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The Supreme Court of Canada, Institutional Legitimacy, and the Media: Newspaper Coverage of *Morgentaler*, *Symes* and *Thibaudeau*

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ABSTRACT

The institutional legitimacy and impact of the Supreme Court, like all political institutions, ultimately depend on public support. However, unlike other political institutions, the Court does not draw that support directly from the democratic process. Scholars in the United States have examined this problem by analyzing the relationship between public perceptions of judicial institutions and their legitimacy, emphasizing the importance of myth in sustaining support for courts in the absence of democratic accountability. This thesis extends American research to the Canadian case, by examining the role of the media as a significant source of popular perceptions of the Canadian Supreme Court. The objective of this thesis is to provide a preliminary assessment of this role by analyzing newspaper coverage of three of the Court's important and high-profile decisions: The *Morgentaler*, *Thibaudeau* and *Symes* cases. The thesis contends that the media, at times through oversimplifications and mischaracterization of issues, help to perpetuate a positive myth of the Court. Through qualitative and quantitative analysis, this thesis shows that the public appears to base its support on this myth, which is built upon incomplete and oversimplified information. This distorted image of the Court helps to strengthen its legitimacy in the eyes of the public.

RÉSUMÉ

La légitimité et l'impact institutionnels de la Cour Suprême, comme toute institution politique, dépend, en dernière analyse, du soutien public dont elle joit. Cependant, contrairement à d'autes institutions poliques, la Cour ne puisse pas le soutien directement du processus démocratique. Des chercheurs américains ont éxaminé cette question en analysant la relation entre la perception publique des institutions judiciaires et leur légitimité, en faisant ressortir l'importance du mythe dans le maintien du soutien offert aux cours de justice en l'absence de responsabilité démocratique directe. Ce mémoire extrapole la recherche américaine vers le cas canadien en examinant le rôle des médias comme source significative de perceptions populaires de la Cour Suprême du Canada. Le but de ce mémoire est d'apporter une évaluation préliminaire de ce rôle en analysant la couverture par la presse écrite de trois décisions parmi les plus importantes et les plus renommées: les procès *Morgentaler*, *Symes* et *Thibaudeau*. Ce mémoire soutien que les médias, parfois à travers une simplification outre mesure et une fausse caractérisation des enjeux, contribuent à perpétuer un mythe positif de la Cour. A travers des analyses qualitatives et quantitatives, ce mémoire démontre que le public semble baser son soutien sur ce mythe qui, lui, est bâti sur de l'information incomplète et trop simplifiée. Cette image déformée de la Cour contribue à renforcer sa légimité aux yeux du public.

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Secluded as it is, the Court does have the means of securing publicity: its Justices might make headlines for their personal accomplishments and/or peccadilloes, and its rulings can make news for it directly. But the Justices' newsworthy activities are infrequent and, ordinarily, discreet, and thus appear unlikely to affect judicial mystique adversely.
--Gregory Casey

To argue that the media do not have considerable power in shaping public perceptions is the equivalent of arguing that the earth is flat or that Tinkerbell and the Tooth Fairy are real. It's just not so.
--David Taras

INTRODUCTION

In 1966, Ronald Cheffins described the Supreme Court of Canada as a "quiet court in an unquiet country."[1] The Court's relative lack of engagement in the nation's public life was the result of several factors. First, until 1949 the Court served as the junior partner to Canada's final appellate authority, the Judicial Committee of the Privy Council. Not only were the Court's decisions subject to review by the JCPC, but it could be bypassed altogether by litigants who wished to appeal directly from provincial courts of appeal to the JCPC. Second, the Court did not acquire discretionary control over its own docket until 1974, when the rationale for granting leaves of appeal shifted from the amount of money involved in a lawsuit to the public importance of the issues raised by the parties. The principal consequence of this change was to shift the Court's workload from private to public law. Finally, when the Court did exercise final appellate authority over public law matters, it exercised this authority primarily in the arcane areas of administrative law and federalism. Without underestimating the importance of this activity, it did not generally produce decisions that captured the imagination of Canadians. Although politically significant, the Supreme Court's public law jurisprudence was largely technical and of interest primarily to governments and practitioners.

The Court's role as a political institution changed dramatically with the constitutional entrenchment of the Charter of Rights and Freedoms in 1982.[2] The constitutional changes of 1982 established the doctrine of constitutional supremacy and provided courts with the constitutional authority to identify and remedy violations of individual rights through the

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[1]Ronald Cheffins, "The Supreme Court of Canada: The Quiet Court in an Unquiet Country", Osgoode Hall Law Journal 4 (1966): 259.

[2]These changes have been well-documented. See for example, Rainer Knopff and F.L. Morton, Charter Politics, (Toronto: Nelson Canada, 1992) and Christopher P. Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism (Toronto: McClelland and Stewart, 1993).

Charter. As the institutional apex of Canada's judicial system, the Supreme Court has been affected in two important ways by the Charter. First, the Charter has enhanced the Court's political status, which is evident in the favourable ratings that it has consistently received in public opinion polls since 1982.[3] Second, the Charter has enhanced the Court's relevance, and therefore visibility, as a result of increased coverage of the Court's decisions in the printed press, and even lately some experiments by the Court itself with television broadcasting of its proceedings. These changes are both fundamental and irrevocable.

The purpose of this thesis is to explore the relationship between these two elements of the Court's public role in the post-Charter era. Since it does not exercise any direct control over the traditional instruments for implementing public policy, the Court's impact depends in large part on its institutional legitimacy. Public visibility and political status are linked in the sense that legitimacy depends on status, which is in turn dependent on public perceptions of the Court. This thesis provides a preliminary assessment of these linkages by examining newspaper coverage of three of the Court's decisions concerning abortion, and challenges to the *Income Tax Act*. These cases, all centring upon the rights of women, thrust the Court into the midst of controversial and highly visible policy disputes that significantly challenged judicial legitimacy.

The major assumption guiding this study is that popular perceptions of the Supreme Court have a direct impact upon the level of support and legitimacy extended to the institution as a whole.[4] Hence, individuals who perceive the Court in a positive light will support it and

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[3]In one important survey of Canadians, anglophones and francophones alike were overwhelmingly positive in their views of the Charter. More specifically, 72 percent of anglophones and 62 percent of francophones said that the Charter is a good thing for Canada. Paul M. Sniderman, Joseph F. Fletcher, Peter H. Russel and Philip E. Tetlock, The Clash of Rights: Liberty, Equality and Legitimacy in Pluralist Democracy (New Haven: Yale University Press, 1996) 169.

[4]This presumption needs to be qualified. As Gregory Casey notes, although perceptions do affect the

comply with its rulings. Moreover, in many cases, even when citizens are confronted with socially controversial or unpopular judicial decisions, they will continue to recognize the Court's role in the political system.[5] In sum, even under adverse conditions, legitimacy prevails.

This concept of legitimacy, while much studied in American literature, has not been dealt with in Canadian political science. In the United States, the literature focuses primarily on the dynamics of Court legitimacy and public opinion. Since the Court does not enjoy the traditional political mechanisms of institutional legitimacy, such as routine elections and/or limited tenure in office[6], many researchers have sought to identify the various sources of its support. Much of this research centers upon legitimacy as it relates to popular perception. More specifically, the role of myth in the sustenance of support for judicial institutions, especially the Supreme Court, has received a great deal of scholarly attention. The mystique surrounding the Court is said to have contributed to public deference toward the Court's decision making. This research is founded on the notion that the Court enjoys a "special place" in the mind of the public. As a result, the public is willing to accept what is an essentially undemocratic institution since it is perceived as the sole legitimate protector of the Constitution. Related research also shows that the mystique of the Court perpetuates its image as a nonpolitical, independent institution that is a legitimate authority figure, perhaps even more procedurally fair than other governmental

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feelings toward the object perceived, the perceiver's general mindset and pre-existing beliefs are also determinative. Casey uses the example of ideology as a crucial variable entering into the perceptive relationship. See Casey, "Popular Perceptions of Supreme Court Rulings", American Politics Quarterly 4 (January 1976): 22.

[5]Dean Jaros and Roger Roper, "The U.S. Supreme Court: Myth, Diffuse Support, Specific Support, and Legitimacy", American Politics Quarterly 8 (1980): 85.

[6] See Thomas Marshall, Public Opinion and the Supreme Court (New York: Longman, 1989).

institutions.[7]

The contribution of this study to the literature is twofold. First, this thesis will add to the understanding of the myth of the judiciary. Whereas scholars traditionally have drawn a link between popular opinion and the judicial legitimacy, this thesis enlarges upon the conventional understanding by incorporating the role of the media. It will seek to identify the media as a significant source for the popular perception of the myth of the Canadian Supreme Court. This thesis recognizes that perceptions of the myth affect support for this institution, however, it seeks to specify more clearly the role of the media as the source of those popular perceptions.

This essay attempts to show that the media plays a critical role in forging the relationship between popular perceptions and judicial support. Since members of the Court, unlike members of other governmental institutions, do not communicate directly to the public, virtually all knowledge of the Court's activities must be filtered by the media. Therefore, public cognizance and perception of the Court is largely a function of the media's portrayal of the institution. It will become apparent that the media, at times through oversimplification and mischaracterization of the issues, plays a critical role in conditioning the public perception of the Supreme Court. The media is central to the perpetuation of a "myth of the Supreme Court", a myth which we shall see is crucial for maintaining the high level of public legitimacy that the Court enjoys, even when rendering unpopular decisions.

This thesis thus represents an attempt to bring together two bodies of knowledge: judicial politics and communications studies. The contribution from the communication discipline consists of an understanding of the role played by the media in forming public perceptions. This

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[7] Richard Davis, Decisions and Images: The Supreme Court and the Press (New Jersey: Prentice-Hall, Inc., 1994) 12-16.

contribution is then synthesized with lessons drawn from judicial politics concerning the public perceptions leading to the legitimacy of the Supreme Court. The argument of this paper, based on assumptions derived from both schools of thought, is that media coverage of the Court is "ad hoc, episodic and impressionistic",[8] leading to a distorted image of the Supreme Court. The media, carriers of words and images, are the primary conduit between the Supreme Court and the public. As such, it will be seen that restraints on the media that stem from characteristics of the Court and the media itself, often result in a distortion of the Court's message. The deficiency of coverage, in terms both of breadth and depth, helps to perpetuate this myth of the Court, whereby the Court benefits from a basis of public support that is grounded in miscommunication, if not lack of information, of the Court and its activities.[9]

The second contribution of this work is that it draws upon numerous American studies and extrapolates them to the Canadian case. While one finds an abundance of literature on the legitimacy of the American Supreme Court, there is a dearth of literature generated for its Canadian counterpart. Of course, since one cannot extrapolate directly from one country to another, several qualifying factors must be accounted for. In terms of judicial review, these differences include, inter alia, a more activist and visible judicial review by American Courts, less controversy surrounding the legitimacy of judicial review in Canada,[10] and a different impact

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[8] Patrick Monahan, Politics and the Constitution (Carswell/Methuen, 1987) 4.

[9] It would be foolish to claim that the media are in any sense the sole determinant of the Court's legitimacy. Nevertheless, the mass media have a number of characteristics which make them a pervasive political and cultural force. For the development of the argument that the expanse of our knowledge of public affairs comes from the media, see William L. Rivers and Wilbur Schramm, Responsibility in Mass Communication (revised edition) (New York: Harper and Row, 1969) 14.

[10] For a further discussion of this matter, see Smith, Jennifer. "The Origins of Judicial Review in Canada" Canadian Journal of Political Science 16 (1983) 115-34.

on the nature of federalism in the two countries. Judicial review is less controversial in Canada because the imperial relationship between Canada and the United Kingdom early on established the legitimacy of judicial review. Finally, the Charter of Rights and Freedoms was entrenched only in 1982, as compared to its American counterpart, the Bill of Rights, which has a two-century long tradition. These distinctions do not inhibit learning from the American experience, but they must be borne in mind when analyzing the Canadian context.

Utilizing newspaper coverage of the *Morgentaler*, *Symes*, and *Thibaudeau* decisions as its case studies, this thesis will attempt to show how the media perpetuates the "myth of the Supreme Court", which translates into popular support of the institution.[11] In more specific terms, this thesis will look at newspaper articles on the respective cases to understand what information is being conveyed to the Canadian public regarding the Supreme Court. The fundamental argument of this thesis is based on an analysis of the number of articles on a case by case basis and in the aggregate, together with an evaluation of the articles' content on a story by story basis. This investigation of the media coverage of the Court's decisions will help to uncover one of the sources for the Court's legitimacy in the eyes of the Canadian public.

In seeking to make its two contributions, this thesis is divided into several parts. The first chapter of this thesis will review the literature on the different theories concerning the institutional legitimacy of judicial institutions. Here the concept and the various facets of legitimacy will be explored, both on the general level of all political institutions, and more

[11] Most Canadian adults use more than one medium every day to acquire information. The use of newspaper coverage as the unit of analysis for the cases is substantiated by the fact that, "[a]lmost all Canadian adults read daily newspapers during the course of a week:. Moreover, "[o]nly 11 per cent of Canadian adults do not read a daily newspaper during a week". Kubas, Leonard, Newspapers and their Readers, vol. 1 of publications for the Royal Commission on Newspapers. (Ottawa: Minister of Supply and Services Canada: 1981) 11.

specifically with regard to the Supreme Court of Canada. The public perception of the Court will be analyzed as an important source of the Court's legitimacy. Chapter two of this thesis will examine the role of the media in Canadian society. The emphasis will be upon the specific characteristics and difficulties of the media when transmitting information to the public. The two chapters, representing two distinct fields of study, then will be linked by looking at the interaction between the Supreme Court, the media, and public perception. The attempt here will be to show how the Court's legitimacy in the eyes of the public is enhanced by the features that characterize its relationship with the media. In order to substantiate this argument, the final chapter of the thesis will take the form of a quantitative analysis of the newspaper coverage of select Supreme Court decisions. The coverage of the cases will be analyzed to determine both the breadth and depth of information that is being transmitted to the Canadian public.

The Supreme Court cases were carefully selected based upon several factors. First, all three cases involve the same area of the law: the rights of women. Moreover, the *Symes* and *Thibaudeau* cases not only involve a significant female voice, but share a second commonality in their challenge of tax law. In the *Morgentaler* case, the Court's decision was to uphold the Charter claim, favouring the appellant, whereas the opposite was true in *Symes* and *Thibaudeau*, where the appellants' Charter claims were rejected. These different positions taken on the same area of the law reduce the danger of bias in the study. A further factor which was considered in the selection of these cases was their time frame. Given the relative newness of the entrenchment of the Charter, legitimacy could change as a function of the passage of time. With this in mind, the cases selected span the very beginning of Charter litigation, with the *Morgentaler* case in 1988, to more current litigation, with the *Symes* case in 1993 and *Thibaudeau* in 1995. Finally,

relative to other Supreme Court cases, these decisions commanded substantial public interest. As such, they disclose salient features of the task of communicating information of Court actions to the public.

CHAPTER 1

INSTITUTIONAL LEGITIMACY AND JUDICIAL INSTITUTIONS

1.1 The Concept of Legitimacy

For both the American and Canadian case, the concept of institutional legitimacy figures prominently in theories of compliance, obedience, and system stability. Although most of the literature on legitimacy is based on the U.S. Supreme Court, the American discussion is relevant to the Canadian case, and as such, is often cited in works on the Canadian judicial process.[12] The legitimacy of governing institutions is critical for two reasons. First, institutions require legitimacy in order to operate properly and to be able to fulfill their societal functions effectively. In the presence of legitimacy, citizens will obey laws because they accept the right of authorities to make rules that regulate their behaviour. In this sense legitimacy enhances behavioural compliance. Effective leadership requires compliance with the leaders' decisions from "the bulk of the members of society... most of the time".[13] In Why People Obey the Law, Tom R. Tyler explains how normative factors, often involving legitimacy, influence compliance with the law independently of deterrence judgments. Through the use of data collected in a longitudinal study of Chicago citizens, he finds that, "legitimacy in the eyes of the public is a key precondition to the effectiveness of authorities".[14]

Second, the legitimacy of one branch of government may be critical to the governing system as a whole. Dean Jaros and Robert Roper point out that there may be a relationship

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[12] This relevance has been recognized by Peter H. Russell in his book, The Judiciary in Canada: the Third Branch of Government , (Toronto: McGraw-Hill Ryerson Ltd., 1987) 93.

[13]David Easton and Jack Dennis, Children in the Political system: Origins of Political Legitimacy, (New York: McGraw-Hill Book Company, 1969) 185.

[14]Tyler, Tom R., Why People Obey the Law, (New Haven: Yale University Press, 1990) 5.

between the legitimacy of an entire regime and that of its constituent operating institutions. In this sense, legitimacy is "cumulatively additive" .[15] For example, legitimacy for the Prime Minister may be aggregated into support for the government in general. Similarly, a crisis involving a particular judge, such as Clarence Thomas in the United States, may serve to diminish the legitimacy of the whole bench and judicial order.

Not surprisingly, the concept of legitimacy has been applied to the judiciary and to the U.S. Supreme Court. While all institutions require legitimacy it may be argued that the Supreme Court is especially sensitive to this requirement for two reasons. First, "[i]t is a commonplace that the Supreme Court's lack of means of enforcing its edicts makes legitimacy, and hence myth, particularly crucial for it".[16] Second, the inherent limits of judicial power render the legitimacy of judicial review a crucial concern. Justice Frankfurter stated this point most eloquently in a much-quoted passage: "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction".[17]

In addition, judges on the bench are appointed rather than elected, which occasionally leads to the charge that the judiciary is an undemocratic body. The main difficulty, according to Alexander Bickel, is that,

> judicial review is a counter-majoritarian force in our system... [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the

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[15]Jaros and Roper, "The U.S. Supreme Court: Myth, Diffuse Support, Specific Support and Legitimacy", 85.

[16] Gregory Casey, "The Supreme Court and Myth: An Empirical Investigation", Law and Society Review , 8 (Spring 1974) 386.

[17]Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting), in Smith, Christopher E., "The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution", Kentucky Law Journal, 79 (1990-91) 326.

here and now; it exercises control, not on behalf of the prevailing majority, but against it"[18]

Criticisms such as those offered by Bickel point to the urgent need to find legitimacy for judicial review and at the same time hint that judicial review in its modern form may never be fully legitimated.

