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THE IMPACT OF INTEREST GROUPS ON JUDICIAL DECISION MAKING:
A COMPARISON OF WOMEN’S GROUPS IN THE U.S. AND CANADA

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

Lori Joanne Hausegger, B.A., M.A.

* * * * *

The Ohio State University
1999

Dissertation Committee:  
Approved by
Professor Lawrence Baum, Advisor

Professor Gregory Caldeira

Professor Elliot Slotnick

Advisor
Political Science Department
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Lori Joanne Hausegger
1999
ABSTRACT

This project is a study of the determinants of judicial behaviour and judicial policy. It focuses on the impact of interest groups on judicial decisions and examines the success and influence of women's interest groups before the American and Canadian Supreme Courts. The first part of the dissertation involves multivariate analyses of individual cases with decisions analyzed in terms of both outcomes (reversal or affirmance) and doctrines (judicial reasoning supporting the outcomes). The second part of the project shifts the focus to qualitative analyses of the development of doctrine in policy areas in order to examine the extent to which groups are successful and influential over the long term in the areas of interest to them. Those analyses consider development of judicial doctrine as well as legislative action on the same issues.

The analyses in the first part of the project discovered that two of the three American groups studied were both successful and influential in terms of case outcomes. The Canadian group was also successful and influential at this level. However, none of the women's groups were particularly influential at the case level in terms of doctrine. The second part of the project discovered that the women's groups did have influence on the development of doctrine in the long term. The analyses also discovered that American models of judicial decision making do not have as much explanatory power in Canada at the individual case level. However, the Supreme Courts in both countries did appear to be
influenced by similar factors over the long term. The study concluded that women’s
groups’ litigation is worth the time and resources devoted to it.
To My Parents
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VITA

June 8, 1970 .......................................... Born – Calgary, Alberta

1992 ...................................................... B.A. (HON), University of Calgary

1994 ...................................................... M.A. Political Science, University of Calgary

1994-1998 ............................................. Graduate Teaching and Research Associate, The Ohio State University

1999 ...................................................... Presidential Fellow, The Ohio State University

PUBLICATIONS


FIELDS OF STUDY

Major Field: Political Science

Studies in Judicial Politics
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CHAPTER 1

INTRODUCTION

In 1982, Canada finally “patriated” its Constitution, bringing it “home” from Britain. The most interesting development – and probably the most contentious – was the addition of the Charter of Rights and Freedoms, Canada’s own bill of rights. Political scientists suggested that this addition could change the role of the courts. Several interests agreed with this suggestion and hurried to organize for litigation. These groups believed the Canadian courts would now act more like those in the United States – providing another access point for groups to influence policy and achieve their goals. Out of this expectation came the Women’s Legal Education and Action Fund (LEAF), the most frequent interest group litigator before the Canadian Supreme Court in the years since the adoption of the Charter. This group was deliberately modeled after American women’s interest groups in the hopes of emulating their impact.

When the Supreme Court heard its first major equality rights case (Andrews v. Law Society of British Columbia 1989), LEAF was there. This case involved a lawyer’s challenge to the citizenship requirement for admission to the British Columbia bar. While not terribly interested in the actual facts of the case, LEAF saw this as an opportunity to try to persuade the justices as to the “proper” interpretation of the equality section (s.15)
of the Charter – their first chance to “influence the influencers.” The Supreme Court decided the case in favour of the lawyer challenging the citizenship requirement, and interpreted s.15 as LEAF had hoped. It appears that LEAF was very successful here. But was it their arguments that had an impact on the Court? Did they influence the justices’ decision or did the fact that six groups lined up on their side while only three groups made opposing arguments have an effect? Or did the Court merely decide their first equality case in a manner consistent with the justices’ own ideology and preferences?

LEAF’s experience in the Andrews case raises broader questions. What factors do influence judicial decision making? Were the Canadian groups following logically in the footsteps of the U.S. groups in believing that interest groups could influence the courts – or have they based their existence on false assumptions? Do the American groups they patterned themselves after actually influence the courts themselves?

This dissertation examines the success and influence of women’s interest groups litigating before the Canadian and American Supreme Courts. It is an attempt to better understand judicial decision making and the factors that influence the justices. It is also an attempt to understand the litigation of women’s groups in Canada and the United States.

The question of interest group influence and the broader question about the determinants of judicial decisions are important questions that have not yet been resolved either theoretically or empirically. Much of the literature casts doubt on interest group influence. The influential “attitudinal model” holds that justices decide cases according to their own policy preferences (Segal and Spaeth 1993; Rohde and Spaeth 1976). In light of this view, can interest group influence play any role? Empirical studies have produced
mixed results, with many concluding that "there is reason for skepticism" (Songer and Sheehan 1993). But I believe this requires further study for several reasons. The large number of interest groups litigating as amicus curiae (a third "interested party" submitting briefs in a case), demonstrates that these groups think they can play a role. In addition, the fact that the United States and Canadian Supreme Courts rarely limit group participation, despite their heavy caseloads, suggests that group briefs do have value for the justices as well (Caldeira and Wright 1990). My expectation is that the briefs do have value, a value that comes primarily through the information they provide to the justices. This information not only provides the justices with arguments (in a sense aiding in their research), but also can provide a signal to the justices as to the political forces behind different claims.

I focus on women’s groups because historically they have received less attention from scholars than groups litigating on behalf of race or religion. And, perhaps more importantly, women’s interest groups in Canada have been the most visible and the most active litigators in the years since the Charter. These groups are widely believed to have the most impact on the Canadian courts and this assumption requires evaluation. The study adopts a comparison of Canada and the United States in order to determine whether American models of judicial decision making have explanatory power in other countries—particularly one as similar as Canada. The comparison is more interesting since women’s groups in Canada have undertaken litigation in a fashion similar to those in the

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1 In Canada, the term amicus curiae is not used. Instead, Canadians refer to "intervenors" before the Court—which are roughly equivalent to amici curiae. An "intervenor" is a "person, organization or government department that is not a direct party to a case but receives permission from a court to present its own arguments in that case" (Brodie 1992, 224).
United States. Indeed the woman's group that has litigated most frequently in Canada outlined its plan of attack after studying the behaviour of its U.S. counterparts. Thus studying the litigation of groups in the two countries should tell us not only whether different factors influence decisions in each Supreme Court, but also whether similar groups manage to achieve different impacts.

In determining the success and influence of women's groups litigating before their respective Supreme Courts, this study makes a distinction between the "bottom line" outcome of the case (a reversal or affirmance) and the doctrine (judicial reasoning) that accompanies it. An attempt is made first to determine how successful groups are in achieving favourable outcomes and reasoning, before moving on to the more fundamental question: is any success enjoyed by the groups due to their own efforts? Do they have actual influence on the courts or do they owe the right outcome and the right reasoning to other factors influencing the courts? The complete picture – of reasoning and outcome, success and influence – is important not only for assessing the consequences of interest group litigation but also for justifying the litigation itself. Groups litigate primarily because they believe they can have an effect. Through a more comprehensive study we may achieve a better understanding of whether litigation is worth the time and resources devoted to it.

Success: Outcome and Doctrine

While recognizing that some groups litigate merely to achieve publicity for their cause or to display action for their membership, this study defines litigation success as
“winning” a case. However, an approach focusing on the “winning” of cases leaves unresolved what qualifies as “winning” – a fundamental issue that has received little attention.

In 1986, the Canadian Supreme Court heard oral argument in what would prove to be one of its most controversial and high profile cases: *Morgentaler v. the Queen*. Henry Morgentaler was a Canadian doctor charged with performing abortions in violation of Canada’s “abortion law” – section 251 of the *Criminal Code*. In his defense, Morgentaler argued that the law was unconstitutional, violating various sections of Canada’s Charter of Rights and Freedoms, including the right to equality and to liberty and security of the person. When the Supreme Court finally handed down its decision nearly two years later, five of the seven justices ruled Canada’s “abortion law” was unconstitutional.² Clearly Morgentaler’s side had won.

Women’s groups across the country celebrated the *Morgentaler* decision as a victory for women’s rights. But was this ruling as favourable in fact as its outcome appeared – was the “abortion law scrapped [and did] women get free choice” (Morton 1992, 233)? Of the seven justices hearing the case, only one held that women have the right to abortion. The other four justices struck down the law on procedural grounds. And of the five justices ruling the law unconstitutional, at least two seemed to suggest that the law need only be remedied to accord with the Court’s decision. In fact, all seven of the justices suggested that the state had a legitimate interest in protecting the life of the foetus

² The other two justices objected to the Court’s even considering Morgentaler’s constitutional questions but drafted a response to the majority which supported s.251. These justices noted that Parliament had deliberately not addressed the abortion issue in the Charter of Rights and Freedoms and argued that the Court should respect that decision.
at some point in the pregnancy. Thus the Court’s reasoning in Morgentaler left room for the reintroduction of an “abortion law” in Parliament: it did not guarantee free choice to women.

The Morgentaler decision illustrates the necessity of looking at both outcome and doctrine when examining the success of litigation before the courts. While pro-choice groups were pleased with the outcome of the case, they had to be worried about the reasoning used to produce that outcome. The right outcome does not ensure the right result in the future if the right reasoning is not there to support it. And a case won for the “wrong” reasons must surely be considered less of a victory than one won for the “right” reasons.

However, despite this, studies of judicial decision making have tended to focus on the outcome of cases in their analyses. Studies of interest group litigation are no exception. The great majority of scholars who have examined the success and influence of interest groups before the courts have concentrated solely on the outcome of cases. But it is not always clear whether the studies are consistent – whether a favourable bottom line outcome is consistently determined only from the vote in a case (such as a reversal when a party wanted a reversal) or whether the determination may sometimes take judicial reasoning into account. This dissertation argues that the scholarship would benefit from a clear distinction.

A few studies have attempted to do just that. Gregg Ivers and Karen O’Connor (1987) pay explicit attention to this distinction in their measure of success. They examine whether the Supreme Court adopts arguments presented by the two groups in their study: the American Civil Liberties Union and Americans for Effective Law Enforcement. A
similar approach is taken by Susan Behuniak-Long (1991) in her analysis of interest group participation in *Webster v. Reproductive Health Services* and by Catharina Csaky Hirt (1995) in her study of appellate and Supreme Court "school prayer" decisions. Like Ivers and O'Connor, both Behuniak-Long and Csaky Hirt appear to consider winning a case to involve case doctrine.

I argue that in order to completely assess the impact of groups one must go beyond simple outcome. Both outcome and doctrine have to be taken into account and the distinction between them recognized. This dissertation attempts to do just that.

**Group Influence in Litigation**

However, even if one manages to cautiously measure interest group success – distinguishing between bottom line outcomes and doctrine – a question remains as to whether the group has exhibited any real influence on the court’s decision. As Songer and Kuersten argue in the case of interest groups acting as amici curiae, “being on the winning side may have more to do with the type of litigants amici choose to support than any effect of amicus participation” (1995, 36). In fact, as mentioned earlier, much of the literature discounts the possibility of interest group influence. The “attitudinal model” suggests that justices decide cases according to their own policy preferences (Segal and Spaeth 1993; Rohde and Spaeth 1976). And, most rational choice theories of judicial decision making also emphasize the influence of judicial preferences on their decisions (although suggesting that justices act strategically to achieve those purposes).

A few recent studies have undertaken a more systematic assessment of the influence of interest groups on court decision making. Epstein and Rowland (1991)
measured group impact versus that of non-groups at U.S. District Courts. They attempted to isolate the influence of interest group litigation from the influence of various other factors which may impact a court’s decision, by using a “precision matching” design. Matched pair cases were identified and used to determine the impact of group sponsorship. One case of the pair did not include group participation while the other case included a group litigant versus a non-group litigant. The cases were identical in terms of the judges hearing the case, the year the case was heard, and the policy issue involved (210). Epstein and Rowland discovered that group sponsors of cases are no more likely to win their cases than non-groups.

Songer and Sheehan (1993) conducted a similar precision matching analysis for groups acting as amici curiae at the U.S. Supreme Court. They discovered that litigants who were supported by amicus curiae briefs were no more successful than those who were not. However, Songer and Kuersten (1995), using the same method, discovered that amicus support of litigants did contribute to those litigants’ success in state Supreme Courts. These latter authors also undertook a multivariate analysis of the relationship of amicus support to litigant success. The effect of amicus support or opposition on a litigant’s success was evaluated, controlling for variables thought by scholars to affect judicial decisions such as the policy orientation of the court. Litigants supported by amici were still found to be more likely to win their case.

Multivariate analysis of interest group influence has also been undertaken by other researchers. Gregory Caldeira and John Wright (1988) address the influence of interest group litigation at the certiorari level using a model that attempts to control for the judges’ own inclinations. They discover that the presence of amicus curiae briefs at
this stage does in fact “increase the chances of the justices’ binding of a case over for full treatment – even after [one takes] into account the full array of variables other scholars have hypothesized or shown to be substantial influences on the [certiorari decision]” (1988, 1110).

A similar analysis was conducted by Caldeira and Kevin McGuire in 1993, to determine the effects of organized interests on agenda setting – the decision of the Court to accept a case – in the area of obscenity. Caldeira and McGuire controlled for the presence of a professional obscenity litigator, the identity of the petitioner (federal, state or local governments, bookstores, theatres, individuals or corporations), and various case facts. Similar to Caldeira and Wright, this study concluded that the presence of groups had “considerable weight” on the decision of the Court on its plenary agenda (724).

Multivariate analyses of the influences at the “decisions on the merits” stage have also been conducted. For example, Kevin McGuire (1990) developed a model to explain the voting behaviour of justices in obscenity cases while Robin Wolpert (1991) focussed on gender discrimination cases. Both found that the number of amicus curiae briefs in support of a litigant did have a positive impact on the probability of the court deciding in favour of the litigant.

In a more recent analysis, Steven Tauber (1998) focuses on a particular group and asks whether the NAACP Legal Defense Fund’s presence in a capital punishment case influences U.S. Courts of Appeal to favour the inmate once other legal and non legal influences are taken into account (195-6). After running his model, Tauber concludes that “there is no evidence that the LDF exerts an impact on the outcome of these cases”
(1998, 212). He notes that other studies have considered interest group influence by looking at groups in general—instead of focussing on a particular group—and argues for the merits of his approach.

Thus some multivariate analysis of interest group influence has been conducted with mixed results. However, some of these studies have not made distinctions on their dependent variable—what qualifies as a favourable case outcome—and none have studied both outcome and doctrine. There appears to be room for a study of women's interest groups that makes a distinction between the groups' influence on favourable bottom line outcome and their influence on favourable doctrine in the various areas of interest to them (beyond just gender discrimination).

**Judicial Decision Making**

One of the hallmarks of political life in the late twentieth century has been an increase in the power of judicial institutions, in particular, national Supreme Courts. Indeed, these institutions are now often regarded as yet another law-making body. While they do not, in principle, initiate laws, they do, in practice, often cause a law to mean something beyond—or even contradictory to—the intent of the framers. But why do they do this? Despite the myth of the robe, focussing on judicial objectivity and impartiality, justices do not make their decisions in a vacuum. Many factors must enter into judicial decisions, not the least of which will be the influence of institutions and groups who dedicate themselves to exerting some influence over the decision makers in order to achieve some goal.
Examining both case outcome and case doctrine, a comprehensive study must determine not only whether a group is "successful" when litigating but also whether it has any influence on the court. A group's degree of success is not an indicator of its degree of influence. It is possible that a group judged "unsuccessful" — in terms of outcome or doctrine — may actually exert some influence, persuading the court to its way of thinking. Of course, it is also possible that a successful group may not be influential. Several other factors could function as determinants of success in a particular case. In order to arrive at the determinants of success, one must root it in the determinants of judicial behaviour.

Judicial scholars have postulated both micro-level and macro-level theories to describe judicial decision making. Micro-level theories focus on the individual decision maker and suggest that a judge's values, the case facts, and the judge's role orientation influence decisions. Macro-level (or institutional) theories emphasize the influence of colleague persuasion, institutional factors and environmental factors on judicial decision making. Combining the two, James Gibson argues that judicial decision making is a "function of what [judges] prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (Gibson 1991, 256). A judge's values are usually defined on a liberal-conservative scale — these are indicators of what judges prefer to do (Rohde and Spaeth 1976). The case facts, however, put some constraints on judges: they set the parameters (Segal 1984). Role theory involves the concepts of activism and restraint. These describe what a justice feels he ought to do (Gibson 1991). The action and expectations of colleagues (Murphy 1964), the rules and norms of the institution (Walker, Epstein and Dixon 1988), and the environment — whether it is a time of crisis (Gibson 1991), the state of public opinion (Marshall 1989), the impact of various
groups on the court (Vose 1959; Epstein and Rowland 1991) and so on – all provide constraints on judicial decision making. Therefore, "individuals make decisions, but they do so within the context of group, institutional and environmental constraints" (Gibson 1983, 32).

Interest groups are successful at the case level when the collectivity of the determinants of individual judicial behaviour causes the court to make the decision the group desires (either in outcome or doctrine). Groups are influential to the extent that they help determine the court's behaviour, again either in outcome or in doctrine. Groups may exert influence through the provision of information to the justices just as they are now believed to exert influence on the legislature through information (see, for example, Smith 1984; Rothenberg 1989; Hansen 1991). They may act as "signals" to the court, alerting the justices to important issues, or to the value of a particular case, in much the same way as their participation at the certiorari stage alerts justices as to which are the most important cases to accept for review (Caldeira and Wright 1988). Groups may also alert the justices as to the state of the political environment. They can provide justices with "an indication of the array of social forces at play in the litigation" (Caldeira and Wright 1988, 1111). They possess information about public opinion – or at least their constituency’s opinion – on the issue before the Court. In addition, interest groups may gain a more subtle influence through their ability to lobby the legislature if necessary to challenge the courts’ decisions. If justices wish their decisions to stand they may feel more compelled to listen to group arguments.
Outline of the Project

In its attempt to systematically assess the success and influence of women's interest groups litigating before the Canadian and American Supreme Courts, this dissertation is divided into two parts. The first part of the project assesses group success and influence at the level of individual cases. A multivariate analysis is conducted, with decisions analyzed in terms of both the "bottom line" outcome of the case and the doctrine that accompanies it.

However, most groups are interested in their impact over the long term— in the doctrine that develops into precedent over time (perhaps despite occasional case setbacks). Thus, the second part of the project broadens its focus to qualitative analyses of the development of doctrine in a policy area over time. An attempt is made to determine the extent to which groups are successful and influential in the long term in the policy areas of interest to them.

Both the case-level and long-term analyses are conducted separately for the Canadian and American Supreme Courts. Comparisons are then made in the final chapter of the dissertation.

Forthcoming Chapters

The next chapter, Chapter 2, offers a description of the women's groups studied in the United States and Canada. The backgrounds of the groups are briefly explored, and their litigation strategies and objectives are discussed. Chapter 2 also lays out the parameters of the dissertation. The issue areas and time period covered by the project are addressed.
Chapter 3 assesses the success and influence of the women's groups at the case level of analysis. After discussing my expectations for the factors influencing each Supreme Court's decision making, I present the models used to test these expectations and their results. This is done for both case outcome and case doctrine.

Chapters 4 (for the United States) and 5 (for Canada) then present the "story" of women's groups' litigation. Tracing the path of doctrine in each policy area, an attempt is made to determine how successful the groups are in the long term. Has favourable doctrine emerged from litigation before the Court? Have other institutions allowed that doctrine to stand (or reversed unfavourable doctrine)? Finally – as with the case level analysis – regardless of the groups' rate of success, other influences on doctrinal development are included in the analysis in order to determine the extent of the groups' actual influence on that development. Although the two halves of the dissertation are of equal importance, they are of unequal length since tracing the path of doctrine in the long term (Chapters 4 and 5) requires more space to accommodate the discussion.

The final chapter compares the findings for the United States and Canada in order to determine whether different factors do, in fact, influence each Supreme Court. Has the Charter provoked the Canadian Court to act more like its American counterpart? Has the Women's Legal Education and Action Fund followed the same path as the American groups – and have their expectations been fulfilled?
CHAPTER 2

INTEREST GROUP SUCCESS AND INFLUENCE AT COURT:
THE GROUPS, THE ISSUES AND THE TIME PERIODS OF STUDY

Interest groups have attempted to influence the decisions of the United States Supreme Court since before the turn of the last century. Interest groups in Canada did not appear to notice the potential opportunities of such activity until the Charter of Rights and Freedoms came into effect in 1982. Groups have been active in both countries in recent years, achieving publicity in the media, but their effect on the courts is still a matter of dispute. This dissertation examines the success and influence of women’s interest groups litigating before the Canadian and American Supreme Courts.

This chapter provides the background for the analyses that follow. Not all women's interest groups, and only a limited number of Supreme Court decisions, were included in the study. These choices must be explained. In the sections that follow, the selected Courts, groups, issue areas and time periods are described. The primary focus of the chapter is on the interest groups chosen for the analyses. Who are these interest groups appearing before the Supreme Court and what are their litigation goals, strategies and participation patterns?
The Canadian and American Supreme Courts

The focus on the Supreme Court, itself, was a choice that resulted from its being at the apex of the judicial system in both countries – the court of last resort. Its decisions serve as precedent for lower courts and, therefore, have greater implications – and offer the potential for greater rewards – to interest groups. This position ensures that Supreme Court justices are less constrained than their lower court counterparts and perhaps open to a wider range of influences. In addition, interest group participation at the lower court level is unusual in Canada, and less common in the United States than at the Supreme Court level.

Perhaps most importantly, the similarities between the Canadian and American Courts make comparisons of the influences on the Courts, and the success and influence of the groups, possible – and make any differences interesting. The different structure and function of lower courts in the two countries would make comparing influences on judicial decision making difficult, if not irrelevant.

The Canadian and American Supreme Courts are both composed of nine members, and their functions and processes are similar, but some differences do exist. For example, each Court’s members are chosen differently. In the United States, the President nominates a candidate for the Supreme Court but this nomination has to be confirmed by the Senate. The Senate does occasionally reject nominees, as it did very publicly to President Reagan’s candidate, Robert Bork, in 1987. Presidents may take various factors into account when choosing a nominee, including the race and gender of
the candidate and the prospects for them being confirmed (Baum 1995; O'Brien 1996). However, in recent decades the most important consideration appears to be the policy preferences of the candidate (Goldman 1991; Baum 1995).

In Canada, by contrast, Supreme Court appointments are made by the Prime Minister with the advice of the Minister of Justice.¹ There is no parliamentary confirmation of the Prime Minister’s choice. However, his choice of candidate is limited by the requirement that three members of the Court come from the province of Quebec to ensure that the Court will have members who are familiar with Quebec’s Civil Code. A candidate’s region of origin actually plays a large role in appointments in Canada. Besides the three justices from Quebec, three spots on the Court are typically designated for justices from Ontario, while the remaining three spots are shared by justices from the west and from the Maritimes. After region of origin, the next most important factor in judicial appointments has traditionally been patronage (Archer et. al. 1995; McCormick and Greene 1990).

In stark contrast to the United States, ideology has not as yet played a noticeable role in Canadian appointments,² although this may change with the increasing policy making role of the Court under the Charter of Rights and Freedoms. Certainly, the appointment process has generated more attention in the last few years. However, governments in Canada still do not appear to have “taken stands of their own regarding the appropriate ideological direction of judicial appointments” (Archer et. al. 1995, 341).

¹ Unlike the United States, in Canada Justices are appointed only until age 75.
Several reasons have been suggested to account for this. First, it may be the result of the more recent recognition of the Court's policy making role in Canada. In addition, the Canadian Supreme Court has usually been careful not to take explicit sides on the most controversial issues, which may protect them from calls to "pack the Court." Thus in Morgentaler, the Court struck down Canada's abortion law on procedural grounds. The implication that a more procedurally fair version of the same law might pass judicial scrutiny turned attention once more to Parliament (Archer et. al. 1995, 341). Further, the existence of section 33 of the Charter – which allows a five year renewable legislative override of certain Supreme Court decisions – may make governments less concerned with ideological appointments (Knopff and Morton 1992, 136-137).

Unlike the selection of justices, the case selection procedures of the Canadian and American Supreme Courts are similar. Both Courts have widespread discretion on what cases they hear. The Canadian Supreme Court has slightly less discretion than its American counterpart. Automatic access to the Court is still possible through "appeals of right" for certain criminal cases.\(^2\) However, applications for leave to appeal are the most common route to the Canadian Supreme Court, just as petitions for writs of certiorari are the most common route to the American Court. For the Canadian Court, applications for leave to appeal are heard by a panel of three justices with decisions made by majority

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\(^2\) The one exception to this may have been Prime Minister Trudeau's elevation of Justice Bora Laskin to the Chief Justiceship in 1973. By tradition, the Chief Justiceship has rotated between the most senior French and English members of the Court. Trudeau violated this tradition by appointing a junior member, Laskin, who shared his federalist and civil libertarian views (Morton 1992, 72-73).

\(^3\) "Appeals as of right" are allowed primarily when there is a dissenting opinion on a court of appeal and when a person's acquittal is set aside by a court of appeal. "Appeals as of right" are also allowed in very limited circumstances for civil cases (for disputes between governments). For more detailed rules see Crane and Brown (1996, 10, 15).
vote. The panel is appointed by the Chief Justice (little is known on what factors actually
guide his choice – see McCormick and Greene 1990, 257). While oral arguments were
common for case selection until the end of the 1980s, in the 1990s, the decision has been
based primarily on written submissions by the parties (Crane and Brown 1996, 32;
McCormick and Greene 1990, 199). In the United States, case selection is based entirely
on written submissions. The entire Court participates in the process and a case will be
accepted if four justices vote to hear it. In recent years, the Canadian Supreme Court has
received between 300 and 400 requests to appeal each year, while the American Supreme
Court has received over 6000 (Epp 1996, 775; Jost 1999, 70).

In the 1980s and 1990s, the Canadian Supreme Court has heard an average of 100
cases a year (Morton, Russell and Riddell 1995, 3). The number of cases heard by the
American Court has been steadily decreasing during this time. It now hears less than 100
cases a year (for example, it heard only 80 cases in the 1996 term and 90 in the 1997 term
– Jost 1999, 70-72). The type of cases the American Supreme Court hears has also been
shifting. In the latter half of the twentieth century its agenda has emphasized civil
liberties issues (Casper and Posner 1976). The agenda of the Canadian Supreme Court
has been undergoing a similar (although later) shift. Civil liberties issues have come
before the Court in increasing numbers since the 1970s. While about 50% of the Court’s
issue agenda was composed of tax cases and ordinary economic disputes in the 1970s,
this had declined to less than 10% in 1990 (Epp 1996, 772-773). Instead, civil liberties
and civil rights cases increased from barely 10% in the 1970s to comprise about 60% of
the Court’s docket in the 1990s (772-773).
The Canadian Court continues to have the possibility of a different caseload from its American counterpart, however, due to Canada's integrated judicial system. While the United States has two distinct court systems, state and federal, the Canadian Supreme Court is the Court of last resort for both provincial and federal law. It is a "general court of appeal" for all local, provincial and national legal matters. This means that "even parking tickets can theoretically be appealed all the way to the Supreme Court, [and indeed] it was a parking ticket that started the trail of litigation in the 1980s dealing with the issue of language rights in Manitoba" (McCormick 1994, 31). In addition, "appeals as of right" continue to make up around one-fifth of the Canadian Court's agenda (McCormick 1994, 82).

Once cases are selected for hearing, the processes are very similar in both Courts. In the United States, case participants submit written briefs to the Court arguing their positions on the questions of law. In Canada these same briefs are submitted to the Court but are called "factums." Both Courts allow for the participation of interested "third parties" in cases. In the United States these are called amicus curiae, while in Canada they are called intervenors (and are a much more recent phenomenon). At the hearing of a case, the parties are allowed to make oral arguments. Intervenors have been allowed to present oral arguments before the Canadian Supreme Court much more frequently than amicus curiae in the United States. Once a case has been heard, the assignment of opinions is done very similarly in both countries and the written opinions look very much the same.

The most significant difference in the hearing of cases involves the size of the Court. While the full Court of nine justices always hears cases in the United States
(unless there is an illness or a recusal), in Canada, panels of five or seven justices often hear a case. In fact, panels of seven justices were the most common size of Court in the 1980s (McCormick and Greene 1990, 205). The Chief Justice of the Supreme Court is responsible for deciding both the size and the composition of the panel. Although little is known about the process of panel selection, it is believed that his decision on panel size is influenced by the importance of the case and the availability of justices (Greene 1994; McCormick and Greene 1990; Russell 1987). The more important the case, the more likely it will be heard by a panel of nine justices. Panel size decreases, however, with illnesses and mid year retirements. The composition of the panel is apparently determined randomly (Greene 1994 – but again, little is known about the actual practice and no study has yet addressed this issue systematically). The one exception involves cases coming out of the province of Quebec. The Chief Justice attempts to place all three Quebec justices on panels hearing Quebec civil code appeals (Russell 1987, 350).

Thus there are a few differences between the Courts. However, these differences seem to be outweighed by similarities. A focus on the Canadian and American Supreme Courts appears to offer the best conditions for this study’s objectives.

**Interest Groups**

With limited resources at their disposal interest groups must make choices on how best to achieve their goals. The interest groups included in this study have all chosen litigation as a main strategy for achieving their goals.
American Women's Groups

In the United States, the Women's Rights Project of the American Civil Liberties Union (WRP), the National Organization of Women's Legal Defense and Education Fund (NOW LDEF) and the Women's Legal Defense and Education Fund (WLDF) were the focus of study. The three groups were chosen because they have consistently shown the highest rates of litigation among women's groups (O'Connor and Epstein 1983; George and Epstein 1991).

WRP

Before the 1970s, the United States Supreme Court consistently upheld gender distinctions as constitutional. In 1961, an unanimous Court upheld a Florida practice of excluding women from jury duty unless they voluntarily registered to participate (*Hoyt v. Florida*). The Court observed that "women are at the center of home and family life" and Florida could thus relieve them from a civic duty that might interfere with their role. The American Civil Liberties Union (ACLU) had been involved sporadically in battles for women's rights since the 1940s, and their efforts intensified after *Hoyt* (ACLU 1982). Other groups were also becoming active in this time period and the ACLU "became aware that the advancement of women's rights merited its concentrated attention" (Cowan 1976, 376). Thus, in 1971, they created the Women's Right Project (WRP) to litigate for women's equality. The WRP experienced success in its first case before the Supreme Court, when the Court held a gender based classification unconstitutional for the first time (*Reed v. Reed* 1971). A new era in sex discrimination litigation had begun. Over the next two decades, the WRP would become the most frequent women's interest...
group litigator before the Court – “the ‘premier’ representative of women’s rights interests in that forum” (ACLU 1999, 1; O’Connor and Epstein 1983; George and Epstein 1991).

The WRP benefited from its relationship to its parent group, the ACLU. In 1971, the ACLU was “more than a half-century old. Therefore, the WRP enjoyed from its creation the experience of a seasoned litigator” (O’Connor 1980, 126). The WRP could rely on the ACLU for resources – including both money and personnel. The ACLU provided office space for the new group and access to their library. Initially, funding for the group came from the ACLU’s general fund and from a Playboy Foundation grant (Cowan 1976, 384). Later the WRP was able to secure other grants from sources such as the Ford Foundation (beginning in 1975), but even this they probably owed to the prestige of their parent organization (WRP 1999).

The staff of the WRP was also provided by the ACLU. Ruth Bader Ginsburg (now a Justice on the Supreme Court) was named as the first director of the Project. Ginsburg was a professor in the law school of Columbia University and had earned the respect of her field. She had a co-director who was also a prominent attorney, Brenda Feigen Fasteau. Ginsburg was in charge of litigation while Fasteau was in charge of the “operational aspects” of the group. This meant she was responsible for organizing the office and communicating with “the more than eighty-five persons (almost exclusively women) involved with, or developing, women’s rights programs in the numerous ACLU local affiliates” (Cowan 1976, 386). The two directors were aided by a staff assistant, by volunteer lawyers and by law students at Columbia University and other universities in the New York area (Cowan 1976, 385). Ginsburg was also able to draw on the ACLU
attorneys’ experience before the Supreme Court. The ACLU had a policy that all Supreme Court cases should be reviewed by its legal director. In fact, the WRP’s first brief was a collective effort between Ginsburg and the ACLU’s Legal Director, Melvin Wulf (Cowan 1976, 387).

By the time Isabelle Katz Pinzler took over from Ginsburg and Fasteau in 1979, the WRP had four staff attorneys, an office manager and a support staff (O’Connor 1980, 127). And, in addition to financial resources and staff, the WRP was benefiting from being able to draw on the ACLU’s impressive local affiliate system. These affiliates could bring potential cases to the attention of the WRP, which allowed them “to keep abreast of most significant sex-discrimination litigation being initiated throughout the country” (O’Connor 1980, 124).

From its inception, the WRP recognized the need to do more than litigate. Women at the grass roots level had to be mobilized, and judges, lawyers and the public had to be “educated” on sex discrimination. To this end, Ginsburg frequently gave speeches to law students, professo...
to their ultimate goal. This required the direct sponsorship of “easy” cases—cases which would be “clear winners” (Markowitz 1989, 75). Besides cases with a high likelihood of victory, the group prefers cases involving new issues “of national importance for poor, minority, working, or older women” and cases which promise direct or indirect benefit for a large number of women (WRP Memo, O’Connor 1980, 125).

When the WRP was created, its goal was to use its systematic approach to litigation to achieve a judicial pronouncement that sex was a “suspect” classification, similar to race. However, it soon became apparent that the Court was reluctant to apply the highest level of scrutiny to sex. Facing this reality, the WRP decided to put aside its original objective and concentrate instead on “chipping away at sexual stereotyping through cases that demonstrated the inequities that may result from an unthinking application of generalizations about the sexes” (Berger 1980, 19). The WRP hoped that developing favourable precedent through these cases would eventually lead the Court to adopt a more favourable standard of scrutiny for gender discrimination.

The WRP has not been able to follow their ideal strategy consistently. Not surprisingly, it has proven impossible to detect every important case early enough to become involved from the start. The group has had to participate in several cases as amicus curiae, rather than as a sponsor of the case. In a few cases this has proved damaging to their interests. One example of this is provided by Kahn v. Shevin (1974), a challenge to a state statute which exempted widows, but not widowers, from paying a property tax. This case arrived at the Supreme Court before the WRP was aware of its existence. Ironically, the case had been brought by one of the ACLU’s affiliates but had slipped through the cracks and gone unnoticed by the national organization. This case
would not have been brought by the WRP since it did not qualify as the next incremental step in their reasoning: it asked the Supreme Court to go further than the group felt they would be ready to go. According to Ginsburg, "Kahn should never have come up that year... but it was much too late to do anything about it at that point" (Cowan 1976, 391). The WRP was forced to choose between allowing the Florida Civil Liberties Union to continue to litigate, or taking over the case themselves and doing the best they could. They chose the latter option and lost the case. Ginsburg admitted that they had "appreciated the risk but hope[d] that the Supreme Court might take a giant step" (Cowan 1976, 391). Instead, the result would be described by the WRP as the "greatest blow women’s litigation has suffered... since Hoyt v. Florida" (Cowan 1976, 391).

However, despite the occasional miscue, the WRP has used sponsorship more than any other women’s organization. It has frequently participated as both a sponsor and an amicus curiae before the Supreme Court. Of the 164 cases included in this study, the WRP was involved in 54 cases (or 32.9%).

**NOW LDEF**

The National Organization of Women (NOW) was created in 1966 and was the first “modern” feminist organization to consider a litigation strategy. Almost from the beginning, consideration was given to the creation of a separate, tax exempt, non-profit legal fund that would systematically litigate sex discrimination cases (O’Connor 1980, 26).

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4 When Kahn came to their attention, the WRP was actually working on what they hoped would be the next step towards getting sex declared a suspect classification (Weinberger v. Wiesenfeld 1975).
In 1970, the founders of NOW established the NOW Legal Defense and Education Fund. This group was intended to be the “litigating arm of the women’s rights community” (NOW LDEF 1999, 1).

The NOW LDEF litigation rate was low in the early 1970s, as a full time staff lawyer was not hired until 1977 (O’Connor 1980, 104). Instead, the group relied on volunteer attorneys in its early years. By 1980, two full time staff members were employed and the LDEF’s litigation rate had substantially increased. Today, the group has five staff attorneys working with the director of their legal section. The funding of the NOW LDEF has also improved over time. While the group had trouble getting foundation grants in the early 1970s, it is now funded through a variety of private contributions, corporate gifts and foundation grants. In 1997, alone, the NOW LDEF received over one million dollars from corporations and foundations (NOW LDEF Annual Report 1997, 17-20). As a sign of its growth, in the mid 1990s, the NOW LDEF moved to a much larger office space, expanded its staff and is in the process of attempting to double its operating budget (NOW LDEF Annual Report 1997).

The NOW LDEF long term objective is the elimination of sex based discrimination and the achievement of equal rights. It pursues this objective “in the workplace, the schools, the family and the courts, through litigation, education and public information programs” (NOW LDEF 1999b, 1). The organization appears before Congress, organizes national grassroots campaigns, creates national public service ad campaigns and establishes various educational programs (for example, the National Judicial Education Program to Promote Equality for Women and Men in the Courts).
Since its inception, the NOW LDEF has concentrated on litigation as amicus curiae. In the beginning, the group’s limited funds meant this strategy was the only one open to them. With the expansion of its staff and financial resources, the NOW LDEF has increased its attempts at sponsorship of cases. However, at the Supreme Court level, this type of participation has still been rare. Of the 164 cases included in this database, the NOW LDEF has participated in 56 cases (or 34.1%), only two of which have been as sponsors of the case (*Bray v. Alexandria Women’s Health Clinic* 1993; *Schenck v. Pro-choice Network* 1997). The group’s participation rate as amicus curiae, however, is impressive. For the cases included in this study the NOW LDEF has litigated more frequently than the WRP.

Interestingly, one often sees cases with both the NOW and the NOW LDEF participating (see, for example, *Personnel Administrator of MA v. Feeney* 1979; *Thornburgh v. American College of Obstetricians and Gynecologists* 1986; *Harris v. Forklift* 1993). While their origins lay with NOW, and the NOW LDEF appears to have been used almost interchangeably with NOW by some observers, the NOW LDEF emphasizes that it is a “separate organization with its own mission, programs and Board of Directors” (NOW 1999b, 1). Since NOW has participated less frequently than its daughter organization, this study considers only the NOW LDEF. And, since they are, in reality, separate organizations, the study does not combine the results of both groups.

\[\text{NOW has participated in 21% of the cases included in this study.}\] 28
Created at roughly the same time as the other two American groups of interest, the WLDF was a much smaller organization. Thirty-five women, all attorneys, started the organization in 1971 as a means to use their legal training to advance the concerns of women. The WLDF was a non profit, tax exempt organization making use of volunteer lawyers (O’Connor 1980, 102). The group soon recognized the need to have someone to coordinate these volunteer efforts and, in 1973, it hired an attorney, Judith Lichtman, as its first executive director (O’Connor 1980, 103). Ms. Lichtman remained with the group for over two decades (and currently serves as president of the WLDF’s new incarnation: the National Partnership for Women and Families). In 1978 WLDF hired its first staff attorney, Donna Lenhoff, and the group began its evolution from a small group of volunteers to a powerful and effective advocate.

The WLDF’s objective was to provide “pro bono legal assistance to women who have been discriminated against on the basis of sex... [devoting] a major portion of its resources to combating sex discrimination in employment” (Brief of ACLU WRP et. al., County of Washington v. Gunther, 1981, 6). The group strove for fairness in the workplace and policies that helped men and women meet the demands of work and family. Its goal was the elimination of gender based discrimination – against either sex.

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6 In February 1998, the WLDF became the National Partnership for Women and Families. With the new name came a new agenda focusing on health care and workplace issues (National Partnership 1998). However, the organization’s mission remained the same: “to improve the lives of women and families” (National Partnership 1998, 1). The change in the group does not affect this study as it occurred after the study’s endpoint.

7 Donna Lenhoff served as the WLDF’s General Counsel for nearly 20 years and has continued in that position in the new group: the National Partnership of Women and Families.
The WLDF sought to achieve its goals through litigation. However, it was also active in public education and lobbying efforts, attempting to inform policy makers about sex discrimination, submitting testimony before congressional hearings and appearing before federal agencies charged with the enforcement of equal opportunity laws. Thus the group worked "in the courts, Congress and the administrative branch of government to further public policy for women and their families" (Brief of National Women's Law Center et. al., J.E.B. v. Alabama 1993, 18).

The WLDF originally played a limited role in litigation, hampered by a lack of financial resources (O'Connor 1980, 103). However, by the end of the 1970s, the group was participating in an increasing number of cases – entering over 20% of the cases in which at least one women's interest group participated (O'Connor and Epstein 1983, 138). In the 1980s this had jumped to almost 50% of the cases with one women's group or more (George and Epstein 1991, 316). In fact, the group was behind only the NOW LDEF and the WRP in its litigation rate. Its participation in front of the Supreme Court was always as amicus curiae but of the 164 cases included in this study, the group participated in 52 of them (or 31.7%).

**Canadian Women's Group**

In Canada, the Women's Legal Education and Action Fund (LEAF) was the subject of study. As with the United States groups, this group was chosen because it has been the most frequent women's group litigator before the Canadian Supreme Court. In fact, since its inception, this group has intervened in more Supreme Court cases than any other Canadian interest group. Created in 1985, LEAF's history and goals are intimately
connected to the enactment of Canada’s Charter of Rights and Freedoms – the country’s new bill of rights. This fact, and its explicit attempt to pattern itself after various American groups (emulating their strengths and avoiding their weaknesses), makes LEAF an interesting group for this study. Its status as the first and only women’s interest group litigating in a sustained fashion before the Canadian Supreme Court may impact the group’s success and influence before the Court, and suggests the need for an in depth exploration of its origins, goals and participation.

**Group Origins**

Before the Charter, Canadian women had been frustrated with the Supreme Court’s treatment of sex discrimination. Cases in the 1970s had demonstrated the inadequacy of the equality guarantees in the 1960 Bill of Rights. In 1974, for example, the Supreme Court ruled that a section of the *Indian Act* which deprived female — but not male — Aboriginals of their status if they married a non-Aboriginal, was not sex discrimination since it treated all female Aboriginals equally (*Attorney General of Canada v. Lavall*). The Bill of Rights guaranteed only “equality before the law” and this was apparently satisfied by the section, since it had been applied equally to all Aboriginal women. Five years later, the Court would again anger women with its decision in *Bliss v. Attorney General of Canada* (1979). In *Bliss*, the Supreme Court ruled that pregnancy discrimination was not sex discrimination because it only distinguished between pregnant and non-pregnant people — not between women and men.

Thus, when discussions began on the government’s proposal for a new bill of rights, women rushed to participate. With the *Lavall* and *Bliss* decisions still lingering
unpleasantly in their minds, feminists were determined to influence the wording of the rights guaranteed in the Charter (LEAF 1999b). In 1981, the Ad Hoc Committee of Canadian Women on the Constitution was formed to lobby the government for “proper” equality guarantees (Vickers et. al. 1993, 48; Razack 1991, 34). This lobbying succeeded in achieving the addition of a new section to the Charter – section 28 – which stated that “notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons” (Constitution Act 1982). Women’s lobbying efforts also succeeded in changing the wording of the equality section (section 15) of the Charter. Canadians were now guaranteed more than just “equality before the law,” they were also guaranteed “equality under the law” and everyone had the right “to equal protection and equal benefit of the law.” The Charter wording suggested that women were entitled to both equality in the application of the law and equality in the substance of the law. Thus a gender distinction should no longer be saved just because it treats all women alike.

While this was a triumph for the women’s efforts, they felt their task was not yet finished (Atcheson et. al. 1984, 1). Arguing that “rights on paper mean nothing unless the courts correctly interpret their scope and application” (Razack 1991, 36), the women who lobbied successfully for the inclusion of the revised s.15 and the new s.28 of the Charter, refused to return quietly to the sidelines of constitutional politics. The new Constitution had placed a three year moratorium on section 15 equality rights litigation to give

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8 Section 15 of the Charter states that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” (Constitution Act 1982).
governments time to revise their existing legislation. The women intended to use this
time to look for new methods to ensure their constitutional success became meaningful in
practice.

One result was *Women and Legal Action: Precedents, Resources and Strategies for the Future* (1984), a study commissioned by the Canadian Advisory Council on the Status of Women (CACSW). This study examined the litigation efforts of American interest groups (in particular, American women’s interest groups) in order to determine how such efforts might work in Canada. The authors (all of whom would later be heavily involved in the formation of LEAF) recommended the creation of a legal action fund as a mechanism for developing and protecting women’s constitutional gains. Noting the ad hoc, reactive and largely unsuccessful litigation efforts undertaken by individual women prior to the Charter, the authors suggested a women’s legal action fund was needed to provide cohesion and continuity. In the early 1980s, no Canadian women’s group was litigating in a sustained manner and the interest groups that were litigating were not doing so from a feminist perspective (Atcheson et. al. 1984, 81-82). This was troubling since the first few years of Charter litigation would be critical to the reception of future litigation. With the growing recognition of the Court’s enhanced role as a “policy maker” came the fear that if women did not litigate, that policy might well be unfavourable to their sex. Thus the authors saw a need for systematic and sustained goal oriented Charter litigation (Atcheson et. al. 1984, 46, 81).

Having recommended the formation of a legal action fund, the study went on to make a series of recommendations to guide the formation of such a fund. Interestingly, after examining the American experience with several women’s groups litigating before
the courts, the study recommended the creation of just one national fund. Having a single fund would limit the competition for scarce financial resources and allow for easier cooperation with other interest groups litigating on behalf of other (s.15) equality provisions such as race or physical disabilities. Perhaps more importantly, the authors argued that one fund “could speak on behalf of a large number of Canadian women with one voice whereas a variety of funds might be perceived as sectarian, divisive and fragmented” (Atcheson et. al. 1984, 165).

*Women and Legal Action* also recommended that the proposed fund undertake the systematic approach to litigation that had been developed in the United States by groups such as the NAACP LDEF. This would involve both the direct sponsorship of cases and the selection of “winnable” cases that could build upon each other, case by case, until the ultimate objective was achieved. Therefore, the proposed fund should avoid, if possible, “cases which will frustrate or complicate the development of the [desired] principle [of law]” (Atcheson et. al. 1984, 167). The authors noted that in the United States, the WRP had made more frequent use of the direct sponsorship of cases than had other women’s groups. They argued that this had allowed the WRP to have more of an impact in areas such as employment discrimination than groups like the NOW LDEF which had relied more on amicus curiae participation.

However, *Women and Legal Action* also argued that, to achieve its ultimate goal of equality for women, the proposed legal defense fund should pursue more than just litigation. Instead, the group’s strategy should combine “public education, lobbying, use of the media, law reform, education of lawyers and the judiciary, as well as litigation” (Atcheson et. al. 1984, 171).
The study concluded that Canadian women had to begin implementing their strategy now that their lobbying efforts had ensured favourable wording for the equality rights provision of the Charter. The new wording made a "clear break" with the Court's previous interpretation of equality rights under the 1960 Bill of Rights. Thus, "the time [was] right to begin to develop a theory of equality that [would] meet the expectations of Canadian women" (Atcheson et. al. 1984, 168).

**LEAF: Objectives, Strategy and Participation**

On April 17, 1985 – the same day section 15 of the Charter came into effect – the Women's Legal Education and Action Fund (LEAF) officially came into existence. LEAF is a non-profit federally incorporated litigation group. It is funded by contributions from individual women, corporations, unions, and programs of the Federal government (in particular the Secretary of State Women's Program). LEAF's structure very deliberately reflects some of the factors Karen O'Connor deemed necessary for a group's success in her book *Women's Organizations' Use of the Courts* (1980) – a study of litigating American women's groups. These factors include a full time staff, dedicated and skilled volunteers (including lawyers and law professors from across Canada), and close coordination between national headquarters and local affiliates.

With the *Women and Legal Action* report directing their actions, the women behind LEAF – including the authors of the report⁹ – aimed to "make the promise of equality contained in section 15 a reality for all Canadian women" (Razack 1991, 47).

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⁹ A select group of women formed LEAF. This small homogenous "Toronto core" was composed of high profile professional women – primarily lawyers and human rights professionals (Razack 1992). This group included Elizabeth Atcheson, Mary Eberts and Beth Symes, the authors of *Women and Legal Action*. 35
Besides litigation, a complementary strategy of both education and lobbying was emphasized. These latter two methods are characterized by a more “behind-the-scenes campaign of ‘influencing the influencers’” (Morton 1992b, 231). This consists of traditional activities such as lobbying, but also non-traditional activities such as sponsoring legal scholarship supporting the “correct” interpretation of Charter equality rights, participating in training sessions for judges, and developing media contacts.

Lobbying is believed to be beneficial as a follow up to litigation efforts. Often the outcome of a case will either require or leave room for legislative action by government. According to LEAF’s founders, it is beneficial for a litigating interest group to use lobbying to either protect their courtroom success or sensitize legislators to the damage an unfavourable precedent might bring (Eberts 1986). The \( R \ v. \ Seaboyer \) (1991) case – where the Supreme Court ruled that a “rape shield” provision in the Criminal Code violated sections of the Charter – is a good example of where post litigation lobbying did occur. LEAF, who had argued in favour of the provisions before the Court, lobbied the Minister of Justice to ensure that new sexual assault legislation was enacted that addressed women’s equality concerns.

In keeping with the *Women and Legal Action* report, at its founding, LEAF’s litigation objective was said to be “to assist women with important test cases and to ensure that equality rights litigation is undertaken in a planned, responsible and expert manner” (Fudge 1987, 487). Cases are brought to LEAF’s attention in a variety of ways including referrals from other lawyers and women activists. The group selects cases based on a number of criteria. The favoured case promotes substantive equality for women and promises to result in either “significant gains for women, or gains for a
significant number of women" (LEAF 1997, 1). Preference is given to Charter cases and to cases that “break new ground.” The chosen case must allow the Court to decide on the equality issue and must “lend itself to fashioning a remedy capable of concretely advancing women’s equality rights” (LEAF 1997, 1). Also, although LEAF aims for the equal protection and benefit of the law for all women, it is particularly concerned with cases involving women who are “doubly disadvantaged – for example women experiencing discrimination based on their sex and race” (Eberts 1986, 421). In its first three years, alone, LEAF received over 300 case files. Its legal committee considered 64 cases for litigation and pursued over thirty (Razack 1991, 62).

Armed with their official strategy – the systematic approach to litigation outlined in *Women and Legal Action* – LEAF’s lawyers looked forward to incremental litigation. They identified their agenda from statute audits undertaken by women during the section 15 moratorium years (Eberts 1985, 345). These surveys of existing federal and provincial legislation pointed out where inequalities lay and where the women of LEAF intended to act.

However, even at LEAF’s formation, the women behind the organization doubted their ability to control the litigation field of equality. For many years, the NAACP “was the dominant if not the sole civil rights litigator thus having substantial control over litigation” (Wasby 1988, 159). In contrast, the equality section of the Charter (section 15) conferred benefits on other disadvantaged groups besides women, and many of these groups were interested in litigating. The availability of legal aid in provinces also assured that disadvantaged individuals would attempt legal action. In the end, LEAF’s earlier hopes for incremental litigation would have to be delayed (if not abandoned) because of a
crowded field impossible to dominate. Instead, LEAF shifted its focus to “building up a
‘track record’ of cases early in the history of the Charter, to establish its reputation for
ease in the area” (Eberts1986, 422). If it could not be the only group litigating, it
would attempt to be the most authoritative.

