JUDICIAL DISAGREEMENT ON THE SUPREME COURT OF CANADA

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Bachelor of Arts, University of Lethbridge, 2001

A Thesis
Submitted to the School of Graduate Studies
Of the University of Lethbridge
In Partial Fulfillment of the
Requirements for the Degree

MASTER OF ARTS

Political Science
University of Lethbridge
LETHBRIDGE, ALBERTA, CANADA

I dedicate this thesis to my husband, Greg; whose unconditional support kept me sane and words of encouragement brought me back from the abyss.
How very lucky I am.

Abstract:

This paper will attempt to explore the history and function of judicial disagreement behaviour using information from both the Canadian Supreme Court and the US Supreme Court. The evolution of national high court decision making, highlights the changing role of courts within the political and public spheres, as well as the increasing authority courts have over policy. This changing role reinforces the need to study the role of courts on law. I will use minority opinions from the Laskin and Dickson courts to study what disagreement reveals about the decision making process. Judicial disagreement has largely been summed up into two deficient stereotypes: the dissent as "serious" disagreement and the separate concurrence as inferior disagreement to the dissent. I will dispel this fallacy by introducing the five categories created to describe a new way of thinking about judicial disagreement and to shatter the old stereotypes.

Acknowledgements:

This thesis could not have been completed without the tremendous support and knowledge of Dr. Peter McCormick. Thank you for trusting me with your idea and for being my most valuable resource.

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Chapter I
The Evolution of National High Courts

The recent appearance of more activist and powerful national high courts in democratic nations around the globe has generated a multitude of questions regarding the role of supreme courts within civilized society. As the highest appellate court in the nation, the Canadian Supreme Court represents the pinnacle of judicial decision making, but the modern Supreme Court is no longer just about interpreting the law, but is evolving into a dynamic and multifaceted institution capable of law creation. The judiciary has recently found itself the object of public scrutiny regarding the judicial appointment process. Demands are being made by different actors to make the appointment process more transparent and less unilateral instead of at the sole discretion of the Prime Minister. The Supreme Court has faced numerous legitimacy and accountability challenges in the last thirty years, all of which have contributed to the evolution of the institution into the modern day high court seen today. I will first start with a brief examination of the history of the Supreme Court in Canada and follow with a description of the emergence of the modern day Supreme Court. The purpose of which will lead to an explanation of the decision making process of Canada's highest appellate court through the analysis of the minority opinion.

As constrained, strategic decision makers, Supreme Court judges have become active participants in the political game, exercising significant influence over the development of the law and political policy. The practice of judicial review provides the courts with the authority to declare government statutes null and void if deemed unconstitutional, essentially allowing the judiciary a final say over certain government

policies. The power of judicial review is not a new phenomenon, but has existed since the beginning on both the Canadian and the American Supreme Courts. However, it is only the last half of the twentieth century that the degree and scope of this tool has proven to be so controversial. The United States Supreme Court provides a template for national high courts around the world, having used human rights legislation and the power of judicial review to create a highly activist tribunal determined to champion the protection of civil liberties and human rights in the US. The socially progressive court debuted in the United States during the early 1950's under the leadership of Chief Justice Earl Warren causing a shift in judicial authority resulting in a trend duplicated by many international democracies. The Warren Court facilitated the American "rights revolution"[1] that forever changed the face of civil liberties in the US, but greater still was the emergence of the modern activist court. The *Bill of Rights* helped carve a distinctive niche for the Courts within the political sphere by creating the judiciary as protector of civil liberties. This phenomenon, referred to as the judicialization of politics, has the decisions of the Court impacting public policy which has traditionally been a responsibility reserved for governments and legislatures. The US experience sparked the interest of Canadian Prime Minister Pierre Trudeau, who would be a key figure in Canada's judicial reformation. Emulating the American "rights revolution", Trudeau's ambitious vision for a stronger judiciary was realized vis-à-vis his judicial appointments to the Supreme Court, both who and what type of judge was selected, and the patriation of the Constitution including the entrenchment of the *Charter of Rights and Freedoms.*

[1] See Charles Epp's book, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspectives.* Chicago and London: The University of Chicago Press, (1998).

These developments helped shape the modern Supreme Court of Canada, bringing it in line with our American counterparts.

The evolution of the modern Supreme Court introduces the first main question of my paper – why is the role of national high courts in democracy worth studying? Once it has been established that high courts merit examination, this will lead into the second and more important portion of my paper - why focus on disagreement behaviour and how does it factor into the role of national high courts?

The final judgment of a case epitomizes the judiciary's adjudicatory function, with the written reasons concluding the Supreme Court's responsibility with any given legal action. There are a number of theories that attempt to explain the judicial decision making process through an examination of either judicial attitudes, institutional constraints or the collegial nature of court life. The three dominant approaches, the attitudinal, institutionalist and strategic, attempt to shed light on why and how judges make decisions. I endeavor to use disagreement behaviour in the same way, by using the minority reasons to provide a more comprehensive picture of why judges decide the way they do and what process led up to the final outcome. With an increasing capacity to influence the direction and potential outcomes of public policy with the authority to declare null and void certain legislative material, Courts enjoy unprecedented power. Public scrutiny, government criticism and open debate regarding the role of courts in democratic society have made the judiciary more visible, calling into question many aspects of the institutions seemingly undemocratic nature and legitimate authority over the Constitution. Is it right for an appointed nine-member institution to wield so much

power? Despite the Supreme Court's rather high approval rating[2] the judiciary faces a number of serious criticisms regarding its independent, unaccountable position within the democratic framework. The Court's expanding influence over policy and law draws public attention to the workings of the judiciary that previously went unnoticed. As concerned citizens it is our duty to question the functioning of political institutions and to ensure that the checks on power are effective. If the Courts are meant to act as a check on the tyranny of government, than what is protecting us from the tyranny of the Courts?

The latest explosion of judicial activism on the modern Supreme Court is evidence of a growing political force emanating from the bench. This phenomenon breaks from the traditional view of the judiciary as simply interpreters of law. The creative judge signifies the arrival of a new way of thinking about the judiciary as a collegial body with a clear law-making function. The certainty of legal precedent is no longer taken for granted, but instead replaced by the acknowledgment of more than one potentially correct legal interpretation. With greater legal uncertainty and indeterminacy comes greater space for disagreement and as the legal questions that come before the court become more complex, disagreement becomes more prevalent and noteworthy. The acceptance that there is more than one correct answer for any given legal question has brought minority opinions into the open as a legitimate, beneficial function of judicial adjudication. The appropriateness of judicial disagreement has been debated since Chief

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[2] "A recent Survey showed that 70 percent of Canadians had some degree of confidence in the courts, compared with only 46 percent who had the same confidence in Parliament." Greene, Ian, et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal.* Toronto: James Lorimer & Company Ltd., (1998), 1. Also, taken from an Ipsos-Reid/CTV/Globe and Mail poll, released April 5th, 2002, Canadians appear to be satisfied with the *Charter*. In fact, three-quarters (74%) of Canadians believe that their individual rights and freedoms are better protected today than before the *Charter of Rights and Freedoms* was enacted in 1982. And 70% Feel More Comfortable Entrusting Individual Rights and Freedoms To Judges Than to Politicians (21%). Source, http://www.ipsos-na.com/news/pressrelease.cfm?id=1473.

Justice John Marshal of the US Supreme Court tried to unsuccessfully ban the practice of open disagreement in the early 1800's. The debate between the seriatim and per curiam opinion morphed into the modern struggle between the unanimous front v. the fragmented bench which still plagues the Court's legitimacy today. The argument highlights the advantages and disadvantages of disagreement on the Court while addressing the functions of separate opinion writing.

A description of the functions of disagreement are readily available in disagreement scholarship, authored by Supreme Court judges such as Canada's Justice Wilson, Justice L'Heureux-Dube, and the US's Justice Douglas, Justice Brennan, Justice Bader-Ginsburg and Justice Scalia offering a first hand discussion of the power and function of dissent. Scholars like Maltzman, Sprigg and Wahlbeck look at the strategic nature of disagreement in achieving a justice's desired policy outcome or the numerous scholars who educate us with their opinion on the practice. Recently a new approach to disagreement has been presented by Nancy Maveety in, *Concurrence and the Study of Judicial Behavior* and Charles Turner and Lori Beth Way, authors of *Writing for the Future: The Dynamics of Supreme Court Concurrence*, use the separate concurrence in a similar manner to my own research; it categorizes minority decisions to explain the purpose behind the separate opinion. Turner and Way claim that their "project is a step towards explaining the relationship between concurrences and majority Court opinions."[3] My research attempts to build upon the relationship between minority and majority decisions by using both types of separate opinions, the dissent and separate concurrence to better understand the decision making process.

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[3] Turner, Charles and Lori Beth Way, "Writing for the Future: The Dynamics of Supreme Court Concurrence" *American Political Science Association Annual Meeting*, (2003), 4.

Minority opinions do not hold the authority of the court and are frequently discarded as irrelevant and insignificant in light of the majority decision. My position embraces the minority opinion and recognizes the contribution the minority opinion has not only on the final outcome of a decision, but the impact disagreement has on the process leading to a final judgment. Disagreement behavior can illustrate the true and complete opinion of the Court, revealing the other part of the picture. My research is unique in that it is the first time the frequency and patterns of minority opinions, both dissent and separate concurrences have been used to analyze and to garner a better understanding of and reveal the functioning of Court interaction on the bench while offering insight into such a dynamic institution. A systematic analysis of each minority set of reasons through two Canadian chief justiceships, Bora Laskin and Brian Dickson, allows me to develop a working knowledge of each justice and their habits, personalities and styles. My research takes each minority opinion and through its structural components places it into a specific category, which will eventually tell a story of its own.

My research begins by first organizing disagreement into categories based on certain criteria or elements present within the text of each minority opinion. The twenty-four initial categories were then collapsed into five main headings, *Decision in Waiting, Creative, Failed Accommodation, Repetitive*, and *Perfunctory*. Each category represents a hypothesis regarding the collaborative decision making dialogue that led up to the final outcome. What caused the minority author to write separately? Was it failed negotiation that could not produce a unanimous decision or did the dissenting judge simply lose the confidence of his colleagues which resulted in a minority opinion? The presence or

absence of certain structural elements in any minority decision indicates the majority and minority position on certain issues and can identify positive or negative relationships on the bench. The interdependent relationship between judges does factor into the final outcome of the decision making process. The Court is a collegial body with strategic interaction between justices playing a major role in the final product... the written decision.

As Canada's court of last resort, with an increasing influence on politics, policy and the law, it is necessary to gain the most comprehensive and complete understanding of what the Supreme Court does. The American experience supplies the requisite background information on the transformation of national high courts into the socially progressive institutions of today, as well as highlighting the way judicial disagreement behaviour has evolved over the last two hundred years. Canada's own judicial reformation has increased the Courts influence over the everyday lives of its citizens through its decisions. Because of the Court's creative function, it is our duty to question the institution's role, duties and powers, particularly considering the judiciary's independent nature. The Supreme Court matters because it determines major doctrines of law that govern our daily lives. It helps create the legal rules, provides justice and security to Canadians and guards the Constitution from the tyranny of the majority.

The American Experience

It is useful to briefly summarize the influence the US has had on the evolution of the Canadian Supreme Court for two reasons. First, by highlighting the past struggles of disagreement writing on the bench, the Marshall years illustrate the progression and

challenges faced by the public display of minority opinions from the bench. Second, as the first socially progressive court, the United States Supreme Court demonstrates the evolution and impact the power of judicial review has had on the judiciary by means of the "rights revolution" beginning with the Warren Court.[4] Drawing on the United States Supreme Court's strengths and weaknesses through the years of trial and error gives the Canadian Supreme Court a template by which to guide its own advancement. This is not to suggest that the Canadian Supreme Court is simply a product of the US experience or that the two courts are identical, because they are not, the similarities however, warrant a comparison.

The Marshall Years:

The United States Supreme Court (USSC) has had a dynamic and sometimes bumpy existence since its inception in 1789. There are two main periods in American judicial history which have greatly affected disagreement behavior on the Canadian bench; the first being the chief justiceship of John Marshall (1801-1835). It was during his leadership that the practice of disagreement came under fire and was almost extinguished. "With the arrival of John Marshall as Chief Justice, that potent individualism was reined in by a leader who insisted on speaking for a unified Court, even as the cost of vigorously suppressing the disagreement of colleagues."[5] The practice of seriatim opinion writing, where each justice wrote his own individual set of reasons for each case, was the norm for the early USSC. Although overlap and repetition of ideas often occurred, all sets of ideas were represented, regardless of their position in the final

[4] Both areas will be touched on in greater detail in Chapters 2 and 3, where the evolution of opinion writing from seriatim to per curiam will be addressed in Chapter 3 and judicialization of politics in Chapter 2.
[5] Krugman-Ray, Laura. "The History of the Per Curiam Opinion: Consensus and Individual Expression on the Supreme Court" *Journal of Supreme Court History*, (2000), 182.

outcome. Chief Justice Marshall did not support the public display of dissention and as a result, he implemented a new practice of per curiam, where one decision was written on behalf of the 'Court'. According to Marshall, "unanimity would strengthen the 'power and dignity of the Court'."[6] As a result, any disagreement was left on the confidential conference table and all decisions were presented as a single unanimous voice regardless of the vote. "So high a value did Chief Justice Marshall place upon a united front that, according to his colleague, Justice William Johnson, he not only went along with opinions that were contrary to his own view, but even announced some."[7] The implications of per curiam were significant, as suppression of disagreement alters the functioning of the decision-making process.[8] Despite Marshall's greatest efforts to quash visible disagreement, his approach was replaced a scant four years after implementation, with Justice Johnson's separate concurrence in *Huidekoper's Lessee v Douglass*.[9] It is ironic that Marshall, a staunch advocate of the unanimous decision, disagreed numerous times, authoring nine dissents and one special concurrence, with his dissent in *Ogden v Saunders*[10] widely viewed as his judicial masterpiece.[11] Despite Marshall's overly zealous control of his court, and the sometimes harsh criticisms directed at the other members of the Court, "Marshall's disciplined leadership solidified and increased the Court's power, but it also shaped a Court that continued to value its collective institutional power above the independent voices of its members and thus, into the start of

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[6] Kirman, Igor, "Standing Apart To Be A Part: The Precedential Value of Supreme Court Concurring Opinions" *Columbia Law Review*, Vol 95, (1995), 2086.
[7] Scalia, Antonin. "The Dissenting Opinion" *Journal of Supreme Court History*, (1994), 35.
[8] This will be addressed in Chapter 3.
[9] 7 U.S. (3 Cranch) 1, 72 (1805) (Johnson, J., Concurring).
[10] 25 U.S. (12 Wheat) 213, (1827) (Marshall, C.J., Dissenting).
[11] Bergman, Matthew. "Dissent in the Judicial Process: Discord in Service of Harmony" *Denver University Law Review*, Vol. 68, No. 1, (1991), 81.

the twentieth century, to discourage dissent."[12] The effect of the Marshall years shaped the current nature of judicial decision-making on both the American and Canadian national high court.

The Warren Court:

The second major American influence was in the 1950's with the Warren Court. Appointed in 1953, Chief Justice Earl Warren led his court down a socially progressive road that would change the nature of National High Court decision making forever. The USSC had suffered a legitimacy crisis with a string of bad racial discrimination cases reflected in the infamous *Dred Scott v Sandford*[13] and continuing with *Plessy v Ferguson*[14]. Dred Scott was a slave in St. Louis in the early 1800's who filed suit against his owner, Irene Emerson, for his freedom[15]. A slave who could neither read nor write, Scott petitioned the Court for his freedom with financial help from his original owners, the Blow family, and after eleven years of complex litigation, the Supreme Court of the United States finally passed down a decision on March 6th, 1857. The Court's majority opinion, authored by Chief Justice Roger B. Taney, not only denied Scott's freedom but went a step further and claimed that as a slave and as personal property, Scott was not an American citizen therefore he did not posses the right to file suit in federal court. Justice Curtis, authoring the lone dissent felt otherwise. It was his dissent that resonated with the people and would later prove to be one of the most influential dissent ever written. Used

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[12] Krugman-Ray, Laura. "The History of the Per Curiam Opinion: Consensus and Individual Expression on the Supreme Court" *Journal of Supreme Court History*, (2000), 183.
[13] 60 U.S. (19 How.) 393 (1857) (Justice Curtis Dissenting).
[14] 163 U.S. 537, 552 (1896) (Justice Harlan Dissenting).
[15] http://www.nps.gov/jeff/ocv-dscottd.htm

in the landmark human rights case, *Brown v Board of Education*[16], Justice Curtis's dissent helped shape equality rights in the US almost a hundred years after it was written.

Brown v Board of Education[17] was a civil liberties case addressing racial segregation in American schools. A young third grade student, named Linda Brown, was forced to attend an all black school over a mile away from her home despite the fact that a white elementary school was only blocks away. Her father, Oliver Brown, tried to enroll Linda in the white elementary school but was refused. After seeking help from the National Association for the Advancement of Colored People (NAACP), the Browns', along with other black families, took the issue of racial segregation all the way to the United States Supreme Court. In a unanimous decision, delivered by Chief Justice Warren, the Supreme Court negated the "separate but equal" doctrine developed in *Plessy v Ferguson*[18] and overturned the previous rulings of lower courts. This case would not only mark the beginning of desegregation in public schools all over America and spark the Rights Revolution in the US, but it would also initiate the transformation of the USSC.

What had been a traditional, politically conservative Court resistant to change developed into a socially progressive force during the 1950's following the *Brown* decision. *Brown* opened the door and led the way for minority groups to plead their case in front of a sympathetic Court which was focused on civil liberties and the protection of minority rights, catapulting the Court into a new era of decision-making. The American social and political environment was primed and ready to start moving in the direction of racial integration, with the Supreme Court taking the first major visible step with the

[16] 347 U.S. 483 (1954).
[17] 347 U.S. 483 (1954).
[18] 163 U.S. 537 (1896).

Brown decision. Although the transition was met with some skepticism and resistance, *Brown* opened the door for other major rights advocates to take action, thus starting the "rights revolution" which will be addressed later on in the chapter. Not only had the Court acted out of character by initiating a major social policy change by challenging the government's policy on segregation but also it had significantly altered its role to include champion of human rights. "By the late sixties, almost 70 percent of its decisions involved individual rights, and the Court had, essentially, proclaimed itself the guardian of the individual rights of the ordinary citizen."[19] Although the *Brown* case is only one of many that radically changed the role of the Court, the real impact occurred with the US Supreme Court's influence on high courts in other democracies. Never before had a national high court approached decision making with such an intent focus on minority rights. The Court's new found role within the socio-political structure attracted some admirers from other parts of the world and the US model became the template for other democracies to begin reshaping their own high courts.

The Canadian Experience

The 1970's marked a major shift in the Canadian Supreme Court style of decision-making from the old "formalism" to the new "contexualism". Formalism is the traditional conception of legal questions having "one and only one objectively correct answer, and can be established through the technical expertise of experience professional applying a rigorously constrained methodology."[20] Contexualism is the acceptance of potentially more than one correct answer for a given legal question, which can determine

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[19] Epp, Charles, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago and London: The University of Chicago Press, (1998), 2.
[20] McCormick, Peter, "Blocs, Swarms and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" *Osgoode Hall Law Journal*, Vol. 42, No. 1, (2004), 105.

itself on a number of applicable factors, including the social and factual background of the circumstances involved. It is now accepted that this rigid interpretation is no longer the norm and that "many questions brought to the Court do not have a single correct answer, that there are a number of principles and values that have to be balanced very carefully against each other and that a wide range of social causes and societal consequences link to the fact-background of many disputes..."[21] Prime Minister Trudeau's vision for a more creative Court would take years to come to fruition, as old members were replaced by new ones, a fresh set of ideas and a modern way of doing things was introduced to the Court. It appeared that a shift in the Court's mentality and way of thinking had been brewing since the introduction of the *Bill of Rights* in 1960. The *Bill of Rights* represented a possible new direction but was hampered by a very conservative bench with an engrained set of ideas. "Most of the justices had been on the bench for many years and were clearly unsympathetic with or ignorant of the public's changing expectations."[22] Although it was Prime Minister John Diefenbaker who spearheaded the Canadian *Bill of Rights* with a "tentative" push towards a new role for the Supreme Court, his appointments did not reflect this. "In four appointments to the Supreme Court, the government gave no indication of leadership or new direction. Both the Diefenbaker government and it 1963 successor, led by Lester Pearson, continued to name to the Court justices who fit into the traditional mold."[23] It would be the Trudeau years that would transform the Court.

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[21] *Ibid*, 6.
[22] Snell, James G., Frederick Vaughan, *The Supreme Court of Canada: History of the Institution*. Toronto: University of Toronto Press, The Osgoode Society, (1985), 214.
[23] *Ibid*, 214.

The Trudeau Impact:

There are many factors which played a part in the evolution of the modern Supreme Court with two taking prominence - the appointment of Bora Laskin to the bench and the entrenchment of the *Charter of Rights and Freedoms*. Both factors were the product of Pierre E. Trudeau's self-proclaimed vision for Canada, which was inspired by the USSC and their gains in the rights revolution during the 1950's. The 1970's ushered in a new era for the Supreme Court.

Trudeau strongly encouraged the implementation of the *Charter of Rights and Freedoms*, including some major improvements not seen in the *Bill of Rights*. As a constitutionally entrenched document, the *Charter* would allow the notion of civil rights to have more political and judicial authority. The *Charter* was also applicable to both the federal and provincial governments equally. "Before the *Charter*, courts ensured that the federal government did not trample on the toes of provincial governments, and vice versa; the difference now is that the courts are obliged to ensure that no government tramples on the toes of each person."[24] Trudeau had been pushing for a charter-like document since his early years as Minister of Justice and continuing on into his two terms as Prime Minister.[25] His many reasons for pushing an entrenched charter of rights included a strong desire for national unity[26] and to create "a national discourse about

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[24] L'Heureux-Dube, Claire, "Nomination of Supreme Court Judges: Some Issues for Canada" *Manitoba Law Journal*, (1991), 603.
[25] Knopff, Rainer, F.L Morton, *Charter Politics*. Ontario: Nelson Canada, (1992), 13.
[26] Trudeau has described the Charter as "essentially testing, and hopefully establishing, the unity of Canada" and "defining the common thread that binds us together," overcoming "the forces of self-interest [that threaten to] tear us apart." Taken from Knopff and Morton's book, *The Charter Revolution and the Court Party*. Ontario: Broadview Press (2000), 60.

human rights" thus strengthening nationalism and "weaken the forces of regionalism and provincialism."[27]

Through his judicial appointments, Prime Minister Trudeau would make significant contributions to, as well as greatly alter the face of the judicial institution at that time. With the judicial appointment process left primarily to the discretion of the Prime Minister, Trudeau appointed a distinct kind of judge, choosing to create a balance between practice and theory which had never before been done on the Court. For the first time, legal scholars and academics were being considered, equaling out the judges that had been practicing lawyers.[28] A new dynamic on the bench emerged as was evident with the appearance of Bora Laskin, that would advance Trudeau's ultimate plan for the Court, but would however be met with hesitation by the other justices. The appointment of Bora Laskin to the Supreme Court in 1970 was quickly followed by his rather controversial elevation to Chief Justice with "Laskin's appointment (being) praised as Trudeau's first and most admired appointment to the Supreme Court."[29]

Chief Justice Bora Laskin:

His Supreme Court colleagues met Justice Laskin's appointment to the Supreme Court in 1970 with some hesitation, and the controversy was further fueled by his elevation to Chief Justice three years later. Many questioned Trudeau's intentions for the appointment of Laskin because not only did he lack the traditional prerequisites considered necessary for appointment to the bench, but also Laskin's reputation and background preceded him. A professor of law at two of Canada's leading law schools,

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[27] Greene, Ian, *The Charter of Rights*. Toronto: James Lormier & Company, Publishers, (1989), 38.
[28] Judges such as Justice Bora Laskin, Justice Jean Beetz, Justice Yves Pratte and Justice Gerald Le Dain all had academic experience and brought to the bench an innovative perspective to legal interpretation.
[29] Clarkson, Stephen, and Christina McCall, *Trudeau and Our Times*. Toronto: M & S Inc. The Canadian Publishers, (1994), 348.

University of Toronto and Osgoode Hall Law School, he took an active interest in the Supreme Court of Canada, "demonstrating his own independent frame of mind when, in 1951, he called for the Court to take advantage of its new supremacy to dissociate itself from *stare decisis* and to develop its own personality."[30] Laskin's stance on what the role of the Supreme Court should be was somewhat prophetic and it would be this attitude that would get Prime Minister Trudeau's attention. Laskin was an academic and a Jew, born to Russian Jewish immigrants, which would be another oddity that would distinguish him from the other justices. Laskin's lack of major experience in private practice, his Jewish background and the first non-Christian to be named to the bench, his sympathetic leanings to civil liberties and strong central government, and his academic background all contributed to his strong influence in Pierre Trudeau's ultimate design for Canada.[31] "Laskin would provide the Supreme Court, it was hoped, with a much-needed intellectual vigor and with a philosophical position in constitutional law and civil liberties much akin to the prime minister's."[32]

What would cause another sensation was Laskin's appointment to Chief Justice a mere three years after his appointment to the Supreme Court. An unwritten tradition dictated that the most senior justice would fill the vacancy upon the retirement of a chief justice. This tradition has been disregarded only three times in the history of the Court; and one such time was the appointment of Bora Laskin as Chief Justice.[33] Trudeau's blatant disregard for tradition did not go unnoticed, as Laskin "was the second most junior puisne justice, outranked in seniority by five other members of the Court, led by

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[30] Snell, James G., Frederick Vaughan, *The Supreme Court of Canada: History of the Institution*. Toronto: The Osgoode Society by the University of Toronto Press, (1985), 217.
[31] *Ibid*, 218.
[32] *Ibid*, 225.
[33] *Ibid*, 224.

Ronald Martland."[34] Although not the sole cause of the rift between Martland and Laskin that would last for years, Martland's snub would signal the initial divide between "old formalist" and "new contextualist" justices on the bench. Laskin would earn his title, "The Great Dissenter" during the first half of his term as Chief Justice. Justice Martland, Justice Beetz and Justice Ritchie formed the majority coalition with Chief Justice Laskin, Justice Spence and Justice Dickson, a.k.a. the "L-S-D Connection", in the minority enough to be noteworthy.[35]

Laskin agreed with Trudeau's more "creative" style of judicial interpretation and supported his vision for a stronger judicial role in constitutional issues. "We are the umpire of the Canadian constitutional system – the only umpire"[36] The *Charter* would prove to be the vehicle by which Laskin could help to fulfill Trudeau's vision for a stronger Supreme Court in Canada. During his eleven years as Chief Justice, Laskin "presided over the Supreme Court's transformation from a relatively minor factor to a central institution in Canada's political landscape by boldly asserting its importance as another branch of government."[37]

The *Charter* Revolution:

Peter McCormick in his book, *Supreme At Last: The Evolution of the Supreme Court of Canada* outlines the Canadian Supreme Court's transformation through three phases. Phase one "succeeded in building a foundation for broad judicial review that

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[34] *Ibid*, 224.
[35] For an expanded discussion see Peter McCormick, *Supreme At Last*, chapter 6, note 37.
[36] Clarkson, Stephen, and Christina McCall, *Trudeau and Our Times*, Vol. 1. Toronto: M & S Inc. The Canadian Publishers, (1994), 350.
[37] *Ibid*, 350.

involved a very 'broad scope' for its review powers."[38] This involved cases dealing with the principle of purposive interpretation. Phase two focused on Section 1 of the *Charter*, establishing the "reasonable limits" clause. The Court was still giving a broad interpretation of the *Charter* while trying to solidify "the general test for the 'reasonable limits' clause of Section 1 of the *Charter*. To oversimplify the style was to give a broad interpretation to the *Charter* right but to uphold the statute as constituting a reasonable limit."[39] Phase three showed a major shift in the mentality of judicial decision-making. The Court was aggressively tackling new, controversial issues "in ways that challenged political orthodoxies...reading words into statutes that legislatures had deliberately omitted."[40] This fresh, confident style played well with the public. The Court was growing and adapting with the environment, trying to reflect the ideals and values paramount in Canadian culture. The Court was being "creative".