1.2 Substantive and Symbolic Legitimacy

One of the methods of addressing the long-standing tension between judicial review and majoritarian principles is to assert the legitimacy of the judicial branch, and the court system itself. One way for an institution to gain legitimacy is substantively, that is through its accepted historical roots and procedures. More difficult to trace are symbolic concepts of legitimacy. This form of legitimacy encompasses concepts which are more elusive -- what individuals may think the Court is or does.

Substantive Legitimacy – Canadian Context

There are several traditional sources through which the Canadian Supreme Court has gained substantive legitimacy both as an institution and in its exercise of judicial review[19]. First, Canada's colonial status resulted in the judicial review of legislation to ensure compatibility with imperial statutes. This early exercise of judicial review provides historical continuity to modern claims of judicial power by the courts. Second, the division found in the Constitution Act, 1867,

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[18] Bickel, Alexander M., The Least Dangerous Branch, (Indianapolis: Bobbs-Merill, 1962) 16-17.

[19] For a more detailed discussion of the entrenchment of judicial review, see Peter H. Russell The Judiciary in Canada: The Third Branch of Government, 93-97.

between federal and provincial powers has led to the judicial determination of whether challenged legislation is *intra vires* or *ultra vires* the level of government which enacts it. This role of judicial review on grounds of federalism continues today and has helped in the establishment of the Supreme Court's legitimacy when striking down legislation. Finally, the principle of stare *decisis* has been an important legitimating tool in that it gives the appearance of limiting judicial decisions to narrow, accepted prior decisions. The degree to which courts feel themselves bound to precedent may be debatable, but at least to the common imagination the principle assists in furnishing legitimacy by appearing to set limits on judicial discretion. Thus, we can see that judicial review is traditionally enshrined in Canada's constitutional history and practice. In fact, while courts in the United States have been characterized as relatively activist in their judicial review, judicial review is less problematic in Canada than in the U.S.[20]

Substantive legitimacy has been buttressed further in Canada through the adoption of the Constitution Act and the Charter of Rights and Freedoms in 1982. Section 52(1) of the Constitution Act states that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency of no force or effect.[21]

This supremacy clause should be read in conjunction with the Charter's section 24(1) which confers on anyone whose rights or freedoms are infringed, the right to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. Together, these sections provide written constitutional confirmation of the

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[20] Manfredi, Judicial Power and the Charter: The Paradox of Liberal Constitutionalism, chapter 2, 35-89.

[21] Constitution Act, 1982, section 52(1) of the *Canadian Charter of Rights and Freedoms*.

substantive legitimacy of judicial review.

Symbolic Legitimacy -- Legitimacy as myth

A second way in which both the supreme courts of Canada and the U.S. derive legitimacy is through symbolic imagery. Throughout history, the U.S. Supreme Court has been viewed as having a particular symbolic character in the public mind, with some constitutional commentators even terming it "our most important symbol of government."[22] For citizens who accept these beliefs, the Court is regarded as proper and legitimate. This conception of legitimacy, similar to the *positivistic* or *legal model*[23], is somewhat more elusive than the more concrete substantive legitimacy. This is due to the overwhelming power that symbols and images can hold in people's minds. Evidence with regard to public awareness of the Supreme Court indicates that low levels of public knowledge translates into a proclivity to view the Court in symbolic rather than substantive terms. Moreover, since people are highly sensitive and responsive to images and symbols, the Court's symbolic legitimacy may be fundamental to its proper functioning.

Symbolic legitimacy comes from public respect or reverence for the law. The "myth" surrounding the U.S. Supreme Court was promoted in Max Lerner's classic article, "The Constitution and the Court as Symbols", published in 1937.[24] In this essay Lerner wrote about a deep-seated psychological need for tradition, certainty, and security among the public that was requited in the United States by worship of the constitution and transferred to the justices as

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[22]Thurman W. Arnold, The Symbols of Government (New Haven: Yale University Press, 1935) 196.

[23]For a full description of the contrast between the legal model and the extralegal model, see Tracey E. George and Lee Epstein, "On the Nature of Supreme Court Decision Making", American Political Science Review 86 (June 1992): 323-337.

[24]Lerner, Max, "Constitution and Court as Symbols", Yale Law Journal, 46 (1936-37): 1290-1319.

interpreters of the law. Lerner explained that support of judicial power lies largely in the psychological realm through which the Court has a strong symbolic hold over the American mind.

> Talk to the men on the street, the men in the mines and factories... and real-estate offices... dig into their minds and even below the threshold of their consciousness, and you will in the main find that constitution and Supreme Court are symbols of an ancient sureness and a comforting stability. If you watch the black-robed justices as they come filing in... you will be strong not to succumb to a sense of the Court's timelessness... Even today the Court still wears the ancient garments of divine right.[25]

For Lerner, the "cult of judicial power"[26] and worship of the Supreme Court went hand in hand with worship of the Constitution. In the minds of many, the Constitution stands for permanence and stability: "Every tribe needs its totem and its fetish, and the Constitution is ours".[27]

While events may have changed since Max Lerner's seminal essay appeared over half a century ago, the image of a revered and deified Supreme Court has displayed remarkable durability in the U.S. literature. In 1964, Anthony Lewis explained in Gideon's Trumpet that the Court "performs its functions in a physical setting with appropriate majestic and honorific rituals designed to convey the image of a *court* rather than the image of a quasi-judicial body as much concerned with politics as with law".[28] With symbols such as black judicial robes, majestic courtrooms, a technical legal language, and secrecy of decision-making conferences, the myth of an impersonal judiciary divining decisions based on some timeless truth contained in the

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[25]Ibid., 1291

[26]Ibid., 1305.

[27]Ibid., 1295.

[28]Anthony Lewis, Gideon's Trumpet, (New York: Random House, 1964), 11-12, cited in Joel B. Grossman and Richard Wells, Constitutional Law and Judicial Policy-Making II, (New York: John Wiley & Sons, Inc.) 1972.

Constitution, itself another symbol, is sustained.

David Adamy, a more contemporary scholar, reinforces Lerner's theory of the Constitution's importance as a legitimating symbol for the Supreme Court. He avers that such a strong attachment to the constitution, as irrational as it may appear, is an important political fact: "Adoration of the constitution soon became adoration of its guardians, the Justices, despite lingering doubts about the constitutional source of their self-proclaimed power of judicial review".[29] The merging and equating of Supreme Court with Constitution exists not only in the public imagination but in the mind of many judges as well. Adamy points to the notorious words of Justice Roberts to show the Court's relentless self-identification with the Constitution.

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, - to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.[30]

The power of judicial review has been justified "by the fiction that the Supreme Court is merely requiring other agencies of government to subordinate themselves to a self-evident Constitution which, in some miraculous way, coincides, at the particular moment of the decision, with the judicial version of it".[31]

The concept of judicial neutrality strengthens even further the fusion of Constitution and Court. Because they are appointed and unaccountable to the public, justices are spared the

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[29]David Adamy, "Legitimacy, Realigning Elections, and the Supreme Court", Wisconsin Law Review, 3 (1973): 791.

[30]297 U.S. 62 (1935), quoted in Adamy, Ibid. 791.

[31]Alpheus Thomas Mason, "Myth and Reality in Supreme Court Decisions", Virginia Law Review, 48 (Dec. 1962): 1388.

stigma of partisanship that inheres in campaigning for office. As a result, many people view the Court as insulated from "politics". Courts tend to be thought of as non-political in the sense that they make decisions on the basis of merit and logic, rather than the favouritism and skewed processes found in the other political branches of government. The traditional and predominant view in society is that, "judges do not sing their own songs, but mouth the words of the law".[32] It is widely believed that judges have no power, but are subordinate to the Constitution; they merely apply the constitution which is the widely accepted expression of the will of the people. Together these beliefs render judicial decisions more acceptable and legitimate.

Scholars such as Christopher E. Smith argue that the legitimacy of the judicial branch ultimately depends on its reputation for impartiality and nonpartisanship".[33] Smith agrees with Grossman and Wells who describe the "Model of Law" which seeks to avoid the political contamination, or harm to the Court's legitimacy, that would follow if the Supreme Court were viewed as a political institution.

> The strength, and ultimately the legitimacy, of law and the courts lies in the establishment and application of fair predictable procedures, not in producing any particular result. Law is the application of principles to the solution of human problems, and it is only when judges objectively apply "neutral" principles that they are acting as *judges* whose decisions are entitled to legitimacy and respect.[34]

Clearly, the Court derives special legitimacy from the public reverence for its guardianship of the Constitution, as well as for its illusion of impartiality. Although judicial

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[32]Allan C. Hutchinson, "Good Judging", Canadian Lawyer, (May 1990): 44.

[33]Christopher E. Smith, "The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution".

[34]Grossman and Wells, Constitutional Law and Judicial Policy-Making II, 11.

realists have criticized these mythic beliefs for over half a century,[35] a substantial percentage of the American population still holds some mythic beliefs about the Supreme Court. In one study Gregory Casey reported that sixty percent of Missouri residents described the Supreme Court in terms of its symbolic and constitutional role.[36] In another study, some forty percent of the respondents explained the Supreme Court's role in constitutional terms, compared to 26 percent who viewed the Court from a policy-making or law court perspective.[37] These studies lead to the conclusion, as Casey expresses in a forthright manner, that "political myth transforms political institutions from instruments of naked power to legitimate authorities capable of proclaiming and implementing policies without use of force."[38]

1.3 Legitimacy, Support, and Judicial Institutions

Thus far, this thesis has shown how the myth surrounding judicial institutions contains numerous elements -- impartiality, honesty, objectivity, and justness, to name a few. From

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[35] Beginning with Roscoe Pound's "The Call for a Realist Jurisprudence", Harvard Law Review, 44 (1931): 697-711, numerous scholars have criticized the positivist notion that judges merely apply the law without allowing their personal predispositions to affect their decision-making. See for example, Glenden Schubert, The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices (Evanston: Northwestern University Press, 1965); For Canadian studies see, Donald E. Fouts, "Policy-Making in the Supreme Court of Canada 1950-1960", in Glendon Schubert and David J. Danelski eds., Comparative Judicial Behavior: Cross-Cultural Study of Political Decision-Making in the East and West, (New York: Oxford University Press, 1969): 257-291; Peter H. Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution, (Prepared for the Royal Commission on Bilingualism and Biculturalism, Ottawa: Queen's Printer for Canada, 1969); Peter McCormick and Ian Greene, Judges and Judging: Inside the Canadian Judicial System. (Toronto: James Lorimer and Co., 1990); and Andrew D. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judge Hears an Appeal", Canadian Journal of Political Science 24 (1991): 289-307.

[36] Casey, Law and Society Review , 385-419.

[37] Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and the Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes", Law and Society Review, 2 (1968): 357-384.

[38] Casey, Law and Society Review , 386.

among this collection of sentiments which comprise the myth, however, the notion of fairness seems to dominate the popular imagination. Much of the research emphasizes that that courts are perceived as more procedurally fair than are other institutions.[39] So integral is the idea of fairness to individuals that when lay people make reference to the fairness of courts, they are reflecting what the more precise language of political scientists refers to as legitimacy and support.

1.4 Popular Awareness of the Supreme Court and its Decisions

Knowledge of the Court is often cited as a primary determinant in the public's attitude towards the institution.[40] Political knowledge can be thought of as an important precursor of political participation. Upon examination of the relevant American literature, one finds overwhelming evidence supporting the fact that awareness and knowledge of the Supreme Court's procedures and its decisions is slight. Ignorance of the Court as an institution was reflected in a 1965 study, determining that 17.3 percent of respondents did not even know what the nation's highest court was, and sixty percent were unaware as to the number of justices.[41]

Many empirical studies using systematic opinion data confirm the results of this poll. Kenneth M. Dolbeare and Phillip P. Hammond conducted a comprehensive study in Wisconsin using Gallup surveys in order to assess, *inter alia*, the mass public's knowledge about recent

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[39]James L. Gibson, "Understanding of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance", Law and Society Review, 23 (1989).

[40]See for example Kenneth Dolbeare and Phillip Hammond "The Political Party Basis of Attitudes Toward the Supreme Court", Public Opinion Quarterly, 32 (1968) and Murphy and Tanenhaus "Public Opinion and the United States Supreme Court: Mappings of Some Prerequisites for Court Legitimation of Regime Changes".

[41]S. Krislow The Supreme Court in the Political Process, 152, 1965, cited in Adamy, "Legitimacy, Realigning Elections, and the Supreme Court", 808.

decisions.[42] Respondents were asked to say whether the Court had made decisions in the last few years in each of eight specified subject areas; in four, the Court had actually rendered decisions, and in the other four, it had not. The specific content of the case was not questioned, merely whether the Court had made a decision. Their results showed that only two areas, school prayer and segregation, had been of sufficient impact to be recalled with much accuracy (approximately seventy percent), despite the fact that Wisconsin had been duly affected, and experienced a typical level of reactions to all these cases.[43] In addition, Dolbeare and Hammond report that 79 percent of Wisconsin survey respondents had an opinion of the Court, but that only nineteen percent could cite cases or area of judicial activity explaining how their opinion was formed. Dolbeare and Hammond thus conclude that "[f]ar from being likely to react against 'judicial activism,' the general public is more likely to be blissfully unaware of the Court's activity except in those rare instances when a decision cuts into its consciousness".[44]

Similarly, Walter F. Murphy and Joseph Tanenhaus produced several reports on the Court's low visibility among the American public. In their 1968 study, they conducted a Survey Research Poll asking respondents "[h]ave you had time to pay any attention to what the Supreme Court of the United States has been doing in the past few years?".[45] Fifty-nine percent of the respondents responded in the negative. In addition, in a different study of theirs, Murphy and Tanenhaus reported that less than half the population could name a single Supreme Court policy

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[42]Dolbeare and Hammond, "The Political Party Basis of Attitudes Toward the Supreme Court", 20.

[43]Ibid., 24.

[44]Ibid., 30.

[45]Murphy and Tanenhaus, "Public Opinion and the Supreme Court: The Goldwater Campaign", Public Opinion Quarterly, vol. 31, 1968, 34-35.

or decision they liked or disliked.[46]

John Kessel's survey research poll on Seattle residents substantiates Murphy and Tanenhaus' study. Kessel sampled attitudes of Seattle residents about the Court and concluded that "[t]he comments... reveal a fairly low level of informational support for these attitudes".[47] Twenty-one percent of his respondents were unable to give any answer even to the open-ended question asking about their general feelings about the Court and its role. In fact, "[n]early two-thirds of these individuals stated frankly that they didn't feel they knew enough to have an opinion".[48]

Of equal importance is the shallowness of knowledge even among those who were able to give an "informed" response about judicial decisions. Only 24.2 percent of the Murphy and Tanenhaus sample were able to name more than one Supreme Court decision or policy they liked or disliked. Another 22 percent of this "knowledgeable" group cited only a single decision.[49] In sum, there is overwhelming agreement among scholars on two matters concerning the public's knowledge of the Supreme Court: First, the vast majority of the public is unaware as to the Court and its activities. Second, even for those considered relatively aware in this respect, the Supreme Court remain an institution of low salience in the public mind.

Unlike in the United States and perhaps due in part to the relative newness of the Charter,

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[46]Murphy and Tanenhaus, "Public Opinion and the Supreme Court: Mappings of Some Prerequisites for Court Legitimation of Regime Changes", Law and Society Review, 366 table 3.

[47]John E. Kessel, "Public Perceptions of the Supreme Court", Midwest Journal of Political Science, 10 (1966):167-71.

[48]Ibid., 170-74.

[49]Murphy and Tanenhaus, "Public Opinion and the Supreme Court: Mappings of Some Prerequisites for Court Legitimation of Regime Changes", 366 table 3.

there is a marked absence of empirical studies examining Canadians' level of knowledge about the courts.[50] There have been sporadic references in the literature alluding to the fact Canadians too have a low level of knowledge about judicial institutions. On a number of occasion in their book, Judges and Judging, McCormick and Greene refer to the myth surrounding the Canadian Court.[51] Moreover, in their chapter on Court reform, they refer to the low level of knowledge about the Court, albeit without any empirical evidence to support their proposition, that, "[n]ine out of ten Canadians think the Court structure is too complex to understand".[52] Another commentator on this matter suggested that, "[I]n Canada, the layperson has no real knowledge of our judicial system. Indeed, few particularly care about it so long as it is perceived to buttress peace, order and good government in the country".[53]

Finally, a 1997 Canadian study of the courts and the television medium explains one reason which may account for the low level of knowledge of the Supreme Court among Canadians. Miljan and Cooper found that, the Supreme Court handed down 103 written decisions in 1995, but only fifteen of them received any mention on national television news. In addition, ten applications for leave to appeal were mentioned, bringing the total to 25. They explain that more important, in their view, is the fact that, "of the 25 cases reported, only 4

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[50] An on-line search for such empirical studies found none to be existent, to date.

[51] The authors begin their book with a blatant exposition of the mystique: "The judicial process has always had a certain mystique surrounding it. The ambience created by the robes, a specialized jargon - often an anglocized Latin - and a formal and complex court structure tends to discourage lay persons from learning about legal issues". See Peter McCormick and Ian Greene, Judges and Judging: Inside the Canadian Judicial System. (Toronto: James Lorimer and Co., 1990) 3.

[52] Ibid., 251.

[53] Murrant, Robert. Notes from a talk given at the Conference on Media and the Image of Justice, The University of King's College, Halifax, N.S. Published by: Canadian Law Information Council, Ottawa: 1990.

received any substantive coverage".[54] The insufficiency of television coverage of the Supreme Court thus helps to explain the lack of knowledge about the Court among the Canadian public.

1.5 Diffuse and Specific Support

In light of the public's shallow knowledge with regard to the Court and its activities, it is interesting to consider what bases exist for public support for the Court. One key finding of the literature is that the support extended by citizens, which in turn legitimizes the institution, is not necessarily of a uniform kind. Rather, two kinds of support are readily distinguishable: diffuse and specific support. Diffuse support, refers to the belief that courts make decisions on the basis of fair and established procedures rather than arbitrarily. It is defined as, "the degree to which the Supreme Court is thought to carry out its overall responsibilities in an impartial and competent fashion."[55] By contrast, specific support is based upon popular appreciation of the inherent merits of the Court's work; the public responds to particular outputs and specific actions taken by the Supreme Court.