LEAF’s lack of control over the equality field assured not only that some equality
cases would be brought by other litigants, but that some of these litigants would have
different and even opposing equality interpretations to those held by LEAF. Such cases
can be brought by groups or individuals who are directly opposed to LEAF’s goals and
are litigating in an attempt to preempt LEAF’s interpretations. Or, they can be brought by
parties who are neutral, or unaware, of LEAF’s goals, and are litigating a personal
dispute that happens to affect an area of concern to LEAF. In such cases direct
sponsorship is obviously impossible and LEAF is forced to consider intervenor status in
order to have their interests heard by the Court. Although intervention is cheaper
financially than sponsoring cases, it limits the amount of influence an interest group
enjoys. Control over what issues are argued before the Court is possessed by the actual
parties in the case. There are also time constraints on intervenors, who must request leave
to intervene within 30 days of the filing of an appeal and have only 30 days to produce a
factum after the last party’s factum is filed. Therefore, intervention is viewed by many
women litigating under the Charter as merely a “strategy of necessity,” not of choice
(Atcheson et. al. 1984, 149).

The existence of other litigators has meant that this second choice strategy has
often had to be undertaken by LEAF. In particular, the increasing use of Charter equality
rights by men has frequently forced LEAF to react in defense. In fact, Christopher
Manfredi found that men were responsible for 80% of the equality claims from 1985 to 1988 (1993, 139). As a result, women found that the few legislative gains they had made in the decades before section 15 were suddenly threatened. LEAF was increasingly forced to spend time and money defending these gains. For LEAF a reactive strategy has become part of their reality. Women are engaging in “damage control” as cases challenging rape shield provisions and maternity benefits are brought to court by men. Although much of this damage control may be successful, LEAF’s lawyers believe that the full potential of the Charter will go unrealized if they are forced to put their own agenda for equality rights litigation behind that of men (Razack 1991, 61).

A further disturbing reality for LEAF’s official strategy flows from their lack of control over the equality field. This involves the existence, and the persistence, of less than perfect test cases – cases brought by litigants pursuing the same policy outcomes as LEAF, but whose factual situation does not put that policy outcome in its most favourable light. When a case arises addressing issues of fundamental concern to women and equality rights, but exhibiting less than favourable facts, LEAF faces a dilemma. Should they become involved in a case whose facts cast doubt on the chance of success and pose the risk of unfavourable precedent?

This dilemma is demonstrated by the Tremblay v. Daigle (1989) case, which concerned an injunction granted by the Quebec courts against a woman obtaining an abortion. The injunction was sought by the woman’s boyfriend and quickly became the focus of national attention. LEAF was necessarily attracted to an abortion case of such prominence. However, the facts made it a less than ideal addition to LEAF’s case repertoire. Daigle’s pregnancy had originally been voluntary and there was no threat to
her or the baby’s health. She was also relatively far along in the pregnancy. The decision to abort had been triggered by her breakup with her boyfriend and pro-life groups characterized this as a “lifestyle abortion.” Given this, it certainly appeared that “intervening in the Daigle case violated LEAF’s litigation strategy of seeking incremental change in favourable fact circumstances” (Morton 1992, 278). Yet, LEAF felt they had little choice but to become involved in a case of this magnitude.

Thus, while the women of LEAF may have preferred to initiate cases, they recognized from the start that “sometimes, reacting to the initiatives of others is the best – or the only – means of seeing that a crucial constitutional point goes before the court” (Eberts and Brodsky 1986, 1). The group now appears to have accepted intervention as their method for advancing gender equality arguments. They argue that “by concentrating on intervening in cases which have reached the provincial appeal courts and those before the Supreme Court of Canada... LEAF has the ability to effect change for women’s equality in a cost-effective manner” (LEAF 1997, 1-2). Indeed, all of the group’s appearances before the Supreme Court have been as an intervenor. Of the 78 Canadian Supreme Court cases included in this study, LEAF intervened in 23 of them (29.5%). Has LEAF obtained its objectives without the use of its ideal strategy? The results of the analyses performed in this dissertation should help answer this question.

**Issue Areas**

**United States**

In the United States, cases in the areas of sex discrimination, sex discrimination in employment, other bases of discrimination in employment, affirmative action and
abortion were the subject of study. These issue area titles are taken from Professor Harold Spaeth’s United States Supreme Court Judicial Database, 1953 to 1996 Terms. The categories refer to the subject matter of the controversy – “the context in which the legal basis for [the] decision appears” (Spaeth 1994, 70; Spaeth 1997). Thus cases in both the sex discrimination and affirmative action categories could involve the “equal protection clause,” but are divided by their substance and considered in those terms.

The issue areas, themselves, were chosen by examining the areas in which women’s interest groups tended to litigate. LEXIS/NEXIS was used to identify the cases the women’s groups of interest had participated in (the groups’ names and their lawyers’ names were used as key words in a search of Supreme Court cases). The cases identified for each group were then examined in the Supreme Court Database and their issue area was recorded. If at least eight of one group’s identified cases fell within an issue area, that area was included in the study. This dividing line was chosen because involvement in eight cases in an area suggested the area was of importance to women’s groups. Further, the distribution of cases suggested this as a cutoff point. There was a large gap between the groups’ participation across the areas. Cases fell predominantly in the five issue areas mentioned above – other issue areas had only a few cases each. In fact, these five areas are the ones most often mentioned by the groups when discussing their areas of concern. Thus all the cases coded in Spaeth’s Database as sex discrimination (issue 283), sex discrimination in employment (issue 284), other discrimination in employment (issue 222), affirmative action (issue 223) and abortion (issue 533) were included in the study.

All cases in the issue area were then used in the analysis whether the women’s groups were present or not. Cases were not included in the American analyses if they
were summarily decided, if they were decided by an equally divided court, or if the Court's opinion in the case took up less than one page in the *U.S. Reports*. These cases did not provide enough information to code doctrine so were excluded. In addition, two unusual cases – which had more than a one page opinion and fell in the discrimination areas of interest – were excluded as they did not involve a discrimination claim. And two affirmative action cases were not included as they dealt with unusual and less comparable issues: employment on military bases in the Philippines and employment at the Bureau of Indian Affairs.

*The Issue Areas: Sex Discrimination*

The "sex discrimination" category includes all claims of discrimination that were based on gender, excepting those involving employment. This includes claims based on both statutory and equal protection grounds. Among the cases in this category are those addressing the appropriate standard of scrutiny for gender claims, cases involving gender discrimination in education, and cases involving fathers of illegitimate children.

"Compensation cases" – the early cases dealing with preferential (and stereotypical) treatment of women – are also included in sex discrimination, as are cases dealing with "physical differences" between the sexes. Thus challenges to laws benefiting widows but not widowers ("compensation"), and challenges to laws allowing males but not females to be charged with statutory rape ("physical differences"), both fall within the sex discrimination category.

"Sex discrimination" includes some of the most important cases for the women's groups' concerns. Much of the early litigation (including the WRP's first case, *Reed v.*
Reed 1971), falls within this category. The groups would prefer gender to be treated like race as a suspect classification – subject to the highest level of scrutiny. They also aim for the elimination of sexual stereotyping (beginning with the WRP’s case by case attempt to have widows and widowers treated equally in terms of social security benefits). The three groups of interest here have argued against sex discrimination and against preferential treatment for women. The groups fear that treating women differently will lead to “judicial paternalism” and discrimination against women “for their own good” (Berger 1980, 24). They favour equal treatment of the sexes even in cases involving physical differences between them (such as statutory rape and military combat). There were 33 sex discrimination cases included in this study. The WRP participated in 21 (63.6%) of them, the NOW LDEF participated in 14 (42.4%), and the WLDF were in 13 (39.4%). In fact, nearly 40% of the WRP’s litigation occurred within the sex discrimination area.

Sex Discrimination in Employment

“Sex discrimination in employment” includes cases involving equal pay, sexual harassment and pregnancy discrimination. Cases addressing the distinction between intentional and unintentional gender discrimination, and the appropriate test to be used in each case, are also in this category. The women’s groups included in this study have committed substantial resources to fighting sex discrimination in employment – hoping to secure equal opportunities and equal pay for women. They seek to “eliminate barriers that deny women economic opportunities” (Brief of WLDF, NOW LDEF et. al. Meritor Savings Bank v. Vinson 1986, 19; WRP 1999) such as sexual harassment. However, again fearing that differential treatment will be harmful in the long run, the three groups
considered here do not argue for special consideration to be given to pregnancy. They believe that calling attention to the distinctions between men and women will have adverse consequences for women. Instead, the groups would prefer pregnancy to be treated like any other disability. Of the 22 cases included in this study, the WRP participated in 17 (77.3%), and the NOW LDEF and WLDF both participated in 12 (54.5%).

*Other Discrimination in Employment*

"Other bases of discrimination in employment" includes discrimination based on race, age or working conditions (Spaeth 1997). The women's groups entered these cases to ensure the most favourable interpretation of equal protection and statutory guarantees. The groups participated in cases with gender implications in this area, arguing in favour of the claimant and a broad interpretation of rights. With 68 cases, this was the largest issue area in the study, accounting for slightly over 40% of all the cases analyzed. The WRP was involved in 13 (19.1%) of these cases, the NOW LDEF was involved in 10 (14.7%) and the WLDF participated in 11 (16.2%).

*Affirmative Action*

The "affirmative action" category includes cases involving preferential treatment for race or gender in education or employment. The women's groups of interest are in favour of affirmative action, arguing it is necessary in order to achieve equal employment opportunity. The WRP's participation in this area is unusual in that the group does not participate directly in the cases. Rather, affirmative action cases are handled by the
ACLU's general legal staff, with the WRP assisting in the writing of the briefs\(^\text{10}\) (WRP 1999, 3). Of the 14 affirmative action cases included in this study, the WRP was counted as participating in only three (21.4%), while the NOW LDEF was in 9 (64.3%) and the WLDF was in 8 (57.1%).

Abortion

The "abortion" issue area included cases involving contraceptives, challenges to restrictions on the abortion choice for women, and cases involving protest activity at abortion clinics. The WRP does not participate in abortion cases. Instead, in 1974, the ACLU established a Reproductive Freedom Project to handle these cases. (This specialized group's participation was not included in this study.) The remaining two groups, the NOW LDEF and the WLDF, argue in favour of reproductive freedom before the Court. These groups believe that "the right of women to decide for themselves whether or when to bear children is essential to women's achievement of full equality in... society" (Brief of NOW et al. Thornburgh v. American College of Obstetricians and Gynecologists 1986, 18). Both groups are also active in trying to defend access to clinics. The NOW LDEF participated in 11 (40.7%) of the 27 abortion cases included here, while the WLDF participated in 8 (29.6%).

\(^{10}\) The WRP's participation in these cases is difficult to determine. The group was coded as present only if the group name was used on the ACLU brief or one of its lawyers was listed on the brief. Thus its participation may be underreported here if its lawyers in fact assisted in writing the brief but were not listed as lawyers for the group.
Canada

In Canada, cases involving equality and discrimination, family law, sexual assault, pornography and abortion were studied. As with the United States, these categories are based on subject. Equality (s.15) claims have been made in nearly all the areas but cases are divided according to their substance. This division was done using the QUICKLAW database and the Court's own case descriptions found in the Supreme Court Reports.

As in the United States, these issue areas were chosen by examining the areas in which the women's group of interest tended to litigate. Thus, the issue areas LEAF was involved in were recorded. If the issue area was identified in their publications as part of the group's agenda, and the group participated in at least one case in the area, it was selected. The number of cases required for an issue to be included was much smaller than in the United States where at least one group had to have participated in eight cases in an area. This difference reflects LEAF's lower rate of litigation before the Supreme Court (26 cases in the time period of interest, just over 30 cases at present) and their status as the only Canadian women's group being studied. An inclusive approach was taken and the issue areas identified by LEAF to be important to their agenda were given extra attention. The five selected issue areas included all but three of LEAF's Supreme Court appearances (LEAF's interventions in two cases on hate speech and a case on the rules of standing were excluded as they were not central to the group's agenda).

The selected issue areas were then put into QUICKLAW and a list of all the cases in those issue areas was derived. (Since the list of relevant Canadian cases was compiled specifically for this study rather than being drawn from a database as was the case in the
United States, Appendix A identifies all of the Canadian cases included in the study.) All cases in the issue area were included in the Canadian analyses, whether LEAF participated or not. Cases were not included if they contained a decision but no reasoning or if they dealt with a distinct subset of an issue area that was of no interest to women’s groups – issues they never participated in (for example, child testimony cases within the sexual assault area). This varies slightly from the American criteria. In the United States cases were not included if the Court’s opinion took less than a page in the U.S. Reports. This criterion was not applied in Canada and a few of the opinions in the included cases did indeed take up one page or less in the Supreme Court Reports. The difference in criteria results from the issue areas covered in each country. In Canada the sexual assault cases sometimes come to the Court as “appeals of right” and these cases are likely to have short opinions. To exclude cases with short opinions would disproportionately exclude sexual assault cases (about 25% of the sexual assault cases had brief opinions). Thus cases were included as long as the Court provided enough reasoning to allow doctrine to be coded.\textsuperscript{11}

\textit{Issue Areas: Equality and Discrimination}

The equality and discrimination area included cases dealing with the interpretation of the equality section (s.15) of the Charter, gender discrimination – including employment discrimination, pregnancy discrimination, sexual harassment – and discrimination based on categories such as age and physical disability. This category of

\textsuperscript{11} American cases were also excluded if they involved an equally divided Court. This criterion never had to be applied in Canada as the Court was never equally divided.
cases is LEAF’s primary area of concern. LEAF pursues substantive equality for women and a broad interpretation of the equality guarantees of the Charter. The group seeks to promote equal employment opportunities for women, which includes freedom from sexual harassment and pregnancy discrimination. However, unlike the American groups, LEAF is not afraid of preferential treatment for women. In fact, the group argues that the “same treatment” for men and women may in fact “exacerbate social disadvantage” (LEAF Factum R. v. Conway, 10). The group argues that equality for women is promoted by the accommodation of working women’s childbearing needs. It quotes with approval American cases which have allowed preferential treatment of pregnancy (LEAF Factum Brooks v. Canada Safeway, 17). The study included 23 cases in the equality and discrimination area and LEAF was involved in 8 (34.8%) of them. These cases comprised 35% of LEAF’s litigation.

*Family Law*

The “family law” area included cases dealing with such issues as common-law wives, spousal support and child custody. LEAF is concerned with the special disadvantages for women arising out of marriage. Intervening always in support of women, LEAF pursues recognition that it is women who “take primary responsibility for childcare and other household responsibilities, often at the expense of employment outside the home” (LEAF 1998, 1). They argue in favour of the “equitable sharing of the economic consequences of marriage” (LEAF 1998, 1). They also support deference to the custodial (usually female) parent. Twelve family law cases were included in the study and LEAF participated in two (16.7%) of them.
Sexual Assault

For the sexual assault area, only issues specific to sexual assault were included. Thus in this study, the sexual assault area is composed of issues such as the defense of “consent” and the proper use of the victims’ previous sexual history, but not of issues dealing with defendants’ rights. LEAF argues in favor of victims in these cases and against the accused. They support a narrow interpretation of the consent defense and are against the use of the victim’s previous sexual activity at Court. Unlike many liberal groups, their arguments pit them against defendants’ rights in this area. LEAF participated in 8 (24.2%) of the 33 sexual assault cases included in the study.

Abortion

Any case involving the issue of abortion or foetal versus mothers’ rights was included in the study. LEAF has been very active in this area arguing for reproductive freedom for Canadian women. The group argues in support of access to abortion. They push the Court to recognize the rights of the woman and speak against foetal rights. Only six abortion cases were included in the study and LEAF was involved in four (66.7%) of them.

Pornography

Finally, the “pornography” issue area involves cases dealing with the interpretation of Canada’s obscenity law. Again, unlike some liberal groups, LEAF argues in favor of censorship in this area. The group holds that pornography “amounts to a practice of sex discrimination against individual women and women as a group”
(Factum of LEAF, *R. v. Butler* 1992, 2), and seeks to eliminate it. Focussing on the harm pornography causes to women they argue that it is not a protected form of expression. This was a small area of litigation. Only four cases were included in the analyses and LEAF was involved in only one (25%) of them. However, this has been an issue area identified by LEAF as important to their interests and they participated in two hate speech cases (that were not included in this study) in order to pave the way for their litigation in pornography. Thus the area is included here.

**Time Period of Study**

The success and influence of the American women's groups is examined from the 1970 to the 1996 Supreme Court terms. In the United States, 1970 was chosen as a starting date because prior to this time women's rights issues appeared much less frequently before the Court and the women's interest groups had yet to fully mobilize for litigation (Cowan 1976). The study ends with the 1996 term (cases decided from October 1996 to July 1997), as that was the last complete Court term when this research commenced.

In Canada, success and influence was examined for cases decided from 1984 to 1997. Again the study ended in 1997 as that was the last year for which all cases were reported when research began. Fewer years are included in the Canadian analysis since historically there has been much less interest group activity to study. “Canadians have not generally used litigation as a political tactic... [and] the courts, the press and the public have all tended to reject 'any concept of the courts as positive instruments in the political process’” (Morton 1984, 151). The passage of the Canadian Charter of Rights and
Freedoms in 1982 began to change this. Interest groups were active in the constitutional drafting process, and after the advent of the Charter, these groups lobbied the Supreme Court to allow more group intervenors to appear before it. The Court meanwhile was adapting to its greater policy making role and its need for different kinds of evidence. Thus by the mid 1980s, the Court responded with a “more open-door policy” (Brodie 1992, 226) – providing us with something to study.

The Next Step

The rest of the dissertation makes use of the choices described in this chapter. The success and influence of the WRP, NOW LDEF and WLDF are examined at the level of both individual cases and policy areas as a whole. Each of the analyses includes cases decided by the Supreme Court from its 1970 to its 1996 term, in the areas of sex discrimination, sex discrimination in employment, other areas of discrimination in employment, affirmative action and abortion.

The success and influence of the Canadian women’s group, LEAF, is also examined in terms of both individual cases and broad policy areas. These analyses are conducted for cases decided by the Supreme Court from 1984 to 1997, in the areas of equality and discrimination, family law, sexual assault, abortion and pornography. Chapter 3 discusses the first half of the analyses for both countries – success and influence at the individual case level.
CHAPTER 3

GROUP SUCCESS AND INFLUENCE IN THE U.S. AND CANADA:
OUTCOME AND DOCTRINE AT THE CASE LEVEL OF ANALYSIS

American political scientists have spent decades learning of the motivations, resources, and strategies of first liberal (Vose 1959; Manwaring 1962; Sorauf 1976), and later conservative (Epstein 1985), interest groups involved in litigation. Much less is known, however, about the actual impact of these groups. While studies have examined their success in particular cases, success has been differently defined and variously measured. More importantly, case success does not in itself equal impact. Thus even if groups appear successful it must be asked whether they are influential. Does a successful group actually influence the direction of the court's decision or do other factors determine the outcome regardless of the group's preferences?

While the early American literature accepted that groups were "intrepid litigators," more recent work has called this conventional wisdom into question (Epstein and Rowland 1991; Songer and Sheehan 1993). As argued in Chapter 1, determining the truth behind the myth is important not only for assessing the consequences of interest group litigation but also for justifying the litigation itself.
This chapter attempts to determine the success and influence of women’s interest
groups at the United States and Canadian Supreme Courts. The focus here is on the case
level of analysis. The next two chapters will take a broader focus and attempt to
determine success and influence in policy areas over the long term. In the United States,
case outcome and doctrine are examined from the 1970 to the 1996 Court terms. As
detailed in Chapter 2, cases in the areas of sex discrimination, sex discrimination in
employment, other bases of discrimination in employment, affirmative action and
abortion were the subject of study. In Canada, case outcome and doctrine are examined
for cases decided from 1984 to 1997 involving equality and discrimination, family law,
sexual assault, pornography and abortion. All cases in the issue area were used in the
analysis (whether the women’s groups were present or not). Determining group success
and influence in achieving favourable case outcome and doctrine should provide a more
accurate picture of the impact of interest groups on the courts.

Hypotheses and Measurement

For the time periods of interest in each country it is expected that many of the
micro-level and macro-level factors mentioned in Chapter 1 will have an impact on
judicial decision making.

Micro-Level Factors

Judicial Preferences

Particularly for the United States model, judicial preferences are expected to have
a relationship to the outcome and doctrine of the case. Of course, if one followed strictly
a pure “attitudinal model,” policy preferences would be considered the most important predictor of the direction of the decision – including, presumably, both outcome and doctrine. However, even those who discount this model should accept that judicial preferences will have some influence on the way cases are decided, with conservative justices less likely than liberal justices to decide cases favourably for rights claimants.

It is unclear whether this relationship will be stronger for doctrine than for case outcome. One would expect that Supreme Court justices would care more about the long-term legacy of a case than the immediate result. This would mean that judicial preferences would be a stronger predictor of the doctrine of a case than of its outcome. Constraints, such as the particular case facts, might force a conservative justice to vote in a liberal direction on the outcome of a case but this justice’s reasoning may still be in a conservative direction (Baum 1997, 71). However, because we are looking at justices as a group, it is also possible that judicial preferences may be a more powerful predictor of case outcome than of case doctrine. Justices writing opinions will often compromise to get other justices to join on and the effect may be to moderate the opinions. There should be fewer ideologically pure opinions and the effect of judicial preferences may be diluted. Regardless of which of these scenarios proves true, judicial preferences should still have some influence on the direction of a court’s decision in terms of both outcome and doctrine. Thus it is hypothesized here that the more conservative the court hearing a case, the less likely the outcome will be favourable to women’s groups, and the less likely the doctrine will be favourable to the groups.

This is hypothesized for both countries. However, it is not expected – at least at this time – that judicial preferences will have as much of an influence on the decisions of
Canadian justices. Ideology has not played an important role in judicial appointments in Canada, and more importantly, even the Supreme Court's ideological leaning has been neither obvious nor consistent (Morton, Russell and Riddell 1994). Perhaps the traditional emphasis on region and patronage, rather than ideological leaning, in judicial appointments in Canada has resulted in the appointment of more moderate justices. Since Canadian justices exhibit at least less obvious ideological differences than American justices it is less likely that ideology will have as much impact.

The measurement of judicial ideology is difficult, of course, and has been the subject of controversy. The approach used for this project was to first measure justices' ideology in cases analogous to those in the issue areas of interest. A mean score was then computed for each justice, and finally, from these, a mean ideology for the court hearing each case of interest was derived (see Appendix B for details on the construction of this and the following independent variables). While some argue that the Segal and Cover (1989) scores (based on newspaper accounts of justices' ideology, published after their nomination to the Court) offer a more unbiased measure, this method is impossible to duplicate in Canada, where even the national newspaper (the Globe and Mail) rarely mentions ideology with regard to justices. In fact, in Canada, it was difficult even to compute ideology using analogous cases. Given the more limited time span over which the Canadian Supreme Court has been deciding individual rights cases, the realm of relevant cases was obviously smaller. In addition, since sexual assault is one of the issue areas of interest, cases involving criminal defendants' rights could not be used as analogous cases. As criminal matters make up a significant part of the Canadian Supreme
Court’s docket,¹ judicial ideology had to be computed using far fewer cases than in the United States. For that reason, more caution should be used in interpreting the results of the ideology variable in Canada.

Case Facts

Case facts are also expected to be important to the justices’ decisions.² This includes the type of discrimination claimed by the party (explicit or implicit), the basis of the claim (constitutional or statutory) and, perhaps less obviously, the gender of the party bringing the claim. The case facts should be equally important in determining both outcome and doctrine. It is expected here that claims involving implicit discrimination will be less likely to result in a favourable outcome or favourable doctrine for rights claimants than claims involving explicit discrimination. Explicit discrimination claims challenge laws that involve unequal treatment – laws which are “on their face” discriminatory. Implicit claims, by contrast, involve laws or actions that look neutral. However, the discrimination claim arises because these laws have a disparate impact on one of the genders. This less obvious form of discrimination should receive a less favourable reception at the Court (see for example, Wolpert 1991). One has to convince a justice that it is discrimination. In addition, in the United States, the party challenging the law or action has to prove that there was an “intent” to discriminate (at least in the equal

¹ In contrast to the United States, the Canadian judicial system is an integrated one. There is a single judicial system to interpret and apply both federal and provincial laws. Thus the Canadian Supreme Court’s docket often has a composition different from that of the U.S. Supreme Court.

² There is a debate in the literature about whether the case facts qualify as legal considerations. The facts are used essentially as controls in this analysis. However, at other points in the dissertation they are considered more in depth and are, in fact, treated as legal considerations. See Chapters 4 and 6 for a discussion of this point.
protection area). The explicit versus implicit distinction was coded using the description of the claim provided in the syllabus of the *U.S. Reports* and the Canadian *Supreme Court Reports*. If a claim complained of unequal treatment it was treated as explicit discrimination, while claims suggesting unequal impact were coded as implicit discrimination.

Since scholars distinguish between the Court’s treatment of statutory and constitutional claims, this is another case fact that will be taken into account in the model. According to Wolpert (1991), since “Title VII’s statutory mandates are clearer than the less rigorous constitutional requirements under the equal protection clause, the court [can be] expected to treat statutory claims more favorably than constitutional claims” (5; for the basis of this suggestion, see Ginsburg 1975; Baer 1978). Thus it is hypothesized that rights claims brought under the constitution will be less successful than those based on statutory law. This case fact is very simply measured, again using the description in the syllabus of the *U.S. Reports* and the Canadian *Supreme Court Reports*. Does the party challenge the action or law as contrary to the constitution, to statutory law, or to both?

Finally, a model must consider the gender of the party bringing the case. The expectations for this case fact, however, may not be as straightforward. In the 1970s, when American women’s groups became very active in litigation, the arena was composed of men. “The judges [were] men, attorneys entering courts [were] men and those who trained them [were] men... there wasn’t a ... baby sitter among them” (Cowan 1976, 380). Given this, one might expect females – and the rights issues of concern to

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3 This variable is coded in terms of who is bringing the case, except in the Canadian criminal cases included in the analyses. These cases are coded in terms of who is challenging the prosecution.
them—to receive less favourable treatment, and males to be more successful before the court. However, if one considers that a male bringing a case will usually be challenging a law or action that gives special preference to women, a different expectation arises. In the years after 1970, American and Canadian justices will probably be less likely to strike down a law that favours women than a law that favours men (Segal and Reedy 1988, 557; Wolpert 1991, 4). The progress towards equal rights may make the latter a more obvious and less acceptable form of discrimination and thus increase the likelihood of its being struck down. In addition, some argue that “the persistence of paternalism” may move a justice to favour the special treatment of women (Wolpert 1991, 4). In this study the gender of the party bringing the claim was recorded. It was hypothesized that males will be less successful than females in achieving favourable outcomes and doctrine.

Macro-Level Factors

Public Opinion

Public opinion has also been suggested as a factor which may influence judicial decisions. While the amount and form of influence is still a matter of debate (Norpoth and Segal 1994), various studies have noticed a relationship between public opinion and judicial decisions (Marshall 1989; Mishler and Sheehan 1993). Public opinion is thought to play an important role in death penalty cases (Tauber 1998) and may also have a role in gender issue cases. Wolpert (1991, 8) suggests that the court’s refusal to apply strict scrutiny to gender classifications requires justices to draw the line between acceptable and unacceptable classifications based on their own perceptions. She argues that “what
the Court believes to be ‘outmoded, stereotypic’ differences and ‘real’ differences is likely to be influenced by” such factors as changing social standards and public opinion (8).

It is hypothesized here that higher levels of public support for equality should correspond with more favourable case outcomes and doctrine for women’s groups and their goals. However, it is not expected that public opinion will have as strong a relationship to case doctrine as to case outcome. As the Morgentaler decision illustrates, the public tends to notice only case outcome. Therefore, justices may feel more pressure to compromise on the outcome than on the doctrine in a particular case. Since little is reported of even majority opinions – much less concurrences and dissents – justices may feel more comfortable ignoring public sentiment in their reasoning, thus providing a hollow victory at best.

Measuring public opinion proved difficult. The same measure of public support for gender equality had to be found for all the years of interest. In the United States a question on the General Social Survey, which had been asked nearly every year from 1970 until 1996, was eventually selected. This question asked respondents “do you approve or disapprove of a married woman earning money in business or industry if she has a husband capable of supporting her?” The more limited selection of polls in Canada, however, meant that the search was less successful for that country. The question selected asked respondents whether they agreed that “if a company has to lay off some of its employees, the first workers to be laid off should be women whose husbands have jobs.”
While this question was somewhat comparable to that asked in the United States, it was not asked nearly as frequently.\(^4\) Once the questions were selected, the percentages in favour of equality were included in the models of both countries.

Solicitor General and Attorney General Participation

Another factor that must be included in any model of the influences on judicial decision making is the participation of the Solicitor General in the United States and the Attorney General in Canada. The Solicitor General’s success before the American Supreme Court is well noted in the literature (Segal and Reedy 1988; Segal 1991; McGuire 1996). He is regarded as “one of the most influential actors in the federal judicial system” (Segal and Reedy 1988, 555), litigating on behalf of the government and controlling the appeals to the Supreme Court. Indeed, Segal and Reedy discover a clear relationship between the position of the Solicitor General and that of the Court in sex discrimination cases (1988). Thus the Solicitor General is expected to increase the chances of success for whichever party he favours. While perhaps not as dramatic as in the United States, the Attorney General of Canada has also enjoyed a high success rate before the Court (McCormick 1994). Therefore, it is hypothesized here that if the Solicitor General (U.S.) or Attorney General (Canada) takes a side in a case that side will be more likely to win. For example, the Solicitor General (U.S.) or Attorney General (Canada) taking a position favourable to the interests of women’s groups will make

\(^4\) Indeed a second question had to be substituted for a few of the years. This question asked respondents if they agreed that “in this time of high unemployment, a married woman, with a gainfully employed spouse, should not be given equal opportunity in the job market.” Even with this second question, however, there were gaps for some of the years of interest. Results for these years were interpolated from the results of the other years. Thus caution must again be used when interpreting this variable.
favourable outcomes and doctrine more likely. This variable is expected to perform similarly in terms of both outcome and doctrine. The variable included in the model measures the Solicitor General’s or Attorney General’s position (favourable or unfavourable) when participating either as a party or as amicus curiae in a case.

Women’s Interest Groups

The macro-level factor of direct interest to this study is, of course, the participation of particular women’s interest groups in cases before each nation’s Supreme Court. In the United States, the focus was on the Women’s Rights Project (WRP) of the American Civil Liberties Union, along with the National Organization of Women’s Legal Defense and Education Fund (NOW LDEF) and the Women’s Legal Defense Fund (WLDF). As detailed in Chapter 2, these groups were chosen because they have consistently shown the highest rates of litigation among women’s groups (O’Connor and Epstein 1983; George and Epstein 1991). In Canada, the Women’s Legal Education and Action Fund (LEAF) was chosen – again because it has out-litigated any other group.¹

Some previous research has suggested that women’s groups have had an impact on court decisions, at least for gender based claims (O’Connor and Epstein 1983; Wolpert 1991). It is hypothesized here that the presence of these groups in a particular case will make favourable outcomes and doctrine more likely. Some might be concerned that the appearance of interest group influence occurs simply because interest groups enter cases

¹ LEAF was created specifically to take advantage of the litigating opportunities provided by the Charter. It has become the Supreme Court’s “top intervenor” among all interest groups – far outdistancing any other women’s group (Allen and Morton 1997).
they think they can win. The inclusion of other potential influences in this analysis should help address this concern. For example, the inclusion of the case fact variables and the variable measuring the participation of the Solicitor General controls for conditions under which cases are more likely to be won. More importantly, I believe groups do not just enter cases they think they can win. They often appear to be forced to become involved when an important issue is brought before the Court by a party, even though the facts of the case may be somewhat unfavourable for their interests (for example, a woman wanting an abortion as a lifestyle choice). The groups may also enter a case to protect a previous victory. Or they may feel compelled to join all important cases in particular issue areas, voicing their arguments even in decisions expected to go against them (again, the abortion area may provide an example of this). Certain issue areas may just be of such inherent concern to them that they participate as frequently as possible — even if just to keep the justices informed as to the state of public opinion.

The United States model includes three variables measuring the presence or absence of each of the groups. The model was also run with one variable combining the three groups (see Appendix B for details). In Canada the model was run with a measure of the presence or absence of LEAF. While these groups may have influence on both case outcome and case doctrine, they are expected to perform less well in terms of doctrine. It will be more difficult to persuade the justices to their ideal legal positions. Although the groups can alert the justices as to the depths of feeling on an issue and may, in fact, provide some credibility to the claims being made, the women’s groups may push the arguments further than the courts are willing to go.
Other Interest Groups

The first part of this dissertation discussed interest group influence on the courts and suggested that there have been some findings of support. Therefore, the participation of all interest groups should be considered. Groups other than the ones of particular interest may have an influence on the outcome and the doctrine of a case. And it is possible that the sheer number of groups arguing a position before the Court may be influential. Thus the models for each country include measures of the number of amicus curiae briefs (or intervenor factums in Canada) arguing for a favourable decision, the number of amicus briefs arguing against, and the number taking a neutral position. In the United States it is expected that the higher the number of briefs for a favourable decision (in terms of either outcome or doctrine), the more likely such a decision will occur. And conversely, the higher the number of briefs against a favourable decision, the less likely it will occur.

In Canada, however, these variables are not expected to have the same impact. Few groups other than LEAF have been repeat players before the Court and none have the expertise of the American groups. Thus, while LEAF is expected to have influence, the other Canadian groups are less likely to have a significant impact.

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6 For the purposes of this study, a group’s position on the outcome of a case was taken as a surrogate for their position on doctrine. Obviously there are problems with this assumption and future projects will attempt to take the actual arguments of each group into account.
The Models

This project is interested in determining the influence of interest groups on Supreme Court decision making in the United States and Canada. The project has two dependent variables: case outcome and doctrine. The model was first run with the “bottom line” outcome of the case (excluding reasoning) as the dependent variable. If the rights claimant in the issue area of interest wanted a reversal in the case, a reversal was coded as a favourable outcome, while an affirmance was coded as an unfavourable outcome. In the cases where the law makes distinctions between males and females the American groups will usually support the man challenging the law favouring women – these groups are in favour of more absolute equality. In Canada, LEAF supports substantive equality for women – not absolute equality – so favourable treatment for women is often preferred (see Appendix C for more details on the measurement of this variable).

The model was then run with the doctrine of the case as the dependent variable. All the majority opinions in the cases of interest at the Canadian and U.S. Supreme Courts were read to determine how favourable their doctrine was to the positions of the women’s interest groups – very favourable, moderately favourable, moderately unfavourable or very unfavourable. In cases where the interest groups did not participate, their preferred doctrine was determined by examining both their position in similar cases

7 What constitutes a favourable outcome for the Canadian cases differs over the issue areas. For abortion and family law the favourable outcome is pro-woman. For sexual assault the favourable outcome is against the male accused. For pornography a favourable outcome is the side of the state. And for equality a favourable outcome is pro-woman. This will be pro-claimant unless it is a male challenging sex discrimination.
and their publications. The favourability of a decision was coded looking first at the central argument of the case. If the big issue was favourable than smaller issues could affect the degree of favourability but could not put a case over the line (positive to negative or negative to positive). If there was no major issue in a case, but instead, small and equal issues, then these were coded and the balance of favourable arguments was determined. To be coded as "very favourable" doctrine, all of the Court's main arguments had to go in favour of the group. This meant all layers of reasoning - for example, in abortion, both the standard used by the Court, and the reasoning on restrictions had to be favourable. In Canada, the Court's reasoning on both the substantive section of the Charter (under which the rights claim was brought) and s.1 (whether the distinction was a reasonable limit) had to be decided favourably for the group. For more detail on the measurement of these categories see Appendix C.

Because the first dependent variable, outcome, is dichotomous, I use the logit technique for multivariate analysis. However, the second dependent variable is ordinal so the ordered probit technique is more appropriate. My independent variables for the models include the variable measuring judicial preferences (court ideology) as well as the three variables measuring case facts (implicit or explicit discrimination, constitutional or statutory case, gender of the party bringing the case). They also include the measures of public opinion, Solicitor General or Attorney General (in Canada) participation, and women's groups participation (in the U.S.: participation of the ACLU WRP, NOW LDEF, WLDF - measured separately and together; in Canada: participation of LEAF).

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See the discussion in Chapter 2 for the groups' positions.
Finally, the models include the three measures of total interest group participation (number of amicus/intervenor briefs for a “favourable” decision, number of briefs against a “favourable” decision, and number of briefs taking a neutral position).

**Results**

Before considering the results from the models measuring influence, one must first determine whether the groups are successful. To measure success, I focused on the cases in which the women’s groups participated in each country. For case outcome, the number of cases in which groups were on the winning side was simply divided by the total number of cases in which they participated (in the issue areas of interest). In the United States, the WRP enjoyed a 67% success rate. The NOW LDEF had a 64% success rate, while the WLDF was successful only 58% of the time. However, when the groups combined in participation, one discovers a 76% success rate for the cases in which all three groups are present. However, this still does not catch LEAF, in Canada, who enjoyed an 83% success rate in the cases in which it chose to participate.

To measure success in terms of doctrine, I again focused on the cases in which the women’s groups participated in each country. The number of these cases which featured either “moderately” or “very favourable” reasoning was simply divided by the total number of these cases. In the United States, the WRP was successful 70% of the time. The NOW LDEF had a 66% success rate, while the WLDF was successful only 62% of the time. However, when the groups combine in participation, one again finds a higher
success rate, 80%, for the cases in which all three groups are present. This is only slightly higher than LEAF who individually enjoys a 78% success rate in the cases in which it chose to participate.

Somewhat unexpectedly, the three U.S. interest groups experienced slightly lower success rates in terms of bottom line outcome than in terms of doctrine. The three groups together also experienced a slightly lower success rate for outcome. In Canada, by contrast, LEAF enjoyed a higher success rate in terms of case outcome than it did for doctrine.

Why would the U.S. groups experience a higher success rate for doctrine than for outcome? One would expect that favourable doctrine would be more difficult to achieve. While the differences are not great, they should be examined. Obviously, in a few cases, the women’s groups’ preferred outcome did not occur (perhaps the Court reversed instead of affirmed), and yet the reasoning used to bring about this event was not damaging to the groups’ interests. An abortion case such as Planned Parenthood v. Casey might fit in this category. On outcome it could be coded as a loss as most of the restrictions Pennsylvania put on abortion were upheld. And yet on doctrine the Court explicitly reaffirmed Roe v. Wade (although with the addition of a less favourable standard) when most observers expected it to fall. This provided the groups with at least a tempered victory on doctrine.

In LEAF’s case, the opposite situation occurred. The group was successful on outcome in cases that were not accompanied by favourable reasoning. An example of this is provided by R. v. Seaboyer where the Supreme Court dismissed the appeal of a man accused of sexual assault (a victory on outcome) and yet held that one of Canada’s “rape shield” laws was unconstitutional (a loss on doctrine).
Influences on Case Outcome

United States

Tables 1 and 2 present the results of the logit analysis for the United States – Table 1 with three variables measuring the presence of each women’s group and Table 2 with one variable for all women’s groups taken together.9 Looking first at the analysis in Table 1, none of the case fact variables had a significant impact on a favourable case outcome. This may be the result of the different issue areas studied here – the case facts may not have transferred well from sex discrimination cases to abortion cases.10 Thus the actual impact of these variables may be concealed by their different meaning in each area.

Most of the other variables, however, did have an influence on the outcome of the case. Court ideology had an influence on the decision of the Court in the expected direction (p< .01). The more conservative a court hearing a case, the less likely it was to produce a case outcome favourable for the women’s groups’ goals.11 This was to be expected from most of the literature. However, perhaps more surprisingly, public opinion was also significant in the predicted direction (p< .05). The higher the percentage of the public favouring equality, the more likely a favourable case outcome would result. With the somewhat dubious quality of the question equated here with equality, and the mixed

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9 The fit of both models is reasonably good. The log likelihood function and the chi square of each model indicate that it is significantly better than the null model without the independent variables.

10 To preserve the number of cases for analysis, each of the case fact variables was coded even in the abortion and affirmative action areas where concepts such as implicit and explicit discrimination, in particular, were not as easy to apply.

11 Following the coding of the Supreme Court Database, a 2 was a conservative score and a 1 a liberal score. Thus the bigger the number, the less likely it would produce a favourable outcome. This explains the negative coefficient for this variable in the model.
results of studies on the influence of public opinion, this result is interesting. It may be that both the Court’s decisions and public opinion are products of the more progressive times after 1970. They may be moving together but without causation between them. Regardless, favourable public opinion has coincided with favourable court outcomes in this model.

The position of the Solicitor General was also important in the cases in which he participated. His support for an outcome favourable to women’s groups made such an outcome more likely (p< .05). The women’s groups themselves had mixed results. The participation of both the WRP and the NOW LDEF made a favourable outcome more likely (p< .05), but the participation of the WLDF did not. In fact, this latter group’s participation had an effect in an unexpected direction – the more they participated the less favourable the outcome. However, this relationship did not achieve statistical significance.

Finally, the number of amicus curiae briefs submitted in a case had varied results depending on the position they advocated. The number of briefs submitted arguing for a favourable outcome had no effect on that outcome. However, the variable measuring the number of briefs arguing against a favourable outcome came close to statistical significance at the .05 level (p=.054). The higher the number of briefs that argued against a favourable outcome the less likely a favourable outcome would occur. Not surprisingly, the number of briefs submitted advocating a neutral position on the case outcome had no appreciable effect.\(^{12}\)

\(^{12}\) The model was also run substituting variables coding the number of amicus curiae briefs into low, medium and high categories. The results were consistent, with the same variables attaining significance.
Table 2 presents the results of a model substituting one variable, measuring the presence of all of the women's groups combined, for the three variables measuring the presence of each. This variable increased in value for each additional group that was present (to a maximum of three). In this second model, the variables significant in Table 1 (the Court's ideology, public opinion, the Solicitor General's position, briefs against a favourable outcome) remain significant, while the three variables measuring case facts still do not have an effect. Interestingly, the new variable combining the participation of the WRP, NOW LDEF and WLDF does appear to have an impact on favourable case outcomes ($p < .01$). The more groups that participate in a case the more likely a favourable case outcome is to result. From this it would seem that women's groups might want to combine their efforts to better achieve their goals. The WLDF, in particular, might want to consider encouraging other women's groups to participate in its cases of interest.

Canada

Table 3 presents the results of the logit analyses for the Canadian model. In Table 3 one sees that again most of the case fact variables do not perform well. Neither the type of discrimination claimed in a case nor the gender of the claimant bringing the case had a significant impact on the outcome of the case. The gender variable was even in the unexpected direction. Males appear to be more successful than females in achieving favourable outcomes. While this result is contrary to the hypothesis, it was suggested earlier that some might expect it in the male dominated judicial arena. And, one should
probably not make too much of this since the variable, itself, was not statistically
significant. The basis of the case (statutory or constitutional) did reach statistical
significance but only at the .10 level (p=.084). This poor performance of the case fact
variables is perhaps not surprising when one considers that the issue areas included in the
Canadian model range from discrimination to abortion to sexual assault.

In contrast to the American results, neither Court ideology nor public opinion
exhibit an influence on favourable case outcomes in Canada. The results for both
variables were not unexpected. Ideology has traditionally played less of a role in the
judiciary in Canada. And as noted earlier, caution must be used in interpreting the results
because of the way the two variables were measured.

The Attorney General of Canada’s position in a case did not have as much of an
impact in this model as did that of the Solicitor General in the United States model. A
favourable case outcome was probably more likely when the Attorney General argued for
it, but this relationship did not quite reach even the .10 level of significance. This is
perhaps predictable since the Attorney General of Canada has not been found to dominate
Court proceedings in quite the same way as its counterpart in the U.S.

Also not surprising were the poor findings for intervenor (amicus curiae)
participation. None of the three variables attained significance. In fact the variables

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13 The log likelihood function and the chi square of the model indicate that it is significantly better than the
null model without the independent variables.

14 The model was also run with a different measure of public opinion. This measure stated “there are more
married women – with families – in the working world than ever before. Do you think this has a harmful
effect on family life or not?” The results were very similar with the same variables reaching statistical
significance.
arguing for a favourable outcome and those arguing against such an outcome were in unexpected directions. The lower the number of factums (briefs) arguing for a favourable outcome, the more likely that outcome was to result and the higher the number of factums arguing against a favourable outcome the more likely a favourable outcome was to result. This anomaly will require more detailed analysis.

However, the variable measuring the presence or absence of LEAF was significant \( (p < .05) \). A favourable outcome was more likely to result when the group intervened in a case. That the particular variable of interest is the only group variable to attain significance at the .05 level is interesting. It appears that LEAF is a very valuable ally to have on one’s side – even more valuable than the Attorney General of Canada.

**Probability Change**

Since a logit analysis was used for the models, the impact of the independent variables is not subject to straightforward interpretation. Therefore, to assess their impact more precisely a change in probabilities score was calculated for each of the significant independent variables in the U.S. and Canadian models. This score is calculated by varying the relevant variables from their minimum to their maximum value while holding the other independent variables at their means. The third columns in Tables 1 and 3 present the probability change score for each of the significant variables. This number is derived from the change in the probability of a favourable case outcome given a move from the minimum to the maximum value of the independent variable.

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15 The court ideology variable is in fact, not only insignificant, but also in the wrong direction. However, given the problems with the measurement of this variable and the limited number of analogous cases used to derive it, it is unclear what to make of this result.
For example, in the United States a conservative court had a .16 probability of
producing a favourable outcome while a more liberal court had a .89 probability. Within
the range from most conservative to most liberal courts there is a difference of 73
percentage points in the likelihood of a favourable outcome. For the women's groups
there is a less drastic difference. When the WRP was present there was a .64 probability
of a favourable outcome, whereas when the group was absent there was a .46 probability
— a difference of 18 percentage points. The NOW LDEF made more of an impact. Its
presence increased the probability of a favourable outcome by 29 percentage points.

In Canada, the presence of LEAF before the Court meant there was a .91
probability of a favourable outcome, while in LEAF's absence there was only a .58
probability. Thus from LEAF's presence to its absence there was a difference of 33
percentage points in the likelihood of a favourable outcome in a case.

**Group Influence on Doctrine:**

*United States*

Once the influences on case outcome were determined for each country, the
analysis shifted to case doctrine. Tables 4 and 5 present the results of the ordered probit
analyses for the United States – Table 4 with three variables measuring the presence of
each women's group and Table 5 with one variable for all women's groups taken
together. Looking first at the analysis in Table 4, one sees that, unlike in the outcome
model, one of the case fact variables did have a significant impact on favourable case
doctrine: type of discrimination. Explicit discrimination claims were more likely to result
in favourable doctrine than implicit claims (p< .05). This variable was not predicted to be
more powerful in terms of doctrine, but a Justice could be more willing to speak against explicit discrimination, and yet, still rule against the claimant based on other considerations.

Other than the addition of the type of discrimination variable, similar influences acted on case doctrine as acted on case outcome. As with outcome, the more conservative a Court hearing a case, the less likely favourable doctrine was to emerge (p<.05). And the position of the Solicitor General again influenced the direction of doctrine (p<.05).

Public opinion was only significant at the .10 level in this model. The higher the percentage of the public favouring equality, the more likely a favourable case outcome would result, but the relationship was not particularly strong. This difference was expected as the public should be less aware of the actual doctrine of the case. With less threat of a public reaction the Court may feel less pressure to take public opinion into account.

The women's groups themselves were not as influential as they had been in outcome. The WRP just missed statistical significance at the .05 level (p=.059), while the NOW LDEF was significant only at the .10 level (p=.082). The participation of the WLDF again had an effect in an unexpected direction — the more they participated the less favourable the doctrine. But this relationship still did not achieve statistical significance. The groups' drop in influence was expected for doctrine since it should be more difficult to persuade the Court to their precise positions than to help sway it in the right direction.
Finally the number of amicus curiae briefs submitted in a case had no effect regardless of the position they advocated. The number of briefs submitted arguing for doctrine favourable to the women’s groups – or against them – did not make that doctrine more likely.

Table 5 presents the results of a model substituting the multi-group variable for the three variables measuring the presence of each group. In this second model of doctrine, the variables significant in Table 4 still achieve statistical significance (type of discrimination p< .05; court ideology p< .05; solicitor general p< .05), while the variables measuring the other case facts and other interest groups still do not have an effect. Interestingly, as with case outcome, the new variable combining the participation of the WRP, NOW LDEF and WLDF does appear to have a significant impact on favourable case doctrine (p< .05). The more groups that participate in a case the more likely favourable case doctrine will result. This reemphasizes the importance of the groups combining their efforts.

**Canada**

Table 6 presents the results of the ordered probit analysis for the Canadian model. The results of this model are disappointing and must be interpreted cautiously. With only 78 cases included and four categories in the dependent variable, the model itself does not reach statistical significance. However, while its results can have only suggestive value, the model does have some interesting outcomes.

The one variable found to have a significant influence on the Supreme Court with regard to doctrine was a case fact variable: the basis of the claim (p< .05). Rights claims
brought under the constitution are indeed less successful than those based on statutory law. Given the more far-reaching effects of changes in the constitution and their relative permanence, this finding seems reasonable. Justices are probably more reluctant to tinker with constitutional cases. And as argued earlier, statutory mandates are believed to be clearer than the broad language of the Constitution, making it easier for the justices to find in favour of statutory claims.

Unlike the model for case outcome, the variable measuring the presence or absence of LEAF does not appear to be significant. Favourable doctrine was not more likely to result when the group intervened in a case. This may follow, since many of the group’s arguments tend to push the envelope – to be more extreme than one would expect the Court to find comfortable. Thus the Court’s doctrine is unlikely to be as favourable as the groups might want. For example, in sexual assault cases dealing with the release of counseling records of the victim, the Court takes an approach recognizing the need to balance the victim’s rights with those of the defendant. LEAF, however, argues that such counseling records should never be allowed into court.

Conclusion

Defining interest group success as “winning” the case, and making a distinction between favourable bottom line outcomes and favourable case reasoning, this chapter has examined whether successful groups are also influential. Were women’s groups influential in producing favourable outcomes and doctrine in the areas of interest to them? The results of this analysis should be somewhat encouraging to the women’s groups litigating in both the U.S. and Canada.
While several other factors (such as court ideology and a favourable position taken by the Solicitor General) did have an impact on both favourable case outcome and case doctrine in the United States, two of the three groups focussed on, the WRP and the NOW LDEF, were both successful and influential (although to a lesser extent for doctrine). The third group, the WLDF, demonstrated the importance of looking at both success and influence in determining a group's impact. While the WLDF did have a 58% success rate for case outcome, and a 62% success rate for doctrine, they did not appear to have any real influence over the way the Court decided the cases of interest. When their presence was included in models with other potential factors influencing judicial decision making, their relationship to favourable outcome and doctrine was insignificant. However, when this group was included in the variable measuring the number of women's groups participating in a case, the greater the number of groups the more likely favourable outcome and doctrine would result. While this requires further study, it does suggest that there may be merit in the groups participating more often in the same cases – particularly for the WLDF.