***Impact of the Charter*:**

The consequence of the *Charter* has effected the functioning of the Court in many respects. Firstly, it has transformed the power of judicial review and brought the actions of the Court into the limelight. With increasing influence over social policy, not only did government take notice but the public did as well. A second effect of the *Charter*, which ties in with the practice of judicial review, is the judicialization of politics in Canada. A phenomenon that modern democracies are experiencing all over the world has drastically altered how the political game is played. "Around the globe, in numerous countries and in several supranational entities, fundamental constitutional reform has transferred an

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[38] McCormick, Peter, *Supreme At Last: The Evolution of the Supreme Court of Canada.* Toronto: James Lorimer & Co., (2000), 166.
[39] *Ibid*, 167.
[40] *Ibid*, 167.

unprecedented amount of power to judiciaries."[41] Thirdly, the *Charter* has expanded the role of Courts to now include protection of civil liberties and human rights. Minority groups now look to the Courts for support and recognition as opposed to the traditional legislative route. Lastly, judicial decision-making looks different post-*Charter* than it did pre-*Charter*. As pointed out by Peter Russell when the *Charter* was adopted, "(A) charter of rights guarantees not rights but a particular way of making decisions about rights, in which the judicial branch of government has a much more systematic and authoritative role." As I will show in Chapter 4, the way Supreme Court justices disagreed with each other also changed with the *Charter*. The net effect of this evolution is "its tendency to judicialize politics and to politicize the judiciary."[42]

The impact of the *Charter* is undeniable as the modern Supreme Court embraced its new role with open arms. The contrast between the effects of the *Charter* compared to the *Bill of Rights* was staggering. "In the first two years in which the Court heard *Charter* appeals, the rights claimant was successful 64% of the time (9/14). By 1992, this figure had declined to 33% for the first 195 Charter decisions...the rights claimant was successful only 15% of the time under the 1960 *Bill of Rights* (5/34)."[43] The initial enthusiasm of the early *Charter* bench was a clear indication of where the Court was prepared to go. "Just as the Court's unreceptive attitude toward the 1960 *Bill of Rights* had the effect of discouraging litigation, the Court's activist jurisprudence under the *Charter* has stimulated litigation. The Court heard only thirty-five *Bill of Rights* cases

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[41] Hirschl, Ran, "Resituating the Judicializtion of Politics: Bush v Gore as a Global Trend" *Canadian Journal of Law and Jurisprudence*, Vol. XV, No. 2, (July 2002), 191.
[42]Russell, Peter H., *The Effect of the Charter of Rights on the Policy-Making Role of Canadian Courts*. Canadian Public Administration, (1982), 1.
[43] Kelly, James B., "The Supreme Court of Canada's Charter of Rights Decisions, 1982-1999: A Statistical Analysis" *Law, Politics and the Judicial Process in Canada*, 3rd ed., Ed. F.L. Morton. Calgary: University of Calgary Press, (2002), 497-498.

over a twenty-two year period but has decided 395 *Charter* cases over seventeen years."[44] Although a long road lay ahead, the Supreme Court was signaling to the nation that it was willing to embrace a radically new, socially progressive direction.

Conclusion:

Tracing through a brief history of the American Supreme Court and establishing the immense influence it had on the progression of the Canadian institution is useful in understanding how decision making has evolved as a result of increased judicial power. Now that the basic background has been laid out by highlighting the influence of Chief Justice Marshall, detailing Warren's "rights revolution", establishing the heavy hand of Prime Minister Trudeau in the eventual emergence of Canada's modern day Supreme Court and demonstrating Chief Justice Laskin's contribution to the reformation of the institution, I can now discuss the judicialization of politics and the maturity of the minority opinion in greater depth. Not only has the judicialization of politics increased the Court's authority over government policy but it has also made Canada's high court more visible, raising questions regarding the legitimacy of the institution that will be addressed in the next chapter.

[44] Morton, F.L., ed. *Law, Politics and the Judicial Process in Canada,* 3rd ed. Calgary: University of Calgary Press, (2002), 486.

Chapter II
The Role and Function of Canada's National High Court: The Creative Judge

One of the most significant changes in the modern high court is the judicial approach to decision-making. No longer the stuffy, elitist institution that simply interprets the law, judicial decision-making has become creative, meaning judges are no longer strictly bound by rigid precedent but free to explore alternate interpretations and to consider possible new directions. Most judges have admitted the need to create law on occasion as opposed to simple interpretation. Although still a controversial issue and a claim some judges are still reluctant to make, judges no longer "simply *find* the law, they also *make* law."[45] The traditional view of judges as the "mouthpiece of the law" has become obsolete because of the constitutionally entrenched Canadian *Charter of Rights and Freedoms*. The *Charter* was designed to be vague, with the narrow scope and ambiguous nature of the legal sections intended for judicial interpretation. Flexible and innovative decision making has become characteristic of the modern creative Court which is in stark contrast to the traditional "rule of law" approach strictly adhered to by Courts in the past. It is now expected and encouraged that judges approach decision making with a creative flare and the ability to adapt and apply new meaning and precedent into contemporary situations. The introduction of the modern Supreme Court has altered the decision making process, thereby affecting all aspects of Court procedure and consequently the nature of disagreement behaviour.

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[45] Clayton, Cornell W., and Howard Gillman, eds. *Supreme Court Decision-Making: New Institutionalist Approaches*. Chicago and London: The University of Chicago Press, (1999), 16.

In this section I will address creative decision making by the collegial Court and the effects of this change on the decision making style on the bench. The "creative court" implies a different style of decision making, highly influenced by the collegial nature of the Court. Collegiality denotes community and interaction on the bench, only a recently used description of Supreme Court decision making process. As a result of collegial interdependency between judicial actors on the bench, individual judges are more inclined to engage in strategic techniques to make decisions in order to achieve their preferred outcome. Strategy has profoundly altered the way appellate court judges make decisions; coupled with increased control over the direction of government policy via judicial review, the modern Supreme Court justice must contend with multiple forces influencing his final decision.

Using the power of judicial review, the *Charter* became the vehicle by which the Supreme Court became an active, participating member in the political game. Judges however must play the game with a different set of rules than other government agencies. Fundamental characteristics inherent in the Canadian judicial system including judicial independence, security of tenure, constitutional protection and the unelected, unaccountable nature of judicial appointment, offer both advantages and disadvantages to the high court judge engaged in the political game. The *Charter* authorizes the Courts, as chief arbitrator of human rights, to play the game, but the judicial institution as a whole becomes more visible spurring greater public scrutiny. Greater media exposure and public visibility consequently calls into question the legitimacy of the Court's role in society and the institution's ability to adjudicate objectively, despite the perceived subjective nature of judicial decision making. The counter-majoritarian argument outlines

some of the major criticisms faced by the Court regarding its apparent undemocratic nature. The Court is a great contradiction; on the one hand it is shielded from the inherent pressures of the political game, but on the other, judges are free to engage in public policy making through the use of judicial review. The judiciary enjoys the advantages of being a government branch but suffers none of the drawbacks of elected tenure. As constrained strategic policy makers, judges are performing a new and powerful function in the political sphere, while adjusting to an alternative decision making style, unparalleled by past judicial actors. As Canada's highest court evolves, the adapting internal procedures are reflected in the decision making process, making the study of decision making more imperative.

Indeterminacy and Judicial Discretion:

The greatest challenge the Court faces while trying to move into the new arena of creative decision making is getting past the traditional view of judges as simple interpreters of the law. That view, along with the perception that there is often only one correct answer to legal questions has become outdated and obsolete. Legal positivism postulates "law can be understood in terms of rules or standards whose authority derives from their provenance in some human source, sociologically defined and which can be identified as law in terms of that provenance."[46] Similar to the codes of a civil law system like that of the French, positive law argues that all laws and their interpretations can be traced back to an original, legitimate source. This process provides the necessary legal credibility to make the law predictable and determinate. Positivism does have its place on the Court, but its authority is diminished. No one would argue that judges on

[46] Waldron, Jeremy, "The Irrelevance of Moral Objectivity" *Natural Law Theory*. Ed. Robert P. George. Oxford: Clarendon Press, (1992), 160.

the modern Supreme Court do not, at some point, create law. Although some critics argue that law creation by judges happens too often. Critics claim that the traditional strict adherence to precedent or original intent supplies continuity and determinacy in law, which is essential to positivism. The reality is that "more and more law is indeterminate in the sense that answers to legal questions often lie outside the black boxes of settled precedent and unambiguous constitutional and statutory provisions. Thus, there is not always one right answer to legal problems."[47] What is still up for debate is the unpredictability of the law and the infusion of judicial discretion into the decision making process. Higher disagreement rates could be attributed to this recent acceptance of the creative court because without proper boundaries and constraints to guide the legal jurisdiction of judges, the law may become arbitrary and therefore difficult to follow, leaving judges open to pursue their own policy objectives, resulting in disagreement. Legal realists and critical legal studies theorists have exposed the somewhat indeterminate nature of judicial decision making and argued that judges vote in favour of their preferred policy outcomes instead of voting in an impartial manner based on established legal rules. The uncertainty of law ultimately leads to greater disagreement.

Rational Indeterminacy:

The largest feature of critical legal theory is its assertion that judges arbitrarily decide the law. Critical Legal Studies (CLS) contends that judicial decision making is not rationally determinate, meaning that the "authoritative materials and their reasoned elaboration by judges yield pre-existing, discoverable, right answers to legal questions."[48]

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[47] Flanders, Robert G. Jr., "The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable" *Roger Williams University Law Review*, Vol. 4, (1999), 415.
[48] Belliotti, Raymond A., "Is Law A Sham?" *Philosophy and Phenomenological Research*, Vol. 48, Issue 1, (Sept. 1987), 26.

With the rejection of formalism and the rule of law as a means of governing judicial adjudication, the law becomes radically indeterminate. Without formal legal doctrines to justify their decisions, judges must look elsewhere for their reasons. Instead of pointing to judicial discretion as the culprit, CLS writers point to politics. The basic assertion by CLS scholars is that "all law is politics in a narrow and disreputable sense".[49] People determine law with their own self-interest in mind; they apply the law according to their own policy initiatives and political preferences. "The law embodies specific political and, especially, economic values, such as self-interest, individualism, and advantage, and it reflects the personal prejudices of particular judges."[50]

Whether or not an individual judicial decision is indeterminate is beside the point; it is the potential for judicial discretion that is the cause for concern. Precedent and legal doctrine can be "manipulated to 'justify' an almost infinite number of possible rationalizations for various legal outcomes."[51] Although judges and officials can point to precedent to defend their position, it is possible to rationalize different possible outcomes. "Law consists of a whole variety of contradiction and inconsistencies, allowing decisions to go either way."[52] This becomes a trouble spot because judges can justify their position by pointing at precedent, while manipulating established legal doctrine to their own individual end.

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[49] Posner, Richard A., *The Problems of Jurisprudence.* Cambridge and London: Harvard University Press, (1990), 153.
[50] McCormick, John P., "Three Ways of Thinking "Critically" about the Law" *The American Political Science Review*, Vol. 93, Issue 2, June (1999), 414.
[51] Belliotti, Raymond A., "Is law a Sham" *Philosophy and Phenomenological Research*, Vol. 48, Issue 1, (Sept. 1987), 27.
[52] Scheppele, Kim Lane, "Legal Theory and Social Theory" *Annual Review of Sociology*, Vol. 20, (1994), 391.

***Judicial Discretion*:**

At the heart of all critical legal theory is the notion that the law is determined by the creativity of the judiciary in the form of judicial discretion. The judiciary now performs a "creative" function, which is to say that judges have more influence over the law, essentially creating law alongside other political actors.[53] It was met with much criticism as it rebuffed the old philosophy of original intent and rule of law as the standards by which the law should be determined. Original intent theory asserts that it is not the role of the judiciary to create law, but simply to interpret and define the law's original meaning, leaving law creation to the legislatures. As the role of the courts changed, concern arose over the development of law. Some thinkers argued that the law was becoming too arbitrary, too indeterminate, and too much the creation of judges. Much to the dismay of liberal legalists, judges were becoming political players, instead of insignificant bystanders to the political game.

In the past there has been a strong belief in the rule of law and established legal traditions to govern the decision making process. Liberal legalism[54] has been the norm by which the law has been determined by judges, which in principle means that the rule of law, precedent and established legal standards govern the decision making process. It is not for judges to create the law but simply to interpret its original meaning as set out by the constitution and legislators, and apply it to the current case.

i) Law creation

The introduction of judicial discretion into adjudication contravenes the original intent theory so engrained in the decision making process. "When the judiciary refuses to

[53] This is a relatively new idea that was introduced by the Realists and later expanded on by other critical legal theories such as CLS and Feminist Jurisprudence.
[54] Also known as formalism, doctrinalism or interpretivism depending on the author.

be guided by original intent in its interpretation of the constitution, it exercises an extra-constitutional and arbitrary form of power."[55] It is not within the legitimate mandate of the judiciary to indulge in law creation, but to determine the original intent of law. Liberal legalists argue that a divergence from the established legal norms produces distrust in the legal rules and logical reasoning that normally govern the judicial process.[56] The law is no longer as predictable as it once was, creating a system of rules that is essentially unknowable and arbitrary, defeating the security offered by the rule of law principle.

Original intent theory has too many flaws to legitimately stand up as the central guide for judicial adjudication. Although part of a judge's adjudicative mandate is to take into account the initial intention of the law and its application, it cannot be the only consideration. The original meaning intended by the initial writer can sometimes be impossible to decipher, either because the rule is outdated or has been applied in so many different ways that a single correct answer no longer exists. It could also be the case that the document was designed to be interpreted and expanded on by judges as its original purpose.[57]

For practical purposes, original intent theory is far too restrictive to cover all possible legal situations. Changing societal norms force the law to develop and grow, allowing a level of flexibility during the adjudicatory process, "The Constitution was written for all

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[55] Kelly, James B. and Michael Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" *Canadian Journal of Law and Society*, Vol. 16, No. 1, (2001), 4.

56 Llewellyn, Karl, "Some Realism About Realism" Edward Allen Kent, Ed. *Law and Philosophy: Readings in Legal Philosophy*. New York: Meredith Corporation, (1970), 63.

[57] The *Charter* was designed with judicial interpretation in mind. Prime Minister Trudeau in the 1970's wanted to revolutionize the Canadian court system, similar to the rights revolution initiated by the Warren Court in the United States. Trudeau's vision was for a socially progressive Court to become the champion of human rights here in Canada, and to have chief authority over the *Charter*. It was Trudeau's intention for the Supreme Court to expand and define the sections of the *Charter*.

time and all ages. It would lose its great character and become feeble, if it were allowed to become encrusted with narrow, legalistic notions that dominated the thinking of one generation."[58] Given the plethora of hypothetical situations that may arise in future cases, not to mention the number of unexpected circumstances that have already forced a change in legal precedent, it would be unrealistic to assume that judges should not create law. Critical legal theory acknowledges that "legal doctrine can neither generate pre-existing right answers to legal questions nor cover all conceivable situations."[59] Therefore it is necessary for judges to fill the "gaps".[60] It is this recognition, concludes the critical legal theorist, which will lead to a better understanding of the law.

b) Absence of judicial restraint

Critics claim that lack of judicial restraint is a form of tyranny by the courts. This criticism emphasizes the need to minimize the extent to which judges make law using their own personal preferences to influence constitutional change. "Changing the core meaning of constitutional rights is a responsibility which belongs solely to the people or their elected representatives."[61] Judges are unelected, independent and unaccountable to the people; therefore it should not be within judicial power to alter law created by legitimate, elected representatives.

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[58] Douglas, William O., "The Dissent: A Safeguard of Democracy" *Journal of the American Judicature Society*, Vol. 32, (1948), 106.
[59] Belliotti, Raymond A., "Is law a Sham?" *Philosophy and Phenomenological Research*, Vol. 48, Issue 1, (Sept. 1987), 27.
[60] Carl Schmitt, an indeterminacy scholar and critic of liberal legal theory claimed that, "between the law and concrete reality there will always be a gap that must be mediated by a judge. This is the 'humanity' or 'life' of the law." Schmitt also felt that liberal jurists pretended that the law is applied "consistently and appropriately most or all of the time" when they were fully aware that it was not. Taken from John McCormick's article, "Three Ways of Thinking "Critically" about the Law" *The American Political Science Review*, V. 93, Issue 2 (June, 1999), 413-428.
[61] Kelly, James B. and Michael Murphy, "Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" *Canadian Journal of Law and Society*, Vol. 16, No. 1, (2001), 3-4.

Although a valid concern, this argument puts far too much emphasis on the power of judicial review without considering the restraints already in place to keep the judicial power in check. Section 24(2) of the *Charter* (the exclusionary rule), section 33 (the notwithstanding clause), section 15 (equality rights) and section 1 (the reasonable limits clause) create a symbiotic check and balance on all three levels of government.[62] "The absence of judicial restraint can certainly detract from the democratic quality of judicial decision-making, but the proper structural safeguards render the likelihood of unchecked judicial supremacy marginal at best."[63] It is inaccurate to claim that the power of judicial review will destroy the delicate balance between government and judiciary. The system is designed to prevent legislative supremacy by either actor; therefore maintaining a balance of power is inherent in a democracy.

c) Democracy threatened

Lastly, there is a concern by liberal legalists that the fundamental principles of democracy are threatened by judicial discretion and the absence of rule of law. Ignoring original intent only weakens the democratic system by threatening the very foundation on which it stands, namely rule by the people, which is manifested in elected representatives. "By engaging in these exercises of judicial 'creativity' judges act more like legislators and even amenders of the constitution than is neutral and objective guardians."[64] The purpose of a rigid and structured constitution is to prevent arbitrary governance, which is precisely the consequence of judge-made law.

Kelly and Murphy offer a rebuttal to the criticisms of critical legal theory. They argue that there are a number of judicial restraints preventing an abuse of power by the

[62] For an expanded discussion see Kelly and Murphy, *Confronting Judicial Supremacy,* 4-14.
[63] *Ibid*, 4.
[64] *Ibid*, 8.

judiciary and that "original intent focuses too exclusively on the non-structural aspects of the constitutional balance of power and as a result exaggerates the fear of unchecked judicial power."[65] The judiciary also restrains the power of the other branches of government by acting as a check and balance, actually preserving the democratic principles. The argument purporting lack of judicial restraint does not hold up to the extensive and effective restrictions placed on judicial power not only by the *Charter* but also through judicial procedure. It is not possible for a lone justice to change the law single-handedly, due to the appeal process and panel judging which requires a majority. Also, safeguards exist allowing other branches of government to quash a bad judicial decision if need be.

Others argue that disagreement strengthens democracy. Firstly, "(u)ncertainty in the law is not a cause for alarm; it is endemic to democratic societies."[66] It is part of democracy to question those principles that govern society and to encourage evolution of legal doctrines to remain current with the times. It is also the duty of the judiciary to act as a check on other government agencies to preserve the balanced coexistence that exists between the different levels of government and the people; "any functional democracy requires both freedoms and internal limits, in order to balance social forces of order and dissent, of the individual and collective will, and of certainty and flexibility."[67] Multiple interpretations are symbolic of a fundamental freedom in democratic societies; "Disagreement among judges is as true to the character of democracy as freedom of

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[65] *Ibid*, 12.
[66] Bergman, Matthew, "Dissent in the Judicial Process: Discord in Service of Harmony" *Denver University Law Review*, Vol. 68, No. 1, (1991), 87.
[67] L'Heureux-Dube, Claire, "The Dissenting Opinion: Voice of the Future" *Osgoode Hall Law Journal*, Vol. 38, No. 3, (2000), 503.

speech itself."[68] Judicial disagreement is actually indicative of a healthy democracy, which encourages dissention and values the "marketplace of ideas" to grow and flourish. It would be unlikely for a dictator to invite or allow independent judges to increase their participation in the arena of public policy.[69] It would be even more unlikely for a undemocratic government to encourage the use of judicial review which essentially has the potential to usurp the powers of government. "Certainty and unanimity in the law are possible both under the fascist and communist systems. They are not only possible but indispensable; for complete subservience to the political regime is a *sine qua non* to judicial survival under either system."[70]

Democracy also favours change and transformation in a way undemocratic nations do not. Groups are allowed to openly convene and discuss political beliefs, ideological positions and controversial issues without repression and can express those beliefs without coercion. In the same way courts are openly allowed to disagree about matters of legal jurisdiction. The Supreme Court is charged with constitutional protection and is actively involved in civil liberties and issues of human rights, all of which must develop with the changing times. It is imperative that they have to opportunity to openly express disagreement to fully represent all potential viewpoints. "(D)issents assists in making the rule of law more transparent, since they allow courts to convey, in majority and dissenting reasons, the many ideas and principles that often

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[68] Douglas, William O., "The Dissent: A Safeguard of Democracy" *Journal of the American Judicature Society*, Vol. 32, (1948), 105.
[69] Tate, C. Neal, and Torbjorn Vallinder, *The Global Expansion of Power*. New York: New York Univerisy Press, (1995), 28.
[70] Douglas, William O., "The Dissent: A Safeguard of Democracy" *Journal of the American Judicature Society*, Vol. 32, (1948), 105.

compete within a single normative system...every judge has an opportunity to participate fully, even while the majority decision rules the outcome."[71]

In the well-known Canadian 'Persons Case,' Lord Sankey articulated his now famous 'living tree' approach where he "stressed the necessity of interpreting constitutional language in light of society's changing beliefs and not just internal grammatical constructions and original intent of the framers."[72] The creative court is entrusted with overseeing constitutional change and ensuring it is done in an appropriate and controlled fashion. "Democratic principles require that we do not permanently privilege any particular policies or values so as to tie the hands of those who come after us."[73] The Constitution is not a rigid, lifeless document, stagnant and unchangeable, but instead a living document capable of development.

Counter-Majoritarian Argument[74]

I have already emphasized one major concern with the current structure of the judiciary, namely the power of judicial review. It is now useful to address the counter-majoritarian argument and address its particular concerns for democracy. The three major elements of concern for the counter-majoritarian are the judicial appointment process, judicial independence and the security of tenure. The argument, broken down into its basic elements, claims that because the judiciary is unelected, unrepresentative,

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[71] L'Heureux-Dube, Claire, "The Dissenting Opinion: Voice of the Future" *Osgoode Hall Law Journal*, Vol. 38, No. 3, (2000), 503.
[72] Morton, F.L., ed. *Law, Politics and the Judicial Process in Canada,* 3rd ed. Calgary: University of Calgary Press, (2002), 426-427.
[73] Alder, John, "Dissents in Courts of Last Resort: Tragic Choices?" *Oxford Journal of Legal Studies*, Vol. 20, No. 2, (2000), 222.
[74] Due to the enormity of the counter-majoritarian argument, I must condense it to fit into my space constraints. It would also be unrealistic for me to cover every aspect of the debate; therefore generalizations exist despite my attempts to lay the argument out as clearly as I could to help illustrate my position.

independent and unaccountable, it does not meet the fundamental requirements of democracy. It is obvious that the judiciary does not meet the requirements of democracy, nor can I argue that it does. I will argue that aspects of the judiciary, although seemingly undemocratic, can be linked to democratic ideals.

> (D)emocracy is not just about majoritarianism; it is also about individual and minority rights, about limits to what even a large and determined majority can do. Therefore, there is a sense in which a strong and independent judiciary is democratic – not because the courts are overtly democratic in their organization or their selection or their process (they are not), but because they are the mechanism that serves this "other face" of democracy.[75]

The "other face" of democracy is key to the transformation of the judiciary after the *Charter* and the subsequent Canadian rights revolution, where the Supreme Court embraced the title as protector of civil liberties, which will be addressed later in this section. Justifying the Court's new role largely connected to the practice of judicial review, addresses the legitimacy crisis the Courts periodically face as new challenges arise. The undemocratic nature of Canada's high court is a serious issue that requires some explanation.

Judicial Independence:

Judicial independence serves two very important functions, protection from the government and protection from the citizens. This conflicting nature is interesting considering it is technically the courts job to protect these same individuals. However, by first protecting judges from the capricious nature of the current political party in power, judges are immune from having to play the political game. The political agenda is wrought with negotiation, bargaining and pressure from outside players, which would make it difficult for judges to remain impartial. "This independence is considered crucial

[75] McCormick, Peter, *Supreme at Last: The Evolution of the Supreme Court of Canada*. Toronto: James Lorimer & Company Ltd. Publishers, (2000), 172-173.

to the ideal that in the settling of individual disputes, especially those with which the authorities themselves are concerned, the judge will be able to exercise his judgment so that the result of the case is not dictated by the powers-that-be."[76] The Court is supposedly immune from political pressure, thus eliminating the possibility of government influencing the Court for their own self-motivated political end.

Courts are shielded from 'majority will' by being autonomous from the citizenry. Judges are appointed by government, eliminating any potential influence by the will of the public majority, which would potentially cause the court to succumb to public pressure on certain issues, taking the focus away from the truth of the law. Outside influence, whether by politicians or the public, acts to create an atmosphere of political pressure on judges. Although they should be cognizant of social values, the Courts should never be controlled by it. Judicial independence is a method for "defining and securing personal freedoms against the popular will – the one favored by champions of judicial review – is to assign this task to some government institution that functions at least somewhat outside the mainstream of the political process."[77] Keeping the judiciary independent and impartial is essential to its proper functioning. Courts can focus on the more important questions of law and the fundamental task of protecting minority rights, instead of focusing on the next election issues.

Judicial independence does not benefit the Courts alone. Elected officials find it useful to turn to the Courts to decide controversial issues when it becomes too politically risky for politicians to choose sides. A Court can compel government to an unfavorable

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[76] Gavison, Ruth, "The Role of Courts in Rifted Democracies" *Israel Law Review* Vol. 33, No. 2, (1999) 230-231.
[77] Choper, Jesse H., *Judicial Review and the National Political Process.* Chicago and London: The University of Chicago Press, (1980), 9.

or controversial policy direction, thus making government immune to public criticism. In the same way the Court can fall back on the constitution, the government can fall back on the Court. By allowing the two institutions to play off each other in this way, the ideals of democracy are strengthened by each branch fulfilling a role the other is incapable of.