Diffuse Support

Easton and Dennis appear to be the first to have developed the concept of diffuse and specific support.

> By *diffuse support* we mean *the generalized trust and confidence that members invest in the various objects of the system as ends in themselves.* The peculiar quality of this kind of attachment is not contingent on any *quid pro quo;* it is offered unconditionally. In its extreme form it may appear as blind loyalty or

[54] Lydia Miljan and Barry Cooper, "Courts and the Media: Providing a Climate for Social Change", 7. Paper prepared for the 1997 annual meeting of the Canadian Political Science Association, St. John's Newfoundland.

[55] Ibid., 373.

unshakable patriotism.[56]

Thus, diffuse support for the Supreme Court does not come primarily from the substantive values projected in particular decisions. Rather, the support is extended to judicial institutions as a whole, regardless of their particular outputs. Stemming from the innovative work of Easton and Dennis, many scholars since have pointed to various sources of diffuse support. Such studies have drawn an association between diffuse support for the Court and low public cognizance of this institution. Hence, diffuse support is a function of the relative ignorance of the public as to the Court and its activities. The underlying rationale here is, put simply: "ignorance is bliss". In other words, individuals are more likely to support the Court if they are unaware of its specific procedures and activities. Engstrom and Giles promote this point of view. They explain that "[i]n view of the public's relative unawareness of judicial outputs, it is logical to assume that support for judicial institutions may well be more diffuse than specific."[57]

Lack of knowledge about the Court is closely linked to the official theory or mythology attached to the Supreme Court, as a source of diffuse support. The argument here is a classic one: in the absence of widespread knowledge, people resort to myth. More specifically, the myth of the Court's objectivity and neutrality translates into automatic diffuse public support of the institution. Engstrom and Giles' concept of diffuse support rests largely upon this argument. They explain how a great deal of support for the Court is derived from symbolic and normative expectations of "fairness". Fairness, which includes elements of impartiality and objectivity is an aspect of the mythology surrounding the Court and judges. Courts are perceived as the most fair

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[56]Easton and Dennis, Children in the Political System: Origins of Political Legitimacy, 62-63.

[57]Richard L. Engstrom, and Michael W. Giles, "Expectations and Images: A Note on Diffuse Support for Legal Institutions" Law and Society Review, 6 (1971-72): 635.

of all political institutions, since many people view them as insulated from "politics".

> Obviously, support derived from the simple existence of this due process or fairness norm within the society or culture would not require a knowledge of court outputs, or even a general political awareness, since such norms are part of the substance generally disseminated through political socialization. Support of this origin thus might well be considered diffuse support of the compliance and maintenance type.[58]

Engstrom and Giles take this argument even one step further by claiming that greater court visibility imperils the public's mythic orientation towards the Court, and thus its basis of diffuse support. Their data show that the Court's legitimacy decreases when one facet of the myth loses its credibility: ninth-graders who believe that the Supreme Court operates in accord with the symbolic norm of fairness are significantly more supportive of the Court than their peers who perceive that it is inconsistent with fairness.[59] Thus, due to the low visibility of judicial outputs in the layperson's mind, the mythology attached to the Supreme Court becomes a likely source of diffuse support.

In addition to the studies linking knowledge and support, a second source of diffuse support comes from an extensive empirical literature on procedural justice. That literature demonstrates that the belief that authorities are following fair procedures is a key component of their legitimacy.[60] Legitimacy thus influences the public's willingness to accept both legal rules and the decisions of legal authorities.[61] Decisions that are perceived as having been fairly made -

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[58]Ibid., 631-632.

[59]Ibid., 633-34.

[60]For a more comprehensive review, see Allan E. Lind, and Tom R. Tyler, The Social Psychology of Procedural Justice, (New York: Plenum Press) 1988.

[61]Tyler, Why People Obey the Law , 9.

even if they are unpopular - generate considerably greater support than they otherwise would.[62] David Adamy summarizes this position succinctly in defining legitimacy in terms of diffuse support, or institutional fairness.

> Legitimacy is an evaluative perception by the people that Supreme Court mandates should be accepted because the justices, as guardians of the constitution, act by legal right, because they exercise a traditional authority, and because they constitute an appropriate societal institution.[63]

Inherent in this definition of legitimacy is the belief in the institution's overall competence and appropriateness. Thus, a public who views the system as appropriate and legitimate, will willingly accept and obey its policies - even specific laws which may be unpopular. As Tyler and Rasinski note, "Citizens' compliance with the law... is not based solely on reward and punishment considerations, but also on judgments about the fairness of rules and policies and of the process by which these policies were arrived at."[64] In short, the key argument for procedural or diffuse system support is that individuals are more supportive of authorities if they believe that the authorities make their decisions fairly.

Specific Support

The presence of diffuse support for the Court explains how a system can be sustained over time despite dissatisfaction brought on by specific objectionable policies. In addition to diffuse support, however, the Court also enjoys specific support, which provides an independent

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[62]See for example Lind and Tyler, The Social Psychology of Procedural Justice; Engstrom and Giles, W. Giles, "Expectations and Images: A Note on Diffuse Support for Legal Institutions"; and Murphy and Tanenhaus "Public Opinion and the Supreme Court: The Goldwater Campaign".

[63]Adamy, "Legitimacy, Realigning Elections, and the Supreme Court", 803.

[64]Tom R. Tyler and Kenneth Rasinski, "Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson", Law and Society Review, 25 (1991).

contribution to the capacity of a system to persist. This latter form of support emphasizes evaluations of the Court's particular decisions and policies, which is an important, although conceptually distinct aspect of legitimacy. Specific support thus resembles the notion of issue voting in research on electoral behaviour, where individuals evaluate an institution based on a set of tangible goods it provides and their attitude toward those goods. As such, when the institution changes its outputs, the individual's support follows accordingly.

Easton and Dennis explain how citizens may be favourably disposed to an institution because of the specific benefits or advantages they associate with it.

> The responses of the members are in part *quid pro quo* for what they see themselves as obtaining from membership in the system. In this sense the support the members extend is *specific*. It will increase or decline depending upon the way in which the members interpret the consequences of the various outputs of the system.[65]

It is through specific support that we are able to isolate those sentiments that are linked to what citizens perceive the Court as doing, or failing to do.[66]

Specific support becomes increasingly important for those scholars who no longer accept the conventional wisdom of the myth of the Supreme Court. Chester A. Newland points out that "[w]ith the spread of legal realism and social science criticism in this century, the Supreme Court has lost the somewhat protective cloak provided by past myths of mechanical judging, and its opinions and processes are subject to increasingly broad political scrutiny".[67] While this paper argues that the Court's "protective cloak" in fact prevails, Newland's general argument for

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[65]Easton and Dennis, Children in the Political System: Origins of Political Legitimacy , 61.

[66]Ibid., 62

[67]Chester A. Newland, "Press Coverage of the United States Supreme Court", Western Political Quarterly, 17 (1964) 15.

increasingly upon popular appreciation of the inherent merits of the Court's work".[68]

Gregory A. Caldeira also bases his argument for specific support on the fact that the American public is not as disinterested and ignorant about the Court's activities as the conventional wisdom portrays.[69] Caldeira's study challenges Max Lerner's concept of a revered and deified Supreme Court. In contrast, he establishes that support for the Court varies over time, and then questions, "what accounts for these perturbations in public confidence?" He thus develops and tests six alternative plausible propositions about the dynamics of support for the Court, including political events, the rates of crime, unemployment, inflation, and the salience of the Court. Caldeira's findings reveal that, "[o]ver the period from 1966 through 1984, ebbs and flows of confidence in the Court responded, to a surprisingly large extent, to the happenstances of political events".[70] Making a strong argument for specific support of the Court, Caldeira concludes,

> Public evaluations of the Court do not float freely, in a seemingly aimless fashion, unconnected to the perturbations of the political and legal processes. Rather, in evaluating the justices, the public appears to respond to events on the political landscape and to actions taken by the Supreme Court.[71]

Clearly, for Caldeira , the myth of the Supreme Court does not automatically translate into public support for the institution. Rather, it is specific support that remains critical for legitimating the Court.

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[68]Ibid.

[69]Gregory A. Caldeira, "Neither The Purse Nor The Sword: Dynamics of Public Confidence in the Supreme Court", American Political Science Review, 80 (Dec. 1986).

[70]Ibid., 1219

[71]Ibid., 1223.

More recently, Caldeira attempted to construct a more comprehensive theory of support in a study with James Gibson, "The etiology of Public Support for the Supreme Court".[72] Rather than looking at the population as a whole, their research differentiates between the mass public and elites. Their findings indicate that for the mass public, there appears to be little connection between the specific outputs of the Court and the perception of the Court. On the other hand, "opinion leaders show a greater tendency to link support for the Supreme Court to the satisfaction of specific policy preferences".[73] In sum, the research of Caldeira and Gibson shows that specific support appears more among elites, and diffuse support among the mass public.

In theory, specific and diffuse support are conceptually distinct. In practice, however, they do not represent two watertight concepts. While academics have engaged in debates concerning the exclusivity of one form of support as opposed to another, distinguishing between these concepts should not obscure their interplay.[74] For instance, although some individuals may seem to provide more of one form of support than another, the presence of both specific and diffuse support is intrinsic in all evaluations of the Court. As such, this thesis adopts a pluralistic approach, conceding that both specific and diffuse support contribute to the Court's overall legitimacy. Nevertheless, in keeping to its hypothesis, that "the myth of the Supreme Court" lends the institution greater legitimacy, this thesis indeed emphasizes that diffuse support more fully accounts for the Court's legitimacy.

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[72] Caldeira, Gregory A., and James L. Gibson, "The Etiology of Public Support for the Supreme Court" American Journal of Political Science 36 (1992): 635-664.

[73] Ibid., 636.

[74] In response to the empirical difficulty of separating diffuse and specific support, some scholars have given up the task entirely and considered support as a generic concept. See for example, Davidson, Roger H., and Glenn R. Parker "Positive Support for Political Institutions: The Case of Congress." Western Political Quarterly 25 (1972): 600-612.

CHAPTER 2

JUDICIAL LEGITIMACY AND THE MEDIA

In reviewing the above works on both diffuse and specific support, one cannot avoid noting the element of public perception which is involved in nearly every conceptualization of support. It is at this level that the role of the media becomes fundamental, as it becomes the primary linking mechanism between political institutions and the public. Writing of the American experience, Earl Warren asserts that the issues the Court handles should be "well understood and intelligently apprised by the public. Since the public cannot be expected to read the opinions themselves, it must depend on newspapers, periodicals, radio, and television for its information".[75] The consequences for the Court and the public of course is that the media is more than simply a public address system and will inevitably, intentionally or not, distort the issues when conveying them to the public. In order to examine the perceptions of the Supreme Court as created by the media, the specific functions of the media vis-a-vis the Court and its legitimacy as well as the nature of the reporting on the Court, merit careful analysis.[76]

This thesis began with the assumption, derived from the scholarly consensus, that the positive myth of the Supreme Court leads to diffuse and specific support, which translates to a degree of legitimacy for the institution. Having shown this, and explained the symbolic and substantive aspects of legitimacy, it is now necessary to take a step backwards. If the public does

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[75]Statement on Special Committee of Supreme Court Decisions, September 12, 1966, Earl Warren Papers, Box 665, Library of Congress, Washington, D.C., Quoted in Richard Davis, Decisions and Images: The Supreme Court and the Press , 16.

[76]Although this thesis focuses exclusively upon the impact of the media as an agent of political socialization, it should be clear that it does recognize the presence and impact of other agents such as the family, school and peers. The media is considered only as a potential influence, albeit a large one, not as a demonstrated influence on mass-level sentiment and legitimacy. For a review of studies on these latter agents, see Sidney Kraus and Dennis Davis, The Effects of Mass Communication on Political Behavior, (University Park: the Pennsylvania State University Press, 1976) 19-29.

grant support to the Court, and if this is based on its knowledge, or, as some argue, its ignorance of the Court's activities, then where do these perceptions and information emanate from? How is the "myth of the Supreme Court" propagated? Why are citizens much more aware of other government institutions, such as the Senate and House of Commons, and not of the Supreme Court? We can gain insight into these questions by exploring the literature on the mass media from the field of communications.

2.1 Functions of the Media

Communication media have been consequential both in maintaining social order, and as powerful agents of change. There can be no denying that the mass media play a pivotal role in shaping public opinion. The media help create and perpetuate images, attitudes, and beliefs in the minds of citizens and governments alike. Thomas R. Marshall advances this view in his book Public Opinion and the Supreme Court.

> Public awareness of Supreme Court decisions depends heavily on the quality of coverage provided by the mass media - especially that of newspapers and television. In the mid-1970s, a Florida study found that about three-quarters of respondents reported that they relied either on newspapers (76 percent) or on television (71 percent) for news of Court decisions.[77]

Despite the emergence and growth of film, radio, and television, the appetite for print media has been sustained, and its unique impact upon the shaping of public perceptions prevails.[78] Moreover, the impact of the print media for Canadians in particular was stressed in a study

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[77]Thomas R. Marshall, Public Opinion and the Supreme Court, (Boston: Unwin Hyman, Inc., 1989) 142.

[78]For example, Martin Linsky writes about how, "the press has become one of the most potent institutions in contemporary society..." Impact: How the Press Affects Federal Policymaking, (New York: W.W. Norton & Company, Inc., 1986) 69.

conducted by Lambert, Curtis, and Brown.[79] Their work explores the sources of political knowledge using data from the 1984 Canadian National Election Study. The authors tested four hypotheses about the determinants of political knowledge dealing respectively with education, political participation, media effects, and region. The findings show substantial support for the educational readiness and media effects hypothesis.

> There was also strong support for the effectiveness of the mass media, but mainly the print media. Reading newspapers and magazines appeared to be more "instructive" on both factual and conceptual knowledge than was viewing television.[80]

Remembering that political knowledge is inextricably related to support, we are able to discern the role played by the media in terms of knowledge. The media helps forge the relationship between the public and judicial legitimacy in two ways. First, the media emerge as an agent of political socialization able to influence the public's perception of the Supreme Court. Second, due to the specific nature of the Supreme Court itself, involving features such as complex legal concepts, technical decisions, and secrecy of judicial procedures, coverage by the media becomes increasingly difficult. Consequently, the media may depict the Court in a simpler, mythic fashion which obscures the actual work of the Court. People's perception of the myth then leads to the legitimization of the Court by the public. In order to analyze the two relationships stated above, it is necessary first to explore the media as an institution itself, and its prescribed role in a liberal society.[81]

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[79]Ronald D. James, E. Curtis, Barry J. Kay and Steven D. Brown, "The Social Sources of Political Knowledge", Canadian Journal of Political Science, 21 (June 1988) 359-374.

[80]Ibid., 373.

[81] Before proceeding to a review of the functions of the media, however, a final explanatory note is in order. This thesis does not deny that each particular medium, such as radio, television, and the press, make unique

Harold Lasswell provides a three-fold typology of the fundamental roles fulfilled by the media in a liberal society: First, "surveillance of the world to report ongoing events"; second, the "interpretation of the meaning of events"; and third, "socialization of individuals into their cultural settings".[82] The manner in which these functions are carried out by the Canadian press is important, as we shall see that these tasks play a decisive role in contributing to the legitimacy of judicial institutions.

According to Lasswell, the media survey the events of the day and make them the focus of public and private attention. This essential surveillance function means that the media are often "agenda-setters" as they have the prerogative to influence the salience of events in the public mind. Maxwell McCombs and Donald Shaw, the foremost investigators of this power ascribed to the media, point to the significance of the media's capacity to structure our world for us.

> ...[E]ditors and broadcasters play an important part in shaping our social reality as they go about their day-to-day task of choosing and displaying the news. Audiences not only learn about public issues and other matters through the media, they also learn how much importance to attach to an issue or topic from the

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contributions to politics. The research on the differential effects of various types of media reveals that different types present stimuli and political effects that vary substantially in nature and content. Differences in the political affects of print and electronic media are discussed in Peter Clarke and Eric Fredin, "Newspapers, Television, and Political Reasoning", Public Opinion Quarterly, 42 (Summer 1978) 143-160. However, because all media coexist, reporting on the same events at the same time, it is difficult to differentiate between the impact of one specific medium as opposed to another. Therefore, while this study is limited in scope to the print medium, and more specifically to Canadian newspapers, the findings may be applicable to some extent to other media forms as well. Focusing on the print medium is supported by the view that, despite the emergence and growth of more complex mediums of communication such as radio and television, the appetite for print media has been sustained. Its unique impact upon political life prevails. See for example, Doris A Graber, Mass Media and American Politics, Washington D.C.: Congressional Quarterly Press, 1980; in Canada, Fletcher Frederick J., The Newspaper and Public Affairs, volume 7 of research publications for the Royal Commission on Newspapers (Ottawa: Supply and Services Canada, 1981).

[82]Harold D. Lasswell, "The Structure and Function of Communication in Society", in W. Schramm and D.F. Roberts, eds., The Process and Effects of Mass Communication, (Urbana: University of Illinois Press, 1971).

emphasis placed on it by the mass media.[83]

Agenda-setting research is particularly useful in studying the impact of the media on the level of public knowledge and support enlisted towards the Supreme Court. Bernard Cohen elucidates this point in his study of the press and foreign policy. He argues convincingly that the press, "is significantly more than a purveyor of information and opinion. It may not be successful much of the time in telling people what to think, but it is stunningly successful in telling readers what to think about".[84] The consequences of this are of vital importance, because public perceptions and knowledge depend not only on people's personal interests, but also on the map that is drawn for them by the papers they read.[85] In this thesis, the case studies will be utilized, in part, to show to what extent Canadian newspapers attended to the *Morgentaler*, *Symes*, and *Thibaudeau* decisions, thereby setting the public's priorities of concern, or "setting the agenda". If, as it is argued here, the media are an important information source about politics for the general population, then agenda setting is of critical importance in the analysis of the political and judicial process.