In Canada, LEAF has enjoyed a high level of both success and influence in terms of case outcome. At this stage they appear to be a powerful litigator before the Canadian Supreme Court. However, while the group still enjoyed success under doctrine – at nearly the same level as the three American groups combined – the group's presence does not seem to make favourable doctrine more likely in a case. Since the group is probably more interested in their impact over the long term, this apparent lack of influence over doctrine may make them less satisfied with their litigation strategy.
Interestingly, different factors appear to influence Supreme Court decisions in each country. The basis of a case (constitutional or statutory) appears to influence the doctrine (and to a lesser extent, the outcome) of a case in Canada but not in the United States. But why would constitutional cases be less likely to result in favourable doctrine in Canada than in the United States? It may be that the late date of the Canadian Constitution's enactment means the intentions of its framers are knowable, thus making justices less comfortable dealing with constitutional claims. It is also possible that some of the features of the 1982 Charter — such as the inclusion of equality "before and under the law" — mean that the easy battles were already conceded, thus leaving future constitutional claims with difficult challenges, less likely to be successful.

Another observed difference involves the role of each court's ideology. While the Court's ideology seems to play some role in the United States, it has had no effect on the outcome or doctrine of Canadian cases. It may be that I am not capturing Justices' ideology correctly: perhaps the positions Canadian justices bring to cases are not measurable on a left-right scale. In addition, the briefs of other interest groups may have had less of an influence in the Canadian Court than that enjoyed by their counterparts in the United States (who just miss the .05 level of statistical significance — p=.054). While groups litigating against favourable outcomes for women's groups have made such an outcome less likely in the United States, they have had no appreciable impact in Canada. It would be interesting to determine the reason for this difference. Canadian groups are probably less likely to turn to the legislature after a loss in the Court since there are fewer access points for lobbying in the Parliamentary system (although as Chapter 5 will demonstrate, this lack does not appear to have bothered LEAF). Justices may thus feel
less compelled to take the groups’ positions into account in Canada, recognizing that the
groups will have a more difficult time achieving reversals of decisions in the legislature.
In addition, most Canadian groups (with the exception of LEAF) are lacking the expertise
and repeat player status of the American groups which may be hampering their efforts.

Finally, while the Solicitor General has had a noticeable impact on both case
outcome and doctrine in the United States, his Canadian counterpart, the Attorney
General, does not appear to have had much effect. This difference may be influenced by
the issue areas that were included in this study. A high percentage of the Canadian cases
(about 40%) were in the sexual assault issue area. Since the provincial Attorneys General
are responsible for prosecuting the accused in these cases, the Federal Attorney General
has only rarely participated. Thus the Attorney General’s influence is being determined
over a small number of cases.

The differences in each country in the variables influencing judicial decisions and
in the impact of the women’s groups require further exploration. Chapter 6 will attempt
to determine whether the differences in the institutional characteristics of the courts in
each country have an impact. Does the use of panels to hear cases in the Canadian
Supreme Court have an effect? Do the different appointment procedures result in
differences in the importance of judicial ideology? Does the prevalence of the “myth of
the court” in Canada (at least until the 1990s) mean that different variables influence
justices when making their decisions? With a majority of Canadians perceiving the Court
as non-political, do Canadian justices face more pressure to avoid (or at least disguise)
their ideological preferences? These differences will have to be further explored.

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Interest groups litigate because they believe they can have an effect. The results of this analysis seem to suggest that women's groups in both countries (with the possible exception of the WLDF) are, indeed, influencing the outcome of cases in their respective Supreme Court. However, none of the groups (especially not LEAF or the WLDF) have had as significant an impact on persuading the Court to adopt the right reasoning to accompany those outcomes. A review of strategy might be rewarding. However, it is possible that the apparent decline in influence at the doctrine level merely reflects the Court's reluctance to adopt the groups' ideal positions. Courts do not readily abandon long-held positions to embrace "radical" new concepts, but the goal of women's equality - substantive or absolute - may yet be achievable over time.
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<td></td>
<td>(0.226)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discrn Claim</td>
<td>0.526</td>
<td>0.130</td>
<td>----</td>
</tr>
<tr>
<td></td>
<td>(0.467)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Case Basis</td>
<td>-0.006</td>
<td>0.976</td>
<td>----</td>
</tr>
<tr>
<td></td>
<td>(0.211)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ct Ideology</td>
<td>-15.534</td>
<td>0.007</td>
<td>0.73</td>
</tr>
<tr>
<td></td>
<td>(6.354)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Opinion</td>
<td>0.089</td>
<td>0.040</td>
<td>0.49</td>
</tr>
<tr>
<td></td>
<td>(0.051)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SG Position</td>
<td>0.477</td>
<td>0.030</td>
<td>0.23</td>
</tr>
<tr>
<td></td>
<td>(0.253)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WRP</td>
<td>0.752</td>
<td>0.048</td>
<td>0.18</td>
</tr>
<tr>
<td></td>
<td>(0.452)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NOW LDEF</td>
<td>1.200</td>
<td>0.019</td>
<td>0.29</td>
</tr>
<tr>
<td></td>
<td>(0.578)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WLDF</td>
<td>-0.362</td>
<td>0.549</td>
<td>----</td>
</tr>
<tr>
<td></td>
<td>(0.604)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Briefs PRO</td>
<td>0.002</td>
<td>0.488</td>
<td>----</td>
</tr>
<tr>
<td></td>
<td>(0.065)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Briefs CON</td>
<td>-0.158</td>
<td>0.054</td>
<td>0.27</td>
</tr>
<tr>
<td></td>
<td>(0.098)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Briefs NEU</td>
<td>-0.062</td>
<td>0.761</td>
<td>----</td>
</tr>
<tr>
<td></td>
<td>(0.203)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 3.1: Logit Analysis of the Hypothesized Determinants of Favourable Case Outcomes – United States Supreme Court, 1970-1996 Court Terms

**Level of statistical significance. Based on one-tailed tests for variables in the expected direction.

N=164

Initial Log Likelihood function -113.48
Final Log Likelihood -97.14
Chi Square of the Model 32.69 (12 df; sig. <.01)
<table>
<thead>
<tr>
<th>Variable</th>
<th>B</th>
<th>SE</th>
<th>Sig.**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>19.107</td>
<td>7.916</td>
<td></td>
</tr>
<tr>
<td>Gender</td>
<td>0.205</td>
<td>0.223</td>
<td>0.179</td>
</tr>
<tr>
<td>Discrm Claim</td>
<td>0.630</td>
<td>0.451</td>
<td>0.082</td>
</tr>
<tr>
<td>Case Basis</td>
<td>-0.033</td>
<td>0.207</td>
<td>0.873</td>
</tr>
<tr>
<td>Ct Ideology</td>
<td>-16.602</td>
<td>6.301</td>
<td>0.004</td>
</tr>
<tr>
<td>Public Opinion</td>
<td>0.084</td>
<td>0.048</td>
<td>0.040</td>
</tr>
<tr>
<td>SG Position</td>
<td>0.471</td>
<td>0.248</td>
<td>0.029</td>
</tr>
<tr>
<td>Women’s Grps</td>
<td>0.526</td>
<td>0.185</td>
<td>0.003</td>
</tr>
<tr>
<td>Briefs PRO</td>
<td>-0.003</td>
<td>0.063</td>
<td>0.963</td>
</tr>
<tr>
<td>Briefs CON</td>
<td>-0.147</td>
<td>0.097</td>
<td>0.065</td>
</tr>
<tr>
<td>Briefs NEU</td>
<td>0.007</td>
<td>0.193</td>
<td>0.972</td>
</tr>
</tbody>
</table>

**Table 3.2: Logit Analysis (b) of the Hypothesized Determinants of Favourable Case Outcomes – United States Supreme Court, 1970-1996 Court Terms**

**Level of statistical significance. Based on one-tailed tests for variables in the expected direction.

N=164

Initial Log Likelihood function -113.48
Final Log Likelihood -98.46
Chi Square of the Model 30.05 (10 df; sig. <.01)
<table>
<thead>
<tr>
<th>Variable</th>
<th>B (SE)</th>
<th>Sig.**</th>
<th>Probability Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>5.228 (23.347)</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>Gender</td>
<td>-0.355 (0.333)</td>
<td>0.286</td>
<td>----</td>
</tr>
<tr>
<td>Discrm Claim</td>
<td>0.075 (0.763)</td>
<td>0.461</td>
<td>----</td>
</tr>
<tr>
<td>Case Basis</td>
<td>0.540 (0.391)</td>
<td>0.083</td>
<td>0.23</td>
</tr>
<tr>
<td>Ct Ideology</td>
<td>0.761 (9.688)</td>
<td>0.937</td>
<td>----</td>
</tr>
<tr>
<td>Public Opinion</td>
<td>-0.092 (0.135)</td>
<td>0.495</td>
<td>----</td>
</tr>
<tr>
<td>AG Position</td>
<td>0.857 (0.757)</td>
<td>0.129</td>
<td>----</td>
</tr>
<tr>
<td>LEAF</td>
<td>2.040 (0.922)</td>
<td><strong>0.014</strong></td>
<td>0.33</td>
</tr>
<tr>
<td>Briefs PRO</td>
<td>-0.374 (0.280)</td>
<td>0.181</td>
<td>----</td>
</tr>
<tr>
<td>Briefs CON</td>
<td>0.080 (0.332)</td>
<td>0.809</td>
<td>----</td>
</tr>
<tr>
<td>Briefs NEU</td>
<td>-0.153 (0.243)</td>
<td>0.529</td>
<td>----</td>
</tr>
</tbody>
</table>

Table 3.3: Logit Analysis of the Hypothesized Determinants of Favourable Case Outcomes – Canadian Supreme Court, 1984-1997

**Level of statistical significance. Based on one-tailed tests for variables in the expected direction.

N=78

Initial Log Likelihood function: -48.93
Final Log Likelihood: -39.05
Chi Square of the Model: 19.74 (10 df; sig. <.05)
<table>
<thead>
<tr>
<th>Variable</th>
<th>B(SE)</th>
<th>Sig.**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>0.040 (0.119)</td>
<td>0.370</td>
</tr>
<tr>
<td>Discrn Claim</td>
<td>0.401 (0.239)</td>
<td><strong>0.047</strong></td>
</tr>
<tr>
<td>Case Basis</td>
<td>-0.002 (0.110)</td>
<td>0.494</td>
</tr>
<tr>
<td>Ct Ideology</td>
<td>-5.962 (3.088)</td>
<td><strong>0.027</strong></td>
</tr>
<tr>
<td>Public Opinion</td>
<td>0.0355 (0.025)</td>
<td>0.080</td>
</tr>
<tr>
<td>SG Position</td>
<td>0.215 (0.129)</td>
<td><strong>0.049</strong></td>
</tr>
<tr>
<td>WRP</td>
<td>0.362 (0.232)</td>
<td>0.059</td>
</tr>
<tr>
<td>NOW LDEF</td>
<td>0.379 (0.272)</td>
<td><strong>0.082</strong></td>
</tr>
<tr>
<td>WLDF</td>
<td>-0.125 (0.303)</td>
<td>0.680</td>
</tr>
<tr>
<td>Briefs PRO</td>
<td>-0.005 (0.032)</td>
<td>0.869</td>
</tr>
<tr>
<td>Briefs CON</td>
<td>-0.008 (0.029)</td>
<td>0.386</td>
</tr>
<tr>
<td>Briefs NEU</td>
<td>0.084 (0.099)</td>
<td>0.392</td>
</tr>
</tbody>
</table>

Table 3.4: Ordered Probit Analysis of the Hypothesized Determinants of Favourable Case Doctrine – United States Supreme Court, 1970-1996 Court Terms

**Level of statistical significance. Based on one-tailed tests for variables in the expected direction.

N=164

Initial Log Likelihood function -212.66  
Final Log Likelihood -201.24  
Chi Square of the Model 22.83 (12 df; sig. <.05)
<table>
<thead>
<tr>
<th>Variable</th>
<th>B(SE)</th>
<th>Sig.**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>0.049</td>
<td>0.338</td>
</tr>
<tr>
<td></td>
<td>(0.118)</td>
<td></td>
</tr>
<tr>
<td>Discrim Claim</td>
<td>0.443</td>
<td><strong>0.030</strong></td>
</tr>
<tr>
<td></td>
<td>(0.234)</td>
<td></td>
</tr>
<tr>
<td>Case Basis</td>
<td>-0.005</td>
<td>0.958</td>
</tr>
<tr>
<td></td>
<td>(0.109)</td>
<td></td>
</tr>
<tr>
<td>Ct Ideology</td>
<td>-6.501</td>
<td><strong>0.016</strong></td>
</tr>
<tr>
<td></td>
<td>(3.034)</td>
<td></td>
</tr>
<tr>
<td>Public Opinion</td>
<td>0.031</td>
<td>0.095</td>
</tr>
<tr>
<td></td>
<td>(0.024)</td>
<td></td>
</tr>
<tr>
<td>SG Position</td>
<td>0.221</td>
<td><strong>0.044</strong></td>
</tr>
<tr>
<td></td>
<td>(0.129)</td>
<td></td>
</tr>
<tr>
<td>Women’s Grps</td>
<td>0.215</td>
<td><strong>0.011</strong></td>
</tr>
<tr>
<td></td>
<td>(0.094)</td>
<td></td>
</tr>
<tr>
<td>Briefs PRO</td>
<td>-0.010</td>
<td>0.759</td>
</tr>
<tr>
<td></td>
<td>(0.031)</td>
<td></td>
</tr>
<tr>
<td>Briefs CON</td>
<td>-0.008</td>
<td>0.388</td>
</tr>
<tr>
<td></td>
<td>(0.029)</td>
<td></td>
</tr>
<tr>
<td>Briefs NEU</td>
<td>0.108</td>
<td>0.261</td>
</tr>
<tr>
<td></td>
<td>(0.096)</td>
<td></td>
</tr>
</tbody>
</table>

**Level of statistical significance. Based on one-tailed tests for variables in the expected direction.

N=164

<table>
<thead>
<tr>
<th>Statistic</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Log Likelihood function</td>
<td>-212.66</td>
</tr>
<tr>
<td>Final Log Likelihood</td>
<td>-201.95</td>
</tr>
<tr>
<td>Chi Square of the Model</td>
<td>21.42 (10 df; sig. &lt;.05)</td>
</tr>
</tbody>
</table>

Table 3.5: Ordered Probit Analysis (b) of the Hypothesized Determinants of Favourable Case Doctrine – United States Supreme Court, 1970-1996 Court Terms
<table>
<thead>
<tr>
<th>Variable</th>
<th>B (SE)</th>
<th>Sig.**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>-0.116 (0.148)</td>
<td>0.434</td>
</tr>
<tr>
<td>Discrn Claim</td>
<td>0.166 (0.360)</td>
<td>0.322</td>
</tr>
<tr>
<td>Case Basis</td>
<td>0.395 (0.189)</td>
<td>0.019</td>
</tr>
<tr>
<td>Ct Ideology</td>
<td>-1.919 (4.357)</td>
<td>0.330</td>
</tr>
<tr>
<td>Public Opinion</td>
<td>-0.115 (0.063)</td>
<td>0.069</td>
</tr>
<tr>
<td>AG Position</td>
<td>0.362 (0.329)</td>
<td>0.136</td>
</tr>
<tr>
<td>LEAF</td>
<td>0.265 (0.330)</td>
<td>0.211</td>
</tr>
<tr>
<td>Briefs PRO</td>
<td>-0.019 (0.121)</td>
<td>0.875</td>
</tr>
<tr>
<td>Briefs CON</td>
<td>0.212 (0.163)</td>
<td>0.194</td>
</tr>
<tr>
<td>Briefs NEU</td>
<td>-0.081 (0.112)</td>
<td>0.470</td>
</tr>
</tbody>
</table>

Table 3.6: Ordered Probit Analysis of the Hypothesized Determinants of Favourable Case Doctrine—Canadian Supreme Court, 1984-1997

**Level of statistical significance. Based on one-tailed tests for variables in the expected direction.

N=78

Initial Log Likelihood function          -96.79
Final Log Likelihood                     -89.99
Chi Square of the Model                  13.60 (10 df, not significant)
CHAPTER 4

EXAMINING THE LONG TERM IN THE UNITED STATES:
GROUP SUCCESS AND INFLUENCE OVER TIME

The American Supreme Court's 1973 decision in Roe v. Wade was a significant victory for women's interest groups, in terms of both outcome and doctrine, in one issue area important to them. The decision struck down a restrictive abortion law and declared that a woman's "right to privacy" included the right to choose whether or not to have an abortion. This was a fundamental right, and thus, restrictions could only be justified by a "compelling" state interest (although the state's interest was said to become more compelling as the pregnancy advanced).

An analysis of only this case would lead one to conclude that women's interest groups have experienced success in their litigation. But have the groups been successful in the abortion area beyond this single case? Is a woman's right to choose as compelling today as it was in 1973? Answering these questions requires a more complete picture of women's groups' litigation and may actually bring us closer to the real objectives of the groups themselves. Most interest groups have goals that extend beyond any one individual case. Their mission statements often include more encompassing goals such as equality for women and reproductive freedom. Thus, to fully evaluate the groups'
success, one must examine the development of doctrine in each issue area over time. Have the groups achieved (or are they achieving) their objectives despite the occasional case setback?

This chapter attempts to trace the American groups’ long term success in each of the issue areas of prime interest to them. Has favourable doctrine emerged from litigation before the Court? What is the stance of the United States towards abortion – a quarter century after Roe? How does it deal with sex discrimination in employment? The chapter traces the bumpy judicial road to where the issues stand today – examining the positive developments and setbacks of doctrine in each area. While focussing primarily on the Court, the timeline requires that some consideration be given to the actions of the legislature in response to the Court’s decisions. Has Congress allowed favourable doctrine to stand? Has it reversed unfavourable doctrine?

Further, regardless of how favourable doctrine has been towards the groups’ interests, the next step must be to determine to what extent the groups themselves are responsible. Just as the last chapter attempted to determine the impact of groups at the case level, this chapter attempts to determine their impact over the long term. Thus other influences on doctrinal development are considered in an analysis to determine the groups’ actual influence on that development. Do the groups – their presence and arguments – really influence the direction of policy emerging from the Court? Or is it more a result of the efforts of the federal government’s litigation, the justices’ own preferences, the presence of other interest groups or even the state of public opinion?
This chapter begins with a brief description of the approach taken in this analysis, including a broader discussion of possible influences on the development of doctrine. The chapter then considers each issue area in turn—tracing the path of doctrine in the area and the possible influences on the direction of that path.

**Approach**

This chapter (for the United States) and the next (for Canada) move beyond the case level analysis adopted up to this point to study the same cases over the long term. Each of four issue areas (abortion, sex discrimination, affirmative action and discrimination in employment) is examined in its entirety, from 1970 to the present in the United States, while five are examined in Canada from 1984 to the present. All cases within the issue area were included—whether the women’s groups had participated in them or not. The issue level analysis involved ordering all of the cases in an area by the date of the Court’s decision. Movements in doctrine were then recorded from the first case of interest until the latest in each issue area. This record allows one to determine how favourable present doctrine is to the groups’ interests, how it got there, and thus whether groups have been successful in their litigation over the long term.

---

1 The five issue areas include in the case level analysis were combined into four for the long term analysis. The doctrine established in the area of sex discrimination in employment fit into two other categories (sex discrimination and other discrimination in employment) and thus was not treated as a separate category.

2 For an explanation of the different years and issue areas studied in the United States and Canada see Chapter 2.

3 Not all cases in an issue area are discussed in this chapter. Instead, only cases significantly affecting doctrine are mentioned.
Once success or failure has been determined for an issue area, attention is shifted to a determination of the groups’ influence in that area. Have groups managed to attain their objectives – or failed to attain them – due to their own efforts? Are they responsible for the end result or are they merely being carried along by the strength of some other influence on the Court? In previous chapters, various factors have been hypothesized to impact judicial decision making at the case level of analysis. Similar factors are expected to influence the way doctrine has developed over time. These factors are considered in turn for each issue area. I examine the covariation between the factors and the Court’s opinions – does the groups’ rate of success change with variations in the conditions of the factors, and does it change in the expected direction? When the factors do not change over time I take a more in depth look. For example, if governments do not change I try to determine whether the activities of the same government over the time period are having any effect on the doctrine produced by the Court. Studying the covariation between the factors and the Court’s opinions, an attempt is made to evaluate the effect of changes in these factors on changes in doctrine.

Court Membership

As doctrine has developed over the decades, the Court’s membership has changed as well. Of the justices hearing Roe v. Wade, only Chief Justice Rehnquist remains on the Court today – and even he missed the first few sex discrimination cases. This nearly complete turnover in Court membership must be considered when examining the influences on doctrinal development in an issue area. The last chapter hypothesized that the justices’ own preferences would be an important predictor of the direction of a
decision. Since a change in justices can bring a change in preferences, this could well lead to a change in doctrine (McGuire 1990; Segal 1984; Wopert 1991). In fact, according to Baum (1995) “membership change is probably the most important source of policy change in the Court” (169). Thus it is expected here that bumps in doctrine in an issue area - either positive or negative - will correspond to some change in membership on the Court.

Legal Considerations

Movement in doctrine may be very gradual and it is possible that “the law,’ in some sense, drives itself’ (Epstein and Kobylka 1992). Other factors may have only limited influence on the development of doctrine. Instead, precedent, the language of statutes, and the facts of the cases themselves may be the best predictors of the path of doctrine in an issue area. Certainly this corresponds with a more traditional view of the Court which suggests justices merely apply the law as they see it (see, for example, the arguments of Justice Roberts in United States v. Butler 1936, 62-63). While this extreme view is no longer in favour, some more recent scholars have noted the importance of legal considerations, without discounting the influence of other factors (Gillman 1993; Perry 1991; Brigham 1978). Given the dominance of the “language of the law” in the justices’ training and work environment, it would be surprising if they did not feel any constraint from legal considerations (Stinchcombe 1990; Howard 1981).

Thus it is possible that some perceived shifts in doctrine may be a result of a different set of questions and case facts and, therefore, merely the logical progression of the same judicial reasoning, not a response to changes in preferences by government or
the justices themselves. A doctrinal shift may not be a dramatic change in direction but rather the culmination of a series of incremental changes occurring over a long period of time (Epstein and Kobylka 1992). And the Supreme Court may refuse to reverse an earlier decision because of the power of precedent, regardless of their own preferences or the persuasiveness of government arguments. While legal considerations are surely not the only factor determining the development of doctrine, an analysis of the changes in an issue area must recognize their potential.

Of course, some might argue that discovering influence for case facts is not discovering influence for legal considerations. These people suggest that the Justices' approaches to case facts are determined by their policy preferences. However, various studies on the impact of the facts of the case do appear to consider case facts as legal considerations (Ignagni 1994; George and Epstein 1992; Wolpert 1991). While Segal and Spaeth may be correct in stating that case facts are consistent with both the legal and attitudinal models (1993, 362), they are treated here as legal considerations.4

Changes in Government

The cases included in the American analysis stretch from 1970 until today. In that time, 16 sessions of Congress have met and six different presidents have held office. Ten of the 16 Congressional sessions have had Democratic majorities in both houses while the last three have experienced Republican control. (The other 3 sessions of Congress occurred in the 1980s when Democrats controlled the House and Republicans the Senate.) By contrast, Republicans have controlled the presidency – with only two of the

4 For a justification of this treatment see Chapter 6.
six Presidents being Democrats. If one accepts that the other two governmental institutions have an impact on the Supreme Court, the changes between each Congress and presidency should be significant.

**Congress**

Congress is connected to the Court through its ability to change the Court’s appellate jurisdiction, the justices’ salaries (determining when increases will occur), and the Court’s budget (Murphy 1964, 123-144; Epstein and Knight 1998, 142-145). Another, perhaps more important connection, comes from its ability to overrule the Court’s decisions. Although the complicated amendment process makes this less of a consideration for constitutional cases, Congress can vary statutory case decisions merely by enacting a new statute or amending the language of the original one. And such changes are not rare – a small but significant number of Supreme Court decisions are overridden each year (Hausegger and Baum 1998). In order to avoid such congressional action, the Court may take Congress’ position into account when writing its decisions (Gely and Spiller 1990; Eskridge 1991; Schwartz, Spiller and Urbiztondo 1994). Thus as the political philosophy of Congress changes over the years, accompanied presumably by changes in its positions, one might expect to see changes in doctrine as the Court recognizes these new realities.

**The President**

The President’s most obvious link to the Supreme Court is his appointment of its members. Ideology has become increasingly important to these appointments in the latter
half of this century as presidents try to appoint "like-minded" individuals to the Court. A
president, presented with more than one vacancy to fill on the Court, may be able to shift
the Court's ideological tenor and, perhaps, the direction of doctrine as a result. The Court
may also be responsive to the presidency due to its own lack of enactment ability
(Murphy 1964; Epstein and Knight 1998). Presidents can ensure that the Court's
decisions are implemented "or they can refuse to help. They can lend their own prestige
to the Court, or they can undercut public support by criticizing it" (Baum 1995, 159).
Recognizing this, justices may be sensitive to the President's opinion.

Perhaps most importantly, however, presidents may have influence on the
development of doctrine through the Solicitor General. Various studies have pointed to
the success and influence of the American Solicitor General before the Supreme Court
(Segal and Reedy 1988; Segal 1991; George and Epstein 1992; Pacelle 1999).
Significantly, this very influential player is appointed by the President. And, particularly
when the Solicitor General participates as amicus curiae, his arguments before the Court
have tended to correspond with the president's preferences (Pacelle 1996). In fact,
according to Segal and Reedy (1988), "the solicitor serves at the pleasure of the president
and would not remain in office long if he frequently diverged from the administration's
path" (556). Thus, the influence of the Solicitor General leads to the hypothesis that
changes in doctrine will have some relationship to changes in the President and his
administration's agenda before the Court.
Changes in Public Opinion

The relationship between public opinion and the Supreme Court has been widely studied. There appears to be some correlation between the state of public opinion and the Court's decisions (Mishler and Sheehan 1993; Stimson, MacKuen and Erikson 1995; Flemming and Wood 1997), although the extent to which this may be counted as influence is still a matter of disagreement (Norpoth and Segal 1994). Of all the issue areas before the Court, one would expect that those covered here - such as abortion and affirmative action - would be fairly salient to the public and that the decisions within those areas would be widely reported. Thus, if public opinion is ever to exert influence on the Court, these should be the areas to find it. Justices will certainly hear about unpopular decisions in salient areas and may even have trouble getting such decisions enforced. This may encourage them to consider public opinion more carefully (Epstein and Kobylka 1992).

In addition, public opinion may have an influence on the development of doctrine through its "indirect" effect on the justices. The justices are members of society and exposed to the same events shaping the general public's opinions (Baum 1997). Thus the justices may have become less tolerant of sex discrimination in the 1970s, not merely because public opinion was moving in that direction, but rather because they themselves were part of that public - a product of the more progressive times.

Interest Group Participation

Obviously, the participation of each of the three women's groups of direct interest to this study is expected to have some impact on the development of doctrine in an issue
area. Despite somewhat mixed findings in the literature (Epstein and Kobylka 1992; Songer and Kuersten 1995), the participation of other interest groups is also expected to have an influence on the Court and its doctrine over time. As detailed earlier at the case level of analysis, interest groups are expected to exert influence through both their arguments and their presence itself. Their presence acts as a signal to the Court as to the importance of the issue before it, while groups’ briefs provide information on the issues to the justices (Caldeira and Wright 1988; McGuire and Caldeira 1993). They also provide the Court with an indication of the state of public opinion – or at least their constituency’s opinion – on the issue being litigated.

The expectation of interest group influence over the long term is based on many of the same considerations. If the groups participating before the Court change over time, different information will be given to the justices (Epstein and Kobylka 1992). A shift in the balance of interest groups supporting various issues will also provide the justices with different signals as to the support for various positions by the public. This may influence the path of doctrinal development.

Abortion

In 1992, Susan Gluck Mezey wrote that the abortion issue area “has become a fight to the finish. It is not clear which side will prevail; what is clear is that neither side can claim victory and that the battle will continue” (210). Mezey made this statement before the Supreme Court decided yet another important case in the abortion area, Planned Parenthood of Southeastern Pa. v. Casey, but her statement is probably as true today as it was when she wrote it. The American Supreme Court has decided only a few
abortion cases since 1992 and those have dealt more with the rights of abortion protesters than the right to abortion itself. So just how does doctrine stand today – and how did it get there? Have women’s groups been able to claim any success after *Roe* in achieving their goal of reproductive freedom for women – the right to choose whether or not to end a pregnancy without government interference?

The Landmark Cases

For the time period covered by this project, the first major case in the abortion issue area is the Supreme Court’s 1973 decision in *Roe v. Wade*. However, cases in the late 1960s really started the abortion timeline. The Court’s 1965 decision in *Griswold v. Connecticut* struck down a Connecticut law prohibiting the sale of contraceptives as a violation of a married couple’s “right to privacy.” This discovery of the right to privacy somewhere in the constitution would prove very important to the later abortion cases. The *Griswold* decision was extended in 1972 in *Eisenstadt v. Baird* when the Court ruled that a single person could not be treated differently from married people in terms of access to contraceptives. Foreshadowing *Roe*, the Court’s majority argued that “if the right to privacy means anything, it is the right of the individual... to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” (453).

Thus the stage was set for the 1973 cases of *Roe v. Wade* and *Doe v. Bolton*. Both cases brought the issue of abortion to the forefront with challenges to state laws;

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5 The *Eisenstadt* decision actually came down between Roe and Doe’s original arguments before the Supreme Court (December 1971) and their rearguments (October 1972).
both involved impoverished young women who had been unable to obtain an abortion in their state. Roe challenged a very traditional Texas law that allowed abortion only to save the life of the mother (Roe v. Wade 1973). Doe, by contrast, challenged a much more liberal Georgia law that allowed abortions when a woman’s health was endangered, she was the victim of rape or incest, or the fetus was likely to be born with a serious defect (Doe v. Bolton 1973). Such abortions could only be performed, however, in certain accredited hospitals and first needed to be deemed “necessary” by three doctors and three members of a hospital’s abortion committee.

The Roe decision was very favourable to the interests of women’s groups and the abortion issue area began with a dramatic success. It was not a complete victory for the groups’ preferences, as the Court did emphasize there was no absolute right to abortion. The state’s interest in protecting a woman’s health and the “potentiality of human life” was said to become more “compelling” as the pregnancy advanced. However, the decision definitely set up favourable precedent as a woman’s right to privacy was said to be broad enough to include her decision to end her pregnancy. Perhaps more importantly, the right was fundamental and thus more insulated from state actions. If states wanted to restrict an aspect of abortion they would have to prove a “compelling” interest. This reasoning would ease the burden of women’s groups when challenging future state laws.

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6 The “trimester” approach suggested that the state had no compelling interest in the first trimester of pregnancy – the abortion decision had to be left to the woman and her doctor. However, by the second trimester the state’s interest was more compelling and thus abortion could be regulated in ways “reasonably related” to a woman’s health. In the third trimester the state’s interest was compelling and thus abortion could be regulated or even prevented except to save the life of the mother (Roe v. Wade 1973).
Roe v. Wade produced the most favourable reasoning women's groups would see in the abortion area. Ironically, none of the three groups of direct interest here participated in the case.

With the right to privacy settled by Roe, Doe v. Bolton focussed on the procedural restrictions within the Georgia law. Applying the “compelling interest” standard, the majority in Doe held that the accredited hospital requirement did not further the state’s interest in protecting the patient – particularly without an exception for first trimester abortions. The requirements that three members of a hospital’s committee and three physicians approve all abortions were also judged “unduly restrictive” of a woman’s rights. They did allow, however, a requirement that a doctor’s decision to perform an abortion must rest on his or her “best clinical judgment.” Regardless, the Doe decision was very favourable to the interests of women’s groups. The Court showed little tolerance for restrictions on the abortion decision. At this point, the state could not make abortions unreasonably difficult to get.

The Deterioration of Roe

Women’s groups started their litigation in the abortion issue area at – or near – the top. In the decades since Roe, it has become apparent that the only direction to go from this pinnacle was down. The states almost immediately began enacting new restrictions

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7 The Supreme Court also struck down a requirement that all abortion patients be Georgia residents as a violation of the Privileges and Immunities Clause.
on abortion. In the two years following Roe’s release “thirty-two states enacted a total of sixty-two abortion related laws” (Mezey 1992, 220). And by 1976 the issue was back before the Supreme Court.

1970s

A challenge to a Missouri abortion statute containing various restrictions on abortion, Planned Parenthood of Mo. v. Danforth, was the first to make it back to the high court. The Court’s decision provided reasoning more favourable to the interests of women’s groups than unfavourable. Spousal and parental consent requirements were struck down.® The state’s prohibition of saline amniocentesis after the first trimester was set aside as an unreasonable restriction for protecting the health of the mother. In fact, the Court suggested that this restriction of one of the safest and most common methods for abortion in the second trimester was “designed to prevent the vast majority of abortions after the first 12 weeks and thus plainly unconstitutional” (78).

Two of the Missouri restrictions – the requirements that records be kept of performed abortions and that the woman’s consent be “informed” – were upheld. And the Court accepted the definition of viability provided by the Missouri statute. However, none of these three provisions appears terribly damaging to the interests of women’s groups, and neither appears to contradict the reasoning in Roe. Still the Danforth decision is significant in that it provided the first glimpse of division among the Justices. The parental consent requirement, for example, was upheld only 5-4.

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® However, the parental consent requirement was the subject of disagreement among the justices. While it was struck down, the reasoning appeared to leave room for a future, better tailored, restriction. The justices appeared to object to the “blanket” parental consent requirement that allowed minors no alternatives.
The next few abortion cases before the Supreme Court can only be described as major losses for the women's groups. The Federal government and various states had decided to attack the abortion issue from a different direction: funding. The target of their actions was Medicaid, which provided necessary health care for indigents under Title XIX of the Social Security Act. Restrictions were passed in legislatures prohibiting the use of Medicaid funds for "nontherapeutic" abortions. This meant different things from state to state but in Pennsylvania it meant funding would only be provided for abortions which were declared medically necessary by a physician. This law was challenged before the Supreme Court in *Beal v. Doe* (1977). Shocking women's groups, the Supreme Court allowed this restriction on the abortion right (with Blackmun, Brennan and Marshall dissenting). The justices ruled there was no requirement in Title XIX for Medicaid to fund such (unnecessary) abortions.

In *Beal's* companion case, *Maher v. Roe* (1977), the Supreme Court also upheld (this time on constitutional grounds) Connecticut's refusal to pay for the nontherapeutic abortions of Medicaid recipients. The Court ruled that such a restriction did not violate the Equal Protection Clause of the 14th Amendment. Justice Powell argued for the majority that "the indigency that may make it difficult – and in some cases, perhaps impossible – for some women to have abortions is neither created nor in any way affected by the Connecticut regulation" (474). However, he insisted that nothing in the decision signaled a "retreat" from *Roe v. Wade*.

A third case heard along with *Beal* and *Maher* revolved around the use of publicly financed hospitals. St. Louis allowed the use of such hospitals for childbirth but not for
nontherapeutic abortions. In *Poelker v. Doe*, the Court ruled that such a restriction did not violate the Constitution – states were allowed to express a preference for childbirth over abortion.

Despite Justice Powell's assurances as to *Roe*, this trilogy of cases was a profound disappointment to women's groups. A lack of funding would ensure a lack of choice for indigent women and thus severely curtail the abortion right in the United States.

In the aftermath of the trilogy, the women's groups did get some respite as the Court refused to uphold other restrictions on abortion. In *Colautti v. Franklin* (1979) a statute requiring doctors to determine viability, and take steps to preserve the fetus if viable, was struck. Similarly, in *Belotti v. Baird* (1979) a statute requiring parental consent for abortions performed on unmarried women under 18 was ruled unconstitutional – despite a built in alternative of seeking judicial consent. The justices argued the consent requirement unduly burdened the right to privacy since it did not make exceptions for mature minors. However, both cases seemed to leave room for further restrictions. The Court appeared to indicate how an amended statute might be acceptable. Thus by the end of the 1970s the abortion issue was delivering qualified victories at best to women's groups.

**1980s**

In 1980, the Supreme Court heard two further funding cases, *Harris v. McRae* and *Williams v. Zbaraz*. It delivered another blow to women's groups by upholding a version
of the Hyde Amendment (which severely limited Federal funding of abortion to cases where the mother’s life was in danger or she had been the victim of rape or incest), and ruling that states did not have to fund even medically necessary abortions if the federal government would not do so. Thus there was a right to abortion but not one the government had to fund.

Further restrictions on abortion (beyond limitations on funding) received more sympathetic hearings in the 1980s. The Supreme Court began by upholding a requirement of parental notice (although not a veto) where possible (*H.L. v. Matheson* 1981). Women’s groups hoped they had stemmed the tide in *Akron v. Akron Center for Reproductive Health* (1983), when the Supreme Court once again rejected blanket parental consent provisions directed at all minors under 15. The groups were further encouraged when the Court in *Akron* struck provisions requiring all second and third trimester abortions to be performed in a hospital, a 24 hour waiting period be observed, and women seeking abortion to be provided with particular information.

However, *Akron* was disturbing by the addition of another justice voting (in dissent) to allow restrictions. Justice Sandra Day O’Connor joined the *Roe* opponents (Rehnquist and White) in her first abortion case. O’Connor argued that *Roe’s* trimester approach was “unworkable,” as medical advances were moving the viability point earlier and earlier in pregnancy, and that the state’s interest was as compelling in the first trimester as in the third (453, 459). She suggested, instead, an approach that considered

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9 In *Bellotti v. Baird*, for example, the Court outlined what kind of judicial bypass would be acceptable. A minor had to be given the opportunity to show that she was mature enough to make the abortion decision or that an abortion would be in her best interests. She also must be guaranteed anonymity and allowed an expedited process (642-644).
whether regulations posed an “undue burden” on the right to abortion. Only those that posed such a burden would require the state to prove a “compelling” interest. While this dissent sent warning signals to women’s groups, Akron was still considered a victory. However, the women’s groups would soon realize the weak foundations of their temporary success as restriction after restriction was later allowed.

The same year as Akron, the Supreme Court finally allowed a requirement for parental or judicial consent for “immature” minors (Planned Parenthood v. Ashcroft 1983). In that case they also allowed a requirement that a second physician be present for abortions performed after viability. It was no longer only a matter for a woman and her doctor. Ashcroft did not allow a requirement for all second trimester abortions to be performed in a hospital but later that same year, in Simopoulos v. Virginia, the Court did uphold a statute with such a requirement since “hospital” was defined to include licensed outpatient clinics. The early success for women’s groups’ interests was being whittled away case by case.

The End of Roe?

Thornburgh v. American College of Obstetricians and Gynecologists

The Roe precedent faced direct attack in the Court’s next major abortion case, Thornburgh v. American College of Obstetricians and Gynecologists (1986). In Thornburgh, the Federal government submitted an amicus curiae brief explicitly asking, for the first time, that the Court overrule Roe v. Wade. The case itself revolved around a challenge to restrictions very similar to those in Akron and the Court decided the case in a very similar manner. The majority reacted strongly against the Solicitor General’s
arguments stating that “again today, we reaffirm the general principles laid down in Roe” (747). They went on to argue that the “states were not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies” (747).

The dissenters (with the possible exception of O’Connor) were much more willing to overrule Roe. However, more important than their position was their number. The Thornburgh case was decided 5-4: Justice Burger had suddenly switched sides. To the horror of women’s groups, opponents to Roe now made up a large minority on the Court. Pro-life groups were optimistic, noting that they were now “just one vote away from a Court which may be prepared to abandon Roe v. Wade” (as quoted in Epstein and Kobylka 1992, 259). Thus Thornburgh could only be considered a razor-thin success for women’s groups.

Webster v. Reproductive Health Services

By the time the next major abortion case was heard, the Reagan administration had appointed two new members to the Supreme Court: Justice Burger – now an opponent to Roe – was replaced by Antonin Scalia, while Justice Powell – a Roe supporter – was replaced by Anthony Kennedy. Webster v. Reproductive Health Services involved a challenge to regulations enacted once again by Missouri. The Missouri statute began with a preamble stating that “life begins at conception” and that “unborn children have protectable interests in life, health, and well being” (500). It went on to prohibit public funds, facilities and employees from being used to counsel women on abortion or to perform abortions not necessary to save a woman’s life. It also required doctors to determine the viability of a fetus before performing an abortion.

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The Federal government intervened in *Webster* to once again argue for the reversal of *Roe v. Wade*. They were not alone – a record number of amicus curiae briefs were filed in the case. Given the 5-4 vote in *Thornburgh* and the two new Reagan appointees sitting on the Court, *Webster* presented a bleak prospect for women’s interest groups. Justice Blackmun – the author of *Roe* – only darkened their mood when he was quoted as saying “I think there’s a very distinct possibility that [Roe v. Wade] will [go down the drain], this term. You can count the votes” (*New York Times* 1988).

The Court’s decision in *Webster* was, in fact, a defeat for women’s groups but it was not a complete loss. Five justices voted to uphold the Missouri restrictions\(^\text{10}\) but only one justice explicitly called for *Roe v. Wade* to be overturned (Scalia). Three of the other justices (Rehnquist, White and Kennedy) presented detailed arguments for why the trimester approach should be abandoned but held that *Roe* was still precedent. O’Connor, the fifth justice, claimed there was no need to reexamine *Roe* in *Webster*, but focused again on her “undue burden” approach to uphold the restrictions.

Thus, by the end of *Webster*, the abortion precedent was preserved – albeit severely battered. Few were optimistic this would continue. The justices voting for *Roe* were now the minority on the Court and it was thought to be only a matter of time before *Roe* would fall. However, it would be a few years before the justices would face the question squarely again. In the meantime they would turn their attention once more to parental consent and funding restrictions.

\(^{10}\) The restriction on public funding for counseling abortions was ruled moot by all the justices. In addition, the majority argued it was unnecessary to rule on the statute’s preamble since it did not itself regulate abortion.
The Early 1990s

In the early 1990s, women's groups suffered further losses in the abortion area. In *Hodgson v. Minnesota* (1990), the Supreme Court allowed a provision requiring both parents to be notified 48 hours before an abortion was performed on a minor – provided the restriction was accompanied by a judicial bypass. A similar requirement (although only one parent and 24 hours) was allowed in *Ohio v. Akron Center for Reproductive Health* (1990).

In *Rust v. Sullivan* (1991) the Court upheld federal restrictions that prohibited any organization receiving federal funds from counseling women on abortion. This would turn out to be less of a loss than it first appeared, however: the restriction “was repealed by an executive order issued by President Clinton two days after his inauguration” (Hensley et. al., 1997, 845).

*Planned Parenthood v. Casey*

The *Roe v. Wade* precedent would again be at issue before the Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey* (1992). This was the case pro-life groups had been waiting for and women’s groups had been dreading. Another two Supreme Court justices had been appointed in the years since *Webster* – this time by the Republican President George Bush. The two departing justices (Brennan and Marshall) had been part of the *Roe* majority and the two new justices (Souter and Thomas) were unlikely to be sympathetic.

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11 Justice Souter was already on the Court when it heard *Rust v. Sullivan* (1991). In that case he voted with Rehnquist, White, Scalia and Kennedy – not a promising sign for women’s groups.
Casey involved a challenge to Pennsylvania legislation that required "informed" consent, a 24 hour waiting period, parental consent (although with a judicial bypass), spousal consent and record keeping. The legislation waived compliance with the restrictions only in cases of medical emergency. The Federal government participated as amicus curiae and once again requested that Roe be overturned.

Many felt Roe to be doomed. To their surprise, however, O'Connor, Kennedy and Souter – in a jointly authored, plurality opinion – ruled that "the essential holding of Roe v. Wade should be retained and once again reaffirmed" (845). In such troubled times, the Casey decision can only be considered a victory for the interests of women's groups but it is a victory hardly worth celebrating. The plurality decision upheld all but the spousal consent restrictions in the Pennsylvania legislation. More importantly, the decision replaced Roe's trimester approach with O'Connor's "undue burden" approach.

The new standard determined whether regulations on abortion imposed an "undue burden" on a woman's right to choose to terminate her pregnancy. A regulation imposes an "undue burden" if its "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (878). Such regulations can only be upheld if the state can prove a compelling interest. Regulations that did not impose an "undue burden" merely had to be "rationally related" to the state's interest in the potentiality of life. Depending on the definition of "substantial obstacle" this approach may make restrictions much easier to sustain. Thus while Roe was maintained in Casey, it was made almost unrecognizable.
After *Casey*

In the aftermath of *Casey*, pro-choice groups were hopeful that the Supreme Court would at least interpret "undue burden" in a favourable manner – limiting further restrictions. Instead, however, after 1992, the justices "turned aside most abortion disputes or, occasionally, issued summary rulings that did little to clarify the broader issues" (Jost 1999, 69). Attention shifted to a newer phenomenon: pro-life demonstrations at abortion clinics. The litigation record here is mixed, but in the few cases decided by the Court, the women’s groups have managed to achieve at least a fixed buffer zone between demonstrators and clinics (*Bray v. Alexandria Women’s Health Clinic* 1993; *N.O.W. v. Scheidler* 1994; *Madsen v. Women’s Health Center* 1994; *Schenck v. Prochoice Network* 1996).

**Long Term Success**

If one merely calculates the percentage of Supreme Court decisions favourable to the interests of women’s groups, the groups’ success rate in the abortion area would be 44%. However, if one takes into account the decisions themselves and the state of doctrine today, one might conclude that the success rate since 1970 is much further below the break-even point.

The issue area certainly started off well: in its first abortion case the Supreme Court handed women’s groups a substantial victory. Although not a complete adoption of

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12 This percentage is the number of cases producing favourable doctrine (either moderately favourable or very favourable) divided by the total number of cases. All the percentages in this chapter are done for the cases in the time period of interest to this study. Thus while I talk about cases that have affected doctrine both before and after the time period, I do not include these cases when determining how successful the women’s groups have been.
the positions of women’s groups, *Roe v. Wade* went further than the pro-choice interests had hoped and established a right to abortion. However, this would prove to be the high-water mark for women’s groups’ achievements in the area.

Women’s groups were not to be allowed the time to try to extend the reasoning in *Roe*. The decision came under immediate attack in state legislatures. After 1973, the groups would be continually on the defensive, striving to preserve their early victory. For the most part, they were unsuccessful as restriction after restriction was imposed on the abortion right, and upheld by the Supreme Court. It looked for a time as though *Roe* itself would fall – bringing the entire abortion area full circle to the conditions before 1973. The *Casey* decision, however scant a victory, managed to salvage the abortion area from complete disaster for the groups: *Roe* was explicitly upheld – if only in name.

Today, a woman seeking an abortion may face restrictions on where it is to be performed. She may not be able to receive funding to pay for the abortion, even if she is indigent. If she is a minor, she may have to receive her parents’ or a judge’s consent before receiving an abortion. However, she still has some right to choose to terminate her pregnancy. With the addition of two Clinton appointees to the Supreme Court – one to replace a *Roe* opponent (White) – the *Roe* precedent seems secure, at least for the near future. Thus, the abortion issue area may not have been a complete failure for women’s groups, but it has not been a resounding example of success either.

**Influences on Abortion Doctrine Development**

What was responsible for the transformation of doctrine in the abortion issue area from its very favourable beginning to its near disastrous end? And why was its end not a
complete disaster? Why was Roe allowed to stand after years of encroachments which seemed to spell its death – encroachment which included direct attacks by the federal government on the Roe decision itself? This next section considers the conditions of various factors in an attempt to trace the influences on doctrine development.

Court Membership

Can a change in court membership explain the gradual whittling away of the abortion right, the threats to precedent itself and its ultimate salvation (at least to this point)? This section traces the retirements and appointments of justices in the years since Roe v. Wade in an attempt to determine whether such changes coincided with changes in doctrine.

The vote in Roe v. Wade was 7-2, with only Rehnquist and White dissenting. This case and Doe v. Bolton were the last abortion cases heard by Justice Douglas – one of the seven. However, his replacement on the Court – Justice Stevens – would prove to be a supporter of Roe, and thus unlikely to be responsible for any dramatic changes in doctrine. Still, this new presence must be examined for any effect it might have had on the Court’s rulings on restrictions to the abortion right. When the Court first considered restrictions in Planned Parenthood v. Danforth, Stevens did vote (with Rehnquist and White) in favour of upholding one restriction: parental consent. Further, in the trilogy of cases challenging funding restrictions by various states, he voted with the majority to uphold the regulations. However, the Court’s quick backward steps after Roe are unlikely to be a result of Stevens’ presence. In Danforth his vote for parental consent was only in dissent and in the funding cases he was part of a six-person majority. Therefore, Stevens’
vote on the Court does not appear to have effected the outcome. More likely, these cases indicate that members of the original *Roe* majority saw the abortion right differently. Only justices Blackmun, Brennan and Marshall were unwilling to allow restrictions.

Another change in Court membership took place in 1981 when another member of *Roe*'s majority group – Justice Stewart – retired. Stewart was replaced by Justice Sandra Day O’Connor who would prove to be a *Roe* opponent. O’Connor made her position clear in her first abortion case, *Akron v. Akron Center of Reproductive Health* (1983), when she took issue with *Roe*'s trimester scheme and advocated an “undue burden” approach to abortion regulations. But did O’Connor’s addition change the flow of doctrine? Until her appointment, only the funding restrictions and a parental “notification” restriction had been upheld; after her appointment several other state restrictions were allowed. However, many of these same restrictions had been struck down in that first abortion case in which she had advocated – in dissent – the “undue burden” approach. It seems unlikely that her presence was a determining factor.

The Court’s next two appointments – Justice Scalia replacing Burger and Justice Kennedy replacing Powell – occurred before *Webster v. Reproductive Health Services*, in which the federal government argued for *Roe*'s reversal. Both new justices voted to uphold various restrictions on abortion in this case. Scalia went on to call for *Roe* to be overturned while Kennedy joined Rehnquist and White in arguing for the removal of *Roe*'s trimester approach to abortion. Added to O’Connor, this meant the opponents to *Roe* now held a majority on the Court. The replacement of Powell – one of the majority in *Roe* – with Kennedy – a *Roe* opponent – does appear to have had an influence on doctrine.
With *Roe* supporters reduced to a minority on the Court, it came as no surprise that more restrictions to abortion were allowed, or that the *Roe* precedent itself was now seen to be in danger. Indeed, it does seem surprising that the new majority did not vote together to overrule *Roe* in *Webster*, or later, in *Casey*. By the time *Casey* was considered by the Court, two of *Roe*’s staunchest supporters – Justices Brennan and Marshall – had left the Court to be replaced by two Republican appointees – Justices Souter and Thomas. Yet, while *Roe* was drastically changed, it was explicitly reaffirmed by this new group, not overruled. Thus, while changes in membership obviously influence the direction of doctrine, other constraints must apply.

*Legal Considerations*

Shifts in doctrine in the abortion area can probably be at least partly attributed to legal considerations such as varying case facts and the power of precedent. When the Court faced cases involving restrictions on the abortion right, cracks in the *Roe* majority immediately appeared. These cracks could not be attributed solely to the addition of Justice Stevens. It is more probable that the seven justices in the majority in *Roe* saw the decision differently. The votes of Powell, Stewart and Burger to uphold funding restrictions on abortion may have been consistent with how they defined the “qualified” right to abortion. And these were, of course, fundamentally different cases. In *Roe*, the criminalization of abortion was directly at issue and a general right was pronounced. In later cases the Court was faced with defining the parameters of that right and the procedures by which it could be exercised.
Differences in case facts might also explain the Court’s different treatment of restrictions. In *Akron* and *Ashcroft*, the Court struck down requirements that abortions be performed in hospitals, yet it allowed such a requirement in a third case, *Simopoulos*. On its face, the different facts in the cases seems to have had an influence. The hospital requirement upheld in the third case was more finely tuned – it defined “hospital” to include licensed outpatient clinics.