Judicial independence, some would argue, threatens democracy because the flip side of independence is accountability. By creating a judiciary free from any formal accountability you run the risk of judicial abuse of power. Judges need to be responsible as well as independent; "responsible, in the sense that they faithfully interpret the law regardless of their personal policy preferences, and independent, in the sense that they interpret the law regardless of the extralegislative preferences of the legislature, the executive, or the people."[78] How can we guarantee a responsible judge when judges enjoy an incredible amount of autonomy? Judges for the most part, unlike other people in government or even in private businesses, cannot be fired by their superiors, do not have to face re-election and do not run the risk of abandonment by their customers.[79] High Court judges appear to be safe from any real consequences to their actions, aside from the occasional threat of impeachment, which is extremely rare due to the lengthy and expensive process. The question remains, how do judges stay responsible to the truth of the law and not allow their own personal policy preferences to cloud their judgment?

According to Duncan Kennedy in his article, *Toward a Critical Phenomenology of Judging*, most judges cannot separate their personal preferences from their initial impression of the law. What judges try to accomplish is a connection between their first

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[78] Rasmusen, Eric, "Judicial Legitimacy as a Repeated Game" *The Journal of Law, Economic, & Organization*, Vol. 10, No. 1, (1994), 63.
[79] *Ibid*, 64.

impression of the law and their "initial sense of how-I-want-it-to-come-out."[80] It is this sense of "how-I-want-to-come-out" that directs the judge in her interpretation of the law, to bring about an outcome that concurs with her sense of justice. It is only when the law conflicts with the judges own personal preference that the judge is forced to consider the other available options; 1) try and justify her position in accordance with precedent or 2) abandon her personal preference altogether and remain true to the law. Either way, a judge's legal opinion is initially influenced by her subjective personal preference and the desire to achieve the "how-I-want-to-come-out" end. This still leaves us with the question, what prevents a judge from deciding a case based on personal preference even when the outcome cannot be justified with established law?

Judicial Accountability:

It is true that the judiciary has no effective means of formal accountability. The Courts are not bound by elections, which force them to succumb to the will of the people, and there are no formal mechanisms forcing the Court to adhere to public opinion. However, it is an inaccurate conclusion to assume that the judiciary is not restrained by other means. Although the judiciary is not held responsible in the same manner as elected officials, it is possible to show some level of accountability. Minor checks and balances do exist to keep judges accountable, but the consequences are far less severe than for an elected official who risks losing his job. The security of judicial independence cannot be denied, nor can the judiciary prove its equivalency to the accountability of the elected branch. What can be shown is the existence of a balance,

[80] Kennedy, Duncan, *Toward a Critical Phenomenology of Judging, taken* from Hutchinson and Monahan's *The Rule of Law*. Toronto; Carswell, (1987), 141.

proving that although not entirely democratic, the judiciary is not entirely undemocratic either.

The collegial court plays a major role in providing accountability on the bench. By creating inter-dependency between justices, a nine-member panel diminishes the potential for abuse by a rogue judge. Individual credibility and persuasion force judges to be responsible to each other to achieve and maintain a majority coalition. Judicial relationships are established through interaction on and off the bench, validating individual credibility and reputation. This knowledge contributes to the strategic tactics employed by judges to determine final outcomes. It becomes almost impossible for a single judge to perpetuate his own individual policy preference in a system designed for panel majority rule. Without the support of other judges, a minority objective cannot have any enduring impact.

a) Accountability through dissent

The threat and use of dissent helps to ensure judges are producing the best possible decisions. Separate opinion writing helps to eliminate careless mistakes and improves the final judgment by challenging the ideas of the majority and testing majority opinions; "rigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side."[81] Open criticism challenges the argument of the majority, forcing it to potentially rethink and defend its ideas ultimately improving the quality of the law. Well-tested law is less susceptible to error and therefore helps to safeguard the system from manipulation and abuse of power.

Open criticism of majority opinions through separate opinion writing makes it difficult for judges to pursue personal policy preferences. With the freedom to persuade

[81] Brennan, William J. Jr., "In Defense of Dissents" *The Hastings Law Journal*, Vol. 37, (1986), 430.

a majority toward an individual political preference, judges are not immune to strategic game playing on the bench. The ability to direct and influence through accommodation and negotiation to reach a desired end is a permanent practice of the modern adjudicatory process.[82] Direct abuse of judicial independence is usually taken care of behind closed doors[83] and what is not, is addressed in a separate opinion for all to read.

b) The Weakest Branch

The credibility of the judicial system plays a major role in the legitimacy of the Court. Maintaining a high approval rating benefits the Court by allowing it to function in the manner it has grown accustomed to and helps to reinforce the authority of the judiciary. Jeopardizing the long-term legitimacy of the Court would be devastating to an institution which relies on the support of the other governing bodies as well as confidence from the people whom it is mandated to protect. The courts are "without sword or purse...they cannot enforce their own decisions, nor can they budget the mechanisms needed to implement them."[84] Without the financial and enforcing support of the other branches, judicial decisions would just be a collection of pretty words. Once judgment has been rendered, it is a rare occasion if the Court ever follows up on the implementation of is decision. "Lacking fail proof means of enforcing its decisions, the power of the Supreme Court depends in part on the legitimacy the public affords its rulings."[85] Judges are at the mercy of the populace and therefore must be mindful of their reputation. With the Court's legitimacy playing such a crucial role in the effectiveness of

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[82] A more detailed discussion will be presented in "The Collegial Court" section in Chapter 3.
[83] Depending on the judicial system, some are more open about the interactions of judges. The Canadian Supreme Court for example, is very quiet about what goes on behind closed doors, while American judges are far more open.
[84] Gavison, Ruth, "The Role of Courts in Rifted Democracies" *Israel Law Review* Vol 33, No. 2, (1999) 233.
[85] Maltzman, Forrest, James F. Spriggs II and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press, (2000), 490.

judicial authority, it is imperative that judges ensure that their legitimacy is maintained. "One of the most important concerns of any judiciary is its right relations with the public. No court can satisfy the public need for faith in the processes of justice, or can function with the highest efficiency without the support of public confidence."[86] As a result, all aspects of judicial decision making must be carefully balanced. "Its decisions matter because people – elected officials, police, public servants, ordinary citizens – think they ought to matter; and they would matter less if fewer people accepted this importance as self-evident and axiomatic."[87] Maintaining public approval goes hand in hand with maintaining the Courts legitimacy as a viable authority on law.

Judicial legitimacy comes from the people's belief in the system. By keeping the Court in good standing with the public, judges maintain the ability to continue functioning with a high level of authority. The Court has become an acceptable and widely used institution mainly because the Courts continue to make "good" laws. If the Courts were to go too far and step significantly outside their prescribed authority, what would happen? "Some people suggest that if the court overreaches itself, if it pushes too far too fast in a direction that public opinion and elected officials are unwilling to accept, then the widespread support it now enjoys will evaporate."[88] Without support, the Court lacks authority and will eventually become ineffective. The Courts consider the will of the people enough to maintain their effectiveness.

The division of powers between the two levels of government puts the Court in a very dangerous position that could threaten the judiciary's legitimacy. Not accustomed

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[86] Stone, Harlan F., C.J. "Dissenting Opinions Are Not Without Value" *Journal of the American Judicature Society*, Vol. 26, (1942), 78.
[87] McCormick, Peter, *Supreme at Last.* James Lorimer & Co., (2000), 168.
[88] *Ibid*, 168.

to playing the political game, the Court is forced to tread lightly so as not to disrupt the delicate balance between provincial and federal relations. "By focusing on statues and regulations the Court placed itself in a confrontational relationship with democratic actors for control of the policy process in Canada, and this shift in focus intensified the judicialization of politics in a parliamentary democracy."[89] As an essential part of federalism, the Court acts as an impartial arbiter when disputes about jurisdiction arise. The Court's recent influx of judicial activism, greater visibility due to the *Charter* and the resulting increased use of judicial review, has challenged the Court's claim to impartiality by thrusting it into the policy making arena. The Court is very cognizant of it role within the political sphere and attempts to respect federal and provincial jurisdiction through proper and acceptable use of judicial review. It must be cautious how and when it uses its power so as not to disrupt the balance and bring its own authority into doubt.[90]

c) Accountability through the written reason

In the modern high court, in both the American and Canadian systems, the importance of the written reasons for a decision has developed to new heights. Once a case reaches the high court, the outcome is no longer the most important element of the decision. The reasons given for a decision become the law by setting the standard, creating the precedent, and affecting future generations. Bad law stems from bad reasons, not necessarily from bad outcomes. Judges are now writing longer, meticulously detailed decisions, emphasizing the need to get the reasons right through in-depth

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[89] Kelly, James B., "The Supreme Court of Canada's Charter of Rights Decisions, 1982-1999: A Statistical Analysis" *Law, Politics and the Judicial Process in Canada*, 3rd ed., Ed. F.L. Morton. Calgary: University of Calgary Press, (2002), 503.

[90] *R v. Crown Zellerbach*, highlights the Courts struggle with federal/provincial jurisdiction over ocean rights. The fragmentation on the Court is an example of the challenge faced by Supreme Court justices to appropriately decide jurisdictional disputes.

persuasion. Unlike past decisions, judgment without reasons is no longer an acceptable practice. Blind faith in the wisdom of judges no longer exists and judges have an obligation and a duty to explain their opinions. Justice Binnie of the Canadian Supreme Court recently wrote in *R v Sheppard*, "The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large."[91] This responsibility was echoed in *R v Braich*[92], thus establishing the clear legal precedent for judges to provide sufficient reasons for judgments rendered.

Written reasons by judges provide a link between the untouchable, independent judge and the public. Justice Binnie continued on in *R v Sheppard* to further establish the need for accountability of judges via the written reasons:

> At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges.[93]

Not only does the set of written reasons supply the public with a physical copy of judicial decisions, but it forces judges to confidently sign their name to a decision, proclaiming to the world with confidence that they stand by their decision. "The publication of concurring and dissenting opinions summons the appellate judge to stand up and be counted; this disclosure is of importance in view of the otherwise secret aspects of the

[91] [2002] 1 S.C.C., 869.
[92] [2002] 1 S.C.C., 903.
[93] [2002] 1 S.C.C., 869.

deciding process."[94] The power of these statements is critical to the establishment of the judiciary as an accountable body. Not only do non-judicial players feel that the Court should be restrained, but the Court itself desires a level of accountability and requires it from the other justices. The Court realizes that the credibility of the Court is bound to the persuasiveness of its decisions. The success of the Court's decisions potentially translates into public support, which is a main factor for the independence the Court enjoys. Judges have an obligation to report to the public through the written reason.

Judicialization of Politics

The judicialization of politics is a recent term coined to describe an occurrence that has swept through many nations around the world and refers to the dramatic expansion of judicial power in modern democracies. The growth of judicial power, via practices such as judicial review, "has also expanded in its local scope to become a manifold, multifaceted phenomenon, extending well beyond the now 'standard' concept of judge-made policy-making, through constitutional rights jurisprudence and judicial redrawing of legislative boundaries between state organs."[95] It is the increasing judicial intervention into the political sphere of constitutions, "core prerogatives of legislatures and executives in foreign, military and fiscal affairs" that has made this the "most significant phenomena of contemporary governance."[96] The dynamic nature of judicialization makes it an essential component to the understanding of modern national high courts; because it describes the evolving role judiciaries are now challenged with.

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[94] Stephens, Richard B., "The Function of Concurring and Dissenting Opinions in Courts of Last Resort" *University of Florida Law Review*, Vol. 5, (1952), 397.
[95] Hirschl, Ran, "Resituating the Judicializtion of Politics: Bush v Gore as a Global Trend" *Canadian Journal of Law and Jurisprudence*, Vol. XV, No. 2, (July, 2002), 192.
[96] *Ibid*, 193.

The judicialization of politics normally refers to, "1) the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislatures, the cabinet, or the civil service to the courts" or "(2) the spread of judicial decision-making methods outside the judicial province proper."[97] More accurately stated, the primary form is the practice of courts playing an active political role and ultimately effecting public policy outcomes, which traditionally has been outside of the judicial sphere of influence. The second form is less common, involving the expansion of non-judicial negotiating and decision making by actors other than judges, using quasi-judicial methods. Basically it involves turning something into a form of a judicial process.[98] For my purposes it is not necessary to discuss this at great length, as it does not apply here.

Conditions of Judicialization:

Judicialization can only occur under certain political conditions. The first major condition is democracy. It is unlikely that judicialization of politics would occur outside a democratic nation, because it is improbable that a dictator would willingly give up any degree of power to the judiciary.[99] A dangerous move especially if the judiciary had intentions of playing a more active role in the political realm, specifically in the area of public policy making.

The "separation of powers" and the "politics of rights" go hand in hand to enhance to authority of the judiciary. Federalism requires the use of a "neutral umpire" to settle disputes that arise over division of powers. "For a federal division of legislative

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[97] Tate, C. Neal, and Torbjorn Vallinder, *The Global Expansion of Power.* New York: New York University Press, (1995) 13.
[98] *Ibid*, 13.
[99] See note 25.

powers to be effective, there must be a mutually acceptable process for settling the inevitable disputes over where one government's jurisdiction ends and the other's begins..."[100] The role of Courts in a liberal democracy is an obvious one; however, what that role is continues to change, causing disagreement over the Court's position relative to the other branches of government. A separation of powers structure allows a certain level of flexibility within the power structure, giving the judiciary a more equal footing with the other branches of government, putting it in a very good position to assert its authority. The politics of rights, namely in the form of a bill of rights, further encourages the judiciary to advance its authority. In this way, a bill of rights gives the Court a stronghold, something to call its own and forces the other branches of government to let the judiciary into the political game.

Other conditions make judicialization more feasible. They include things like "interest groups use of the courts", "opposition use of the courts", "ineffective majoritarian institutions", "perceptions of policy-making institutions", and "delegation by majoritarian institutions".[101] I have indicated the few I believe to be the most important, with the exception of the one I have left for later discussion: the willingness of judges to judicialize.

There is no set formula for judicialization as it occurs naturally and for its own reasons. All the above conditions could be present and judicialization may never occur. The single most important condition necessary for judicialization is the desire for judicialization by the judges themselves. Unless the current judges on the Court decide

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[100] Morton, F.L., ed. *Law, Politics and the Judicial Process in Canada,* 3rd ed. Calgary: University of Calgary Press, (2002), 423-424.

[101] For a more detailed description of these conditions, see *The Global Expansion of Power* by Neal Tate and Torbjorn Vallinder, page 28-33. For my purposes only a brief outline is necessary.

they should, judicialization will never happen. Judges must decide that they want to "(1) participate in policy-making that could be left to the wise or foolish discretion of other institutions, and, at least on occasion, (2) substitute policy solutions they derive for those derived by other institutions."[102] The lack of desire for judicialization by Supreme Court justices during the *Bill of Rights* era was a key factor in the *Bills* ineffectiveness. It is true that the *Bill* lacked constitutional authority and was considered by Bora Laskin to be a "quasi-constitutional document" which played a role in its demise[103], but ultimately it was the judges themselves that were reluctant. "The fact of the matter was that a majority of the judges did not want the power of judicial review because they viewed it as inconsistent with Canada's political and legal inheritance."[104] The necessary attitudes and personal preferences of the justices are essential to understanding the progression of high courts from the "least dangerous branch"[105] to an active political participant.

Judicial Review

The power of judicial review gives courts the authority to review the decisions of other branches of government to determine whether or not they are consistent with the legal principles outlined in the Constitution. The authority to invalidate laws passed by legislatures, if deemed unconstitutional, puts the courts in a very precarious, yet powerful political position. As overseers of the Constitution, the Court indirectly becomes the overseer of certain areas of both federal and provincial government jurisdiction. The

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[102] *Ibid*, 33.
[103] "From the start, the *Bill of Rights* was plagues by problems of interpretation. These problems stemmed principally from its legal status as an ordinary statute and the ambiguous working of its second section. Canadian judges, including those on the Supreme Court, could not agree on what function the *Bill of Rights* assigned to the courts." Morton, F.L., ed. *Law, Politics and the Judicial Process in Canada*, 3rd ed. Calgary: University of Calgary Press, (2002), 482.
[104] *Ibid*, 483.
[105] Reference to Alexander Bickel's book *The Least Dangerous Branch*. New York: The Bobbs-Merrill Company Inc., (1962).

"essential role of judicial review in our society is to guard against certain constitutional transgressions which popular majorities specifically seek to impose."[106] If the Court is supervising the government, then who is supervising the Court?

With little accountability, the power of judicial review raises some serious questions about the intention of the court, which can be evaluated in two different ways. The more negative assumption views the Courts use of judicial review as a means to advance their own policy objectives while disregarding the rule of law and *stare decisis*;[107] often associated with such criticisms is an implied abuse of power and subjective decision making by the Courts. The more positive explanation refers to the Courts simply using this power to ensure that the legislative branch is keeping within its proper limits as outlined in the Constitution and an abuse of power by legislatures is not occurring. Judicial review provides a check on the other branches of government:

> Judicial power can be abused, and so for that matter can legislative power, but I feel no doubt at all that the power which demands most attention from lawyers is administrative power. Judicial power is restrained by a most elaborate system of rules, precedents, appeals, etc. Legislative power is restrained by responsibility to the electorate. But administrative power is restrained by little unless by law. Personally I believe that judicial review is necessary to prevent abuse and to preserve fairness, and that if not carried to excessive lengths it is perfectly compatible with efficient administration.[108]

Authority of Judicial Review:

Judicial review falls within the Courts jurisdiction as authorized by the Constitution; "Section 52 of the *Constitution Act, 1982*, by declaring the Constitution of Canada to be the 'supreme law' and any law inconsistent with its provisions to be of 'no

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[106] Choper, Jesse H., *Judicial Review and the National Political Process*. Chicago and London: The University of Chicago Press, (1980), 59.
[107] Often referred to as the Realist approach; see such thinkers as Oliver Wendell Holmes, *The Path of the Law* or Karl Llewellyn, *Some Realism About Realism*.
[108] Justice Claire L'Heureux-Dube speaking in *TWU v. British Columbia Telephone Co.* [1988] 2 S.C.R., 564.

force or effect,' gives the courts' power to invalidate unconstitutional laws an explicit constitutional footing for the first time."[109] The power of the courts to declare any statute null and void if deemed unconstitutional has been around since the inception of the Constitution and originally was met with little controversy.[110]

The American's have recognized judicial review since the Marshall Court passed down the famous *Marbury v Madison* decision in 1803.[111] Chief Justice Marshall forever altered the authority of the Court, by proclaiming "the Supreme Court's possession of the power of judicial review."[112] Chief Justice Earl Warren and his court transformed the use of judicial review, using it as a tool that would help the Court take the first step towards the socially progressive approach used today. By allowing the Court to invalidate government segregation policy and forcing integration in schools in *Brown v Board of Education*, the Court positioned itself within the political game. What started as a racial segregation case turned into a "non-elected, independent and neutral court" stepping in to "correct a failure or pathology of the democratic process."[113] From there, the Court succeeded in becoming the protector of civil liberties and taking the lead role as the

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[109] Smith, Jennifer, "The Origins of Judicial Review in Canada" F.L. Morton, Ed. *Law, Politics and the Judicial Process in Canada*, 3rd ed. Calgary: University of Calgary Press, (2002), 441.

[110] "The *Constitution Act* took the form of an Imperial Statute and section 129 mandated the continuation of the existing legal regime. This meant that the *Constitution Act* was subject to the already existing *Colonial Laws Validity Act*, which required consistency of colonial law with British Imperial Statues. The Judicial Committee of the Privy Council was charged with the responsibility of enforcing this policy." It was because of the JCPC that Canada felt a national high court was unnecessary and a lack of a Supreme Court made the introduction of judicial review easier. A fear of federal domination over the provinces through a national high court produced controversy surrounding the creation of the Supreme Court of Canada and subsequently the power of judicial review. Oddly enough, provincial concerns were eased due to the continued practice of appeals to the JCPC, and when the *Supreme Court Act* was adopted in 1875, "the newly created Supreme Court of Canada immediately began to exercise the power of judicial review and did so without controversy." Morton, F.L., ed. *Law, Politics and the Judicial Process in Canada*, 3rd ed. Calgary: University of Calgary Press, (2002), 425.

[111] 5 U.S. 137 (1803).

[112] Shapiro, Martin, *Freedom of Speech: The Supreme Court and Judicial Review*. New Jersey: Prentice-Hall, Inc., (1966), 8.

[113] Tate, C. Neal, and Torbjorn Vallinder, *The Global Expansion of Power*. New York: New York University Press, (1995), 47.

champion of human rights. This precedent would allow the Warren Court to introduce "nationally uniform and reformed set of police procedures for dealing with the accused, a new national law of obscenity, profound reform of the system of electing state and federal legislators and a new libel law more protective of criticism of public officials."[114] This new use of judicial review created a precedent that would eventually influence many national high courts, with the US Supreme Court as the leader of the "rights revolution". The Court had found an appropriate outlet by which to make its mark, however, it could not have done it alone.

The Rights Revolution:

A transformation of this magnitude could not happen overnight, nor can it be credited to only one determining factor. The modern day Supreme Court emerged through the efforts of a support structure that laid the foundation and paved the way for legal mobilization to occur.[115] According to Charles Epp in his book, *The Rights Revolution*, "strategic rights advocacy became possible because of the development of what I call the support structure...consisting of rights-advocacy organizations, rights-advocacy lawyers and sources of financing, particularly government-supported financing."[116] Although it may appear to have occurred effortlessly, the Court's transformation could not have happened without the support structure paving the way for reform; otherwise change would have appeared too drastic, radical, severe, and revolutionary. This was evident with the Courts reluctance in Canada to applying the *Bill of Rights* in an activist manner, despite growing support for such an action. Society was

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[114] *Ibid*, 47.
[115] Epp, Charles, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago and London: The University of Chicago Press, (1998), 3.
[116] Chicago and London: The University of Chicago Press, (1998), 3.

gradually readying itself and encouraging a socially progressive Court. Justice Cartwright provided the writing on the wall with his dissent in *Robertson and Rosetanni v R.*[117] His application of the *Bill* stated "where there was an irreconcilable conflict between an act of Parliament and the *Bill of Rights*, the latter must prevail."[118] This was an unprecedented endorsement of the *Bill* as protector of civil liberties. [119] "Cartwright's dissent in *Robertson and Rosetanni* encouraged civil libertarians throughout Canada. Many saw it as the thin edge of the wedge; given time, they hoped, the entire *Bill of Rights* would one day win approval from the Supreme Court."[120] Cartwright quickly retracted his statements upon further reflection of the potential consequences his dissent would impose not only on the Court but also on government if his decision ever came to fruition.

The direction of the Court was further confused by *The Queen v Drybones.*[121] A full nine-judge panel sat on this controversial case involving equality rights under the *Bill of Rights*. Joseph Drybones was charged under the *Indian Act*, section 94(b) with being intoxicated off the reserve and was fined $10. He pleaded his case all the way to the Supreme Court arguing that he had been denied equality before the law based on race. This time around, the Court, in a 6-3 vote, voted in favour of a *Bill of Rights* application, with a number of judges changing their previous position with regard to the *Bill*. Rights advocacy groups praised the Court's majority opinion and felt that reform was eminent, but as subsequent civil rights cases showed, change was not to be. "In the years

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[117] *Robertson and Rosetanni v The Queen,* [1963] S.C.R. 651.
[118] Snell, James G., Frederick Vaughan, *The Supreme Court of Canada: History of the Institution.* Toronto: The Osgoode Society by the University of Toronto Press, (1985), 219.
[119] Bushnell, Ian, *The Captive Court: A Study of the Supreme Court of Canada.* Montreal & Kingston, London and Buffalo: McGill-Queen's University Press, (1992), 354.
[120] Snell, James G., Frederick Vaughan, *The Supreme Court of Canada: History of the Institution.* Toronto: The Osgoode Society by the University of Toronto Press, (1985), 219.
[121] [1970] S.C.R. 282.

following the *Lavell and Bedard*[122] and *Morgentaler*[123] decisions, feminists and civil libertarian groups became disillusioned with the 1960 *Bill of Rights* as an effective legal instrument to achieve the kinds of judge-led policy reforms that they observed in the United States and wanted to emulate in Canada."[124] The Court was not prepared to commit to the demands of a socially progressive judiciary or the consequences that would result from an activist bench.

Democratization of Courts:

The support structure significantly "democratized access to the Supreme Court."[125] The democratization of the courts opened up the litigation process, making it available to more than just wealthy corporations or government, but to the average citizen; "increasingly disenchanted publics turn away from elected officials towards the judiciary as an effective means of resolving matters of fundamental principle."[126] As a result, the courts were sending a message to the support structure indicating a desire to deal with a more socially progressive docket. Judges are forced to decide cases that are brought before them and do not have the luxury of seeking cases out that focus on the issues the Court would like to address. Instead, the court must send out signals with the hope that the appropriate cases are presented. The rights revolution in the US, starting with *Brown*, sent a very clear message about the potential direction the Court was

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[122] *Attorney General of Canada v Lavell and Bedard*, [1974] 1 S.C.R. 1349.
[123] *Morgentaler v The Queen*, [1976] 1 S.C.R. 616 at 675.
[124] Morton, F.L., ed., *Law, Politics and the Judicial Process in Canada*, 3rd ed. Calgary: University of Calgary Press, (2002), 484.
[125] Epp, Charles, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago and London: The University of Chicago Press, (1998), 3.
[126] Kelly, James B. and Michael Murphy, "Confronting Judicial Supremacy: A Defense of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence" *Canadian Journal of Law and Society*, Vol. 16, No. 1, (2001), 3.

prepared to take. The support structure needed to take that cue and supply the appropriate docket.

The democratization of courts, although seemingly undemocratic, ultimately strengthens democracy by representing all Canadians by becoming more accessible to minority groups. The rights revolution signified the first time the "courts finally began properly defending and protecting" individual rights.[127] Not only were the Courts fulfilling a role that was once vacant, but also it legitimized the need for the protection of civil liberties. The support structure prepared the environment for desegregation to be effective, presented *Brown*, now all the Court needed to do was take the final legitimizing step and make the decision. Once that step had been taken, it was the public's responsibility to accept and encourage the rights revolution, not only by allowing the Courts to fulfill their role as protector of constitutional rights, but by recognizing the Courts judgment as supreme law.

Conclusion:

The role of the Canada's national high court has changed drastically over the last thirty years. The emergence and acceptance of the creative judge via the introduction of the *Charter* and the judicialization of politics caused a shift in decision making style on the bench. The use of judicial review gave Supreme Court judges significantly more authority over the government directive and a heavier hand in the political game, forever altering the way the Court functions. Understanding the evolution of the Courts is applicable to the explanation of the evolution of minority decisions addressed in Chapter 4. The eleven years leading up to the entrenchment of the *Charter* and the crucial first

[127] Epp, Charles, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago and London: The University of Chicago Press, (1998), 4.

six years of *Charter* decision making represents the emergence of the modern Supreme Court, with this era signifying the massive shift in Supreme Court mentality, attitude and opinion writing. With a solid understanding of the role and function of the Supreme Court, I can now move ahead with the development and functions of the minority opinion and disagreement behaviour.

