to the Supreme Court of Canada was itself a pretty good reason for granting leave.”\textsuperscript{83} While this sentiment appears to not have lasted very long, the impact on the Court’s agenda should not be understated. According to several clerks who served just a few years later, it was evident that some litigants applying for leave would try to squeeze Charter arguments into their applications when they did not fit.\textsuperscript{84} One former clerk notes that it felt as though everyone was making a Charter argument.\textsuperscript{85} The justices tried to look at all of these applications carefully, but became more selective after the first few years of the Charter.

Another important consideration when assessing Flemming’s analysis is that the end of his study corresponds to the time when the law clerks were, for the most part, removed from involvement in the leave applications process. When the number of leave applications spiked after 1975, the judges came to rely heavily on the clerks for leave memoranda (summarizing the applications and supplying recommendations), where each justice would have a clerk provide a written opinion on each application. Even this soon became unworkable and out of necessity a “pooling system” developed in which each clerk was associated with one of the leave panels and would be responsible for producing a leave memorandum for all nine justices.\textsuperscript{86} This process is now completed by the staff lawyers in the Court’s Law Branch. In the U.S., the justices have their

\textsuperscript{82} Interviews.
\textsuperscript{83} Interview.
\textsuperscript{84} Interviews.
\textsuperscript{85} Interview.
own clerks provide memos for every case. Most of the justices in the Canadian Court appear to have relied on the memo prepared by a single clerk; however, some justices required their own clerks to comment on leave memos prepared by clerks working for other judges.

The switch from oral to written appeal applications in 1987 had unforeseen consequences for the Court’s efficiency. Although the change helped alleviate a frustrating backlog that hit the Court around that time, the new emphasis on written submissions created its own problems. According to one senior staff member, the Court had the oral leave applications process “down pat,” but after a while it became apparent that the written process would accumulate with the clerks. Unfortunately, the applications for leave were often placed on the back-burner, as over-burdened clerks focused on bench memoranda and judgment work. The staff member explains that depending on how organized certain judges were, a significant backlog could ensue. By the mid-1990s, Lamer, concerned about timeliness, decided that handing the job to staff lawyers would help streamline the process. One former justice notes that the law clerks were not completely removed from the leave process – as the judges are always free to ask their clerk to review an application for more depth or to examine a particular aspect – but adds that the change was conducive to better use of the clerks, giving them more time to prepare cases for hearing and to research and work on judgments.

Thus, since 1995 staff lawyers at the Law Branch have been responsible for preparing summaries and recommendations regarding leave to appeal applications. This change may have

88 McInnes et al note that at the time of their writing in 1994 that only one justice on the Court required this. 72.
89 Bertha Wilson, who retired earlier than then, is said to have required memos for applications for leave to appeal at a time when many of the other justices did not require them of their own clerks. See: Ellen Anderson, Judging Bertha Wilson: Law as Large as Life. (Toronto: University of Toronto Press, 2001). 160.
90 The different expectations the justices have of their clerks and the implications of this is discussed more thoroughly in Chapter 5.
91 Interview.
92 Interview.
produced a stabilizing effect on the outcome of leave applications. Law clerks typically serve only one year on the Court. That turnover rate means that a substantial number of leave applications each year would have been prepared by individuals with little familiarity with them. Giving long-term staff attorneys at the Court responsibility for leave applications means the summaries and recommendations that come to the justices are prepared by people with substantially more experience.

McInnes et al contend that clerks at the Canadian Court are likely to have less “undue influence” than has been reported about clerks in the U.S. Court in part because the leave memoranda prepared by Canadian clerks, at anywhere from four to forty pages long, are much more substantial than those prepared by their American counterparts.92 This argument suggests that because Canadian clerks must provide extensive justifications for their reasoning they are less likely to get anything past their justice. Lorne Sossin contends that this view “does not make very much sense.”93 He writes that, “[c]lerks rarely have an interest in intentionally misleading the Justices. Nonetheless, they do tend to favour granting leave to appeal more often than the Justices do.”94 One senior staff member at the Court concurs with Sossin on this point, noting that clerks tend to arrive at the Court eager about their role and might tend to see more cases as “worthy” or, at least, more likely to conform to the criteria of public importance.95

I explore the role of the law clerks more fully in the next chapter. For the present purposes, however, it suffices to point out that the removal of clerks from regular involvement in the leave process may have reduced or stabilized the number of leave memoranda received by the justices that recommend granting leave. While a judge may still ask a law clerk to review a particular application in depth, most law clerks I interviewed who worked at the Court after 1996 suggest this happens only occasionally. The impact the clerks may have had, or the staff attorneys

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92 McInnes et al, “Clerking at the Supreme Court of Canada.” 73.
95 Interview.
have now, is of course mitigated by the fact that the judges retain the final say on the leave applications, and will disagree with the recommendations of those screening the applications with some regularity.\footnote{Interviews.}

Other broad trends and decisions shape the pattern of the Court’s choices in granting leave. Charter cases play a less prominent role than they once did in terms of their proportion of the Court’s total caseload. The justices are acutely aware of what types of cases the Court takes and many of them have strong opinions on the areas of law they think receive too much or too little attention. Flemming notes that Lamer felt Charter appeals overshadowed commercial law cases. Shortly after becoming chief in 1990, Lamer felt he had the support of some of the other justices to “reaffirm a national perspective in private law.”\footnote{Flemming, \textit{Tournament of Appeals}, 12.} Flemming asserts, however, that Lamer’s efforts had little impact on the mix of cases granted leave by the Court. Indeed, one justice I interviewed who served at that time notes agreeing with Lamer’s sentiment – but only prior to coming to the Court. This justice initially felt the Court was not taking enough civil cases and was dealing with too many Charter claims and Aboriginal cases. Yet once she was on the Court, the justice found that many commercial cases, even those involving many millions of dollars, had carefully followed trial processes and had seemingly correct appellate judgments. “I was surprised at how few civil cases came with important questions of law that were of national interest.”\footnote{Interview. Note that all interviewees are referred to as “she” or “her” regardless of gender.}

Another justice complains that many of her colleagues seem to feel that every criminal case is important. The Court would often end up dismissing criminal appeals immediately from the bench, something that added to this justice’s frustration.\footnote{Interview.} The Court has recently moved to reduce the number of criminal as-of-right appeals on the docket. In 1997, the Court won the support of the Canadian Bar Association for changes to the Supreme Court Act that eliminated
appeals as of right in criminal cases where acquittals were overturned on appeal. This cut the number of automatic appeals in roughly half.\textsuperscript{100} There is some indication that McLachlin may agree with the view that many criminal appeals still fail to involve matters of national importance. Since she became chief justice the Court has sought, but thus far not received, the abolition of the final category of automatic appeals (criminal cases involving dissenting votes at the appellate court level).\textsuperscript{101} The primary impetus for the change, however, is said to be to further ameliorate the Court’s workload.\textsuperscript{102}

Workload problems may create an impetus for another broad change to the leave process: curtailing the total number of cases granted leave. In 1972, then Justice Laskin writes that there is no support for “any conclusion that there is a policy of rejection according to the volume of work awaiting the court.”\textsuperscript{103} At least one account contends that since then the Court purposely cut the number of cases heard in the face of the large backlog it faced in the early 1980s. Ellen Anderson writes, “[q]uietly and without announcement to the public or the profession that it was doing so, the Court clamped down pre-emptively through a more stringent exercise of the leave to appeal provision provided in the 1975 amendment.”\textsuperscript{104} Significantly, it appears the legal profession at the time failed to notice.\textsuperscript{105}

Since the early 1980s several justices have publicly voiced their opinion that the Court should cut back on the number of cases it agrees to hear. Several of the Court’s former justices, including William McIntyre, Claire L’Heureux-Dubé and Louise Arbour, are on the record as saying a reduction in cases would result in judgments that are better crafted. L’Heureux-Dubé argues “I think we could ease it a little bit so that we could take more time for each case and not rush all the time … There is no doubt the cases are not as clear-cut, they are much more difficult,

\textsuperscript{100} The average number of appeals as of right was 53 per year in the five years leading up to the change, down to an average of 19 per year from 1998 to 2002.
\textsuperscript{101} Schmitz, “Chief Justice McLachlin Discusses Terrorism, Liberty, Live Webcasting of Appeals.”
\textsuperscript{102} Schmitz, “SCC’s Resources Now ‘Stretched to the Limit,’ McLachlin Tells CBA.”
\textsuperscript{104} Anderson, Judging Bertha Wilson. 243.
\textsuperscript{105} Anderson, Judging Bertha Wilson. 243.
we are refining the jurisprudence and we have a long way to go.” Interestingly, both L’Heureux-Dubé and Arbour expressed these sentiments while still serving on the Court. However, the chief justice recently refuted the suggestion that a drop in the number of appeals granted leave by the Court in 2006 (when it granted only 55 appeals) was an indication that the justices sought to reduce their workload by curtailing the number of cases granted. McLachlin describes such assertions as “alarmist” and noted that the Court typically aims to take on 80 to 85 cases per year, but that this fluctuates in any given year depending on the number of appeal applications and their complexity. The chief justice also notes that while the justices recognize that if they were overworked there could be negative repercussions for the quality of the Court’s judgments, none of her colleagues have requested caseload reductions.

Reference Cases

The preceding section examined broad trends and changes in the processes through which the vast majority of cases reach the Court: by right or through the leave process. The final category of cases the Court engages are questions referred to it by the federal government or reference questions from provincial governments that have been appealed from provincial courts of appeal. References, or “advisory opinions,” usually pertain to constitutional questions but can involve any area of law. Final appellate courts in other common law jurisdictions have refused to render advisory opinions on the basis that they are not a proper function of the judiciary. The

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106 Cristin Schmitz, “Leaving After 15 Years on Bench, Justice L’Heureux-Dubé says she’s ‘Extremely Serene’,” *The Lawyer’s Weekly*. 22(2) (May 10, 2002).


109 This power is laid out in section 53 of the Supreme Court Act.

110 The High Court of Australia’s refusal was based on that reason: *Re Judiciary and Navigation Act* (1921) 29 C.L.R. 257. The United States Supreme Court refused through informal communication between the justices and President Washington in 1793. It is believed the “cases” and “controversies” requirements under the judicial functions outlined under Article III of the United States Constitution precludes advisory opinions. See: Peter W. Hogg, *Constitutional Law of Canada* (Scarborough: Thomson Canada Limited, 2003). 242.
Canadian Court does not have such qualms, but has repeatedly asserted the discretion to refuse to answer a reference question, particularly if the issues raised are non-justiciable, but has rarely exercised that discretion. Where it has refused to answer a question, aside from issues of justiciability, the decision is usually because the question is too ambiguous to allow a precise answer or because the parties have not provided the Court with sufficient information to provide an answer.

Although the Court’s decisions in reference cases are not technically binding and are not thought to carry the same weight as legal precedents as opinions in regular cases, Peter Hogg notes that in practice advisory opinions are treated every bit as authoritatively by lower courts and the other branches of government as any of the Court’s decisions. Interestingly, however, the Court’s decision to refuse to answer one of the four questions referred to it in the 2004 Same-Sex Marriage reference was based in part on the fact that the non-binding nature of the reference opinion could result in confusion in the law. The first three questions in the reference dealt with whether Parliament had exclusive authority over the definition of marriage, whether extending civil marriage to same-sex couples was consistent with the Charter, and whether the Charter protected religious officials from being forced to perform same-sex marriages. The fourth question concerned the constitutionality of the opposite-sex definition and was added by then Prime Minister Paul Martin after the initial three questions had already been posed to the Court. The final appellate courts in three provinces (British Columbia, Ontario and Quebec) had already

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ruled that the traditional understanding of marriage lacked constitutionality under the Charter’s equality provisions and the federal government had not appealed those decisions to the Supreme Court. As a result, in the reference the Court expressed concern that an advisory opinion stating that an opposite-sex definition of marriage was constitutional would result in a lack of uniformity in the law, because the provincial appeal courts’ rulings would remain binding in those provinces.116

Without stating as much, the justices seem to have recognized the overtly political nature of Martin’s decision to add the fourth question, noting in the opinion that, “[t]here is no precedent for answering a reference question which mirrors issues already disposed of in lower courts where an appeal was available but not pursued.”117 Despite this example, there are many instances in which the Court has failed to show similar prudence. The reference procedure lends itself to use as a tool for politicians to pass off difficult decisions to the courts, regardless if those issues are almost entirely political. Hogg criticizes the Court for an “astonishingly liberal” approach to answering questions referred to it surrounding the constitutional battles of 1982, particularly on the meaning of constitutional conventions which raise “no legal issue and had only political consequences.”118 Writing just prior to the Same-Sex Marriage reference, Hogg argues the Court has not been cautious enough in its handling of reference questions:

the Court has not made sufficient use of its discretion not to answer a question posed on a reference. The reference procedure has often presented the Court with a relatively abstract question divorced from the factual setting which would be present in a concrete case. It has been a common and justified complaint that some of the opinions rendered in references have propounded doctrine that was too general and abstract to provide a satisfactory rule. A number of the most important Canadian cases are open to criticism on this ground.119

Some of the justices I interviewed acknowledge the political opportunism that arises in the context of the reference procedure, but they generally view advisory opinions as a serious

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116 Reference re Same-Sex Marriage at para. 70.
117 Reference re Same-Sex Marriage at para. 68.
118 Hogg, 244, citing Re Resolution to Amend the Constitution [1981] 1 S.C.R. 753 [the “Patriation Reference”] and Re Objection by Que. to Resolution to Amend the Constitution [1982] 2 S.C.R. 793 [the “Quebec Veto Reference”].
119 Hogg, Constitutional Law of Canada, 244.
component of the Court’s role and an occasion to provide clarity to the other branches of government on matters of great importance.\textsuperscript{120}

**Written Submissions and Case Research**

Once leave to appeal is granted, the Court sets a date for the oral hearing. The parties and interveners submit written legal arguments for the justices to review, called factums. Just over thirty years ago, these factums were said to have played a far less significant role than the equivalent legal “briefs” submitted by parties to the U.S. Supreme Court. Up until the 1960s, oral argument was by far the most important stage of the decision-making process.\textsuperscript{121} Several important changes have transformed this practice. Since the public importance criterion for leave to appeal was introduced in 1975, the majority of the cases before the Court involve substantive issues of the law rather than merely the resolution of disputes between two parties. The Court’s leave to appeal process since then and the entrenchment of the Charter in 1982 also mean that the cases reaching the Court in the contemporary period have become increasingly complex. This means that the justices must pay more attention to the written arguments, lower court decisions and issues at hand prior to the oral hearing. Furthermore, the backlog that built up during the 1980s led the Court to introduce time limits for oral hearings in 1987.\textsuperscript{122} Together, all of these factors have greatly increased the emphasis and importance of the written materials for the outcome of the cases.

One of the law clerks’ most important tasks – and the one that occupies most of their time – is to synthesize and analyze factums and accompanying documents, and prepare “bench memoranda” for their justice on each case. Bench memos are normally due to the justice approximately one week before the hearing. Most justices appear to allow their three clerks to divide the cases evenly among themselves at the start of each term. Although some of the justices note their preference is that the clerks expose themselves to as many different areas of law as possible, they typically allow the clerks

\textsuperscript{120} Interviews.
\textsuperscript{121} Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, 80.
\textsuperscript{122} Sharpe and Roach, *Brian Dickson*, 295. The authors note that Justice Estey wrote in a memo to his colleagues that long hearings were a ‘microcosm’ of the ‘problem of this Court.’
to pursue cases that particularly interest them or fall under their specialization.\textsuperscript{123} Once assigned to a case, a clerk is responsible for that case throughout the process. For example, if the clerk’s justice was assigned to write the decision on that case that clerk might assist in further research, drafting or editing of the decision. Alternatively, if another justice was assigned, the clerk might be asked to produce a “comment memo” for her justice on the draft once it was circulated.\textsuperscript{124} For some time, the clerks have also been required to attend the oral hearing for the cases to which they were assigned.\textsuperscript{125}

The substance and style of the bench memos vary from justice to justice, and even from clerk to clerk. In the 1970s, when each justice had a single clerk, some preferred to have their clerk do in-depth research on a limited number of cases, while others wanted their clerk’s impression of each case via a bench memo prior to the hearing.\textsuperscript{126} During this period, the bench memos were but a few handwritten pages in length.\textsuperscript{127} As the law clerk program expanded, the norm became for the clerks to prepare a bench memorandum on each case. Bench memos are now typically twenty to forty typed pages and, in rare instances, may even exceed 100 pages in length.\textsuperscript{128} Larger bench memos include an executive summary, a recitation of the facts and proceedings in the lower courts, summaries and an analysis of the parties’ arguments and, depending on the justice, a recommendation on how to treat the appeal.

The importance or influence of the clerk’s bench memo appears to vary depending on the justice. All of the justices emphasize that they read the factums and lower court decisions themselves. In one sense then, the bench memo is largely an aid. As several justices note, the volume of cases and the sheer amount of written materials associated with each case makes it impossible for the justices to

\textsuperscript{123} Interviews.
\textsuperscript{124} These processes are explored more fully in the next chapter.
\textsuperscript{125} Some of the clerks I interviewed who served in the 1980s and early 1990s indicated they rarely had time to attend the hearings. This may be the result of the clerks having to work on applications for leave until 1996. All of the clerks I interviewed who served on the Court since then normally attend the hearings.
\textsuperscript{127} Sharpe and Roach, \textit{Brian Dickson}, 209.
\textsuperscript{128} Interviews.
check all of the cases cited in the material or go to the library to do further research themselves.\textsuperscript{129} The clerks’ role in what one justice described as “the process of validation and verification” is extremely important.\textsuperscript{130} The justices might reasonably be placed along on a continuum in regard to how they treat the bench memos. On one end, some justices aim to read as much of the material themselves, and thus prefer short, concise bench memos that they use primarily as a reference tool. Further, these justices may not even solicit the clerk for their recommendation on how to handle the appeal. On the other end, some justices appear to rely more heavily on the bench memos as a primary aid in preparing for the hearing. Many of the justices will discuss the bench memo in person with their clerk prior to the hearing to flesh out particular issues or even to argue certain points. In this sense, then, the bench memo is both the start and end point on which the justice’s first impressions of the case rests.\textsuperscript{131} This is significant because, as discussed below, the written material is usually determinative for the outcome of the case.

**Panel Selection: Determining Which Justices Hear an Appeal**

As noted above, unlike the U.S. Supreme Court, where all of the justices sit in each case (\textit{en banc}), the Canadian Court has traditionally heard cases in panels of five, seven or nine. The chief justice determines both the size of the panels and which justices sit. This decision is thus a potential site for strategic behaviour, assuming that a chief justice might try to determine panel compositions based on her preferred outcome. In this section I explore two studies that examine panel compositions. I then argue that broader constraints like collegiality and relatively new conventions of consensus call the strategic view of panel assignments into doubt.

Andrew Heard examines the voting records of 16 judges in 121 Charter cases from 1983 to 1989 to see whether panel compositions are correlated to different case outcomes in Charter

\textsuperscript{129} Interviews.
\textsuperscript{130} Interview.
\textsuperscript{131} As Lorne Sossin writes in his “insider” account of the clerk’s work: “Though the weight of attention paid to the bench memoranda varies from Justice to Justice, it is fair to say that bench memoranda often serve as a screen or filter through which the appeal is first viewed.” Sossin, “The Sounds of Silence,” 292.
cases. He found “profound differences” in the judges’ voting records: “among those judges who have heard a significant number of cases, the rate of accepting Charter claims varies from Claire L’Heureux-Dubé’s 21.8 per cent to Bertha Wilson’s 47.2 per cent.” Heard assesses the depth of disagreements on the Charter by examining patterns of agreements among judges hearing the same cases, dividing the justices into two groups: those more receptive to Charter claims and those less receptive. He examines the composition of each panel – which range from 5 to 9 justices – that heard a Charter case to see if the deciding panel was composed of a majority of judges from either group. The results show a strong correlation. Where a panel had a majority of more receptive judges, 38.5 per cent of Charter claims were successful; where deciding panels had majorities composed of less receptive judges, Charter claims were only successful in 15.9 per cent of the cases. Although Heard drew no conclusions about the ideological disposition of the justices, his was one of the first studies of the Charter era to examine judicial voting patterns of individual justices, rather than simply the Court as a whole.

Picking up where he left off, Lori Hausegger and Stacia Haynie examine the use of panels to see whether chief justices took advantage of the power to assign them for the strategic purpose of pursuing their own policy goals. In their study, the authors gauge each justice’s policy preference based on the percentage of votes he or she casts in favour of the accused in criminal cases, with the hypothesis that the closer a judge’s score to that of the Chief Justice, the more likely he or she will be assigned to a panel. They coded all published cases from 1986 to 1997, creating a variable for each judge sitting on the Court when the case was heard. The authors find that for the full range of cases, the chief justice is actually significantly more likely to select individuals ideologically further away for panel assignment. However, for cases involving

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134 Heard, “The Charter in the Supreme Court of Canada,” 305.
136 Hausegger and Haynie, “Judicial Decisionmaking and the Use of Panels,” 651.
“salient civil rights and liberties issues,” the chief justice is more likely to assign judges with close policy preferences. The authors suggest that institutional constraints, such as workload and the desire to have Quebec judges assigned to panels for cases coming out of that province, may inhibit some strategic behaviour. Nevertheless, the finding that the chief justice is more likely to assign judges with close policy preferences to more salient cases confirms their central premise.

Yet even this qualified conclusion seems problematic. First, Hausegger and Haynie extrapolate the justices’ ideological position based on their votes in criminal cases and then apply that to all cases for the period under study. Yet as explored in previous chapters, justices do not necessarily vote with ideological consistency across different types of cases or areas of law. Second, even without this crucial measurement problem, the emphasis by the current Court under McLachlin in assigning panels with all nine justices appears to render Hausegger and Haynie’s time bound study less applicable. The remainder of this section explores this important change.

The convention that all nine justices sit in particularly important cases has strengthened over the period since the Charter. Panels of five are normally struck for appeals by right or in cases implicating the Quebec civil code, so that the justices from that province constitute a majority on the panel. On other occasions, illness, retirement or recusal from new appointees to the Court in cases they have already heard require the creation of smaller panels. As former Chief Justice Lamer explained:

If there is a possibility that the outcome of a case might be different with fewer than nine judges, I’ll do my best to strike a panel of nine judges. How do I know if there will be a division? First, my executive legal officer helps me to flag these cases. Also, I know my colleagues and I have a fairly good idea about what they are thinking on particular issues. I might ask what the other judges think about a particular issue, even if it is not of national general importance. I wouldn’t like to see a minority in the court impose its views on the court, and even for the cases that are not of general importance I will strike the bench of nine if necessary.  

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137 Hausegger and Haynie, “Judicial Decisionmaking and the Use of Panels,” 651.
138 Greene et al, Final Appeal, 115.
While Lamer’s comments about knowing what his colleague’s are thinking about particular issues suggest that an opportunistic chief justice could conceivably use his or her power to strike panels in an ideological manner, the long-term trend towards larger panels in the Charter era Court suggest that conventions override such considerations. McLachlin, the current chief justice, has an even stronger preference to strike panels with the full court. Donald Songer finds that the percentage of nine-judge panels went from 9.8 percent under Dickson to 30.4 percent under Lamer to 51.7 percent under McLachlin. This may be in part due to the reduction in appeals by right after 1997, the last year in Hausegger and Haynie’s study. Further, in interviews, justices, regardless of whether they served under Dickson, Lamer or McLachlin, state that they were satisfied with how panels are selected.

**Oral Hearing**

Historically, arguments by counsel during oral hearing were given considerable weight compared to the written facta. As noted above, a dramatic change in the type of cases heard by the Court since it gained control over its docket in 1975 has effectively reversed this reality. This section examines changes to the oral hearing process and explores its impact on the Court’s decisions. It will demonstrate that despite the significantly reduced role hearings have in terms of their impact on case outcomes, the oral arguments remain significant in enough cases to demonstrate the importance of legal considerations in the overall process of decision making.

As the Court has evolved increasingly into an explicitly policy-making institution, particularly under the Charter, the justices have come to accept a broader array of evidence. The establishment and expansion of the law clerk program has helped to facilitate the research necessary for this role. Even with the clerks, however, the complexity of the cases and a sharp increase in the number of applications for leave through the late 1970s and 1980s created a significant backlog.

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140 Interviews.
141 Snell and Vaughan, *The Supreme Court of Canada*, 44.
which mandated reforms to the process. Oral hearings for leave applications were eliminated in 1987. In the same year, Chief Justice Brian Dickson established time limits for oral hearings of actual appeals, something which would allow the Court to begin the practice of hearing two cases per day.\textsuperscript{142}

The Court holds three 3-month terms beginning in January, April and October, during which it alternates sitting for two weeks to hear appeals and two weeks off for research and judgment writing. New, stricter time limits established in the 1990s by Chief Justice Antonio Lamer limit litigants on each side to one hour each, with those interveners that have been granted access to the oral hearing normally limited to twenty minutes. Lawyer’s arguments are frequently interrupted by questions from the justices, which count towards the time limits. This leaves a rather short period for litigants to convince the justices in the hearing. As a result, the oral hearing is only determinative of the outcome of a minority of cases.\textsuperscript{143}

This does not mean the hearing is inconsequential. Rather, by the time the justices have considered the written submissions of the parties and completed their preparatory work going into the hearings, they tend to at least lean towards a probable outcome. In most cases, the oral hearing serves largely to confirm these initial inclinations. Nevertheless, in a substantial number of cases – from 10 to 25 percent, according to the justices I interviewed – the hearing can change this line of thinking in a manner that either reverses a justice’s support for an appeal or fundamentally alters the main line of reasoning they might have in mind going into the hearing.\textsuperscript{144}

\textsuperscript{142} According to Snell and Vaughan, the Court first instituted restrictions on oral hearings in 1907, when a new rule limited the number of counsel to be heard for each side to two, and the time of argument to three hours. \textit{The Supreme Court of Canada}, 100. By the 1970s and 1980s, this seems to have evolved into a system by which lawyers would advise the Court Registrar of the amount of time they required for oral argument. This came to frustrate the justices, particularly Justice Estey, who in the midst of the case backlog, noted in a memo to colleagues that never-ending hearings were a ‘microcosm’ of the ‘problem of this Court.’ Sharpe and Roach, \textit{Brian Dickson}, 295.

\textsuperscript{143} Interviews.

\textsuperscript{144} Interviews.
Former Justice John Sopinka has written that “[b]y the time a case reaches our court, counsel’s performance contributes no more than 10 or 15 percent to the outcome.”¹⁴⁵ Most of the justices I interviewed generally agree with this sentiment.¹⁴⁶ As one justice explains, “you have to realize when a case gets to the Supreme Court it has already been dealt with by two courts, a trial court and a court of appeal. … Things have been pretty well sifted through by that stage.” This justice notes that in rare instances, the justices may have such a firm view that they need only to hear from one of the parties during oral argument:

In some cases by that time the direction may be pretty obvious and the Court will decide, depending on which way things appear, either to hear the appellant and then not call on the respondent, because they feel that the appeal is obviously unfounded. Or, in the reverse, call upon the respondent, before calling on the appellant, and then rendering judgment without hearing the other side because the Court was already of the opinion that the other side was correct but still felt it should give the side that was arguing otherwise a full opportunity to be heard. To be able to do that before actually sitting you have to know the case very well. That’s a minority of cases. Most cases the Court will hear both sides, but it may well stick to the initial impression it had and the impression may be different with different judges.¹⁴⁷

Another justice notes being a bit leery of indicating what percentage of cases the oral hearing impacts the thought process, but notes the effect hearings have can take different forms:

You may change your mind in respect of the outcome. And you may change your mind in respect of what are the relevant issues, on what basis the judgment should be prepared. Sometimes oral arguments in the Court will have an impact on the outcome. More often, on the way issues are defined and the reasons drafted by bringing sometimes more clarity to what are really relevant issues, what are the matters which are of grave concern to the parties, or often bringing out what the members of the Court think the issues are [and] which issues should be addressed. It may happen during the hearing and sometimes after, during the writing process.¹⁴⁸

A third justice acknowledges that oral hearings can change the thinking on a case, usually if new or unexpected issues arise and “you decide to see it in a different light.” However, this justice noted the percentage of cases in which this would happen is nowhere near 25 percent. “After you’ve read all [of the written material] it would be unusual for me not to have a pretty good idea of how I thought

¹⁴⁶ Interviews.
¹⁴⁷ Interview.
¹⁴⁸ Interview.
the case should go. And most times it went the way I thought it was going to go.”

Another justice contends that the hearing becomes less important the further up the judicial hierarchy a case goes. Nevertheless, this justice notes, even if a judge only changes her mind 5 percent of the time that is very significant for the highest court in the land.

The fact that the oral hearing is not usually determinative of the outcome of a case does not render the hearings unimportant. This is something all of the justices emphasize. As one justice states,

The oral hearing is a useful exercise in a significant number of cases – not the majority – but even if it doesn’t change the Court’s opinion about which way a case should go, it may enlighten the issues further and may bring a better or different focus on the issues and sometimes that focus may be different from the focus that appeared from the factums.

Another justice puts it this way:

There is a dynamic in the collegial process, in the discussion with the counsel for the parties, and you may suddenly acquire a different perspective on an aspect of the case. You may discover something that you may have missed in your analysis of the case or of the judgment, some fact you may have overlooked which is really critical to the case.

While oral hearings have their part, both for the outcome and with respect to the reasoning in the decision, this justice did acknowledge that the Canadian Court is probably closer to the American Court, which places little emphasis on hearings, than to the British House of Lords, where hearings “are virtually unlimited.”

A third justice notes that the Canadian Court puts more emphasis on the hearings than the U.S. Court, which limits arguments to half an hour. The time limits that the Canadian Court imposes are important for the discipline of both the lawyers and the judges because “it helps efficiency and forces you to really focus on what’s important for the case.” This justice also notes that the hearing is

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149 Interview.
150 Interview.
151 Interview.
152 Interview. Implied here is the notion that there is a correlation between the amount of time spent on the hearings and the level of impact the hearing have on the ultimate result reached by the justices. While an in depth investigation of whether this is true might be possible, it is beyond the scope of this dissertation. For the purposes of this analysis, it is accepted as intuitively plausible that such a correlation generally exists.
important because it can confirm a justice’s view – something that is often neglected in academic literature that examines judicial voting behaviour.153

The oral hearing is an opportunity for the justices to flesh out the ideas they have developed about the issues involved in a case. The usual effect is to solidify these ideas, but in a significant number of cases the hearing has an important impact on the justices’ perceptions of the written material. What does this say about the judicial motivations involved? As noted in Chapter 2, the attitudinal model has difficulty accounting for changes in judicial attitudes over time. What is even more problematic for the attitudinal model is explaining why justices would change their mind during the course of deciding particular cases. These changes in votes, referred to as “vote fluidity” in the American judicial behaviour literature, should virtually never occur if justices are pursuing outcomes predicated on ideological policy preferences.

As examined in Chapter 2, limited studies exploring fluidity on the U.S. Supreme Court have found instances of vote changes near 12 percent.154 Attitudinal scholars have asserted in such studies that because judicial votes are consistent in the majority of cases the existence of fluidity does little damage to their theory. Yet because these studies rely on voting records accessible through the justices’ private papers, they focus on changes in votes from the original conference votes to the final votes. Thus they do not capture the justices’ considerations before and during the oral hearing. All of the Canadian justices’ interviewed report that they are considerably more likely to change their minds with respect to the outcome of a case before or during the hearing stage, rather than later. It is thus likely that the American studies capture only a fraction of the actual voting fluidity on the U.S. Supreme Court. This is significant because it means judges might change their minds as a result of legal argument more than often thought.