Finally, the explicit reaffirmation of *Roe* in *Casey* appears inconsistent with the replacement of key members of the *Roe* majority with Republican appointees, and the government’s continued call for *Roe*’s reversal. One explanation for *Roe*’s continuation – at least in name – is the power of precedent. In their jointly authored opinion in *Casey*, O’Connor, Kennedy and Souter emphasized the importance of *stare decisis*. They devoted several pages of their opinion to address why an overturn of *Roe* would be a mistake which “would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law” (864).

*Changes in Government*

In the aftermath of *Roe v. Wade*, many anti-abortion amendments were introduced in Congress – 58 by 1974 alone (Epstein and Kobylka 1992, 356). However, no amendment has been able to garner the two-thirds majority vote required. An amendment proposed to the Senate in 1983 was probably the closest challenge, falling 18 votes short of the required two-thirds (Mezey 1992, 220). It is doubtful that the Court would have been disturbed enough by Congress’ actions to take their position into account.
Statutory cases, however, are much easier to overturn and the Court has upheld the only real restriction—funding—imposed by Congress on the abortion right. It is possible that they considered Congress in making these decisions but for most of these years, both houses of Congress were controlled by the Democrats—ostensibly more favourable to the abortion right than their Republican counterparts. While several restrictions were allowed in Ashcroft and Simopoulos during a time of divided control in Congress (the Senate was held by the Republicans), Akron and Thornburgh were also decided during that period. Thus there is nothing to indicate that Congress was a dominant influence on the development of abortion doctrine.

It is probable that the president had an effect on the development of doctrine. It was Republican President Ronald Reagan’s Solicitor General, Rex Lee, who first suggested the “undue burden” approach picked up by O’Connor in Akron (Epstein and Kobylka 1992). And it was another Reagan Solicitor General, Charles Fried, who first called for Roe to be overturned.13 Having the most prestigious (and successful) litigator before the Supreme Court advocate the reversal of Roe obviously gave the position some credibility. Certainly the justices must have felt less inhibited to impose more restrictions on the abortion right, recognizing the President’s obvious preferences. However, Roe was ultimately reaffirmed even though, in Casey another Republican President’s Solicitor General was still advocating Roe’s demise. Further, the president’s influence does not adequately account for the differences in the treatment of restrictions within the Reagan

13 Fried became Solicitor General after the interesting departure of Rex Lee. There is some debate about whether Lee was fired because he refused to ask the Court to overturn Roe. It has also been suggested that Fried’s promotion from “acting” Solicitor General to Solicitor General was determined by his arguments in Thornburgh (Epstein and Kobylka 1992).
era, with some being upheld (Ashcroft, Simopoulos), while others (Akron, Thornburgh) were struck. Thus while a president must obviously exert an influence, that influence is not absolute.

Changes in Public Opinion

It is possible that public opinion had an impact on the Court as they were deciding Roe v. Wade. Epstein and Kobylka (1992) provide evidence that the public's support for abortion in certain circumstances had increased throughout the 1960s (150, 153). Gerald Rosenberg (1991) argues that the abortion decision was in part attributable to favourable public opinion. However, it is unlikely that changes in public opinion had much effect on the development of doctrine in the abortion area after Roe.

Public opinion on the abortion issue does not appear to have changed significantly since the mid-1970s. For example, in polls done by the Gallup Organization from 1975 to 1999, respondents were asked: "do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances" (Gallup polls, April 1975 to April 1999). The responses are fairly similar throughout the years. The largest percentage of respondents (always in the 50% range) falls in the middle category (legal under certain conditions). The percentage of respondents answering that abortion should be "illegal in all circumstances" has decreased since the 1970s but has hovered around 17% for most of the years since. Thus there do not appear to be any significant changes in public opinion to accompany the Court's increasing receptivity to restrictions on abortion.
Interest Groups

Whether the groups of direct interest here exerted influence on the development of doctrine in the abortion area is unresolved – and the groups may prefer to disclaim responsibility in any case. For reasons detailed in Chapter 2, the Women’s Rights Project (WRP) did not participate in any of the abortion cases. Indeed, none of the three groups were present in Roe v. Wade – the biggest victory for their interests. The first case in which both the National Organization for Women’s Legal Defense and Education Fund (NOW LDEF) and the Women’s Legal Defense Fund (WLDF) participated, Harris v. McRae, resulted in a loss for the groups. Their litigation over the next several years met with mixed results at best, including a significant loss in Webster and a victory (however qualified) in Casey. The path of doctrine does not seem to have been any smoother in the cases in which the groups did participate. Funding restrictions were upheld in cases in which they participated and in cases in which they did not. Parental consent restrictions were struck down when they participated in Akron but upheld in Ashcroft. Overall, cases in which the groups participated were favourable 42% of the time, while cases in which they did not participate were favourable 47% of the time.

Interest groups as a whole may have influenced the Court. In the abortion area, the number of pro-life organizations litigating before the Court increased after Roe v. Wade. Perhaps the sheer number of groups litigating on each side of the debate had an impact on the justices’ perceptions of the state of the debate in the public. On inspection, however, there does not seem to be any pattern to the number of briefs filed for and against the abortion right and the direction of the Court’s decision. While Webster had more amici curiae arguing against Roe, so did Casey.
The increased numbers of pro-life groups litigating may have exerted influence in another manner. The provision of different information to the justices may have provided them with alternatives to their previous doctrinal positions. In addition, Epstein and Kobylka (1992) attribute some of the change in doctrine in the abortion area to the indirect influence of the arguments of the pro-life groups. According to these authors, the pro-choice groups did not change their arguments after Roe to address changes in the political environment and in the Court, and thus did not counter the arguments of their increasing number of opponents effectively in later years. The groups “never seriously raised alternative arguments that, while not saving all of Roe, would have protected at least some elements of the core holding” (295). Epstein and Kobylka believe that the groups could have set a different path for doctrine if they had not clung so tightly to their early success. They argue that the groups should have addressed arguments to Justice O’Connor in an attempt to bring her on board. The authors also suggest that pro-choice groups made a costly error by not responding legally to Solicitor General Lee’s proposal of the “undue burden” approach.

Thus, while pro-life interest groups may have enjoyed at least some indirect influence on the development of doctrine in the abortion issue area, pro-choice groups may have had a negative influence on the achievement of their desired doctrine. The unfavourable path of doctrine may have been influenced by their mistakes. While “the
essential holding” of Roe v. Wade was reaffirmed in Casey, this might speak more to the strength of the justices’ learned norms as to the importance of precedent than to the quality of Roe’s defense in subsequent years.¹⁴

Not surprisingly, no single factor appears to have completely determined the development of doctrine in the abortion area. Rather, a variety of factors have exerted influence. Of these, changes in the Court’s membership, legal considerations and the position of the president seem to have been the most powerful. Table 4.1 summarizes these findings and those for the other policy areas.

**Affirmative Action**

The elimination of employment discrimination has been the focus of much of the litigation of women’s interest groups. They have supported affirmative action programs as a method to achieve “equal employment opportunity” – a mechanism to right the effects of past wrongs. Affirmative action, which involves “positive steps” to erase the effects of past discrimination, emerged out of two presidential Executive Orders, judicial decrees in employment discrimination cases, and programs adopted voluntarily (often in an effort to stave off litigation) by public and private institutions. However, it has grown into one of the most controversial issues in the United States and has been the subject of numerous challenges in the Court. The vast majority of these challenges have revolved

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¹⁴ This conclusion is consistent with the method used here. However, I believe that to fully determine the influence of interest groups one must examine the arguments of all the participants in a case, comparing each to the Court’s opinion. Only then can one determine whether an argument advanced by a particular participant was picked up by the Court – and whether that argument was put forward by all briefs or only by the brief in question. This method was beyond the scope of this project. However, it has been undertaken previously for the Canadian cases and will be undertaken for both countries in a future project.
around race rather than gender but, since the doctrine they establish has implications for
gender, women's groups have felt the need to participate. Thus the groups have once
again found themselves undertaking defensive litigation. This next section attempts to
determine how well the groups have fared in the face of tough opposition.

The Early Cases

After effectively "ducking" the controversial issue in *Defunis v. Odegaard* (by
declaring the case moot), the Court finally decided its first affirmative action case in
1978: *Regents of the University of California v. Bakke*. This case addressed affirmative
action in education and attracted significant attention with over 50 briefs filed. The
Court's decision, addressing both Title VI and the 14th Amendment of the Constitution,
provided no clear winner but *Bakke* appears to be more favourable than unfavourable for
the interests of women's groups. The doctrine emerging from the case seemed to indicate
that there was no prohibition on affirmative action programs developed to take race into
account. However, while race consideration was allowed, strict quotas were not. While
all sides could probably claim a victory from this ruling, the precedent did allow some
form of affirmative action programs to continue and thus delivered to the groups another
early success.

Establishing Acceptable Parameters

Several affirmative action programs would be challenged over the next few years
forcing the Court to further define what form of affirmative action was acceptable. The
Court's first cases after *Bakke* involved affirmative action in employment and
government contracts. In both situations, the Court seemed to indicate that programs which were voluntary, temporary and designed to address past discrimination would be allowed to stand under either Title VII (*United Steelworkers of America v. Weber* 1979) or the constitution (*Fullilove v. Klutznick* 1980). This was a victory for women’s groups, particularly since the explicit language of Title VII – and the debate surrounding its enactment – suggested that such programs would not be permissible. The majority in *Weber* decided to follow the “spirit” if not the letter of the law (Abraham and Perry 1998). Women’s groups had to be pleased with this early litigation which “in effect, provided a green light, or at least a green-and-yellow one, for the widespread affirmative action programs pushed aggressively by the Carter administration” (Abraham and Perry 1998, 432).

However, the groups did experience some setbacks in their litigation. In *Firefighters Local Union v. Stotts* (1984) the Court instituted a limit on affirmative action in employment – ruling that Title VII protects bona fide seniority systems even if they thwart the goals of affirmative action. Therefore, a “last hired, first fired” rule could stand even though this would result in a disproportionate number of minorities losing their jobs. (They had been the most recent hires under a plan established to remedy past discrimination.) More disturbing to the groups, the Court suggested that relief could be achieved only if black workers could demonstrate that they had been “individually victimized” – a position advocated by the Reagan administration (Mezey 1992).

Unfavourable doctrine also emerged from the constitutional challenge in *Wygant v. Jackson Board of Education* (1986 – an employment case) when the Court ruled that the “mere fact of discrimination in American life does not constitute sufficient reason for
the type of affirmative action program" adopted by the Jackson board (laying off nonminority workers ahead of minority workers). However, this decision also appeared to counter at least part of the Stotts loss when O'Connor’s concurring opinion suggested that affirmative action programs need not be limited to specific individual victims of discrimination. This erasure of Stotts' negative doctrine was firmly accomplished in two employment cases: Local 28 Sheetmetal Workers v. EEOC (1986) and Local 93 International Association of Firefighters v. Cleveland (1986). Thus the groups had regained a lost step.

Local 28 and Local 93 went a step further when the justices allowed the use of hiring and promotion goals in affirmative action programs under Title VII. In Local 28, the majority upheld a lower court order that required the union to meet a specific quota of minority members by a specified year. In Local 93, the Court upheld a voluntary agreement between the City of Cleveland (which had a history of discrimination) and firefighters that required the promotion of one minority for every white promoted. The Court went even further in its next constitutional employment case, U.S. v. Paradise (1987), when it allowed strict quotas to be used in an area where past discrimination had been particularly "pervasive."

However, the case that established the most favourable doctrine yet for women’s groups was Johnson v. Transportation Agency of Santa Clara (1987). In that Title VII case the Court applied the Weber reasoning to a public employer and ruled that gender and race could be taken into account in employment decisions. In fact, the Johnson opinion ruled that preferential treatment of gender and race could occur even in the absence of a finding of past discrimination against an employer. This decision was a
substantial victory for the groups, broadening the definition of allowable affirmative action programs. After Johnson, both public and private employers could give preference to females and minorities in order to increase their numbers – even when the lack of such employees had not been the result of the employer’s own discrimination.

However, two years later, the path of doctrine in employment cases took an unfavourable turn. In Martin v. Wilks (1989), the Court addressed who could challenge consent decrees already in place. The majority allowed a challenge (brought under both Title VII and the Constitution) by white firefighters of an affirmative action program created by a consent decree in which they had chosen not to participate. The majority did not see the firefighters’ failure to participate at the time of the decree as a problem – indeed they argued that it was the responsibility of either the plaintiffs or the employer to identify those who might be “adversely affected.” This decision was obviously contrary to women’s interests as it made consent decrees subject to wider challenge. However, Congress rescued the groups’ cause when it overruled the decision in the Civil Rights Act of 1991 (legislation which itself had been the focus of lobbying efforts of women’s groups). The Act stated that consent decrees were not vulnerable to subsequent challenge by those who had had an opportunity to object during the process (Goldstein 1994, 229).

A difference between the Court’s treatment of statutory and constitutional cases became apparent in a case dealing with a set-aside program for city contracts, City of Richmond v. Croson (1989). Here the Court took a step back and once again held societal discrimination insufficient to justify affirmative action – in constitutional cases there must be evidence of past discrimination by the employer. The majority in Croson adopted the strict scrutiny standard for challenges brought on equal protection grounds –
programs had to be "narrowly tailored" to achieve a "compelling" state interest. Thus, by the end of *Croson*, a different standard existed for states and the federal government. For constitutional challenges, programs under the federal government were examined under a less exacting light than state programs. This was a blow to women's groups as it now appeared that state affirmative action programs would be difficult to justify and the groups' goal of equal employment opportunity would be more difficult to achieve.

When the Court returned to the issue of state versus federal programs it looked at first as if the groups would preserve some of their earlier success and have at least federal programs easier to sustain. In a case involving a constitutional challenge to the awarding of broadcast licenses, *Metro Broadcasting v. FCC* (1990), the Court explicitly held that the federal government did have more latitude than states and its programs were not subject to strict scrutiny. However, in its next big affirmative action case (a case challenging the allocation of government contracts under the 5th Amendment), the Court leveled the playing field to the detriment of the groups' interests. In *Adarand Constructors v. Pena* (1995) the Court ruled that both state and federal racial classifications would be subject to the strict scrutiny standard. With this decision they explicitly overruled *Metro Broadcasting*.

**Long Term Success**

Using a simple, arithmetic measure of the overall success rate of women's groups in the affirmative action area (the number of cases favourable to women's interests divided by the total number of cases in the area), the groups were successful 57% of the time. Moreover, the cases demonstrate a wave pattern as doctrine will be favourable in
one period of time and then unfavourable in the next. However, once again, the apparent success rate does not tell the entire story. By the end of the period of interest here, affirmative action programs were perhaps not impossible, but certainly difficult to sustain. Despite a better than even performance, women's groups had to be discouraged by the Court's more limited acceptance of affirmative action programs in later years. The area was not a complete loss, however, as consideration of race and gender is still allowed as long as the program is "narrowly tailored." Notable as well the Court appears to rule more favourably when programs are subject to statutory rather than constitutional challenge and when programs are used to guide hiring and promotion rather than firing decisions.

Influences on Doctrine Development

Why has doctrine in the affirmative action area shifted from being favourable to women's interests to being unfavourable? What prompted the Court to adopt the more difficult standard it now favours for constitutional challenges to affirmative action programs? Will women's groups be able to preserve any gains in this area or will other factors push doctrine from a point where affirmative action programs are difficult to sustain to where they will be illegal? To answer these questions we must first determine which factors are managing to exert influence in this area.

Court Membership

Changes in Court membership probably did not have much of an impact early in the time period under study. Justice O'Connor's replacement of Justice Stewart did not
produce dramatically different doctrine as Stewart himself had voted against affirmative action programs more often than for them. Similarly, Justice Scalia’s replacement of Justice Burger did not bring notably different regard for affirmative action to the Court. Burger had usually stood against affirmative action programs (although see Fullilove) and Scalia has consistently voted against them.

However, the replacement of Justice Powell with Justice Kennedy may have had an impact on the Court’s decisions. Although not always in favour of affirmative action programs, Powell did vote with the liberal majority on most cases. Kennedy, by contrast, has always voted in opposition to the programs. The two cases immediately following his appointment to the bench (Croson and Martin) were decided unfavourably for the groups’ interests. Kennedy sided with the majority in both cases although his vote was not decisive in Croson which had a six justice majority. However, five justices voted in favour of an affirmative action program in Metro Broadcasting despite Kennedy’s presence. This victory came about with the help of an unusual ally, Justice White, without whose defection the opponents to affirmative action would have held a majority. Thus, White may have merely postponed the appearance of an unfavourable shift in doctrine for women’s groups.

That unfavourable shift in doctrine occurred in the Court’s next big affirmative action case, Adarand. But what happened between Metro Broadcasting (1990) and Adarand (1995) to produce the opposite result? The replacement of four members of the Court in the years between the two cases may have influenced the doctrine shift. However, this membership change must be examined more closely. While the three most unfailing supporters of affirmative action (Blackmun, Brennan and Marshall) left the
Court in this period, only one of their replacements (Thomas) was an opponent of affirmative action. Further, a Justice (White) who had voted more often against affirmative action than in support of it, was replaced by a firm supporter (Ginsburg).

It seems likely that the changes may have contributed to the difference between the *Metro Broadcasting* and *Adarand* decisions. White’s surprising show of support for federal affirmative action programs in *Metro Broadcasting* is not dissimilar from how Ginsburg would probably have voted, while Thomas (replacing Marshall) left the favourable majority in *Metro Broadcasting* one justice short in *Adarand*. However, the major change in justices between the two cases would probably have less of an effect on other affirmative action questions – where White was usually an opponent to affirmative action. In these issues the addition of Ginsburg would counter the addition of Thomas and a dramatic change in doctrine should not result. Probably more significant was the earlier addition of Kennedy, which did shift the balance on the Court. In any case, change in the Supreme Court’s membership does seem to have had some impact on the Court’s decisions in the affirmative action area.

*Legal Considerations*

Legal considerations also appear to have had some impact on doctrine development in affirmative action. Some of the differences in the Court’s treatment of cases probably can be attributed to variations in case facts and the basis of the case (constitutional versus statutory). The Court, for example, has treated affirmative action programs involving hiring, training and promotion more favourably than programs involving the layoff of workers. After upholding both a training program that reserved
positions for minority workers (Weber) and a “set aside” program that required a certain percentage of work to be contracted to minority businesses (Fullilove), the Court struck down an order that protected recently hired minorities from layoffs (Stotts). The majority was concerned with a program that involved such drastic consequences for nonminority workers arguing it was “inappropriate to deny an innocent employee the benefits of his seniority” (574). Even the three most consistent supporters of affirmative action programs (Marshall, Brennan and Blackmun) concentrated their dissent in this case on the issue of mootness rather than on defense of the program.

The Court also appears to treat affirmative action programs challenged on statutory grounds more favourably than those challenged on constitutional grounds. In Johnson, the Court allowed an employer to adopt an affirmative action program to redress past discrimination even though it had not been responsible for that discrimination. Thus evidence of “societal discrimination” was enough in this statutory case. However, in Croson the Court took quite a different stance in ruling an affirmative action program contrary to the Equal Protection Clause. Applying the strict scrutiny standard, the Court ruled that there must be evidence of past discrimination by the employer for a program to be permissible. Thus, programs subject to constitutional challenge must satisfy a more difficult standard.

This more difficult standard was originally agreed on in a state case. When the next federal case arrived at the Court, this difference in case facts (state to federal) had an impact on the Court’s doctrine. The majority opinion in Croson had suggested that Congress may have more latitude in its affirmative action programs than states have in theirs. In Metro Broadcasting the Court ruled that this was in fact the case. Thus the
programs of the federal government were subject to only an intermediate standard of review. The difference between the case facts – a state program in *Croson* versus a federal program in *Metro Broadcasting* – may have influenced at least Justices White and Stevens. Both justices voted with the majority in *Croson*, striking down the program, and with the majority in *Metro Broadcasting*, upholding the program. Thus legal considerations appear to be very relevant to several shifts in doctrine in the affirmative action area.

*Changes in Government*

Was the Supreme Court concerned with the potential for Congress to overturn its decisions in the affirmative action area? Did it consider the position of Congress when it decided such cases? Certainly the first wave of the Court’s favourable decisions (*Bakke, Weber, Fullilove*) occurred in a period when Congress was controlled by Democrats – the party more likely to support affirmative action. Its following wave of more negative decisions (*Stotts, Wygant*) took place during a split Congress – with Democrats in the House and Republicans in the Senate. And its latest negative decision (*Adarand*) was rendered during a Republican Congress. Thus, one sees some correlation between the party in power in Congress and how favourable the Court’s decisions are towards affirmative action. The justices may have felt more comfortable making a decision unfavourable to affirmative action when Congress was controlled by Republicans (who generally stand against affirmative action) or when there was divided control over Congress – when agreement on an override would have been more difficult to achieve.
However, one also sees a wave of the most favourable decisions (*Paradise* and *Johnson* in particular) during the split Congress of the mid-1980s, and some very negative decisions (*Croson* and *Martin*) during the Democratic Congress of the late 1980s. In addition, even if the Court did feel more comfortable making decisions unfavourable to affirmative action when Congress shared their views we are still left with no good explanation for the influences behind the Court’s predilection to an unfavourable decision. Thus the evidence of Congressional influence on the Court is not very convincing. Indeed, if the Court was taking Congress’ position into account in its decisions, it certainly miscalculated in *Martin* which was later overturned by the Democratic Congress.

Has the presidency been any more influential? During Carter’s presidency the Solicitor General participated in three major affirmative action cases – always in support of the programs being challenged. All three of these cases were decided favourably for the interests of women’s groups. However, the records of the two Republican presidents were mixed. Both Reagan and Bush opposed affirmative action programs, equating affirmative action with discrimination. In the Reagan era, the Solicitor General often intervened in cases to argue against affirmative action – he was successful about half the time. At first, the Reagan administration appeared to sway the Court to their way of thinking when the Court held in *Stotts* that affirmative action programs could only provide relief for “identifiable victims” of past discrimination – a position advocated in the Solicitor General’s brief. However, this victory was soon reversed by the Court despite the Solicitor General’s continued arguments for it in later cases.
The Bush administration continued to argue against affirmative action in two cases, winning only one. President Clinton's Solicitor General participated in the Court's last major case, Adarand, arguing unsuccessfully for the Court to uphold the affirmative action program under challenge. Thus presidential influence in the affirmative action area does not appear to be overwhelming.

Changes in Public Opinion

Once again, public opinion does not appear to have a significant effect on the Court's decisions. When asked in a variety of polls whether they favoured or opposed "federal laws requiring affirmative action programs for women and minorities in employment and education as long as there [was] no rigid quotas," the percentages of respondents in each category were fairly stable over the 1980s and 1990s (Roper Center 1982-1995). The percentage supporting such programs increased very slightly throughout the years while the percentage opposing decreased slightly in the mid-1980s – while the Court was deciding cases unfavourably for affirmative action.

Interest Groups

The women's groups of interest here attempted to influence the Court as amici curiae – none of the three groups sponsored any cases in this area. The WRP's participation is more difficult to judge since cases in the affirmative action area are usually handled by the ACLU's general legal staff, with the WRP assisting in the write up of the briefs (WRP 1999). However, the WRP was obviously present in a few of these cases, and the NOW LDEF and the WLDF both participated in the majority of cases. The
groups were present when the Court decided cases favourable to their interests (in Weber and Johnson for example) and when it did not (Stotts, Croson). In fact, when the groups were present favourable doctrine only resulted 55% of the time. This pattern, and the fact that the Court sometimes decided cases favourable to affirmative action programs, even when the groups were absent (2 of the 3 cases the groups did not participate in were decided favourably for their interests), make any real influence by the groups difficult to detect.

Other interest groups litigating in the affirmative action area did not exert any obvious patterns of influence. Unlike the abortion area, the number of groups litigating in opposition to affirmative action did not increase significantly throughout the time period. In fact, in all the cases in this area, there were more briefs submitted in favour of affirmative action programs than against them. Therefore, an increase in opposing arguments cannot account for the Court’s unfavourable decisions in the late 1980s and mid-1990s.

Once again, no single factor appears to have influenced the development of doctrine in the affirmative action area. Instead, changes in the Court’s membership and legal considerations both seem to have exerted significant influence on the Court’s decisions.
Sex Discrimination

“In the 1970s... the federal courts became a forum for the debate over sexual equality” (Mezey 1992, 17). Women’s groups made widespread use of litigation in pursuit of their ultimate goal: complete equality for women. For three decades, the groups have appeared before the Supreme Court to urge it “to treat sex discrimination in the same constitutional terms as race discrimination, to attack... sex discrimination permitted by law, and to fashion strategies to overcome practices which... effectively denied true equality to women” (WRP 1999). How much success have the groups achieved?

Standard of Review

_Reed v. Reed_ (1971) began a new era of sex discrimination litigation when the Supreme Court struck down a law favouring men over women for the first time. The Court held that an Idaho law giving preference to men over (equally qualified) women as administrators of estates violated the Equal Protection Clause of the 14th Amendment. This was an unprecedented victory for women’s groups – a “legal breakthrough” (WRP 1999) – which they would attempt to build on in the coming decades.

However triumphant this “breakthrough” victory, the judgment did contain some reasoning unfavourable to the groups’ interests. The Court appeared to use the “rational basis” test to rule Idaho’s law unconstitutional. Under this test, the state had only to prove that the gender classification contained in the law was “reasonable” and not arbitrary (which Idaho failed to do in _Reed_). Arguing for the appellant, the WRP had urged the

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15 As detailed in Chapter 2, the sex discrimination category includes all claims to discrimination that were based on gender, excepting those involving employment. This includes both constitutional and statutory claims.
Court to consider gender as analogous to race and thus a “suspect classification” subject to the “strict scrutiny” standard. Under “strict scrutiny,” the government would have had to prove that the law’s preference for men served a “compelling” state interest and that the classification was “necessary” to achieve that interest. The Court’s use of a lesser standard was detrimental to the interests of women’s groups as it made gender classifications easier to justify.

The appropriate standard for gender discrimination cases would again be at issue in *Frontiero v. Richardson* (1973). The WRP — in their amicus curiae brief — still advocated a strict scrutiny approach but offered a reluctant Court an alternative. If the Court held that gender was not a “suspect” classification, the WRP urged the Court to “apply an intermediate test” (Brief of the WRP, 8) rather than the rational basis test. The Court, however, did neither: the majority agreed that the gender classification at issue was unconstitutional but could not agree as to the appropriate standard. Four justices argued for strict scrutiny, four argued against, and one justice did not explicitly address the issue. Thus *Frontiero* was, in effect, a doctrinal loss for the interests of women’s groups as they failed to get a majority to endorse their favoured or even their fallback position.

The Court’s next foray into the standard of review issue occurred in *Craig v. Boren* (1976). The WRP’s lead attorney, Ruth Bader Ginsburg, had already added detail to her intermediate standard of review in a brief for a previous case (*Weinberger v. Wiesenfeld* 1975). By *Craig*, the group seemed to believe that the pursuit of this “intermediate” standard was a better strategy — that the Court would not adopt strict scrutiny but might be open to a new standard for gender, one more exacting than the
rational basis test. The Court's decision in this case was a victory for women's groups. Although the Court did not adopt the strict scrutiny approach for gender discrimination cases, a majority did agree that an "intermediate" standard was appropriate. The majority ruled that "to withstand constitutional challenge... classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" (197). The group had achieved all it had felt realistic to hope for in this case. Governments making classifications by gender would have to do more than prove their distinctions were reasonable. This would have important implications for the women's groups' subsequent litigation.

Nearly two decades later the standard of review issue would again be discussed in the Court. In a 1993 case, *Harris v. Forklift Systems, Inc.*, Justice Ruth Bader Ginsburg (the former head of the WRP) suggested that it was still an "open question" whether distinctions based on gender were inherently suspect. Three years later in her majority opinion in *United States v. Virginia* (1996), Justice Ginsburg appeared to alter the intermediate standard of review used for gender. Citing opinions in *Mississippi v. Hogan* (1982) and *J.E.B. v. Alabama* (1994), Ginsburg stated that it was necessary for governments to demonstrate an "exceedingly persuasive justification" for gender based action. While she did not abandon the intermediate standard of scrutiny, Ginsburg did interpret it in a manner that made it more difficult for gender distinctions to be upheld - closer to strict scrutiny than to the rational basis standard of review.
Challenging Laws Favouring Men

The early sex discrimination litigation involved relatively straightforward cases - cases challenging laws explicitly discriminating against women. Thus, *Reed* involved a law which had given a father preference over a mother in the administration of their child’s estate, solely because of gender. *Kirchberg v. Feenstra* (1981) involved a Louisiana law that allowed husbands to dispose of jointly owned property without their wife’s consent (see also *Frontiero v. Richardson* 1973; *Stanton v. Stanton* 1975; *Califano v. Westcott* 1979). The Court had little trouble finding such laws unconstitutional. Women’s groups embraced the favourable doctrine that emerged from these cases, as the Court spoke out against traditional stereotypes and signaled its growing recognition of the new roles for women. Its new position was summarized in *Westcott*, when the majority held that gender classifications would not withstand the Court’s scrutiny if they were part of the “baggage of sexual stereotypes” that “presume the father has the ‘primary responsibility to provide a home and its essentials’ while the mother is the ‘center of the home and family life’” (89).

Challenging Laws Favouring Women

The success of *Reed* encouraged sex discrimination litigation and the Court soon found itself deciding more complicated cases. These cases often involved laws giving preference to females – laws “placing her not at the ‘back of the bus,’ but on a pedestal” (Ginsburg 1983, 134). Thus in *Kahn v. Shevin* (1974) the Court had to rule on a Florida law which allowed widows, but not widowers, a $500 property tax exemption. Women’s groups were against such distinctions as they tended to reinforce stereotypes about the
dependency of women (Cowan 1976). However, the Court upheld this “benign” gender classification arguing that it protected the sex for which spousal loss “imposes a disproportionately heavy burden” (355). Opinions like Kahn (see also Schlesinger v. Ballard 1975) could be viewed as providing women with the best of both worlds: laws favouring men were struck down by the Court, while laws favouring women were allowed. Women’s groups, however, viewed Kahn as a loss, arguing that it was “barely distinguishable from other products of paternalistic legislators who regarded the husband more as his wife’s guardian than as her peer” (Ginsburg 1983, 137).

This (benign) loss was not to last, however, as a year later the Court struck down a provision of the Social Security Act which allocated benefits to widows and their children on the death of a husband, but allocated benefits only to the children (not to the widower) on the death of a wife. In Weinberger v. Wiesenfeld (1975) the Court held that such a gender distinction violated the 5th Amendment by discriminating against female workers who paid social security taxes but received less protection for their survivors. The government had defended the law by arguing that the distinction actually compensated women who would be more adversely affected than men by the loss of their spouse. A similar argument was accepted by the Court in Kahn, however the Court rejected this claim, citing the legislative history of the provision. After Wiesenfeld, laws allocating benefits unequally depending on gender would be difficult to sustain (Califano v. Goldfarb 1977; Orr v. Orr 1979; Wengler v. Druggists Mutual Insurance Company 1980). While removing an apparent advantage to women, this would produce favourable doctrine for the interests of women’s groups as “paternalistic” laws would be less acceptable.
An extension of this result was apparent in the Court’s reasoning in cases involving juries. Various states had, in effect, put women on a “pedestal” by considering jury duty inappropriate for women. These states enacted laws which excluded women unless they requested to serve, or automatically exempted women who requested not to serve (or who simply did not respond to a summons). In the 1970s the Court struck down both these laws (*Taylor v. Louisiana* 1975; *Duren v. Missouri* 1979). Although the Court based its reasoning on 6th Amendment (fair trial) grounds, these decisions demonstrated movement away from the more traditional thinking. The Court furthered this victory in 1994 when it ruled that the Equal Protection Clause prohibits gender discrimination during jury selection (*J.E.B. v. Alabama* 1994). Thus potential jury members could not be subject to preemptory challenge on the basis of their gender.

*Fathers of Illegitimate Children*

More complicated, however, were cases involving gender distinctions and unwed fathers. Traditionally the law had treated unwed mothers similarly to those who were married. They automatically had custody of their children (unless proven unfit), and could allow or veto their adoption. Fathers, by contrast, had none of these rights unless they were – or had been – married to the mother (Baer 1996, 41). This unequal treatment was challenged first in *Stanley v. Illinois* (1971). This case involved an Illinois law that allowed children to be separated from their unwed father upon the mother’s death, without the hearing on parental fitness that would be required for cases involving unwed mothers or married parents. The Court struck down this law as a violation of the Due Process Clause of the 14th Amendment: the unwed father was entitled to the hearing.
However, in cases decided after *Stanley*, the Court has usually allowed gender distinctions if the unwed father did not take steps to legitimize the child. Thus, the Court has upheld state legislation preventing unwed fathers from vetoing the adoption of their child (*Quilloon v. Walcott* 1978), and from suing for the wrongful death of their child (*Parham v. Hughes* 1979). The only exception to this line of reasoning occurred in a case in which the unwed father had been significantly involved in his children's lives: the Court allowed this father to veto their adoption (*Caban v. Mohammed* 1979).

Women's groups appeared reluctant to enter these cases, believing the Court was not yet "ready" to deal with these distinctions (Cowan 1976, 393). However, their emphasis on strict equality would ensure their opposition to such gender classifications. By upholding these laws "in which the biological reality of women bearing children was intertwined with the cultural role of women assuming primary care for children" (Mezey 1992, 28), the Court was upholding more stereotypical views on the role of women. The only case ruled in favour of the unwed father (*Caban*) resembled the more traditional family — where the father “conform[ed] to patriarchal norms” (Baer 1996). The groups' reluctance was thus well founded — overall, these cases were not decided favourable to their interests.

*When Women are Not Similarly Situated*

It had taken women until 1971 to get the Court to recognize that women should be treated equally when they were similarly situated to men. However, this victory included its own danger — how would the Court react to discrimination claims when the genders were not similarly situated? Two cases challenging laws giving preference to women
would answer this question unfavourably for women’s interests. In *Michael M. v. Superior Court* (1981), a law punishing men for having sex with underage women (statutory rape), but not punishing women for having sex with underage men, was upheld by the Court. The plurality held that the genders were not similarly situated in this situation – only women could become pregnant – and males needed an additional deterrent.

*Rostker v. Goldberg* (1981) also revolved around the physical differences between the genders. This case involved a challenge to the military draft, which required males to register but not females. The Court held that since the purpose of the draft registration was to raise an army of combat troops, and women could not be combat troops, the gender distinction did not violate the constitution. Thus when males and females were not similarly situated, the Court allowed them to be treated differently. The women had “been caught in a trap of their own making... [since] embracing a theory of ‘sameness’ mean[s] that any sign of difference between women and men could be used to justify treating women differently from men” (Mezey 1992, 27). This was a significant loss for the groups.

**Discrimination in Private Organizations**

The women’s groups’ goal of “eliminating sex discrimination permitted by law” led them to participate in various cases dealing with restricted membership in private organizations. In *Roberts v. United States Jaycees*, for example, all three groups submitted briefs when the Jaycees challenged the application of the Minnesota Human Rights Act to their private group. The Jaycees, a male only organization, argued that the
state law prohibiting sex discrimination violated their freedom of association and their freedom of expression. The women’s groups argued that by admitting male members only, this organization was limiting the opportunities of women in the business world. Women were disadvantaged by their exclusion from places known to be sources of valuable contacts. The Court’s decision in Roberts was favourable to the women’s groups. The Court developed a narrow definition of what qualified as a private organization able to assert freedom of association rights and exclude women. Since the Jaycees were a “large and unselective” group the Minnesota law was applicable to them. The Court also argued that the freedom of expression right was not absolute but could instead be infringed if there was a “compelling” interest. It argued that Minnesota’s interest in prohibiting sex discrimination qualified as compelling.

Later cases dealing with private discrimination continued to be favourable to the women’s groups’ interests, adopting narrow interpretations of what qualified as a private club immune from legislation prohibiting sex discrimination (Board of Directors of Rotary International v. Rotary Club of Duarte 1987; New York City State Club Association v. City of New York 1988). These cases were a significant step forward for the interests of women’s groups. Small (and really) private men’s clubs are still allowed, but larger, non-selective, business oriented organizations cannot exclude women.

Equality in Education

The women’s groups’ concern for “true equality” for women means the doctrine established in education cases is also of interest. In Mississippi University of Women v. Hogan (1982), a male challenged the single sex admissions policy of a nursing school.

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Supporters of the school argued this was a “benign” gender classification which actually benefited women – who flourished without males in the classroom. However, the Supreme Court ruled the policy violated the constitution. In her decision, Justice O’Connor noted that such a policy actually “perpetuated the stereotyped view of nursing as an exclusively woman’s job” (729). The favourable doctrine established for women’s groups in this case helped ensure that male only programs were later struck down by the Court (United States v. Virginia 1996). Thus the groups had won an important victory – women could not be excluded from such unique and valuable programs as the Virginia Military Institute.

Other education cases of interest to the groups involved Title IX (which prohibited gender discrimination in federally funded programs). The doctrine established by these cases is mixed. The Court did broaden Title IX’s protection by ruling that employment discrimination fell within its boundaries (North Haven Board of Education v. Bell ) – that employees, not just students, were covered. In addition, the Court ruled that private colleges were covered by Title IX if their students received government grants (Grove City College v. Bell). However, the Court’s ruling in Grove City was a disappointment to women’s groups as it held that these student grants did not trigger “institution wide coverage.” Instead, only the area directly affected by the grants (the college’s financial aid program) would have to comply with Title IX. This had dangerous implications according to women’s groups, as various programs within a college – for example athletics – could declare themselves immune from the scope of Title IX, lessening the protection for women. Groups turned to Congress to lobby for an override of the Court’s decision and in 1988, Congress managed to pass such an override – over
the veto of President Reagan. Among other things, the Civil Rights Restoration Act extended Title IX’s coverage to the entire college. Education doctrine was thus salvaged for the groups.

**Long Term Success**

The groups’ mathematical success rate in the sex discrimination area is 74% (number of cases favourable to the groups’ interests divided by the total number of cases). But does this tell the complete story? Groups do appear to have been more successful in this area than any of the previous ones. Laws explicitly discriminating against women, and legislation giving unequal benefits dependent on gender, are difficult to sustain. Single sex schools and male-only private organizations, if not extinct, are certainly endangered species. The groups have not achieved their goal of having the Court view sex discrimination in the same constitutional terms as race discrimination but they have been successful in achieving their fallback position: intermediate scrutiny. The Court has subjected gender classifications to a high standard of review. In addition, the debate over the appropriate standard of review may not be over. The groups continue to press for strict scrutiny and Justice Ginsburg has declared gender classification standards an “open question” (*Harris v. Forklift Systems* 1993) and altered the intermediate standard of review (*U.S. v. Virginia* 1996). Ginsburg has always hoped that the buildup of favourable precedent would result in strict scrutiny in practice without needing the Court to explicitly state a new standard (Cowan 1976; Ginsburg 1983). Her majority opinion in
U.S. v. Virginia may in fact be a movement in that direction. While it is not yet clear whether their goal has been realized, with a new ally on the Court, the groups are hopeful that effective strict scrutiny will emerge in the future.

The groups were much less successful in cases involving fathers of illegitimate children. However, this is probably less damaging to the groups’ interests as the issue area is complicated and the groups, perhaps wisely, have not invested their energy in the area. More damaging are the Court’s rulings when males and females have not been similarly situated. The groups’ successful approach in early sex discrimination cases led to their downfall in later cases involving physical differences between the genders. In these cases the Court has felt justified in allowing the law to treat men and women differently. Litigation on this type of sex discrimination has not been favourable to the groups, and has made achievement of “true equality” doubtful.

Influences on Sex Discrimination Doctrine Development

Overall, doctrine in the sex discrimination area seems to have developed in a direction more favourable to the interests of women’s groups. What influenced this direction and were the groups themselves responsible for their higher rate of success?

Court Membership

Changes in Court membership seem to have had less noticeable impact in sex discrimination cases than in other areas before the Court. Unlike the abortion area, Justice O’Connor’s replacement of Justice Stewart did not shift sex discrimination doctrine in an unfavourable direction. Stewart had not had a particularly liberal record in this area,
voting against equality in *Kahn* and in cases where there were "physical differences" between the genders (*Michael M and Rostker*). O'Connor's contributions were not always favourable to the groups' interests (see, for example, *Grove City*), but she has tended to vote more liberally in gender cases than in others. It was O'Connor who wrote the majority opinion in *Mississippi University for Women v. Hogan*, arguing that the program's "female only" policy encouraged stereotypical thinking that nursing was "women's work."

Some might have expected Justice Kennedy's replacement of Justice Powell to have had more of an effect, as a moderate justice was replaced by a more conservative one. However, on closer inspection, it is apparent that Justice Powell tended to vote more often in opposition to gender discrimination claims (against strict scrutiny in *Frontiero*; against equality in cases where the genders were not similarly situated). Thus the addition of Kennedy should not have contributed to any noticeable shifts in doctrine.

The four justices who joined the Court after Kennedy have not had much of an opportunity to influence the direction of sex discrimination doctrine, since the Court has had few of these cases before it in the 1990s. Justice Ginsburg can be expected to approach gender cases differently from her predecessor, Justice White, but her vote has not had a decisive impact in the few cases in which she has participated. Thus membership change does not appear to have much explanatory power in this area of law.

*Legal Considerations*

Legal considerations probably did have influence on the development of sex discrimination doctrine since, with only a few exceptions (*Kahn, Grove City*), the Court
has decided cases favourably, unless they involve fathers of illegitimate children or physical differences between the sexes. The concentration of negative cases in these two situations of fact suggests that these facts are influencing the justices’ decisions. Willing to accept that males and females should be treated alike when they are similarly situated, the justices seem to have taken the “logical” next step in that reasoning: ruling that the genders do not have to be treated alike when they are not similarly situated. In addition, the justices have rarely ruled favourable to the groups’ interests in the complicated cases involving unwed fathers. They appear predisposed against unwed fathers unless they have been heavily involved in their children’s lives.

Changes in Government

Ruth Bader Ginsburg (1983) suggests that past Congressional action may have helped pave the way for the Court’s decision in Reed. The passage of the Equal Pay Act in 1963 and Title VII of the Civil Rights Act in 1964 (which prohibited discrimination on the basis of gender and other traits) increased public awareness of the conditions for women and signaled to the Court that traditional decisions might be contrary to the mood of the House (Ginsburg 1983, 133-4). But did Congress have an influence on the development of doctrine after that first law was struck down as gender discrimination?

The course of developing doctrine did not alter much throughout the various sessions of Congress. Negative decisions occurred during the Democratic Congress of the 1970s as well as in the divided Congress of the 1980s. The Court held that the sexes could be treated differently when not similarly situated during a Democratic Congress (Michael M) and during a divided Congress (Rostker). The Court also made a decision
very favourable to the groups – striking down a male only school (*US v. Virginia*) – during a Republican Congress. Thus, the Court’s attention to Congress’ positions was not always readily apparent.

Yet, the Court probably did take Congress’ position into account in *Rostker v. Goldberg*. In upholding the exclusion of women from the draft, the Court made reference to congressional hearings which showed Congress had considered – and rejected – including women. The majority emphasized the need for deference to Congress in matters of national defense.

The change in the presidency over the years does not appear to have exerted much influence on sex discrimination cases. There are few shifts in doctrine from favourable to unfavourable and back, corresponding to a president’s preferences or his Solicitor General’s arguments. Rather, doctrine has generally progressed favourably for groups except in two distinct areas – cases involving fathers of illegitimate children, and cases where the genders are not similarly situated. Presidents may have had some influence on this latter area as Carter’s administration had argued against treating males and females similarly in terms of statutory rape (*Michael M*) and Reagan’s administration argued against treating them similarly for the draft (*Rostker*). But it seems more likely that the Court would approach this form of unequal treatment the same regardless of presidential arguments. In fact, the only instance in which presidential influence appears evident occurred in *Grove City*, when the Reagan administration argued that Title IX’s coverage did not extend institution wide – a position adopted by the Court.
Changes in Public Opinion

The state of public opinion probably did have some kind of influence on the development of sex discrimination doctrine. The Court’s decision in Reed marked the first time the Court had struck down a law as gender discrimination. In the years after Reed, the Court would become intolerant of laws that explicitly discriminated against women. This was happening at the same time as the introduction of the Equal Rights Amendment in Congress and an increasing awareness among the public of the unequal treatment of women. Public opinion was becoming more favourable to women’s rights as the Court continued to hear more and more cases. The proportion of poll respondents favouring the passage of an amendment to the Constitution that would “guarantee women equal rights with men” has steadily increased since the 1970s (Roper Center 1978-1995). And, while less than 50% of respondents thought women should have equal opportunities with men in 1976, this number had increased to 91% by 1995. Thus the Court was becoming less tolerant of sex discrimination at the same time that society was becoming less tolerant. The influence here may be indirect, of course, as justices are members of the public and exposed to the same societal changes, but the challenge to the traditional way of thinking was clearly being felt.

Interest Groups

When the women’s groups participated in sex discrimination cases, favourable doctrine resulted 75% of the time. In cases where the groups were absent, favourable doctrine still occurred, but a little less frequently (70%). This does not suggest overwhelming influence by the groups but it seems possible that they did have some
impact here, particularly in the early cases. When strict scrutiny looked unattainable, the WRP started pushing the Court to adopt an intermediate standard of review. The group also exerted influence through their sponsorship of cases. Reed, Wiesenfeld and Goldfarb, among others, arrived at the Court with Ruth Bader Ginsburg (then of the WRP) as counsel for the claimant. The careful selection of cases for the Court’s review probably helped achieve some of the groups’ goals for gender equality.

The pattern of participation of other interest groups may also have had influence on the development of doctrine. The early, predominantly favourable, cases involved only interest groups positive toward the groups’ interests – often only the WRP itself. Groups intervened to argue against the women’s groups’ positions only in certain subcategories of cases. Thus, until 1982, negative briefs were filed only in cases involving fathers of illegitimate children, and cases where the genders were not similarly situated – the two areas in which women’s groups have not been successful. After 1982, negative briefs were filed more often, as the Court accepted cases in the areas of education and private discrimination. However, in private discrimination, the number of briefs filed in support of women’s interests always outnumbered those against. In the education area, briefs were more mixed, and in the one case the groups lost – Grove City – the briefs filed in favour actually equaled those filed against.

Thus the pattern of participation suggests that the women’s groups may have benefited by the absence of opposition in their early cases and suffered from opposition in others. However, since negative group participation corresponds with certain types of cases, evidence of influence – whether group arguments or case facts determine the
outcome – remains unclear. Further, the influence of opposing groups is not demonstrated in *U.S. v. Virginia* when more briefs were submitted in favour of maintaining the male only school than for opening it to females – yet the school was opened.

The influences on the development of sex discrimination doctrine appear to be slightly different than those in previous areas considered. Changes in Court membership do not appear to have an effect. Instead, legal considerations, public opinion, interest groups and – to a lesser extent – Congress appear to have the most impact.

**Employment Discrimination**

Title VII of the *Civil Rights Act* of 1964 prohibits employment discrimination on the basis of race, colour, religion, sex or national origin. However, it does allow an exception for a distinction based on religion, sex or national origin if it is a “bona fide occupational qualification” (BFOQ) “reasonably necessary” for the operation of a business. This section has been the basis of most employment discrimination litigation.

The Supreme Court heard its first Title VII sex discrimination case, *Phillips v. Martin Marietta*, in 1971. The Martin Marietta Company refused to hire mothers of preschool age children but did hire fathers of such children. After being denied a job, Ida Phillips sued the company. The Supreme Court held that different hiring policies for women and men with preschool age children were not permitted under Title VII. However, the Court went on to argue that distinctions between the genders might be allowed, if there was evidence that family obligations were more relevant to the job performance of one of the sexes. They remanded the case for further consideration.
This was hardly an auspicious start for the interests of women’s groups, as the groups wanted complete equality in employment opportunities for women. In the decades that followed, women’s groups would pursue their goal in gender cases dealing with everything from equal pay to pregnancy and sexual harassment. The groups also followed with interest (and sometimes participated in) other non-gender litigation under Title VII, as they felt the need “to use and adapt this law for women, to enhance their actual economic well-being along with their constitutional rights” (WRP 1999). How successful have their efforts been? The next sections will trace the development of doctrine in employment discrimination — focussing primarily on sex discrimination, but including pertinent highlights from the Court’s rulings in other forms of discrimination in employment.  

BFOQ

The Supreme Court’s decision in Phillips v. Martin Marietta had left open the question of whether the gender distinction was a “bona fide occupational qualification” — whether having preschool age children was more relevant to a woman’s job performance than a man’s. The Court returned to the BFOQ clause in Dothard v. Rawlinson (1977 — discussed in more detail later) when it upheld an Alabama statute excluding women from “contact” positions in male prisons (positions in close proximity to the prisoners). While holding that the BFOQ must be narrowly interpreted, the Court upheld Alabama’s regulation because of the unusually bad conditions of the state’s prisons, in which women

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16 The case level analysis includes all employment discrimination cases — “sex discrimination” and “other discrimination.” However, for the long term analysis I will discuss only those most relevant to the groups’ interests.
guards would be a “substantial security problem.” The groups wanted the narrow interpretation of the BFOQ exception and hoped that the doctrine could survive the actual outcome of the case.

In 1983, the Court ruled on a similar BFOQ exception to the Age Discrimination Act in Western Airlines v. Criswell. Women’s groups were very interested in the reasoning of this case and intervened to argue for a narrow interpretation. The Court did, in fact, rule that the BFOQ exception was meant to be very narrow. The majority reiterated that in order to survive, distinctions had to be a BFOQ that was “reasonably necessary,” not merely reasonable.

The groups continued to enjoy success with this clause, as the Court’s 1991 ruling on a fetal protection policy in UAW v. Johnson (discussed later), again gave the BFOQ a narrow interpretation. The Johnson Controls Company had banned fertile women from certain jobs because of the danger of lead exposure to a fetus. The Court argued that the BFOQ safety exception was limited to situations where sex or pregnancy “actually interferes with the employee’s ability to perform” (206). And the employer had to “direct its concerns in this regard to those aspects of the woman’s job related activities that fall within the ‘essence’ of the particular business” (206). Since fertile women were able to perform the job as efficiently as others, a BFOQ was not established. Women’s groups celebrated this case as a major victory for their interests.