Chapter III
The Development and Functions of Disagreement

Judges are required to make hard decisions on a daily basis. Sometimes disagreement may arise between judges and a fragmented decision may result. In what form judges express disagreement and the functions that disagreement serves is the topic of the next chapter. Because decision making is not an individual act but instead a deliberate dialogue between judges, the collegial nature of the Court plays into how disagreement can act as a strategic tool to influence the final outcome. The advantages and disadvantages of disagreement on the bench highlight the longstanding debate between the unanimous decision vs. a fragmented one. This section will outline the existing understanding of disagreement and its affects on opinion writing, as well as the evolution of the written opinion, including the strategic nature of the collegial court.

Definitions:

i) Dissent

A dissent is an opinion that disagrees with the outcome supported by the majority. A judge that chooses to dissent usually disagrees with the reasons of the majority as well. This judge (or judges as the case may be), for whatever reason, has decided to separate herself from the majority. A dissent may be an extensive opinion, with full reasons and arguments or it may be a short paragraph simply stating a judge's desire to "respectfully disagree" with the majority. Either way, the dissenting judge is making a bold statement regarding her position toward the majority.

ii) Separate concurrence

A separate concurrence is not a full split from the majority, but is disagreement with the majority reasons but not the outcome. It involves a judge simply disagreeing with one or more aspects of the *reasons* given by the majority, but is in full agreement with the outcome of the case. Sometimes a judge will feel compelled to make a major point more clear, which might not have been a significant point to the majority writer. This form of separate opinion writing has implications of its own and can be used in many different ways, as I will explore later.

Disagreement comes in various shapes and sizes, both within dissent and separate concurrence. This statement is sometimes overlooked and it is assumed, quite wrongly, that these two categories adequately define what judicial disagreement looks like. Disagreement has traditionally been slated into two main stereotypes, the dissent as canonical disagreement and the concurrence as less important than the dissent. Canonical dissent refers to the dissent that judges write in the hope they will convince their colleagues and the public that the majority has made a frightful mistake and will change the future law accordingly.[128] The assumption that the separate concurrence is minor disagreement compared to the dissent has been a regular theme throughout disagreement literature. Although these postulations are not incorrect; some dissents are canonical and some concurrences are lesser than some dissents, the assertion is not completely accurate either. Disagreement can fall into many different categories, with numerous different types of dissent and separate concurrence that Chapter 4 will outline. This chapter will first explore what disagreement looks like in practice, with a brief historical look at the written reasons and the functions disagreement serves in the decision making process.

[128] The canonical dissent will be addressed in Chapter 4, note 237.

The Written Reasons:

The practice of opinion writing can take three major forms, the seriatim approach used by the British, the civil law tradition of per curiam favored by the French and through the tumultuous Marshall period on the USSC and concluding with the current North American practice which involves a mixture of the two. A brief examination of the different approaches will show the evolution of disagreement as well as the challenges faced by minority opinion writing on the bench. Emphasizing the value of the written reasons will stress the need and necessity for the study of opinion writing in the first place.

The written opinion fulfills two essential functions of the adjuratory process, by providing the physical external end product explaining the Court's decision and by offering an element of public accountability to an otherwise intangible institution. When a decision reaches the Supreme Court level, outcome is no longer the primary consideration but has become a secondary consequence overshadowed by the development of legal principles. The Supreme Court's essential function is not dispute resolution, but the examination and resolution of major questions of law. It is through the written reasons that the Supreme Court relays their final result to the lower courts, other government agencies and the public at large. Acting as the Court's link to the outside world, the written reasons provide leadership and guidelines signaling the direction and mindset of the bench. The written reasons also act as an accountability mechanism, requiring judges to attach their name to a set of reasons unto which they are held liable. Openly published written opinions, both majority and minority, do not allow judges the opportunity to hide behind the mask of anonymity and is "not submerged within an

artificially unanimous opinion."[129] Published opinions not only substantiate individual reputations but also determine the credibility of the Court as a whole based on the reasons for judgment presented. "Public accountability through the disclosure of votes and opinion authors puts the judge's conscience and reputation on the line, and the repercussions are sometimes severe."[130] Therefore a rational and justified set of reasons is necessary to protect the legitimacy of the institution. The option of disagreement through the signing onto a minority set of reasons or choosing to author a minority opinion, due to the displeasing nature of the majority, leaves little excuse for a judge not to stand by what he signed. In the event of disagreement, Canadian judges have the option to write separately, adding a whole new dimension to the decision making process as will be shown in this chapter.

***The Seriatim, The Per Curiam and Everything in Between*:**

According to USSC Justice Ruth Bader-Ginsburg, in her article "Remarks on Writing Separately," there are three patterns of appellate judgments by collegial courts.[131] The British high court practice of seriatim decision writing has each justice writing a separate and individual set of reasons for each case rendered. This can be a very time consuming and repetitive practice especially if all justices are in agreement with the final outcome. As national high courts saw an ever-increasing caseload, it became increasingly difficult for judges to keep up to their commitments, put in the necessary effort and supply a set of reasons for every single decision. The advantages, however, of the seriatim opinion are that multiple viewpoints and all considerations are represented with every opinion being published. The seriatim provides a clear presentation of law as

[129] Scalia, Antonin, "The Dissenting Opinion" *Journal of Supreme Court History*, (1994), 42.
[130] Bader Ginsburg, Ruth, "Remarks on Writing Separately" *Washington Law Review*, Vol. 65, (1990), 140.
[131] *Ibid*, 134.

there is no mistaking the Court's stance on a particular issue or an individual judge's stance on a certain position. The stigma attached to disagreement is absent because of the expectation for all judges to supply separate and individual opinions. Therefore, the greatest challenge to seriatim opinion writing is the amount of time required to produce reasons for every decision and the overlap in reasons from one judge to the next.

The per curiam decision, or "for the court" approach as seen in the French system, has one justice assigned to write the opinion on behalf of the Court. A single, unanimous decision is written, "(i)n the civil law pattern, anonymity (faceless or nameless judgments) and unanimity (one judgment, no divergent individual opinions) go together"[132], regardless of the conference vote. Unanimity provides clarity of law and a solid, unified, judicial front, which instills confidence in the judiciary's ability to interpret the law correctly. The French system, for example, believes that "the law is the law" and "(t)here can be but one officially correct reading" of the law.[133] This view and others like it feel that unanimity or at least the appearance of unanimity is essential to maintain a strong belief in the "rightness" of the law. Some view separate opinions as weakening the majority judgment and undermining the integrity of the Court.[134] However, unanimity can come with a cost as suppressing dissention for a false display of consensus can also jeopardize the integrity of the law as will be addressed in the next section.

The American system had a taste of a per curiam court when Chief Justice John Marshall tried to impose a strict per curiam approach on his Court by breaking "with English tradition and adopted the practice of announcing judgments of the Court in a

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[132] *Ibid*, 38.
[133] *Ibid*, 133
[134] Wahlbeck, Paul J., James F. Spriggs II, Forrest Maltzman, "The Politics of Dissents and Concurrences on the U.S. Supreme Court" *American Politics Quarterly*, Vol. 27, No. 4, (1999), 489.

single opinion."[135] The spell was broken a mere four years later by a single, special concurrence and never returned to the per curiam decision. While the coup was a bold statement in favour of minority opinions and the inherent benefits valued by the justices, Marshall's original objective was not forsaken. "Marshall's disciplined leadership solidified and increased the Court's power, but it also shaped a Court that continued to value its collective institutional power above the independent voices of its members and thus, into the start of the twentieth century, to discourage dissent."[136] Although not originally as expected, Marshall's influence did result in a highly unified Court that continued for many years after his departure.

The last opinion writing style describes the approach employed by Canada and the United States. Standard practice has an opinion for the court authored by a single judge, with a majority of signatures, from which individual judges sometimes disassociate themselves in varying degrees.[137] Referred to by Claire L'Heureux-Dube as "multiple voices"[138], the Canadian tradition has struck a balance between seriatim and per curiam, allowing for a strong unified judicial voice in the case of a truly unanimous decision or an honest reflection of the Court's position in a fragmented outcome. "(D)issenting opinions serves the interests of the truth...judges who disagree with the majority point of view is the only truthful way to reflect the court's actual disparate opinions on the matter before it."[139] Although minor debate still continues between the two conflicting styles, "it would be...shocking in our countries, if it were seriously suggested that dissents should

[135] Brennan, William J. Jr., "In Defense of Dissents" *The Hastings Law Journal*, Vol. 37, (1986), 432-433.
[136] Krugman-Ray, Laura, 182-83.
[137] Bader Ginsburg, Ruth, "Remarks on Writing Separately" *Washington Law Review*, Vol. 65, (1990), 134.
[138] L'Heureux-Dube, Claire, "The Dissenting Opinion: The Voice of the Future" *Osgoode Hall Law Journal*, Vol. 38. No. 3 (2000), 499.
[139] Flanders, Robert G. Jr., "The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable" *Roger Williams University Law Review*, Vol. 4, (1999), 406.

be banned."[140] The unanimous Court is not without merit and although true consensus is preferable to a false sense of unanimity, balance must prevail through the use of restraint and wisdom.

The Unanimous Court:

Ideally, a unanimous decision is more favorable than a fragmented one. The existence of multiple voices in a single decision can create doubt in the certainty of the law and has the potential to diminish public confidence in the ability of SC Justices to accurately determine supreme law. The lack of consensus represented by multiple judicial interpretations creates doubt in the authority of legal doctrine as determined by a majority coalition. Some argue that unanimity strengthens the clarity and integrity of the law while others claim that disagreement serves to do the same by challenging the majority opinion. Before discussing the functions of disagreement behaviour, I will examine briefly the arguments in favour of a unanimous judicial voice.

The Unified Voice:

Judge Learned Hand, formerly of the United States Supreme Court, warned that a dissent "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."[141] The traditional view of the Courts presents judges as a single unit, searching to find the truly correct answer to the legal questions brought before them. Judges are pressured, especially when hearing important cases, for the

[140] L'Heureux-Dube, Claire, "The Dissenting Opinion: The Voice of the Future" *Osgoode Hall Law Journal*, Vol. 38. No. 3 (2003), 498.
[141] Scalia, Antonin, "The Dissenting Opinion" *Journal of Supreme Court History*, Vol. 4, (1994),35; William J. Brennan, Jr., "In Defense of Dissents", 37 *The Hastings Law Journal* (1986), 429.

"Court to speak collectively, to send a strong message."[142] There is authority in unanimity and strong consensus leaves little uncertainty as to the position of the Court on controversial issues. A deeply fragmented panel will only signal to interested parties that the Court is divided, inviting criticism, skepticism and backlash, whereas a unanimous Court would have less difficulty justifying a controversial issue to the critics.

***Clarity of law*:**

Disagreement clouds the clarity of the law by offering multiple interpretations to the same legal questions. "The appearance of unanimity is thought by many to buttress the authority of and confidence in the law."[143] The legal profession prides itself on predictability and determinacy of the laws that govern our great nation, but even though majority rules the day, several different interpretations can cause confusion. "Dissents create uncertainty,"[144] and minority opinions only cast doubt in the minds of the litigants, signals dissention to the lower courts, which rely on the high court for direction and ultimately sends a muddled judgment to government. Precedent and rule of law not only provide clarity and dependability in judgment, but also offer security through procedural uniformity necessary to reach consistent outcomes. As the "the mouthpiece of the law", judges exercised minimal discretion and little room existed for variation in legal answers. Disagreement must be kept to a minimum because it has been "recognized over time, even if unconsciously, that they (Supreme Court Justices) must exercise a degree of self-discipline in order to avoid having multiple, redundant opinions detract from the quality

[142] L'Heureux-Dube, Claire, "The Length and Plurality of Supreme Court of Canada Decisions" *Alberta Law Review*, Vol. XXVII, No. 3, (1990), 586.
[143] Alder, John, "Dissents in Courts of Last Resort: Tragic Choices?" *Oxford Journal of Legal Studies*, Vol. 20, No. 2, (2000), 242.
[144] *Ibid*, 242.

of the Court's decisions and thereby diminish its legitimacy."[145]

Confidence in Judiciary:

"The most widespread argument against dissenting opinions, however, is that they detract from the authority of the court."[146] When disagreement arises, the certainty of the law is called into question, and as a result, the justices' ability to properly decipher the correct meaning of legal questions is also called into question. It is the duty of the judiciary to determine the meaning of the law – how can the public be expected to trust the judiciary's capability when they cannot even agree on an outcome? "By publicizing dissension, the dissenting judge airs the court's dirty laundry before the public and undermines public confidence in the wisdom and universality of the judicial process."[147] It is better to suppress public displays of disagreement to maintain the outward appearance of a confident, unified judiciary.

A truly unanimous court would be ideal; however, unwavering consensus is unrealistic and difficult to achieve. "Certainty in the law and flawless adjudication are, of course, extremely desirable objectives; the question here, however, is not whether such ends shall be achieved but only whether we should seek to maintain the appearance of a perfection that does not in fact exist."[148] It would be implausible to assume that the law is perfect and an even greater stretch to assume that judges would be able to supply perfect interpretation. The reality is that the law is full of contradictions, ambiguity, and flaws, coupled with the fact that "society is continually undergoing transformation, whether it is

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[145] L'Heureux-Dube, Claire, "The Dissenting Opinion: Voice of the Future" *Osgoode Hall Law Journal*, Vol. 38, No. 3, (2000), 501.
[146] Bergman, Matthew, "Dissent in the Judicial Process: Discord in Service of Harmony" *Denver University Law Review*, Vol. 68, No. 1, (1991), 86.
[147] *Ibid*, 86.
[148] Stephens, Richard B., "The Function of Concurring and Dissenting Opinions in Courts of Last Resort" *University of Florida Law Review*, Vol. 5, (1952), 399.

due to the advent of new technologies, globalization or growing multiculturalism, to give just a few contemporary examples. These challenges demand new ideas and the evolution of legal thought."[149]

A Court of Outspoken Individuals:

The debate between the pros and cons of a unanimous court versus the benefits of disagreement has raged on for years. The point is best illustrated by the famous dispute between Chief Justice Marshall and Thomas Jefferson that highlights the struggle between unanimity and fragmentation. As already suggested, Chief Justice John Marshall had a significant impact on the United States Supreme Court, which in turn affected aspects of Canada's Supreme Court development. Marshall's vision of the Court was met with criticism, greatest of which came from Thomas Jefferson. Jefferson believed strongly in the power of disagreement and the benefits it brought to the Court, expressing deep concern over the false illusion of unanimity dictated by Marshall. Jefferson felt that "An opinion...huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lax or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning"[150] would do nothing but weaken the Court's legitimacy. Jefferson also made no attempt to mask his harsh criticism of Marshall's apparent dominance over his fellow justices, making Jefferson's condemnation double sided.

Marshall, on the other hand, represents the desire for a unified court, where each decision is delivered, as if unanimous with the full support of all members. Marshall

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[149] L'Heureux-Dube, Claire, "The Dissenting Opinion: Voice of the Future" *Osgoode Hall Law Journal*, Vol. 38, No. 3, (2000), 504.
[150] Quoting Thomas Jefferson, Bergman, Matthew, "Dissent in the Judicial Process: Discord in Service of Harmony" *Denver University Law Review*, Vol. 68, No. 1, (1991), 81.

favoured the power of unanimity and felt strongly that the Court's authority would only be strengthened by consensus. A unified front not only provides a certainty of legal doctrine but also the reassuring confidence a unanimous decision has on the general public. Simply put, a 9-0 vote looks better than a 5-4 vote, especially when dealing with a controversial issue. Marshall valued the principle of unanimity and strived to achieve it. However, Marshall's dominance over the direction of his Court was well known, offering an alternative motivation for Marshall's staunch desire for unanimity. Without open disagreement, the true mentality of the Court would remain behind confidential doors.

Jefferson's primary critique of Marshall's per curiam approach claimed that forced unanimity conceals the true nature of the Court, which serves to undermine the integrity of the institution. A desire for disclosure of all opinions, not just for accountability reasons but also for a more comprehensive picture of where the Court stands on specific issues appeared to be Jefferson's rationale as the false illusion of solidarity masks potential alternatives by closing off the marketplace of ideas. Jefferson also points out that the suppression of disagreement through the "silent acquiescence of lax or timid associates" goes against the duty of a judge to speak out against the majority when their conscience compels them to disagree. The ulterior motive presents itself when Jefferson lectures that this is especially true in the event of a "crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning." Could a Chief Justice wield such influence over his colleagues and use manipulation to reflect his desired outcome? Is it possible that Jefferson was not unreasonable in his accusations

regarding Marshall's "crafty" nature? Did Marshall suppress disagreement to garner stricter control over his Court or were his intentions dignified?

Jefferson's dislike for Marshall is apparent and supported by historical evidence.[151] The turbulent relationship between the two men forces me to question Jefferson's motives for his attack on Marshall. Does Jefferson support the practice of open disagreement for its own sake and the functions it serves or does he support disagreement because Marshall does not? Or even deeper still, does Jefferson criticize Marshall so harshly simply because he does not agree with the policy outcomes that Marshall supports? If the Supreme Court were passing down decisions that Jefferson supported, would Jefferson criticize Marshall's decision to abolish public disagreement? On the flip side, did Marshall remove disagreement for the strength of the court or for his own individual purposes? These questions raise some of the concerns at the core of the disagreement debate.

The Collegial Court:

Collegiality refers to the interdependent nature of Supreme Court interaction and decision making. Judges are no longer viewed as simply nine individuals deciding independently of each other, but instead as a group that decides through an on going dialogue between each other as well as other political actors. Judges are constrained strategic policy makers, and as such, when deciding a case must take into account their colleague's position, the social environment, constitutional validity, other government

[151] See James F. Simon, *What Kind of Nation; Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*. Simon & Schuster, (2002), for an in-depth discussion of the ideological struggle between Chief Justice Marshall and President Jefferson.

institutions and a number of other factors. The decision making process changes as a result of the collegial nature of the Court.

The Collegial Game:

The collegial game involves the strategies and maneuvers judges employ during the beginning and middle stages of decision making.[152] "Because outcomes on the Supreme Court depend on forging a majority coalition that for most cases must consist of at least five justices, there is good reason to expect that final Court opinions will be the product of a collaborative process, what we call the collegial game."[153] After the initial conference where a vote is taken and the majority is assigned, the collegial game begins. According to Forrest Maltzman, James Spriggs and Paul Wahlbeck, experts on *Crafting Law on the Supreme Court*, the game is played in three phases – 1. The first draft of the majority opinion is circulated to all the panel members. Strategic tactics have already been employed by the majority author in the construction of the first majority draft. It is wise to use the information gleaned at conference from the initial vote, comments made by the other justices and past knowledge of individual stances on certain issues to draft an opinion that reflects both his or her own policy goal and the preferences of the expected majority coalition. This is referred to as *preemptive accommodation.*[154] 2. Next, there is a process of give and take between colleagues, through memos in response to initial drafts. It is at this point that accommodation, bargaining and compromise is discussed and minority authors decide if they are persuaded or will write separately. 3. Finally, all

[152] Due to the confidential nature of the Canadian Supreme Court, I must rely on the abundant information available describing the American process which is significantly more open, with published letters between justices, internal memos and open dialogue concerning the building of judicial decisions. I do believe the Canadian method is similar enough to the USSC that the discussion will be useful.
[153] Maltzman, Forrest, James F. Spriggs II and Paul J. Wahlbeck. *Crafting Law on the Supreme Court: The Collegial Game.* Cambridge: Cambridge University Press, (2000), 8.
[154] *Ibid*, 96.

opinion authors, both majority and minority circulate additional drafts in response to colleagues concerns, concluding with the final vote. Constant intellectual exchange and discussion is an ongoing process among justices and these responses play a dramatic and influential role in shaping the Court's final opinion. [155]

Attitudinal vs. Institutional approach:

There are many conflicting theories attempting to explain judicial outcomes on the collegial court, two of the most significant are the attitudinal model and the institutional approach. The attitudinal model claims that "judicial outcomes reflect a combination of legal facts and the policy preferences of individual justices,"[156] with Court decisions as a direct reflection of an individual justice's attitudes toward certain key issues, worldviews and ideological beliefs.[157] The institutional approach says, "the rules of the game in society or, more formally, are the humanly devised constraints that shape human interaction. Institutions, in other words, provide the structure within which decision making occurs and thereby affect the choices that can be made."[158] Judicial independence affords judges a great deal of liberty, but as constrained strategic decision makers, institutional restrictions force judges to play within certain guidelines and rules. "The most important of these constraints is an acknowledgment that Supreme Court decision making is a collective enterprise among all of the justices."[159] Although both theories view decision making from a different perspective, the reality lies in the middle ground coined the strategic model. Judges are free if they chose, through judicial

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[155] *Ibid*, 8.
[156] *Ibid*, 4.
[157] Clayton, Cornell, W., and Howard Gillman, eds. *Supreme Court Decision-Making: New Institutionalist Approaches.* Chicago and London: The University of Chicago Press, (1999), 1.
[158] Maltzman, Forrest, James F. Spriggs II and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press, (2000), 13.
[159] *Ibid*, 17.

independence and security of office, to allow their individual policy preferences to shape their final vote. However, the nature of the judicial institution and its relationship to other institutions in the political system restricts how much liberty a judge may take with regard to serving his own self-interest.[160] Judges must forge a majority coalition in order to rule the day; therefore, without majority support, a judge is unable to push a personal policy initiative. The inherent interdependencies in judicial decision making drive the strategic element of the collegial game. "The strategic model implies that final Court opinions cannot be exclusively attributed to justices' strict reading of the law, simple accounting of justices' policy preferences, or strategic calculation about the response (or non-response) of political actors exogenous to the Court" but instead a strategic justice will work within the institutional constraints to persuade his colleagues, form a successful majority coalition, and achieve his own policy preferences in the end.[161]

Crafting Law on the Supreme Court[162] outlines some of the major factors that influence and explain the strategic choices judges make when forming a coalition, joining the majority or deciding to disagree and write separately. These factors are the rules of the collegial game and are taken into consideration when a judge decides to write/sign onto the majority or write/sign onto the minority. The first sets of components are strategic in nature and are dependent upon the preferences of the other panel members.

i) Ideology:

The first strategic factor influencing a judge's vote is the ideological position he or she holds. An individual justice's own ideological position will immediately be reflected

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[160] Clayton, Cornell, W., and Howard Gillman, eds. *Supreme Court Decision-Making: New Institutionalist Approaches*. Chicago and London: The University of Chicago Press, (1999), 3.
[161] Maltzman, Forrest, James F. Spriggs II and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press, (2000), 16.
[162] *Ibid*, 19-24.

in his initial vote, which will automatically categorize each justice. Next, a justice's ideological position relative to his colleagues with an understanding of their ideological preferences will factor into potential coalitions. This aspect is not hard to decipher considering that justices serve together on the bench for a significant number of years; the longer they have worked together, the easier it is to determine their ideological preferences.

ii) Size of majority:

If a clear majority has already been established, this will determine the next strategic move made by both the majority and any minority judges. With a significant winning coalition after the initial conference, the majority author holds the wild card. With a safe majority in tow (8-1 margin), less accommodation is necessary to maintain the advantage. However, with a slim majority (5-4 margin), the minority group holds the wild card; resulting in a greater effort by the majority author to persuade and recruit. Chief Justice Rehnquist of the USSC openly acknowledged that, "(t)he willingness to accommodate on the part of the author of the opinion is directly proportional to the number of votes supporting the majority result at conference..."[163] The size of the majority coalition is a significant factor in the collegial game.

iii) Alliances and Coalitions:

Due to long-term interaction on the bench, judges develop allies and foes through natural ideological cleavages, manifested through voting patterns. In some cases, voting coalitions can become almost predictable when certain issues are tackled. It is the swing vote that may prove essential in determining the majority. However, other factors are at play when attempting to build an alliance, which must be taken into consideration.

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[163] *Ibid*, 20.

"(O)ver time justices presumably learn to cooperate and engage in reciprocity, rewarding those who have cooperated with them in the past and punishing others."[164] A tit-for-tat mentality may find its way into the decision making process, highlighting the imperfect, petty, human nature of judges.

***iv) Accommodation, Negotiation, and Bargaining*:**

Easily the greatest tactical maneuver judge's possess is the ability to accommodate or be accommodated is at the core of the strategic game. During phase two of the collegial game, if *preemptive accommodation* has failed, *responsive accommodation* takes over. Through a series of threats, articulated suggestions and comments, expressed uncertainty, and even circulated separate opinions, "justices seek to influence the actions of the majority opinion writer and thus shape the content of the majority opinion."[165] A majority author will attempt to negotiate certain concerns any minority voice may have. The parties involved will determine the extent and degree of compromise and how stubborn they intend to be. Some judges may find it easier to succumb to the majority alleviating the need to write separately, a time consuming effort and more work than they are willing to put forth. Chief Justice Stone, a defender of the right to dissent, once wrote to Karl Llewellyn, "You know, if I should write in every case where I do not agree with some of the views expressed in the opinions, you and all my other friends would stop reading [my separate opinions]."[166] This shows us that it is easy to disagree with elements of the majority, but it is significantly harder to continually write about it. Choosing the appropriate time to pick ones battles makes more sense than creating conflict over a trivial issue.

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[164] *Ibid*, 21
[165] *Ibid*, 98.
[166] Bader Ginsburg, Ruth. "Remarks on Writing Separately" *Washington Law Review*, Vol. 65, (1990), 142.

The level of confidence the majority author feels about the strength of his coalition or his strong belief in the issue at hand could result in a reluctance to accommodate the minority at all. With a secure 8-1 advantage, the majority author has more freedom to design his opinion without compromise. An exception to that rule would be where a controversial question of law was brought before the Court and the authority of the Court require a unified voice. Agreement on the outcome would put pressure on the majority to accommodate any minority concerns, without compromising the integrity of the decision, and achieve a unanimous final vote. At the end of the day, accommodation is a key technique in the collegial game.