In setting the agenda of news events, the media indirectly are interpreting the meaning of events for the public, by setting out their importance. For example, an item that appears repeatedly in the news may be interpreted as more important than one that appears infrequently, or perhaps is omitted altogether. Because the truth about matters is subjective and entails more probing and explanation than the hectic pace of news production allows, the media's power in

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[83]McCombs, Maxwell E., and Donald L. Shaw, "The Agenda-Setting Function of Mass Media", Public Opinion Quarterly, 36 (Summer, 1972) 176-87.

[84] Bernard C. Cohen, The Press and Foreign Policy, (Princeton: Princeton University Press, 1963) 13.

[85] Ibid.

shaping people's beliefs and perceptions is evident once again in this second media function.

The third basic role of the media involves the "socialization of individuals into their cultural setting".[86] The mass media are crucial in this process as they provide for the learning and acceptance of norms, rules, and structures governing political life. The traditional argument is that the media help foster a sense of identity and unity, and mobilize consensus for the political culture of the society. Through this function it is possible to observe the media playing a direct role in legitimating political institutions and the actions of political leaders. Doris Graber provides an example of how this is achieved: "assumptions that underscore the legitimacy of the current political system are routinely embedded in news stories".[87] Thus, simply by granting attention to particular institutions, the mass media confers status, and serves to legitimize those institutions.

Media studies have outlined several problems in news communication that result from the complex nature of the Supreme Court. This thesis will dissect the communication factors involved and trace their apparent effect upon the public's perception of the legitimacy of the Supreme Court. The problems of communication will be outlined first in terms of characteristics particular to the Supreme Court, and second, from the perspective of the press. Such communication complexities often lead to oversimplification in news reporting. For example, in his review of these various problems of press reporting, David L. Grey emphasizes that he is not concerned with bias or major errors in reporting of facts. His criticism centres mostly on the

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[86]Harold Lasswell, "The Structure and Function of Communication in Society", 25.

[87]Doris A. Graber, Mass Media and American Politics, 102.

misinterpretations and shallowness of meaning in what the press has reported about the U.S. Court. As a result, he describes the press' coverage of that Court as "impressionistic" and "indirect" at best.[88] Perhaps inadvertently, these oversimplifications contribute to the "myth of the Supreme Court" and hence its legitimacy in the public mind.

2.2 Communication Problems

Characteristics of the Supreme Court and the Judicial Process

The process of distortion of the Court's message by the media has been well documented, respectively, by Grey and. Wasby. [89] The first characteristic of the Court's message which may lead to transmission problems from the media's perspective is the "clarity or ambiguity of the [Court's] decisions".[90] Wasby explains that a concern with message clarity by the Court would improve the chances for adequate transmission. A second major difficulty arises from the "relative technicality of the language, something different from ambiguity, because a message can be precise but so technical that the average layman cannot understand it".[91] Here, the question of audiences for which the Court writes is important since its writing does not seem to be aimed towards the general public. Because of this lack of concern for general audiences, responsibility is upon the media to interpret the Court's messages for its readers. Thus "the

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[88]David Grey, The Supreme Court and the News Media, (Evanston: Northwestern University Press, 1968) 5-9.

[89]Stephen L. Wasby, The Impact of the United States Supreme Court, (Illinois: The Dorsey Press, 1970).

[90]Ibid., 84.

[91]Ibid.

chances for misinterpretation (both purposeful and innocent) increase radically".[92] Grey summarizes these problems in his examination of the relationship between the Supreme Court and the press.

> The Court... speaks on complex issues - often at great length and with multiple concurring and dissenting opinions - and then remains silent; the press still is left with the task of trying to interpret such floods of legal words within minutes or only a few hours.[93]

Not only are messages technical, but disagreements among judges and dissenting opinions also create problems in understanding the Court's messages. Wasby explains how this aspect of the legal process is problematic for, "the sharp crossfire between judges causes reporters to interpret cases in terms of battles between individual judges and to lose sight of the legal issues involved".[94] Furthermore, not only do justices on one panel differ concerning particular cases, but judges at one time differ with their predecessors and overturn precedents, further complicating the communication process.

Grey points to other Court procedures, such as deliberate isolation from the public, that complicate news reporting on the U.S. Court: "There is little doubt that much of this isolation is needed to protect the judicial process; but the point... is that such practices also help to complicate communication between institution and citizen".[95] This aloofness and inaccessibility, albeit a necessity, contribute to the mystical element of the Court.

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[92]Ibid.

[93]Grey, The Supreme Court and the News Media, 2.

[94]Wasby, The Impact of the United States Supreme Court, 84.

[95]Grey, The Supreme Court and the News Media, 15.

Grey illuminates an interesting factor related to the Court's isolation. He points to the significance not only of what is reported, but also of what is not.

> But there is another factor that should be considered, a different view that sees power as partly the ability to control the flow of information about government. In general, the stream of communication is an instrument by which the powerful protect their power and position.[96]

Grey specifies that the Court's "low profile", or what others have termed its "invisibility", is the shared responsibility of the media as well as the Court itself. Regardless of where the fault lies, it is the impact of low press coverage that is relevant here. The remoteness of the Court has led to a common assertion that the Supreme Court's relative invisibility is responsible for the endurance of its legitimacy.[97] Many have suggested that because the Court is shielded from the public eye, and does not receive as much press coverage as other branches, the mystique about its operations is profligated. In fact some scholars argue that,

> ...a political institution can heighten its legitimacy by showing to its public symbols and ceremony rather than revealing its true nature, its concrete reality. Symbols can elevate the institution, setting it up as special, remote from ordinary skills and practices, difficult to check against daily experience, and unapproachable by the common man.[98]

In their view, visibility would jeopardize the Court's mystique and cause a decline in its legitimacy. It is at this point that the role of the media and its functions comes in to either expose or reinforce the "myth of the Supreme Court".

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[96]Ibid., 23.

[97]See for example Max Lerner, "Constitution and Court as Symbols", Kenneth Dolbeare and Philip Hammond, "The Political Party Basis of Attitudes Toward the Supreme Court", and Alpheus T. Mason, "Myth and Reality in Supreme Court Decisions".

[98]MacIver and Edelman, reviewed by Gregory Casey, "The Supreme Court and Myth", 387.

All these characteristics of the Court and the judicial process cumulatively affect what occurs later in the communication process. Grey thus contends that because messages are not clear, succinct, and without contradictions, a situation is created in which "the task of understanding Supreme Court decisions has been made a struggle for both expert and lay consumer long before the Court's decision is even announced".[99]

Communication Problems: Characteristics of the Media

In addition to these characteristics of the Court which complicate the effective transmission of the institution's structure and activities, we can identify, from the work of Stephen Wasby three distortions in reporting, viewed specifically from the media's perspective.[100] The first distortion which occurs is oversimplification. This occurs especially in article headlines, which often are "correct as far as they go, but they are obviously too brief to convey the full meaning of the ruling".[101] In the drive for brevity and simplification, the Court's reasoning for its decision of a case is one of the matters most often eliminated in the reporting of Court decisions.

Involved in the oversimplification process is the second distortion in reporting: an emphasis on individuals as opposed to content. Rather than focusing upon the legal issues at hand, the names of individuals and personal experiences receive a disproportionate amount of

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[99]Grey, The Supreme Court and the News Media, 23.

[100]Wasby, The Impact of the United States Supreme Court, 94-99.

[101]Gilbert Crannberg, "What did the Supreme Court Say", Saturday Review, April 8, 1967, 91, quoted in Wasby, Ibid., 97.

press attention.[102]

Finally, while reports on the Supreme Court often de-emphasize the reasoning behind Court decisions, "immediate reaction to those decisions is quite heavily emphasized, particularly if 'big names' have reacted".[103] Often, the content of the decision itself is ignored and in its place, perhaps the more alluring or "newsworthy" public reactions are published.

The above review of restraints on the media that stem from the press and the judicial process is not intended to point to the fault of either institution. Rather, it offers impressive testimony that a substantial communication problem exists in conveying news about the Supreme Court. The analytic concern for this thesis is upon the impact of this predicament. The inherent argument is that news distortions lead to further promotion of the more simple, mythic conceptions of the Supreme Court. In turn, the perception of this promoted myth may contribute to the public support and legitimacy of the Supreme Court.

2.3 Judicial Legitimacy and the Media in Canada

Having reviewed both legitimacy and media studies, an a priori summary examination of the respective conclusions drawn from both these fields is necessary in order to elaborate an analytic relationship. Once that dynamic has been set out, the quantitative study of the reporting of the Supreme Court decisions in Canadian newspapers will follow, as an extension and empirical inquiry into the relationship.

Chapter One of this thesis suggested that legitimacy is instrumental to courts as a necessary condition for compliance. Scholars have examined the foundation for the Court's

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[102]Ibid., 96.

[103]Ibid., 97.

legitimacy under the rubric of political myth, suggesting that part of its legitimacy rests on popular belief in illusions and myths of the Court. The symbolic quality of Supreme Court adjudication was recognized as a fact, and it was put forth that the Court derives legitimacy through this symbolic imagery.

A number of empirical studies were examined which focused on the public's level of knowledge as it relates to a mythical understanding of the Court. Virtually all the survey research pointed to knowledge as a main determinant of support. In conjunction with this finding, most studies also revealed that the public has a marked lack of understanding about the Court and its activities. Notwithstanding dissenting theorists, there was a general consensus that the public's level of knowledge about the Supreme Court appears to be inversely proportional to its support for the institution. Moreover, a low level of knowledge leads people to view the Court in symbolic terms. Support for the Court, and in turn, its legitimacy is enhanced by its low visibility.

When looking more closely at the basis for Court support, two types of support, diffuse and specific were reviewed. Diffuse support, where people have a generalized trust and acceptance of the Court, is often associated with the public's low cognizance of the institution. Other theorists, especially those who do not espouse the belief of low public knowledge of the Court, argue that the basis for Court support is specific, based upon the public's affinity with the institution's specific decisions or outputs. In conjunction with the findings on the media, the quantitative analysis portion of this paper addresses the relative "invisibility" of the Court in Canada, as well as both bases that exist for the Court's support.

In addition to the lessons drawn from the body of literature on judicial politics and

legitimacy, the quantitative section of this paper will also be based upon assumptions attained from communication studies. In Chapter Two, the role, functions, and inherent problems of the media were discussed at length. Studies in this field indicate that newspapers in particular play a special role in the democratic process by connecting political institutions to the general public. As such they act as an agent of political socialization, whereby they are able to influence perceptions and public opinions. The manner in which they carry out their specified roles of (i) surveillance, (ii)interpreting the meaning of events and (iii)socialization of individuals, is consequential in terms of communicating political knowledge, and in turn fostering judicial legitimacy.

In the process of the media's carrying out its prescribed roles, however, several problems inherent in media reporting have been documented by communication scholars. Characteristics specific to both the media and the Court, respectively, lead to complications in reporting about the Court and its work. As a result, newspapers often contain distorted and simplistic reporting about the Supreme Court.

Having drawn lessons from the school of judicial politics (Chapter One) as well as from the school of communications (Chapter Two), it is time to combine the lessons drawn from the separate fields. If the legitimacy of the Canadian Supreme Court, is like its U.S. counterpart, largely dependent upon public knowledge and public perceptions, and if the media, as an important agent of socialization, is responsible for forging that knowledge and perception, then the nature of Supreme Court reporting in Canadian newspapers is critical. It is this presentation of the Court's message to the public that merits closer empirical scrutiny for understanding how it relates to the Court's legitimacy. For, to the extent that the media (i) surveys the events of the

day, (ii) interprets the meaning of these events and (iii) socializes individuals into their cultural settings, they can yield tremendous impact upon the public image of the Supreme Court. For example, in fulfilling its first and second functions, surveillance and interpretation of the day's events, both the quantity and content of newspaper reporting will contribute to public perceptions of the Court.

The empirical section of this study will look at the media as one of the elements which creates the perception of the Court's legitimacy in the public mind. The existing literature provides overwhelming evidence that the public's awareness of the Supreme Court and its decisions is slight, and that this lack of knowledge helps to promote the myth of the Court. Diverse commentators, such as Max Lerner (1937), Kenneth Dolbeare (1967) and MacIver and Edelman (1971) have asserted that the Supreme Court's relative invisibility is responsible for the endurance of its legitimacy.

Based on this research, this thesis will follow three paths of inquiry. First, it will look at Canadian newspapers in an attempt to assess both the breadth and depth of the knowledge that they are communicating to the Canadian public. Building upon past studies which expound a mythical view of the Court, Canadian newspapers will be scrutinized in order to assess their role, as one of the major agents of socialization, in promoting this mythical view of the Court.

Inherent in this illusory conception of the Court, is a simplistic or distorted vision of the reality of the Court's work. One way in which the media helps to forge this vision and hence the myth of the Court is by focusing on the outcomes of the cases, or their substance, as opposed to the procedural aspects guiding the decisions. Thus, this thesis will look secondly, at the newspapers' depiction of the Court in three Supreme Court decisions, to determine the main

focus of these reports, whether substantive or procedural.

Finally, in further exploring the relationship between the media and public perceptions of the Court, the newspapers' position with regard to the Court and its work will be examined, as it affects both the specific and diffuse support extended to the Court. In addition to the examination of the breadth and depth of coverage, looking at the articles' stand on each decision will be telling in a very simplistic and direct way, the newspapers' position with regard to the Court.

In sum, the (i) quantitative examination of the number of articles published (ii) characterization of these articles, and (iii) their positions taken on the various Court decisions, will provide novel Canadian data as to the portrayal of the Court in the press. The analysis of the newspapers' behaviour in the context of these three cases will shed light on the relationship between the media and public perceptions of the institutional legitimacy of the Canadian Supreme Court.

CHAPTER 3

QUANTITATIVE ANALYSIS

The analysis in this chapter will focus on three Supreme Court cases. Before turning to the quantitative portion of this thesis, a brief description of these cases will be provided in order to proceed with the analysis of their portrayal in Canadian newspapers.

Morgentaler[104]

The first of the three cases I will examine, the most emotional and highly publicized decision of the three, is *Morgentaler, Smoling and Scott v. The Queen*, decided by the Supreme Court on January 28, 1988.

The principal issue raised in this case was whether the abortion provisions of section 251 of the *Criminal Code of Canada* infringed upon the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as formulated in section 7 of the Charter of Rights and Freedoms. The abortion provision in question distinguished between therapeutic and non-therapeutic abortions, making the former legal and the latter an indictable offence. In order for an abortion to be deemed therapeutic and thus legal, it had to be approved by a hospital committee, accredited by the respective province. An abortion performed without gaining this approval thus constituted an offence for both the woman and the individual performing the abortion.

Section 251 was challenged before the Supreme Court in 1988 by three physicians, Morgentaler, Smoling and Scott. The counsel for the appellants submitted that "the court should

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104 *Morgentaler, Smoling and Scott v. The Queen* [1988] Dominion Law Reports (4th), 385. [Hereinafter, *Morgentaler*].

recognize a very wide ambit for the rights protected under s.7 of the Charter".[105] They argued that the law was unconstitutional based upon a wide reading of the right to life, liberty, and security of the person, whereby it encompassed a right to privacy and a right to make free decisions about one's own life. With the notable exception of Justice Bertha Wilson, the majority of the Court refrained from declaring a "constitutional right to abortion" or "freedom of choice", as the counsel for the appellants had put forth. Nevertheless, the law was struck down by a margin of 5-2. In addition to the two dissenting judges, the five judge majority was divided three ways in their reasons for deeming section 251 invalid. Thus, the issue generated four separate judgments from the seven justices who participated in the case.

The main opinion, presented by Chief Justice Dickson explicitly avoided the issue of the substantive merits of legalised abortion. Dickson postulated that it was both unwise and inappropriate to explore the broadest implications of section 7 at such an early point in the Charter's history. Rather, he found it sufficient to, "limit my comments to some interpretive principles already set down by the court and to an analysis of only two aspects of s.7, the right to "security of the person" and "the principles of fundamental justice".[106] Relying heavily on the extrinsic evidence contained in the 1977 Badgley Report, Dickson found several problems with the administration of the law, which impaired the security of pregnant women. The problems, essentially of limited and unequal access included, inter alia, sharp disparities in the distribution and the accessibility of therapeutic abortion services. These often resulted in undue delays in obtaining the necessary authorization for an abortion, which caused both a physical and psychological threat to the health of

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105 Ibid., 397. [per Dickson].

106 Ibid.

the woman. This "interfer[ence] with a woman's bodily integrity"[107] thus constituted a breach of "security of the person" and represented a serious administrative flaw.

Having established an infringement of security of the person, Dickson sought to determine whether the violation was in accordance with the principles of fundamental justice. Here again Dickson restricted his arguments to procedural grounds, and, "[r]ather than consider whether the Criminal Code's criminalization of abortion was inconsistent with substantive principles of fundamental justice, Chief Justice Dickson focused on the impact of section 251's procedural mechanisms and administrative structure on the availability of the defence that Parliament had established against criminal charges brought under the section".[108] Citing several administrative deficiencies, Dickson concluded that the procedure stipulated in s.251 for access to therapeutic abortions "is a failure to comply with the principles of fundamental justice".[109] The law was thus repealed as it could not be saved under a section 1 analysis of the Charter.[110]

Although they concurred with Dickson and Lamer, Beetz and Estey took a far more conservative approach in their decision, and defined the procedural problems more narrowly, leaving open the possibility for amendment of the legislative procedures to be constitutionally

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[107] Ibid., 402

[108] Manfredi, Canada and the Paradox of Liberal Constitutionalism: Judicial Power and the Charter, 17.

[109] *Morgentaler*, 413. [per Dickson].