Voting fluidity and its possible sources are explored more fully in the next chapter. It is worth pointing out here, however, that although scholars of the Canadian Court lack access to the

153 Interview.
internal memoranda and voting records of the justices, the fluidity levels found in U.S. studies approximate the self-reported rates of vote change by the Canadian justices. The patterns of when and how often justices change their minds were independently confirmed by most of the clerks interviewed for this study.\textsuperscript{155} The justices’ attention to the legal arguments of counsel at oral hearings and the frequency with which it changes the outcome shows that such considerations are at least one important factor in decisions. The even larger percentage of cases where oral hearings have an impact on the reasoning involved in a decision but not the vote itself is also significant, and is ignored by attitudinal scholars.\textsuperscript{156}

One justice I interviewed acknowledges that, like everyone, judges are, in part, a product of their experiences. This justice spoke at length about how the hearing itself might help justices avoid value-based decision making:

The challenge is to use that experience to enlighten, not to prejudge, issues. It’s easy for me to say that, but it’s difficult to be faithful to that. So why is this all relevant to the hearing? Well, until the hearing of the case, you might find when you read the case it looks like something you would [resolve] in a certain way because you’ve had familiarity with the issue or you’ve had experience with the issue. But you can quite often get a different perspective on that through the hearing. You might have missed it in the reading of the facta. You might get it from an intervener – because you grew up with a certain set of values and a certain set of experiences – that says ‘hey wait a minute, that’s conventional thinking that I’m not sure is called for in this case.’ And there are a lot of areas, in the area of the Charter in particular, where you get a far better view of the issue through the hearing emphasizing certain points in a way that [may result in] a more enlightened way of looking at certain issues. We’re all products of our experiences and we have to make sure that we’re not just prematurely giving into those experience-based perceptions as opposed to the more logical and more objective analyses.\textsuperscript{157}

The give-and-take in the hearing can provide different lenses of analysis for justices who might otherwise rely on their own perceptions and preferences to determine the appropriate outcome in

\textsuperscript{155} Clerks were asked how often their justice changed their minds during the course of a deciding a case. Six clerks interviewed refused to answer the question on the basis of confidentiality. Of the remaining 15, only one clerk did not recall the justice ever changing his or her mind, and two clerks indicated not being privy to their justices’ mindset going into oral hearings.

\textsuperscript{156} Indeed, until recently, the oral arguments at the U.S. Supreme Court were largely treated as unimportant by all scholars of judicial behaviour. See: Timothy R. Johnson, \textit{Oral Arguments and Decision Making on the United States Supreme Court.} (Albany: State University of New York Press, 2004); Lawrence S. Wrightsman, \textit{Oral Arguments Before the Supreme Court: An Empirical Approach.} (New York: Oxford University Press, 2008).

\textsuperscript{157} Interview.
certain cases. Based on the justices’ comments about the frequency with which their perceptions are changed by the oral hearing, it is clear that this process of elucidation does not necessarily occur in the majority of cases. Further, it would be naïve to presume that this process always precludes the justices’ ideological preferences or personal values from creeping in (consciously or unconsciously). Finally, the time limits and the reduced emphasis the Court has placed on the hearings over the past several decades means the parties have limited opportunity to impress these varied perspectives on the justices. Nevertheless, that many clerks confirm that on occasion their justice would return from oral hearing with a different perspective on a case lends some independent credence to the preceding description of how the hearing can impact the justices’ thinking. Further, this suggests a process at work that the attitudinal model is unable to explain.

Voting fluidity is also cited as a central indicator of strategic behaviour. Voting fluidity is also cited as a central indicator of strategic behaviour. What do the justices’ behaviour at oral hearing tell us about their possible motivations? Some justices have publicly commented on their expectations for the hearings. Former Justice Michel Bastarache states that the approach of different justices varies widely in oral hearing: “There are the “get on with it” judges, the patient judges, the chatty judges and the quiet judges.” Further, the justices’ sympathy to passionate advocacy varies as well, as “some will be upset by arguments based on simplistic morality, others not.” That said, however, Bastarache points out that in many instances if counsel does not move beyond the arguments already presented in the factums in some way then they may not be successful in changing most of the justices’ minds:

It is all but impossible for us judges to come into a hearing without having a preliminary view of the matter to be heard. This does not mean that oral advocacy cannot make a difference, but it does mean that except in those cases where a judge still thinks there is a good chance of going either way, counsel will have to do a lot more than repeat what they have argued in their factum to persuade him or her.

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160 Bastarache, “Passion and Advocacy in the Supreme Court of Canada.”
Former Justice Sopinka notes that counsel should be direct and should not regard questions as imposing on their time. “An effective answer will often persuade other judges even if it does not persuade the questioner.”

One of the only external indicators of the judges’ possible train of thought in the oral hearing is the type of questions they pose to counsel. McCormick and Greene rightly point out that the questions and the justices’ reaction to the responses given by the lawyers might suggest which way they are leaning. However, the justices’ questions may be misleading for several reasons. Most of the justices note that they will occasionally play ‘Devil’s Advocate’ by asking questions that challenge counsel, even if the justice is already sympathetic to the arguments. At times, this may be because a justice wants to emphasize a point for her colleagues.

Alternatively, such questions may help a justice consider the implications of coming down on one side. One justice notes that good lawyers make the justices reflect on issues that may result from a decision that the justices had not considered. This justice cites R. v. Askov as an example of a case in which questions during oral hearing may have avoided controversial repercussions. In Askov, the Court ruled that a two-year delay in trial proceedings, the product of an overburdened system, violated section 11(b) of the Charter of Rights, the right to be tried within a reasonable time. The decision resulted in thousands of criminal charges dropped or stayed by lower courts, and was subject to intense media scrutiny and criticism. This justice argues that government counsel failed at the oral hearing to sufficiently highlight the possible effects such a ruling would have at the lower court system. The justice states, “I think [the decision in] Askov was perfectly right, but we may have been more precise in avoiding that onslaught.”

Finally, a justice may be leaning in favour of a counsel’s case, but still have difficult questions relating to subsidiary issues of concern to that justice. The justices generally agree that

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163 Interviews.
165 Interview.
lawyers are usually (or should be) thankful for such questions, as they allow counsel to focus specifically on what is troubling the justice and attempt to resolve it. As a result, several justices argue, it would be futile for an observer to attempt to draw conclusions about where the justices might be leaning with respect to a case based on the questions posed at hearing. It was for this very reason, according to one justice, that the Court decided there would be no questions from the bench during arguments at the hearing for the Quebec Secession Reference. All of the questions the judges had were given to the chief justice and were put to the lawyers by the chief after argument. “The Court wanted to avoid as much as possible the hearing being relayed in the form of little bits, extracts, which would be presented out of context.” The justices agreed that given the intense media coverage of the reference that this measure would help avoid misperceptions that would not be helpful for the public.

Nevertheless, the justices do often ask questions or otherwise give some indication at the hearing that reveals their sincere sentiments about the disposition of the case or the issues at hand. Some justices may pose questions which, in effect, dispute or damage a counsel’s point. Alternatively, a justice might come to the aid of a counsel. As Former Justice Bertha Wilson states, “a lot of ink has been spilled on the subject of whether or not it is appropriate for judges to compensate for unevenly matched counsel by putting forward arguments themselves. I have never had much doubt about that. I think we have to – in the interests of justice.” This advocacy rarely comes in the form of a speech or statement from the bench. The convention among the justices is to frame their sentiments in the form of a question to counsel. In the course of posing questions, however, the justices might refer to precedents or evidence that answer another justice’s question for counsel. Coming to counsel’s aid in this sense can be interpreted as a strategic move on the part of

166 Interviews.
167 Interview.
some justices to highlight certain issues or to frame the debate before the justices go into the post-hearing conference.

The emphasis on written material in the contemporary period is regarded as having diminished the importance of the oral hearing stage. Nevertheless, it is clear that in a significant percentage of cases, the hearing can be determinative as to outcome or the rationale supporting the outcome. The fact that this voting fluidity exists illustrates the need for attention on aspects of judicial decision making that do not pertain to the justices’ ideological policy preferences. Nonetheless, the hearing can certainly be said to act as a site for strategic behaviour on the part of the justices, at least on occasion. Although observation of the questions posed to counsel in the hearing is unlikely to yield straightforward information as to vote intentions or the justices’ motivations, the preceding analysis makes clear that information gathering, attempts to sway colleagues, and sincere questions are all part of the mix that constitute the incentives of the justices.

**Conclusion**

This chapter identifies how a number of important institutional factors outside of policy preferences influence decision making on the Supreme Court. Continuous procedural reforms enacted throughout the modern period reflect a concern for the administrative effectiveness of the Court. Imbued in this attention to efficiency is a consideration of the institution’s reputation and the quality of its work.

The evidence in this chapter also demonstrates that a variety of factors come into play when justices make decisions. At the leave to appeal stage, strong norms of consensual decision making, or collegiality, tend to predominate. Legal rules governing the process really do dictate how cases are selected for hearing. In rare instances where they do not, it is often the case that justices relent to the preferences of an individual colleague to have a particular case heard. Even this seems to be a result of collegial, rather than attitudinal or strategic, concern.

There appears to be little room for strategic manoeuvring due to the institutional design of the process. When a conference of the full Court considers a particular case, the panel of three
justices to which it was originally assigned retain the final say. Nor have changes made to the process over the years made case selection any more susceptible to attitudinal or strategic behaviour. Rather, changes like the removal of the clerks from the process have generally been made to ensure institutional efficiency. Finally, a number of justices in recent years have advocated reducing the number of cases accepted by the Court, something that makes little sense from an attitudinal perspective given it would reduce the number of opportunities available to justices to influence policy. The concern for quality evidenced by such a preference suggests that many of the justices care about the work of the Court for its own sake.

Moreover, stages of the Court’s process that might make for obvious sites of activity for strategic behaviour, such as the selection of panels to hear appeals, are not clearly representative of such activity. Contrary to other findings, the analysis presented here suggests that norms and conventions dictate the composition of such panels. Under successive chief justices in the contemporary period, full panels of nine judges are becoming more and more the norm. Further, in none of the interviews conducted with justices or former law clerks was there any suggestion that a justice was unhappy with not being assigned to a panel.

The oral hearing provides room for all types of behaviour. The justices acknowledge sincere and strategic approaches to questioning counsel. Court observers must be careful, however, because of the difficulties associated with correctly identifying such behaviour prior to the written reasons. That the justices acknowledge sometimes changing their minds around the oral hearing stage suggests two important things. First, ‘the law’ as a resource for coming to the correct conclusion about issues confronting the Court is often indeterminate. Second, there are a significant set of cases left unexplained by the attitudinal model, as it cannot account for why justices would change their minds.

The process-focused approach undertaken here is not limited to demonstrating that a multitude of factors influence judicial decisions. The approach is also well suited to identifying when and under what conditions particular factors are most prominent. Attention to changes over
time also shed light on how specific procedures and rules act to constrain or dictate motivating factors. For example, changes in the rules governing appeals as of right allowed the Court to focus on cases of national importance, but this has repercussions for efficiency, which instigated further changes. Other changes, such as the strengthening convention that the full Court sits on important cases, serve to cast doubt on the view that panel selection is a site for strategic behaviour. The shift in emphasis to written materials and away from oral hearings reflects the Court’s transformation to a more full-fledged policymaking institution. The consequences of this evolution are explored more fully in the next two chapters.
“I think that chief justices would like to think that they could have a court marching to the same tune, but it just doesn’t happen.” – Supreme Court Justice.

Chapter 5

This chapter examines the drafting of the Court’s written reasons and the deliberation, collaboration and compromises the justices make along the way. The processes explored here make clear that the landscape in which the justices operate is shaped to a large extent by institutionally-derived norms of collegiality and consensus. Within this landscape, however, judicial conceptions of the appropriate collegial role – to what extent a justice should work individually or in concert with colleagues, how to utilize law clerks, what the proper limits of deliberation and negotiation are – vary significantly among the individual justices. These differences explain how the level of consensus on the Court can vary over time as well as the different degrees to which individual justices might pursue attitudinally-inspired or strategic behaviour.

As is explored below, the various stages of the Court’s processes in developing written reasons also allow for potential “sites of activity” for certain kinds of behaviour. At times during the Court’s recent history, interpersonal divisions and incidents of informal lobbying among certain justices arguably reflect strategic behaviour and have created tension between the justices. During other periods, particularly on the current Court, an effort to achieve more consensus has informed the collaborative process. These patterns of operation in the institution’s working environment stem in large part from judicial conceptions of collegiality noted above.

Preparation and revision of drafts are the most time-consuming components of the justices’ work, in part because written reasons are viewed as the institution’s primary legitimating and accountability function. One argument emphasized in chapter 2 is that the relative lack of attention in much of the judicial behaviour literature to the development of the Court’s actual written reasons, as opposed to merely judicial votes, is highly problematic. As the analysis in this
chapter demonstrates, understanding this component of a Court’s work is central to explaining what motivates judges and how judicial processes, norms and values impact outcomes.

One central feature of this process is the consensual nature of the Canadian Court’s decision making, including the marked tendency for unanimous decisions.\(^1\) Only on rare occasions is unanimity an express goal of the justices, but this occurs in especially important cases. Given the collegial nature of the Supreme Court of Canada (especially relative to the United States Supreme Court, as explored below), this particular aspect of judicial interaction warrants attention. Analysis of cases where unanimity was an explicit objective of the Court suggests that unanimity as a goal actually reduces the depth and breadth of consensus on the Court in terms of the concrete legal or policy outcomes of the written reasons.

**Conference**

Following oral hearing of each case, the justices retire to the conference room, where each justice indicates where she stands on the case and the primary rationale in support of that position. The conference is often the only time that the full panel of justices will discuss the case together at the same time. As this section explores, the tenor of the conference varies over time, something influenced by the approach taken by the chief justice. Within this broader context, the length and depth of deliberation that takes place also varies from case to case.

Conferences were not regular practice at the Supreme Court until the late 1960s, when John Cartwright became chief justice and standardized the meetings. Although little is known about the Court’s internal practices prior to that time, decision making was a much more individualized process. In the Court’s first few decades *seriatim* opinions (where each justice writes individual reasons) were the standard practice, and most of the time there was little to no

\(^1\) This has been noted by other empirical analyses of the Court’s decision making. See, for example, Donald R. Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination.* (Toronto: University of Toronto Press, 2008), Chapter 8.
communication between justices prior to the delivery of decisions. Through these early decades conferences were occasionally held in the chief justice’s chambers, but “how often these meetings occurred and what benefits accrued from them is unknown.” At least one justice of this era reportedly refused to participate in discussions with his colleagues altogether.

The lack of regularized internal procedures arguably contributed to the Court’s slow progress towards becoming a true leader in the development of Canadian law. As Donald Fouts explains,

As has been demonstrated repeatedly in the U.S. Court, the judicial conference helps to focus the issues and bring conflict over the judicial role or public policy to the level of discussion. By forgoing the intellectual give and take of the conference, the Canadian Court gives fuller rein to the idiosyncratic legal views of individual judges.

In effect, more debate, compromise and collaboration results not only in more authoritative pronouncements on the law for the lower courts to follow but in judgments of better quality. McCormick notes, however, where the move to a regular system of conferences helps make for more coherent leadership (and innovation), the *seriatim* court is well suited to applying longstanding principles of law. If multiple judges reach the same conclusion in *seriatim* decision-making then it is evidence that previously established doctrine directs a given outcome.

The timing of conferences has not changed since they became regular practice. As one justice explains, conferencing immediately after hearing “leaves you the freshest.” There has been some discussion of changing this, perhaps moving to weekly conferences where groups of cases are discussed, but no such reform has taken place. If a consensus is immediately reached and the jurisprudence does not require substantive elaboration, the justices may decide to dispose of the

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4 Snell and Vaughan, *The Supreme Court of Canada*. 76.
7 Interviews.
case with an oral pronouncement in the courtroom. The vast majority of cases disposed of in this
to of-right, and often the Court will simply signal agreement with the reasons
manner are appeals as-of-right, and often the Court will simply signal agreement with the reasons
of the court below.

The justices express their views on the case in reverse order of seniority, a convention
designed to ensure that junior justices are not unduly influenced by or deferential to their more
experienced colleagues – something former Justice Bertha Wilson notes there is little risk of
because judges on the Court are “fiercely independent.”8 (Interestingly, the justices of the U.S.
Court speak in order of seniority). Two of the justices interviewed for this study acknowledge
being nervous the first time they spoke at conference; the added burden of speaking first
contributed to their apprehension.

The tone, duration and comprehensiveness of the conference appear to ebb and flow,
something that is usually dictated by the style of the chief justice. Where some justices would
prefer more opportunity for comprehensive, free-flowing group discussions of the cases, in reality
the conferences can be as short as five minutes long.9 Under Chief Justice Laskin, they were quite
brief. In the early years of the Charter under Chief Justice Dickson, however, longer discussions
would take place. Dickson believed the new issues the Court was facing required more
 collaborative attention. According to McCormick and Greene, “because of the tendency of the
judges on the Dickson court to debate issues with each other directly, comments were sometimes
not made according to the usual junior-senior order, but ricocheted around the room in a more
random and variable manner.”10 Dickson’s “collegial” approach has been compared to Laskin’s
“more austere and professorial style.” Whereas Laskin was reportedly “inclined to try to influence
the result,” Dickson “was less interested in imposing his own views than in achieving broad
consensus; he was looking for clear and practical solutions that would attract the widest possible

9 Interviews.
support from his colleagues and the community at large.”\textsuperscript{11} The drawback to this approach, according to former Justice Gérard La Forest, was that “the discussions were sometimes like faculty meetings – need I say more.”\textsuperscript{12}

The tone at conferences is almost always cordial. As Russell writes, “the Canadian Supreme Court judges do not go at one another in these conferences with quite the same vigour as is characteristic of debate in the American Court’s conference chamber.”\textsuperscript{13} Nevertheless, some justices are more forceful than others.\textsuperscript{14} The personalities and the circumstances of the Court play a role with regard to the congeniality of the conferences. Laskin’s blunt management style occasionally cropped up at conference. For example, his biography recounts his scolding Justice Beetz in front of the others for the slow production of decisions.\textsuperscript{15}

On the contemporary Court, the majority of conferences are twenty minutes in duration or less, though they can exceed that when consensus does not develop or the case is particularly complex or controversial.\textsuperscript{16} One justice interviewed for this dissertation complains that conference discussions are limited, sometimes even as short as “two to five minutes.” Another justice notes, however, that the conference is not meant to be a drafting process. Discussion is usually meant to formulate where each justice stands, the outcome of the case and the main reasons or basis for it. Sometimes it will take considerable discussion to accomplish this, but where a consensus is reached quickly, it would be inefficient to prolong the conversation. “There is an effort that when the first people speak, you try to build on what they say. You don’t repeat what they say, you

\textsuperscript{12} Sharpe and Roach, \textit{Brian Dickson}. 301-3.
\textsuperscript{14} Sharpe and Roach’s access to Court papers leads them to conclude that some justices were very blunt in the discussion (Ronald Martin, Louis-Phillippe Pigeon, and Bora Laskin), others were slow to make firm decisions (Jean Beetz) and others rarely spoke (Wilfred Judson). Sharpe and Roach, \textit{Brian Dickson}, 144.
\textsuperscript{15} Philip Girard, \textit{Bora Laskin: Bringing Law to Life}. (Toronto: The Osgoode Society, 2005) 432.
\textsuperscript{16} Interviews.
simply say ‘I agree with that point or that point.’” The discussion will take longer if certain judges
are uncertain or if there is disagreement on “how far to go in our reasoning.”

Despite this, conferences on the current “McLachlin Court” tend to be more
comprehensive than they were under her predecessor, Chief Justice Lamer. Former Justice
Michel Bastarache noted not long after McLachlin became chief that she “rejuvenated” the
process, seeking from the outset of a case to reduce the number of written reasons. This goal
tends to require more thorough conference meetings, something that occurred with less frequency
on the Lamer Court, where in particular areas of law, such as Charter cases involving due process
issues, deep divisions were evident.

Once the justices have aired their views as to the disposition of the case, the remaining
task is usually to assign an opinion writer. Justices will typically volunteer to write because they
specialize in the particular area of law or because the case interests them. According to the
justices, case assignment tends to be a collegial process. Ostberg and Wetstein’s analysis suggests
justices will defer to colleagues with expertise in a particular area of law, as this is a strong factor
in determining authorship of reasons. Nonetheless, on occasion a justice will push strongly to
write the majority reasons, particularly if the case is one of high visibility or constitutional
importance. Competition between the justices in the period immediately following the Charter
was especially strong, “with judges jostling to write majority judgments and make legal
history.” Songer’s research suggests that under some chief justices, the primary determinant in
these instances was seniority, although under McLachlin this is not automatic.

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17 Interview.
18 Interviews.
19 Cristin Schmitz, “The Bastarache Interview: ‘Overall, this is not a Frustrating Job,” The Lawyer’s
Weekly. 20(36) (February 2, 2001).
20 McCormick, Supreme at Last, 134-5.
21 C.L. Ostberg and Matthew Wetstein, Attitudinal Decision-Making in the Supreme Court of Canada.
22 Interviews.
23 Ellen Anderson, Judging Bertha Wilson: Law as Large as Life. (Toronto: University of Toronto Press,
2001) 152.
In instances where no volunteers are forthcoming, the chief justice will assign the case, with careful attention paid to the workload of each judge.25 One account suggests that on occasion the judges demonstrate avoidance techniques:

[Bertha] Wilson soon discovered that her new colleagues were fully capable of looking down at the table (or even bending under it to attend to a propitiously untied shoelace) in order to avoid catching the chief justice’s eye when he was seeking a volunteer to prepare the first draft. Such evasive techniques were understandable in dry technical cases where the decision seemed relatively uncontroversial.26

While an amusing anecdote, the justices assert that writing assignments are almost always made with little ‘jostling’ or attempts at avoidance. Under McLachlin in particular, workload considerations and legal specialization tend to dominate assigning priorities.27 In addition, one study finds that a transitional effect exists, such that junior members write significantly fewer decisions in their first five or so years on the Court.28

The generally collegial and professional approach to writing assignments does not mean there is no room for strategically-minded behaviour. For example, at conference following hearings for the “labour trilogy,”29 all of the justices except for Dickson and Wilson spoke strongly against protecting the right to strike under the Charter. According to Robert Sharpe and Kent Roach, Dickson refrained from expressing his view, thereby “preserving his prerogative as chief justice and leading exponent of the Charter to write first reasons, a task he could not have assumed had he taken a strong position at odds with the majority of the Court.”30 Such behaviour is reminiscent of the political machinations revealed in Woodward and Armstrong’s account of the U.S. Supreme Court, where former Chief Justice Warren Burger would not vote – or would

27 Interviews.
30 Sharpe and Roach, Brian Dickson, 358.
even switch his vote – at conference to retain decision assignment power.\textsuperscript{31} Where the controversial practice appears to have been representative of a pattern of behaviour on Burger’s part, the same cannot be said of Dickson. Nevertheless, the story reveals one avenue for outright strategic manoeuvring by the chief justice when particularly important or controversial cases arise.

\textbf{Preparation of Reasons}

There is no uniform approach among the justices with regard to how they prepare drafts of reasons. Some of the Court’s members will prepare a simple outline of the reasoning explored in conference. Others will go through the case materials and begin work on a substantial rough draft. Regardless of the starting point, most judgments go through several drafts before they are circulated to the rest of the Court, and then even more revisions after that.\textsuperscript{32}

Each justice also varies in the extent to which she relies on her law clerks, and even this can vary from case to case. One thing is especially clear: the law clerks’ involvement in the preparation of reasons is substantial, ranging from assisting in editing and additional research to writing full drafts of the reasons themselves. Typically, the clerk that prepared the bench memoranda will be the clerk assigned to work on the judgment.\textsuperscript{33}

One justice suggests that the two primary aspects of the clerks’ relationship with the judge are professional and educational. The professional relationship ensures the justice understands all aspects of the case through the clerk’s research and assistance. In the educational aspect of the relationship, the judge tries to give the clerks as much exposure to the judicial process and all areas of the law during their year of service. With this view in mind, this justice allows her clerks to participate in all aspects of handling a case, including working on the drafting of the reasons. When assigned writing responsibilities for a case, the justice prepares an outline

\textsuperscript{32} Interviews.
\textsuperscript{33} Interviews.
following the conference discussion for the clerk to follow when the clerk is working on the reasons.\textsuperscript{34}

Another justice follows every conference by writing a memo of a page or two in length, describing what was discussed, what the consensus was and why, and the key issues or problems of the case. This justice notes that “through these years, I’ve written the majority of the first drafts of my own reasons. If I’m assigned to write the reasons, I have habits going back to college – I write an outline of the reasons, I almost never start cold.” Occasionally this justice will have clerks prepare a first draft. In these instances the clerk “has this outline that I discuss with him. If I do it myself, I start writing after doing my research, asking sometimes my clerk for a summation of research.”\textsuperscript{35}

A third justice notes relying “a great deal” on the clerks. “My philosophy was that the essential role of the judge, for which he can’t be replaced or substituted, is judging. The rest, he can get assistance.” This includes both research and writing. “Our clerks are the cream of the crop from the law faculties across the country. They have good minds, therefore, they research intelligently and understand [how] the judge is thinking.” The real substantive thinking remains the purview of the justice. One of the key reasons for including the clerks so thoroughly in the process is efficiency. “You have to be mindful that each judge has three clerks, and he’s dealing with cases that were worked on by each one of the three law clerks.”\textsuperscript{36}

A fourth justice is even more effusive about the importance of the clerks’ work. “You can have a wonderful exchange with these young people.” In some respects, the clerks are “much more knowledgeable” than justices, because they are just out of law school and have received training on constitutional issues and the Charter. Describing the clerks as a “great resource,” this justice notes that she did not initially have clerks write drafts, but over time decided it could be

\textsuperscript{34} Interview.  
\textsuperscript{35} Interview.  
\textsuperscript{36} Interview.
fruitful. “I thought it was good for them to be able to sit in ‘my chair’,” she says, finding the clerks’ writing can produce interesting things for discussion and contemplation.37

Some commentators suggest the clerks’ activity is important, in part because their research and intellectual contributions reflect the fact that the Court has evolved into a more full-fledged policymaking institution, but also because they have a high degree of influence on case outcomes. F.L. Morton and Rainer Knopff write, for example, that “in effect, the clerks function as a filter between what comes into the court (factums) and what goes out (written judgments). Lawyers can no longer assume that the judges have actually read their factums, as opposed to selective summaries prepared by the clerks.”38 The justices and clerks I interviewed for this study assert that the justices look at all of the relevant material for each case, as noted in chapter 4. Yet Morton and Knopff’s assertion that the “rapid growth in the number of functions of the clerks has effected a devolution of power from the top (judges) to the middle (clerks) of the bureaucratic pyramid”39 is worth examination.

While it is obvious the justices retain the final say in the outcome of a case, the process of research and writing undertaken by the clerks may help shape the judgments in a fundamental way. By choosing to frame issues in a particular manner in the course of writing the first draft, or by introducing or emphasizing particular research on a given issue, the clerks wield tremendous power. Most of the clerks are modest about the extent of their influence, although a couple of the clerks I interviewed say they were surprised at how much power they had. One clerk notes that there were justices who would give surprisingly little instruction, telling their clerks ‘I want to find for the appellant, go write the first draft.’ Says the clerk, “that’s an extraordinary amount of power to give somebody who just graduated from law school.”40

37 Interview.
40 Interview.
Most of the justices also acknowledge that clerks do have significant influence. This extends from bringing better wording to reasons or strengthening the research – and therefore the justifications – of a given decision to developing arguments or bringing new ideas to the logic of a decision. The strength of the clerks’ influence, however, no doubt depends on which justice they work with.

Dickson worked very closely with his clerks. His biographers describe in detail the impact they had on important cases, including the development of what would become the Court’s approach to the Charter’s reasonable limits provisions in the *Oakes* case.\(^4\) Dickson had in depth discussions with his clerks, using them as sounding boards for ideas and encouraging them to challenge his ideas. He also gave his clerks great leeway in advocating for particular outcomes. His private papers relating to the original labour trilogy of cases regarding the right to strike shows that “his drafts and memoranda to and from his law clerks suggest that the matter was one of lively debate in his chambers and the issue remained unresolved in his mind for some time.”\(^4\) As a result, his biographers conclude that in important, ground-breaking judgments he was more influenced by his clerks than by the arguments of counsel.\(^4\)

For Wilson, similar participation of her clerks was indispensable. She told the clerks “We want your views … Don’t be shy. Don’t be modest. If you disagree with us, say so. If you think we’ve missed the point, say so. This is one of your most important functions – to be a critic and a sounding board for your judge. Through argument and discussion and debate our thinking is refined and our insights sharpened. *We try to do this with our colleagues but it’s not always possible.* So we rely on you.”\(^4\)

This is not the case with some of the other justices. One justice specifically tells the clerks at the start of each year that they “are not there to be advocates.” As noted above, the experiences of the clerks vary quite widely. Some of the clerks describe their function primarily as that of research assistants and a couple of them state that they had relatively little face-to-face contact with their judge. Even some of those clerks who regularly draft decisions would not challenge their justice’s reasoning in the way Wilson suggests. One says, “I guess I wouldn’t have seen it as appropriate for clerks to be seeking to influence their judge, I always saw my role to respond to what my judge wanted. But there would be other clerks who have different perspectives on that and may have been more ready to try to convince a judge to their point of view.” Simply put, some justices do not foster a type of relationship with their clerks that permits the clerks significant input on case decisions.

Finally, it is worth recalling that there is no question as to who has the final say. One clerk sums it up nicely by remarking that “there were several cases where clerks were researching reasons, and the nine clerks who worked on the case came to one conclusion and the nine justices on that case came to an opposite conclusion.”

**Circulation of Drafts: The Process of Deliberation and Negotiation**

The Court has developed a culture of substantial collaboration. Once a judge has completed a draft of reasons, it is circulated among her colleagues for comment. If a justice finds the draft satisfactory, she signs on to the reasons as written. Normally justices will send out comments on the draft, either asking for clarification about certain points, or proposing a different way to frame or word particular sections of the judgment. Usually these comments are intended as suggestions...
for improvement and a justice’s support is not contingent on the changes being adopted by the author. At times, however, a judge will make their support conditional on the author making particular modifications.

The level of collaboration can at times be much more comprehensive. One justice notes, “I know that there are judgments that are under my name that could really reflect other members of the court’s names. And I could point to judgments that are not under my name that could have reflected my name. And there are judgments under one judge’s name that could basically be a judgment of ‘The Court’.”

An opinion’s author will routinely accommodate changes if the comments or requests are not significant points, in that they do not fundamentally alter the rationale or structure of a decision. In this context, adopting such changes – particularly when the majority of judges agree with them – is part of the collegiality of the contemporary Court. Consensus and unanimity are common features of the Court’s decision making, and thus many decisions end up being the by-product of a collaborative writing process.

One justice explains: “In this Court a first draft is only that, a first draft. It usually attracts comments, objections and discussion. This process of exchange, review, modifying reasons, removing things, adding some, I think is a fairly regular process.” A second justice describes how minor changes might commonly occur: “I read his reasons, and there’s a paragraph that to me could be interpreted to mean something that I can’t agree with or that I didn’t think he intended to say. I would go to him and say, ‘you know that paragraph in particular, you can read that two ways … if you want to say what I think you want to say you’re going to have to take out that sentence or this sentence, or write it in the affirmative rather than negative, or something like that.’”

This justice notes that more major differences are often about the scope of the reasons:

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produce a comment memorandum on the draft for their justice. Other justices do not involve their clerks at all in commenting on colleagues’ drafts.

50 Interview.
You might [vote to] allow the appeal, and then you see the reasons, and the reasons for allowing the appeal might turn on a particular section of the Criminal Code or the Charter, and the interpretation given by the judge might be far broader than he needs to give for the reasons in that particular case. [Or] you might see a judgment where the appeal is allowed because of a particular section of the Constitution or the Criminal Code or some other Act, [and] you say ‘you can allow the appeal, but you don’t have to give the section that broad an interpretation in this case. Why don’t you restrict it, and we’ll wait for the next case that might require the extra interpretation.’ It gives us time to think about it. … But at the end of the day, if the judge says ‘well, I feel more comfortable with the reasons as they are’ you can either agree or you can write a concurrence that say ‘I agree with the results but I don’t agree that section 17 necessarily means x, y, z.’