Certain contextual factors must also be considered; however, these factors are independent of other justices' preferences.

i) Importance of Issue:

Considering the "give and take" attitude on the bench, it is not uncommon for a judge to concede his position to the majority on issues that may be more important to one judge than another. "In unimportant cases, justices may be willing to ignore their preferences and thus create an illusion of consensus. This is suggested in a memo from Chief Justice Warren Burger to Justice Hugo Black in 1971: 'I do not really agree but the case is narrow and unimportant except to this one man...I will join up with you in spite of my reservations."[167] A controversial case may benefit from a unified front to carry and strengthen the position and authority of the Court. The legitimacy of the Court's decisions affects all judges equally; for the sake of the Court's reputation, all justices

[167] Wahlbeck, Paul J., Forrest Maltzman and James F. Spriggs II, "The Politics of Dissents and Concurrences on the U.S. Supreme Court." *American Politics Quarterly*, Vol. 27 No. 4, Oct. (1999), 497.

would strive to achieve unanimity on a contentious issue and speak with one solid voice on behalf of the Court.

ii) ***Complexity of Case and Workload:***

Some cases are more difficult than others. The degree of effort required to do the requisite background and necessary research, to deal with negotiations and the time necessary to write a minority opinion on a complex case, would factor into a decision to write separately. The current caseload of a judge would require prioritization of opinions, sometimes forcing a judge to forgo a written disagreement. "Thus, from the standpoint of each appellate judge on such a court attempting to manage his or her heavy opinion workload as efficiently as possible and to minimize any unnecessary or extra work, there is a built-in disincentive for the judges to take on the extra burden of preparing a dissent."[168]

iii) Institutional Position of Judge:

Where a judge ranks on the judicial hierarchy may affect her desire to disagree. A "freshman" judge, newly appointed to the bench, may be more comfortable following her more senior colleagues as opposed to leading the minority. A probationary period may also force a junior judge to prove herself to the rest of the Court before any sort of leadership role can be taken. This will not affect her ability to write a minority, but it may influence her chances of writing a majority opinion. Although the Chief Justice's opinion does not technically possess more power than her colleagues, she does perform a leadership role. There may be pressure on the Chief Justice to "protect and enhance the

[168] Flanders, Robert G. Jr., "The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable" *Roger Williams University Law Review*, Vol. 4, (1999), 401.

Court's reputation by producing unanimous opinions, suppressing conflict, and otherwise facilitate harmony on the Court."[169]

iv) ***Time Pressures:***

With increasing caseloads and an ever-expanding docket, all judges are restricted by time. While "some judges are more prone to indulge their individuality than others, all operate under one intensely practical constraint: time."[170] Arrangements can be made as some justice may only disagree if another writes the reasons with the promise of a signature. The costs associated with delay must also be taken into consideration as accommodation and bargaining will slow down the process and impede the final outcome.

v) Principled Choice:

A judge's own personal attitude towards the practice of disagreement will govern the degree and frequency with which he chooses to write separately. As the minority opinion continues to be a common occurrence on the modern day Supreme Court and is an integral part of the decision making process, it would be hard to argue against the practice. However, small cleavages still exist separating those that favour disagreement with those that choose to use it sparingly. An advocate of the practice will tend to disagree more readily and with less reservation, resulting in more frequent minority opinions. This type of judge believes in disagreement for disagreement sake and values the benefits of separate opinion writing as outlined in the functions of disagreement. An advocate of unanimity will support the unanimous decision and will disagree less often, doing so only when they feel it is absolutely necessary. This results in fewer minority

[169] Maltzman, Forrest, James F. Spriggs II and Paul J. Wahlbeck. *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press, (2000), 23.
[170] Bader Ginsburg, Ruth, "Remarks on Writing Separately" *Washington Law Review*, Vol. 65, (1990), 142.

opinions, a greater willingness to accommodate and would concede his own individual position for the sake of the Court. "Concern for the well-being of the court, on which one serves, for the authority and respect, its pronouncements command, may be the most powerful deterrent to writing separately."[171] Where a judge stands with regard to the practice of disagreement may not prevent a judge from never disagreeing, but will ultimately affect her desire to agree or disagree.

vi) Conscience:

Ideally disagreement should only occur out of absolute necessity with an appeal to the "brooding spirit of the ages". A judge feels absolutely compelled to write for fear a horrendous mistake is being made by the majority and a voice of reason must break through the barrier to offer hope and reassurance that all is not lost. In this capacity, a judge is fulfilling her duty to produce the best possible law by questioning the rationale of the majority. However, not all minority reasons are intended to appeal to the "brooding spirit of the ages" but are in fact written for less impressive reasons; difference of opinion about a word or phrase can be enough to produce a separate set of reasons.

vii) Disassociation:

A judge may want to disassociate himself from the majority opinion for a number of different reasons. All decisions are made public and published for the world to read; therefore, it is prudent that judges only sign their name to a decision they are comfortable defending, otherwise they have the option of authoring or signing onto a minority opinion. When a judge feels the majority just plain got it wrong, and accommodation and negotiation have failed, he may write a minority opinion to distance himself from the majority.

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[171] *Ibid,* 142.

Disagreement can also occur due to personality conflicts between judges. It would be too bold a statement to claim that a judge would disagree solely for that reason; it is possible that hostility between colleagues may impact voting behaviour. Because "justices are engaged in long-term interactions with their colleagues and thus are likely to adopt tit-for-tat strategies...justices are likely to reward colleagues who have cooperated with them in the past and punish those who have not."[172]

Making a stand on a certain issue may require years of persistence and dedication. "As a court we sometimes have to allow new arguments to be distilled and gradually come to be accepted by the community" as well as by the other justices on the bench, and "(t)he successful adoption of a particular doctrine may take years and many visits to the Court."[173] With this in mind, a judge on the minority end of the argument is obliged, for credibility and consistency reasons, to take a similar stance in future cases.

viii) Pleasure Factor:

There is something liberating about the idea of an unrestrained, uninhibited dissenting voice, free from boundaries and limitations. "To be able to write an opinion solely for oneself without the need to accommodate, to any degree whatever, the more-or-less-differing views of one's colleagues; to address precisely the points of law that one considers important and *no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender – that is indeed an unparalleled pleasure."[174] This may be an unrealistic fantasy, but it is an exciting thought. On a more realistic level, Justice William O. Douglas of the

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[172] Maltzman, Forrest, James F. Spriggs II and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press, (2000), 496.
[173] L'Heureux-Dube, Claire, "The Length and Plurality of Decisions" *Alberta Law Review*, Vol. XXVIII, No. 3, 1990), 586.
[174] Antonin Scalia, "The Dissenting Opinion" *Journal of Supreme Court History* (1994), 42.

USSC believed that "(t)he right to dissent is the only thing that makes life tolerable for a judge on an appellate court."[175] His reasoning was that the freedom to disagree when need be made decision making on the bench more agreeable, allowing judges an unrestrained ability to properly explore all options in an attempt to fulfill their duty and obligations as adjudicators.

Functions of Disagreement:

The practice of disagreement is a significant feature in the decision making process. An ideal outcome is a unanimous decision that carries the weight and authority of all the panel members. It is in the best interests of a majority author to secure, if possible, a unanimous vote not just for workload reasons, but also because of the strength a unanimous decision carries. With this in mind, the threat of disagreement can be a very powerful tool for a judge in a minority position. However, disagreement is not just a bargaining chip but brings to the decision making table some valuable functions.

i) Improve the Majority Opinion

Justice William Brennan formally of the United States Supreme Court suggested that strong debate "reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas."[176] Disagreement opens up the marketplace of ideas by allowing each individual justice the opportunity to present a different set of reasons. The strongest, most compelling, persuasive arguments will rule the day, while the others fade away or become minority opinions. Strong debate serves to improve the majority opinion because "truth, we believe, best emerges from the fires of

[175] Douglas O. Williams, *America Challenged.* Princeton: Princeton University Press, (1960), 405.
[176] Brennan, William J. Jr., "In Defense of Dissents" *The Hastings Law Journal*, Vol. 37, (1986), 433.

controversy."[177] "The precious right to dissent...when exercised, brings into sharper focus the area or nature of the differences between the decision of the Court and the views of those judges who are in disagreement. The result would be a more orderly process of growth."[178] Judges no longer question the existence of more than one "right" answer regarding a single question of law; however, fierce debate assists in discovering the "best" acceptable choice. "The livelier the discourse, the more open and genuinely collegial the exchange and opposition of ideas among the members of the court, the better reasoned the court's decision is likely to be."[179] Not only does debate open up the "marketplace of ideas", it tests those ideas for weakness and defects, because "our argument is only as good as our ability to refute the opposing side."[180] A weak argument will fall apart under such rigorous debate and scrutiny.

ii) Brooding Spirit

Supreme Court justices are charged with the difficult task of determining the supreme law of the land. As the court of last resort, it is imperative that judges get it right, or as close to right as possible. However, to assume that mistakes are never made would be assuming far too much; "Great cases like hard cases make bad law."[181] The Supreme Court is faced with many great cases and may make wrong decisions. Solace can be found in a well-written, powerful dissent. "When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting and conducive

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[177] Jones, Harry W., "Multitude of Counselors: Appellate Adjudication as Group Decision-Making" *Tulane Law Review*, Vol. 54, No. 3, (1980), 543.
[178] Laskin, Bora, "The Supreme Court of Canada: A Final Court of and for Canadians" *The Canadian Bar Review*, Vol. XXIX, (1951), 1048.
[179] Jones, Harry W., "Multitude of Counselors: Appellate Adjudication as Group Decision-Making" *Tulane Law Review*, Vol. 54, No. 3, (1980), 543.
[180] *Ibid* 542.
[181] Quoting USSC Justice Holmes' dissenting opinion in *Northern Sec. Co.,* 193 U.S. at 400-01. Flanders, Robert G. Jr. "The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable" *Roger Williams University Law Review*, Vol. 4, (1999), 405.

of respect for the Court – to look back and realize that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice to their concern."[182] Justice Brennan argues that the "most enduring dissents…are the ones in which the author speaks…as "Prophets with Honor."[183] These dissents offer guidance and "seek to sow seeds for future harvest" and "soar with passion and ring with rhetoric."[184] Almost like poetry, a minority opinion written at the right time and with the right words can become timeless in it effect. "There is no caste here. Our Constitution is color-blind…" wrote Justice Harlan in his dissent from *Plessy v Ferguson.*[185] "Justice Harlan stood alone in this dissent, criticizing the majority and the use of precedent" in his rejection of the Court's decision on civil rights and the rights of colored people. He spoke to the very core of the civil rights movement, echoing the injustice of the colored people at the time. Harlan's dissent eventually overshadowed the majority opinion, but at the time offered the only consolation to a race of people who were unfairly discriminated against. "A dissent in a court of last resort is an appeal to the *brooding spirit of the law*, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[186] This is the ideal function of a minority opinion, and unfortunately one that we rarely get to see; a dissent so powerful it speaks to future generations offers hope to the citizenry and ultimately succeeds in helping to change the law.

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[182] Antonin Scalia, "The Dissenting Opinion" *Journal of Supreme Court History*, (1994), 35.
[183] Brennan, William J. Jr., "In Defense of Dissents" *The Hastings Law Journal*, Vol. 37, (1986), 431.
[184] *Ibid* 431.
[185] 163 U.S. 537, 552 (1896), 554.
[186] C. Hughes, *The Supreme Court of the United States.* New York: Columbia University Press, (1928), 68.

iii. Law Development

"The hope of every dissenting judge is that today's dissent will become tomorrow's majority opinion."[187] In this way, separate opinions are intended to plead with the public, not just on behalf of the minority justice who wants to disassociate himself from a bad majority opinion, and to initiate social change. "(D)issenting opinions may be viewed both as innovative yet, paradoxically, potentially stabilizing forces in the law, particularly when these opinions are oriented toward the future and invite dialogue with those who are unsatisfied with, or feel excluded by, the majority decision."[188] Although it rarely happens at the Supreme Court level, minority opinions can influence future law by a reversal of precedent.[189] The minority opinions in *Dred Scott* and *Plessy*[190] offer examples of dissents which were relevant long after they were delivered because they spoke not only to their peers, but to society, and, more importantly across time to later generations and were in a sense, "secular prophets."[191] The intent is to write a separate opinion that may eventually become the majority opinion. "Dissenting opinions have the potential, therefore, to lay the foundations for future decisions, to be gradually constructed by the people who are interested in developing new approaches to existing law."[192] Reality is somewhat more pragmatic with "even the most ardent defender of dissenting opinions... compelled to admit that in most cases, it is the majority

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[187] Bergman, Matthew, "Dissent in the Judicial Process: Discord in Service of Harmony" *Denver University Law Review*, Vol. 68, No. 1, (1991), 82.
[188] L'Heureux-Dube, Claire, "The Dissenting Opinion: Voice of the Future" *Osgoode Hall Law Journal*, Vol. 38, No. 3, (2000), 504.
[189] Antonin Scalia, "The Dissenting Opinion" *Journal of Supreme Court History*, (1994), 37.
[190] 163 U.S. 537, 552 (1896).
[191] Brennan, William J. Jr. "In Defense of Dissents" *The Hastings Law Journal*, Vol. 37, (1986), 432.
[192] L'Heureux-Dube, Claire, "The Dissenting Opinion: Voice of the Future" *Osgoode Hall Law Journal*, Vol. 38, No. 3, (2000), 509.

opinion which blazes the law's trail."[193] Minority opinions can offer hope of new precedent but incremental change is usually the best that can be hoped for.

iv) Reassures the Losing Party

Although a small token, a minority opinion can offer the losing party the reassurance that their side was heard and understood. A well-written separate opinion sheds light on the other side of the argument, while offering alternative viewpoints. "(T)he publication of a dissenting opinion is, among other things, some assurance to the litigants in the case, their counsel, and the bar and the public generally that the decision has been reached after careful consideration and that the deciding process has not become perfunctory."[194] It can be comforting to the losing side that all was not lost, and that their position was documented. "The publication of a dissent might be a safety valve for the dissenter and more importantly for the losing party and a way of mollifying the lower court thus reinforcing the collegiality of the bench. On the other hand, depending on the mind-set of the losing party, the knowledge that the court was divided might make matters worse."[195] The topic at hand, the salience of the issue and the timing are all factors that would dictate whether a minority finish was acceptable to the losing party. A move up from a dissent to a separate concurrence on certain controversial issues, such as abortion or equality rights, could be construed as a victory, not a loss. Just by having the losing party's concerns recognized is enough to send a signal that the members of the Court are divided on certain issues and that the potential for a future precedent change may exist.

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[193] *Ibid* 498.
[194] Stephens, Richard B., "The Function of Concurring and Dissenting Opinions in Courts of Last Resort" *University of Florida Law Review*, Vol. 5, (1952), 395.
[195] Alder, John, "Dissents in Courts of Last Resort: Tragic Choices?" *Oxford Journal of Legal Studies*, Vol. 20, No. 2, (2000), 242.

v) Signaling

The primary way courts communicate with the public is through the written decision. Judges rarely discuss publicly what goes on behind closed doors and are reluctant to address judicial relationships on the bench. A judicial decision not only relates to lower courts, the legal profession, government and the general public the outcome and subsequent legal consequences of their decision, but it also informs the public, lower courts and government agencies as to where the Court sits on certain issues. Court watchers can track the direction of the Supreme Court based on past decisions, voting patterns and minority opinions. Separate decisions can establish guideposts and inform future court users of where the Court stands regarding issues of law; "...the last external effect of a dissenting opinion, which is to inform the public in general, and the Bar in particular, about the state of the Court's collective mind."[196] Justice Cartwright's dissent in *Robertson and Rosetanni v R,*[197] sent a signal to society, questioning the mentality of the majority regarding the use of the *Bill of Rights* and invited similar issues to be brought before the Court. Minority opinions can signal to the public that the Court may waver on past precedent and move in a new direction. Signaling is a crucial step in garnering the necessary support for preparing the social environment for change as minority opinions help to make the transition smoother.

Signaling sends cues to society regarding the Court's willingness to hear cases dealing with specific issues and "provide a talisman of where the Court is heading from where both the bench and bar can take their bearings in subsequent cases."[198] Due to the

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[196] Antonin Scalia, "The Dissenting Opinion" *Journal of Supreme Court History*, (1994), 38.
[197] *Robertson and Rosetanni v The Queen,* [1963] S.C.R. 651.
[198] Bergman, Matthew, "Dissent in the Judicial Process: Discord in Service of Harmony" *Denver University Law Review*, Vol. 68, No. 1, (1991), 86.

lengthy and often expensive cost of using the justice system, it can be strategically beneficial to know the Court's leanings ahead of time. The cues implied through the written decisions of the Court encourage particular issues to come to the forefront by including "a variety of messages to potential litigants regarding the types of arguments to which they are sympathetic."[199] As the Court agrees to hear more cases on a particular issue, that encourages likeminded litigants to bring similar cases before the judiciary. "Court opinions inevitably contain some ambiguity and separate opinions provide individual justices the opportunity to shape the public's understanding of a majority opinion. For example, they send signals to lower court judges, administrative agencies and the broader legal community about the tentative nature of the Court opinion, and in so doing may affect how implementers react to it."[200]

Voting patterns offer cues as to the position of the Court. As the voting splits lessen, a message is sent announcing the Courts willingness to reconsider precedent with the potential for adjustment, pending the advent of the appropriate case. If the Court is prepared to tackle a contentious issue, the proper litigants, asking the desired legal question, must find its way before the Supreme Court before the Court can proceed. The Court cannot solicit the issues it wants to address, but can only choose from the cases already before it.

vi) Accountability

The judicial system is designed to ensure that the institution is an independent and impartial tribunal. Judges are afforded a significant level of autonomy to guarantee that

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[199] Turner, Charles and Lori Beth Way, "Writing for the Future: The Dynamics of Supreme Court Concurrence" (Presented at the Annual Meeting of the American Political Science Association, 2003), 7.
[200] Wahlbeck, Paul J, Forrest Maltzman, and James F. Spriggs II, "The Politics of Dissents and Concurrences on the U.S. Supreme Court" *American Politics Quarterly*, Vol. 27 No. 4, Oct. (1999), 491.

they remain unbiased, impartial third party, free from outside influences and the politics of the day. With so few constraints placed upon the actions of judges, the practice of disagreement acts as a check and balance on the majority opinion. Panel decision making and the interdependent, collegial nature of the bench requires a majority vote to successfully render a decision. Disagreement works to achieve majority accountability by pointing out careless flaws in the majority opinion. The threat of disagreement and a desire to maintain unanimity may compel a majority author to improve his opinion before it becomes public. In this way, disagreement or the threat of disagreement has strengthened the decision making process by holding the majority responsible for the end product.

vii) Changing Societal Norms

Signaling is linked with changing societal norms. The Court must be sensitive to societal values and its decisions must not only reflect the intentions of law, but also the social environment in which the laws exist. With the introduction of the Charter and the subsequent democratization of the courts, it is not surprising that interest and minority groups find the judicial system a more successful means of reform than the legislative route. The judiciary has become more sympathetic to minority concerns resulting in judicial democratization. Through an influx of "financing, organizational support and willing and able lawyers..." which were either "legislatively created or reflected a democratization and diversification of the legal profession and the interest-group system" the court system opened up to minority groups.[201] Mandated with the protection of civil liberties, the Court is prudent to be socially sensitive to the changing environment.

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[201] Epp, Charles, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective.* Chicago and London: The University of Chicago Press, (1998), 5.

Brown v Board of Education exemplified the need for the bench to be consciously aware of the social implications that racial equality and desegregation presented, though society was not fully prepared for the consequences of such a decision. In the end, deciding to desegregate and actually implementing desegregation were two very different challenges. Although parts of society were ready to attempt desegregation, some states were vehemently opposed, thus producing a conflict in which President Eisenhower was forced to call in federal troops to enforce a desegregation order.[202] It would take years for society to catch up to the socially progressive nature of the *Brown* decision. This demonstrates the need for Supreme Court decisions to be compatible with the social order; otherwise those decisions may fall to the wayside.

Does the Supreme Court dictate the direction society is heading with respect to controversial social issues or does society influence the direction the Court must take in its decisions? It is a precarious position for the judiciary to be in when dealing with complex social issues that will lead to major reform in existing legislation as the Court's legitimacy requires public confidence in its ability to properly determine the law. However, when the law is forced to evolve with the shifting times, "that constitutional norms and values are culturally and socially contingent..."[203] the Court must change with it. Some critics argue that it is not the judiciary's place to reflect social evolution. The judiciary must stay within the confines of the constitution and not transgress borders of legislatures. The flip side argues that the constitution was not meant to be a stagnant

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[202] For a more thorough discussion on the repercussions of the *Brown* decision, see *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision*, edited by Jack M. Balkin, New York and London: New York University Press, (2002).
[203] Botha, Henk, "Judicial Dissent and Democratic Deliberation" *SA Public Law*, Vol. 15, (2000), 321.

document, but instead a "living tree", capable of growth and adaptation.[204] It is this creative approach that has been embraced by judges. As for the question of who's influencing whom, society must first open up the discussion before the Courts can address social reform "when judges do not agree, it is a sign that they are dealing with problems on which society itself is divided."[205] As Charles Epp discusses in his book, *The Rights Revolution*, the Court is a reflection of where society is prepared to go because the 'support structure' has paved the way. Society may need a transition period to get used to the idea of social reform but the infrastructure for judicial initiative should already be well in place before the Court can deal with such issues.

> With prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not 'a bevy of Platonic Guardians,' the Justices generally follow; they do not lead, changes taking place elsewhere in society. But without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change.[206]

Conclusion:

It seems only appropriate to conclude this chapter with a warning. Disagreement is a powerful and effective tool in the decision making process. As disagreement rates soar, judges must use restraint when disagreeing so as not to jeopardize the integrity of the process. US Supreme Court Justice Antonio Scalia offers his viewpoint on disagreement, "I do not refer to and I don not approve of, separate concurrences that are written only to say the same thing better than the Court has done, or, worse still, to display the intensity of the concurring judge's feeling on the issue before the court. I

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[204] Morton, F.L., ed. *Law, Politics and the Judicial Process in Canada*, 3rd ed. Calgary: University of Calgary Press, (2002), "Lord Sankey articulated his now famous 'living tree' approach in his opinion in the well-known 'Persons Case'...Lord Sankey stressed the necessity of interpreting constitutional language in light of society's changing beliefs and not just internal grammatical constructions and original intent of the framers." 426-427.

[205] Douglas, William O., "The Dissent: A Safeguard of Democracy" *Journal of the American Judicature Society*, Vol. 32, (1948), 106.

[206] Bader Ginsburg, Ruth, "Speaking in a Judicial Voice" *Washington Law Review*, Vol. 65, (1990), 1208.

regard such separate opinions as an abuse..."[207] Unjustified or useless disagreement does nothing but diminish the quality of minority opinions thus decreasing its effective functioning on the collegial Court. The American Bar Association Proposed Canons of Judicial Ethics, No. 19 advises:

> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

This is a strong statement regarding where disagreement fits into judicial decision making. The benefits of disagreement secures its place within the process; however, judges should be more selective in their frequency and use of disagreement to ensure it maintains its effectiveness. "The most effective dissent...stands on its own legal footing, it spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary."[208] There should be a time and place for disagreement and judges should be cognizant of when and why they chose to disagree. With very few checks and balances, judges must regulate themselves, choosing to disagree only when necessary and for good reason. Justice Holmes initially noted his reluctance to dissent "when it does not seem that an important principle is involved or that there is some public advantage to be gained from a statement of the other side."[209]

Another prominent US Supreme Court Chief Justice, Charles Hughes once said,

> There are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgment. Undoubtedly, they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision

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[207] Scalia, Antonin, "The Dissenting Opinion" *Journal of Supreme Court History*, (1994), 33
[208] Bader Ginsburg, Ruth, "Speaking in a Judicial Voice" *New York University Law Review*, Vol. 67, No. 6, (December 1992), 1196.
[209] Krugman-Ray, Laura, "The History of the Per Curiam Opinion: Consensus and Individual Expression on the Supreme Court" *Journal of Supreme Court History*, (2000), 180

to public confidence. But unanimity, which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort; whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice."

Chapter IV
Research Analysis

My research questions some basic assumptions and deep-seeded beliefs about disagreement behaviour on national high courts. It is no longer adequate to sort judicial disagreement into two simple categories, the dissent and separate concurrence, although this division was a good starting point at one time. Final outcome used to represent the distinguishing feature that defined disagreement behaviour through an identifiable difference. This simple categorization is no longer sufficient, as it does not account for the multiple and diverse variations that exist in judicial disagreement, nor does it take into account the similarities between dissent and separate concurrence. The separation between dissent and separate concurrence allowed a ranking to occur, which incorrectly placed the concurrence behind the dissent in value and importance. "Concurrence still retains something of a taint to it – that it is somehow more destructive of judicial or judicial institutional integrity, more invidious with respect to legal clarity, less cooperative and more persnickety than dissent."[210] This ranking transpired because it was assumed that a majority of dissents represented the ideal canonical disagreement and the concurrence represented only a slight differing of opinions, but my research indicates otherwise. The distinction between the dissent and concurrence is becoming blurred as there is a multiplicity of disagreement on the Supreme Court. Not all dissents represent the ideal form of disagreement and not all separate concurrences are minor; some dissents are more persuasive than some separate concurrences and some separate concurrences are more persuasive than some dissents. What is important is the recognition of a growing

[210] Maveety, Nancy, "Concurrence and the Study of Judicial Behavior" (Presented to the annual meeting of the American Political Science Association, Boston, MA, August 28-Sept. 1, 2002), 1.

spectrum of disagreement. The modern Supreme Court has evolved and disagreement behaviour adapted right alongside this evolution, forcing us to reconsider what it is we thought we knew about minority opinions. Minority opinions are not to be underestimated or disregarded based on their outcome, nor can it be taken for granted that all minority opinions look the same, because they do not. The study of disagreement behaviour uncovers the very diverse world of judicial adjudication, exposing the individual personalities and tendencies on the bench, reinforcing the collegial court as a strategic game, establishing the separate concurrence as a persuasive form of judicial expression, and illustrating the importance of minority opinion writing in an institution with increasing political and social influence.

Currently, a single comprehensive approach for the explanation of judicial decision making does not exist. Despite political scientist best efforts "it is exceedingly difficult to capture the richness and complexity of justices' responses to majority opinion authors in any single model."[211] There are numerous factors that influence the adjudicatory process, which consequently affect the final judgment. The attitudes and ideological preferences of judges is one element, the institutional constraints are another as well as the everyday interaction between judges on the collegial court which must be taken into consideration. It is impossible to determine the exact influences on judicial decision making as it is unlikely we will ever be able to accurately measure the factors that come into play. Speculation through an analysis of the written reasons is the best tool available to garner a deeper understanding of how law is crafted on the Supreme Court. What can be gleaned from the conventions of disagreement, the categorical

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[211] Maltzman, Forrest, James F. Spriggs II and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press, (2000), 76.

information and the subtleties of the minority's written text will aide in the endeavor to explain the decision making process and arrive at a more complete understanding of disagreement behaviour. "Dissenting opinions – and the judicial disagreement over the meaning of the law that they register – are not only an important facet of common law legal systems, they are also fully understandable and, therefore, explainable, in terms of the legal factors identified by a legal model of judicial decision making."[212]

Scholars have tried to explain judicial decision making by several different approaches, the most effective examples being the attitudinal, institutional and the strategic model. It is only recently that scholars have attempted to use the study of minority opinions to explain how and why judges decide the way they do and what influences help shape the Court's final outcome. Scholars Nancy Maveety, and Charles Turner and Lori Beth Way have used the special concurrence to explain judicial decision making behaviour on the US Supreme Court. They chose to focus on the concurrence "because there has been less invested in their explanation, concurring opinions and their issuance make for a good testing ground for the development of a unified model of judicial decision making."[213] This is both exciting and discouraging. As an entirely new approach to studying the Courts, there was little literature on disagreement behaviour to assist me in my pursuit of knowledge or to even provide a basic background for my research. However, the lack of available research enabled me to develop and refine my categories from scratch with the ability to adapt as the research dictated without forcing me to conform to a pre-existing framework. The results, although rudimentary in nature will lay the foundation for possible future research in this area.