[110] In his s.1 analysis, Dickson bases himself on the wording of Parliament in s.251, and expressly refrains from evaluating any claim to "foetal rights" or to assess the meaning of the "right to life". In the first step of the Section 1 Oakes test, he concludes that "the protection of the interests of pregnant women is a valid governmental objective" (at 416). However, he then continues to say that "the means chosen to advance the legislative objectives of s.251 do not satisfy any of the three elements of the proportionality component of R. v. Oakes" (at 416). Finally, the effects of the limitation of the section 7 rights are not proportional to the goals they set out to achieve. Section 251 therefore cannot be saved under s.1 of the Charter.

valid.[111] The remaining male justices, McIntyre and LaForest, dissented. However they too avoided the substantive policy issue, and presented an opinion which represents perhaps the clearest example of judicial self restraint. In Justice McIntyre's view, the power of judicial review acquired greater scope under the Charter, but, "that scope is not unlimited and should be carefully confined to that which is ordained by the Charter".[112] McIntyre continued by defining a role for the Courts, whereby they must not, "in the guise of interpretation, postulate rights and freedoms which do not have a firm and reasonably identifiable base in the Charter".[113] In terms of this specific decision, McIntyre argued that, "the task of the Court in this case is not to solve nor seek to solve... the abortion issue, but simply to measure the content of s. 251 against the Charter".[114] Thus McIntyre concluded that the abortion issue did not fall within the proper jurisdiction of the Court. Manifesting his belief in sticking to the "framers' intent", McIntyre's final words on the issue were that, "nothing in this Canadian Charter of Rights and Freedoms gives the Court the power or duty to displace Parliament in this matter..."[115]

While in the majority, Justice Wilson's decision lies at the other end of the spectrum from the narrow approaches adopted, respectively, by the six judges above. Wilson was the sole judge to adopt explicitly a wide interpretation of section 7. Wilson immediately attacked the substance of the matter by urging that, "we must answer the question: what is meant by the right to liberty in the

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[111]Ibid.,459-460 [per Beetz].

[112]Ibid., 464. [per McIntyre].

[113]Ibid.

[114]Ibid., 465.

[115]Ibid., 480.

context of the abortion issue?"[116] Beginning with an interpretation of section 7 to encompass the concept of human dignity, Wilson decided quickly that a woman's decision to terminate her pregnancy was protected by much more than simply the "security of the person" under section 7 but also by the right to liberty inherent in this section. Insisting upon the importance of the "right to make fundamental personal decisions without interference from the state".[117] Wilson pronounced that section 251 is a "complete denial of the woman's constitutionally protected right under s. 7".[118] Finally, Wilson did qualify that the protection of the foetus, as weighed against the right of pregnant women to carry the foetus to term, had to be considered, however, "[i]n the early stages the woman's autonomy would be absolute".[119]

Symes

Symes v. Canada,[120] a second case with a distinctive female voice, was decided by the Supreme Court in 1993. At issue in this case was whether the *Income Tax Act* (*ITA*) violated section 15(1) of the Charter by not allowing individuals to deduct the full cost of child care as a business expense. Under the more recently amended section 63 of the *ITA*, a limited deduction for child care was provided. However, the taxpayer, appellant Elizabeth Symes, had attempted to deduct the full wages she paid to her nanny for the care of her children. The equality provisions of the Charter were invoked in two ways. First, it was argued that the *ITA* should be interpreted in a

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[116]Ibid., 484. [per Wilson].

[117]Ibid., 490.

[118]Ibid., 500.

[119]Ibid., 499

[120]*Symes v. Canada* [1993] Dominion Law Reports (4th), 470. [Hereinafter, *Symes*]

manner consistent with Charter equality, thus to permit the deduction, and second, for the first time the Supreme Court heard a s.15 claim based upon the unintended effects of a neutral provision: the appellant argued that if the *ITA* precluded the deduction, it violated s.15(1) through its impact on women, who inordinately bear the responsibility for child care. The Supreme Court dismissed Symes' claim, in a split decision written for the majority by Justice Iacobucci, and concurred in by the other six male members of the Court. Justice L'Heureux-Dubé wrote dissenting reasons, concurred in by the other female justice on the panel, Justice McLachlin.

In terms of the first issue of statutory interpretation, the majority took a procedural approach, treating this as an unambiguous question, and concluded that there was no violation of section 15(1). Section 63 of the *ITA* was very clear in precluding the child care deduction, and "the purpose for which the appellant maintains she has incurred her child care expenses falls squarely within the language of s.63...".[121] The values in the Charter, therefore, could not be used as an interpretive aid.[122]

Adopting an activist and substantive approach to judicial decision-making, the dissenting justices stated that although the appellant's arguments are, "ostensibly about the proper statutory interpretation of the *Act*, this case reflects a far more complex struggle over fundamental issues, the meaning of equality and the extent to which these values require that women's experience be considered when the interpretation of legal concepts is at issue".[123] In her analysis of section 63, Justice L'Heureux-Dubé found that child care costs are properly deductible as business expenses notwithstanding s.63, for the section either permitted the deduction or was ambiguous about the

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[121] Ibid., 547. [per Iacobucci].

[122]Ibid., 544-547.

[123]Ibid., 481-482. [per L'Heureux-Dubé].

matter. L'Heureux-Dubé observed that a wide array of expenditures, "such as club dues, meals and entertainment expenses, car expenses", has been recognized as deductible business expenses, and that the definition of "business expense" has been "shaped to reflect the experience of businessmen, and the ways in which they engaged in business".[124] She proceeded to argue that the concept of "business expense" has been "wrought with male perspective and subjectivity".[125] Therefore, it must be expanded to fit the experience of all participants in the field, including women. Finally, she argued that the responsibility for child care is an important part of that experience for business women.

With regard to the second issue in this case, Iacobucci confirmed at the outset that "[s]ection 15 guarantees more than formal equality"[126] and that "adverse effects discrimination is comprehended by s.15(1).[127]. In principle, the effect of the distinction created by s.63 could be discriminatory even though it was not expressly or directly discriminatory. Based on "an abundance of information"[128] that was placed before them, the majority of the Court acknowledged that indeed, women in Canada disproportionately bore the social costs of child care. However, in order to establish that s.63 had an adverse effect upon women, "it is not sufficient for the appellant to show that women disproportionately bear the burden of *child care*

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[124]Ibid., 488.

[125]Ibid., 496-497.

[126]Ibid., 551 [per Iacobucci] 551.

[127]Ibid., 552.

[128]Ibid., 557.

in society. Rather, she must show that women disproportionately *pay child care expenses.*"[129] Although those social costs were very real, they existed outside the realm of the *ITA*. Since the deduction would be available only with respect to the financial costs of child care, it would benefit men as much as women, and its restriction did not amount to discrimination on the basis of sex. Clearly, the majority placed heavy emphasis upon this evidentiary gap in terms of their decision-making.

The dissenting Justices L'Heureux-Dubé and McLachlin agreed with Iacobucci concerning the goal of s.15 to guarantee more than formal equality, but came to different conclusions about the interpretation of this second issue. L'Heureux-Dubé found that because women were more likely than men to bear child care responsibilities, the *ITA*'s denial of full deductibility for child care expenses had an adverse impact upon women. She disagreed with Iacobucci's conclusion that "proof that women pay social costs is not sufficient proof that women pay child care expenses".[130] For her, that inference was "inescapable" and further, in this case, "it was proven that Ms. Symes did incur the expenses for which she claims the deduction.[131] Thus the statutory provision, although seemingly neutral, was in effect discriminatory on the basis of sex.

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[129]Ibid., 558. [emphasis in original].

[130]Ibid., 559.

[131]Ibid., 507 [per L'Heureux-Dubé].

Thibaudeau

In *Thibaudeau v. Canada*,[132] Suzanne Thibaudeau, a divorced mother with custody of the children of the marriage, challenged a provision in the *Income Tax Act* (*ITA*) that required her to pay income tax on the child support payments that she received from her former husband. She objected to the "inclusion/exclusion system" whereby the recipient of child support must include such amounts in her income, while the payer is permitted to deduct them, pursuant to sections 56(1)(b) and 60(b) respectively. At issue in this case was whether s.56(1)(b) of the *Income Tax Act*, the inclusion side of the equation, infringed the equality rights guaranteed by s.15 of the Charter. Thibaudeau argued that by imposing a tax burden on money which she was to use solely for the benefit of her children, s. 56(1)(b) infringed her right to equality because in an intact family the income tax spent on child support would be paid by the spouse who earned the income.

The Supreme Court, by a 5-2 majority, rejected her argument and upheld the provisions of the *Income Tax Act*. The Court ruled that paragraph 56(1)(b) of the *ITA* did not violate section 15(1) of the Charter, and that single custodial parents receiving child support payments were not placed under a burden by the existing provisions of the *Act*. The seven justice bench was divided four ways in its decision, and the two female judges on the panel, McLachlin and L'Heureux-Dubé, dissented. The majority of the decision of the Court was presented by Justice Gonthier.[133]

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132 *Thibaudeau v. Canada* [1995] Dominion Law Reports, 449. [Hereinafter, *Thibaudeau*].

133 Although Justices Cory and Iacobucci as well as Sopinka and La Forest wrote separate concurring opinions, the majority opinion, presented by Justice Gonthier, will be treated as a consolidated one. While Cory and Iacobucci wrote a short separate decision from Gonthier, their differences in terms of reasons for judgment are minor and extraneous for the purpose of this thesis. Furthermore, although Sopinka and La Forest did not present their decision together with Gonthier, their decision was very brief, in that they simply concurred with Gonthier, and with Cory and Iacobucci. For the purpose of this thesis, therefore, it is superfluous to explore the details of the respective justices' reasons for judgment.

Both the majority and dissent based their argument on two primary points, but came to different conclusions in terms of both. The main argument of the majority hinged upon one factor, the appropriate unit of analysis, where they disagreed from the dissent. For the majority, sections 56(1)(b) and 60(b) operated "at the level of the couple",[134] rather than at the individual level.[135] Based on this starting premise they argued that these sections of the *ITA* were designed to minimize the tax consequences of support payments, thereby promoting the best interests of the children by ensuring that more money is available to provide for their care. Since the payer spouse was usually in a higher tax bracket than the recipient spouse, the tax saved by the deduction would normally exceed the tax incurred by the inclusion. This resulted in a deduction of tax, and net saving for the majority of the separated couple, thus leaving more money available to the entire unit for child support. The system therefore provides an overall benefit to couples supporting children.[136] In view of the substantial savings generated by the inclusion/deduction system, "the group of separated or divorced parents cannot as a whole claim to suffer prejudice associated with the very existence of the system in question".[137] If anything, the inclusion/deduction regime had been designed by the legislature to confer a benefit on the post divorce "family unit".[138] Moreover, according to all five majority judges, "it is of the very essence of the *ITA* to make distinctions",[139] and these sections of the *ITA* were introduced specifically to alleviate the economic consequences of the breakdown of

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[134] *Thibaudeau*, 490-91 [per Gonthier].

[135] Ibid., 490.

[136] Ibid., 494.

[137] Ibid., 493.

[138] For simplicity, the term "divorce" is utilized here to encompass both divorced and separated couples.

[139] *Thibaudeau*, 482. [per Gonthier].

the family, as distinct from intact families. Cory and Iacobucci concluded that, [T]he fact that one member of the unit might derive a greater benefit from the legislation than the other, does not, in and of itself, trigger a s.15 violation, nor does it lead to a finding that the distinction in any way amounts to a denial of equal benefit or protection under the law".[140]

McLachlin and L'Heureux-Dubé voiced strong disagreement with the majority's reasoning, which considered the fractured family as a unit for taxation purposes. Although the dissenting judges agreed that former spouses have an obligation toward their children and thus may be viewed as a single entity, they "respectfully disagree[d]" with their colleagues, "who concluded that the appropriate unit of analysis is the couple".[141] In their separate dissenting reasons, L'Heureux-Dubé and McLachlin both made reference to the fact that, "notwithstanding both parents' continuing mutual obligation to support the children of the relationship, it is unrealistic to assume that they continue to function as a single unit even after they have separated or divorced."[142] Rather, they believed that "in practical terms, the former spouses conduct their everyday lives much more as individuals than as a couple."[143] Defining the unit of analysis as the couple thus is inconsistent with the purpose and spirit of s.15.

The second point of difference between the majority and dissenting judges centered on the source of the inequitable division of the burdens and benefits of the inclusion/deduction regime. For the majority, the source of this inequality was the family law system, as the family law judges are required to take the tax benefit, and the payer's enhanced ability to pay, into account in fixing

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[140]Ibid., 502. [per Cory and Iacobucci].

[141]Ibid., 458. [per L'Heureux-Dubé].

[142]Ibid.

[143]Ibid., 512-513. [per McLachlin].

the amount of child support. Gonthier, as well as Cory and Iacobucci argued that the family law regime rectifies the inequality that the legislation creates between custodial and non-custodial parents by allowing the amount of the child support to be grossed up to fully compensate the recipient for her additional tax liability.[144] If these benefits were not taken into account in calculating the payer's support payments, this inadequacy was not the result of the provisions of the *ITA*. Rather, the distribution takes place in principle in accordance with family law, which is incorporated directly into the tax system, and referred to specifically in sections 56(1)(b) and 60(b) of the *ITA*.[145] Although some separated parents did not benefit from the deduction-inclusion system, as a group, separated custodial parents did benefit. Thus, the *Income Tax Act* did not discriminate against them, and there was no breach of s.15 of the Charter.

McLachlin and L'Heureux-Dubé[146] dissented primarily on the ground that "the family-law regime does not and cannot succeed in rectifying the inequality created by the deduction/inclusion scheme".[147] Both dissenting judges recognized that the emotional and financial costs associated with initiating the necessary family law court proceedings easily outweighed the benefits of the additional gross-up and may act as a "significant disincentive"[148] to custodial parents. Thus, by conferring the benefit of the deduction on the non-custodial spouse, and imposing the burden of the

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[144]Ibid., 496 [per Gonthier].

[145] Ibid., 499.

[146] Although they arrived at the same results, McLachlin and L'Heureux-Dubé differed slightly in their methodology. L'Heureux-Dubé focused on the group adversely affected by the distinction and the nature of the interest affected, whereas McLachlin focused on the grounds of the impugned distinction. For the purpose of this paper, their separate reasons for judgment, which are not as important as the essence of their argument , will not be detailed but treated together.

[147]*Thibaudeau*, 514 [per McLachlin].

[148] Ibid., 462. [per L'Heureux-Dubé]. See also 514-515 of reasons of McLachlin.

tax on the custodial spouse, the Act was discriminatory.

3.2 Methodology

The data to assess how the Supreme Court was portrayed in the media was gathered by means of examining coverage the *Morgentaler*, *Symes* and *Thibaudeau* cases in four daily Canadian newspapers: the Vancouver-based mass circulation daily, *The Vancouver Sun*; the Toronto-based mass circulation national daily *The Globe and Mail*; the Montreal-based mass circulation English language daily, *The Montreal Gazette*; and the Montreal-based, limited circulation, sovereignist French-language daily *Le Devoir*.

The dailies were selected based upon three criteria to distinguish key national media, as set out by Frederick Fletcher: first, national media that reach audiences across the regions of Canada; second, regional media based in large cities that have wide distribution in a particular province or portion of it; and finally, their representation of both official languages.[149] In order to account for the vast majority of public opinion, hence the source of knowledge for the largest number of people, I selected newspapers with a circulation of over 200 000.[150] My selection of *Le Devoir*, while not satisfying this last criterion, was included due to its strong influence among French-speaking elites,[151] and because of its reputation as being influential in nationalist circles in Quebec.

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[149]Fletcher, The Newspapers and Public Affairs, 15-31

[150] In 1992, which represents the average year of the three Supreme Court decisions (*Morgentaler* 1988; *Symes* 1993; and *Thibaudeau* 1995), the daily circulation figures of these newspapers, were as follows: the *Vancouver Sun*: 254 908; the *Globe and Mail*: 337 252; the *Montreal Gazette*: 236 055; *Le Devoir* 26 348. Source: Editor and Publisher International Yearbook 1992, III-6 - III-20.

[151] Fletcher, The Newspapers and Public Affairs, 20.

The sample includes all newspaper articles which referred specifically to any of the three Supreme Court cases, but the sample does not include references to the cases in the letters to the editors.[152] The respective cases were followed separately in the four newspapers on a daily basis in the immediate two weeks following the Court's decision.[153] This produced a total of 163 articles for analysis. For each article, several factors were charted, based largely upon the prescribed roles of the media.

For each decision, the first and most simple observation made was the number of articles appearing on the case. Based upon studies suggesting that visibility of the Court is related to its mystique, it is important to chart the number of times articles regarding these decisions appeared in the papers. Having counted all the articles for each case, the study then examined the content of the individual articles, on a story by story basis. Each article was read and carefully coded for two factors: its position toward the decision, and its characterization of the decision.

The position, the first factor charted, represents simply whether the article supports, opposes, or is neutral with regard to the decision taken by the Court. In deciding whether to label an article either for or against the Court's decision, the article had to distinctively lean one way or another. Several indicators were used in this respect.[154] For each article these included, inter alia, a disproportionate focus on the public reactions from only one side of the decision, a

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[152]Note - "letters to the editor" generally serve as a reflection of the readers' comments, as opposed to that of the specific newspapers'.

[153]This time period represents the height of press coverage for the cases, and the coverage in fact diminished progressively with the passage of time, to the point where virtually no articles were found in the last few days of this defined period.

[154]Despite the use of certain indicators, the coding for the stand and characterization of articles cannot be considered scientific. Nevertheless, the results should be internally consistent, in accordance with the criteria set out here, as the initial articles read were re-coded upon completion of the last data collected, in the attempt to avoid any systematic errors.

headline or photo clearly favouring one aspect of the decision, and excerpts of the judgment from only or mostly one side of the ruling. Although it may seem intuitive that the majority decision receive a greater amount of coverage in terms of all the aforementioned indicators there was, in fact, no such pattern found in any of the three cases, and the use of these indicators was accordingly validated.

Of course, not every article had a clear and definitive stand, and therefore a third category, "neutral", was created. Articles in this category, where there was no obvious position taken on the Court's decision, were nonetheless included in the study because (i) despite their neutrality, the articles were relevant because, by virtue of their publication, they lent visibility to the Court and its decisions and (ii) the articles often included material that pertained to the decision but discussed it in another context.[155]

To an extent, the aim of the tabulations of the articles' stand is to establish whether the sum of articles, and hence the media, lend legitimacy to the Court by supporting its decisions. This tabulation, albeit important and telling in and of itself, was supplemented by a more complex and revealing aspect of the article coding. In conjunction with the article's stand on the decision, the characterization of the article - whether it focused upon procedural or substantive aspects of the decision - was noted as well. The reasoning behind coding for this factor is to mark the important differentiation between a focus on the substance of the case, for example on abortion itself, as opposed to the means by which the Court arrived to their abortion decision. The characterization of articles is especially important to this thesis as it reveals the type and

[155]For example, a neutral article could be one pertaining to the decision, but written from the context of legislative behaviour. Such articles may contain issues such as the specific discussion of the new laws, the future laws regarding these issues decided upon, or perhaps a detailed examination of the personalities involved in the case, such as a history of Dr. Morgentaler.

level of knowledge being communicated to the public by the press.