Disparate Treatment

The Supreme Court has identified two types of employment discrimination: disparate treatment and disparate impact. Disparate treatment (also called “intentional
discrimination”) involves regulations and actions that are discriminatory on their face, while disparate impact involves regulations that are facially neutral but discriminatory in their effect. In *McDonnell Douglas v. Green* (1973) and *Texas Department of Community Affairs v. Burdine* (1981), the Court established a three part test for evaluating disparate treatment cases. First, the complainant has the burden of establishing a prima facie case. To do this he or she must show four things: (a) that they belong to a class protected by Title VII; (b) that they applied for and were qualified for the job; (c) that they were rejected for the job despite their qualifications; and (d) that after their rejection, the employer continued to look for applicants with comparable qualifications. If the complainant has satisfied these requirements, the second part of the test shifts to the employer. The employer must refute the complainant’s prima facie case – they must give a legitimate reason for the rejection. Once they have provided this, the third step gives the plaintiffs an opportunity to convince the Court that the reason advanced by the employer is not the “true reason” – but merely a pretext for discrimination. This test was favourable to the interests of complainants (and thus to women’s groups in gender cases), as it did not require direct proof that the employer intended to discriminate. To establish the prima facie case, a complainant just has to meet the four conditions, which allowed the Court to “infer that there was discrimination” (Mezey 1992, 55; see also *U.S. Postal Services v. Aikens*).

**Disparate Impact**

Difficult cases involving facially neutral regulations and actions have come before the Court more often in recent decades. If women’s groups want to achieve their goal of
employment equity, this form of discrimination has to be addressed. The Court’s approach to these disparate impact cases was outlined in *Griggs v. Duke Power Company* (1971) and *Albemarle Paper v. Moody* (1975). The Court’s opinions in these cases were favourable to the interests of women’s groups as they ruled that, for a regulation to violate Title VII, an intent to discriminate was not required – consequences were what mattered. The Court established another three part test for this type of discrimination. First the complainant had to identify the policy or action that had a disparate impact on them. The burden then shifted to the employer who had to prove that the disparate impact was a business necessity. Finally, the complainant had an opportunity to demonstrate that less discriminatory alternatives existed. In *Griggs*, the use of a standardized test and high school diploma for job transfer decisions was ruled a violation of Title VII, as it disqualified a higher proportion of blacks and was unrelated to job performance.

However, while women’s groups were very pleased with this statutory doctrine, the Supreme Court ensured, in 1976, that bringing discrimination cases under the constitution would be more difficult. The Court ruled in *Washington v. Davis* that in constitutional challenges, complainants had to prove intent, identifying disparate impact was not enough to trigger strict scrutiny. Thus, a verbal aptitude test which had excluded a disproportionate number of blacks from the Washington police force was allowed to stand. This constitutional approach was strengthened (adversely for the women’s groups) in *Personnel Administrator of Massachusetts v. Feeney* (1979), when the Court held that a veteran’s preference policy did not discriminate against women – even though the vast majority of veterans were male. The Court reiterated the need to prove intent in order to establish discrimination in constitutional cases. It then went further and argued that
discriminatory intent meant more than an awareness of the consequences. Rather, establishing intent required showing that the policy was chosen, at least in part, "because of" a discriminatory effect, not merely in "spite of" one.

The first major statutory case involving gender and disparate impact arrived at the Court in 1977. *Dothard v. Rawlinson* involved a challenge to an Alabama statute which imposed height and weight requirements on candidates for prison jobs (and later added same sex requirements for "contact" positions in the prison, as discussed above). Dianne Rawlinson did not meet the 120 pound, 5 foot 2 requirements and sued under Title VII, claiming this was an example of disparate impact discrimination against women – since women would disproportionately fail the requirements. The Court held that Title VII prohibited such height and weight requirements. The plaintiff had shown that this facially neutral standard had a disproportionate impact on one of the sexes and the state had failed to show that the standard was job related. This part of the *Dothard* reasoning was a victory for the groups.

The groups achieved another victory in *Watson v. Fort Worth Bank* (1988), when the Court ruled that subjective or discretionary decisions – such as promotion – would be subject to disparate impact reasoning. This meant one did not have to prove intent, and thus, discrimination would be easier to challenge. However, *Watson* also raised some concern, as a plurality of justices considered amending the test used in disparate impact cases. Led by Justice O'Connor, the plurality seemed to suggest that the test used in disparate impact should look more like the test in disparate treatment, in that the burden
of proof should rest with the complainant all the way through. This would mean that the complainant would have to prove the disparate impact was not a business necessity, instead of the employer having to prove that it was.

The plurality decision in *Watson* became a majority in *Wards Cove Packing Company v. Atonio* (1989), as the Court changed the favourable disparate impact test. To the dismay of women's groups and other civil rights litigants, the burden of proof now lay with employees throughout the test. They had to prove that the policy they were challenging could not be justified as a business necessity. This decision, in effect, overturned *Griggs* and made it much more difficult to win discrimination cases. *Wards Cove* was a major loss for women's groups. However, this loss was short lived, as women's groups turned once again to Congress for relief from a negative shift in doctrine. Congress passed the *Civil Rights Act of 1991*, which overruled *Wards Cove* and several other cases that had made it more difficult to prove employment discrimination under Title VII. Among other things, the *Civil Rights Act 1991* returned the burden to employers for proving that their policies were a job necessity.\(^{17}\)

**Mixed Motive Cases**

Of course, some cases may not fit nicely into either the disparate treatment or the disparate impact category. These cases have been much more complicated for the courts as they involve actions only partly motivated by discrimination. The key case was *Price Waterhouse v. Hopkins* (1989), in which a woman was denied a partnership in an

\(^{17}\) The Court had another word on this issue, however, when it ruled that the *Civil Rights Act* did not apply to cases pending when it was passed or that arose before it was enacted (Landgraf v. USI Film Production; Rivers and Davison v Roadway Express).
accounting firm. The firm claimed this was due to her poor interpersonal skills, but there was also evidence that gender stereotypes had played a role, as partners complained she was “too macho,” and indicated she would do better if she acted more feminine. Women’s groups were concerned with this sexual stereotyping and argued that this was enough to prove discriminatory motive. The Court adopted similar reasoning, arguing that on “some showing” by a plaintiff that gender had entered into the employment decision, the burden of proof shifts to the employer who must prove (by a preponderance of evidence) that they would have made the same decision without the gender consideration. Thus mixed motive cases required employers to meet a tougher standard than needed for disparate treatment cases.

**Equal Pay/Benefits**

The women’s groups’ goal of equal employment opportunities for women is, of course, accompanied by a desire for women to be reimbursed for their work at the same rate as men. The *Equal Pay Act* was passed in 1963 and called for “equal pay for equal work.” Women could not be paid less than men when doing equal work under “similar working conditions.” The Supreme Court heard its first case in this area in 1974 (*Corning Glassware v. Brennan*) when a company’s policy of paying men on the night shift more than women on the day shift was challenged. The company held that the day and night shift were not “similar working conditions.” The Court, however, held that Corning Glassware had violated the *Equal Pay Act*, ruling that the term, “working conditions,” included only physical surroundings and hazards – not the time of day worked. The Court also argued that merely allowing women on the night shift was not a sufficient remedy –
the company had to equalize women’s base wages with those of men. This narrow reading of the term was a victory for women’s groups as it limited the situations in which women could be paid less.

The groups had another success in the equal pay area in *County of Washington v. Gunther* (1981). This case involved a wage discrimination claim brought under Title VII. Women were forced to turn to Title VII since the EPA was limited to situations where men and women were paid differently for equal jobs – something not easy to prove in sex segregated occupations (Mezey 1992). However, claims under Title VII had been difficult to win, since it included a section (the Bennett Amendment) which allowed unequal pay if the difference was allowed in the EPA. In Gunther, however, the Supreme Court held that the Bennett Amendment did not restrict Title VII claims to equal pay for equal work. Thus the plaintiffs, female guards in a woman’s prison, could claim wage discrimination under Title VII, even though no male held the same job for higher pay. This was not a complete victory, however, as the Court did not endorse the “comparable worth”18 theory. Cases decided by lower courts after *Gunther* have demonstrated the limited nature of this victory as the judiciary appears to be “unreceptive to comparable worth actions” (Mezey 1992, 104 – see, for example, *Spaulding v. University of Washington*, 1984).

Women also had success in the area of employment benefits. The Court held in *City of Los Angeles v. Manhart* (1978), that gender differences in pension plans violated Title VII. Thus, Los Angeles could not have women pay 15% more into a pension fund

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18 Comparable worth is “based on the premise that men and women working in jobs of comparable skill, effort, responsibility, and conditions merit comparable pay” (Mezey 1992, 99).
than men, just because it expected women to live longer. Instead, the Court argued that such generalizations could not justify discriminating against individuals -- who may not live longer themselves. The Court rendered a similar decision in Arizona v. Norris (1983). Here the Court held that a retirement plan violated Title VII by allocating lower retirement benefits to women than men. The Court reiterated that employees have to be treated as individuals and benefits from contributions had to be calculated without regard to sex.

The women's groups' success in this area continued in Hishon v. King and Spalding (1984). The Court broadened Title VII's coverage when it ruled that its protection extended to benefits (not just employment) which were part of an employment contract. Thus a Title VII challenge could be brought for the denial of partnership in a law firm.

Pregnancy

Falling within the employment discrimination area is a subset of cases involving the treatment of pregnant workers. Women's groups have, of course, been very concerned with this type of litigation. The WRP believes pregnancy is "at the heart" of employment discrimination against women, and argues that "until we eliminate the stereotype that child-rearing is exclusively a woman's role, women's employment will continue to be seen as marginal and temporary" (WRP 1999). The groups would prefer to have pregnancy treated as a disability, suggesting that disabilities arising from pregnancy "are functionally indistinguishable from disabilities due to other physical and mental conditions" (Brief of the WRP, Geduldig v. Aiello, 1974, 6). They do not seek
preferential treatment for pregnancy as this might emphasize the differences between men and women to the detriment of women. Among other things, special treatment might discourage employers from hiring women (Brief of NOW et. al., California Federal Savings and Loan Association v. Guerra, 1987).

At first, the Court seemed sympathetic to the groups’ interests. In 1974, it struck down an employer’s rule which forced all pregnant teachers into unpaid maternity leave, five months prior to giving birth (Cleveland Board of Education v. LaFleur 1974).19 This was a victory for the women’s groups as it prevented pregnancy from being singled out for “involuntary termination” of employment, without regard for the women’s capacity to work. However, later that same year, the Court ruled against the groups when it held, in Geduldig v. Aiello, that a disability plan excluding pregnancy from coverage did not discriminate in violation of the Equal Protection Clause. The Court argued that pregnancy discrimination was not sex discrimination and was thus only entitled to minimal scrutiny.20 Since the state could prove a “rational” basis for excluding pregnancy from the disability plan (the cost that inclusion would entail), the plan was allowed to stand. This case delivered more than one blow to the groups – not only did the Court treat pregnancy differently from other disabilities, it also ruled that pregnancy discrimination was not sex discrimination!

However, Geduldig was decided on constitutional grounds; there was still hope that the Court would take a more favourable approach to challenges brought under Title

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19 The Court did not decide this case on equal protection grounds. Instead the rule was struck down as a violation of the Due Process Clause of the 14th Amendment.

20 Geduldig was decided before the standard for gender discrimination cases was settled. Craig v. Boren would not be decided for another two years.
VII of the *Civil Rights Act* of 1964. Distinctions on the basis of sex are allowed under Title VII only if they are “bona fide occupational qualifications.” Thus a rational basis and cost considerations would not save gender distinctions in statutory cases. Groups were, therefore, still optimistic when *General Electric Company v. Gilbert* arrived at the Court in 1976. The General Electric Company had a disability plan that provided non-occupational sickness and accident benefits to its employees, but the plan excluded disabilities arising from pregnancy. A class action was brought, challenging this plan under Title VII. Extinguishing all optimism, the Court allowed the plan to stand — reaffirming that pregnancy discrimination was not sex discrimination. According to the majority, the company’s plan did not exclude because of gender, it just removed one physical condition from the “list of compensable disabilities.” Pregnancy litigation had become an uphill battle for the groups.

The Court created some confusion the next year, when it ruled that the denial of seniority to women returning from pregnancy leave did violate Title VII (*Nashville Gas Company v. Satty*). The Court distinguished this action from *Gilbert* in that it did not involve an extension of benefits, but rather imposed a “substantial burden” on women that men would not suffer. In the same case, however, the Court allowed the denial of sick pay to the pregnant women while on leave (at least until further investigation took place into the company’s motivations). Thus while the groups experienced some success in *Satty*, they were far from establishing favourable doctrine through litigation.

Frustrated by the Supreme Court, several women’s groups turned to Congress to lobby for their goals. In 1978, their efforts were successful when Congress overruled *General Electric v. Gilbert* with its enactment of the *Pregnancy Disabilities Act*.
(Eskridge 1991). This Act amended Title VII to hold that sex discrimination did include pregnancy discrimination. Pregnant women now had to be treated similarly to others affected by disabilities. The groups had achieved their goal: pregnant women were now protected from employment discrimination.

However, the Supreme Court soon faced a new type of pregnancy challenge. The PDA had established that companies could not treat pregnant women differently, excluding them from benefits enjoyed by others. But a question arose as to whether companies could give preferential treatment to women – allowing them benefits not extended to others. This question first came before the Supreme Court in *California Federal Savings and Loan (Cal Fed) v. Guerra* (1987). This case originated when Cal Fed did not reinstate one of their female workers after her pregnancy leave. The woman filed a complaint under the California Fair Employment and Housing Act which required employers to provide leave and reinstatement to pregnant employees. Cal Fed then challenged this provision on the ground that it was “inconsistent with, and preempted by,” Title VII since special consideration was given to pregnancy.

*Guerra* was a difficult case as the issue of preferential treatment has even divided feminists. While the groups of interest here have been consistently opposed to preferential treatment – fearing it would “reinforce sex based stereotypes” – they did not want pregnant women in California to lose the benefits they enjoyed. The groups’ ideal outcome would have had the Court treat all disabilities alike by extending the benefits of pregnant women to all those with disabilities. However, the Court held otherwise.

The Court upheld the California law, arguing that while Title VII did not compel preferential treatment for pregnant women, it did not prohibit it either. Thus the Court
agreed with the appeal court below, that the *Pregnancy Discrimination Act* was meant to be a floor beneath which benefits could not fall – not a ceiling above which they could not rise. Although the Court recognized that an employer could comply with both the California law and Title VII by extending benefits to other disabled employees, its decision had allowed special treatment for women. Women’s groups were, therefore, troubled by the doctrine established in this case, fearing it would lead to unfavourable special treatment of women in the future.

However, in the Court’s next case (*Wimberly v. Labor and Industrial Relations Commission* 1987), the majority refused to extend its preferential treatment reasoning. Wimberly’s position had been filled while she was away on maternity leave. She was then denied unemployment insurance under a Missouri law that disqualified individuals from receiving the benefit if they had left their job voluntarily (which included taking pregnancy leave). Wimberly challenged this ruling as a violation of the *Federal Unemployment Tax Act*, which prohibited states from denying compensation on the basis of pregnancy. The Supreme Court upheld the Missouri law, arguing that the Federal Act only prohibited states from discriminating against pregnancy, it did not mandate preferential treatment. After reiterating their reservations on preferential treatment for pregnancy, the women’s groups had stopped short of arguing against Wimberly’s claim. Instead they had focused their concern on why Wimberly’s job had been filled in the first place, and what motivations had underlain Missouri’s law. However, the groups must have been pleased with the Court’s recognition that pregnancy should be treated like other disabilities – doctrine favourable to their long term interests.
One last pregnancy related issue facing the Court involved what the women's groups refer to as "the new protectionism" (WRP 1999). This refers to company policies which exclude fertile women from certain positions which pose "reproductive hazards"—policies which "protect" women. The groups are against such policies as they limit the job opportunities of women. They view this as yet another attempt to discriminate since these policies do not exclude fertile males.

The Court faced this issue in *UAW v. Johnson Controls* (1991), when a group of employees challenged a company policy barring all fertile women from positions with exposure to lead. The Court held that Johnson Controls' "fetal protection policy" violated Title VII as amended by the Pregnancy Discrimination Act—it discriminated on the basis of sex and the potential for pregnancy. While recognizing that women may still face tough choices, the women's groups were pleased with the development of doctrine in this area.

**Sexual Harassment**

Another subset of employment discrimination cases in which women's groups are particularly interested are sexual harassment cases. The groups seek to eliminate sexual harassment as it "is as much an arbitrary barrier to equality in the workplace as other forms of gender based discrimination" (Brief of WLDF et. al., *Meritor Savings Bank v. Vinson*, 1986). However, this issue area took a while to be recognized. Title VII of the Civil Rights Act does not contain any references to sexual harassment as the term was unknown until the 1970s. In 1980, the EEOC recognized two forms of it: quid pro quo harassment (involving economic consequences) and harassment creating a "hostile
environment” (Baer 1996). The Supreme Court finally heard its first case in 1986 (Meritor Savings Bank v. Vinson). The women’s groups urged the Court to recognize sexual harassment as employment discrimination prohibited by Title VII, and to adopt the EEOC’s guidelines (Brief of WLDF et. al., Meritor, 1986).

The Supreme Court’s decision in Meritor was primarily favourable to the groups’ interests. The Court ruled that sexual harassment is sex discrimination actionable under Title VII. This harassment does not have to have economic consequences for the woman, it is enough that it produced a “hostile environment.” The Court also stated that when the harassment included sexual activity (as in Meritor), the appropriate question for the courts was not whether the woman participated in the activity “voluntarily,” but rather whether she found the advances “unwelcome.” This was all similar to the arguments made by the groups in their brief.

However, the decision was not completely favourable to the groups. The Court majority allowed evidence of the woman’s dress and speech to be introduced by the defense in a sexual harassment charge. The groups were concerned with the prejudicial impact of such evidence and argued it was irrelevant to whether a woman had been sexually harassed. The Court went on to rule that employers were not automatically liable for any sexual harassment by their supervisors. Instead, employer liability was to be determined on a case by case basis.

Meritor established that to qualify as sexual harassment an action need not have tangible economic effects on the woman, but could just create a hostile work environment for her. In the Court’s next big sexual harassment case, Harris v. Forklift Systems (1993), the Court was asked to again consider what qualified as a “hostile environment.” The
lower courts had dismissed Harris' claim, arguing that her work situation was not an abusive environment as it had not been severe enough to affect her psychological well being. However, the Supreme Court ruled that "so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious" (22). Thus claimants had an easier standard to meet -- they did not have to prove they had suffered an injury. However, this decision, also, was not completely favourable to women's groups, as they were nervous of the "reasonable person" test it imposed.

Women's groups have experienced more success in the sexual harassment area after the time period of primarily studied here. In Faragher v. City of Boca Raton (1998) and Burlington Industries v. Ellerth (1998), the Court established a liability standard for employers. If a supervisor's harassment of an employee results in a tangible employment action -- such as firing, demotion or transfer -- the employer will be held liable. If no tangible employment action occurs, the employer will still be liable unless it can show that it took reasonable care to prevent and correct such harassment, and that the employee did not take reasonable steps, available through the employer, to prevent or avoid the harm (Jost 1999). Women's groups have pushed for employer liability, and the executive director of the NOW LDEF called the doctrine established in Faragher and Ellerth "a tremendous victory for women" (Jost 1999, 36).

The groups had more mixed success in cases dealing with sexual harassment in schools. The Court had recognized a sexually harassed student's right to sue for damages under Title IX in Franklin v. Gwinnett County Public Schools (1992). However, the rules governing the school's liability were still an open question. In Gebser v. Lago Vista
Independent School District (1998), the Supreme Court held that schools were liable for sexual harassment of a student by a teacher, only when a person in authority had known of the harassment and deliberately ignored it. This ruling discouraged women’s groups who had wanted schools subject to the same liability as employers (NOW LDEF 1998).

The next year the groups achieved another partial victory in this area. In Davis v. Monroe County Board of Education (1999), the Court allowed schools to be sued for damages in cases where a student had sexually harassed another (as long as it was “severe, pervasive and objectively offensive). However, the majority still held that schools would be liable only when they had known about the harassment, and had been “deliberately indifferent.” Thus while the women’s groups have celebrated sexual harassment litigation successes in employment, they are still pursuing their goals in the education arena.

Long Term Success

Overall, the success rate for the goals of women’s groups has been 68% in cases involving sex discrimination in employment. For all cases involving “other discrimination” in employment, not limited to those discussed here, it has been only 50%. Despite these unimpressive figures, the women’s groups have been quite successful in certain categories of employment discrimination cases. This success has sometimes required the efforts of Congress, but the effect remains.

Sexual harassment is one litigation area where the Court’s decisions have been positive to the groups from the start. Doctrine has developed in a favourable direction, such that both quid pro quo and hostile environment harassment are recognized. Further,
women do not have to prove severe psychological suffering in order to obtain relief. While damages for sexual harassment in schools will still be difficult to achieve, the Court’s determination of employer liability was viewed as a victory by the groups.

The 1978 enactment of the Pregnancy Discrimination Act by Congress rescued the groups’ fortunes in pregnancy litigation, and ensured that doctrine developed favourably in the long term. Although the groups are still concerned with the potential effects of the Court’s allowance of preferential treatment in the area, they are pleased that pregnancy discrimination has been ruled sex discrimination and recognized as a problem in employment.

The few instances of Supreme Court litigation in pursuit of “equal pay for equal work,” and for equal benefits, have been largely successful. This is also true for the litigation undertaken in the major disparate treatment and disparate impact cases under Title VII. The tests developed for these types of discrimination in statutory cases have been favourable to the groups’ goals. In later years, this has probably been more a result of congressional action than judicial, but for now, at least, the original Griggs test stands. In fact, the only area where groups have not furthered their long term interests involves disparate impact claims brought under the constitution. In these cases, the Court still looks for intent – something difficult for complainants to prove.
Influences on Doctrine Development

Despite several case setbacks, the development of doctrine in employment litigation has been largely favourable to the interests of women's groups. Have the groups, then, been influential litigators or have their fortunes depended more on other factors?

Court Membership

Early changes in Court membership do not seem to have had any significant effect on doctrine in employment discrimination. Stevens' replacement of Douglas did not result in a noticeable doctrine shift, as both justices tended to vote liberally in employment discrimination cases.\(^\text{21}\)

Similarly, O'Connor's replacement of Stewart was not immediately followed by a shift in doctrine. O'Connor followed Stewart's fairly conservative approach in employment discrimination cases (see *Watson*; *Ward Cove*), although her presence may have had an impact in some cases involving sex discrimination in employment — where she has tended to vote more liberally.\(^\text{22}\)

The addition of Justice Kennedy to the Court gave Justice O'Connor's plurality in *Watson* a majority in *Wards Cove* and effectively overruled the favourable *Griggs* test. The burden of proof in disparate impact cases would stay with the employee, making

\(^\text{21}\) It is possible that Douglas would have voted with the minority in *Washington v. Davis*, while Stevens joined the majority in requiring intent in constitutional cases (a major loss for the groups). However, that case was decided 7-2, so the shift to Stevens was not a decisive factor.

\(^\text{22}\) For example, in *Arizona v. Norris*, O'Connor voted with the majority, arguing that benefits could not be calculated differently depending on an employee's gender. The justices split 5-4 in this decision, so it is possible that her replacement of Stewart had an impact in this case.
cases harder for claimants to win. However, only eight justices heard the *Watson* case. If Powell – whom Kennedy replaced – had heard *Watson* and *Wards Cove*, he may have given O’Connor her majority as well, since his vote tended to be more conservative in employment discrimination cases (see for example, *Washington v. Davis*; *Personnel Administrator of Massachusetts v. Feeney*).

The additions of Souter, Thomas, Ginsburg and Breyer have not immediately shifted doctrine in this area. Souter joined an unanimous Court in deciding two major cases (*UAW v. Johnson*; *Harris v. Forklift*) favourably for the groups’ interests – as Brennan (whom he replaced) surely would have done. Thomas has a more conservative approach than his predecessor, but his effect on the Court is countered by Ginsburg’s more liberal approach than her predecessor. And while Breyer may vote more liberally than Blackmun in this area, the Court has not faced major cases or shifted doctrine since his appointment. Thus while changes in Court membership may have had some effect, they do not appear to be have been powerful influences on the development of employment discrimination doctrine.

**Legal Considerations**

Legal considerations appear to have played some part in shifts in doctrine in certain areas of employment discrimination. Litigation on pregnancy discrimination began unfavourably for groups, but became more favourable after Congress passed the *Pregnancy Discrimination Act*. The Court then had a different statute guiding them in their decisions – one that explicitly said pregnancy discrimination was sex discrimination. Changes in statutory law resulted in changes in doctrine. The Court’s interpretation of the
new statute was not as favourable as the groups would have liked in *Guerra*, but it did recognize pregnancy as a disability and held that preferential treatment was not required for pregnant women.

The basis of the case also had an influence in employment discrimination cases. Claims brought under statutory law had an easier time than those brought under constitutional law. A plaintiff challenging policies with a disparate impact under Title VII does not have to prove that the employer had a discriminatory intent. However, the Court has held similar claims made under the constitution to a higher standard. These claims do have to prove intentional discrimination — proof of a disproportionately negative effect on a disadvantaged group is not enough.

*Changes in Government*

Congress has influenced the development of doctrine through their action in the employment discrimination area. Their inclusion of sex in Title VII’s protection, and the enactment of the *Equal Pay Act*, gave the groups a basis for litigation. The passage of the *Pregnancy Discrimination Act* overruled unfavourable doctrine holding pregnancy discrimination not to be sex discrimination. The *Civil Rights Act of 1991* overruled various negative Court decisions (including *Wards Cove*), and reasserted earlier doctrine that made it easier to challenge discrimination.

However, changes in Congress over the decades have not had a recognizable effect on the shifts in doctrine. The Court continued to make conservative decisions unfavourable to the women’s groups’ interests during a Democratic Congress, just as it had made favourable decisions during the split Congress of the 1980s. The Court did not
appear to take Congress’ position into account in *Wards Cove* when it made
discrimination claimants carry the burden of proof, effectively overruling earlier
favourable precedent. This decision was obviously contrary to the preferences of a
Congress which overturned it two years later.

Changes in the presidency may have had some influence on the development of
document. In sexual harassment litigation, Reagan’s Solicitor General argued against the
groups’ interests in *Meritor*, while Clinton’s administration argued in favour of them in
*Harris, Faragher and Burlington*. While the Court decided these cases more favourably
than unfavourably for the groups, the Reagan administration did achieve some success in
*Meritor* when the Court ruled against automatic employer liability. By contrast, in
*Faragher* and *Burlington* the Clinton administration argued in favour of employer
liability and the Court adopted a broader definition – more favourable to the groups’
ininterests. The president’s position may have had an effect in each case. Rehnquist and
O’Connor were in the majority in *Meritor*, arguing against automatic employment
liability, yet both joined the majority in *Faragher*, agreeing to a broad definition.

Presidential influence might explain this change, but it may also be that Souter and
Kennedy – the authors of *Faragher* and *Burlington* – wrote opinions defining employer
liability in a way that satisfied Rehnquist’s and O’Connor’s preferences.

Presidential influence is not obvious in pregnancy discrimination. The Ford
administration argued in favour of the groups’ interests in *GE v. Gilbert*, yet the Court
ruled against them. The Reagan administration argued in favour of preferential treatment
for pregnant women in *Guerra* and *Wimberly*, but the Court obliged them only in *Guerra*.
The change in the presidency may have had some influence on the shift in doctrine that
occurred in disparate impact cases with *Wards Cove*. While Nixon’s administration had argued in support of the favourable approach the Court took in *Griggs*, the Bush administration’s brief in *Wards Cove* suggested unfavourable changes to the test. But given the Court’s decision in *Watson* (when the Bush administration had not pushed for change), *Wards Cove* may have had more to do with the justices on the bench than the president in front of it. Thus, while presidential influence may be present in this area, major doctrinal shifts do not seem to be a result of it.

**Public Opinion**

As with sex discrimination, it seems probable that public opinion had an impact, at least indirectly, on the development of doctrine in the employment discrimination area. The narrowing of the BFOQ defense from *Phillips v. Martin Marietta Corporation* in (1971) to *UAW v. Johnson* (1991) corresponded with increasing public support for equal job opportunities for women. In the early 1970s, less than 50% of poll respondents agreed that “women should have equal job opportunities with men.” By the 1980s this had risen to the 80% range, and by the 1990s it was over 90% (Gallup Organization Polls, 1976 – 1995).

By the time the Supreme Court heard its first sexual harassment case in 1986, 84% of poll respondents saw sexual harassment to be “somewhat of a problem” or a “big problem.” This number had increased to 92% by 1997 (Roper Center 1989; 1999). Thus the Court may have been influenced by the state of public opinion – or been part of that opinion themselves – when deciding these cases favourably for the victims of sexual harassment.
In general, the progression of doctrine in employment discrimination – at least in cases involving gender – has become more favourable over the years. This corresponds with changing public attitudes. In 1970 (the year before Phillips), only 60% of respondents approved “of a married woman earning money in business or industry if she [had] a husband capable of supporting her.” By 1980, this had risen to 75%, and by 1996, it was at 82% (Gallup Organization 1970-1996). Whether the Court is following public opinion or has merely been affected by the same modernizing conditions, the possibility that public opinion had some influence on the development of this doctrine cannot be ruled out.

Interest Groups

Favourable doctrine emerged from 70% of the employment gender discrimination cases in which women’s groups participated. When the groups were not there, doctrine was favourable only 50% of the time. However, this difference is not very telling, as the groups participated in all but two cases. In cases involving “other discrimination” in employment, doctrine was favourable to the groups’ interests in 57% of the cases in which they participated, but only 47% of the cases in which they did not. The groups’ continuous presence before the Court, and their arguments for equal employment opportunities for women, with equal pay, may have had an influence but there is no case in which it is particularly apparent.

The pattern of participation of other interest groups may also have had an impact on the development of favourable doctrine, at least in the gender employment cases. As in the sex discrimination cases, groups participated mostly in support of women’s
interests in this area. The two cases where significantly more briefs were filed against the interests of women’s groups ended up as losses for the groups (General Electric v. Gilbert and Personnel v. Feeney). Of course, mere preponderance of briefs cannot be the decisive influence on the Court since the groups also lost cases where all the briefs filed had argued in favour of their position. But other interest groups may still exert influence, since the favourable development of doctrine has tended to correspond with cases where the majority of amici curiae briefs argue in support of the groups’ positions.

Thus, in the employment discrimination area, legal considerations, public opinion, and interest groups seem to have exerted the most influence on doctrine.

Conclusion

This chapter has examined the development of doctrine in four issue areas of interest to women’s groups in the United States. Tracing the groups’ long term success in each area, it has tried to determine whether favourable doctrine has emerged and survived through litigation before the Court – whether groups have been successful beyond Roe v. Wade, a landmark case in which, ironically, they did not participate.

The first issue area, abortion, started off with Roe, an enormous success for the interests of women’s groups. However, that favourable doctrine would be whittled away in the decades that followed as more and more restrictions on the abortion right were allowed. In the end, Roe was upheld, but in a greatly altered state. Today, very few states (Hawaii, New Hampshire, Vermont among others) do not impose any of the four most common restrictions on abortion: parental consent, waiting periods, restrictions on insurance coverage, and restrictions on late term abortions (USA Today 1999). The
abortion area has not been kind to women’s groups. They began with a resounding victory, then flirted with disaster and ended up barely ahead of where they started.

Affirmative action, also, has ended up far less favourable to the groups than it was at various points along the way. Cases started off well, hit a bit of a rocky patch, picked up again briefly, then took a more permanent unfavourable turn. Under current Court resolutions, affirmative action programs will be difficult to sustain against constitutional challenge. Groups may have more luck with statutory cases.

The two most successful areas for women’s groups have been sex discrimination and discrimination in employment. While doctrine has not yet developed to the complete satisfaction of the groups, they have achieved great strides in each area – without the lasting setbacks. While the groups have still not achieved their preferred standard of scrutiny for gender in constitutional cases, they have secured their fallback position, and at least one of the justices still holds the issue to be an “open question.” In fact, doctrine has become increasingly favourable in all but a few of the issues within each area. As things stand today, policies that discriminate openly towards women are very difficult to uphold, and the Court has been more open to the pursuit of strict equality between the sexes – even allowing challenges to some laws favouring women. In addition, statutory disparate impact challenges are not prohibitive for claimants to prove, and relief from pregnancy discrimination and sexual harassment has been forthcoming. Conditions for women in the 1990s are generally much better than those faced in the 1970s.

After evaluating success and failure in each issue area, an attempt was made to discover the influences behind long term doctrine development. In particular, did the groups have an impact on the Court and the fate of their interests. No one factor appeared
to exert a dominant influence in any issue area. Rather, multiple factors had an impact – and these were different in every area (see Table 4.1). In the abortion area, changes in Court membership, legal considerations and the position of the presidency seemed to have the most powerful effect on shifts in doctrine. In affirmative action, it was court membership and legal considerations. In the sex discrimination and employment discrimination areas the most powerful influences appear to have been legal considerations, public opinion and interest groups.

In the two issue areas that ended up badly for them, abortion and affirmative action, the groups appear to have had little influence. Indeed, the groups’ voices may have been hard to hear in these highly controversial areas. In abortion, the groups may have become victims of their own initial success which stimulated the growth and proliferation of abortion opponents. The groups may then have fumbled in not adapting their arguments to better suit the changing times thus effectively nullifying the potential for exerting any real influence. The field of affirmative action was another emotionally charged area but one in which the women’s groups were often no more than bit players. Affirmative action was generally taken to be a consideration of race not of gender. The women’s groups have had the most impact in the areas of central concern to them, sex discrimination and discrimination in employment. The information they provided the Court as “experts” may have received more attention in those cases, and their positions more weight. Thus, in the issue areas in which the greater constituency of women suffered significant division, the groups were largely ineffectual. But when this constituency embraced solidarity, the groups found their goal to be within their reach, if slightly beyond their grasp.
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Table 4.1: Influences on Doctrinal Development in the United States

* Degree of Influence

++ = significant influence

+ = some influence

0 = no influence
CHAPTER 5

EXAMINING THE LONG TERM IN CANADA:
GROUP SUCCESS AND INFLUENCE OVER TIME

Canada’s premier interest group litigator, the Women’s Legal Education and Action Fund (LEAF), holds substantive equality for women as its goal. The equality rights section (s.15) of the Charter of Rights and Freedoms is vital to this goal. Thus, when the Canadian Supreme Court heard its first case involving this section of the Charter (Andrews v. Law Society of British Columbia 1989), LEAF hurried to participate. This “landmark” case delivered a substantial victory to the group when the Court applied the “proper” interpretation to various aspects of s.15. However, while Andrews was a great success for LEAF, it did not ensure that their goal had been completely and permanently achieved. Rather, “the meaning of equality provisions is being continually determined in Canadian courts” (LEAF 1999). Thus LEAF has continued to litigate in various issue areas, pursuing success in the long term. Their pursuit has taken them into more than 100 cases across all levels of courts, involving everything from reproductive freedom and pornography, to pregnancy discrimination, and violence against women. To fully evaluate the group’s achievements one must look at the development of doctrine in these issue areas over time.
This chapter traces the development of doctrine in the various areas of interest to LEAF in an attempt to determine whether the group has been successful in the long term. Has the group managed to preserve their *Andrews* victory in later equality cases or has the Court backtracked on their interests? Once success or failure has been mapped, the chapter undertakes an analysis of influence. What factors influenced the Supreme Court’s doctrine and determined the group’s fate? Has LEAF, itself, managed to have the impact they hoped for when litigating before the Court?

After a brief description of the approach taken in the analysis – including a discussion of the possible influences on the development of doctrine in Canada – this chapter focuses on the major issue areas of concern to LEAF. The path of doctrine is tracked for each issue area, and the potential influences on the direction of that path are considered.

**Approach**

Like Chapter 4, this chapter moves beyond the case level of analysis to examine policy areas as a whole. Doctrine is examined in five issue areas (abortion, pornography, family law, equality and discrimination, and sexual assault), from 1984 to the present. As in Chapter 4, this analysis required ordering all the cases in an area by the date of the Court’s decision and included all cases in the area – whether LEAF had participated or not. Shifts in doctrine in each area were then traced from the first case to the latest. This

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1 For an explanation of why these issue areas and these years were chosen see Chapter 2.
allows us to see where a doctrine began, where it currently sits, and any bumps between. From this, one should be able to determine how favourable the doctrine has been to LEAF, and thus how successful they have been in their litigation over the long term.

As in past chapters, once the women’s group’s success or failure has been determined, I attempt to discover whether the group was responsible for its own fate. While LEAF is expected to have had an impact, several other factors – similar to those examined previously – are expected to have influenced the development of doctrine in Canada. These factors (described below) are considered in turn in each issue area of interest to LEAF. Taking into account the condition of all the factors, the covariation between each of them and any movement in doctrine is studied in an attempt to derive a complete picture of potential influence.

Court Membership

The Canadian Supreme Court has experienced a large turnover in membership in the last decade. Justices Beetz, Estey, McIntyre, Chouinard and LeDain all left the Court in the late 1980s. Chief Justice Dickson and Justices Wilson, LaForest, Sopinka and Cory have left in the 1990s. Of the Justices hearing the first case in the time period of interest here, only Chief Justice Lamer remains. In the United States, change in court membership is often a powerful predictor of shifts in doctrine. As explained in Chapter 3, this is

2 Not all cases in an issue area are discussed in this chapter. Instead, only cases significantly affecting doctrine are mentioned.
expected to be less true in Canada where judicial ideology has apparently played less of a role. However, this almost complete turnover in Court membership should have some influence, as it must, at least, bring some different approaches to the bench.

Complicating this picture is the fact that the Canadian Supreme Court often hears cases in panels of five or seven justices. Thus in some issue areas, a different group of justices may hear each case. The American literature on panel decisions in Federal Courts of Appeal has found that case outcomes often depend on the membership of the panel hearing a case (Howard 1981; McIver 1976; Richardson and Vines 1970). Andrew Heard (1991) has discovered similar findings for the Canadian Supreme Court. Heard found that panels composed of a majority of Charter receptive justices accepted Charter claims in 38.5% of the cases brought before them. By contrast, in the same time period, panels composed of a majority of less receptive justices accepted Charter claims in only 15.9% of the cases (304-305). Thus variations in panel participation may have as much impact as the change in Court membership, perhaps more, and must be considered when studying influence.

Legal Considerations

Changes in legal considerations — such as precedent and case facts — are also expected to have influence on shifts in doctrine. This may be more true — or at least more obvious — in Canada than in the United States. The influence of judicial preferences has traditionally been less accepted in Canada where, at least until the late 1980s, the “role of the judiciary [was] perceived as being essentially technical and non-political... there to apply the laws made by the political branches of government” (Russell 1987, 3). In this
(albeit rapidly changing) climate, Justices may need to emphasize legal considerations in their opinions, and may actually give them more weight. Added to this, of course, is the fact that justices in Canada, like their counterparts in the United States, are exposed to an emphasis on the "language of the law" in their training and work environment.

Thus, doctrine may shift in the course of litigation, not because of a change of Court membership or a change in public opinion, but rather because a statute's language has been changed or different case facts have come before the Court.

Changes in Government

In the United States, there were 16 sessions of Congress and six different presidents from 1970 to the present. Changes in Congress and the presidency were examined separately, and each was found to exert influence in some issue areas important to women's groups. By contrast, in the time period of interest here, there have been only four different Parliaments and two different Prime Ministers in Canada – and this effectively represents only one change in government.

In the Canadian parliamentary system, the legislative and executive branches are fused. The Prime Minister is the head of the majority party in the House of Commons and he and his cabinet dominate its proceedings. With majority governments in all four elections in our time period, the Prime Minister has had less need to take opposition party concerns into account. Thus, there should be no significant difference between the actions of the two Parliaments elected during Prime Minister Chretien's tenure (1993-present), or between the two Parliaments that met during Mulroney's term in office (1984-1993). This leaves us with only one major change in government to examine.
The Court’s relationship with the federal government certainly makes it possible that it would take the government’s position into account in judicial decisions. The Canadian Supreme Court lacks explicit constitutional entrenchment. Instead, the federal government may “from time to time” establish “a general court of appeal” and provide for its maintenance and organization (Section 101, Constitution Act, 1867). The government determines the Court’s jurisdiction, appoints its members and sets its salaries. This power could cross justices’ minds when making decisions. However, the lack of a combative history between the two institutions makes this unlikely to have any real influence.

More likely to affect decisions is the government’s ability to enact new statutes which could effectively override the Court’s rulings. If the justices want their decisions to stand they may take the position of the government into account when deciding cases. Thus when the government changes, there may be some change in doctrine corresponding with the new Prime Minister’s positions.

Technically, this last effect would not be limited to statutory cases since the government could use the “notwithstanding clause” in the Charter of Rights and Freedoms to suspend the application of certain Charter decisions (those involving section 2 or sections 7-15) for a renewable five year period. However, this is probably not a very viable threat as only the Quebec government has used this clause successfully since its enactment.

As in the United States, the Canadian government could also exert influence through their representative at Court, the Attorney General of Canada. The Attorney General has enjoyed much success before the Supreme Court (McCormick 1994; Brodie
1992). However, while he may have influence in individual cases, it seems unlikely that he will have been behind many changes in doctrine. The Attorneys General should have been advocating similar positions over the years of a given government (one position for most of the 1980s and early 1990s, and then, perhaps, some different position for the later 1990s).

Finally, the Prime Minister can have influence through the appointment of justices to the Court. If Jean Chretien tended to appoint ideologically different justices than Brian Mulroney, one would expect shifts in doctrine to occur. However, as mentioned previously, ideology has never played a conspicuous role in judicial appointments. Instead, geography and patronage have had more of an effect historically. Further, whether Mulroney and Chretien would appoint justices with fundamentally different ideology in the “rights” cases which tend to be of interest to the woman’s group, is unlikely (Morton, Ho and Hennigar 1996, 13).

Thus changes in government are expected to play a more limited role in doctrine shifts in Canada. This should be particularly true in the sexual assault cases (which make up around 40% of the cases discussed here), as there should be little difference in a Liberal or Conservative government approach to this area of criminal law.

Public Opinion

Although the relationship between public opinion and the Court has been much less studied in Canada, it is expected here that public opinion will have some impact on the development of doctrine. The issue areas in which LEAF is litigating, such as abortion and equality rights, tend to be controversial and high profile. The Court’s
decisions in these areas have been getting increasing media coverage in the 1990s—
increasing public awareness. Therefore, if the opinion of the public is ever going to affect
the Court, it should be in these areas.

As in the American case, it is possible that public opinion has an influence on
doctrine through its “indirect” effect on the justices. The justices’ decisions may reflect
their exposure to current conditions—the same conditions shaping public opinion. Thus
doctrine may develop in a direction similar to the public’s preferences, not because the
Justices are influenced by public opinion, but rather because both their decisions and
public opinion are being determined by the same thing.

Interest Groups

The Women’s Legal Education and Action Fund (LEAF) is expected to have
influence on the development of doctrine in the issue areas of interest to them. LEAF has
been the “top intervenor” among interest groups and thus may have achieved more
credibility before the Court. The group’s widespread activity may also lead the Justices to
view them as “experts” in their areas, which should generate more respect for their
arguments.

Other interest groups are also expected to have an effect on the development of
doctrine, through their presence and their arguments. The number of groups litigating on
each side of a controversy signals the Court as to the importance of the issue and the
opinion of various constituencies. In addition, since Canadian justices may place more
emphasis on disguising the influence of their own preferences, the arguments of interest
groups may provide them with vital reasoning. However, countering this influence is the
fact that interest groups in Canada are new at the litigation game. "As late as 1980 most
Canadian lawyers considered interest group litigation to be primarily an American
phenomenon" (Brodie 1999). Thus most Canadian groups do not have "repeat player
status" with its advantage of familiarity before the Court. This may put them at a
disadvantage compared to their American counterparts.

Abortion

In R. v. Morgentaler (1988), the Supreme Court of Canada struck down s.251 of
the Criminal Code and Canada became “the only western nation not to have laws
governing abortion” (Vaughan 1999, 14). LEAF rejoiced in at least the outcome of this
case. A champion of reproductive freedom, the group argues that “access to abortion is
necessary as a means for women to survive in their unequal circumstances” (LEAF
Factum, Borowski v. Canada, 1989, 17). According to LEAF, “the Charter must provide
women faced with unwanted pregnancies a secure right to control the number, timing and
spacing of their children” (Borowski, 17). Striking down s.251 was hoped to settle the
matter – the abortion supporters had won.

However, the Court’s action in Morgentaler was not the end of the debate, only a
midpoint – more litigation was to come. What has happened in the years after
Morgentaler? Have pro-choice groups managed to prevent the enactment of a new
abortion law in Canada? Has the Court provided doctrine to support the favoured
Morgentaler outcome? The next section examines how favourable the path of doctrine
has been to LEAF in the long term, and the influences behind the direction of that path.
Canada’s Own Landmark Case

In 1969, Canada enacted a new abortion law: section 251 of the Criminal Code. While prior to this time, abortion had been legal only to save the life of the mother, section 251 allowed abortions if a hospital’s therapeutic abortion committee (TAC) agreed that the pregnant woman’s “life or health” was in danger. The addition of the word “health” was important, allowing the medical community some discretion and making abortion more readily available (Morton 1992). However, the new law did not allow abortion on demand. Women had to go through the cumbersome process of the TAC’s, and doctors faced life imprisonment for performing abortions not deemed “required” for the life or health of the mother.

Upset with a law which he called “a liberalization on paper only” (as quoted in Morton 1992, 34), Henry Morgentaler began a campaign of “civil disobedience” – regularly performing abortions in his Montreal clinic. This campaign would take him to the Supreme Court once a decade, from the 1970s to the 1990s. Morgentaler v. the Queen (1976) was the Court’s first major abortion case and Morgentaler took advantage of the occasion not only to argue against his conviction for performing illegal abortions, but also to challenge the validity of s.251 under the 1960 Bill of Rights. However, the Supreme Court would prove to be unsympathetic to the supporters of abortion rights (and thus to the interests of the yet unformed LEAF) in this first case. The Court upheld s.251 and allowed Morgentaler’s imprisonment.

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3 Morgentaler had been acquitted by a jury, but the Quebec Court of Appeal had substituted a conviction. This was allowed by the Criminal Code if the Court felt the accused would have been found guilty if not for a mistake in law. This provision of the Code would be amended by the federal government after Morgentaler’s appearance at the Supreme Court. Thus today, Canadian Courts of Appeal cannot substitute a verdict of guilty – they can only order a retrial.
Another challenge to s.251 was launched not long after Morgentaler's defeat. Pro-life activist, Joe Borowski, argued that s.251 violated the 1960 Bill of Rights by allowing some abortions to occur – a violation of the "right to life." As he was neither a doctor nor a pregnant woman, Borowski first had to establish that he had standing to bring the case. This issue would be appealed all the way to the Supreme Court (Minister of Justice v. Borowski 1981). Supporters of abortion rights were dismayed when the Supreme Court used this case to further liberalize the rules of standing in Canada, holding that Borowski could in fact bring his case.

Thus, by the time the second Morgentaler case reached the Court in 1986, advocates of reproductive freedom had cause for alarm – favourable doctrine had yet to emerge. The second case originated when Morgentaler was once again charged with performing abortions contrary to s.251 of the Criminal Code. This time Morgentaler challenged the constitutionality of s.251 using the new Charter of Rights and Freedoms. Morgentaler claimed the abortion law violated several sections of the Charter which guaranteed freedom of conscience (s.2a), the right to liberty and security of person (s.7), the right not to be subjected to cruel and unusual punishment (s.12), and equality rights (ss.15 and 28).

When the Court finally released its decision in 1988, the outcome was a victory for the interests of women's groups, as five of the seven justices hearing the case voted to strike down s.251 as a violation of s.7 of the Charter. However, this outcome was not accompanied with reasoning that would ensure unfavourable abortion laws could not be enacted in the future. Instead the five justice majority wrote three different opinions – only one of which found a right to abortion. Four justices found that the procedures
required by s.251 to obtain an abortion violated procedural fairness guarantees in s.7.
Two of these justices argued that the requirements were “inherently unfair” – that the unequal access and delays caused by the therapeutic abortion committees made them unworkable. The other two argued that the procedural problems with the TACs could be fixed and thus another version of the requirements might well be acceptable. These justices held that “in principle” there was nothing wrong with limiting abortions to situations where the health or life of the mother was endangered or with requiring some third party to determine whether that condition was met (Morton 1992, 232).

Thus the Morgentaler reasoning was not very favourable to the interests of abortion supporters such as LEAF. It threatened to be only a temporary victory, as four of seven justices (the latter two justices plus the two dissenters) believed another abortion law requiring the use of therapeutic abortion committees would not necessarily violate the constitution. More importantly, only one justice had recognized a woman’s right to abortion and even she was willing to recognize the state’s interest in protecting the foetus at some time during the pregnancy. Thus reproductive freedom was not ensured, as favourable doctrine did not exist to support it – a revised abortion law might well pass judicial scrutiny in the future.

The Aftermath of Morgentaler

The Court’s decision left Canada without an abortion law. The Mulroney government struggled to fill this void, finally introducing a proposal to the House of Commons six months after Morgentaler. The government’s proposal made abortions relatively easy to get during the early stages of pregnancy (a qualified doctor just had to
assert that the pregnancy threatened the “physical or mental wellbeing” of the mother).

However, in the later stages of pregnancy, an abortion would only be performed after two qualified doctors ruled it necessary to save the life or health of the mother (Morton 343-344). The government suspended party discipline for this vote and allowed amendments to be made. The result was the defeat of various pro-life and pro-choice amendments and the proposal itself. Frustrated, the Mulroney government announced it would suspend its efforts until the Supreme Court rendered its decision in its next major abortion case, *Borowski v. Canada*, scheduled to be heard in the fall of 1988 (Morton 1992, 251).

*Foetal Rights -- Borowski v. Canada*

*Borowski v. Canada* (1989) was the continuation of Borowski’s struggle to have s.251 ruled a violation of the “right to life” of the foetus. Borowski had amended his challenge in the early 1980s to take advantage of the new Charter of Rights and Freedoms. Section 7 of the Charter held that “everyone” had the right to life, liberty and security of person and Borowski argued that the “unborn child” was included in the term “everyone.” Still celebrating the *Morgentaler* victory, LEAF and its allies were unpleasantly surprised when the Court did not strike the *Borowski* case from its calendar. The law Borowski was attempting to challenge no longer existed and the group had been confident the Court would declare the case moot. LEAF, who had been granted permission to intervene in *Borowski* before the *Morgentaler* decision, was further dismayed when the Supreme Court allowed an application by REAL Women – LEAF’s conservative rival – to intervene in *Borowski*, six months after the application deadline.
(Morton 1992). Pro-choice supporters suddenly became concerned that the Court was intending to use Borowski to limit their victory in Morgentaler by ruling that the foetus did indeed have the “right to life.”

LEAF’s factum in Borowski first attempted to persuade the Court not to rule on the abstract question before it. This would be the safest outcome for the group as it would avoid any reevaluation of Morgentaler. However, as a fallback position, LEAF also spelled out its position against Borowski’s claim, arguing that recognizing “foetal personhood would undermine the possibility of recognizing an abortion right, depriving women of sex equality in a unique, unprecedented and discriminatory manner” (LEAF Factum, Borowski, 17-18).

After spending most of the first day of oral arguments debating whether to allow the case to proceed, the Supreme Court decided to give Borowski the chance to be heard. However, when the Court released its decision five months later, it did, in fact, declare the case moot and declined to consider the rights of the foetus. Borowski had been granted his day in Court, but no more (Morton 1992). This delighted women’s groups as the decision left Morgentaler untouched and added no unfavourable reasoning to damage their cause. However, it also left the question of foetal personhood unresolved – a threat to be faced another day.