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[212] Maveety, Nancy, "Concurrence and the Study of Judicial Behavior" (Presented to the annual meeting of the American Political Science Association, Boston, MA, August 28-Sept. 1, 2002), 1.
[213] *Ibid*, 8.

The approach taken by Turner and Way is very similar to my own in that it attempts to use the separate concurrence as "a step towards explaining the relationship between concurrences and majority Court opinions."[214] One major difference being that I have chosen to analyze both types of disagreement, dissent and separate concurrence, but the underlying premise is the same. On today's modern Supreme Court, the voting patterns are no longer a satisfactory means of determining the nature of court decision making; "it is only with reference to the goals and motivations of the justices, not just their votes, that we can explore some of the characteristics of the Court as an institution and its relationship to larger political structures."[215] The increasing influence court decisions have on political policy has made the Court's relationship with the greater political community more salient than ever before. Judges are not viewed as separate from the political action but instead, are considered active members in the political game. Turner and Way, as well as Maveety have realized that the study of minority opinion "at the individual level is critical for understanding the dynamics of judicial decision making"[216] and aspire to develop a "unified model of judicial decision making"[217] which has not yet been achieved.

Turner and Way have developed four categories to "begin to account for the *content* of concurrences" and to "reveal patterns in concurring behavior by classifying the content of these opinions according to the four broad categories": *Groundlaying,*

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[214] Turner, Charles and Lori Beth Way, "Writing for the Future: The Dynamics of Supreme Court Concurrence" (Presented at the Annual Meeting of the American Political Science Association, 2003), 4.
[215] Clayton, Cornell W., and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutionalist Approaches*. Chicago and London: The University of Chicago Press, (1999), 6.
[216] Maltzman, Forrest, James F. Spriggs II and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press, (2000), 493.
[217] Maveety, Nancy, "Concurrence and the Study of Judicial Behavior" (Presented to the annual meeting of the American Political Science Association, Boston, MA, August 28-Sept. 1, 2002), 8.

Signaling, Weakening, and *Preserving.*[218] Their reasons for studying the concurrence are twofold. They wish to emphasize the neglect that the concurrence has faced in the shadow of the dissent as a viable means of studying opinion writing and secondly, the "concurrence may be full of political and legal implications...that detail serious doctrinal differences with the majority opinion or serve other, perhaps political purposes."[219] As the closest and only comparison to my own research, I think it useful to highlight Turner and Way's categories and basic arguments.

Groundlaying describes the concurrence that establishes an alternative test or interpretation for possible future use. This type of concurrence is characterized when an "author declares an interpretive difference with the majority opinion and often presents an alternative strategy for deciding such cases."[220] A concurrence that falls under the *Signaling* category would send a message to other political institutions or interested parties as to how a justice might decide on a potential issue. "Signaling occurs when the author goes beyond merely stating a difference of opinion and discusses directly the points of law that he or she would like to revisit in a future case."[221] When a concurrence wants to "narrow the scope and authority of the majority opinion by indicating that they do not agree with particular parts of the majority's reasoning or with any of the Court's opinion,"[222] this is categorized as *Weakening.* The final category is termed *Preserving* and is a residual category of all concurrences that do not meet the requirements of the other three codes. A Preserving concurrence could simply provide a descriptive history,

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[218] Turner, Charles and Lori Beth Way, "Writing for the Future: The Dynamics of Supreme Court Concurrence" (Presented at the Annual Meeting of the American Political Science Association, 2003), 2-3.
[219] *Ibid,* 2.
[220] *Ibid,* 9.
[221] *Ibid,* 10.
[222] *Ibid,* 10.

a "just noting" for the record or even act as a warning to the other Court judges. It is also noted by Turner and Way that the tone of concurrences in the Preserving category could "range from mundane reflection to pithy annoyance with other members of the Court to full blown jeremiad warning the reader of the dangers of another party's interpretation."[223] I find the inclusion of tone to be pertinent because it can denote personality conflicts between justices.

The significance of the Turner and Way categories are how they parallel the typology created for my research. Although not identical, there are some similarities between categories; for instance, Weakening resembles *Just One More Thing* and *Just One Less Thing*. *Groundlaying* is very similar to a *Responsive* and *I Concur but for Different Reasons* and *Preserving* is comparable to the *Perfunctory* section, including *Observation*. The significance of these similarities is the credibility it lends to my categories as a viable measure of disagreement behaviour; what can be seen on the Canadian Supreme Court can also be seen on the US Supreme Court. The frequencies for Turner and Way's opinion characteristics show Preserving at 43.1%, Groundlaying 32.9%, Weakening 30.3% and Signaling 20.3%.

Nancy Maveety in her essay, *Concurrence and the Study of Judicial Behavior*, contributes to the study of disagreement behaviour by examining "how concurring opinion-writing has been explained by the dominant models of the study of judicial behaviour."[224] She explains the dominant models of decision making through the analysis of separate concurrences and then attempts to use the separate concurrence to show the evolution of the decision making approaches. Maveety's assessment includes "how the

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[223] *Ibid*, 11-12.

[224] Maveety, Nancy, "Concurrence and the Study of Judicial Behavior" (Presented to the annual meeting of the American Political Science Association, Boston, MA, August 28-Sept. 1, 2002), 2.

increased incidence of concurrence on the contemporary court has affected (1) the construction and evolution of these models and (2) the discussion within the law and courts field as to the generation of a unified model of judicial decision making."[225] Maveety's focus on separate opinions results from a desire to change the stereotype associated with minority opinions as the "step-siblings of real influence: authoring (or shaping) majority opinions."[226] She argues that the "reason concurring opinion writing has not been fully explained, even by models and research designs that focus on explaining the politics of opinion writing, is that judicial scholarship has heretofore limited itself to viewing the phenomenon in terms of extant theories of judicial behavior."[227]

I concur with Maveety's assessment that minority opinions have largely been ignored as a means of explaining opinion writing on the bench. My research will not only show the equal importance between the dissent and concurrence, but it also uses the minority opinion to explain the decision making process. Through a systematic reading of almost 800 minority decisions between the years 1973, when Bora Laskin was appointed Chief Justice, through the *Charter* years and ending in 1990 with the retirement of Chief Justice Brian Dickson, a record of disagreement was documented through the critical years just before and just after the *Charter*.

Prior to the chief justiceship of Bora Laskin, the study of disagreement behaviour is somewhat irrelevant and inconsequential. The Laskin years would witness the beginning of the judicialization of politics and increasing judicial activism, which would contribute to the Court's growing visibility with the public, reaching a new crossroads

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[225] *Ibid, 2.*
[226] *Ibid,* 13.
[227] *Ibid,* 13.

manifested on the Dickson Court after the *Charter*. As Laskin would never have the opportunity to decide a *Charter* case, it would be the Dickson Court that would aide and contribute to the massive transformation provoked by the *Charter*, with all areas of government, the judiciary and society experiencing the after effects. The *Charter* presented the Court new questions that did not have prior existing legal precedent. Designed to be interpreted by judges[228], the *Charter* solidified judicial jurisdiction over constitutional protection. With increasing power and greater visibility the Court was challenging old perceptions and fighting new criticisms while trying to balance a growing workload. Disagreement behaviour took on an entirely new significance, exposing the uncertainty of the law and the "creative" ability of the Court to read into constitutional text new meaning that possessed considerable ramifications for all areas of political life.

Methodology:

My research looks at the first two chief justiceships of the modern Supreme Court, identified simply as the Laskin and the Dickson Court. The Laskin Court represents the emergence of the modern Supreme Court in Canada and the first time disagreement became a pertinent topic of study. The practice of disagreement before this period is irrelevant due to the formalist nature of the Court decision making. The elevation of Brian Dickson to Chief Justice in 1984 coincided with the entrenchment of the *Charter*, making the Dickson Court crucial to evaluating the *Charter* impact on adjudication, which ultimately changed the nature of disagreement behaviour. Dickson passed the torch to Antonio Lamer in 1990, signaling the end of the first six years of

[228] Trudeau felt that it would be the Court's responsibility to interpret the future *Charter* document, "to decide how much scope should be given to the protected rights and to what extent the power of government should be curtailed." Taken from an address to the Canadian Bar Association, Sept. 4, 1967. Trudeau, Pierre Elliot, Trudeau, *Federalism and the French Canadians*. Toronto: The Macmillan Company of Canada Limited, (1968), 58.

Charter decision making. The seventeen year period between Laskin's elevation to Chief Justice and Dickson's retirement saw almost 1800 decisions passed down by the Court with 775 separate minority opinions written, 439 dissents and 336 separate concurrences (see Table 1).

Type of Decision – Breakdown by Court
Table 1

Type of Decision	Laskin Court (1973-1984)	Dickson Court (1984-1990)
Dissent	268 (66%)	171 (46%)
Separate Concurrence	139 (34%)	197 (54%)
Total	407 (100%)	368 (100%)

A systematic reading of each separate opinion was conducted, with all dissents and separate concurrences read in chronological order by Court and judge, starting with Justice Beetz and moving through in alphabetical order. This method enabled a rapport to develop with each individual justice, allowing personalities to grow throughout their tenure on the bench; patterns emerged, personal tone and writing styles surfaced revealing subtle nuances unique to each justice. Through a sequential reading of each justice, it became easier to identify changes in attitudes, distinct styles and routines and recognize inconsistencies otherwise undetectable from a single case reading. Each separate opinion was analyzed and broken down into its basic components using a checklist of points. Individual items on the checklist would assist in classifying each decision into one of twenty-four categories; twelve dissent categories and twelve separate concurrence categories, which were later consolidated into five main headings. The checklist includes panel size, listing of the majority coalition, all minority groups, the

majority author, all minority authored, type of minority opinion, length, acknowledgment, position, background information, description/categorization, tone/style and any use of respect terms.

Majority/Minority Identification:

All members of the panel were coded based on their position in relation to the majority and the majority author. If Justice X signed onto the majority, it was coded as such, with the majority writer being coded as authoring the majority decision. As there were sometimes more than one minority opinion present, it was necessary to distinguish the minority author being studied at that particular point from any secondary minority opinions. Therefore, Justice Y and Justice Z were both minority authors, but I was reading all Justice Y's separate opinions, so Justice Y would be coded as "primary" minority author and Justice Z would be coded as "secondary" minority author. Any justices that signed onto, but did not write a decision was coded as either "signed onto majority", "signed onto prime minority" or "signed onto secondary/third/fourth minority" so all justices could be accounted for. This distinction is critical in determining coalitions and alliances later on, as well as supplying an average number of justices who joined each individual judge's minority position.

Type of Minority Opinion/Length/Panel Size:

Type of minority distinguishes the decision as a dissent or a separate concurrence, length records the number of pages of the minority opinion and indicates whether or not the minority in question is longer than the majority, panel size indicates how many judges sat on the case as well as how many participated in the vote/final judgment. Due to the

lengthy adjudicatory process, some justices present for the hearing were not present for final judgment usually because of sickness or death.

***Acknowledgement (Ack.)*:**

An acknowledgement usually comes at the beginning of an opinion, but on the odd occasion has been placed either in the middle or at the end, and is intended to recognize the majority author or any minority authors for their contribution. The standard format looks like this, "I have had the benefit of reading the reasons of my colleague, Justice X..." or "I have had the advantage of reading the reasons prepared for judgment by Justice Y..." but can be a variation on this theme. An acknowledgement is intended as a common courtesy extended to one's colleagues out of respect, very much like a greeting or hello.

***Position*:**

The minority author may position himself with respect to the majority, which might entail a brief description of the issues he agrees with, disagrees with or intends to address in the body of his opinion. The standard positioning usually follows the acknowledgement and basic format looks like, "It is with respect that I must disagree with Justice X", or "Unfortunately, I cannot agree with issue y." Some authors choose to be very detailed in their positioning, "Like my brother Justice X, I would dismiss the appeal but I have reached this conclusion by another route." There are numerous variations, but all positioning places the minority author's opinion in relation to the majority decision.

***Background Information*:**

The detail a minority justice chooses to go into depends on the type of opinion she writes. It is usually the case that the majority opinion will include all facts, background information regarding the case and any relevant legislation offering a complete package. In some instances, the minority author will also include all or parts of the background information or may choose instead to credit the majority with this information; "My colleague Justice X has given the facts so there is no need to repeat them here." It may also be the case that no reference to the background information is provided, but instead the minority author has opted to skip it entirely and jump right into the issues of the case.

The standard format for a minority opinion that includes an introduction would start off with a brief introduction that would include an acknowledgment, a position and a summary of the background information, or any combination of the three. It is common for an acknowledgement and a position to appear together (see Table 3.1 and 3.2), occurring on the Laskin Court as a team 77% (106/138) an Ack. was present and 60.5% (106/175) a Position was recorded. The relationship between the Ack. and the Position was more irregular on the Dickson Court with a significantly higher rate, 93% for Ack. and modest rate of 63% for the Position. It is odd that an Ack. would appear with a Position 30% more often than a Position would appear with an Ack..

Laskin Court: Frequency of Acknowledgement and Position
Table 2.1

	No Acknowledgement	Yes Acknowledgement	Total
No Position	200	32	232
Yes Position	69	106	175
Total	269	138	407

Dickson Court: Frequency of Acknowledgement and Position
Table 2.2

	No Acknowledgement	Yes Acknowledgement	Total
No Position	104	12	116
Yes Position	94	158	252
Total	198	170	368

The presence of background information is not contingent upon the presence of the acknowledgment or position, but is more an indicator of the category within which it is placed. However, the background information, if present (see Table 2.3), usually appears in the introduction or beginning of the opinion. The higher presence of background information in minority opinions on the Laskin Court is consistent with the higher rate of *Decision in Waiting* during this period. A major requirement of the *Decision in Waiting* is the presence of background information and therefore it makes sense that the Laskin Court with 25.2% more *Decision in Waiting* than the Dickson Court, also had 26% more Background information (Table 4). The Dickson Court saw significantly less *Decision in Waiting* opinions resulting in a lower presence of background information.[229]

Background Frequency by Court
Table 2.3

	Laskin	Dickson
No Background	**51%** (209/407)	**77%** (282/368)
Yes Background	**49%** (198/407)	**23%** (86/368)

[229] This will be expanded on later in the paper, but is included as introductory data necessary for upcoming analysis.

***Description/Categorization*:**

The description of the case is determined by the presence or absence of the above elements, as well as my impression of the reading. Once a decision has been read and the checklist complete, the minority opinion is placed within one of the categories, which will be described in the next section.

***Tone/Style and Respect Terms*:**

This is a highly subjective classification as it relies on my own interpretation of the minority author's manner and attitude. Personalities, highlighting certain habits and patterns for each judge, develop from case to case, and it is through these patterns along with word choice that determine the author's tone. Tone can be determined through acknowledgement, respect terms and word use, the presence or absence of the conventions of disagreement and the overall positive or negative feel of the decision. Decisions are coded on a +5 to -5 scale, with +5 being very positive, 0 being neutral and -5 being very negative. The majority of cases are coded as neutral with the number of respect terms and conventions of disagreement contributing to a higher positive rating. There is a typical judicial tone that a large majority of minority opinions take based on the basic formalities and a pleasant manner; 66% (269/407) of the Laskin Court and 58.4% (216/370) of the Dickson Court were coded as neutral in tone. The positive rating increases with the use of respect terms and conventions of disagreement.

There is a standard way of showing deference to a current or former colleague or when quoting a justice from another case through the use of respect terms. Respect terms can be as obvious as "with the greatest respect I must disagree," as subtle as an acknowledgement and can include terms of endearment such as "my brother" or "my

colleague". Positive connotations are easily recognized, while negative undertones are more difficult to decipher. The use of respect terms on the Laskin Court were nominal at best with only 26% (106/407) of cases recorded as using respect terms and only 1.7% (7/407) recorded as being "very respectful". The Dickson Court was only slightly higher with 30.8% (114/370) using respect terms and 4.3% (16/370) being "very respectful". These are deceiving numbers for a variety of reasons, first, when you consider that out of the 30.8% of judges who did use respect terms, on average there are only one to two respect terms per decision. The neutral tone is by far the most dominant attitude taken, with 66% (269/407) of Laskin judges and 58% (216/368) of Dickson judges expressing little or no emotion above the standard formalities (see Table 2.4). Second, respect terms are not always used to show deference but as I will explain in "Conventions of Disagreement" at the end of this chapter, certain tools are employed to adjust the tone of the author to achieve a desired effect. When used in this manner, the genuine use of a respect term is diminished significantly.

Tone and Style Analysis
Table 2.4

Tone/Style	Laskin Court	Dickson Court
Very Negative	0	0
-4	0	3
-3	0	5
-2	3	6
-1	18	13
Neutral	269	216
1	35	18
2	34	38
3	39	46
4	9	12
Very Positive	0	11
Total	407	368

Canadian judges subtlety disagree, unlike our American counterparts. Supreme Court justices are prudently aware of their image that is portrayed to the outside world, using discreet criticisms, understated approaches and delicate word choice to create an impeccably diplomatic public persona. It is an arduous challenge to find an offensive Canadian minority opinion because overtly negative attacks on another justice do not happen, or at least it did not happen on the Laskin or Dickson Courts. Disagreement is civilized and conducted in the most amicable manner. Therefore, bearing this in mind, negative disagreement does not appear to be very negative at all, but instead comes across as rather tame. Only 5.1% of all the minority opinions on the Laskin Court and 7.3% on the Dickson Court received a rating of -1 or under for tone. In fact, no minority decision on the Laskin Court received a rating lower than a -2 and nothing lower than a -4 was recorded on the Dickson Court. Twenty six percent of cases on the Laskin Court and 27% on the Dickson Court that was not included in the "neutral" category fell into the "pleasant/less pleasant" zone.

Justice L'Heureux-Dube provides us with an excellent example of an openly critical tone, with an almost lecturing attitude and confident style directed at the majority in *TWU v. British Columbia Telephone Co.*. "The majority of this Court assumed without deciding that the arbitrator erred in law. They answered the second question in the negative, and allowed the appeal. I cannot agree with the conclusions of the majority. Furthermore, I feel that the questions raised merit greater discussion."[230] L'Heureux-Dube continued on to reprimand the majority for their inability to perform their duty in this circumstance, "I would agree with the majority that if there is no jurisdictional error, we ought to defer. But contrary to the opinion of the majority, in my view, a

[230] [1988] 2 S.C.R., 564.

jurisdictional error exists in this case, and there is a duty to intervene."[231] It is unusual for a justice to so adamantly force her opinion without employing a more cautious approach, but L'Heureux-Dube openly criticizes the majority choosing not to use carefully selected terminology to disguise her disdain. L'Heureux-Dube continues on to say "(a) non-interventionist approach is acceptable as long as it protects the rights and interests of individuals, but it must not be extended to denying recourse to courts of justice on the sole ground that such courts are reluctant to "interfere". When an arbitrator fails to act within jurisdiction, the court does not have the discretion to intervene; it has a duty to intervene at the behest of one or another of the parties" (emphasis in original). [232] This is clearly an example of what I would consider "negative" disagreement, because of the sharp, lecturing tone.

Style is a reflection of a judge's own unique writing technique, whether it is organized and clear, detailed and thorough, short and to the point or written as if it were a story and is left to the discretion of the author. For instance, some judge's choose to inform the reader through excessive information or detail, others get right to the point and forgo any unnecessary information, while some are very clear and concise in their reasoning making it easy for the reader to follow along. A judge's personal style is recorded to note any decisions that stray from the usual formula, making identification of conflict or personality clashes more straightforward.

Typology:

The purpose of the written reasons is to provide the reader with the logical rationale used by the Supreme Court to reach a final outcome consistent with current

[231] *Ibid*, 587.
[232] *Ibid*, 593.

legislation and the Constitution. The reasons act as a guide for lower courts, other government agencies such as law enforcement, legislatures and Parliament in their application and use of the law. Written decisions provide a level of accountability for the untouchable judge, by requiring judges to sign their name to a physical set of reasons that is made available for all to read. Judges are required to provide a rational and logical set of reasons not only for the benefit of other judicial actors and political officers but also for the public because a decision rendered without reason is considered an abuse of judicial power. With very little to hold the judiciary accountable, the reasons become the only means by which we can measure judicial success or failure and ensure that the Court is adjudicating justly. "The practice of dissent reveals the deliberative character of the court's decision-making process; it shows that a judgment is issued from an 'argumentative interchange' among the members of the court. The publication of disagreements among judges is particularly important in view of the fact that the actual deliberations of the court (judge's conferences, the exchange of draft opinions, and the dialogue through which judges articulate and modify their views of a case) are removed from the public eye."[233] As the only outlet available to view the rationale of the Court, the written reasons become a valuable exercise in judicial adjudication and the means by which I conducted my research.

Studying a nineteen-year period and two chief justiceships resulted in a 775 minority opinions that needed to be read, classified and coded. Each opinion was analyzed and placed into one of twenty four different categories, which were then divided into five different main groupings; *Decision in Waiting* (DIW), *Failed Accommodation*

[233] Botha, Henk, "Judicial Dissent and Democratic Deliberation" SA *Public Law*, Vol. 15, (2000), 327.

(FA), *Repetitive*, *Creative*, and *Perfunctory*.[234] Each category attempts to describe the minority author's potential purpose for writing separately. These five categories embrace both dissent and separate concurrence; they also show the different patterns of disagreement from the Laskin Court to the Dickson Court (Table 4.1 and 4.2).

Laskin Court: Category Breakdown by Judge
Table 3.1

Judge	DIW	Creative	FA	Repetitive	Perfunctory	Total
Beetz	1	2	16	0	4	23
Chouinard	0	0	1	0	1	2
Dickson	34	8	6	0	2	50
Estey	10	5	6	0	0	21
de Grandpre	18	4	8	2	3	35
Judson	2	0	0	6	1	9
Lamer	7	0	4	1	1	13
Laskin	37	16	20	2	2	77
Martland	19	8	8	5	2	42
McIntyre	1	0	6	0	0	7
Pigeon	24	5	14	0	1	44
Pratte	1	1	4	0	1	7
Ritchie	8	11	10	4	3	36
Spence	22	6	8	2	1	39
Wilson	0	0	1	1	0	2
Total	184	66	112	23	22	407

[234] The analysis of each category shows the top five judges in each category, with any justice registering less than four coded minority opinions dropped from the list to ensure an undistorted presentation.

Dickson Court: Category Breakdown by Judge
Table 3.2

Judge	DIW	Creative	FA	Repetitive	Perfunctory	Total
Beetz	0	3	11	1	2	17
Chouinard	1	0	1	1	0	3
Cory	1	5	4	0	0	10
Dickson	11	5	7	1	0	24
Estey	5	4	3	3	3	17
Gonthier	0	0	2	0	0	2
La Forest	6	11	16	4	6	43
Lamer	7	3	17	8	3	38
Le Dain	1	3	6	2	1	13
L'HD	1	17	6	8	0	32
McIntyre	7	10	10	3	2	32
McLachlin	6	4	3	3	1	17
Ritchie	0	0	0	0	1	1
Sopinka	5	10	10	9	0	34
Stevenson	0	0	0	0	1	1
Wilson	15	24	30	9	6	84
Total	74	91	125	52	26	368

Disagreement Categories by Court
Table 4

Category	Laskin Court (407)	Dickson Court (368)
Decision in Waiting	**45.2%** (184)	**20%** (74)
Creative	**16.3%** (66)	**25%** (91)
Failed Accommodation	**27.5%** (112)	**34%** (125)
Repetitive	**5.6%** (23)	**14%** (52)
Perfunctory	**5.4%** (22)	**7%** (26)

Decision in Waiting (DIW):

Although disagreement can serve many different purposes, it has already been established that the dominant position is that a minority judge should use restraint, disagreeing only when a "conscientious difference of opinion on fundamental principle"[235] compels him to do so. Under these circumstances, disagreement can be justified through use of legal precedent, logical reasoning, supported by established or developing legal doctrine, which is explained in the written decision and made public. This type of separate opinion epitomizes what ideal disagreement should reflect, by pleading to a judge's sense of duty to only disagree when necessary for the dignity of the Court. This represents the reluctant dissenter who disagrees in an attempt to appeal to the "brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[236] Also termed the canonical dissent, this form of opinion describes a situation where "originally penned to record the losing, minority viewpoint – that since not only have shaken off the stigma of the losing position, but have come to command a constitutional stature far superior to that accorded most *majority* opinion in other cases."[237] Anita Krishnakumar in her essay, *On the Evolution of the Canonical Dissent* explains that original theory applies to majority decisions that "legal theorists increasingly have come to recognize and study the existence of a constitutional canon composed of highly authoritative legal texts that command special reverence in the law" such as Canada's *R v Oakes*, and the US's *Marbury v Madison*, and *Brown v Board of*

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[235] American Bar Association's Proposed Canons of Judicial Ethics, No. 19.
[236] Quoting Chief Justice Hughes, Douglas, William O., "The Dissent: A Safeguard of Democracy" *Journal of the American Judicature Society*, Vol. 32, (1948), 106.
[237] Krishnakumar, Anita S., "On the Evolution of the Canonical Dissent" *Rutgers Law Review*, Vol. 52, (2000), 781.

Education.[238] Relevant for my purpose is the reverse of the canonical decision, the canonical dissent; examples of American canonical dissents would be the obvious dissent by Justice Harlan in *Plessy v Ferguson*[239] and Justice Holmes' dissent in *Lochner v New York.*[240] For the dissenter, to achieve canonical status is the ultimate achievement for a minority opinion and the ultimate goal behind a *Decision in Waiting.* However, this achievement takes years, sometimes centuries for a dissent to find its place among the majority. "The canonicity of a dissent is not a function of the dissent itself but of the later court or courts that redeem it and make it canonical."[241] Judges write DIW with the intention of convincing future courts to correct the error of their ways.

Considered the most persuasive and influential category, the title *Decision in Waiting* does not adequately describe the potential significance this type of minority opinion can have. Written as if it were a majority opinion, it includes all elements necessary to properly convey the decision of the Court, including detailed facts and background information of the case, as well as all relevant legislation with little or no reference to the actual majority reasons of the Court. A DIW usually does not include any form of acknowledgment or positioning with regards to the majority and will not engage in the majority reasons specifically. A self contained DIW allows the reader to fully understand the position of the authoring judge, leaving little question as to his reasons for judgment, resulting in a persuasive, solid argument; it is simply an outcome plus reasons of what the court should do. The most identifiable characteristics of the DIW are the presence of facts, background and legislation, with no mention of the majority author or

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[238] *Ibid,* 781.
[239] 163 U.S. 537, 552 (1896).
[240] 198 U.S. 45, 74 (1905).
[241] Primus, Richard A., "Canon, Anti-Canon, and Judicial Dissent" *Duke Law Journal,* Vol. 48, (1998), 247.

reasons and tends to be long in length. Another less concrete feature of the DIW is a very confident, almost arrogant tone; however this tone was not standard during the Laskin years but evolved as a result of Justice Dickson, who is the quintessential DIW writer. It was Justice Dickson who established the strong DIW style and set the standard by which all others are held. The confident tone lends to its "written as if a majority" feel as well as its persuasive authority. There are variations on the theme but for the most part, the DIW is easily identifiable.