It is with these more significant differences that a judge may accommodate minor or even major changes to ensure a colleague will sign on to his or her decision. These types of choices are a major focus of the strategic model in the judicial behaviour literature.

Lamer has made what is likely the most explicit public explanation of the give-and-take involved in the process of garnering votes in favour of a particular set of reasons. He explains that if his draft contains elements that his colleagues do not like, but that they indicate they would join his reasons if he removed them, he would do so, so long as the removal of the offensive components of the judgment did not do damage to the primary rationale for the result. Lamer argues that if a justice does not get colleagues to sign on to her reasons, “the rest of it is literature. And so I horse-trade. I don’t compromise on principle, though. I would never do that. But if I can’t get something through as it is, I’ll get half of it through, and see to the rest of it the next time around.”

For example, Lamer describes not being able to move his colleagues to support a particular approach in the 1987 case *R. v. Vaillancourt*, which involved a Charter challenge of a provision of the Criminal Code that allowed the charge of murder for a death caused in the commission of an armed robbery. Lamer, writing for the majority, struck down the section of the Code as unconstitutional, but he could not get his colleagues to agree on a “subjective test” of

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51 Interview.
foreseeability, instead relying in this case on a minimum standard of objective foresight (that is, a reasonable expectation that death could occur in the eyes of a “reasonable person” as opposed to in the eyes of the accused). Three years later, however, he was able to swing the Court to favour his approach: “in Vaillancourt, the felony murder, I wasn’t getting a majority for the subjective test. Well I got at least the objective test, and said we need not decide in the case whether it has to be subjective…. But you’ll notice that in Martineau I went up the further step with different judges. The court had changed.” Of the seven judges deciding Martineau, only three – Dickson, Wilson and Lamer – were involved in the Vaillancourt decision.

Lamer’s description of his conduct in these cases epitomizes the strategic considerations some scholars of decision making view as central to judicial behaviour. He presents a frank account of his willingness to forgo or alter his “sincere preferences” in order to avoid an outcome that runs contrary to his preferences. The willingness to settle one issue in his favour and leave others out of a judgment in the hope of dealing favourably with them later is consistent with the bargaining depicted in strategic accounts of judicial decision making.

Without access to the private papers of the justices, it is impossible to definitively document how common such strategic behaviour is at the Canadian Court. How often a justice writes narrower reasons with the express intent of pushing the Court further at a later opportunity is thus unknown. Nevertheless, strategic behaviour on a much broader level appears quite common. Based on my interviews with the justices, during the initial writing stage two approaches seem to predominate. On the one hand, some judges acknowledge writing reasons – even first drafts – with the explicit consideration of whether their colleagues will be willing to sign on. From the outset, these justices modulate their views and make strategic choices about how forcefully the reasons are worded or how broadly the decision applies before circulating the

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55 Babinski, “Backstage at the Supreme Court.” 11.
57 Interviews.
first draft to the other judges. Other judges take a different approach, choosing instead to write the reasons they think are best (in other words, writing their ‘sincere preferences’) and then allowing their colleagues to respond and later deciding based on that feedback whether or not to incorporate changes.\textsuperscript{58} Both approaches might be said to fall under the rubric of strategic behaviour because all of the justices at some point in the drafting process may be willing to modulate their views to accommodate colleagues and secure votes.

To characterize the overall process as strategic is problematic for two reasons, however. First, norms of collegiality and collaboration infuse the process to the point that, as noted above, reasons are sometimes attributed to a particular justice in name only. In instances where a judge works hard with her colleagues to produce the ‘best’ possible reasons, where changes are made not to secure votes but to improve the quality of the decisions, then such choices are not strategic in the instrumentalist sense predominant in the scholarly literature. Second, because half, if not more, of the initial votes at the conference stage are unanimous, there are invariably many occasions where strategic behaviour on the part of the justice assigned to write the reasons is simply unnecessary. This is especially true of instances where the justices are not only unanimous on the outcome of the case, but the reasoning for the outcome from the outset, something which is fairly common at the Court.

Some of the justices describe their thinking when deciding to write a concurring or dissenting opinion. One justice states,

\begin{quote}
Law is a very rigorous intellectual enterprise, but it isn’t mathematical. It’s not \textit{scientific}. It is argument and persuasion and deciding cases according to principle, precedent, policy, and when you put those things together you’re going to get different views of an outcome in a particular case and a reason that supports that outcome.
\end{quote}

This justice continues, “I would ask myself the basic question: can I go along with the majority on this particular case? I didn’t say ‘I must go with the majority on this case’ but ‘can I?’ If I can’t, then I have to think about dissenting if I’m in strong disagreement, or concurring if I agree with

\textsuperscript{58} Interviews.
result but not the reasoning. Those are the legitimate reasons for taking a different view. But my first question was always ‘can there be a consensus opinion on this?’”

Another justice notes that, particularly with dissents, separate reasons should only be written on matters of substance. “You won’t just write for the pleasure of writing.” That said, this justice notes that dissents and concurring opinions can be important for the future of the law, even on an aspect that is not a central issue in the given case.

Former Justice Bastarache has commented on the emotions that can arise during this process: “It’s obviously very frustrating when you consider that the majority in a decision is going to adopt a decision that you think is wrong or that you think is going to pose problems for the application of the law … There are also frustrations in difficult cases when you find it difficult to make your views understood by colleagues or when it’s difficult to reach consensus when you think it’s essential … But overall, this is not a frustrating job. It’s a very cordial atmosphere. We can discuss, and we do discuss, our cases intensely and we all understand that people have strong views on various subjects and that we will not convince colleagues easily on any given point, and this is all part of the process.”

Chapter 4 explored vote fluidity with respect to the impact the oral hearing has on the outcome of a case. The justices generally agree with former Justice John Sopinka’s statement that the hearings are determinative in approximately ten to fifteen percent of cases. They also concur that while they are less likely to change their mind after the oral hearing, a certain degree of fluidity exists at the latter stages of the decision-making process. All of the judges at some point arrive at conference unable to make a firm decision on the merits of an appeal. In such instances, that justice typically needs to see the first draft of reasons before deciding how to vote. While cases where a justice votes one way at conference and switches to the other side during the

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59 Interview.
60 Interview.
61 Schmitz, “The Bastarache Interview.”
writing stage are less common, they do occur. Explanations of judicial behaviour premised solely on ideologically-based policy preferences cannot account for this type of vote fluidity.

One justice’s approach is to study a case, “give it your best, and you issue your reasons. You put the case to rest in your mind and you’re on to something else.” This justice is doubtful the percentage of cases in which she changed her mind was anywhere near twenty percent, although notes “but maybe I’m fooling myself.”

Another justice notes it is not uncommon to change one’s mind on whether or not to dissent. A judge who thought they would dissent can end up joining the majority on the strength of their arguments, and vice versa. Although rare, it is not unheard of for a justice assigned to write the reasons to have a change of heart. In one very rare instance, confirmed by two justices, the entire Court changed sides after the justice who was assigned what everyone thought to be unanimous reasons to dismiss an appeal could not get to the originally desired result and ended up writing reasons that held the appeal. Quite obviously, such an occurrence does not fit with either the attitudinal or strategic conceptions of decision making.

One justice states that “I don’t think I ever changed my mind after I started writing a judgment. Now I know some judges have. One in particular said he was going to write for a unanimous Court, and he changed his mind writing. He didn’t tell anybody, and I’m reading the judgment, and I’m thinking ‘this doesn’t make sense, I thought we were going the other way.’ And I called him and he said ‘oh, well I changed my mind as I was writing it.’ And I said ‘well, you might have told me, it would have saved me a lot of guessing.’ He said, ‘yes, I suppose I should have.” Former Justice Claire L’Heureux-Dubé also confirms that the Court has had “a

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63 Interviews.  
64 Interview.  
65 Interviews.  
66 Interview.
few cases where we unanimously said [at conference] we would reject an appeal, and then eventually we unanimously allowed it.”

The extent to which justices change their mind is verified by interviews with the law clerks. Further, drawing on rare access to internal court documents, Dickson’s biographers point to several instances of vote fluidity at later stages. The 1989 *Borowski* case involved a challenge to the Criminal Code provisions concerning abortion on the grounds they contravened the life, security and equality rights of the foetus. According to conference notes accessed by Sharpe and Roach, Wilson and L’Heureux-Dubé favoured deciding the case on the merits and holding that the foetus was not protected under the Charter. The other justices, determined to avoid the abortion issue, ultimately convinced the two to sign on to a unanimous opinion declaring the issue moot, as the impugned provisions had already been struck down in the *Morgentaler* case a year earlier. In *Edwards Books*, which focused on the constitutional validity of a Sunday-closing law, all of the judges at conference voted to uphold the law because it had a secular purpose. The actual decision, however, reveals sharp divisions on both the question of whether the law infringed religious freedom and on whether it could be upheld under section 1. In a case involving the assault by a caregiver on a twenty-one year-old patient with mental disabilities, Dickson was in the minority at conference but wrote reasons that became the Court’s unanimous judgment upholding the conviction. And in *Lavallee*, Dickson voted at conference to overturn the

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68 Interviews. My impression was that some of the justices actually downplayed the extent to which they change their minds, perhaps because they interpreted the question as implying, or vote fluidity as demonstrating, that the law is often indeterminate.


acquittal of a battered woman who shot her husband, but ultimately joined his colleagues in
upholding the acquittal.77

These examples lend credence to the argument that “vote fluidity” runs counter to
attitudinal conceptions of judicial behaviour. If judicial decisions are premised on a justice’s
ideologically-inspired policy preferences, there is no explanation for these alterations in votes.
These examples may conform to expected behaviour under the strategic model, although even that
is uncertain. It is difficult to characterize Wilson and L’Heureux-Dubé’s decision to join the
unanimous judgment in Borowski as a straight-forward strategic choice, for example. Both
justices are known for their willingness to write dissenting judgments and the decision to join the
majority does not appear to be premised on changing the scope of its judgment, since the
majority’s original position appears to have been the narrow grounds that the case was moot. One
reasonable, alternative explanation for this decision is that Wilson and L’Heureux-Dubé were
honestly convinced by their colleagues that this course of action was the most appropriate.

Without access to judicial papers, it is impossible to know the extent of this type of
behaviour or of vote fluidity more broadly. Nonetheless, the preceding discussion further
reinforces the notion that attitudinal and strategic conceptions of decision making at the Supreme
Court of Canada are simplistic and, at times, erroneous.

**Formal versus Informal Deliberation: “Lobbying” within the Court?**

Discussion of draft judgments does not take place solely through written memoranda. The justices
also will discuss cases on an informal, face-to-face basis. There appears to be strong disagreement
in previous studies of the Court about the extent to which deliberation takes place via written
memoranda or in-person meetings. Greene et al contend in their 1998 study that face-to-face
discussions are “rare.”78 In their biography of former Chief Justice Brian Dickson, however,

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77 Sharpe and Roach, *Brian Dickson*,
78 Greene et al, *Final Appeal*. 121.
Sharpe and Roach suggest that “post-conference discussion between judges appear, for the most part, to have been oral and informal.”

The very human nature of this process has occasionally caused friction or frosty relations on the Court. ‘Insider’ accounts suggest outright lobbying between the justices. In her biography, Bertha Wilson describes being left out of informal deliberations:

the concept of lobbying your colleagues to support you became an important part of the process. So people would spend quite long periods in each other’s rooms, arguing about changes and amendments and so on and so forth. You might not know anything about this, of course, and that person wouldn’t come and speak to you, because they were going to speak to the person that they thought, well, this is the judgment I am going to be supporting. So there never was any kind of opportunity to explain why you didn’t think that was a sound addition, or a sound subtraction. The first thing you knew was the group had now formed.

In the same book, L’Heureux-Dubé recalls numerous occasions when she, Wilson and, later, McLachlin, were left out of some deliberations.

Interviews for this dissertation confirm that some members of the Court are significantly more likely to engage their colleagues in informal deliberations about drafts of reasons than others. In part, this depends on personality. Some justices are more gregarious than others, and feel more comfortable “walking the halls” and having discussions in each other’s offices.

On occasion, however, this process suffers from political manoeuvring or, at least, the perception that such strategic machinations are occurring. One former clerk recalls an instance in which Wilson distributed dissenting reasons and a couple of her colleagues came to her to say that while they agreed with her, they had already promised the judge writing the initial draft that they would sign on to his reasons. Such an example would confirm a type of strategic behaviour, but one predicated less on policy preferences and more on concern about good relations with

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83 Interviews.
84 Interview.
colleagues (although they risked poor relations with Wilson as a result!). It is important to underline that this type of incident may be exceptional, but the broader issue of what Wilson refers to as “lobbying” between justices is precisely the type of activity strategic scholars contend is at the core of judicial decision making. Indeed, one of the troubling aspects for Wilson was that “once a particular group knew it had ‘won,’ there was little incentive for it to consider any diverging or opposing opinions.”

Without access to the Court’s records or justices’ private papers, a systematic study of this type of behaviour is not possible. Former Chief Justice Lamer disputed Wilson’s contention, arguing that “there was no little clique, no little gang. Like-minded people tend to congregate.” In an interview with the *Globe and Mail*, Lamer states that “there was no point in going to Bertha’s office and saying: ‘Bertha, if you were to change this or that, I could go along with it.’ Because she was stubborn as a mule.”

All of the justices I interviewed confirm that informal discussions among their colleagues regularly take place, but they differ on the extent to which they prevent others from fully participating and on whether they are as problematic as Wilson and L’Heureux-Dubé describe. One justice expressly denies that there is any attempt to “lobby” or change minds. “The majority would write the first opinion, probably in the hope that they would write an opinion that the dissenters would find answers their dissent. But there was never any arm-twisting … you were from the beginning and all through the process completely independent [without] any pressure from anybody.”

Another justice points out that personality does make a difference. “Some are more outgoing, more extroverted by personality, easier to approach or deal with … You can’t take human nature away from the judges. They’ve got their own personalities. But there was no

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antagonism. There’s too much going on – you may disagree on one case, but how long are you
going to want to talk about it when you’ve got two or three more that should get done?” This
justice continues, “everybody’s very polite about this, but some [colleagues] you know from past
history are just reluctant to change anything. Sometimes you don’t bother trying, you just simply
write your concurrence or your dissent.”

A third justice states that “I think the principle is that if something is important enough to
warrant changes, normally other colleagues should be added to the discussion. But it’s not that
formal. There is still a lot of face-to-face interaction.”

A fourth justice explains, “we do some walking around the halls, but you can’t do it in an
unprincipled way. By that I mean you’ve got to be transparent eventually about it.” For example,
“there’s one paragraph of a judgment that you say, ‘look, I could send a memo on this if you
want, but here’s something, would you consider this.’ And it does see the light of day, because if
the judge does accept it, then he or she [reports on] why they made the changes.” This justice
acknowledges, however that there is on occasion the potential for harm to the Court’s collegial
relations:

There’s a danger when you have informal discussions that somebody will not
be involved. That’s something that one has to be sensitive to. And sometimes
that will happen. But it doesn’t detract, in my view, from having both formal
and informal contact. And if you know that that’s going to happen, then you
can be more sensitive to it. But I never felt that – maybe others did – but I
didn’t feel that there was a sort of deliberate cabal or factionalizing. Sometimes
it came together that five judges were all seeing a problem in a particular way,
and four were not.

In other instances, “you may have a question that you’re not sure about. You don’t want to waste
everybody’s time exploring something by sending a formal memorandum around when it’s
something that you want to raise and have a discussion with a colleague about.”

Wilson viewed the “lobbying” process as too dependent on personalities and as reflecting
ideological considerations.88 Further, the lobbying described in her biography suggests informal

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discussions were about far more substantive issues than changes in wording to a particular paragraph or minor changes that might amount to a waste of everyone’s time. Part of the problem, in Wilson’s view, was that it manifested as a “boy’s club,” where some of the justices would often lunch together or play squash, but Wilson and later L’Heureux-Dubé, were never invited. The problem was that these activities can carry over to discussions of decisions and that, in Wilson’s words, “those who weren’t part of that didn’t have the benefit of that private intimate discussion and exchange of views.”

It bothered Wilson enough that, according to one justice, she broached the topic at conference. “Dickson was furious. He didn’t accept that because he didn’t do that. It was not him at all. He couldn’t imagine that others would do that. But that was what [was] going on.”

Wilson felt that the Court required a clear protocol on decision making, such as ensuring justices did not sign onto opinions until all dissenting or concurring drafts had been circulated. Her understanding was that once a justice notifies her colleagues that she proposes to dissent, the process of concurring to the original reasons stops, as it is “bad form” to concur with the first set of reasons until the dissenting reasons are circulated. Such a protocol never materialized because the justices do not agree on the best approach.

Within this dynamic, different avenues emerge through which strategic decision making becomes possible. Lorne Sossin writes that “[i]f, at a conference meeting, one or more Justices remain undecided, then persuading the “swing” Justice(s) becomes the subject of intense lobbying by others who have already voted on one side or the other.” Separately, lobbying among the law clerks occurred as well, with clerks “attempting to persuade a “swing” Justice’s clerks to agree with their Justice’s position.”

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89 Anderson, Judging Bertha Wilson, 415, note 12.
90 Interview.
91 Anderson, Judging Bertha Wilson. 165.
92 Wilson, “Decision-Making at the Supreme Court.” 237.
The clerks I interviewed were sharply divided on whether this type of behaviour occurred. Some note that there was often very “active” debate between clerks, which on occasion would border on “heated.” Other former clerks suggest such discussions were normally out of purely analytical interest as opposed to strategic efforts to change each other’s minds. As one clerk puts it, “I don’t think that, to the extent that there were discussions among the clerks, aspirations of trying to lobby the other clerks to adopt their judges’ perspective, I don’t think that ever happened.” Further, several clerks note that certain justices did not want their clerks speaking to other justices’ clerks, evidently to preserve independence.

For the most part, however, regular deliberation occurs between the various clerks. For many clerks, this entails acting as an advocate for their judge’s position, particularly if their judge was writing the opinion. As one clerk describes, “I’m there to defend [my judge] in front of other clerks when we’re writing the decision, but at the same time I’m still talking to him and expressing a different point of view if I don’t completely agree with his position. And sometimes I think it did have a significant impact on the outcome … For example, if I’m talking to a clerk about what my judge thinks, and [this clerk says] ‘my judge is thinking the same thing,’ I would sometimes tell that clerk, ‘well don’t you think this’ and I would sometimes talk to that person about my own opinion, so that he or she can also raise the issue with their judge.”

A crucial component of the strategic model is that justices have knowledge of the preferences of their colleagues. The law clerks can prove useful in gaining information about informal deliberations between other judges. The clerks have much more opportunity to engage each other in discussion and debate about issues surrounding cases than the justices do. As a result, justices can occasionally ascertain where their colleagues are positioning themselves through their clerks. Wilson’s biography notes that, in instances where for whatever reason she

95 Interviews.
96 Interview.
97 Interviews.
98 Interview.
was left out of private discussions among her colleagues, she often depended on her clerks in this manner. Conversely, Lamer made it clear to his clerks that he was not keen on their having discussions with other clerks about cases. Any suggestion this was intended to prevent other justices from gaining information about coalitions forming between the other justices, however, would be purely speculative.

While the clerks’ discussions often take the form of debates and attempts to sway each other, only occasionally does this include attempts to influence the justices. Yet because, in the words of one former clerk, “there was often communication between clerks where there wasn’t necessarily between those judges,” to an extent the clerks often serve as an ‘information network’ for some justices. This feature of the Court’s environment suggests at least the potential and capacity for the justices to pursue strategic behaviour, but it is an element of the process for which direct evidence is unlikely to be captured even if scholars had access to Court records and justices’ private papers.

The debate over lobbying and when a judge should sign on to a set of reasons stems from competing conceptions of the Court as a collaborative decision making collegium or as nine individual decision makers. While the pursuit of particular outcomes manifested in these patterns of decision making reflect both attitudinal and strategic behaviour, the differing approaches of the various justices and their willingness to engage in certain methods of conduct are dependent on their view of their role in this regard.

A host of factors can influence the degree to which justices are motivated to engage in such lobbying. There is little doubt that, as noted above, like-minded justices will deliberate and collaborate more often with each other. Over the Court’s history, “voting blocs” of justices have been identified. In the 1970s, Chief Justice Laskin, with Justices Spence and Dickson, came to be

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100 Interview.
101 Interview.
known as the “L-S-D Connection” for their frequent joint dissents.\textsuperscript{102} Through much of the 1990s, a bloc consisting of Lamer, Sopinka, Cory, Iacobucci and Major, also known as the “gang of five,” was instrumental in consistent rulings strengthening legal rights under the Charter for the accused in criminal cases. The Court often sharply divided on these issues, with other justices, McLachlin and L’Heureux-Dubé especially, frequently in dissent.\textsuperscript{103}

It is clear that, depending on the issue, certain justices are inclined to speak to those colleagues they believe are predisposed to agree with them. Several former law clerks confirm that their respective justice would have obvious choices among their colleagues regarding who to approach, and who not to, about a particular case.\textsuperscript{104} One clerk explains, “my judge tended to take the opinions of certain judges with more seriousness than some of the other judges. I think that’s normal in any institution … that the closer your opinions lie to somebody the more likely you are to consider their input and take them seriously.” Just as significantly, “when he was considering whether to concur on judgment x, it mattered to him if it was coming from judge x or judge y, judge x being someone he had a lot of respect for, judge y less so.”\textsuperscript{105} Lamer’s comments that “there was no point in going to Bertha [Wilson’s] office”\textsuperscript{106} provide further confirmation of this point.

This, of course, depends largely on the issues at stake, although personality conflicts could at times infect and deepen the patterns of division on the Court.\textsuperscript{107} Recent studies make clear that the Charter itself has been a major source of jurisprudential division on the Court;

\textsuperscript{102} McCormick, \textit{Supreme at Last}, 92.  
\textsuperscript{104} Interviews. It is important to note, however, that approximately half of the former law clerks interviewed for this study claim to have had little to no knowledge about the informal discussions between justices as it pertained to who would speak to whom and what was said. A few clerks note not even being privy to the more formal comment memorandum distributed between all of the chambers.  
\textsuperscript{105} Interview.  
\textsuperscript{106} Makin, “Lobbying Hurt Court.”  
\textsuperscript{107} Interviews.
Charter cases are twice as likely to generate disagreement as non-Charter cases.\textsuperscript{108} Even throughout the Charter era, the collegiality on the Court has ebbed and flowed. Despite the consensus-driven approach Dickson strived for in the first couple of years of the Charter, sharp divisions quickly became evident. Between the tensions involved in dealing with a large backlog of cases and strong disagreement among the justices over how expansively to interpret the Charter, the Court of the mid-to-late 1980s has been described as an unhappy place. As L’Heureux-Dubé explains, “there is a little joke that says marriage is like a tower which is under siege: ‘Everybody that’s in wants to get out, and everybody that’s out wants to get in.’ When I arrived here [in 1987], the Supreme Court was exactly that … There will always be divisions between nine people of different backgrounds, nine people of different visions … Sometimes it will become more personal, more bitter.”\textsuperscript{109}

Levels of disagreement on the Court peaked in the middle of the 1990s, also the middle of Lamer’s tenure as chief justice. Under McLachlin, as noted earlier, consensus has increased, particularly as it pertains to reducing the number of separate reasons. McCormick speculates on why patterns of disagreement seem to coincide with the tenure of different chief justices: “Perhaps it is a question of a forceful personality in the centre chair to whom the others defer; perhaps it is a successful attempt to persuade the members of the Court to a certain style or tone of disagreement; or perhaps it is leadership by example.”\textsuperscript{110} With regard to the latter, McCormick notes that McLachlin and Dickson wrote or signed onto minority opinions with less frequency after they became chief, suggesting a “moderating effect” on the behaviour of their colleagues, while Lamer’s behaviour did not change. Ostberg and Wetstein also suggest that McLachlin “is


\textsuperscript{109} Cristin Schmitz, “Our One-On-One with Justice Claire L’Heureux-Dubé,” \textit{The Lawyer’s Weekly}. 22(3) (May 17, 2002).

\textsuperscript{110} McCormick, “Blocs, Swarms, and Outliers,” 135.
more interested in consolidating the Court by letting others shoulder the majority opinion workload, and in casting few dissenting votes and writing few dissenting opinions as chief.”  

By the mid-1990s, the major backlog problems of the 1980s had largely been alleviated, but divisions and a certain degree of interpersonal tensions remained significant. Upon retiring in 1997, La Forest described the Court as having a “closed style” under Lamer, reflecting some of the concerns Wilson had about the Court’s collegiality a decade earlier. A few years later, after his own retirement, Lamer was dismissive of such concerns:

[La Forest] was never one of the boys [who], after an important judgment, would say: ‘Let’s go up to the dining room at the end of the day and have a beer or a scotch … To me, it’s just sour grapes. La Forest sulked because he didn’t get a couple of majorities. He wasn’t getting the majorities he thought he should be getting … He thought it was a clique, but it wasn’t. We just didn’t agree with him. If you go to a collegial court, you’ve got to take the knocks and the bumps and accept that people are going to disagree with you. 

Several justices, without commenting negatively on Lamer’s approach to collegiality, agree that under McLachlin, the level of deliberation and congeniality has increased. One former clerk describes Lamer as “arrogant” and contends that the less than friendly relationship he had with certain justices would have prevented consensus.

The implication of this discussion is clear: the influence certain justices have on each other is a combination of good personal relations and past records of agreement. Similar ideologies matter, of course, but mutual respect plays a role as well. Collegiality (in terms of how the justices work together), and the interpersonal relationships on the Court (in terms of how well the various personalities mesh), are connected and mutually reinforcing.

It should not be surprising that jurisprudential divisions and personality conflicts might, on occasion, come together in a manner that impacts the Court’s decisions and working

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112 Interviews. See also comments of L’Heureux-Dubé that the Court under McLachlin is a happy one. Schmitz, “Our One-On-One.”
114 Interviews.
115 Interview.
116 In *Judging Bertha Wilson*, Ellen Anderson, makes the distinction between ‘collegiality’ and ‘congeniality’ at 153.
environment. Despite the fact that identifiable voting blocs develop from time-to-time, these divisions are far from permanently entrenched on the Canadian Court in the way they seem to be on its American counterpart. The justices acknowledge these tensions, but maintain that for the most part, the Court has been a very collegial place, even during the more tumultuous periods of its modern history.\textsuperscript{117} Comments throughout the interview process that the McLachlin Court is a particularly happy and collegial place are important, not only for what they say about the current environment but because they reflect how it can improve or deteriorate over time.

**Re-conferencing**

On occasion the Court, usually at the behest of the chief justice, will reconvene for a second conference about a particular case. One justice notes that there is a general acceptance among members of the Court if one of their colleagues wants to reconvene. The practice was relatively common in the first few years of the Charter, when the Court was first developing approaches to its various provisions.\textsuperscript{118} Dickson’s biographers confirm this, noting that at the time, “ongoing, seminar-type discussion of broad legal issues was virtually unheard of, but … the judges were conscious that their early Charter pronouncements would set the tone for the future, and they wanted to sound as clear, confident, and unanimous as possible.”\textsuperscript{119} While reconvening was quite rare under Chief Justice Lamer,\textsuperscript{120} it has increased again under McLachlin, who became chief in 2000.\textsuperscript{121} This practice comports with her stated intention to increase consensus on the Court.

Reconferencing usually occurs in particularly difficult or divisive cases. For example, many conferences were convened with respect to the Quebec *Secession Reference*. More generally, one justice describes why a second conference might be called: “Sometimes, for example, there would be two main streams of reasoning after the circulation of drafts. Or quite

\textsuperscript{117} Interviews.
\textsuperscript{118} Interviews.
\textsuperscript{119} Sharpe and Roach, *Brian Dickson*, 312.
\textsuperscript{120} Interviews – see also, Sossin, “The Sounds of Silence,” 296.
\textsuperscript{121} Interviews.
often a reason would be complicated so you’d have three sets of reasons, and there would be consideration of whether you can combine two sets of reasons in some way.” Often the second conference will help smooth over divisions or help to get the justices to reach some type of consensus. Nonetheless, they are not always successful. Another justice notes that “you can never be sure how helpful the [second] conference will be until after the fact.”

McLachlin has publicly stated that reconferencing also helps to prevent unnecessary friction or invective between majority and minority factions. She notes that they are intended “to make sure that anything which could develop into a more major issue gets defused at an early level … Occasionally you just have a chat on something that you think might blow up, even if it’s just a [single] case.”

The practice of reconvening, from the perspective of a clerk on the McLachlin Court, can help reduce confusion as well: “You’d sometimes see a flurry of memos and comments going around, and then there’d be a pause, and then [the justices] would actually have a discussion following from that [in the conference room]. And then you’d hear the results of that discussion. … Once the judges can get together and talk again about what their points of disagreement [were] they’d realize they weren’t that far apart.”

Unanimity as a Goal and its Effects

As noted above, the Court is driven by norms of consensus and collegiality. These norms so infuse the process of decision making at the Court that in any given year a majority of the cases are resolved on a unanimous basis. This is something that the predominant political science models of judicial behaviour are at pains to explain. The attitudinal model cannot account for the high degree of collegiality on the Court, unless we presume ideological consistency among all of

122 Interviews.
124 Interview.
the justices\textsuperscript{125} or cases extreme enough to compel agreement among an ideologically diverse panel. One recent study finds that the attitudinal model fails to explain the Court’s unanimous cases.\textsuperscript{126} The strategic model explains how judges with competing policy preferences might sometimes reach consensus, but it arguably has difficulty explaining why the rates of consensus on the Court are so high.

The consensus that marks decision making at the Court is driven in large part by the normative role perceptions of the justices. In rare instances, these role-related norms compel justices to make unanimity an express goal. Because this usually occurs in the context of particularly important cases, it is worthwhile exploring the impact this goal has on the decisions themselves. Below, I explore those cases in which unanimity was an express goal of the justices.\textsuperscript{127} It is important to emphasize that unanimity is usually a by-product of the general consensual style of decision making on the Court, and that according to the justices and former law clerks, those instances in which it is an explicit goal are quite rare.\textsuperscript{128} Nonetheless, examining the impact of unanimity as a goal and its effect on decisions is warranted given the importance of the particular cases it involves. Moreover, this analysis may provide insight into the broader trend of collegiality in the institution. Before engaging in this analysis, this section considers collegiality from a broader perspective.

In a wide-ranging lecture on the Court’s decision-making processes delivered in 1985, former Justice Bertha Wilson emphasizes the collegial nature of a court. She notes that “if there is, indeed, an obligation on a collegial court to strive for a consensus, or at least submerge individuality in the interests of a few sets of reasons, then the dynamics of the Court’s process

\textsuperscript{125} Which the measures obtained by Ostberg and Wetstein’s study clearly do not. \textit{Attitudinal Decision Making in the Supreme Court of Canada}. 55.


\textsuperscript{127} These were identified as such in interviews with justices.

\textsuperscript{128} Interviews.
would seem to be extremely important.”129 Her alert that “very little has been said or written” about this aspect of judicial decision-making on multi-member courts of appeal remains true to this day. In this section, taking Wilson’s exploration as my starting point, I explore the ramifications that consensus, or more specifically, unanimity, has for both Court process and outcomes.

Wilson identifies four “tensions” within judicial decision making. The first three might be considered ‘legal’ tensions: the tension between doing justice in the individual case versus rationalizing the development of jurisprudence in a given area of law; the tension between establishing certainty in the law versus ensuring that law can adapt and grow to meet changing societal conditions; and the tension between judicial minimalism (deciding only what’s necessary in the given case) versus a view that the Court’s role is to oversee the development of jurisprudence (elaborating on points of law related to, but beyond what is necessary, in a given case). While these three tensions may reflect, to some extent, dichotomies between ‘activism’ and ‘restraint,’ they do not necessarily reflect ideological considerations. What Wilson’s first three tensions identify, rather, are the normative perspectives individual justices hold regarding their approach to the law. Despite the fact that particular jurisprudential approaches are sometimes affiliated with particular ideologies (U.S. Justice Antonin Scalia’s originalism is said to reflect his conservatism, for example), activism, in general terms, is not necessarily liberal or conservative. For this reason we can see why some components of a justice’s role perception are certainly related to, but at the same time conceptually distinct from, ideology.