*Tremblay v. Daigle*

In fact, the question would be before the Court later that same year. Jean Tremblay had obtained an injunction from a Quebec Superior Court judge preventing his ex-girlfriend from obtaining an abortion. The judge ruled that the foetus was a “human
being” under the Quebec Charter of Human Rights and Freedoms and thus had a “right to life.” As the father, Tremblay was found to have the proper “interest” to be able to apply for the injunction. The injunction was obtained on July 7, 1989. On July 26, 1989, the Quebec Court of Appeal upheld the lower court’s decision and on August 8, 1989 the Supreme Court (recalled from summer vacation) was hearing arguments in the case—making *Tremblay v. Daigle* (1989) the speediest case in Canadian history (Morton 1992). Despite the short notice and time pressure (Daigle was already in her 22nd week of pregnancy by the time the Supreme Court heard the case), the Court allowed several intervenors to participate in the case. LEAF was among those intervenors anxious to be heard. At issue was this new threat to a woman’s abortion right, injunctions, and a ruling on whether the foetus had a “right to life” under the Canadian and Quebec Charters and the Quebec Civil Code. However, the group could not have been pleased with the less than favourable facts of this important case. Chantel Daigle was well beyond her first trimester and had got pregnant deliberately, only deciding to obtain an abortion after breaking up with her boyfriend. This was not the perfect “test case” on foetal rights for the group.

The Court’s decision in *Tremblay v. Daigle* was complicated further, when halfway through the first day of oral arguments, it was announced that Daigle had obtained her abortion. Although this appeared to make the case moot, the Supreme Court decided to continue hearing it. At the end of oral arguments the Court announced that it was striking down the injunction against Daigle. The Court added reasoning to this outcome in a unanimous “judgment of the Court,” released three months later. According to the Court, nothing in Quebec legislation supported Tremblay’s claim that his interest in the
foetus gave him “the right to veto a woman’s decisions in respect of the foetus she is carrying” (Tremblay 1989). The Court went on to rule that a foetus was not a “human being,” and therefore, did not have the “right to life” under the Quebec Charter or Civil Code. Neither the Charter nor the Civil Code “display[ed] any clear intention on the part of its framers to consider the status of a foetus” (555) and it seemed unlikely that if they had intended this, they would have left it to chance. However, the Court did not rule on the issue under the Canadian Charter of Rights and Freedoms since Tremblay involved a civil action between two private parties – no state action was involved. Thus the question of whether the foetus has a right to life under s.7 of the Canadian Charter had yet to be settled.

Although the Canadian Charter question was not reached, the reasoning in Tremblay was a victory for abortion rights interests and LEAF. Favourable doctrine had been established against the “right to life” of the foetus and injunctions could not be used as a “back door” limit to the right to abortion.

However, women’s groups would not be allowed to rest easy after their litigation success. Instead, in November of 1989, Prime Minister Mulroney’s government introduced new abortion legislation to Parliament: Bill C-43. This bill would allow abortions to occur if a “medical practitioner” ruled that the abortion was necessary to save the health or life of the mother. Health was defined fairly broadly to include “physical, mental and psychological health” (Morton 1992). This was a compromise bill that eliminated the TAC’s that had troubled the Supreme Court in Morgentaler. However, both pro-life and pro-choice groups were unhappy with Bill C-43. LEAF, itself, submitted a report to the legislative committee considering the bill, to argue against its
enactment. After narrowly passing a “free vote” (party discipline had been suspended) in the House of Commons, Bill C-43 went to the Senate where a tie vote defeated the bill (a tie in the Canadian Senate is equal to a defeat). The Mulroney government announced yet again that it would not enact further legislation – Canada would be without an abortion law (Morton 1992, 292).

R. v. Sullivan

The foetal rights question would again arise in a case (R. v. Sullivan 1991) involving two midwives, charged with both criminal negligence causing the death of a child and criminal negligence causing bodily harm to a mother, after a baby they were delivering died in the birth canal. The trial court had convicted Sullivan and Lemay of criminal negligence causing death, but acquitted them on the charge of criminal negligence causing bodily harm. The Court of Appeal allowed the midwives’ appeal from their conviction but substituted a conviction on the court of criminal negligence causing bodily harm (even though the Crown had not appealed their earlier acquittal). Both counts were then appealed to the Supreme Court. At issue in one count was whether the partially born child could be considered a “person” under the Criminal Code so that the midwives could be convicted of criminal negligence causing death. The issue for the other count was whether the child could be considered part of the mother, allowing the charge of criminal negligence causing bodily harm. LEAF, of course, was against holding that a foetus – even partially born – was a person. The group argued that the full term foetus was still part of the mother and, therefore, Sullivan and Lemay were guilty of causing bodily harm to the mother through the death of her foetus.
The Supreme Court’s decision was favourable to the group’s interests. The Court ruled that the midwives could not be convicted of criminal negligence causing death to a person since the foetus was not a person – or a human being – for the purposes of the Criminal Code. The Court even mentioned LEAF’s argument that finding the foetus to be a “person” within the Criminal Code would be inconsistent with the goal of sex equality. The majority wrote that “the result reached above is consistent with the ‘equality approach’ taken by L.E.A.F.; but it is unnecessary to consider this point in further detail” (Sullivan 1991). The Court went on to argue that the midwives could have been convicted of criminal negligence causing bodily harm. However, the Court allowed Sullivan and Lemay’s appeal from their conviction on this count, ruling that the Court of Appeal should not have substituted a conviction when the Crown had not appealed the women’s earlier acquittal.

R. v. Sullivan established more favourable doctrine for LEAF’s interests. It had now been ruled that the foetus was not a “human being” or a “person” under the Quebec Charter and Civil Code or the Canadian Criminal Code. Although a Canadian Charter pronouncement still proved elusive, LEAF was pleased with the incremental success they were achieving.

Morgentaler v. the Queen (1993)

In addition to the battle against foetal rights, abortion supporters faced another challenge in the aftermath of the 1988 Morgentaler decision: provincial governments. While the regulation of abortion was part of the Criminal Code, and thus federal law, the provinces could exert some influence through their control of health policy. British
Columbia's Social Credit government had attempted to limit abortions within the province by excluding coverage for abortion in their health insurance program. This policy was short lived, when a B.C. court struck it down and the government decided not to appeal (Morton 1992). However, a few other provincial governments attempted to limit abortions by prohibiting abortion clinics within their boundaries. It was one of these restriction attempts that came before the Supreme Court in *Morgentaler v. the Queen* (1993).

Shortly after the 1988 *Morgentaler* decision, the Nova Scotia government enacted legislation which prohibited abortions from being performed outside of hospitals and denied health insurance coverage for any abortions performed in violation of this principle. Henry Morgentaler had decided to open an abortion clinic in Halifax anyway, and began to perform abortions in clear violation of the new legislation. He was arrested and so began his third trip to the Supreme Court.

Both the trial and appeal court acquitted Morgentaler on the grounds that the Nova Scotia legislation was "ultra vires" of the province since the regulation of abortion was criminal law and, therefore, the responsibility of the federal government. This ruling was the preferred outcome for those championing reproductive freedom, as it did not implicate their build up of favourable precedent and prevented provincial governments from implementing restrictions like those adopted in some American states. The interests of LEAF were furthered when the Supreme Court struck down the Nova Scotia statute, arguing that the legislation had been enacted primarily to prevent Morgentaler from opening his clinic. This meant the statute was "aimed primarily at suppressing the
perceived harm or evil of abortion clinics” (Morgentaler 1993), and was thus an encroachment on federal criminal law. Threats to the abortion right could now come only from limited directions.

_Winnipeg Child and Family Services v. G(DF)_

Although still not ruling on constitutional grounds, the Court did give LEAF a broader ruling on foetal rights in _Winnipeg Child and Family Services v. G.(D.F.)_ (1997), when it ruled that “the law of Canada does not recognize the unborn child as a legal person possessing rights” (Winnipeg 1997). This case involved a lower court order for a pregnant woman, addicted to glue sniffing, to be placed in the custody of the Winnipeg Child and Family Services until the birth of her child. LEAF opposed what they saw as a “coercive regime under which judges would mandate how women conduct their lives and manage their pregnancies” (LEAF Factum, _Winnipeg Child and Family Services_, 3). By allowing this regime, the Supreme Court would “participate in an unprecedented rights violation by creating new ways to control women and deprive them of their constitutional entitlements” (27). The Supreme Court, however, ruled against the court order, arguing that the only rights recognized under Canadian law were those of a “born person.” The majority went on to argue that since the pregnant woman and unborn child are one, detaining the woman would involve “moral choices and conflicts between fundamental interests and rights” which were better resolved by the legislature. In 1999, the Court continued in this same vein when it held that a child who had been harmed while in the womb could not sue the mother for damages due to prenatal negligence (_Dobson_, 1989).
Litigation Guardian of, v. Dobson). However, once again, the Court argued this area was better left to the legislature, which, again, threatens that LEAF’s victory may not be on solid foundations.

Long Term Success

The bottom line success rate for LEAF’s interests during the time period of interest was 83% (the number of cases producing favourable doctrine divided by the total number of cases). However, while Canada still does not have an abortion law, a Court majority has never said that Canadian women have a constitutional right to choose whether to terminate their pregnancy. If, unlike the Conservative and Liberal governments, a future government (perhaps Reform) desires to enter the abortion debate and can generate the legislative numbers for a new “procedurally fair” abortion law, there is nothing to guarantee that the Court would not uphold this law as constitutionally valid.

However, while 83% might be a distortion, LEAF and its interests have assuredly experienced success in the abortion area. The Court has enacted doctrine favourable to the group with regard to foetal rights and has recognized that the woman and foetus are one – such that any interference with the foetus potentially infringes the woman’s rights. In addition, the provinces have been prevented from enacting restrictions on abortion similar to those used by some American states to whittle away at Roe. Thus, while a

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4 All the percentages in this chapter are done for the cases in the time period of interest to this study. Thus while I talk about cases that have affected doctrine both before and after the time period, I do not include these cases when determining how successful LEAF has been.
future restrictive abortion law is possible, and litigation impacting the abortion right continues, the current doctrine of the Court has been favourable to LEAF's interests and the 1990s have been a decade of reproductive freedom in Canada.

Influences on Abortion Doctrine Development

What influenced the path of doctrine in the abortion area from its rather shaky start for abortion rights in the first Morgentaler decision, to its landmark Morgentaler decision in 1988? And what has influenced the development of favourable doctrine since? This next section examines the factors that may have led to the current lack of abortion law in Canada. Why does the Court keep deciding cases favourably for the interests of LEAF?

Court Membership

The Canadian Supreme Court experienced a large turnover in membership during the period of study. Yet, given the pattern of voting in the abortion cases, it seems unlikely that the change in Court membership had a significant influence on the development of doctrine in the area. Of the Justices voting against Morgentaler in his first trip to the Court in 1974, only Dickson and Beetz were still on the Court to hear his second case in 1988. Both of these Justices had been in the majority during the first Morgentaler – holding that s.251 did not contravene the Bill of Rights. However, these same justices were also in the majority for the second Morgentaler – ruling that s.251 did
contravene the Charter of Rights and Freedoms. The fact that these two remaining
Justices switched positions suggests that case facts may have more bearing on the shift in
document than changes in membership.

Casting further doubt on the influence of Court membership (or at least clouding
its appearance) is the fact that of the remaining six cases in the abortion area, four were
decided unanimously.\(^5\) New Justices on the Court continued to join the majority as their
predecessors had done. It is possible, of course, that at least Justice McIntyre – the only
departing Justice to have dissented in *Morgentaler* – would not have voted as favourably
as his replacement, Justice McLachlin, in some of the later cases. However, this possible
change of one vote did not affect the development of doctrine. Further, two justices
dissenting in the fifth case, *Winnipeg Child and Family Services*, had both been part of
the favourable majority in previous cases, suggesting something beyond their identity
was determining the outcome of the case. In the final case, *Dobson*, a new Justice did
dote in dissent but the vote was still 7-2 for favourable doctrine. Thus membership
change does not appear to have influenced the path of doctrine.

Panel assignments also do not appear to have influenced the development of
document in the abortion area. All but two of the abortion related cases were decided by a
full Court (nine Justices). Although only seven Justices heard the 1988 *Morgentaler*
decision, the addition of the missing Justices would not have changed the outcome, even

\(^5\) *R. v. Sullivan* (1991) was only unanimous in one of the two appeals to the Court. L’Heureux-Dube
dissent had in the other appeal (*Sullivan v. R*).
if they had voted in dissent (a 7-2 vote would have just been reduced to 5-4).⁶ And in Borowski, all seven justices delivered an unanimous decision so the addition of two justices should not have altered doctrine.

Of course, the lack of real shifts in doctrine after Morgentaler makes it possible that it is the continuing preferences of the Justices, rather than a change in membership, that is having an effect. In Borowski, the law being challenged had been struck down months earlier. The Court declared the case moot and declined to rule on the rights of the foetus. However, in the Court’s next case, Tremblay, the Court decided to rule on the abortion injunction despite the fact the woman had gone ahead and had her abortion – making the case equally moot. Each was the desired decision in LEAF’s view, but why did the Court rule on a moot case in one instance but not in the other? It is possible that the differences had to do with the Justices’ preferences in each case. If the Justices were sympathetic to abortion rights, they may have decided to take the easy way out in Borowski by “ducking” the issue, and yet felt compelled to rule in Tremblay to end the threat of injunctions to abortion rights. These preferences would have then led to the continuing favourable decisions as the Court prevented provincial restrictions and ruled against foetal personhood.

However, while judicial preferences undoubtedly have some impact on decisions, it seems a bit simplistic to place all the influence at their door. Something else must also be influencing the direction of doctrine. If preferences were all that mattered, why did the Court “duck” the issue in Borowski instead of ruling against foetal rights then and there?

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⁶ It has been suggested that both the missing Justices, Chouinard and LeDain, would have been more likely to have joined Justice McIntyre in dissent (Morton 1992). Chouinard was missing due to poor health and LeDain was left off to ensure an odd number of Justices heard the case.
Also if doctrine developed favourably merely because of the Justices’ own preferences for abortion rights or “liberal” outcomes, how can one explain the position of Justice LaForest, who voted against abortion rights in Morgentaler but effectively for them in every case since?

Legal Considerations

In 1974, the Supreme Court of Canada ruled against Morgentaler, holding that s.251 of the Criminal Code did not violate the rights of women guaranteed in the 1960 Bill of Rights. In 1988, the Court ruled in favour of Morgentaler, holding that the unequal access to abortion resulting from s.251 did, in fact, violate rights guaranteed to women in the Charter of Rights and Freedoms. One influence on the shift in doctrine between the two decisions is probably the basis of the case. The 1960 Bill of Rights was similar in content to the United States Bill of Rights. However, it had one major flaw: it was not a constitutional amendment – merely a federal statute. This left the Canadian Supreme Court unsure of its role: “if a statute conflicted with a provision of the Bill of Rights, should the Court declare it to be null and without effect... or would this be a violation of... parliamentary supremacy” (Morton 1992, 70). The Court’s decisions in the 1970s indicated that they recognized the difference between themselves and the American Supreme Court and felt more comfortable bowing to parliamentary supremacy. Given this, Morgentaler’s appeal to the Bill of Rights was unlikely to succeed.

By contrast, the Charter of Rights and Freedoms, which Morgentaler used in his second appearance before the Supreme Court, was part of the 1982 Canadian Constitution. This Constitution effectively ended parliamentary supremacy with s.52
which stated 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” (*Constitution Act 1982*). By the time the second *Morgentaler* case reached the Court in 1988, the Justices had faced several Charter decisions and were getting comfortable with their new role. Thus the two cases presented fundamentally different facts to the Court and those differences had an impact on the doctrine that emerged.

Did legal considerations have an impact after *Morgentaler*, when favourable doctrine continued to emerge for LEAF’s interests? It is possible that case facts had an impact on the Court’s decision not to rule on a moot case in *Borowski*, and yet, to decide a case – just as moot – in *Tremblay*. Borowski did not involve a concrete dispute – it was not a challenge brought by a pregnant woman being denied an abortion, or by a doctor charged with performing abortions. Instead, the case was brought by an “interested party” who wanted the Court to rule on the “rights” of the foetus. The *Tremblay* case, by contrast, involved a woman who had been prevented from getting an abortion in Quebec by an injunction. Even though she had gone ahead and got one elsewhere by the time the case reached the Supreme Court, the growing popularity of injunctions and the short time period a pregnant woman had to contest them, presented more favourable case facts for the Court to proceed with a decision. (Of course, if the Court had refused to hear *Tremblay* on abortion, it may well have been faced with a consequent case involving the criminality of defying an injunction.)

Legal considerations probably also had some impact on the favourable doctrine that continued to emerge from the Court. The Court carefully studied the language and
legislative history of the Quebec Charter in *Tremblay* and the Criminal Code in *Sullivan* to determine that the foetus had not been included within their terms. In the third *Morgentaler* case, the Court studied legislative debates to determine the motive behind the province’s restrictions on clinics. The province’s determination to avoid a Morgentaler clinic implicated criminal law. This fact changed an abortion case into a federalism question, as criminal law was the Federal government’s domain.

*Changes in Government*

The first *Morgentaler* and *Borowski* decisions were decided unfavourably for the abortion rights interests during Prime Minister Trudeau’s era. The Court decided the second *Morgentaler* and *Borowski* cases favourably to these interests when Mulroney was Prime Minister. However, it is unlikely that the Court was taking the position of the government into account in these cases, since the change from Trudeau to Mulroney should not have resulted in the government being more favourable to abortion. Although Trudeau’s government defended their law from attack, just as Mulroney did in 1988, it was Trudeau that said “the state has no business in the bedrooms of the nation.” Thus the shift in doctrine should not be attributable to the shift in governments.

Governmental influence is difficult to discern after this point as Mulroney was Prime Minister for all but *Winnipeg Child and Family Services* and this case produced a continuation of favourable doctrine. Of course, the Court may have recognized that the change in government from Mulroney to Chretien did not result in notably different preferences on abortion. The Court may have thus felt quite secure continuing their doctrine in a direction favourable to abortion rights.
In some ways, LEAF does have the Mulroney and Chretien governments to thank for the group’s continued success in the abortion area. Without explicit doctrine on whether women really do have the right to choose to terminate their pregnancy, the best situation for LEAF is the present void in abortion law. If the Chretien government had decided to enact a law, it is not clear that the Court would have upheld it. Thus this lack of legislative action has allowed the continuation of the group’s victory in outcome in Morgentaler, and given them time to build up favourable doctrine to support it.

Public Opinion

Public opinion may have influenced the development of doctrine in the abortion area through its generally favourable tenor. By 1990, 25% of poll respondents thought abortions “should be legal under any circumstance” and 59% thought they should be legal “under certain circumstances.” Only 12% thought abortions should be illegal “in all circumstances” (Gallup Canada, 1990). The Court may have felt more secure making their decisions against a restrictive abortion law and against the concept of foetal rights in this climate.

The Court’s actions in Borowski (1989) may also have demonstrated some sensitivity to public opinion. Despite having struck down, in a previous case, the law Borowski was attempting to challenge, the Justices allowed Borowski his day in court. This may have been a deliberate attempt on the Court’s part to avoid alienating any part of the public. Since Morgentaler had had his day in court, it may have been important to show that the other side was being heard. Further in the third Morgentaler case (1993),
the Court decided the potentially controversial issue of abortion restrictions on grounds of federalism. This avoided a pronouncement on the legitimacy of restrictions on abortion and decreased the likelihood of a public reaction.

Thus the potential for influence – or at least consideration – is there. However, change in public opinion cannot account for the shift in doctrine between the first two Morgentaler decisions. Public opinion towards abortion in Canada varied little from the 1970s on. In 1975 (the year after the first Morgentaler) only 16% of respondents said abortions should be illegal “in all circumstances” – a figure that would change by only 4% in the next 15 years (Gallup Canada, 1975-1990).

Interest Groups

LEAF was on the winning side in every abortion case in which they participated. When LEAF was not there, favourable doctrine emerged 50% of the time in the period of interest – or if one includes the first Morgentaler and Borowski cases and the latest case (Dobson), 67% of the time. Although these percentages are based on a small number of cases it is possible the group did have influence. In Borowski, they were the only intervenor to argue for the case to be declared moot (against two interest group opponents). In Sullivan, LEAF went one on one, successfully, with their conservative rival REAL Women – even having their equality arguments explicitly recognized by the Court, if not pursued in depth. However, while it is possible that LEAF exerts some influence, their continuing efforts to have the Court address all issues in equality terms have not yet met with success – the arguments in several sections of each LEAF factum are never addressed by the Court.
Other interest groups may have had an impact in the landmark *Morgentaler* decision – through their absence. Remarkably, no interest groups intervened in this case. The Canadian Abortion Rights Action League (CARAL) had instead contributed financially to Morgentaler’s campaign and Morgentaler’s lawyer had asked other pro-choice groups not to participate in order to avoid a pro-life counter-response (Morton 1992). The pro-life groups did not participate since they had committed themselves financially to the *Borowski* case, which would be heard later that year. They decided to make their arguments then – a decision which turned out to be a “bad tactical error” (Morton 1992, 221). Whether the pro-life groups could have made a difference to the *Morgentaler* doctrine (which was not actually completely favourable to abortion rights) is speculative, but when *Borowski* was declared moot, the groups worried they had missed the best chance to influence the Justices.

However, the pattern of interest group participation did not have any obvious impact on doctrine after *Morgentaler*. Favourable doctrine emerged in cases despite the fact that more groups lined up against LEAF’s interests than in support of them (*Borowski, Winnipeg, Dobson*).

Thus the path of doctrine in the abortion issue area appears to have been influenced mostly by legal considerations (in particular the change from the Bill of Rights to the Charter of Rights and Freedoms), with judicial preferences, LEAF and public opinion having some impact as well. Table 5.1 summarizes these findings and those for the other issue areas.
Pornography

LEAF’s pursuit of equality for women has also led them to participate in the pornography issue area. Like many feminists, LEAF argues that pornography “amounts to a practice of sex discrimination against individual women and women as a group” (LEAF Factum, R. v. Butler, 1992, 2). Following this reasoning, they have used litigation in an attempt to convince the Court that regulation of pornography is constitutionally justified.

Historically, Canadian courts have used “morality based” reasoning in their pornography cases – they have allowed the restriction of pornography in order to protect public morality (Hogg 1997). LEAF, and other feminist groups, object to this “moving target” approach, advocating, instead, a focus on the harm caused by pornography. Under the “harm-based” approach, pornography is offensive, not because it is sexually explicit or because it damages “morality”, but rather because it promotes inequality and the degradation and humiliation of women. This approach views pornography as a “first cousin to hate propaganda” (Hogg 1997, 1016). The next section attempts to determine how successful LEAF has been in convincing the Court to adopt their way of thinking on pornography.

The Pornography Cases

In the first case in the time period of interest here, Towne Cinema Theatres Ltd. v. the Queen (1985), the Supreme Court defined a film to be obscene if its dominant characteristic was the “undue exploitation of sex.” To determine what constituted “undue
exploitation," the Court looked to community standards and argued that what mattered was “what Canadians would not abide other Canadians seeing” (Towne Cinema 1985).

LEAF has argued that this approach places emphasis on sexual explicitness. The group finds this troubling since much of the material emerging in the 1970s and 1980s was not necessarily explicit, yet was harmful to women (LEAF Factum, Butler). The group did find reason for optimism in Towne, when the Court majority stated that even if sex related materials “were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not ‘undue’... in the sense that they portray persons in a degrading manner...” (Towne Cinemas 1985, 505). While the Court said that only the community standard of tolerance was relevant in Towne, LEAF argues that the Court was at least implicitly recognizing that one purpose of the obscenity law was the “avoidance of harm” (LEAF Factum, Butler, 8).

The Court did not face another significant pornography case until 1992 (R. v. Butler). By this time, LEAF was ready to press its “harm based” approach at Court. It had just intervened successfully in a hate speech case (R. v. Keegstra 1990) in an effort to establish favourable precedent. In that case, the Court had allowed limits on freedom of expression due to the importance of the law’s objective: preventing harm to identifiable groups. LEAF hoped the Court would apply this reasoning to pornography.

In Butler, a shop owner, charged with possessing and selling obscene material, challenged Canada’s obscenity law (s.163.8 of the Criminal Code). Butler argued that the

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7 An example would be an issue of Penthouse which featured partially naked Asian women, tightly bound and hanging from trees (LEAF Factum, Butler, 4). The picture of partially clad women would not necessarily be found to be sexually explicit and yet LEAF would argue that showing women tied up in that manner promotes degradation and humiliation – and thus harm – to women.
law infringed s.2(b) of the Charter of Rights and Freedoms: the right to freedom of expression. LEAF intervened to support the law. Using their “harm based” reasoning, the group argued that pornography was not protected by s.2(b), or, in the alternative, that any regulation of pornography was a reasonable limit on freedom of expression under s.1 of the Charter.\(^8\)

The Court decided in \textit{Butler} that the obscenity law did, in fact, infringe s.2(b). This was consistent with previous Charter litigation, where the Court had given a broad interpretation to the freedom of expression guarantee – holding that any “content based” restrictions violate its terms. However, in \textit{Butler}, the Court went on to hold that the infringement was justified under s.1 of the Charter.\(^9\) The Court argued that the overriding objective of the obscenity law was not the protection of morality, but rather the avoidance of harm to society. And this objective was sufficiently “pressing and substantial” to justify any infringement on freedom of expression.

Thus, the Court adopted LEAF’s preferred “harm based” approach to pornography. The Court reiterated that in order to determine whether material involved the “undue exploitation of sex,” one could use the “community standard of tolerance” test. It argued that recent cases had recognized that material which exploited sex in a

\(^{8}\) Section 1 holds that the rights and freedoms guaranteed in the Charter are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (\textit{Constitution Act 1982}).

\(^{9}\) The Supreme Court has set out a two step procedure for analyzing s.1 (\textit{R. v. Oakes} 1986). First, the government must demonstrate that the law under challenge has a “pressing and substantial” objective. If this is shown, it must still demonstrate that the means used to achieve the objective are “proportional” to the objective, itself.
“degrading or dehumanizing” manner would fail the test – “not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly women” (Butler 1992). This was a considerable victory for LEAF.

**Long Term Success**

Litigation in the pornography issue area has been very successful for LEAF’s interests. The early cases established doctrine that held promise for the group and Butler established the favourable doctrine LEAF had sought in order to further their equality goals. The area was not a complete victory, as the Court did allow pornography to be included in protected expression under s.2(b) of the Charter. However, the Court’s reasoning under s.1 ensured that LEAF’s goals in this area were furthered. LEAF, itself, considers this area to be one of their successes, as the Court now recognizes that Canada’s obscenity law addresses “the grave harms of violent, degrading and dehumanizing pornography on women” (LEAF 1998).

**Influences on Pornography Doctrine Development**

Why did doctrine in the pornography area develop in a favourable direction? What factors influenced the Court to adopt a “harm based” approach to pornography in Butler? Did LEAF’s success result because of the group’s own arguments before the Court, the changing tide of public opinion, or the addition of new justices bringing different preferences to the Court?
Court Membership

By the time the Court heard Butler in 1992, six of the nine Justices had not heard the previous pornography cases – including the Justice who wrote the majority opinion. It is possible that these new Justices were willing to explicitly adopt an approach rejected by their predecessors, and that membership change did have an effect. However, the Court’s decisions leading up to Butler had begun to recognize the harm associated with pornography. Therefore, it is also possible that Butler, the first case to involve a constitutional challenge to the law, was determined by other factors.

Legal Considerations

Legal considerations may have had an impact on the path of pornography doctrine. The Court carefully worked out its interpretation of the obscenity law in the early cases – detailing the “community standards of tolerance” test for whether a material involved the “undue exploitation” of sex. In this interpretation, mention was made that a finding of “undue” could result from material harmful to members of society. Thus when the Court finally faced a constitutional challenge to the obscenity law in Butler, it may have just taken the logical next step in its developing precedent. By interpreting the law’s objective to be the prevention of harm to women, rather than the original morality motivation, the Court could find it sufficiently “pressing and substantial” to uphold under s.1. And s.1 had to be used only because of legal considerations. The Court had followed its earlier rulings on freedom of expression and held that the law infringed s.2(b) of the Charter. Thus legal considerations had at least some indirect influence in this issue area.
When the first cases were heard in this issue area, feminist arguments equating pornography with inequality were still relatively new and untried (articles by Catherine MacKinnon, one of its biggest advocates, were not published until the early 1980s). The Justices may have been unfamiliar with any legal approach other than that of morality. The development of the “harm based” approach provided them with alternative arguments to consider. The justices’ preferences may have determined which approach was used, but legal considerations – the structure of the approach – had some influence on the treatment of pornography. Choosing to apply the “harm-based” approach the Justices applied concepts which favoured the groups’ interests.

Changes in Government

Changes in government would not have been a factor in the pornography area, as Brian Mulroney was Prime Minister when all of the cases were heard. The early cases involved individuals charged under the obscenity law – not a challenge to the law itself – so the federal government did not even participate (provincial Attorneys General argued the cases). The federal government did intervene to argue in favour of its law in Butler, but its factum did not attempt to move the Court to the “harm based” approach. Therefore, it seems unlikely that the government had much effect in this area.

Public Opinion

Public opinion also does not appear to have had a discernible impact on the development of pornography doctrine. Between the first case in 1985, and the last in 1992, there is no evidence that public opinion regarding pornography changed
significantly. The public did become slightly more favourable to gender equality issues but the change was small and should not have provoked the Court to adopt a new standard.

*Interest Groups*

LEAF was very successful in *Butler*. They may even have been influential. Theirs was the only factum to argue against the old morality based approach and in favour of the new harm based approach (the few others to mention a harm based approach argued for both the harm based and the morality based approach). LEAF’s arguments in *Keegstra* may have helped persuade the Court to view pornography in a light similar to that used on hate speech.

Other interest groups were also present in *Butler*. In fact, *Butler* is the only pornography case to have intervenors – and it had eight. This surely must have signaled the Court as to the importance of the issue. And the fact that six of those factums argued in favour of the obscenity law may have given the Court added comfort in making their decision.

Thus in the pornography issue area, LEAF, other interest groups, and legal considerations appear to have had the most impact on the development of doctrine.

*Family Law*

LEAF’s commitment to eliminating the inequality of women in society has led the group into family law issues as well. LEAF argues that marriage (and its termination) is associated with economic disadvantage for women, whereas it “significantly benefit[s]
most men” (LEAF Factum, Moge v. Moge 1992, 5-6). The group has attempted to get the Court to consider the disadvantages experienced by women when it is deciding cases involving marriage breakdown. Thus, LEAF points to the employment sacrifices wives have made in supporting their husbands and caring for their children. The group argues that the result of these sacrifices is demonstrated by studies finding that “three years after separation, the incomes of women and children had dropped by at least 30%; while on average, men’s incomes more than doubled those of their former wives” (LEAF Factum, Goertz v. Gordon 1996, 4). LEAF litigates in the family law area in an effort to achieve doctrine that will remedy this situation. But how successful have they been?

The Aftermath of Divorce

LEAF is concerned with equality for women and this concern extends to both legal wives and common law wives. Historically, however, common law wives have had less protection upon a relationship’s dissolution. These women have been particularly vulnerable. The Supreme Court’s first family law case in this time period, Sorochan v. Sorochan (1986), involved such a situation.

The Sorochans had lived together for 42 years without marrying. They had six children and Mary Sorochan had raised the children, ran the household and worked on the farm. When her common law husband had been away working as a travelling salesman, Mary had run the farm. However, Alex Sorochan had owned the farm when the two had met and had always refused to transfer any of the land into her name. Thus when their relationship collapsed, Mary Sorochan was forced to sue for an interest in the farm.
The trial judge decided in this situation that a "constructive trust" existed and Alex Sorochan owed his common law wife a quarter section of land. After the Court of Appeal reversed, the Supreme Court was asked whether a constructive trust existed where a common law wife had contributed her labour for several years to the preservation and maintenance of a farm that she did not own (and which had existed before the relationship began). The Court held that such a trust did, indeed, exist. Alex Sorochan had benefited from his common law wife’s years of unpaid labour, maintaining and preserving the farm and running the household. Mary Sorochan had a “reasonable expectation” of receiving some benefit from this labour. The Court argued that the fact that Mary had not been in on the acquisition of the property was not important – it was enough that she had contributed to its preservation and maintenance. The Court’s favourable interpretation of a constructive trust gave common law wives a remedy if their relationship with their husbands should end, and thus, was favourable to LEAF’s interests.

This issue would again be before the Court in 1993 in *Peter v. Beblow*. In that case, the Court provided further favourable reasoning when it held that the provision of homemaking and childcare services, during a 12 year common law relationship, was sufficient to give rise to a constructive trust to remedy the “unjust enrichment” of a common law husband. The Court argued that it could use “the equitable doctrine of

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10 A constructive trust is one “which is not expressed in any instrument, but is imposed upon a person by a court of Equity upon the ground of public policy, so as to prevent him from holding, for his own benefit, an advantage which he has gained by reason of some fiduciary relation subsisting between him and others” (Yogi’s 1995).
unjust enrichment to remedy the situation even though the legislature has chosen to exclude unmarried couples from the right to claim an interest in the matrimonial assets on the basis of contribution to the relationship" (Peter 1993).

Spousal Support Settlements

For women ending legal marriages, spousal support has been a source of litigation. LEAF has been critical of support provisions, arguing that spousal support awards, “including those under the Divorce Act, are inadequate and have only a marginal impact on reducing women’s poverty on separation” (LEAF Factum, Moge, 7).

The first case to address this issue in the time period of interest here was Richardson v. Richardson (1987). In this case, the Court was asked when it was appropriate for a judge to make an order for spousal maintenance under the Divorce Act, which differed from what had been agreed upon by the parties in an earlier settlement agreement. At the time of the Richardson’s separation, Donna Richardson had not worked for five years. The separation settlement had provided maintenance for the child in her custody, but for only one year of maintenance for Donna Richardson. At the end of that year, Donna Richardson was still unemployed and was receiving social assistance. In the divorce action, she applied for a variation in the terms of the settlement. The trial judge awarded maintenance to her but the Court of Appeal and the Supreme Court disagreed.

The Supreme Court argued that a settlement agreement could only be altered if there had been a “radical change” in a spouse’s circumstances and the change had resulted from the “pattern of economic dependency generated by the marriage
relationship” (Richardson 1987). They found there was no change in circumstances between the Richardson’s separation settlement and their divorce proceeding. Further, they suggested it was “questionable” whether Donna Richardson’s unemployment was a result of economic dependency during marriage, since she had worked in the early years of the marriage. The fact that she was now on social assistance was also not enough to justify varying the maintenance order. Since there had not been a radical change in circumstances generated by the marriage, the state, not George Richardson, bore the obligation to support Donna Richardson. This was a loss for LEAF’s interests and the group would later be particularly critical of the Court’s findings on the economic dependency resulting from marriage.

The Court’s next major case on spousal support would be a landmark one for LEAF. Moge v. Moge (1992) involved an ex-husband’s attempt to discontinue support payments. The Moges had been married for over 20 years at the time of their divorce in 1980. Zofia Moge had only a grade seven education and no special skills or training. She had worked six hours a day cleaning offices during her marriage and continued to clean after her divorce. In 1987, she was laid off but managed to later find part time cleaning work. In 1989, her ex-husband sought, and won, an order terminating his support payments to her. The trial judge argued that Zofia had had time to become “financially independent” and that her husband was no long required to support her. The Court of Appeal disagreed and ordered Andrzej Moge to pay $150 a month to Zofia Moge for an indefinite period. The Supreme Court was asked whether the wife was entitled to support indefinitely or whether the support should be terminated.
This case provided a textbook example of LEAF’s arguments on the effects of marriage and divorce on women, and LEAF hastened to intervene. The group’s factum spoke of the “feminization of poverty,” offering statistics on the economic disadvantage of divorced women, and the implications of the division of labour in marriage. Often still shouldering prime responsibility for childcare and other unpaid labour in the home, women are forced to make career sacrifices (either interrupting their career or forgoing opportunities requiring overtime or travel), which damage their future earning potential. LEAF argued that spousal support was “an important mechanism for providing equal access to economic resources and relieving against the economic disadvantage of women” (LEAF Factum, Moge, 7). In Zofia Moge’s case, continued spousal support was vital. The group argued that the trial judge was mistaken – that in the Divorce Act “self sufficiency” is only one of four objectives a support order must address. Instead, in making any order, the Court must consider the economic disadvantage arising out of the marriage.

The Supreme Court agreed that “self sufficiency” was only one objective for a support order, and recognized the economic effects of divorce and its role in the feminization of poverty. Most women were still the economically disadvantaged partner. Thus the ultimate goal of a support order should be “alleviating the disadvantaged spouse’s economic losses as completely as possible” (Moge 1992). Thus the trial judge erred in focusing only on “financial independence” instead of noting the different earning potential of each spouse and the disadvantage Zofia Moge had suffered through marriage.
This decision was a significant victory for LEAF. Not only was Zofia Moge entitled to
spousal support indefinitely, but LEAF’s arguments on the economic disadvantage faced
by women and the feminization of poverty were explicitly addressed.

_Moge_ was followed by more favourable doctrine when the Supreme Court held, in
_Willick v. Willick_ (1994), that a support order could be changed if there was a “material
change in circumstances” – a change which would have resulted in different terms if it
had been known at the time. Thus a husband’s substantial increase in salary was grounds
to adjust the order.

_Custodial Parents_

Another outcome of divorce – the custody order – has also been subject to
litigation. LEAF has been concerned with this area since it is “overwhelmingly mothers
that have sole custody of their children” (LEAF Factum _Goertz_, 2). The Supreme Court
has held that the only issue in custody cases is the “best interests of the child.” In _Goertz
v. Gordon_ (1996), the Supreme Court was asked whether a mother with custody of her
child could move to Australia in order to study orthodontics. The father had applied for
custody of the child or, in the alternative, an order restraining the mother from moving.
LEAF intervened in support of the woman’s right to move, arguing that restrictions
furthered the disadvantages of women. According to the group, the custodial parent was
best able to determine the best interests of the child and the Court should give deference
to their views. In fact, the group suggested, the best interests of the child “were
inextricably linked to the well being of the custodial parent” (LEAF Factum, _Goertz_, 10).
Thus, the Court should interpret the best interests of the child consistent with the “constitutional goal of promoting women’s substantive equality” (LEAF Factum, Goertz, 13).

The Supreme Court did, in fact, allow the mother to move to Australia with her child, but not until they had conducted a fresh inquiry into the best interests of the child. In this inquiry, the Court stated that the interests and rights of the parents were not important – that the child’s best interest was the only consideration. Thus while the outcome was favourable to LEAF’s interests, the doctrine did not recognize their equality arguments.

Long Term Success

LEAF’s overall success rate in the family law issue area is 83%. Common law spouses have a remedy available to them that has been interpreted generously for their interests. Spousal support doctrine has developed favourably after an early loss. The Court seems to have gained a more realistic view of the economic disadvantages of marriage for women than it demonstrated in Richardson. It has showed sensitivity to the “feminization of poverty” and indicated that the objective of spousal support is to alleviate the economic losses of the disadvantaged spouse. The doctrine on child custody has not been as favourable as LEAF would like, but the Court has allowed a custodial mother to move great distances over the father’s objection. Overall, the group’s 83% success rate is probably an accurate reflection of their gains.
Influences on Family Law Doctrine Development

The path of doctrine in family law developed in a primarily favourable direction. But what determined that path? Why did the Court originally question the economic disadvantage “flowing from marriage” but embrace it five years later?

Court Membership

Court membership may have had an influence in the family law area. Cases producing positive doctrine for LEAF’s interests were heard by different justices from those sitting on cases producing negative doctrine. For example, none of the Justices who voted in the majority – against LEAF’s interests – in Richardson, heard the Moge case, which was decided favourably for the group’s interests. The only Justice to hear both cases, LaForest, wrote in dissent in Richardson and in the majority in Moge. (His opinion in Richardson was favourable enough to be quoted by LEAF in their Moge factum.) When the Court later produced negative doctrine in Goertz, five of the six Justices signing the majority opinion had not participated in Moge. In fact, the three Justices hearing Goertz who had been in the Moge majority, Justices LaForest, L’Heureux-Dube and Gonthier, wrote concurring opinions in Goertz, advocating doctrine more favourable to LEAF’s interests than that contained in the majority opinion. Thus, in the family law area, it does seem to matter which Justices hear the case.

Legal Considerations

It is also possible that legal considerations had some influence on the development of doctrine in this area. They seem to have had at least some impact on the
shift in doctrine between Richardson and Moge. Many feared that Richardson had established an unfavourable model of spousal support. However, the majority in Moge argued that Richardson merely “showed respect for the wishes of persons who... decided to forego litigation and settled their affairs by agreement under the 1970 Divorce Act” (Moge 1992). Moge, by contrast, did not involve a consensual settlement and was decided under the 1985 Divorce Act. This latter Act explicitly stated that one of the objectives for a spousal order was to “relieve any economic hardship” arising from the termination of marriage, while another was to “recognize any economic advantages or disadvantages” experienced by the spouses through the marriage or its breakdown. Thus, the statutory language forced the Court to at least a more favourable consideration of LEAF’s interests.

Legal considerations probably had some influence in Goertz as well. The Court had established precedent on the “best interests of the child” to guide them in their decision. The introduction of equality arguments into their interpretation was an uphill battle.

Change in Government

The government does not appear to have influenced the path of doctrine in the family law area. No change in government took place between Richardson and Moge to give different signals on acceptable spousal support interpretation. More importantly, the government did not participate in any of the family law cases to press its opinion before the Court. Thus, it is unlikely that government positions had an impact on Court doctrine.
Public Opinion

Public opinion probably did not have an impact on the development of family law doctrine in the time period of interest here. Family law cases do not raise issues that generate much publicity before they are heard, and there is no evidence to suggest a change in public opinion in the five years between Richardson and Moge. Certainly the government’s view on economic dependency and marriage remained unaffected. Thus, there was nothing to raise the Court’s awareness of public concern in these situations, if, indeed, there was any.

Interest Groups

LEAF appears to have exerted some influence in the family law area. This seems particularly true for Moge. The Court’s opinion in that case makes use of some of the statistics provided in LEAF’s factum and picks up on some of the arguments as well. The “feminization of poverty” and the effects of the division of labour in the home – emphasized in LEAF’s factum – are acknowledged in the Court’s decision and the doctrine established is very close to that championed by LEAF. This is obviously not the case in Goertz, but even here, L’Heureux-Dube’s concurring opinion suggests that LEAF’s voice is being heard.

While the group appears to have had some impact, they have not been dominant in the area. Participating in only two of the 12 cases in the area, LEAF had a success rate of 50% doctrinally. When they have not participated, the Court has decided cases favourably 90% of the time. This might suggest that LEAF’s participation was unnecessary for (or even detrimental to) favourable doctrine. But this high percentage
may not be indicative, since most of these cases involved narrower issues. Of more concern to the group is the fact that LEAF has not managed to persuade the Court to accept their ultimate objective: the group’s equality arguments have been largely ignored by the Court.

Other interest groups have not exerted influence on the development of doctrine in this area – mainly by lack of participation. Only two cases (other than those in which LEAF participated) have generated interventions and, in both cases, this was by provincial governments, not interest groups. The governments intervened to argue that the provisions of the Divorce Act did not violate freedom of religion guarantees in the Charter, and confined their factums to constitutional arguments – not addressing the custody issues.

Thus the path of doctrine in family law appears to have been influenced, in varying degrees, by changes in the Justices hearing the cases, by legal considerations, and by the arguments of LEAF itself.

**Sexual Assault**

Violence against women has been one of LEAF’s primary areas of concern. The group has intervened before the Supreme Court in sexual assault cases dealing with a wide range of issues, including the interpretation of limitation periods for bringing claims, consent, “rape shield” laws and disclosure of records. LEAF argues that sexual assault is an equality issue since it is “a social practice that harms women as women, because they are women” (LEAF Factum, *Norberg v. Wynrib* 1992, 1). As “targets” of sexual assault, women are relegated to a “disadvantaged”, “subordinate” status in society.
The group urges the Court to decide sexual assault cases in a manner consistent with the fundamental values of the Charter, and to avoid “stereotypical and unfounded assumptions about women and sexual assault” (LEAF Factum, R. v. Whitley 1994, 7). Has the Court listened? Has doctrine in the sexual assault area developed favourably for LEAF’s goals?

Limitation of Actions

In K.M. v. H.M. (1992), the Supreme Court faced a common feature of sexual assault cases: delay in bringing charges. This case involved a victim of incest who sued her father for damages, and for breach of a parent’s fiduciary duty, years after the assault. Her attempts to disclose the abuse had come to nothing until she was an adult and attended a therapy group for incest survivors. There she began to realize her father’s actions were responsible for her psychological problems, and ultimately brought suit. Professional opinion held that she “was unable to assess her situation rationally until she entered this therapy” (K.M. 1992).

Arguing that the interpretation of the limitation of actions must be consistent with the fundamental values in the Charter, LEAF’s factum detailed the special problems associated with childhood sexual assault – including a veil of secrecy and complex psychological injuries. These problems ensure that mere disclosure of the abuse does not mean the victim understands that it is wrong or recognizes the injuries it has caused. Often it takes therapy to help victims discover the causal connection. LEAF argued that victims could not be expected to bring suit in childhood assault cases until this connection had been made. Thus the limitation of actions should be delayed by the
reasonable discoverability principle.” The running of the limitation period should not begin until the victim “discovered or ought reasonably to have discovered” the wrongful nature of the act and the causal connection between the act and a subsequent injury (LEAF Factum, K.M., 17). To LEAF this meant the limitation period would not begin until a victim had received professional help.

The Supreme Court ruled in favour of the victim, holding that incest was both a tortious assault and a breach of fiduciary duty. While the tort claim was subject to a limitations period, the Court argued this did not begin until the victim was “reasonably capable of discovering the wrongful nature of the defendant’s acts and the nexus between those acts and the [victim’s] injuries” (K.M. v. H.M. 1992). Thus, in this case, the discovery did not occur until the victim had entered therapy. The court went further, to rule that the fact this discovery is often tied to therapy in incest cases “creates a presumption that incest victims only discover the necessary connection between their injuries and the wrong done to them... during some form of psychotherapy” (K.M. v. H.M. 1992). Although the Court stated it was unnecessary to address LEAF’s equality arguments, the main thrust of its decision was a victory for LEAF’s interests. The special circumstances surrounding childhood sexual assault had been recognized and some compensation could be achieved.

Consent

In sexual assault cases, the issue of consent is an important one. Many accused argue that the woman actually consented in the act, or that they had had an “honest, but
mistaken, belief in consent.” LEAF advocates a narrow interpretation in consent and pushes the Court to recognize “the distinction between consent and coerced submission in the contest of unequal power” (LEAF Factum, Norberg v. Wynrib 1992, 7).

Many of the Court’s decisions, early in the time period of interest, did limit the consent defense for the accused. The Court ruled that the defense of “honest but mistaken belief in consent” could not be used where the accused “had blinded himself to reality” (Sansregret v. the Queen 1985). It also held that this defense did not automatically go to a jury in a sexual assault case. Rather, to be put before the jury, evidence was needed that gave the defense an “air of reality” (R. v. Robertson 1987). And in R. v. Reddick (1991), the Court seemed to suggest that, to achieve this “air of reality,” evidence was needed from (or had to be supported by) sources other than the accused. However, this suggestion was the source of some confusion in later rulings. In R. v. Osolin (1993) (and again in R. v. Park 1995), the Court settled this confusion in an unfavourable direction when the Justices explicitly ruled evidence did not have to be independent of the accused in order to give a consent claim an “air of reality.” Yet, Osolin was not a complete loss, as it did uphold the “air of reality” test against a constitutional challenge (when an accused had argued it violated his right to fair trial).

The interpretation of consent, itself, came into direct question in Norberg v. Wynrib (1992). Laura Norberg was addicted to pain killers. When it became impossible to obtain any more prescriptions from other doctors, she gave in to one doctor’s offer to trade drugs for sex. After receiving treatment for her condition, Norberg sought damages from that doctor for sexual assault, negligence, breach of fiduciary duty and breach of
contract. She was unsuccessful at trial, after she admitted that the doctor had not used physical force, and that she had known he was lonely and "played" on the fact that he liked her.

LEAF argued that by "denying recovery to litigants regarded as 'immoral,'" and confusing consent with coerced submission, the trial court's ruling "condoned" sexual assault – and in particular "sexual exploitation of chemically dependent women" (LEAF Factum, Norberg, 5). The group urged the Court to rule "that consent to sex does not exist where the defendant occupies a position of such power, trust or authority that the plaintiff is left no free choice to decline to have sex" (LEAF Factum, Norberg, 12). They argued that this described the doctor-patient relationship. The doctor's power and the patient's vulnerability in this relationship meant that avoiding sexual contact with patients was a doctor's responsibility. Thus Laura Norberg should be awarded damages for the harms she had suffered.

The Supreme Court acknowledged, in Norberg, that a notion of consent had to include "an appreciation of the power relationship between the parties" (Norberg 1992). The relative weakness of one of the parties could interfere with the freedom of their will. In circumstances where a weaker party is not able to choose freely, the Court ruled that consent must be considered "legally ineffective." In "power dependency" relationships, a two step test should be used to determine whether consent had been freely given. First, the Court will determine whether there was, in fact, an inequality between the parties, and second, whether there has been exploitation. In Norberg, the Court recognized that the doctor-patient relationship did involve unequal power, and that Laura Norberg's drug dependence had left her unable to make a free choice. Further, the doctor had exploited
his knowledge of her drug dependence in order to promote his own personal interests. This was a complete victory for LEAF. The Court had noted the effect of unequal power in a relationship and defined consent favourably for LEAF’s interests.

The definition of consent in more equal relationships would also be subject to litigation. The Court again provided favourable doctrine for LEAF’s interests when it ruled that lack of resistance did not equal consent (R. v. M. (M.L.) 1994). This favourable doctrine would continue, and in 1999, the Court ruled that “no means no” in sexual assault (R. v. Ewanchuk). 11 Thus a woman either consents or she does not – the accused cannot rely on a defense of “implied consent.” If the woman did not consent, it does not matter whether she physically resisted the advances, or how ambiguous her conduct was – there still was no consent. 12 LEAF celebrated this doctrine which “upheld the fact that no one has the right to sexually touch another unless that person clearly communicates consent” (LEAF 1999).

Protection for the Victim’s Identity, Reputation and Activity

One of LEAF’s first cases before the Supreme Court (Canadian Newspapers Co. v. Canada 1988) addressed a provision of the Criminal Code (s.442.3) that allowed bans on the publication of names and other information that could identify victims of sexual assault (the ban was mandatory when the victim applied for it). The Canadian

11 This case was the subject of controversy when Justice McClung, from the appeal court whose opinion had been overruled in Ewanchuk, sent a letter to one of Canada’s national newspapers criticizing the Court’s decision. His criticism included seemingly personal attacks on Justice L’Heureux-Dube, who had taken him to task for his use of “inappropriate myths and stereotypes” in her concurring opinion.

12 Justice McClung had emphasized that the victim “did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines” (Ewanchuk 1999). He had also pointed out that she had a six month old child and lived with her boyfriend.