Laskin Court: Decision in Waiting Category
Table 5.1

Judge	DIW Dissent	DIW Separate Concurrence	Total
Dickson	**50%** (25/50)	**18%** (9)	**68%** (34/50)
Spence	**51%** (20/39)	**5%** (2/39)	**56%** (22/39)
Pigeon	**41%** (18/44)	**14%** (6/44)	**55%** (24/44)
de Grandpre	**47%** (17/35)	**3%** (1/35)	**51%** (18/35)
Laskin	**45%** (35/77)	**3%** (2/77)	**48%** (37/77)
Estey	**48%** (10/21)	**0%**	**48%** (10/21)

Dickson Court: Decision in Waiting Category
Table 5.2

Judge	DIW Dissent	DIW Separate Concurrence	Total
Dickson	**33%** (8/24)	**25%** (6/24)	**58%** (14/24)
McLachlin	**35%** (6/17)	**0%**	**35%** (6/17)
Estey	**23%** (4/17)	**6%** (1/17)	**29%** (5/17)
L'Heureux-Dube	**25%** (8/32)	**3%** (1/32)	**28%** (9/32)
Lamer	**16%** (6/38)	**3%** (1/38)	**19%** (7/38)

The DIW can be explained in two ways; the first possibility being the author probably had a majority at some point but during the circulation of drafts lost votes along the way, resulting in a minority opinion. The evidence of this option can be found not only in the minority opinion but also in the majority text. Clear elements of a lost majority would be a minority DIW that is significantly longer in length than the majority,

the majority author acknowledges the minority either for the contribution of facts or for the reasons given, and the minority in no way acknowledges the majority. In *Reference Re Public Service Employee Relations Act (Alta.)*[242] Dickson provides a classic example of a DIW written as if it were the majority opinion. Dickson's minority opinion is an extensive sixty-five pages in length with all the relevant background, facts and applicable legislation, compared to the short two-page decision of the majority. The majority author, Justice Le Dain, contributes to this theory by acknowledging Dickson "for the background, the issues and the relevant authority and considerations in this appeal." [243] This is just one example of a DIW that could be construed as a lost majority opinion.

The other potential explanation for the appearance of a DIW is a decision that was intended by the author to speak to future generations as the ideal version of a canonical disagreement. This type of DIW describes a situation where the minority author feels very strongly about the issue at hand and considers the majority opinion to have dealt poorly with that issue, making it necessary, out of conscientious difference of opinion to disagree in a major way. Justice McLachlin's dissent in *R v Keegstra*,[244] exemplifies the necessary characteristics for the canonical dissent. The controversial issues are *Charter* related dealing with freedom of expression and hate propaganda against an identifiable group, which mark this case as one of future importance, making the decisions presented of the utmost importance.

Another defining characteristic that separates the two DIW categories is the length. Both the majority and minority opinions are extremely long, with McLachlin's registering in at seventy-two pages long and the majority's a whopping eighty three

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[242] [1987] 1 S.C.R., 313.
[243] *Ibid*, 390.
[244] [1990] 3 S.C.R., 697.

pages, indicating that the minority did not lose the majority. A judge who had the majority at one point, but lost votes along the way usually sees the majority as significantly shorter than the minority. *R v Keegstra* is not such an example, but instead McLachlin was probably always in the minority, indicating early on in the decision making process her differences with the majority. McLachlin wrote her dissent with the hope to persuade not only her colleagues but future generations as well. The majority also addresses McLachlin's reasons throughout, indicating a level of respect for a different interpretation, which can be seen as lending credit to the possible consideration of such reasons in the future. It is for this reason that the *Keegstra* decision is considered a different type of DIW than the *Public Service reference*.

Creative/Interpretive:

This grouping describes minority opinions that address the flaws of the minority reasoning directly and supplies a new set of reasons in its place. Included in this group are *Positive Responsive (PR)*, *Negative Responsive (NR)* and *I Concur but for Different Reasons (ICDR)*. Both the PR and the NR follow the same pattern, the only difference being in the perceived tone of the minority author. A *Responsive* is an extensive track through all or parts of the majority reasons, with specific references to the majority author by an acknowledgement and positioning on the issues, with a strong responsive mentioning the majority author by name throughout the decision. The PR has a strong conversational feel and is either neutral or amicable in nature, whereas the NR is more confrontational and critical in tone. The tone of the opinion can be determined through the use of respect terms and word choice.

Another important category is the *I Concur but for Different Reasons*. These separate opinions are easily identified as most judges indicate this approach in the introduction of the concurring decision; "I agree with the majority outcome but unfortunately I arrived at this conclusion by a different route." Justice Le Dain, in *Canada (Canada Employment and Immigration Commission) v. Gagnon*[245] presents a textbook example of an ICDR introduction, "I agree with her that the appeal should be allowed..., but I find it necessary to state my own understanding of the issue and the reasons for that conclusion." Justice Sopinka also provides an excellent ICDR in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*[246], stating "I have had the advantage of reading the reasons of Wilson herein...Although I agree with the disposition proposed by her, I arrive at that conclusion by a different route." The both ICDR examples are medium in length averaging 6.5 pages, indicating a level of detail was provided for the reasons given. Neither decision provided facts or background but instead credited the majority author with supplying the background information. This leaves the minority author free to get right into the reasons, which is what distinguishes an ICDR from a *Responsive* or a DIW.

What appears to be an innocent disagreement has three very crucial implications. By overtly stating that more than one possible interpretation of applicable legal rules exists for the same case admits the law is sometimes indeterminate and uncertain. The practice of disagreement "undermines the belief that judges can arrive at correct answers to legal questions simply by applying legal rules in neutral and mechanical fashion."[247] Second, the *Creative* category reinforces the assertion that outcome is nothing and

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[245] [1988] 2. S.C.R., 29.
[246] [1990] 2. S.C.R., 489.
[247] Botha, Henk, "Judicial Dissent and Democratic Deliberation" *SA Public Law*, Vol. 15, (2000), 323.

reasons are everything Thirdly, the Court signals through the *Creative* category alerting lower courts, the legal community and the population at large of possible legal avenues the Court may take.

It is generally accepted that the Courts are in the policy making business and judges no longer just find the law but can create it. However, for the sake of judicial legitimacy, this admission should be downplayed instead of flaunted. There are those who criticize the Court's increased power in politics and debate still circulates raising questions regarding the role of the Supreme Court in the political sphere. An ICDR draws attention to the uncertainty of the law and the potential manipulation of legal rules to further a judge's own personal policy objectives. Although a useful category in opening up the marketplace of ideas and exploring all options for legal interpretation, it is a category that must be used wisely and fully justified.

The *Creative* category has a larger capacity for persuasion as it is intended to stress the inadequacies or faults of the majority argument, while emphasizing the minority author's ideal course of action. Opinions that fall into this category are written to persuade the reader, the author's colleagues and possibly even the lower courts that the majority reasoning was flawed and the minority reasoning was superior. *R v Morgentaler*[248] represents an excellent example of the *Creative* prototype because it has extreme fragmentation, extensive acknowledgement of differing views by all parties involved and a fervent exploration of similar questions and possible interpretations of the same *Charter* sections, extending 155 pages in length. A seven judge panel heard the case, resulting in a 2-2-1-2 split, with the majority represented by Dickson and Lamer, the first separate concurrence included Beetz and Estey, followed by Wilson's solo

[248] [1988] 1 S.C.R., 30.

concurrence and concluded with a dissent by McIntyre and La Forest. All three minority opinions authored by Beetz, Wilson, and McIntyre were coded as Positive Responsive. This is noteworthy because all three separate opinions were highly in-depth and influential, indicating the desire by all authors to make strong, rationally detailed arguments in support of their preferred line of reasoning.[249] *Morgentaler* showcases the collegial nature of the modern Supreme Court decision making, emphasizing the dialogue and interaction that occurs between justices leading up to the final outcome. In this case, no one decision is significantly more important than the others and why Dickson, with only one other vote, was chosen to represent the majority is speculation. Could it be because as Chief Justice, Dickson had seniority? Or was a vote taken and Dickson won? With the Supreme Court's internal proceedings well hidden, it is difficult to know the specifics of assignment of the majority.

Thirdly, there is an element of signaling inherent in the *Creative* category; due to alternative possible interpretations, the Court opens up discussion and dialogue on certain issues, while inviting similar issues to come to the forefront. The *Creative* category, coupled with the *Repetitive* typology make it convenient to watch the direction of the Court on certain issues, as well as changes in the voting splits, indicating to the legal community and society at large what issues the Court is sympathetic to and why. A creative minority has the opportunity to lay out the requirements necessary for an unsuccessful appeal to become a future successful appeal. A string of *Creative* cases dealing with a similar issue is a dialogue between majority and minority, documenting

[249] Rarely does an entire case so clearly fall into a specific category. The categories are intended for individual sets of reasons, but *Morgentaler*, as a whole is a serious dialogue between all authors. Normally with multiple minority reasons, one minority author is dominant followed by more minor disagreement; this is not the case here, instead all parties are equally serious in their disagreement.

the Court's position, where they will compromise and what areas at the present time cannot be compromised, thus making the *Creative* decision one to analyze for future revisions.

Laskin Court: Creative Category
Table 6.1

Judge	Creative Category
Ritchie	**31%** (11/36)
Estey	**24%** (5/21)
Laskin	**21%** (16/77)
Dickson	**16%** (8/50)
Spence	**15%** (6/39)

Dickson Court: Creative Category
Table 6.2

Judge	Creative Category
Cory	**50%** (5/10)
McIntyre	**31%** (10/32)
Sopinka	**29%** (10/34)
Wilson	**29%** (24/84)
L'Heureux-Dube	**28%** (9/32)

The evolution of the *Creative* section is less drastic than the DIW type, although they fulfill a similar function. It also made a significant jump in frequency, moving from 16.3% on the Laskin Court to 25% on Dickson, moving into second place behind Failed Accommodation. The *Creative* judge is one who values detail and thoroughness, using the minority opinion to register justified disagreement. Considering Justice Dickson, Laskin, Estey, Spence, and L'Heureux-Dube, all made the top five for DIW, it is safe to say that these justice's disagree over serious issues requiring extensive reasons, as opposed to minor details.

Failed Accommodation (FA):

It has already been established that the collegial court judge is a constrained, strategic policy maker; therefore, strategy plays heavily into the decision making process. This game playing mentality on the bench is most evident in the *Failed Accommodation* category, which includes the *Mixture*, *Partial dissent*, *Concur to a concurrence*, *Concur to a dissent*, *Just One More Thing*, and *Just One Less Thing*. Accommodation of majority and minority ideas is an essential element to either achieving or maintaining a

majority, or a key factor in the decision to write separately. With many minority decisions hanging in the balance, contingent upon the revision of a paragraph, the modification of a word or the narrowing of the majority scope, this section has increased in importance. I began my research underestimating the significance of this section, but further study revealed that the collegial game manifested itself through these six categories.

Just One Less Thing (JOLT) and *Just One More Thing* (JOMT) are self-explanatory. JOLT refers to a judge's desire not to comment on an issue the majority author felt necessary, usually presenting itself in the form of "I concur with Justice X, except with regards to issue y, which I do not feel is necessary to address in this case" or some variation on that theme. JOMT is the exact opposite, describing a situation where the minority justice's wishes to add a comment to the judgment that the majority author did not: "I agree with Justice Y but would like to add one further comment." These two cases are the most significant examples of failed accommodation because they expressly state the small issue (with potential major ramifications) that the two parties could not agree on. Why would a minority judge choose to write separately or a majority judge throw away a unanimous decision if those contentious issues could have been included in the majority? If we had access to the private memos sent between authors, it is my hypothesis that the issues presented in the JOMT and the JOLT would be discussed. The degree of accommodation is based on the threshold of each individual justice and how far they are willing to compromise their opinion. The presence of a JOMT or a JOLT indicates the threshold has been met and compromise could not be reached.

Soo Mill and Lumber Co. v City of Sault Ste-Marie[250] had Justice Pigeon separately concurring in 4-1 majority written by Chief Justice Laskin. Classified as a classic JOMT, this concurrence was only two paragraphs long but Pigeon made it very clear that the majority would not accommodate his reading of the issues. Pigeon positions himself saying, "I would hesitate to agree with the Chief Justice's construction of..." the issue at hand and continues to make his point, concluding with, "Subject to this observation, I agree with the Chief Justice." This is a cut and dry example of a majority author who does not feel it necessary to compromise his position either because he does not want to concede any portion of the reasons for the integrity of the opinion or the author does not have to accommodate with such a strong majority lead.

The *Mixture* is a collage of ideas, which involves combining select elements from both the majority and another minority opinion to create another set of reasons. I call this the piecemeal effect because the minority justice does not add any of his own ideas to the reasons but instead takes bits and pieces from the other writers to create his own opinion. The *Mixture* is easily identified based on a clear statement of agreement or disagreement and direct reference to the issues and the authors in question. *Stoffman v Vancouver General Hospital*[251] has Justice L'Heureux-Dube dissenting in a typical *Mixture* decision, with a continual switch back and forth between the reasons of the majority author, Justice La Forest, and another minority writer, Justice Wilson. Throughout the opinion, L'Heureux-Dube regularly positions herself with regard to the reasons she agrees or disagrees by stating, "I agree with Justice Wilson on her point..." or "I disagree with La Forest because...", which is a defining feature of the *Mixture* category.

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[250] [1974] 1 S.C.R., 78.
[251] [1990] 3 S.C.R., 483.

Some *partial dissents* are recorded by the Supreme Court Reports as "Justice X, Dissenting in Part", which makes a Partial Dissent easy to recognize. It must be noted that not all "Dissenting in Part" separate opinions become classified as *Partial Dissents*. The *Partial Dissent* is a smaller version of the *Responsive*, with the minority judge disagreeing with only part of the majority reasons. The *Partial Dissent* justice does not provide as much detail or in-depth reasoning as the *Responsive* justice would, resulting in a much shorter decision.

The *Concur to a Dissent* and *Concur to a Concurrence* describes a situation where a minority author has attached herself to another minority author, but has a few additional comments to include. This is also a form of failed accommodation but not in the conventional sense, as it is a minority writer who would not accommodate the reasons of another minority writer, which leads to further fragmentation of the Court. One has to question the validity of such unrestrained disagreement when it is encouraged to disagree only when absolutely necessary and these types of disagreement represent disagreement with disagreement. Is individual recognition the deciding factor or are the areas of divergence relevant enough to justify fragmentation?

Laskin Court
Failed Accommodation Category
Table 7.1

Judge	Failed Accommodation
McIntyre	**86%** (6/7)
Beetz	**70%** (16/23)
Pigeon	**32%** (14/44)
Lamer	**31%** (4/13)
Estey	**29%** (6/21)

Dickson Court
Failed Accommodation Category
Table 7.2

Judge	Failed Accommodation
Beetz	**65%** (11/17)
Cory	**40%** (4/10)
Le Dain	**46%** (6/13)
Lamer	**45%** (17/38)
La Forest	**37%** (16/43)

The DIW saw a decline in use from the Laskin to the Dickson Court, and the *Failed Accommodation* typology absorbed a good portion of the slack, gaining 6.5% more cases, increasing from 27.5% on the Laskin Court to 34% on the Dickson Court, moving into first place (See Table 4). The appearance of the *Failed Accommodation* into first place suggests what Maltzman, Spriggs and Wahlbeck argue that the strategic model of decision making is now dominating the bench, more so than personality or institutional constraints, although they do factor in. What is more surprising besides the evidence to support the relatively new notion of the collegial court is the percentage of disagreement that occurs over little things. FA represents conflict over a single issue or even the use of certain words or phrases, areas that past judges tended to ignore to maintain consensus.[252] Increasing FA indicates that unresolved conflict over minor details is becoming the norm, which may lead to a trend in careless disagreement. Not to say that all disagreement over minor details is careless, because that is too harsh a generalization. Often the small details can be extremely important when dealing with major doctrines of law; however, it is well established that an appellate court at the highest level should strive to achieve unanimity whenever necessary. The FA type is more inclined to lean in the direction of less serious disagreement and a clash over small areas, instead of a major "conscientious difference of opinion on fundamental principle."[253]

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[252] "Even when Brandeis failed to win concessions, however, he would refrain from publishing the dissent if the majority opinion, though incorrect in his judgment, was narrow and unlikely to cause real harm in future cases." Taken from Bader-Ginsburg, 1990 (143). This is not the only example of a Justice refusing to disagree when the issue at stake was of little importance, "Justice Holmes initially noted his reluctance to dissent 'when it does not seem that an important principle is involved or that there is some public advantage to be gained from a statement of the other side." Taken from Laura Krugman-Ray, 2000 (180).
[253] American Bar Association's Proposed Canon of Judicial Ethics, No. 19.

Repetitive:

This section includes the *Ditto* cases, which describe a minority decision where the disagreeing judge refers back to the reasons of another case. There were three types of *Ditto*; the first directed the reader to a previous case written by the minority author with no reasons attached. This type was very short in length, usually no longer than a paragraph, consisting of, "For the reasons I gave in...I would dismiss the appeal." and nothing more. The second type of *Ditto* is just like the first with the minority author directing the reader to the reasons of a previous case but some basic reasons accompany the decision. These decisions are usually between one to four pages in length and contain little detail. These two types combined comprise only 9% (2/23) of the *Repetitive* cases on the Laskin Court and a massive 81% (42/52) on the Dickson. The third *Ditto* type has the minority author referring to the reasons of a different case authored by another judge; "Precedent established in...binds me to this decision." The third type of *Ditto* on the Laskin Court made up 91% (21/23) of all *Repetitive* cases and only 19% (10/52) from the Dickson Court (see Table 8.1 and 8.2).

Laskin Court: Repetitive Category
Table 8.1

Judge	Repetitive
Judson	**67%** (6/9)
Martland	**12%** (5/42)
Ritchie	**11%** (4/36)
Lamer	**8%** (1/13)
Spence	**5%** (2/39)

Dickson Court: Repetitive Category
Table 8.2

Judge	Repetitive
Sopinka	**26%** (9/34)
L'Heureux-Dube	**25%** (8/32)
Lamer	**21%** (8/38)
Estey	**18%** (3/17)
Le Dain	**15%** (2/13)

The *Repetitive* section made significant gains from the Laskin to the Dickson Court, jumping from 5.6% to 14% (see Table 4). This means that Supreme Court judges

were referring back to themselves, each other or lower court decisions 8.4% more after the *Charter*. The Dickson Court saw its judges not only use the Repetitive type more often, but also reference back to their own individual past decisions a majority of the time. This could imply that a desire by Dickson Court justices to rely more readily on their own decisions instead the decisions set by other national high court.[254] This shift could also be accounted for by the newness of the *Charter* document and the lack of established precedent, necessitating the use of domestic judgments to properly deal with *Charter* issues. Also, it could be inferred that more controversial issues introduced by the *Charter* required a longer period of time by the majority, spread out between cases to sufficiently address the topic. Therefore for the sake of time, minority authors found it convenient to use the *Repetitive* decision instead of repeating themselves to address the same concerns with the majority.

Justice Judson from the Laskin Court offers a third, less attractive, explanation for the use of a *Repetitive* decision. Although not a frequent minority writer, Justice Judson managed to write *Repetitive* opinions 67% (6/9) of the time during the last four years of his tenure on the bench. For a judge to develop such a strong pattern with only nine minority decisions is notable, as styles do not often appear so obviously with so few decisions. Coupled with the fact that Judson was reaching retirement, this particular pattern and type could indicate a strong apathetic attitude regarding disagreement. The *Repetitive* category can be interpreted as one of convenience as it simply points to reasons already delivered, requiring little or no effort on the part of the minority judge with caseload, time constraints, illness or laziness accounting for the use of this type of

[254] Which is consistent with Dr. Peter McCormick's assertion in "Second Thoughts: Supreme Court Citation of Dissent & Separate Concurrences, 1949-1996", that following the *Charter* the Supreme Court cited itself more regularly than it did outside precedent.

disagreement. Due to a lack of information regarding Justice Judson's previous performance on the bench prior to Laskin's elevation to the position of Chief Justice, I would hypothesize that it was lack of effort and ease that prompted such a high occurrence of *Repetitive* opinions for Justice Judson.

On the other hand, Justice L'Heureux-Dube uses the *Repetitive* type to address a series of cases dealing with similar issues concurrently. The Court often hears similar cases in groupings and decides them all at once. For instance, L'Heureux-Dube's minority opinion in *R v Martineau*[255], decided on September 13, 1990 was a thirty-two page *Creative* decision. Subsequently, her next four minority decisions in *R v Rodney*[256], *R v Arkell*[257], *R v Luxton*[258], and *R v Logan*[259] were handed down together and all were classified as *Repetitive*, referring back to L'Heureux-Dube's detailed and thorough *Creative* decision in *Martineau*. In this situation the Repetitive format was used for consistency as well as convenience, with the minority author fulfilling her obligation to provide a set of logical reasons to support her arguments.

Perfunctory:

Not all separate opinions are written with a discernible purpose; some minority opinions appear to have been written for no reason at all with the written reasons giving little or no evidence as to the purpose for the author writing separately. Most *Perfunctory* decisions are extremely short in length, constituting either a few sentences or a few pages at the most, with a lack of original arguments being presented by the minority author or no disagreement with majority opinion. On average, a *Perfunctory* type decision filled

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[255] [1990] 2 S.C.R., 633.
[256] [1990] 2 S.C.R., 687.
[257] [1990] 2 S.C.R., 695.
[258] [1990] 2 S.C.R., 711.
[259] [1990] 2 S.C.R., 731.

1.55 pages on the Laskin Court and 0.87 pages on the Dickson. Such a separate opinion may be an indication of something bigger going on that the reader is unaware of, like a desire for the minority author to disassociate herself from the majority for personal reasons. With little or no evidence present in the content of the decision, this assertion becomes conjecture and beyond my capabilities to infer. Justice Wilson in *Calgary v Northern Construction Co.*[260] wrote a separate concurrence, representing herself and Justice L'Heureux-Dube. Both the majority, written by Justice McIntyre for Justice Estey and Justice La Forest, and the minority were extremely short in length at only a few sentences long. Wilson, in her minority proceeded to repeat the issue of the case and agree with McIntyre's use of another case as precedent as well as his outcome. No other reasons were given and no disagreement was registered, making it difficult to understand why a separate opinion was even presented. What makes this case of interest is the separation between two female justices from three males, which raises the question about gender divisions on the bench. Did gender factor into the reasons to disagree? However, this line of reasoning cannot be substantiated because there is no proof indicating this being the reason for Wilson and L'Heureux-Dube's separate position. Another illustration is Justice Beetz's opinion in *Labrosse v R*[261] that, in its entirety, consisted of, "I agree with the conclusion of McIntyre, Lamer and La Forest JJ. that the appeal should be dismissed." There are a few elements worth noting here; the fifth judge on the case, Justice Chouinard took no part in judgment, meaning that the final outcome was three against one. Also, the majority opinion was recorded as written by all three judges, instead of the usual one author for the majority. This rarity not only amplifies the

[260] [1987] 2 S.C.R., 757.
[261] [1987] 1 S.C.R., 310.

division between the majority and the minority, but it stresses the unity between the majority and their willingness to write as a coalition, signing all three names as the opinion writer. A clear pattern of disagreement does not exist between Justice Beetz and the majority authors that would suggest a strong personality conflict between the two parties, resulting in a desire by Beetz to disassociate himself from the Court. Although classified as a *Perfunctory* decision, there is more going on than meets the eye. Unfortunately in this case, a lack of information requires speculation and I do not posses the necessary details to adequately hypothesize the minority judge's intentions.

Laskin Court: Perfunctory Category
Table 9.1

Judge	Perfunctory
Beetz	**17%** (4/23)
Judson	**11%** (1/9)
de Grandpre	**9%** (3/35)
Lamer	**8%** (1/13)
Ritchie	**8%** (3/36)

Dickson Court: Perfunctory Category
Table 9.2

Judge	Perfunctory
Estey	**12%** (2/17)
La Forest	**7%** (3/43)
Beetz	**6%** (1/17)
McIntyre	**3%** (1/32)
Wilson	**2%** (2/84)

Justice La Forest is the classic example of a justice who uses minority opinions to disassociate himself from the majority. During the years 1987 to 1989, a strong pattern of alienation developed in a series of solo minority opinions authored by La Forest. The first instance being a series of three cases, *Pelech v Pelech*[262], *Richardson v Richardson*[263], and *Caron v Caron,*[264] with all majority opinions being authored by Justice Wilson. All three cases were written a day apart and dealt with similar issues regarding spousal support after divorce, creating a link which might account for La Forest's consistent minority position; however, the link is not supported by the content

[262] [1987] 1 S.C.R., 801. (La Forest concurring); written as an "In My Own Words" concurrence.
[263] [1987] 1 S.C.R., 857. (La Forest dissenting); written as a "Negative Responsive".
[264] [1987] 1 S.C.R., 892. (La Forest concurring); written as a "Perfunctory" concurrence.

of the decisions. If La Forest had been consistently in disagreement with Wilson's reasoning, the link could be supported, but La Forest was not. In both *Pelech* and *Caron*, La Forest agreed with Wilson on her "proposed disposition and reasons for judgment" but chose to write separately. The separate concurrence in *Caron v Caron* draws the most attention because it appears to be a separate opinion written only to be consistently separate. La Forest's does not disagree with the majority, and states his agreement accordingly, giving no reason for his separate concurrence. However, despite La Forest's extremely brief reasons in *Caron*, read in conjunction with the first two minority opinions, which were both negative in tone and confrontational in style, it can be inferred that a conflict existed between Wilson and La Forest. The reason for the conflict is unknowable to the reader but compelled La Forest to distance himself from Wilson to make a point; a point only the majority justices involved would be able to detect. La Forest's desire to separate himself from his colleagues was not an isolated incident, but became part of La Forest's earlier disagreement style with seven distinct cases where I noted La Forest's detachment from the majority for nominal reasons. *R v Holmes*[265] and *Maurice v Priel*[266] are prime examples of deliberate alienation from the majority. Both cases are solo separate concurrences, consisting of one or two sentences stating La Forest's full agreement with the reasons and outcome of the appeal with no other reasons for writing separately. La Forest's disassociation from the majority is not necessarily negative in nature or reflects his abrasive manner, but in some cases simply a way for La Forest to distinguish himself separately. Obviously, La Forest is a justice who does not favour unanimity at all costs, and I speculate instead that he embraces individual

[265] [1988] 1 S.C.R., 914.
[266] [1989] 1 S.C.R, 1023.

expression when he feels it is necessary. La Forest felt that "the fact-centric nature of litigation and the multiplicity of principles available for resolving disputes in any given context, *stare decisis* seems to me less of a constraint on judicial lawmaking than is generally supposed. Certainly, in my attempts to move the law forward, I have only rarely found it necessary to overrule cases."[267] This is a powerful statement regarding La Forest's opinion of the principle of *stare decisis*; La Forest does not feel strictly bound by it, or at least he acknowledges there is flexibility in its use. Where other justice's might have signed onto the majority to provide the ideal unanimous decision, in these cases La Forest chose instead to fragment the Court "to move the law forward" in his own personal way.