The fourth tension Wilson identifies might be referred to as an institutional one: the tension between the judge as an individual member of the Court and the Court as an institution.130 This feature of decision making relates directly to collegiality and raises two important questions:

To what extent should justices make decisions autonomously? How important is consensus or, more specifically, unanimity? The justices have a variety of views on these questions. Some justices see unanimity as an ideal, as it is said to add clarity to the law, provide clear direction for lower courts, and potentially gives the decision more legitimacy in the eyes of the public. These justices view strong dissents as inevitable on occasion, but they contend that keeping the number of separately written reasons to a minimum is a good principle, both for the development of the law and to avoid confusion on the part of other political actors and the legal community. Indeed, upon becoming chief justice one of Beverley McLachlin’s key goals was to increase consensus on the Court.\footnote{Cristin Schmitz, “Communication, Consensus Among McLachlin’s Targets,” \textit{The Lawyer’s Weekly}. Vol. 19(27) (19 November 1999).}

The traditional high rate of unanimity on the Court is worth noting. The Court’s statistics categorize as unanimous those cases which do not produce a dissenting opinion.\footnote{Supreme Court of Canada, \textit{Statistics 1998-2008}. (Ottawa: Supreme Court of Canada, 2009).} Because concurring opinions are not considered, “unanimous” judgments may have more than one set of written reasons. Songer’s recent book adopts this understanding as well. Thus, he finds that from 1970 to 2003, unanimous judgments represent nearly three-quarters (74.4 percent) of all cases.\footnote{Songer, \textit{The Transformation of the Supreme Court of Canada}. 213.} This is in sharp contrast to the United States Supreme Court, which over a similar period (1975 to 2005) had a unanimity rate of only 28.4 percent.\footnote{Richard A. Posner, \textit{How Judges Think}. (Cambridge: Harvard University Press, 2008). 50.}

This measure of unanimity is problematic, particularly if the future legal and policy \textit{effect} of a given case matters more than the simple dichotomous outcome of the case itself. The justices’ reasoning is what ought to be given the most weight in examining rates of unanimity. A preferable measure of unanimity thus includes a consideration of concurring opinions. As noted in previous chapters, some scholars dismiss written reasons as “mere rationalizations” for particular outcomes. These scholars simultaneously view judicial policy preferences as the most important factor in decisions. Since the rationale for a judgment can result in wider or narrower implications
for the policy issues at stake in a case, written reasons are arguably a more precise representation of those policy preferences than the simple yes or no vote represented by majority and dissenting opinions.

McCormick draws on this latter understanding of unanimity in previous studies. In contrast to Songer’s reporting of 74.4 percent unanimity for 1970 to 2003, McCormick finds that for the slightly shorter period of 1970 to 2002 a unanimity rate of 63.7 percent.\footnote{McCormick, “Blocs, Swarms, and Outliers,” 107.} Unanimity rates are only one measure of how successful McLachlin has been in increasing consensus on the Court, but they provide some indication. Following the last few years of the Laskin Court, which saw unanimity rates of well over 80 percent, the Court entered the age of the Charter. Unanimity rates under Chief Justice Brian Dickson (1984-1990) were 64.7 percent,\footnote{McCormick, “Blocs, Swarms, and Outliers,” 123.} falling to 58.4 percent under Chief Justice Antonio Lamer (1990-1999).\footnote{McCormick, “Blocs, Swarms, and Outliers,” 127.} The Court’s unanimity rate under McLachlin from 2000 through to July 12, 2009 is 62.8 percent.\footnote{Correspondence with McCormick (July 13, 2009), drawing on his Supreme Court database from the start of McLachlin’s term as chief justice to \textit{Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component}, 2009 SCC 31.}

At first glance, it might seem that McLachlin has only been marginally successful at achieving her goal of increasing consensus on the Court. This can be placed into further perspective, however, by recalling that McLachlin is much more likely to assign full panels of nine justices than her predecessors.\footnote{Songer, \textit{The Transformation of the Supreme Court of Canada}. 214.} Larger panel sizes decrease the opportunity for unanimous judgments because it is harder to achieve unanimity when there are more justices involved in a decision. The increase in unanimous judgments under McLachlin is thus even more impressive than the simple statistics indicate.

Further, earlier data reported by McCormick suggests in her first few years as chief, McLachlin was especially good at reducing the number of extra written reasons that were
produced when the Court did split.140 In other words, the chief justice worked with her colleagues to consolidate disagreement as much as possible. Comments by former Justice Bastarache confirm this effort. He notes that “there are a lot more things that are being reconsidered. There is more place for discussion and dialogue in the sense that we strive more to discover each other’s reasons and opinions, and try to determine ways in which we can reduce the number of dissents, or reduce the number of published reasons in a case. I don’t mean to say that there wasn’t discussion before. There was always a conference and a meaningful discussion. But I think we’ve tried different approaches to reduce the number of written reasons and try to produce decisions that are more useful to the courts of appeal.”141

Regardless of whether McLachlin has been successful, not all justices think striving for consensus should be an overarching goal of the Court. One justice views attempts by the chief to push for it as interference, noting that because justices are totally independent, compromise cannot be forced.142 Another justice says, “I think that chief justices would like to think that they could have a court marching to the same tune, but it just doesn’t happen.” This justice notes that with all chief justices, the degree of unanimity achieved on the Court varies year-to-year. Neither Lamer nor McLachlin are said to have ever attempted to persuade the judges for unanimity just for its own sake, although there have been important cases where the justices have agreed that a unanimous judgment would be ideal.143

Where there is disagreement, the degree of division on a panel makes a difference with respect to the ability of the majority to persuade those in the minority. “I don’t remember seeing a case where there’s been four judges dissenting where the majority was able to persuade all four that their dissent was not well founded. If it’s eight people see it one way, and one dissenter, I

140 McCormick, “Blocs, Swarms, and Outliers,” 130.
141 Schmitz, “The Bastarache Interview.”
142 Interview.
143 Interview.
think the one might spend some time reflecting on whether or not all eight others could be wrong and he could be right."\textsuperscript{144}

A third justice, however, suggests that the chief is capable of at least some influence in this regard:

There is such a thing as collegiality and people influencing each other. For some people influence is a nasty word, but in reality you’re subject to all sorts of influences. The answer is that you should remain impartial and independently minded, and be able to properly integrate or refuse to integrate these influences. And the chief justice can have influence. She may be persuasive in her arguments. She may bring certain elements, aspects home for better understanding, or find ways of reconciling divergent views because, of course, these really difficult issues are usually issues on which reasonable people can reasonably differ. There’s no absolute answer that is evident to everybody. And that’s why they’re before the Court. But someone has to decide them.\textsuperscript{145}

A fourth justice concurs with this assessment, noting that “in an ideal world a Supreme Court would speak with one voice.” This justice explains the role of the chief justice in this regard: “One of the functions of the chief is in fact to try to bring people together, [and] make sure that if there are disagreements those are what I would call ‘real,’ ‘true’ disagreements, but not matters of what I would call pure drafting or style of judgments. I think the chief justice normally will, if there are disagreements, try to probe the depth of the disagreements and see if there are ways to bring people together. This is part of the process of most collegial courts.”\textsuperscript{146}

A fifth justice states that “there is no doubt that the whole environment of decision-making is influenced at an important level on the Court by the chief justice.” Nevertheless, “the other eight judges have to play an important role in what might be called ‘creating the collegial environment’ at the Court … it’s a collegium, it’s not individuals. It has an institutional, or collegial, role. The institution is ongoing, we just occupy those seats for a period of time. The work of the Court continues as we leave it.”\textsuperscript{147}

\textsuperscript{144} Interview.
\textsuperscript{145} Interview.
\textsuperscript{146} Interview.
\textsuperscript{147} Interview.
This final justice feels McLachlin has been successful at improving consensus, but does not want to give the impression that her predecessor, Lamer, was somehow unconcerned with collegiality. “The preferential outcome for a collegial court, especially a Supreme Court, is a unanimous judgment,” because it provides the most clarity and guidance for lower courts, lawyers, and most importantly the public who are affected by the decision. Any success McLachlin has had, this justice notes, depends on the attitude and approach of the other eight justices.  

The chief justice, like her eight colleagues, has no authority to ensure a particular level of consensus on the Court. Instead, she must rely on the art of persuasion. Further, there is some question about whether unanimity actually produces better results. Bastarache agrees that consensus can occasionally “muddy the legal waters”:

> We have had a few experiences that I think were meant to be helpful, but didn’t produce very good results because I guess too much compromise [by the judges], or too much wording to try and meet the minimum requirements of everybody on what should be said, produces [decisions] that are difficult to read and too long and not helpful with regard to the use that can be made of them, in the courts of appeal especially. So, thinking about it now I think there are some cases where we might have been better to produce a few sets of reasons instead of one.  

Bertha Wilson felt the informal negotiations between justices were too often justified on the basis that they produced clear majorities instead of split decisions, even if the result was increased ambiguity in the reasons: “calculated ambiguity, as one colleague described it, was anathema for her; far better to have a range of judgments offering options, including a dissent and a diverging concurrence if necessary, as long as each judgment was written with crystal clarity.”

Wilson’s sentiment raises the question of what effect a goal of unanimity might have for the Court’s decisions. Before exploring this question, it is worth noting that the Canadian Court’s high general rate of unanimity is a ‘natural’ outgrowth of the collegial atmosphere of the institution. In other words, according to several of the justices, while unanimity is desirable, it is

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148 Interview.
149 Schmitz, “The Bastarache Interview.”
150 Anderson, Judging Bertha Wilson, 164.
not an overarching goal in a strict sense.\textsuperscript{151} There are, however, exceptional circumstances under which the justices have made unanimity a goal in particularly important cases. This is especially interesting given that scholars find that within the Court’s more visible cases, particularly Charter cases, the Court’s unanimity rate is generally lower.\textsuperscript{152} Thus, it appears where unanimity becomes an explicit goal of the justices, it is often in those cases where it is generally harder to achieve.\textsuperscript{153}

Further complicating the matter is the fact that no one outside the Court knows when unanimity is an express objective of the justices. There are a couple of instances, however, where the justices expressly sought unanimity and these have been identified as a goal by them in public or in interviews conducted for this study. These cases and the effects that objective have are explored in this section.

Unanimity has the effect of both narrowing and broadening the Court’s written reasons. On the one hand, decisions become narrow because the compromise required among the justices necessitates focusing only on those issues to which all of the justices on a panel can agree. Otherwise important issues about which agreement cannot be reached are deemed tangential to the main problem at hand and are left out of the decision. Former Chief Justice Dickson has stated that “it might be necessary to pass up the benefits to be had from discussion about fine points of difference between various colleagues” in order to achieve unanimity around an issue that requires a “clear and firm statement of principle from the Court.”\textsuperscript{154} One recent study confirms that narrow opinions, measured by the number of separate legal issues raised by a case, were more likely to be unanimous.\textsuperscript{155} On the other hand, decisions become broader or ambiguous when the justices agree on particular concepts but leave them underspecified to avoid conflict. It is likely

\textsuperscript{151} Interviews.
\textsuperscript{153} L’Heureux-Dubé explains there are “strong pressures” for the Court to speak collectively “and usually in the most important cases.” “The Length and Plurality of Supreme Court of Canada Decisions.” 586.
\textsuperscript{155} Songer and Siripurapu, “Unanimous Decisions of the Supreme Court of Canada as a Test of the Attitudinal Model.” 87.
that this is what Wilson suggests when she notes that the pursuit of unanimity might result in “watered down” decisions\textsuperscript{156} and what Bastarache means when he concurs that the result might be to “muddy” the legal waters.\textsuperscript{157}

Perhaps the most important decision the Court has rendered is its opinion in the Quebec Secession Reference. The justices put considerable effort into producing a unanimous judgment, and signed it with no lead author, choosing instead to write as “The Court.” Following the narrow victory of the federalist side in the 1995 referendum on Quebec sovereignty, the federal government tossed the Court a political hand grenade, asking it to rule on whether the provincial government of Quebec could effect secession unilaterally. The stakes for the Court’s legitimacy, across Canada but also specifically within Quebec, were clear. Throughout much of Quebec, a decision limited to a declaration that the province had no constitutional right to secede unilaterally would only confirm suspicions that the Court was firmly in the hands of federalist Ottawa. Indeed, separatists initially claimed that the Court would prove to be politicized in this manner if it chose to even render a decision.\textsuperscript{158} Rather than limiting the decision in this manner, however, the Court balanced its reasons by ruling that in the event of a “clear majority” on a “clear question” in favour of sovereignty, the rest of Canada has a duty to negotiate.

The Court has generally received high praise for the political acumen the justices demonstrated in fashioning a decision from which both federalists and sovereigntists could claim some victory. Commentators have described the decision as “masterful”\textsuperscript{159} and “ingenious.”\textsuperscript{160} Lacking legal precedent or explicit guidance in the Constitution’s text, the Court’s decision refers to four “basic constitutional principles” – federalism, democracy, rule of law and

\textsuperscript{157} Semitz, “The Bastarache Interview.”
\textsuperscript{159} Robert A. Young, \textit{The Struggle for Quebec.} (Montreal: McGill-Queen’s University Press, 1999) 146.
constitutionalism, and the protection of minority rights – and from those principles developed an opinion that “reads more like an essay than a legal decision.”

Yet the decision is also remarkable for what it left unanswered. The Court leaves “for the political actors to determine what constitutes “a clear majority on a clear question”.” The justices provide no guidance on a host of other issues: what amending formula should be used to achieve secession; the rights of Aboriginals or other minorities; and the content of negotiations between Quebec and the rest of Canada. Peter Leslie writes that the “Secession case actually resolved almost nothing, in the sense of removing any critical questions from the realm of political controversy. Even the “obligation to negotiate,” highlighted by so many commentators (certainly by the indépendentistes), left in place almost all the existing ambiguities and uncertainties surrounding the process that could lead to secession.”

The explanation for this is almost universally ascribed to the Court’s concern for protecting its institutional legitimacy. Put simply, the Court left these questions to the “political” sphere so as preserve its role as guardian of the Constitution in the eyes of all Canadians. In the judgment, the Court notes that “judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.” Writing further,

The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the

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161 Russell et al., The Court and the Constitution. 542.
164 Young, The Struggle for Quebec. 147; Russell et al, 543; Choudhry and Howse, 166.
165 Reference re Secession of Quebec, para. 98.
political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.\textsuperscript{166}

There is little reason to disagree with the consensus view that part of the reason for the Court’s restraint was to avoid breaking the balance the justices fought so hard to achieve. Having given something for both federalists and sovereigntists to cling to following the ruling (and claim ‘victory’ with), spelling out the requirements for a potential negotiated secession or the meaning of “clear majority” or “clear question” risked disaffecting one side and raising the spectre of attacks on the Court’s legitimacy.

Seemingly ignored in extant analyses of the reference decision is a consideration of the written judgment as a product of a collegial process where, in this instance, unanimity was an important goal of the justices. Under this condition, the tendency is for justices to coalesce around the major issues of agreement. Where disagreement arises over specific issues, if the desire for unanimity is strong enough, the effect of a collegial decision-making process is to leave those issues out. This is not intended as an alternative explanation to the legitimacy-centred account of the issue-avoidance the Court demonstrates in the reference. Rather, the point is that a consideration of unanimity as a goal in the justices’ decision may add another layer to understanding how the Court functions and what motivates the judges or explains their decisions.

A second case in which the goal of unanimity effectively narrowed the Court’s final decision was in \textit{Tremblay v. Daigle}.\textsuperscript{167} The appellant, Chantal Daigle, sought to overturn an injunction obtained in a Quebec Superior Court by her former boyfriend that prevented her from terminating her 18-week pregnancy. A memorandum circulated by Dickson indicated his intention to write reasons declaring that a foetus had no legal status under section 7 of the Charter. La Forest responded by saying he would write separate reasons dealing only with the Quebec Charter of Human Rights and Freedoms, as it was unnecessary, in his opinion, to deal with the

\textsuperscript{166} \textit{Reference re Secession of Quebec}, para. 100.
issue under the Canadian Charter. According to Sharpe and Roach, “this prompted Dickson to pull back. He did not want a divided opinion. Although it seems possible that he might have attracted a majority of the Court on his more broadly based draft, he preferred an immediate and unanimous decision on narrower grounds.”

It is important not to understate the significance of Dickson’s preference for unanimity in this case. It was not surprising that the justices sought unanimity in a case such as the *Secession Reference*. For one thing, the notion that federalist judges in a case involving Quebec secession would have ideological differences premised on simple liberal versus conservative considerations is highly questionable. But in a case dealing with abortion rights, most observers – attitudinal scholars in particular – would not expect an institutionally-derived preference for unanimity to override the philosophical or ideological predilections of any of the justices involved. Indeed, if Sharpe and Roach’s supposition based on their reading of the Court documents is correct, the decision was not even necessarily a strategic move based on ensuring the enactment of Dickson’s preferred policy position, but rather a decision to ensure a quick and unanimous judgment for its own sake.

Where the decision to seek unanimity in *Daigle* resulted in a decidedly more narrow set of reasons, other instances in which the justices aim to achieve unanimity result in broader judgments that hinge on vague concepts or ambiguous wording. One prominent 1999 case, *Law v. Canada*, established a new approach to the Charter’s equality provisions. In so doing, a finding that a law impaired the “human dignity” of the claimant became a crucial component of the Court’s approach to section 15. As explored below, this concept proved to be so vague that its application in later cases created sharp disagreement among the justices.

Ten years prior to *Law*, in the Court’s first equality case the justices agreed to an approach that promoted a substantive understanding of equality as opposed to a more restrictive,

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170 Interviews.
formal understanding of it as identical treatment under the law.171 A finding of discrimination, however, would be limited to the grounds enumerated in section 15(1) of the Charter, as well as any “analogous” grounds.172 The justices soon split into three camps on identifying discrimination.173 In Law, the justices decided to develop a unanimous approach that resolved these divisions.174

The new interpretation of section 15 incorporated a novel element to discrimination beyond a distinction based on an enumerated or analogous ground: the impairment of “human dignity.” Iacobucci, writing for the Court, defines human dignity as follows:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?175

Iacobucci writes further that the “equality guarantee in s. 15(1) of the Charter must be understood and applied in light of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.”176 Although not setting up a strict legal ‘test’ per se, Iacobucci outlines four “contextual factors” to help guide analysis: whether there is pre-existing disadvantage

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171 Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143. The justices were unanimous on the approach, but divided over the outcome of the particular case.

172 The grounds enumerated in s. 15(1) are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Over the years, the Court has identified several analogous grounds: marital status (Miron v. Trudel [1995] 2 S.C.R. 418); sexual orientation (Egan v. Canada [1995] 2 S.C.R. 513) citizenship/non-citizenship (Andrews); and off-reserve residence for Aboriginals (Corbere v. Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R. 203).


174 Interviews.

175 Law at para. 53.

176 Law at para. 54.
experienced by the individual or group at issue; whether there is a correspondence between the
distinction made in the impugned law and the claimant’s characteristics or circumstances; the
ameliorative purpose or effects of the law with respect to other, potentially more disadvantaged,
groups; and the nature of the particular interest affected by the impugned law.\footnote{Law at para. 88.}

Although the justices aimed to reconcile diverging equality approaches into a single
framework, the decision has been criticized for its complexity, for being confusing, and for
justices fell rather quickly into the pattern of disagreement that marked equality jurisprudence
prior to Law. The 2002 case Lavoie v. Canada, which concerned the constitutionality of the
Public Service Commission’s hiring preference for citizens, had four sets of written reasons.\footnote{Lavoie v. Canada, 2002 SCC 23, [2002] 1 S.C.R. 769.} As
Sonia Lawrence writes, “[a]ll of the reasons purport to apply the Law test, which confirms the

The justices sought and achieved unanimity in Law, but the vague nature of the central
element of the new approach – human dignity – and the subsequent disagreement among the
justices over its meaning reveals that the level of consensus achieved was quite thin. Moreover,
since most equality cases failed under the Law regime,\footnote{Sharpe and Roach, 292-3.} it is clear that judicial readiness to push
for more consensus-based decision making can have important repercussions not only for statements of the law, but for the outcomes of subsequent cases.

Criticism of the Court’s post-Law equality jurisprudence has been so significant that the Court addressed it in 2008, when the justices unanimously backtracked on the human dignity standard and re-enunciated the original approach to equality found in *Andrews*. Chief Justice McLachlin and Justice Abella write, “as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.” It remains to be seen whether the divisions that have plagued the Court with regard to the proper approach to section 15 are solved by this restated position.

Consensus and unanimity are important elements of the Court’s decision-making process that are obscured by other approaches to the study of judicial behaviour. It is difficult to view a justice’s orientation towards independent versus group decision making as reflecting simple ideological concerns. Ideological motivations may play part of the role in determining whether unanimity is likely in a given situation, yet the general view a justice holds regarding the desirability of achieving unanimous decisions has as much to do with normative principles about the clarity of the law and a broader culture of collaboration and collegiality. This is not to say ideology has no effect in these cases: judicial policy preferences modulate the outcomes of cases where unanimity is desired by introducing ambiguity into the reasons or by narrowing the scope of the reasons, sometimes by removing issues of contention altogether. Significantly, it is possible the impact of ambiguous wording is to make ideologically-based decision-making easier for judges in subsequent cases.

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183 Justice Bastarache wrote a concurring opinion relating specifically to section 25, but signalled agreement with the restatement of the application of section 15 found in the majority reasons.


185 *Kapp*, at para. 22.
The behaviouralist attitudinal model overlooks written reasons and instead focuses on mere votes, providing little explanation about how and when ideological considerations are tempered or intensified. And while the process of achieving unanimity is infused with the type of bargaining considered central to the strategic model, the ultimate motivation is fundamentally different. Instead of negotiating and making compromises to achieve a minimum winning coalition, the justices seek consensus. In this respect, straightforward liberal versus conservative policy preferences are not in question in the manner in which the strategic model is normally operationalized. An emphasis on judicial role perceptions – with institutional norms and values like consensus contemplated as significant – allows us to construe the processes at play in light of the outcomes and their effects, while still accounting for important factors like ideology.

Conclusion

The exploration of the various processes and factors that come into play in generating the Court’s primary product – its written judgments – make three things clear. First, the energy and time exerted in crafting written reasons and the tenor, style and general attitude through which the justices approach this task render any assertion that written reasons are mere *post hoc* rationalizations of votes completely false. This is not to say that the process uncovers the “correct” answers to difficult questions. The task here has not been to assess whether the justices find the right answers; rather, it is to describe and analyze *how* they go about resolving the questions before them. Indeed, the fact that critics and commentators have for decades pursued the former without addressing the latter is one of the primary impetuses for this study.

Second, judicial role perceptions – the justices’ view of how they ought to work together and the institutional processes, norms and values which govern the various stages of the process – are central to understanding both case outcomes and the process by which judgments are produced. Using the justices’ conceptions of their proper role as the fulcrum of analysis allows for a consideration of the many factors that come into play, including attitudinal and strategic
behaviour, interpersonal relations, norms of consensus, and the approach of the chief justice. The various stages of decision-making and the rules that govern them restrict certain choices or forms of behaviour, while giving wide latitude to others. For example, ideology does not appear to play a large role in assigning authorship, but the chief’s prerogative to decide who will write permits strategic decision making. Further, the justices’ individual approaches to these processes, such as how they use their clerks or the extent to which they view consensus as a favourable goal, add to the complexity of interaction between these many variables by making certain types of behaviour more or less likely. For example, a justice more willing to achieve consensus is more likely to engage in the type of bargaining that characterizes strategic behaviour, but the motivation behind such bargaining may not represent the most commonly asserted goal of implementing personal policy preferences or rational choice theory’s basic assumption that the desire is to achieve a minimum winning coalition.

Judicial role perceptions dictate the extent of attitudinal or strategic behaviour on the Court. By identifying “sites of activity” for particular forms of behaviour within institutional processes, a role theoretic understanding of Court decision-making reveals how behaviour comes to be shaped. The fact that personal relations can reinforce divisions on the Court and can play a role in the extent to which justices have informal deliberations about judgments is one example. Further, changes in both rules and institutional culture over the contemporary period have had a significant impact on the Court’s operation. For example, important factors like the chief justice’s leadership style can increase or diminish the degree of consensus over time.

The analysis in this chapter also makes clear that norms like consensus can have a clear impact on policy outcomes. In instances where unanimity is an express goal, for example, the result is that the degree of consensus can actually be quite shallow. Reaching compromise in these instances necessitates issue-avoidance and can reduce the clarity of the judgment. For advocates of strong judicial enforcement of Charter rights, the moderation and perceived deference that can result is problematic. Moreover, while in these particular cases it seems any ideologically-based
preferences are stifled, ambiguity that results in wording or concepts used in the reasons can open the way to increased value-based decision-making in subsequent cases.
“Dialogue yes, as a goal, but not necessarily dialogue.” – Supreme Court Justice.

Chapter 6

The primary focus of this chapter is judicial perceptions of the institutional relationships surrounding judicial review, particularly as they pertain to the Charter. Central to these considerations, and related to a fundamental concern of critics of the Supreme Court’s role, is the question of whether courts are equipped to deal with the moral and policy-laden issues entailed in judicial review of constitutionally enshrined rights. In part, this question arises from the contested nature of rights, both in terms of defining what constitutes rights and in determining their limits.¹ Cases involving moral and policy issues in particular – often referred to in broad terms as “social policy” cases in the judicial politics literature² – are said to allow judges far more discretion than those cases viewed as falling in the more traditionally legal or judicial domain.

Concern about the Court’s involvement with social policy issues is linked to the broader themes explored in this dissertation in three ways. First, the justices’ considerations of their appropriate role in relation to the elected branches of government become particularly pertinent when they must consider the Court’s capacity or competence to deal with complex questions of social policy. As is explored below, many justices have expressed apprehension at judicial involvement in the resolution of competing values or complex policy choices. How these views have evolved and how they have implicated actual case outcomes is thus significant. Second, if social policy cases provide a particular context for attitudinal behaviour, understanding how judicial role perceptions may constrain, or fail to constrain, such discretion is important. Finally, the most prominent account of the institutional relationships surrounding Charter review is one of

² In the judicial politics literature, the term “social policy” tends to encompass issues beyond specific policy programs (such as health care, welfare or education). For example, Donald Horowitz defines “social policy” as “policy designed to affect the structure of social norms, social relations, or social decisionmaking” in The Courts and Social Policy (Washington, D.C.: The Brookings Institution, 1977). 56. Horowitz admits this definition is “amorphous.” Consistent with this view, in this chapter I refer to social policy cases by way of focusing on the distinction between cases that involve social, economic or value-laden issues and those cases that have been viewed more traditionally as falling within judicial expertise (such as criminal cases).
a “dialogue” between the courts and elected branches. The dialogue metaphor is in part a defence against criticism of the Court’s involvement in social policy matters, as its proponents assert that legislatures are usually able to respond to such decisions and thus the impact of judicial rulings is minimal. The role perception approach taken here allows for a consideration of the justices’ views on dialogue.

The first section of this chapter examines how Charter review makes relevant the concern of critics – and, indeed, some judges – that the judicial arena is not an ideal location for the resolution of complex policy matters. The Court has often made a distinction between cases implicating social policy issues and other cases that are traditionally viewed as more consonant with the judicial process, with the understanding that legislatures are better suited to determine the effects of policy choices. This has often meant deference to legislative policy choices in those cases where the evidence necessary for analysis of impugned policies is unclear or controversial. Interviews reveal that whether individual justices believe this distinction is appropriate depends on their views about the relative indeterminacy of the rights – and especially the “reasonable limits” of those rights – implicated in cases that involve matters of social or moral concern. I examine the Court’s Charter cases involving health policy and find that in practice the justices give surprisingly little attention to the issue of whether they have the capacity or legitimacy to resolve contentious social policy issues. This gives them wide discretion to decide such cases according to their personal policy preferences.

The chapter then turns to an examination of the dominant theoretical understanding of judicial review under the Charter as a “dialogue” between the courts, particularly the Supreme Court, and the federal and provincial legislatures. The dialogue metaphor views legislatures as generally able to respond to court decisions either by amending impugned legislation or by temporarily suspending judicial decisions through use of the Charter’s notwithstanding clause. Conceived of in this manner, proponents of the metaphor contend dialogue eliminates or seriously lessens concerns about the policy impact of the Court or its institutional competence to make
decisions regarding social policy. The analysis below explores the intense normative and empirical debate surrounding this conception of inter-institutional activity. Bringing the justices’ conceptions of dialogue to bear on these debates reinforces the concerns critics raise about conceiving of the institutional relationships in dialogic terms.

The final part of this chapter examines the justices’ considerations of public opinion and the Court’s evolving relationship with the media. These relationships are of considerable importance to the justices in an era where the Court’s decisions often garner substantial scrutiny. While it is difficult to gauge the specific impact public opinion may have on judicial decision making, judicial perceptions of popular opinion act as a meaningful constraint in terms of the frequency with which they might otherwise be willing to make decisions that divert significantly from public attitudes. The justices’ concern regarding public opinion, particularly their interest in ensuring their institution’s continued legitimacy in the eyes of the public, has also meant diligence on their part with respect to the media. The Court’s importance in the contemporary period has mandated increased accessibility and transparency in the institution’s relationship with the media.

Institutional Boundaries and Questions of Capacity

In chapter 3 I examined the Court’s development of the law of justiciability, concerning which cases, controversies or issues courts ought to decide. A related and important constraint on the Court’s decision-making pertains to what the justices feel they are capable of deciding. This aspect of the justices’ role perceptions has become of heightened significance under the Charter, particularly as the justices have determined that virtually any issue may legitimately fall under their purview. As discussed earlier, the open approach to issues of justiciability and standing is one important part of the reason the Court ultimately decided to liberalize its stance on allowing third party interveners and the type of evidence it examines when determining complex moral or social policy matters. The justices came to realize they required external assistance in synthesizing the new policy issues they would now confront.
These developments are significant given the sharp concern many of the justices have expressed over the years about the institutional capacity and general appropriateness of the Court dealing with social policy questions. Just six years prior to the Charter’s enactment, in a case involving whether peaceful picketing at a shopping centre was considered trespassing on private property, then-Justice Dickson described his unease with the idea that the Court should weigh competing social values:

The submission that this court should weigh and determine the respective values of society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs.3

Similar concerns continue to be expressed by some judges during the Charter era. In *R. v. Morgentaler*, the 1988 abortion case, Justice McIntyre (with Justice La Forest concurring) acknowledged that the Charter imposed on the Court new responsibilities to ensure that legislative initiatives “conform to the democratic values expressed” within its guarantees. Nevertheless, he argued that “it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy.”4 McIntyre noted that nothing in the Charter makes clear that there exists an inherent right to abortion, and that without an obvious basis for such a right, it was not for the Court to interfere with Parliament’s balancing of the societal values at stake in the case.