In coding for the characterization of articles, it became apparent that two additional categories had to be allotted within this grouping. First, not all articles dealt exclusively with one aspect of the decision. Hence, the category of "both" was created, to indicate articles that discussed, to some extent, both the substantive and procedural aspects of the decision.[156] Finally the category of "neutral" was created for those articles that dealt with the case at hand but not with its procedural or substantive issues.[157] Although these "neutral" type articles may appear to be irrelevant to the main argument of this paper, they are important simply by virtue of their appearance in the press, which lends visibility to the case at hand, and thus to the Court as an institution.

The final tabulation of the characterization of articles is critical to the larger argument of this thesis. For example, in the *Morgentaler* case, if the majority of articles were to focus upon the substance of the abortion debate, then the process by which the Court reached its abortion decision would be eclipsed. As a result, the public would gain minimal knowledge about the dynamics of the Supreme Court itself. Since the relevant literature has suggested that a lack of knowledge of the Supreme Court leads the public to perceive the institution in mythic terms, the implications of the media's emphasis on substance as opposed to procedure are decisive for the main argument of this thesis. In other words, if the media conveys only the practical outcome or result, meaning the substance, of a decision, and fails to discuss the true reasons for a decision,

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[156]Note - The articles within this category could have been classified into one of the first two schema, either substance or process, depending upon the factor that was most emphasized. However, it was decided that allowing for this category would present a truer image of the media reporting. Nevertheless, it must be noted that even within this category, some articles, although they do include both characterizations of the decision, might be deemed to emphasize one slightly more than the other.

[157]This category of "neutral" is similar in principle to the one in the grouping for the article's position. See

the public is left with an incomplete if not distorted view of the Court's decision. Emphasis by the media on substance might obscure the dynamics of decision-making and may lead Canadians to view the Court in symbolic rather than substantive terms, helping to legitimate the institution.

Before turning to the results of the empirical analysis, a word of caution concerning the methodology is in order. While the data set includes both the numerical frequency and content of the press stories, one factor that was not examined was the format or layout of the stories. Mass media scholars have emphasized that the location of an article within a newspaper, or the image attached to it, is often as important as the content of the story itself.[158] While this study moves beyond quantitative content analysis by examining the news articles on a story-by-story basis, it does account for all the underlying factors, such as article placement, which may affect the content.

3.3 Results [159]

Having examined all the articles for the three cases, several summary statements must be made, before looking at the specific results and their repercussions. First, it became apparent that the findings for the three cases had to be divided into two basic categories: the first category of findings was for the *Morgentaler* case, where the Supreme Court upheld the female appellant's Charter claim, and the second category was for the *Symes* and *Thibaudeau* cases, where the Court

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footnote 155.

[158] For a review of how format affects content, please see, Robert A. Hackett, News and Dissent: The Press and the Politics of Peace in Canada (New Jersey: Ablex Publishing Company, 1991) 18-30.

[159] Note- Because the goal of this section is not to compare my findings across the four newspapers, but to apply the findings of all the newspapers to further explore my hypothesis, my discussion of these empirical results will aggregate the findings of the newspapers as one whole. Nevertheless, the results per individual newspapers, are available by referring to Tables 1, 2 and 3.

rejected the women's Charter claims. The decision to support or reject these claims appeared to have a strong impact in their reporting in the papers. In addition to this factor separating the two sets of cases, they are also distinct due to their prevalence in the media. Whereas the *Morgentaler* case figured prominently in all the newspapers during the entire two week period, the *Symes* and *Thibaudeau* cases, pertaining to tax law, attracted far less media attention (see Table 4).

For these reasons, an examination of all the data for the three cases together, in the aggregate form, is not necessarily beneficial in terms of the first two factors examined, the number of articles, and the newspaper's position on the Court's decision. However, in terms of the third factor examined, the characterization of the articles, the separation between the two types of cases is unnecessary. Neither the subject matter of the case, the Court's decision, nor the article's position with regard to that decision appeared to have an impact upon the characterization of the Court's decision. Thus, for the results of the characterization of the articles, it was beneficial to look at the aggregate sum of all three cases together.

Results -- *Morgentaler* Decision

Of all three cases, the *Morgentaler* case generated the greatest amount of media attention, eliciting a total of 134 newspaper articles, in fact, more than the two other cases combined. Given that *Morgentaler*, "was clearly going to be the Court's most important and controversial decision to date"[160] media prevalence on this case came as no surprise. Moreover, in terms of Canadian judicial politics, this case represented one of the first times the Court was asked to

[160]F.L. Morton, Morgentaler v. Borowski: Abortion, the Charter, and the Courts, (Toronto: McClelland and Stewart, 1992): 231. In chapter 19 entitled, "The Decision That Rocked the Country".

exercise its new political power conferred by the recently adopted Charter.

Although the coverage was extensive, it was by no means unbiased in terms of the factors examined for this study. As can be seen in Table 5, of the 134 articles written in the four newspapers covered, 57.5 percent were favourable toward the Court's decision. Of these same 134 articles, there were twenty, or 14.9 percent that were clearly against the Court's *Morgentaler* decision. For the remaining 37 articles, it appeared that there was no clear stand taken on the Court's decision, and thus 27.6 percent of these were labeled as neutral.

In terms of the third and most revealing factor coded, the characterization of the articles, the results were as expected. Of the 134 articles found in the four newspapers, only twenty of them, corresponding to 14.9 percent, focused on the process by which the decision was taken. The majority of the articles, 64.9 percent, focused on substantive aspects of the decision (see Table 9). Many of the 87 articles that dealt with substantive aspects of the decision focused upon the controversial issue of abortion itself, upon the "gender split" of the decision among the judges of the bench, and on the misconstrued fact that the top court of the country had decided to rule abortion legal. For these 65 percent of the articles, there was thus little, if any, mention of the procedural aspects that truly characterized the decision.

As could be expected, not all the articles dealt exclusively with either the substantive or procedural aspects of the decision. Hence, nineteen of the 134 articles on this case (14.2 percent) discussed both the procedural and substantive aspects of the case. Finally, a small percentage of the articles dealt with neither substantive nor procedural aspects of the decision. Rather, these eight articles focused for the most part on issues stemming from the case, such as the development of legislative action concerning a new abortion law, or as in one article, a historical

profile presentation of Dr. Morgentaler himself. Of interest here is that, even when the number of articles labeled "both" substantive and procedural was added to the number of articles focusing only on procedure, the combined sum still is less than the number of articles dealing with substance.

In short, the results based on the newspaper coverage in first two weeks following the *Morgentaler* decision indicate that the papers favoured the Court's decision, which in effect struck down the abortion provision in the Criminal Code. In addition, although the majority decision of the Court was clearly procedurally based, the newspapers, in the aggregate, portrayed the decision as one that was based upon the substantive merits of abortion itself.

The patterns found for the *Thibaudeau* and *Symes* cases, although not identical to those in *Morgentaler*, are equally revealing to the arguments put forth in this thesis. Despite the differences found between the two sets of cases, the conclusions for all three cases complement and complete each other, and in the final outcome, the analysis of the results are consistent throughout the three cases.

Results – *Symes* Decision

In the *Symes* case, where a businesswoman wanted to deduct her child care expenses in her personal tax returns, one of the most glaring findings does not pertain to the articles themselves, but rather, the conspicuous shortage of articles. The *Symes* decision elicited a mere thirteen articles in total, for all four newspapers examined.

In terms of the stand taken on the Court's decision for the *Symes* case, the results do not correspond with those found in *Morgentaler*, perhaps due to the fact that the appellant's claim in

Symes was rejected, as opposed to the victory in *Morgentaler*. In the *Symes* case, the majority of the justices dismissed the appellant's argument on the basis that the *ITA* already precluded child care deductions, and that there was a lack of evidence with regard to the financial costs borne by women for child care. In the newspapers, this evidentiary gap was virtually disregarded, and the reasons for the majority's judgment were glossed over. In stark contrast to the *Morgentaler* case, where the dissenting judgments were barely mentioned, in *Symes* it was largely the voice of the two female dissenting judges that was highlighted. In addition, the press focused on Ms. Symes herself, albeit not always in an entirely sympathetic fashion. In this case, not one of the articles was explicitly favourable to the Court's decision. Rather, seven of the articles, just a little over half, were critical of the Court's decision, and the remaining six (46.2 percent) were neutral (see Table 6).

If one were to look at stand alone, it may appear that the media is not helping in terms of engendering specific support from the public. As has been shown, however, it is too simplistic to look at stand alone, as true conclusions can only be drawn once the stand of the articles are viewed in conjunction with the content, or what has been termed the characterization of the articles themselves.

With regard to the content of the articles, or their characterization, there was no ambiguity in the results found. Table 10 shows that of the thirteen articles written about the *Symes* case, only one of them focused upon only the procedural aspects of the case. In the category for both process and substance, two articles were found to discuss both aspects of the case. Thus, even if one were to add this latter limited discussion of process with the one article discussing process alone, the sum would be only three articles addressing the procedural aspects

of the case. In contrast, ten of the thirteen articles focused uniquely on the Court's decision and the substantive aspects of the case.

Results – *Thibaudeau* Decision

The *Thibaudeau* case, again, is one where the female appellant's claim was rejected, with the female justices on the panel dissenting. In essence, the justices in the majority and minority split on the issue of the role of family law. The majority believed that Ms. Thibaudeau's claim could be better resolved through the family law system, but the dissenting justices disagreed, arguing that this solution was unrealistic and impractical.

Even though conventional wisdom dictates that the *Thibaudeau* case generated substantial media attention, like the *Symes* case, newspaper coverage was minimal. Only sixteen articles were found in the two weeks following the decision in the four national newspapers combined.

A closer inspection of the number of articles per newspaper is beneficial to highlight this dearth of knowledge communicated. In the *Gazette*, read and relied upon for information by over 230 000 people, only six articles appeared in the first fourteen days following the decision. The *Globe and Mail*, Canada's national daily newspaper, published only four articles. In the French language *Le Devoir*, and in the *Vancouver Sun*, a mere three articles were published in each (see Table 3).

Within these sixteen articles, the findings are quite revealing in terms of the arguments put forth by this paper. As was discussed earlier, the Court rejected the cause of Ms. Thibaudeau, with the two women on the panel presenting a dissenting judgment. Echoing the supportive stand taken on the Court's *Morgentaler* decision, and in contrast with *Symes*, the newspapers again presented

the Court's decision in *Thibaudeau* in a positive light. Only nineteen percent of the articles, three out of the sixteen stories, were critical of the Court's decision. Seven of the articles, or 43.7 percent sided with the Court's decision. Finally, six articles, or 37.5 percent were neutral (see Table 7).

With regard to the characterization of the articles, the findings are more clearly divided. First, not a single article in any of the four newspapers emphasized only the procedural aspects of the decision, explaining that the majority decision was based upon a very narrow reading of the *Charter*. Three of the sixteen articles however, communicated, albeit to a limited extent, an *both* the procedural and substantive aspects of the Court's decision. In other words, for the *Thibaudeau* case, as far as Canadian newspapers were concerned, there was very limited discussion on the procedural aspects of the decision, and where this aspect of the decision was discussed, it was not dealt with exclusively, but merged with a discussion of the substantive aspects of the decision..

Table 11 indicates that the substantive discussion of the *Thibaudeau* case dominated the press in twelve of the sixteen articles (77.5 percent). Many of these stories focused on the gender battle as characterizing the *Thibaudeau* decision. In addition, the predicament of Ms. Thibaudeau herself became a main area of focus, with almost every newspaper pointing to her as a victim of gender politics. Like the other two cases examined, the essence of this decision was lost in the more attention-grabbing issues, as exemplified in the following quotation by Ms. Thibaudeau in the Montreal *Gazette*, "The female justices were the only ones who really understood the plight of single mothers struggling to feed their kids, Thibaudeau said".[161]

Finally, with the exception of one article, all the stories fit into either the process or substance categories, and only one article was coded as "neither".

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[161] *The Gazette*, "Child- Support taxation upheld; Top Court splits on gender lines", May 26, 1995, A2.

Aggregate Results

While the results for each case are generally representative of the findings as a whole for the three cases together, a major exception must be noted before tabulating the empirical results in the aggregate format. As was pointed out earlier, the number of articles as a whole is misleading, due the disproportionate number of articles on the *Morgentaler* case.[162] Thus, in for the first factor coded, the number of stories per case, the results can best be analyzed by dividing when the two sets of cases. Hence, the data in the *Morgentaler* case revealed that 134 articles were published. In contrast to this large number, the data for the second set of cases, thus the stories published for the *Symes* and *Thibaudeau* decisions combined, reveals only 29 articles altogether (see Table 4).

As can be seen in Table 8, in terms of the position taken on the Court's decision, 51.5 percent of all articles relayed the Court's decision in a positive light. As opposed to this majority figure, only 18.5 percent of the stories depicted the Court's decision in a negative fashion. The remainder of the stories, comprising of 30.1 percent, were neutral in terms of their stand. For this category, the *Symes* case does not appear to follow the results of the aggregate, for it can be recalled that none of the articles for *Symes* were positive. Rather, the stories on the *Symes* decision were almost evenly split in their position, between "anti" and "neutral".

The aggregate results are most consistent with respect to the characterization of the articles. For all of the cases, the emphasis was disproportionately upon the substance of the decision, and this proclivity virtually to ignore the procedural aspects of the decision, was again reflected in the aggregate results. Table 12 thus indicates that 67.5 percent of all the stories emphasized the substance of the cases , as opposed to 12.5 percent, that explained the procedural realities upon

[162] Note - The reasons explaining this discrepancy in amount of coverage were detailed above.

which these decisions were based. Disregarding the 14.7 percent of articles that dealt with both the substantive and procedural aspects of the decision, and the 5.5 percent that dealt with neither of those issues, the ratio of "substance" articles to "process" articles is a stunning 5.5 to 1.

CHAPTER 4

ANALYSIS AND CONCLUSION

The examination of selected Canadian newspaper coverage of three key Supreme Court cases provides the basis for some preliminary observations relevant both to judicial politics and communications. A major assumption of this thesis was that the general public possesses a minimal knowledge and understanding of the Supreme Court. If, according to the body of literature generated from the field of communications, the media is indeed one of the primary sources for the public's political socialization, then it appears from these results that in so far as the Canadian public is relying on these newspapers for knowledge about the Court, they are receiving very little information. Moreover, it appears that even the limited knowledge being transmitted to the public is somewhat misconstrued. A closer discussion of the empirical results is in order, to analyze this matter further.

Numerical Frequency

In terms of the first factor examined, the numerical frequency of Court coverage in the newspaper, the original expectation of minimal coverage was not substantiated for *Morgentaler*, but was confirmed for the second set of cases.[163] The *Morgentaler* case, however, may be viewed as representing an outlier case in this respect. Although this proposition has not been tested, and in fact may prove to be an interesting area for further research, it appears that the amount of coverage that was found for the second set of cases is more representative of media

[163]Note --- It is possible that the original assumption, based on conventional wisdom, was correct for media in general. In other words, perhaps other forms of media, such as radio and television, extended greater coverage to these cases. Nevertheless, as was indicated earlier, a great percentage of the Canadian population relies on newspapers not only as a primary source of information, but also as a guide as to agenda setting and news relevancy.

behaviour in Supreme Court reporting. This premise is based on the fact that the *Morgentaler* case not only received an exceptional amount of attention due to its controversial nature, but also because it involved many sub-issues, including the fact that it was one of the first major cases decided under the Charter of Rights.[164]

In the second set of cases, however, the assumption in terms of numerical frequency was confirmed. In fact, the newspapers carried fewer articles concerning these decisions than was anticipated. Although the expectation was not one of finding pages of coverage every day, it certainly was anticipated that the papers would ascribe a higher priority to matters of such social relevance.

At this point, one could begin the discourse on the fact that this "invisibility of the Court" contributes to its positive "mythic" perceptions by the public, the myth of the Court and its justices. Based on the arguments put forth earlier, the low salience of the Court, only one of the findings of this thesis, in and of itself may be contributing to the Court's support. In light of the earlier arguments made by Engstrong and Giles that diffuse support is a function of the relative ignorance of the public, and that low visibility of judicial outputs is a likely source of judicial support, the results found for this variable alone, seem to have important implications. Such an argument, at this stage, is premature. A stronger argument of this nature is based not only upon the quantity of coverage but also upon its quality.

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[164]In light of its controversial subject matter alone, it is likely that the *Morgentaler* case would have attracted a disproportionate amount of media attention. Moreover, F.L. Morton, in his book, Morgentaler v. Borowski: Abortion, the Charter and the Courts [15-16] explains that the abortion battle "became a metaphor for a series of larger and older conflicts" such as the issues of West versus East, Protestant versus Catholic etc..... These sub-issues underlying the case undoubtedly made it that much more appealing to the media, perhaps more appealing than the majority of Supreme Court cases.

Position

A review of the aggregate results relating to the position of the articles reveals that the media sided with the Court's decisions in 51.5 percent of the articles. Although 51 percent barely constitutes a majority, this figure is considered important and telling by virtue of its comparison with the eighteen percent of the articles that were critical of the Court's decision. The ratio of positive to negative articles is thus nearly three to one (see Table 8).

The positive position adopted towards the Court may be viewed as contributing to its specific support, which is based directly on actions taken by the Court. Since specific support emphasizes evaluations of the Court's particular outputs, the fact that the media is presenting the Court decisions in a positive light is consequential to understanding the sources of support extended to the Canadian Supreme Court.

While the aggregate results indicate a propensity for the press to portray Supreme Court cases positively, the individual results for the *Symes* decision do not conform with the overall pattern. In the coverage for this case, where 46.1 percent of the articles were negative with regard to the Court's decision, it appears that specific support is not being extended to the Court. These results may seem to counter the original expectation that the media would convey the Court's decision favourably, and hence extend specific support for the Court. Although the *Morgentaler* and *Thibaudeau* decisions were presented in a positive light, the discrepancy found in the somewhat negative reporting of *Symes* calls for closer attention as it illuminates a critical point about news coverage of the Court.