Perfunctory also includes an "observation" element as some decisions are written with a lecturing or a "by the way" tone. Often associated with a warning as to the role of courts within the Canadian system or a description of how the law should fit into the social climate, the *Observation* decisions are rare. These decisions are classified as Perfunctory because separate opinions should be used for the benefit of the judicial process and not as a means of reprimand. Justice Wilson's Perfunctory decision in *Forget v Quebec (AG),*[268] provides an example of a "by the way" quality, written only to inform the reader of what Wilson thinks the role of the Court could be if the circumstances were different surrounding the merits of the case.

The *Cryptic* disagreement signifies an opinion that is indecipherable and confusing. There are very few cases that are described as *Cryptic*; it is usually a confusing format and lack in organization that results in a *Cryptic* opinion. *R v*

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[267] Johnson, Rebecca and John P. McEvoy, ed., *Gerard La Forest at the Supreme Court of Canada, 1985-1997*. Winnipeg: University of Manitoba (2000), 3-4.
[268] [1988] 2 S.C.R., 90.

Nehring,[269] is a one page decision written "by the Court" with the Court stating the position of the minority as, "Three members of the Court (Estey, Lamer and Wilson JJ.) are in substantial agreement with the minority judgment of the Alberta Court of Appeal and would allow the appeal." No only is it impossible to determine who is writing the majority reasons, but the minority is not even responsible for writing the minority reasons. It is an odd situation that results in a pointless set of reasons.

Justice Beetz led the Laskin Court in *Perfunctory* decisions and placed third on the Dickson Court, giving him the inauspicious title of the most perfunctory judge. Beetz's style and purpose was sometimes hard to decipher, making it difficult to classify some of his decisions. Fortunately, *Perfunctory* represents only a nominal portion of disagreement on the bench, and even though it requires analysis because it does happen, it is not an overly significant category. Although stating *Perfunctory* decisions as useless disagreement is a harsh criticism, these cases represent pointless dissention from the majority and should be discouraged. It is somewhat presumptuous of me to judge the rationale of a Supreme Court justice, as I am not privy to the inner workings of their legal mind; however, based on the available reasons presented in some Supreme Court cases, I am confident in my observation of perfunctory disagreement.

Overview:

As shown in Table 4, disagreement changed significantly between the two courts, with a massive shift in dominance by the DIW during the Laskin Court to a more balanced spread of disagreement during Dickson's tenure. The drop in the DIW is a significant change from first place on the Laskin Court to third place on the Dickson

[269] [1986] 2 S.C.R., 709.

Court. The DIW category made the most drastic evolution from one court to the next. The DIW represented the "standard" type of disagreement during the Laskin Court, meaning that the minority authors tended to use the DIW as the typical format when disagreeing. Dissents on the Laskin Court accounted for 268 (66%) of the 407 separate opinions written, with 161 (60%) of those being dissent DIW, clearly showing the dominance of the DIW over the other forms of disagreement. The dissent DIW represented only 56 (33%) of the 171 dissents on the Dickson Court. An early Laskin DIW has all the elements necessary to fall into this category; however, the Dickson Court would add two more key characteristics, lengthy decisions and a confident tone. Chief Justice Dickson can be credited with creating the new standard for the DIW, taking it from its typical, casual use to the form of disagreement only utilized under strong conviction, which is the DIW's more ideal function. A Dickson DIW possess all the necessary elements of the ideal canonical minority opinion one would expect from a decision meant to persuade future generations and overturn precedent. The style and the tone became significantly more serious, compelling and persuasive which could be contributed to the Court dealing with more controversial issues or important questions of law. The increased length of a Dickson DIW is of significance as well because although the Laskin Court had a higher frequency of disagreement, the Dickson Court wrote longer decisions, almost three pages more on average (7.9 to 10.3), with considerable difference in length between a Laskin DIW (D=13.2 pgs, SC=14.4 pgs [**13.9**]) and a Dickson DIW (D=25.6 pgs, SC=24.2 pgs [**24.9**]). An eleven-page difference in length is substantial and a possible explanation could attribute this massive disparity to the introduction of the *Charter*. The Court's sudden thrust into unknown legal territory caused an influx of

serious legal questions with little or no precedent to offer guidance, resulting in a greater variation of disagreement and the need for more space to provide adequate reasons.

As a result of the *Charter,* the Dickson Court required a modified ranking system of disagreement with the DIW becoming a more serious type of disagreement. By "serious" it is meant that the minority opinion adheres to the ideal function of disagreement, which is when a judge's conscience compels them to write separately and not for more minor reasons. The DIW represents "serious" disagreement because in order to fit under this heading, the decision usually contains a lengthy, well thought out, detailed set of reasons. The *Creative* disagreement category comes in a close second, differing from the DIW mostly in tone and style, while the *Failed Accommodation* and *Repetitive* categories pick up the less serious disagreement which can be defined by the "little things". This is not to say that minor disagreement cannot be important, but a separate opinion that differs from the majority reasons entirely is substantially more significant than one that disagrees with a word or phrase. I hesitate to compare the first four categories in terms of "importance", because the sections all have an important, but different functioning; it would be like comparing apples to oranges. However, the final *Perfunctory* category, not only comes in last as the least serious grouping, but can also be coined the least important as it represents relatively useless disagreement.

The evolution of the DIW parallels the evolution of judicial decision making, with the *Charter* being the chief catalyst. With the increased acceptance of the indeterminacy of the law and the expectation of judges to create law from time to time, the *Charter* opened the door for disagreement to expand, with the categories supporting this claim. More judges were experimenting with minority opinions, and some judges took it to a

whole different level, carving out a new path for decision making. Laskin himself was responsible for making disagreement "important" and was consequently dubbed the "great dissenter" although Laskin's frequency of disagreement cannot match that of L'Heureux-Dube or Wilson. The contribution of the Laskin Court was to pave the way for serious disagreement and serious questioning of the majority reasoning, offering the alternative interpretation that Laskin was so deeply committed. The Dickson Court was compelled to change its decision making style as a result of the *Charter*. With no precedent to guide them and a Laskin inspired innovative decision making style, Dickson Court judges embraced disagreement, expanded the options of disagreement and gave it personality. Disagreement became more complex, with inherently deeper meaning, allowing judges the opportunity to fully express themselves. The strategic nature of disagreement manifested itself with the expansion of the *Failed Accommodation* category. Disagreement over "little things" became more readily accepted, with a change in attitude towards disagreement by certain judges. The Laskin Court was still a bit reluctant to disagree over the little things to preserve the unanimous court, reserving disagreement for the more important issues, hence the dominance of the DIW. The Dickson court used less restraint or accommodation in order to register disagreement over "little" issues of divergence. The *Charter* also raised new issues requiring careful and prudent consideration, and a level of "tweaking" over the years can be seen in the high frequency of *Failed Accommodation* on the Dickson Court. It would be interesting to know the dominant category on the Lamer Court to see where disagreement has evolved to next. Were the *Charter* tests generally established on the Dickson Court, causing

disagreement to change for the Lamer Court? Did disagreement remain evenly spread between the categories or did one type take dominance?

Conventions of Disagreement:

Supreme Court decision writing is distinctive to judges or members of the legal profession because they have to speak in a way that is both accurate to the legal code but ambiguous enough to fit into the "living tree" analogy of the Constitution. Like legalese, a judicial decision can be very difficult to read and even harder to comprehend. However, once the written text can be deciphered, patterns and styles emerge making it not only easy to follow the author's reasoning but also to pick up on certain formalities or unwritten rules that are consistent from writer to writer; these formalities will be referred to as conventions of disagreement. Conventions of disagreement are tools used to make disagreement more agreeable. Due to the collegial nature of decision making, it is in a justice's best interest not to alienate his colleagues through a harsh critique of majority reasoning or an aggressive tone towards the majority author. Disagreement can be a subversive tactical move by a minority or a subtle reprimand of the majority, all of which can depend on word choice, tone and style.

There is a distinct difference between the American and Canadian systems with regard to conventions of disagreement. A far more vocal and overtly critical institution, the USSC practice of verbal abuse is legendary. Philip Cooper in his book, *Battles on the Bench: Conflict Inside the Supreme Court*, exposes some of the darker side of judicial relationships. Cooper quotes Justice O'Connor saying this is how the legal profession prefers to see justice interaction as, "every justice holds every other justice in very high

regard and has great respect one for the other."[270] Truly, this statement is true more often than not. However, USSC justices have had some infamous public as well as private confrontations, which we have the pleasure of reading when private papers, memos, and diaries are published.[271] This sort of information is not made public in Canada, and although it is hard to deduce from the written reasons whether or not this kind of conflict arises between justices, it is safe to assume that some altercations do occur. "Internal disputes among the justices over professional matters are at the very core of collegial decision making"; perhaps, it can be inferred that Canadian judges find themselves in similar circumstances but they simply hide it better. Conventions of disagreement act to preserve the civilized nature of judicial decision making while maintaining disagreement between judges respectfully.

As already established by the strategic model of opinion writing, constructing a majority opinion can be a complicated process. It is not just legal precedent and doctrines of law that come into play, although it should not be taken for granted that this is the leading determinant in a judge's decision. Strategy will affect the final majority coalition and what a judge does today may hurt him tomorrow by creating an enemy instead of an ally on the bench. A minority opinion is still a criticism of the majority reasoning; some disagreement is small and inoffensive, while other forms of disagreement can be

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[270] Cooper, Phillip J., *Battles on the Bench: Conflict Inside the Supreme Court.* Kansas: University Press of Kansas, (1995), 104.

[271] One such example of a direct attack in a dissent was between Justice Rehnquist and Justice Brennan in *Island Trees Bd. Of Ed. V. Pico* (457 U.S. 853 (1982)). Rehnquist began "I disagree with Justice Brennan's opinion because it is largely hypothetical in character, failing to take account of the facts as admitted by the parties...and because it is analytically unsound and internally inconsistent." This type of aggressive tone is rarely seen on the Canadian Supreme Court. Rehnquist does not stop there but he continues saying, "When Justice Brennan finally does address the state of the record, he refers to snippets and excerpt of the relevant facts...But it is not the limitations which Justice Brennan places on the right with which I disagree; they simply demonstrate his discomfort with the new doctrine which he fashions out of whole cloth...I find wholly unsupported by our past decisions..." I could continue but the point is made. Cooper, 64.

considerable and potentially abrasive. Conventions of disagreement can soften the blow of a harsh criticism by reducing the offensive undertones.

Conventions of disagreement are tools of the judicial trade and have evolved over time to maintain harmonious relations on the bench. Used for a specific purpose, these tools act as a buffering instrument allowing a judge to disagree without being too offensive, derogatory or rude, unless of course it is the intention of the minority justice to do so. The presence or absence of conventions of disagreement set the tone for the separate opinion and can act as a tactical maneuver in the collegial game.

Laskin Court: Conventions of Disagreement
Table 10.1

	Yes	No
Acknowledgement	**40%** (138/407)	**66%** (269/407)
Positioning	**43%** (175/407)	**57%** (232/407)
Respect Term Use	**28%** (113/407)	**72%** (294/407)

Dickson Court: Conventions of Disagreement
Table 10.2

	Yes	No
Acknowledgement	**46%** (170/368)	**54%** (198/368)
Positioning	**68%** (252/368)	**32%** (116/368)
Respect Term Use	**35%** (130/368)	**65%** (238/368)

The Acknowledgement:

Not only is the acknowledgement the most basic tool but as a standard part of the introduction, it is also the first tool you will see. The normal use of the acknowledgement is in the first sentence or paragraph of a separate opinion. It can also be the case, although rare, where the acknowledgement can come a few pages into the decision or at the end.

The standard form is, "I have had the advantage of reading..." or "I have had the benefit of reading the reasons of Justice X..." Occasionally a judge will make a small deviation from this form, but the wording is usually similar. There is the odd case where a justice will surprise the reader with a, "I have read with *great interest* the *compelling* reasons of my *colleague*..." or a "With much *reflection and all due respect*..." which indicates a greater amount of respect than the standard, with the author going over and above what is necessary. Another respectful deviation from the standard is to include the majority author's name using "my brother" Dickson or "my colleague" Wilson. An direct acknowledgement using the majority or another minority author's name can be taken either as a compliment or in some instances as an attack.

The standard acknowledgement is a safe and expected way to address the majority, being used 40% (138/407) of the time on the Laskin Court and 46% (170/370) on the Dickson Court. The Dickson Court used acknowledgement 6% more than the Laskin Court, even with less minority opinions. Judges vary in their use of the acknowledgement, some being very consistent and predictable while others rarely use it. Justice McIntyre acknowledged consistently more than he did not on both Courts. On the Dickson Court, McIntyre acknowledged his colleagues 65.6% (21/32), with Justice Ritchie on the Laskin Court a close second with 61% (22/36). Acknowledgement was part of McIntyre's writing "formula" and was not used as a respect tool. Because of its overuse, the acknowledgement in this situation loses its value by desensitizing the reader to it. However, due to a Justice McIntyre's indiscriminate use of acknowledgement, when it is absent, one has to question the author's intention. For the most part, when an acknowledgement was absent, a position was present indicating some recognition of the

majority. When both were missing, McIntyre was usually writing a DIW, where neither was expected. On the few occasions where there was an absence of an acknowledgement, such as *Re: B.C. Motor Vehicles Act*, the case was classified as "perfunctory" and McIntyre had a strong desire to disassociate himself from the majority, thereby warranting his lack of acknowledgement. An absence of acknowledgement can be an indication that something is going on behind the scenes that the reader is not privy to. Was it a deliberate omission? Was the minority writer trying to make a point? Does a personality conflict exist between the two authors? In the case of Justice McIntyre, further readings helped answer these questions by arriving at a speculative conclusion. The absence of an acknowledgement where one would normally exist sends up a red flag, targeting that separate opinion for greater scrutiny.

On the flip side, a judge who rarely uses acknowledgement does not send up red flags because that is his standard routine. On the occasion when he chooses to engage the acknowledgement, it is useful to pay closer attention to the details of the case. Who is the majority author and why did the minority writer decide to signal him out? What kind of category does this case fall into? Chief Justice Dickson chose not to use acknowledgement on a regular basis, acknowledging only 18% (9/50) on the Laskin Court and 33% (8/24) as Chief Justice. Justice Martland was also leery of the acknowledgement, using it only 21% (9/42) on the Laskin Court. When he did acknowledge, 77.7% (7/9) were accompanied by a "my brother", which indicates a greater level of respect. This is consistent with my assumption that those that rarely acknowledge only do so when they want to show respect. The alliance between Justice Spence and Chief Justice Laskin is no secret. Justice Spence was a loyal ally to Laskin

and when Spence was not supporting Laskin with his vote, Spence was disagreeing with Laskin "respectfully". Seven of the 17 (41%) cases where Spence acknowledged the majority writer were directed at Laskin and of the 11 cases where Spence was in disagreement with an opinion Laskin wrote, Spence acknowledges Laskin 63.6% (7/11) of the time. The only judge Justice Spence was consistently "respectful" to was Chief Justice Laskin.

Acknowledgement is a very common convention of disagreement because it is easy to use. Crediting the majority with supplying the facts or recognizing the majority opinion is as common as greeting someone on the street with a passing hello or starting a letter with "Dear Sirs". The level of respect increases with the degree of personal touches the minority authors adds to the mix. The acknowledgement has become standard practice on the modern Supreme Court and although it may seem insignificant, and surely cannot expose the tone of the entire opinion, it can foreshadow the tone of the minority author.

The Position:

A second basic tool of respect is the positioning of a judge and involves the minority judge indicating his agreement or disagreement with aspects of the majority opinion. A minority judge can either disagree with majority on issue z and may briefly explain why, or start with aspects of the majority the minority judge agrees with and then go into what is in dispute. Positioning usually follows the acknowledgement in the form of "I agree with my colleague on issue y..." or "I must disagree with issue z..." The acknowledgement and the position make up a significant portion of the introduction, giving the reader a clear and organized picture of where the minority author intends to go

and the issues that will be addressed in the main body of the opinion. This is a practical way to lead into their argument as well as clearly stating what issues are in disagreement. Aside from the functionality of the position, the basic format can be enhanced to heighten the degree of respect. "With *great deference* I must disagree with my *brother* Justice X" or "With the *utmost respect*, I *regrettably* must dissent from the majority..." Positioning allows the minority author to ease into criticism without ruffling too many feathers right off the start and provides an opportunity to indirectly apologize for disagreeing.

In certain opinions, a justice will continually position himself throughout his minority opinion, with respect to the issues he disagrees with. This can be construed as a sign of respect by crediting the majority with the introduction of that particular question. "I agree with Justice X's disposition in this appeal..." or "The question raised by my colleague, Justice Y is not one that needs to be addressed." Very respectful positioning is accompanied by a respect term, "Regrettably, I must respectfully disagree," or "With respect for those who hold a different view..."

Respect Terms:

Respect terms are the most useful and effective convention of disagreement. Aside from being used to show deference for a justice held in high regard, minority judges use respect terms as an effective tool to soften the blow of a particularly harsh criticism, acknowledge the contribution of another justice or show regret for disagreeing. Respect terms refer to phrases such as "with great respect", "with all due respect", "with utmost respect for those who think differently", "I am grateful to..." as well as the less obvious, "my brother", "in my humble opinion", or "my colleague", to name a few. Occurring 27.7% (113/407) on the Laskin Court and 35.3% (130/368) on the Dickson

Court, respect terms are used sparingly. The use, frequency, and degree of respect varies from judge to judge, with Justice Estey respectfully disagreeing 76% (16/21) on the Laskin Court and 47%(8/17) on the Dickson Court and Justice Dickson displaying high levels of respect on the Laskin Court, 52% (26/50) and as Chief Justice 37.5% (9/24). Chief Justice Laskin on the other hand has very low respect rates, 2.5% (2/77) as did Justice Beetz, 17.3% (4/23) and 17.6% (3/17).

The most obvious use of respect terms is to indicate high esteem for a colleague, either on the sitting panel or from another case. The classic example would be Chief Justice Dickson's deep distress with having to disagree with his friend, Justice Wilson in *R v Gamble*; "I have read the reasons of Justice Wilson but with considerable regret have concluded that I cannot concur."[272] Throughout the text, Dickson's struggle is apparent, "I respectfully disagree with this conclusion..." but he continues with, "I am grateful to Wilson for her discussion of the facts and resume of the lower court judgments and I adopt such discussion and resume." This example is made more effective when Dickson's usual character is taken into account. Although Dickson uses respect terms frequently, his tone is rarely reverent. Dickson's confident and arrogant tone surpasses Laskin with 76% (38/50) of Dickson's minority opinions being very aggressive.

It was very clear from this opinion that Dickson holds Wilson in high regard and reluctantly decides to disagree with her. This is a powerful statement regarding the choice to disagree. The issues at stake compelled Dickson to dissent despite his admiration for the majority author and the possibility of insulting her by dissenting. Dickson also used respect terms to convey his high regard for the majority to the public

[272] [1988] 2 S.C.R., 595.

through the written reasons. I have yet to read another minority opinion that compliments the majority author so sincerely.

Conventions of disagreement must be used properly to ensure their effectiveness, because excessive use of the tools limits their value and under use amplifies their impact. Each individual justice has their own tone and style which they choose to convey to the public. Creating a balance to maximize the potential of the respect term is a struggle. Justice Wilson has mastered the use of the respect term to soften her critical edges without compromising her opinion. A moderate user of respect, 45% (38/84) on the Dickson Court, Wilson's writing style was eloquent, subtle, yet strongly critical of the majority reasoning. Two strong examples of Wilson's appeasing style stand out in *R v Beland*[273] and *R v Morgentaler*[274], where respect terms were used to soften Wilson's rough edges. Both cases include an acknowledgement of all authors, both majority and minority, and have extensive use of "respect terms". "I must respectfully disagree..." Wilson starts in *Beland*, "In my respectful view...", "my own view would be...", "With all due respect to those who think otherwise..." humbles Wilson's disagreement with the majority. In *Morgentaler*, Wilson also includes "I am not unmindful of the fact that..." and extensively uses "I would respectfully agree..." instead of focusing strictly on the elements of disagreement. The sensitive nature of the issues in *Morgentaler* required dealing with the topic delicately. Wilson obviously had strong opinions about the issues at hand, as she made publicly known, but dealt with the case in a professional and dignified manner, while still holding true to her principles. What is also unique to Wilson is her ability to successfully lecture the Court without coming across as abrasive.

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[273] [1987] 2 S.C.R., 398.
[274] [1988] 1 S.C.R., 30.

In *Beland*, while disagreeing with the majority's decision, Wilson's skill shines through: "In my view, therefore, we would be making law in this area if we were to hold such a rule applicable in the circumstances of this case. This is not to say that we should not do so, but merely that, if we do so, we should do so advisedly."[275]

Respect terms can also be used sarcastically to discreetly attack the majority writer or in an antagonistic way by indicating a frustration with the Court. This unfortunately can be difficult to detect and requires familiarity with individual justices and their specific personalities. The tension between Justice Martland and Chief Justice Laskin was well known, given the circumstances surrounding Laskin's appointment to the chief justiceship over Martland. This resulted in a period of deep-seeded division between the two judges and Laskin's subsequent difficulty to hold a solid majority of the Court for a five-year period.[276] Martland provides us with an excellent example of sarcastic respect terms, used to antagonize the majority. In *Mitchell v R*, Martland is a sole minority author among three different minority groups; one group is led by Laskin, the other by Spence, and the majority writer is Ritchie. In his acknowledgement, Martland refers to Ritchie and Spence as his "brothers", while referring to Laskin only as the "Chief Justice". This has two significant implications; the first being Martland's reluctance to refer to Laskin in a personal way and by using the rather formal title of Chief Justice, which is reminiscent of what could have been his, and second, the exclusion of Laskin from the others justices sends a rather stern message. This theme is carried on in *Volvo Canada Ltd. V U.A.W., Local 720*, where Martland again fails to refer to Laskin as "brother", which he does for Pigeon. Martland's flippant tone is evident

[275] [1987] 2 S.C.R., 423
[276] See note in Chapter 1.

when he says, "I *would* agree with the disposition of this appeal as proposed by the Chief Justice, but, with *great respect*, I am not prepared to agree with..."(emphasis added). One would automatically assume this was meant sincerely but in conjunction with the other elements of Martland's decision, the sarcastic tone is undeniable.

Future Inquiry:

Time and space constraints made it impossible to address all the aspects of my research that were noteworthy. I wish to briefly highlight the next step in disagreement research that is of great interest to me.

Basic categorization is the first step in understanding disagreement behaviour as a means of explaining the decision making process. I was able to examine the first two Courts of the modern Supreme Court, leaving the Lamer and the McLachlin Court unexamined. A comprehensive examination of the Lamer and McLachlin Courts is necessary to provide the most up-to-date picture of judicial disagreement. The next step is to identify the type of law and the legal issues judges are disagreeing about. Do certain subjects cause more disagreement than others? Are these issues *Charter* related or have I overestimated the impact of the *Charter* on decision making? The content of minority opinions is necessary to fully comprehend disagreement behaviour and to legitimize some of the rudimentary claims my categories have made.

After the issues of disagreement have been determined, I would address gender disagreement. Do female justices disagree over certain issues more often than male justices? In the last thirty years, female disagreement far surpassed male disagreement, warranting a closer analysis of gender decision making. During their tenure on the bench, the first three women judges on the Supreme Court wrote minority opinions more

often than all the disagreement of the male judges combined.[277] Associated with gender divisions would be to assess the effects of personality conflicts on the decision making process. Are certain majority judges disagreed with more often than other judges and if so, why? Do personality conflicts cause disagreement between judges? The conventions of disagreement, the use of respect terms and the number of judges that sign onto a minority opinion, can aid in the assessment of personal relationships on the bench.

Final Conclusion:

"Sometimes judges disagree."[278] The level and degree of disagreement depends on a wide range of surrounding circumstance, influencing factors and tactical maneuvers which will impact the final product of the adjudicatory process. The modern collegial Supreme Court is no longer just about *stare decisis* and rule of law, but instead maintains a degree of creativity in its decision making that may result in multiple interpretations of the same legal question. This leads to disagreement not just about outcome but also the reasons for the outcome. Does this mean that the majority is right and the minority is wrong? Not necessarily. As constrained, strategic policy makers, judges wear a number of different hats, so the answer to this question is not as straightforward as "right" and "wrong". There are numerous factors that must be considered. Besides the ideological and personal preferences of judges that inevitably come into play, the collegial game takes into account the issue at hand, the persuasiveness of the argument, the majority author, the social environment and the judicial bargaining process. Judicial interaction

[277] From Wilson's appointment to the bench in 1982, to the end of the Lamer Court in 1999, Wilson, L'Heureux-Dube and McLachlin accounted for 46% of disagreement on the Dickson and Lamer Courts, writing 407 minority opinions out of roughly 1028. Three out of twenty-eight judges are responsible for almost half of the Supreme Court's disagreement is a mind-boggling discovery.
[278] McCormick, Peter, "With Respect...-Levels of Disagreement on the Lamer Court 1990-2000" *McGill Law Journal*, Vol. 48, No. 1, (2003), 91.

makes decision making less about just finding the single correct legal answer, which increases in difficulty depending on the contentiousness of the issue, and more about the actual process of adjudication. This being the case, studying the decision making process becomes invaluable to understanding the courts and the decisions that are passed down. Disagreement behaviour is an effective way of exploring and ultimately explaining the decision making process.

Why are the courts worth studying? The Supreme Court is not in the business of dispute resolution, although inevitably that function is served. National High Courts answer major questions of law ensuring the proper application of legal rules and the administration of justice by government branches. In Canada, the entrenchment of the *Charter of Rights and Freedoms* moved the Supreme Court from the realms of obscurity to the forefront of the political game. Mandated with the welfare of the Constitution and the protection of civil liberties in Canada, the Court's authority over public policy escalated to unprecedented highs. "The *judicial lawmakers*, not John A. Macdonald or Sir Francis Reilly, are the real authors of Canadian Constitutional law...Occasionally the decisions of the judicial lawmakers have encouraged the political actors to seek compromise solutions. But on the whole it has been the judges themselves who have decided or been forced by circumstance to rewrite the law they have written."[279] John Saywell concluded his book, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* with these compelling words, summing up the influence of the Supreme Court on the political process. What began as an independent, impartial tribunal, designed to mediate provincial/federal disputes, has evolved into a powerful

[279] Saywell, John T., *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. Toronto: University of Toronto Press, (2002), 308.

entity never envisioned at its inception in 1875. For this reason, the Court merits our attention.

Although there are many stones left unturned and countless questions unanswered, one conclusion can be reached – disagreement behaviour cannot be underestimated. The academic world is starting to realize the value of the minority opinion and research in this area has only just begun. Classifying and categorizing minority opinions maps out the topography of disagreement and lays the foundation for future study. What judicial disagreement looks like answers only some of the questions, and leaves me wondering what else can be discovered?

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