More recently, in 2002 the Court divided sharply on the issue of prisoner’s voting rights. Justice Gonthier, writing for the minority, emphasized the competing social values underpinning the issue:

This case rests on philosophical, political and social considerations which are not capable of “scientific proof”. It involves justifications for and against the limitation of the right to vote which are based upon axiomatic arguments of principle or value statements. I am of the view that when faced with such justifications, this Court ought to turn to the text of s. 1 of the Charter and to

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the basic principles which undergird both s. 1 and the relationship that provision has with the rights and freedoms protected within the Charter. Particularly, s. 1 of the Charter requires that this Court look to the fact that there may be different social or political philosophies upon which justifications for or against the limitations of rights may be based. In such a context, where this Court is presented with competing social or political philosophies relating to the right to vote, it is not by merely approving or preferring one that the other is necessarily disproved or shown not to survive Charter scrutiny. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional.5

The problem articulated by Gonthier strikes at the core of normative arguments about the role of the courts under the Charter. In 1983, Peter Russell noted that “excessive reliance on litigation and the judicial process for settling contentious policy issues can weaken the sinews of our democracy. The danger here is not so much that non-elected judges will impose their will on a democratic majority, but that questions of social and political justice will be transformed into technical legal questions.”6

For both conservative and liberal critics of the judicial role under the Charter, the concern is not just about the supposed anti-democratic or “counter-majoritarian”7 nature of judicial review. Rather, the more fundamental concern with the Supreme Court’s handling of social policy issues under the Charter is that the truly “principled” form of adjudication that would justify the counter-majoritarian nature by which the Court resolves them is ultimately impossible.8 In other words, because there are competing answers to what constitutes a reasonable resolution to complex moral or social questions that implicate rights, many consider courts ill suited to resolving such issues. Jeremy Waldron, a leading critic of asking courts to resolve such matters, notes that even where

7 Alexander Bickel is credited for his articulation of the “counter-majoritarian difficulty” associated with judicial review: The Least Dangerous Branch: The Supreme Court at the Bar of Politics. (Indianapolis: Bobbs-Merrill, 1962).
there is apparent consensus over rights (strong, universal support for guarantees like freedom to expression or the right to equality), disagreement over their application remains. Waldron writes,

> the extent of these disagreements belies our ingenuity at devising abstract formulations. Disagreement does not prevent the enactment of a Bill of Rights. But the disagreements remain unresolved, leaving us in a situation in which – when an issues about a rights-violation arises – it is beyond dispute that a Bill of Rights provision bears on the matter, but what its bearing is and whether it prohibits (or should limit the application of) the legislative provision that is called into question remains a matter of dispute among reasonable people.9

In such instances, there are not necessarily correct answers, legal expertise provides no substantive guidance, and judges are left with nothing to rely on but their personal conceptions of justice.

In the Canadian case, after the Charter’s enactment the Supreme Court has come to rely on third party interveners and a more comprehensive examination of the “social facts” deemed necessary to resolve the dispute. The remainder of this section explores the Court’s treatment of evidence in social policy cases and the extent to which its record is coherent from a role perception perspective. The following analysis suggests that the Court lacks a coherent approach to those cases that involve complex policy matters and where a consideration of social facts is prominent. This stems directly from the failure of the justices to ground these decisions in a framework that explicitly considers appropriate institutional roles. As a result, and confirming the assertions of critics, such cases are a site of activity for value-driven (attitudinal) decision-making.

*Reasonable Limits and the Social Policy Distinction*

Gonthier’s statement in *Sauvé* underlines that the principal site of activity for judicial consideration of institutional roles under the Charter is in its reasonable limits analysis. Ultimately, it is under section 1 that governments can defend policy objectives and the means by

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which they are achieved, and thus where these capacity or competence issues are paramount.\footnote{As is demonstrated below, in section 7 cases the reasonable limits analysis is often embedded in a consideration of whether a law accords with “the principles of fundamental justice.” The Court has said that section 1 justifications for section 7 violations will be “rare.” \textit{United States v. Burns}, 2001 SCC 7, [2001] 1 S.C.R. 283 at para. 133.}
The Court’s two-stage approach to Charter review conditions this process. First, the Court identifies whether rights have been infringed, while the second stage involves assessing the reasonableness of the impugned policy objective. The Court consciously decided from the outset to avoid narrow definitional limits on the rights themselves.\footnote{Robert J. Sharpe and Kent Roach, \textit{The Charter of Rights and Freedoms.} (3d) (Toronto: Irwin Law Inc., 2005) 49.} As a result, the justices are more likely to have to evaluate policies under section 1. If rights were interpreted more narrowly the necessity of complex policy assessment would be reduced.

In \textit{R. v. Oakes},\footnote{\textit{R. v. Oakes}, [1986] 1 S.C.R. 103.} the Court established a two-prong test to determine the reasonableness of a law. First, the objective of the measure must be important enough to warrant overriding a Charter right. The second stage is a “proportionality test,” of which there are three steps: first, the measure must be rationally connected to the objective; second, the means by which the objective is achieved should impair the Charter right as little as possible; and, finally, there must be proportionality between the effects of the means and the objective. Until \textit{Oakes}, the Court had generally avoided a systemic or comprehensive reasonable limits analysis; “instead, members seemed preoccupied with the need to deny the policy contribution judicial review assumes in the legislative process.”\footnote{Hiebert, \textit{Limiting Rights}. 56.}

Since the \textit{Oakes} test was first established, two trends are worth noting. First, the minimal impairment step of the proportionality stage has become the most pivotal component of the test. According to one study, the Court rarely strikes down legislation on the basis of the objective or the rational connection between the objective and the measure used to meet it.\footnote{The government succeeded in 97 percent of cases at justifying its objective as “pressing and substantial” and in 86 percent of cases that the measures to do so were rational. Leon E. Trakman, William Cole-
instance in which the minimal impairment stage was passed, the proportional effects stage also passed, giving the final stage of the *Oakes* test “a wholly vestigial role within section 1 decisionmaking.”

Second, over time, the Court has relaxed or made “flexible” the standard of scrutiny applied. Critics have argued that the test is insufficiently objective or predictable, with some complaining that it encourages deference on the part of the Court, and others expressing concern that it involves the Court too deeply in evaluating the merits of particular policies. Hiebert writes that there was a realization among many of the justices “that a large and liberal interpretation of protected rights in the initial stage of review, if accompanied by a strict application of the proportionality criteria, will result in the frequent invalidation of government objectives. It has quickly become apparent that a majority of the Court is not comfortable with this possibility.” She describes the crux of the problem as follows:

> The complexity of policy development makes it difficult to undertake careful and prudent policy analysis by judges (or others) who are external to the policy process or who lack the resources, relevant information, and analytical skills to evaluate conflicting social science evidence. It is therefore not surprising that the Court found the *Oakes* criteria of limited guidance when assessing the reasonableness of impugned policies. The difficulty of analysing the merits of policy encouraged individual justices to read into the standard their particular normative perspectives of liberty or democracy or institutional assumptions about the appropriate role of courts in a representative democracy.

This difficulty is especially apparent in the context of social policy cases; however, the Court has been less reticent about applying a stricter level of scrutiny to criminal matters.

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*Lorraine E. Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada’s Constitution,” The Canadian Bar Review, 80 (2001).*


*Hiebert, Limiting Rights, 70.*

*Hiebert, Limiting Rights, 71.*

*Hiebert, Limiting Rights, 77-8.*
The general capacity of courts to deal with social policy questions and the evidence
surrounding them has long been called into doubt in the political science literature.22 As explored
in chapter 3, the role of social or “legislative” facts has become prominent under the Charter. The
judicial process does not lend itself to the collection and analysis of legislative facts necessary to
formulate policy. Judges may take “judicial notice” of facts that are generally well known, and
may rely on expert witnesses at the trial level, government reports, legislative history and
published studies submitted by the parties. But courts, particularly appellate courts, cannot
conduct extensive hearings to gather additional information or commission new studies and
reports as those in the legislative process can. Nor do courts have the entrenched resources of
governmental bureaucracy to draw from. Further, as Donald Horowitz notes, the adjudicative
process is focused on particular litigants instead of whole categories of people, it is piecemeal and
incremental, and it is passive, in that judges can only act when parties come before them.23 These
features make judicial investigation into “historical facts” surrounding particular cases relatively
straightforward, but they make the process of synthesizing broader social facts extremely difficult.

Studies of the Supreme Court of Canada’s application of such facts suggest its track
record is fairly weak. Mahmud Jamal’s exploration of how the Court’s treatment of legislative
facts has evolved reveals a discretionary and ad hoc approach. Jamal suggests that the Court’s
approach “will ultimately depend on whether the Court is in a mood to think creatively and reach
out beyond the party-prepared record of evidence.”24 Danielle Pinard writes that “the reliance on a
language of fact and evidence creates an illusion of certainty.” She explains,

The consideration of the reasonableness of limits imposed on rights and freedoms
is presented not as a subjective weighing of the social values at issue, but as an
objective exercise in the assessment of empirical data, correlations, and causal
relationships established by scientific studies. This recourse to a language of facts

22 An oft-cited study in this vein was conducted in the American context in 1977. Horowitz, The Courts and
Social Policy.
24 Mahmud Jamal, “Legislative Facts in Charter Litigation: Where Are We Now?” National Journal of
therefore also creates an illusion of neutrality: judges’ values play no role in the objective analysis of data.\textsuperscript{25}

Pinard’s analysis of several Court decisions leads her to conclude that the justices routinely refer to evidence or facts for their rhetorical appeal, but these facts do not play a very important role in the ultimate decisions rendered. For example, in \textit{Figueroa v. Canada},\textsuperscript{26} the Court ruled unconstitutional provisions in the Canada Elections Act mandating that political parties must nominate candidates in at least 50 ridings to qualify for certain benefits. The majority decision lamented the lack of evidence on the practical effect of the rule on the costs to government, on majority building or majority government, or even on whether minority governments are “less democratic” than majority governments. In effect, the justices were asking for evidence to answer questions which, in some instances, there are no single correct answers. Pinard writes that in using their latitude to invoke such evidence (or the lack thereof), the justices in \textit{Figueroa} adopted “a “not our fault” type of reasoning” in which they “reasoned the facts necessary to come to a conclusion of violation of rights. And [they] regretted the lack of factual justification for such a limitation.”\textsuperscript{27}

Several of the Court’s justices have spoken publicly about the problems associated with scientific or social scientific evidence. In 2003, Justice Binnie commented on the “scientific illiteracy” of the judiciary. He noted that judges are “generalist decision makers,” and made the somewhat shocking statement that they find they have to “sail into the Internet” to try to further understand scientific evidence, acknowledging they can encounter “all sorts of misinformation” as they do so. Binnie stated that this problem is not insurmountable because the courts are not “unteachable” and reforms, such as having court-appointed, “neutral” experts at the trial level, could make scientific material more “digestable.”\textsuperscript{28}


\textsuperscript{27} Pinard, “Institutional Boundaries and Judicial Review,” 222.

Former Justice Iacobucci places the onus on governments to improve the extent and quality of evidence provided to courts. He writes, “[o]wing to the fact that judicial decision-making in the context of an adversarial trial is a far less sophisticated process for addressing social welfare concerns than the research, drafting and debate that accompanies legislative development, the quality of the dialogue between government and the judiciary is compromised where the government does not make a concerted effort to engage in that dialogue. It is more difficult for the judiciary to assess the constitutionality of legislation, or to provide suggestions as to alternative means to achieve the same objective in a less intrusive means, if it has little basis upon which to verify a government’s claim that the effects of the legislation are reasonable.”

Although identifying problems associated with social facts and the judicial process, Binnie and Iacobucci suggest the solution lies in reforms to improve the delivery of the evidence as opposed to more carefully proscribing the use of such evidence in a court setting. This reflects a confidence on their part in the ability of courts to delve into the intricacies of policymaking despite the institutional limitations they identify.

Other justices are even less concerned about the competency of courts to deal with such matters. According to former Justice L’Heureux-Dubé, the Court merely needs to be more explicit about the underlying policy assumptions with which it approaches cases implicating social science evidence. “The more courts acknowledge their active contribution to lawmaking, the greater becomes both their duty and their need to lay bare the policy assumptions upon which their decisions are based.” She argues courts must not impose overly strict rules on the taking of judicial notice so as not to discourage courts from admitting they use it, a consequence of which is that “underlying questions of policy are obfuscated by a mask of legal “principles.”” Principles formulated on such a basis, in turn, may lead to illogical applications in subsequent cases. Judicial notice must not be a convenient means by which courts can escape examination of their

underlying policy assumptions.” Former Justice Arbour argues passionately in favour of enforcing social and economic rights under the Charter and contends that reviewing such claims is “no quantum leap from those associated with ordinary review.”

The question of social and economic rights has become central to the Court’s jurisprudence under section 7 of the Charter, which states that, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The evolution of the Court’s approach to section 7 illustrates uncertainty and disagreement among the justices about their role in dealing with substantive policy issues.

Falling under the “legal rights” section of the Charter, section 7 was originally understood to apply to matters relating to the administration of justice, as opposed to substantive issues. In other words, at the time of the Charter’s adoption, it is generally understood that the phrase “principles of fundamental justice” was restricted to issues of procedural fairness. In the Court’s first section 7 case, the Motor Vehicle Reference, the justices unanimously decided to ignore the intention of the framers and allow for a substantive interpretation of the clause. Justice Lamer, writing for the Court, saw the distinction between procedural and substantive content as importing an American debate into the Canadian system. This is inappropriate, he argued, because that debate pertains to the nature and legitimacy of the U.S. Constitution, which is structured very differently than the Canadian one (the latter of which includes section 1 and 33 of the Charter and section 52 of the Constitution Act, 1982, of which there are no equivalent American provisions).

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32 The Charter framers are said to have used “fundamental justice” instead of “due process” to avoid substantive interpretation that had long plagued debates in the United States. Thomas M.J. Bateman, Janet L. Hiebert, Rainer Knopf and Peter H. Russell, The Court and the Charter: Leading Cases. (Toronto: Emond Montgomery Publications Limited, 2008) 195.
34 Re B.C. Motor Vehicle Act, at para. 18.
At least some of the justices were concerned that opening section 7 to substantive interpretation risked placing the Court in a position of dealing with pure policy matter. Lamer acknowledged that such an approach would raise “the spectre of a judicial “super-legislature”.35 In the decision he restricted the scope of the guarantee to matters pertaining to the administration of justice, which he described as “the inherent domain of the judiciary.”36 This explicit articulation of the distinction between criminal cases and those relating to social and economic policy corresponds with the tendency of the Court to defer to legislatures in decisions involving the latter.37 In a later section 7 case Lamer writes that, “[t]he courts must not, because of the nature of the institution, be involved in the realm of pure public policy.”38 As is explored more fully below, this institutionally-grounded distinction between matters of justice and those of public policy has slowly dissolved over time, as the Court has delved deeper into more pure policy matters in its section 7 jurisprudence.39

Justice Arbour’s position that the life, liberty and security of the person guarantees outlined in section 7 should be interpreted as having a positive dimension was clearly articulated in the 2002 case Gosselin v. Quebec.40 Gosselin was the first case in which the Court faced squarely the question of whether the Charter imposed positive welfare obligations on government. The case demonstrates sharp divisions among the justices on the issue. Arbour’s minority opinion (with L’Heureux-Dubé concurring with her section 7 analysis) stated forcefully that the Court should take an expansive approach to section 7 that included the right to basic needs. Writing the other dissent, Justice Bastarache acknowledged that in “certain exceptional circumstances” section 7 rights might include those outside of the traditional criminal context, but maintained that

39 For a comprehensive exploration of this, see: Jamie Cameron, “From the MVR to Chaoulli v. Quebec: The Road Not Taken and the Future of Section 7,” Supreme Court Law Review. 34(2d) (2006).
there must be some link between the right and the administration of justice.\textsuperscript{41} Chief Justice McLachlin’s majority opinion refused to settle the manner conclusively. However, citing the “living tree” metaphor, McLachlin left open the possibility that section 7 jurisprudence may grow to include basic welfare and social rights.\textsuperscript{42}

Jamie Cameron argues that the Court failed to acknowledge “the boundary which separates judicial and democratic functions.”\textsuperscript{43} She contends that “\textit{Gosselin} demonstrates how easy it is for the judges to ignore or dismiss institutional questions which might require them to recognize limits on the scope of Charter rights, as well as on their own powers of review.”\textsuperscript{44} Seven years after \textit{Gosselin}, the future status of positive welfare rights in the Charter remains uncertain. Nevertheless, as discussed below in relation to the health care case \textit{Chaoulli v. Quebec},\textsuperscript{45} the decision in \textit{Gosselin} to leave the door open to positive welfare rights has had a significant impact.

\textit{Dealing with Social Policy: The Justices’ Views}

Lamer’s reference to justice-related cases as the “inherent domain of the judiciary” pertains in part to the fact that there is a relative lack of determinacy with respect to evidence in social policy cases. The justices interviewed for this dissertation provide a range of responses on their views about the potential for uncertain or conflicting evidence surrounding policy issues. As noted above, these considerations help to shape the justices’ views on deference. Some justices support the distinction between social policy cases and criminal cases, while others dismiss it as not generally useful.\textsuperscript{46} The implication of this distinction in the Court’s jurisprudence has meant, in effect, that the Court has been more deferential to legislative choices when social policy issues are

\textsuperscript{41} \textit{Gosselin} at para 213.
\textsuperscript{42} \textit{Gosselin}, at para. 82.
\textsuperscript{43} Cameron, “Positive Obligations Under Sections 15 and 7 of the Charter,” 90.
\textsuperscript{44} Cameron, “Positive Obligations Under Sections 15 and 7 of the Charter,” 91.
\textsuperscript{46} Interviews.
implicated. The justices’ views or their concern about the use of social science evidence seem to correlate with their perspective on this distinction. In other words, justices concerned about the indeterminacy of evidence or the Court’s capacity to deal with such legislative facts are more likely to see a distinction between social policy cases and other cases, and thus the need for deference in the former.

One justice notes never being concerned about her capacity to evaluate evidence in social policy cases. For this justice, admitting such evidence is crucial to understanding the context surrounding the issues that come before the Court. This justice does state, however, that the Court generally relies on such evidence only when it is clear. Asked about the distinction between social policy cases and criminal cases, this justice states that it is relatively meaningless, noting that many criminal cases involve social issues as well.

A second justice states that “the social sciences are less certain than the physical sciences … let us say that perhaps they’re another element that feeds into the decision-making, but they aren’t as determinative as some law of physics might be.” This justice sees the distinction between social policy cases and others as a “fact of life,” noting it pertains to the proper roles of the courts and Parliament in terms of their institutional capabilities and vocation. This justice notes it is very important and very difficult to draw the line.

Another justice expresses an even more reserved or guarded approach to the consideration of evidence. “I think [research] articles have to be taken, I shouldn’t say with a grain of salt, but you have to consider exactly what they are. Depending on the article, suppose it’s written by a psychiatrist on mental illness, you have to remember that he’s a doctor, and that he’s writing it from a medical perspective. And he’s writing it with the hope that the Court can change something that will make his job easier or better, that you’ll get better results on, say, forcing medication on a person. But they’re just opinions. Some judges quote them; L’Heureux-Dubé

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48 Interview.
49 Interview.
used to quote a lot of them. I never relied on them very much. I never relied on them without hearing what the lawyers on both sides had to say about the article. I can’t think of an article that was decisive on a judgment.” This justice thus views the distinction between cases involving social policy and other ones as necessary. “In spite of what you read about ‘the nine most powerful people, the unelected group that run the country,’ I think the Court is very conscious of the fact that Parliament runs the country and that on social policies they have budgetary restraints, they have a number of factors that go into running the government and how they spend their money. The Court’s pretty reluctant to tell the government how they should be spending their money. That came up a couple of years ago on treatment for autistic children.”

“As I recall, we took the position that we couldn’t interfere with the way the government chose to spend their money, in the absence of a clear violation of the Charter. Even with a clear violation, on money matters you point out where you think the violation is and you give them a year or a certain amount of time to correct it.”

A fourth justice acknowledges that judges place a degree of faith in scientists or social scientists and they hope that the data has been rigorously tested, that it’s not shoddy, anecdotal or speculative. She notes that “this is where interveners come in, who have experience in the social science areas and can provide a helpful perspective” for the Court. This justice sees it as simply a reality of the Charter era that these other disciplines are “incredibly important” to the Court. This justice notes that some issues may stress “the limits of the judicial function” because by their vary nature scientific or social scientific evidence is not clear, pointing to the Rodriguez case (which dealt with the prohibition against assisted suicide) as an example. Implicit in this response is the notion that deference is warranted in social policy cases where evidence is unclear or a lack of consensus exists.

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50 Interview.
51 Interview.
52 Interview.
A fifth justice explains that “we’re quite aware of some of the difficulties and limitations of the material, and I believe that some recent judgments of the Court have raised some caveats about the use of some of the evidence and of the need to build and test proper evidentiary record … Over the years I think we have perhaps become a little more cautious than the Court was at first, in the first years after the Charter about the use of that material, and about the need to put it through a more rigorous and analytical process.” She notes that the line between criminal cases and social policy cases is becoming blurred. Criminal cases raise more than just the common law. This justice suspects that in both the Court’s jurisprudence and in the academic literature more broadly, it will be difficult in the long-run to bother speaking of such a distinction.54

Most of the justices acknowledge that the distinction between criminal cases and those involving social policy is not always cut and dry. Several cited as an example the Court’s ruling in Askov,55 which involved the right of defendants to a trial in a reasonable time. The decision stated that six to eight months would be the “outside limit” of a reasonable delay. This resulted in tens of thousands of cases being dismissed, mainly in Ontario (where Askov originated).56 The case is noteworthy because it clearly demonstrates that criminal cases have important policy effects.

Askov also stands as one of the early Charter cases to illustrate the “fallibility of judicial decision making,” particularly when it involves policymaking.57 According to Carl Baar, the Court in Askov made social science data “more central to its judgment than in any previous constitutional case.”58 Baar notes the Court arrived at the six to eight month standard by doubling the amount of time it took an average case to proceed in Montreal, a jurisdiction for which no evidence was presented in the case (the justices gathered the data on their own initiative). More significantly, there

54 Interview.
56 The actual figure appears to be in dispute. Carl Baar puts the number at 40,000. “Social Facts, Court Delay and the Charter,” Law, Politics and the Judicial Process in Canada. (3d) F.L. Morton ed. (Calgary: University of Calgary Press, 2002). 375. Kent Roach claims the actual figure is closer to 25,000. The Supreme Court on Trial. 181.
57 Roach, The Supreme Court on Trial, 181. Roach acknowledges the problematic outcome of the case, but argues the deleterious effects of the case were exaggerated in the media and by the Court’s critics.
was no empirical basis for the conclusion that multiplying the average time in Montreal would yield
good results or constitute reasonable delays in a standard case in other jurisdictions.\(^{59}\) Just over a year
later, the Court, reacting at least in part to the public outcry, used two cases to declare that its decision
in *Askov* should be interpreted flexibly.\(^{60}\)

Despite the fact that *Askov* shows that criminal cases have significant policy implications, the
distinction made with regard to social policy cases is clearly reflected in the Court’s jurisprudence. A
recent study of the Court’s reasonable limits analysis examines the distinction and finds that the
Court divides on the outcome of section 1 analysis nearly twice as often in social policy cases
(typically involving challenges under sections 2, 7 or 15) than criminal cases (those challenges
brought under sections 8 to 14, and occasionally section 7).\(^{61}\) This significant difference
highlights the lack of legal certainty in adjudicating matters of social policy. The justices have not
settled on an approach that allows them to evaluate social policy matters in a more unified way. In
effect, the value-laden issues at stake in such cases permit a more discretionary form of decision
making.

Interviews suggest that the distinction between criminal cases and social policy cases is at
least in part premised on judicial considerations of the capacity of courts to deal with complex
policy issues. As a result, an exploration of social policy cases is warranted. The next section
explores how the justices have tackled social policy issues in practice.

*The Court’s Approach to Social Policy Cases: Health Policy and the Use of Evidence*

In what follows, I will examine the Court’s Charter cases involving health policy. These cases
have garnered considerable attention in the scholarly literature, reflecting their importance both
for the substantive outcomes of the cases themselves and for debates over judicial review more
generally. Moreover, health policy cases tend to be limited to two distinct strands of Charter law:

61 Barbara Billingsley, “*Oakes* at 100: A Snapshot of the Supreme Court’s Application of the *Oakes* Test in
the right to life, liberty and security of the person under section 7 and equality rights under section 15.\textsuperscript{62} The weighing of values in each of these areas of the Charter is an exercise fraught with difficulty. As the discussion in chapter 5 demonstrates, section 15 concerns one of the most contested concepts in equality. Further, as noted above, section 7 jurisprudence has direct implications for judicial perceptions of institutional roles. Finally, a focus on health policy cases is suitable because they constitute a clear subset of cases in which the Court’s jurisprudence has evolved and the cases have developed directly from each other.

The analysis reveals that the justices have not been overly concerned about deference to Parliament or respecting earlier judicial concerns about what constitutes an appropriate institutional division of labour for contested social policies. The Court delves primarily into a discussion of the particular policy issues at stake, often emphasizing an analysis of whether the impugned policy constitutes a reasonable limit of the right in question. An exploration of the health policy cases exposes a piecemeal and discretionary approach to the primary issues at stake.

Generally, two primary considerations come into play. In the first two health policy cases explored here, which involved the constitutionality of abortion\textsuperscript{63} and assisted suicide,\textsuperscript{64} the justices dealt with diverging philosophical conceptions of justice. The justices generally failed to address whether or under what conditions the Court is the suitable venue for addressing competing values. The next two cases involved the delivery of particular services, sign language interpreters for deaf patients in public hospitals\textsuperscript{65} and a form of intensive behavioural therapy for autistic children.\textsuperscript{66} These cases required a consideration of under what conditions the Charter imposes positive obligations on governments. They show that the justices have not provided a framework of analysis for the conditions under which the Court should require legislative policy

\textsuperscript{62} \textit{Rocket v. Royal College of Dental Surgeons of Ontario}, [1990] 2 S.C.R. 232, which involved professional advertising regulations (a restriction of freedom of expression under section 2), is thus excluded from this analysis, despite its status as a “health care” decision.

\textsuperscript{63} \textit{Morgentaler}.

\textsuperscript{64} \textit{Rodriguez}.


choices that necessitate direct distribution of scarce resources. The final health care case, *Chaoulli v. Quebec,* brought the Court into the heart of the debate over the delivery of private medical insurance. *Chaoulli* involved both types of considerations and, as will be shown, the nature of the decision reflects the discretionary approach that marked the Court’s decisions in the other four cases.

The analysis that follows suggests that the justices’ treatment of conflicting social science evidence is highly discretionary. More significantly, they have been reluctant to address in any explicit manner what they consider the appropriate institutional roles surrounding the resolution of social policy issues, something which would help lessen the degree to which such cases are resolved by recourse to the justices’ personally held attitudes.

The 1988 *Morgentaler* case on abortion was arguably the first Charter case that involved the Court in a highly visible, controversial moral question. It is certainly among the most prominent examples of judicial involvement in an issue that sharply divides society and over which there are no obviously correct answers. Further, as Cameron argues, the case represents “a first and critical step away from [the Motor Vehicle] logic and the constraints it sought to impose on review under section 7.”67 The four opinions reflect not just a split over the abortion issue itself, but uncertainty among the justices about how to approach a case that rests principally on the balancing of fundamental values.

*Morgentaler* involved a provision in the Criminal Code that required women seeking an abortion to obtain a certificate from the therapeutic abortion committee of an accredited or approved hospital. The seven justices hearing the case split into four camps in the decision, with five voting to strike down the provision. Justice Beetz’s reasons (with Estey concurring) struck down the law on the narrowest grounds, finding that the law violated women’s right to security of the person because the committee system was arbitrary and applied in an uneven fashion. Chief Justice Dickson (with Lamer concurring) cited testimony and reports that made clear the

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67 Cameron, “From the MVR to Chaoulli v. Quebec,” 121.
committee system produced significant (and potentially dangerous) delays in care, and that these delays violated the right to security of the person because they were “manifestly unfair.” Only Justice Wilson directly tackled the substantive issue of whether women had the right to abortion:

the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.68

The four justices in the plurality wrote decisions that rest, on the surface at least, on procedural grounds, avoiding the substantive issue of whether women have the right to an abortion. As Cameron points out, however, “it is difficult to see how delay can be a constitutional violation if there is no right of access to the procedure in the first place.”69 Indeed, in his dissenting reasons, McIntyre (with La Forest concurring) noted that Dickson’s judgment “has not said in specific terms that the pregnant woman has the right to an abortion, whether therapeutic or otherwise. In my view, however, his whole position depends for its validity upon that proposition.”70 Thus, where the other opinions on the majority side paid lip-service to the Court’s position in the Motor Vehicle Reference that section 7 only applied to matters related to the administration of justice and not pure policy concerns, Wilson’s opinion explicitly rejected it.

McIntyre’s dissent also reflects a concern about the values at stake and the basis for the rights in question. He argued that there was no textual or historical basis for the right to abortion, writing that “the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time.” This, in McIntyre’s view, “does not mean that judges

68 Morgentaler, at page 171.
69 Cameron, “From the MVR to Chaoulli v. Quebec,” 121.
70 Morgentaler, at page 142.
may not make some policy choices when confronted with competing conceptions of the extent of rights or freedoms. Difficult choices must be made and the personal views of judges will unavoidably be engaged from time to time. The decisions made by judges, however, and the interpretations that they advance or accept must be plausibly inferable from something in the *Charter*. It is not for the courts to manufacture a constitutional right out of whole cloth.”

The Court’s reliance on extrinsic evidence in the case is also significant. *Morgentaler* was arguably the first highly visible Charter case involving a question of great social and moral controversy. Although there appears to be little doubt as to the veracity of the facts relied upon in the case that demonstrate significant delays and unequal access across the country, the Court’s reliance on such data is not without controversy. Just over a decade earlier in the 1976 *Morgentaler* case, Chief Justice Laskin rejected the use of similar evidence, noting “It would mean that the Court would have to come to … decide how large or small an area must be within which an acceptable distribution of physicians and hospitals must be found.” Further, the majority reasons relied heavily on the Badgley Report, which was commissioned by the Trudeau government in response to the 1976 *Morgentaler* case. As Bateman et al note, “[The Badgley Report] was intended to serve as the basis for possible legislative reform to the abortion law, but Parliament never acted on it. Now, 10 years later, the Badgley Report was being used by judges to strike down the same abortion law.”

*Morgentaler* made clear that under the Charter some judges would not shy away from the most contentious of topics or from dealing directly with policy issues. Just as significantly, the division among the justices over their approach to the abortion issue and, more broadly, to section 7, reflects that their conceptions of the appropriate institutional roles pertaining to judicial review were very much in flux. Further, the policy impact of the *Morgentaler* decision has been

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71 *Morgentaler*, at page 140-1.
73 Bateman et al., *The Court and the Charter*, 215.
immense. Manfredi documents a sharp rise in the number of abortions following the case (after one year the rate of abortions per thousand women increased by 15.9 percent; after 10 years it had increased by 35.3 percent).\textsuperscript{74} He writes this increase “is primarily a function of an increase in the number of abortions performed in clinics rather than hospitals, a development directly traceable to \textit{Morgentaler}.”\textsuperscript{75}

A few years later, the Court grappled with the constitutionality of a provision of the Criminal Code prohibiting the giving of assistance to commit suicide in \textit{Rodriguez}, which involved a 42 year-old woman suffering from a degenerative disease that would eventually leave her unable to move, eat or breathe on her own. The case raised many of the same section 7 issues as \textit{Morgentaler}, but this time a narrow 5-4 majority voted to uphold the law. Justice Sopinka, writing for the majority, acknowledged the discretionary nature of the values at stake in the case:

\begin{quote}
On the one hand, the Court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of the wisdom of legislation. On the other hand, the Court has not only the power but the duty to deal with this question if it appears that the \textit{Charter} has been violated. The power to review legislation to determine whether it conforms to the \textit{Charter} extends to not only procedural matters but also substantive issues. The principles of fundamental justice leave a great deal of scope for personal judgment and the Court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder only.
\end{quote}

Sopinka went on to explain that the principles of fundamental justice are concerned not only with the rights of the individual claimant but with the protection of society as a whole. Further, he noted the lack of consensus over the issue of assisted suicide, adding, “[t]o the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it.”