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Newspapers Company had challenged the provision on the grounds that it infringed the freedom of the press guaranteed in s.2(b) of the Charter. LEAF intervened (in a joint brief with seven allies) to argue in favour of publication bans, arguing that “for a woman to be known as a victim of sexual violence is always stigmatic, frequently humiliating, and sometimes dangerous” (LEAF et. al. Factum, Newspapers, 6). The intervenors argued that women would be less willing to report a sexual assault if they were unable to control whether their identity would be published. They also argued against reducing the “mandatory” ban to a discretionary one (giving judges power to decide whether a ban is appropriate in a particular situation), since the uncertainty it would create would decrease reporting.

The Supreme Court’s reasoning in Newspapers was favourable to LEAF’s interests. While the Court did hold that the provision allowing publication bans infringed the freedom of the press, it upheld the provision as a justifiable limit on the right under s.1 of the Charter. The Court recognized that these bans encouraged victims to come forward, which in turn facilitated the prosecution of the sexual assault. The provision’s objective – suppressing crime – was held to be pressing and substantial enough to justify the infringement on the press. The Court even held that a discretionary ban would not meet this objective since victims would not have assurance that their identity would be protected.

LEAF was delighted with this positive foundation in the sexual assault area. They had successfully defended a favourable provision against attack. And the victory in Newspapers was furthered in R. v. Adams (1995), when the Court held that publication
bans cannot be revoked without the consent of both the Crown and the victim. The Court argued that allowing bans to be revoked without consent, would act like a discretionary ban and discourage women from filing charges of sexual assault.

However, while the Court has tended to rule favourably for LEAF’s interests in matters of protecting the victim’s identity, they have approached her sexual history much differently. In R. v. Seaboyer (1991), the Court was asked whether the Criminal Code’s “rape-shield” provisions (ss. 276 and 277) infringed ss.7 and 11(d) of the Charter: the right to fundamental justice and to a fair trial. The “rape-shield” provisions restricted the right of the defense to cross-examine and lead evidence of a victim’s prior sexual conduct. Section 277 prevented a victim’s sexual reputation from being used to challenge her credibility, while section 276 imposed restrictions on the introduction of evidence of previous sexual activity.

LEAF (in a coalition factum with rape crisis centres and others) argued that these sections were vital to avoid evidence which was irrelevant and prejudicial. The group argued that “empirical research supports the conclusion that the admission of sexual history in sexual assault trials independently reduces the possibility of conviction and lowers sentences” (LEAF Factum, Seaboyer, 11). They added that the embarrassment faced by the victim would ensure a decrease in the number of reports.

The Supreme Court held that s.277 did not infringe the Charter. There was no connection between a woman’s reputation and the credibility of her evidence, and thus no legitimate reason to introduce it at trial. However, to LEAF’s dismay, the Court did strike down s.276, arguing that it “had the potential to exclude evidence which was relevant to the defense and whose probative value is not substantially outweighed by the potential
prejudices to the trial process” (Seaboyer 1991). The majority argued that s.276 was flawed in that it did not distinguish between the different purposes for which evidence of sexual activity could be introduced. According to the Court, it was not the evidence of sexual activity that was the problem, it was the misuse of this evidence. Thus, in attempting to prevent sexist use of sexual conduct evidence, the provision had gone too far and had made inadmissible evidence essential to a fair trial.

This was a devastating loss for LEAF’s interests. They turned hurriedly to Parliament for some redress. The Mulroney government did consult with women’s groups in drafting a new sexual assault law (Morton and Allen 1997). In addition, LEAF submitted a report to the legislative committee considering the new sexual assault bill, urging Parliament to make amendments consistent with gender equality. In 1992, the new s.276 of the Criminal Code came into effect. While it did respond to Seaboyer, allowing judicial discretion on the admission of evidence on sexual history, in other respects, this section was even tougher than the original one – narrowing the definition of “consent” and the defense of “honest but mistaken belief in consent.” Women’s groups were so pleased with the final output that one feminist suggested that the Supreme Court “may unwittingly have done women a service” – that Seaboyer may have been a “blessing in disguise” (Shaffer 1992; Mandel 1994).

Disclosure of Records

In the 1990s, the Court has faced a new issue in sexual assault: demands for disclosure of a victim’s medical, psychological and other personal records. The accused have insisted access is necessary for their right to a fair trial and their ability to make
“full answer and defense.” LEAF, however, sides with victims and against allowing disclosure, arguing the requests are based on myths and stereotypes about sexual assault victims and their credibility. The group has advocated that the Court allow no personal records to be disclosed in any sexual assault case. They argue that until the law addresses, rather than reinforces, the inequality and degradation of women, disclosure is too likely “to reinstate sexism in the administration of criminal law, to deter reporting, to distort the fact finding process and to violate victims’ integrity” (LEAF Factum, R. v. O’Connor, 1995, 19).

LEAF was not successful in achieving this goal. In R. v. Osolin (1993), the Court ruled that the defense should be allowed to cross-examine the victim on her medical records in order to generate evidence on consent and on the victim’s credibility, if the probative value of the evidence was not outweighed by its prejudicial effect. In R. v. O’Connor (1995), the Court ruled that the Crown’s disclosure obligations were unaffected by the confidential nature of therapists’ records. Once the Crown receives this type of document, the concern for privacy disappears. Thus, “if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defense” (O’Connor 1995). The relevance of these records is presumed.

However, for records in the hands of a third party, the Court ruled that the accused must apply for disclosure and convince a judge that they are relevant to his defense. Further, once convinced of their relevance for disclosure, the judge must decide the extent to which they should be produced to the accused. In doing this he must weigh the competing rights and determine the probative value versus the prejudicial effect. This
reasoning, with its built in safeguards on disclosure, was more favourable to the group, but LEAF was still concerned about the potential for abuse. This was far from their ideal situation – third party records were not protected, there was no guarantee of privacy, and their goal of no disclosure in any sexual assault case appeared unlikely to be achieved.

To preempt disclosure, some sexual assault crisis centres instituted policies of shredding files that had police involvement. This would prove to be ineffective when the Court held in one such case, *R. v. Carosella* (1997), that this action violated the accused’s right to a fair trial. However, that same year, Parliament passed a new amendment to the Criminal Code, which provided concrete guidelines for when personal records could be introduced. LEAF had been active in the drafting of this legislation and was pleased with its explicit recognition of the victim’s equality rights (LEAF 1998). However, the group’s ultimate objective – no disclosure in any sexual assault case – remains elusive. Even more disturbing for LEAF, the small gains they have made are now being threatened. In 1999, the Court heard a case challenging the constitutionality of the 1997 legislation (*L.C. v. Mills*). Brian Mills is seeking the production of his 13 year old victim’s medical records. The Court has yet to decide this case.

**Long Term Success**

LEAF’s overall success rate for all the sexual assault cases of interest was 74%. However, their performance was unequal over the issues. The group was very successful in terms of the interpretation of limitation of actions. The Supreme Court has been sensitive to one of the distinctive features of sexual assault – the delay in bringing cases.
However, LEAF was very unsuccessful in the disclosure of records. The group’s objective that no disclosure be allowed has proven unattainable. And even their smaller gains may not be lasting.

In consent, after some minor setbacks on the defense of “honest but mistaken belief in consent,” LEAF achieved some important victories. The Court has recognized the effects of power dependent relationships on consent. It has insisted that consent be voluntary and that lack of resistance cannot be equated with consent. As of its latest case, *Ewanchuk*, “no” means “no.” LEAF has experienced similar success with the protection of the victim’s identity, reputation and activity. Publication bans are allowed as a vital means of encouraging assault reports. A woman’s sexual reputation has been finally prohibited as a means of challenging her credibility. Even LEAF’s devastating loss in *Seaboyer* has been rectified by Parliament. Thus, while a woman’s previous sexual activity may be cross-examined in some situations, these are infrequent and carefully scrutinized.

Overall, LEAF must be pleased with the path of doctrine. Progress has been made and the Court has become more sensitive to the myths and stereotypes that surround sexual assault. However, they feel this area needs continued vigilance. They have not achieved some of their major objectives, and those gains they have made have come under frequent attack.
Influences on Sexual Assault Doctrine Development

In some issues, the path of doctrine has been favourable to LEAF's interests; in others it has gone in the wrong direction. What is responsible for the difference? What factors have influenced the Court's doctrine development? Has LEAF managed to have any impact in areas they consider vital to women's equality?

Court Membership

Court membership may have had an impact on the development of doctrine in some of the issues. Looking at the issue of consent, one sees that while *Norberg* had been a significant victory for LEAF's interests, *Osolin* had established unfavourable doctrine. Interestingly, the four dissenters in *Osolin* had all been in the majority in *Norberg*, and three of the five justices ruling unfavourably in *Osolin* had not participated in the favourable *Norberg* decision. The position of these three new justices obviously had an impact – tilting the Court in an unfavourable direction. But this change in course still needed two of the justices from *Norberg* to rule more unfavourably in *Osolin*. Thus, some factors beyond the change of membership must be influencing the development of doctrine in this area.

Since the sexual assault area involves many different issues it is difficult to trace influences on its development. Change of membership cannot account for the difference between the favourable decision in *K.M. v. H.M.* and the unfavourable decision in *Seaboyer*. Five of the justices in the majority in *K.M.* were also in the majority in *Seaboyer*. Thus while two members of the *Seaboyer* majority, Lamer and Stevenson, did not hear *K.M.*, their absence did not determine the result. However, while both cases
involved the protection of the victim versus defendant rights, the different specific issues complicate the picture. Thus, while a change in membership did not influence the variation in doctrine, the justices’ preferences in each of the specific issues may have had an impact.

This could also help explain why the same justices who had voted favourably for LEAF’s interests in Norberg and K.M. voted against their interests in the disclosure of records area – joining the majority to allow some disclosure of records. However, it must be remembered that while this was unfavourable for LEAF’s ultimate objective, the decisions did put restrictions on their release and emphasized the balancing of rights that must occur. While it was not the favourable doctrine LEAF preferred, it was not a drastic negative shift in doctrine – thus the justices may have been acting consistently over the areas.

The different preferences of the justices, across the specific issue areas, cannot be ruled out as an influence on the development of doctrine in the sexual assault area as a whole. However, membership changes are unlikely to have had a significant effect.

Legal Considerations

The case facts have probably had more influence in the sexual assault issue area than other legal considerations. The Justices have been much more sympathetic to the victims of sexual assault in cases addressing the protection of their identity, than in cases dealing with their cross-examination on personal records and past sexual activity.  

Of course, whether it is the different facts, or the justices’ different preferences on these facts, which determines the different doctrine, is unclear – see the discussion in Chapter 6.

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Changes in statutory language may have also influenced the Court’s decisions. The new legislation, enacted in the aftermath of Seaboyer, tightened up the definition of consent. Consent was no longer defined merely negatively – as the absence of threats or fraud – it was now defined positively as “voluntary agreement” (Mandel 1994; Criminal Code s.276, 273). The legislation also defined an agreement induced by “abusing a position of trust, power or authority” as a lack of consent (Criminal Code s.273, 1992). Thus, when the Court decided Norberg favourably for LEAF’s interests, emphasizing the need for consent to be voluntary, its decision may have been determined by the new statutory language before it.

The effect of the other major statutory change – an amendment dealing with the disclosure of records – remains to be seen as the Court is currently considering whether the provision, itself, is constitutional.

Change in Government

The change in government probably had little effect on the path of doctrine. Favourable and unfavourable decisions were made by the Court during both the Mulroney and Chretien governments. There was no apparent change in the direction of decisions corresponding to a change in government. Legislation has been enacted by both Mulroney and Chretien in response to Supreme Court decisions, suggesting that the Court was not notably sensitive to either government’s positions. In fact, it is unlikely that changeovers in the federal government brought different positions to sexual assault. All
federal governments will be concerned with protecting the Criminal Code and neither the Liberals nor the Conservatives seem more inclined to favour defendants’ rights. Both seem more inclined to support the victim of the assault.

However, while change in government does not appear to have had an impact, the government itself has exerted some direct influence on doctrine. In the aftermath of Seaboyer, favourable legislation was enacted by Mulroney’s government to address cross-examination on victims’ past sexual activity. And, in 1997, the Chretien government passed legislation to address the disclosure of records. LEAF was involved in the drafting of both of these bills and was optimistic about their effect.

This governmental influence came about through amendments to the Criminal Code – not by attempted influence on the Court’s decisions. The government has not often participated in sexual assault cases – the prosecution of the accused is left to the provincial attorneys general. In the few cases in which they did take a position, they have attempted to defeat a challenge to their laws. They were successful in cases involving victims’ identity but were on the losing side in Seaboyer. Any influence before the Court, therefore, is difficult to detect.

Public Opinion

Public opinion probably did not have an appreciable impact on the path of doctrine in this area. Most sexual assault cases do not generate a lot of attention, so the Court is probably unaware of how the public stands on the specific issues under review. Ewanchuk was probably more the exception than the rule. This 1999 case generated public interest, as much after the fact as before, when the lower court judge spoke out
against the Supreme Court’s decision. People on both sides of the issue spoke out on each Court’s treatment of the woman’s actions in the case. While, it is too early to determine whether these opinions will have an influence on future Court decisions, the case did attract unusual public attention.

The Court certainly did not seem to have been influenced by public opinion in their *R. v. Seaboyer* decision. While they struck down a rule restricting the cross-examination of a woman’s previous sexual activity, a poll conducted less than six months later found 55% of respondents felt that “in sexual assault trials... the alleged victim’s history of past sexual behaviour is... irrelevant as trial evidence” (Gallup Canada 1992). Further, if the Supreme Court did, in fact, follow the public’s position on sexual assault issues, one would expect their decisions to have become increasingly more favourable to victims over time. After all, by 1992, nearly 80% of respondents stated that “the most important issue facing women” was violence against women (Environics Canada 1992).

*Interest Groups*

LEAF may have had some influence in the sexual assault area but it is difficult to demonstrate. While they were successful in 63% of the cases in which they intervened, cases where they did not participate were decided favourably 79% of the time. This does not suggest an overwhelming influence, although caution must again be used in interpreting these bare numbers as many of the cases in which they did not participate involved narrower issues. In the cases in which LEAF did intervene, their arguments may have had an impact. In *K.M. v. H.M.*, where LEAF was the only intervenor, some of the Court’s arguments on the limitation of action were similar to those made by the group –
particularly in the emphasis on the importance of therapy to incest survivors. However, even in this case LEAF’s equality arguments were not addressed. And in cases like Newspapers, the only arguments of LEAF that were picked up by the Court were also made by several other participants in the case.

LEAF may have helped influence the path of doctrine in the future through their efforts at the legislature. They were involved in consultations in the drafting of favourable amendments to the Criminal Code. Both the Mulroney and the Chretien governments seemed to listen to the group’s arguments. It remains to be seen whether the Court will allow these gains to stand.

Other interest groups probably have not had much influence in the sexual assault area, again due to their lack of participation. In the few cases in which groups did participate more briefs were favourable to LEAF’s positions than unfavourable. In three of these cases, the Court’s opinion was unfavourable despite the added support. In the remaining two cases the outcome was favourable. However, these were cases dealing with the protection of the victim’s identity – something the Court has seemed predisposed to allow.

Thus the development of doctrine in the sexual assault area appears to have been influenced by the justices themselves, legal considerations, the government (although not through litigation), and to a much lesser extent, LEAF.

Equality and Discrimination

The Charter’s equality guarantees were the main motivation behind the creation of LEAF, and the group has been active in important equality cases since, urging the
Court to “adopt an approach to equality which addresses the roots of the social inequalities women experience” (LEAF 1999). Their concern has led them to intervene in cases dealing with such central concerns as employment discrimination, pregnancy discrimination and sexual harassment, as well as cases having implications for women’s equality rights such as the interpretation of s. 15 and sexual orientation discrimination. Has the Court listened to LEAF in their area of main concern? Has it produced doctrine favourable to the group’s interests over the long term?

The Interpretation of Section 15

Andrews v. Law Society of British Columbia (1989) was a landmark case for the Canadian Supreme Court and LEAF. Andrews, a British subject but a permanent resident of Canada, had been denied admission to the British Columbia bar because he was not a Canadian citizen. Andrews argued that this requirement violated the equality rights guaranteed in s. 15 of the Charter. LEAF intervened in this case after two lower courts ruled against Andrews. The group, and several other intervenors, were concerned with the Court of Appeal’s interpretation of s. 15. They hoped to persuade the Supreme Court to adopt a more favourable interpretation – and thus establish precedent more favourable for the interests of women (Razack 1991). This was their first big chance to ensure the Court made the “proper” interpretation of the hard won equality provisions.

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14 A co-respondent was added to this case when it appeared before the Supreme Court. Kinersly was an American citizen (but a permanent resident of Canada) who had brought a similar complaint.

15 Section 15 of the Charter states that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” (Constitution Act 1982).
LEAF's factum urged the Court to take a “purposive approach” to the interpretation of the Charter, rather than a narrow or technical one. They argued that the purpose of s.15 was to benefit those who had been historically disadvantaged. Thus, even though s.15 guarantees against discrimination based on such all-encompassing terms as sex and race, the intended beneficiaries are not white males, but rather, those who have been excluded from power and equal participation in society – the “powerless, the excluded, [and] the disadvantaged” (LEAF Factum, Andrews, 10). Any group enumerated in s.15, or “akin” to those enumerated, fall under its protection. Further, these beneficiaries are entitled to substantive equality, not just the equal application of laws. Therefore, it is not enough that the process is equal – that the government applies the law equally – instead, the substance of the law had to be equal as well.

To ensure substantive equality, LEAF was determined to get the Court to abandon the “similarly situated” reasoning used in earlier decisions under the Canadian 1960 Bill of Rights, and by the lower court in Andrews. American women’s groups had used this principle in their early equality cases, arguing that women were similarly situated and thus should be treated the same as men. However, as litigation progressed in the United States, the use of this principle would backfire and actually damage the groups’ interests. Extending the same reasoning, the American Supreme Court would rule that different treatment was allowed when the sexes were not similarly situated (for example, in terms of the military draft in Rostker v. Goldberg, and in terms of statutory rape in Michael M. v. Sonoma County). LEAF learned from the mistakes of its American counterparts and used its factum in Andrews to point out the dangers of the similarly situated approach.
The group warned that differences can always be found between people, and the biological differences between the sexes would ensure that much discriminatory treatment would be allowed under the similarly situated principle.

In another departure from their American counterparts, LEAF argued that the interests of true equality might require “differentiation in treatment.” Perfect symmetry may not further the interests of the disadvantaged. Instead s.15 “is meant to accommodate legislation which favours the disadvantaged over the advantaged” (LEAF Factum, Andrews, 16). Thus, LEAF’s litigation can be distinguished from that of the American women’s groups: the Canadian group does not push for strict or formal equality, preferring its own concept of substantive equality instead.

LEAF also argued that s.15 covered systemic discrimination, not just direct discrimination. Systemic (also called indirect or disparate impact) discrimination includes height and weight requirements – requirements that do not discriminate directly against women but do affect them disproportionately. LEAF pointed out that “explicit ‘facial’ distinctions against women are comparatively few, yet sex inequality in society is pervasive and damaging. [They argued that] the greatest harm is done by distinctions which are facially neutral” (LEAF Factum, Andrews, 17). Thus the Court needed to be sensitive to the “adverse impact” of measures before it. The group argued further that such measures need not be intentional to be discrimination.

Finally, LEAF was concerned about the Court’s treatment of s.15 in relation to s.1 of the Charter. Section 1 indicates that the rights guaranteed under the Charter are subject to “reasonable limits.” The B.C. Court of Appeal had considered whether the citizenship requirement was “reasonable and fair” when it was determining whether discrimination
under s.15 had occurred. Under this reasoning, distinctions would not be discrimination if
they were reasonable. LEAF preferred to “get out of Section 15 and into an analysis
under Section 1” (Razack 1991, 102) as quickly as possible. Thus, once an infringement
under an enumerated or analogous ground was established under s.15, any justification of
the distinction should be left to s.1 – where the burden of proof fell to the government.

The Supreme Court’s decision in Andrews was a victory for LEAF. The Court’s
interpretation of s.15 was very close to that championed in LEAF’s factum. Advocating a
purposive approach to the Charter, the Court stated that s.15 was “the broadest of all
guarantees in the Charter. It applies to and supports all other rights guaranteed by the
Charter” (Andrews 1989, 185). The Court held that the similarly situated test was
deficient – that bad law could not be saved because it operates equally. Further, not every
difference in the treatment between individuals would result in inequality, but identical
treatment could produce inequality (Andrews 1989). The Court also defined
discrimination to include both intentional and unintentional distinctions, and argued that
one must look at the effect of the distinction. Finally, the Supreme Court set forth a two
step approach to equality litigation. First, it must be determined whether an infringement
has occurred. And if such an infringement does exist, the Court asks whether it can be
justified under s.1. The Justices emphasized that these steps must be kept separate since
the burden of proof shifts between them: claimants were responsible for establishing that
an infringement existed while the state had to demonstrate that the infringement was
justified.
The Court’s decision in Andrews would affect all of LEAF’s subsequent litigation. The “proper” interpretation of the “rights on paper” in s.15 ensured that the group had a powerful tool with which to pursue their goals.

Analysis Under Section 15

In 1995, a trilogy of cases addressed the application of s.15 itself – the steps to determining discrimination – by three different approaches (Miron v. Trudel 1995; Egan v. Canada 1995; Thibaudeau v. v. Canada 1995). In Miron, a two step analysis of s.15 was put forward. To establish a violation of s.15, claimants had to first demonstrate that they had been denied “equal protection” or “equal benefit” of the law compared to someone else. If this was done, the claimant then had to demonstrate that this denial constituted discrimination. To do this, he had to show that the denial was based on one of the grounds enumerated in s.15 (or an analogous one), and that “the unequal treatment was based on the stereotypical application of presumed group or personal characteristics (Miron 1995).

The minority in Miron put forward a second approach and this was adopted by the majority opinion writer in Egan. This approach suggests that to discover discrimination, one must analyze the relevancy of a distinction to the purpose of the legislation (if that purpose is not discriminatory). Under this approach, some distinctions will be outside the scope of s.15.

Yet a third approach has been put forward by L’Heureux-Dube in all three cases. Under this approach, discovering discrimination requires a determination of whether the distinction is “capable of either promoting or perpetuating the view that the individual
adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being” (Egan 1995). To determine this, one must consider both the group and the nature of the interest which have been adversely affected by the distinction. Thus the “interaction of the group’s social vulnerability... and the constitutional and societal significance of the interest will determine whether the impact of the distinction constitutes discrimination” (Benner 1997). This latter approach appears the most favourable to LEAF’s interests, while the second approach appears the most unfavourable. However, the Court has yet to settle on one test to determine when s.15 has been violated.16

The confusion generated by the trilogy may have been eased somewhat by a few recent cases. These cases recognized that different approaches had been advocated for s.15, without selecting one or the other. Yet, in these cases, the Court appears to have attempted to communicate more clearly what will violate s.15 of the Charter (Vaughan 1999). Thus in Eaton v. Brant (1997), the Supreme Court ruled that placing a disabled child in a special education class did not violate s.15 because the child did not suffer a disadvantage – she was not adversely affected – despite the “different” treatment. Similarly, in Eldridge v. British Columbia (1997), the Court ruled that the failure of the province’s Medical Services Commission to provide for sign language interpreters as a medically necessary service did violate s.15, as deaf people did suffer a disadvantage –

16 In March 1999, the Court once again mentioned the differences in opinion as to the appropriate interpretation of s.15 (Law v. Canada, Minister of Employment and Immigration 1999). That decision went on to outline the areas where there was consensus, and provided a set of guidelines, based on this consensus, for the proper approach to equality analysis. Some of the Justices from all three approaches signed on to that opinion. However, it is too early to determine if these guidelines will be accepted in future deliberations as an agreed test for use in equality analysis.
they were adversely affected. In *Benner v. Canada* (1997), the Court struck down a provision of the *Citizenship Act* that allowed children born abroad before February 15, 1977, an automatic right to Canadian citizenship if they had Canadian fathers, but required a security check for those with only Canadian mothers. The Court ruled that this provision was unacceptable, since “access to the valuable privilege of Canadian citizenship is restricted in different degrees depending on the gender of an applicant’s Canadian parent” (*Benner* 1997).

**Discrimination in Employment**

LEAF’s efforts to achieve equality for women have led them into the area of discrimination in employment. The group has been concerned with unequal opportunities and unequal power balances in the workplace. In *Conway v. Canada* (1993, indexed as *Weatherall v. Canada*), LEAF intervened to protect the ability of women to work as guards in male prisons (and to protect female inmates from male guards). Conway had challenged the constitutionality of women guards performing frisk searches and patrols (both announced counts and unannounced “winds”) through the cell block. Conway held that these actions were not only violations of his right to privacy, but also of his right to equality, since female inmates were not subject to the same activities by male guards.

Intervening in favour of women guards in male prisons, LEAF argued that “one of the important factors contributing to [women’s] disadvantage in employment is occupational segregation” (LEAF Factum, *Conway*, 15). Thus women have been disadvantaged by their historical exclusion from positions as federal prison guards. And any new restrictions on the activities of women guards would have negative effects on
their employment opportunities and chances of equal pay and equal respect (LEAF Factum, Conway, 17). Further, the group held that women guards in male prisons had improved the conditions for male inmates. While sympathizing with the disadvantages of prisoners and their vulnerability, LEAF argued that Conway’s privacy claims were without foundation. Women had much more contact with males in their traditional roles as nurses and “care givers” – where their role was not questioned. In addition, prisoners had only a “reasonable expectation of privacy” and that had been met here.

While LEAF argued in favour of female guards in male prisons, they argued against male guards in female prisons – once again setting themselves apart from their American counterparts. The group held that the different treatment of male and female inmates was not a violation of equality – that the same treatment would in fact “exacerbate social disadvantage” (LEAF Factum, Conway, 10). Women are more threatened by cross-gender surveillance, where the power imbalance would increase fear of sexual violence.

The Court ruled that there was a “substantially reduced” level of privacy in prison and that the practices being challenged did not implicate prisoners’ privacy rights. They also held that the fact female prisoners were not subject to cross-gender frisk searches and patrols did not mean male inmates were discriminated against. The Court reiterated that s.15 does not demand identical treatment, and, “in fact, different treatment may be called for in certain cases to promote equality” (Conway 1993). The Justices recognized that historical, biological and sociological differences between the sexes meant that cross
gender searches would be more threatening for female inmates. Thus, this case was a substantial victory for LEAF – women guards had been allowed to keep their positions in male prisons, while female prisoners were still protected from male guards.

Pregnancy

In Brooks v. Canada Safeway Ltd. (1989), the Supreme Court faced an issue of central concern to most women: pregnancy and employment. Canada Safeway’s group insurance plan provided weekly benefits when employees missed work because of an accident or sickness. The plan covered pregnant employees except for the 17 weeks immediately surrounding the birth. During that 17 weeks, women could not receive the benefits even if they had an illness unrelated to pregnancy. The Supreme Court was asked to decide whether the company plan’s different treatment of pregnant employees was discrimination on the basis of sex, and thus prohibited by the Manitoba Human Rights Act.

This case was very important to LEAF’s interests. In a previous case, brought prior to the Charter’s enactment (Bliss v. Attorney General of Canada 1979), the Supreme Court had held that pregnancy discrimination was not sex discrimination since not all women got pregnant. Thus women, lacking constitutional protection, were forced to bear the consequences of this “voluntary” state. LEAF was determined that things would be different under the Charter. The group was optimistic since s.15 of the Charter had more inclusive equality language than the 1960 Bill of Rights. Women were not only guaranteed “equality before the law,” they were also guaranteed “equality under the law” – the equal administration of the law was no longer enough. In addition, Andrews had
discredited the similarly situated principle, suggesting the Court might be inclined to a more favourable decision. While *Brooks* was brought under human rights legislation rather than the Charter, LEAF was hopeful that Charter principles would influence the Court's decision.

The Supreme Court's decision in *Brooks* was, indeed, a victory for LEAF. The Court ruled that while pregnancy was not a sickness or an accident, it was a valid health related reason for absence from work and should not have been excluded from Canada Safeway's plan. The Justices argued that the plan would still have been found discriminatory if it had covered non pregnancy related illnesses during the excluded period – it was enough that it excluded compensation for pregnancy itself. The Justices argued this exclusion imposed an unfair disadvantage on pregnant women, for undertaking a condition that benefited everyone in society.

The Court also overturned the *Bliss* decision. The Justices held that pregnancy discrimination is sex discrimination "simply because of the basic biological fact that only women have the capacity to become pregnant" (*Brooks* 1989). The Canadian Supreme Court held that while not all women become pregnant, no one who is not a woman becomes pregnant – it cannot be separated from gender. Therefore, the fact that the plan discriminated against pregnant women, only, did not make it any less discriminating.

Interestingly, Safeway had based some of their arguments on the American Supreme Court's decisions in *Geduldig v. Aiello* and *General Electric v. Gilbert*. In response, the Canadian Supreme Court argued that the reasoning in those cases "does not fit well within the Canadian approach to issues of discrimination" (*Brooks* 1989).
Sexual Harassment

Another area of central concern to LEAF is sexual harassment in the workplace. The group argues that it is an equality issue as it "both mirrors and reinforces a fundamental imbalance of power between men and women in the workplace and in society" (LEAF Factum, Janzen v. Platy Enterprises, 1989, 6). The path of doctrine in this area has been favourable for the group's interests. In an early case (Robichaud v. Canada 1984), the Supreme Court held employers liable for sexual harassment under the Canadian Human Rights Act. The Justices argued that the Act was more interested in preventing or removing the discrimination, than in punishing it. Thus the motivations or intentions of those committing the harassment were not of concern – it was the effects that mattered. And since the employer was the only one who could remedy the effects of sexual harassment, they should be held liable.

In Janzen v. Platy Enterprises (1989), Court was asked to decide whether sexual harassment was sex discrimination, and whether an employer could be held liable for harassment of one employee by another employee (who had represented himself as a manager to the victim). The Court held that sexual harassment was indeed a form of sex discrimination. The fact that some and not all of the female employees had been subject to the harassment did not save it from being sex discrimination. Reiterating its reasoning in Andrews and Brooks, the Court argued that a finding of discrimination does not require uniform treatment of all members of a group. Thus, the fact that only those employees found to be sexually attractive had been victims of the harassment, did not save it from
being sex discrimination. Sexual attractiveness could not be separated from gender and only female employees were potential victims of the harasser. Referring to its decision in Robichaud, the Court held Platy Enterprises liable for the harassment.

In recognizing that sexual harassment was, in fact, sex discrimination, the Canadian Supreme Court made reference to the findings of the American Supreme Court in earlier cases. They also quoted various feminist writings on sexual harassment – including one of the best known American authorities on the subject, Catherine MacKinnon.

**Other Discrimination**

LEAF’s concern with the interpretation of equality rights in Canada has also led them to intervene in cases not directly involving gender discrimination – but with implications for women and LEAF’s litigation. Many of these cases have dealt with the definition of “spouse” and discrimination against sexual orientation (LEAF litigates on behalf of lesbians).

The Court used the first approach to s.15 advocated in the trilogy (outlined above), to rule that the exclusion of unmarried partners from the definition of “spouse” violated s.15 of the Charter (Miron v. Trudel 1995). However, using the second approach, it held that the exclusion of same sex couples from the definition of “spouse” in the Old Age Security Act did not violate s.15 (Egan v. Canada 1995). The majority in Egan argued that it was not enough that a denial of equality was based on an enumerated or analogous ground under s.15, instead the denial had to be irrelevant to the values underlying the legislation. Since Parliament had defined spouse to include married
couples in order to further a social objective – procreation – the denial of benefits to homosexual couples did not violate the Charter. This was a negative interpretation of equality rights for LEAF’s interests as it worked considerations from s.1 into the s.15 analysis. However, the Court did recognize in Egan that sexual orientation was an analogous ground included in s.15. This reasoning, and LEAF’s interest in rectifying the discrimination faced by lesbians, meant Egan was not a complete loss for the group.

LEAF’s interest in protecting lesbians from discrimination gained further favourable doctrine in Vriend v. Alberta (1998), when the Supreme Court “read in” sexual orientation to the Alberta Individual Rights Protection Act as a protected ground. This was an important decision as the Court indicated that a government could violate the Charter even by omission – by failing to do something, rather than only by enacting discriminatory legislation. The Court has gone even further in this area very recently. In M. v. H. (1999) the Court allowed spousal benefits for same sex couples (striking down the Family Law Act which had excluded same sex partners from making claims for support). The Court argued that the Family Law Act recognized “that financial dependence can arise in an intimate relationship in a context entirely unrelated either to child rearing or to any gender based discrimination” (M. v. H. 1999). Recognizing this and the fact that gay and lesbian couples were often involved in relationships of long duration (satisfying the FLA’s time requirements), they could not be excluded from its coverage. This decision may have broad reaching implications for the definition of spouse and the rights of homosexual couples.
Long Term Success

Numerically, the equality area has not been particularly successful for LEAF — only 57% of all the cases in the area were decided favourably for the group’s interests. However, this fails to recognize the actual path of doctrine. The equality area has provided some major victories for LEAF, and many of the losses have been in cases involving issues of lesser importance or cases attempting to “push the envelope” of equality rights.\(^\text{17}\)

In issues of central concern to the group, the Court has established favourable doctrine. Most importantly, its approach to s.15 has given LEAF a positive basis for their litigation. Many of the battles fought by women’s groups in the United States have become unnecessary for LEAF because of the Court’s interpretation of s.15 in *Andrews*. Governments in Canada are not allowed to justify different treatment for men and women using their physical differences — the similarly situated test has been discredited. Further, women are protected from systemic discrimination without having to prove intent. Pregnancy discrimination and sexual harassment have been ruled by the Court to be sex discrimination, and employers have been held liable for their employees’ acts. LEAF’s argument that different treatment may be necessary to promote equality, has also been accepted by the Court. Finally, after a few early losses, the equality rights of lesbians are now gaining more recognition from the Court. Thus, the path of doctrine in the equality

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\(^{17}\) For example, in *Symes v. Canada* (1993), a s.15 challenge was brought by a working mother who had not been allowed to deduct child care expenses as a business expense on her income tax. And in *Rodriguez v. British Columbia* (1993), a woman used s.15 (and others) to challenge a B.C. law prohibiting physician assisted suicide.
issue area has been more favourable than 57% would indicate. While the Court has not
usually been comfortable with attempts to push equality rights beyond their traditional
sphere, it has ruled very favourably on issues of central concern to most women.

Influences on the Development of Equality Doctrine

The path of doctrine has taken a favourable direction in equality issues of central
concern to LEAF. What has influenced this direction? Why did the Court abandon its
previous approaches to equality – including the similarly situated test – in Andrews? Why
did the Justices rule that pregnancy discrimination was, in fact, sex discrimination, after
rejecting that argument ten years earlier? Why have the Court’s more recent decisions on
sexual orientation been more favourable than early decisions? This next section will
attempt to determine the influences behind the changes in doctrine.

Court Membership

Court membership has probably had some influence on the path of equality
document, even if it has not been the deciding factor. Of the seven Justices hearing
Andrews, only two (Dickson and McIntyre) had been on the Court in the 1970s, when
decisions had made use of the similarly situated test. Similarly, only two of the Justices
hearing Brooks had been on the Court when it had decided Bliss (Beetz and Estey). Thus,
the almost complete replacement of justices over the time period may have brought
different preferences to the Court which caused the shift in doctrine. Of course, the
introduction of the Charter of Rights and Freedoms probably had more of an impact on
this shift, but the change in justices may well have had some influence on the interpretation given to the Charter. A more modern approach to equality jurisprudence would probably have accompanied the new Justices, particularly since two of the Justices hearing *Brooks* – and voting to overrule *Bliss* – were women, the first to sit on the Canadian Supreme Court.

The difference in court membership may also have had influence in the development of doctrine on the treatment of sexual orientation. The four dissenters in the unfavourable *Egan* decision (where same sex partners were not included in the definition of spouse for the *Old Age Security Act*), were joined by a new Justice (Binnie) to become the favourable majority in *M. v. H.* (where the *Family Law Act* was held unconstitutional for excluding same sex partners from spousal support). However, the fact that Chief Justice Lamer was a sixth member of the majority in *M. v. H.*, but had also been in the majority in *Egan*, suggests that some other factor is at work.

The influence of court membership appears significant in the different approaches to the analysis of s.15. The trilogy of cases in 1995 emphasized the importance of which Justices hear a case. Depending on the panel of justices assigned to hear an equality case, one of three different approaches to the interpretation of s.15 could be championed by the majority of the Court. Since the second approach is the least favourable to LEAF’s interests, different justice participation could be more or less damaging to the group’s interests.
Legal Considerations

The enactment of the Charter of Rights and Freedoms in 1982 has probably had the largest impact on the development of doctrine in the equality area. Section 15 of the Charter explicitly called for “equality under the law,” not just “equality before the law,” and for both “equal protection” and “equal benefit” of the law. Thus the Court had a different basis for their decisions in *Andrews* and *Brooks* than they had before 1982. The Charter, itself, suggests that the equal administration of law is no longer enough, that substantive equality is necessary. In addition, the new section 15(2) of the Charter may have led to the Court’s ruling that different treatment may actually promote equality. This provision allows laws, programs or activities that are designed to improve the condition of disadvantaged individuals or groups.

Legal considerations may have also influenced the path of doctrine in terms of sexual orientation. As noted above, Lamer voted in the majority of both *Egan* (an unfavourable decision) and *M. v. H.* (a favourable one). This may have been determined by the differences in the Acts before the Court. In *Egan*, the *Old Age Security Act* was designed to promote a social objective – procreation – which homosexual couples could not participate in. Thus Lamer (and the Court) ruled that their exclusion from the term “spouse” was justified. However, the *Family Law Act* at issue in *M. v. H.*, was designed to allow a partner to apply for support because of the financial dependence arising out of intimate relationships “in a context entirely unrelated… to child rearing.” Since homosexual couples could participate in such relationships, Lamer (and the Court) found they should be included in the Act’s provisions. Thus differences in legal considerations should have helped determine the doctrine emerging from each case.
Change in Government

The change in government does not appear to have had much of an effect on equality doctrine. Of course, the differences between the Mulroney government and the Chretien government do not appear to have been significant in this area, either. Both governments have participated at Court more often to argue against LEAF’s positions than for them. Yet, decisions both favourable and unfavourable to LEAF’s interests were made under each government, with no obvious pattern in their direction.

In addition, the position of the governments does not seem to have earned much deference from the Court. Neither was particularly successful in their litigation at Court in this area (Mulroney’s government won about 66% of the cases they entered, while Chretien’s government has won about 50%). More significantly, the Court has deliberately ignored known governmental preferences in some cases. Thus, even though the Federal government pointed out that Parliament had deliberately left sexual orientation out of section 15 of the Charter, the Court had no qualms about reading it into the section.18

Public Opinion

Public opinion probably did have some impact on the development of doctrine in the equality area – both directly and indirectly. The Justices were deciding cases at a time when public opinion was becoming increasingly favourable to women’s equality. Sex
discrimination was becoming much less acceptable from the 1970s into the 1990s, and most people supported equal opportunities for women in employment. The percentage of respondents agreeing “that women with husbands should be the first people laid off” decreased steadily throughout the 1980s and 1990s (Gallup Canada 1982-1997). Of course, any influence by this opinion may be indirect in that the Justices themselves are part of this changing society.

Public opinion towards the issue of sexual orientation may have influenced the Court. While there was much outcry in some newspaper editorials against the Court’s decision in *Vriend*, several Gallop polls have demonstrated that public opinion towards homosexuals has become much more favourable in the past ten years. Thus the Court may have been closer to the public when it decided *Vriend* and *M. v. H.* than media commentary would reflect.

*Interest Groups*

Has LEAF had influence in the equality area – an area that is their raison d’etre? LEAF was successful in 88% of the cases in which they participated. When the group

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18 The Court also read sexual orientation into Alberta’s *Individual Rights Protection Act*, despite the fact that the Alberta government had voted to exclude it after several debates on the matter. The Court’s decision in *Vriend* caused much controversy in Alberta, where the provincial government threatened to enact the “notwithstanding clause” to prevent the enforcement of *Vriend*. However, after public outcry the Alberta government abandoned its plan. Given the difficulty in invoking the “notwithstanding clause” even for this very controversial decision, the Court may feel secure in not deferring to governmental preferences.

19 The percentage of respondents agreeing that homosexuals should be employed as doctors has increased from 52% in 1988, to 82% in 1999. The percentage agreeing that they should be employed as salespeople has increased from 72% in 1988, to 95% in 1999 (Gallup Canada 1988-1999).
was not there, the Court decided equality cases favourably only 40% of the time. While caution must again be advised in interpreting these percentages, it does appear probable that LEAF was influential on the development of equality doctrine.

The group may have had some impact on sexual harassment doctrine. They were the only intervenor in Janzen, and some of the Court’s arguments do appear similar to the group’s. LEAF also recommended the use of Catherine MacKinnon’s work, which the Court did address, although MacKinnon’s renown may be more responsible than the group for this influence. Still, the Court did quote LEAF’s factum at one point, suggesting that the justices found LEAF’s arguments at least useful to support their own preferences.

LEAF probably did have an influence on the Court’s doctrine in the area of differential treatment for women. Some of the group’s arguments in Conway are very near those which appear in the Court’s decision. Thus, the Court may have found LEAF’s arguments useful in at least these areas of central concern to LEAF – areas where the group may appear to be more of an “expert.”

However, while LEAF’s presence may have had some effect in Andrews, there is no evidence that the Court was influenced by LEAF over other factors. Various aspects of LEAF’s preferred approach to s.15 were also advocated by other intervenors’ factums. Yet, while LEAF’s presence and arguments may not have been a determining factor, it appears that their participation in this area has had some influence on doctrine.

Other interest groups, by contrast, have probably had only minimal impact on the development of doctrine. Many of the Court’s decisions have been opposite to what the majority of groups were arguing. Interestingly, however, of those cases that were decided
in the direction advocated by interest groups, all but one were cases in which the groups appeared on only one side of the issue. Thus in *Conway*, five groups intervened in favour of women guards in male prisons but none intervened against. Perhaps the balance of groups did have some effect.

In the equality area, legal considerations, public opinion, LEAF and, to a lesser extent, Court membership and other interest groups, all appear to have had some influence on the direction of doctrine.

**Conclusion**

This chapter has traced the development of doctrine in the five issue areas of direct concern to LEAF. For each area, an attempt was made to determine how favourable the emerging doctrine was to LEAF’s interests. Has the group managed to achieve long term success – has substantive equality for women been reached?

After a rocky start, the abortion area has been very favourable to LEAF’s interests. Canada still does not have an abortion law and the foetus has not been recognized as a “human being” protected by law against an unwilling mother. While the doctrine has never explicitly said a woman has a right to choose to terminate her pregnancy, the Court has been building up favourable precedent, case by case, which should make abortion restrictions difficult to sustain.

The pornography area has also been a success for LEAF. Further litigation has proved unnecessary as the Court established the group’s preferred approach to obscenity law in 1992. Family law has not been quite so successful, but the Court has recognized the disproportionate difficulties of women in the breakdown of marriage and has been
supportive of LEAF's interests in spousal support. While the justices' rulings on child
custody have not embraced LEAF's preferred doctrine, the existing doctrine is not
particularly damaging to their interests.

LEAF's long term success in the sexual assault area is more uneven. Doctrine has
developed favourably for the group's interests in the limitation of actions, consent and the
protection of the victim's identity and reputation. However, the group has been much less
successful in preventing the disclosure of personal records, and LEAF had to turn to the
legislature to rectify unfavourable doctrine on a victim's past sexual activity.

In the area of most concern to the group, equality, LEAF has experienced
resounding long term success. The Andrews case set favourable doctrine that eased the
group's litigation thereafter. In several areas of importance to women - employment
discrimination, pregnancy discrimination and sexual harassment - favourable doctrine
has made substantive equality more attainable.

Looking next at influence, one sees that, as in the United States, no one factor
determined the path of doctrine. Instead, multiple influences were at work in each issue
area (see Table 5.1). This influence was more difficult to trace in Canada, as the shorter
time period studied meant there were fewer bumps in doctrine to examine, and less
change in factors to compare to shifts in doctrine. However, it appears that in the abortion
area, legal considerations, and - to a lesser extent - judicial preferences, public opinion
and LEAF, all had some effect. In pornography, the influential factors appeared to be
LEAF, other interest groups and legal considerations. In family law, the change in
justices seemed to have some effect, as did legal considerations and LEAF. In sexual
assault it was again the justices, legal considerations, the government and - to a lesser
extent – LEAF. Finally in equality, public opinion, legal considerations, LEAF and – minimally – other interest groups and Court membership all seemed to have an impact.

Created in 1985 in an attempt to turn the “promise” of s.15 into reality, LEAF has obviously achieved some of its goals. LEAF was modeled after American women’s interest groups, and has had the advantage of studying the strategy of these earlier pathfinders. It has managed to learn from the mishaps suffered by American women’s groups early in their litigation, and has successfully used the Court in various areas important to women’s equality. Doctrine has made great strides for LEAF’s interests in the last decade and a half, and the analysis in this chapter suggests that the group can claim some responsibility for those strides. LEAF appears to have had at least some influence in all five issue areas in which it has litigated. While this influence may be seen as nothing more than pointing out legal considerations to the Justices or providing them with arguments needed to support an opinion determined by their own preferences, the influence remains, probably more real than apparent. And the Court has recognized LEAF’s equality arguments in various areas outside s.15, often calling them unnecessary to address, but affording LEAF their day in court. While its ultimate objective of substantive equality remains elusive, the tenacity of the group and the resulting increasing familiarity of the Court with LEAF’s arguments, bodes well for its ultimate achievement.
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Table 5.1: Influences on Doctrinal Development in Canada

* Degree of Influence

+++ = significant influence

+ = some influence

0 = no influence
CHAPTER 6

COMPARISONS AND CONCLUSIONS

Judges – even Supreme Court Justices – do not make their decisions in a vacuum. But what factors influence judicial decision making? Justices make their decisions behind a veil of judicial objectivity and impartiality. However, many political scientists believe that Justices’ own preferences are what actually determine their decisions. Given these conditions and beliefs, is it possible for determined parties to have an impact on the Court? Specifically, do interest groups – dedicated to the purpose – influence judicial decisions? And if so, does this influence vary across countries? Do different factors influence decisions in the Canadian and American Supreme Courts or do American models of judicial decision making have a wider application? Were Canadian groups following logically in the footsteps of their U.S. counterparts in believing that interest groups could influence the courts?

This dissertation set out to find answers to these questions. Selecting identifiable and comparable groups in Canada and the United States, it examined the success and influence of women’s interest groups litigating before the Canadian and American Supreme Courts. The first half of the project attempted to assess group success and influence at the level of individual cases. Multivariate analyses were conducted to
determine whether these groups had any influence on the way the Courts decided either the outcome or the doctrine of a case. Regardless of these groups’ influence on individual case decisions, the second half of the project attempted to determine whether the women’s groups managed to achieve success and influence in front of their respective Supreme Courts in the long term. It asked the extent to which the path of doctrine led in a favourable direction for the groups in the policy areas of interest to them, and the extent the groups were responsible for that direction. Analyses in both parts of the project were conducted separately for the Canadian and American Supreme Courts.

This chapter discusses the findings of the two halves of the project. Throughout these discussions, it attempts to draw comparisons between the American and Canadian results. Have different factors influenced each Supreme Court? Have similar groups managed to achieve different impacts?

The Success of Women’s Groups Before the Court

The Women’s Rights Project (WRP), the National Organization of Women’s Legal Defense and Education Fund (NOW LDEF) and the Women’s Legal Defense Fund (WLDF) had some success before the Court in achieving both favourable outcomes and doctrine. The WRP experienced the most success (67% in terms of outcome and 70% for doctrine), followed by the NOW LDEF (64% for outcome and 66% for doctrine). The WLDF was successful much less frequently (58% for outcome and 62% for doctrine). The different success rates may foreshadow the different degrees of influence enjoyed by

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1 Success in doctrine is the percentage of cases featuring either moderately or very favourable reasoning. For both outcome and doctrine at the case level of analysis, success is measured in terms of the cases in which the women’s groups actually participated.
the groups. The WRP was the group most likely to participate on its own. In 12 of its 54 cases (22%), it was the only one of the three groups present. And only three of the 12 cases were unfavourable for the group in terms of both outcome and doctrine. The WLDF, by contrast, participated only three times (out of 52 cases) without one of the other two groups being present, and two of the three were losses in terms of both outcome and doctrine (and the third was a loss on outcome). The NOW LDEF fell between these two, participating seven times on its own and suffering losses in terms of both outcome and doctrine in four of these cases.

When the three groups combined in participation their success rate increased. In cases in which all three groups were present, the case outcome was favourable 76% of the time, while doctrine was decided favourably 80% of the time. This should be welcome news to the groups since cases attracting all three groups will tend to be those most important to their interests.

However, even when the American groups participated together, their success rate, at least in terms of outcome, was still not as high as that enjoyed by LEAF in Canada. LEAF, the main women’s group litigator before the Canadian Supreme Court, enjoyed an 83% success rate in terms of the outcome of the cases in which it chose to participate. And it had a 78% success rate in terms of the doctrine of the cases – just 2% lower than the success rate of the American groups when they participated together. Thus, overall, LEAF has been more successful than any one of its American counterparts. This success reflects the fact that as measured by outcome and doctrine, decisions in nearly all the included Canadian issue areas have been more favourable than those for the issue areas studied in the United States. For example, in the abortion area, the U.S.
Supreme Court’s case outcomes were favourable to the American groups only 33% of the time, while the Canadian Supreme Court’s case outcomes were favourable 83% of the time. A similar discrepancy exists for doctrine (44% in the U.S., 83% in Canada). While state governments added restriction after restriction to the abortion right in the United States, the provincial governments in Canada were prevented by the Constitution (and Court rulings) from legislating in this area of federal responsibility – and the federal government itself was never able to get agreement on a new abortion law.

It is interesting that the American groups experience greater success with doctrine than with outcome, whereas LEAF experiences the reverse. As explained in Chapter 3, LEAF’s situation was the expected one, as favourable doctrine should be more difficult to obtain than the right outcome. Yet the American groups have had more luck with doctrine. Obviously there have been a few cases where the American groups managed to get the right reasoning despite the wrong outcome. Chapter 3 provided one example – an abortion case upholding Roe v. Wade when it was expected to fall, but ruling unfavourably on the specific question of the appeal and allowing restrictions on abortion.

Of course, the situation in a particular issue area does not explain the American anomaly, as cases with favourable doctrine but unfavourable outcomes occurred in all the issue areas studied. However, given the small number of cases involved here (10 cases had unfavourable outcomes but favourable doctrine), the discrepancy may not be meaningful.

The women’s groups in both the United States and Canada experienced some success in the long term – and some disappointment. Overall, in the United States, the Court’s doctrine in two of the four issue areas developed favourably for the American groups’ interests (sex discrimination and discrimination in employment). The path of
doctrine was probably most favourable in the sex discrimination area. The majority of these cases were heard in the 1970s, with only three of the 33 cases being decided in the 1990s. The early litigation in this area was very successful for the groups as these were some of the "easy" cases – laws discriminating explicitly against women or against men. The abortion area was not favourable to the groups' interests despite a promising beginning and a last minute rescue. Doctrine in the affirmative action area followed a wandering path at different points in its history but its latest move has been in a direction unfavourable for the groups.

LEAF has enjoyed more success than its American counterparts. Doctrine did not develop unfavourably in any of the issue areas, although some of the sub-issues within areas (for example, the disclosure of records in sexual assault and child custody in family law) were less favourable than others.