A closer look at the aberrant results found in the *Symes* case reveals only that specific

support, and not diffuse, was affected by the negative reporting. As was suggested earlier, this thesis is not making an argument uniquely for specific support. For such an argument to be substantiated, the majority of articles for all cases would have to be reported positively. Moreover, a strong argument for specific support might require research of greater rigour than was possible in this thesis. Such a project would entail looking at a greater number of cases, over a longer period of time, and using very specific and replicable indicators to qualify a positive or negative stand.

Rather, this preliminary research looked at the articles' stand and specific support as it contributes to diffuse support. From this perspective, the results found in the *Symes* case in fact substantiate and even strengthen the larger argument of this thesis. For, although the newspapers appeared to be critical of the *Symes* decision, the criticism was limited to the justices themselves, and did not extend to the Court as a whole. Thus, the criticism of the case, which centred around the fact that it was gender divided, focused entirely upon the outcome of the debate, and the particular justices that decided it. At no point did this specific criticism translate into a an undermining of the institutional legitimacy of the Supreme Court.

Characterization

The results thus far have indicated that the media may be helping to perpetuate both specific and diffuse support for the Court. The results for the third variable measured, the characterization of the articles, provides further confirmation of these arguments, as they are the most telling in terms of the wide discrepancy found between the two factors measured.

For this portion of the quantitative analysis, the results were consistent for all three cases,

and appear to be consistent with the theoretical studies and expectations regarding this matter as well. The characterization of articles, and their overwhelming emphasis on the substance of the decisions proved to be the most striking feature of the results. While the respective cases were decided upon very narrow procedural grounds, these important aspects of the decisions disappeared amidst the media's generalized and at times sensationalized coverage of the respective decisions. A closer look at the media coverage, on a case per case basis, is necessary to highlight this point.

The *Morgentaler* case represents perhaps the clearest discrepancy between the reality of a decision and its coverage in the press. We can recall from the *Morgentaler* summary that the majority decision was especially narrow and procedurally based. While the decision had the effect of striking down the Criminal Code's prohibition of abortion, with the exception of Madame Justice Wilson, the majority deliberately refrained from passing judgment on the substantive merits of this regulation. In fact, Chief Justice Dickson took pains to "transform[ed] *Morgentaler, Smoling, and Scott* from a case about substantive abortion rights into one about procedural rights of criminal defendants".[165] A reading of the newspapers, however, tells a very different story.

In his book about the *Morgentaler* case, F.L. Morton's description of the media coverage correlates exactly with the newspaper results of this study: "Th[e] division within the Court, not to mention the other nuances and subtleties of its decision, quickly disappeared as the media relayed the news across the country".[166] One of the most surprising aspects of the content of the

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[165] Manfredi, Canada and the Paradox of Liberal Constitutionalism: Judicial Power and the Charter, 118.

[166] Morton, Morgentaler v. Borowski: Abortion, the Charter, and the Courts, 233.

articles was the distinct absence of reporting of the dissenting opinions, almost to the extent that the decision appeared unanimous. The failure of the press to give due emphasis to dissenting opinions in the *Morgentaler* case may be the result of characteristics of the press itself. As was noted in the earlier review of the functions and problems of the media, the press cannot discuss everything it considers important, and moreover, it has less interest in the complexities inherent in most controversial issues than in attracting audiences.

This notable omission of dissents may stem from characteristics of reporting and restraints placed upon the press, but it may also be due to the press' desire to preserve the image of the Court, and hence perpetuate its mystique. One element of the myth surrounding the Supreme Court is of unanimity and consent among the justices on the panel. Such an image of harmony among the justices helps bolster the legitimacy of judicial review. In keeping with its third prescribed role, to socialize individuals into their cultural setting, it is likely that the press attempts to promote this perception of the Court. Since this function of the media is to help foster consensus for the political system, it is likely, especially at the beginning of judicial review under the Charter of Rights, that the media would have purposefully downplayed the differences of opinions among the justices in order to establish the initial legitimacy of the Court. Hence, while the dissents were minimized in the coverage of the Morgentaler case, which arrived to the Court's docket only three years after the entrenchment of the Charter, the portrayal of a unanimous Court was no longer as critical in the later *Symes* and *Thibaudeau* cases. With the passage of time, and the acceptance of the Charter as part of political life, this element of the myth is no longer necessary. Regardless of the reason for this omission of dissenting opinions, the result may be viewed as preserving the mystique of the Court.

The newspapers were filled with stories trumpeting the pro-abortion decision. Predictably then, the findings in this category indicated that only 14.9 percent of the articles explained the reality of the decision. The remainder of the articles mostly offered distorted versions of the true *Morgentaler* decision, focusing to a large extent on the conflict between "pro life" and "pro choice" activists. The decision was relayed in a manner that suggested the Court had sided with the "pro choice" camp, when in reality, only one of the seven justices, Justice Wilson, declared a constitutional right to abortion.

It is likely that the ambiguity of the *Morgentaler* decision and the discrepancy between the written opinions and the media coverage of the case impeded later legislative efforts to deal with the decision. Despite the determination of the Mulroney government to respond to the nullification of section 251 promptly, to date, all of Parliament's attempts at passing new legislation on abortion have failed.[167] The fruitless attempts of the Canadian government to respond legislatively to the Court's *Morgentaler* decision may be due to the fact that the public believed the Court had sided with the pro-choice camp. This public perception may have made it difficult for Parliament to legislate on this matter, as the widely held public perception does not reflect the true opinions presented in the *Morgentaler* decision. Hence the oversimplified and often misleading coverage of the case may be one of the causes for the defeat of every proposal to legislate on abortion.

An analogous pattern of reporting was evident for the second set of cases. Like the *Morgentaler* decision, a review of the actual case decisions in *Thibaudeau* and *Symes* shows they

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[167] For a greater discussion of the post-*Morgentaler* attempts at legislation, see Thomas Flanagan, "The Staying Power of the Legislative Status Quo: Collective Choice in Canada's Parliament After *Morgentaler*", Canadian Journal of Political Science, 30 (March 1997): 31-53; and F.L. Morton, Morgentaler v. Borowski: Abortion, the Charter, and the Courts, 250-260.

were both decided on primarily narrow legal grounds. The newspapers, however, focused purely upon the outcome of the cases, gender politics generally, and more specifically the gender of both the litigants and the actual decision makers on the Court.

In the *Symes* case, it will be recalled, the evidence before the Court demonstrated that women, including women entrepreneurs and female lawyers as Ms. Symes, bear the disproportionate share of the "social costs" of the child care burden. However, for the majority, in order to establish that non-recognition of child care constituted adverse effects discrimination on the basis of sex, Ms. Symes needed to show that women disproportionately pay the "financial costs" of child care. Her claim was rejected simply because the Court was unwilling to infer a positive child care expense burden from the evidence of the social burden.

At no point did the press coverage of this case spell out that it was this evidentiary gap which led to the majority decision. As opposed to its depiction in the papers, a reading of the decision shows that it was not a case about "The Taxman and the Children"[168] as one *Globe and Mail* headline would lead us to believe. This case did not involve male justices weighing the substantive merits of tax deductions for golf dues and cars, as opposed to the cost child care deduction. However, article headlines such as "They Just Don't Get It: Decision shows need for more women on the bench"[169] suggest that the females on the panel dissented due to their empathy with the female appellant, and the plight of females in general, when in truth the decision of Madame Justices McLachlin and L'Heureux-Dubé were based upon role orientation differences.

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[168] *The Globe and Mail*, Dec. 20, 1993, A12

[169] *The Gazette*, Dec. 19, 1993, B2.

The evidentiary gap which led to the majority judgment in *Symes* did not exist in *Thibaudeau*. However a parallel phenomenon was evident in the reporting of both cases, perhaps because both were decided by the majority on narrow procedural grounds, and both featured the same gender patterns of female dissent. In the latter case, the claimant Thibaudeau regarded herself as disadvantaged by the "deduction - inclusion" provisions of the *ITA*, which compelled her to pay tax on the child support payments she received, and allowed her ex-spouse, the non-custodial parent, to deduct this sum. The male justices upheld the *Income Tax Act*, claiming that the deduction inclusion system was, *on the whole*, beneficial, to separated custodial parents. The justices of the Court thus divided on two technical issues (i) the definition of the group affected by the legislation (i.e.: unit of analysis) and (ii) the proper role of the family law system as the method of resolving the problem.

Clearly, these differences were based upon ideological views on the nature of Charter interpretation, and not, as the press conveyed, on the degree of one's sensitivity to the difficulties for women of the family breakdown. As opposed to what was relayed in the press coverage, all the justices on the panel determined that Ms. Thibaudeau's predicament might seem unfair. The majority simply believed the best place for her to resolve such an inequality would be in the system of family law courts. The newspapers, however, reported this as a gender politics case, with the outcome perceived as a loss for women's equality. In fact, the majority avoided mentioning gender issues almost entirely, and concluded that discrimination was not even an issue in the case.

A case in point depicting the oversimplification of coverage for this decision, was the disproportionate emphasis placed on Ms. Thibaudeau herself, to the exclusion of other parties

and issues in this case. Her comments following the case, such as "[L]aws are made by men for men"[170] were repeated in nearly every article examined. The outcome of the case. much less the personal reaction of Ms. Thibaudeau were not as important as the legal issues at hand. The press focused almost exclusively on the reaction of Ms. Thibaudeau, characterizing her as a defender of single mothers and as a champion of women's rights in Canada, rather than on reporting. let alone explaining, the actual reasons for Court's decision. The portrayal of the *Thibaudeau* decision would have been more complete had Thibaudeau's ex-husband been interviewed as well, or perhaps if the coverage had included the opinions of groups representing non-custodial parents. Rather, the prominence given to direct quotes from an irate Ms. Thibaudeau, such as, "I'm angry and I'm tired and I'm ashamed to live in a society that doesn't make room for women and children",[171] bears testimony to the skewed nature of the coverage.

In sum, the results for the three categories examined substantiate, for the most part, the earlier expectations regarding media coverage. In terms of numerical frequency, the cases were only minimally covered, and in terms of quality, they were only given summary treatment. While some exceptions were found, such as a large number of articles for the *Morgentaler* case, and a somewhat negative stand on the *Symes* decision, these aberrations were not ignored, but rather accounted for and explained within the context of the larger arguments put forth by this thesis.

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[170] "Top Court Upholds Tax on Support; Custodial Parents not Discriminated Against", *The Vancouver Sun*, May 26, 1995.

[171] "Child-Support Taxation Upheld; Top Court Splits on Gender Lines; Rock Plans Changes", *The Gazette*, May 26, 1995 .

3.5 Conclusion

In 1956 the Washington correspondent for the Manchester *Guardian* noted that, "The Supreme Court is the worst reported institution in the American system of government".[172] This thesis begins to explore and extend that assessment with regard to the Canadian Supreme Court, qualifying the conclusions of American research to the Canadian context. Accordingly, the relationship and contribution of media coverage to the legitimacy of the Supreme Court of Canada has been analyzed.

Public support for the Supreme Court and its decisions is essential for the Canadian constitutional system of government because of the central role the Court plays. Since the Court has no enforcement power, its viability as an institution depends upon the legitimacy extended to it by its constituents. Clearly, the lack of any formal mechanism of institutional legitimacy renders the Court substantially dependent upon the public support, or at the very least public acquiescence to the Court's authority, defined in terms of images of the institution graven in the public's mind.

Much of the literature on the images of the Court suggests that the Court enjoys a "special status" in the public mind. Given that the population in general has little direct contact with the Court or its decisions, this thesis posits that the media portrayal of the Court dominates the public's understanding, if not misunderstanding, of the institution. The printed press' portrayal has been analyzed by examining how three Court decisions were presented in popular Canadian newspapers.

While public support is critical for the Court, the results of this study support the

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[172]Max Freedman, "Worst Reported Institution", Nieman Reports (April 1956): 2.

proposition that the public appears to be basing its legitimacy on a false premise -- on a myth of the Court built upon incomplete, oversimplified and often one-sided information. More specifically, this thesis suggests that the information, or lack thereof, contained in Canadian newspapers with respect to the *Morgentaler*, *Symes* and *Thibaudeau* cases may help to contribute to a mythic perception of the Court. This thesis demonstrates that both the quantity and quality of media coverage of the Court warrants further study. Current printed press coverage provides the public with a distorted image of the Supreme Court, an image that is conducive to perpetuating the myth of the Court. This distorted image of the Court helps in turn to strengthen its support and legitimacy in the eyes of the public.

Before turning to the wider implications of these preliminary findings, it is useful to attempt some explanation as to why this process occurs. As can be recalled from the theoretical analysis of the communications literature, qualities inherent to both the Court and the media help perpetuate the myth of the Court. From the perspective of the media writing for the lay audience, it is often the most alluring and "newsworthy" issues that receive attention. As one reporter put it, "The way they [U.S. Supreme Court] got there - the technical stuff - is only interesting to a lawyer. The reader just wants to know what did they say and why did they say it".[173]

Paradoxically, the muzzled nature of the coverage of decisions speaks volumes to the fact that the Court is not seen by the public as an important institution. As Maxwell and McCombs explained, through the media's agenda-setting function, it determines the salience of events in the public mind. Hence, the marginalization of the Court in the news

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[173] Dawn Weyrich Ceol, Former Washington Times reporter, quoted in Davis, Decisions and Images: The Supreme Court and the Press, 84.

not only is leading to a lack of information and knowledge, it is advising the public not to ascribe a great deal of political significance to the highest court of our country.

As for their role as educators, newspapers are providing only a superficial critique of the Court as a basis for public discourse. The coverage focused almost entirely on the merit of the issues to be decided. With the exception of a few articles on the *Symes* case, at no time did the coverage focus on the central issue, and one of the subjects of this thesis, regarding the judicial process; namely, the legitimacy of the Court to overturn legislation.

From the Court's perspective, the perpetuation of the myth may be viewed simply as a problem of inadequate and incomplete transmission of information between the Court and the press. The complicated issues facing the Court coupled with the complex nature of judicial decision making explains the substandard coverage. As shown earlier, problems include the ambiguity of the Court's message, the technicality of its language, and the Court's isolation from the public.[174] These characteristics of the Court do not lend themselves to easy reporting.

While the myth perpetuation from the Court's perspective may arise from these complications, the dynamic at hand bears serious consequences, and should be cause for concern to judicial process scholars and the public alike. In particular, one of the misinterpretations of the Court's work, the description of the Court's decision-making, merits special attention as it relates to the institutional legitimacy of the Court to review policy. One of the major foci of the newspaper articles in all three cases was the gender split among the justices on the panel. This review suggests, however, that rather than the

[174]Grey, The Supreme Court and The News Media, 23.

gender cleavages reported in the news, the real differences in the decisions studied were ideological in nature.[175] The dissenting judgments of Madame Justices McLachlin, and L'Heureux-Dubé in *Symes* and *Thibaudeau* do not necessarily reveal a greater sensitivity to the realities of women, as was promulgated by the newspapers.

Dissenting judgments are a reality in judicial decision making, and indeed the number of dissenting opinions is rising every year.[176] The dissenting opinions in *Symes* and *Thibaudeau* merely reflect a more activist vision of the Charter as a vehicle for disempowered groups to challenge inequalities. In the *Symes* case, for instance, the women justices were making a policy decision that the males on the bench simply were unprepared or unready to make due to a lack of empirical evidence. In the *Thibaudeau* case, the newspapers failed to address with any emphasis the problems inherent in the Canadian family law system. The fact that it was the females on the panel that dissented had little to do with their empathy with the female appellants. While the press' account is facile and superficially seductive for the public, a careful analysis of the separate opinions reveals that the clash was not one of gender but rather of judicial philosophies.

It is perhaps coincidental that these were women's cases, and it was the women on the bench who were more activist in their approach to judicial decision-making. This argument is evident clearly in the *Symes* and *Thibaudeau* cases, but applies as well to the opinion penned by Madame Justice Bertha Wilson in the *Morgentaler* case. Although she

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[175] Ideological decision-making has been the subject of much qualitative and empirical research. See footnote 35.

[176] See F.L. Morton, Peter H. Russell and Troy Riddell, "The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982 - 1992", National Journal of Constitutional Law 5 (1994):32-33.

did not dissent, Wilson did present separate reasons for judgment, in which she revealed a very different approach to Charter decision-making from that of her colleagues. Unlike the female justices for the other set of cases, Wilson did become a vanguard for the cause of women,[177] yet in doing so, she also articulated her ever present activist view of judicial review. Whereas her colleagues approached the issue only as a matter of security of the person, she was the sole justice on the bench, whether male or female, willing to free her judgment of merely procedural or formal issues.

The legitimacy extended to the Court despite the ideological decision-making taking place in these cases ties in to broader themes in the constitutional debate over the scope of judicial review. The finding that the Supreme Court and its decisions have such low salience in the public mind inevitably raises serious questions about the source of public support for the Court. For, if the public is basing its support on a myth, then what basis exists for the legitimacy of the Court to overturn legislation? The evidence presented in this thesis reveals significant possible support for the Court, possible support which provides the Court with considerable legitimacy, but surprisingly that support is based upon misconceptions about the institution transmitted by the press. The fear in terms of judicial power, is that "judicial review, taken too far can become an anti-democratic power, wielded by courts to alter the fundamental character of a nation's constitution without significant

[177] Wilson was explicit in this respect, as evidenced in her judgment: "It is probably impossible for a man to respond, even imaginatively, to such a dilemma [abortion] not just because it is outside the realm of his personal experience, (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma". See *Morgentaler*, 555.

popular participation *or even public awareness.*[178]

The findings of this thesis therefore speak to the two distinct but related schools of judicial interpretivism and judicial self-restraint. Interpretivists contend that judges should only uphold and enforce laws and norms which are clearly stated, or reasonably derivable from the written constitution. In light of the questionable nature of the Court's legitimacy, as presented in the preliminary findings of this thesis, it is reasonable to follow the words of interpretivists, who prefer that judges look to the framers of the Constitution. The legitimacy of judges overturning the laws of democratically accountable legislatures on the grounds that they violate the Constitution would be enhanced if the justices manifested a more narrow and restrained reading of the Constitution.