McLachlin’s dissenting opinion argued that the law was not in accordance with the principles of fundamental justice because it was arbitrary (it made a distinction between passive

\textsuperscript{74} Christopher P. Manfredi, \textit{Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund}. (Vancouver: UBC Press, 2004), 180.
\textsuperscript{75} Manfredi, \textit{Feminist Activism in the Supreme Court}. 181.
euthanasia and suicide on the other). Arbitrariness as a concept for appraising laws under section 7 would arise again in the plurality judgment in Chaoulli (discussed below). This is significant, Cameron argues, because like the “manifest unfairness” principle articulated by Dickson in Morgentaler, the arbitrariness concept “collapsed the distinction between justice and policy, and in doing so, ignored [Motor Vehicle] logic and its search for principled limits on review. Each lacked criteria and both presented an unlimited potential for review as a result.”

Rodriguez, as much as any other case, highlighted for the justices the question of the appropriate institutional roles in resolving such matters and the issue of the capacity of courts to do so. As noted in Chapter 3, one justice interviewed for this dissertation says of Rodriguez: “I believe you’re stressing the limits of the judicial function in that case to in effect say that a prohibition against assisted suicide was unconstitutional.” She explains, “Is this just a legal question? What’s the input coming from philosophers, medical science, care givers, social workers … It’s a poly-centric kind of issue, not left only to judges to decide on the basis of evidence and input that might be incomplete. So there are questions you always have.” Implicit in this response is the notion that deference is warranted in social policy cases where evidence is unclear or a lack of consensus exists. The fact that clearly not all justices agree with such logic reflects the large degree of uncertainty and haphazardness in the Court’s jurisprudence on social policy questions. More specifically, the Court has not addressed or developed in any systemic way an underlying logic or approach to dealing with such matters.

Morgentaler and Rodriguez highlight sharp disagreement among the justices regarding the appropriate institutional roles when the matters before the Court involve contentious moral or philosophical concern. The justices who resisted deference to Parliament’s choices in these cases

76 In another dissenting opinion, Chief Justice Lamer argued that the law violated the equality rights of the disabled under section 15. Justice Cory’s short dissenting opinion agreed with both McLachlin and Lamer.
77 Cameron, “The Future of Section 7,” 122.
78 Interview.
gave little explicit attention to the idea that there might be “institutional boundaries” surrounding judicial review. In other words, less than a decade after the Charter, some justices appear to have abandoned the idea expressed by the Court in *Motor Vehicles* that under section 7 the Court ought to leave pure policy issues to the legislatures.

The relative inattention to the appropriate institutional roles applies not only to cases involving moral controversy but to those extending positive rights. As Cameron points out, the Court has not hesitated to recognize positive rights and impose positive obligations under the Charter. She writes, “[t]hough the judges are aware of limits on their powers of review, the question of institutional boundaries has played a minor role in this jurisprudence. It is the merits of claims, rather than doubts about the legitimacy of review, that determine the outcome in these cases.” When the Court pretends there are no boundaries or ignores their presence, it places the legitimacy of judicial review at risk.

The next two health care cases involve the determination of positive entitlements under the Charter, but they reach conflicting results. In *Eldridge v. British Columbia*, the Court unanimously ruled that the Medical Services Commission in British Columbia acted unconstitutionally under section 15 of the Charter when it failed to provide sign language interpreters to deaf patients in hospitals. In *Auton v. British Columbia*, the Court unanimously rejected the claim that the Charter’s equality provisions required the provincial government to fund a particular intensive behavioural treatment for children with autism.

Both cases involved the justices in deciding whether or not to require the provincial government to provide specific services. If critics are generally concerned about the supposed anti-democratic nature of judicial review, they are especially sceptical of the enforcement of

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79 Cameron, “Positive Obligations Under Sections 15 and 7 of the Charter.”
81 Cameron, “Positive Obligations Under Sections 15 and 7 of the Charter,”66.
82 Cameron, “Positive Obligations Under Sections 15 and 7 of the Charter,”68.
positive rights under the Charter given their belief that decisions involving the distribution of scarce resources are the proper domain of elected representatives. It is perhaps for this reason that the Court has generally shied away from decisions that inflict direct costs on governments. A prominent example of this logic is the unanimous judgment in the 2004 case Newfoundland v. N.A.P.E., which upheld as reasonable the government of Newfoundland and Labrador’s decision to cut pay equity payments owed to female hospital employees because the province was in severe financial distress.83

In holding that the failure to provide sign language interpretation violated the equality rights of deaf patients in Eldridge, Justice La Forest, writing for the Court, moved immediately to the minimum impairment stage of the Oakes test in his section 1 analysis to deal with the question of cost:

In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only $150,000, or approximately 0.0025 percent of the provincial health care budget at the time. … In these circumstances, the refusal to expend such a relatively insignificant sum to continue and extend the service cannot possibly constitute a minimum impairment of the appellants’ constitutional rights.84

La Forest further remarked, “[t]he respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state.”85

Manfredi points to significant problems with how the Court handled the question of costs. Noting the Court’s estimate of $150,000 was extrapolated from a private, volunteer-based institute in Victoria and the lower mainland of B.C., he points out that “there was no serious analysis at any stage of the proceedings of whether this would be an adequate basis for supplying

84 Eldridge, at para. 87.
85 Eldridge, at para. 92.
the more extensive services implicit in the appellants’ claim.” Further, no consideration was
given to whether the costs of the service in more remote or rural regions of the province would be
higher. Manfredi is also critical of the fact that the Court’s judgment brushes aside concerns of
the province that the broader implication of the decision is to invite similar claims from other
disadvantaged groups.

This latter concern is shared by Cameron in the sense of the decision’s implications for
the Court’s jurisprudence. In her view, Eldridge implies that “decisions affecting the allocation of
resources are subject to the Charter, except when the fiscal integrity of the state is at stake. This
line of reasoning is problematic, though, because it treats the consequences of imposing positive
obligations as an isolated phenomenon, which is limited in significance to the circumstances of a
particular case. An approach that assumes the consequences are discrete allows the Court to
minimize their importance. As a result, the cumulative or systemic impact of such obligations can
be avoided, and might never be addressed.”

The lack of consistency in such an approach became evident in Auton, where the Court
refused to require the province to provide an intensive treatment for children with autism. In her
judgment for the Court, McLachlin distinguished the case from Eldridge by noting that the
province “was obliged to provide translators to the deaf so that they could have equal access to
core benefits accorded to everyone.” In Eldridge, she wrote, the province was denying benefits in
a discriminatory fashion that were prescribed by law. The particular form of autism treatment at
issue in Auton, however, involves “access to a benefit that the law has not conferred.” Despite
this determination, McLachlin nevertheless proceeded to consider whether failure to fund the
treatment constituted discrimination under section 15. She wrote that “the appropriate comparator
for the petitioners is a non-disabled person or a person suffering a disability other than a mental

86 Manfredi, Feminist Activism in the Supreme Court, 106.
87 Manfredi, Feminist Activism in the Supreme Court, 106.
88 Cameron, “Positive Obligations Under Sections 15 and 7 of the Charter,” 74.
89 Auton, at para. 38.
disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.\textsuperscript{90} In drawing these conclusions, McLachlin noted the controversial and “emergent” nature of the treatment in question. She also pointed out that at the time of the trial, the government funded “a number of programs for autistic children.”

McLachlin’s logic in distinguishing the cases is arguably narrow and unconvincing. As Manfredi and Antonia Maioni write, “[b]y focusing on these facts – rather than on the tragic impact of autism, bureaucratic intransigence, personal economic sacrifice, or individual progress under [the treatment in question] – the Chief Justice provided a relatively benign picture of the pre-\textit{Auton} status quo.”\textsuperscript{91} Just as significantly, in framing the facts in this way McLachlin re-interpreted their application in sharp contrast to the trial judge, who rebuked government attempts to question the scientific validity of two existing studies on the treatment.\textsuperscript{92} The Supreme Court’s judgment also overturned the unanimous holding of the British Columbia Court of Appeal, which held that the province’s failure “to consider the individual needs of the infant complainants by funding treatment is a statement that their mental disability is less worthy of assistance than the transitory medical problems of others.”\textsuperscript{93}

Finally, in her narrow definition of the appropriate comparator group, McLachlin made it “virtually impossible” for a finding of discrimination.\textsuperscript{94} This latter determination allowed McLachlin to avoid section 1 analysis, which would have required the government to justify the funding decision (something it failed to do at the trial or appeal court levels) and the Court to more deeply consider the evidence surrounding whether the treatment is medically necessary.

\textsuperscript{90} \textit{Auton}, at para. 55.
\textsuperscript{92} Manfredi and Maioni, “Reversal of Fortune,” 123.
\textsuperscript{93} Manfredi and Maioni, “Reversal of Fortune,” 126. Citing \textit{Auton (Guardian ad litem of) v. British Columbia (Minister of Health)}.
\textsuperscript{94} Manfredi and Maioni, “Reversal of Fortune,” 130.
Taken together, the decisions in *Eldridge* and *Auton* provide no indication of how the Court might determine whether a government is obligated to provide particular policy programs. How relatively inexpensive must a particular program be for the Court to feel comfortable enforcing and imposing the cost of an impugned Charter right? How established or scientifically proven-to-be-effective must a particular medical treatment be for it to become mandatory under the Charter? *Eldridge* and *Auton* do not address these issues. More importantly, the cases do not provide any framework for which the Court might determine the answers to such questions or provide governments any clues that might aid them in identifying their obligations.

Like *Morgentaler* and *Rodriguez* before them, *Eldridge* and *Auton* reflect reasoning focused squarely on the particular policy issues at hand. Little attention is paid to the broader bases for determining when and under what circumstances the Court ought to mandate positive obligations on governments. Without an explicit consideration of the respective institutional responsibilities and capacities involved in the design of complex policies, the legitimacy, coherence and principled nature of the Court’s decision-making is put at risk. There is no better example of this than *Chaoulli v. Quebec*.95

In *Chaoulli*, the Court was essentially tasked with determining the validity of one of the founding principles of the country’s health care system. Under challenge was the Quebec government’s prohibition of private health insurance. The case exemplifies the type of issue that concerned those critical of the Court’s liberalization of its approach to justiciability. As noted in chapter 3, the justices even took the time to once again repudiate the notion that there ought to be a “political questions” doctrine that restricts the scope of Charter review.96 *Chaoulli* also forcefully highlights the continued division among the justices about the fate of section 7 as a vehicle for the resolution of policy disputes that do not involve matters of the administration of justice.

96 *Chaoulli* at para. 183.
In the case the Court split 4-3 in finding the provisions unconstitutional under the Quebec Charter of Human Rights and Freedoms, and 3-3 (with Justice Deschamps abstaining) on whether the prohibition was constitutional under the Canadian Charter. On the majority side, McLachlin and Major (with Bastarache concurring) write that the prohibition of private health insurance subjects Canadians to physical and psychological harm stemming from the long delays under the existing system, and thus violates the right to life, liberty and security of the person under section 7. In determining whether this violation was in accordance with the principles of fundamental justice, McLachlin and Major invoke a standard of arbitrariness, first raised by McLachlin in Rodriguez. Relying on the evidence presented at trial and drawing heavily from a 2002 report by the Canadian Senate’s Standing Committee on Social Affairs, Science and Technology (the Kirby Report),97 the justices purport to refute the government’s contention that the prohibition on private health care maintains and protects the integrity and quality of the public system. Their analysis and treatment of the evidence in this part of the decision has been roundly criticized, with one commentator arguing the justices “violated almost every scholarly standard for competent policy analysis.”98

The majority judgment misrepresented some evidence and ignored other evidence surrounding the question of whether expanding private insurance would improve care. First, it misrepresented the evidence by giving one solitary expert witness who was willing to claim that allowing private insurance would not harm the public system equal weight to six others who said it would.99 As David Schneiderman contends, “the Chaoulli expert’s rogue opinion was elevated to a status equivalent to that of all the other experts. [Then], all of the expert opinion then was

demoted to the realm of mere common sense.” 100 Second, the majority attributes the waiting lists in Canada to the public system, something that comparative evidence demonstrates is “clearly wrong.” 101 In fact, the justices draw on comparative evidence to demonstrate that other Western nations allow a substantial degree of private care, but ignore the fact that waiting lists are as much a concern in those countries. 102

Binnie and LeBel’s dissenting opinion “resisted the Court’s institutional competence” 103 to address the complex, fact-laden policy issues at stake in the case. Their judgment highlights the judicial debate over the Court’s role in resolving complex policy issues. In doing so, they appealed to the deferential approach the Court adopted in Auton:

The Court recently held in Auton … that the government was not required to fund the treatment of autistic children. It did not on that occasion address in constitutional terms the scope and nature of “reasonable” health services. Courts will now have to make that determination. What, then, are constitutionally required “reasonable health services”? What is treatment “within a reasonable time”? What are the benchmarks? How short a waiting list is short enough? How many MRIs does the Constitution require? The majority does not tell us. The majority lays down no manageable constitutional standard. The public cannot know, nor can judges or governments know, how much health care is “reasonable” enough to satisfy s. 7 of the Canadian Charter … It is to be hoped that we will know it when we see it. 104

Most significantly, the dissenting justices criticized the majority for wading deep into the realm of policy analysis and ignoring the appropriate limits of institutional boundaries: “The evidence certainly established that the public health care system put in place to implement this policy has serious and persistent problems. This does not mean that the courts are well placed to perform the required surgery. The resolution of such a complex fact-laden policy debate does not fit easily within the institutional competence or procedures of courts of law.” 105

103 Cameron, “From the MVR to Chaoulli v. Quebec,” 142.
104 Chaoulli, at para. 163.
105 Chaoulli, at para. 164.
The Binnie-LeBel judgment also serves to underscore the concern some critics have with the Court’s handling of the social facts at stake in the case. The minority criticizes McLachlin and Major for their characterization of the expert witnesses as providing little more than “common sense” appraisals of the policy. They write, “[t]he respondent’s experts testified and were cross-examined. The trial judge found them to be credible and reliable. We owe deference to her findings in this respect.” Further, they identify as problematic the majority’s reliance on the Kirby Report to substantiate the problems with the Canadians system and to make note of private delivery in other countries, while ignoring the fact that the Kirby Report itself recommended continued support for the single-tier system of delivery in Canada.

*Chaoulli* also highlights the underlying values at stake in the case. The minority judgment suggests the majority erred in drawing their own conclusions about the facts on the case without considering that the legislative choices constitute a reflection on societal values. They write that the snippets the majority draws from the Kirby Report “do not displace the conclusion of the trial judge, let alone the conclusion of the Kirby Report itself. Apart from everything else, it leaves out of consideration the commitment in principle in this country to health care based on need, not wealth or status.” Taken together with the other statements in the Binnie-LeBel judgment, it is clear that the minority was uncomfortable with judicial resolution of policy matters especially when those policy choices reflect a balancing of competing interests and values.

The two sides in *Chaoulli* come to divergent conclusions based on substantially different premises regarding institutional roles and responsibilities. The minority views the central question of the case as one that pertained to social values rather than constitutional law. The majority, by contrast, asserts that, “The mere fact that this question may have policy ramifications does not permit us to avoid answering it.” In her solo opinion in favour of striking down the law, Justice

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106 *Chaoulli*, at para. 214.
108 *Chaoulli* at para. 166.
109 *Chaoulli* at para. 108.
Deschamps presents an impassioned argument on why the Court should not defer to the legislative policy choice in question:

Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens.

For many years, the government has failed to act; the situation continues to deteriorate. This is not a case in which missing scientific data would allow for a more informed decision to be made. The principle of prudence that is so popular in matters relating to the environment and to medical research cannot be transposed to this case. Under the Quebec plan, the government can control its human resources in various ways, whether by using the time of professionals who have already reached the maximum for payment by the state, by applying the provision that authorizes it to compel even non-participating physicians to provide services (s. 30 HEIA) or by implementing less restrictive measures, like those adopted in the four Canadian provinces that do not prohibit private insurance or in the other OECD countries. While the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebeckers’ right to security. The government has not given reasons for its failure to act. Inertia cannot be used as an argument to justify deference.110

Deschamps’ portrayal of government inaction notwithstanding, the fact remains that the Chaoulli majority imposed a policy constraint on the Quebec government for its failure to resolve a particular policy problem (waiting lists) in part on the basis that other jurisdictions – other countries and four Canadian provinces – do not prohibit private insurance. As already noted, many of those jurisdictions face similar waiting lists regardless of that fact. Following Deschamps’ logic, had a section 7 claim originated from a province that had not prohibited private insurance, the Court could have imposed on that province the requirement that it did so. In other words, there appears no basis on which the majority relied on but their personal policy preference to allow the delivery of private health insurance.

In part, this judicial discretion stems from the problematic treatment the majority gives the evidence at hand in the case. Indeed, critics of the decision contend the evidence strongly supports the opposite conclusion – that the introduction of private health care is likely to increase

110 Chaoulli at para. 96 and 97.
costs and exacerbate the problems in the system rather than alleviate them. Even if the justices had determined the evidence was inconclusive, more restraint would have been appropriate. As Robert Charney notes, “the Supreme Court has held that in justifying legislation under Charter section 1 the legislature is not to be held to a standard of “scientific proof based on concrete evidence” but to a standard of “reasoned apprehension of harm.” When confronted with competing experts in disciplines such as economics, the courts must accept that there is no one “right answer” to many policy questions, and legislative deference is appropriate.”\footnote{Robert E. Charney, “Evidence in Charter Cases: Expert Evidence and Proving Purpose,” \textit{National Journal of Constitutional Law}, 16 (2004-2005). 5.} The McLachlin-Major judgment’s characterization of the law as “arbitrary,” however, essentially pre-determined the outcome of their reasonable limits analysis. As the justices themselves note,\footnote{Chaoulli at para. 155.} it is unlikely that any “arbitrary” law could ever be considered “rationally connected” to the objective and thus pass that stage of the \textit{Oakes} test.

The Court’s collective record in dealing with health policy issues, culminating in \textit{Chaoulli}, makes it difficult to agree with Arbour’s argument that review of social and economic rights claims is “no quantum leap from those associated with ordinary judicial review.”\footnote{Arbour, in Dialogue on Democracy, 175.} The justices’ treatment of the evidence in \textit{Chaoulli} stands as the foremost confirmation of Horowitz’s contention that certain policy problems “are beyond the capabilities of even the most able judges to handle well.”\footnote{Horowitz, \textit{The Courts and Social Policy}, 298.} For Manfredi, the case “is the entirely predictable consequence of a process in which the Court has progressively liberated itself from the ideas that there are fixed limits to its decision making capacity and that the Charter has any meaning independent of what judges give it.”\footnote{Christopher P. Manfredi, “Déjà Vu All Over Again: \textit{Chaoulli} and the Limits of Judicial Policymaking,” \textit{Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada}. Colleen M. Flood, Kent Roach, and Lorne Sossin eds. (Toronto: University of Toronto Press, 2005) 140.}
Chaoulli may stand as the paradigmatic example of how the Court is not well-suited to evaluating social science evidence, but the health policy cases leading up to Chaoulli set the stage for that decision by not explicitly addressing what the appropriate institutional roles ought to be in the determination of policies under the Charter. Chaoulli stands in many ways as a culmination of the Court’s evolving section 7 jurisprudence and its adjudication of previous health care cases more specifically. In addition to drawing on the “arbitrariness” standard from Rodriguez, the McLachlin-Major plurality also invoked Morgentaler as an important precedent establishing that delays in medical treatment violate security of the person.116 The minority judgment criticizes the majority for “extending too far the strands of interpretation” in Morgentaler, noting, “[w]e cannot find in the constitutional law of Canada a “principle of fundamental justice” dispositive of the problems of waiting lists in the Quebec health system. In our view, the appellants’ case does not rest on constitutional law but on their disagreement with the Quebec government on aspects of its social policy. The proper forum to determine the social policy of Quebec in this matter is the National Assembly.”117

Extending the logic of Morgentaler and adopting the arbitrariness standard in Rodriguez effectively gave the Chaoulli justices free rein to determine the acceptability of the policy at stake in the case. Cameron writes that the application of the arbitrariness standard “allows the Court to invalidate laws which are seen as fundamentally unjust.”118 In effect, it provides no obvious standard by which the justices would determine whether the law is in accordance with the principles of fundamental justice. Taken together with the problematic manner in which the McLachlin-Major plurality judgment treats the evidence in Chaoulli, it is clear that the decision rests on little more than their personal conception of what is just.

The impact of the Court’s decision in Gosselin also played a significant role in Chaoulli. As noted above, the majority in Gosselin refused to determine whether section 7 included positive

117 Chaoulli, at para. 167.
118 Cameron, “From the MVR to Chaoulli v. Quebec,” 141-2.
rights or imposed positive obligations on governments, but explicitly left the door open to the possibility. Despite their obvious concern that it was inappropriate for the Court to involve itself in the resolution of fact-laden policy debate in *Chaoulli*, the Binnie-LeBel minority judgment cited *Gosselin* in rejecting the argument of Quebec’s attorney general that section 7 was limited to matters relating to the administration of justice. This arguably severs the final string that may have attached the Court to the institutional logic it articulated in the *Motor Vehicle Reference*. Although they articulated concern about the values and policy choices at stake in *Chaoulli*, the justices in the minority still abandoned the notion of limiting section 7’s reach. This suggests the current Court’s justices are much more comfortable with the notion that there are no boundaries surrounding their powers of judicial review than their predecessors had been just two decades earlier.

I have argued that a more explicit consideration of institutional roles in social policy cases may lead to more principled decision making. This argument corresponds to the broader contention made throughout this dissertation that judicial role perceptions can and do constrain attitudinal decisions on the part of the justices. In the context of the health policy cases examined in this section, a consideration of the Court’s proper role in social policy cases is likely to lead to deference in instances where the policy effects are unclear, the evidence is not determinative or a balancing of competing values is at stake. Yet this is not a normative argument in favour of deference for its own sake. Development of a clear, role-based framework for approaching social policy issues (either within the confines of section 7 or, as it pertains to section 15 cases, within section 1), will provide legitimacy for those occasions where the Court can justify incursions into the social policy realm. The lack of attention paid to institutional roles and whether there ought to be boundaries around the Court’s powers of judicial review has made social policy cases clear sites of activity for the imposition of the justices’ personal policy preferences.

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119 *Chaoulli* at para. 196.
In chapter 3 it was noted that the Court has determined that section 1 is the appropriate site for the development of a “political questions” doctrine. The analysis here suggests that instead, the Court’s approach to reasonable limits analysis (within section 1 or in the internal limits provided by section 7) has in fact shielded the justices from a consideration of the division between judicial questions and political questions altogether. In part this is because, as noted above, the Court’s two-stage approach to Charter review, specifically its broad and generous interpretation of the rights themselves, encourages recourse to policy evaluation under the guise of its reasonable limits analysis. More importantly, the justices have tended to deal only with the particular policy issues at hand in each case instead of developing a framework by which to determine when the Court ought to make incursions into substantive policy or value-laden issues, when it ought to impose costs on governments, or even whether deference is warranted given the limitations of the judicial process to properly resolve such matters.

Defenders of the Court’s role in determining social policy issues argue that the policy impact of judicial decisions is limited. The most prominent expression of this claim is through the notion that judicial review of the Charter constitutes a “dialogue” between the courts and legislatures. The next section explores the theoretical and empirical basis for understanding the institutional relationships in this way. This exploration is important not only because of the debate over the Court’s role in social policy matters, but because the justices themselves have invoked the dialogue metaphor on several occasions in case decisions. Understanding judicial perceptions of the institutional relationships surrounding Charter review is thus important for several reasons. First, consistent with the approach adopted in the rest of this dissertation, a focus on judicial role perceptions allows for a deeper understanding of how and why the justices arrive at decisions. Second, if the dialogue metaphor is a useful indicator of how Charter review operates in practice, it may temper the normative concerns of critics of the Court’s role. Finally, it is worth examining whether, if at all, a dialogic understanding of judicial review on the part of the justices constrains the degree to which individual ideologies or policy preferences are a factor in decisions.
Institutional Relationships and the Notion of Dialogue

The most prevalent understanding of inter-institutional dialogue was first articulated in a 1997 article by Peter Hogg and Allison Bushell. The article was originally envisioned as a response to democratic objections to judicial review (specifically the “counter-majoritarian difficulty”). More importantly, given the analysis of the preceding section, the dialogue metaphor stands as a particular defence of court involvement in social policy matters. The authors state that judicial review should be viewed as “the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole.” Legislatures are said to be provided substantial latitude by virtue of the fact that many of the rights enumerated in the Charter have internal limitations (for example, section 7 protects the right to life, liberty and security of the person and “the right not to be deprived thereof except in accordance with the principles of fundamental justice”). Most significantly, all Charter rights are subject to the “reasonable limits” clause in section 1, which is viewed as the primary avenue through which legislatures can respond to judicial decisions.

Hogg and Bushell examine a selection of Charter cases in which legislatures responded to Supreme Court decisions. The authors state that dialogue “consists of those cases in which a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body.” Not surprisingly, given this broad definition, they find dialogue occurs in a substantial majority of cases. Hogg and Bushell also claim that in most cases only

minor amendments are required to respect Charter decisions and that the legislation’s original intent is thus rarely compromised.\textsuperscript{123}

The Hogg-Bushell account of the relationship between the Court and legislatures has produced a voluminous response from critics.\textsuperscript{124} One of the principal claims shared by many of these commentators is that dialogue fails in practice because legislatures routinely treat the Supreme Court’s decisions as the final word. Thus, the dialogue is really a judicial “monologue” about what policy prescriptions the Charter requires.\textsuperscript{125} One major problem that the dialogue metaphor suffers from is the metaphor itself. Dialogue connotes two-way communication in which the parties involved listen to each other, but the dialogue metaphor “maintains judicial supremacy as far as interpretive authority is concerned.”\textsuperscript{126} It is for this reason that some scholars advocate abandoning the judicial-centric understanding of dialogue in favour of alternative approaches. For example, Janet Hiebert’s “relational approach” envisions Parliament and the Supreme Court as each having distinct but complementary roles in ensuring that Charter values inform the legislative process. A key component of the relational approach is that each governing institution starts from a perspective that accounts for and reflects on the other’s judgment, and

\begin{thebibliography}{99}
\bibitem{123} Hogg and Bushell, “The \textit{Charter} Dialogue Between Courts and Legislatures,” 81.
\bibitem{125} Morton, “Dialogue or Monologue?”
\bibitem{126} Baker and Knopff, “Minority Retort.” 348.
\end{thebibliography}
that neither considers their position on the Charter values as the last word.\textsuperscript{127} Dialogue thus does not necessarily begin with judicial invalidation of a legislative initiative.

Hogg has written that he and Bushell “went too far” when they originally claimed that the dialogue metaphor successfully answered the counter-majoritarian objection to judicial review; nevertheless, he states that “we were surely right to say that our finding that the decisions of the Court were not usually the last word should at least transform the debate about the legitimacy of judicial review.”\textsuperscript{128} More recently, the authors argue that critics attack an “idealized” conception of dialogue, noting that they “never made the ridiculous suggestion that courts and legislatures were actually “talking” to each other.” Instead, their principal claim is that “Canada has only a weak form of judicial review, because Charter decisions usually leave room for a legislative response and usually received legislative response.”\textsuperscript{129}

The dialogue metaphor, then, is a descriptive statement on Charter review as opposed to a normative theory. Although underlying the debates about dialogue are the normative questions surrounding judicial review, the dispute over dialogue’s veracity is fundamentally an empirical question. Proponents and critics differ on what counts as dialogue and what tools are or should be available to legislatures in responding to Court decisions. Much debate has also stemmed from the justices’ adoption of the dialogue metaphor in several prominent cases. I will briefly specify the nature of the empirical disagreements and review how judicial references to the metaphor have tended to contribute to those disagreements. The remainder of this section will then focus on how the justices conceive of dialogue and whether their views on the metaphor might impact the extant debates.

One major critique of Hogg and Bushell’s original study is that the focus on instances of judicial nullification of legislation ignores other exercises of judicial power, especially

\textsuperscript{127} Hiebert, \textit{Charter Conflicts}.


particularly intrusive remedies like “reading in,” in which the Court explicitly adds new words to a statute in order to render it constitutional.\(^{130}\) The response to this concern is that legislatures are free to override such decisions by using the notwithstanding clause.\(^{131}\) Yet the reasonableness of this option is itself in dispute. The notwithstanding clause is only available in cases involving sections 2 and 7 through 15 of the Charter (sexual equality rights are also exempt because of the language of s. 28). More significantly, use of the clause is generally viewed as politically infeasible since the decision by Quebec premier Robert Bourassa to invoke it to protect the province’s language laws in 1988 amid intense debate over the Meech Lake Accord.\(^{132}\) Jamie Cameron writes that “the legitimacy of overriding constitutional rights has so quickly and so readily been marginalized that section 33 has effectively been consigned to dormant status under the Charter.”\(^{133}\)

Tsvi Kahana examines the use of the notwithstanding mechanism and finds that it has been used more often than thought; however, its employ has almost always been to pre-empt judicial review rather than express disagreement with judicial rulings on the Charter. Further, in most cases public reaction was virtually nonexistent because “these uses were both invisible and inaccessible.”\(^{134}\) Attempts to use the clause in more visible cases is practically impossible from a political perspective because rather than being viewed as an expression of disagreement with a Court ruling the clause is viewed as an “override” of the Charter itself.\(^{135}\) The idea of “overriding” rights so dominates general perceptions about the notwithstanding clause that Prime Minister Paul Martin attempted to salvage a faltering 2006 election campaign by promising to abolish

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\(^{133}\) Jamie Cameron, “The Charter’s Legislative Override:Feat or Figment of the Constitutional Imagination?” Constitutionalism in the Charter Era Grant Huscroft and Ian Brodie eds. (Markham, ON: LexisNexis Canada Inc., 2004), 167.


\(^{135}\) This point is also made by Jeremy Waldron, “Some Models of Dialogue Between Judges and Legislators,” Supreme Court Law Review 23(2d) (2004).
Parliament’s capacity to use it. 136 Mark Tushnet writes that the “limited use of section 33 itself suggests that there is little difference between the Canadian system and one in which the Constitutional Court’s decisions are final.” 137 Even former justice Frank Iacobucci has publicly stated that the clause’s “legality can’t be questioned, but one could question [its] legitimacy.” 138 Dialogue proponents respond by arguing it is unfair to blame the Court for the failure of the legislatures to invoke the clause. 139 This sentiment is fair enough, but it does not alter the political reality that as an “instrument” of dialogue, the notwithstanding clause is more pipe dream than pipe organ. Put simply, if it is not viewed as an option, then it cannot be considered an avenue through which legislatures take part in the dialogue.

Another major disagreement concerns whether all forms of legislative amendment constitute legitimate dialogue. Critics argue that instances where legislatures merely enact into law the Court’s policy prescriptions should not count as dialogue. Christopher Manfredi and James Kelly write that elected officials simply repealing offending sections or replacing entire acts is tantamount to “Charter ventriloquism.” 140 Proponents do not accept that cases in which a “constitutional defect” was “properly corrected” by the legislature should be discounted. They contend that precluding instances where legislatures have followed the prescription laid out by the courts invites too narrow a definition of dialogue: “after all, it is always possible that the outcome of dialogue will be an agreement between the participants!” 141

This response to Manfredi and Kelly’s contention is naïve because it seriously underestimates the powerful effect of the Court’s declarations on rights. Elected representatives face a tremendous rhetorical disadvantage in responding to rulings that claim the Charter has been infringed. Public debate surrounding the notwithstanding clause, for instance, illustrates that

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139 Roach, *The Supreme Court on Trial*, 193.
Court rulings are viewed as authoritative and that rather than being viewed as signalling disagreement over interpretation of the Charter, mere mention of section 33 implies that legislatures seek to “override” rights.\textsuperscript{142} Legislators face the same rhetorical challenges in attempts to enact amendments that differ from the dictates of judicial decisions. As Matthew Hennigar points out, “the government’s Charter review process does not occur within a legal vacuum, but typically involves bureaucratic actors attempting to gauge the courts’ likely response to legislation, based on existing case law. To this extent, there is usually, if not always, an external judicial influence on internal legislative-executive discussions of constitutional rights.”\textsuperscript{143}

The impetus is thus for amendments to reflect Court rulings.