Overall, the American groups have to be pleased that the two areas of most concern to them – sex discrimination and employment discrimination – continue to progress favourably. LEAF must also be pleased with its significant success in all the areas of concern.

The Influence of Women's Groups

Studies of the influence of interest groups on judicial decision making have produced mixed results. Epstein and Kobylka (1992) suggest that the arguments of interest groups have some impact on the Supreme Court in abortion and capital punishment cases over the long term. Several multivariate studies have also noted interest group influence before the Court (Caldeira and McGuire 1993; Wolpert 1991; Caldeira
and Wright 1988). However, other studies have concluded that the success of amici curiae has more to do with being on the “right side” than on any influence of the groups themselves (Songer and Kuersten 1995; see also Tauber 1998; Songer and Sheehan 1993; Epstein and Rowland 1991). This study expected women’s interest groups to have an impact on the Court’s decisions whether they were sponsoring the case or acting as amicus curiae.

In the United States, at the case level of analysis, the WRP and the NOW LDEF were in fact influential. The presence of each of these groups made a favourable case outcome more likely. However, the WLDF – while somewhat successful – was not influential. The differences among the three groups are probably not surprising. The WLDF only rarely participated on its own in the cases studied here, and it was generally unsuccessful when it did so. The WRP and the NOW LDEF are also more widely recognized organizations which should make their presence more noticeable to the Justices. Each of these groups was founded by a large, well known organization whose prestige probably gave the daughter groups a distinct advantage in credibility.

But even the WRP and the NOW LDEF do not appear to be very influential in terms of doctrine (both miss the .05 level of significance). The presence of either group, on its own, did not make favourable doctrine significantly more likely. Interestingly, however, the presence of a higher number of groups in a case does appear to have an impact on the Court’s decisions on doctrine. The more groups that participate in a case, the more likely favourable doctrine is to result. The Justices’ attention seems to be caught by any show of solidarity among the groups. The participation of more of these prominent groups, all arguing for a particular reasoning, may give the argument more
credibility – or at least inform the Justices as to the position of a good portion of the women’s community. This certainly must alert the Justices as to the importance of the issue and may suggest to them the potential for the women’s groups to organize and take the issue past the Court.

In Canada, LEAF was both successful and influential in front of the Supreme Court at the case outcome level. However, the group was not influential in terms of doctrine. The most frequent (and often sole) litigator on women’s issues in Canada was able to help persuade the Justices to adopt the right outcome in cases, but appears to have had no part in persuading the Justices to adopt the right reasoning to go along with it.

Why were the groups influential at the case outcome level but (at least individually) not at the level of doctrine? The outcome of cases is what is headlined in the media and noticed by the public. The wrong outcome can occasionally incite segments of the population to speak out against Court decisions. Since the women’s groups represent distinct constituencies, some of the groups’ influence on outcome may be attributable to their ability to alert the Justices to the state of the political environment and public opinion. Doctrine, however, tends to receive less attention and the value of the groups’ information on the state of the political environment may be discounted. Justices should feel more freedom to vote with their preferences here. Further, the groups’ arguments on doctrine often attempt to push the Court further than it appears ready to go. While this may help groups with their long term success, the arguments are unlikely to be picked up by the Court. The groups do not achieve their ideal doctrine in individual cases and thus may not appear to have influence in the short term.
This may help explain why LEAF had no influence on doctrine, while the American groups managed to have some impact by participating together. The Canadian Charter’s recent enactment meant that many of the goals pursued by the American women’s groups were already satisfied in Canada – written into the Charter. The Charter’s guarantee of equality “before and under,” as well as its guarantee for equal protection and benefit of the law, allowed the Canadian groups to lay the “similarly situated” test – with all its dangers – to rest quickly. In addition, the Charter’s explicit acceptance of programs and laws attempting to “ameliorate” the conditions of the disadvantaged provided a firm basis for affirmative action type of programs. These kinds of guarantees allowed LEAF to focus its attention on new challenges. Its submissions to the Court attempt to persuade the Justices to view every issue in terms of equality. For example, in pornography, LEAF attempted to convince the Court that Canada’s obscenity law did not violate the Charter’s guarantee of freedom of expression (s.2.b) because pornography infringed a woman’s right to equality. They argued that the equality right superseded freedom of expression and the Charter was not violated (the Court held that the law did violate s.2.b but upheld it as a “reasonable limit” under s.1 of the Charter). In fact, LEAF makes equality arguments in all of their cases, whether they are arguing for the ability of female custodial parents to relocate, or arguing against the disclosure of victims’ records in sexual assault cases. LEAF may thus appear less influential on doctrine since it is pushing a more unfamiliar concept that the Court is not yet ready to accept.

Looking at the policy areas over the long term, the influence of the American groups appears to vary across the issue areas. The groups do not seem to have exerted
any influence in the abortion or affirmative action areas – the two areas where they experienced the least success. They did however, have some impact in the sex discrimination area – particularly in the earlier stages. The WRP was responsible for advocating an intermediate standard of review, providing the Justices with an alternative to the lowest level of scrutiny, when the Court appeared reluctant to treat gender similar to race (and apply strict scrutiny). This group also sponsored a sequence of cases at the Court that carefully built up precedent aimed at eliminating sexual stereotypes. Overall, cases were decided more favourably in this area when the women’s groups participated than when they did not. The groups were probably also influential in the area of discrimination in employment – at least in terms of sex discrimination in employment. In this area decisions were much more likely to be favourable when the groups participated.

LEAF appears to have exerted some influence in all the issue areas in which they participated – although to a much lesser extent in abortion and sexual assault. Their arguments were picked up in cases in nearly all the issue areas of interest. For example, in the pornography area, LEAF was the only participant to argue for the rejection of the “morality based” approach and for the adoption of the “harms based” approach. They championed an interpretation of pornography that placed it in the same realm as hate speech – a position the Court seemed willing to consider. This moved doctrine in a direction that probably has made further intervention by the group unnecessary. The group’s arguments were also picked up in the family law area where the Court recognized the “feminization of poverty” arguments and the potential effects of the inequality of marriage. This recognition showed that the Court was sensitive to LEAF’s concerns in the area and ensured more favourable doctrine in the future.

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However, perhaps most importantly to the group, LEAF appears to have been influential in their main area of concern: equality and discrimination. The group was the only intervenor in several of the cases decided favourably for their interests, and its approach to sexual harassment and employment equity appears to have been recognized by the Court. When the group participated in the equality cases the doctrine was much more likely to be favourable to their interests than when they did not.

But why would LEAF be more influential over the long term than it was in terms of doctrine at the case level of analysis? As mentioned earlier, LEAF may not have been found to be influential at the case level of analysis because they did not reach their ideal endpoints in the different cases. For example, the Court has not usually been ready to accept their attempts to have issues considered in terms of equality. This failure to reach their ideal point would lead to a case being coded as less favourable to the group’s interests which would in turn tend to discount the appearance of influence in a particular case. However, looking at the policy area as a whole, the failures of the group’s ideal positions diminish in importance. The long term analysis allows for a more nuanced approach as it considers whether the group’s arguments as a whole -- not just its ideal positions -- do in fact seem to be influencing the doctrine emerging from the Court. Thus it is enough that the groups’ arguments are being accepted in the issue areas. They are making gains -- even if not great strides.

Why does LEAF appear to be more consistently influential than the American groups? Despite their attempts to “push the envelope,” many of the LEAF’s main arguments may be easier for the Court to accept than those made by the United States’ groups. LEAF argues in favour of substantive equality, whereas the American groups
push for strict equality. These latter groups fight against preferential treatment for women and often argue in favour of male complainants. LEAF, by contrast, does not dispute preferential treatment for women. They argue that differential treatment may actually be necessary for equality to be achieved. And the group argues consistently against men trying to use the equality guarantees to challenge previous gains by women.

LEAF may also be more influential than its American counterparts because of its position as the main litigator for women's interests in Canada. Its arguments are less likely to get lost in a crowd and some of its different positions may achieve credibility through its unchallenged role as the litigator for women's rights. Thus, LEAF's influence appears strongest in the areas where the Court would expect it to have the most expertise – the disadvantages faced by women in family law, the harm caused to women by pornography and equality implications of sexual harassment and pregnancy discrimination.

Other Influences on the Courts

These results suggest that models of judicial decision making should include the potential influence of interest groups – particularly when considering case outcomes and the policy area as a whole. But what other factors are shown to influence the Court's decisions at each level of analysis? Do American models of judicial decision making have application outside of the United States?

In addition to the women's groups, at the case level of analysis, case outcomes in the United States appear to have been influenced by the Court's own ideology, public opinion, the Solicitor General and – to a lesser extent – other interest groups arguing
against the women's positions. Case doctrine was also affected by the Court's ideology and the position of the Solicitor General, but public opinion had less of an effect and the groups arguing against women's interests had none. Instead, the type of discrimination claimed (implicit or explicit) was important. These results differ dramatically from the Canadian models. Only LEAF and the basis of the case (constitutional or statutory) were found to have an impact on the outcomes of cases and only the basis of the case had an impact on doctrine (this latter result must be interpreted carefully given the problems resulting from the small number of cases in the doctrine model – see Chapter 3). Thus in neither Canadian model did judicial preferences, the Attorney General, public opinion or other interest groups have an effect. Instead, at the case level of analysis, a variable with no significance in the United States – the basis of the case – was one of the most important predictors of judicial decisions in Canada.

In the analysis of policy areas over the long term, different factors were found to influence each issue area in both the United States and Canada – no one factor determined the path of doctrine in either country.

**Differences Between Countries: Judicial Preferences**

There is widespread agreement in the American literature that the justices' policy preferences are important. This study found that judicial preferences did in fact have influence on the decisions of the American Supreme Court but not the Canadian Court. As suggested in Chapter 3, the differences between Canada and the United States were not entirely unexpected. Judicial preferences were expected to have less of an impact (or at least a less detectable impact) on Canadian decisions in terms of both outcome and
doctrine, since the ideology of the justices and even of the Court, itself, has been difficult to determine (Morton, Russell and Riddell 1994). Some part of this difficulty may be a measurement problem. The ideology of Canadian Justices is not mentioned at their appointment, either by the appointing Prime Minister or the newspapers. They are rarely even identified by party affiliation. Therefore, the Justices’ past votes in analogous cases must be used to calculate their ideology. However, even this measure is difficult, given the limited time span over which Canadian Justices have been deciding individual rights cases: only a small number of analogous cases are available. Furthering this difficulty, the inclusion of sexual assault cases in the database meant that criminal defendants’ rights – often used as an analogous measure of Justices’ votes on other civil liberties issues – could not be used.

However, it is probable that some of the difference in the importance of judicial preferences in the United States and Canada is real. A large majority of Canadian justices cluster around the neutral mark of the ideology measure, while more of the United States justices are found further towards the extremes (this accords with the 1995 findings of Morton, Russell and Riddell of a “centre-dominant Court” in Canada). The existence of more moderate Justices in Canada probably reflects the different appointment procedures in the two countries. In Canada, judicial appointments have traditionally been determined more by a justice’s region of origin and by patronage than by the justice’s ideology (Russell 1987, 112-117; Archer et. al. 1995, 340). The situation is, of course, quite different in the United States where, in recent years, ideology appears to have played the most important role in appointments. Having more moderate justices has two implications for the influence of judicial preferences. It may be that judicial preferences
are just difficult to detect because most of the justices are moderate. The justices’ preferences may still be playing a role but the broad liberal-conservative measure is not sensitive enough to capture it. However, it is also probable that judicial preferences play less of a role with more moderate justices. The fact that these justices do not hold extreme positions on the issues before them should allow other factors to play a larger role in their decisions on both outcome and doctrine. The accuracy of these suppositions needs to be tested, but a better measure of judicial preferences is a prerequisite.

The effect of judicial preferences in the long term was examined in terms of changes in Court membership. In the United States, court membership played a significant role in at least two of the areas (abortion and affirmative action). In both areas, a doctrinal shift was preceded by a change in the justices on the Court and appeared attributable to that change. However, in neither case was this the only factor to have influence.

The impact of Court membership was not as straightforward in Canada. The use of panels complicated the picture as a different coalition of Justices could hear each case and there was no easy dividing line between a Justice’s presence and absence in an area. The different Courts hearing a case seemed to have some impact in a few cases in most issue areas. However, the path of doctrine appears to have been significantly affected by Court membership in one area in particular, that of family law. The fact that differences in justices’ participation demonstrated influence in any area in Canada is somewhat surprising after the discussion on judicial preferences. However, this finding does accord with the literature on panel assignments. One Canadian researcher has argued that “the outcome of Charter cases litigated in the highest Court of the land appears to be
somewhat of a lottery based on which judges sit on a panel" (Heard 1991, 305; see also Morton, Russell and Riddell 1995). And several American researchers have found in the past that case outcome in the U.S. Federal Courts of Appeal does depend on the composition of the panel hearing the case (Howard 1981; Mclver 1976; Richardson and Vines 1970).

Thus something unique to each Justice appears to be influencing the Court's decisions. It may be that a better measure of judicial preferences would account for the differences between panels. Ideology may actually be determining the Justices' preferences and influencing their decisions but, as noted earlier, the measures used here may not be capturing its effect (Tate and Sittiwong, 1989, certainly suggest that differences in personal attributes among the Canadian Justices have "conservatizing" and "liberalizing" effects which are in fact demonstrated in the Justices' votes; Heard, 1991, also appears to assume it is ideology that is determining the differences he observes among the panels hearing cases).

However, it is also possible that there are differences in preferences on specific issues which do not reflect broad ideological positions but which nonetheless shape justices' positions. Thus a panel hearing a family law case may be composed of all moderate Justices and yet these Justices may still have different preferences for the decision in the case. Some other trait may be determining their preferences. For example, each Justice's favoured approach to decision making, activism or restraint, may have an impact on the output of the different panels. Morton, Russell and Riddell (1995) have noted differences in the Justices' preferences for activism and have used these to explain the votes of Justices in Charter cases. Justices in Canada may also have preferences that
affect cases based on their position on federalism – an issue much more important in Canada than in the United States. With the separatist concerns in Quebec, recent Prime Ministers have attempted to appoint strong federalists (rather than decentralists) to the bench. These Justices may be less inclined to uphold provincial laws which effectively restrict abortion and thus intrude in an area of Federal government responsibility (R. v. Morgentaler 1993). They may also be more inclined to “read in” rights to provincial Human Rights legislation in order to equalize the situation across Canada (Vriend v. Alberta 1998).

However, one should be careful about making too much of the differences between panels in this study. At one point in the family law area, for example, doctrine shifted between two cases and different justices did hear each case. However, a new Divorce Act enacted between the two cases may have had as much influence on the decision in the subsequent case as the identity of the Justices hearing the case.

Solicitor General and Attorney General

Most of the other differences in influences before the American and Canadian Supreme Courts were somewhat expected. For example, while it would have been surprising if the American Solicitor General had been found not to influence the Court in terms of either outcome or doctrine at the case level of analysis (Pacelle 1999; McGuire 1996; Segal and Reedy 1988), it is less surprising for the Canadian Attorney General. While the Attorney General has been successful before the Supreme Court, he does not enjoy the same position of dominance – he would never be referred to as the “tenth justice,” a term that has been used to describe the Solicitor General in the United States.
A factor in the Attorney General's lack of influence may be his modest level of involvement in the issue areas of interest (he has participated in only 25% of the cases included in this study). Slightly over 40% of the cases included here fall within the sexual assault area – an area where cases are more commonly litigated by provincial Attorneys General.

It may be that Canada's integrated judicial system is playing a role here. With a single judicial system interpreting and applying both federal and provincial laws, the provincial Attorneys General may participate before the Supreme Court as often as the Federal Attorney General² and may be “repeat players” in their own right. This may mean that it is the provincial Attorneys General who have real influence before the Court, or it may mean that none of the Attorneys General influence the process because participation before the Court is shared among 11 litigators. More likely, however, it means that rather than individual governments, the position of the Crown is what possesses real influence. The Crown (R. or the Queen) is the government party in criminal cases (so in abortion it was R. v. Morgentaler, in pornography it was R. v. Butler and in sexual assault it was R. v. Seaboyer). Either level of government (provincial or federal) may be acting in her name, but the position is usually filled by the Attorney General from the province where the case originates. Thus the status conferred by being the Crown in a case may allow a government to have influence on the Court that it would not have when participating under its own name. This would make the Crown more comparable to the Solicitor General than the Federal Attorney General himself. The

² All the Attorneys General are certainly treated as equal in Morton, Ho and Hennigar's analysis of the government participation before the Supreme Court (1996). And in McCormick's analysis of the success rate of litigants the federal and provincial governments are often combined into one category (1994).
Crown's high rate of success as a litigant (which is higher than the rate of any provincial or federal government litigating in its own name) suggests that this may in fact be the case (McCormick 1994, 156-7). Measuring the position of the Federal Attorney General is not enough. To more accurately capture the influence on judicial decisions a future model should include the participation of both levels of Attorney General and the position of the Crown itself (regardless of what level of government is acting in her name).

The position of the government itself was considered in each country over the long term. In the United States, the presidency did seem to have some impact in the abortion area. It was Reagan's Solicitor General who introduced the alternative test to Roe's trimester approach that O'Connor would end up championing. And it was another Reagan Solicitor General who first started asking the Court to overturn Roe. However, the influence of the presidency was not definitive on its own. For example, it could not account for the different treatment of several restrictions on abortion during the Reagan presidency.

Of course, the other branches of government can affect the Court through more than just their litigation. The legislature's role as a policy maker can have an impact on the path of doctrine. Legislatures can enact new legislation to override Supreme Court statutory rulings or can introduce constitutional amendments to reverse an unpopular constitutional ruling by the Supreme Court. Justices may take this power into account when deciding cases and vote strategically to avoid a legislative override of their decision (Gely and Spiller 1990; Eskridge 1991; Schwarz, Spiller and Urbiztondo 1994). Legislatures may also affect the future path of doctrine by enacting new statutes requiring
different interpretations by the Court. And governments may affect doctrine through their choice of which cases to appeal (Pacelle 1999; Zorn 1997; Perry 1991). They may choose not to appeal cases establishing favoured precedents at lower court levels or may choose to appeal cases with a goal of pushing the justices in a particular direction – or to push the Court to address a concern the government itself wants to avoid (Archer et. al. 1995, 346-347).

In Canada, the government did not exert direct influence on the Court through litigation in the abortion area but it may, in fact, have affected the path of doctrine through its other activities. For example, when Canada’s abortion law was struck down in 1988, the Borowski case was still before the Court. Since Borowski was attempting to challenge the abortion law (from a pro-life perspective) his case appeared to be moot – the law he was challenging had been struck down by the Court. In this situation, the Federal government would normally ask the Court to quash the case. However, the Mulroney government did not. The government preferred to keep the issue before the Court “so as to avoid taking a stand on abortion during the [1988] election campaign [since] it is considered a violation of judicial independence for a politician to comment about a case before the courts” (McCormick and Greene 1990, 31).3 The Mulroney government tried to enact a new abortion law after the 1988 election – allowing a free vote in Parliament. However, when this effort failed the government announced it would not make another attempt and no further action has been taken by any government since.

3 The Federal government’s decision in terms of Borowski came under attack by one of the Supreme Court Justices after the case had been finally decided. Justice Sopinka resented how the Court had been used as a “political weapon” and argued that since the government’s action had caused Borowski “needless expense” it was “appropriate that the [government] pay to [Borowski] the costs of the appeal” (McCormick and Greene 1990, 32).
The failure of the Mulroney and Chretien governments to legislate in this area has allowed the women’s groups’ victory to stand without explicit judicial reasoning to support it.

Thus, in some senses, the present state of the policy area – in particular, the lack of an abortion law – can be attributed to the Federal government. Governments in Canada have “ducked” the abortion issue. This is quite different from the American government’s explicit position on abortion and its attempt to tackle the issue head on. This difference can be attributed to the parliamentary system of government. In the American separation of powers system there is less concern – particularly in times of divided government – to preserve political coalitions. Instead, there are “incentives to exploit moral conflicts for electoral advantages” (Tatalovich 1997, 11). In a parliamentary system, by contrast, there is a need to maintain the support of Parliament and since moral conflicts usually destroy party unity there is a tendency for governments to avoid them (Tatalovich 1997, 9-14; Smith 1975).

The only other area where the Canadian government appeared to be influential, sexual assault, again involved influence through legislation not litigation. Given the limited effect of changes in government in Canada, the less dominant position of the Attorney General (discussed above), and its parliamentary system of government this lack of influence before the Court is not surprising. Further, it is not much different from that found in the United States where the influence of changes in government has itself been only limited.
Amicus Curiae

While women’s groups are of particular interest here, this study also attempted to determine the extent of other interest groups’ influence on judicial decision making. As mentioned in the section on the influence of women’s groups, the literature has produced mixed findings on interest group influence. This study expected amicus briefs to have an impact on the Court’s decisions. As expected, the number of amicus curiae briefs arguing against the women’s groups positions had an impact (which just missed the .05 level of statistical significance) on the decisions of the American Supreme Court – if only in terms of case outcomes. The higher the number of American groups arguing against a favourable outcome, the less willing the Court was to provide such an outcome. The existence of opposition to the women’s groups’ positions gives justices a different sense of the state of the political environment and public opinion. Further, the higher the number of groups opposing a favourable outcome, the higher the risk that someone will challenge the Court’s decision in Congress.

In Canada, by contrast, opposition briefs had no impact on outcome. This is not surprising given the infrequency of their participation before the Court. In the United States, only 20% of cases had no amicus brief arguing against the women’s position. In Canada, 71% of cases had no such briefs. In fact, in Canada, less than 4% of cases had more than three opposition briefs filed (compared to 29% in the United States). This infrequency probably also coincides with inexperience when the groups do participate – which will reduce their effectiveness. Finally, Canadian groups pose less of a threat to the Court’s decisions, as lobbying Parliament for changes after a decision is difficult. Parliamentary systems tend to concentrate power in the cabinet and usually correspond
with strong party discipline among members (as governments require Parliament’s support to continue in office). The Canadian system has been one where decision making is “tightly controlled” – dominated by cabinet ministers and bureaucrats (Archer et. al. 1995, 467-469). This has meant a more closed system where decision makers are relatively insulated from the outside and points of access for interest groups are rather limited (Pross 1992; Vickers et. al. 1993). This is very different from the United States where the separation of powers prevents concentration of power and the lack of party discipline allows individual members of Congress to be lobbied successfully by groups.

The fact that the American amicus briefs were influential only in terms of case outcomes is interesting. It may be that this is a product of the way the groups were coded. Only the briefs of the women’s groups of interest were coded for doctrine. For the other interest groups, their position on the outcome of the case was held to indicate their position on doctrine as well. It may be that a group advocated an outcome favourable to the women’s groups but did not advocate supportive doctrine. This would suggest the groups are having an influence which has not been captured here. However, differences in the groups’ positions on outcome and doctrine should be uncommon and seem unlikely to be determining the different levels of influence. Instead, it may be that many of the groups arguing against women on outcome are more casual litigators, interested in particular case issues rather than the doctrine the justices might produce.

Interest groups, other than the women’s groups of concern here, appeared to have some limited influence on the development of doctrine in the policy areas over the long term in each country. In the United States, the growth of pro-life groups in the abortion area over the decades may have given justices another perspective on the topic. In the sex
discrimination and employment discrimination areas, other interest groups may have had influence through their absence. The success of women's groups in the 1970s was probably furthered by the absence of opposition briefs. In the few early cases in which groups argued against women's interests, the decisions were unfavourable for women's groups. However, in later years, the other groups did not seem to have a noticeable influence on the path of doctrine.

In Canada, other interest groups' lack of participation may have had an impact on the abortion area. Groups against abortion did not participate in the Morgentaler decision where Canada's abortion law was struck down. These groups, at least, believe their absence had an impact (Morton 1992). In the pornography and equality areas, other interest groups appear to have had influence when they have lined up predominantly on one side of the issue. Thus, in the long term, there does not appear to be much difference in interest group influence before the Canadian and American Supreme Courts. This was unexpected. It may be that the limited lobbying potential of Canadian groups is counterbalanced by their limited number. With fewer groups litigating, the Canadian Supreme Court may have less trouble hearing a group's arguments. It is interesting that the groups appear to have had the most influence when they have appeared predominantly on one side of an issue. Arguments on both sides of an issue may in fact cancel each other out, or at least allow the Supreme Court to feel more freedom to follow its own path.
Public Opinion

The potential influence of public opinion on judicial decision making has also been a matter of disagreement in the literature. Several studies have found similarities between the U.S. Supreme Court’s position and that of the public on specific issues (Barnum 1985; Marshall 1989; Marshall and Ignagni 1995). Other studies have noted covariation between public opinion and the Court’s output (Mishler and Sheehan 1993; Stimson, Mackuen and Erikson 1995; Flemming and Wood 1997). However, no study has demonstrated conclusively that public opinion has influence on Supreme Court decisions (Caldeira 1991; Norpoth and Segal 1994).

This study found a different impact for public opinion in the United States and Canada. While higher level of public support for equality made favourable case outcomes (and to a lesser extent, favourable case doctrine) more likely in the United States, it had no impact in Canada. This difference probably reflects the smaller time frame covered in Canada. While the study examined cases in the United States from 1970 to 1996, in Canada the time period was just slightly over a decade (1984-1997). This left less time for public opinion to change. There were probably also more drastic changes in the public’s opinion from 1970 to 1980 than from 1980 to 1990, which should make public opinion more influential (if only indirectly) in the United States. The fact that public opinion was less influential on case doctrine than on case outcome in the United States was not unexpected. Case outcomes are what capture the media and the public’s attention. The Court’s opinion is rarely widely published and there should be less incentive for the Justices to take the public’s preferences into account.
Public opinion appears to have had an impact, over the long term, in two issue areas in each country—although not the same two areas. In the United States, public opinion seemed to have influenced the Justices in the sex discrimination and employment discrimination areas. In both these areas the influence may be more indirect in that the Justices were subject to the same modernizing of attitudes as the public from the 1970s onward. It may be that Wolpert (1991) was correct in suggesting that the Court's adoption of the "intermediate" standard of scrutiny for gender allowed public opinion to have some influence in the areas. Wolpert argued that the new standard required justices to determine the line between acceptable and unacceptable gender classifications, and this determination—what a justice considered to be "stereotypic differences" versus "real differences"—would be influenced by changing social standards and opinions.

In Canada, public opinion appeared to exert some influence in the abortion area and the equality area. Again the equality area may be a result of indirect influence. The finding in the abortion area reflects the Court's decision to allow the "other" side of the abortion issue to have their day in Court, even though the abortion law had been struck down—an apparent concession to public opinion. However, a gradual change in public opinion does not explain the dramatic doctrine shift between the two Morgentaler decisions (one upholding the abortion law and the other striking it down)—that was more a result of a change in law from the Bill of Rights to the Charter.

**Legal Considerations**

The hypothesis that legal considerations have some influence on judicial decisions has been a matter of controversy in the literature. Some argue that while justices may in
fact care about legal considerations, the legal ambiguity of cases reaching the Supreme Court ensures that these considerations have no impact on the Justices’ decisions (Rohde and Spaeth 1976; Segal and Spaeth 1993). The Court’s control over its docket allows it to choose to hear cases that “tender plausible legal arguments on both sides” (Segal and Spaeth 1993, 70). Thus Justices are free to decide cases according to their own preferences and are able to use legal arguments to justify whichever side they choose (72).

Others believe that legal considerations can influence judicial decisions and play a role beyond merely justifying the justices’ own policy preferences (Brigham 1978; Perry 1991; Gillman 1993). Advocates of this view do not argue that justices’ preferences have no impact on their decisions. However, they suggest that justices are trying to make good law and are constrained by this goal in their decision making.

This debate over the impact of legal considerations is an enduring controversy. This study found that some “legal considerations” did have an effect at the case level of analysis, but the effect of these factors varied across the countries. The basis of the case (constitutional or statutory) was found to influence case outcome and case doctrine in Canada, while the type of discrimination (explicit or implicit) was found to impact case doctrine in the United States. Some might argue that the factors included as legal considerations at the case level of analysis are not in fact legal. These people suggest, for example, that finding claims of explicit discrimination more likely to result in favourable doctrine than claims of implicit discrimination does not imply influence for legal considerations. Instead, it may be the Justices’ preferences that are determining their approach to the case facts. As yet this debate has not been settled. In fact, Segal and
Spaeth conclude that “fact models are consistent with both legal and attitudinal models” (1993, 362). However, while it is still unsettled how these factors are best interpreted, in this study I treat them as legal considerations. I believe, for example, that while it is possible that policy preferences determined the Court’s approach to implicit discrimination in the beginning, the rules, once created, had an effect of their own. Thus subsequent Courts have continued to follow the original approach.4

This study also attempted to determine the effect of legal considerations such as the language of constitutional and statutory law and precedent – considerations that all would probably agree are legal. While these concepts were impossible to measure at the case level of analysis, they were included in the analyses of the policy area over the long term. Studying the cases in depth over the policy areas as a whole allowed a more nuanced examination of precedent and legal language.

Basis of the Case

Interestingly, at the case level of analysis, one factor that has had influence in Canada but not in the United States is the basis of the case (constitutional versus statutory). The Canadian Justices were more likely to produce favourable outcome and doctrine for statutory than for constitutional cases. Given the young age of the Charter of Rights and Freedoms this seems reasonable. The Court had a recent record of what the legislators had in mind in enacting the Charter and should have been more reluctant to

4 But again I cannot rule out the possibility that subsequent Courts have followed the rules merely because the majority’s preferences still favour that approach.
make changes. On the other side, many of the statutes involved in cases pre-dated the Charter and the Court was willing, even obliged, to bring them up to date – in light of the new state of constitutional protections.

_Type of Discrimination_

While the case basis was not significant in the United States at the case level of analysis, the type of discrimination claimed in a case did have an effect on doctrine. Claims involving implicit discrimination were less likely to result in favourable doctrine than claims involving explicit discrimination. Given the different judicial tests used for implicit and explicit claims (and the need for implicit claims brought under the Constitution to prove intent), this is not surprising. The finding that this case fact is significant in the United States but not in Canada is also expected. The Supreme Court has treated implicit claims very favourably in Canada – rejecting any need for intent. In addition, the coding of this variable may help explain its lack of influence in Canada. The different issue areas in Canada made coding this variable difficult. In order to preserve numbers, cases in the sexual assault, pornography, abortion and family law areas had to be fit within this coding scheme.

_Legal Language_

The long term analyses looked at the impact of precedent and the language of the law on judicial decisions. Although the findings in this section are contrary to the “pure” attitudinal model, they were somewhat expected given the Justices’ training and the environment in which they work (see, for example, Stinchcombe 1990).
Legal considerations appeared to have some impact on the abortion area in the United States and Canada. In the United States, for example, *Roe* was upheld in *Casey*, despite expectations to the contrary, apparently because of the power of precedent. The authors of the majority opinion emphasized the importance of respecting *stare decisis*. While *Roe* was seriously weakened, the Justices appear to have felt constrained by a legal consideration from taking the extra step and striking down *Roe*. In Canada, the abortion law was upheld in 1974, but struck down in 1988, despite the fact that the same litigant was in front of the Court facing the same charges. The difference in the Court's decisions appears to be primarily attributable to the basis of the case. In 1974, Canada's abortion law was challenged under the 1960 Bill of Rights — a federal statute that left the Supreme Court unsure of their power to strike down laws. In 1988, by contrast, the challenge to the abortion law was based on the new Charter of Rights and Freedoms — a constitutionally entrenched document that indicated explicitly that the Court could strike down laws contrary to the Constitution.

Pregnancy discrimination cases in the American employment issue area provide another interesting example of the impact of legal considerations. After a dismal beginning (where the Court ruled pregnancy discrimination was not sex discrimination), the groups' litigation before the Court resulted in more favourable decisions. The intervening variable was the passage of the *Pregnancy Discrimination Act* which provided a new statute for the Justices to interpret in these cases — one that explicitly stated that pregnancy discrimination was in fact sex discrimination.

Similarly, in Canada, spousal support litigation started off unfavourably to the group's interests but shifted course after the enactment of the 1985 *Divorce Act* which
outlined different factors for the Court to consider in making its determinations. The most obvious example of the influence of legal considerations, however, probably came in the equality and discrimination area in Canada. After 1982, one sees the rejection of the “similarly situated” approach to sex discrimination (used in the 1970s) and an emphasis on substantive equality: equal administration of the laws was no longer enough. This appears to have resulted from the addition of a few phrases to the equality rights section (s.15) of the Charter. The Court was now faced with interpreting a constitutional provision that guaranteed “equality under the law” not just “equality before the law” and called for both “equal protection” and “equal benefit” of the law. The Court, therefore, had to take into account the new protections in decisions rendered after 1982 – and the path of doctrine shifted direction.

Summary

Different factors do, indeed, appear to have influenced the Canadian and American Supreme Courts at the case level of analysis. An American model of judicial decision making should include the Court’s ideology, the Solicitor General, public opinion, interest groups and case facts. However, these factors, with the exception of the women’s group and the case facts, do not seem to hold as much explanatory power in Canada. Part of the problem may be simply that of measurement. But, some of the concepts do not transfer without modification. When judicial preferences are believed to play a large role in the decisions of the American Supreme Court, it is difficult to believe that preferences would have no effect in Canada. Some more definitive measure of
judicial preferences must be derived. The Canadian model should also include the provincial as well as the Federal Attorney General and define whether their participation was as the Crown.

The models of influences on judicial decision making in the long term would look more similar than different in the United States and Canada. In both countries, legal considerations are very important to the development of doctrine. Government and public opinion have only limited impact in an issue area as a whole. Court membership is probably still more important in the United States than in Canada but the panel conditions in Canada suggest the need to refine this issue.

Seymour Martin Lipset suggests that “the more similar the units being compared, the more possible it should be to isolate the factors responsible for differences between them” (1990, xiii). He argues that Canada and the United States are very similar nations “most of whose peoples speak the same language... who are among the richest in the developed world, who inhabit comparably and highly urbanized environments and live in complex, socially heterogeneous, continent-spanning federal unions” (xiv). These fundamental similarities allow for effective comparison between Canada and the United States, but differences between the two countries do exist. These differences are thought to have an impact on the factors found to influence judicial decision making in the United States and Canada.

Most importantly, perhaps, the two countries have different systems of government. Canada has a parliamentary government where the executive and legislature are fused and the executive must maintain the support of the majority in Parliament in order to continue in office. The results are highly disciplined political parties and a
centralized system of decision making where power effectively rests with the Prime Minister and his cabinet. The United States, by contrast, has a presidential system of government characterized by the separation of powers. In this system the executive is not dependent on the legislature for its continuance in office, the parties are relatively undisciplined and decision making occurs in all branches of government.

The different government systems in Canada and the United States appear to have an impact on the influence of interest groups and the influence of governments on judicial decision making. In Canada the parliamentary system probably limits the influence of interest groups by limiting their potential to lobby past the Court. There are fewer points of access to government decision makers in Canada than what exists in the United States. The parliamentary system also makes Canadian governments much more reluctant to become involved in certain issues. As noted, these governments require the support of Parliament and may thus be reluctant to address controversial moral issues, such as abortion, that have a tendency to divide party members. Indeed the Canadian parties (with the possible exception of the new Reform Party) have not taken a distinctive position on capital punishment or abortion – there is an “ambiguity of party positions” (Archer et. al. 1995, 395; Tatalovich 1997; Schwartz 1981). Through their characteristic reluctance to act on abortion, Canadian governments have had influence on the path of doctrine. The status quo (the lack of an abortion law) has been maintained beyond what would be expected from the Court’s reasoning.

The documents guaranteeing rights in the two countries also differ from one another. The American Bill of Rights was enacted over 200 years ago while the Canadian Charter of Rights and Freedoms was enacted 17 years ago. When drafting the Charter,
Canadian politicians were able to examine and learn from the American experience. Several of the Charter’s rights sections parallel those found in the United States (for example, sections guaranteeing freedom of religion and freedom of the press) and a few go beyond what is guaranteed in the Bill of Rights (for example, the gender guarantees in ss. 15 and 28 grant what women were pursuing through the failed Equal Rights Amendment in the United States, Gibbins 1993). The Charter also has a distinctive Canadian clause, section 33 (the “notwithstanding clause”), which allows governments to “immunize” legislation from challenges under particular sections of the Charter (ss.2, fundamental freedoms, and 7-15, legal and equality rights) for a renewable five year period. This unique section of the Charter reflected Canada’s traditional wariness of judicial review (which arose in part from watching its American neighbour) and its history of parliamentary sovereignty (Gibbins 1993, 138).

The relatively young age of the Canadian Charter versus the American Bill of Rights and its more “modern” guarantees had an impact on the factors influencing decision making in each country. It ensured that the Canadian women’s group entered the field at an advanced position compared to its American counterparts. This may have influenced the group’s approach and arguments before the Court and ultimately their own influence. In addition, the unique section of the Charter, the “notwithstanding clause,” may have affected the influence of judicial preferences and the government’s relationship with the Court. With the power to effectively override even the Court’s constitutional
decisions, legislatures may need to be less concerned with appointing the correct ideological balance on the Court (Archer et. al. 1995, 341). The Canadian appointment system may thus result in more moderate justices, allowing other factors besides policy preferences to have some impact on decisions.

The court systems in the two countries and the Supreme Courts themselves have differences which may have influence on judicial decisions. As described in Chapter 2, Canada has an integrated court system, meaning the Supreme Court sits as a “general court of appeal.” All federal and provincial laws can be appealed all the way up to the Supreme Court. This system has meant that government influence before the Court has to be considered differently from that in the United States. It is not enough to examine the Federal Attorney General in isolation. In addition, the use of panels by the Canadian Supreme Court has demonstrated that measuring judicial preferences may be more complicated in Canada than in the United States. While judicial preferences, as measured by ideology, were found not to have an impact on Canadian decisions, variations in the panels of Justices hearing cases were found to influence the direction of doctrine. In Canada, it is necessary to examine what is determining the differences in preferences in more than ideological terms.

Finally differences in the maturity of the Canadian and American Courts in their policy making role may produce different influences on judicial decision making. The

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5 Of course, this power has rarely been used. The only government to make use of section 33 has been Quebec (with the possible exception of Saskatchewan who attached it unnecessarily to a law in 1986). Indeed it may be less of a comfort to governments today. The public seems reluctant to support the clause. Thus when the Premier of Alberta threatened to invoke the notwithstanding clause to override the unpopular *Vriend* decision, widespread negative public reaction forced him to withdraw his threat (Vaughn 1999, 15).
Canadian Supreme Court's new policy making role (granted by the 1982 Charter of Rights and Freedoms) is just now beginning to be recognized by the Canadian public. This may have meant that Canadian Justices felt a greater need to justify their decisions with legal considerations than their more experienced American neighbours. The Canadian Court's more recent entry into policy making has meant that litigation by Canadian interest groups is much less developed than in the United States. Canadian groups only began to regularly appear before the Court in the 1980s. This fact may have had an impact on the influence of interest groups. While their more limited experience has probably worked against them, their lower numbers have made them more noticeable to the Court, and increased the likelihood of their arguments being recognized rather than drowned out.

Thus while Canada and the United States are similar, they are not identical. Learning about the implications of their similarities and differences should allow Canadians and Americans "to understand their own countries better" (Lipset 1990, 227).

Conclusions

Looking back to the beginning of the dissertation, and to the Andrews equality rights case, was it LEAF's arguments that impacted the Court? Did LEAF influence the Court's decision or was it the other interest groups participating in the case? Or was it the Court's own ideology? After analysis it appears that the Andrews decision itself was determined more by the language of the new Charter than by LEAF. However, LEAF need not despair: overall, the group has experienced much success and influence before the Supreme Court of Canada.

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This dissertation set out to determine the success and influence of women's interest groups before the American and Canadian Supreme Courts in the issue areas of interest to them. Success was defined in terms of both outcome and doctrine, and both success and influence were analyzed at the case level and in the long term. This was thought to provide a more complete picture allowing us to determine the factors influencing judicial decision making and, in particular, the influence of women's interest groups. The analyses suggested that American models of judicial decision making had limited applicability to the Canadian situation in terms of the case level of analysis. However, over the long term, similar factors did appear to influence the Supreme Courts of both countries.

It was also discovered that two of the three American women's groups enjoyed both success and influence in terms of case outcomes at the case level of analysis. They were not as influential, however, in terms of doctrine. LEAF was also both successful and influential in terms of case outcome, but experienced no influence in terms of doctrine. However, when one looked to the long term, the women's interest groups did enjoy some influence. LEAF, in particular, appeared to have an effect on the path of doctrine in Canada. Thus the group had chosen a wise course of action in patterning itself after the American groups.

The various legal defense and education funds established over the years since the early 1970s would appear to have proven their worth. The successes gained by litigation, however gradual, have been substantial: the litigation appears to be worth the time and resources devoted to it. Courts yield slowly to change – but they do listen.
APPENDIX A
Cases Included in the Canadian Analyses

**Equality and Discrimination**
- C.N. v. Canada (Human Rights Commission), [1987] 1 SCR 1115
- Robichaud v. Canada, [1987] 2 SCR 84
- Canada (Attorney General) v. Moskop, [1993] 1 SCR 554
- Weatherall v. Canada (Conway v. Canada), [1993] 2 SCR 872
- Symes v. Canada, [1993] 4 SCR 695
- Native Women’s Association of Canada v. Canada, [1994] 3 SCR 627
- Miron v. Trudel, [1995] 2 SCR 418
- Egan v. Canada, [1995] 2 SCR 513
- Thibaudeau v. Canada, [1995] 2 SCR 627
- Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre), [1996] 2 SCR 3
- Battlefords and District Co-operative Ltd. v. Gibbs, [1996] 3 SCR 566
- Benner v. Canada, [1997] 1 SCR 358
- Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624

**Family Law**
- Richardson v. Richardson, [1987] 1 SCR 857
- Leblanc v. Leblanc, [1988] 1 SCR 217
- Rawluk v. Rawluk, [1990] 1 SCR 70
- Clarke v. Clarke, [1990] 2 SCR 795
- Peter v. Beblow, [1993] 1 SCR 980
Young v. Young, [1993] 4 SCR 3
P(D) v. S(C), [1993] 4 SCR 141
G(L) v. B(G), [1995] 3 SCR 370

Sexual Assault
Consent
Sansregarret v. The Queen, [1985] 1 SCR 570
R. v. Bulmer, [1987] 1 SCR 782
R. v. Robertson, [1987] 1 SCR 918
R. v. Pitt, [1993] 1 SCR 466
R. v. Park, [1995] 2 SCR 836
R. v. Livermore, [1995] 4 SCR 123

Disclosure of Records
A.(L.L.) v. B.(A.), [1995] 4 SCR 536

Limitation of Actions

Reputation and Identity Issues
Canadian Newspapers Co. v. Canada, [1988] 2 SCR 122
Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 SCR 480

Other
R. v. Chase, [1987] 2 SCR 293

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R. v. V.(K.B.), [1993] 2 SCR 857
R. v. Audet, [1996] 2 SCR 171

Abortion
Borowski v. Canada (Attorney General), [1989] 1 SCR 342
Tremblay v. Daigle, [1989] 2 SCR 530
R. v. Morgentaler, [1993] 3 SCR 463

Pornography
Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 SCR 494
Germain v. The Queen, [1985] 2 SCR 241
APPENDIX B
Coding Rules for Independent Variables

Gender bringing the case
Males coded as 0; mixed (class actions or corporations) coded as 1; females coded as 2.

This was the claimant bringing the case – except in the Canadian criminal cases where it was the party challenging the prosecution.

Discrimination Claim (Discrm Claim)
Unequal treatment = explicit discrimination; Unequal impact = implicit discrimination

Explicit discrimination = 1 (also includes Affirmative Action in U.S.)
Implicit discrimination = 0 (also includes abortion in both countries, and sexual assault, pornography and family law cases in Canada)

Case Basis
Constitutional = 0
Both = 1
Statutory = 2

Ideology of the Court (Ct ideology)
In the United States, the Supreme Court Database was consulted for the justices’ positions in analogous cases (civil liberties cases in Values 1-6 minus the issue areas of interest). The mean of the justices’ ideology in these cases was determined. The mean ideology of the Court hearing each case of interest was then computed. This was done by adding up all the (previously discovered) mean ideologies of the justices participating in the case.

In Canada, the justices’ votes in primarily freedom of expression and freedom of religion cases were determined using similar criteria to the Supreme Court Database. The procedures for determining the Court’s ideology were then the same as in the United States.

Public Opinion
In the U.S.: the percentage answering they “approved of a married woman earning money in business or industry if she has a husband capable of supporting her” was

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entered in the database. Data ranged from 1970 to 1996 with 18 observation points.

In Canada: the percentage answering they did not believe “the first workers to be laid off should be married women whose husbands had jobs” was used. This was a more problematic measure. Data ranged from 1975 to 1995 but there were only 7 observation points in between. Public opinion for the years without observations was derived by interpolating from the data available.

**Solicitor General/Attorney General Position**

Participated as either a party or amicus curiae arguing a position **unfavourable** to the rights claim = 0

Not present or neutral = 1

Participated as either a party or amicus curiae arguing a position **favourable** to the rights claim = 2

**WRP, NOW LDEF, WLDF, LEAF**

Participated in the case = 1

Did not participate in the case = 0

In the United States, group participation was determined using the *U.S. Reports*. Where the *Reports* listed amicus curiae with et. al. the brief was consulted in the microfiche *Briefs and Records* of Supreme Court cases.

In Canada, group participation was determined using records at the Supreme Court of Canada.

**Women’s Groups Together (US only)**

If one of the WRP, NOW LDEF or WLDF participated = 1

If two of the above groups participated = 2

If all three of the above groups participated = 3

**Briefs arguing for a favourable outcome (Briefs pro); an unfavourable outcome (Briefs con) or a neutral outcome (Briefs neu)**

The number of briefs supporting each side were counted. In the U.S., these were identified from the *U.S. Reports*. However, where the *Reports* were unclear as to the side supported, the briefs on LEXIS/NEXIS and the microfiche *Records and Briefs* were consulted. In Canada the positions were identified from the actual factums of the groups.
APPENDIX C
Coding for Dependent Variables

Case Outcome

For both countries, the case outcome dependent variable was dichotomous: coded as 1 if the outcome (for example, a reversal or affirmance) was favourable to the women's groups’ goals; coded as 0 if unfavourable.

This was coded using the U.S. Reports and the Canadian Supreme Court Reports.

United States

If the party the group supports wins the case, it is considered a favourable outcome.

In all the issue areas -- sex discrimination, sex discrimination in employment, other bases of discrimination in employment, affirmative action and abortion – a favourable outcome is recorded if the rights claimant wins.

In the cases where the law makes distinctions between males and females the American groups prefer absolute equality – so they have often supported men challenging laws favouring women.

Cases involving pregnancy are tricky. The American groups want pregnancy treated like other disabilities – but they do consider it a disability

If a decision was AFFIRMED IN PART and REVERSED IN PART I examined whether there was a preponderance of one or the other – asking who won more or how much of the CA’s decision was overturned. For example, did the petitioner get the job they wanted; how many abortion restrictions were allowed and so on. The focus was kept on the outcome of the case.

If the Court decided to VACATE AND REMAND – and this is what the CA ruled and what favours the claimant this is a favourable outcome. However, if this was not called for by the CA and upsets favourable outcome established at that court level, the decisions is coded as unfavourable. If the party of interest is the respondent at the Supreme Court level, then a decision to vacate will usually be unfavourable. The vacate ruling is usually favourable to the petitioner unless there is compelling evidence to the contrary.

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Canada

In Canada if the party the group wanted to win did in fact win the outcome was coded as favourable.

For the abortion and family law areas this coding was more obvious – a favourable outcome was simply pro-woman.

In sexual assault cases a favourable outcome is a decision against the male bringing the case.

In the obscenity/pornography area a favourable outcome is the side of the state.

For equality and discrimination a favourable outcome is pro-woman – this will be pro-claimant except if a male is challenging sex discrimination. In the cases where the law makes distinctions between males and females the group would want substantive equality for women – NOT absolute equality. Thus the Canadian group does not argue against special treatment for pregnancy.

For decisions which VACATE and REMAND or AFFIRM IN PART and REVERSE IN PART, case outcome is treated as outlined for the US.

Case Doctrine

For both countries, the Court’s opinions were coded. The dependent variable was how favourable the Court’s reasoning was to the groups of interest.

Coding was done using majority opinions. If there was no majority opinion, coding was done on the middle opinion – the opinion the majority of justices would probably agree with.

To be included in the coding, an issue had to be addressed by the court. Thus if some doctrine was not at issue it could not affect the favourability of the doctrine (for example, in the early abortion cases, Roe was not at issue so the continuation of Roe did not make a decision more favourable). Similarly, doctrine cannot be coded less favourably if the Court does not mention something the group wants addressed– unless the court explicitly recognized the arguments, perhaps by stating “we don’t think there is reason to address...”

To code the Court’s decisions it was determined whether there was a central argument to a case – one that outweighed the minor issues. This argument was coded for its favourability to the groups.

If the big issue was favourable, the smaller issues could affect the degree of favourability but could not put doctrine over the line (from positive to negative or negative to positive).
If there was no central argument but several small equal issues, then these were coded and the balance of favourable arguments was determined.

(4) very favourable

- all of the court’s main arguments (that the group cares about) go in favour of the group

- this means all layers of reasoning – so both the standard used and the reasoning on the issue (for example, in the abortion cases both the standard and the reasoning on restrictions had to be favourable for the case to be coded as a 4)

- both the substantive section of the Charter and section 1 had to be decided favourably in Canada

- if the Court avoids a main issue (for example, abortion) but the group would approve the duck, the doctrine can still be a 4 (as occurred in Borowski)

- doctrine cannot be a 4, however, if it is very case specific (a narrow category of cases – usually involving appeals of right in Canada). These cases are only a 3 (but I do code them as a 3 because if you add up enough circumstance by circumstance reasoning one should get favourable reasoning in the future).

(3) Moderately Favourable

- the big issue may be favourable for the groups but some unfavourable reasoning exists.

- Or the doctrine may be somewhat favourable but the Court does not adopt the ideal position of the group – so it is just paving the way (unless the group intends this case as an incremental step – has plans to go step by step – then it would be coded a 4)

- Doctrine will also be coded a 3 if it is favourable but leaves room for unfavourable results in the future – for example, if it comments on how to fix unfavourable legislation so it will pass judicial scrutiny

- in Canada doctrine was coded as a 3 if the court said a challenged provision did violate a substantive section of the Charter and relied on section 1 to save it

- case specific arguments that were favourable to the group were also coded as a 3
(2) Moderately Unfavourable

- the big issue may be unfavourable for the groups' interests but there is some saving reasoning

- or doctrine may be unfavourable but the Court adopts some part of the argument the group wants – so the majority of court’s arguments go against group – balance negative

- a decision would be also be a 2 if its doctrine was unfavourable but left room for a favourable result – mentioning how its result is problematic

- case specific arguments which are unfavourable to the groups also fall in this category

(1) Very Unfavourable

- all of the court’s main arguments (that the group cares about) go against the group (go in an unfavourable direction for their interests)

- this means all layers of reasoning – the standard used and the reasoning on the issue

- in Canada this would mean both a substantive section and section 1 of the Charter are decided in an unfavourable direction

- doctrine cannot be a 1 if the opinion is very case specific – only a 2 – since case specific reasoning is less likely to hurt the groups in the future
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