The paradox that exists in terms of the findings of this thesis, is that legitimacy prevails even though the activist decisions of the judges are not being camouflaged in the news. The perception of legitimacy in the eyes of the public prevails, however, because the media never challenges the legitimacy of the Court's activism. In fact, the opposite was true, as the judgments that were most severely criticized were the ones that did not lead to activism. A reading of the articles in the newspapers leads one to believe that when individual justices refuse to strike down legislation, as in the *Symes* and *Thibaudeau* cases, they are not fulfilling their proper role. Hence the message that is extended to the public is that courts ought to be more activist in their review of legislation.

Even though the individual justices on the bench were criticized for their gender politics, it would take a long time for criticism of particular judges to translate into criticism

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[178] Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism: 9. [Emphasis added].

of the institution and thereby undermine its institutional legitimacy. Moreover, even this limited criticism of the Court is particularized, and framed in terms of the outcomes of decisions. Most importantly, although the actual decisions are being communicated, they are not being explained within a historical context of the Court and judicial decision making – at no point has the media provided an evaluation or analysis of the Court as a political institution. Thus, in terms of "agenda setting', the validity of judge made policy is not addressed. As a result, "Canadians have little understanding of the political significance of judicial interpretation of the constitution".[179]

Implicit here is the argument that Canadians would extend less legitimacy to the Court if they had an understanding of the political significance of the Court's actions and the framework within which those decisions are taken. Taken even further, one could argue that that visibility imperils the myth of the Court, a myth which sustains its legitimacy. It is not within the limits of this study to make such sweeping arguments. Nevertheless, recognizing the findings here, it is suggested that the scope of judicial review should be limited so as to avoid the danger of constitutional supremacy collapsing into judicial supremacy.

To suggest that the Court should be limited in its judicial review due to its basis of legitimacy in the public mind is not to deny that judicial review can serve as a positive element in our democracy.[180] However, bearing in mind the findings of this thesis, it might

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[179] So important is this fact that Constitutional scholars, Russell, Knopff, and Morton begin the introduction to their book on leading constitutional decisions with it. See Federalism and the Charter: Leading Constitutional Decisions (Ottawa: Carleton University Press, 1990) 3.

[180]For a discussion of the merits of constitutional review, see, David Beatty, Talking Heads and the Supremes: The Canadian Production of the Constitutional Review (Toronto: Carswell, 1990).

be wise to reconsider the nature of the relationship between the general public and the Supreme Court of Canada. Since the media serves as a major determinant of political and social knowledge, its coverage of the Court should be reevaluated. From the perspective of the Court, it too should strive to make its decisions and their justification more intelligible to the public at large. Finally, because political instruction is not the sole responsibility of the Court and media, other agents of socialization, including academic institutions, such as schools, should rethink fundamentally their assumptions and approaches in teaching about the Court.

The purpose of a thesis is not only to make contributions to the field but also to suggest further avenues for research. It is my hope that this study will both make a contribution to understanding and inspire further study of the relationship between the Court's legitimacy and the media. This area merits further investigation because of central role of both the media and the Court in the democratic process. Since the entrenchment of the Charter in 1982 it is even more obvious than before that the actions of the Supreme Court have serious political and social implications. Given the increasingly persuasive influence of the Court, more rigorous and extensive testing of the issues submitted here are in order. A more thorough testing of the variables is also suggested in terms of the media, especially in view of the increasing use of new electronic publishing alternatives. Researchers may therefore find the present work useful in formulating hypotheses for a more systematic analysis of the aforementioned relationship.

A further issue to consider is the implications of these findings for the future. As the Court is engaging in a growing number of policy making-decisions, it appears that the

findings of this thesis may become more consequential with the passage of time. In 1988, when the *Morgentaler* decision was delivered, it sparked tremendous interest in part because the Court was deciding on such a controversial and politically charged issue. However, by the time the *Symes* and *Thibaudeau* cases made their way to the Court's docket, policy-making as a role for the Supreme Court was no longer as contentious an issue, except of course for interpretivists. Hence, with the entrenchment of the policy-making role of the Court and the apparently inevitable media-influenced public acceptance of such a role, will we witness a rise in the myth of the Court?

At this point, the relationship between the media and the Court can also be examined from an opposite viewpoint. While there is a general consensus in the literature confirming the existence of an inverse relationship between public knowledge of the Court and support for the institution, an alternative hypothesis is possible. Arguably, the public's misunderstanding, if not ignorance, of the Court and its work potentially jeopardizes the Court's mantle of institutional legitimacy. The media's oversimplification, when viewed from such a perspective, could well work to undermine the Court's legitimacy. This proposition might serve as an interesting follow-up study to this thesis; however it might be difficult to realize given the considerable evidence from at least the American experience detailing the positive myth of the Court. In addition, notwithstanding the media's oversimplification of the work of the Court, the results of both the theoretical studies and the empirical data reviewed here indicate not only that the decisions of the Court are likely to be communicated favourably, but that the media tends to be supportive of the Court in general.

Having presented the difficulties, possible solutions, and areas of future study in the relationship between the media and the public perception of judicial legitimacy, a few questions and limitations of this thesis remain to be addressed. One is the degree to which this study, limited as it is to four newspapers and three Court cases, is a universal indicator of the media's role in perpetuating public perceptions of the Court. Will the pattern for all media behaviour, including the recent development of the Internet, be supportive of these findings?

Moreover, is the pattern exhibited in the *Morgentaler*, *Symes*, and *Thibaudeau* cases an indicator of a trend for all Court decisions? If the trend of increasing judicial activism persists, will public support be affected? Will the myth of the "impartial judicial robes" disintegrate as the Court plunges deeper into the political process, or will the public continue to remain "blissfully unaware" and blindly accepting of the activism of the third branch of government? This thesis bears witness to the fact that, "despite the growing celebrity of the Supreme Court, we continue to have a relatively primitive understanding of its role in Canadian political life".[181] In a liberal democracy, characterized by a free press and a free judiciary, such a state of affairs is not only perplexing, it is disturbing.

[181] Patrick Monahan, Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada, 4.

TABLE #1

RAW DATA: MORGENTALER CASE (1988)

TOTAL NUMBER OF ARTICLES: 134

		GAZETTE	GLOBE & MAIL	VANC. SUN	LE DEVOIR	TOTAL
POSITION	For	12	22	30	13	**77**
	Against	4	8	4	4	**20**
	Neutral	7	10	16	4	**37**
CHARA*	Process	4	12	2	2	**20**
	Substance	11	24	39	13	**87**
	Both	6	4	6	3	**19**
	Neither	2	0	3	3	**8**

* CHARACTERIZATION

TABLE #2

RAW DATA: SYMES CASE (1993)

TOTAL NUMBER OF ARTICLES: 13

		GAZETTE	GLOBE & MAIL	VANC. SUN	LE DEVOIR	TOTAL
POSITION	For	0	0	0	0	**0**
	Against	2	2	2	1	**7**
	Neutral	2	1	2	1	**6**
CHARA*	Process	1	0	0	0	**1**
	Substance	3	2	3	2	**10**
	Both	0	1	1	0	**2**
	Neither	0	0	0	0	**0**

* CHARACTERIZATION

TABLE #3

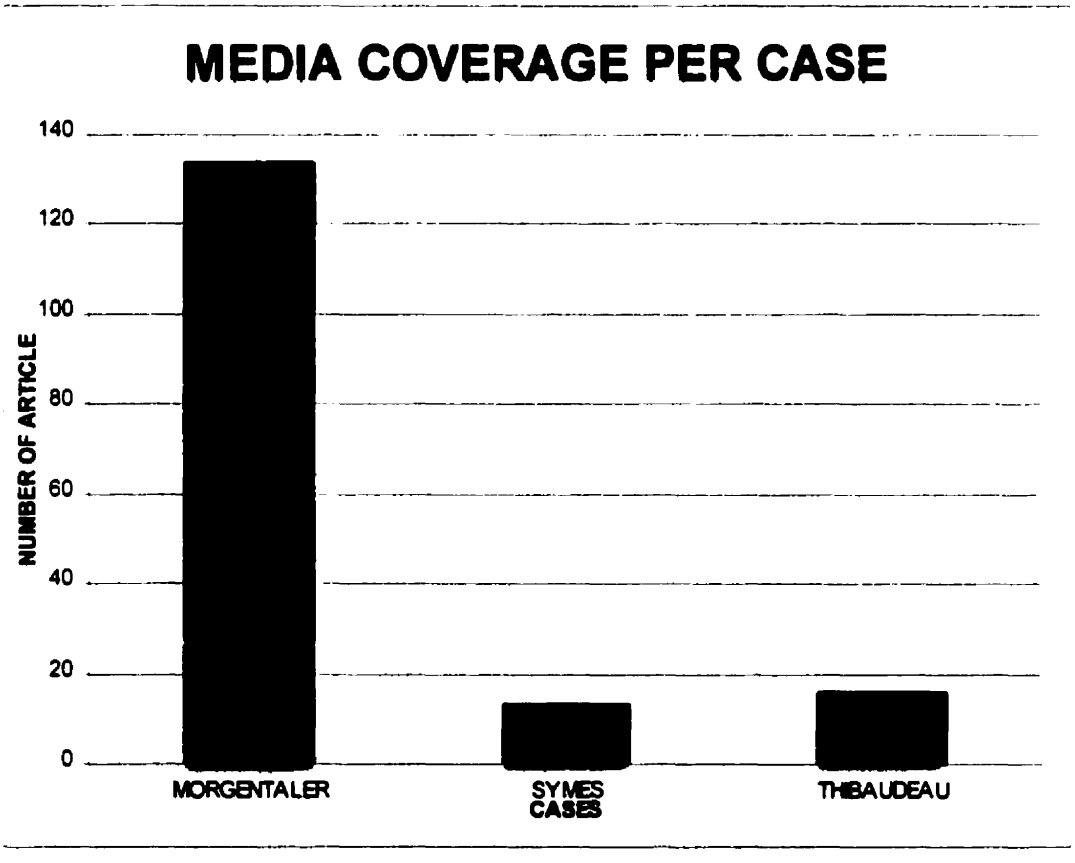
RAW DATA: THIBAUDEAU CASE (1995)

TOTAL NUMBER OF ARTICLES: 16

		GAZETTE	GLOBE & MAIL	VANC. SUN	LE DEVOIR	TOTAL
POSITION	For	4	1	1	1	**7**
	Against	1	0	0	2	**3**
	Neutral	1	3	2	0	**6**
CHARA*	Process	0	0	0	0	**0**
	Substance	3	4	3	2	**12**
	Both	2	0	0	1	**3**
	Neither	1	0	0	0	**1**

* CHARACTERIZATION

TABLE #4


MEDIA COVERAGE PER CASE
NUMBER OF ARTICLE
140
120
100
80
60
40
20
0
MORGENTALER
SYMES CASES
THIBAUDEAU

POSITION OF ALL ARTICLES

TABLE #5: MORGENTALER

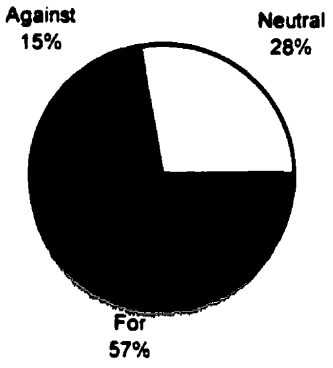


TABLE #6: SYMES

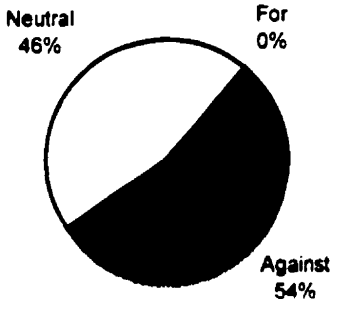


TABLE #7: THIBAUDEAU

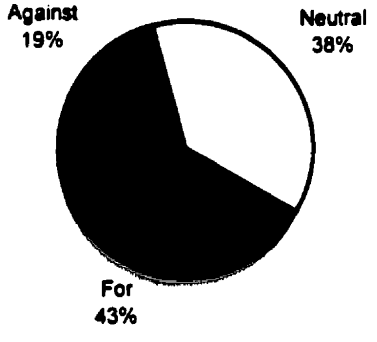
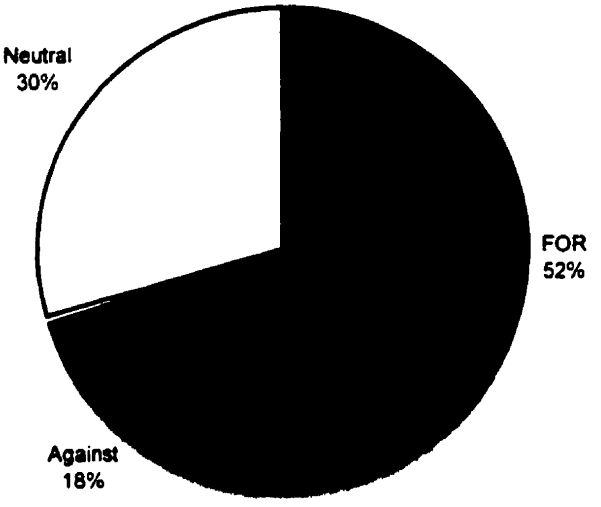


TABLE #8

POSITION OF ALL ARTICLES FOR ALL THREE CASES



CHARACTERIZATION OF ALL ARTICLES

TABLE #9: MORGENTALER

TABLE #10: SYMES

TABLE #11: THIBAUDEAU

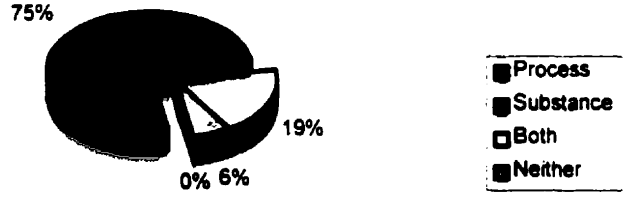
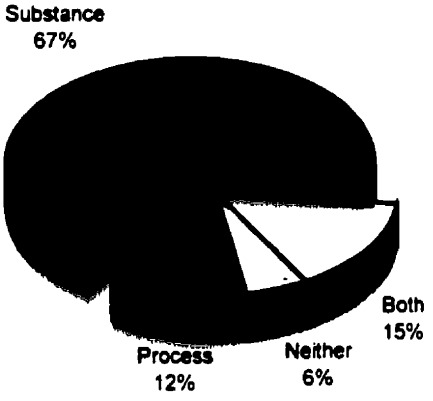


TABLE #12

CHARACTERIZATION OF ALL ARTICLES FOR ALL CASES



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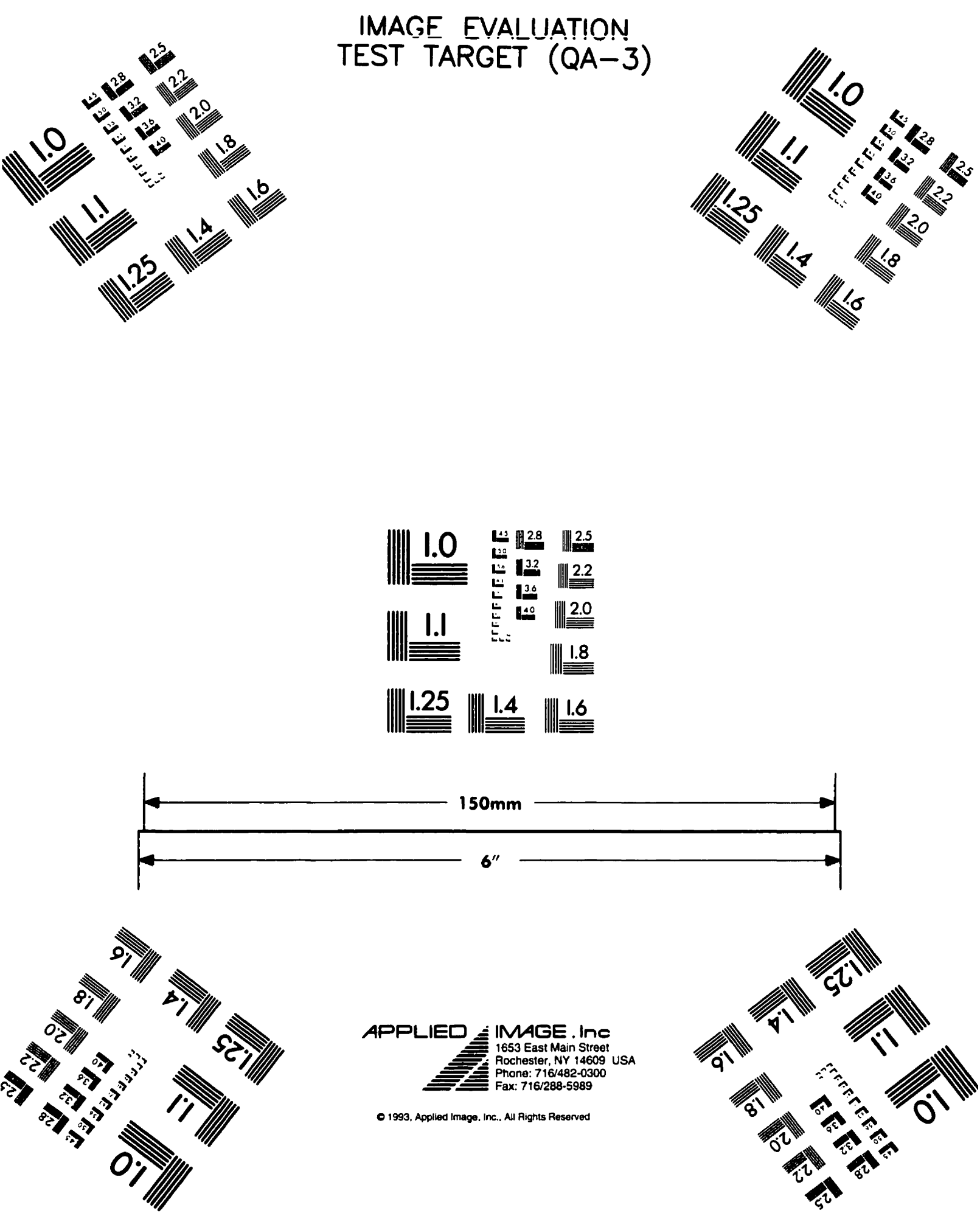
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