This does not mean genuine agreement is impossible, but as Hennigar correctly points out, “genuine agreement and grudging compliance “look” identical.”\textsuperscript{144} The implications this argument has for how dialogue is defined and operationalized is clear: “dialogue requires a legislative response which dissents, to some degree, from the court’s ruling; that is, it must entail a creative element.”\textsuperscript{145} Thus it is difficult to classify as dialogue one of the Court’s most recent references to the metaphor – in a case\textsuperscript{146} in which it upheld Parliament’s response to an earlier decision\textsuperscript{147} striking down restrictions on tobacco advertising – because, as Grant Huscroft writes, “Parliament simply legislated in accordance with the parameters that the Court’s majority decision allowed. The Court did not just influence the democratic process; it dictated the content of constitutionally permissible legislation.”\textsuperscript{148}

Dialogue proponents also understate the actual policy impact of legislative amendments. Tushnet writes that in instances where legislatures enact reply legislation “the new legislation

\textsuperscript{142} The predominant view of the clause as an “override” of rights has been confirmed in analysis of media coverage. See: Emmett Macfarlane, “Terms of Entitlement: Is there a Distinctly Canadian ‘Rights Talk’?” \textit{Canadian Journal of Political Science.} 41(2) (2008).
\textsuperscript{144} Hennigar, “Expanding the “Dialogue” Debate,” 8.
\textsuperscript{145} Hennigar, “Expanding the “Dialogue” Debate,” 8.
\textsuperscript{148} Huscroft, “Rationalizing Judicial Power,” 60.
cannot accomplish precisely what the earlier one did, because the enhanced protection of constitutional values necessarily reduces the statute’s policy-effectiveness relative to the original.”

Huscroft points out that a judicial decision “creates powerful incentives and disincentives to political action that dialogue theory ignores.” He points to the inability of Parliament to pass new legislation regulating abortion after the Court’s decision in *Morgentaler* as a classic example in this regard. Finally, Hennigar’s study of government responses to lower court Charter decisions contradicts Hogg and Busnell’s suggestion that legislative sequels usually involve only minor changes.

Just as significantly, the amount of legislative room available to governments is uncertain because in those “second look” cases that have reached the Supreme Court, the justices have become strongly divided on how much deference to award amendments. Hogg and Busnell argue that the dispute in cases where section 1 applies nearly always lies on the issue of minimal impairment; therefore, “one can usually be confident that a carefully drafted “second attempt” will be upheld against any future Charter challenges.”

The first reference to the dialogue metaphor by the Supreme Court was introduced by Justice Iacobucci in *Vriend v. Alberta*, where the Court ruled unconstitutional the omission of sexual orientation from the province of Alberta’s human rights legislation. Manfredi astutely notes a certain irony that the metaphor was first cited in *Vriend*. First, because the legislation failed to meet the requirement that legislative objectives be pressing and substantial – dialogue is precluded. Second, the Court’s remedy was to read sexual orientation into the legislation, leaving little possibility of a response from the legislature. Manfredi suggests that “the utility of

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156 Hogg et al acknowledge that in this respect, *Vriend* was “unusual.” “Charter Dialogue Revisited,” 40.
the metaphor was its rhetorical value as a defense against democratic unaccountability rather than as a serious theory of judicial-legislative relations.”

R. v. Mills was the first second look case in which dialogue was invoked by the Court. In R. v. O’Connor, the Court ruled that defendants in sexual assault trials had a fair trial right to third-party medical and therapeutic records. The justices divided 5-4 over the rules governing the production of such records, with the minority emphasizing issues of privacy and equality to establish a much tougher test to determine the relevance of records prior to their admittance. When the federal government responded to O’Connor with Bill C-46, it developed guidelines that closely mirrored the position of the minority. When the new provisions were challenged in Mills, “the court had to confront whether it was willing to accept the obvious will of Parliament when that will was contrary to its own majority judgment.” In upholding Bill C-46’s constitutionality, Justices McLachlin and Iacobucci note that “Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups.”

On first glance, if any case was going to confirm Hogg and Bushell’s original argument that a democratic dialogue often informs the Charter review process, it would be this one. Interestingly, however, neither critics nor proponents of dialogue view the O’Connor-Mills sequence as a healthy reflection of how dialogue ought to occur. Manfredi and Kelly write,

If any dialogue occurred in Mills, it was an internal one among the justices about which O’Connor regime should prevail. The Court did not defer to legislative judgment in Mills, but merely affirmed a policy that four of its own members had constructed in 1995. Indeed, the “privacy shield” amendments were not the product of an independent legislative assessment of what might constitute optimal public policy, but of the government’s best guess about what policy might withstand judicial scrutiny.

157 Manfredi, “The Life of a Metaphor.”
160 For more details, see: Hiebert, Charter Conflicts, 107-16.
161 Hiebert, Charter Conflicts, 115.
162 Mills, at para. 58.
On the other side, Kent Roach describes Mills as an “in-your-face reply” and argues that the more legitimate response by Parliament would have been to invoke the notwithstanding clause.164

The combined effect of these views makes clear that the debate over dialogue is irreconcilable. Rather than viewing the justices’ reference to dialogue as a signal of respect for Parliament’s judgment, critics see the justices’ invocation of the metaphor as a convenient rhetorical tool with which they “could rally in the face of external criticism that they had usurped or unduly deferred to legislative power.”165 Proponents, meanwhile, hold steadfastly to a conception of dialogue that leaves little room for substantive disagreement from the legislative side, especially as it applies to the interpretation of particular Charter provisions. To admit otherwise, they say, would invite “interpretative anarchy.”166 For critics, then, dialogue describes deference or restraint;167 for proponents, dialogue describes any legislative response except those that would undermine judicial supremacy in interpretation. Under both conceptions, the metaphor is rendered meaningless.

Further exemplifying the barren nature of the dialogue metaphor are a series of cases that reveal strong disagreement among the justices about the extent to which dialogue should encourage deference towards legislative choices. R. v. Hall168 involved a challenge to bail provisions in the Criminal Code that were enacted in response to an earlier case169 in which the Court declared unconstitutional a provision authorizing pre-trial detention in the “public interest.” In a 5-4 ruling, the Court upheld the new provisions. Chief Justice McLachlin, writing for the

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164 Roach, The Supreme Court on Trial, 280-1.
167 Manfredi and Kelly explain the distinction between deference and restraint as a difference between the outcome of a particular case and whether or not that case still advances judicial autonomy or power. In other words, they argue, the Court can show deference by upholding provisions in the Criminal Code, but where those provisions pertain to judicial discretion over trial procedures, a deferential approach is not necessarily a “restrained” approach. Notwithstanding this distinction, it is fair to say that in many instances deference and restraint overlap. Manfredi and Kelly, “Dialogue, Deference and Restraint,” 338.
majority, called the case “an excellent example” of constitutional dialogue, noting that Parliament considered the Court’s earlier decision when drafting language this time around. Justice Iacobucci, by contrast, viewed Parliament’s response as an example of “how this constitutional dialogue can break down.” Iacobucci argued that the new provisions were crafted without due regard for the standards set out by the Court by simply introducing vague wording that effectively re-introduced the same unconstitutional element. Using particularly strong language, Iacobucci accused McLachlin of having “transformed dialogue into abdication.”170

A similar split is evident in a second look case on prisoner voting rights. This time, McLachlin took the view that Parliament’s response to the first case, Sauvé I,171 should not be accorded deference. In that case, the Court struck down a provision of the Canada Elections Act that disfranchised inmates in a short, unanimous decision that simply stated the law was drawn too broadly. Parliament redrafted the legislation to prohibit from voting those prisoners serving sentences of two years or more. In her majority judgment in Sauvé II,172 McLachlin wrote that constitutional dialogue “should not be debased to a rule of ‘if at first you don’t succeed, try, try again.’”173

Writing for the minority, Justice Gonthier argued that dialogue and deference to Parliament’s competing but equally legitimate conception of the values at stake in the policy was warranted:

I am of the view that since this case is about evaluating choices regarding social or political philosophies and about shaping, giving expression, and giving practical application to values, especially values that may lie outside the Charter but are of fundamental importance to Canadians, “dialogue” is of particular importance. In my view, especially in the context of the case at bar, the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values. Importantly, the dialogue metaphor does not signal a lowering of the s. 1 justification standard. It simply suggests that when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and

170 Hall, at para. 127.
173 Sauvé II, at para. 17.
democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament’s reasonable choices with its own.\footnote{\textit{Sauvé II}, at para. 104. Emphasis in original.}

\textit{Sauvé II} is significant in undercutting the dialogue metaphor in another respect, in that McLachlin’s majority judgment uses the unavailability of the notwithstanding clause (which does not apply to the voting rights under section 3) as a reason for \textit{stricter} scrutiny by the Court.\footnote{McLachlin writes, “The framers of the \textit{Charter} signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33’s notwithstanding clause.” \textit{Sauvé II} at para. 11.} Manfredi notes that “McLachlin could just as easily have interpreted the non-applicability of section 33 as a reason for judicial caution. Indeed, the dialogue metaphor would seem to support the view that judicial deference should \textit{increase} as the potential for dialogue decreases.”\footnote{Christopher P. Manfredi, “Strategic Behaviour and the Canadian Charter of Rights and Freedoms,” \textit{The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada.} Patrick James, Donald E. Abelson and Michael Lusztig, eds. (Montreal: McGill Queen’s University Press, 2002).} A strategic conception of judicial decision making might suggest that a policy-oriented justice would want to avoid legislative “override” of a judgment, and so might be more deferential in cases where it applies. However, Manfredi has persuasively argued elsewhere that there is evidence the Court has been willing to act more assertively after it became clear the notwithstanding clause was no longer a viable political choice.\footnote{Harper \textit{v. Canada} (Attorney General) [2004] 1 S.C.R. 827.}

Division among the justices over deference and dialogue persisted in \textit{Harper v. Canada},\footnote{Libman \textit{v. Quebec} (Attorney General) [1997] 3 S.C.R. 569.} where the Court voted 6-3 to uphold limits on third party spending in election campaigns. The legislation was the federal government’s response to the Court’s decision to strike down spending limits in \textit{Libman v. Quebec}.\footnote{Harper, at para. 63.} The majority in \textit{Harper} found that “broadly speaking, the third party election advertising regime is consistent with an egalitarian conception of elections and the principles endorsed by this Court in \textit{Libman}.”\footnote{Harper, at para. 63.} The justices in the minority agreed that Parliament went to considerable lengths to adopt non-intrusive means to pursue its
objectives; however, they stated that good faith, “said to be evidenced by the ongoing dialogue with the courts as to where the limits should be set,” was insufficient: “good faith cannot remedy an impairment of the right to freedom of expression.”

Not all of the cases in which the justices cite dialogue result in disagreement, although even in some of these cases the metaphor is linked to the idea of deference. Some of the justices have clearly come to view this as problematic. In *Doucet-Boudreau v. Nova Scotia*, the Court was faced with the question of what remedies are available under section 24 of the Charter in the context of minority language education rights. Justices Iacobucci and Arbour, writing for the majority in favour of a lower court judge’s ability to retain jurisdiction over a case to ensure compliance with his order, caution that “judicial restraint and metaphors such as “dialogue” must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated.” Most recently, McLachlin’s unanimous judgment in the second look case involving tobacco advertising restrictions states that “[t]he mere fact that the legislation represents Parliament’s response to a decision of this Court does not militate for or against deference.”

The disagreement among the justices about the use of dialogue and its conflation with deference is pronounced enough that even the metaphor’s original proponents have acknowledged that it may be best if judges did not refer to it in decisions. This argument is made most forcefully by Richard Haigh and Michael Sobkin, who argue that judges “can remain neutral observers if they only describe the metaphor, but they can also unintentionally change a simple metaphor into an analytical tool by being interfering observers and using the metaphor prescriptively.” The preceding analysis confirms the substance of their argument. Nevertheless, Haigh and Sobkin’s assumption that judges are, or should be, “neutral observers” in the purported

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184 *Doucet-Boudreau*, at para. 53
185 *JTI-Macdonald Corp.*, at para 11.
dialogue makes little sense. The dialogue metaphor may be a descriptive statement about the relationship between courts and legislatures, but the justices’ views on the relationship are certainly pertinent to their decisions regardless of whether or not they cite the metaphor.

Despite the extraordinary amount of attention devoted to the question of dialogue over the past decade, one facet that has not been explored outside of Court decisions are the justices’ views on the metaphor. Perhaps not surprisingly, some of the justices are themselves highly sceptical about how the dialogue metaphor has been invoked or used by their colleagues.\textsuperscript{188} One justice says it is a fine theory, but it does not work well in practice because it has been used to justify undue deference. “There are cases where the law is wrong and the government has to face it and change it … Dialogue yes, as a goal, but not necessarily dialogue.” This justice describes \textit{O’Connor} as the best example of dialogue, and \textit{Morgentaler} as an example where dialogue is impossible, noting “one should not sacrifice to dialogue his principles.” One of the key problems of the dialogue metaphor, this justice argues, is that it promotes the idea of restraint. “I don’t see why at the start of a decision you would say ‘oh, I have to be restrained.’” This is not a proper component of a judge’s role. “Restraint to me is not something that a judge should start with. It may be that in the course of things deference should be shown for one reason or the other. We [do] that regularly. But it shouldn’t be a principle that you start with.”\textsuperscript{189}

Other justices describe the metaphor as largely symbolizing the respect the Court should have for the respective roles of the legislative or executive branches. One justice states, “when you’re telling the legislature or the executive through a judicial outcome [or] decision, that they’re offside of the Constitution, you want to lower the temperature. You don’t want to get into adversarial kinds of relationships that have happened in other countries. There’s going to be tension, but I don’t think it helps anybody’s role – legislature, executive or judiciary – to say that somehow there is this adversarial nature to the functioning of each of the branches of

\textsuperscript{188} Interviews.
\textsuperscript{189} Interview.
government.” This justice argues it is a mistake to take the dialogue metaphor literally. “One of
my former colleagues [said] ‘what do you mean ‘dialogue’? We’re not talking to anybody.’
That’s just such an impoverished view of what I think dialogue is all about. It’s about trying to
have a proper amount of respect for each other’s roles. That doesn’t mean going crazy
deferentially or going crazy in an activist way. Because you get into all these debates about labels
and I think that takes you away from what the proper role of the judiciary is and what the proper
role of the legislature is. And there’s where political science is very important. This is not just
about lawyers monopolizing this conversation.”

A third justice argues that the metaphor is “useful in the sense that it points out that the
Charter is everybody’s business.” This justice says of Mills that the Court decided that Parliament
chose an alternative to the Court’s majority decision in O’Connor, noting that “in that sense, there
was a dialogue. They weren’t speaking to each other, but each had a view of what the other had
said and what the other was thinking about.” Despite this example, for this justice there are clear
limits to a dialogic understanding of review under the Charter: “where there isn’t a dialogue is in
the final resort, as regard the Charter framework. The Court’s decision is final. If the Court says
such a provision is contrary to the Charter, meaning contrary to the Constitution, it becomes
inoperable under the Constitution. And there’s no going against that, unless eventually you get the
Court to change its mind, which is highly unlikely.”

Another justice states, “I really wonder how much has changed with that notion of a
dialogue. What I always understood from that was that the Court should make an effort to
understand what Parliament was trying to do rather than substituting your own view … All it
really meant to me was that you had to carefully consider what it is that the government was
trying to say.”

190 Interview.
191 Interview.
192 Interview.
A fifth justice states “I think the term was perhaps overused over the years. I think it’s sending a message that courts would unduly defer. I think the real meaning of that is whether we like it or not the simple fact that we make decisions on legal issues impacts on the work of Parliament, of government sometimes, and triggers responses, changes in the law, changes in administrative process. Those responses sometimes generate other issues, other exchanges, in this ongoing process of interaction between courts and legislatures.” In this sense dialogue is a useful concept, but it has practical limits. “It’s a way to reflect the fact that in the Canadian state there is an interaction and interplay between the courts and the other branches of government. They will influence one another, sometimes through their own responses. And sometimes the dialogue falls flat.”

The distinction many justices make between “deference” to the other branches, on the one hand, and “respect” for them on the other, may strike critics as thin. For those critics who support the idea of a legislature having an equal say in constitutional interpretation (a notion referred to as “coordinate interpretation”), the view among the justices that the Court’s judgment is final with respect to the meaning of the Charter renders meaningless any talk of respect. Yet respect for the legislative process on the part of the justices might prove useful in terms of the inter-institutional relationship in two ways. First, the justices generally acknowledge that legislative preambles can sometimes be useful – though not determinative – in reasonable limits analysis. Janet Hiebert points out that a preamble can be used as an “education device” for courts as well as a “statement of parliamentary intent” in the event legislation is challenged. She notes that preambles are “a more honest and forthright way of attempting to justify a legislative objective than relying on government lawyers to speculate, after the fact, about the reasons behind a legislative decision.”

193 Interview.
194 Interviews.
195 Hiebert, Charter Conflicts, 94.
196 Hiebert, Charter Conflicts, 95.
Another signal of judicial respect for the legislative process is the remedy of suspended declaration of invalidity, where the Court strikes down unconstitutional legislation but suspends the effect of its ruling for a period of time (usually six to eighteen months) in order to give the legislature time to respond or to avoid potentially serious consequences from a vacuum in the law. First used in the 1985 *Manitoba Language Reference*,197 the remedy was originally intended for exceptional circumstances, but it has become quite common under the Charter.198

The extent to which the justices demonstrate sensitivity to the role of legislatures in this manner may reflect strategic considerations. Suspended declarations of invalidity are a useful legitimating function, in that they reduce the immediate impact of the Court’s incursion into policymaking. In this respect, such remedies, coupled with cursory acknowledgment of items like legislative preambles, might simply be new weapons recently added to the justices’ strategic arsenal to avoid more direct conflict or potential acrimony with the other branches. If the Court were too confrontational it might risk damage to its reputation or authority. This is a somewhat cynical interpretation, particularly because remedies like suspended declarations have real effects. For example, the Court granted the Quebec government a one-year suspension of its decision striking down the prohibition of private delivery of health care, allowing the province time to craft new legislation.199 This is something Roach argues demonstrates that “legislative paralysis is not the necessary Canadian response to judicial activism.”200

The expression of respect for the legislative role that justices find at the heart of the dialogue metaphor also serves to once again emphasize that the cornerstone for the inter-institutional relationship as it relates to the Charter is section 1. It is within the reasonable limits analysis that the Court is most likely to give strong consideration to the objectives of, and

justification for, legislative initiatives. As the analysis in this chapter demonstrates, however, a crucial component of the consideration justices give to the appropriate institutional boundaries at stake pertains to their competence or capacity to deal with complex policy issues and the evidence necessary to determine the effects of those policies. Considering the state of the Court’s jurisprudence in dealing with social policy matters, the rhetoric surrounding the dialogue metaphor is largely a facade. While more empirical work is necessary to evaluate the extent and nature of legislative responses to judicial decisions, the way in which the justices conceive of dialogue fails to correspond to the descriptive account put forward by its advocates.

Until the Court develops a more robust and explicit framework for addressing the institutional boundaries at stake in social policy cases, the fundamental concerns of critics of Charter review remain pressing and substantial. In many ways, despite these important concerns, the justices likely feel little pressure to develop an approach with more explicit attention paid to the legitimacy issues surrounding review. This is in large part due to the broad support it receives from the public. The analysis thus far suggests that judicial consideration of legislative roles, particularly in a context in which the notwithstanding clause is viewed as irrelevant, fails to place significant constraints on discretionary decision making on the Court. The next section explores whether and to what extent public opinion might influence judicial decisions.

**Public Perception**

An important component of the judicial role perceptions central to the approach in this dissertation is whether judicial considerations of the Court’s place in society influence how the justices operate. The public at large represents the Court’s most important audience. It is society to which the tethers of the institution’s legitimacy are tied. In this respect, the justices may make strategic decisions designed to ensure their continued legitimacy. Opinion polls generally reveal
the public has highly favourable opinions of the Court when compared to elected politicians.201 Nevertheless, there is ample evidence that the justices are sensitive to public perceptions of the Court and to the media or academic criticism that might affect those perceptions. This section explores public opinion as a constraint on judicial decision making.

Just over a decade ago, scholars of the Court noted that the “judges themselves have played very little role in the debate about judges and democracy; to do so would, from the perspective of most of them, draw them into the political arena in violation of the principle of judicial independence.”202 This has changed considerably. In the late 1990s, former Chief Justice Lamer was outspoken about the potentially deleterious effects of “judge-bashing” on the “fragility of the judiciary.”203 In 1999, Lamer wrote a letter to the editor of the National Post following an article highly critical of the Court to say he had been misquoted.204 Chief Justice McLachlin and some of her colleagues routinely speak or write on the subject of the Court’s place in democracy.205 More importantly, as noted above, the contemporary justices are much more likely to grant interviews to the media.

This relatively new engagement with the public is a response to the significant amount of attention, criticism and commentary to which the Court is subjected. A public dialogue that is too expansive can sometimes be risky, as the justices are occasionally accused of bias or ignoring judicial independence. As former Justice Iacobucci states, “Nowadays, when a judge, especially

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204 Roach, The Supreme Court on Trial. 88.
one of our court, gets up to give a public talk, he or she is poised between a cliché and a complaint to the Canadian Judicial Council.” Former Justices Wilson and L’Heureux-Dubé, and Chief Justice McLachlin have all been subject to complaints of feminist bias to the Canadian Judicial Council by the conservative group REAL Women, for public statements. Former Justice Bastarache was subject to CJC complaints by criminal lawyers and aboriginal chiefs after a controversial interview in which he criticized the Court’s record on aboriginal right. Although such complaints are usually dismissed, they raise the question of to what extent judges must restrain their public statements. Contemporary justices obviously feel compelled to engage in the debate about their role and the legitimacy of judicial review. At times, at stake in this discourse is the legitimacy of the institution in the eyes of the broader public. As a result, public perception of the Court might be viewed as having an accountability function or, to some extent, as being factor in decision making.

The justices interviewed for this dissertation are unanimous in claiming that public opinion generally does not influence their decision making. Nevertheless, they acknowledge that public opinion can sometimes be important because it provides an indication of societal values. Former Justice Bastarache states that public opinion matters “because the Court’s legitimacy can at some point be questioned if it’s consistently seen by a majority of people as going too far, as extending rights, as having sort of an agenda … The rule of law reflects a certain understanding of society’s concerns, and the Constitution is also a political document. And in that

209 For a discussion on this topic by a former Supreme Court justice, see: John Sopinka, “Must a Judge Be a Monk – Revisited,” *University of New Brunswick Law Journal*. 45 (1996).
210 Interviews.
sense I think it’s still a question of line drawing.” Former Justice La Forest writes that, “The opinion of the public generally can sometimes afford us considerable assistance. This is not to say that judges should be swayed by public opinion from applying long term community values, and particularly Charter values, in unpopular circumstances … Yet there are cases where even a generally wise court may be seduced by the attractiveness of its own logic to adopt a course that is not in the long term benefit of society.”

It is ultimately concern about public perception that might make the justices react to criticism from the media or academic circles. Roach writes that “there is some evidence that the Court has not ignored the critique of judicial activism that has swirled around it for the last twenty years.” He notes, for example, that the Court “appeared to back away” from its unpopular decision regarding the private records of sexual assault complainants in the O’Connor-Mills sequence. Dickson’s biographers note that “he was always sensitive to public criticism of the Court,” and note, for example, that it influenced his push to change the Court’s policy regarding interveners, as explored in chapter 3. F.L. Morton and Rainer Knopff contend that former Chief Justice Lamer hinted at his true reasoning in Morgentaler when he referenced public opinion on abortion in saying, “you should not make a crime out of something that does not have the large support of the community … Who am I to tell 50 percent of the population that they are criminals?”

Public, media and academic attention may influence particular cases and policy decisions, but that attention has also been attributed to broader patterns in the Court’s decision making. Former Justice McIntyre criticized his colleagues’ approach to the first 10 years of the Charter,

213 Roach, The Supreme Court on Trial. 89.
214 Roach, The Supreme Court on Trial. 92.
215 Sharpe and Roach, Brian Dickson, 388.
arguing that Chief Justice Dickson and others “responded to ‘the pressure of all the propaganda in the newspapers and the academic world, all the professors were writing articles and there was a certain amount of hysteria about it.” More recently, critics claim a more deferential approach of the Court under McLachlin is the result of attacks on the institution for perceived activism.

Former Justice L’Heureux-Dubé spoke out against this charge, but her answer implicitly confirms the effect of considerations given to broader societal context: “I don’t think we are bending to criticism. We are just taking the pulse of reality. We cannot ignore what happens in a society. We cannot ignore that there is a war against terrorism … it’s inevitable that the Court will be in sync with society. It would be totally unhealthy if the Court were [here] and society was there.”

Asked about the oft-stated axiom that the Court should not be too far ahead nor too far behind society, the justices generally agree with the sentiment, but cautioned that they cannot be held captive to the passions of public opinion. One justice states, “I think someone once said to me many years ago that the United States Supreme Court could not come out with a Brown v. Board of Education every month,” referring to that Court’s famous school desegregation decision.

The Court’s legitimacy is rooted in public acceptance of its decisions, even when those decisions are controversial in nature. According to this justice, “there are what I call badges of legitimacy to the judicial process.” These include competent appointments, independence and impartiality, a fair process in open court, transparency, and reasons supporting every decision for everyone to see and to criticize.

For this reason, this justice argues, some of the criticism the Court faces misses the mark. “The current debates about the judiciary have been very unfortunate. I think there is an assumption that the judiciary comes with one background, with agendas, etcetera.” The Supreme Court has to live up to its mandate to apply the law. “There are many areas where the legislatures

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217 Sharpe and Roach, Brian Dickson, 216.
219 Cristin Schmitz, “Our One-on-One with Justice Claire L’Heureux-Dubé,” The Lawyer’s Weekly. 22(3) (May 17, 2002).
220 Interviews.
refrain from taking action. That is a legitimate legislative decision. But courts cannot walk away from their responsibility to decide a case, to apply the law. [For example], in the same-sex area of cases, legislatures were not acting to provide sexual orientation as a ground for equal treatment. Courts felt compelled, and I think rightly so, to move in on that. Was that controversial? Yes it was controversial. And you do take risks in making unpopular decisions.” Returning to the example of Brown v. Board of Education: “There’s a fragile relationship between the people and the Court. The Court gains the acceptance of the people through its role. The people say they want to have a court that is the arbiter of disputes. It’s a civilized way of dealing with it. But if every decision the Court comes out with is going to be controversial, then you’re going to test that fragility of acceptance ... You hope that your reasons will not just attract support from the wider public over time, but if they don’t support it, enlightened people, informed people, will stand up [for the role of the Court].”

A second justice concurs with this sentiment. “I do not say that courts should seek controversy, but they should not shy away from the decisions that they think should be made because they would be controversial.” That said, this justice explains, the Court does not set its own agenda. “We keep in tune with society because society determines what comes before us.” Issues have had time to mature and develop in the “surrounding social milieu” before reaching the Supreme Court. A third justice notes, however, that “courts that are too distant from reality are not credible. It’s very important that the people believe in the institutions.”

A fourth justice frames the issue of the Court’s position vis-à-vis society in terms of values. “Where you have well-established values, they generally will be expressed in the first place in the most authoritative manner, in the law itself.” Controversy arises where values change or are changed in certain people. “My own view, generally, because [there are] exceptions, is that the Court should not recognize what we might call ‘emerging values’ until they have really

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221 Interview.
222 Interview.
223 Interview.
emerged. In the sense that the proper function of the Court is not to make law, but to apply the law that is being pronounced by the elected authorities.” In other words, this justice argues, “there is a rule of prudence, or precaution, that you don’t change the basic rules of a country or a society unless it’s clear that they have changed. But reasonable people can differ on whether that’s the case or not.”  

For the most part, the judges say they can identify which cases will generate the most attention or criticism.225 As one justice says, “generally speaking, with some experience, you can pretty well foresee what’s going to make waves or be controversial. Sometimes you get surprised. But there is a certain degree of foreseeability. Sometimes you think that a judgement is important and there will be barely a ripple. Other times more minor issues will be taken up.”226 Another justice states that, “we live in the community. It’s clear that we know that there might be some reaction.”227

Whether judicial perceptions of public opinion necessarily influence outcomes in particular cases remains unclear. Certainly, the justices’ comments suggest that public opinion serves as a broad restraint on the Court as a whole, preventing it from moving too far “ahead” or too far “behind” society in general terms. Further complicating this, however, is that some judges point to popular opinion of the Court itself in support of a more “activist” role:

We spent the last decade listening to a chorus of moaning over the fate of a majority whose legislatively endorsed wishes could theoretically be superceded by those of judges, only to learn in poll after poll that an overwhelming majority of that majority is happy, proud and grateful to live in a country that puts its views in perspective rather than in cruise control; who prefers to see judicial rights protection as a reflection of judicial integrity or independence rather than of judicial trespass or activism; and who understands that the plea for judicial deference may be nothing more than a prescription for judicial rigor mortis.228

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224 Interview.
225 Interviews.
226 Interview.
227 Interview.
Notwithstanding this sentiment, it is clear that judicial engagement in public debates is in part premised in ensuring the continued popular support of the institution. From this perspective, it seems obvious that on a broad level – if not in particular cases – public opinion exerts a degree of influence on the Court’s approach.

**Engaging the Media**

The Charter era bestowed a new prominence upon the Court; the magnitude of its decision-making authority and the nature of the issues it now confronts have fuelled debates about the institution’s role in the broader political system. The judges and other personnel at the Court have not been oblivious to this new scrutiny. The three chief justices who have sat during the Charter era have each recognized the virtue of enriching public knowledge about the Court, its role and the judges themselves.\(^{229}\) Thus the Court has increasingly opened itself to the public, particularly through the media.

The Court’s relationship with the media has changed dramatically over the last three decades. Chief Justice Bora Laskin gave the first media interview in the mid-1970s, and created the Court-Media Liaison Committee in 1981, which consists of three judges and meets several times a year to discuss ideas and complaints from media representatives.\(^{230}\) Since the committee’s inception, the Court has persistently deepened its rapport with the press through various initiatives, the most significant of which may have been the creation of an Executive Legal Officer (ELO) by Dickson in 1985. As noted in chapter 4, a great deal of the ELO’s work is to function as the Court’s media relations officer. In that capacity, the ELO provides not-for-attribution briefings to the press on judgments of the Court. Such briefings had been

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\(^{229}\) Bora Laskin sat for a couple of the first Charter cases, but did not participate in any of the judgments. He died in 1984.

“categorically rejected” by Laskin in the 1970s, and were viewed with some suspicion by several of the other judges when Dickson instituted them.231

Dickson’s openness stemmed from his concern that the Court not be accused of inaccessibility, or worse, threatened with lawsuits for better media access, even though some justices distrusted the media. According to his biographers, “it was inevitable that the media would shape public opinion about the Court and its work. In these circumstances, Dickson concluded that the Court should be open and as helpful as possible with the media.”232 In practicing what he preached Dickson was the first chief justice to grant regular media interviews, to release advance text of all of his speeches, and to debate on a public stage with his British and American counterparts.233 He even permitted cameras into the Court’s conference room, judges’ chambers and private dining room in 1985 for a documentary by the CTV network’s current affairs show *W5*.

While Dickson’s successor Antonio Lamer had opened up oral hearings to CPAC broadcasts in the 1990s, he was reluctant to go much further in the expansion of media access. When the Parliamentary Press Gallery first proposed in 1995 that the Court hold lockups to brief the media in advance of the release of a judgment, Lamer rejected the idea.234 Upon being named chief in 1999, Beverley McLachlin took another look at the concept. She held a wide-ranging press conference on November 5, 1999, itself an “unprecedented” event, shortly after being named chief, at which she stated that improved communication would be one of her key priorities for the Court.235

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233 Calamai, “The Media and the Court’s Public Accountability.” 293.
When the Press Gallery reiterated its request for lockups, some judges still had significant concerns about the process. They generally felt that no one should know the outcome of a case before the litigants. In response, the Gallery argued in letters to McLachlin that, “inaccuracies that result from the media reporting on judgments within seconds or minutes, without having the opportunity to read or understand the court’s lengthy and complex reasons, can hurt both litigants and the public and can be minimized by a lockup procedure.” McLachlin was apparently convinced. A memorandum of understanding was negotiated with the Gallery and a format for the lockups was created that roughly matched those that occur prior to release of the federal budget. Because some of the justices were still resistant to the idea, the process was first initiated as a pilot project to show that it could be executed in a manner that would prevent leaks. Further, the parties to the case must give consent and be given access to the judgment at the same time as the press, in a separate lockup. On January 30, 2004, 23 reporters from Canadian and international media outlets were participants in the first media lockup by a high court in the world. The process has now become entrenched, and lockups are typically held for controversial or widely covered cases, assuming the parties provide consent.

The extent of the ELO’s briefings with the media has also evolved; initially there were only post-decision briefings, but they are now commonly held before the start of a Court session, the day before a judgment is released, and the day before important hearings. Several of the former law clerks I interviewed who served prior to the establishment of lockups said they felt the media typically performed poorly in its the coverage of the Court and its decisions, but believe the institution of lockups appear to have improved matters significantly. Clerks who have served since contend the role of the ELO has been extremely important in helping the media “get it

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236 Schmitz, “Supreme Court Agrees to Test Pre-Release Media Lockups.”
237 Cristin Schmitz, “SCC Held First Media Lockup for its Spanking Judgment,” The Lawyer’s Weekly. 23(38) (February 13, 2004).
238 Sauvageau, Schneiderman and Taras, The Last Word. 201.
239 Interviews.
right.” Yet in their book on media and the Court, Sauvageau et al. point out that some critics believe the institutionalized relationship with the media can be problematic:

The trust that most journalists place in the ELO gives the [C]ourt enormous leverage. First, the executive legal officer reinforces the image of professional detachment that the court wishes to present to the public. Just as the [C]ourt wishes to be seen as being above the rancour and partisanship of the political world, the ELO is above the blatant spin doctoring that is found elsewhere in Ottawa. Second, the ELO’s main job is to point journalists to what the judges have written. The message that underlies all the ELO’s briefings is that the “reasons” behind a judgment, the arguments and the logic of the judges, are the story. Lastly, some would contend that by directing journalists to one part of a judgment and not another, the ELO has the capacity to set the media agenda.240

One former clerk feels that the media was at least partially guided by this process.241 Several other clerks argue that while the ELO’s briefings have aided accuracy in reporting, they have not been able to counteract a tendency among the press towards sensationalistic coverage.242

The justices receive daily press clippings (now in electronic format) of coverage of the Court.243 This indicates a concern with how their reasons are received by the media and public, and also an interest in external perceptions of the institution more broadly. Many of the justices are critical of the overall quality of the coverage.244 One justice notes the repetitive nature of much of the coverage, pointing out that news stories are typically run from the flagship paper of a particular organization, in which its smaller, regional papers later pick them up. “You get a sense that press coverage of the Court, and I believe of other matters, is essentially press coverage for perhaps four or five media organizations.”245

Several justices argue that the complexity of the decisions make it preferable to have journalists with legal training covering the Court, but they note news organizations have told them they do not have the resources to do this.246 One justice states that the media are fairly accurate in

241 Interview.
242 Interviews.
243 Interviews.
244 Interviews.
245 Interview.
246 Interviews.
describing the outcome of a case, but coverage is problematic in explaining the reasons. Two justices lament that Canada lacks a Linda Greenhouse – the former New York Times journalist responsible for covering the U.S. Court – noting her knowledge of the case law and ability to place decisions in context makes her analysis superior to that of any comparable Canadian journalists. Further, the justices find that the news media rarely explores dissenting opinions, even in 5-4 decisions.

One justice complains of exaggerated or sensationalistic coverage, noting this likely stems from the profit-oriented nature of the news media. Another justice says that at times, over-the-top critical media coverage may threaten the Court’s reputation and legitimacy. “I have been concerned that that is possible where the media chooses to be mischievous about what they report, and the harping for quite a while – I think it’s abated somewhat – on judges being unanswerable, being the final word, being unelected, running the country, overruling the government. That constant barrage could have a bad affect on people’s perception of the Court. On the other hand, you know the average person doesn’t pay a lot of attention to what courts generally do.” This justice notes, “I [also] think there’s the potential for harm when the reporting is not accurate.”

For an institution rarely in the public spotlight before the 1970s, the Court’s ascent to prominence during the Charter era has no doubt had many of its judges apprehensive at the thought of facilitating more exposure to the media and the broader public. Concerns for their independence, worries about politicization of the Court, and a distrust of the media among some judges all contributed to a generally cautious attitude towards reforms. It is clear, however, that one of the sources of the considerable growth of the Court’s staff is the initiatives that have been implemented to open the Court to public scrutiny. The Canadian Court has become a world leader

247 Interview.
248 Interviews.
249 Interviews.
250 Interview.
251 Interview.
in terms of the procedures it has established for exhibiting oral hearings and for dealing with the media.

While many judges now donate their private papers to the National Archives upon retirement, severe restrictions on public access mean that, with few exceptions, these documents will not be available to researchers until decades after the retirement date. Researchers of the U.S. Supreme Court have been able to take advantage of these types of records for some time, and have used them to explore all facets of decision-making at that institution. However, behind-the-scenes accounts of the American Court have also revealed blatantly political, ideological and strategic behaviour on the part of the justices, and it may be that the Canadian justices wish to avoid similar treatment. A handful of excellent judicial biographies have been written about Canadian Supreme Court justices in which the authors have had special access to such records. While they invariably show the very human element of the judicial role, these biographies provide a rich history of the internal workings of the Court and do little to tarnish the reputation of the justices. Nevertheless, the reason for precluding immediate public access to sensitive case records is obvious: protection of the integrity of the judicial decision-making process. Details of specific case deliberations, for example, must remain behind closed doors to safeguard the Court’s independence. The desirability, even right, of the public to know how important decisions are arrived at must be balanced with ensuring that judges can make difficult choices without fear of external pressure. For this reason, reasonable time limits on the release of archived documents are imperative.

Preservation of judicial independence is another reason the Court must be cautious in implementing any further changes in its relationship with the media. The desire to correct the public record when judges feel that the press has erred in its coverage must be tremendous. Yet if the Court were to publicly respond to every criticism or error in the media, or if the judges were to

252 The first, and most prominent example is Bob Woodward and Scott Armstrong’s account of the Court. See: The Brethren: Inside the Supreme Court. (New York: Avon Books, 1979).
hold regular press conferences, its ability to remain genuinely neutral or to at least appear ‘above’ the political fray would be lost. The Court’s legitimacy and authority rests on its reputation as an independent body whose decisions are based in law and reason. Nonetheless, as described above, the institution has developed formal mechanisms to facilitate an open dialogue with members of the press so that new initiatives, such as media lockups, can be discussed and considered. This relationship, in turn, has significant implications for public discourse surrounding the important issues confronted by the Court, given the media’s role in facilitating such debate.253

It is difficult to imagine the Court refusing to yield to the normative demands for more transparency given its heightened public prominence following the Charter. The decision to introduce media lockups was not without considerable hesitation. This caution is understandable. The Court, with its unique place within the broader political system, cannot allow itself to forfeit its independence as a result of demands for transparency and accessibility. Instead, the main goal has been to balance these factors.

Conclusion

This dissertation has advanced an approach to the study of judicial behaviour that emphasizes the importance of the justices’ perceptions of their appropriate role and that of their institution. This chapter’s discussion of the institutional relationships surrounding judicial review of the Charter reveals the importance of those considerations in several specific ways.

First, judicial consideration of the Court’s capacity to deal with complex social policy issues and the relatively indeterminate evidence often involved in evaluating them is directly related to whether justices see the distinction between such cases and those cases of more traditional judicial import as useful. In turn, this aspect of justices’ role perceptions tells us whether they see as appropriate some measure of deference with regard to particular policy

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matters or whether they see the boundaries surrounding the Court’s role in judicial review as essentially limitless.

Second, analysis of cases involving health care policy illustrate that where explicit consideration is not given to the question of whether courts are well-equipped to address complex social policy problems that permit a range of reasonable prescriptions, judicial decisions can more easily reflect judicial policy or ideological preferences, whether or not justices are acutely aware of the significance of their own positions. In this respect, the conclusions drawn here reinforce the arguments made by attitudinal scholars that ideological factors influence outcomes. The approach here demonstrates not just that attitudinal behaviour occurs, but how it is permitted to come about in the context of social policy cases.

Unlike the attitudinal model, however, the role-centered approach advanced here suggests that the effect of these individual preferences is consciously or subconsciously made possible because of a lack of explicit attention paid to institutional roles or a coherent framework that dictates when deference to legislative policy choices is appropriate. The justices have not settled on a framework that would force them to pay heed to what specific conditions might make the Court an appropriate venue for the settlement of value-laden or policy-intensive issues. Rather, they have determined each case with exclusive attention to the particular issues at hand on a piecemeal basis. The lack of guidelines dictating such factors as when the Court should impose direct costs on government resources or when deference to legislative choices is fitting in the event of conflicting or unclear evidence leave open a site of activity for attitudinal behaviour. This problem coincides with critics of the Court’s liberal approach to the law of justiciability and, as explored in chapter 3, is why some contend the Court ought to reconsider adopting a “political questions” doctrine. Thus the analysis in this chapter not only identifies the existence of attitudinal behaviour, but suggests that the imposition of personal policy preferences is most likely to crop up in those instances where judicial consideration of the appropriate institutional
roles wanes. Further, the examination of health care cases confirms the concern of critics and some judges that social policy cases are inherently problematic for the judicial arena.

Finally, the justices’ generally consign the notion of dialogue to the thin status of “respect” for the legislature. In crucial ways this respect aids the justices in ascertaining legislative intent (through the reading of preambles, for example) and provides a certain degree of leeway for legislative responses to judicial decisions (through remedies like the suspended declaration of invalidity). However, where conflation of dialogue with deference to legislative judgment is problematic in the sense that it threatens to dilute the Court’s role in enforcing the Charter, reducing the metaphor to the simple concept of respect leaves it empty of any substantial content that might inform us of the institutional boundaries that surround or ought to surround judicial review. Further, as a descriptive statement on the nature of judicial review that stands as a defence of the Court’s involvement in complex or controversial matters of social policy, the dialogue metaphor does not withstand scrutiny. Both of these conclusions are crucial in the context of the broader arguments in this dissertation to the extent that they imply judicial invocations of the dialogue metaphor are strategic. A strategic perspective suggests use of the dialogue metaphor is simply as a convenient, rhetorical tool to disguise what critics contend are unwarranted judicial incursions into the realm of policy.

This chapter also explored the justices’ consideration of public opinion and the Court’s relationship with the media. The prominence of the Court in the contemporary period, particularly following the Charter, placed pressure on the justices to open the institution and themselves up to increased scrutiny. Public debate about the institution’s new role has compelled some justices to engage the public, journalists and critics in debate and defend the exercise of their policymaking power. In this respect, public opinion is regarded as a measure of the Court’s legitimacy, and is something to be fought for. In another respect, public opinion is an important constraint on the general direction or posture the Court takes over time. The justices are generally unanimous that
the Court’s legitimacy would be at stake if a string of important decisions were grossly inconsistent with broad public sentiment.

Public opinion might be considered a constraint in several different ways. The justices may gain personal satisfaction from the knowledge that the public supports the institution or particular decisions they have made. Secondly, they may have a normative desire to protect the institution’s legitimacy or a belief that the law ought to conform to widely held social values. Finally, from a strategic perspective, the justices may not want any decision to engender such a negative reaction from the public as to justify legislative use of the notwithstanding clause. If the clause were to ever gain political viability in this manner, it could considerably reduce the Court’s policymaking power. As it stands, there is sufficient indication that public opinion may serve as a constraint in all three ways.
Chapter 7 - Conclusion

This dissertation has explored the Supreme Court of Canada from a historical institutionalist perspective. Rather than attempting to explain judicial behaviour through exclusive focus on the justices’ votes, the approach undertaken here has sought to place the work of the Court and its judges in their full institutional context. The examination of the Court’s evolution, its internal environment and the broader governmental and societal forces that surround the institution reveals a multitude of forces that help shape, constrain and constitute the justices’ decisions.

The primary lens of analysis has been the justices’ role perceptions. This permits a consideration not only of the impact of formal rules and procedures, but the norms, conventions and broader structural considerations that come into play when justices tackle the array of issues that come before them. The dominant approaches in the judicial behaviour literature in political science emphasize the judges’ primary goal as the pursuit of their ideologically-based policy preferences. While scholars adopting the behaviouralist attitudinal model or the rational choice-inspired strategic model of decision-making claim to explain a large majority of the Court’s decisions, I have argued that their methodologies provide a limited understanding of how the institution actually functions. The most fundamental problem with these models of decision-making is how they treat and operationalize the dominant object of study: ideology. Because the starting assumption is that the judges’ choices stem from their position on the liberal-conservative spectrum, vote outcomes that correlate with this rudimentary dichotomy are taken for granted, with little consideration of the various factors that may have a high degree of correlation or consistency with similar outcomes.

The long-term dominance of the attitudinal model in particular has resulted in conceptual problems arising from the ontological assumptions of those who adopt a behaviouralist methodology. Put simply, many of the role-related norms that help to shape judicial decisions are not directly observable or measurable, at least in a manner consistent with the supposed scientific
rigour necessary to satisfy those who believe valid social inquiry requires causal explanation via statistical prediction. The explanation-as-prediction approach is especially problematic given the questionable means by which attitudinal scholars obtain measures of judicial ideologies in the first instance, as explored in chapter 2.

Despite these methodological and theoretical critiques of the judicial behaviour literature, nothing in this dissertation denies that the justices’ backgrounds, personal values and ideological predilections play a significant part in decision-making. The force of these personal characteristics may vary to the extent that an individual judge acts upon them (in other words, some judges are more ideological than others). Further, a judge’s ideology may change over time and is often dependent on the type of issue or area of law at stake at a given moment or in a given context. Even within particular areas of law, individual judges may feel especially passionate about specific issues or cases while in others they may not hold strong feelings whatsoever.

More importantly, a host of personal, professional, institutional, and societal factors have both independent and interdependent influence on judicial decisions as well as the ideology, values or idiosyncratic personality quirks a judge possesses. An approach to the study of judicial decision-making that uses ideology as the dominant lens of analysis is thus problematic. The judicial role conceptions that serve as the central foci for this study, embedded in an historical institutionalist analysis, permit a more comprehensive investigation into the myriad interconnected factors that influence the Court’s decisions. While this focus helps to account for the legal factors that other political science approaches fail to consider properly (or completely ignore), this is not a purely legalistic understanding of the judicial role. As the analysis in this dissertation reveals, the Supreme Court is properly understood as a political institution.

This new institutionalist conception of the judicial role has three broad components. The first relates to the justices’ views of the proper role of the institution itself. A common refrain among judges defending themselves against the charge of undue “activism” has been that the responsibilities they bear were thrust upon them, particularly through the advent of the Charter of
Rights.¹ It is certainly important to recognize that the elected branches of government put in place the means by which the judiciary could strike down laws and government actions that contravene the principles enshrined in the Constitution Act, 1982. Further, Parliament enacted statutory changes prior to and after the Charter that dramatically altered the manner and overall importance of the issues that come before the Court. For example, the justices were given broad discretion in choosing which cases to hear.

Within this context, however, the justices themselves made a series of choices that helped transform the Court from a primarily adjudicative body to a full-fledged political institution. As chapter 3 explores, the justices dramatically liberalized the law of justiciability, the admittance of third party interveners into the process, and the type of evidence they are willing to consider in the course of making decisions. These decisions sent signals to the legal community and to interest groups that the Court was an open venue in which they could pursue their political goals. Additionally, the Court’s expansion of the law clerk program and the manner in which many justices now use their clerks has been compared to the policy-making process and structure of the Prime Minister’s Office and the Privy Council’s Office.²

In short, the Court’s transformation was the result of reciprocal forces external and internal to the Court. The avenue for this transition was paved in large part by the constitutional initiatives of the federal government. Yet it is the justices that ultimately determined the scope, depth and tenor of the Court’s handling of issues under the Charter. The very fact that there were sharp divisions among the justices with regard to issues like justiciability and third party interveners demonstrates that the Court’s current approach and process was not wholly imposed on the Court by outside forces or in any other way preordained.

The second component of the judicial role pertains to how the justices view their individual role within the institution. This extends far beyond the simple perspective of whether the judges consider themselves “law-interpreters” or “law-makers,” or even how much they may allow their personal values to intrude on decision-making. As explored in chapter 5, a host of considerations play into their individual role when making decisions. These include, for example, the extent to which they strive to achieve consensus (or unanimity) with their colleagues. As examined in relation to the Court’s equality jurisprudence, the extent to which compromise and unanimity is sought has deep repercussions for subsequent cases.

Also important is the individual style or approach judges take to collaboration, such as a propensity to have informal, face-to-face discussions with peers or a preference to maintain primarily formal communication by way of written memoranda. Depending on the mix of personalities on the Court at a given time, congeniality (the degree to which the justices get along personally) can have a considerable impact on collegiality (how the justices work together). While “like minds” tend to congregate within the working environment, the extent to which they come to represent visible and entrenched divisions on the Court depends deeply on the approach taken by individual justices and on the leadership style of the chief justice.

Role theory is also useful for identifying which stages of the decision-making process and under what conditions sites of activity for attitudinal or strategic behaviour are likely to emerge. The process of deliberation and negotiation on the Court is closely intertwined with norms of collegiality and rules of convention. For example, the chief justice’s ability to select panels for cases is largely dictated by widely shared views on when it is proper to compose a panel of less than the full nine members of the Court. Where attitudinal or strategic behaviour materializes, it usually coincides with those areas where consensus regarding such norms or conventions breaks down. This is especially apparent, for example, in the debate over the degree of “lobbying” that takes place between justices.
The third perspective of the judicial role involves a consideration of both the Court and the individual justice in relation to broader government and society. The strategic literature emphasizes the degree to which justices must consider the preferences and actions of the other branches of government. Stressing the strategic element of these considerations too much, however, can overlook the variety of motivations at play when judges contemplate the different roles of other governmental institutions. Judicial motivations extend beyond policy considerations, and include concern for the quality of the jurisprudence, media and public criticism, and the legitimacy of the Court itself, personal reputation, and esteem from the legal and wider community.\(^3\) Further, the justices’ decisions may reflect genuine, rather than strategic, regard for other factors. For example, they have normative understandings of the appropriate place of legislatures in making policy choices. This shapes not only the degree of “deference” they give to those institutional roles, but the reasons for and type of action they choose to take.

In relation to the Court’s external context, the question of institutional capacity is one that most judges do consider, but that is rarely explicitly addressed in the Court’s jurisprudence. Judicial conceptions of the Court’s capacity for dealing with complex social policy matters correlate to the idea of a distinction between those cases and others that are viewed as belonging to a more traditionally “legal” domain. This has generally resulted in deference to legislative choices implicating issues of redistribution or program design. An investigation into the Court’s jurisprudence in social policy cases suggests that the justices do not explicitly ground their decisions in a framework that considers institutional roles or the question of whether there are boundaries to their power to review matters under the Charter. This has resulted in a piecemeal and uncertain approach, opening a site of activity for the justices to impose their personal conceptions of the just outcome on an issue-by-issue basis.

The justices’ differing views thus have implications for decisions and how they in turn conceive of the Court’s relationship with the other branches of government. As chapter 6 also explores, where some scholars view the dialogue metaphor as the dominant theoretical understanding of Charter review, the justices tend to view it as little more than an elaboration of respect for these institutional roles. The fact that dialogic review in their eyes does not resemble a process with the communicative significance its proponents suggest has important ramifications for how scholars should evaluate the Court’s policy decisions. Moreover, the analysis of the metaphor suggests that it fails as a defence to critics’ arguments that judicial involvement in social policy matters is problematic.

The role-centric, historical institutionalist approach undertaken in this dissertation allows for a deeper description and analysis of what is, and what should be regarded as, a complex institutional context. It is important to emphasize that this study is largely a qualitative enterprise, and it does not claim to explain specific case outcomes generated by the Court. Many recent book-length behavioural or statistical studies of the Court exist, and this study draws upon them where relevant. What this dissertation reveals is the importance of a richer understanding of the institution, how it operates and how it is affected by the broader context in which it is situated.

The dissertation sheds a new and important light on justices’ perceptions of their role and responsibilities in the contemporary period. Despite important changes that improve transparency in how justices conceive of their roles and on the procedures that govern their function, the Supreme Court of Canada remains a secretive place. The Court’s law clerks are said to be “sworn to lifelong silence” about their year-long tenure with the institution. The stringent standard of these confidentiality agreements and the great concern the institution has in enforcing them came

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to light in June, 2009, when the Court’s executive legal officer issued a warning to more than 500 former clerks that participation in a survey sent to them by an American political scientist would place them in breach of their agreements. In an email to the clerks, the Court maintains that confidentiality obligations “are not limited to information about cases, but also extend to internal processes of each Justice’s chambers.”

As a result, until or unless the Court reassesses questions of access, this dissertation represents the first and last comprehensive examination of the internal workings of the Court that takes advantage of a substantial number of interviews of former law clerks. The confidentiality agreements limit access to information the Court feels is sensitive. Contrary to the assertions of one former clerk who claims that information about case assignments and the clerks’ work “is trivia of no scholarly value,” the analysis presented here reveals how the various processes imbedded in the Court’s decision making can serve to constrain or shape certain types of behaviour. Further, given the importance of the Court’s work, the extent of the law clerks’ influence over substantive case outcomes is worthy of study.

Despite the relatively controversial and secretive nature of the clerks’ confidentiality agreements, I would be remiss in not again acknowledging the interviews I was able to conduct with five justices and two other staff members. The Court’s justices rarely make themselves available in this manner for scholarly work. Much like their decision to have more regular contact with the media, the willingness of some justices to allow these interviews speaks to their recognition that enhancing our general understanding of the institution is a meaningful exercise. This dissertation has benefited greatly from their participation.

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7 Makin, “Top Court Orders Clerks to Keep Quiet.”
8 Perhaps the three most prominent examples are: Songer, The Transformation of the Supreme Court of Canada; Florian Sauvageau, David Schneidermann, and David Taras, The Last Word: Media Coverage of the Supreme Court of Canada. (Vancouver: UBC Press, 2006); Ian Greene et al, Final Appeal: Decision-Making in Canadian Courts of Appeal. (Toronto: James Lorimer & Company Ltd., 1998).
Implications and Future Research

This dissertation adopts an approach to the study of judicial decision making that accounts for the complexity inherent in understanding how an institution like the Supreme Court of Canada operates. One of the primary implications to draw from the analysis and conclusions herein is that it is possible to build bridges between the dominant theories in the scholarly literature. The process driven, historical, role-centric approach adopted here identifies when and under what contexts attitudinal or strategic motivations are likely to emerge on the Court. Rather than seeking to emphasize the key factor in judicial decision making, such as ideology, this approach may foster a more ecumenical framework from which to analyze the work of multi-member appellate courts. As noted above, future research applying this approach in the comparative context would prove fruitful.

Beyond this theoretical and methodological contribution, the analysis presented here has several practical implications. The first concerns the appointments process. The ability of the federal executive to select judges for the Supreme Court is the most significant power any of the elected branches of government have to influence the institution’s work. Attention to the policy-making role of the Supreme Court has in recent years generated demands for reform to the appointments process, which up until now has been conducted entirely behind the scenes and left to the discretion of the prime minister.9 The March 2006 appointment of Justice Marshall Rothstein by Prime Minister Stephen Harper was the first in Canadian history to include a public hearing in which an appointee faced questions from representatives of the four political parties in the House of Commons. The hearing was moderated by constitutional expert Peter Hogg, who informed the committee that Rothstein would not answer questions about controversial issues or hypothetical cases. The process has been lauded for making the selection procedure more transparent, for its relatively non-partisan feel (in sharp contrast to U.S. nomination hearings), and

9 The only statutory limitations are that an appointee must be a member of the bar of a province for at least ten years, and that at least three of the judges on the Court at any time must be from Quebec.
for its potential to educate the Canadian public about the nominee and the Court itself.\textsuperscript{10} Nevertheless, the Harper government failed to follow a similar process when it appointed Justice Thomas Cromwell in 2008, leaving the status of reform to the appointments procedure in doubt.

Opening up the appointments process to more public scrutiny is a controversial prospect, particularly in legal circles. Many of the Court’s justices have spoken out against any reform that would risk “politicizing” the Court or emulating the partisan American process.\textsuperscript{11} It is important to point out, however, that just because the long-standing process of appointments has not been subject to public scrutiny does not mean it has somehow escaped politics. The very lack of transparency in the process prevents the public from knowing what factors are significant when appointments are made, including perceptions of a potential justice’s ideological leanings.

More importantly, the analysis in this dissertation provides ample evidence that there exists a host of questions that might be posed to nominees regarding how they conceive of their role without treading into the more controversial waters of asking about their policy preferences or about hypothetical cases. Posing questions to nominees about how they balance the tension between individual and collective decision making, what emphasis they might place on unanimity, or how they believe they ought to treat conflicting social scientific evidence in cases is unlikely to risk damage to the nominee’s reputation or a descent into partisanship surrounding the appointment. Such questions would, however, shed further light on how the Court operates and how individual justices approach their work.

Another practical effect of the analysis in this dissertation is that it sheds light on how judges approach particular aspects of the decision making process that may benefit individuals or groups that come before the Court. Particularly pertinent in this regard, for example, is the discussion in chapter 4 concerning what factors the justices consider important when deciding whether to grant leave to an appeal, how the justices approach the oral hearing, what type of

\textsuperscript{10} See, for example, Hausegger, Hennigar and Riddell, \textit{Canadian Courts}, 141-3.

\textsuperscript{11} Included among these is Chief Justice McLachlin. See: Cristin Schmitz, “McLachlin Enjoys Job, has No Thought of Retirement,” \textit{The Lawyers Weekly}. 24(15) (August 27, 2004).
questions they pose to counsel and the best way litigants can have an impact. Chapter 6 also confirms for individuals and interest groups the intuitively obvious idea that public opinion and media coverage can be important to the justices. While the analysis does not suggest that waging a media campaign could in any way convince the Court to decide a specific case in a particular way, it does make clear that the Court is in no way isolated from its broader political environment or completely immune to the overarching effects of popular opinion.

Knowledge of how the justices conceive of the institutional roles relating to review of the Charter and having a better understanding of how they view the dialogue metaphor might also prove useful to governments seeking to defend legislative initiatives before the Court. Existing scholarship makes clear that Charter considerations play a significant role in the legislative process.12 Because some judges are hesitant to make incursions into policy areas that implicate competing values, governments may want to be even more explicit about the underlying values dictating their policy choices when passing legislation and when defending the reasonableness of those policies if they are challenged Charter grounds. The fact that the Court’s Charter jurisprudence has evolved in a manner that has made the justices less apprehensive about adjudicating social policy issues might also encourage governments to consider under what circumstances it might be plausible to revisit use of the notwithstanding clause. Rulings as controversial as the one in Chaoulli13 might make it feasible to invoke section 33 without sparking a public backlash.

Finally, the findings explored in this dissertation have implications for normative debates about judicial review in Canada. One of the starting premises for this study has been that arguments over judicial “activism” and the impact of the Charter have occurred without a sufficient understanding of how the Supreme Court actually operates. The analysis presented here is unlikely to change the minds of those engaged in debates over whether judicial review is

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12 See, for example: James B. Kelly, Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent. (Vancouver: UBC Press, 2005).
sufficiently democratic or whether courts are the proper fora for the resolution of social policy issues. Nevertheless, this study confirms two of the central arguments put forward by both sides of these debates. First, as critics of the Court’s role under the Charter contend, decision making on the Supreme Court is intrinsically political, not only because it is enmeshed in substantive policy issues but because the justices have substantial discretion in settling the issues that come before them. Second, and on the other side, decision making on the Supreme Court is distinct in form and substance because the justices are bound by a host of procedural and legal rules, and by a set of role-related norms and conventions which constrain and shape the extent to which their decisions are merely representations of their personal policy preferences.

These two basic points are neither surprising nor novel. What this account of the institution offers, however, are specifics about the various motivations justices carry and under what contexts different factors become particularly influential. Normative or prescriptive scholarship might be able to draw on the empirical findings in this study to develop more specific arguments about how to better reconcile the institutional relationships and tensions inherent in judicial review.

Many of the issues and themes explored in this study require further investigation. As access to the justices’ private papers opens up over the course of the next decade, more investigation into the extent of attitudinal or strategic behaviour on the Court will no doubt be undertaken. Different elements of the justices’ role perceptions should also be placed under further scrutiny. For example, in depth case study research exploring the effect unanimity has on the depth and scope of judicial decisions is important given the high rate of consensus on the Court. Additionally, scholars might further inquire into the relationship between public opinion and judicial decisions.

More empirical work into the policy impact of the Court’s decisions is particularly warranted, given that the influence judicial decisions have on policy matters is bound up in the question of the institution’s competence to resolve them. Despite the fact that the analysis in
Chapter 6 suggests the dialogue metaphor is devoid of substantive meaning from the judicial perspective, the basic notion that legislatures have ample opportunity to respond to the Court’s rulings warrants empirical investigation. A systematic examination of legislative responses to judicial invalidation of statutes by the Supreme Court would identify the extent to which the elected branches are able to respond to judicial rulings on the Charter. Such an analysis would consider whether legislatures merely follow the Court’s policy prescriptions (or even fail to respond at all) or whether amendments are made that could require the Court to take a second look at the policies if they are challenged under the Charter again. In-depth case study research on specific policy areas to evaluate more carefully the effect judicial interpretations of the Charter have on particular policies is also worthwhile.

The intention behind this study is not to provide the definitive word on judicial decision making, or even on the Supreme Court of Canada. Its more modest aim is to develop an approach that examines the institution in a way that captures the multitude of factors that explain how justices arrive at decisions. Using judicial role perceptions as the central lens of analysis allows for an approach that does not focus solely on judicial votes or emphasize single variable explanations, such as ideology. As a result, a host of factors internal and external to the Court are viewed as having an important influence within the various stages of the decision making process. This prompts the development of a thick, descriptive account of the institution, something that makes it impossible to explore each theme or factor so thoroughly as to preclude the need for more future research. Indeed, it is my hope that this study will serve as a starting point for research into the many facets of the Court’s decision making.

14 An appendix to a recent article by the scholars who first articulated the dialogue metaphor in the Canadian context lists types of legislative responses for all instances in which a law was invalidated by the Supreme Court on Charter grounds (66 instances through March 2006). However, there has been no systemic evaluation of the substance of such responses. This is particularly important given that critics of dialogic review do not consider amendments that simply follow the Court’s prescriptions to count as “genuine” dialogue. Peter W. Hogg, Allison A. Bushell Thornton, and Wade K. Wright, “Charter Dialogue Revisited – Or “Much Ado About Metaphors”,” Osgoode Hall Law Journal. 45(1) (2007).
In addition to more empirical work, the approach taken here encourages explicit attention to the development of theory and the consequences of particular methodologies in the study of judicial behaviour. Although one basis for this project has been to develop a critique of the dominant methodological approaches in the literature, I have sought to build bridges between the underlying theories implicit in each of the main approaches in political science scholarship. As noted in chapter 2, James Gibson has provided an oft-cited definition of how judges decide: “judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.”15 The attitudinal model has emphasized what judges prefer to do and the strategic model has incorporated what judges perceive is feasible to do. The aim of this project has been to incorporate what judges think they ought to do, without discounting the other two factors. I believe that attitudinal, strategic and legal scholars will all benefit from attention to the competing theories and will in turn continue to refine their own approaches. The main conclusion to be drawn from this dissertation is that a consideration of judicial role perceptions can greatly aid the development of such theory-building in the broader judicial politics literature.

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